COURT OF FEDERAL CLAIMS TASK ORDER BID PROTEST JURISDICTION AND EXPECTATION DAMAGES: THE 2009 MCKENNA LONG & ALDRIDGE "GILBERT A. CUNEO" GOVERNMENT CONTRACTS MOOT COURT COMPETITION

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Matthew Chow and Tara Ward, who received their J.D. degrees in May 2009 from The George Washington University Law School, drafted the competition problem and bench memo. Captain Amy Bryan and Major Theodore Richard, Air Force Judge Advocates and LL.M. candidates at The George Washington University Law School, drafted the best briefs. The views expressed in the article are those of the authors and do not reflect the official policy or position of the U.S. Air Force, the Department of Defense, or the U.S. Government.

This competition was hosted by The George Washington University Law School. Jocelyn Bond and Yael Krigman won the competition; the runner-up team was Katherine Dimengo and Ashley Keiser. Additional awards were presented to Anthony Bernard, Gary Bilski, Katerina Horska, Nathan Page, Ryan Roberts, John Sorrenti, Sandeep Verma, and Andrew Welz. The law school thanks its outstanding volunteer judges for challenging the competitors, Stephanie Allgaier for her invaluable contributions, and Andrew Schwartz for his help in preparing these materials for publication. Professors Steven Schooner and Christopher Yukins served as faculty advisors.

I. COMPETITION PROBLEM

A. *Hypothetical Decision Below*

(Cite as 2009 WL 12345678, *)
United States Court of Federal Claims
AUSTEN TECHNOLOGIES, INC.,
Plaintiff,
v.
The UNITED STATES,
Defendant.
January 16, 2009
Opinion and Order

DE BOURGH, Judge.

Before the Court is a unique, consolidated case. Plaintiff, Austen Technologies, Inc. ("Austen" or "Plaintiff"), has initiated a bid protest challenging the award of a task order. The Court is accustomed to hearing protests of garden-variety government contract awards. Yet this Court has not previously encountered a protest against a task order awarded under an indefinite-delivery/indefinite-quantity (ID/IQ or "umbrella") contract when the scope, period, or maximum value of the ID/IQ contract was *not* at issue. Adding to the uniqueness of the case is Austen's breach-of-contract claim. Although this Court routinely hears contract disputes brought, for example, pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601–613 (2000), Austen's claim for lost profits in the context of the award of an ID/IQ contract causes us to address important issues on the cutting edge of the Court's jurisdiction.

Austen's post-award bid protest challenges the Government's award of a task order for explosive ordnance disposal services in the Qumari Province of Yukistan (pronounced "yOO-ki-stân"). Austen asserts that this Court has jurisdiction and that it is an "interested party" under the Tucker Act, 28 U.S.C. § 1491(b)(1) (2000). Austen asserts that the Defendant, the U.S. Army En-

gineering Agency (the "AEA" or "Defendant"), denied Austen a fair opportunity to compete by failing to provide notice of the task order solicitation. Austen seeks injunctive relief, asking this Court to order the AEA to stay the performance of the task order, compel its cancellation, and re-solicit proposals.[1] The AEA moved to dismiss Austen's bid protest for lack of subject matter jurisdiction, arguing that the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304c), grants exclusive jurisdiction for such protests to the Government Accountability Office (GAO).[2] We consider the motion in this final opinion and order pursuant to Rule 12(i) of the Court of Federal Claims (RCFC).

Austen's breach-of-contract claim arises under the CDA, 41 U.S.C. § 609, with this Court's jurisdiction firmly grounded upon 28 U.S.C. § 1491(a)(2) (2000). Here, Austen moves for partial summary judgment, claiming that the AEA breached the parties' ID/IQ contract by denying Austen a fair opportunity to compete, and that, as a result, Austen is entitled to $2.5 million in lost profits.

For the reasons set forth below, the Court rejects the AEA's narrow characterization of this Court's jurisdiction and grants Austen's request for injunctive relief in accordance with the Tucker Act, 28 U.S.C. § 1491(b)(1). Thus, the AEA's Motion to Dismiss is denied, and the Court orders the AEA to cancel the task order award and re-solicit proposals. The Court further finds that, although the AEA breached the ID/IQ contract by denying Austen a fair opportunity to compete for the task order, Austen's lost profits are too speculative to be awarded here. Accordingly, Austen's Motion for Partial Summary Judgment is granted with regard to liability and denied with regard to lost profits.

1. Background

Austen is a Virginia corporation that specializes in explosive ordnance disposal (EOD). EOD entails the collection and neutralization of captured munitions such as grenades, chemical bombs, nuclear weapons, and improvised explosive devices ("roadside bombs"). EOD hastily emerged as a distinct specialty in World War II, and today's Global War on Terror has created exponential demand for specially trained EOD experts deployed to the battlefields. Because of the military's increasing demand for EOD services at numerous stations throughout the Middle Eastern countries of Irash and Yukistan, the

1. We consolidated Austen's Motion for a Preliminary Injunction to Stay Performance with its subsequent Motion for a Permanent Injunction to Cancel the Award and Re-Solicit Proposals.

2. The Government Accountability Office (GAO), under the leadership of the Comptroller General, is an extension of the legislative branch and has statutory authority to decide certain bid protest actions. 31 U.S.C. §§ 3551–3556 (2000); *see* Bowsher v. Synar, 478 U.S. 714, 731 (1986); Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 994 (3d Cir. 1986).

AEA decided, in late 2007, to expand the roster of contractors from which it routinely procures EOD services from one to three.

Thus, on May 27, 2008, the AEA awarded a Prevention of Inadvertent or Mistaken Explosions ("PRIME") ID/IQ contract to Austen, which had been the incumbent contractor and preferred source for the AEA's EOD needs for the past four years. That same day, PRIME ID/IQ contracts were also awarded to two other contractors.[3] Under the PRIME ID/IQ contract, the AEA could issue time-and-materials task orders to PRIME contractors for EOD services, such as management of munitions clearance operations and depots at U.S. military bases in Irash and Yukistan, whenever necessary.[4] Specifically, the Statement of Work clause in the PRIME ID/IQ contract contains two pertinent paragraphs:

> (1) It is the intent of this contract to provide the Government with explosive ordnance disposal (EOD) services. Explosive ordnances covered by this contract include unexploded ordnance (UXO) and discarded military munitions (DMM). EOD services include: neutralization of sites containing UXO and DMM; collection of UXO and captured DMM from U.S. military personnel; determination of whether DMM are serviceable or unserviceable; and destruction of selected UXO and DMM.
> (2) The services covered by this contract may be used under the terms and conditions herein stated when the Contracting Officer issues a task order pursuant to Clause H.1, ORDERING, of this contract.[5]

The first period for placing task orders under the PRIME ID/IQ contract extended from May 27, 2008, through September 30, 2008, with options for two additional years thereafter beginning October 1, 2008, and October 1, 2009, respectively. The contract provided a guaranteed minimum of $3 million worth of EOD services to each of the three PRIME contractors, and a maximum cumulative dollar ceiling value of $30 million for all task orders issued under the PRIME ID/IQ contract. The AEA satisfied its minimum ordering requirements for Austen and the two other PRIME contractors by issuing $3.5 million in task orders to each of them on June 1. Austen's award was for a four-month task order for EOD services in the northern Irashi city

3. The two other contractors were Atheon, Inc. of Pereira, VA, and Groscrup Drummen, Inc. of Lasaracina, WA. No other parties were awarded PRIME ID/IQ contracts. Each PRIME ID/IQ contract contained Clause G.8, CONTRACTORS AND CONTRACT AWARD NUMBERS, which identifies all three contractors who received PRIME ID/IQ contracts.

4. The Federal Acquisition Regulation (FAR), codified at Title 48 of the Code of Federal Regulations, governs the issuance of ID/IQ and time-and-materials contracts. *See* FAR 16.500–.506, 16.601, 52.216-18. For background information about ID/IQ contracts, *see generally* Cheryl Lee Sandner and Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 Pub. Cont. L.J. 461 (2001).

5. Clause H.1, ORDERING, in the PRIME ID/IQ contract states:

> H.1 (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of task orders by the Contracting Officer.
> (b) All task orders are subject to the terms and conditions of this contract. In the event of conflict between a task order and this contract, the contract shall control.
> (c) Orders may be issued orally, by facsimile, or by electronic commerce methods.

of Arbala. In an e-mail dated August 1, 2008, the AEA's PRIME Program Director David Darcy told Austen's then-chief executive officer (CEO) Charles Collins: "Thanks for a smooth operation so far in Arbala. Truly exemplary work! Austen has saved a lot of lives in Operation Irashi Freedom. I'm sure more opportunities will arise as we continue to execute the GWOT [Global War on Terror]—keep your eyes peeled for new task orders." At trial, Austen effectively demonstrated that this hint of future task orders corresponded with the Estimated Quantities Schedule incorporated into the PRIME ID/IQ contract, which indicated that the AEA expected to order another $10 to $12 million in EOD services.[6]

On September 1, PRIME Contracting Officer (CO), Brian Bingley, e-mailed a new request for task order proposals (RFOP) to all PRIME contractors except Austen, and both of the solicited contractors offered proposals. This RFOP was for a time-and-materials task order for EOD services to begin on October 1, 2008, and continue until September 30, 2009, in the Qumar Province of Yukistan with a $12,000,000 ceiling (the "Qumari task order"). The solicitation estimated 5,760 hours of work would be needed. After a best value assessment of the two offerors' technical proposals, projected costs, and their past performance on previous PRIME projects, Mr. Bingley awarded the Qumari task order to Atheon, Inc. ("Atheon") on September 15.[7]

Austen first learned of the Qumari task order one week later. Austen promptly complained, in writing, to the PRIME Program's task order ombudsman pursuant to 10 U.S.C. § 2304c(e) (2006), arguing that Austen should have been sent notice of the RFOP. The ombudsman responded, by letter dated October 15, 2008, that no wrongdoing occurred in the solicitation or award of the task order.

That same October 15, in response to an inquiry by the U.S. Senate Committee on Armed Services, the Inspector General for the Department of Defense issued a report (the "IG Report") on the solicitation of the Qumari task order. The IG Report revealed that, on August 30, prior to the issuance of the Qumari RFOP, Mr. Darcy and Mr. Bingley engaged in the following e-mail exchange:

> Mr. Darcy: "Let's keep Austen out of this. I'm sure they would deliver the best proposal if we let them in on the RFOP because they've always done great work and they keep costs low. But they just replaced Collins with a new CEO, Will Wickham, and I hate that guy."
>
> Mr. Bingley: "Sure, but this is all just because you don't like Wickham?"
>
> Mr. Darcy: "Yeah. He's way too young to be CEO of that company. I don't care what kind of impeccable resume he has—he's still a rookie in my book. I've been

6. The Schedule also noted that "[t]he quantities of supplies and services specified in this Schedule are estimates only and are not purchased by this contract."

7. A best value assessment of task order proposals, as opposed to selection of the lowest priced, technically acceptable offer, involves evaluating proposals under stated factors and considering the degree to which proposals provide the greatest overall benefit to the procuring agency. *See* FAR 2.101.

> in this industry for forty years, and Wickham thinks he can just waltz in without paying his dues? Don't tell Austen about the Qumari RFOP. I want them kept in the dark. I don't care if Atheon and Groscrup have had problems with their past performance or if they're more expensive; let's go with one of them."
>
> Mr. Bingley: "Hey, didn't you interview for the Austen CEO job?"
>
> Mr. Darcy: "Where did you hear that? Anyway, that job should have been mine! But that's ancient history now. Just axe Austen, all right? No more task orders for them."
>
> Mr. Bingley: "No problem. I'll take care of it."

By letter dated November 3, 2008, Austen submitted a certified claim to Mr. Bingley. Austen claimed a breach of the fair opportunity to compete, outlining the above factual information, and asserting that the government officials acted in bad faith. In substance, Austen alleged that the AEA's conduct in soliciting the Qumari task order proposals under the PRIME ID/IQ contract denied Austen a fair opportunity to compete, in violation of (1) the NDAA, Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304c); and (2) Clause F.4 of the PRIME ID/IQ contract, FAIR OPPORTUNITY TO COMPETE, which specifically subjects the PRIME ID/IQ contract to the policies and procedures set forth in 48 C.F.R. § 16.505 (2008).[8] In particular, FAR 16.505(b)(1)(iii) states that "[f]or task or delivery orders in excess of $5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum—(A) A *notice* of the task or delivery order that includes a clear statement of the agency's requirements…." (Emphasis added).

Austen contends that, had it received notice of the RFOP, it likely would have received the award, earned more than $11.5 million in gross receipts, and reaped a profit in excess of $2.5 million. Based upon these assertions, Austen detailed its requested monetary relief using factors considered by the Federal Circuit to provide a "fair and reasonable" basis from which to calculate lost profits. *Ace-Fed. Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000). The Defense Contract Audit Agency (DCAA) audited the claim

8. *See* FAR Case 2008-006, Enhanced Competition for Task and Delivery Order Contracts, 73 Fed. Reg. 54,008-02, 54,010 (2008) (establishing interim rules amending the FAR to implement the Fiscal Year 2008 NDAA, section 843, "Enhanced Competition for Task and Delivery Order Contracts").

The PRIME ID/IQ contract included clause F.4, titled "Fair Opportunity to Be Considered." In pertinent part, it states:

> F.4 Pursuant to FAR 16.505, the following procedures shall be followed in order to ensure that the Contractor shall have a fair opportunity to be considered for each task order:
>
> …
>
> (c) The PRIME Program Manager will forward the required order to the Contracting Officer who will, in turn, contact each of the contractors awarded a contract and provide them an opportunity to submit a proposal for the order. The Contracting Officer, along with the Program Manager, will determine the minimal information necessary to obtain from each contractor in order to make the selection among them, and will provide each of them the evaluation criteria which will be utilized in making the selection.

and, without opining on entitlement, verified the underlying assumptions in the quantum calculation.

By letter dated November 7, 2008, Mr. Bingley advised Austen that it would not consider the claim because "the matters raised are not issues relating to contract administration for which the Contract Disputes Act is applicable." Letter from Brian Bingley, Contracting Officer, to Will Wickham, President and Chief Executive Officer, Austen Techs., Inc. (Nov. 7, 2008). Austen subsequently filed two complaints in this Court on December 1, 2008. The first complaint, in the nature of a bid protest, involved the AEA's alleged failure to provide notice of the Qumari task order, and requested an injunction to stay performance, cancel the award, and re-solicit proposals pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1). The second complaint asserted the AEA's breach of the PRIME ID/IQ contract and sought $2.5 million in lost profits and interest under the Contract Disputes Act (CDA), 41 U.S.C. § 609. We consolidated the two complaints into the above-captioned case.[9]

The AEA moved to dismiss the bid protest pursuant to RCFC 12(b)(1) on the grounds that this Court lacks subject matter jurisdiction. Specifically, the AEA argues that because Austen's protest concerns a task order in excess of $10 million, the NDAA, Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304c), vests exclusive jurisdiction over its claim in the GAO. This Court deferred consideration of the Motion to Dismiss until now. RCFC 12(i). Austen also moved for partial summary judgment under RCFC 56(c) on its breach-of-contract claim for lost profits. Having reviewed all of the evidence, we deny the AEA's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and grant Austen's request for cancellation of the task order and re-solicitation of proposals. On the issue of breach, we grant in part (liability) and deny in part (lost profits) Austen's Motion for Partial Summary Judgment.

2. Legal Standards

When considering a motion to dismiss for lack of subject matter jurisdiction, this Court must "accept as true the facts alleged in the complaint and must construe such facts in the light most favorable to the pleader." *Novell, Inc. v. United States*, 46 Fed. Cl. 601, 603 (2000) (citing *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)). Plaintiff bears the burden of proving by the preponderance of the evidence that jurisdiction exists such that this Court will not dismiss a complaint for lack of subject matter jurisdiction "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

9. After consolidation, Austen's Motion for Summary Judgment was considered as a partial motion for summary judgment on the issues of breach and lost profits.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Jay v. Sec'y, Dep't Health and Human Servs.*, 998 F.2d 979, 982 (Fed. Cir. 1993). Both the existence of lost profits and their quantum are factual matters that should not be decided on summary judgment if material facts are in dispute. RCFC 56(c); *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1350 (Fed. Cir. 2001).

3. Discussion

a. This Court Exercises Jurisdiction over Austen's Task Order Bid Protest

The AEA argues that the Complaint must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims. The AEA contends that this lawsuit constitutes nothing more than a bid protest, a cause of action precluded by the plain language of the NDAA, which vests exclusive jurisdiction over protests of task orders valued at more than $10 million in the Government Accountability Office. Because Austen's suit claims that the AEA failed to provide Austen notice of the Qumari task order,[10] this Court lacks jurisdiction to adjudicate the claim; only the GAO may consider the lawsuit.

Austen counters that the NDAA does not divest this Court of its jurisdiction under the Tucker Act. Instead, this lawsuit seeks to take advantage of this Court's unique, well-established dual jurisdiction over protests and claims—areas in which this Court enjoys special expertise—such that it would be proper for this Court to consider its task order protest. Furthermore, the spirit of the NDAA supports Austen's selection of this Court.

i. Jurisdiction over the Task Order Bid Protest

This Court has not yet ruled on the NDAA's newly created bid protest jurisdiction and, as such, turns to the history of task order protest jurisdiction as well as specific statutory language for guidance.

The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.), provided that all ID/IQ contract holders "shall be provided a fair opportunity to be considered" for task orders placed under an overarching ID/IQ contract. At the same time, Congress limited protests of task order awards to allegations that the order increased the scope, period, or maximum value of the ID/IQ contract under which the order was placed. 10 U.S.C. § 2304c(b), (d) (2000). Experience demonstrates that these contract vehicles did not generate the much-anticipated hyper-competitive environment originally envisioned.

10. All parties agree that Austen does not contend that the Qumari task order increases the scope, period, or maximum value of the PRIME ID/IQ contract.

See U.S. Gen. Accounting Office, Acquisition Reform: Multiple-Award Contracting at Six Federal Organizations 3 (1998), *available at* http://www.gao.gov/archive/1998/ns98215.pdf (detailing various agencies' inconsistent application of FASA's ID/IQ competition requirements); Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Cont. L.J. 429, 432–33 & n.10 (2002) (noting the lack of competition present in ID/IQ contracting).

Recently, however, the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 843, 122 Stat. 3, 236–39 (to be codified at 10 U.S.C. § 2304c), amended these provisions to expand the rights of ID/IQ contract holders. In order to meet the "fair opportunity to be considered" requirement, the NDAA requires that, for orders in excess of $5 million, procuring agencies must provide ID/IQ contract holders with specific information regarding pending task order competitions. Pub. L. No. 110-181, § 843, 122 Stat. 3, 237. Specifically, an agency must provide potential task order competitors with "a notice of the task or delivery order that includes a clear statement of the agency's requirements," and other details regarding the method by which offerors' proposals will be evaluated. *Id*.

Section 203 of the NDAA further amends the protest provisions as follows:

(1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order *except for*—

  (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
  (B) a protest of an order valued in excess of $10,000,000.

Subsection (1)(B)'s authorization of protests of task orders in excess of $10 million extends to protests alleging that the AEA's decision to award a task order violated the aforementioned requirements for establishing a "fair opportunity to be considered." *See Triple Canopy, Inc.*, 2008 CPD ¶ 207, 2008 WL 4845230, at *4–5 (C.G. Oct. 30, 2008) ("[I]n enacting the NDAA and authorizing certain task order protests, Congress intended to establish a system that requires agencies to advise offerors of the bases for task order competitions, and enforces that requirement through authorization of bid protests ….").

The AEA points out, however, that NDAA's expansion of bid protest jurisdiction is not without limits. Specifically, subsection (2) of section 203 of the NDAA lodges jurisdiction over these claims in the GAO and thus precludes this Court from hearing Austen's task order protest: "Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B)…."[11] *Id*.

11. 31 U.S.C. § 3556 (2000) "does not give the Comptroller General exclusive jurisdiction over protests, and [does not] affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States [Court of Federal Claims]."

The Government focuses the weight of its statutory arguments on the statute's use of the term "exclusive," arguing principally that the NDAA divests this Court of authority over Austen's protest. Specifically, because the task order at issue exceeds the $10 million threshold, the GAO retains "exclusive" jurisdiction over Austen's protest.

Austen argues, however, that the statute's purported grant of "exclusive" jurisdiction runs counter to this Court's generally expansive view of its protest jurisdiction. Specifically, Austen argues that the NDAA fails to divest this Court of any of its Tucker Act jurisdiction by not explicitly overriding 28 U.S.C. § 1491(b)(1). Moreover, blindly adhering to the NDAA's use of the term "exclusive" despite the statute's silence on the Tucker Act would render meaningless this Court's preexisting statutory grant of jurisdiction.

We agree with Austen. In discussing and excepting only the GAO's statutory authority, Congress has not altered this Court's preexisting and well-developed expansive jurisdiction under the Tucker Act, 28 U.S.C. § 1491. We are loathe to read in such an exception where it is not so stated. The Tucker Act provides that this Court "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." 28 U.S.C. § 1491(b)(1). If Congress sought to limit some portion of this Court's "interested party" jurisdiction, *infra* Part I.A.3.a.ii, it could and should have effected that intention by explicitly overriding 28 U.S.C. § 1491 in its text.

This holding is consistent with Congress's goal of invigorating competition in, and strengthening oversight over, the task order solicitation and award process. Indeed, the NDAA's language regarding task order protest jurisdiction was inspired by recommendations of the Acquisition Advisory Panel established by section 1423 of the Services Acquisition Reform Act of 2003 (SARA). That panel noted abuses of the ID/IQ system and promoted competition in task order awards. *See Report of Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, Executive Summary at 11 (Jan. 2007), *available at* http://www.acquisition.gov/comp/aap/documents/Introduction.pdf. When developing legislation to implement recommendations to expand task order protest jurisdiction, members of Congress opined that task orders were often not subject to full and open competition. S. Rep. No. 110-201, at 5 (2007). Providing contractors with multiple forums, i.e., this Court as well as the GAO, in which to protest improper competitive procedures furthers the overarching goal of restoring competition as "the mainstay of the government's acquisition system." *Id.*

We are mindful of the AEA's concern that inviting ID/IQ contractors to protest in multiple forums could undermine efficiency and flexibility in government procurement, two significant goals and benefits of ID/IQ contracting. *See BLR Group of Am., Inc. v. United States*, 84 Fed. Cl. 634, 647 (2008); *Omega World Travel, Inc. v. United States*, 82 Fed. Cl. 452, 462 (2008) (FASA's

"revised contracting procedures and the new, accelerated notice of contract awards, contract debriefings, and bid protest" procedures were "all designed to reduce staff time, lessen the amount of paperwork required, and shrink the bureaucracy" (quoting 140 Cong. Rec. H9245 (daily ed. Sept. 20, 1994) (statement of Rep. Harman))). We remain confident, however, that both the GAO and this Court will ensure that an active motion practice will be used in handling these protests to maintain efficiency. *See* S. Rep. No. 110-201, at 12–13 (2007). Indeed, the positive effects of enhanced competition will far outweigh disruptions to the procurement process.

Moreover, allowing Austen to consolidate its bid protest and breach-of-contract claim in this Court is "in complete harmony with the overall jurisdictional scheme fashioned by Congress in enacting and amending the Tucker Act" such that we cannot agree with the AEA's narrow construction of this Court's jurisdiction. *BLR*, 84 Fed. Cl. at 646. Congress has expanded the Court's jurisdiction through a number of amendments to create the expansive jurisdiction in place today. *See*, *e.g.*, Contract Disputes Act of 1978, Pub. L. No. 95-563, § 14(i), 92 Stat. 2383, 2391 (extending the court's jurisdiction to suits arising under the CDA); Act of Aug. 29, 1972, Pub. L. No. 92-415, 86 Stat. 652 (allowing the court to award certain nonmonetary relief "incident of and collateral to" judgments for money damages); Act of July 23, 1970, Pub. L. No. 91-350, 84 Stat. 449 (extending jurisdiction to suits concerning contracts with certain nonappropriated fund instrumentalities); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25, 39–40 (providing the court jurisdiction over pre-award bid protests); Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874–75 (extending jurisdiction to post-award bid protests).

Today, it is no accident that the Court of Federal Claims "possesses jurisdiction to entertain both contract award-related protests and contract performance-related claims. The fact that the court entertains both types of actions allows it to render decisions with an eye towards the overall government contracting process." *BLR*, 84 Fed. Cl. at 646; *see also* Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wis. L. Rev. 1225, 1237 ("[T]he [Court of Federal Claims]'s unique jurisdiction over both contract-award protests and contract-performance disputes gives it a unique perspective, allowing principles from one area of procurement law to inform its decisions in the other."); Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 863, 870 (2003) (suggesting that courts having jurisdiction over both contract formation and performance disputes are "uniquely situated" to "bring to bear a lucid understanding of the integrated functioning of the system of government contracts law").[12]

12. Whatever historical anomalies generate greater protest activity at the GAO or more frequent contract dispute litigation at the agency boards of contract appeals do not, in any way, diminish this Court's unique perspective and value added. *But see* Steven L. Schooner, *The Future:*

In the instant case, exercising Tucker Act jurisdiction over Austen's claim is consistent with the relevant statutes, and is especially prudent once we consider the goals of government procurement and efficient conflict resolution.

ii. Request for Injunctive Relief

In turning to Austen's request for injunctive relief, this Court must determine whether Austen is an "interested party" under the Tucker Act. We hold that it is. This Court's jurisdiction is limited to "interested part[ies]," or "actual or prospective bidders or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1352 (Fed. Cir. 2005); *see* 31 U.S.C. § 3551(2)(A) (2000);[13] *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006). To demonstrate a "direct economic interest," a plaintiff must show that alleged errors caused the plaintiff "prejudice." *Galen Med. Assocs. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004); *Sealift, Inc. v. United States*, 82 Fed. Cl. 527, 534 (2008). A protestor can establish prejudice by showing a "substantial chance" that it would have received the award if the alleged error was corrected. *Bannum, Inc. v. United States*, 404 F.3d 1346, 1358 (Fed. Cir. 2005) ("To establish prejudice [plaintiff] was required to show that there was a 'substantial chance' it would have received the contract award but for [the government's] errors in the bid process.").

