

No. 26-

IN THE
Supreme Court of the United States

FOX LOGISTICS AND CONSTRUCTION CO.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented Are:

1. Whether, when the United States responds to a prime contractor's acknowledged inability to pay an identified subcontractor by replacing the ordinary payment mechanism with a restricted arrangement that dedicates contract proceeds to that debt, the scope of the Government's undertaking is determined from the integrated payment arrangement and the circumstances of its creation and performance, or from a single implementing communication read in isolation.
2. Whether federal common law governing third-party beneficiaries of contracts with the United States recognizes the creditor-beneficiary rule embodied in Restatement (Second) of Contracts § 302(1)(a)—where performance of the Government's promise satisfies the promisee's monetary obligation to an identified beneficiary—as an independent basis for intended-beneficiary status, or instead requires the beneficiary also to establish the distinct manifested-intent showing described in § 302(1)(b).
3. Whether, on cross-motions confined by court order to liability, a court may grant summary judgment against a beneficiary for failing to prove unpaid invoices beyond those the Government paid—where the Government, as movant, offered no evidence that later invoices were not submitted and the government records reference the same invoices claimed missing, and the government's own cure notice identified them.

PARTIES TO THE PROCEEDING

Petitioner Fox Logistics and Construction Co. was the plaintiff in the United States Court of Federal Claims and the plaintiff-appellant in the United States Court of Appeals for the Federal Circuit.

Respondent the United States of America was the defendant in the Court of Federal Claims and the defendant-appellee in the court of appeals.

**RULE 29.6 CORPORATE DISCLOSURE
STATEMENT**

Petitioner states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Federal Circuit

No. 2024-2150

Fox Logistics and Construction Co., Plaintiff-Appellant, v. United States, Defendant-Appellee

Date of Final Judgment: June 3, 2026

Order Denying Leave to File Petition for Panel Rehearing Out of Time: July 30, 2026

United States Court of Federal Claims

No. 18-1395C (No. 1:18-cv-01395-EHM)

Fox Logistics and Construction Co. v. United States

Date of Final Judgment: May 31, 2024

Supreme Court of the United States

No. 26A236, Fox Logistics and Construction Co. v. United States

Application to extend time to file petition granted August 21, 2026

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fox Logistics and Construction Co. (“Fox”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit, and asks the Court to vacate that judgment and remand for application of the correct rule and completion of discovery.

INTRODUCTION

This case asks what the United States undertakes when, knowing its prime contractor has failed beyond cure, it changes how its money moves to keep the subcontractor working.

By December 2013, Lakeshore had collected \$3,551,663.42 from the Government for Fox’s work and kept it—“the amounts which you have already collected from the Government on their behalf,” as the contracting officer wrote. Appx2071. Lakeshore admitted that a company-wide “lack of cash” had a “paralytic effect.” Appx2072. The contracting officer knew Lakeshore “lacked funding . . . to pay FOX . . . from their own funds.” Appx3491 ¶ 53. Lakeshore’s default was not one it could cure.

Fox, unpaid, would no longer accept a Lakeshore check. Appx3485 ¶ 37. It told the Air Force that it would continue only under “AFCEC’s overall control and monitoring of any special account,” because “FOX trusts AFCEC as a Govt body but we do not trust LTC.” App. 23a. The contracting officer, for her part, testified that terminating Lakeshore would have left the Government “with nothing.” App. 21a. On January 17, 2014, Lakeshore answered the Show Cause Notice with a cover letter and Exhibits A

through E, including the Task Order 42 Wire Transfer Authorization redirecting payment to a new account, Appx3173, and transmitted the complete package again on January 18. Appx3487–88 ¶¶ 42–45; Appx3490 ¶¶ 49–50. The contracting officer accepted that account, barred Lakeshore from taking any proceeds “absent the express consent of AFCEC,” and released further invoices only on a plan dedicating their proceeds to Lakeshore’s debt to Fox. Appx2096–97, 2171–73; Appx3499 ¶ 76. Fox returned to work on that footing.

The Government’s undertaking, as Fox asserts it, followed from that arrangement: to make the payments due under Task Order 42 through the restricted new payment mechanism, and controls by the CO for their application under the approved allocations and payment plan for Fox’s protection. Appx2096–97, 2171–73; Appx2348. Fox seeks enforcement of that undertaking for the work it performed. Its status as an intended beneficiary is what entitles it to enforce; the breach is the Government’s failure to carry the undertaking through the invoice cycles that followed.

The Government got what it wanted. Fox built the expansion of Shindand Air Base in the Afghan war zone, and the contracting officer’s representative recorded that it “continued to work and produce construction . . . despite the fact that they continued to be owed money.” Appx2604. After Invoice 29, nothing more reached Fox, and its arrearage grew “with each billing cycle.” App. 27a. The court of appeals nonetheless measured the Government’s undertaking by four invoices—the figure Government counsel offered at argument as “four, I think,”

attributing it not to any record but to “page 19” of the trial court’s opinion. Oral Arg. at 19:04.

Petitioner is aware of no decision of this Court or the Federal Circuit that places on a subcontractor the incurable default of an insolvent prime after the Government has replaced the payment mechanism to secure that subcontractor’s performance. The question is not how many invoices were paid; it is what the Government undertook when it built the mechanism. Twelve years later, Fox has not been paid for the invoice cycles it performed in reliance on the Special Account.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–8a) is not published. Its order denying leave to file a petition for panel rehearing out of time (App. 69a–70a) is unreported, as is its order on supplementation of the record (App. 71a–73a).

The opinion and order of the Court of Federal Claims granting summary judgment to the United States (App. 9a–53a) is unreported.

Its earlier opinion staying the Government’s motion to dismiss pending jurisdictional discovery (App. 54a–68a) is reported at 145 Fed. Cl. 236 (2019).

JURISDICTION

The court of appeals entered judgment on June 3, 2026. App. 1a. Fox tendered a petition for panel rehearing out of time, and on July 30, 2026, the court denied leave to file it. App. 69a–70a. Because no timely petition for rehearing was filed, the time to petition runs from entry of judgment. Sup. Ct. R. 13.3. On August 21, 2026, the Chief Justice extended that

time to and including October 1, 2026. No. 26A236. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

Pertinent provisions are reproduced at App. 74a–83a.

STATEMENT OF THE CASE

Record citations use “App.” for the appendix to this petition, “Appx” for the joint appendix in the court of appeals (which that court cited as “J.A.”), and “ECF No.” for filings in the Court of Federal Claims, No. 18-1395C.

1. Proceedings Below.

Fox sued the United States in the Court of Federal Claims on September 13, 2018, under the Tucker Act, 28 U.S.C. § 1491(a)(1). It alleged that it was a third-party beneficiary of the Air Force’s contract with Lakeshore Engineering Services, Inc. (“Lakeshore”), that it had an implied-in-fact contract with the Air Force, and that the Air Force breached the implied duty of good faith and fair dealing. App. 4a, 28a.

The court stayed the Government’s jurisdictional motion to dismiss, holding that Fox had raised non-frivolous claims on both contract theories, and ordered limited jurisdictional discovery. App. 54a–68a. The Government later withdrew its renewed motion, and the court denied both motions. ECF No. 77. By the parties’ agreement, further discovery was confined to liability. App. 29a; ECF No. 78 at 3–4. The officials who administered the payment arrangement before and after February 14, 2014, and who issued the May

8, 2014 cure notice—Supervisory Contracting Officer Leticia D. Walton, Maj. Karlo M. Jajliardo, Lt. Col. Erik M. Sell, and Maj. Seth D. Platt—were not deposed.

On cross-motions, the Court of Federal Claims granted summary judgment to the Government. It held that no implied-in-fact contract existed, that Fox was not a third-party beneficiary, and that the Air Force had not breached in any event. App. 29a–53a. It quoted *D & H*'s description of a clause giving the subcontractor “a right to control the disbursement of the contract proceeds,” but held that “[n]o matter how vocally Fox demanded direct payment, Fox signed a document saying it would not be paid directly by the Air Force.” App. 46a, 48a. It treated all of the money as one category, describing the February 2014 arrangement as “a means of curing Lakeshore’s default” of its “pre-existing duty to pay its subcontractors,” App. 52a, and holding that “Fox received all four payments owed to it under its agreement with Lakeshore,” App. 50a. It stated that the Air Force paid Lakeshore “\$4,052,085.01, as agreed,” *ibid.*—the net amount Fox received after wire costs, not what the Air Force paid. The court’s own itemization shows AFCEC payments to Lakeshore of \$3,466,448.76 (for invoices on two task orders), \$316,719.18, and \$565,616.22. App. 50a–51a & n.4. It concluded: “If Lakeshore still owes Fox money for work performed under their subcontract, that is an issue for the bankruptcy court, not this one.” App. 53a.

The court of appeals affirmed without deciding beneficiary status: “We need not reach whether Fox established third-party-beneficiary status, because even if it did, it would still have to show a breach.” App. 5a (citing *Sullivan v. United States*, 625 F.3d

1378, 1380 (Fed. Cir. 2010)). Reasoning that “[c]ontract interpretation begins with the language of the written agreement,” it read the February 7, 2014 letter alone, concluded that “the agreement focuses on Lakeshore’s obligations,” App. 6a, and held that “the Air Force did what it agreed to do: pay the invoices submitted to it by Lakeshore,” App. 8a. It added that the Air Force “again did what it said it would do in the February 2014 agreement: terminate for default,” citing the May 2, 2014 stop-work direction. *Ibid.* (citing Appx2097, 2102). Neither court separated the proceeds paid into Lakeshore’s general account before January 17, 2014 from those routed to the AFCEC Special Account afterward.

At argument, the panel gave Fox the opportunity, with the Government’s consent, to supplement the record with evidence in the record below of invoices the Government refused to pay. App. 7a n.2; App. 72a. Chief Judge Moore observed that the case came “very close to a line.” Oral Arg. at 21:56. After directing a corrected motion, App. 71a–73a, the court accepted Fox’s supplemental appendix (Fed. Cir. ECF No. 59), which included the Sell emails on releasing the invoices, Maj. Jajliardo’s reconciliation and \$6 million memorandum, and Fox’s declaration that its arrearage grew after Invoice 29, granted its motions for leave and for an extension of time (ECF Nos. 60, 61), and stated that the contents of the supplemental appendix “do not furnish evidence that alters the decision set forth in this opinion.” App. 7a n.2. On July 30, 2026, it denied leave to file a petition for panel rehearing out of time. App. 69a–70a.

2. The Federal Circuit's Rule.

The United States consents to contract suits only by those in privity with it. *Erickson Air Crane Co. of Washington v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984); *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). An intended third-party beneficiary is the recognized exception. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999). The privilege is “exceptional,” *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912), and the intent to benefit the third party must be “fairly attributable to the contracting officer,” *G4S Technology LLC v. United States*, 779 F.3d 1337, 1340 (Fed. Cir. 2015); *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001).

Restatement (Second) of Contracts § 302(1) supplies two independent routes to that status, joined by “either . . . or.” Under subsection (1)(a), it suffices that performance of the promise will “satisfy an obligation of the promisee to pay money to the beneficiary.” Comment b calls that party a “creditor beneficiary” and explains that a direct action is normally appropriate “even though no intention is manifested to give the beneficiary the benefit” of the performance. The Federal Circuit applied that rule to a Government contract in *D & H Distributing Co. v. United States*, 102 F.3d 542, 546–47 (Fed. Cir. 1996): a contract directing proceeds toward satisfaction of the promisee’s debt made the creditor a beneficiary “accorded full rights to sue under the original contract.” That beneficiary’s claim is its own, not derivative of the prime’s. *J.G.B. Enterprises, Inc. v. United States*, 497 F.3d 1259, 1261 (Fed. Cir. 2007).

When the Government pays the prime's general account in the ordinary course, the subcontractor acquires no rights, even if the Government knows the subcontractor will be paid from those funds. *G4S*, 779 F.3d at 1340–42. But joint-payee and escrow arrangements “are not the only payment mechanisms that can make a subcontractor a third party beneficiary.” *Id.* at 1342. And where an authorized official, knowing of a condition to the subcontractor's continued performance, “specifically modifies the prime contract so as to ensure the third party's continued performance,” the Government “necessarily intend[s] to benefit the third party.” *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1263 (Fed. Cir. 2005) (quoted at App. 41a).

Below, those strands were collapsed into a formal test. Following the synthesis in *Constructora Guzman, S.A. v. United States*, 161 Fed. Cl. 686, 694 (2022), the Court of Federal Claims required “a payment mechanism by which the subcontractor has direct access to payments made by the government,” and rejected Fox's claim because the arrangement “did nothing to alter the payor or payee.” App. 44a, 46a. The court of appeals then assumed status under *Sullivan*, read one implementing letter, and measured the Government's undertaking by the payments it made. App. 5a–8a. Read together, the decisions below apply this rule (the “Federal Circuit's Rule”): a Government-created payment arrangement for an identified creditor confers no enforceable right unless the Government changes the payor or payee, and the scope of any undertaking is fixed by the text of the implementing letter and the payments the Government chose to make.

