APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENTS

APPENDIX TABLE OF CONTENTS (Cont.)

RELATED CASE
TURPING ET AL. V. UNITED STATES
913 F.3D 1060 (FED. CIR. 2019)

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOVEMBER 3, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FRANK CALAPRISTI, AND
OTHER SIMILARLY SITUATED PERSONS,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

No. 2022-1080

Appeal from the United States Court of Federal Claims in No. 1:18-cv-00612-TMD, Judge Thompson M. Dietz.

Before: MOORE, Chief Judge, LOURIE and PROST, Circuit Judges.

JUDGMENT

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM:

AFFIRMED. *See* Fed. Cir. R. 36.

Entered by Order of the Court

/s/ Peter R. Marksteiner
Clerk of Court

Date: November 3, 2022

JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS (SEPTEMBER 28, 2021)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

FRANK CALAPRISTI

v.

THE UNITED STATES

No. 18-612 C

JUDGMENT

Pursuant to the court's Order and Opinion, filed September 28, 2021, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted.

Lisa L. Reyes
Clerk of Court

By: /s/ Debra L. Samler
Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

ORDER AND OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS (SEPTEMBER 28, 2021)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

FRANK CALAPRISTI,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

No. 18-612

Implied-in-fact Contract; Mutuality of Intent; Failure to State a Claim; RCFC 12(b)(6).

Before: Thompson M. DIETZ, Judge.

ORDER AND OPINION

DIETZ, Judge.

Plaintiff, Frank Calapristi, sues for breach of an implied-in-fact contract that he claims existed between the United States and government contractor employees who worked on a United States Department of Energy nuclear site. His case presents nearly identical facts and claims as those in *Turping v. United States*, a directly related case. In *Turping*, the Federal Circuit affirmed this Court's dismissal for failure to state a

claim because the plaintiffs had not established mutuality of intent to contract. Before the Court in this case is the government's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims. Because Mr. Calapristi's complaint fails to allege sufficient facts to establish the government's intent to contract, the same defect in *Turping*, the government's motion to dismiss is GRANTED.

I. Background

A. Factual Background

The United States operates a plutonium production facility in southeastern Washington called the Hanford Nuclear Reservation (the "Hanford Site"). Am. Compl. ¶ 6, ECF No. 17. Since 1977, the United States Department of Energy ("DOE") has served as the lead government agency in charge of the Hanford Site. *Id.* ¶ 10. From 1982 to 1987, Hanford Engineering and Development Laboratory ("HEDL"), a subsidiary of the Westinghouse Corporation, operated the Hanford Site under a prime contract with DOE. *Id.* ¶ 11. There were multiple other contractors also performing work on the Hanford Site. *Id.* ¶ 12. In the normal course of operations, when a particular contractor was replaced, employees performing work for the old contractor would continue to perform the same work at the Hanford Site as an employee of the new contractor. *Id.* ¶¶ 19-20. This change in employer apparently caused administrative burdens when transferring individual employee pension plans and associated funds. *Id.* ¶ 23.

To ease the administrative burdens, sometime before 1987, DOE instructed HEDL and other Hanford Site contractors to draft a multi-employer pension plan

(the "MEPP") to cover all workers at the Hanford Site. Am. Compl. ¶¶ 30, 34; Am. Compl. Ex. 1. The Hanford Site contractors submitted the MEPP to DOE for review and approval. *Id.* ¶ 39. In 1987, DOE issued a solicitation for a new Hanford Site prime contract, which required the new prime contractor to implement the MEPP. *Id.* ¶ 49. In June 1987, DOE awarded the new prime contract to Westinghouse Hanford Company ("WHC"). *Id.* ¶ 52. Around that same time, WHC and its subcontractors implemented the MEPP "at the direction of DOE." *Id.* ¶ 53. All contractor employees at the Hanford Site became "Participants" in the MEPP. *Id.*

The MEPP states that it was "established effective June 29, 1987 . . . by the Employers for the benefit of Eligible Employees." Def.'s Mot. to Dismiss Ex. A at A6, ECF No. 20 [hereinafter Def.'s MTD].[1] The MEPP sets forth which contractors are "Employers" and which contractor employees are "Eligible Employees." *Id.* at A8-A9. The MEPP is administered by an independent pension committee (the "Plan Administrator") charged with the authority to control and manage the MEPP, including the ability to modify the plan, determine questions relating to eligibility, and compute the amount and type of benefits payable to any plan participant. *Id.* at A40-A41. Most relevant to Calapristi's

---

[1] The Court may consider documents attached to a motion to dismiss as part of the pleadings if they are referred to in the plaintiff's complaint and are central to their claim. *Ambrose v. United States*, 106 Fed. Cl. 152, 156 n.4 (2012); *see also Brooks v. Blue Cross and Blue Shield of Fl., Inc.*, 116 F.3d 1264, 1269 (11th Cir. 1997); *Wright v. Assoc. Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994).

complaint, Article 29 of the MEPP, titled "Terminations for Transfer," states:

> In the case of a Termination for Transfer, an Employee who becomes a Participant hereunder shall be entitled to credit for eligibility under Article 2, benefit accrual under Article 3 and vesting under Article 6 to such a degree as shall be determined by the Plan Administrator in order to assure that the Participant receives a benefit at normal retirement date *which is reflective of his years of service on the Hanford Reservation*. The Plan Administrator's decision shall be adopted by a rule pursuant to Article 11. *A Termination for Transfer means a termination from one contractor on the Hanford Reservation to another [contractor] which is determined to be in the best interests of the government.*

Id. at A79 (emphasis added).

In 1996, DOE again solicited bids for a new Hanford Site prime contractor. Am. Compl. ¶ 75. The new prime contract, referred to as the Project Hanford Management Contract, had a transition date of October 1, 1996. *Id.* The solicitation required the new prime contractor and its major subcontractors to hire employees from the workforce of the incumbent prime contractor and its subcontractors and to "assume the assets, liabilities, and other obligations and continue the defined benefit pension plans . . . of the incumbent contractor and integrated subcontractors." *Id.* ¶¶ 78-79. In this regard, the eventual prime contractor, Fluor Daniel Hanford, Inc. ("FDH"), submitted a bid whereby most of the Hanford Site workforce would continue to participate in the MEPP; however, a portion of the workforce

would be assigned to new entities referred to as the "Enterprise Companies." *Id.* ¶ 82. The Enterprise Companies would be subcontractors to FDH and would not become "sponsoring employers" under the MEPP. *Id.* ¶¶ 82, 84.

DOE announced on August 6, 1996 that management of the Hanford Site would be transferred from WHC and its subcontractors to FDH and its subcontractors on October 1, 1996. Am. Compl. 1 88. As part of the transfer, DOE executed a Transfer Agreement with WHC and FDH, which set forth, *inter alia*, which employers "would leave the MEPP and which would remain." *Id.* ¶¶ 91-93. Since the Enterprise Companies did not become "Employers" under the MEPP, the MEPP was modified to provide that Enterprise Company employees, which included Calapristi, would remain "Participants" in the MEPP; however, upon retirement, their respective retirement benefits would be calculated using the highest five-year salary (the "High-Five Benefit") during their service at the Hanford Site and would not include the number of years worked for the Enterprise Company. *Id.* ¶ 103. As a result, on or about October 2014, when employees of the Enterprise Companies began to retire and seek pension benefits under the MEPP, the Plan Administrator began paying benefits based on the High-Five Benefit approach, not the total years of service at the Hanford Site. *Id.* ¶¶ 136-37. Calapristi alleges this is a breach of an implied-in-fact contract that existed between the government and Enterprise Company employees, and he now seeks relief for the alleged breach. *Id.*

B. Procedural History

Calapristi filed his original class action complaint on April 30, 2018. Compl., ECF No. 1. The case was stayed shortly thereafter pending the outcome of *Turping v. United States*, 134 Fed. Cl. 293 (2017), *aff'd*, 913 F.3d 1060 (Fed. Cir. 2019), a related case on appeal before the Federal Circuit. *See* Notice of Directly Related Cases at 1-2, ECF No. 2 (stating the *Turping* case alleges "an essentially identical legal claim").

In *Turping*, a group of former Hanford Site workers employed by Lockheed Martin Services, Inc. ("Lockheed"), one of the Enterprise Companies, alleged an implied-in-fact contract with the government. *Turping*, 913 F.3d at 1060. The *Turping* plaintiffs claimed that DOE breached the contract by changing the benefits that the Lockheed employees were entitled to receive under the MEPP. *Id*. at 1064. This Court dismissed the case finding that the employees failed to allege facts sufficient to establish that the government intended to enter an implied-in-fact contract with the employees. *Turping*, 134 Fed. Cl. at 306-07. The Federal Circuit affirmed the dismissal finding that the employees failed to meet their burden of proving mutuality of intent. *Turping*, 913 F.3d at 1065.

After the Federal Circuit affirmed the dismissal, the Court lifted the stay, and Calapristi filed an amended complaint, setting forth additional facts by which he hopes to cure the defects present in *Turping*. *See* Am. Compl. The government subsequently filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted. Def.'s MTD at 23. After the motion was fully briefed, the Court conducted oral argument. *See* ECF No. 27. Upon motion by Calapristi, the Court

held a supplementary oral argument after reassignment of the case to the undersigned. *See* ECF No. 35.

II. Legal Standards

A challenge to this Court's ability to "exercise its general power with regard to the facts peculiar to the specific claim" is properly raised by a Rule 12(b)(6) motion. *Palmer v. United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999). When deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the Court construes the complaint's allegations in favor of the plaintiff. RCFC 12(b)(6); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982). The Court must inquire whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In other words, the Court must assess whether "a claim has been stated adequately" and whether "it may be supported by [a] showing [of] any sets of facts consistent with the allegations in the complaint." *Id.* at 563. The plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 555.[2]

---

[2] The government also seeks to dismiss Calapristi's complaint under RCFC 12(b)(1). The government asserts that Calapristi fails to properly plead the elements of a contract with the government, and, therefore, the complaint should be dismissed for lack of subject-matter jurisdiction. Def.'s MTD at 23. Calapristi's complaint alleges an implied-in-fact contract with the government, and this Court has jurisdiction under the Tucker Act to adjudicate "any claims against the United States founded . . . upon *any express or implied contract* with the United States." 28 U.S.C. § 1491 (emphasis added). Based on the allegations,

III. Discussion

This case presents nearly identical facts and allegations to those in *Turping*. *See* Pl.'s Resp. at 2 ("The Plaintiffs in this matter are a different group of Hanford workers who are making essentially the same claim against the [g]overnment as the Plaintiffs in *Turping*."), ECF No. 23. Calapristi seeks to distinguish his case from *Turping* by manufacturing a "test" derived from a footnote in the Federal Circuit's *Turping* decision and presenting additional facts that he argues demonstrate mutuality of intent. *Id.* at 10-11; *see also Turping*, 913 F.3d at 1067 n.2. The government asserts that, even with the additional facts, the *Turping* decision controls the outcome of this case. Def.'s MTD at 1-3. Because the additional facts presented by Calapristi fail to demonstrate the government's intent to contract—the same defect identified in *Turping*—his complaint likewise must be dismissed.[3]

Like the plaintiffs in *Turping*, Calapristi has the burden of proving the existence of an implied-in-fact contract. *Pac. Gas & Elec. v. United States*, 3 Cl. Ct. 329, 339 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984). An implied-in-fact contract with the federal government requires: (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) "actual

---

Calapristi's complaint survives the government's motion to dismiss on jurisdictional grounds. *See Trauma Serv. Grp., Inc. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (a well-pleaded allegation of an implied-in-fact contract is sufficient to overcome a jurisdictional challenge).

[3] The Court does not consider the remaining three required elements of an implied-in-fact contract because the Court dismisses the complaint on the grounds that Calapristi fails to prove mutuality of intent—a threshold condition.

authority" on the part of the government's representative to bind the government in contract. *Id.*; *see City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). While the requirements for an implied-in-fact contract are indistinguishable to those for an express contract, the nature of the evidence differs. *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). Implied-in-fact contracts are agreements "founded upon a meeting of minds and [are] inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Trauma Serv. Grp., Inc. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 526 U.S. 417, 424 (1996)). An agreement will not be implied "unless the meeting of minds was indicated by some intelligible conduct, act or sign." *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 598 (1923). "In short, an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates mutual assent." *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998).

Most critical to this case, binding precedent clearly establishes that mutuality of intent to contract is a threshold condition for contract formation. *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). A plaintiff cannot meet its burden if it fails to show mutuality of intent. *Hanlin*, 316 F.3d at 1330; *see also Columbus Regional Hospital v. United States*, 990 F.3d 1330, 1344-45 (Fed. Cir. 2021) (finding plaintiff failed to meet its burden of establishing mutual intent to contract).

Calapristi argues that an implied-in-fact contract arose from the government's offer "that if the employees

worked at the Hanford [S]ite, the [g]overnment would fund the MEPP and enforce Article 29 of the MEPP." Am. Compl. ¶ 69. To advance his argument, Calapristi strings together the government's conduct in connection with the MEPP to demonstrate that the government intended to be contractually bound to Enterprise Company employees, like Calapristi, under the MEPP. *Id.* ¶¶ 30, 38-41, 45-46, 49, 53. The problem for Calapristi is that this argument mirrors the argument rejected by the Federal Circuit in *Turping*.

In *Turping*, the Federal Circuit found that "nothing in the MEPP indicates intent by the [g]overnment to be in privity of contract with Lockheed's employees." 913 F.3d at 1066. The MEPP does not list the government as a party to the contract and only evidences a contractual relationship between the participating employers and employees. *Id.* The MEPP also specifies that the Plan Administrator, not the government, is the entity that funds the plan and makes benefits determinations. *Id.* The Federal Circuit concluded that the "[g]overnment funds Lockheed and other [e]mployers to manage Hanford, but there is no evidence that the [g]overnment intended to be contractually obligated to Lockheed's or other [e]mployer's employees, either through the MEPP or by other means." *Id.* at 1067. For these same reasons, Calapristi's argument in this case also fails.

To salvage his complaint from the same outcome as *Turping*, Calapristi manufactures a "test" derived from the following footnote in the Federal Circuit's *Turping* decision:

> Appellants argue that WHC acted as the [g]overnment's "agent" in drafting Article 29 of the MEPP, which provided for Hanford

> workers to receive benefits reflective of their total years of service. Appellants do not plead sufficient plausible facts to support this agency argument. Likewise, Appellants cannot support their broad allegation that only the [g]overnment—a non-party to the MEPP—had the authority to "enforce" Article 29 and compel subcontractors to remain in the MEPP.

913 F.3d at 1067 n.2 (citations omitted). Calapristi states that this footnote "essentially [lays] out a roadmap for . . . the Court to determine whether the parties' conduct in this matter demonstrated the requisite mutual assent to form a contract." Pl.'s Resp. at 10. Calapristi argues all that is needed to demonstrate the government's intent is a showing that: (1) the WHC acted as an agent of the government in drafting Article 29[4] and (2) only the government had authority to enforce Article 29 and compel contractors to remain in the MEPP. *Id*. Calapristi presents "new facts" to satisfy his "test."