Austen has established that it is an "interested party" as an actual protestor with a direct economic interest in the Qumari task order. Our conclusion that Austen had a "substantial chance" of being awarded the contract but for the alleged errors is supported by PRIME Program Director Darcy's own statement that, had Austen been given notice, he was "*sure they would deliver the best proposal* … because they've always done great work and they keep costs low." *See id*.

Proceeding to the merits of Austen's request for a stay of the task order award, Austen challenges the task order award on the basis that the CO, Mr. Bingley, failed to provide notice of the competition as required under the NDAA. As discussed above, ID/IQ contract holders must be afforded a "fair opportunity to compete" for task orders, which includes being given notice of solicitations when the task order is valued at above $5 million. Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304c). Here, prior to issuing the RFOP, Mr. Darcy and Mr. Bingley discussed whether

Scrutinizing the Empirical Case for the Court of Federal Claims, 31 Geo. Wash. L. Rev. 714, 758–62 (2004) (demonstrating little more than the point so eloquently made by Mark Twain in *Chapters from My Autobiography*, published in the North American Review, No. DCXVIII (July 5, 1907), and attributed to Benjamin Disraeli: "There are three kinds of lies: lies, damned lies, and statistics.").

13. The term "'interested party' … with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2)(A).

to provide Austen with a copy of—or even notice regarding—the solicitation. Despite the CO's conviction that Austen would win if given the opportunity to compete, Mr. Darcy instructed, "Let's keep Austen out of this.... But they just replaced Collins with a new CEO, Will Wickham, and I hate that guy." When Mr. Bingley clarified that these instructions were based on personal animus, Mr. Darcy confirmed: "Don't tell Austen about the Qumari RFOP. I want them kept in the dark.... Just axe Austen, all right? No more task orders for them."

Frankly, we are both saddened and appalled at the AEA's bad faith disregard for the competitive process and failure to provide Austen with a "fair opportunity to compete" for the task order. Austen's request for a preliminary injunction is therefore GRANTED.

b. Austen Is Not Entitled to an Award of Lost Profits Under the PRIME ID/IQ Contract

The AEA also argues that Austen is not entitled to partial summary judgment on its CDA claim because it has failed to prove a breach of contract and lost profits. We are unconvinced by the AEA's defense to liability; the facts establish clear and convincing evidence of a bad faith breach. With regard to damages, the AEA specifically contends that evidence of lost profits is too speculative under the PRIME ID/IQ contract. Austen counters that common law principles should prevail regardless of the ID/IQ context. Here, Austen argues, an award of lost profits is just as appropriate as in common law breach-of-contract cases. The alleged lost profits were not only foreseeable, but were caused by the AEA's bad faith breach, and have been calculated with reasonable certainty. The AEA's breach, the absence of a remedy-granting clause, and the spirit of the NDAA support Austen's claim for lost profits.

Government contract claims are at once subject to intricate federal laws and the same common law principles that govern any private breach of contract dispute. *See Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002); *Praecomm, Inc. v. United States*, 78 Fed. Cl. 5, 10 (2007). Sometimes these two schemes work in harmony, with both contributing to the overall body of government contracts law, and other times, federal law departs from common law principles to create exceptionalist rules. *See* Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 Geo. Wash. L. Rev. 633, 637–38 (1996). This case, one of first impression in this Court, stands at the crossroads. In considering Austen's claim for breach of the PRIME ID/IQ contract, we acknowledge that the issue of lost profits is a novel one in the context of ID/IQ contracts.[14]

14. As such, we welcomed the parties' presentation of persuasive authority from the administrative boards of contract appeals, which also have jurisdiction to hear government contract claims under the CDA. 41 U.S.C. §§ 606–07 (2000).

i. Breach of the PRIME ID/IQ Contract

Austen argues that, first and foremost, its desired remedy is cancellation of the Qumari task order award and re-solicitation of the RFOP to all PRIME contractors, including Austen. Alternatively, if the Court cannot grant such a remedy for reasons argued by the AEA, *see supra* Part I.A.3.a, then Austen seeks monetary damages stemming from the AEA's alleged breach of the PRIME ID/IQ contract. The latter theory arises under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601–613. The CDA, in conjunction with the Tucker Act, 28 U.S.C. § 1491(a)(2), represents the Government's waiver of sovereign immunity for damages claims arising from contracts with federal agencies.[15]

The promise of a fair opportunity to compete for individual task orders is a "valid and enforceable contractual promise." *See Cmty. Consulting Int'l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, at 157,785 (quotations omitted). Clause F.4, Fair Opportunity to Be Considered, of the PRIME ID/IQ contract, is backed up by an array of statutory and regulatory commands. For task orders over $5 million, notice of requests for task order proposals is necessary to ensure that a fair opportunity to compete has been provided. NDAA, Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304c); *see also* 48 C.F.R. § 16.505(b)(1). Furthermore, the Defense Federal Acquisition Regulation Supplement, notably DFARS 216.505-70(c), echoes the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.), and the FAR in requiring that notice of requests for order proposals be sent to "all contractors offering the required supplies or services under the multiple award contract."

Here, the AEA acted in bad faith and, in so doing, clearly breached Clause F.4 by denying Austen a fair opportunity to compete for the Qumari task order. No doubt, the clear and convincing evidence surpasses the "high evidentiary burden of proof" for proving bad faith claims. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1236 (Fed. Cir. 2002). To start, the facts indicate that Austen's past performance in Arbala was "exemplary" by Mr. Darcy's own admission. Mr. Darcy praised Austen's ability to "keep costs low," and he expected Austen to win the RFOP if given the chance. Praise, however, gave way to acrimony. The IG Report also suggests that Mr. Darcy was angered about being passed over for Austen's CEO job, which ultimately went to Mr. Wickham. Mr. Darcy accused Mr. Wickham of being too young to lead Austen, and condemned him for allegedly not "paying his dues" despite having an "impeccable resume." This led to Mr. Darcy's demand that Austen

15. All of the jurisdictional requirements for Austen's CDA claim have been fulfilled, including the undisputed facts that Austen submitted a sufficient, certified, written claim to the Contracting Officer, Mr. Bingley. *See* 41 U.S.C. § 605(a). Mr. Bingley refused to issue a final decision, as required by 41 U.S.C. § 609(a)(3). Accordingly, our jurisdiction over Austen's CDA claim is uncontroverted.

be "kept in the dark" about the Qumari task order, and that "[n]o more task orders" be awarded to Austen despite its "exemplary" past performance.

We rarely encounter such inappropriate behavior, but the evidence here is clear and convincing. Mr. Darcy's demand that Mr. Bingley "axe Austen," merely because of personal animus toward Mr. Wickham, is an egregious act that constitutes bad faith. Denying Austen a fair opportunity to be considered for the award thus constituted a breach of paragraph (c) of Clause F.4 of the PRIME ID/IQ contract.

ii. Lost Profits: Causation and a Reasonably Certain Amount

For this breach, Austen seeks $2.5 million in lost profits that Austen alleges it would have earned from providing EOD services in Qumar had the AEA not breached the PRIME ID/IQ contract. The AEA argues that lost profits are too speculative given the unique nature of ID/IQ contracts. "One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred." *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001) (citing Restatement (Second) of Contracts § 344(a) (1981)). Commonly included among such expectation damages are lost profits. *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001).

Recovery of lost profits requires proof that

> (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Energy Capital Corp. v. United States, 302 F.3d 1314, 1324–25 (Fed. Cir. 2002).[16]

The Court is convinced that Austen's alleged lost profits are the direct and proximate result of the AEA's breach of the PRIME ID/IQ contract. Although the Federal Circuit has established three distinct tests explaining the "proximate result" prong (perhaps evidencing a general reluctance to award lost profits), the recovery of lost profits does not depend on whether a breach of contract was the sole cause of the plaintiff's lost profits. *Astoria Fed. Sav. & Loan Ass'n v. United States*, 80 Fed. Cl. 65, 87 (2008). Austen was the incumbent contractor for four years prior to the establishment of the PRIME program, and it was thereafter awarded a task order for EOD services in Arbala, Irash. There is nothing to indicate that Austen's past performance would have hindered its chances of winning the Qumari task order. Quite the contrary—Mr. Darcy's e-mail to Mr. Bingley proves that Austen's past performance was "great" while the other two PRIME contractors had "problems" in the past. Likewise, Mr. Darcy's e-mail acknowledged Austen's tendency to

16. As noted in *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 746 n.49 (2004), the causation and foreseeability prongs have sometimes been analyzed as one.

keep costs low, which likely would have meant Austen would have presented a low-price proposal.

Likewise, we are convinced that there is a sufficient basis for *estimating* the amount of lost profits with reasonable certainty. Because this is a time-and-materials task order, Austen asserts that it can accurately estimate from its past performance how much profit it makes per hour providing EOD services. By simply multiplying that rate by the estimated duration of performance, Austen can make a reasonably certain determination of its lost profits. *See Anchor Sav. Bank, FSB v. United States*, 81 Fed. Cl. 1, 57–58 (2008); *see also Ace-Fed. Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) (establishing appropriate factors to consider in calculating lost business). We agree, and note that these calculations are much less speculative than many garden-variety damages cases. *See*, *e.g.*, *CACI Int'l, Inc.*, ASBCA Nos. 54110, 53058, 05-1 BCA ¶ 32,948, at 163,249. Indeed, calculating the amount of lost profits in this case, with reasonable certainty, is relatively straightforward when compared to analysis under the *Winstar* line of cases we have toiled with for more than a decade. *See Glendale Fed. Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004); *see also*, *e.g.*, *Sterling Sav. Ass'n v. United States*, 80 Fed. Cl. 497, 516–18 (2008); *Cal. Fed. Bank, FSB v. United States*, 54 Fed. Cl. 704, 714 (2002). We also note that the DCAA verified Austen's accounting system and approach. Notably, the AEA did not challenge the certainty of this amount in its briefs. Thus, we are confident that Austen provided a sufficient basis for estimating its $2.5 million in lost profits with reasonable certainty.

iii. Lost Profits: Special Considerations in the Context of ID/IQ Contracts

Determining causation and amount of lost profits is a straightforward exercise in this case, but the issue of foreseeability of lost profits in the context of claims arising out of ID/IQ contracts is much more complex. Thus, Austen's CDA claim brings us into uncharted territory. The AEA argues that awards of lost profits are inappropriate given the nature of ID/IQ contracts. The AEA argues, and we agree, that it is individual task orders, not the PRIME ID/IQ contract, from which profits are to be earned. *See Travel Centre v. Barram*, 236 F.3d 1316, 1318–19 (Fed. Cir. 2001); *see also Rumsfeld v. Applied Cos.*, 325 F.3d 1328, 1336–40 (Fed. Cir. 2003) (involving requirements contracts); *Appeal of Delfour, Inc.*, ASBCA No. 46059, 93-3 BCA ¶ 26,237, at 130,541. The AEA points out that the Statement of Work in the PRIME ID/IQ contract states that "[t]he services covered by this contract *may* be used. . . ." (emphasis added). These arguments go to the heart of why ID/IQ contracts exist—the AEA uses ID/IQ contracts because it *may* need more than the guaranteed minimum, but there is no guarantee that the need will materialize. ID/IQ contracts exist to accommodate this uncertainty.

Under the PRIME ID/IQ contract, as in all ID/IQ contracts, the AEA promised a minimum quantity of task order awards to Austen, specifically, $3 million. That promise was satisfied when the AEA awarded a $3.5 million

task order to Austen for EOD services in Arbala. As such, the AEA argues, any more profits to be derived from future task orders are unforeseeable because the AEA had satisfied its obligation to procure from Austen. This is especially true where, as with the PRIME ID/IQ contract, there have been multiple awards of the ID/IQ contract to several contractors, any one of which could win the next task order. Even if Austen had won the Qumari task order, there is still no guarantee that it would do any work under the task order. The war may end earlier than expected, there may be less need for EOD services than estimated,[17] or the AEA might terminate the contract for convenience.[18]

Austen maintains that the ID/IQ context takes nothing away from its case. Instead, Austen argues, this is a plain breach-of-contract case appropriate for the application of common law principles in awarding lost profits. Austen alleges that this is especially so because there is no "remedy-granting" clause for breach of the fair opportunity to compete.[19] The Court disagrees with Austen's suggestion that the absence of a remedy-granting clause for breach of Clause F.4 simply means that common law principles should bind the Court's approach to lost profits. The prerogative remains in the executive agencies to issue regulations creating a remedy-granting clause for this kind of breach. Until then, the absence of such a clause frees this Court to consider the uniqueness of claims for lost profits under ID/IQ contracts. After all, not everything in government contracts can be congruent with the common law.

The AEA also argues that Austen's dispute is actually not a breach-of-contract claim but a bid protest. *See* 10 U.S.C. § 2304c(e)(1)(B); *L-3 Commc'ns Corp.*, ASBCA No. 54920, 2006 WL 2349233 (July 26, 2006). The AEA's position is that the Complaint is nothing more than a protest on the Qumari task order, and that (A) as such, the GAO has exclusive jurisdiction, *see supra* Part I.A.3.a; 10 U.S.C. § 2304c(e)(2), and (B) lost profits are prohibited in bid protests because the appropriate remedy is to re-solicit bids or award bid preparation and proposal costs, 28 U.S.C. § 1491(b)(2); *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115, 119 (2002). But, Austen argues, there is noth-

17. We acknowledge that the PRIME ID/IQ contract also contained a VARIATION IN ESTIMATED QUANTITY clause, which states in relevant part:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. . . .

Thus, continuing the hypothetical, although Austen may have received an equitable adjustment if the estimated work fell below eighty-five percent of estimated EOD services, this does not negate the unforeseeability of how much work would actually be needed.

18. The PRIME ID/IQ contract incorporated the standard TERMINATION FOR CONVENIENCE clause applicable to cost-reimbursement contracts. *See* FAR 52.249-6.

19. Remedy-granting clauses, which are FAR provisions incorporated into government contracts, stipulate exactly what the remedy will be for a particular breach of contract. For example, the CHANGES clause expressly entitles contractors to profits for work performed based on contract modifications unilaterally made by the Government. FAR 52.243-1.

ing wrong with consolidating a bid protest and a breach-of-contract claim into one case, and the request for damages stemming from an alleged breach of a contract by the AEA properly invokes the CDA. 41 U.S.C. § 609(a)(3); *see also L-3 Commc'ns Corp*., ASBCA No. 54,920, 2006 WL 2349233 (July 26, 2006). We agree with Austen's characterization of the case. But we also acknowledge some discomfort in this "slicing and dicing" of lawsuits just to make lost profits available to the nonawardee of a task order under an ID/IQ contract. This discomfort is exacerbated by the fact that Austen did not even prepare a task order proposal.

Of course, bad faith by the AEA widens the doorway to lost profits. *See SMS Data Prods. Group, Inc. v. United States*, 19 Ct. Cl. 612, 617 (1990); *see also CACI Int'l, Inc*., ASBCA Nos. 54110, 53058, 05-1 BCA ¶ 32,948, at 163,252. The AEA's decision to keep Austen from winning the Qumari task order is the worst kind of abuse that destroys trust in Government. And, as noted above, this case does not present the complexities of proving lost profits confronted by plaintiffs in this Court's *Winstar* and spent nuclear fuel cases. *See Glendale Fed. Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004); *see also*, *e.g*., *Cal. Fed. Bank, FSB v. United States*, 54 Fed. Cl. 704, 714 (2002); *Sterling Savings Ass'n v. United States*, 80 Fed. Cl. 497, 516–18 (2008). The remedy, however, is not to do further damage to the procurement system, and awarding lost profits under an ID/IQ contract would do just that.

The Court hears Austen's argument that section 843 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 843, 122 Stat. 3, 236–39 (2008) (codified at 10 U.S.C. § 2304c), was enacted to curb abuse and fraud of ID/IQ contracts, and that is particularly poignant given the AEA's egregious conduct. The integrity of the ID/IQ system depends on the application of all available tools to curb such conduct. While the Court's mouth is soured by the bitter taste of inequity in denying lost profits in the face of such bad faith, the Court believes that the proper remedy is to re-solicit the bids for the Qumari task order.

4. Conclusion

For the reasons set forth above, the court **DENIES** Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, **GRANTS** Plaintiff's Motion for a Permanent Injunction, and **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

L. CATHERINE DE BOURGH, JUDGE

II. BENCH MEMORANDUM

A. *Introductory Guidelines*

Please read the fictional opinion by Judge De Bourgh of the U.S. Court of Federal Claims (COFC) before reading this bench memorandum. This memorandum assumes familiarity with the opinion, and, accordingly, does not repeat the factual and legal premises for the court's decision.

The issues, ideas, and suggestions presented herein are those of the competition problem authors, and are offered as a guide to understanding the likely arguments that competitors will make. Please feel free to question competitors based upon your own experience, knowledge, and analysis, and to explore ideas not expressly addressed in the opinion below or this memorandum. Remember, however, that particularly in the initial round, many competitors have only a limited familiarity with government procurement law, practice, and policy. Although a few competitors are candidates for an LL.M. degree in government procurement law, most are second- and third-year law students who have taken at most one or two courses in government contracts law; others may have taken none.

Although there is some overlap between the two issues in the competition problem, many competitors will be unable—and even unwilling—to argue their partners' issues. Because of this artificial restraint on the competition, please attempt to keep the two issues distinct by focusing on factors unique to each issue. To the extent that overlap arises, do not hesitate to reward competitors who demonstrate comfort with both issues, but please do not penalize those students who are unable to do so.

This memorandum is designed to supply you with the relevant information considered in drafting the competition problem, as well as to introduce the major arguments that competitors are likely to make. The sections that follow provide a brief overview of the arguments as well as a detailed discussion of the two issues: (1) the task order bid protest jurisdictional issue and (2) the lost profits issue.

If you have any questions or concerns regarding the competition problem or this bench memorandum, please do not hesitate to contact us by telephone or e-mail. Thank you again for your participation!

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B. *Overview of the Arguments*

The first issue addresses the question of whether the Court of Federal Claims (COFC) had jurisdiction over Austen's protest of a task order (valued over $10 million) given that the National Defense Authorization Act of 2008 (NDAA) purports to grant exclusive jurisdiction over such actions to the Government Accountability Office (GAO). The competition problem simulates a garden variety indefinite-delivery/indefinite-quantity (ID/IQ) and associated task order award for defense-related services. The question on appeal explores issues begged by the enactment of the NDAA, the scope of the Tucker Act, and the issuance of *L-3 Communications Corp.*, ASBCA No. 54920, 2006 WL 2349233 (July 26, 2006).

The second issue addresses whether Austen was entitled to lost profits under the PRIME ID/IQ contract. With respect to this issue, the competition problem purposefully does not discuss details of the different task order proposals or the selection authority's trade-off determination. Instead, the

problem rather explicitly includes evidence of bad faith in the solicitation process, both to make it easier to administer as a moot court competition and to ensure that competitors consider not only the facts, but also whether the court should award lost profits from a legal and policy perspective.

Because both issues are largely ones of first impression for the COFC and the Court of Appeals for the Federal Circuit, there is little if any case law directly on point for either side. Accordingly, competitors will be required to use case law, canons of statutory construction, legislative history, and policy creatively to support their arguments. Although this memorandum seeks to address most of the issues that competitors will make, please do not be surprised to hear arguments that are not presented herein.

1. Issue I: The AEA's Appeal: Whether the Court of Federal Claims Improperly Exercised Jurisdiction Because the National Defense Authorization Act of 2008 Vested the GAO with Exclusive Jurisdiction over Task Order Protests

COFC's Holding and Rationale: The Court of Federal Claims (COFC) held that the National Defense Authorization Act of 2008 (NDAA) did not alter the court's expansive jurisdiction under the Tucker Act, 28 U.S.C. § 1491(b)(1), and, as such, the court had jurisdiction over Austen's task order protest and could properly consider the merits of Austen's requests for injunctive relief. The court based its holding on its determination that the NDAA ineffectively vested exclusive jurisdiction over protests of task orders valued over $10 million in the Government Accountability Office (GAO). In so doing, the court discounted the AEA's argument that the statute is clear in its grant of "exclusive" jurisdiction to the GAO. In arriving at its decision, the court further outlined (1) the court's well-established and expansive jurisdiction over bid protests and (2) the benefits of maintaining the court's unique dual jurisdiction over contract formation- and performance-related disputes.

The AEA's Three Main Arguments: The COFC's holding that the court retains jurisdiction over Austen's protest under the Tucker Act should be reversed. First, the text of the NDAA clearly and unambiguously specifies that "the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under [the Act]…." Second, even if the court proceeds to an examination of legislative intent to elucidate the NDAA's jurisdictional provisions, the court will find that reading the statute to grant exclusive jurisdiction over task order protests to the GAO comports with Congress's goals of increasing competition and transparency. Third, the COFC failed to consider the advent of ID/IQ contracting as an efficient means for the Government to procure goods and services; giving contractors a choice of fora in which to protest task orders will not only burden the judicial system with additional lawsuits, but will also equip contractors with the ability to delay acquisitions.

Austen's Three Main Arguments: The COFC properly exercised jurisdiction under the Tucker Act. First, the text of the Tucker Act clearly speci-

fies that the court "shall have jurisdiction to render judgment on an action by an interested party" objecting to "the award of a contract or any alleged violation of statute or regulation in connection with a procurement. . . ." 28 U.S.C. § 1491(b)(1). The court correctly noted that the NDAA does not explicitly override these provisions and concluded that the court consequently had jurisdiction over Austen's protest; the NDAA's jurisdictional provisions are either ambiguous or ineffective. Second, the NDAA's legislative history supports the establishment of jurisdiction in the COFC because granting ID/IQ holders two fora in which to protest promotes enhanced competition and ensures transparency. Third, interpreting the NDAA to include the COFC as a protest forum comports with long-standing expansive views of the court's Tucker Act jurisdiction. The COFC's unique status as a forum in which contractors can bring both protests and claims renders its continued ability to hear task order protests of utmost importance, particularly in the ID/IQ context in which contractors can frame their suit as either a protest *or* a claim.

2. Issue II: Austen's Appeal: Whether Austen Is Entitled to Lost Profits for the AEA's Breach of the PRIME ID/IQ Contract

COFC's Holding and Rationale: The Court of Federal Claims denied Austen's claim for lost profits as speculative despite the AEA's breach of the PRIME ID/IQ contract. Specifically, the court reasoned that Austen's lost profits from the Qumari task order were not foreseeable because the AEA had already fulfilled its minimum quantity requirement, and multiple contractors submitted proposals for the Qumari task order. The court further found that the absence of a remedy-granting clause for the AEA's breach of the fair opportunity to compete gave the court license to consider the uniqueness of claims for lost profits under ID/IQ contracts. The court, therefore, stated that injunctive relief was a sufficient remedy, and that awarding lost profits would hinder the procurement system. In arriving at its decision, the court discounted (1) Austen's argument that common law principles regarding lost profits should apply and (2) the AEA's argument that Austen was masquerading its bid protest as a CDA claim.

The AEA's Three Key Arguments: The COFC's denial of lost profits should be affirmed. First, the court properly found that lost profits from the Qumari task order were not foreseeable at the time of awarding the PRIME ID/IQ contract. Foreseeability was lacking because the AEA only promised to order a minimum quantity of EOD services worth $3 million from Austen, which it already fulfilled, and Austen may not have won the Qumari task order even if it had submitted a proposal. Second, Austen's claim is actually a bid protest for which lost profits are a prohibited remedy.[20] Awarding lost

20. The AEA also argues in Issue I that the GAO has sole jurisdiction over Austen's task order bid protest. *See supra* Part II.B.1. This is where Issue II overlaps with Issue I. *See infra* Part II.C.2.b for a discussion of simultaneously bringing a bid protest and a CDA claim.

profits would amount to a windfall because injunctive relief has already been granted under Austen's protest. Third, awarding lost profits practically and inappropriately amounts to punitive damages.

Austen's Three Key Arguments: The COFC's denial of lost profits should be reversed. First, lost profits were foreseeable, caused by the AEA's breach, and estimated with reasonable certainty. Lost profits are foreseeable even when an obligation to purchase a minimum quantity has been fulfilled. Here, the PRIME Program Director told Austen to anticipate future task orders beyond the guaranteed minimum, and the Estimated Quantities Schedule indicated orders $10–12 million in excess of the guaranteed minimum. Furthermore, lost profits were foreseeable because the PRIME Program Director was "sure [Austen] would deliver the best proposal" for the Qumari task order given its "truly exemplary" past performance, whereas the other two PRIME contractors "have had problems." Second, the common law has no qualms about awarding lost profits to place the nonbreaching party in its expected position absent breach, and that principle should apply here in the absence of a remedy-granting clause. Third, the AEA's bad faith conduct undermined transparency and accountability. Awarding lost profits appropriately punishes and deters such conduct, and promotes the NDAA's goal of greater task order competition.