3. Factual Background.

*a. Before any Special Account existed,
Lakeshore owed Fox \$3,551,663.42 for work
the Government had already paid for.*

In August 2012, the Air Force awarded Lakeshore Task Order 42 under Contract No. FA8903-06-D-8505 for the expansion of Shindand Air Base in Afghanistan. In October 2012, Lakeshore subcontracted the construction to Fox, which performed it. App. 2a, 10a–11a; Appx2604. The Air Force waived the usual bond requirements because the base was in a war zone. App. 55a; 40 U.S.C. § 3131(d); 48 C.F.R. § 28.102-1(a)(1). No payment bond stood behind the prime. The Defense Finance and Accounting Service (“DFAS”) paid Lakeshore, App. 11a, and through Lakeshore Invoice 25 those payments went to Lakeshore’s general operating account, where Lakeshore alone controlled the proceeds. Fox does not seek from the Government the money it paid Lakeshore on those invoices.

On December 20, 2013, the contracting officer notified Lakeshore that it was “delinquent in payment to a number of your sub-contractors on TO 0042” and that subcontractor payments were due “in full, within 7 days of receipt of payment from the government.” Appx2070. The Government was “aware of the following delinquencies,” including “FOX: Owed \$3,551,663.42”—“the amounts which you have already collected from the Government on their behalf.” Appx2071; see App. 19a. She rejected Invoice 26 for payment, stated that “[n]o future invoices will be released for payment” until Lakeshore proved payment, and found Lakeshore “in direct violation of

its contract with 772 ESS/PKA-D as well as with its sub-contractors.” Appx2071.

b. Lakeshore was insolvent, and the Government knew it.

On December 31, 2013, Lakeshore wrote that “the funds for the TO42 subcontractors are not yet paid,” that a company-wide “lack of cash” had a “paralytic effect,” and that it had been “forced to make unpopular payment priorities in order to ensure the continuation of the company.” Appx2072. It proposed payment “into a joint LTC/Fox account” or “a multi-party payment . . . issued by the USG.” Appx2072–73.

On January 7, 2014, the Air Force found that Lakeshore “has invoiced for amounts adequate to pay sub-contracts in full” but was “utilizing funds provided by the Governemnt [sic] from this contract for other internal purposes,” and that the nonpayment was “endangering performance.” Appx2074–75 ¶ 6; see App. 19a–20a. On January 16, Lakeshore admitted it was in default on more than forty-nine Government contracts. Appx3485 ¶ 36. The contracting officer knew Lakeshore “lacked funding to perform on TO 42, to pay FOX, or any subcontractor on TO 42, from their own funds.” Appx3491 ¶ 53; see Appx3484 ¶ 33. That evening, Lt. Col. Gregory Reich wrote to her: “I guess they used the money elsewhere aren’t planning on paying FOX or the other subs.” Appx3487 ¶ 41.

c. The Government chose Fox’s performance over termination, which would have left it with nothing.

The contracting officer testified that terminating Lakeshore would have left the Government “with

nothing,” and that completing the project “would be worth more to the Government.” App. 21a (quoting Ban Dep. 101:14–23, 143:7–16); Appx2340, 2350. Her reason for the restricted account: “we didn’t trust them to do the right thing with the cash, and so the whole point of this account is so that we could see that the money’s going back into the project.” Ban Dep. 79:16–19 (quoted at Appx3493 ¶ 57). She agreed that Fox “was not going to complete its work unless they got paid.” Ban Dep. 100:2–6 (ECF No. 85-1 at 140). Completion depended on Fox. Whenever Lakeshore’s nonpayment halted the work, “it was the FOX corporation that supplied the labor/materials/funds to re-start the site work.” Appx2604. Fox would no longer accept a Lakeshore check, Appx3485 ¶ 37, and told the Air Force that its agreement to any plan “will be based on AFCEC’s overall control and monitoring of any special account,” because “FOX trusts AFCEC as a Govt body but we do not trust LTC.” App. 23a.

d. The Government reconciled the debt, invoice by invoice.

On January 23, 2014, Maj. Jajliardo, the contracting officer’s representative, sent Fox a spreadsheet tracking every Lakeshore invoice from 1 through 29—gross amount, liquidated-damages deductions, and net proceeds—against Fox’s corresponding invoices, the amounts Lakeshore had paid, and the balance owed. He asked Fox to verify that “[a]ll the FOX invoice amounts are correct,” and wrote: “I cannot stress how important this info is, and to what useful purposes this will be applied to.” App. 23a; ECF No. 88-2 at 371–72.

e. The January 17, 2014 response changed the payee account.

On January 17, 2014, Lakeshore sent the contracting officer its formal response to the Show Cause Notice: a cover letter and five attachments, resent in complete form the next day. Appx3487–88 ¶¶ 42–45; Appx3490 ¶¶ 49–50; Appx3155–63; see App. 21a–22a. The attachments included a presentation proposing that Task Order proceeds be released “100% to the projects, especially Fox and 0% to LES.” Appx3485–86 ¶ 39. They also included Letters of Direction to DFAS routing Task Order proceeds into the new account. Appx3173, 3180–85. The Task Order 42 letter attached Fox’s wire information and stated that all remittances “will be used exclusively to pay subcontractors as previously attested to AFCEC on this project.” Appx3180; Appx3489 ¶ 47. The stated purpose was “to allow AFCEC full access to all incoming and outgoing wire activity, use of proceeds and account information to ensure and demonstrate that all incoming proceeds shall be applied directly to the projects.” Appx3490 ¶ 51.

By February 1, 2014, “AFCEC ha[d] accepted the letters of direction with their full access to the account.” Appx3496 ¶ 67; see App. 24a. The account was operational by February 4. Appx3498 ¶ 71. Changing the payee account required a new CAGE code, which the Government admitted “was first approved by the appropriate Air Force representative” before the Air Force provided it to DFAS. Appx3497–98 ¶ 70; Appx3508 ¶ 104.

f. The contracting officer restricted the account and approved where the money went.

On February 6, 2014, at the contracting officer's direction, the Air Force identified the personnel to be given access to the Special Account: the contracting officer, her contracting staff, the contracting officer's representative, and the AFCEC program manager. Appx3499 ¶ 74. On February 7, she "concur[red] with [the] establishment of the designated holding account" and provided that Lakeshore "will not take any proceeds . . . from these accounts absent the express consent of AFCEC, until the projects are closed out." Appx3499 ¶ 76. And "[i]f at any time, transactions do not occur in accordance with the approved subcontractor payment certification[,] this task order will be immediately terminated for default." Appx2096–97; App. 6a, 22a, 25a.

The allocation of each invoice required her approval: "Before we approve invoices, they submit to us a plan with how much of the invoice will go to who, and we either approve or reject that." Ban Dep. 136:13–15 (Appx2348).

g. The executed plan applied the Government's reconciled figures to the debt.

The payment plan recited that "AFCEC has informed LES that it will not release payment for the above invoices or subsequent invoices until and unless LES and Fox . . . enter into [a] payment plan," and quoted the contracting officer's conditions. Appx2171–72. It stated Fox's balance—\$6,482,062.17 on Fox's invoices 22 through 27—"regardless of the subcontract terms regarding payment." Appx2172. It applied the net proceeds of Invoices 26 through 29, in figures identical to Maj. Jajliardo's reconciliation, to

that debt: \$3,309,890.01 to Fox, \$10,256.42 to another subcontractor, and nothing to Lakeshore. Appx2171; ECF No. 88-2 at 371–72; see App. 43a. It carried forward an unpaid \$3,172,172.16. Appx2173. It committed 100% of Invoice 30 to Fox, and later invoices to Fox and project costs only through Invoice 38. Lakeshore could take no “overhead or similar charges from this account” until Fox was paid. Appx2172–73. Fox in reliance of the change of the payee to the AFCEC Special Account, signed the plan on February 14, 2014, and returned to work. Appx2137–38 ¶¶ 37, 40; App. 27a.

h. The mechanism operated through Invoice 29.

On February 27, 2014, DFAS wired approximately \$3.4 million “intended for the AFCEC Special Account” to Lakeshore’s general account by mistake. Lakeshore transferred it to the AFCEC Special Account, and from there Fox was paid \$3,309,890.01. Appx3507 ¶ 101; App. 50a–51a. By March 5, Lt. Col. Sell considered the mechanism proven, and said it could be extended to another task order “because this way of moving of the money was demonstrated on TO 42.” Appx3508–09 ¶ 106.

Between February 27 and April 29, 2014, the proceeds of Invoices 26 through 29 reached Fox: \$4,052,225.02 wired, \$4,052,085.01 received after wire costs. App. 27a, 50a–51a & n.4. Fox kept building. On April 30, Maj. Jajliardo recorded that Fox “continued to work and produce construction that LTC could invoice on despite the fact that they continued to be owed money.” Appx2604.

i. After Invoice 29, the arrearage grew through Invoice 34.

Lakeshore abandoned the project on or about May 1, 2014, and filed a Chapter 7 petition. App. 3a, 27a. The arrearage then grew. The trial court quoted Fox's sworn declaration that after the April 29 payment for Invoice 29, "the amount in arrears [sic] to FOX increased with each billing cycle." App. 27a (quoting Appx2139 ¶ 47). At Lt. Col. Reich's deposition, Fox marked the Government's May 8, 2014 cure notice as Reich Deposition Exhibit 57. Counsel read its paragraph 6 into the record as stating that, from Invoice 30 through Invoice 34, the debt to Fox had grown from \$3,172,172 to \$4,119,406; the witness acknowledged those amounts; and the Government's counsel did not object to the exhibit, noting only that a highlighting box had been added to the copy. Reich Dep. 162:6–166:8, ECF No. 88-2 at 279–283. The notice itself was not filed; discovery was limited to liability. App. 29a.

No proceeds reached Fox after April 29, 2014. On June 8, 2014, Maj. Platt told Fox that "all money and assets are still frozen." ECF No. 85-1 at App56. On October 9, Lt. Col. Sell reported that the Government had inventoried Fox's work in place and was checking whether he was "allowed to release the invoices" to Fox. Appx2139 ¶ 44. Maj. Jajliardo later recorded that Lakeshore's bankruptcy left "unpaid invoices to FOX for over \$6M." Appx2606. On October 24, 2017, the contracting officer denied Fox's certified claim on the ground that the Air Force had no contract with Fox. App. 28a, 58a.

j. Two categories of money.

The record divides Task Order 42 proceeds by payment route. Through Lakeshore Invoice 25, DFAS paid Lakeshore's general account, and the Government made no promise concerning those funds. Beginning with Lakeshore's January 17, 2014 Letters of Direction, the payee of record changed to the AFCEC Special Account under a new CAGE code the Air Force approved, and on February 14 Fox signed the plan allocating those proceeds. Appx3508 ¶ 104; Appx2171–73. That mechanism delivered the proceeds of Invoices 26 through 29. After April 29, 2014, nothing more reached Fox, while its arrearage grew through Invoice 34, the last cycle the May 8, 2014 cure notice addressed. App. 27a; ECF No. 88-2 at 279–283.

Invoices	Payment route	Control of proceeds	Fox's position
1–25	DFAS to Lakeshore's general operating account	Unrestricted	Fox bore the risk of prime nonpayment; asserts no beneficiary rights
26–29	DFAS to the designated account under the certified plan	Restricted to the plan; nonconforming disbursement grounds for immediate default termination	\$3,309,890.01 applied; four wires reach Fox

Invoices	Payment route	Control of proceeds	Fox's position
30–34	Same mechanism; allocations continue under the plan	Lakeshore abandons and files Chapter 7	Arrearage grows with each billing cycle (App. 27a); cure notice described at deposition as \$3,172,172 to \$4,119,406; no proceeds reach Fox after April 29
35–38	Plan's allocation schedule extends through Invoice 38	Never reached	No proceeds flowed

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are of Great Legal and National Significance.

A. The Government needs a predictable rule.

When the Government waives the Miller Act bond requirement, a prime contractor's failure to pay its subcontractors leaves contracting officers no bond to call on, and termination may interrupt a mission. The Federal Acquisition Regulation contemplates that the

officer may “[e]ncourage the contractor to make timely payment” or, where authorized, “reduce or suspend progress payments.” 48 C.F.R. § 32.112-1(b).

B. The decision below returns to the subcontractor the risk the mechanism was built to address.

For Invoices 1 through 25, the ordinary allocation of risk governed. The Government paid Lakeshore; Lakeshore controlled the proceeds; Fox bore the risk that Lakeshore would not pay. *G4S* correctly holds that payment into a contractor’s general fund, even with knowledge that subcontractors will be paid from it, creates no third-party right. 779 F.3d at 1342.