The Court is not persuaded by Calapristi's interpretation of the *Turping* footnote or the "new facts" alleged in his amended complaint. Calapristi overstates

---

[4] There appears to be a factual discrepancy with which contractor was directed by DOE to draft the MEPP. The *Turping* plaintiffs' stated "WHC . . . draft[ed] Article 29 of the MEPP[,]" *Turping*, 913 F.3d at 1067 n.2 (citing Appellant Op. Br. at 54), and Calapristi states HEDL and various Hanford Site contractors drafted the MEPP. Am. Compl. ¶ 30. Resolution of this discrepancy is not necessary for the Court to reach its decision. Whether it was WHC or HEDL, Calapristi's agency argument still fails because there is no evidence that either contractor was acting as an authorized agent of the government in connection with the MEPP.

the meaning of the footnote. The footnote did not create a "test" for demonstrating intent to contract—a well-established threshold condition for contract formation—but instead simply rejected alternative arguments raised, but not sufficiently supported, by the *Turping* plaintiffs. The defect identified in *Turping* is the plaintiffs' failure to provide any evidence of the government's intent to contract, and the new facts presented in this case, however packaged, do not remedy this defect.

Calapristi points to a sworn statement from Ernest Vodney ("Vodney") to satisfy the first prong of his "test" by showing that HEDL, the prime contractor whose employees assisted with drafting the MEPP, was acting as an "agent" of the government in drafting Article 29 of the MEPP. *See* Am. Compl. Ex. 1 [hereinafter Vodney Decl.]; *see also* Am. Compl. ¶ 35. Calapristi argues that the sworn statement "shows conclusively that the [g]overnment contractor, HEDL, was acting under contract with the DOE and at the explicit direction of the DOE" when it created the MEPP and "was thereby acting as an 'agent' of the [g]overnment." Pl.'s Resp. at 11. Calapristi presumably advances this agency argument to avert the general rule that subcontractors—like Calapristi and other Enterprise Company employees—are not in privity of contract with the government. *See Turping*, 913 F.3d at 1066.

This argument is unpersuasive. Vodney was employed as the Controller at HEDL and was one of two employees of HEDL involved in drafting the MEPP. Vodney Decl. ¶ 6; Pl.'s Resp. at 11. To establish a contract with the United States, the plaintiff must show that the government representative who entered

or ratified the agreement had actual authority to bind the government. *Trauma Serv. Grp*, 104 F.2d at 1326; *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984), *cert denied*, 474 U.S. 818 (1985). While it may be true that DOE tasked HEDL with drafting the MEPP, HEDL was acting in its role as a government contractor—and Vodney as an employee of a HEDL—when drafting the MEPP. Neither were acting as an agent of the government with authority to bind the government to contractual obligations. *See BGT Holdings LLC v. United States*, 984 F.3d 1003, 1015 (Fed. Cir. 2020) (actions by unauthorized government employees do not bind the government). There is no clear contractual consent for HEDL or Vodney to act as an agent of the government with respect to the MEPP, and nothing in the MEPP or otherwise provides that the government will be directly liable to participating employees under the MEPP. *See Central Freight Lines, Inc. v. United States*, 87 Fed. Cl. 104, 110 (2009) (citing *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983)).

To satisfy the second prong of his "test," Calapristi points to the Transfer Agreement executed by DOE, a DOE policy governing pension programs, and various press releases issued by DOE to show that the government exclusively controlled the operation and enforcement of Article 29 of the MEPP. Am. Compl. ¶¶ 47, 93-95, 100, 102, 116; Pl.'s Resp. at 2-3.

Calapristi argues that the Transfer Agreement "demonstrates conclusively that the [g]overnment, as a party to the Transfer Agreement, exercised complete and total control over which subsequent contractors (and thus which Hanford [S]ite employees) would be included in the MEPP." Pl.'s Resp. at 12. The purpose

of the Transfer Agreement was to "facilitate an orderly transfer of . . . documents, agreements and property" between the contractors, and, in furtherance of this purpose, it addressed a broad spectrum of Hanford Site operational and management items. Am. Compl. Ex. 3 at 50. While the fact that DOE was a party to the Transfer Agreement may show that DOE exercised control over which contractors would assume liability and responsibility for the MEPP, as the Federal Circuit made clear in *Turping*, the degree of government involvement or control over a government project does not indicate an implied-in-fact contract enforceable against the government. 913 F.2d at 1066-67. The control exercised by DOE as a party to the Transfer Agreement is a natural part of DOE's role as lead government agency at the Hanford Site overseeing the transition between contractors and ensuring continuity of operations. This control does not evidence DOE's intent to enter a contract with government contractor employees. Further complicating this argument is the fact that the Transfer Agreement does not indicate any government role in the administration of the MEPP and instead assigns all administrator responsibilities to the new prime contractor, FDH. Am. Compl. Ex. 3 at 65 ("FDH accepts all responsibility as administrator for the [MEPP.]").

Calapristi next points to DOE Order 3830.1 (the "Order") to demonstrate that "DOE had the 'authority' to enforce Article 29 and compel subcontractors to remain in the MEPP" and "also the responsibility to do so." Pl.'s Resp. at 13. The purpose of the Order is "to establish policies, procedures, responsibilities, and authorities relating to establishment, continuity, and termination of pension programs applicable to operating

and onsite service contracts" and to set forth objectives and requirements for "pension programs funded by DOE." Am. Compl. Ex. 2. at 37-38, 40. However, nothing in the Order demonstrates the government's intent to establish privity of contract with anyone, let alone government contractor employees. *See D & N Bank v. United States*, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003) ("[P]erformance of . . . regulatory or sovereign functions [do] not create contractual obligations."). Further, Calapristi does not identify any specific provision in the Order that provides DOE with the authority or responsibility to enforce Article 29 of the MEPP. By issuing this Order, the government does not intend to bind itself in contract. *See Turping*, 134 Fed. Cl. at 307 (citing *Anderson*, 344 F.3d at 1357) ("DOE Order 350.1 does not evidence an intent to contract with Plaintiffs, because it is a 'regulation of an executive agency,' and 'regulatory proclamations are insufficient to create contractual obligations.'"); *see also Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985).

Calapristi also identifies four press releases which he argues "makes . . . clear that it is the DOE, and the DOE alone, who decides which Hanford area employees will be included in the MEPP when there is a change in contractors." Pl.'s Resp. at 12. Three of the press releases identified by Calapristi communicate information about upcoming Hanford Site solicitations, and one communicates information about pension benefits for individuals accepting employment with Enterprise Companies. *See* Am. Compl. Ex. 4 at 76-88. These press releases illustrate DOE's oversight function as the lead government agency at the Hanford Site. None of the press releases provide any indication

that the government intends to create privity of contract with government contractor employees, and this degree of government involvement does not indicate an implied-in-fact contract enforceable against the government. *Turping*, 913 F.2d at 1066-67.

IV. Conclusion

As in *Turping*, the underlying defect in this case is a failure to establish intent by the government to enter a contract. Without sufficient facts to demonstrate mutuality of intent, Calapristi fails to meet his burden of proving an implied-in-fact contract, and his complaint must be dismissed under RCFC 12(b)(6).

For the reasons set forth in this opinion, the government's Motion to Dismiss is GRANTED. The Clerk of the Court is DIRECTED to enter judgment accordingly.

IT IS SO ORDERED.

/s/ Thompson M. Dietz
Judge

FIRST AMENDED
CLASS ACTION COMPLAINT
(JUNE 3, 2019)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

FRANK CALAPRISTI, AND
OTHER SIMILARLY SITUATED PERSONS

v.

THE UNITED STATES

No. 18-cv-00612-VJW

I. Introduction

1. This case is filed on behalf of the above named Plaintiffs whose pension retirement benefits were substantially reduced by the United States of America (hereafter the "Government") in breach of an implied contract in fact that existed, and continues to exist, between an executive agency of the Government, the United States Department of Energy (hereafter the "DOE"), and the Plaintiffs. The Plaintiffs are entitled under the Tucker Act to obtain just compensation from the Government for the Government's breach of the implied contract in fact.

II. Jurisdiction

2. This Court has exclusive subject matter jurisdiction pursuant to 28 U.S.C. § 1491 because the

United States is the defendant; the amount being sought by Plaintiffs individually, and each and every member of the Class, exceeds $10,000; and these claims are brought within six (6) years.

III. Venue

3. Washington D.C. is the appropriate venue pursuant to 28 U.S.C. § 1491.

IV. Parties

4. The Plaintiffs (hereafter "Plaintiffs" or "Class Members") are all individuals who

a) were employed by contractors at the United States Government's Hanford site in southeastern Washington state between 1987 and October 1, 1996,

b) were Participants in The Hanford Multi-Employer Pension Plan, Engineering and Operations (hereafter the "MEPP") on September 30, 1996,

c) had their contractor (employer) terminated from the Hanford site by the Government on or about September 30, 1996,

d) were transferred to a contractor which was a so-called "Enterprise Company" by the Government on or about October 1, 1996, and

e) have made a claim for their retirement benefits in the six years preceding the initiation of this action, or who have the right to make a claim for their retirement benefits at any point in the future.

5. The Defendant is the United States of America ("Government") together with The Hanford Multi-Employer Pension Plan, Engineering and Operations (the MEPP) which Plaintiffs allege is an entity so completely controlled by the United States Department of Energy that it is in fact and law a part of the United States Government.

V. Operative Facts

6. In January 1943 the United States Government made the decision to build the United States plutonium production facilities at the Hanford site in southeastern Washington state.

7. Ultimately, that decision would lead to the Hanford site becoming the largest and most dangerous nuclear and hazardous waste site in the United States and perhaps the world.

8. From the beginning of the Government's activities at the Hanford site and continuing to this day, the work on the Hanford site, including but not limited to manufacturing plutonium and cleaning up the waste generated by that manufacturing, is performed by individuals either employed by the Government or by individuals employed by prime or sub-tier contractors of the Government.

9. All of these employees are performing tasks, including but not limited to manufacturing plutonium at a Government-owned facility and cleaning up the waste generated by manufacturing plutonium at a Government-owned facility, that are the sole and exclusive responsibility of the United States Government, and are thus decidedly governmental in nature.

10. On October 1, 1977 the United States Department of Energy became the lead agency for the Government's management of the Hanford site.

11. Between 1982 and 1987 a subsidiary of the Westinghouse Corporation called the Hanford Engineering and Development Laboratory (hereafter "HEDL") was operating the Hanford site under a prime contract with the United States Department of Energy.

12. By 1987, along with HEDL, no fewer than seven separate contractors were providing services to the Government at the Hanford site.

13. The contractors and their employees at the Hanford site had numerous characteristics in common.

14. All of the contractors, and all of the contractor's employees, were performing work on the Hanford site for the sole and exclusive benefit of the Government.

15. Directly or indirectly, all contractors and all of their employees were paid for their services by the Government.

16. All contractors offered retirement benefits to their employees upon retirement that included a defined benefit pension.

17. At all times relevant to this litigation, the funding for the defined benefit pension was directly or indirectly provided exclusively by the Government.

18. At all times relevant to this litigation, the participation of all prime and sub-tier contractors, and the participation of all of their employees, in the

defined benefit pension plan, was controlled exclusively by the Government.

19. Prior to 1987, when a particular contractor was replaced with a new contractor, or when a portion of work performed by one contractor was transferred to another contractor, (often referred to as a "successor contractor") the actual workers who performed that work would typically continue to perform their same jobs, in the same locations.

20. Prior to 1987, when a contractor on the Hanford site lost their contract and left the Hanford site, their employees would have a choice; they would either be transferred to a successor contractor and stay on the Hanford site, or they would stay employed with their old employer and leave the Hanford site along with their employer.

21. Prior to 1987, if they left the Hanford site to stay with their old employer, their participation in their old employer's pension plan would typically continue in an uninterrupted fashion.

22. Prior to 1987, if they stayed at the Hanford site, the credit for their years of service with their old employer's pension plan would typically be transferred to their new employer, and the funds necessary to fund their years of service would also typically be transferred from their old employer's pension plan to their new employer's pension plan.

23. Prior to 1987, the termination of one contractor and transfer of the work to a successor contractor by the Government therefore created a significant administrative burdens and costs for the Government related to transferring the pension funds for thousands

of employees from the old contractor to the new contractor.

24. To relieve the Government from these costs and burdens created when the Government terminated a contractor and hired a successor contractor, in 1986 the United States Department of Energy decided to create a pension plan for the workers of the Hanford site contractors that would be separated from their employers.

25. It was the intention of the Government that this new pension plan would separate the obligations of the pension plan to the Hanford site workers from their continued employment with any particular Hanford site employer.

26. This new pension plan was created by the Government to directly and explicitly tie the employees' pensions to their continuing to work on the Government's behalf at the Hanford site.

27. It was the intention of the Government that this new pension plan would allow the Government to remove and replace contractors doing work on the Hanford site in and out of the pension plan at the Government's convenience, while keeping all of the Hanford site employees in the pension plan.

28. To do so, and in exchange for removing these Hanford employees from their company-based pension plans, the Government included provisions in the new pension plan that explicitly promised that these Hanford employees would continue to participate in the new pension plan even if the Government terminated their old contractor/employer and transferred them to a new contractor/employer.

29. Within the new pension plan, the Government also explicitly guaranteed the Hanford employees that their years of service at the Hanford site would be counted in the calculation of their retirement benefits at their retirement even if, from time to time, the Government terminated their old contractor/employers and transferred them to new contractor/employers.

30. To achieve that end, sometime prior to 1987, officials with the United States Department of Energy who had the actual authority to bind the United States Government instructed the President of HEDL, John Nolan, and the heads of the other various Hanford contractors, to work together to draft a multi-employer pension plan (hereafter the multi-employer pension plan, or the "MEPP") that would cover all of their employees in anticipation of a consolidated Hanford contract being awarded in 1987.

31. By combining the worker's separate, company based pensions into a single pension plan that was separated from their employers and tied instead to their continued work at the Hanford site, the United States Department of Energy sought to simplify the Government's administrative burden of transferring any particular work scope from one contractor to a successor contractor.

32. Absent DOE's explicit orders and instructions to do so, none of the contractors or their employees ever had the power or authority to draft a new pension plan and impose it on all of the workers at the Hanford site, particularly a contract that contained obligations that would extend beyond their contracts with the Government.

33. The Government therefore had the sole authority to create, administer, and dictate the terms of the MEPP.

34. To comply with the Government's directive, sometime prior to the consolidation of the Hanford work into a single prime contract in 1987, HEDL and the various Hanford contractors each appointed two employees to a working group tasked with drafting the multi-employer pension plan that would become the MEPP.

35. HEDL appointed Earnest Vodney and Paul Matthews to the working group.

36. Earnst Vodney was the Controller of HEDL at the time.

37. Paul Matthews was the head of the Human Resources department of HEDL at the time.

38. During the process of drafting the multi-employer pension plan, officials with the United States Department of Energy who had the actual authority to bind the United States Government would periodically review the working group's drafting activities and coordinate with the working group to provide the Government's input into the terms and conditions of the emerging multi-employer pension plan.

39. When the working group completed the multi-employer pension plan, it was submitted to the United States Department of Energy for final review and approval by officials with the United States Department of Energy who had the actual authority to bind the United States Government to the responsibilities contained within the multi-employer pension plan.

40. When the working group completed the multi-employer pension plan, officials with the United States Department of Energy who had the actual authority to bind the United States Government to responsibilities contained within the multi-employer pension plan provided their final review and approval of the multi-employer pension plan.

41. The officials with the United States Department of Energy who had the actual authority to bind the United States Government to responsibilities contained within the multi-employer pension plan intended to bind the Government to those responsibilities set forth in the muti-employer pension plan that could only be fulfilled by the Government at the time that they provided their final review and approval of the multi-employer pension plan.