C. *Detailed Discussion of the Arguments*

1. Issue I: The AEA's Appeal: Task Order Protest Jurisdiction

This moot court competition presents a unique case—the COFC's first ever task order protest—which tests the outer limits of the court's jurisdiction. This case was inspired by *L-3 Commc'ns Corp.*, ASBCA No. 54920, 2006 WL 2349233 (July 26, 2006), a recent Armed Services Board of Contract Appeals (ASBCA) decision that provides persuasive authority for the COFC's consideration of its task order protest jurisdiction. In *L-3*, the ASBCA considered whether a contractor's complaint that the Government had deviated from the specified evaluation criteria constituted a protest or a claim. The board construed the complaint as a claim and exercised jurisdiction over the case under the Contract Disputes Act (CDA), noting that the denial of a fair opportunity to compete for task orders "may theoretically be grounds for both a 'protest' seeking to cancel or modify the award and a 'claim' for damages." *L-3*, 2006 WL 2349233.

Also inspiring the decision below is a recent COFC case, *BLR Group of Am. Inc. v. United States*, 84 Fed. Cl. 634 (2008), in which the court expressed an expansionist view of its Tucker Act jurisdiction. In *BLR*, a contractor alleged that the Government conducted a flawed performance evaluation, and sought injunctive relief from the court. *BLR*, 84 Fed. Cl. at 646. Although the court exercised jurisdiction under the CDA, it noted that the Tucker Act would also apply because allowing contractors to challenge performance evaluations in the COFC was "in complete harmony with the overall jurisdictional

scheme fashioned by Congress in enacting and amending the Tucker Act." *Id.* at 643, 646.

Together, *L-3* and *BLR* suggest what Austen should argue on appeal: the Tucker Act is as strong today as it was prior to Congress's enactment of the NDAA. Consequently, the Tucker Act confers the COFC with jurisdiction over Austen's protest. The AEA, however, will argue that only the GAO was granted jurisdiction over task order bid protests. The NDAA conferred that much, and only that much.

Turning to the COFC's general protest jurisdiction, the Tucker Act provides that the court "shall have jurisdiction to render judgment on an action by an interested party objecting to … the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1); *see RAMCOR Servs., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999).

Under the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 32423 (codified in scattered sections of 10 U.S.C. and 41 U.S.C.), ID/IQ contract holders "shall be provided a fair opportunity to be considered" for task orders placed under an overarching ID/IQ contract. Importantly, the National Defense Authorization Act of 2008 (NDAA), Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304(c)), expands the rights of ID/IQ contract holders by redefining how the Government must proceed to fulfill the "fair opportunity to proceed" requirement. Specifically, the NDAA requires that for orders in excess of $10 million, procuring agencies must provide ID/IQ contract holders with specific information regarding pending task order competitions. Pub. L. No. 110-181, § 843, 122 Stat. 3, 237. For example, an agency must provide notice of the task order that includes "a clear statement of the agency's requirements" and other details regarding the evaluation of proposals. *Id.*

Thus, because Austen is an "interested party"[21] asserting the violation of a statute in the AEA's failure to provide notice of the PRIME task order, the COFC had original subject-matter jurisdiction over Austen's protest unless another statute divested the court of its jurisdiction.

In creating new protest jurisdiction for task orders valued over $10 million, the NDAA purports to grant the Government Accountability Office (GAO) "exclusive" jurisdiction over such actions. Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304(c)). First, section 203 of the NDAA provides:

> (1) A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for—
>
> (A) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
>
> (B) a protest of an order valued in excess of $10,000,000.

21. The issue of whether Austen is an interested party is not an issue on appeal.

Id. The NDAA further notes, "[n]otwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B)…." *Id*.

Thus, the jurisdictional question is whether the NDAA divests the COFC of subject matter jurisdiction over Austen's suit. More precisely, the issue is whether the court can exercise jurisdiction over a protest of a task order under the Tucker Act despite the NDAA's direction that the Comptroller General have "exclusive" jurisdiction over such protests.

The subsections that follow address the arguments that the AEA and Austen will likely make regarding the intersection of the NDAA and the Tucker Act. Part a of this memorandum examines the text of the NDAA itself—the AEA's strongest argument against recognition of Tucker Act jurisdiction—and Austen's likely responses to the AEA's contentions. Part b addresses the legislative history of both the NDAA and the Tucker Act—upon which Austen's strongest arguments will likely be based—and predicted claims and responses that advocates should make based upon this legislative history. Part c outlines policy considerations including efficiency concerns as well as the history and scope of the COFC's jurisdiction. Finally, Part d addresses various other arguments that the AEA and Austen may make.

a. Textual Analysis of the National Defense Authorization Act of 2008 and Related Arguments

The AEA's strongest argument against the court's ability to invoke Tucker Act jurisdiction is based upon an analysis of the plain text of the NDAA.

i. Statutory Construction

Analysis of any statute begins with "the language of the statute itself." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 475 (1992)); *accord Clary v. United States*, 333 F.3d 1345, 1348 (Fed. Cir. 2003). If the text at issue "has a plain and unambiguous meaning with regard to the particular dispute in the case," the court's inquiry "must cease." *Clary*, 333 F.3d at 1348 (quoting *Robinson v. Shell Oil Co*., 519 U.S. 337, 340 (1997)). Where the statutory text is clear, there is no need to refer to legislative history, as "[t]he plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Ex parte Collett*, 337 U.S. 55, 61 (1949); *see Bull v. United States*, 479 F.3d 1365, 1377 (Fed. Cir. 2007) ("[M]ere ambiguities in the legislative history are insufficient to rebut the strong presumption in favor of the plain language of the statute.").

ii. The Text of the NDAA

The court must engage in a detailed examination of the text of the NDAA to ascertain whether, in creating protest jurisdiction over certain task order protests, the statute effectively waives sovereign immunity such that Austen

may sue the AEA in the COFC. The COFC is a court of limited jurisdiction wherein contractors may seek relief from the Government given the proper waiver of sovereign immunity. *See* 28 U.S.C. § 1491. "[W]aivers of sovereign immunity … are to be construed narrowly." *Am. Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1301 (Fed. Cir. 2001) (citing *McMahon v. United States*, 342 U.S. 25, 27 (1951)). Generally, for the COFC to entertain a claim against the United States, there "requires a clear statement from the United States waiving sovereign immunity … together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Testan*, 424 U.S. 392, 399 (1976). With regard to protests, the Tucker Act serves as both a waiver of sovereign immunity and a jurisdictional grant for this court. *See* 28 U.S.C. § 1491(b)(1).

Though the NDAA expands contractor rights to enhance competition, the statutory text sets forth narrow parameters for the new jurisdiction. First, the statute frames protest authorization in negative terms: "A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order *except*" where certain conditions are present. Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304(c)) (emphasis added). Specifically, the protester must either allege that the order increases the scope, duration, or maximum value of the overarching ID/IQ contract under which the order is issued, or demonstrate that the task order is valued at over $10 million. Second, the text expressly states that "the Comptroller General of the United States shall have *exclusive* jurisdiction of a protest authorized under [the NDAA]." *Id.* (emphasis added).

Based on a similar statutory analysis, the AEA should argue that the text of the NDAA clearly and unambiguously indicates that the GAO shall have "exclusive" jurisdiction over task order protests such as Austen's. The AEA should argue that by its terms, the NDAA reserves jurisdiction for the GAO "exclusive" of all other fora, including the boards of contract appeals *and* the COFC. Accordingly, the AEA should argue that resort to the legislative history of either the NDAA or the Tucker Act is both unnecessary and improper. *See Robinson v. Shell Oil Co.*, 519 U.S. at 340; *Clary*, 333 F.3d at 1348.

Austen may first challenge the AEA's choice of statutory canon, noting that courts will look beyond the plain language of the statute where the text is inconsistent with the intent of Congress. *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989). Indeed, in such cases, the court will consider the statute within the surrounding framework of laws on the subject. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). Here, Austen will argue that reading the NDAA as suggested by the AEA would contradict Congress's original intent for both the GAO and the COFC to have jurisdiction over task order protests. *See infra* Part II.C.1.b.ii. Austen should thus argue that the court should look to the text of the Tucker Act for guidance.

Austen should emphasize that its interpretation of the NDAA comports with the broader context of the COFC's expansive Tucker Act jurisdiction. For example, Austen may note that courts have routinely recognized the

breadth of Tucker Act jurisdiction, focusing on terms and phrases such as "in connection with" and "procurement." *See Distributed Solutions, Inc.*, 539 F.3d 1340, 1345 (Fed. Cir. 2008). In *Distributed Solutions*, an ID/IQ contract holder protested the Government's decision to award a task order to an incumbent contractor. *Id.* at 1344. Specifically, the contractor argued that the Government's issuance and subsequent review of a Request for Information (RFI) constituted an act "in connection with" a "proposed procurement" such that the COFC had jurisdiction over its protest. The COFC agreed, noting that while the Tucker Act does not define either phrase, Congress defined "procurement" in a separate statute related to the establishment of the Office of Federal Procurement Policy: "'procurement' includes all stages of the process of acquiring property or services. . . ." *Id.* at 1345 (citing 41 U.S.C. § 403(2)). Moreover, the court found that "the operative phrase 'in connection with' is very sweeping in scope." *Id.* (citing *RAMCOR Servs., Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)). Accordingly, Austen may argue that the AEA's proposed reading of the NDAA is inconsistent with the Tucker Act's sweeping grant of authority.

Second, and in response to the AEA's analysis of the text itself, Austen should argue that the text of the NDAA is not clear given its failure to override or even mention the COFC's broad jurisdiction under the Tucker Act.[22] Withdrawal of Tucker Act jurisdiction is "tantamount to a partial repeal of that Act" and is therefore "strictly construed." *Biltmore Forest Broad., Inc. v. United States*, 80 Fed. Cl. 322, 328 (2008). It is well-established that repeals "by implication" are not favored. *See Traynor v. Turnage*, 485 U.S. 535, 537 (1988); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). Courts are not to infer statutory repeal "unless the later statute *expressly* contradicts the original act. . . ." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007). Because the NDAA remains silent with regard to its intersection with the Tucker Act, Austen will argue that the court cannot merely assume that Congress meant to withdraw the court's jurisdiction.

Austen should also argue that the NDAA's failure to override the Tucker Act renders its purported grant of "exclusive" jurisdiction ineffective. Indeed, the absence of mention of the Tucker Act in light of the NDAA's explicit override of 31 U.S.C. § 3556 supports the contention that Congress did not intend to strip the COFC of its broad Tucker Act jurisdiction. Moreover, Austen should argue that Congress could have amended the Tucker Act's standing requirements to exclude ID/IQ contract holders, thus ensuring protesters seek relief solely in the GAO. Indeed, Congress previously amended the Tucker Act to include specialized "interested party" definitions in other sections of the statute, *see* Pub. L. No. 110-181, § 326, 122 Stat. 3, 63 (altering the definition of "interested party" standing to permit bid protests by

22. The Tucker Act, 28 U.S.C. § 1491(b)(1) (2000), provides that the Court of Federal Claims "shall have jurisdiction to render judgment on an action by an interested party objecting to . . . the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

federal employees in actions under Office of Management and Budget Circular A-76), thus demonstrating Congress's familiarity with the Tucker Act and its parameters. Congress's failure to amend the Tucker Act here suggests its intent to maintain the COFC's broad protest jurisdiction.

Finally, Austen should respond to the AEA's reading of the term "exclusive" by suggesting Congress meant only to exclude boards of contract appeals and agencies from the new NDAA jurisdiction—not the COFC.

b. Legislative History and Related Arguments

Austen's strongest argument in favor of the applicability of the Tucker Act is based on an analysis of the overarching goals of the NDAA: to increase competition and transparency at the task order level.

i. Statutory Construction

Although the court must first look to the plain language of a statute to determine its meaning, *see Hughes Aircraft Co.*, 525 U.S. at 438; *Clary*, 333 F.3d at 1348, if the plain meaning produces an "absurd" or even "unreasonable" result "plainly at variance with the policy of the legislation as a whole," the court may look to the purpose rather than the literal words. *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)). Moreover, though statutory language is itself the primary indication of legislative intent, "*clear* evidence of legislative intent prevails over *other* principles of statutory construction." *Bath Iron Works Corp. v. United States*, 20 F.3d 1567 (Fed. Cir. 1994) (citing *Johns-Manville v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1998)).

ii. The Purposes of the NDAA

(a) Enhancing Competition

Through the enactment of the NDAA, Congress intended to enhance competition at the task order contracting level. Indeed, the Senate report accompanying the legislation predicted that "providing contractors an opportunity to protest awards in which agencies failed to follow appropriate processes will result in more competitive and accountable procurements." S. Rep. No. 110-201, at 12 (2007). As explained by the GAO, "Congress intended to establish a system that requires agencies to advise offerors of the bases for task order competitions, and enforces that requirement through authorization of bid protests. . . ." *Triple Canopy, Inc.*, B-310566.4, 2008 WL 4845230 (C.G. Oct. 2008). Furthermore, as explained by the Acquisition Advisory Panel (AAP), which first promoted the creation of this jurisdiction, enhancing competition by affording contractors additional rights helps invigorate the marketplace and keep prices low. *Report of Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 10–11 (2007), *available at* http://acquisition.gov/comp/aap/documents/Introduction.pdf.

As such, Austen should argue that affirming the lower court's decision and recognizing jurisdiction in the COFC would further Congress's intent by

safeguarding contractors' newly acquired rights. The scheme created by the NDAA provides significant incentives for contractors holding ID/IQ contracts; the creation of two fora in which contractors can enforce these rights further entices contractors to compete for these contracts in the first place.

The AEA will not likely dispute the fact that the NDAA was meant to increase competition, but will instead argue that including the COFC as a protest forum is not necessary to achieve this goal. Indeed, contractor rights are enforceable in the GAO, a forum that boasts undeniable expertise.

The AEA may further argue that construing the NDAA to create multiple protest fora would thwart the purpose of ID/IQ contracting—to provide the Government with an efficient means of obtaining goods and services. Specifically, the AEA may point to the text and history behind FASA, which emphasized the importance of efficiency in government contracting. For example, FASA revised contracting procedures to include "new, accelerated notice of contract awards, contract debriefings, and bid protest" procedures to "reduce staff time, lessen the amount of paperwork required, and shrink the bureaucracy." *Omega World Travel, Inc. v. United States*, 82 Fed. Cl. 452, 462 (2008) (quoting 140 Cong. Rec. H9245 (daily ed. Sept. 20, 1994) (statement of Rep. Harman)). The AEA may argue that allowing the COFC to hear task order protests, i.e., creating jurisdiction in two fora where one is appropriate, would lead to an increase in protests and would impermissibly stall procurements. Additionally, the COFC's slower, less efficient protest procedures further exacerbate this concern. *See infra* Part II.C.1.c.i.

(b) Increasing Transparency

Austen should argue that in addition to enhancing competition, Congress meant to increase transparency in ID/IQ contracting via the NDAA protest provisions. Indeed, the GAO notes that through the NDAA, Congress intended to "establish a system that requires agencies to advise offerors of the bases for task order competitions, and enforces that requirement through authorization of bid protests. . . ." *Triple Canopy, Inc.*, 2008 CPD ¶ 207, 2008 WL 4845230, at *4–5 (C.G. Oct. 30, 2008). Thus, Austen will likely argue that, to remain true to the intent of Congress, the Court should affirm the COFC's decision to exercise jurisdiction over its claim.

The AEA will likely not challenge the NDAA's goal of promoting transparency in government contract law, but again will cite what it claims to be the limited scope of the Act as well as the importance of maintaining efficiency. *See infra* Part II.C.1.c.i. Thus, the AEA will counter Austen's argument by asserting that the NDAA achieves transparency through the creation of one task order protest forum.

c. Policy Concerns: Efficiency and COFC Perspective

i. Maintaining Efficiency in Government Contracting

Efficiency and flexibility remain two significant goals and benefits of ID/IQ contracting such that Austen should contend that Congress could not have

intended to exclude the COFC from the NDAA, as doing so would undermine both goals. *See Omega World Travel, Inc. v. United States*, 82 Fed. Cl. 452, 462 (2008) (FASA's "revised contracting procedures and the new, accelerated notice of contract awards, contract debriefings, and bid protest" procedures were "all designed to reduce staff time, lessen the amount of paperwork required, and shrink the bureaucracy" (quoting 140 Cong. Rec. H9245 (daily ed. Sept. 20, 1994) (statement of Rep. Harman))). Accordingly, Austen will argue that allowing it to consolidate its protest and damage claims in one forum would streamline not only Austen's litigation, but also the Government's ability to obtain the required explosive ordnance devices (EODs) in a timely fashion.

Accordingly, Austen will argue that if the NDAA is read as narrowly as is suggested by the AEA, Austen would be forced to pursue its claims in two fora, thus undermining the very efficiency argument propounded by the AEA. Specifically, Austen would refile its protest in the GAO while simultaneously pursuing its claim for damages in the COFC, resulting in inefficient litigation and increased transaction costs for both parties. More importantly, delays caused by Austen's continued litigation would translate into inefficient procurement, as the AEA would not be able to obtain the EODs until Austen's protest is resolved. Because Austen's argument is largely fact-specific, however, i.e., Austen does not demonstrate any *intrinsic* inefficiency in denying the COFC jurisdiction, this argument does not have widespread appeal.

The AEA has a stronger efficiency-based argument. It will argue that construing the NDAA to create jurisdiction in both the GAO and the COFC increases litigation costs, inconsistent legal standards, and uncertainty. *See* Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 714, 718 (2003).

ii. The COFC's Unique Perspective

Austen will likely argue that the COFC's ability to hear both contract formation and performance claims renders the court a unique and ideal forum in which to pursue task order protests. Indeed, allowing the COFC to exercise jurisdiction over Austen's task order protest is "in complete harmony with the overall jurisdictional scheme fashioned by Congress in enacting and amending the Tucker Act." *BLR Group of Am., Inc. v. United States*, 84 Fed. Cl. 634, 646 (2008). As noted by Professor Joshua I. Schwartz, the court's dual jurisdiction gives the court a "lucid understanding of the integrated functioning of the system of government contracts law" unmatched by other fora. Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 863, 870 (2003); *see* Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wis. L. Rev. 1225, 1236 (2007) (the COFC's dual jurisdiction lends it "a unique perspective, allowing principles from one area of procurement law to inform its decisions in the other").

Moreover, Austen may contend, interpreting the NDAA to allow the COFC to exercise jurisdiction comports with the consistent expansion of the

court's Tucker Act jurisdiction. In arguing this point, Austen will likely trace the history of the Tucker Act, noting its amendment to allow the COFC to award monetary relief, Act of Aug. 29, 1972, Pub. L. No. 92-415, 86 Stat. 652, 652 (codified as amended at 28 U.S.C. § 1491); hear suits concerning contracts with nonappropriated fund instrumentalities, Act of July 23, 1970, Pub. L. No. 91-350, 84 Stat. 449; and handle pre-award and post-award protests, Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25, 39–40 (codified as amended at 28 U.S.C. § 1491); Pub. L. No. 104-320, § 12(a), 110 Stat. 3870, 3874–75 (codified as amended at 28 U.S.C. § 1491).

Additional contractor-friendly features of the COFC support Austen's contention that the court should have jurisdiction over task order protests. For example, the court uses "robust procedures" including discovery and evidentiary rules, whereas the GAO uses more streamlined procedures. Meztger, *supra* at 1241. Similarly, the opportunity for appellate review is unique to the COFC. Finally, the COFC's power to enforce its judgments also proves a key feature from Austen's perspective. Were Austen forced to seek injunctive relief from the GAO, the best Austen could receive would be a recommendation that the AEA could choose to accept or reject. 31 U.S.C. § 3554.

The AEA may counter, however, that agencies almost always follow GAO's recommendations such that they almost have the full force and effect of a judicial injunction. Indeed, "Congress contemplated and intended that procurement agencies would follow the Comptroller General's recommendation." *Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989). More specifically, Congress viewed an agency's failure to follow GAO's recommendations as "sufficiently unusual as to require the agency to report such noncompliance to the Comptroller General and to require the latter annually to inform Congress of any instances of noncompliance." *Id.* at 648; *see* 31 U.S.C. § 3554(b)(1), (3) (2000).

Moreover, the AEA will likely argue that, in addition to the fact that the unique status of a tribunal cannot overcome clear statutory text, the COFC's unique perspective is unnecessary in this case. Austen's claim does not implicate the type of complex government procurement issues that require a systemic perspective. Rather, it is a classic protest coupled with a typical breach of contract claim.

d. Additional Arguments and Counterarguments

i. Arguments Likely to Be Advanced by the AEA

(a) The AEA's Reading of the NDAA Comports with GAO Decisions Analyzing the Text of the Statute

The GAO has repeatedly noted the "exclusive" nature of task order protest jurisdiction. *See*, *e.g.*, *e-Management Consultants, Inc.*, B-400585.2, B-400585.3 (2009) ("[T]he NDAA authorizes *this* Office … to consider protests filed in connection with task orders that are valued in excess of $10 million.") (em-

phasis added). Though neither the COFC nor the Court of Appeals for the Federal Circuit has examined the NDAA or considered a related task order protest, both courts show high regard for GAO expertise on bid protest law. *See*, *e.g.*, *Ideal Int'l, Inc. v. United States*, 74 Fed. Cl. 129, 136 (2006) ("The [COFC] recognizes GAO's longstanding expertise in the bid protest area and accords its decisions due regard.").

In response, Austen will likely steer the court toward its previously articulated contention that the COFC offers significant benefits to task order protestors. *See supra* Part II.C.1.c.ii. In so doing, Austen may or may not take issue with the AEA's exaltation of the GAO, but will certainly attempt to refocus the court's attention on the unique characteristics of the COFC that render the forum particularly well-suited to hear its protest. *See id*.

ii. Arguments Likely to Be Advanced by Austen

(a) The NDAA Only Grants the GAO "Exclusive" Jurisdiction over a Certain Category of Task Order Protests and Austen's Protest Does Not Fall Within That Category

Austen may argue that the NDAA only gives the GAO "exclusive" jurisdiction over task order protests brought on certain grounds. Because Austen's claim alleges a violation of the NDAA itself, the "exclusivity" provision does not apply to its claim.

This argument necessitates a close reading of the NDAA and its subsections. The NDAA expands contractor rights in subsection 2304(d), requiring that in task orders valued above $5 million, the Government provide (1) notice and a clear statement of the agency's requirements; (2) a "reasonable period of time" to prepare a proposal; (3) disclosure of the factors and subcontractor the agency will consider in evaluating the proposals; (4) a written statement detailing the basis for best value awards; and (5) an opportunity for a post-award debriefing. Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304(d)). Protest provisions are set forth in subsection 2304(e)(1). First, under subsection 2304(e)(1)(A), contractors may protest if they allege the order increases the scope, period, or maximum value of the overarching contract. Second, under subsection 2304(e)(1)(B), contractors may protest orders valued over $10 million.

Importantly, the provision purporting to grant "exclusive" jurisdiction over task order protests applies to protests authorized under paragraph (e)(1)(B). Austen may allege that because its protest asserts a violation of the newly expanded procedural rights under paragraph (d)(1), the exclusivity clause does not apply.

The AEA should reply that subsection (d) does not set forth separate or independent protest rights such that Austen's protest is indeed authorized by paragraph (e). The fact that Austen alleges a violation of the NDAA fits the Tucker Act's requirement that interested parties protest a "violation of statute … in connection with a procurement," 28 U.S.C. § 1491(b)(1), and thus adds nothing to the debate.

(b) Reversing the COFC's Finding of Subject Matter Jurisdiction Would Leave Austen Without Recourse and Would Hinder Similarly Situated Contractors' Ability to Recover in Future Actions

Austen may contend that because the COFC features more contractor-friendly, flexible timeliness requirements than the GAO, the elimination of the COFC as a forum for task order protests would be inequitable. GAO protests must be filed "no later than 10 days after the basis of protest is known or should have been known, whichever is earlier." 41 C.F.R. § 33.103 (2008). In this case, Austen learned of the AEA's award of the task order on September 22, 2008, but did not bring this action until December 1, 2008. As such, if the court reverses the COFC's finding, Austen will not be able to pursue a protest at GAO.

In response, the AEA may note that subject matter jurisdiction is not an equitable concern; whether a court has jurisdiction is not a consideration that bends to the needs of contractors, but rather is "strictly construed." *Biltmore Forest Broad., Inc. v. United States*, 80 Fed. Cl. 322, 328 (2008).

(c) The COFC Could Have Exercised Jurisdiction Relying Upon Other Theories

Austen may offer alternative bases on which the COFC has jurisdiction over Austen's claim. First, though largely obviated by the COFC's bid protest jurisdiction, the court could exercise jurisdiction over Austen's protest by analogizing Austen's allegations to a breach of implied contract theory. The COFC has jurisdiction over "any claim against the United States" under 28 U.S.C. § 1491(a)(1). In attempting to analogize its protest to a traditional contract claim, Austen may cite to *Community Consulting Int'l*, ASBCA 53489, 02-2 BCA ¶ 31940, 2002 WL 1788535 (Aug. 2, 2002), in which the ASBCA held that a contract clause assuring a fair opportunity to compete gave the board jurisdiction over a protest-like action. *See also L-3 Commc'ns Corp.*, ASBCA No. 54920, 2006 WL 2349233 (July 27, 2006).

Second, the COFC could have recharacterized Austen's task order protest as a performance-related suit, thus converting Austen's protest into a claim properly heard by the COFC under the Contract Disputes Act, 41 U.S.C. § 609(a)(1) (2000). *See id.* ("The same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a 'protest' seeking to cancel or modify the award and a 'claim' for damages.…"); *see also* discussion *infra* Part II.C.2.b.ii.