When that allocation failed, the Air Force did something different. It conditioned continued invoice processing on a restricted arrangement, required certifications and a plan identifying Fox and the existing debt, confined the proceeds to subcontractor payment on pain of immediate default termination, and obtained Fox’s continued performance. Lakeshore remained the account holder and made the wires only after the CO approved or rejected each allocation before release. Appx3499 ¶¶ 74, 76; Appx2348. The decision below nonetheless treats the case as though the Government had continued to pay Lakeshore’s general operating account. Changing that payment route was the entire purpose of the Special Account.

That choice was the Government’s, not Fox’s. The contracting officer had grounds to terminate and knew Lakeshore had diverted contract funds collected for Fox. Appx2075 ¶ 6. The trial court reasoned that Fox “signed a document saying it would not be paid directly by the Air Force.” App. 48a. But Lakeshore was a conduit, not a source; the plan could be

performed only with Government funds. As in the 1996 *Flexfab* decision, *see* Part III.C, *infra*, an authorized official knowingly changed how payment flowed to secure a subcontractor's continued performance. The Government kept that performance and left Fox with the risk.

C. The waiver of the Miller Act bond makes the question consequential.

Federal construction ordinarily carries payment-bond protection. 40 U.S.C. § 3131(b). The requirement may be waived, *id.* § 3131(d); 48 C.F.R. § 28.102-1(a), and here it was. App. 55a. When an unbonded prime cannot pay the subcontractor actually performing the work, officials must choose between termination and repurchase or preserving performance through a restricted payment arrangement. The AFCEC Special Account was not a Miller Act bond and did not make the United States a surety. It was a different protection against the same practical risk.

If the decision below stands as the operative understanding of *D & H*, the creditor-beneficiary rule will do no work in the one setting where the Government most needs it to be clear.

D. The rule petitioner seeks is narrow and self-limiting.

Ordinary Government payment to a prime creates no third-party right merely because the Government knows subcontractors will ultimately receive the funds. The question arises, as *G4S* framed it, only when payment is made through a payment mechanism different from the ordinary one. It also requires that an authorized contracting officer have materially departed from the ordinary payment

relationship. The facts that mark that departure are a known payment failure, restricted proceeds, an identified creditor holding an existing debt, an agreed payment plan, and Government control over disbursement sufficient to administer the arrangement. Those features define the category of cases in which the questions presented arise.

II. Except for This Court, No Court Can Settle These Questions.

Congress has vested exclusive appellate jurisdiction over judgments of the Court of Federal Claims in the Federal Circuit. 28 U.S.C. § 1295(a)(3). The ordinary mechanism by which an unsettled federal question develops—consideration by multiple courts of appeals, followed by review when they disagree—cannot operate here. There will be no regional-circuit conflict and no percolation.

Nor do the Federal Circuit’s own decisions supply a unified rule. One strand is functional: *D & H* located a payment clause’s force in its purpose, to give the subcontractor “a right to control the disbursement of the contract proceeds,” 102 F.3d at 546–47, and *J.G.B.* sustained a subcontractor’s claim where payments were routed to an escrow account, 497 F.3d at 1260–61. The other is formal: *G4S* found no “direct” benefit where the agency “always paid” the prime, 779 F.3d at 1340–41, while cautioning that joint-payee and escrow arrangements “are not the only payment mechanisms that can make a subcontractor a third party beneficiary,” *id.* at 1342. The Court of Federal Claims has synthesized the line as requiring “direct access to payments made by the government.” *Guzman*, 161 Fed. Cl. at 694 (quoted at App. 44a). That synthesis cannot be squared with the decision

from which the Federal Circuit drew its own rule. *See* Part III.C, *infra*.

Sullivan, in turn, permits a court to bypass status and decide breach, 625 F.3d at 1380–81 during a typical payment sub-performing prime relationship. Fox falls between these strands. The AFCEC Special Account was not a joint-payee clause or an escrow, and Lakeshore made the wires. But it was funds earmarked for Fox, and other subs not a general fund either: the proceeds were restricted to paying subcontractors under a certified plan naming Fox, on pain of immediate default termination. The Court of Federal Claims quoted the functional test and applied the formal one. App. 44a–46a. The panel applied neither; it assumed status, invoked *Sullivan*, and read one letter. That is an important question of federal law “that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c).

III. The Decisions Below Depart From This Court’s Method and the Federal Circuit’s Own Precedent.

A. This Court reads Government contracts and construction-payment arrangements by their purpose and circumstances.

For more than a century, this Court has read contracts with the United States against their setting. In *United States v. Peck*, 102 U.S. 64 (1880), an appeal from the Court of Claims, the Court admitted evidence of the surrounding circumstances to show the subject matter of the contract and the conduct of the Government’s agents by which the claimant “was encouraged and led on to rely on a particular means of fulfilling his contract.” *Id.* at 65. The writing was

silent on the means on which the claimant relied; the Court read it through the circumstances known to both sides. *Id.* at 64–65. The Restatement states the same rule: words and conduct “are interpreted in the light of all the circumstances,” and “all writings that are part of the same transaction are interpreted together.” Restatement (Second) of Contracts § 202(1)–(2).

This Court’s federal construction-payment cases apply the same method, examining the purpose and operation of protected funds rather than treating formal labels as dispositive. *Prairie State Bank v. United States*, 164 U.S. 227 (1896); *Henningsen v. United States Fidelity & Guaranty Co.*, 208 U.S. 404 (1908); *Martin v. National Surety Co.*, 300 U.S. 588 (1937). In *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 141–42 (1962), the Court held that retained percentages were not the defaulting contractor’s unencumbered property, because the contractor’s entitlement was qualified by the purpose for which the fund was withheld. Fox claims nothing by subrogation, and *Pearlman* does not establish its claim. See *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 264–65 (1999). Its relevance is its method: the Court asked what the restricted fund was withheld to accomplish in deciding who was entitled to it, not whose name appeared on the instrument.

B. The Federal Circuit adopted that method in D & H, and the decisions below did not apply it.

In *D & H*, the Federal Circuit held that where a payment arrangement directs the proceeds of performance toward satisfaction of the promisee’s debt, the party whose debt is satisfied is the

traditional creditor beneficiary, “accorded full rights to sue under the original contract.” 102 F.3d at 547. The court did not ask whether the Government had promised to pay the claimant; it asked what performance of the arrangement necessarily accomplished. *J.G.B.* applied it again, holding that such a beneficiary’s “claims are not derivative of [the prime’s] rights under the contract.” 497 F.3d at 1261.

The Court of Federal Claims quoted *D & H* and then distinguished it because the February arrangement “did nothing to alter the payor or payee” and the Air Force never made Lakeshore and Fox joint payees. App. 46a–48a. That reasoning states the formal test *D & H* displaced.

That distinction also departs from the Court of Federal Claims’ own line of cases. That court, applying *D & H*, has held a subcontractor to be a beneficiary of a modified remittance clause whose “entire purpose” was “to provide protection for [the subcontractor] by giving it a right to control the disbursement of the contract proceeds.” *J.G.B. Enterprises, Inc. v. United States*, 63 Fed. Cl. 319, 334 (2004) (quoting *D & H*, 102 F.3d at 547), *aff’d*, 497 F.3d 1259; *accord Nelson Construction Co. v. United States*, 79 Fed. Cl. 81, 98 (2007). In *Norwest* the court stated the subcontractor is a “creditor beneficiary” because the prime redirected its payments “with the intent to discharge or prevent any present or future liability” to it—the rule of § 302(1)(a). 37 Fed. Cl. at 609.

The court of appeals did not reach the question. It assumed beneficiary status, App. 5a, and then construed the arrangement as though the assumed beneficiary’s protection formed no part of what the Government undertook. Those two steps cannot

coexist. A court that assumes a claimant is an intended beneficiary has assumed the arrangement was designed in part for that claimant's protection. It cannot then read the arrangement as though that protection were absent.

C. The arrangement here was stronger than the one from which the Federal Circuit drew its rule.

The Federal Circuit's governing formulation traces to an unreported decision it calls the "1996 *Flexfab* Decision." *Flexfab, Inc. v. United States*, No. 94-974 (Fed. Cl. Feb. 8, 1996), described in 424 F.3d at 1261. There, the Government would not make the subcontractor a payee—formal assignment would have required re-bidding in wartime—and instead designated it the "mailee" for future payments. Checks still issued in the prime's name, and the subcontractor's access came from an endorsement authority the prime gave it. *Ibid.* On that record beneficiary status was established. *Id.* at 1261–62. From that decision the court of appeals drew the rule it recites today. *Id.* at 1263 (quoted at App. 41a). Every feature the 1996 arrangement lacked, the arrangement here supplied:

	1996 <i>Flexfab</i>	Fox
Payment route	Subcontractor designated “mailee”; checks issued in the prime’s name	Proceeds directed by Letter of Direction to a designated account, “to be used exclusively to pay subcontractors” (Appx3180)
Source of access	Endorsement authority the prime granted	A plan the Government required, naming Fox and fixing its arrearage (Appx2171–73)
Control of allocation	None	Each release conditioned on a plan showing “how much of the invoice will go to who,” which the Government would “either approve or reject” (Appx2348)
Sanction	None	Nonconforming disbursement grounds for immediate default termination (Appx2097)

	1996 <i>Flexfab</i>	Fox
Restriction on the prime	None	Prime barred from overhead or corporate charges while Fox went unpaid (Appx2172)
Antecedent reconciliation	None	Invoice-by-invoice reconciliation of Fox's billings, payments, and wires before acceptance (App. 23a)

If a mailee designation carrying none of those controls sufficed, a mechanism carrying all of them cannot fail for want of a payment route. The court of appeals did not distinguish the 1996 decision. It did not discuss it.

The executed plan also fixed the allocations in advance: 100% of Invoice 30 to Fox, 100% less \$70,000 of Invoices 31 and 32, and tiered allocations through Invoice 38. Appx2171–73. Pre-committing the destination of proceeds not yet earned, on invoices not yet submitted, is how a payor removes an intermediary's discretion over money passing through its hands.

IV. The Creditor-Beneficiary Rule Has Deep Roots, but Its Application to a Government-

Created Payment Mechanism Remains Unsettled.

A. Fox invokes an established creditor beneficiary doctrine, not a new theory.

In *Lawrence v. Fox*, 20 N.Y. 268 (1859) (no relation to petitioner), a stranger to a promise was allowed to enforce a promise made to pay his debtor’s creditor, and this Court acknowledged the prevailing American rule in *Hendrick v. Lindsay*, 93 U.S. 143, 149 (1876). The decisions below confine the inquiry to one letter. App. 5a–6a. The Federal Circuit’s rule looks to “the contract language or the attendant circumstances.” *Flexfab*, 424 F.3d at 1263.

Here the CO conditioned renewed invoicing on a plan for subcontractors in arrears, Appx2095–97, and the plan identified Fox’s debt and how Task Order 42 proceeds would be applied, Appx2171–73.

B. Subsections (1)(a) and (1)(b) must remain analytically distinct.

Section 302(1) deliberately uses “either . . . or,” and comment b explains why the difference matters. It calls the subsection (1)(a) beneficiary a “creditor beneficiary” and states that a direct action against the promisor is normally appropriate “even though no intention is manifested to give the beneficiary the benefit of the promised performance.” Under (1)(a), the inquiry is what the arrangement was built to do—whether a debt existed and whether performance applied the proceeds to it. The Government’s interest in completing the work is not a defense under that branch; it is the consideration for the undertaking. Intent is not irrelevant: the introductory clause still requires that recognition of a right be “appropriate to

effectuate the intention of the parties.” But comment b explains that in the creditor-beneficiary setting that requirement is normally met. Requiring the (1)(b) showing under (1)(a) collapses two alternative routes into one. Whether federal common law permits courts to bypass that inquiry is the second question presented, and only this Court can settle it.

Fox’s reply brief applied that rule through the Restatement’s own illustration. Appellant’s Reply Br. 19–23, C.A. Doc. 22. Illustration 3 to § 302 separates a promise by B to pay A’s creditors, who are intended beneficiaries, from money paid to A “in order that he may be provided with money to pay” them, who are at most incidental. B is the Air Force, A is Lakeshore, and C is Fox. For Invoices 1 through 25, B paid A, and C was incidental. A’s known inability to pay then caused B to change the arrangement: B released further proceeds only into an account A could not draw on without B’s consent, under a plan applying them to A’s debt to C. Appx2096–97, 2171–73; Appx3499 ¶ 76. Fox’s continued construction was the performance the Air Force as B sought, and C (Fox) returned only on that footing. App. 21a, 23a. That is the intended side of the line.

The trigger for subsection (1)(a) here was the Government’s own act. It rejected Invoice 26 and refused to release “future invoices” until Lakeshore proved payment of amounts “already collected from the Government on [the subcontractors’] behalf,” Appx2071; approved the new CAGE code that redirected payment to the new payee account, Appx3508 ¶ 104; accepted Letters of Direction routing proceeds “exclusively to pay subcontractors,” Appx3180; *see* Appx3496 ¶ 67; and withheld payment “until and unless LES and Fox” signed a plan applying

those proceeds to Fox's debt, Appx2171–72. When the promisor itself redirects contract proceeds so that its performance will discharge the promisee's debt to an identified creditor, § 302(1)(a) is satisfied by the structure of the undertaking; no further showing of solicitude is required.