42. The sworn statement of Earnest Vodney attesting to these actions by the United States Department of Energy is attached herewith as Exhibit 1.

43. The responsibilities set forth in the muti-employer pension plan that could only be fulfilled by the Government at the time the MEPP was implemented were two-fold; to provide the funding to the Hanford area contractors to fund the MEPP, and to insure that Hanford area employees would continue to participate in the MEPP when the Government terminated their old contractor/employer and replaced them with a new contractor/employer.

44. The Government acknowledged its responsibility to provide the funding to the Hanford area contractors to fund the MEPP and to insure that Hanford area employees would continue to participate in the

MEPP when the Government terminated their contractor/employer and replaced them with another contractor/employer in the Department of Energy's official policies.

45. At the time the MEPP was put in place in 1987, and at all times thereafter, the Government maintained exclusive authority over the management of Department of Energy reimbursed contractor pension programs.

46. The Department of Energy's exclusive authority over the management of Department of Energy reimbursed contractor pension programs was set forth in DOE Order 3830.1, which was made effective 8-23-1982 and which remained in effect up to and through 1987, and which stated, in pertinent part:

> 1. Purpose. To establish policies, procedures, responsibilities, and authorities relating to establishment, continuity and termination of pension programs applicable to operating and onsite service contracts subject to Department of Energy (DOE) Procurement Regulation (PR) 9-50.001.
>
> 2. Scope. The provisions of this Order apply to all elements of DOE which have cognizant authority over operating and onsite service contractor operations and to operating and onsite service contractors performing work for DOE.
>
> 6. RESPONSIBILITIES AND AUTHORITIES
>
> d. Contracting Officer shall:
>
> (1) After approval by Director of Industrial Relations, execute approval on contract

provisions relating to pension programs which affect:

(a) New contracts or contract renewals;

(b) Changes in plan provisions

47. DOE Order 3830.1 thereby directed the DOE contracting officers to control "contract provisions relating to pension programs which affect new contracts or contract renewals" and "changes in (pension) plan provisions.

48. A copy of DOE Order 3830.1 is attached herewith as Exhibit 2.

49. In the solicitation for the Hanford prime contract in 1987, officials with the United States Department of Energy who had the actual authority to bind the United States Government to responsibilities contained within the MEPP then required the contractors who bid on the prime contract to implement the MEPP as part of the scope of work for the new prime contract.

50. Because the Government controlled the terms and conditions of all contracts and subcontracts for all entities and individuals working on the Hanford site, and consistent with the DOE's policy, the DOE's contracting officers had the sole and exclusive power and authority to determine which contractors and which Hanford site employees would participate in the MEPP.

51. Absent DOE's contracting officer's direct authorization, none of the contractors, past, present, or future, ever had, or ever will have, the ability or authority to require any entity, including themselves, to implement or participate in any multi-employer pension plan at the Hanford site.

52. On June 29, 1987 Westinghouse Hanford Company (WHC) was awarded the prime contract for the Hanford site by contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government, and WHC was given overall responsibilities for site management & operations at the Hanford site.

53. On or about the same date, contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government directed WHC and WHC's subcontractors to implement the MEPP as set forth in the solicitation and, at DOE's direction, all of the employees of the contractors and sub-contractors at the Hanford site thereby became "Participants" in the MEPP in 1987 as the term "Participants" is defined in the MEPP.

54. At the time that Westinghouse Hanford Company (WHC) was awarded the prime contract for the Hanford site, contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government, intended to bind the Government to the responsibilities set forth in Article 29 of the MEPP.

55. At the direction of DOE's contracting officer, and as set forth in the terms and conditions of the MEPP, the pension funds that had been earned by these employees under their prior employer's pension plans, and the obligations of those pension plans, were all then transferred into the MEPP.

56. The MEPP included at least one implied obligation and at least one explicit obligation that could only ever be fulfilled by the Government.

57. The implied obligation was for the Government to provide the money to the Hanford contractors, present and future, so that they could in turn adequately fund the MEPP.

58. To fulfill that implied obligation, the Government's contracting officers implicitly agreed to include in contracts with Hanford contractors the obligation that the Hanford contractors who received government funds for work at the Hanford site would use some portion of those funds to fund the obligations of the MEPP.

59. No one except the Government ever had the intention, authority, ability or obligation to fund the MEPP, because everyone, including particularly the contracting officers with the United States Department of Energy with the actual authority to bind the United States Government, knew that the contracting officers and the Government had the sole and exclusive ability to authorize any and all payments to any and all contractors and subcontractors at the Hanford site, and that the Government further had the sole and exclusive ability to require that those contractors and subcontractors use a portion of those funds to fund the MEPP.

60. The explicit obligation created by the Government when the Government implemented the MEPP was to insure that when the Government decided to change contractors, the Government's contracting officers would draft all new contracts with the new contractors to insure that a Participant in the MEPP would continue to accrue credit for their "Years of Service on the Hanford Reservation" to "assure that the Participant receives a benefit at Normal Retirement Date which is reflective of his Years of Service on the

Hanford Reservation" as was required by Article 29 of the MEPP.

61. The explicit obligation was set forth as Article 29 in the MEPP, which states: Termination and Transfer

> In the case of a Termination for Transfer, an Employee who becomes a Participant hereunder shall be entitled to credit for eligibility under Article 2, Benefit Service under Article 3 and Vesting Service under Article 6 to such a degree as shall be determined by the Plan Administrator in order to assure that the Participant receives a benefit at Normal Retirement Date which is reflective of his Years of Service on the Hanford Reservation. The Plan Administrator's decision shall be adopted by a rule pursuant to Article 11. A termination for transfer means a termination from one contractor on the Hanford reservation to another contractor which is determined to be in the best interests of the Government.

62. At the time the MEPP was put in place at the Hanford site, the contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government, intended to bind the Government to enforcing Article 29 of the MEPP, because they knew that the Government was the only entity that could ever enforce the terms of Article 29, and if the Government was not bound to Article 29, no one was.

63. While Article 29 of the MEPP purports to create an obligation of the "Plan Administrator," at

the time the MEPP was put in place at the Hanford site, contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government knew that the Plan Administer lacked the authority to enforce Article 29 of the MEPP.

64. While Article 29 of the MEPP purports to create an obligation of the "Plan Administrator," at the time the MEPP was put in place at the Hanford site, contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government knew that the Government was the only entity that held the ability and authority to enforce Article 29 of the MEPP.

65. While Article 29 of the MEPP purports to create an obligation of the "Plan Administrator," beginning with the Government's creation of the MEPP, and at all times relevant to this litigation, contracting officers with the United States Department of Energy who had the actual authority to bind the United States Government have actually controlled the operation and implementation of Article 29 of the MEPP.

66. No one except the Government ever had the intention, authority, ability or obligation to enforce Article 29 of the MEPP, because everyone, including particularly officials with the United States Department of Energy with the actual authority to bind the United States Government who formed and then administered the MEPP, always knew that the Government had the sole and exclusive ability to determine the terms, conditions, and requirements of all contracts at the Hanford site, and to determine the inclusion or exclusion of

all future contractors and contractor employees in the MEPP.

67. At the time the Government put the MEPP in place in 1987, and as set forth in DOE Order 3830.1, the Government's contracting officers (and not the Plan Administrator of the MEPP) had the sole authority to "execute approval on contract provisions relating to pension programs which affect . . . New contracts or contract renewals (and) Changes in plan provisions."

68. By making the implicit promise to fund the MEPP and the explicit promise set forth in Article 29 of the MEPP, the contracting officers acting on behalf of the United States Government made an offer to the employees at the Hanford site in 1987.

69. The terms of the government's offer were that if the employees worked at the Hanford site, the Government would fund the MEPP and enforce Article 29 of the MEPP.

70. When employees accepted the Government's offer by working on the Hanford site, they formed a contract in fact between the Government and themselves obligating the government to fund the MEPP and further obligating the Government to honor Article 29 of the MEPP in exchange for their continued work at the Hanford site.

71. Even if the Government's conduct in forming the MEPP did not constitute an offer, the Government nevertheless formed a contract in fact between the Government and the Participants in the MEPP obligating the Government to fund the MEPP and obligating the Government to enforce Article 29 of the MEPP when contracting officers with the United States Department of Energy who had the actual authority

to bind the United States Government exercised complete and total control over the administration of Article 29 of the MEPP.

72. Beginning concurrently with the implementation of the MEPP the Government began making payments to the Hanford contractors to fund the MEPP.

73. The Government's payments to fund the MEPP have continued to this day.

74. The Government is the only entity that has ever funded the MEPP, and the funds paid by the Government to the various Hanford contractors to be paid into the MEPP are the only funds that have ever been paid into the MEPP.

75. In 1996 the Government asked for bids on a new prime contract for the management of the Hanford site called the Project Hanford Management Contract (PHMC) with a transition date of October 1, 1996.

76. The Government's decision to transition to the PHMC was the first instance of a "Termination for Transfer" that would trigger the enforcement of Article 29 of the MEPP, and therefore the first opportunity for the Government's contracting officers to demonstrate the Government's complete control over the implementation and enforcement of Article 29 of the MEPP.

77. When the Government first made the decision to transition to the PHMC in 1996, the Government initially indicated to the Participants in the MEPP that the Government would enforce the requirements of Article 29 of the MEPP for all Hanford employees as part of the transition to the PHMC contract.

78. The Government's solicitation for the PHMC contract contained a specific requirement that the Contractor who was awarded the PHMC contract would be required to ensure that the Plaintiffs would continue to participate in the MEPP under exactly the terms and conditions that they had prior to the termination for transfer, in a manner that was fully consistent with the Government's assent to the Government's obligations under Article 29 of the MEPP.

79. The Government's Solicitation, in pertinent part, stated:

> The Contractor agrees to the following:
>
> > In filling employment positions for work under the contract, other than management positions, the Contractor and Major Subcontractors, agrees to hire employees who are or can become qualified by the time the work commences from the workforce of the incumbent contractor and its integrated subcontractors (Westinghouse Hanford Company, ICF Kaiser Hanford, and Boeing Computer Services Richland). The Contractor and Major Subcontractors shall assume the assets, liabilities, and other obligations and continue the defined benefit pension plans (does not include any defined contribution plans) of the incumbent contractor and integrated subcontractors.

80. In setting forth this requirement, the Government clearly indicated that the Government assented to, and intended to enforce, the requirements of Article 29 of the MEPP.

81. Shortly thereafter, one of the bidders on the PHMC contract, Fluor Daniel Hanford, Inc. (FDH),

submitted a bid that, if accepted, would require the Government to repudiate the Government's obligations under Article 29 of the MEPP to a sub-set of the Hanford area employees.

82. As set forth in FDH's bid, the majority of the Hanford workforce would continue to participate in the MEPP as DOE had intended, but a portion of the workforce would be assigned to new entities, created to be sub-contractors to FDH, which were termed "Enterprise Companies."

83. As had happened in the past, and as set forth in FDH's bid, the actual workers who performed the work assigned to these Enterprise Companies would continue to perform their same jobs, in the same locations at the Hanford site, including being exposed to highly dangerous radioactive and toxic materials that have given some members of the Class cancer and other fatal health consequences.

84. As set forth in FDH's bid, these Enterprise Companies would not become "sponsoring employers" of the MEPP.

85. As set forth in FDH's bid, since these Enterprise Companies would not become "sponsoring employers" of the MEPP, it would result in a financial savings to the Government.

86. FDH's bid therefore enticed the Government to repudiate the obligations to the Hanford site employees who would work for those Enterprise Companies as those obligations were set forth in Article 29 of the MEPP, in the DOE's policy, and in the Government's solicitation.

87. The Government did not have to accept the terms of FDH's bid.

88. On August 6, 1996, the Government announced that the prime contract for the management of the Hanford site was to be terminated and transferred by the United States Department of Energy from the incumbent contractors Westinghouse Hanford Company (WHC) and its subcontractors to the successor contractor Fluor Daniel Hanford, Inc. (FDH) and its team of integrated subcontractors with a transition date of October 1, 1996 (hereafter the "1996 changeover").

89. For the vast majority of the Hanford workforce affected by the 1996 changeover, the Government would honor the implied contract the Government had with those workers and would require their new employers would be identified as "Employers" under the terms of the MEPP.

90. However, for the employees of "Enterprise Companies," the Government would repudiate the Government's obligations as those obligations were set forth in Article 29 of the MEPP, in the DOE's policy, and in the Government's solicitation.

91. On or about September 30, 1996 the Government entered into a "Transfer Agreement" with Westinghouse Hanford Company, ICF Kaiser Hanford Company, and FDH.

92. A copy of the Transfer Agreement is attached as Exhibit 3.

93. Within the terms of the Transfer Agreement, the Government dictated which companies would leave the MEPP and which would remain, thereby

demonstrating the Government's complete control over the operation of Article 29 of the MEPP.

94. The Plan Administrator of the MEPP was not a participant or signatory to the Transfer Agreement, demonstrating that obligations that purported to be the responsibilities of the Plan Administrator in Article 29 of the MEPP were actually the responsibilities of the Government.

95. At all times subsequent to the Transfer Agreement, the Government also continued to dictate the operation of the MEPP, particularly Article 29.

96. By failing to require that the Enterprise Companies become "Employers" in the MEPP in the Transfer Agreement, the Government repudiated the Government's obligation to the employees of the Enterprise Companies to enforce Article 29 of the MEPP at their retirement.

97. When it became apparent that their Enterprise Company employers were not named as "Employers" in the MEPP, certain Enterprise Company employees (who are not Plaintiffs in this action) sought to begin withdrawing their pension benefits from the MEPP, as was their right under the terms of the MEPP and under ERISA 29 U.S.C. § 1001 et seq.

98. The Government, acting through the MEPP, refused to allow these employees to begin drawing their pensions because the MEPP had insufficient resources to pay these pension benefits and the MEPP would not remain adequately funded under ERISA if these employees were permitted to withdraw their pensions, which would result in the Government being forced to make additional contributions to the MEPP.

99. On October 10, 1996 the Government, realizing that it could not afford to have the Enterprise Company employees withdraw their pension benefits from the MEPP and keep the MEPP adequately funded under the requirements of ERISA, announced that the Enterprise Company employees who continued to work at the Hanford site would be forced to remain in the MEPP.

100. On October 11, 1996 the Department of Energy issued a press release describing how the Government would amend the MEPP and the terms under which the Enterprise Employees would remain in the MEPP.

101. A copy of the October 11, 1996 press release is attached herewith within Exhibit 4.

102. On January 15, 1997, the Government then amended the MEPP in the manner set forth in the October 11, 1996 press release (hereafter the "January 15, 1997 Amendment").

103. The January 15, 1997 Amendment recited that the Enterprise Company employees would remain Participants in the MEPP, and upon retirement the MEPP would calculate Enterprise Company employees pension benefits using the highest five year salary during their employment at the Hanford site (hereafter the "high five benefit"), but that calculation would not include the number of years they worked for Enterprise Company, thereby explicitly repudiating the contract in fact between the Plaintiffs and the Government set forth at Article 29 of the MEPP.

104. By its own terms, the January 15, 1997 Amendment was made retroactive to September 30, 1996.

105. When the Government put in place the January 15, 1997 Amendment, it created a new financial obligation to the Plaintiffs, the high five benefit.

106. The high five benefit required ongoing contributions to the MEPP to account for the fact that the Plaintiffs were continuing to work and get raises at the Hanford site, thereby increasing the amount the MEPP would ultimately be required to pay them at retirement.