Austen may also suggest that because its protest can be characterized as a "downselection" protest, any restriction on task order protest jurisdiction does not apply to its claim. Prior to enactment of the NDAA, the GAO confirmed that the restriction on task order protests did not apply to "downselection," or the "selection of one of multiple contractors for continued performance." *In re Electro-Voice, Inc.*, B-278319, Jan. 15, 1998, 98-1 CPD ¶ 23; *see Teledyne-Commodore, LLC*, B-278408.4, Nov. 23, 1998, 98-2 CPD ¶ 121. Because the

NDAA has only increased jurisdiction over task order protests, Austen may argue, the AEA's elimination of an incumbent contractor from further consideration amounted to a "downselection," the protest of which could properly be heard by the COFC.

The AEA's general response is that all of these bases for jurisdiction are invalid because they simply did not form the *actual* basis for the court's decision to hear Austen's case. Indeed, the issue before the court is narrowly framed as to whether the COFC properly exercised jurisdiction under the Tucker Act given the NDAA's purported grant of exclusive jurisdiction over task order protests to the GAO. Alternatively, the AEA may agree with Austen that the COFC *could* have exercised jurisdiction under any of these theories but did not; Austen's search for alternative grounds for jurisdiction demonstrates its awareness that the Tucker Act does not apply.

With regard to Austen's suggestion that the COFC could accept Austen's protest as an implied-in-fact contract claim, the AEA is likely to counter that the implied-in-fact contract theory did not survive the passage of the Administrative Dispute Resolution Act of 1996 (ADRA), Pub. L. No. 104-320, 110 Stat. 3870, which effectively divested the COFC of implied-in-fact contract theory jurisdiction. *See Info. Sciences Corp. v. United States*, 85 Fed. Cl. 195, 203–06 (2008); *Biltmore Forest Broad. Inc. v. United States*, 80 Fed. Cl. 322, 334–35 (2008). Indeed, prior to the enactment of the ADRA, the COFC's bid protest jurisdiction was predicated on an implied contract between the Government and prospective bidders. *See Keco Indus., Inc. v. United States*, 192 Ct. Cl. 773, 780 (1970). The ADRA expressly provided an independent grant of jurisdiction over bid protests under 28 U.S.C. § 1491(b), leading most to believe the implied contract theory to be dead letter.

The COFC recently suggested that the § 1491(b)(1) Tucker Act jurisdiction "encompasses" Austen's alternative theory for recovery and COFC jurisdiction. *FFTF Restoration Co. v. United States*, No. 07-659C, at 32 (Fed. Cl. Mar. 2, 2009), *available at* http://www.uscfc.uscourts.gov/sites/default/files/FIRESTONE.FFTF030209.pdf. In *FFTF Restoration*, the court held that "the implied-in-fact contract theory survives the ADRA by fitting within the ambit of the requirements to act with integrity, fairness, and openness and to treat bidders fairly," issues over which the court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491(b)(1). *Id.* at 34.

Finally, the AEA may raise several counterarguments to Austen's suggestion that its protest could have been converted into a claim. First, and most basic, Austen should have brought its protest as a claim when it initiated the suit. To argue at this juncture that the court should have corrected its error is nonsensical. Second, the COFC is generally hesitant to recharacterize task order claims as disputes. *See A & D Fire Prot. Inc. v. United States*, 72 Fed. Cl. 126, 135 (2006) (recharacterizing a bid protest as a contract dispute "attempts to evade the bar of task order bid protests" that existed under FASA). Similarly, the AEA should argue that the court should not allow Austen to recast its claim to circumvent the NDAA's clear jurisdictional bar.

2. Issue II: Austen's Appeal: Lost Profits

Austen claims lost profits it would have earned by providing EOD services in the Qumari Province of Yukistan. It seeks recovery of those lost profits by arguing that the AEA breached the parties' multiple-award PRIME ID/IQ contract by denying Austen a fair opportunity to compete for the Qumari task order. The AEA's *liability* is *not* an issue on appeal; the AEA clearly breached the PRIME ID/IQ contract. Issue 2 is whether lost profits should be awarded to Austen.

Exceptionalist laws exist in public contracting because of unique considerations that do not exist in private contracting. Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 Geo. Wash. L. Rev. 633, 637–38 (1996). However, public contracts are still generally subject to common law principles. *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000); *Praecomm, Inc. v. United States*, 78 Fed. Cl. 5, 10–11 (2007). Austen's claim for lost profits stands at the crossroads: common law principles govern the award of lost profits,[23] but novel considerations in ID/IQ contracting suggest exceptionalist policies.

The following subsections address these novel considerations, which form the basis of the AEA's argument for the application of exceptionalist principles, and detract from Austen's argument for general principles of contract law. Part a focuses on the lost profit requirement of foreseeability in the context of ID/IQ contracts; causation and certainty of amount are intended to be less significant issues. Part b discusses the interplay of bid protests and CDA claims. Part c presents additional considerations in light of the AEA's bad faith conduct. Finally, Part d addresses various other arguments that the parties may make.

To start, the Federal Circuit has established three requirements of successful claims for lost profits:

> (1) the loss of profits was the proximate result of the breach; (2) the loss caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Energy Capital Corp. v. United States, 302 F.3d 1314, 1324–25 (Fed. Cir. 2002). The Restatement (Second) of Contracts mirrors the preceding rule. Section 344(a) establishes a party's "expectation interest" for which damages, including lost profits, serve to protect. *See also id*. Section 347 states that dam-

23. This is true as far as this case is concerned. The Federal Circuit departs from common law in discouraging the award of lost profits from "collateral undertakings." Daniel Graham, *Departing from* Hadley*: Recovering Lost Profits on Collateral Undertakings in Suits Against the Government*, 35 Pub. Cont. L.J. 43, 45 (2005). Lost profits must generally "flow from the contract with the Government that is the subject of the lawsuit, and not from 'independent or collateral undertakings.'" *Id*. At common law, lost profits from collateral undertakings are awarded if they satisfy the traditional requirements of foreseeability, causation, and certainty. *See id*. at 51.

ages will be awarded to the extent the breaching party caused them. Finally, section 351 echoes the Federal Circuit's rule on unforeseeability, and section 352 mirrors the rule regarding quantum, or certainty of amount.

Causation and foreseeability are sometimes analyzed as one factor because the same facts usually support analyses of both factors. *See Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 746 n.49 (2004). That was intended to be the case here; thus, causation is addressed separately only briefly *infra* Part II.C.2.d.ii(c) ("Other Arguments"). As for quantum, or estimating the amount of lost profits with reasonable certainty, this was not intended to be an issue below or on appeal. *See infra* Part II.C.2.d.ii(d) ("Other Arguments").

a. Foreseeability of Lost Profits and Related Arguments

The AEA should make two main arguments regarding foreseeability. First, lost profits should not be potentially available where, as here, lost profits from a task order were not foreseeable because the minimum quantity requirement had already been fulfilled. Second, as a matter of fact, Austen's asserted lost profits were not foreseeable because Austen was not the only contractor to submit a proposal for the Qumari task order.

Austen also has two main arguments regarding foreseeability. First, lost profits on subsequent task orders are foreseeable even if the minimum quantity requirement has previously been fulfilled, and here, the PRIME Program Director hinted that task orders in addition to the minimum quantity would be issued. Also, the Estimated Quantities Schedule indicated that the AEA needed to order more EOD services than the guaranteed minimum. Second, lost profits on the Qumari task order were foreseeable because of (1) the AEA's own admission that Austen would deliver the best proposal, (2) Austen's incumbent status, and (3) Austen's strong past performance relative to the other contractors.

i. The Standard for Foreseeability

Foreseeability is a question of fact that is reviewed for clear error. *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001). Lost profits are foreseeable if they follow from a breach "(a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." Restatement (Second) of Contracts § 351 (1981); *see also Energy Capital Corp.*, 302 F.3d at 1324–25. In other words, foreseeability " 'merely requires that the injury must be one of such a kind and amount as a prudent person would have realized to be a probable result of the breach' " at the time of executing the contract. *Precision Pine & Timber, Inc. v. United States*, 72 Fed. Cl. 460, 480 (2006) (quoting 11 Corbin on Contracts § 56.7 (1964)).

The most familiar cases involving lost profits and government contracts have been the *Winstar* cases. In the late 1980s, the Federal Government permitted favorable accounting practices for savings and loan associations ("thrifts") that agreed to merge with failing thrifts. *Winstar Corp. v. United*

States, 64 F.3d 1531, 1535–38, 1551 (Fed. Cir. 1995). Specifically, thrifts were permitted to count "supervisory goodwill" toward their regulatory capital (*i.e.*, the amount of capital required of a thrift by regulation). *Id.* at 1535. Congress, however, subsequently enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which prohibited the previously permitted accounting practices. *Id.* at 1535–38. The Supreme Court affirmed the Federal Circuit's holding regarding the Government's breach of contract, *United States v. Winstar Corp.*, 518 U.S. 839, 870 (1996), and subsequent cases brought by thrifts after *Winstar* focused on damages issues, including lost profits.

In deciding whether to award lost profits, courts hearing *Winstar* cases applied the traditional three-prong rule requiring foreseeability, causation, and certainty of lost profits. *See, e.g.*, *Franconia Assocs. v. United States*, 61 Fed. Cl. at 746. Some commentators described the use of this test as a willingness by the courts to "be receptive to entertaining claims for lost profits. . . ." Roger D. Citron, *Lessons from the Damages Decisions Following* United States v. Winstar Corp., 32 Pub. Cont. L.J. 1, 6 (2002). Still, the Federal Circuit described an award of lost profits as a rare and difficult achievement. *Glendale Fed. Bank, FSB v. United States*, 378 F.3d 1308, 1313 (Fed. Cir. 2004) ("[I]t is largely a waste of time and effort to attempt to prove such damages. . . .").

The discrepancy is a matter of proof, not a question of whether lost profits are potentially recoverable. *LaSalle Talman Bank, F.S.B. v. United States*, 45 Fed. Cl. 64, 87 (1999) (*rev'd on other grounds*); *see also Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379–80 (Fed. Cir. 2001) ("The problems of proof . . . of establishing lost profits . . . are well recognized."); *Cal. Fed. Bank v. United States*, 245 F.3d at 1349; Citron, *supra* at 27. Although this rule holds true for the *Winstar* cases, it is not an absolute rule for all breach-of-public-contract claims. Citron, *supra* at 32–33. Thus, in this case, whether lost profits are recoverable against the United States, and whether Austen has proven that lost profits were in fact foreseeable, are questions that must be resolved by *considering* the uniqueness of ID/IQ contracting.

ii. Prior Fulfillment of the Minimum Quantity Requirement

The AEA asserts that lost profits on subsequent task orders are always unforeseeable when the minimum quantity requirement has previously been fulfilled. Here, Austen's lost profits on the Qumari task order were not foreseeable because the AEA already ordered the guaranteed minimum of EOD services from Austen, and the subsequent Qumari task order was not guaranteed.

FAR 16.501-2(b)(3) states that ID/IQ contracts "limit the Government's obligation to the minimum quantity specified in the contract." This obligation constitutes the Government's consideration. Cheryl Lee Sandner & Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 Pub. Cont. L.J. 461, 471–72 (2001); *see also Torncello v. United States*, 681 F.2d 756, 761–62 (Ct. Cl. 1982). Here, the PRIME ID/IQ contract

specified at least $3 million in task orders for Austen. The AEA discharged this obligation on June 1, 2008, by issuing the $3.5 million Arbala task order. Thus, Austen should not have relied on the issuance of any more task orders. This is analogous to *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319–20 (Fed. Cir. 2001), where the court denied the contractor's request for damages because the Government had already purchased the minimum quantity promised under the parties' ID/IQ contract. *See also Appeal of Delfour, Inc.*, ASBCA No. 46059, 93-3 BCA ¶ 26,237, at 130,541. The court in *Travel Centre* denied lost profits despite the fact that the Government breached its duty of good faith and fair dealing by overstating quantity estimates in its solicitation. 236 F.3d at 1318. Likewise, the only losses that the AEA could have reasonably foreseen were those that would have arisen prior to fulfilling the minimum $3 million order requirement; the AEA bore no obligation beyond that. *See* FAR 16.504(a)(1) (stating that "*if* ordered, the contractor must furnish any additional quantities" beyond the minimum quantity requirement) (emphasis added).

The AEA should argue that ID/IQ contracts exist to accommodate uncertainty. The Government may need more than the minimum quantity, but there is no guarantee that will happen. FAR 16.501-2(b)(2). The PRIME ID/IQ contract's Statement of Work says that "[t]he services covered by this contract *may* be used. . . ." (emphasis added). Awarding lost profits for task orders issued after fulfilling the minimum quantity would undercut the primary benefit, and purpose, of ID/IQ contracting. FAR 16.501-2(b)(2). In response, Austen should argue that cutting off the Government's obligations at the minimum quantity would limit competition beyond that point, thus undermining the NDAA's goal of greater task order competition. NDAA, Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (to be codified at 10 U.S.C. § 2304c); *see also* Christopher R. Yukins, *Are IDIQs Inefficient? Sharing Lessons with European Framework Contracting*, 37 Pub. Cont. L.J. 545, 563–66 (2008). Finally, the AEA may repeat the lower court's suggestion that the Global War on Terror, and the need for EOD services, may cease earlier than expected, thus making additional task orders and profits unforeseeable.

Austen should argue that the Government maintains obligations in addition to fulfilling the minimum quantity requirement. For example, in *L-3 Commc'ns Corp.*, ASBCA No. 54920, 2008 WL 2154902 (May 5, 2008), the Air Force breached its promise of a fair opportunity to compete for task orders by conducting a flawed cost/price evaluation of task order proposals. Although the board denied lost profits for lack of causation, it acknowledged the potential availability of such damages. *See id.*; *see also Cmty. Consulting Int'l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, at 157,785 (finding that the promise of a fair opportunity to compete for task orders is a "valid and enforceable contractual promise"). Furthermore, in *Ace-Fed. Reporters v. Barram*, 226 F.3d 1329, 1332–33 (Fed. Cir. 2000), a unique requirements contract obligated the Government to purchase reporting services only from a small number of contractors. The court held that one of those contractors could recover lost

profits for breach, even though no single contractor was guaranteed any work. *Id*. These cases suggest that lost profits on task orders issued after fulfillment of the minimum quantity requirement are indeed foreseeable because there remains a "substantial business value" in the Government's promise to procure from a small number of contractors. *See id*. at 1332. Likewise, Austen should argue that lost profits were foreseeable because of the substantial business value of possibly winning the Qumari task order when there were only two other PRIME contractors, both of whom had poorer reputations.

Furthermore, Austen should rely heavily on the facts to prove that lost profits were foreseeable in the "ordinary course of events." *See Energy Capital Corp*., 302 F.3d at 1324–25; Restatement (Second) of Contracts § 351 (1981). Here, the PRIME ID/IQ contract contained an Estimated Quantities Schedule that indicated a need for $10–12 million in task orders beyond the minimum requirement. In fact, the AEA exceeded its minimum requirement just five days after awarding the PRIME ID/IQ contracts. This suggests that lost profits from the subsequent Qumari task order was "foreseeable as a probable, as distinguished from a necessary, result of [the] breach." *See* Restatement (Second) of Contracts § 351 cmt. a. Also, lost profits were foreseeable because the PRIME Program Director told Austen to "keep your eyes peeled for new task orders" coming after the AEA fulfilled its minimum requirement. The AEA was in the best position to foresee lost profits because it knew of its need for additional task orders. Collectively, these facts constitute an "ordinary course of events" proving the foreseeability of lost profits following a breach of the PRIME ID/IQ contract. *See Energy Capital Corp*., 302 F.3d at 1324–25; Restatement (Second) of Contracts § 351 (1981). Finally, Austen will rebut the lower court's suggestion that the need for EOD services may decrease by pointing to the recent sharp increase in demand for EOD experts and the short one-year duration of the Qumari project.

iii. The PRIME ID/IQ Contract Was a Multiple-Award Contract

The AEA should argue that lost profits on task orders were not foreseeable because the PRIME ID/IQ contract is a multiple-award contract. Thus, even if Austen had submitted a task order proposal for the Qumari project, the other two PRIME contractors could have won. Here, Austen did not submit a proposal, so there is no certainty that Austen's proposal would have won under the best value assessment. Furthermore, the AEA knew that Austen just hired a new chief executive officer (CEO), which could indicate a change in company performance or a change in the quality of its proposals. The opinion below suggests that Mr. Wickham, Austen's new CEO, is a "rookie" in government contracting. The AEA could use Mr. Wickham's inexperience to argue that Austen lacked sufficient leadership to assume a task order valued at over $10 million—much larger than its $3.5 million Arbalan task order. At a minimum, Austen's new leadership puts into question whether Austen's past "exemplary work" is a reliable indicator of its future performance.

As mentioned *supra* Part II.C.2.a.i, proving foreseeability of lost profits is very difficult for *Winstar* plaintiffs. This may seem like a pitfall for Austen, but Austen should draw a distinction. In *Sterling Savings Ass'n v. United States*, 80 Fed. Cl. 497, 519 (2008), the court denied lost profits as "speculative" for lack of foreseeability. The plaintiff-thrift argued that the Government's breach prevented it from pursuing profitable opportunities. *Id.* at 516. Of course, the thrift was correct in that the purpose of the contracts was to *permit* profitable opportunities, and the Government could foresee that a breach would deny those opportunities. *See Cal. Fed. Bank*, 245 F.3d at 1349–50. But the thrift failed to prove that *its* lost profits were in fact foreseeable. *Id.* at 16; *see also Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1378–89 (Fed. Cir. 2001) ("The mere circumstance that some loss was foreseeable … will not suffice if the loss that actually occurred was not foreseeable."). As in many *Winstar* cases, the court held that lost profits were not foreseeable because making more loans, as a result of favorable accounting, does not always mean more profits. *Id.* at 16; *see also*, *e.g.*, *Glendale Fed. Bank, FSB v. United States*, 43 Fed. Cl. 390, 400–01 & n.3 (1999); Citron, *supra* at 27. Indeed, the present-day subprime mortgage crisis proves that loans are not always profitable. *See* Sally Pitman, Comment, *Arms, but No Legs to Stand on: "Subprime" Solutions Plague the Subprime Mortgage Crisis*, 40 Tex. Tech L. Rev. 1089, 1100–1101 (2008).

Austen should argue that this case is simpler; the AEA was aware of "special circumstances" making foreseeability much clearer than in *Winstar* cases. *See Energy Capital Corp.*, 302 F.3d at 1324–25; Restatement (Second) of Contracts § 351 (1981). First, Austen had been the incumbent contractor for four years prior to the award of the PRIME ID/IQ contracts. It was "foreseeable as a probable, as distinguished from … necessary" occurrence that Austen would earn profits on the Qumari task order despite the other two PRIME contractors' chances because Austen was the only one with a proven track record. *See* Restatement (Second) of Contracts § 351 cmt. a. Second, the AEA was aware of Atheon and Groscrup Drummon's "problems with their past performance," while the PRIME Program Director praised Austen for "truly exemplary work" in completing the Arbalan task order. Mr. Darcy acknowledged Austen's record of keeping costs low, and admitted that he was "sure [Austen] would deliver the best proposal" for the Qumari task order if provided a fair opportunity to compete. Collectively, the AEA knew of these "special circumstances," which proves the foreseeability of lost profits.

The AEA may draw a distinction of its own. In the context of supervisory goodwill contracts, there was no substitute market that the *Winstar* plaintiffs could pursue after the Government breached; the thrifts could not contract with anyone other than the Government because it was the Government's thrift-accounting regulations that they needed. Here, however, Austen presumably had other entities with which to contract. Foreign countries or domestic law enforcement may desire Austen's expertise. As such, Austen retains less of a claim for lost profits than the *Winstar* plaintiffs because Austen failed

to avoid or reduce its losses by pursuing alternative opportunities. *See* Restatement (Second) of Contracts § 350.

b. Simultaneously Bringing a Bid Protest and a CDA Claim

The AEA should argue that Austen's case is really only a bid protest under the Tucker Act, 28 U.S.C. § 1491(b)(1), not a breach-of-contract claim under the CDA, 41 U.S.C. § 609(a)(1). As such, lost profits should be denied because the Tucker Act prohibits lost profits as a form of relief. 28 U.S.C. § 1491 (b)(2). Instead, injunctive relief, from Austen's bid protest, is a sufficient breach remedy. The bid protest system is more appropriate for handling this case, but Austen is circumventing that system by recasting its case as a CDA claim. Permitting Austen to present its case in two shades evades the statutory bar against lost profits and creates a potential windfall.

Austen should argue that presenting dual-claims for injunctive relief and damages, through a bid protest *and* a CDA claim, is entirely appropriate. The absence of a remedy-granting clause justifies application of common law principles. Common law principles call for an award of lost profits because they are necessary to place Austen in its expected position. Also, the AEA's bad faith conduct would negate the application of a remedy-granting clause if one existed.

i. Lost Profits Prohibition in Bid Protests

The Tucker Act provides for the award of "any relief that the court considers proper, including declaratory and injunctive relief *except* that any monetary relief shall be limited to bid preparation and proposal costs" for bid protests. 28 U.S.C. § 1491(b)(2) (emphasis added). As such, disappointed bidders are not entitled to lost profits, and this rule has withstood challenges to its scope. In *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115, 116 (2002), a contractor won a post-award bid protest for wrongful suspension. The contractor claimed entitlement to lost profits under the implied-in-fact contract theory of 28 U.S.C. § 1491(a)(1). *See supra* Part II.C.1.d.ii(b). By presenting its claim for lost profits under the implied contract theory of subsection (a)(1) instead of under the bid protest mechanism in subsection (b)(1), the contractor sought to avoid the statutory bar against lost profits. The court, however, disagreed and held that Congress did not intend to allow lost profits under subsection (a) when it prohibited the recovery of lost profits under subsection (b). *Lion Raisins*, 52 Fed. Cl. at 119–20.

ii. Dual Claims for Injunctive Relief and Lost Profits

The AEA should argue that this case is actually a bid protest, and lost profits are a prohibited remedy for bid protests. 28 U.S.C. § 1491(b)(2); *Lion Raisins*, 52 Fed. Cl. at 119. The COFC should have reviewed Austen's case solely as a bid protest because Austen's concern is not about the underlying PRIME ID/IQ contract; Austen's real concern is how a task order was awarded. As such,

Austen's position is more analogous to that of an "interested party" objecting to "the *award* of a contract . . ." under the Tucker Act. 28 U.S.C. § 1491(b)(1). *See* 31 U.S.C. § 3551(2)(A) (2000) (defining "interested party" as a "prospective bidder or offeror whose direct economic interest would be affected by the award of [a] contract . . ."); *see also Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1352 (Fed. Cir. 2005).

The AEA should also direct the court's attention to *A & D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126 (2006). There, an awardee of a multiple-award ID/IQ contract brought a task order protest, alleging inaccurate evaluation of proposals. *Id.* at 130. The court dismissed the complaint pursuant to 41 U.S.C. § 253j(e) because the plaintiff did not allege an increase in the scope, period, or maximum value of the contract. *Id.* at 140. Although not mentioned by the parties, the court also considered whether jurisdiction could alternatively exist under the CDA. *Id.* at 135. The court disagreed "with the theory that actions, that are in essence bid protests of task order awards, can be re-characterized as contract disputes in order to create jurisdiction in this court or in an agency board of contract appeals." *Id.* Thus, although it was dicta, the AEA will argue that *A & D Fire Protection* provides very persuasive authority for dismissing Austen's CDA claim. Austen's response is that the court was concerned with enforcing the then-existing bar against task order protests, but Congress's subsequent enactment of the NDAA lowered that bar. Thus the court's rationale is less persuasive today. What the *A & D* court sought to protect has been diminished; Congress's fading concern for restricting bid protests likewise implies less concern for challenging task orders through alternate means like a CDA claim.

Austen should argue that its focus is indeed the AEA's breach of the PRIME ID/IQ contract; its CDA claim is not intended to evade any bar against protests or lost profits. The AEA breached the fair opportunity to compete clause when it failed to follow the policies and procedures set forth in 48 C.F.R. § 16.505(b)(iii), specifically by failing to provide Austen with notice of the solicitation of task order proposals. Austen should also argue that the ASBCA has held that a contractor *can* present a complaint consisting of two counts, one bid protest and one breach-of-contract claim, for the Government's denial of the fair opportunity to compete for task orders. *Cmty. Consulting Int'l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, at 157,785–87 (finding that FASA contains no indication that "Congress explicitly carved out multiple award, task order contracts as an exception to [the ASBCA's] Contract Disputes Act jurisdiction"). Likewise, in *L-3 Commc'ns Corp.*, ASBCA No. 54920, 2006 WL 2349233 (July 26, 2006), the board reaffirmed this position by acknowledging that "[t]he same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a 'protest' seeking to cancel or modify the award and a 'claim' for damages for breach of the Awarding Orders clause of the contract." There is nothing inappropriate about simultaneously bringing a breach claim and a bid protest. *See* Ralph C. Nash & John Cibinic, *Task Order Contracts: The Breach*

of Loss of the Fair Opportunity to Compete, 16:10 Nash & Cibinic Rep. ¶ 49, Oct. 2002 ("Taking a case to the agency board of contract appeals appears to be a viable way to contest the lack of a fair opportunity to compete for task orders."). In reply, the AEA should distinguish *L-3 Communications* on the ground that the contractor apparently did not seek to cancel or modify the task order award, *id.*, whereas Austen is seeking both injunctive and monetary relief.