This case presents an opportunity to bring federal creditor-beneficiary law into line with the generally accepted commercial rule.

Commercial law has long since moved past the nineteenth-century privity rule; § 302(1)(a) is the generally accepted rule. The Federal Circuit applies § 302 to Government contracts. See *D & H Distributing Co. v. United States*, 102 F.3d 542, 547 (Fed. Cir. 1996); *J.G.B. Enterprises, Inc. v. United States*, 497 F.3d 1259, 1261 (Fed. Cir. 2007); *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1263 (Fed. Cir. 2005). But it applies § 302 with glosses of its own, and this Court can put forth a uniform guidance as to what rule governs.

The (1)(a) facts are clean. Lakeshore owed Fox an existing debt. The Government and Lakeshore restructured the contract's payment mechanism so that Task Order 42 proceeds would satisfy that debt. And Fox resumed performance in reliance on that arrangement.

***C. The creditor beneficiary's right is direct,
not derivative.***

An intended beneficiary does not take through the promisee; the promisor's duty runs to the beneficiary, who may enforce it in its own right. Restatement (Second) of Contracts § 304; *J.G.B.*, 497 F.3d at 1261. For the same reason, the Government may not reduce

what a beneficiary is owed to collect the prime's debts on other contracts; to set off, it "must have a claim against JGB, not CCP." *Id.* at 1262. That the February 7 letter was addressed to Lakeshore does not make its performance owed only to Lakeshore. Nor does Lakeshore's bankruptcy channel the claim, App. 53a: a direct right is not an asset of the promisee's estate. And enforcement creates no risk of double payment: Fox seeks only what the account never delivered to it, and the promisee is defunct.

The reply brief also explained why that right is enforceable here. Appellant's Reply Br. 27–31. Under the new mechanism, Lakeshore's remaining role was ministerial: to pass Task Order 42 proceeds to Fox "immediately upon receipt of funds." Appx3264. When Lakeshore abandoned even that role in its May 2014 bankruptcy, Fox submitted its own certified claim, which the contracting officer denied on the ground that "the Air Force did not have a contract with Fox." App. 28a. A creditor beneficiary holding "full rights to sue under the original contract," *D & H*, 102 F.3d at 547, does not lose them because the defunct promisee stopped invoicing.

D. The demanding standard for beneficiary status was neither applied nor explained.

Beneficiary status is an "exceptional privilege," available only to one who shows the contract "was intended for his direct benefit." *German Alliance*, 226 U.S. at 230; see *Flexfab*, 424 F.3d at 1259; *Glass*, 258 F.3d at 1354. That standard is not petitioner's obstacle; it is petitioner's premise. Fox does not ask this Court to relax it. Fox asks that it be applied.

It was not. The panel assumed status, App. 5a, and the Court of Federal Claims asked about subjective

intent and the payor or payee, App. 35a–48a; neither examined the arrangement as a whole. A federal payment arrangement adopted in response to an acknowledged prime failure will rarely announce that it confers third-party rights. If status required such an announcement, the standard would collapse into a drafting rule.

Here, the contracting officer declined to terminate a prime she knew could not pay, changed the route by which federal money moved, conditioned every further invoice approval on an agreed plan fixing Fox’s arrearage, and obtained Fox’s continued performance on that footing. App. 21a; Appx2096–97, 2171–73. A standard that examines those facts and finds them insufficient is demanding. A standard that never reaches them is closed.

V. The Decision Below Rests on a Premise the Government’s Own Record Contradicts.

A. Scope must be determined before performance can be measured.

The panel read one letter, observed that it “focuses on Lakeshore’s obligations,” and measured performance by that letter. App. 6a. The letter was addressed to Lakeshore; of course it described Lakeshore’s obligations. Under the whole-transaction rule of Restatement (Second) of Contracts § 202(2), the executed plan, the February 7 letter, the Letters of Direction, the Government’s invoice-by-invoice approvals and controls, and the parties’ performance form one integrated arrangement whose scope must be determined before breach can be measured. Appx2096–97, 2171–73. The Government’s May 8, 2014 cure notice, read into the record at deposition

without objection, is the work product that ties together the accounting that is derived from the invoices 30-34 which the Panel mentioned was missing but was at all times refuted by the record, including addressed Invoices 30 through 34 and a debt that had grown to \$4,119,406. Reich Dep. 163:15–18, ECF No. 88-2 at 280.

B. Four completed payments for Invoices 26–29 cannot define an arrangement extending through Invoice 38.

The panel held that the Air Force “did what it agreed to do: pay the invoices submitted to it by Lakeshore.” App. 8a. But the executed plan did not stop at Invoice 29. It carried forward \$3,172,172.16 and allocated proceeds of Invoices 30 through 38. Appx2173. Fox’s sworn declaration, which the Government itself filed in its summary-judgment appendix and the trial court quoted, attests that its arrearage grew with each billing cycle after Invoice 29. ECF No. 85-1 at App92 ¶ 47; App. 27a.

The Government moved for summary judgment on the premise that no invoice after Invoice 29 was submitted and left unpaid. As movant, it bore the initial burden of showing that absence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It offered no DFAS payment log, no invoice register, and no declaration of non-receipt. And its own cure notice, marked as Reich Deposition Exhibit 57 and read into the record without objection, identifies Invoices 30 through 34 by number, Reich Dep. 162:6–163:18, ECF No. 88-2 at 279–80—the same arrearage the trial court found grew after Invoice 29, App. 27a that incomplete discovery awaits the evidence upon remand. A movant

cannot carry its burden with an asserted absence of records that its own records contradict.

Nor was Fox required due to incomplete discovery to place those invoices in the record, as the Court of Federal Claims confined the proceedings to liability and reserved damages. App. 29a; ECF No. 78 at 3–4. Fox therefore showed its growing arrearage through its declaration and the Government’s own cure notice, not through invoice-by-invoice proof of amount. Faulting Fox for omitting quantum evidence from a liability-phase record resolves a reserved issue against the non-movant.

C. Sullivan does not define the scope of an affirmative payment undertaking.

Sullivan involved a Postal Service contract that imposed no duty on the Postal Service to ensure that its contractor carried insurance. 625 F.3d at 1379–81. Fox is the opposite case. After finding that the ordinary channel had failed, the Air Force accepted a segregated account, conditioned further invoice processing on certifications and a plan identifying the arrearage, restricted Lakeshore’s use of the proceeds, and retained authority to approve or reject each allocation. *Sullivan*’s requirement that a beneficiary prove breach presupposes that the duty has first been identified. It does not permit the duty to be defined by the subset of performance the Government happened to complete.

D. The panel prematurely measured the prime's billings, not the debt the arrangement was built to satisfy.

The panel asked whether Lakeshore submitted additional invoices. App. 7a. But Lakeshore's invoices were not the debt the mechanism was created to discharge. The executed plan fixed that debt by Fox's invoice numbers—"amounts due and owing to Fox for Fox's invoices 22, 23, 24, 25, 26 and 27 . . . is \$6,482,062.17"—and separately allocated the proceeds of Lakeshore's Invoices 26 through 38 to it. Appx2171–73. The instrument thus uses two numbering systems: Fox's invoices establishing the debt, and Lakeshore's identifying the proceeds allocated to it. The panel considered only the latter.

The Court of Federal Claims found that "[n]obody contends or believes that Lakeshore was an ethical actor" and that Lakeshore was filing false payment certifications "to get itself paid." App. 52a. The Air Force knew, yet chose not to terminate. App. 38a. Termination would have left the Government "with nothing," App. 21a. So the contracting officer changed the payee account and conditioned every further invoice on a plan applying the proceeds to Fox's reconciled debt. Appx2096–97, 2171–73; Appx3508 ¶ 104. Fox stayed, and the carried-forward debt of \$3,172,172.16 grew to \$4,119,406. Appx2173 and with retention and log lead items ballooned to \$8 million more. ; Reich Dep. 163:15–18. *D & H* lets such a creditor sue, 102 F.3d at 547.

VI. This Case Is a Clean Vehicle.

The case arises on cross-motions for summary judgment. The Federal Circuit expressly assumed

beneficiary status and affirmed on scope and breach. The operative arrangement is evidenced principally by contemporaneous Government documents: the December 20, 2013 notice, the January 7, 2014 Show Cause Notice, the February 7 letter, and the executed plan.

The questions are preserved. Fox argued below that it was a creditor beneficiary; invoked *D & H*, the 1996 *Flexfab* decision, and *J.G.B.*; and contended that the Government joined in changing the payee to the AFCEC Special Account, imposed restrictions and controls on that mechanism, and, through the letters of direction, the payment plan, and its own notices, identified Fox and its debt. The Court of Federal Claims addressed those contentions. App. 46a–49a. In the court of appeals, Fox argued that it qualified as an intended beneficiary under § 302(1)(a) and Illustration 3, and that the Government “skip[ped] a critical step” by resorting to § 302(1)(b). Appellant’s Reply Br. 19–23, C.A. Doc. 22. Fox again relied on *J.G.B.*, *Flexfab*, and *D & H*, quoted comment b to § 302, and argued its right of enforcement. *Id.* at 27–31. “Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); accord *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). Section 302(1)(a) is a legal argument supporting the preserved creditor-beneficiary claim. And Question One—how the scope of the undertaking is determined—is the very question on which the panel ruled. Question Three is likewise preserved: the panel passed on Fox’s argument that invoices after Invoice 29 went unpaid, and on the supplemental appendix supporting it. App.

7a & n.2; see *United States v. Williams*, 504 U.S. 36, 41 (1992).

Fox does not ask this Court to calculate damages or resolve disputed invoices. It asks the Court to identify the federal rule by which a Government-created payment arrangement must be interpreted. If the Court remands, the Court of Federal Claims can apply that rule and determine what amounts, if any, fall within the undertaking. The records are identified: the invoices Lt. Col. Sell held, Appx2139 ¶ 44, and the accounts behind Maj. Jajliardo's \$6 million finding, Appx2606 and Judge Myers' reference to the \$8 million App. 4a, 27a, and 58a. A short period of targeted discovery, a hearing to prove up the invoices, or a stipulation of the parties would suffice. The contracting officer said termination would leave the Government with "nothing." The Government took Fox's work instead. Unless this Court intervenes, the decision below leaves the subcontractor that did the work with nothing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1, 2026

APPENDIX

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**APPENDIX A — Opinion of the United States Court
of Appeals for the Federal Circuit, No. 2024-2150
(ECF No. 62), filed June 3, 2026 (footnote 2, granting
Petitioner’s motion for leave to file a supplemental
appendix and motion to extend time, ECF Nos. 60, 61,
and accepting the supplemental appendix, ECF No. 59)**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2024-2150

FOX LOGISTICS AND CONSTRUCTION CO.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal
Claims in No. 1:18-cv-01395-EHM, Judge Edward H.
Meyers.

Decided: June 3, 2026

Before MOORE, *Chief Judge*, PROST, *Circuit Judge*, and
SEEBORG, *Chief District Judge*.¹

PROST, *Circuit Judge*.

Fox Logistics and Construction Co. (“Fox”) appeals
a decision of the U.S. Court of Federal Claims (“Claims

1. Honorable Richard Seeborg, Chief District Judge, United
States District Court for the Northern District of California, sitting
by designation.

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Court”) granting summary judgment for the United States. For the reasons below, we affirm.

BACKGROUND

This appeal arises from a subcontractor’s attempts to secure payment from the United States. In August 2012, the U.S. Air Force awarded Lakeshore Engineering Services, Inc. (“Lakeshore”) Task Order No. 42 under Federal Prime Contract #FA8903-06-D-8505 for the expansion of the Shindand Air Base in Afghanistan. J.A. 2-3, 2682. In October 2012, Lakeshore awarded Fox a subcontract in support of that task order. J.A. 3. The arrangement quickly soured—within months of awarding Fox the subcontract, Lakeshore began failing to make timely payments. J.A. 3.

A series of show-cause notices and warnings to Lakeshore from the Air Force ensued. J.A. 3-9. These communications came to a head on January 7, 2014, when the Air Force issued another show-cause notice to Lakeshore. J.A. 2074-76. The notice informed Lakeshore that the Air Force considered Lakeshore’s “nonpayment to subcontractors to be endangering performance under” the task order and explained that “the non-payment and resulting impacts are cause for reconsideration” of termination under the task order’s provisions for default. J.A. 2074. It further directed Lakeshore to “provide the [g]overnment with a corrective action plan to prevent continual financial issues from affecting future performance and completion of the project.” J.A. 2076. In response, Lakeshore proposed that it would deposit

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future payments on task orders into a designated holding account. J.A. 6, 2082-90. In a February 7, 2014 letter to Lakeshore (“the February 2014 agreement”), the Air Force contracting officer agreed to use of the holding account and instructed Lakeshore to include subcontractor payment certifications with future invoices for payments and pay a subcontractor immediately upon receipt of payment. J.A. 2096. The contracting officer advised that the Air Force would monitor transactions from the holding account—if transactions did not occur in accordance with the approved subcontractor payment certification, the task order would be immediately terminated for default. J.A. 2097.