107. Since the Government dictated that the Plaintiff's employers, the Enterprise Companies, were never "Employers" in the MEPP in the Transfer Agreement, the Enterprise Companies therefore had no ability or obligation to fund the Plaintiffs' high five benefit.

108. Beginning in 1997 and continuing to this day, the Government has made payments into the MEPP to account for the ongoing increases in the Plaintiffs' high five benefit.

109. By making payments into the MEPP on the Plaintiffs' behalf to account for the Plaintiffs' high five benefit, the Government has demonstrated that the Government assented to having obligations directly to the Plaintiffs by virtue of the MEPP.

110. Plaintiffs are still Participants in the MEPP.

111. Article 29 is still a term of the MEPP.

112. Subsequent to the Government's repudiation of the contract in fact between the Government and the Plaintiffs, on numerous occasions the Government acting by and through its agent the MEPP has instructed the Plaintiffs that they could not challenge

the purported changes in the Plaintiff's retirement benefits until the Plaintiffs retired.

113. While the MEPP purports to have an independent pension committee charged with the administration and operation of the plan (the Plan Administrator), at all times relevant to this litigation, the United States Department of Energy has actually controlled the terms, administration, and operation of the MEPP.

114. The Transfer Agreement was one example of the Government exercising control over the terms, administration, and operation of the MEPP.

115. Another example of the Government's control of the MEPP is the fact that all actions of the Plan Administrator that would have a financial impact on the MEPP require the prior written approval of the United States Department of Energy.

116. Another example of the Government's total and complete control of the MEPP is the Government's control over which contractors and which employees will be participants in the MEPP, and under what terms and conditions, which the Government has announced prior to or during every contract change on the Hanford Site through a press release wherein the United States Department of Energy describes how the Government will direct the Plan Administrator to amend the MEPP to comply with the decisions made by the United States Department of Energy.

117. Copies of some of those press releases are attached herewith within Exhibit 4.

118. Another example of the Government's control of the MEPP is the fact that any amendments to the

MEPP by the Plan Administrator require the prior written approval of a contracting officer with the United States Department of Energy.

119. Another example of the Government's control of the MEPP includes the fact that the United States Department of Energy provides the funding for all costs of the MEPP including, but not limited to, the high five benefit.

120. Another example of the Government's control of the MEPP is the fact that the United States Department of Energy created the MEPP.

121. Another example of the Government's control of the MEPP is the fact that the United States Department of Energy has controlled all amendments subsequent to the formation of the MEPP through its control of various Hanford site contractors who were controlled by, and at all times act as agents of, the United States Department of Energy.

122. Another example of the Government's control of the MEPP is the fact that at all times relevant to this litigation, the Plan Administrator has always consisted of individuals employed by contractors who were in turn controlled by the United States Department of Energy.

123. Another example of the Government's control of the MEPP and all other aspects of contractor post retirement benefits at the Hanford Site is the fact that the Government admitted it controlled all aspects of contractor pensions and benefits when, on or about March 19, 2007, the Department of Energy sent a letter signed by Keith Klein, manager of the Richland Operations Office and Shirley J. Olinger, Acting Manager of the Office of River Protection, to Ms. Susan

Leckband, Chair of the Hanford Advisory Board, stating, in pertinent part: "The U.S. Department of Energy (DOE) headquarters (HQ) is responsible for establishing the Department's policy and implementation for contractor pensions and benefits."

124. Another example of the Government's control of the MEPP includes the fact that at all times relevant to this litigation, on each and every occasion that the Plan Administrator has sought to change any of the provisions of the MEPP, the United States Department of Energy has required the Plan Administrator to seek and receive approval by the United States Department of Energy for any such changes before such changes became effective.

125. Another example of the Government's control of the MEPP is the fact that on or about 9/24/2008, Fluor Hanford President and CEO Bruce Hanni sent a letter to the United States Department of Energy seeking permission and approval for Fluor Hanford's intended actions discontinuing accruing vesting service and compensation for certain Hanford site employees under the MEPP.

126. Another example of the Government's control of the MEPP is the fact that on or about 11/25/2008, Sally Sieracki, contracting officer for the United States Department of Energy sent the Government's reply, providing that permission and concurrence.

127. Another example of the Government's control of the MEPP is the fact that on or about 7/28/2009, Fluor Hanford President and CEO David Ruscitto sent a letter to the United States Department of Energy seeking approval for the fourth and fifth amendments to the MEPP.

128. Another example of the Government's control of the MEPP is the fact that on or about 08/12/2009, Sally Sieracki, contracting officer for the United States Department of Energy sent the Government's reply, "approving" the fifth amendment to the MEPP, and "not approving" the fourth amendment to the MEPP.

129. Another example of the Government's control of the MEPP is the fact that subsequent to the 08/12/2009 correspondence from Sally Sieracki, the Plan Administrator adopted the fifth amendment to the MEPP and revoked the fourth Amendment to the MEPP, thereby plainly demonstrating that the Plan Administrator had no actual independence, and was merely in place to carry out the directions of the United States Department of Energy.

130. Another example of the Government's assent to being bound by Article 29 of the MEPP includes the fact that on every occasion subsequent to the 1996 contract changeover, in each and every case where the Government has caused contracts to be issued resulting in workers moving from one contractor to another, the Government has written these new contracts to require that the new contractor continue to promise the workers the same post retirement benefits.

131. It was only for a small group, for the Plaintiffs herein, and only on the occasion of the 1996 changeover, that the Government repudiated its contract in fact to provide the post retirement benefits after a "termination for transfer."

132. Evidence of the Government's assent to an implied contract between the Plaintiffs and the Government obligating the Government to enforce Article

29 of the MEPP also includes the fact that at all times relevant to this litigation, the United States Department of Energy has held in place an official policy that required the Government to effectuate the terms of Article 29 during a termination for transfer.

133. Included in the Government's official policy was a requirement that any changes to the MEPP required the approval of a contracting officer.

134. Subsequent to the October 1, 1996 termination and transfer of the Plaintiffs from their prior employers to Enterprise Companies, all of the Plaintiffs herein continued to perform their work at the Hanford site.

135. The Government has received the full benefit of the Plaintiffs' work at the Hanford site subsequent to the Government's repudiation of the contract in fact between the Government and the Plaintiffs.

136. Beginning on or about October, 2014, various Enterprise Company employees began retiring and notified the Plan Administrator that they wished to begin drawing retirement benefits under the MEPP.

137. The Government, acting through the MEPP and the Plan Administrator, responded by beginning to pay those Enterprise Company employees retirement pension benefits that were not calculated using their entire term of service at the Hanford Site as required under Article 29 of the MEPP, thereby breaching the contract in fact that existed between those employees and the Government.

138. The employees appealed.

139. The Government, acting through the MEPP and the Plan Administrator, declined those appeals

and ruled that these employees benefits did not include the entire term of their service at the Hanford Site, as required by Article 29 of the MEPP and the contract in fact between those employees and the Government.

140. When each Class Member retires, the Plaintiffs believe, and therefore allege, that the Government, acting through the MEPP and the Plan Administrator, will determine that each member of the Class is not entitled to have that member's pension benefits calculated using that member's entire term of service at the Hanford Site, thereby breaching the Article 29 and the Government's contract in fact with the Class Member.

141. In the event that any Class Member appeals any such future determination by the Government acting through the MEPP and the Plan Administrator, that the Class Member is not entitled to have that Class Member's pension benefits calculated using that Class Member's entire term of service at the Hanford Site, the Plaintiffs believe, and therefore allege, that the Government, acting through the MEPP and the Plan Administrator, will deny such appeal, rendering all such future appeals futile.

VI. Class Action Allegations

142. This action is brought and may be properly maintained as a class action pursuant to RCFC 23 (a)(1-4) and RCFC 23(b)(2-3). This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority prerequisites of Rule 23. The named class representatives seek to maintain this case as an opt-in class action on behalf of a class ("the Class") as defined as follows:

> The Class is defined as any person who was a Participant in the MEPP on or prior to September 30, 1996 who was transferred to an Enterprise Company between about August and December of 1996 and who have made a claim for their retirement benefits in the six years preceding the initiation of this action, or who have the right to make a claim for their retirement benefits at any point in the future.

143. The Class is comprised of more than 500 individuals making joinder impractical.

144. The disposition of the claims of these class members in a single class action will provide substantial benefits to all parties and to the Court.

145. There is a well-defined community of interest among members of the Class.

146. The proposed Class meets the prerequisites of RCFC 23(a). First, the proposed Class is so numerous that the individual joinder of all members is impracticable. While the exact number and identities of the members of the Class are unknown at this time and can be ascertained only through appropriate discovery, Plaintiff believes that the class consists of more than 500 members.

147. As required by RCFC 23(a)(2), common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual members of Class.

148. Plaintiffs, like all class members, had, or will have, the continuation of their retirement benefits unilaterally terminated in breach of a contract in fact

existing between DOE and the Plaintiffs in direct contradiction of the DOE's own regulations.

149. Plaintiffs, like all Class members, were damaged or will be damaged as a result of the termination of the continuation of their retirement benefits.

150. Among the questions of law and fact common to the members of the Class are the following:

151. Whether the actions of the Government are compensable under the Tucker Act;

152. The appropriate nature of class-wide relief; and

153. Whether the Government is liable for damages to Plaintiffs and members of the Class.

154. As required by RCFC 23(a)(3), Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of the breach by the Government of a contract between the members of the Class and the Government, and the consequent injuries they suffered as a proximate result of the Government's common course of conduct as alleged herein.

155. As required by RCFC 23(a)(4), Plaintiffs will fairly and adequately protect the interests of the members of the Class and have no interest antagonistic to those of members of the Class.

156. Plaintiffs have retained counsel experienced in the litigation of class actions.

157. This action is maintainable as class action pursuant RCFC 23(b)(1) because the Government acted or refused to act on grounds generally applicable to the Class, conduct making the subject of this action a common course of conduct involving standardized

documents, regulations, policies, contracts, and actions applicable to the Class as a whole.

158. As required by RCFC 23(b)(2), the questions of law or fact common to members of the Class predominate over any questions affecting only individual members.

159. In this regard the common question, among other common questions, of whether the actions of the Government, in reducing the Plaintiff's pension and other post retirement benefits in the manner set forth herein give rise to compensation predicated on the Tucker Act, the provisions of which apply to members of the Class.

160. Further, a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Furthermore, the expense and burden of individual litigation would make it difficult or impossible for individual members of the Class to redress the wrongs done to them. The cost to the court system of adjudicating such individualized litigation would be substantial. While the individual claims are large, many of the members of the Class are unable to pursue their individual claims due to the financial hardship caused by the loss of their post retirement benefits.

161. The conduct of this action as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and protects the rights of each member of the Class. Notice of the pendency and any resolution of this action can be provided to members of the Class by a combination of publication and individual notice, based upon

records maintained by the United States Department of Energy and/or Government contractors and/or Plaintiff's counsel.

VII. The Claims for Damages

162. Paragraphs 1 through 137 are incorporated by reference as though fully set forth in this cause of action.

163. The Tucker Act provides that Plaintiffs and the members of the Class be fully compensated for the breach of an implied contract in fact as described above.

164. Beginning with the Government's implementation of the MEPP in 1987, the Government formed an implied contract in fact with the Plaintiffs obligating the Government to provide pension retirement benefits that accounted for the Plaintiffs' years of service on the Hanford site at their normal retirement date, as set forth in Article 29 of the MEPP.

165. Beginning with the contract changeover in 1996, the Government repudiated that obligation.

166. When Plaintiffs herein have retired, the Government has breached the contract in fact formed between the Government and the Plaintiffs.

167. Plaintiffs are entitled to be compensated for the Government's breach of the implied contract in fact under the Tucker Act.

PRAYER

WHEREFORE, Plaintiffs and the putative members of the Class seek judgment against the United States as follows:

1. That the Court certify this case as an opt-in class action under RCFC 23(b);

2. For appointment of the above named Plaintiffs as representative of the certified class;

3. For appointment of Douglas E. McKinley, Jr. as counsel for the certified class;

4. That the Court declare the rights and duties of the parties consistent with the relief sought by Plaintiffs;

5. That Plaintiffs and each of the putative members of the Class recover compensatory damages in amount equal to the value of their economic losses, each individual claim being more than $10,000.00;

6. For an award of damages to the Class in an amount to be proven at trial but which for purpose of pleading is alleged to be one hundred million dollars.

7. That Plaintiffs and the putative members of the Class recover an award of reasonable attorney's fees, costs, and expenses; and

8. For leave to amend these pleadings to conform to the evidence presented at trial;

9. For judgment against the Government in an amount to be determined at trial;

10. Such other additional relief as the interests of justice may require.

/s/Douglas E. McKinley
DOUGLAS E. MCKINLEY, Jr.
WSBA#20806
Attorney for Plaintiffs
DOUGLAS E. MCKINLEY, Jr.
Law Office of Douglas E. McKInley, Jr.
1030 N. Center Parkway
Kennewick, WA 99336
tel. (509) 628-0809
fax (509) 392-8083
email: doug@mckinleylaw.com

EXHIBIT 1 –
DECLARATION OF ERNEST VODNEY
(FEBRUARY 2, 2018)

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

FRANK CALAPRISTI, AND
OTHER SIMILARLY SITUATED PERSONS

v.

THE UNITED STATES

No. 18-cv-00612-VJW

1) My name is Ernest Vodney, I am over the age of 18 and am otherwise competent to testify and have personal knowledge of the facts set forth herein.

2) From 1982 to 1987 I was employed as the Controller at the Hanford Engineering Development Laboratory (HEDL) which was a subsidiary of the Westinghouse Corporation and was operating at the Hanford nuclear reservation under a prime contract with the United States Department of Energy (DOE).

3) I reported directly to John Nolan, who was at that time the President of HEDL.

4) Sometime prior to 1987, the DOE instructed John Nolan and the other heads of various Hanford contractors to draft a multi-employer pension plan (hereafter the MEPP) in anticipation of a consolidated Hanford contract being awarded in 1987.

5) Each of the Hanford contractors whose workscope was to be included in the consolidated contract assigned two employees to be a part of the committee that was assigned to draft the MEPP.

6) Paul Matthews, who at the time was the head of the Human Resources department, and I were assigned to represent the committee on behalf of HEDL.

7) Together with myself and Paul Matthews, the committee, along with supporting staff and external resources drafted the MEPP on behalf of the DOE.

8) During the drafting process, our work would be coordinated and reviewed with DOE.

9) Upon completion, the MEPP was then submitted to the DOE for their final review and approval.

10) Sometime thereafter, the DOE approved the MEPP.

11) In the solicitation for the Hanford prime contractor in 1987, the contractors who bid on the prime contract were required to implement the MEPP by the DOE.

12) When Westinghouse won the prime contract in 1987, Westinghouse implemented the MEPP at the Hanford site thereby binding the Hanford workforce whose pensions were transferred to the MEPP to the terms of the MEPP.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 2018.

/s/ Ernest Vodney
State of Washington
County of Benton

Signed and sworn to before me on February 2, 2018 by Ernest Vodney.

Dated: February 2, 2018

/s/ Tina L. Cook
Notary Public
State of Washington
Commission Expires 02-15-21

EXHIBIT 2 –
DOE POLICIES AND PROCEDURES FOR PENSION PROGRAMS UNDER OPERATING AND ONSITE SERVICE CONTRACTS

US. Department of Energy

Washington, D.C.