The AEA should also argue that awarding lost profits would inappropriately amount to a windfall because the COFC has ordered the cancellation of the Qumari task order and re-solicitation of proposals. That, in itself, is sufficient relief pursuant to *CACI Int'l, Inc.*, ASBCA Nos. 54110, 53058, 05-1 BCA ¶ 32,948, at 163,250–51, which held that a board may limit or preclude lost profits "if it concludes that in the circumstances justice so requires it in order to avoid disproportionate compensation" (quoting the Restatement (Second) of Contracts § 351(3)). The windfall, or "disproportionate compensation," would materialize if Austen were to (a) win the re-solicited Qumari task order and earn profits through its performance of the project, while (b) already having been awarded lost profits by the COFC for the AEA's breach.

Austen should argue that the board in *CACI Int'l* was only referring to disproportionate damages awards; it did not contemplate the appropriateness of awarding lost profits and injunctive relief. Furthermore, the court can consider the award of lost profits to be an appropriate tool for punishment of the AEA's bad faith conduct and deterrence of future abuse. *See infra* Part II.C.2.c.

Finally, the AEA may argue that awarding lost profits would limit the availability of injunctive relief in bid protests. The COFC stated in *Lion Raisins* that "the specter of lost profits often constitutes the irreparable harm upon which injunctive relief is based." 52 Fed. Cl. at 120. The court warned that if that specter was removed through an award of lost profits, then the availability of injunctive relief would be "severely limit[ed]." *Id.*

iii. The Common Law and the Absence of a Remedy-Granting Clause

Historically, the United States has not been liable for lost profits, given its sovereign immunity. Citron, *supra* at 6. Additionally, the AEA should argue that ID/IQ contracting calls for the application of exceptionalist principles to deny Austen's claim for lost profits. The justification for exceptionalism arises from considerations unique to ID/IQ contracting, specifically: (1) the multiple-award aspect, (2) the minimum quantity requirement, and (3) the sufficiency of bid protest remedies. *See supra* Part II.C.2.a–b. Altogether, these considerations warrant the denial of lost profits despite the AEA's breach of a fair opportunity to compete for the Qumari task order.

Austen should respond that ID/IQ contracting does not warrant exceptionalist principles. The AEA is still subject to the same general principles of contract law that bind private parties. *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000); *Praecomm, Inc. v. United States*, 78 Fed. Cl. 5, 10–11 (2007). Accordingly, compliance with general

principles of contract law includes adherence to the common law's provision for lost profits. *Anchor Sav. Bank, FSB v. United States*, 81 Fed. Cl. 1, 57 (2008); *G.L. Christian*, 312 F.2d at 423. Thus, this case calls for the straightforward application of the three-pronged rule for lost profits—proof of foreseeability, causation, and certainty of amount. *Energy Capital Corp.*, 302 F.3d at 1324–25. Austen will assert that it has proven foreseeability and causation, *see supra* Part II.C.2.a, and that the AEA did not dispute its estimated amount of lost profits.

The application of general principles of contract law is especially warranted where, as here, the contract contains no remedy-granting clause. Remedy-granting clauses typically convert a breach-of-contract claim into a claim for relief under the terms of the contract, such that common law damages are precluded. *See Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992); *see also G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 423 (Ct. Cl. 1963). There is no remedy-granting clause in the PRIME ID/IQ contract for breach of the fair opportunity to compete. So, this further justifies the application of general principles of contract law. *See* Steven N. Tomanelli, *Rights and Obligations Concerning Government-Furnished Property*, 24 Pub. Cont. L.J. 413, 431 (1995) ("[I]f the contract did not have a remedy-granting clause for delay-related costs, the contractor was limited to seeking breach of contract damages. . . .").

Moreover, Austen should argue that lost profits would be appropriate even if there was a remedy-granting clause because remedy-granting clauses are subject to bad faith exceptions. *See Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996) (holding that a termination for convenience, if made in bad faith, constitutes a breach of contract). Here, the AEA's willful, abusive conduct toward Austen constitutes such bad faith. The PRIME Program Director ordered the Qumari task order solicitation to be withheld from Austen because of personal animus toward Austen's new CEO. Therefore, if a remedy-granting clause existed for denial of the fair opportunity to compete, it would not apply to this case.

c. Purpose of Awarding Lost Profits in Cases of Bad Faith: Restoring Expectations, Punishment, Deterrence, Compliance, and Competition

Although Austen argues for the application of general principles of contract law, the AEA has an opportunity to use this argument to its own advantage. "The consequences the law imposes [for breach of contract] are for the purpose of making the non-breaching party whole, not for the purpose of punishment, or retribution, or deterrence." *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1379–80 (Fed. Cir. 2001). Austen, as the nonbreaching party, has already been made whole by the COFC's order to cancel the Qumari task order and re-solicit proposals. Thus, the AEA should argue that awarding lost profits would have no practical purpose except for punishment, retribution, or deterrence—all of which are inappropriate remedies under general principles of contract law. Restatement (Second) of Contracts § 355 & cmt. a.

The AEA should also argue that specifically in the context of public procurement, damages are "designed to secure the enforcement of the procurement rules, rather than to protect the interests of bidders." Susan L. Arrowsmith et al., Regulating Public Procurement: National and International Perspectives 801 (Kluwer Law Int'l 2000). Thus, damages for costs, but not lost profits, provide sufficient incentive for disappointed bidders to bring protests and claims, thus securing the Government's compliance with procurement laws. *Id*.

Austen, however, may argue that the European procurement system seeks to promote compliance *and* protect contractors' interests by permitting lost profit awards. Arrowsmith, *supra* at 802; *see also*, *e.g.*, Council Directive 92/13/EEC, art. 2, 1992 O.J. (L76), 14, 16–18, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0013:EN:HTML. Indeed, Austen may highlight the United States' advocacy for punitive or exemplary damages in negotiating the World Trade Organization's Global Procurement Agreement (GPA). Arrowsmith, *supra* at 803 (citing Mary Footer, *Remedies Under the New GATT Agreement on Government Procurement*, 4 Pub. Procurement L. Rev. 80, 90 (1995)).

Austen should acknowledge the prohibition of punitive damages. Restatement (Second) of Contracts § 355 & cmt. a. Nonetheless, Austen may argue that the AEA's bad faith conduct was *so* bad that it provides *additional* justification for awarding lost profits. The Qumari task order solicitation was withheld from Austen because the PRIME Program Director, Mr. Darcy, "hate[s]" Austen's new CEO, and believes him to be "way too young to be CEO of that company." Austen will point out that Mr. Darcy applied for the CEO position that ultimately went to Mr. Wickham. The abusive result was to "axe Austen" by preventing it from competing for new task orders. Austen will argue that punitive damages are appropriate because the AEA put people's lives at stake by willfully excluding Austen, a proven EOD expert, from the EOD procurement process while limiting its best value assessment to two contractors with poorer records of past performance. Additionally, an award of lost profits would deter similar conduct and promote the NDAA's goal of enhanced competition, transparency, and accountability at the task order level.

d. Additional Arguments and Counterarguments That Austen and the AEA May Make

i. Arguments Likely to Be Advanced by Austen

(a) Comparative Procurement Law

A study of comparative procurement law indicates that Canadian and European procurement systems bear no qualms about awarding lost profits. *See supra* Part II.C.2.c. However, the AEA may argue that, although the Canadian International Trade Tribunal (CITT) views lost profits as an appropriate remedy, that view is limited to circumstances where *only* monetary damages are requested; the CITT does not simultaneously award lost profits and injunc-

tive relief. Arrowsmith, *supra* at 796–99 (discussing *In re Mechron Energy Ltd.*, No. PR-95-001, Canadian Int'l Trade Trib., Aug. 18, 1995, *available at* http://www.citt-tcce.gc.ca/procure/orders/pr9501a_e.asp). In response, Austen may emphasize that in France, the Conseil d'Etat awards lost profits even where multiple bids or proposals have been submitted. Arrowsmith, *supra* at 799.

ii. Arguments Likely to Be Advanced by the AEA

(a) Floodgates and Inefficiency

The AEA may argue that awarding lost profits would effectively double litigation associated with task and delivery orders. All ID/IQ contract holders would be incentivized to add a CDA claim to their bid protest actions. This would undermine efficiency in public contracting by slowing the ID/IQ contracting process, a process which is designed to maximize efficiency. Kevin J. Wilkinson, *More Effective Federal Procurement Response to Disasters: Maximizing the Extraordinary Flexibilities of ID/IQ Contracting*, 59 A.F. L. Rev. 231, 233–34 (2007); Sandner & Snyder, *supra* at 502; *see also* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 107 (2002).

Austen should respond that CDA claims would be limited because, first, lost profits are only recoverable on task orders valued over $5 million. *See* FAR 16.505(b)(iii). This is because $5 million is the point at which specific requirements must be followed to ensure a fair opportunity to compete for task orders, so this is the point at which breach is possible. *Id.* Second, it is not unreasonable to expect the development of a remedy-granting clause related to the NDAA's newly expanded contractor rights. That development would sufficiently limit CDA litigation of task orders to situations involving bad faith. *See Krygoski*, 94 F.3d at 1541. Additionally, contractors will still be hesitant to bring breach-of-contract claims against the Government because of the ever-existing need to maintain positive relations for the sake of future business opportunities.

(b) Terminations for Convenience

The AEA may argue that lost profits were not foreseeable because the Government retained the right to terminate the PRIME ID/IQ contract for convenience. Austen should argue that this is a weak argument because it neglects to consider that lost profits need only be "foreseeable as a probable, as distinguished from a necessary, result of [the] breach." Restatement (Second) of Contracts § 351 cmt. a. The AEA's right to terminate the PRIME ID/IQ contract for convenience does not significantly detract from the probability that Austen would suffer lost profits by not being able to compete for the Qumari task order.

(c) Proof of Causation of Lost Profits

The AEA will probably argue that it did not cause the loss claimed by Austen. Austen will respond that the AEA's breach did cause Austen to lose profits

on the Qumari task order. There is uncertainty regarding the standard for causation of lost profits. The COFC in *Astoria Fed. Sav. & Loan Ass'n v. United States*, 80 Fed. Cl. 65, 86 (2008), reviewed the history of the causation standard and noted that three different standards—the "substantial factor" test, the "but for" test, and the "definitely established" test—have been applied in past cases. Judges possess discretion in deciding which standard to apply, and the decision should be based on the particular facts of each case. *Citizens Fed. Bank, FSB v. United States*, 474 F.3d 1314, 1318 (Fed. Cir. 2007).

Austen will argue for the "substantial factor" test, while the AEA will argue for the "but for" or "definitely established" test. However, the question of which standard to apply should not consume much time because resolution of the causation issue, regardless of the standard, involves consideration of the same facts pertaining to the issue of foreseeability. *See supra* Part II.C.2.a.

(d) Estimating Lost Profits with Reasonable Certainty

The AEA may argue that Austen failed to estimate the amount of lost profits with reasonable certainty, but that quantum issue is not on appeal. Austen's lost profit estimation of $2.5 million was not challenged by the AEA, and the amount was verified by the Defense Contract Audit Agency. Indeed, the calculation of lost profits on the Qumari task order is much simpler than the calculation of lost profits in the *Winstar* cases.

III. CONTRACTOR'S BRIEF

A. *Summary of Argument*

Austen respectfully requests this Court to affirm the Court of Federal Claims' denial of the AEA's Motion to Dismiss for lack of subject matter jurisdiction and to affirm the relief granted—cancellation of the award and resolicitation of the requirement. The Court of Federal Claims exercises broad jurisdiction under the Tucker Act, 28 U.S.C. § 1491(b)(1). The National Defense Acquisition Act Fiscal Year 2008 (hereinafter NDAA FY 2008), Pub. L. No. 110-181, § 843, 122 Stat. 3, 236 (as codified at 10 U.S.C. § 2304c(d)–(e)) created enhanced notice requirements for all contractors under the multiple task order contracts exceeding $5 million and extended bid protest jurisdiction for orders valued in excess of $10 million to the Comptroller General. The new notice requirements and increased protest jurisdiction did not divest the Court of Federal Claims of its preexisting broad jurisdiction over Austen's protest under the Tucker Act. Further, the Court of Federal Claims' exercising jurisdiction in this case furthers the policy regarding increased competition and oversight of task and delivery orders in government contracting with minimal disruption.

Alternatively, if this Court finds no jurisdiction over the task order award, Austen respectfully requests this Court reverse the Court of Federal Claims' grant of summary judgment denying Austen lost profit damages. Jurisdiction over the breach of the PRIME ID/IQ contract exists apart from this Court's

jurisdiction over the bid protest. Austen's claim arises from the AEA's bad faith breach of the Prevention of Inadvertent or Mistaken Explosions ("PRIME") indefinite delivery/indefinite quantity ("ID/IQ") Contract (hereinafter as the "PRIME ID/IQ" contract) whereby Austen was wrongfully excluded from an opportunity to participate in a task order competition. Since Austen is entitled to be made whole from the Government's bad faith breach, Austen is entitled to lost profits if injunctive relief is unavailable. The Court of Federal Claims was correct in finding that Austen's lost profits were caused by the AEA's bad faith breach and that the lost profits could be calculated with reasonable certainty. However, the Court of Federal Claims erroneously concluded that the AEA could not foresee the damages. Without injunctive relief or lost profits, Austen will not be made whole from the AEA's bad faith breach.

B. *Argument*

1. The Court of Federal Claims Properly Exercised Subject Matter Jurisdiction over Austen's Request for Injunctive Relief Under the Tucker Act

In denying the United States Army Engineering Agency's (the "AEA" or defendant-appellant) motion to dismiss for lack of subject matter jurisdiction, the Court of Federal Claims properly exercised subject matter jurisdiction over Austen's complaint requesting injunctive relief for the AEA's failure to provide Austen with a fair opportunity to be considered for the Qumari task order. The NDAA FY 2008 § 843 did not divest the Court of Federal Claims of its broad grant of jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (b)(1). The court retains jurisdiction particularly in this case where Austen's bid protest complaint was consolidated with Austen's claim for breach of the clause of good faith and fair dealing.

Subject matter jurisdiction of the Court of Federal Claims is a threshold legal issue reviewed *de novo*. *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1078 (Fed. Cir. 2001); *Ramcor Servs., Inc. v. United States*, 185 F.3d 1286, 1288 (Fed. Cir. 1999). The party seeking jurisdiction (plaintiff-appellee) has the burden of proof to establish the existence of jurisdiction by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). A motion to dismiss shall be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

a. The Court of Federal Claims Exercises Unique and Broad Jurisdiction over Both Bid Protests and Contract Claims

i. The Tucker Act Generally Provides a Broad Waiver of Sovereign Immunity

Because the Court of Federal Claims is a court of limited jurisdiction, subject matter jurisdiction hinges on the extent of the waiver of sovereign

immunity under the Tucker Act, 28 U.S.C. § 1491. *See Labat-Anderson Inc. v. United States*, 50 Fed. Cl. 99, 103 (2001). In general, under the Tucker Act, the 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." 28 U.S.C. § 1491(a)(1). Over the years, Congress has extended the Court of Federal Claims broad jurisdiction to pre- and post-award bid protests and claims against the United States. In 1978, Congress authorized jurisdiction under the Contract Disputes Act. 41 U.S.C. § 609. In 1982, Congress expanded the court's jurisdiction to entertain pre-award protests and permit the court to grant injunctive relief. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 133, 96 Stat. 25, 39–41. In 1996, Congress enlarged the court's jurisdiction to include post-award protests and extended the court's equitable powers. *See* Administrative Dispute Resolution Act ("ADRA"), Pub. L. No. 104-320, § 12(a)–(b), 110 Stat. 3870, 3874–75 (1996). Through the ADRA, Congress sought to ensure the efficiency and harmonization of government contracts law and "increase uniformity of bid protest law and government contract law." *PGBA, LLC. v. United States*, 389 F.3d 1219, 1227 (Fed. Cir. 2004) (citing a quotation from statement of Senator Cohen, 142 Cong. Rec. S6156 (daily ed. 1996)). Since 2001, the Court of Federal Claims has been the exclusive avenue for judicial review of pre- and post-award bid protests. ADRA, Pub. L. No. 104-320, § 12(d), 110 Stat. at 3875. As such, the court has an "eye towards the overall government contracting process." *BLR Group of Am., Inc. v. United States*, 84 Fed. Cl. 634, 646 (2008). It is uniquely situated to handle government contract cases with expertise and efficiency. *See generally* Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 Wis. L. Rev. 1225, 1237; Joshua I. Schwartz, *Public Contracts Specialization as a Rationale for the Court of Federal Claims*, 71 Geo. Wash. L. Rev. 863, 870 (2003).

Under the Tucker Act, the Court of Federal Claims "shall [also] have jurisdiction to render a 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." 28 U.S.C. § 1491(b)(1); *Sealift, Inc. v. United States*, 82 Fed. Cl. 527, 534 (2008). As written, 28 U.S.C. § 1491(b)(1) grants the Court of Federal Claims jurisdiction over three distinct types of protests by an interested party: (1) protests of solicitations; (2) protests of (proposed) awards; or (3) protests of any alleged violation of a statute or regulation in connection with a (proposed) procurement. Effect must be given to all parts of the statute such that jurisdiction "does not require an objection to the actual procurement, but only to the 'violation of a statute or regulation in connection with a procurement or a proposed procurement.'" *Ramcor Servs., Inc.*, 185 F.3d at 1289 (emphasizing the broad language of 28 U.S.C. § 1491(b)(1) when exer-

cising jurisdiction over an objection to defendant's override of the automatic stay pursuant to 31 U.S.C. § 3553(c)(2)); *see also CCL, Inc. v. United States*, 39 Fed. Cl. 780, 789 (1997) (recognizing that since plaintiff alleged defendant was procuring services in violation of the law, the other statutory provisions as a basis for protest were not relevant). Here, Austen has two bases of protest: the award of the Qumari task order and the AEA's failure to provide notice of the task order in violation of 10 U.S.C. § 2304c(b) & (d).

The language "in connection with a (proposed) procurement"—in particular—is drafted broadly. *OTI Am., Inc. v. United States*, 68 Fed. Cl. 108, 113–17 (2005) (finding jurisdiction under the third basis of protest when plaintiff was deselected from further task orders). A procurement or proposed procurement is quite expansive. Procurement begins "with the process for determining a need for property or services and end[s] with contract completion and closeout." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345–46 (Fed. Cir. 2008) (adopting the definition of procurement from 41 U.S.C. § 403(2) establishing the Office of Federal Procurement Policy); *Labat-Anderson Inc.*, 50 Fed. Cl. at 104 (explaining that award of a blanket purchase agreement ("BPA") under a Federal Supply Schedule ("FSS") contract is certainly one of the stages in the procurement process "squarely within the jurisdictional ambit of 28 U.S.C. 1491(b)"). The term "procurement" when combined with the phrase "in connection with" also emphasizes that the court's jurisdiction is sweeping in scope consisting of pre- and post-award bid protests. *Ramcor Servs., Inc.*, 185 F.3d at 1289. As the court below recognized, Congress surely could not have meant to revoke the court's broad jurisdiction to hear protests alleging a violation of a statute or regulation for a task order or delivery orders valued over $10 million. *See Austen Techs., Inc. v. United States*, No. 09-Z4M3X5, 2009 WL 12345678, at *8 (Fed. Cl. 2009).

ii. Section 843 of the NDAA FY 2008 Does Not Divest the Court of Federal Claims of Subject Matter Jurisdiction Under the Tucker Act

Congress did not explicitly divest the Court of Federal Claims of jurisdiction over Austen's complaint in the nature of a bid protest. The NDAA FY 2008 § 843 expanded the notice requirements federal agencies are required to give ID/IQ contract holders for proposed task orders exceeding $5 million. 10 U.S.C. § 2304c(d). Pursuant to the increased requirements, an agency must provide *all* prime ID/IQ holders with "a clear statement of the agency's requirements," a reasonable time to respond, and "disclosure of significant factors and subfactors," to be used in the evaluation and importance of each for a given task order. 10 U.S.C. § 2304c(d); *see also* 48 C.F.R. § 16.505(b)(1)(iii) (implementing the new notice requirements). Section 843 of the NDAA FY 2008 also authorized protests of the issuance or proposed issuance of a task or delivery order valued in excess of $10 million. 10 U.S.C. § 2304c(e)(1)(B); Federal Acquisition Regulation, 48 C.F.R. § 16.505(a)(9)(i) (implementing the new protest requirements); *see, e.g., In re Triple Canopy, Inc.*,

No. B-310566.4, 2008 WL 4845230, at *4–5 (Comp. Gen. Oct. 30, 2008) (explaining alleged violations of the enhanced notice requirements may serve as a basis for a bid protest). Previously, the Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3249–53, had limited bid protests in connection with the issuance or proposed issuance of a task or delivery order to protests alleging the order increased the "scope, period, or maximum value of the contract under which the order is issued." 10 U.S.C. § 2304c(e)(1)(A). However, section 843 of the NDAA FY 2008 also stated: "Notwithstanding section 3556 of title 31,[24] the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B)…." 10 U.S.C. § 2304c(e)(2). With this language, Congress addressed the basis of bid protest jurisdiction with respect to the Government Accountability Office, a legislative body, but did not explicitly revoke the preexisting jurisdiction of a court that has judicial review over both bid protests and claims. As discussed below, a conclusion to the contrary would be a mere inference.

The AEA will argue that Congress, through NDAA FY 2008 § 843, intended to deprive the Court of Federal Claims of jurisdiction over bid protests of task orders valued over $10 million. As recognized by the court below, said argument is unpersuasive. *Austen*, 2009 WL 12345678, at *7–9. In the first instance, withdrawal of jurisdiction under the Tucker Act, 28 U.S.C. § 1491, "is strictly construed." *Biltmore Forest Broad., Inc. v. United States*, 80 Fed. Cl. 322, 328 (2008). Essentially, a withdrawal of Tucker Act jurisdiction "is tantamount to a partial repeal of that Act." *Id.* Repeal "by implication" is disfavored. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984). For a subsequent statute to supersede "an apparently inconsistent earlier enactment, the intent of Congress must be apparent [under] the circumstances." *Sw. Marine of San Francisco, Inc. v. United States*, 896 F.2d 532, 533 (Fed. Cir. 1990) (finding no clear congressional intent that the Federal Courts Improvement Act of 1982 superseded section 603 of the Contract Disputes Act).

The Court of Federal Claims correctly found its preexisting jurisdiction remained intact. *Austen*, 2009 WL 12345678, at *6–9. Congress's grant of jurisdiction for bid protests of task or delivery orders over $10 million to the Comptroller General failed to explicitly repeal the Court of Federal Claims' broad jurisdiction in the nature of a bid protest under the Tucker Act. There were no explicit changes to the Tucker Act, 28 U.S.C. § 1491(b)(1), regarding protests of task or delivery orders over $10 million in the text of the NDAA FY 2008. *Cf. In re Cmty. Consulting Int'l*, ASBCA No. 53489, 02-2 BCA ¶ 31940, 2002 WL 1788535 (2002) (FASA did not explicitly create an exception to the Board's jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601–613).

24. Generally under 31 U.S.C. § 3556, the Comptroller General "does not have exclusive jurisdiction over protests" and filing with the Comptroller General does not "affect the right of any interested party to file a protest with the contracting agency or to file an action in" the Court of Federal Claims. *Id.*

Congress made no textual changes to the broad jurisdictional language of 28 U.S.C. § 1491. Congress did not modify, or limit, the definitions of "interested party" or "procurement" under the Tucker Act. Congress certainly was capable of changing the definition of "interested party" had it desired to do so and thought it was necessary to preclude relief. In fact, in another portion of the NDAA FY 2008, Congress actually changed the definition of "interested party" and standing under an A-76 competition bid protest by explicitly modifying the text of 28 U.S.C § 1491. *See* NDAA FY 2008 § 326 (amending 28 U.S.C. § 1491 to permit the agency tender official to intervene in an A-76 protest action). Unlike public-private competitions, there were no explicit modifications for protests of task orders under 28 U.S.C. § 1491(b) and Austen is an interested party under the Tucker Act.[25] *Austen*, 2009 WL 12345678, at *8–10.

Beyond the fact that there were no explicit changes to the Tucker Act, there was no apparent discussion of the Tucker Act in the legislative history of NDAA FY 2008 for section 843. Where such a gap in new legislation and previous legislation exists, precedent dictates that the new legislation not be interpreted as repealing the preexisting legislation. *See generally Ruckelshaus*, 467 U.S. at 1017 (finding jurisdiction to hear a takings claim noting there was no discussion of the interaction between the Federal Insecticide, Fungicide, and Rodenticide Act and the Tucker Act); *Qwest Corp. v. United States*, 48 Fed. Cl. 672, 686 (2001) (holding the Telecommunications Act of 1996 did not preclude a takings claim under the Tucker Act because there was no reference to the Tucker Act or takings claims anywhere in the Telecommunications Act of 1996 in support of the court's jurisdiction). *But see A&D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 134 (2006) (finding the preexisting 41 U.S.C. § 253j(d) prohibition on task order protests limited the more general grant of jurisdiction under 28 U.S.C. § 1491(b)(1)).