On February 14, 2014, Lakeshore and Fox signed the final version of the Lakeshore-Fox payment plan. J.A. 2173. The plan specified that Lakeshore was to pay Fox for the amounts on Lakeshore’s submitted invoices. J.A. 2172. It also specified that the Air Force would have “full access viewing rights to monitor all proceeds.” J.A. 2172. Under the plan, Lakeshore submitted four invoices to the Air Force. J.A. 19. For each invoice, payment was made by the Air Force to Lakeshore, and by Lakeshore to Fox. J.A. 19-20.

On or about May 1, 2014, Lakeshore abandoned Task Order No. 42 and its other projects in Afghanistan. J.A. 9. On May 2, 2014, the Air Force contracting officer emailed Lakeshore, directing the company to ensure that its subcontractors discontinue performing work, including under Task Order No. 42. J.A. 2102. Lakeshore filed a Chapter 7 bankruptcy petition. J.A. 9. Fox contends that

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Lakeshore owed it “more than \$3,000,000” at the time Lakeshore declared bankruptcy and that it incurred over \$8,000,000 in uncompensated expenses. Appellant’s Br. 21; J.A. 9. Fox alleges it “unsuccessfully” attempted to recover those funds during Lakeshore’s bankruptcy proceedings. Appellant’s Br. 21. Fox further alleges it subsequently filed a certified claim with the Air Force, which was denied. Appellant’s Br. 21; J.A. 9.

Fox filed its complaint with the Claims Court in September 2018. J.A. 9. The complaint alleged that Fox had an implied-in-fact contract with the Air Force, was a third-party beneficiary to the Air Force’s contract with Lakeshore, and that the Air Force had breached its implied duties of good faith and fair dealing. J.A. 41-49. The Claims Court ordered jurisdictional discovery and fact discovery following the government’s (ultimately withdrawn) motion to dismiss. *See Fox Logistics & Constr. Co. v. United States*, 145 Fed. Cl. 236, 239-43 (2019); J.A. 9-10. Both parties filed motions for summary judgment. J.A. 10. In May 2024, the Claims Court granted the government’s motion for summary judgment, concluding that: (1) no implied-in-fact contract existed between Fox and the Air Force; (2) Fox was not a third-party beneficiary of Lakeshore’s February 2014 agreement with the Air Force; and (3) even if Fox were a third-party beneficiary of Lakeshore’s February 2014 agreement with the Air Force, that the Air Force had not breached that agreement. J.A. 11-19.

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

*Appendix A***DISCUSSION**

We affirm a grant of summary judgment “when the record, examined in the light most favorable to the non-movant, demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *G4S Tech. LLC v. United States*, 779 F.3d 1337, 1340 (Fed. Cir. 2015) (cleaned up). We review the Claims Court’s grant of summary judgment de novo and draw all justifiable factual inferences in favor of Fox. *See Ammex, Inc. v. United States*, 384 F.3d 1368, 1371 (Fed. Cir. 2004).

On appeal, Fox argues that the Claims Court erred in granting summary judgment to the government because (1) it was a third-party beneficiary to the Air Force’s February 2014 agreement with Lakeshore and (2) a genuine dispute of material fact exists as to whether the Air Force breached that agreement. Appellant’s Br. 22, 46. We need not reach whether Fox established third-party-beneficiary status, because even if it did, it would still have to show a breach. *See Sullivan v. United States*, 625 F.3d 1378, 1380 (Fed. Cir. 2010). And, because we conclude that the Claims Court properly determined that no genuine dispute of material fact exists as to the alleged breach of the February 2014 agreement, we affirm the Claims Court’s grant of summary judgment.

To determine whether there was a breach, we must know what the February 2014 agreement required. “Contract interpretation begins with the language of the

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written agreement.” *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). The February 2014 agreement between the Air Force and Lakeshore is clear. It sets forth in relevant part that Lakeshore “may resume submitting invoices for payment provided that [Lakeshore] continue[s] to submit sub-contractor payment certifications, and that all payments are made in accordance with that certification immediately upon receipt of funds from the government.” J.A. 2096. The agreement further required Lakeshore to submit “an agreed upon payment plan with sub-contractors currently in arrears.” J.A. 2096. Finally, it specified that, “[o]nce invoices are approved and disbursed to” Lakeshore, the government “will monitor transactions from the designated holding account. If at any time, transactions do not occur in accordance with the approved sub-contractor payment certification[,] this task order will be immediately terminated for default.” J.A. 2097. Importantly, the agreement focuses on Lakeshore’s obligations.

Fox does not anchor its arguments regarding breach in the language of the agreement. Instead, to support its position that a genuine dispute of material fact exists regarding whether the Air Force breached the contract, Fox offers what it believes to be the Claims Court’s “acknowledge[ment]” of a dispute of fact: that “[i]f Lakeshore still owes Fox money for work performed under their subcontract, that is an issue for the bankruptcy court, not this one.” Appellant’s Br. 47 (citing J.A. 20). We disagree with Fox’s interpretation of the Claims Court’s statement. A comment on what Lakeshore may owe Fox is separate from the question ultimately relevant to this

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case: whether the *Air Force* breached. Fox thus failed to raise a material factual dispute.

Fox goes on to assert that the Air Force breached by “neglect[ing] to fund the special account as promised.” Appellant’s Br. 49. But Fox fails to substantiate this assertion. The implication of Fox’s position appears to be that the Air Force should have funded the special account even in the absence of submitted invoices from Lakeshore. *See* Appellee’s Br. 31. But Fox does not provide evidentiary support indicating that the Air Force agreed to such an obligation.

The evidence on the record before us instead demonstrates that Lakeshore submitted four invoices to the Air Force following the February 2014 agreement.² J.A. 9; Appellant’s Br. 20. The Air Force processed those four invoices and paid Lakeshore the invoiced total. J.A. 9. Fox received all four corresponding payments. J.A. 9, 20; Appellant’s Br. 20. The fact that *Lakeshore* then fell

2. At oral argument, Fox was given an opportunity to supplement the record before this court, with the government’s consent, if there exists evidence within the record below of invoices that the government refused to pay. Oral Arg. at 30:23-56, No. 24-2150, https://www.cafc.uscourts.gov/oral-arguments/24-2150_04072026.mp3. Following several non-compliant filings (ECF Nos. 52, 53, 56) and orders from this court for correction (ECF Nos. 55, 57, 58), Fox filed its most recent motion for leave to file a supplemental appendix (ECF Nos. 59, 60) and what appears to be a motion for leave to file the supplemental appendix out of time (ECF No. 61). The court grants Fox’s motions (ECF Nos. 59, 60, 61). We have reviewed Fox’s supplemental appendix and conclude that the contents therein do not furnish evidence that alters the decision set forth in this opinion.

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behind on payments to Fox and subsequently declared bankruptcy does not turn *Lakeshore's* failure to pay its subcontractor into the Air Force's nonperformance. *See Sullivan*, 625 F.3d at 1380-81. Fox does not—and indeed, it cannot—point to any obligation in the February 2014 agreement that the Air Force failed to perform. Instead, the record is clear that the Air Force did what it agreed to do: pay the invoices submitted to it by Lakeshore. J.A. 19-20. And when Lakeshore failed to make payments to its subcontractors, the Air Force again did what it said it would do in the February 2014 agreement: terminate for default. J.A. 2097, 2102. Thus, the Claims Court properly granted the government's summary judgment motion, as Fox failed to raise a genuine dispute of material fact that the Air Force breached.

CONCLUSION

We have considered Fox's remaining arguments and find them unpersuasive. For the foregoing reasons, we affirm the Claims Court's grant of the government's motion for summary judgment.

AFFIRMED

9a

**APPENDIX B — Opinion and Order of the United
States Court of Federal Claims, No. 18-1395C,
filed May 31, 2024**

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 18-1395 C

FOX LOGISTICS & CONSTRUCTION COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPINION AND ORDER

Filed: May 31, 2024

This case involves a subcontractor's efforts to secure payment from the United States for damages alleged to have been incurred on a project to upgrade an air force base in Afghanistan. Although the subcontractor was performing much, if not most, of the work, it was a subcontractor. The prime contractor began having cash flow problems on various projects around Afghanistan, and the subcontractor went unpaid. The Air Force then took steps to enforce provisions of its contract to require the prime contractor to pay its subcontractors and to document both subcontractor agreement to a repayment

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plan and proper payments going forward. The Air Force also agreed to deposit future payments into a new bank account that allowed the Air Force to view the account and monitor transactions. But the payments otherwise stayed the same: the Air Force paid the prime contractor, which then had to pay its subcontractors. This arrangement worked for a time, until the prime contractor went into bankruptcy. The question is whether the subcontractor can enforce either an implied-in-fact contract or the prime contract as a third-party beneficiary. Based on the undisputed material facts, the subcontractor cannot. Therefore, the court grants the Government's motion for summary judgment.

I. BACKGROUND¹**A. Task Order 42.**

FOX Logistics and Construction Company ("Fox") is a contractor located in Kabul, Afghanistan. ECF No. 101 at 1. Lakeshore Engineering Services, Inc. ("Lakeshore") was a contractor based in Michigan. *Id.* This action focuses largely on the performance of Task Order No. 42 ("TO 42") that the U.S. Air Force awarded Lakeshore under Federal Prime Contract # FA8903-06-D-8505. *Id.* at 2. Following the issuance of TO 42, Lakeshore in turn

1. Because the background of this matter is presented at length in a prior reported decision, 145 Fed. Cl. 236 (2019), the background included here is that relevant to the resolution of the pending motion. Although this section is based on undisputed facts apparent from the record, nothing in this section constitutes findings of fact.

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awarded Fox Subcontract PO07684 to support TO 42. ECF No. 88-2 at 619; ECF No. 101 at ¶ 4 (Def's Resp. to Pltf's Statement of Facts).²

TO 42 required Lakeshore to “accomplish the effort described in” the attached Statement of Work and Statements of Requirements. ECF No. 88-2 at 407. According to the Statement of Work, the contract was for “[c]onstruction of Afghan Air Force Expansion, Shindand Air Wing Phase II, Air Traffic Control and Landing Systems (ATCALS), and Central Utilities for Afghan National Security Forces at Shindand Air Base, Herat Province, Afghanistan.” *Id.* at 418. TO 42 contained two Contract Line Item Numbers (“CLINs”): (1) Item 2003 - Construction Effort, and (2) Item 2004 - Reports and Data Exhibits A & B; Item 2003 contained three sub-CLINs: Item 2003AA - Afghanistan Air Force Expansion Shindand Air Wing PH II (CLIN 2003AA), Item 2003AB - Central Utilities For Afghan National Security (CLIN 2003AB), and Item 2003AC - Airfield Traffic Control and Landing Systems (ATCALS) (CLIN 2003AC). *Id.* at 407-08. The contract directed Lakeshore to submit invoices to the Defense Financial Accounting Service (“DFAS”). ECF No. 85-1 at App1. In return, DFAS would pay Lakeshore. *Id.*

The contract also included several provisions that were meant to ensure contractors properly paid their subcontractors. First, the contract included 48 C.F.R.

2. The court cites to ECF No. 101 for the parties' statement of facts because it contains the Government's response that a fact is not disputed.

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(FAR) § 52.232-5. ECF No. 88-2 at 411 (“Payments Under Fixed-Price Construction Contracts”). This requires prime contractors to submit certain information with each request for payment, including an identification of the amount sought for work done by each subcontractor, the total amount of each subcontract, and “[a] listing of the amounts previously paid to each subcontractor under the contract.” FAR § 52.232-5(b). In addition, the contractor may need to provide “[a]dditional supporting data in a form and detail required by the Contracting Officer.” *Id.* § 52.232-5(b)(v). Finally, an appropriate official at the contractor must certify that “to the best of my knowledge and belief . . . [a]ll payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification.” *Id.* § 52.232-5(c)(2). It also requires prime contractors to certify that a “request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.” *Id.* § 52.232-5(c)(3).

Second, the contract included Contract Clause 952.225-0004, ECF No. 88-2 at 593, which states that “[t]he Contractor shall comply with, and ensure that its employees and its subcontractors and their employees, at all tiers, are aware of and obey all . . . Host Nation laws.” As relevant here, Chapter 5 of Afghanistan’s labor laws provided under “Payment of Wage to Employee” that “payment of wage shall be made during the same month

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and shall not be delayed without consent of the employee.” *Id.* at 701.