---

1. PURPOSE. To establish policies, procedures, responsibilities, and authorities relating to establishment, continuity, and termination of pension programs applicable to operating and onsite service contracts subject to Department of Energy (DOE) Procurement Regulation (PR) 9-50.001.

2. SCOPE. The provisions of this Order apply to all elements of DOE which have cognizant authority over operating and onsite service contractor operations and to operating and onsite service contractors performing work for DOE.

3. DEFINITIONS

a. Accrued Benefit

(1) Defined Benefit Plan. Employee's retirement income earned under the contractor's plan as of the date of determination, expressed in the form of an annual benefit commencing at normal retirement age or the actuarial equivalent thereof.

(2) Defined Contribution Plan. The employee's account balance as of the date of determination.

b. Normal Cost. The annual cost associated with the current year by the actuarial cost method used for the actuarial valuation.

c. Past Service Costs. The amount which, together with the present value of future normal costs, will be exactly sufficient to provide all future benefits of the group included in the actuarial valuation.

d. Pension Plan. Defined programs established and maintained to provide payments to employees following retirement. Future payments are definite benefits determined and provided from either defined benefit plans, defined contribution plans, or a combination thereof. Plan benefits may be self-insured where the investment of the funds is handled by plan trustees. Alternatively, plan funds may be placed with an insurance company involving one of the following arrangements: totally insured (individual or deferred group annuities are purchased), partially insured (annuities are purchased at actual retirement-*i.e.*, deposit administration or immediate participation guarantee), or uninsured (where no annuities are purchased-*i.e.*, investment only type).

e. Vesting. The attainment, by a participant in a pension plan, of certain rights in the funds arising out of the employer's contributions made in behalf of such participant: (Such rights ordinarily are granted only after certain requirements of the plan are met, such as the participant's completion of a specified number of years of service and/or attainment of a particular age.)

4. POLICIES AND OBJECTIVES. DOE's policy is to reach agreement with those contractors who operate Government facilities or provide onsite services to provide for pensions to employees working on DOE contracts. The objective is to assure that employee continuity in pension programs funded by DOE contributions is protected in replacement contractor situations and in event of facility shutdown; and that the contractor neither gains nor loses financially from properly providing pension benefits.

5. GUIDELINES FOR APPLICABILITY. When cost-type contracts are negotiated for operation of a DOE facility on a continuing basis, consideration should be given to providing for pension cost reimbursements subject to final accounting at contract expiration or termination. In other situations when a continuing pension obligation is not deemed in the best interest of DOE, cost reimbursements should be made on a full and final settlement basis each year. The following guidance shall be considered in selecting the type of pension arrangement:

a. Pension arrangements which provide for a continuing DOE obligation should be considered for use in contracts for operation of DOE facilities when:

   (1) The facility is a laboratory or institution for which there is a projected continuing national need for research and development in a scientific area(s);

   (2) The facility involves production of a product for which there is a long term national need;

(3) Contractor management of such facility is subject to being recompleted or changed at periodic intervals;

(4) The work force will normally continue at the facility under management of the replacement contractor; or

(5) The long term life of the facility makes preservation of the interests of all affected parties of benefit to the Department.

b. Full and final settlement arrangements are normally considered appropriate for use in demonstration, pilot plant, or other types of DOE facilities when:

(1) The facility is expected to operate for a limited period;

(2) Facility operation may involve one or more private establishments with a contractual interest in the facility;

(3) The facility will be shutdown or turned over to industry when its program is complete;

(4) Employees operating the facility may remain on the payroll of establishment(s) having an interest in the program; and

(5) Departmental interest can be protected by cost principles set forth in Federal Procurement Regulations, FPR 1-15.205.6(f)i "Deferred Compensation."

6. RESPONSIBILITIES AND AUTHORITIES

a. Assistant Secretary, Management and Administration, shall be responsible for overall DOE

management of DOE reimbursed contractor pension programs.

b. Director of Industrial Relations shall:

(1) Assist the Director of Procurement and Assistance Management with:

(a) Preparation of proposed changes to DOE procurement regulations relating to deferred compensation; and

(b) Establishment and maintenance of cost principles relating to allowability of costs for contractor employee pension programs.

(2) Maintain liaison with Department of Labor, Internal Revenue Service (IRS), and Pension Benefit Guaranty Corporation (PBGC) on pension matters.

(3) Provide consultation, guidance, and comments as appropriate to contracting officers on:

(a) Policies and regulations on deferred compensation;

(b) Plan provisions and amendments;

(c) Actuarial valuation and accounting reports; and

(d) Other pension-related matters.

(4) Approve for contracting officer execution:

(a) Pension arrangements at inception and at contractor replacement,

(b) Reasonableness of pension cost figures contained in the actuarial valuation report;

(c) Changes in plan provisions; and

(d) Final settlement covering pension assets and liabilities when contracts are terminated as a result of the selection of a replacement contractor, the contract is partially terminated, or the facility is shutdown.

c. Director of Procurement and Assistance Management shall:

(1) Propose changes to DOE PR's relating to deferred compensation;

(2) Establish and maintain cost principles relating to allowability of cost for contractor employee pension programs; and

(3) Coordinate these pension matters with Director of Industrial Relations.

d. Contracting Officer shall:

(1) After approval by Director of Industrial Relations, execute approval on contract provisions relating to pension programs which affect:

(a) New contracts or contract renewals;

(b) Changes in plan provisions; and

(c) Final agreement on allocations of assets and liabilities at partial or complete contract terminations.

(2) Require and assure that contractors submit pension-related reports in a timely manner; and

(3) Assure completeness of all submissions and provide the Director of Industrial Relations with such or copy thereof.

7. REQUIREMENTS. The following are requirements of pension programs funded by DOE.

a. Basic Requirements of DOE-Reimbursed Pension Programs

(1) Plan shall satisfy requirements of IRS, Department of Labor, 29 U.S.C. 1001, et seq., "Employee Retirement Income Security Act" (ERISA), and any other Federal statutes and regulations.

(2) Where a contractor's program is exempt from ERISA, the contractor shall, nevertheless, follow the requirements of ERISA to the fullest practical extent.

(a) There must be a formal written document providing for payments to be made into a trust or under a contract with an insurance company. This must be communicated to the employees as a pension program.

(b) The plan must be for the exclusive benefit of the employees or their beneficiaries.

(c) The benefits must be definitely determinable and reasonable.

(d) The plan must not discriminate in favor of officers, stockholders, or highly paid employees.

(e) Until the purposes of the plan have been fulfilled, it must be impossible for the principal or income of the plan to be diverted for any other purpose.

(f) The vehicle that funds a pension plan may not engage in transactions which would be prohibited transactions under ERISA.

(3) Automatic cost-of-living adjustments are prohibited. However, ad hoc adjustments may be permitted with prior DOE approval.

(4) Profit-sharing, employee stock ownership plan, or other supplemental pension programs may be considered provided they:

(a) Constitute a bona fide pension program with primary purpose to provide pension benefits at a specified retirement age (as distinguished from an arrangement for the distribution of profits to the contractor's officers and employees).

(b) Contain an acceptable method for the determination of the value of the contractor's contributions, *e.g.*, fair market value of contractor stock provided to the employee stock ownership plan.

(c) Contain a definite method for the application of the contractor's contributions for pension benefits of the employees.

(d) Meet the other pertinent requirements of an acceptable pension program.

(5) Pension programs vary greatly as to the benefits to be provided and also as to areas such as provisions for vesting of rights and equities, eligibility requirements, methods of funding, and retirement ages. Regardless of a plan's compliance with ERISA, where it contains provisions for benefits beyond the scope of a bona fide pension

plan, such as for deferred compensation to be paid to the employees before retirement, the plan may be approved subject to the test of reasonableness of total compensation.

(6) The contractor is held accountable for proper management of its pension program.

b. Plan/Fund Structure for DOE-Reimbursed Pension Programs. Contract should provide that the pension plan and trust fund covering DOE contract employees are separate plans within the meaning of Section 414 (1) of the Internal Revenue Code and comply with page 8, paragraph 10, "Termination Provisions." If necessary to deviate from the requirement for a separate plan, justification for the deviation must resubmitted to DOE for approval. Where a separate plan is not feasible, the agreement must provide that annual accounting for contributions reimbursed by DOE must be made and that assets attributable to contributions reimbursed by DOE shall be used for the benefit of contract employees. If an employee is transferred by the employer to or from work covered by a DOE contract, there shall be no transfer of funds. Instead, the accrued benefit will become payable from the appropriate fund at the time of actual retirement. If a commingled trust fund is maintained, regardless of whether DOE contract employees are covered by a separate plan, ongoing pension contributions reimbursed by DOE shall not be calculated using actuarial methods or assumptions which differ from those being used to calculate the contractor's contribution for non-DOE contract employees, unless DOE approves such difference.

c. Funding Media of DOE-Reimbursed Pension Programs. Preferably pension funds will be self-insured with benefits paid directly from the trust fund. Contractors proposing to fund an ongoing program through an insurance company shall solicit proposals, on a participating basis, from a number of insurers to assure reasonable cost to DOE, taking into consideration expected costs, guarantees, availability, and other pertinent factors. Regardless of which medium, DOE approval is required.

d. Prior Approval. All pension programs (includes aspects such as benefit plans, amendments, and overall funding technique) and changes therein where DOE reimbursements are involved require DOE approval prior to becoming effective.

8. PENSION COSTS

a. Funding. When contributions required as part of the cost of a DOE contract are made, they must be irrevocably deposited in the pension trust or paid to the insurance company issuing the contract through which the plan is funded.

b. Pension Benefit Guaranty Corporation Premium.

(1) Separate Pension Plan. In the case of a separate pension plan, the contractor should seek PBGC determination as to whether or not its program is a governmental plan. Unless and until such determination that the plan is a governmental plan, the PBGC premiums will be considered as an allowable cost. Any premium refunds made by PBGC shall revert to DOE.

(2) Commingled Pension Plan. When DOE contract employees are covered by the same plan as the contractor's other operations, the cost of the PBGC premium for DOE contract employees is an allowable cost under the DOE contract.

9. REPORTING REQUIREMENTS. The contractor shall be required to submit the following reports to the contracting officer. Actuarial valuation reports and copies of IRS Form 5500's with schedules must be submitted for DOE-reimbursed pension plans. In addition, accounting reports must be submitted for commingled trusts. Reports are due within 7 months after the end of the plan year, and shall be submitted to DOE within 30 days of completion.

a. Actuarial Valuation Reports. Periodic (choice of annual, biennial, or triennial-as prepared) actuarial valuation reports are required for DOE-reimbursed pension programs. Also, any special actuarial reports, as prepared, are to be submitted. When pension funds are commingled both total and DOE portions must be listed. The report shall include at least the following items:

(1) A summary of the plan, including the actuarial assumptions, the value of the vested benefits (computed on a unit credit basis without discount for withdrawal), the value of accrued non-invested benefits (computed on a unit credit basis with discount for future withdrawal), the cost methods employed, a summary of the plan, and suggested contribution for the ensuing year (which must comply with ERISA). The report required by the Financial Accounting Standards Board pursuant to statement number 35 may be acceptable in lieu thereof.

(2) Total number of contract employees; number of plan participants including their average age, service, and salary; value of accrued liabilities in each of the following categories: retirees; vested terminus; and active employees. If available, a breakdown of active employee liabilities by decrement should be furnished, *e.g.*, retirement, death, withdrawal, and disability liabilities.

b. Form 5500's. A copy of IRS Form 5500 with schedules, as submitted to IRS, is required for each year.

c. Accounting Reports. When pension funds are commingled with other company pension funds in a single trust, annual accounting reports are required. The accounting report shall include at least the following items:

(1) The amount of the fund at the beginning of the year;

(2) DOE-reimbursed contributions received during the year;

(3) Income (such as interest) including realized and unrealized gains and losses which represent a pro rata share of the total fund;

(4) Actual disbursements for pension benefits excluding return of employee accumulations made during the year;

(5) Pro rata share of expenses paid during the year; and

(6) Fund balance at the end of the year.

10. TERMINATION PROVISIONS. Paragraph 10 does not apply when a contract is extended or is

recompleted with the same contractor receiving the award. Paragraph 10 applies when a contract is terminated or expires, and references to "contract termination" and "terminated contractor" are inclusive, herein, of both termination and expiration situations. Further, the "replacement contractor" refers, herein, to the immediate successor contractor to the terminated contractor.

a. Termination of Contract.

(1) No Replacement Contractor Situation. If upon contract termination there is no replacement contractor, then generally the pension plan is considered terminated and immediate vesting of accrued benefits, to the extent then funded, is ruled on by IRS. In that case, for purposes of this section DOE shall consider as vested only those benefits which would have been vested had termination not been ruled, plus that portion of nonvested accrued benefits which can be covered by the assets attributable to DOE, after covering the vested benefit liability. For a pension plan and/or trust fund where partial or complete termination is not ruled, DOE shall require full and immediate vesting of accrued benefits for employees who are discharged as a result of contract termination, provided such employees do not withdraw their accumulated contributions.

(2) Replacement Contractor Situation. If there is a replacement contractor, the immediate vesting of accrued benefits may or may not be required depending upon whether or not a termination or partial termination of the pension plan is determined to have occurred, on a case-by-case basis. Whether or not termination is ruled, the

rules described in subparagraph (1) will be followed. The terminated and replacement contractors shall assist DOE in preserving opportunities to attain vested rights through continuity of service for switched over employees for contract service both preceding and following switchover. Also, care must be taken to avoid giving duplicate benefits solely on account of change of contractors.

(a) Pension Program Continuance. Where there is a separate plan and trust, it is objective that the replacement contractor take over the terminated contractor pension program for both past. and future service.

(b) Pension Program Discontinuance. If the replacement contractor is unable or refuses to continue the terminated contractor separate pension plan or if the terminated contractor pension plan covers both DOE contract and non-DOE employees, then the replacement contractor shall establish a separate pension program covering the ongoing contract employees consistent with the following:

1 The replacement contractor, in cooperation with the terminated contractor, shall set up a trust fund to provide accrued benefits at the time of normal or early retirement.

2 The employees' service with the terminated DOE contractor shall apply as service toward the participation requirements of the replacement contractor's plan, and also toward any length of service requirements for benefit eligibility, for

example, vesting, early retirement, or disability retirement under the plan. Prior service shall not be credited where the transferring employee at any time elects early retirement under the terminated contractor's plan.

3 When the employee's combined service meets the vesting requirements under either the terminated contractor or the replacement contractor pension program, the employee shall receive a credit for the benefit earned under the replacement plan for the total service, including that with the terminated contractor. In no event shall the employee receive duplicate benefits for the same service. If the terminated contractor plan is a defined contribution plan and the replacement contractor plan is a defined benefit plan, for purposes of avoiding duplication of benefits, the employee account balance at contract termination shall be converted into an annuity based on the actuarial assumptions initially used by the replacement contractor in its regular actuarial valuation.

4 Where the terminated contractor's pension plan was a contributory plan and the nonvested employees are to be refunded their contributions and earnings thereon, such employees shall be encouraged to make their refunds accessible to the replacement contractor's pension program to enable them to get credit for

benefits consistent with the provisions of the pension program in effect during the periods for which contributions were made. An employee not making refunds available shall forfeit the accrued benefit attributable to employer contributions to the extent permissible under ERISA; also, such employee will forfeit any credit for service with the terminated contractor toward participation and vesting under the replacement contractor's program.

b. Methodology for Calculations at Pension Program Termination. The contractor is held accountable for proper custody and management of pension funds.