The AEA will also argue that this is nothing more than a bid protest that would have been rejected under FASA's protest restrictions prior to the new grant of protest jurisdiction. This argument also misses the mark. On sev-

25. Under the Tucker Act, 28 U.S.C. § 1491(b)(1), an "interested party" is "limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract." Rex Serv. Corp. v. United States, 448 F.3d 1305, 1307 (Fed. Cir. 2006); Banknote Corp. of Am., Inc. v. United States, 365 F.3d 1345, 1351–52 (Fed. Cir. 2004) (looking to the definition of "interested party" in the Competition in Contracting Act). An award may be set aside if either "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Banknote Corp.*, 365 F.3d at 1351. For the second ground, the "disappointed bidder must show a clear and prejudicial violation of applicable statutes or regulations. *Id.*; Galen Med. Assocs. v. United States, 369 F.3d 1324, 1331 (Fed. Cir. 2004). This standard can be met by showing there was a substantial chance for award absent the violation. *Banknote Corp.*, 365 F.3d at 1351; Emery Worldwide Airlines, Inc., 264 F.3d 1071, 1086 (Fed. Cir. 2001); Am. Fed'n of Gov't Employees v. United States, 258 F.3d 1294, 1299–1302 (Fed. Cir. 2001) (tracing the congressional history and intent of standing under 28 U.S.C. § 1491(b)(1)). Therefore, the Court of Federal Claims correctly determined that Austen is an interested party in this case.

eral occasions, the Court of Federal Claims has found FASA's restriction on bid protests not applicable to task order protests. *See*, *e.g.*, *Data Mgmt. Servs. Joint Venture v. United States*, 78 Fed. Cl. 366, 370–71 n.4 (2007) (following *Idea Int'l Inc. v. United States*, 74 Fed. Cl. 129, 136–37 (2006) (FASA protest restriction does not apply to GSA FSS task orders)); *Labat-Anderson Inc.*, 50 Fed. Cl. at 104–05 (FASA protest prohibition does not apply to blanket purchase agreement procurements). In particular, the Court of Federal Claims has exercised jurisdiction over bid protests where the protestor is challenging the task order solicitation because of an agency's decision to standardize software "with the intention of knocking out other parties." *Savantage Fin. Servs., Inc. v. United States*, 81 Fed. Cl. 300, 305 (2008). The court commented that the primary concern was not the task order, but the circumvention of competition requirements. *Id.* at 305. The Acquisition Advisory Panel raised similar concerns of circumvention of the competition requirement in ID/IQ contracts and recommended to Congress enhanced notice requirements with increased bid protest jurisdiction. *Accountability in Government Contracting Act of 2007: Before the Senate Subcommittee on Readiness and Management Support Committee on Armed Services*, 110th Cong. 9–11 (Jan. 31, 2007) (Testimony of Marcia G. Madsen, Chair of the Acquisition Advisory Panel)[26] (recommending bid protests of task or delivery order for orders valued at $5 million or less) (hereinafter "Madsen Testimony"); S. Rep. No. 110-201, at 4–5 (2007)[27] (recognizing the volume of task and delivery orders exceeded envisioned expectations such that there should be a renewed emphasis on competition); *see also Austen*, 2009 WL 12345678, at *8 (citing report of the Acquisition Advisory Panel).

Moreover, while not precedent, the rationale used by the Comptroller General for exercising jurisdiction over protests of downselections is persuasive for exercising jurisdiction here. *See*, *e.g.*, *In re Electro-Voice, Inc.*, B-278319, 98-1 CPD ¶ 23, 1998 WL 14952 (Comp. Gen. Jan. 15, 1998) (restriction on task order protests does not apply to protests of downselections resulting in elimination of one contractor from further consideration); *In re Teledyne-Commodore, LLC*, B-278408.4, 98-2 CPD ¶ 121, 1998 WL 826335 (Comp. Gen. Nov. 23, 1998) (restriction on task order protests does not apply when there is essentially only one competitive procurement). "Downselection" means "selection of one of multiple contractors for continued performance." *In re Electro-Voice, Inc.*, 1998 WL 14952. Downselections were not something that Congress would have anticipated. *Id.* (explaining provision meant to "encourage multiple award contracts, rather than single award contracts, in order to promote competition"). In this case, the AEA's actions had the same effect as a downselection. Austen would be prohibited from future com-

26. This testimony can be found at http://armed-services.senate.gov/statemnt/2007/January/Madsen%2001-31-07.pdf.

27. This report can be viewed at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr201.pdf.

petitions under the PRIME ID/IQ. Mr. Darcy made it clear to Mr. Bingley: "Just axe Austen, all right? No more task orders for them." *Austen*, 2009 WL 12345678, at *4. Mr. Bingley willingly obliged. *Id.*

iii. The Court of Federal Claims' Jurisdiction Shall Lie When There Is an Allegation in the Nature of a Bid Protest and a Contract Claim Consolidated into a Single Action

The Court of Federal Claims is uniquely positioned to exercise jurisdiction over both bid protests and claims. The court has unique exposure and perspective to government contracts cases best-suited to address the concerns here. Metzer, *supra* at 1235–36. By entertaining bid protests and contract disputes, the court can further develop government contract law with "an appreciation for the functioning of the integrated system of law." Schwartz, *supra* at 873. As a whole, Congress surely could not have intended to deprive the court of jurisdiction of a bid protest that it could also have entertained as a claim.[28] Exercising jurisdiction furthers government procurement policy goals through enhanced competition and minimal disruption to the process. *Austen*, 2009 WL 1234567, at *8.

In enacting the enhanced notice requirements for task orders in the NDAA FY 2008 § 843, Congress intended for increased competition and transparency because the use of the ID/IQ contracting vehicle, in part, lacked sufficient oversight. *See* Madsen Testimony, at 9–11 (recommending that the limitation on protests also be for orders of $5 million or less); S. Rep. No. 110-201, at 4–5; Majority Staff of H.R. Comm. on Gov. Oversight & Reform, 110th Cong., More Dollars, Less Sense: Worsening Contracting Trends Under the Bush Administration, at 6–11 (2007)[29] (outlining the problems of lack of competition through increased ID/IQ contracts and lack of sufficient oversight). The enhanced notice requirements are in addition to any requirements regarding good faith and fair dealing under the PRIME ID/IQ (umbrella) contract. Where, as here, there is an allegation that the agency has violated both, efficiency and the court's unique jurisdictional perspective

28. Austen filed two separate complaints, one in the nature of a bid protest and one claim. The court consolidated the complaints into one action. Even if the Court of Federal Claims did not have jurisdiction over Austen's bid protest, Austin's complaint alleging a breach of good faith and fair dealing survives. *See infra* Section III.B.2.a; L-3 Commc'ns Corp., ASBCA No. 54920, 06-2 BCA ¶ 33,374 (2006) (finding jurisdiction when evaluation criteria are not properly followed because that is just as much of a denial to compete as when one does not get to compete at all); Cmty. Consulting Int'l, ASBCA No. 53489, 02-2 BCA ¶ 31,940 (2002) (finding jurisdiction where the agency failed to allow the contractor to bid on twenty-five of fifty-one orders awarded); *see also* Ralph C. Nash & John Cibinic, *Task Order Contracts: The Breach of Loss of the Fair Opportunity to Compete*, 16 Nash & Cibinic Rep. ¶ 10, Oct. 2002, at 49. Such a breach may result in nonmonetary relief. Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1268 (Fed. Cir. 1999) (declining to limit the Court of Federal Claims' authority to award nonmonetary relief under 28 U.S.C. § 1491(a)(2)).

29. This document can be found at http://oversight.house.gov/features/moredollars/moredollars.pdf.

dictate that Austen's complaints be heard as one before the court. *See BLR Group*, 84 Fed. Cl. at 647 (recognizing that efficiency is a consideration in accepting jurisdiction over complaint).

In *BLR Group*, plaintiff challenged alleged unfair and inaccurate performance evaluations as a contract-performance claim. The court explained that the plaintiff could have waited to challenge the ratings in subsequent bid protest, but pointed out "[w]hile both options are legally viable, only one makes sense when examining the government procurement process as a whole." *Id.* By analogy, only one option is reasonable in this case considering the goals of bid protest process—such as transparency and oversight—and fostering overall good government procurement. While the allegations in the nature of a bid protest serve as a basis to allege the AEA failed to provide Austen with a fair opportunity to compete, they also serve as a basis to allege a claim for breach of good faith and fair dealing. *In re L-3 Commc'ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374, 2006 WL 2349233 (2006) (explaining that under a multiple award ID/IQ the grounds for a "protest" and "claim" can be the same). The ID/IQ contracting vehicle is unique because in addition to the prime ID/IQ contract, there are essentially mini-competitions for each task or delivery order such that an order acts very much like a contract. *See In re Delex Sys., Inc.*, No. B-400403 at 8, 2008 WL 4570635, at *6 (Comp. Gen. Oct. 8, 2008) (reiterating that "a delivery order placed under an ID/IQ contract is, itself, a 'contract,' at least for some purposes, *see* FAR § 2.101"). If a complainant could not seek relief in the Court of Federal Claims for the complaint in the nature of a bid protest, then the protestor would actually have to separate its two complaints in two different fora: a claim in the Court of Federal Claims and a protest with the Comptroller General. While the Comptroller General surely could hear the protest, efficiency dictates the Court of Federal Claims hear the bid protest and claim simultaneously. Otherwise, there may be inconsistent results and/or relief. Further, the Court of Federal Claims with its unique ability to exercise jurisdiction over both protests and claims is most able to assess and craft the appropriate remedy under the circumstances. Surely, Congress did not intend otherwise.

iv. Alternatively, the Court of Federal Claims Has Jurisdiction Based on an Implied-in-Fact Contract Theory Under the Tucker Act

Even though the ADRA provided the Court of Federal Claims with a specific avenue for bid protest jurisdiction under 28 U.S.C. § 1491(b)(1), the court could also exercise jurisdiction under an implied-in-fact contract theory pursuant to 28 U.S.C. § 1491(a)(1). Prior to the grant of jurisdiction under 28 U.S.C. § 1491(b)(1), unsuccessful bidders argued the court had jurisdiction over a bid protest based upon "any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). This Court has yet to decide whether the implied-in-fact contract theory survives the passage of the ADRA. *See Biltmore Forest Broad. Inc.*, 80 Fed. Cl. at 334–35 n.15. *But see Info.*

Sciences Corp. v. United States, 85 Fed. Cl. 195, 203–06 (2008) (summarizing the Court of Federal Claims case law history and finding persuasive the argument that ADRA divested the court of implied-in-fact contract theory).[30] The ADRA did not eliminate a protestor's ability to challenge arbitrary and capricious conduct which could also constitute a breach of the implied contract of fair dealing. *L-3 Commc'ns Integrated Sys. v. United States*, 79 Fed. Cl. 453, 461–62 (2007). Such conduct should still be actionable as a bid protest. *Id*. at 462 & n.17. Alleging bad faith in pre-planning challenges based upon an implied-in-fact contract has been exercised. *Cf. Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 412 (Ct. Cl. 1956). As argued above, ID/IQ are contracts where each task order is really a contract itself. *In re Delex Sys., Inc*., 2008 WL 4570635, at *6. An unsuccessful offeror has an implied-in-fact contract of fair dealing pre-award. Any rationale that Austen did not actually participate in the task order and, therefore, there cannot be an implied-in-fact contract[31] is unpersuasive because the procuring entity, the AEA, was at fault for Austen's lack of participation. Certainly, the AEA breached the implied contract and that breach is actionable as a bid protest.

Based on the foregoing, this court should find that the Court of Federal Claims properly exercised subject matter jurisdiction over Austen's complaint in the nature of a bid protest and affirm the Court of Federal Claims' decision on the merits granting Austen's request for injunctive relief[32] and ordering the AEA to cancel the task order and re-solicit proposals.

30. [Editor's note: Since the filing of this brief, whether a basis for a bid protest based upon an implied-in-fact contract theory survives passage of the Administrative Dispute Resolution Act (ADRA) has been a hotly contested issue. *Compare* FFTF Restoration Co. v. United States, 86 Fed. Cl. 226, 236–44 (2009) (finding bid protest jurisdiction over canceled negotiated procurement alleging violations of FAR 1.102, based upon an implied-in-fact contract theory under 28 U.S.C. § 1491(b)(1)) *with* Res. Conservation Group, LLC v. United States, 86 Fed. Cl. 475, 480–85 (2009) (finding the court did not have bid protest jurisdiction over allegations of a breach of the implied contract of honest and fair dealing under 28 U.S.C. § 1491(a)(1)). The time has come for the Federal Circuit to decide this issue and establish one rule of law. *See generally* Ralph C. Nash, *The Implied Contract to Fairly and Honestly Consider an Offer: Now You See It, Now You Don't*, 23 Nash & Cibinic Rep. ¶ 5, Feb. 2009 (noting the inconsistency among the current Court of Federal Claims judges who have rendered opinions on the issue that four will take jurisdiction and four will not).]

31. Pure Power!, Inc. v. United States, 70 Fed. Cl. 739, 742–43 (2006); Garchik v. United States, 37 Fed. Cl. 52, 54–57 (1996).

32. In order to establish injunctive relief is appropriate, plaintiff must establish the defendant's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Labat-Anderson, Inc., 50 Fed. Cl. 99, 105 (2001). This Court defers to the Court of Federal Claims decision granting injunctive relief absent an abuse of discretion. *See* PGBA, LLC, 389 F.3d 1219, 1223 (Fed. Cir. 2004). The undisputed facts clearly establish that Defendant failed to provide Austen notice of the Qumari task order as required under the statute. Austen did not find out about the task order until one week after it had been awarded. Austen Techs., Inc., 2009 WL 1234567, at *3. Prior to issuing the Qumari task order, the contracting officer, Mr. Bingley, and program director, Mr. Darcy, purposely kept Austen out of the contract. *Id*. at *4. This is a blatant violation of the new notice provisions and exactly what Congress intended to avoid. Austen is entitled to injunctive relief.

2. As an Alternative to Injunctive Relief, Austen Is Entitled to Lost Profits Resulting from the AEA's Bad Faith Breach of the PRIME ID/IQ Contract

If the Court determines it cannot grant injunctive relief to cancel the task order award and require the AEA to resolicit the request for order proposal (RFOP) to all PRIME contractors, including Austen, then the Court should award monetary damages for the breach of the PRIME ID/IQ contract. These damages would equate to the profits lost to Austen which it would have otherwise gained through performance of the task order. To be clear, once the Court of Federal Claims granted injunctive relief based on the bid protest, lost profits were unnecessary; however, the Court of Federal Claims incorrectly determined that lost profit damages were not foreseeable. If this Court determines injunctive relief is inappropriate, then lost profit damages should be awarded through summary judgment.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Winstar Corp. v. United States*, 64 F.3d 1531, 1539 (Fed. Cir. 1995). This Court reviews a grant of summary judgment by the Court of Federal Claims *de novo* to determine whether the summary judgment standard has been correctly applied. *Id*. By contrast, the Federal Circuit gives deference to the trial court when reviewing a denial of a motion for summary judgment, and will not disturb the trial court's denial of summary judgment unless it finds the court abused its discretion. *Little Six, Inc. v. United States*, 280 F.3d 1371, 1373–74 (Fed. Cir. 2002). This Court reviews questions of law de novo. *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995).

a. The Court Has Jurisdiction over the Breach of the PRIME ID/IQ Contract Under the Contract Disputes Act and the Tucker Act

Regardless of whether this Court has jurisdiction to hear a bid protest of a task order under an ID/IQ contract, the Court has jurisdiction to hear the claim for a breach of the PRIME ID/IQ contract. In this case, the AEA breached the PRIME ID/IQ contract by denying Austen the opportunity to compete for and win the Qumari task order. *Austen Techs., Inc.*, 2009 WL 12345678, at *2.

i. The Jurisdictional Requirements for Austen's Contract Disputes Act Claim Have Been Fulfilled

"Congress waived sovereign immunity when it permitted lawsuits under the [Contract Disputes Act of 1978, 41 U.S.C. § 609] and Tucker Act [28 U.S.C. § 1491(a)(2)]." *Lockheed Martin Corp. v. United States*, 48 Fed. App'x 752, 756 (Fed. Cir. 2002). The Contract Disputes Act requires that "[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." 41 U.S.C. § 605(a). A contractor's failure to present a claim for a sum certain to the contracting officer would preclude jurisdiction. *Davis/HRGM Joint Venture v. United States*, 50 Fed. Cl. 539, 545 (2001). Additionally, the Contracting Of-

ficer is required to issue a final decision on the claim. 41 U.S.C. § 605(c)(3). Any failure by the Contracting Officer to issue a decision on a contract claim will be deemed to be a denial of the claim authorizing a claim as otherwise provided by the Contract Disputes Act. 41 U.S.C. § 605(c)(5).

The AEA does not dispute the facts that Austen submitted a sufficient, certified, written claim to the Contracting Officer, Mr. Bingley, who refused to consider the claim. Thus, all the jurisdictional requirements for Austen's Contract Disputes Act claim have been satisfied. *Austen Techs., Inc.*, 2009 WL 12345678, at *11 n.15.

ii. Jurisdiction over the Breach of a PRIME ID/IQ Contract Is Separate and Distinct from the Jurisdiction over the Bid Protest

The Federal Court of Claims correctly determined jurisdiction was "firmly grounded" for the breach-of-contract claim under the Contract Disputes Act, 41 U.S.C. § 609, and the Tucker Act, 28 U.S.C. § 1491(a)(2). *Austen Techs., Inc.*, 2009 WL 12345678, at *1–2. As the Armed Services Board of Contract Appeals explained, "The same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a 'protest' seeking to cancel or modify the award and a 'claim' for damages for breach of the Awarding Orders clause of the contract." *In re L-3 Commc'ns Corp.*, ASBCA No. 54920, 06-2 BCA ¶ 33,374, 2006 WL 2349233 (2006).

To be sure, the breach of contract claim is separate and distinct from the bid protest. *Id.* First, bid protests are governed by 48 C.F.R. § 33.1, while contract claims are governed by 48 C.F.R. § 33.2. *Id.* The relief available under the Tucker Act is also different. Relief for bid protests includes broad declaratory and injunctive relief while limiting damages to bid preparation costs, 28 U.S.C. § 1491(b)(2), while relief for claims consists of damages, 28 U.S.C. § 1491(a)(1), and ancillary injunctive relief, 28 U.S.C. § 1491(a)(2).

b. The AEA Breached the PRIME ID/IQ Contract in Bad Faith

i. The AEA Had a Duty to Act in Good Faith and Deal Fairly with Austen

The covenant of good faith and fair dealing applies to both Government and private parties and is "an implied duty that each party to a contract owes to its contracting partner." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). "The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Id.*

ii. The AEA Acted in Bad Faith When It Excluded Austen from Task Orders Under the PRIME ID/IQ Contract

Bad faith actions are traditionally believed to be those motivated by malice or the specific intent to injure. *SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612, 617 (1990). Government officials are presumed to act in good

faith and the plaintiff can only show bad faith through "well nigh irrefragable proof." *Id*. (citing *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301–02 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 830 (1977)). "Courts have found bad faith when confronted by a course of government conduct that was 'designedly oppressive,' or that 'initiated a conspiracy' to 'get rid' of a contractor." *N. Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 187–88 (2007) (quoting *Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 222 (1942); *Knotts v. United States*, 121 F. Supp. 630, 636 (Ct. Cl. 1954)).

The August 30, 2008, e-mail exchange between Mr. Darcy, the AEA PRIME Program Director, and Mr. Bingley, the AEA PRIME Contracting Officer, is "well nigh irrefragable proof" the AEA was acting in bad faith. They colluded to deny Austen the opportunity to bid on the Qumari task order because Austen did not hire Mr. Darcy as the company's CEO. Mr. Darcy clearly stated his beliefs that Austen would deliver the best proposal, as he explained, "they've always done great work and they keep costs low." Yet Mr. Darcy wanted Austen excluded from the notification of the task order because of his personal animosity towards Austen's new CEO. In fact, Mr. Darcy wanted Austen excluded from all future task orders: "Just axe Austen, all right? No more task orders for them." Rather than objecting to Mr. Darcy's bad faith motivation, Mr. Bingley acquiesced.

iii. The AEA Breached the PRIME ID/IQ Contract by Failing to Give Austen the Opportunity to Compete for the Qumari Task Order

The contract breach occurred when the AEA denied Austen the opportunity to compete for the Qumari task order. This was a breach of clause F.4 of the PRIME ID/IQ contract, FAIR OPPORTUNITY TO COMPETE, which specifically subjected the PRIME ID/IQ contract to the policies and procedures set forth in 48 C.F.R. § 16.505. *Austen Techs., Inc.*, 2009 WL 12345678, at *4. The regulation states, "For task or delivery orders in excess of $5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum—(A) A *notice* of the task or delivery order that includes a clear statement of the agency's requirements…." (emphasis added). *Id*. at *4–5 (citing 48 C.F.R. § 16.505(b)(1)(iii)). Clearly, the Government's denial of a contractor's opportunity to bid on task orders under an ID/IQ contract violates that clause. *In re Cmty. Consulting Int'l*, 2002 WL 1788535.

Additionally, the AEA's decision to forgo notification of the award to Austen violated the law. *Austen Techs., Inc.*, 2009 WL 12345678, at *11. The Defense Federal Acquisition Regulation Supplement ("DFARS") requires the contracting officer to provide "a fair notice of the intent to make the purchase … to all contractors offering the required supplies or services under the multiple award contract." DFARS 216.505-70(c). A similar requirement is also found in the FAR at 48 C.F.R. § 16.505(b)(1) and at 10 U.S.C.S. § 2304c(b).

c. If This Court Does Not Grant Austen Injunctive Relief, Then Austen Is Entitled to Lost Profits

i. Remedies for a Breach of Contract Should Make Austen Whole

Austen is entitled to a just remedy for the AEA's bad faith breach of the PRIME ID/IQ contract. In a common law breach of contract case, the general rule is to award damages sufficient to place the injured party in as good a position as he or she would have been had the breaching party fully performed. *San Carlos Irr. & Drainage Dist. v. United States*, 111 F.3d 1557, 1562–63 (Fed. Cir. 1997) (citing *Estate of Berg v. United States*, 687 F.2d 377, 379 (Ct. Cl. 1982)). As the Court of Federal Claims noted, "One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred." *Austen Techs., Inc.*, 2009 WL 12345678, at *12 (citing *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001); Restatement (Second) of Contracts § 344(a) (1981)). This common law rule has been extended to government contracts. *See Torncello v. United States*, 681 F.2d 756, 762 (Ct. Cl. 1982) (granting a government contractor lost profits and explaining, "[w]hile it is true that the government has the power to abrogate common-law contract doctrines by specific legislation, … the general rule must be that common-law contract doctrines limit the government's power to contract just as they limit the power of any private person").

The best remedy for making Austen whole is cancellation of the Qumari task order award and re-solicitation of the RFOP to all PRIME contractors, including Austen. The Tucker Act, 28 U.S.C. § 1491(a)(2), however, only permits ancillary equitable relief to claims for monetary relief over which it has jurisdiction. *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998). Thus, Austen must seek monetary damages to have a viable breach-of-contract claim. *Id.* This Court can certainly make Austen whole by granting monetary damages in the form of lost profits.

ii. Remedies May Include Lost Profits

Lost profits may be awarded for a breach of a contract when the Plaintiff proves

> (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Energy Capital Corp. v. U.S., 302 F.3d 1314, 1325 (Fed. Cir. 2002) (citing *Chain Belt Co. v. United States*, 115 F. Supp. 701, 714 (Ct. Cl. 1953); Restatement (Second) of Contracts § 351(1) (1981)). The plaintiff must prove these elements by a preponderance of the evidence. *Energy Capital Corp.*, 302 F.3d at 1325.

Expectation damages in the form of lost profits are available when the Government breaches a contract, including an ID/IQ contract. In *Locke v.*

United States, 283 F.2d 521, 524–25 (Ct. Cl. 1960), the U.S. Claims Court allowed lost profits for the Government's wrongful termination of the plaintiff from the Federal Supply Schedule (FSS). The Government argued lost profits were inappropriate because the Government was not required to provide the plaintiff with any business since there were three other local vendors on the FSS providing the same service. *Id*. at 523. The court rejected this argument and pointed out that plaintiff received substantially all his business from the Government, the plaintiff was the lowest bidder among the local FSS vendors, and therefore there was business value to being on the FSS. *Id*. at 524. This FSS contract is very similar to Austen's PRIME ID/IQ contract, with multiple vendors available for each award and no absolute requirement for the Government to use any one specific contractor. Thus, the rules in *Locke* would be directly applicable to Austen.

The Federal Circuit subsequently relied on *Locke* and reversed an agency board of contract appeals to allow lost profits involving multiple award schedule court reporting service contracts. *Ace-Fed. Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000). These contracts are also comparable to the PRIME ID/IQ contract. In *Ace-Fed. Reporters, Inc*., ten companies were awarded contracts for the supply of "comparable items at either the same or different prices for delivery to the same geographical area." *Id*. at 1330. The Government agreed to use the contracts to order the supplies and services it needed, or go through a waiver procedure to use a different court reporting contractor. *Id*. at 1330–31. When the Government used court reporting services outside of one of the ten companies without going through the waiver procedure, the Government breached the contract. *Id*. at 1332–33. As in *Locke*, lost profits were permitted. There is little, if any, practical distinction between the multiple award contracts in *Ace-Fed. Reporters, Inc*. and the PRIME ID/IQ contract in this case.