B. Task Order performance.

On October 24, 2012, Lakeshore awarded Fox subcontract PO07684 in support of TO 42. ECF No. 88-2 at 619. On or about January 16, 2013, Lakeshore “issued Change Order No. 0001 to FOX . . . [which] increased FOX’s Subcontract by \$24,156,000 to \$39,488,000.” ECF No. 101 at 2. Fox apparently ceased work on PO07684 on or around April 7, 2013. ECF No. 88-2 at 696 (citing 7 Apr 2013 Title II Daily Report). This was because of Lakeshore’s struggles to make timely payments to Fox for its work on TO 42. ECF No. 101 at 7 ¶ 25; *see also* ECF No. 88-2 at 328 (“[M]uch of the delay is attributable to the Prime Contractor, Lakeshore-Toltest Corporation (LTC), who had several times stopped the project through non-payment of invoices.”).

On May 29, 2013, the Air Force sent Lakeshore a Cure Notice (“May 29 Notice”). ECF No. 85-1 at App10. The May 29 Notice stated that Lakeshore was on a “40 day work stoppage and counting,” that the project was “scheduled to be 60% complete, but is only 13% complete,” and that Lakeshore had fallen “4-5 months behind on sub-contractor invoices while the Government has paid in full for all completed work.” *Id.* It further stated that “within ten (10) days of receipt of this letter” the TO 42 Contracting Officer “may terminate this task order for default” unless “1. LES [Lakeshore] shall resume work on project, and 2. provide a Corrective Action Plan detailing

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how LES [Lakeshore] will catch up on sub-contractor invoices and recover lost time on schedule.” *Id.*

Lakeshore then hired new management personnel, resumed some construction activities and began getting the workforce back on base. It also submitted a revised schedule that promised to double the workforce and implement day and night shifts to get the work completed expeditiously. Finally, Lakeshore stated it had “resolved all their [sic] cash flow situation . . . [which has] allowed Lakeshore to fully pay its subcontractors and vendors on this project and to ensure that they will be paid on a timely basis in the future.” ECF No. 85-1 at App11.

After work resumed, the Air Force sent Lakeshore a Show Cause Notice on July 12, 2013 (“July 12 Notice”). *Id.* While acknowledging Lakeshore’s efforts, the July 12 Notice catalogued Lakeshore’s continued shortcomings. The July 12 Notice stated that “construction activities have resumed slightly” but had not resumed to the level that would “meet the conditions of the [May 29] Cure Notice.” *Id.* It recognized that Lakeshore “submitted a revised schedule,” but found that the revised schedule “extremely aggressive” and that Contracting Officer Rendon was “not convinced [Lakeshore] will not slip” for a variety of reasons. *Id.* at App12. The July 12 Notice also acknowledged that Lakeshore “has promised to double the workforce and implement both day and night shifts as an acceleration measure,” but stated that “[i]t is not clear if [Lakeshore] is speaking in the Cure Notice about the existing current labor pool or some other labor mix,” that “the same workers cannot perform both shifts

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without increased risk to the health and safety of the workforce,” and that “[Lakeshore] does not appear to have addressed the provision of additional construction equipment required for a dual-shift schedule.” *Id.* It further acknowledged that Lakeshore “hired a new Project Executive . . . and a new Site Project Manager,” but observed that “adding or changing key personnel raises a concern over delays and additional costs to the government for mobilization to the site.” *Id.* at App13. Finally, the July 12 Notice required Lakeshore to “provide documentation to substantiate their statement of good-standing with all subcontractors.” *Id.*

Based on these issues, the July 12 Notice informed Lakeshore that the Government was “considering terminating CLINS 2003AA and 2003AB of the task order under the provisions for default.” *Id.* at App11. But the Air Force made clear that Lakeshore would be “given the opportunity to present, in writing, any facts bearing on the question to the Contracting Officer, within 10 days after receipt of this notice.” *Id.* In its written response, Lakeshore would have to provide: 1) “a resource-loaded schedule and LSA expansion plan to demonstrate that the workforce proposed will be capable of performing the remaining tasks according to a dual-shift schedule”; 2) “an updated material procurement schedule which includes a listing of intended vendors, substantiated by quotes that verify fabrication and shipping can be accomplished within the stated timeframes”; and 3) “documentation to substantiate [its] statement of good-standing with all subcontractors.” *Id.* at App11-App13. If Lakeshore did not provide excuses for its shortcomings, the Air Force

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would assume that no excuses existed. *Id.* at App11. The July 12 Notice also made clear that “[a]ny assistance given to you on this contract or any acceptance by the government of delinquent goods or services will be solely for the purpose of mitigating damages and it is not the intention of the government to condone any delinquency or waive any rights the government has under the task order.” *Id.* at App11.

On September 9, 2013, the Air Force sent Lakeshore a memorandum on “Non-Payment of Subcontractors.” *Id.* at App15. The memorandum stated that six subcontractors, including Fox, claimed they “have not been paid” by Lakeshore “in over 30 days” for “work that they have performed under [Lakeshore’s] subcontracts.” *Id.* The memorandum stated that the Air Force “need[s] to have verification of payment to your subcontractors, as such payments must be made timely under the terms of your contract.” *Id.* The memorandum reminded Lakeshore that such verification was required by Contract Clause 52.232-5, and that Lakeshore “ha[d] certified that you paid your subcontractors in May, June and July,” meaning “[i]f this is true, you [Lakeshore] are in violation of the terms of the payment clause and have provided false or fraudulent certifications of payments to your subcontractors.” *Id.* The memorandum directed Lakeshore “to provide proof of current and timely payment to your subcontractors” within “4 calendar days from receipt of this letter,” and stated that failure to do so “will result in my pursuit [sic] civil or criminal remedies as indicated.” *Id.* at App16.

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After receiving this memorandum, Lakeshore became current on subcontractor payments to Fox. *Id.* at App28. Because of this, “the Contracting Officer gave Lakeshore permission to continue construction, averting termination, with the qualification that future production and work-force issues would be cause for reconsideration of the termination for default.” *Id.* After being paid by Lakeshore, Fox increased production. *Id.*

But then, by the end of 2013, as Fox began to exhaust on-site materials and funds, it again faced a risk of work stoppage. *Id.* at App20, App28. The Air Force heard from Lakeshore that Fox was going unpaid due to “customer-directed suspensions of work” in November 2013, which the Air Force rejected as “not an acceptable reason for non-payment of subcontractors for previously completed and invoiced work.” *Id.* at App28. In December 2013, Mushtaq Habibi, Director General of Fox, contacted Air Force Officer in Charge (OIC) Lt. Col. Greg Reich, Contracting Officer’s Representative Maj. Karlo Jajliardo, and Lakeshore’s Project Manager Neal Ridgeway; Habibi explained to them that Fox’s ability to complete its work on TO 42 was imperiled by Lakeshore’s failure to pay Fox. ECF No. 88-2 at 336-37 (“I see no success in getting funds from LTC, they have thousand financial gaps and any penny they receive they just fill those gaps elsewhere not on this project.”). Nonetheless, Habibi emphasized that “FOX is yet trying to move forward with the project.” ECF No. 88-2 at 336; *see also* ECF No. 88-2 at 339 (“The Major was in a pretty down mood to start the meeting. But by the end of the meeting when he heard about the hangar containers coming in and potential new concrete

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suppliers I think he realized just how hard FOX wants to complete this project. It was actually very amazing to watch.”). To make the project work, Habibi suggested that the Air Force pay Fox directly for any amount owed under a Lakeshore invoice and that Fox would pay Lakeshore whatever amount it was due under each invoice. ECF No. 88-2 at 336. Habibi stated his belief that “this option of direct payment to FOX approved by all parties will not be beyond contractual obligation of AFCEC and LTC and it would rather speed up the process of construction and I can guarantee you that we can accomplish this job successfully.” *Id.* at 337.

On January 7, 2014, Habibi again contacted Lt. Col. Reich and Maj. Jajliardo and explained the steps Fox was taking to keep the project going, including the “need to order all the long lead items and this will not be able to happen with two invoices only.” ECF No. 88-2 at 342. Habibi added that “[p]ayment issues must be solved before Jan 15th.” *Id.* Maj. Jajliardo responded that it was his understanding that Lakeshore “has proposed that payments be made to a joint account where both parties would control payments out of [sic],” explaining that a joint account “is one where two parties can legally withdraw funds (without approval from the other[]).” ECF No. 88-2 at 740. He also asked whether Habibi had “verified these controls would be in place from the bank directly (not simply believing [Lakeshore])” and requested Habibi to confirm whether “truly NO money whatsoever could be removed without FOX approval . . . It would be helpful to know this independently, and what the terms are specifically for the account.” *Id.*

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Also on January 7, 2014, the Air Force issued another Show Cause Notice (“January 7 Notice”). ECF No. 88-2 at 736. The January 7 Notice explained that “Lakeshore’s non-payment to subcontractors” was “endangering performance” under TO 42, and that this was “cause for reconsideration of the termination of remaining CLINs 2003AA and 2003AB under the provisions for default of this task order.” *Id.* While production had been increased since the July 12 Notice, the Air Force emphasized this time that “[t]he remaining work on CLINs 2003AA and 2003AB are [sic] still only 51% complete.” *Id.* at 737. The January 7 Notice reminded Lakeshore that it was required by law and contract to make payments to subcontractors “in full within 7 days of receipt of payment from the Government.” *Id.* Because of Lakeshore’s nonpayment of subcontractors, the Air Force rejected Invoice 26 on December 19, 2013. At that time, Lakeshore owed Fox \$3,551,663.42 on unpaid invoices. *Id.*; *see also id.* at 347. Fox responded that Lakeshore owed it \$5,857,395.58. *Id.* at 360. Fox also stated in an email that “if AFCEC strongly oversights [sic] the account and redirects invoices to FOX without [LES]’s involvement of transfer . . . then [it] is agreeable to us.” *Id.* at 753.

The January 7 Notice further stated that “[i]f it is not Lakeshore’s intention to repudiate this contract, the government requests specific assurances of its ability to make payments and perform the remaining construction work to completion.” *Id.* at 737. Specifically, the January 7 Notice instructed Lakeshore to “[p]rovide documentation to verify payment to all subcontractors, or explanation as to why there is a discrepancy between

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what has been approved and what has been paid” and “provide the Government with a corrective action plan to prevent continual financial issues from affecting future performance and completion of the project.” *Id.* at 738. Further, the January 7 Notice said that “[u]nless Lakeshore submits acceptable assurance requested within ten (10) days of receipt of this letter, the undersigned may terminate this task order for default.” *Id.* And “[a]ny assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.” *Id.*

On January 8, 2014, Ridgeway forwarded Habibi a copy of the January 7 Notice from the Contracting Officer. On January 10, 2014, Habibi was contacted for the first time by Joseph Saldutti, Managing Director of Gridiron Capital and member of the board of Lakeshore. ECF No. 88-2 at 993. Saldutti told Habibi that “[b]oth projects [TO 42 and another Task Order] are hanging in the balance and on both projects we can pay out the full amount of the PO to Fox and also ourselves if we can continue to invoice and complete them which we hope to achieve.” *Id.* The following Tuesday, Ridgeway told Habibi that Saldutti would meet with the Contracting Officer, Captain Rebecca Ban, later that week on January 16 “to negotiate an appropriate resolution to AFCEC’s January 7, 2014 Show Cause letter.” ECF No. 88-2 at 355.

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At the meeting, Lakeshore responded to the January 7 Notice by stating “Lakeshore has already established a designated holding account with its bank per the attached Letters of Direction for each of our current Task Orders 8505-00 (32, 35 & 42).” *Id.* at 886. Lakeshore proposed to the Air Force that it deposit future payments on the three task orders into this “special account,” and stated that “[a]ll proceeds deposited by AFCEC into the designated account will be for the Direct Costs (primarily subcontract costs), Site Funds & Field Overhead such as LSA and Payroll for those specific projects. Lakeshore will not take and [sic] proceeds for Indirect Costs, Home Office Overhead, Fee or other corporate purposes from these accounts absent the express consent of AFCEC, until the projects are closed out.” *Id.* Lakeshore emphasized that “[t]he accounts will be visible to AFCEC personnel (to be designated by AFCEC) who, upon AFCEC request and direction will have full viewing rights of all activity and statements in order to monitor incoming receipts and outgoing payables and, upon request, may be granted other rights in connection with this holding account.” *Id.*

Capt. Ban agreed to use the special account. *Id.* at 1056. According to her, “[t]he special account was to further the project to completion because that would be worth more to the Government than terminating for default where [the Government] would be left with nothing.” *Id.* at 64, 74 (101:14-23; 143:7-16). And she instructed Lakeshore that future invoices must include “sub-contractor payment certifications” and that Lakeshore must pay a subcontractor immediately upon receipt of payment by Lakeshore for the task order in question. *Id.* at 1058.