(1) Assets. Assets shall include all accumulations of DOE-reimbursed contributions and all DOE contract employee accumulations as determined in the actuarial valuation report and/or annual accounting report (as required for commingled pension trusts) through the date of contract termination. Contributions shall include those due but unpaid as of contract termination.

(2) Liabilities for Present and Future Benefits. The terminated contractor actuary shall determine liabilities for DOE contract employee accrued vested-plan benefits as of the contract termination date. Whether or not there is a replacement contractor, calculations shall reflect IRS rules concerning partial or complete termination and subsequent vesting. Except for active participants switched over to replacement contractor, liabilities may be determined by purchase, through competitive bidding, of nonparticipating annuities.

(a) Nonactive Participants. For pensioners and vested terminees prior to contract termination, present value of accrued benefits shall be calculated using the then PBGC rates of interest and mortality.

(b) Active Participants Retained by Terminated Contractor. For active employees who are retained by the terminated contractor, present value of accrued benefits shall be calculated using unit credit funding method, service and salary history as of the termination date, and the then PBGC rates for interest, mortality, and retirement. Where such employee subsequently terminates within 2 years after contract termination, the value of unvested portion shall revert to DOE.

(c) Active Participants Switched Over to Replacement Contractor. No determination by terminated contractor is required by DOE.

(d) Active Participants Terminated at Contract Termination. For active employees who are not retained by terminated contractor and who are not switched over to replacement contractor, present value of vested accrued benefits shall be calculated using unit credit funding method and the then PBGC interest and mortality rates.

(3) Financial Settlements.

(a) Reconciliation of Funding Obligations. Full and final settlement shall be made, with the only exception being the return to DOE of subsequent nonvested DOE funds at employee termination as described in subparagraph

(2)(b), above. Assets, from subparagraph (1) above, at market value shall be compared with liabilities, from subparagraphs (Z)(a), (b), and (d) above.

1 If assets are lesser than liabilities, then DOE shall pay such difference to the terminated contractor or at the contractor's option directly into the plan of the terminated contractor. These payments may only be used to purchase annuity contracts for vested employees for when reimbursement is being made, or deposited into the pension plan of the terminated contractor. However, in the event that PBGC termination insurance premiums have been paid and plan terminates within 6 months of contract termination, the maximum shortage shall be limited to the amount that the contractor is held liable for as determined by PBGC; of such amount, DOE shall reimburse only that proportional amount which corresponds to the ratio of the shortage of DOE reimbursable funds to the overall shortage of funds. However, DOE retains the right, upon fund termination or transfer, to settle fund deficits in accordance with applicable contract provisions, subject to the availability of funds.

2 If assets are greater than liabilities, then the terminated contractor shall pay such difference into the replacement contractor

pension plan for ongoing contract employees. However, if there is no replacement contractor, then the terminated contractor shall refund such difference to DOE. All payments are subject to IRS requirements for mandatory disbursements to contributory employees and shall include interest on the unpaid balance at an assumed rate of investment return equal to that used by PBGC for benefits in pay status.

(b) Terminated Contractor Retention of Assets and Liabilities. The terminated contractor shall retain liabilities and assets equal to liabilities associated with subparagraph (2)(a) nonactive participants, subparagraph (2)(b) active participants retained by terminated contractor, and subparagraph (2)(d) active participants terminated at contract termination.

(c) Transfer of Assets and Liabilities Upon Establishment of a Replacement Pension Plan. Total covered DOE contract service liability associated with subparagraph (2)(c) active participants switched over to replacement contractor shall transfer with assets of subparagraph (3)(a) 2 above, if any.

William S. Heffelfinger
Assistant Secretary
Management and Administration

EXHIBIT 3 –
TRANSFER AGREEMENT
RELEVANT EXCERPTS
(SEPTEMBER 30, 1996)

THIS TRANSFER AGREEMENT ("Agreement") is entered into effective as of 12:01 a.m. on October 1, 1996, by and between the UNITED STATES OF AMERICA, acting through the United States Department of Energy, Richland Operation Office ("DOE"), represented by the undersigned Contracting Officer, and FLUOR DANIEL HANFORD, INC. ("FDH"), a corporation organized and existing under the laws of the State of Washington; and WESTINGHOUSE HANFORD COMPANY ("WHC"), a corporation organized and existing under the laws of the State of Delaware, on behalf of itself and its subcontractor BCS Richland, Inc. ("BCSR"); and ICF KAISER HANFORD COMPANY ("ICF KH"), a corporation organized and existing under the laws of the State of Delaware. WHC, ICF KH, FDH and the DOE are referred to in this Agreement collectively as the "Parties", and singularly as a "Party".

WITNESSETH THAT:

WHEREAS, the DOE and WHC are parties to Contract NO. DE-ACO6-87RL10930 (M&O Contract"), pursuant to which WHC has management and operational responsibilities for portions of the Hanford Nuclear Reservation ("Hansford Site") owned and operated by the DOE; and

WHEREAS. WHC and ICF KH are parties to Subcontract No. 360393 ("ICF KH Subcontract"),

pursuant to which ICF KH has certain architect, engineering, infrastructure and construction management responsibilities for the Hanford Site; and

WHEREAS, WHC and BCSA are parties to Subcontract No. 50930 ("BCSR Subcontract"). pursuant to which BCSR performs information management services for portions of the Hanford Site; and

WHEREAS, the DOE and FDH are parties to Contract No. DE-AC06-96RL13200 ("PHMC Contract"), which provides for FDH to commence its responsibilities at the Hanford Site at 12:01 a.m. on October 1, 1996, (hereinafter referred to as the "Transfer Date"); and FDH has selected: (1) B&W Hanford Company, (2) DE&S Hanford, Inc., (3) Lockheed Martin Hanford Corporation, (4) Numantec Hanford, Inc., and (5) Rust Federal Services of Hanford, Inc. ("Major Subcontractors") as its subcontractors to perform portions of the work under the PHMC Contract; and FDH has selected (6) Floor Daniel Northwest, Inc., (7) Floor Daniel Northwest Services, Inc., (8) DE&S Northwest, Inc., (9) Lockheed Martin Services, Inc., (10) SGN Eurisys Services Corporation, and (11) B&W Protec, Inc. ("Enterprise Subcontractors") as its subcontractors to perform portions of the work under the PHMC Contract; and FDH has selected (12) DynCorp Tri-Cities Services, Inc. ("DynCorp") as its subcontractor to perform portions of the work under the PHMC Contract; and all of said FDH subcontractors are referred to, where appropriate, in this Agreement collectively as "subcontractors"; and

WHEREAS, effective at midnight, September 30, 1996, the DOE has terminated its M&O Contract with WHC, and, in turn, at the direction of the DOE, WHC has terminated the BCSR Subcontract; and

WHEREAS, effective at midnight, September 30, 1996, the DOE, in accordance with terms of the assignment agreement between the DOE, ICF KH and WHC, dated October 14, 1993, has terminated the ICF KH Subcontract; and

WHEREAS, the DOE has directed FDH and its Subcontractors to hire certain, WHC, ICF KH, and BCSR employees effective at 12:01 a.m. on October 1, 1996; and

WHEREAS, the Parties desire to facilitate an orderly transfer of the documents, agreements, and property referred to in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and understandings contained herein, the Parties, and, as applicable, BCSR, agree as follows:

1. Purpose

The purpose of this Agreement is to effectuate an orderly transfer between the Parties as set forth herein, and this Agreement in and of itself does not modify the terms and conditions of the M&O Contract, the ICF KH Subcontract of the PHMC Contract. In the event of a conflict between the terms and conditions of this Agreement and the M&O Contract, the ICF KH Subcontract or the PHMC Contract, the terms and conditions of the M&O Contract, the ICF KH Subcontract or the PHMC Contract shall control in connection with the respective parties to those contracts.

[. . .]

11. Pension, Savings and Benefit Plans

A. Multiple Employer, Multi-Employer, Guards and OPEIU Pension and Savings Plans

The following pension and savings plans are currently in effect:

(i) WHC, ICF KH and BCSR are sponsoring employers of the;

(a) Hanford Operations & Engineering Pension Plan, and

(b) Hanford Operations & Engineering Investment Plan.

The Operations & Engineering Pension and Investment Plans are multiple employer plans (the "Multiple Employer Plans").

(ii) WHC, ICF KH and BCSR are sponsoring employers of the:

(a) Hanford Contractors Multi-Employer Defined Benefit Pension Plan for HAMTC Represented Employees, and

(b) Hanford Contractors Multi-Employer Savings Plan for HAMTC Represented Employees.

The Hanford Contractors Multi-Employer Defined Benefit Pension Plan and Savings Plans for HAMTC Represented Employees are multi-employer Plans (the "Multi-Employer Plans").

WHC, ICF KH, and BCSR are not the only sponsoring employers of the Multiple Employer and Multi-Employer Plans.

(iii) WHC is the sole sponsoring employer of the:

(a) Westinghouse Hanford Company Pension Plan, Hanford Guards Union, Local 21, and

(b) Westinghouse Hanford Company Savings Plan, Hanford Guards Union, Local 21,

(the "Guard Plans").

(iv) ICF KH is the sole sponsoring employer of the Retirement and Think Plan for Members of Office and Professional Employees International Union, Local 11, (the "OPEIU Plan").

B. Withdrawal from Multiple Employer, Multi-Employer, Guards and OPEIU Pension and Savings Plan

(i) Effective as of the Transfer Date, WHC, ICF KH and BCSR will withdraw as sponsoring employers of the Multi-Employer Plans; and WHC, ICF KH and BCSR shall be relieved of further responsibility as sponsoring employers under the Multi-Employer Plans.

(ii) Effective as of the Transfer Date, WHC will withdraw as the sponsoring employer of the Guards Plans; and WHC is relieved from further responsibility as sponsoring employer under the Guards Plans.

(iii) Effective as of the Transfer Date, ICF KH will withdraw as the sponsoring employer of the OPEIU Plan; and ICF KH is relieved

from further responsibility as sponsoring employer under the OPEIU Plan.

(iv) Effective as of the Transfer Date, WHC shall be relieved of all further responsibility as administrator for the Multiple Employer, Multi-Employer, and Guards and OPEIU Plans.

(v) WHC, ICF KH and BCSR will continue to be sponsoring employers of the Multiple Employer Plans until the Withdrawal Date.

(vi) Effective as of the Withdrawal Date, WHC, ICF KH and BCSR will withdraw as sponsoring employers of the Multiple Employer Plans; and WHC, ICF KH and BCSR shall be relieved of further responsibility as sponsoring employers under the Multiple Employer Plans.

C. New Sponsoring Employers of Multiple Employer, Multi-Employer, Guards and OPEIU Plans

(i) Effective as of the Transfer Date, FDH agrees that it, its Major Subcontractors and DynCorp shall become sponsoring employers under the Multiple Employer Plans referred to in Section 11.A. above, for which their respective employees will be eligible. FDH, its Major Subcontractors and DynCorp hereby accept all liability and responsibility under said plans as applicable to their eligible employees for contributions and benefits, including responsibility for benefits due retirees or former employees with vested

benefits under such plans, regardless of when employment ceased or ceases.

(ii) Effective as of the Transfer Date, FDH agrees that it shall become the sponsoring employer under the Multi-Employer, Guards, and OPEIU Plans referred to in Section 11.A. above, for which its employees will be eligible. FDH hereby accepts all liability and responsibility under said plans as applicable to its employees for contributions and benefits, including responsibility for benefits due retirees or former employees under such plans, regardless of when employment ceased or ceases.

(iii) Effective as of the Transfer Date, FDH accepts all responsibility as administrator for the Multiple Employer Plans, the Multi-Employer Plans, the Guards and OPEIU Plans.

[. . .]

J. Withdrawal Date

The "Withdrawal Date" shall be the date on which WHC, ICF KH and BCSR no longer employ any employees who are participants in the Multiple Employer, Welfare Benefit Plans, and Additional Employee Benefit Arrangements or Plans referred to in Sections 11.A., 11.D., and 11.G. above. Until such date, WHC, ICF KH and BCSR shall continue to be sponsoring employers under said Plans, and shall comply in all respects with their obligations there under as sponsoring employers; provided that, effective as of the Transfer Date, WHC, ICF KH and BCSR shall each be entitled to elect representatives to the

Administrative Committees of each of the Multiple Employer Plans.

[. . .]

11-L. Amendment of Plans and Related Agreements

As of the Transfer Date:

(i) each pension, savings and welfare benefit plan referred to in Sections 11.A. and 11.D. above shall be amended by action of the Plan Administrator by adoption of amendments in form substantially identical to those delivered to FDH prior to, or at the execution of, this Agreement; and

(ii) the related third-party agreements, which include, but are not limited to, actuaries, record keepers, third-party administrator agreements, pension and savings investment manager agreements, related health, life and other welfare benefit insurance contracts listed on Attachment 11.L.(ii) to this Agreement shall be transferred to FDH by action of the Plan Administrator.

[. . .]

20. Signatures

The individuals whose signatures appear below certify that they are authorized to sign on behalf of of their respective Parties to this Agreement. The individual signing on behalf of WHC hereby certifies that WHC has the right to bind BCSR to the actions identified in this Agreement and that such actions may be enforced against WHC. The individual signing on behalf of FDH hereby certifies that FDH has the right to bind its Subcontractors to the actions identified in this Agreement and that such actions may be enforced against FDH.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in several counterparts as of the date and year first above written.

UNITED STATES OF AMERICA
BY: U.S. DEPARTMENT OF ENERGY

By: /s/ John D. Wagoner
Title: Manager and Contracting Officer

Date: 9/30/96

WESTINGHOUSE HANFORD COMPANY

By: /s/ Larry F. Peters
Title: Chief Financial Officer

Date: 9/30/96

ICF KAISER HANFORD COMPANY

By: /s/ Robert L. Benedetti
Title: Executive Vice President, Deputy General Manager and Acting President

Date: 9/30/96

FLUOR DANIEL HANFORD, INC.

By: /s/ Henry J. Hatch
Title: President

Date: 9/30/96

EXHIBIT 4A

**DOE PRESS RELEASE:
DEPARTMENT OF ENERGY CLARIFIES BENEFITS FOR EMPLOYEES OF PROJECT HANFORD MANAGEMENT CONTRACT ENTERPRISE COMPANIES
(OCTOBER 11, 1996)**

DOE NEWS

Media Contact;
Guy Schein, (509) 376-0413
guy_d_schein@rl.gov

The Department of Energy announced today three steps to assist Hanford employees accepting employment with enterprise companies. First, during the initial two years of employment with the enterprise companies, employees of enterprise firms will be entitled to the same layoff benefits as employees who remain with Fluor Daniel Hanford (FDH) and its primary subcontractors. This includes:

- Protection of Separation Credits If the enterprise company does not offer or has a less generous separation pay program. FDH will pay the difference between separation pay that the enterprise company provides and what the employees would have received

had they continued to have been employed with FDH.

- Full Work Force Restructuring Plan Benefits The Hanford Work Force Restructuring Plan provides scaled-down benefits for sub-contractor employees, which includes the enterprise companies. FDH will provide to eligible employees the full Work Force Restructuring Plan Benefits they otherwise would have received upon terminating.

Second, the Hanford Site Operations and Engineering Pension Plan will be amended to provide the following benefits to enterprise companies employees formerly employed by Westinghouse Hanford Company, Boeing Computer Services, Richland, and ICF Kaiser Hanford.