Additionally, since neither the *Locke* nor the *Ace-Fed. Reporters, Inc*. decisions barred lost profits due to the fact that multiple contractors were available to receive awards under the contract, there is no prohibition against Austen recovering lost profits because another PRIME ID/IQ contractor could have won the task order in question.

iii. Austen's Lost Profits Were the Proximate Result of the Breach of the PRIME ID/IQ Contract by the AEA

As explained at *supra* Section III.B.2.b, the AEA breached the ID/IQ contract in bad faith. Prior to the breach, Austen had very favorable past performance ratings and the lowest price. Mr. Darcy, the PRIME ID/IQ program manager, stated, "I'm sure [Austen] would deliver the best proposal if we let them in on the RFOP, because they've always done great work and they keep costs low." He added, "I don't care if Atheon and Groscrup have had problems with their past performance or if they're more expensive; let's go with one of them." Thus, Austen's loss of the task order, and resulting profits, was the direct result of the AEA's bad faith breach.

iv. Austen's Loss of Profits Caused by the Breach Was Within the Contemplation of the Parties Because the Loss Was Foreseeable

A plaintiff must prove that both the magnitude and type of damages were foreseeable. *Landmark Land Co., Inc. v. F.D.I.C.*, 256 F.3d 1365, 1378 (Fed. Cir. 2001). A loss may be foreseeable as a probable result of a breach because it follows from the breach in the ordinary course of events. Restatement (Second) of Contracts § 351. Foreseeability is a question of fact reviewed for clear error. *Landmark Land Co., Inc.*, 256 F.3d at 1378.

When the AEA formed the PRIME ID/IQ contract, the AEA could have easily foreseen Austen would lose profits with the loss of the Qumari task order. Insomuch as a task order is a contract, the AEA could have easily foreseen Austen's lost profits. *See In re Delex Sys., Inc.*, 2008 WL 4570635, at *6 ("We have previously concluded that a delivery order placed under an ID/IQ contract is, itself, a 'contract,' at least for some purposes, *see* FAR § 2.101 [48 C.F.R. § 2.101], and contracts are covered by the definition of 'acquisition' in FAR § 2.101."). Indeed, there is no dispute that "it is individual task orders, not the PRIME ID/IQ contract, from which profits are to be earned." *Austen Techs., Inc.*, 2009 WL 12345678, at *13. The foreseeable magnitude of the lost profit damages would be based on the estimated value of task orders under the contract.

v. The Court of Federal Claims Improperly Examined Legal Issues to Determine Foreseeablity

The Court of Federal Claims went beyond examining the factual foreseeability of the size and type of the damages resulting from the AEA's bad faith breach and examined the legal issues instead. The court explained Austen's loss was not foreseeable to the AEA because the agency's obligations to the contractor had been satisfied. *Id.* at *13–14. This appears to be consistent with the overall premise of *Travel Ctr. v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001), which did not deal with "foreseeability." Rather, the Federal Circuit simply held that once the minimum purchase obligations of an ID/IQ contract were met, the Government's less than ideal contracting tactics failed to constitute a breach. *Travel Ctr.*, 236 F.3d at 1319–20.

However, the ID/IQ contract in *Travel Ctr.* cannot be fairly compared to the PRIME ID/IQ contract. The *Travel Ctr.* plaintiff contracted with the Government Services Administration (GSA) to be a "preferred source" of travel agency services. *Id.* Federal agencies were free to purchase travel management services elsewhere. *Id.* Nothing in the PRIME ID/IQ contract allowed the AEA to use contractors outside the three contractors identified in Clause G.8. Thus, the PRIME ID/IQ contract was more like a requirements contract than the *Travel Ctr.* ID/IQ contract. Furthermore, the AEA had a legal obligation to give Austen fair notice of the task order as explained at *supra* Section III.B.2.b.iii. This obligation also existed under DFARS 216.505-70(c), 48 C.F.R. § 16.505(b)(1), and 10 U.S.C.S. § 2304c(b). By willfully axing

this legal obligation, the AEA could foresee that Austen would not get the task order and would not reap the resulting profits.

Indeed, the PRIME ID/IQ is more akin to the contracts at issue in *Locke* and *Ace-Fed. Reporters, Inc.*, as explained at *supra* Section III.B.2.c.ii, where the courts rejected the Government's defenses that it had satisfied its obligations precluding lost profits. In *Locke*, the Government asserted there were no minimum purchase requirements: "The contract merely provided that plaintiff's name would appear in a Federal Supply Schedule along with other typewriter-repair contractors." *Locke*, 283 F.2d at 523. The court disagreed, explaining that the Government, by breaching the contract, deprived the plaintiff of the business value of having a chance at obtaining task orders under the Federal Supply Schedule. *Id.* at 524. In *Ace-Fed. Reporters, Inc.* the Federal Circuit agreed with analysis in *Locke*, emphasizing the business value of the limited competition within the multiple award schedule contracts. *Ace-Fed. Reporters, Inc.*, 226 F.3d at 1332. In other words, these cases show that the AEA should have foreseen its obligations still existed beyond satisfying any minimal contractual obligations.

The Court of Federal Claims also incorrectly determined the AEA could not have foreseen the amount of work needed under the task order because "[t]he war may end earlier than expected, there may be less need for EOD services than estimated, or the AEA might terminate the contract for convenience." *Austen Techs., Inc.*, 2009 WL 12345678, at *14. First, the foreseeability requirement looks to the probable results of a breach, not hypothetical possibilities. *See* Restatement (Second) of Contracts § 351, Comment a ("It is enough, however, that the loss was foreseeable as a probable, as distinguished from a necessary, result of his breach."). Thus, consideration of the possibility of the war ending early or incorrect estimates is not an appropriate foreseeability consideration. Second, the courts have rejected government arguments that termination for convenience clauses somehow preclude lost profits. *See Ace-Fed. Reporters, Inc.*, 226 F.3d at 1333 (refusing to apply termination for convenience retroactively); *Torncello*, 681 F.2d at 772 ("We hold in this opinion only that the government may not use the standard termination for convenience clause to dishonor, with impunity, its contractual obligations.").

Basically, the Federal Court of Claims' application of foreseeability to the PRIME ID/IQ contract and the Qumari task order was clearly erroneous. The court simply needed to determine whether or not the AEA could foresee the magnitude of lost profit damages as probable in the event of a contract breach. Such damages were obviously foreseeable, especially considering the malicious nature of the breach.

vi. A Sufficient Basis Exists for Estimating Austen's Lost Profits with Reasonable Certainty

The Court of Federal Claims correctly determined that Austen had a sufficient basis for estimating the amount of lost profits with reasonable certainty. The courts do not require "absolute exactness or mathematical precision" for estimating lost profits. *San Carlos Irr. & Drainage Dist.*, 111 F.3d at 1563

(quoting *Elec. & Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1358 (Ct. Cl. 1969). Damages, however, cannot be speculative. *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667 (Fed. Cir. 1992). Additionally, "it must be 'definitely established' that without the government's breach there would have been a profit." *Rumsfeld v. Applied Cos., Inc.*, 325 F.3d 1328, 1340 (Fed. Cir. 2003) (citing *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001)). Difficultly in determining the amount of lost profits to be awarded should not preclude recovery, especially when the Government's misconduct is a contributing factor. *Locke*, 283 F.2d at 524. "The defendant who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable." *Id.* Lost profits may be approximated as long as there is a reasonable probability of damage and if a reasonable basis of computation can be afforded. *See Palmer et al. v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 560 (1941); *Locke*, 283 F.2d at 524 (citing *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927)).

Austen has shown a fair and reasonable approximation of damages. *Austen Techs., Inc.*, 2009 WL 12345678, at *13. Austen can accurately estimate from its past performance how much profit it makes per hour providing EOD services in this time and materials contract. *Id.* By simply multiplying that rate by the estimated duration of performance, Austen can make a reasonably certain determination of its lost profits. *Id.*

As the Court of Federal Claims noted, "the AEA did not challenge the certainty of this amount in its briefs. Thus, we are confident that Austen provided a sufficient basis for estimating its $2.5 million in lost profits with reasonable certainty." *Austen Techs., Inc.*, 2009 WL 12345678, at *13. By not challenging the factual basis for lost profits at the Court of Federal Claims, the AEA has waived this argument. *Vieau v. Japax, Inc.*, 823 F.2d 1510, 1517 (Fed. Cir. 1987); *Black & Decker, Inc. v. Hoover Serv. Ctr.*, 886 F.2d 1285, 1289 (Fed. Cir. 1989); *Diebold, Inc. v. United States*, 891 F.2d 1579, 1583–84 (Fed. Cir. 1989).

vii. Without Injunctive Relief or Lost Profits, Austen Will Not Be Made Whole from the Government's Egregious Conduct

Common law principles favor lost profits in this case. While it is true that the Government has the power to abrogate common-law contract doctrines by specific legislation, the general rule is that common-law contract doctrines limit the Government's power to contract just as they limit the power of any private person. *Torncello*, 681 F.2d at 762. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934). Thus, Austen deserves to be made whole for the Government's willful violation of the law and breach of the contract in bad faith.

C. *Conclusion*

Austen is entitled to a remedy for the AEA's bad faith actions. Injunctive relief would restore Austen to the same position it would have been but for the

Government's lack of procurement integrity. Alternatively, awarding Austen lost profits would make Austen whole and hold the Government accountable for its conduct. For the aforementioned reasons, Austen respectfully requests the Court affirm the Court of Federal Claims' decision on the Motion to Dismiss in Austen's favor as to jurisdiction and injunctive relief. If this Court decides injunctive relief should not be granted, then Austen respectfully requests the Court reverse the grant of summary judgment as to lost profit damages.

IV. GOVERNMENT'S BRIEF

A. *Summary of Argument*

The United States Army Engineering Agency (the "AEA") respectfully requests that this Court reverse the Court of Federal Claims' finding of subject matter jurisdiction over the award of the Qumari task order, grant AEA's Motion to Dismiss, and dismiss Austen Technologies, Inc.'s ("Austen") request for injunctive relief. Congress, through the National Defense Authorization Act for Fiscal Year 2008 (hereinafter "NDAA FY 2008"), Pub. L. No. 110-181, § 843, 122 Stat. 3, 226 (codified at 10 U.S.C. § 2304c(d) & (e)), divested this Court and the Court of Federal Claims of subject matter jurisdiction over Austen's complaint in the nature of a bid protest. First, the plain language of the NDAA FY 2008 § 843 provides the Comptroller General (GAO) with exclusive jurisdiction of a task order protested under 10 U.S.C. § 2304c(e)(1)(B)–(2). Second, even if the plain language is considered ambiguous, the legislative history establishes that Congress intended for the GAO to have exclusive jurisdiction. Third, establishing jurisdiction exclusively with the GAO furthers federal procurement policy goals. Finally, there is no alternate basis for the Court of Federal Claims to exercise jurisdiction over Austen's complaint.

Furthermore, the AEA respectfully requests this Court to sustain the Court of Federal Claims' grant of summary judgment denying Austen lost profit damages. First, there is no jurisdiction under the Contract Disputes Act and Tucker Act to hear a bid protest framed as a breach-of-contract claim. Second, once the AEA placed its minimum required order under the contract, breach was impossible as a matter of law. Third, Austen cannot prove its entitlement to lost profits in this case because the damages were not foreseeable and would be speculative.

B. *Argument*

1. The Court of Federal Claims Did Not Have Subject Matter Jurisdiction over Austen's Request for Injunctive Relief Under the Tucker Act

Subject matter jurisdiction of the Court of Federal Claims is a threshold legal issue reviewed *de novo*. *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1078 (Fed. Cir. 2001); *Ramcor Servs., Inc. v. United States*, 185 F.3d 1286, 1288 (Fed. Cir. 1999). The party seeking jurisdiction (plaintiff) has the

burden of proof to establish the existence of jurisdiction by a preponderance of the evidence. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Jurisdiction "must be construed strictly and all conditions placed upon such grant must be satisfied before the court may assert jurisdiction." *LB & B Assocs., Inc. v. United States*, 68 Fed. Cl. 765, 769 (2005). When "the underlying issue [is] a question of statutory interpretation, [it] is also subject to *de novo* review on appeal." *Mudge v. United States*, 308 F.3d 1220, 1224 (Fed. Cir. 2002); *Strickland v. United States*, 199 F.3d 1310, 1313 (Fed. Cir. 1999). A motion to dismiss shall only be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

a. The Court of Federal Claims Is a Court of Limited Jurisdiction

Congress established the Court of Federal Claims under its Article I powers, 28 U.S.C. § 171(a). *Patton v. Sec'y of Dep't of Health & Human Servs.*, 25 F.3d 1021, 1027 n.9 (Fed. Cir. 1994). Because the Court of Federal Claims is an Article I court, the court "is not entitled to exercise the 'judicial Power of the United States" bestowed exclusively by the Constitution on Article III courts.'" *Id.* (quoting *N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–60 (1982) (plurality opinion)). Unlike Article III courts, Congress grants Article I courts "very specific jurisdiction" through a waiver of sovereign immunity. *Chavez v. United States*, 18 Cl. Ct. 540, 547 (1989). "[C]ourts shall exercise only those powers granted by Congress and shall do so only at the times specified by Congress; nor can [a court] expand by fiat that which has been authorized by Congress." *United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362, 1373 (Fed. Cir. 1983).

i. Waiver of Sovereign Immunity Is Strictly Construed

Waiver of sovereign immunity, such as in the Tucker Act, is construed narrowly. *McMahon v. United States*, 342 U.S. 25, 27 (1951); *see also Am. Fed'n Gov't Employees, AFL-CIO, Local 1412 v. United States*, 258 F.3d 1294, 1301–02 (Fed. Cir. 2001) (narrowly interpreting waiver of sovereign immunity in the district courts). When Congress attempts to narrow a waiver of sovereign immunity with a restriction, that restriction must be construed broadly. *Zoltek Corp. v. United States*, 442 F.3d 1345, 1364 (Fed. Cir. 2006).

ii. Congress Can Withdraw Jurisdiction from the Court of Federal Claims

A contract with the United States will not fall under Tucker Act jurisdiction if Congress has established jurisdiction elsewhere. *Massie v. United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999) (citing several instances where Congress has removed Tucker Act jurisdiction). *Cf. Matson Navigation Co. v. United States*, 284 U.S. 352, 359–60 (1932) (holding that the Court of Claims did not have jurisdiction over a contract whose subject matter was covered by the Suits in Admiralty Act). For bid protests under 28 U.S.C. § 1491(b)(1),

Congress permitted this Court to entertain bid protest jurisdiction for protests under the umbrella indefinite delivery/indefinite quantity ("ID/IQ") contract. But Congress restricted the ability to protest the individual task and delivery orders under that umbrella ID/IQ contract. Absent allegations within a stated exception, Congress provided unsuccessful offerors with only one avenue of review for an individual task or delivery order—the agency's task and delivery order ombudsman. *A&D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 133–34 (2006); *see also Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005) (noting that it has consistently held Tucker Act review of takings claims are barred if Congress provided a comprehensive statutory scheme); *see also Biltmore Forest Broad., Inc. v. United States*, 80 Fed. Cl. 322, 328 (2008) (cases cited therein).

The restriction on protests of individual task and delivery orders predated the Court of Federal Claims' receipt of specific bid protest jurisdiction under 28 U.S.C. § 1491(b)(1). Congress passed the restriction on bid protests for task and delivery orders in the Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, § 1004, 108 Stat. 3243, 3249–55 ("FASA § 1004"). Protests of an individual task or delivery order were limited to protests alleging that the order increased "the scope, period, or maximum value of the contract under which the order [was] issued." FASA § 1004 (codified now at 10 U.S.C. § 2304c(e)(1)(A)). Two years later, Congress passed the Administrative Dispute Resolution Act ("ADRA"), Pub. L. No. 104-320, § 12(a), (b), 110 Stat. 3870, 3874–75 (1996), granting the Court of Federal Claims specific bid protest jurisdiction under 28 U.S.C. § 1491(b)(1). Prior to the passage of the ADRA, the Court of Federal Claims based its bid protest jurisdiction under 28 U.S.C. § 1491(a)(1) using an implied-in-fact contract theory. The ADRA provided the court with general jurisdiction over bid protests. ADRA, Pub. L. No. 104-320, § 12(a), (b), 110 Stat. 3870, 3874–75. When a more general statute, such as the ADRA, follows a more specific statute addressing the same subject matter, the earlier more specific statute trumps the general. *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1370 (Fed. Cir. 2002). Consequently, the Court of Federal Claims has not exercised jurisdiction over task and delivery order protests unless the protest fell within one of the enumerated exceptions. *See, e.g., Northrup Grumman Corp. v. United States*, 50 Fed. Cl. 443, 455 (2001) (exercising jurisdiction where plaintiff alleged that the task order was effectively a cardinal change that increased the scope of the umbrella contract); *Omega World Travel, Inc. v. United States*, 82 Fed. Cl. 452, 462–63 (2008) (outlining the limited legal backdrop to challenge a task order).

b. Congress, Through the NDAA FY 2008, Divested the Court of Federal Claims of Jurisdiction over Austen's Complaint in the Nature of a Bid Protest

The NDAA FY 2008 § 843 explicitly withdraws the Court of Federal Claims from entertaining jurisdiction, under 28 U.S.C. § 1491(b)(1), over

protests of a (proposed) task order valued over $10 million.[33] To begin with, protests generally are "not authorized in connection with the issuance or proposed issuance of a task or delivery order." 10 U.S.C. § 2304c(e)(1). Before the NDAA FY 2008, Congress had permitted exceptions: protests of a task or delivery order alleging that the order increased "the scope, period, or maximum value of the contract under which the order [was] issued." 10 U.S.C. § 2304c(e)(1)(A). The limited exceptions focused on a protest connected to the existing prime contract. This Court and the Court of Federal Claims had strictly adhered to the limited grant of jurisdiction under the statute rarely exercising jurisdiction beyond the limited terms provided. *See*, *e.g.*, *A&D Fire Prot.*, *Inc.*, 72 Fed. Cl. at 133–35 (explaining that the bar on bid protests was intended to apply to protests in the Court of Federal Claims as illustrated by the plain language and legislative history of FASA and the ADRA).

While Congress extended jurisdiction for bid protests under the NDAA FY 2008, the extension was not unlimited. The NDAA FY 2008 § 843 provided that for any protests alleging a violation in connection with a proposed task order or task order valued over $10 million, "[n]otwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of [the] protest." 10 U.S.C. § 2304c(e)(2). Section 3556 of title 31 provides the Comptroller General does not have "exclusive jurisdiction over protests" and filing with the Comptroller General does not "affect the right of any interested party to file a protest with the contracting agency or to file an action in" the Court of Federal Claims. 31 U.S.C. § 3556.

i. The Plain Language of the NDAA FY 2008 Vests Jurisdiction over Task Order Bid Protests Valued over $10 Million Exclusively with the Government Accountability Office

The language of a statute is the best source for determining congressional intent. *Shoshone Indian Tribe of Wind River Reservation et al. v. United States*, 364 F.3d 1339, 1345 (Fed. Cir. 2004). When interpreting a statute, the first step is to determine whether the text has a plain and unambiguous meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997). If the statutory language is unambiguous and 'the statutory scheme is coherent and consistent,'" the inquiry must stop. *Id.* (quoting *United States v. Ron Pair Enters.*, *Inc.*, 489 U.S. 235, 240 (1989)); *see also United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1359 (Fed. Cir. 2007) (finding the statutory language is unambiguous and caps the amount the Government can recover). At that point, a review of the legislative history is simply inappropriate. *Shoshone Indian Tribe*, 364 F.3d at 1346. Further, when the provision at issue narrows a waiver

33. Austen's complaint does not raise any issues under 10 U.S.C. § 2304c(e)(1)(A) concerning "the scope, period, or maximum value of the contract under which the order [was] issued." *Austen*, 2009 WL 12345678, at *6 n.10. Therefore, any references in this brief to a "protest over $10,000,000" refer to a protest under which the only basis for jurisdiction is 10 U.S.C. § 2304c(e)(1)(B).

of sovereign immunity, it must be construed broadly. *Zoltek Corp.*, 442 F.3d at 1364.

The plain language of 10 U.S.C. § 2304c(e)(2) is clear and unambiguous. Even though filing a bid protest with the GAO generally does not prohibit an unsuccessful offeror from filing a bid protest in the Court of Federal Claims, that is not the case for a protest filed with the GAO for a task order over $10 million. "Notwithstanding" is a preposition that means "despite; in spite of." Black's Law Dictionary (8th ed. 2004). The word is placed directly before the citation to the provision that generally describes the GAO's role in the process. While filing with the GAO normally does not preclude a bid protest in the Court of Federal Claims, it does here. *See Shoshone Indian Tribe*, 364 F.3d at 1346 (finding the "introductory phrase 'notwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act"). If the text was somehow unclear, Congress further emphasized its intent for the GAO to have exclusive jurisdiction for bid protests of task orders valued over $10 million with its use of the words "*shall* have *exclusive* jurisdiction." NDAA FY 2008 § 843 (emphasis added). "Shall" is mandatory, not discretionary. Black's Law Dictionary (8th ed. 2004). "Exclusive" means "sole" and "restricted or limited to the person, group, or area concerned." Merriam-Webster Dictionary 170 (Merriam Webster, Inc., 6th ed. 2005); New Oxford American Dictionary 588 (Oxford Univ. Press, Inc., 2d ed. 2005).

Simply put, the GAO has jurisdiction over the bid protest and the Court of Federal Claims does not. The plain language of the NDAA FY 2008 § 843 vests jurisdiction over bid protests concerning the issuance or proposed issuance of a task or delivery order over $10 million explicitly to the GAO, and the GAO only. *See Shoshone Indian Tribe*, 364 F.3d at 1347 (noting there is "a strong presumption that 'Congress expresses its intent through the language it chooses' and that the choice of words in a statute is therefore deliberate and reflective"). Where, as here, the plain language of a statute is clear, further inquiry is unnecessary and inappropriate.

Austen filed its protest in the wrong forum. In its complaint, Austen challenged the failure to provide notice of the Qumari task order in violation of 10 U.S.C. § 2304c(d). The alleged failure to provide notice of the Qumari task order is "in connection with" the issuance of the Qumari task order. *Todd Constr. LLP v. United States*, 85 Fed. Cl. 34, 45 (2008) (recognizing how broadly this Court defines "in connection with" citing *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1345–46 (2008)). The Qumari task order is valued over $10 million. *Austen Techs., Inc.*, 2009 WL 12345678, at *3. Austen is not challenging the scope, period, or maximum value of the contract under which the order was issued. Austen's challenge squarely fits within the grant of bid protest jurisdiction to the GAO under 10 U.S.C. § 2304c(e)(1)(B)–(2). Because it is a protest under 10 U.S.C. § 2304c(e)(1)(B), jurisdiction lies exclusively with the GAO. Accordingly, the Court of Federal Claims erred in exercising jurisdiction over Austen's complaint in the nature of a bid protest.

ii. The Legislative History of the NDAA FY 2008 Supports the Conclusion That Congress Intended for the Government Accountability Office to Have Exclusive Jurisdiction over Task Order Bid Protests Valued over $10 Million

This Court should review the legislative history to determine congressional intent only when the plain language of the statute is not clear. *Am. Fed'n Gov't Employees, Local 1412*, 258 F.3d at 1299. If this Court finds any ambiguity in the language of the statute, the legislative history of the NDAA FY 2008 further illustrates Congress's intent to vest jurisdiction exclusively to the GAO. The acquisition provisions in the NDAA FY 2008 § 843 came from two proposed accountability in contracting provisions in 2007, H.R. 1362 and S. 680, as well as the Senate's version of the NDAA FY 2008, S. 1547. James J. McCullough *et al.*, Feature Comment, *Acquisition Reform Revisited—Section 843 Protests Against Task and Delivery Order Awards at GAO*, 50 GC ¶ 75 (Mar. 5, 2008);[34] H.R. 1362, 110th Cong. (2007); S. 680, 110th Cong. (2007); S. 1547, 110th Cong. (2007). The impetus for these bills came in part from the recommendations of the Acquisition Advisory Panel ("AAP"). McCullough *et al.*, *supra*, at 1; *Report of Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* at 36, 66, 108 (2007)[35] (hereinafter "AAP Rep."); *Accountability in Government Contracting Act of 2007: Before the Senate Subcommittee on Readiness and Management Support Committee on Armed Services*, 110th Cong. 9–11 (Jan. 31, 2007) (Testimony of Marcia G. Madsen, Chair of the Acquisition Advisory Panel).[36] The AAP reviewed the use of ID/IQ contracting along with the frequency and amount of task and delivery orders. AAP Rep. at 33–36, 91–93. The AAP recommended limiting the restriction on bid protests to task or delivery orders under $5 million. *Id.* at 36, 108. The AAP acknowledged there was little evidence the ombudsman had been very active in hearing concerns regarding awards of a specific task or delivery order. *Id.* at 69.

The Senate sought to address the issues and recommendations of the AAP in its proposed accountability in contracting act. In the text of section 203 of S. 680, the committee intended to extend bid protest jurisdiction of task and delivery orders.[37] S. Rep. No. 110-201, at 12–13 (2007);[38] Accountability in

34. This Feature Comment can be viewed at http://xtinformation.com/siteFiles/Publications/B86BBA2A36A6C154055CE7C4F20BE62E.pdf.

35. This report can be viewed at http://www.acquisition.gov/comp/aap/24102_GSA.pdf.

36. This testimony can be viewed at http://armed-services.senate.gov/statemnt/2007/January/Madsen%2001-31-07.pdf.

37. The committee proposed the following text for expanded protest jurisdiction:

> A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery … except for—
> (1) a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or
> (2) a protest by an interested party of an order valued at greater than the threshold established pursuant to section 203(c) of the Accountability in Government Contracting Act of 2007.

S. Rep. No. 110-201, at 30 (2007). This Act can be found at http://www.govtrack.us/congress/billtext.xpd?bill=s110-680.

38. This report can be viewed at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr201.pdf.

Government Contracting Act of 2007, S. 680, 110th Cong. § 203 (2007). The committee suggested a threshold amount of $5 million, but acknowledged that it would be willing to see the threshold increased to as high as $25 million. S. Rep. No. 110-201, at 12. However, the committee clearly anticipated that both the GAO and the Court of Federal Claims would exercise jurisdiction over bid protests for task orders in excess of $5 million as it noted that "active motion practice will be used in dealing with protests under this section (Section 203) and will actively dismiss frivolous protests either on its own motion or the motion of parties before the forum." *Id*. at 12–13.