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Additionally, Capt. Ban directed Lakeshore to create payment plans for each subcontractor with which it was in arrears. *Id.* These payment plans had to be signed by the subcontractor, include the amounts owed to the subcontractor, detail the amount that Lakeshore would actually be paying to the subcontractor, and include the date by which Lakeshore intended to pay all of the money it owed to the subcontractor. *Id.* Capt. Ban also warned Lakeshore that it would not “be allowed to retain funds for their own in-country expenses” other than money necessary for “life support and security,” and that the Air Force would be monitoring the transactions out of the designated holding account, and “[i]f at any time, transactions d[id] not occur in accordance with the approved subcontractor payment certification” the task order would “be immediately terminated for default.” *Id.* at 1058-59.

On January 17, 2014, Saldutti informed Habibi by email that Lakeshore was about to present a plan to AFCEC that included the “opening of a new bank account for TO 42 and our 2 other Afghanistan projects in AFCEC and provide them a letter of direction to send funds to this special account.” *Id.* at 358.

The same day, Maj. Jajliardo sent to Habibi and Hussam Aqrabawi (Fox’s project manager for TO 42) an incomplete spreadsheet of Lakeshore’s payments to Fox, completed and still outstanding. ECF No. 88-2 at 362-66. Maj. Jajliardo further requested Fox “fill in the missing info for the amounts paid by LES to FOX. . . . Also, it would

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help greatly to have a scan of every single wire transfer received by FOX from LES.” *Id.* at 360.

The following week, Lt. Col. Reich asked Habibi to provide him with Fox’s “CAGE and DUNS codes.” ECF No. 88-2 at 369. Fox did. *Id.* Lt. Col. Reich said he “forwarded this information to” Capt. Ban. *Id.* at 368. He then emphasized, “I’m not sure this will help. But, I want to do anything I can to help get your company and most importantly your workers paid.” *Id.*

On January 23, Maj. Jajliardo sent Aqrabawi an updated spreadsheet of Lakeshore’s payment history to Fox. ECF No. 88-2 at 371-72. Maj. Jajliardo said, “I cannot stress how important this info is, and to what useful purposes this will be applied to.” *Id.* at 371. The next day, Maj. Jajliardo told Habibi that Lakeshore’s “proposal is based on the assumption that FOX would agree to the payment proposal and the joint account—has FOX agreed to the LES plan?” *Id.* at 374. Habibi then told Maj. Jajliardo that “FOX has not yet agreed to their plan but our plan agreement will be based on AFCEC’s overall control and monitoring of any special account” and that “[i]t was also asked from me whether FOX would trust AFCEC and our response was that FOX trusts AFCEC as a Govt body but we do not trust LTC as a reliable company. In contrary, FOX is waiting for AFCEC’s control of the special account as there is no trust on LTC and their corporate gaming policies anymore.” *Id.* at 376.

But discussions became more urgent when materials at the job site began to be used up. Habibi told Maj

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Jajliardo and Lt. Col. Reich that “FOX is [running] out of materials on site and the project is automatically going to be stopped due [sic] unavailability of resources in coming days” and that “FOX is only waiting for AFCEC to confirm their control of special account as part of LTC’s response to the show cause letter, if AFCEC confirms it FOX will then sign the letter of support with LTC [Lakeshore].” *Id.* at 368.

By January 31, Lakeshore had come to an agreement with the Air Force. Saldutti told Habibi: “We have . . . finalized arrangements with DFAS/AFCEC subject only to signatures . . . Also AFCEC has accepted the letters of direction with their full access rights to the account. I attach a copy of that direction.” *Id.* at 378.

On February 3, 2014, Saldutti and Habibi executed and signed a Letter Agreement regarding Lakeshore’s plan to repay Fox the overdue amount. *Id.* at 380-81. The Agreement stated that:

[P]rior to our submission and/or receipt of any further invoices . . . for work that has been performed by Lakeshore and Fox, Lakeshore has established a special bank account that shall segregate all cash from Shindand TO 42 . . . Lakeshore has issued letters of direction to AFCEC that any and all invoice amounts or other proceeds related to such projects . . . shall be directed to such account . . . Lakeshore has provided AFCEC viewing or other account rights that AFCEC shall request in order to

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monitor and/or control (at its discretion and choice) the proceeds in order to ensure that payments are made in accordance with [this letter agreement] and in subsequent invoices in accordance with our contract with you.

Id. at 380.

Capt. Ban explained the terms of the new payment arrangement, including continued payment certifications but also certain new obligations (viewing rights, subcontractor-approved payment plans) in a memorandum to Lakeshore dated February 7, 2014. *Id.* at 385-87. The first draft of such a payment plan, for Invoices 26-29, was sent by Lakeshore Saldutti to Habibi on February 12. *Id.* at 383. The draft plan specified “that LES opens a special bank account and directs payment of all proceeds related to the Prime Contract received by LES from any invoices, potentially released LDs . . . and any proceeds of REAs or related claims that we may submit and AFCEC may agree and pay” and explained “[t]his special account shall provide AFCEC with full access viewing rights to monitor all proceeds.” *Id.* at 386. Lakeshore requested that Fox consent to the payment plan. *Id.* at 1066-67.

Habibi forwarded the email containing the draft payment plan “LTC is requesting FOX to sign” to the Contracting Officer’s Representatives Lt. Col. Michael Geer, Capt. Benjamin Knost, and Maj. Jajliardo and asked “if it is required by AFCEC.” *Id.* at 1065. Lt. Col. Geer responded that “[a]s part of the agreement with LTC, the Air Force requires that they have an agreement in place

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to ensure payment to their subcontractors before the Air Force will approve any invoices. In that sense, yes, this is something that AFCEC has asked of LTC.” *Id.* at 1069. Capt. Knost replied, “Yes, AFCEC is requiring LTC to submit specific payment plans with each invoice to document how much you are being paid. We have also provided a list of personnel who have been granted viewing rights to the account [to] which these proceeds will be deposited. We will monitor disbursements to ensure compliance with whatever payment plan you and LTC agree on.” *Id.* at 391.

Saldutti again emailed Habibi on February 12, 2014, and said that “AFCEC informed us that it is not going to release any payments until this final (we hope) step is taken on the subcontractor plans. Our lawyer and we believe that this partial plan/new letter totally satisfies their request.” *Id.* at 395. To confirm, Habibi forwarded this email to Capt. Knost and Maj. Jajliardo, asking “if this is exactly the case.” *Id.* at 394. After conferring with the contracting officer, Capt. Knost confirmed that “what Lakeshore has presented in terms of the sub-contractor plans is accurate. We provided the direction in terms of what information must be included in the payment plans they submit. The original plan they submitted did not fully comply with that direction, and they have updated the plan in accordance with our requirements.” *Id.* at 393. Maj. Jajliardo’s reply explained further that “[i]f LES was not accurately aware of what [documentation] was required[,] it doesn’t mean it is a new requirement” because Lakeshore “will have to meet all the requirements of the Contracting Activity.” *Id.* at 394. He explained

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further that any technical shortcoming in Lakeshore's submissions could cause delays in payment approval. *Id.*

On February 14, 2014, Habibi signed the payment plan. *Id.* at 1030. After signing the plan, Fox returned to work. Fox reports that it then received four payments totaling \$4,052,085.01:

<u>Date</u>	<u>Amount</u>
2/27/2014	\$3,309,855.00
4/19/2014	\$117,801.79
4/19/2014	\$128,847.00
4/29/2014	\$495,581.22

ECF No. 85-1 at App90 ¶ 38. Habibi later noted that after the April 29th payment for Invoice 29, "the amount in arrears [sic] to FOX increased with each billing cycle." *Id.* at App92 ¶ 47.

C. Lakeshore abandons its work and declares bankruptcy.

On or about May 1, 2014, Lakeshore declared Chapter 7 bankruptcy. Fox alleges Lakeshore owed it more than \$3,000,000 at the time Lakeshore declared bankruptcy, and that it has incurred more than \$8,000,000 in uncompensated expenses since. ECF No. 1 ¶ 47. Fox allegedly made an unsuccessful attempt during Lakeshore's bankruptcy proceeding to recover the money it claims Lakeshore owes it. *Id.* ¶ 31; ECF No. 80 ¶ 32.

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Fox then filed a certified claim with Capt. Ban, asking to be paid the money it was owed under TO 42. ECF No. 1 ¶ 31. Capt. Ban denied Fox's claim "and stated that Fox's claim would not be recognized, because the Air Force did not have a contract with Fox." *Id.* ¶ 32; ECF No. 80 ¶ 32; ECF No. 85 at 14.

D. Complaint.

Fox then filed its complaint in this case on September 13, 2018. ECF No. 1. The Government moved to dismiss for lack of subject-matter jurisdiction. ECF No. 15. Following full briefing and argument on the Government's motion, the court stayed the motion, ECF No. 34, and granted jurisdictional discovery limited to the question of whether the Air Force intended to directly benefit Fox or create an implied-in-fact contract with Fox. *Fox Logistics & Constr. Co. v. United States*, 145 Fed. Cl. 236, 239-43 (2019). In that opinion, Judge Wheeler held that Fox had "raised non-frivolous claim[s]" that it was (i) a third-party beneficiary to a Government contract and (ii) that it had an implied-in-fact contract with the Government. *Id.* at 241-42. Upon completion of the limited fact discovery, the Government renewed its motion to dismiss, again solely on jurisdictional grounds, ECF No. 53, and the court held oral argument, ECF No. 67. The court then ordered supplemental briefing in light of the Federal Circuit's decision in *Columbus Regional Hospital v. United States*, 990 F.3d 1330 (Fed. Cir. 2021), in which "the Circuit clarified that all a plaintiff must do to establish this Court's jurisdiction is plead a 'non-frivolous allegation' of its third-party beneficiary status and the existence

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of an implied-in-fact contract.” ECF Nos. 68, 77 (citing *Columbus Reg’l*, 990 F.3d at 1341-42). The Government informed the court it would withdraw its renewed motion given the court’s findings that Plaintiff’s claims here are non-frivolous under *Columbus Regional*, so the court denied both motions to dismiss. ECF No. 77. Further fact discovery was propounded on the issue of liability, ECF No. 78 at 3-4, and following the Government’s answer, ECF No. 80, both parties filed motions for summary judgment, ECF Nos. 85, 86.

II. LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” RCFC 56(a). “By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). A “genuine” dispute of material fact exists where a reasonable factfinder “could return a verdict for the nonmoving party.” *Id.* at 248, 106 S.Ct. 2505. “Material” facts are those “that might affect the outcome of the suit under the governing law,” as opposed to “disputes that are irrelevant or unnecessary.” *Id.* “When both parties move for summary judgment,” moreover, “the court must evaluate each party’s motion on its own merits, taking care in each instance to draw all

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reasonable inferences against the party whose motion is under consideration.” *AT&T Advert., L.P. v. United States*, 147 Fed. Cl. 478, 482 (2020) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

III. DISCUSSION

It is long settled that the United States may only be sued for a breach of contract by a party that is in contractual privity with. *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). Thus, a subcontractor may not generally sue the United States for breach of contract. Like most rules, this one has exceptions, two of which are relevant here. First, if the subcontractor can establish the existence of an implied-in-fact contract, then the subcontractor may sue to enforce the terms of the contract. Second, if the subcontractor can establish that it is an intended third-party beneficiary of another contract, the subcontractor may sue to enforce the terms of that contract. The court addresses each in turn.

A. Implied-in-fact contract.

When this court stayed the Government’s jurisdictional motion to dismiss, it held in part that Fox had alleged a non-frivolous claim that it had an implied-in-fact contract with the United States. *Fox Logistics & Constr. Co.*, 145 Fed. Cl. 236. The undisputed facts, however, indicate that no implied-in-fact contract was created. An implied-in-fact contract is one inferred by a court when “the surrounding circumstances” demonstrate a meeting of the minds between the parties, even if the agreement was never

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formalized in writing. *Turping v. United States*, 913 F.3d 1060, 1065 (Fed. Cir. 2019) (citing *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003)). A subcontractor seeking to establish an implied-in-fact contract must prove the same elements of an express contract: “(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.* Thus, a plaintiff must prove “by objective evidence, the existence of an offer *and a reciprocal acceptance*” to show the “mutuality of intent” necessary for the formation of an implied-in-fact contract. *Id.* (emphasis added).

Fox claims that “[t]he Government sought FOX’s agreement to the alternate payment arrangements and FOX in turn clearly informed the Government that it would stop work absent the Government’s oversight of payments through the new account.” ECF No. 86 at 28. It further contends that since the new “arrangements [were] worked out by all parties, including the Government LTC and FOX . . . [t]his is sufficient to effectuate a meeting of the minds and mutuality of intent to contract, and the attendant modification to the prime contract was approved by the Contracting Officer.” *Id.* at 29. The Government argues that “Fox’s unmet requests—*i.e.*, that the Air Force should pay Fox directly, or that the Air Force must ‘control’ the new account for Fox to continue to perform—only serve to highlight that the Air Force rejected Fox’s ‘terms.’ Accordingly there was no ‘mutuality of intent,’ or exchange of an ‘unambiguous offer and acceptance,’ between Fox and the Air Force, as no one from the Air

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Force . . . ever expressed an ‘acceptance’ of Fox’s various payment proposals and demands.” ECF No. 85 at 16 (citation omitted).