- Recognition of actual age and eligibility service for purposes of early retirement reductions.
- Provide recognition of the salary employees earn with the enterprise company for determination of their pension benefit-under the Operations and Engineering Plan.
- Provide immediate vesting of all employees who were not already vested in the Operations and Engineering Pension Plan.

Finally, the Department will direct FDH to commission an independent study of the compensation/benefit programs of the enterprise companies. The study will compare the compensation/benefit programs of the enterprise companies with their other offices that perform similar work within the United States and to the commercial market in which the enterprise

companies must compete for business. The results of the study will be made available to employees and the public. The Department may consider further options based on the results of the study.

SPECIAL NOTICE

SUBJECT: HANFORD CENTRAL PLATEAU ACQUISITION

Introduction

The purpose of this document is to provide industry and other interested parties with preliminary information as the U.S. Department of Energy (DOE) develops its detailed plans for the Hanford Central Plateau Acquisition. This document is not a Request for Proposals (RFP). All interested parties are encouraged to frequently access the DOE E-Center for information.

The official website for the Hanford Central Plateau Acquisition is the DOE E-Center at www.pr.doe.gov. The DOE E-Center will be the sole distribution medium for all information regarding this acquisition. All interested parties are encouraged to frequently access this website for information. DOE will not distribute paper or other forms of information regarding this acquisition.

Summary Description of the Hanford Central Plateau Scope

Hanford Central Plateau cleanup of legacy waste includes three major overarching objectives: safe work performance that delivers on cleanup commitments, protection of human health and the environment, and effective use and stewardship of Federal resources. The major elements of scope for the Hanford Central Plateau include:

- deactivation, decontamination, decommissioning, and demolition (D4) of 970 surplus facilities across the Central Plateau;

- disposition of five 'canyon' facilities (former radiochemical processing and supporting facilities located on the Central Plateau);
- remediation of 850 waste sites, including burial grounds and liquid waste discharge sites (cribs, ditches, and ponds);
- management and remediation, as appropriate, of six groundwater plumes;
- operation of solid waste disposal facilities (such as the new Integrated Disposal Facility (IDF) and Central Waste Complex (CWC));
- operation and closure of the 149 single-and 28 double-shell waste tanks and the supporting infrastructure for tank waste storage, retrieval, treatment, and disposal/storage;
- management, storage, and/or disposal of multiple, highly radioactive materials (such as cesium and strontium capsules, and spent nuclear fuel (SNF));
- operation of the new tank waste treatment and immobilization facilities, and supplemental technologies (currently under construction and/or demonstration); and
- operation, maintenance, curtailment, and closure of the site infrastructure and support services (water, power, sanitary waste, and miscellaneous systems and services).

Hanford Central Plateau Acquisition Approach

DOE has developed an acquisition approach for the Hanford Site Central Plateau, and will use the competitive acquisition process described under Federal

Acquisition Regulation (FAR) Part 15 to award three new contracts. The acquisition approach is designed to integrate the needs of both Richland Operations Office (RL) and Office of River Protection (ORP) into a group of coordinated contracts that will provide continued cleanup of legacy waste on the Hanford Site Central Plateau.

Three new major prime contracts will replace the existing Project Hanford Management Contract (PHMC) and the Tank Farm Operations Contract (TFC) at Hanford, and include:

- Hanford Mission Support Contract for information management, site utilities, and a broad range of site services managed by RL;
- Waste Material Storage and Disposition Mission Contract that will be managed by RL; and
- Tank Farm Operations and Closure Mission Contract that will be managed by ORP.

A phased approach will be used to implement this acquisition. The Hanford Mission Support Contract will be acquired first, followed by the Waste Material Storage and Disposition, and Tank Farm Operations and Closure acquisitions. Following the acquisition of these three major prime contracts, future contracts and/or task orders for individual projects would be placed for surplus facility D4; remediation; and tank farm projects.

To implement this acquisition approach, the PHMC and TFC will be extended under existing contracts until the mission support and mission acquisitions are

completed. The duration of the extension period will support completing the new acquisitions and the transition to the three new contracts. Contract extensions will be structured to sequentially perform and transition scope through the extension period. The acquisition approach does not include the existing Waste Treatment Plant Contract and the River Corridor Closure Contract (RCCC).

Summary Description of the Hanford Mission Support Contract:

The Hanford Mission Support Contract includes information management, site utilities, and a broad range of site services:

- information technology, telecommunications, and federal information management; operation and maintenance of site utilities such as water, electrical, and roads;
- safeguards and security, emergency services, analytical laboratories, and radiological dosimetry;
- groundwater monitoring and management;
- management services such as administration of contractor employee pension and benefits, site-wide integrated planning and interface management, and property/real estate management; and
- project planning to define and negotiate cleanup end states, and support DOE in preparing and executing future task order contracts.

Under the existing Hanford contract structure, the majority of these services have been assigned to the PHMC to provide linkages with current operations and support mission changes.

Summary Description of the Waste Material Storage and Disposition Mission Contract:

The Waste Material Storage and Disposition includes all non-tank farm activities required to receive, retrieve, characterize, certify, package, treat, store, and dispose/ship legacy and newly generated wastes, including:

- waste treatment, storage, and disposal including liquid effluent treatment, mixed waste treatment, and low level and mixed waste disposal (including the IDF, Environmental Restoration Disposal Facility (ERDF) (following completion of the RCCC), Waste Receiving and Processing Facility (WRAP), and CWC);
- SNF and immobilized high-level waste (IHLW) storage, completion of SNF sludge removal, and special nuclear material (SNM) storage, and possible off-site waste shipments to Hanford; and
- transuranic (TRU) retrieval (including suspect TRU).

Under the existing Hanford contract structure, the majority of these activities have been assigned to the PHMC to provide linkages with current operations and the ability to address emerging new scope.

Summary Description of the Tank Farm Operations and Closure Mission Contract:

The Tank Farm Operations and Closure Mission Contract includes operations activities necessary to continue to retrieve, treat, store, and dispose Hanford tank waste, projects within the operating facilities, and tank farm closure, including:

- maintain and operate the tanks farms, the 242-A evaporator, and the 222-S building in a safe, environmentally compliant and stable configuration transuranic (TRU) retrieval (including suspect TRU).
- operate tank waste treatment, storage, and disposal facilities;
- retrieve tank waste, continuing single-shell tank retrievals, and retrieve and package contact handled TRU tank waste;
- develop a comprehensive, integrated tank waste treatment plan for the future;
- treat and dispose of tank waste; and
- close Tank Farms.

Under the existing Hanford contract structure, these activities have been assigned to the TFC.

Other Areas of Interest

Small Business Opportunities:

Opportunities for small business were carefully considered in the proposed acquisition approach; this provides for a three-tier approach: potential small business set asides within the mission support contract, meaningful small business subcontracting opportunities within the prime contracts, and defined future small business opportunities using the existing DOE Office

of Environmental Management (EM) Indefinite Delivery/Indefinite Quantity contracts with small business and new small business contracts. A key feature of the acquisition approach is to establish a project planning capability within the mission support contract to provide the flexibility to define and effectively break-out work for small business.

Contractor Employee Pension and Other Benefits:

The RFPs for these acquisitions will reflect the Department's standard practice under which transferring incumbent employees would transition to employment under the new contract with equivalent pay for equivalent positions. With respect to the pension plan component of the benefits package, the RFPs will make it clear that contractor employees who are currently participating in the site pension program and are subsequently employed by the selected contractors under the new contracts will remain in their existing pension plan (pursuant to plan eligibility requirements and applicable law); that is, "if you're in, you're in." However, the RFPs would also require the contractors selected for award to provide market-based pension plans for new, contractor employees hired after award. With respect to medical benefits, the Department is currently assessing its policies and the RFPs will reflect, or will be modified to reflect, those policies as concluded by the Department.

Contractor Employment Levels:

Hanford is a closure site and contractor employment will trend down in the future. Each new contractor will be required to establish the required organizational structure, skill mix, and staffing levels for successful contract performance. New contracts will require that

incumbent employees be fairly considered for continued employment under existing and new contracts.

The Department recognizes the contributions of the existing contractor workforce to safe work performance; as part of the transition to closure contracts with scope broader than traditional radioactive waste management activities, the Department will continue to retain existing trained and qualified workers and develop new workforce capabilities.

Contracting Officer Name: Alan Hopko

Contracting Officer Phone: 509-376-2031

Contracting Officer E-mail:
AlanEHopko@RL.gov

Contracting Officer Address:
825 Jadwin Avenue

Contracting Officer City: Richland

Contracting Officer State: WA

Contracting Officer Zip: 99352

Archive Date: (mm/dd/yyyy) 12/31/2006

EXHIBIT 4B

DOE PRESS RELEASE:
DOE ISSUES FINAL RFP FOR HANFORD'S TANK WASTE CLEANUP
(JULY 2, 2007)

DOE NEWS

Media Contact;
Erik Olds, 509-372-8656
DOE Office of River Protection

The U.S. Department of Energy's (DOE) Office of River Protection (ORP) today released the final Request for Proposals (RFP) for the Tank Operations Contract (TOC) to continue cleanup of the central portion of the Hanford Site. Proposals are due on September 17, 2007. The contract term consists of an initial five-year base period, and could be extended up to an additional five years. The contract will be worth an estimated $8.2 billion. The RFP contains specific requirements that mandate at least 15% of the contract work must be performed by small businesses.

The RFP includes a performance-based approach to tank farm operations for Hanford's Central Plateau. Work scope includes storage, retrieval and treatment of Hanford tank waste, storage and disposal of treated waste, and closure of tank farm waste management areas to protect the Columbia River.

Incumbent employees will continue to participate in the Hanford Site Pension Plan (HSPP). This "if you're in, you're in" approach means that incumbent employees will remain in the HSPP if they move into the TOC.

After releasing a draft RFP for the TOC in November 2006, DOE held a public comment period and exchanges with potential offerors. Changes to the RFP scope include:

- Adding the early feed and operation of the Low Activity Waste facility, Balance of Facilities, and the Analytical Laboratory at the Waste Treatment and Immobilization Plant;
- Removing the scope that created an Organizational Conflicts of Interest, as well as the related solicitation provision and contract clause.

Other changes to the RFP include adding a "Community Commitment" Clause requiring the successful contractor to conduct its work in accordance with DOE's policy to engage regional stakeholders in issues and concerns of mutual interest and to recognize that giving back to the community is a worthwhile business practice; clarifying mentor-protégé agreement requirements to ensure meaningful small business participation; clarifying the environmental and regulatory roles, responsibilities and interfaces between Hanford Site contracts; and outlining a process to reach into a contractor's parent organization to tap into diverse experience.

Release of the final RFP continues the Department's cleanup momentum at Hanford, building on such accomplishments as completing the removal of pumpable liquids from underground single-shell tanks, completing the retrieval of sludge and saltcake waste from seven single-shell tanks, developing and deploying new technologies to safely retrieve waste, and completing the construction of the state-of-the-art Integrated Disposal Facility.

The RFP is available on the DOE E-Center Industry Interactive Procurement System website: www.pr.doe.gov. The website will be the sole distribution medium for the solicitation and related information.

EXHIBIT 4C

DOE PRESS RELEASE:
DOE ISSUES FINAL RFP FOR HANFORD'S CENTRAL PLATEAU CLEANUP
(JUNE 25, 2007)

DOE NEWS

Media Contact;
Colleen C. French, 509-373-5985
DOE Richland Operations Office

The U.S. Department of Energy (DOE)'s Richland Operations Office (RL) today released the final Request for Proposals (RFP) for the Plateau Remediation Contract (PRC) to continue cleanup of the central portion of the Hanford Site. Proposals are due on September 21, 2007 and the contract term consists of an initial five-year base period, and could be extended for an additional five year period. The contract will be worth an estimated $6.3 billion. The final RFP contains specific requirements that mandate at least 17% of the contract work must be performed by small businesses.

The RFP includes a performance-based approach to continue cleanup of Hanford's Central Plateau. Work scope includes treating and disposing of low-level, mixed low-level, and transuranic waste; managing the groundwater/vadose zone project; cleaning up some facilities and waste sites and keeping others in minimum-safe condition; conducting near-term shutdown activities and long term surveillance and

maintenance on the Fast Flux Test Facility; cleaning out and closing the Plutonium Finishing Plant; treating radioactive sludge and completing cleanup of the K East and K West Reactor areas; and developing documents for regulatory and other decisions covering groundwater, soil, and facilities.

Incumbent employees will continue to participate in the Hanford Site Pension Plan (HSPP). This "if you're in, you're in" approach means that incumbent employees will remain in the HSPP if they move into the PRC.

After releasing the Draft RFP for the PRC in November 2006, DOE held a public comment period and exchanges with potential offerors. Resulting changes to the Final RFP scope include:

- Adding the removal of water from the K East reactor basin, demolition of the K East and K West basins and superstructures, placing the K East and K West Reactors in an interim safe storage configuration (cocooning), and remediating and closing the remainder of the 100K Area;
- Having the new contractor continue retrieval of transuranic waste and provide support to the Waste Isolation Pilot Plant's Central Characterization Project, which will characterize and certify the contact-handled waste;
- Removing the long-term shutdown activities at the Fast Flux Test Facility (FFTF). The scope now assumes completion of short term shutdown activities for long-term surveillance and maintenance (leading to closure in 2030).

Other changes to the RFP include adding a "Community Commitment" Clause requiring the successful contractor to conduct its work in accordance with DOE's policy to engage regional stakeholders in issues and concerns of mutual interest and to recognize that giving back to the community is a worthwhile business practice; clarifying mentor-protégé agreement requirements to ensure meaningful small business participation; clarifying the environmental and regulatory roles, responsibilities and interfaces between Hanford Site contracts; and outlining a process to reach into a contractor's parent organization to tap into diverse experience.

Release of the final RFP continues the Department's cleanup momentum at Richland, building on such accomplishments this year as completing the removal of radioactive sludge from the K East Reactor basin, deploying new technologies to clean up groundwater, completing cleanup of three high-priority burial grounds in the River Corridor, and decontaminating and demolishing highly contaminated buildings at the Plutonium Finishing Plant.

The Final RFP is available on the DOE E-Center Industry Interactive Procurement System website: www.pr.doe.gov. The website will be the sole distribution medium for the solicitation and related information.

EXHIBIT 4D

DOE PRESS RELEASE:
DOE TO ISSUE FINAL RFP FOR MISSION SUPPORT CONTRACT AT HANFORD
(MAY 2, 2007)

DOE NEWS

FOR IMMEDIATE RELEASE
May 2, 2007

The U.S. Department of Energy (DOE)'s Richland Operations Office (RL) will release later today the Final Request for Proposals (RFP) for the Mission Support Contract (MSC), worth an estimated $325 million annually (excluding fee). The Mission Support Contract will provide cost-effective infrastructure and site services integral and necessary to accomplish the Hanford Site cleanup mission.

The new approach to contracting for these services is designed to enable the MSC contractor to focus on right-sizing and improving the efficiency of site services and free up the Hanford cleanup contractors to focus on their remediation work. Ultimately, DOE anticipates the cost of services to be driven down as portions of the site are cleaned up, enabling more of the Hanford budget to be spent on cleanup.

The contract term will consist of an initial five-year period, and could be extended up to an additional five years. DOE-RL will administer the contract, and

the contractor will provide services to both RL and the DOE Office of River Protection. Proposals are due on July 16, 2007.