The Senate incorporated section 203 of the Accountability in Government Contracting Act of 2007 into section 821 of its version of the NDAA FY 2008 bill. H.R. Rep. No. 110-477 (2007) (Conf. Rep.).[39] The Office of Federal Procurement Policy and industry trade associations opposed the increased protest jurisdiction because it would burden the acquisition process. *See* Statement of Administrative Policy, Executive Office of the President, Office of Budget and Management, S. 1547–National Defense Authorization Act for Fiscal Year 2008 (Jul. 10, 2007)[40] ("Section 821 would create new protest rights for task and delivery order contracts that delay performance and promote unnecessary litigation."); McCullough *et al*., *supra*, at 1 (citing Acquisition Reform Working Group, Comments on Fiscal Year 2008 National Defense Authorization Act at 7 (Sept. 7, 2007)). Congress intended to balance these competing interests in drafting the final text of NDAA FY 2008 § 843 by assessing a $10 million threshold, limiting bid protest jurisdiction solely to the GAO, and establishing a three-year sunset date on the GAO's jurisdiction.

The House Conference Report further illustrates Congress's intent to balance competing interests under the NDAA FY 2008 § 843. H.R. Rep. No. 110-477, at 956 (2007) (Conf. Rep.). The Senate version of its authorization bill had a provision meant to "encourage the use of multiple-award task and delivery order contracts in lieu of single-award contracts, enhance requirements for the competition of task orders and delivery orders under multiple-award contracts, and authorize bid protests for task or delivery orders in excess of $5.0 million under such contracts." *Id*. The House bill did not have a similar provision. *Id*. Ultimately, the House receded "with an amendment that would address the competition issues in the Senate provision on a government-wide basis" and raised "the threshold for bid protests to $10.0 million." *Id*. Congress set a three-year sunset date on the authorization for bid protests because "[t]he conferees expect that the sunset date will provide Congress with an opportunity to review the implementation of the provision and make any necessary adjustments." *Id*. Unlike the enhanced notice provisions, the text of which is nearly exactly the same as the text proposed

39. This conference report can be viewed at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr477.pdf.

40. This statement can be viewed at http://www.whitehouse.gov/omb/legislative/sap/110-1/s1547sap-s.pdf.

by the Senate,[41] the protest provision in the NDAA FY 2008 § 843 is not the same. *See supra* footnote 37 (text of protest jurisdiction under section 203). The NDAA FY 2008 § 843 added a clear limitation—the GAO shall have exclusive jurisdiction—which was noticeably absent from the Senate version of the bill. The Court of Federal Claims erred in its interpretation and reliance on the legislative history to find jurisdiction over Austen's complaint in the nature of a bid protest. *Austen Techs.*, *Inc.*, 2008 WL 12345678, at *7–9. Considering the legislative history as a whole, Congress explicitly intended to divest the Court of Federal Claims of jurisdiction of the Qumari task order.[42]

iii. Establishing Jurisdiction Exclusively with the Government Accountability Office Furthers Federal Procurement Policy Goals

The Government Accountability Office has significant expertise in government contract bid protests. *See generally* Noah B. Bleicher et al., *Accountability in Indefinite-Delivery/Indefinite Quantity Contracting: The Multifaceted Work of the U.S. Government Accountability Office*, 37 Pub. Cont. L.J. 375 (2008) (discussing the GAO's role and history of exercising jurisdiction over task order bid protests). The GAO has exercised bid protest jurisdiction since the 1920s. *See* Daniel I. Gordon, *Annals of Accountability: The First Published Bid Protest Decision*, 39 Procurement Law. 11 (2004) (recounting the story of the first

41. The committee proposed the following text for enhanced notice requirements:

(2) TASK OR DELIVERY ORDERS IN EXCESS OF THE THRESHOLD FOR USE OF SIMPLIFIED PROCEDURES FOR COMMERCIAL ITEMS.—The statement of work for a task or delivery order in excess of the threshold for use of simplified procedures for commercial items under a task or delivery order contract shall be made available to each contractor awarded such contract and shall—

(A) include a clear statement of the executive agency's requirements;
(B) permit a reasonable response period;
(C) disclose the significant factors and sub-factors that the executive agency expects to consider in evaluating proposals, including cost, price, past performance, and the relative importance of those and other factors;
(D) in the case of an award that is to be made on a best value basis, include a written statement documenting the basis for the award and the relative importance of quality, past performance, and price or cost factors; and
(E) provide an opportunity for a post-award debriefing consistent with the requirements of section 303B(e).

S. Rep. No. 110-102, at 30 (2007).

42. The implementing regulations also explicitly state that jurisdiction of a bid protest of a task or delivery order over $10 million lies with GAO. FAR 16.505(a)(9)(i). An agency's interpretation of a statute is entitled to *Chevron* deference if it is a statute that the agency is charged with enforcing. *See* Crawfish Processors Alliance v. United States, 477 F.3d 1375, 1379–80 (Fed. Cir. 2007) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)) (holding that great deference should be given to an "executive department's construction of a statutory scheme it is entrusted to administer," and reviewing the agency's regulations for determining whether or not two companies were "affiliated" under 19 U.S.C. § 1677a). In this case, the FAR Council is charged with implementing the statute. 41 U.S.C. § 421 (2000). The regulations implementing the NDAA FY 2008 § 843 are certainly a reasonable and clear interpretation of the text of the statute—a protest is authorized to the GAO only.

bid protest). The GAO received statutory jurisdiction over bid protests in 1984. Bleicher, 37 Pub. Cont. L.J. at 376 (citing 31 U.S.C. §§ 3551–3556). The GAO has already developed a significant amount of analysis and decisions regarding bid protests of ID/IQ contracts. *Id.* at 383–98.

Allowing the GAO to exclusively hear bid protests of task or delivery orders furthers the AAP's concerns by providing increased oversight while minimizing disruption to the overall procurement process. Giving an offeror the option of filing a protest with the GAO will provide more transparency and oversight to the task orders under a prime ID/IQ contract. The use of the GAO will certainly provide more visibility to concerns regarding task and delivery orders than the use of ombudsmen only. The new jurisdiction also provides uniformity and consistency government-wide whereas before each agency created and managed its own ombudsman program. Finally, after three years, Congress intends to reevaluate to determine whether to continue to allow protests to the GAO or whether additional or alternative bid protest avenues are necessary. 10 U.S.C. § 2304c(e)(3).

c. Under the Circumstances, There Is No Other Basis for the Court of Federal Claims to Exercise Jurisdiction over Austen's Complaint in the Nature of a Bid Protest

The Court of Federal Claims does not have subject matter jurisdiction over Austen's complaint in the nature of a bid protest based on a breach of the duty of fair dealing under an implied-in-fact contract theory under 28 U.S.C. § 1491(a)(1).[43] Because the ADRA provided the Court of Federal Claims with a specific avenue for bid protest jurisdiction under 28 U.S.C. § 1491(b)(1), the Court of Federal Claims cannot exercise jurisdiction under an implied-in-fact contract theory pursuant to 28 U.S.C. § 1491(a)(1). Prior to the grant of jurisdiction under 28 U.S.C. § 1491(b)(1), unsuccessful bidders argued the court had jurisdiction for a bid protest based upon "any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1); *Biltmore Forest Broad. Inc.*, 80 Fed. Cl. at 331. This Court has yet to decide whether the implied-in-fact contract theory survives the passage of the ADRA. *See Biltmore Forest Broad. Inc.*, 80 Fed. Cl. at 335 n.15. With passage of the ADRA, Congress effectively divested the court of exercising bid protest jurisdiction under an implied-in-fact contract theory. *Info. Sciences Corp. v. United States*, 85 Fed. Cl. 195, 204–06 (2008) (summarizing the Court of Federal Claims' case law history). Thus, an implied-in-fact contract theory does not serve as a basis for jurisdiction.

The Court of Federal Claims erred when it exercised subject matter jurisdiction over Austen's bid protest. The plain language of the NDAA FY 2008 and legislative history vest jurisdiction over this type of protest exclusively

43. The Court of Federal Claims also does not have subject matter jurisdiction of Austen's complaint alleging a claim for breach of contract. *See infra* Section IV.B.2.a.

to the GAO. As this Court has acknowledged, it cannot "expand by fiat that which has been authorized by Congress." *John C. Grimberg Co., Inc.*, 702 F.2d at 1373. This Court cannot exercise jurisdiction over Austen's protest. Austen chose to file its bid protest in the wrong forum. This Court cannot correct Austen's error. This Court should reverse the Court of Federal Claims and grant the AEA's Motion to Dismiss Austen's complaint in the nature of a bid protest for lack of subject matter jurisdiction.

2. Austen Is Not Entitled to Lost Profits for Any Breach of the PRIME ID/IQ Contract

This Court should not award any monetary damages for a breach of the PRIME ID/IQ contract.[44] Just as this Court lacks jurisdiction to hear the bid protest of a task order *per se*, the Court lacks jurisdiction to hear the bid protest filed as a claim under the Contract Disputes Act, 41 U.S.C. § 609, and Tucker Act, 28 U.S.C. § 1491. Even if this Court had jurisdiction over such claims, the AEA had fulfilled its minimum ordering requirements under the contract, precluding breach. If this court determines that it has jurisdiction over the bid protest brought under a breach-of-contract theory and that the AEA has breached the contract, Austen would still not be entitled to lost profits.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Winstar Corp. v. United States*, 64 F.3d 1531, 1539 (Fed. Cir. 1995). This Court reviews a grant of summary judgment by the Court of Federal Claims *de novo* to determine whether the summary judgment standard has been correctly applied. *Id.* By contrast, the Federal Circuit gives deference to the trial court when reviewing a denial of a motion for summary judgment, and will not disturb the trial court's denial of summary judgment unless it finds the court abused its discretion. *Little Six, Inc. v. United States*, 280 F.3d 1371, 1373–74 (Fed. Cir. 2002). This Court reviews questions of law *de novo*. *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995).

a. This Court Has No Jurisdiction over a Bid Protest Disguised as a Claim Under the Contract Disputes Act and the Tucker Act

There is no jurisdiction over Austen's breach-of-contract claim despite the summary declaration that the jurisdiction is "firmly grounded upon 28 U.S.C. § 1491(a)(2)." *Austen Techs., Inc.*, 2009 WL 12345678, at *1–2. As the party invoking subject matter jurisdiction, Austen bears the burden of establishing it by a preponderance of the evidence. *Reynolds*, 846 F.2d at 748.

44. The Court of Federal Claims suggests that injunctive relief and lost profits could theoretically be awarded together. Austen Techs., Inc., 2009 WL 12345678, at *15. If awarded, this would constitute unjust enrichment at taxpayer expense. Austen would have windfall gains if the court awarded both lost profit damages and the opportunity to earn them again through performance. Although it is not clear from the decision below, Austen appears to be asking for lost profits as an alternative remedy to the re-solicitation of the Qumari task order.

Just as this Court has no jurisdiction over bid protests of task orders as discussed at *supra* Section IV.B.1, Austen cannot disguise a bid protest as a claim to get jurisdiction under the Contract Disputes Act, 41 U.S.C. § 609, and Tucker Act, 28 U.S.C. § 1491.[45] The Court of Federal Claims previously explained, "as a general matter, the court does not agree with the theory that actions, that are in essence bid protests of task order awards, can be recharacterized as contract disputes in order to create jurisdiction in this court." *A & D Fire Prot., Inc. v. United States*, 72 Fed. Cl. at 135. Furthermore, bid protest related claims must be brought under 28 U.S.C. § 1491(b), which does not allow lost profits. *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115, 120 (2002).

Austen's dispute is not a breach-of-contract claim but a prohibited bid protest of a task order arising out of the exact same facts. The Armed Services Board of Contract Appeals has found jurisdiction over such claims. *In re L-3 Commc'ns Corp.*, ASBCA No. 54920, 2006 WL 2349233 (2006); *In re Cmty. Consulting Int'l*, ASBCA No. 53489, 02-2 BCA ¶ 31,940, 2002 WL 1788535 (2002). However, these board decisions have been met with criticism. *A & D Fire Prot., Inc.*, 72 Fed. Cl. at 135; Sean Sabin, *What Happened to the Federal Acquisition Streamlining Act's Protest Restrictions on Task and Delivery Orders? Recent Developments in Protests (and Protests Disguised as Contract Disputes) Related to the Issuance of Task and Delivery Orders and Proposals to Improve an Impaired System*, 56 A.F. L. Rev. 283, 304–05 (2005). In filing this claim, Austen has filed an action objecting to the award of a contract which is a bid protest as defined by 28 U.S.C. § 1491(b)(1). Austen, as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by a failure to award the contract, would clearly be an interested party authorized to bring a bid protest. *Cincom Sys., Inc. v. United States*, 37 Fed. Cl. 663, 669 (1997) (citing 31 U.S.C. § 3551(2)). Therefore, this breach-of-contract claim fits the legal definition of a bid protest. Congress expressly withheld jurisdiction over bid protests of task order awards from this Court via 10 U.S.C. § 2304c(e) as discussed at *supra* Section IV.B.1.

If this Court finds jurisdiction, then anytime a contractor in an ID/IQ contract lost a bid for a task order, the contractor would be able to file a claim for lost profits in the Court of Federal Claims. This would run counter to the efficiencies inherent to ID/IQ contracts. *See generally* Cheryl Sandner & Mary Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 Pub. Cont. L.J. 461, 468 (2001) (describing how multiple

45. Even if the AEA did not raise this objection at the Court of Federal Claims in jurisdictional terms, objections to subject matter jurisdiction are never waived. R. Ct. Fed. Cl. 12(h)(3); Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). "Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514 (citing Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999)).

awards of task and delivery order contracts afford the Government continued competition during the performance period of the contracts; a much shorter period for ordering than under a new procurement, and, absent certain exceptions, freedom from contractor protests of individual orders). Recognizing jurisdiction over bid protests brought as breach-of-contract claims would also defeat Congress's limitation of task order protests to the GAO when it passed the NDAA FY 2008 § 843.

b. The AEA Did Not Breach the PRIME ID/IQ Contract at the Time of the Qumari Task Order Because All Legal Obligations Had Previously Been Satisfied

Even if jurisdiction existed, Austen's claim would still fail because the contract could not have been breached once the minimum order had been placed. This Court has explained that when the Government places the minimum required order for an ID/IQ contract, the Government will have thereby satisfied its legal obligations under the contract. *Travel Ctr. v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). Indeed, in *Travel Ctr. v. Barram*, the panel deciding the case determined that the Government breached its duty to treat the plaintiff fairly and in good faith by inducing the plaintiff to provide a proposal on quantities the Government knew or should have known were overstated. *Id.* at 1318. Nevertheless, the Federal Circuit reversed, explaining, "Because [the Government] met the legal requirements of the contract at issue, its less than ideal contracting tactics fail to constitute a breach. Therefore, Travel Centre is not entitled to any legal relief, including damages." *Id.* at 1319–20.

The AEA satisfied its contractual obligations when it issued Austen its first task order. The Prevention of Inadvertant or Mistaken Explosions (PRIME) ID/IQ contract provided a guaranteed minimum of $3 million worth of explosive ordnance disposal (EOD) services, which Austen received with the initial award of $3.5 million for EOD services in Arbala. *Austen Techs., Inc.*, 2009 WL 12345678, at *3. Thus, just as in *Travel Centre*, the AEA's conduct fails to constitute a breach.

c. Austen Is Not Entitled to an Award of Lost Profits Under the PRIME ID/IQ Contract

If this Court finds jurisdiction over a bid protest brought as a breach-of-contract claim, and finds the AEA breached the PRIME ID/IQ contract despite satisfying its minimum ordering obligations, lost profits should still not be awarded because Austen cannot make the requisite showing for such damages. Lost profits may be awarded for a breach of a contract when the Plaintiff proves

> (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.

Energy Capital Corp. v. United States, 302 F.3d 1314, 1325 (Fed. Cir. 2002) (citing *Chain Belt Co. v. United States*, 115 F. Supp. 701, 714 (Ct. Cl. 1953); Restatement (Second) of Contracts § 351 (1981)). The plaintiff must prove these elements by a preponderance of the evidence. *Energy Capital Corp.*, 302 F.3d at 1325.

Expectation damages, which include lost profits, are intended to make a nonbreaching party whole by providing the benefits expected to be received had the breach not occurred. *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001). "The problems of proof attendant on the burden placed on the non-breaching party of establishing lost profits—on establishing what might have been—are well recognized." *Id.* Not all breaches, however, are remediable in damages. *San Carlos Irrigation & Drainage Dist. v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997). This is particularly true of claims for lost profits, which must be "definitely established." *Rumsfeld v. Applied Cos., Inc.*, 325 F.3d 1328, 1340 (Fed. Cir. 2003).

Austen seeks $2.5 million in lost profits that Austen alleges it would have earned from providing EOD services through the Qumari task order. *Austen Techs., Inc.*, 2009 WL 12345678, at *5. These lost profits should not be awarded because they were not foreseeable at the time the PRIME ID/IQ contract was formed and they are too speculative.

i. The Court of Federal Claims Correctly Determined That Austen Did Not Prove Lost Profits Were Foreseeable at the Time of Contracting

A plaintiff must prove that both the magnitude and type of damages were foreseeable at the time of contract formation. *Landmark Land Co., Inc. v. F.D.I.C.*, 256 F.3d 1365, 1378 (Fed. Cir. 2001) "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made." Restatement (Second) of Contracts § 351. A loss may be foreseeable as a probable result of a breach because it follows from the breach in the ordinary course of events. *Id.* Foreseeability is a question of fact reviewed for clear error. *Landmark Land Co., Inc.*, 256 F.3d at 1378–79.

Austen cannot prove lost profits for the Qumari task order were foreseeable at the time the PRIME ID/IQ contract was formed. This is due to the fact that an ID/IQ contract obligates the Government to order only a stated minimum quantity of supplies or services; "once the government has purchased the minimum quantity stated in an ID[/]IQ contract from the contractor, it is free to purchase additional supplies or services from any other source it chooses." *Travel Ctr.*, 236 F.3d at 1319; *see also J. Cooper & Assocs., Inc. v. United States*, 53 Fed. Cl. 8, 17 (2002). The regulations authorizing ID/IQ contracts clearly state the advantages include flexibility in both quantity and delivery scheduling. 48 C.F.R. § 16.501-2(b)(2)(i). Thus, the only reasonably foreseeable orders under the PRIME ID/IQ contract were the minimum orders stated in the contract. *Travel Ctr.*, 236 F.3d at 1319 ("Regardless of the

accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the ID[/]IQ contract, [the plaintiff] could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract."). As the Court of Federal Claims explained, "These arguments go to the heart of why ID/IQ contracts exist—the AEA uses ID/IQ contracts because it may need more than the guaranteed minimum, but there is no guarantee that the need will materialize. ID/IQ contracts exist to accommodate this uncertainty." *Austen Techs., Inc.*, 2009 WL 12345678, at *13. Not only is a breach of contract precluded upon satisfaction of the minimum ordering requirement, lost profits are unforeseeable for speculative orders beyond the minimum and are also thereby precluded.

In addition, the AEA did not foresee Austen winning every task order. Any one of the PRIME contractors could have won the Qumari task order. *Id.* Indeed, the other contractors also had minimum order guarantees. *Id.* at 3. Furthermore, the amount of work under the task order was speculative, and therefore not foreseeable at the time the contract was formed, as will be discussed in more detail at *infra* Section IV.B.2.c.ii.

Austen simply did not overcome the burden of proving that the lost profits were foreseeable at the time of contracting. The Court of Federal Claims' factual findings regarding the lack of foreseeability in the ID/IQ context are not clearly erroneous. Austen's lost profit claim thereby fails for lack of foreseeability.

ii. Austen Did Not Prove a Reasonably Certain Basis for Lost Profits

The speculative nature of the lost profits was not only unforeseeable at the time the contract was formed, but also cannot be calculated with reasonable certainty. The measure of damages for a plaintiff seeking lost profits must be reasonably certain. *Cal. Fed. Bank v. United States*, 395 F.3d 1263, 1267 (Fed. Cir. 2005). In other words, "damages for speculative or remote losses may not be recovered." *In re CACI Int'l, Inc.*, ASBCA No. 53058, 05-1 BCA ¶ 32948, 2005 WL 1006865 (2005).

The Court of Federal Claims explained, "we are confident that Austen provided a sufficient basis for estimating its $2.5 million in lost profits with reasonable certainty." *Austen Techs., Inc.*, 2009 WL 12345678, at *13. This was based on the estimated man-hours for the Qumari task order and Austen's past profit experience. *Id.* The certainty of this calculation is not in dispute; rather, the foundation of the calculation is inherently flawed because the estimated duration of the Qumari task order—the man-hours to be spent—are speculative.

The speculative nature of these damages again highlights the fundamental and fatal flaw in seeking lost profits from facts amounting to a bid protest. "Judicial precedent has long held that a plaintiff is precluded from recovering lost profits on the ground that the contract for which plaintiff bid never actually came into existence." *Lion Raisins, Inc.*, 52 Fed. Cl. at 119. The appropriate remedy for bid protests is to re-solicit bids or award bid preparation and

proposal costs. *Id*. In this case, Austen never prepared a bid. *Austen Techs*., *Inc*., 2009 WL 12345678, at *15.

Performance by someone other than a plaintiff-contractor would alleviate damage speculation. For example, in *Locke v. United States*, the plaintiff was wrongfully removed from the Federal Supply Schedule. *Locke v. United States*, 283 F.2d 521, 523 (Ct. Cl. 1960). There were three other local companies providing similar services as the plaintiff covering the exact same time period. *Id*. at 522. Once the court determined lost profits were in order, the court directed damages to be determined based, in part, on the total amount of service purchased by the Government in that area and whether there were any material facts preventing plaintiff from receiving a proportionate share of that business. *Id*. at 525. In other words, the court did not speculate damages based on estimates of future business, but calculated damages based on business the Government actually used. This same approach was used in *Ace-Fed. Reporters, Inc. v. Barram*, where the Government used court-reporting services outside a multiple award schedule contract. *Ace-Fed. Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000); *see also Torncello v. United States*, 681 F.2d 756, 762 (Ct. Cl. 1982) (basing lost profits on services procured by the Government in violation of the contract with the plaintiff); *Bennett v. United States*, 371 F.2d 859, 864 (Ct. Cl. 1967) (authorizing lost profits on additional work required by the Government); *Neely v. United States*, 285 F.2d 438, 443 (Ct. Cl. 1961) (explaining the difficulty in calculating lost profits when the breach occurs before operations begin). Basically, the courts in these lost profit cases knew how much the Government actually spent on contracts and could base the lost profits off these definite amounts.

The estimate of duration of the Qumari task order is inherently speculative since it has not yet been performed. As the Court of Federal Claims explained:

> Even if Austen had won the Qumari task order, there is still no guarantee that it would do any work under the task order. The war may end earlier than expected, there may be less need for EOD services than estimated, or the AEA might terminate the contract for convenience.

Austen Techs., *Inc*., 2009 WL 12345678, at *14. The plaintiff has not proven that a sufficient basis exists for estimating the amount of lost profits with reasonable certainty by a preponderance of the evidence. *Energy Capital Corp*., 302 F.3d at 1325. Thus, Austen is not entitled to lost profits.

d. "Bad Faith" by the Government Does Not Automatically Entitle Austen to Lost Profits

"Bad faith" by governmental employees in breaching a contract does not mean the nonbreaching party should be awarded lost profits. First, there are the issues of jurisdiction and breach as described at *supra* Section IV.B.1.a & b precluding such award. If the AEA could have legally breached the contract despite having fulfilled the required minimum order, then the existence of bad faith on the part of the Government could be used as evidence to dem-

onstrate such a breach. *See Applied Cos., Inc.*, 325 F.3d at 1335 n.4 (explaining that Government negligent misrepresentation is as effective as bad faith in demonstrating a breach of contract claim). However, the existence of bad faith, while potentially being evidence of a breach, does not entitle a plaintiff to lost profits. *Id.* at 1336. Nothing suggests that Austen would need to prove anything short of the three elements of a lost profit claim: (1) causation; (2) foreseeability; and (3) not speculative. *Energy Capital Corp.*, 302 F.3d at 1325.

Furthermore, there is no precedent holding governmental bad faith "widens the doorway to lost profits." *Austen Techs., Inc.*, 2009 WL 12345678, at *15. First, the Armed Services Board of Contract Appeals does not discuss bad faith in the opinion referenced by the Court of Federal Claims to support this proposition. *See In re CACI Int'l, Inc.*, 2005 WL 1006865 (denying lost profits despite finding the Government breached the contract). In the other case cited by the Court of Federal Claims, *SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612 (1990), the parties agreed that plaintiff may recover lost profits if it could show the Government terminated a contract in bad faith. *Id.* at 617. Since there was an agreement by the parties, the decision contains no discussion of the analysis of the lost profit issue. *Id.* Furthermore, the *SMS Data Prods. Group, Inc.* court found that the Government actually acted in good faith. *Id.*

C. *Conclusion*

Austen chose to litigate both of its claims in the federal court forum even though it could only file its complaint in the nature of a bid protest to the GAO. It now laments the fact that it cannot be made whole in a forum without jurisdiction. Anticipatory profits are simply unavailable under the facts and circumstances presented here. For the aforementioned reasons, the AEA respectfully requests this Court to reverse the Court of Federal Claims' decision on the Motion to Dismiss based on lack of jurisdiction and sustain the grant of summary judgment denying lost profit damages.