The Final RFP includes a performance-based approach to five primary functions: Safety, Security and Environment; Site Infrastructure and Utilities; Site Business Management; Information Resources/ Content Management; and Portfolio Management. Examples of scope within these areas include safeguards and security; site training services and operation of the HAMMER training facility; public safety and resource protection; administration of employee benefit plans; strategic planning and program management; information systems; records management; project acquisition and support; independent analysis and assessments; worker safety and health management; quality assurance; and a wide variety of infrastructure and business services including utilities, transportation, biological control, sewer, telecommunications, and correspondence control.

After releasing the draft RFP in November 2006, DOE held a public comment period and meaningful exchanges with potential offerors. Among the resulting changes are the addition of a "Community Commitment Clause" requiring the successful contractor to work in accordance with DOE's policy to engage regional stakeholders in issues and concerns of mutual interest and to recognize that giving back to the community is a worthwhile business practice; clarifying mentor-protégé agreement requirements to ensure substantive small business participation; and clarifying the environmental and regulatory roles, responsibilities and interfaces between the MSC and other Hanford Site contracts.

The Final RFP contains specific requirements that provide an opportunity for small businesses to apply their expertise and experience. At least 25% of the overall contract work must be performed by small businesses.

Incumbent employees will continue to participate in the Hanford Site Pension Plan (HSPP). This "if you're in, you're in" approach means that incumbent employees will remain in the HSPP if they move into the MSC. New employees will be offered a market-based benefits plan.

The Final RFP will be available later today on the DOE E-Center Industry Interactive Procurement System website: www.pr.doe.gov. The website will be the sole distribution medium for the solicitation and related information.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (JANUARY 9, 2019)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETER TURPING, DICK CARTMELL, PHILIP ISAACS, GREG BROWN, JOHN BONGERS, AND OTHER SIMILARLY SITUATED PERSONS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

2018-1005

Appeal from the United States Court of Federal Claims in No. 1:16-cv-00872-SGB, Senior Judge Susan G. Braden

Before: LOURIE, CHEN, and STOLL, Circuit Judges.

CHEN, Circuit Judge.

Appellants are a group of former employees of Lockheed Martin Services, Inc. (Lockheed) who appeal a U.S. Court of Federal Claims (Claims Court) decision dismissing their contract claim against the U.S. government (Government). Because the Claims Court

correctly determined that Appellants did not prove that an implied-in-fact contract between themselves and the Government exists, we affirm the Claims Court's decision.

BACKGROUND

During World War II, the Hanford Nuclear Reservation (Hanford) was established by the U.S. Army Corps of Engineers (Army Corps) in the state of Washington to produce nuclear material for use in atomic weapons. J.A. 24-25. After the war, Hanford continued to be used by the Government for nuclear work, but eventually the Department of Energy (DOE) assumed responsibility for managing Hanford. J.A. 25.

Since 1947, DOE and its predecessors engaged contractors, whose employees performed work at Hanford. J.A. 24-25. Each time the work performed by one contractor was transferred to another contractor, the employees that performed the work would stay the same, and they would typically keep their same pay and benefits, including retirement benefits. J.A. 28.

In 1987, DOE awarded a contract moving the management and operation of Hanford to a contractor, Westinghouse Hanford Company (WHC), and directed WHC to create the Hanford Multi-Employer Pension Plan (MEPP). J.A. 27, 29. The MEPP was a contract between "Employers," defined with specific contractor and subcontractor names including WHC, and "Employees," who were employed by the Employers. J.A. 201-202. Each time a new contractor performs work at Hanford, the definition of "Employer" in the MEPP adds that new contractor. *See* J.A. 102. According to the preamble of the MEPP, the MEPP was created by the Employers for the benefit of the Employees.

J.A. 196. The Government is not listed as a party to the MEPP.

The MEPP is run by a Plan Administrator, which Article 11 of the MEPP defines as a committee established by the Employers. J.A. 248. The Plan Administrator may not amend the MEPP without prior DOE approval and may not take any action that has a financial impact on the MEPP without prior written approval of DOE. J.A. 33. Article 10 requires "[e]ach Employer [to] make contributions to the Plan from time to time as the Plan Administrator shall determine but in at least such amount as is required by the minimum funding standards of federal law applicable to the Plan." J.A. 248.

Article 29 of the MEPP, entitled "Terminations for Transfer," requires that employees be able to "receive[] a benefit at Normal Retirement Date which is reflective of his Years of Service on the Hanford Reservation." J.A. 293. Reference to the Government only appears once in the MEPP, and that is in Article 29, where the MEPP states: "A Termination for Transfer means a termination from one contractor on the Hanford Reservation to another which is determined to be in the best interests of the government." *Id.*

On August 6, 1996, DOE announced that the Hanford Management Contract would be transferred from the current contractor (WHC) to a new contractor (Fluor Daniel Hanford or FDH). J.A. 30. The majority of workers received the same post-retirement benefits when the 1996 contract changeover occurred. J.A. 38.

On August 30, 1996, however, some WHC employees were provided with an "Offer Letter" from Lockheed, which was to be a subcontractor to FDH.

J.A. 37. The Offer Letter stated: "[i]f your employee benefits for this position are different than the current site benefit program, a summary is enclosed," but no summary was enclosed. *Id.* The Offer Letter required the WHC employees to sign it by September 9, 1996, if they wanted to accept employment with Lockheed. J.A. 38.

In September 1996, many former employees of WHC, including Appellants, accepted employment at Lockheed and were informed by Lockheed that, upon their retirement, they would not receive retirement benefits—including medical benefits, death benefits, and pension compensation—that were previously afforded under the MEPP. J.A. 39.

Despite being told earlier in October 1996 that Appellants were no longer parties to the MEPP, on October 10, 1996, Appellants were informed[1] that they would in fact remain in the MEPP. J.A. 40. Instead of calculating their pension benefits based on their total years in service, however, their benefits would be calculated using the highest five year salary during their employment at Hanford (the high-five

---

[1] Appellants allege throughout their amended complaint that "the Government" performed certain actions, including making certain statements to Appellants. *See, e.g.*, J.A. 39-41. At times, Appellants also state that the Government made these statements "acting through the MEPP" or "acting through its agent the MEPP." *Id.* These allegations as to what the Government told Appellants, however, fail to reach the "plausible" level required by *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Moreover, the Government is not a party to the MEPP and therefore cannot act "through" the MEPP.

rule). J.A. 41. This was solidified in an amendment to the MEPP, made retroactive to the end of September 1996. *Id.* The Lockheed employees were told that they could not challenge the new changes to their benefits until they retired. *Id.*

In October 2014, Peter Turping retired from Lockheed and notified the Plan Administrator that he intended to begin withdrawing pension benefits from the MEPP. J.A. 42. The Plan Administrator used the high-five rule to calculate Mr. Turping's pension benefits, rather than calculating the benefits using his entire term of service at Hanford. *Id.*

In July 2016, Appellants, including Mr. Turping, filed a class action lawsuit against the Government under the Tucker Act, alleging, *inter alia*, that they had an implied-in-fact contract with the Government and that the Government breached that contract when it refused to provide Appellants pension benefits based on their total years in service. J.A. 22-52. The Government subsequently filed a motion to dismiss Appellants' amended complaint under Rules of the U.S. Court of Federal Claims (RCFC) 12(b)(1) and 12 (b)(6). J.A. 6. The Claims Court granted the Government's motion, and Appellants timely appealed.

We have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

"This court reviews *de novo* whether the Court of Federal Claims possessed jurisdiction and whether the Court of Federal Claims properly dismissed for failure to state a claim upon which relief can be granted, as both are questions of law." *Wheeler v. United States*, 11 F.3d 156, 158 (Fed. Cir. 1993).

"Whether a contract exists is a mixed question of law and fact." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). "We review the trial court's legal conclusions independently and its findings of fact for clear error." *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346 (Fed. Cir. 2001). Since we accept all facts pleaded in the complaint as true at the 12(b)(6) stage, the issue of whether a party is in privity of contract with the Government reduces to a question of law, which we review *de novo*. *Cienega Gardens*, 194 F.3d at 1239. "Contract interpretation itself also is a question of law, which we review *de novo*." *Id.*

DISCUSSION

A. Statute of Limitations

"Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. "Generally, a claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Bowen v. United States*, 292 F.3d 1383, 1385 (Fed. Cir. 2002) (internal quotation marks omitted). Repudiation "ripens into a breach prior to the time for performance only if the promisee elects to treat it as such." *Franconia Assocs. v. United States*, 536 U.S. 129, 143 (2002) (internal quotation marks omitted). "[I]f the injured party instead opts to await performance, the cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation." *Id.* at 144 (internal quotation marks omitted).

We agree with the Claims Court that performance occurred when each participant received his or her benefits, *i.e.*, on the participant's "Normal Retirement Date." *See* J.A. 182. Because Mr. Turping did not retire until 2014, which is fewer than 6 years before he filed this lawsuit, Appellants' contract claims are not barred by the statute of limitations. *See* J.A. 5.

The Government argues that any repudiation here was not wholly anticipatory because Appellants allege that the Government breached multiple provisions of the contract, and therefore the statute of limitations should have started running immediately upon the Government's first breach of the MEPP, which took place in 1996 or 1997. Appellee Br. at 36-40 (citing *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988)). The Government then cites to specific facts in the amended complaint (*e.g.*, that the Government refused to allow Appellants to withdraw their pensions, in violation of MEPP Article 26 and federal statute) that Appellants could have cited in support of an allegation that the Government breached the MEPP. *Id.* at 37-38.

But Appellants did not bring an action against the Government's alleged breach of Article 26 or its alleged federal law violations. Accordingly, these instances of potential contractual nonperformance are not relevant to the analysis. We must focus on the claim that is in front of us in this appeal, and that is Appellants' allegation that the Government breached its implied-in-fact contract, the performance of which took place at retirement.

B. Implied-in-Fact Contract

The Tucker Act provides the Claims Court with jurisdiction to hear claims against the United States that are founded upon, among other things, an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1). "An implied-in-fact contract is one founded upon a meeting of minds and is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). "[T]he requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs." *Id.* An implied-in-fact contract with the Government requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) "actual authority" on the part of the Government's representative to bind the Government in contract. *Id.* Plaintiffs have the burden to prove the existence of an implied-in-fact contract. *Id.*

"As a threshold condition for contract formation, there must be an objective manifestation of voluntary, mutual assent." *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (citing Restatement (Second) of Contracts § 18 (1981)). "To satisfy its burden to prove such a mutuality of intent, a plaintiff must show, by objective evidence, the existence of an offer and a reciprocal acceptance." *Id.*

Appellants have not met their burden of proving that mutuality of intent between the Government and Lockheed's employees exists. Appellants argue that "[t]he government made two promises to the Hanford workers" when the MEPP was formed: (1) an implicit promise that the government would provide the funds

to meet the pension obligations set forth in the MEPP; and (2) an explicit promise in Article 29 of the MEPP to workers that when they retire from Hanford, they will receive credit in the calculation of their pensions for all their years working at Hanford, even if the Government changed contractors. Appellants Op. Br. at 7-8.

But nothing in the MEPP indicates intent by the *Government* to be in privity of contract with Lockheed's employees. Rather, the MEPP only evidences a contractual relationship between *Lockheed* and its employees. Notably, the MEPP does not list the Government as a party to the contract. Rather, the MEPP states that it was created by "Employers" for the benefit of their Employees. J.A. 197. Appellants do not dispute that the "Employers" referenced in the MEPP do not include the Government, but rather refer to contractors and subcontractors such as Lockheed. *See* J.A. 201-202. The MEPP also specifies that the Plan Administrator, established by the Employers, is the entity that funds the plan, not the Government. J.A. 248. And the MEPP places responsibility for benefits determinations into the hands of the Plan Administrator, not the Government. J.A. 293.

"It is a hornbook rule that, under ordinary government prime contracts, subcontractors do not have standing to sue the government under the Tucker Act, 28 U.S.C. § 1491. . . . " *Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984). "The government consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors." *Id.* In two-tiered contract schemes, the Government's obligations are directed to the contractor, with whom it shares a

contract, and not the subcontractor, with whom it shares no direct contractual relationship. *Cienega Gardens*, 194 F.3d at 1245. "Aggrieved subcontractors have the option of enforcing their subcontract rights against the prime contractor in appropriate proceedings, or of prosecuting a claim against the government through and in right of the prime contractor's contract, and with the prime contractor's consent and cooperation." *Erickson*, 731 F.2d at 813. Employees are treated as subcontractors for the purposes of this rule. *United States v. Munsey Trust Co. of D.C.*, 332 U.S. 234, 241 (1947); *see also Bolin v. United States*, 221 Ct. Cl. 947, 948 (1979). Absent any indicia in the MEPP or other evidence proffered by Appellants of the Government's specific intent to be contractually obligated to Lockheed's employees, we find that privity of contract between Appellants and the Government does not exist.

Appellants' argument that the Government "unilaterally forced the Hanford contractors and their employees to participate in the MEPP," and therefore the Government intended to be bound, is unavailing. Appellants Op. Br. at 32-33. The same is true for Appellants' focus on the Government's alleged "control" in the creation and administration of the MEPP. *Id.* at 6. Our case law has made clear that the "degree of [government] involvement with a project does not create privity [between the government and a subcontractor] so as to allow suit against the government." *Cienega Gardens*, 194 F.3d at 1245; *see also id.* at 1244-45 ("That the Federal Government has intimate control over a project, including prior approval of plans and costs, does not establish liability here for claims by a contractor [whose contract is only with a third party].")

(quoting *Marshall N. Dana Const., Inc. v. United States*, 229 Ct. Cl. 862, 863 (1982)). "Nor does this degree of involvement indicate an implied-in-fact contract enforceable against the United States." *Dana Const.*, 229 Ct. Cl. at 863.

In *Dana Construction*, a construction contractor contracted with an Indian Housing Authority (IHA) that received federal funds from the U.S. Department of Housing and Urban Development (HUD) to build a low-income housing project. *Id.* at 862. The Court of Claims determined that the construction contractor could not assert a claim for breach of contract against HUD because the construction contractor's privity of contract was with the IHA, not HUD. *Id.* at 863. The Court of Claims emphasized that, "[b]y funding and regulating programs designed for the public good the U.S. is acting in its role as a sovereign and the moneys promised . . . do not establish any contractual obligation, express or implied, on the part of the United States." *Id.* at 864.

The same principle applies in this case. The Government funds Lockheed and other Employers to manage Hanford, but there is no evidence that the Government intended to be contractually obligated to Lockheed's or other Employers' employees, either through the MEPP or by other means. Without this mutuality of intent, Appellants fail to meet their burden of proving that an implied-in-fact contract exists between the Government and Lockheed's employees.[2]

---

[2] Appellants argue that WHC acted as the Government's "agent" in drafting Article 29 of the MEPP, which provided for Hanford workers to receive benefits reflective of their total years of service. Appellants Op. Br. at 54; J.A. 293. Appellants do not plead sufficient

Because we determine no mutuality of intent exists, we do not reach the question of whether the other required elements of an implied-in-fact contract exist in this case. We have reviewed Appellants' other arguments, but find them unpersuasive. Accordingly, we affirm the Claims Court's decision finding that no implied-in-fact contract exists.

AFFIRMED

---

plausible facts to support this agency argument. *Iqbal*, 556 U.S. at 678. Likewise, Appellants cannot support their broad allegation that only the Government—a non-party to the MEPP—had the authority to "enforce" Article 29 and compel subcontractors to remain in the MEPP. Appellants Op. Br. at 9-10; *see Iqbal*, 556 U.S. at 678.