Fox has indeed failed to put forward evidence of several of the elements of an implied-in-fact contract. The lack of any agreement by the Government to Fox’s requests and ultimatums demonstrates that there is no mutuality of intent. Capt. Ban testified that the Air Force considered working directly with Fox and chose not to. ECF No. 88-2 at 74 (141:12-23). And she testified that she never intended to create an implied-in-fact contract with Fox. ECF No. 85-1 at 149 (167:11-14). It is true that Fox sought direct payment from the Air Force as a condition of returning to work. ECF No. 88-2 at 32 ¶ 39. But it is equally true that the Air Force refused to pay Fox directly, which Fox acknowledged in writing. ECF No. 85-1 at App48-50; ECF No. 88-2 at 7249-51 (Capt. Ban’s letter indicating LES shall pay Fox and other subcontractors from amounts received from the Air Force); ECF No. 85-1 at 126-28 (agreement signed by Fox acknowledging that “LES shall pay” Fox for its work).

Fox also demanded that the Air Force control the bank account that Lakeshore used to receive payments for TO 42. ECF No. 88-2 at 32 ¶ 39. The Government again refused. Instead, the Government only obtained “viewing rights.” ECF No. 85-1 at App48-50 (“The government concurs with establishment of the designated holding account and a list of individuals requiring viewing rights was provided to LES . . .”); ECF No. 85-1 at 66 ¶¶ 6-9 (Captain Schoenenberger’s testimony as to the “view-

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only access” to monitor the account). Fox understood this clearly, signing an agreement that the Air Force would only have viewing rights to the special account created to receive payment for TO 42 (and other Lakeshore projects). ECF No. 85-1 at App48-50.

The only evidence Fox provides that the Air Force agreed to its terms are Lakeshore’s various proposals that the Air Force *never accepted*. See ECF No. 88 ¶¶ 20-25 (proposals). As explained above, the Air Force plainly rejected paying Fox directly, and it rejected having control over the Lakeshore special account. Nor does Fox put forward evidence of any agreement by the *contracting officer*—the official with the actual authority to bind the Government—to any of Fox’s demands. ECF No. 88-2 at 58 (80:6-11, 80:19-22). Instead, the contracting officer set forth the terms by which *Lakeshore* could cure its default of nonpayment of its subcontractors, including Fox, in the February 7 letter. And Fox made its understanding of these terms clear in writing. ECF No. 85-1 at App68-69.

Habibi also acknowledged that the Air Force chose not to deal directly with Fox. Although the Air Force requested Fox’s DUNS and CAGE codes when considering whether to deal with Fox directly, it did not do so. According to Habibi, on September 11, 2014, he met with AFCEC staff and was told “that when AFCEC requested DUNS and CAGE codes from FOX in late January 2014, AFCEC intended to terminate its contract with Lakeshore for TO 42 and award it to FOX. This was motivated by AFCEC’s lack of confidence in Lakeshore dating to late 2013 and because AFCEC considered

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FOX the ‘driving force’ behind the TO 42 project.” *Id.* at App91 ¶ 42 (citation omitted). But then “TO 42 fell victim to two, larger concurrent events: the drawdown of U.S. forces and the continuing deterioration of the political climate in Afghanistan. Though Lakeshore abandoned TO 42, AFCEC presented the idea of continuing work on the project to Gen. Joseph Dunford, then U.S. NATO commander in Afghanistan. Unfortunately, Gen. Dunford rejected it. AFCEC had no ability to press its case, nor any authority to continue with the project, even though it was near completion and there were sufficient funds available to do so.” *Id.* at App91 ¶ 43. Habibi’s declaration shows the Air Force considered contracting Fox directly and decided not to, just as Capt. Ban testified. ECF No. 88-2 at 74 (141:12-23) (“Q. Was there any discussion of contracting directly with FOX? A. So the engineers were interested in that. I remember looking into the possibility, but it was not possible and I advised AFCEC that that was not possible. Q. And do you know why it wasn’t possible? A. I don’t remember specifically, but it had something to do with vetting. The Government cannot just award a contract to anybody. Contractors must be vetted and I believe they were not vetted properly.”).

In the end, the only evidence that Fox has put before the court is that it demanded certain things from the Air Force as a condition of returning to work. The fact that Fox returned to work despite knowing that the Air Force did not agree to Fox’s demands precludes an implied-in-fact contract based on those demands. Fox has failed to establish a dispute of fact, much less a material one, that there was an implied-in-fact contract. Therefore,

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summary judgment for the Government is proper on the implied-in-fact contract claim.

B. Third-party beneficiary.

Fox alternatively claims that it is a third-party beneficiary of the February 7 changes to the Lakeshore contract. “A nonparty becomes legally entitled to a benefit promised in a contract . . . only if the contracting parties so intend.” *Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 563 U.S. 110, 117, 131 S.Ct. 1342, 179 L.Ed.2d 457 (2011). Therefore, third-party beneficiary status is an “exceptional privilege,” which “should not be granted liberally.” *G4S Tech. LLC v. United States*, 779 F.3d 1337, 1340 (Fed. Cir. 2015) (citing *Flexfab, LLC v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005)). “In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.” *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001), *opinion amended in other respects on reh’g*, 273 F.3d 1072 (Fed. Cir. 2001). In addition, this intent must be “fairly attributable to the contracting officer.” *Glass*, 258 F.3d at 1354.

The intent to benefit a subcontractor directly can be “inferred from the actions of the contracting officer and circumstances providing the contracting officer with appropriate notice that the contract provision at issue was intended to benefit the third party.” *Flexfab*, 424 F.3d at 1262-63. Indeed, the Federal Circuit makes clear:

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[F]or a subcontractor to obtain the status of an intended third-party beneficiary, it must provide *clear* evidence that an authorized government official approved a contract provision for the *express* purpose of effectuating payment from the government to the subcontractor(s). . . . The court will not, however, infer that the government intended to directly benefit the subcontractor merely because an authorized government official (1) oversees the activities of the prime contractor; (2) becomes aware that the prime contractor has failed to timely pay its subcontractors, and/or (3) makes funds available to the prime contractor in order for the prime contractor to pay its subcontractors

G4S Tech. LLC v. United States, 114 Fed.Cl. 662, 672-73 (2014).

There is no contention that Fox was a third-party beneficiary of the contract or TO 42 prior to the February 7, 2014 letter from the contracting officer. Fox contends that the Air Force modified the contract for its direct benefit in the February 7 letter when the contracting officer required the use of the special account and the inclusion of subcontractor repayment plans for future invoices. ECF No. 110 at 1 (“The undisputed evidence shows that Capt. Rebecca Ban, the Air Force’s contracting officer (KO) for the TO 42 contract, intended to provide a ‘direct benefit’ to FOX”). The parties dispute the new payment arrangement’s characterization as

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a “modification.” Fox plainly asserts that there was a modification to the contract. *E.g.*, ECF No. 86 at 25. The Government makes clear that there was no formal contract modification, which is supported by the absence of such a modification in the record. ECF No. 100 at 9 n.7 (“There was no formal contract modification for this purpose.”) (cleaned up). That said, the Government addresses whether the February 7 letter modified the contract in such a way to create third-party beneficiary rights in Fox.

1. The updated payment process.

To understand the changes to the payment process in the February 7 letter, the court begins with a quick review of how the parties got to February 7. In September 2013, Lakeshore’s failure to pay subcontractors came to the Air Force’s attention, which resulted in the Air Force sending Lakeshore a notification of its failure to pay its subcontractors under FAR 52.232-5. After receiving this notice, Lakeshore paid Fox in full, and Fox continued working. By November 2013, however, Lakeshore had again failed to make payments to its subcontractors, and Fox had to suspend work again in January 2014. In response to the January 7 Notice, Lakeshore recommended using a special account for future payments. ECF No. 88-2 at 762. The subsequent discussions between Lakeshore and the Government culminated in Capt. Ban’s February 7, 2014, memo about a new payment arrangement.

The memo contains “[t]he government response to elements of [Lakeshore’s] proposed plan . . . in detail.” ECF No. 85-1 at 51 ¶ 5. Under the February 7 letter,

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Lakeshore could “resume submitting invoices for payment provided that LES continue to submit sub-contractor payment certifications, and that *all payments are made in accordance with that certification immediately upon receipt* of funds from the government.” ECF No. 85-1 at 51 ¶ 5b (emphasis added). The prime contract already required Lakeshore to submit certifications each time it requested a progress payment, i.e., submitted an invoice, and it specifically required Lakeshore to certify that it was properly paying its subcontractors with each invoice to the Air Force. *Id.* at 8. Recall that under FAR 52.232-5, Lakeshore had to include with each invoice the amount of money sought for work by each subcontractor and the amounts previously paid to each subcontractor. By February 7, 2014, the Air Force was well aware, however, that Lakeshore had not been paying Fox or other subcontractors and recognized that Lakeshore had been filing false certifications of payment. *E.g.*, ECF No. 88-2 at 700. Rather than terminate, however, the Air Force sought to have Lakeshore cure its defaults. So far, this does not change anything because FAR 52.232-5(b) already required such certification and payment. Thus, there is no modification that Fox could be the beneficiary of here.

That said, the February 7 Letter also required Lakeshore to submit “an agreed upon payment plan with sub-contractors currently in arrears” until Lakeshore became “current with all sub-contractors.” *Id.* The letter specified that the payment plan “*must be signed by the subcontractor in question*, and include the amounts owed to that sub for work during that invoicing period, the

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amount . . . actually . . . paid, the total [arrearage amount] after payment, and the date anticipated to pay the sub in full.” *Id.* (emphasis added). Further, the February 7 Letter provided that “if at any time, transactions do not occur in accordance with the approved sub-contractor payment certification, this task order will be immediately terminated for default.” *Id.* ¶ 5d. Put simply, to receive any further payment on the project and avoid termination, the Air Force now required Lakeshore to submit FAR 52.232-5 certifications *and* a repayment plan signed by each subcontractor until Lakeshore became current with all subcontractors. ECF No. 85-1 at 50-52. Fox signed such a repayment plan, agreeing to these terms in writing. ECF No. 88-2 at 397-99.

But there is still the question of whether there is a change. While it is true that Lakeshore now had to include subcontractor-signed repayment plans with each invoice, that is not a formal change to the contract. Rather, FAR 52.232-5(b)(v) provided that Lakeshore had to provide “[a]dditional supporting data in a form and detail required by the Contracting Officer.” Given that the contracting officer knew both that Lakeshore was failing to pay its subcontractors and filing false certifications of payment, requiring the additional supporting data in the form of a subcontractor-signed repayment plan that confirmed both the amount in arrears and the plan to bring accounts current was a rational exercise of her authority under the terms of the existing contract. There was no formal contract modification here, but the court considers whether any changes to the payment process made Fox a third-party beneficiary.

*Appendix B***2. The Government rejected Fox's demands for direct payment.**

It is undisputed that Fox demanded “the Air Force should pay Fox directly, or that the Air Force must ‘control’ the new account for Fox to continue to perform.” ECF No. 85 at 16; *see also* ECF No. 85-1 at 20, 45, 88-89, 99; ECF No. 88-2 at 757 (“FOX is waiting for AFCEC’s control of the special account as there is no trust on LTC and their corporate gaming policies anymore.”) Fox contends that it put the Government on notice of these demands that were, according to Fox, conditions precedent to its continued performance in two emails it sent to Lt. Col. Reich and Maj. Jajliardo in January 2014, both of which were forwarded to Capt. Ban. In these emails, Fox stated that it “would not return to work until TO 42 funds were deposited directly into the ‘Holding Account’ and that CO [Contracting Officer] controlled the ‘Holding Account.’” ECF No. 88-2 at 753-59 (emails). Further, in a December 2013 meeting, Habibi told Lt. Col. Reich, that Fox could not continue to perform its work on TO 42 as Fox “see[s] no success in getting funds from [Lakeshore].” ECF No. 101 ¶ 16. By February 2014, “Fox had informed members of the Air Force contract staff that it would cease performance if the Air Force did not ‘control’ the contract funds . . . or otherwise pay Fox directly.” *Id.* ¶ 84. The parties agree that Capt. Ban was aware at the time that Fox was threatening to discontinue performance. *Id.* ¶ 25. Thus, according to Fox, the Contracting Officer “knew that, given the fact that the prime was incapable of completing the project with its own funds, the necessary

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condition to complete TO 42 was getting FOX back to work.” ECF No. 110 at 4.

Fox argues that its ultimatums, and the contracting officer’s knowledge thereof, created conditions precedent sufficient to establish third-party beneficiary status under *Flexfab*. As the Federal Circuit explained:

[W]hen a government agent with authority to contract on the government’s behalf knows of a condition precedent to a third party’s performance as a sub-contractor, such as receipt of payment directly from the government, and specifically modifies the prime contract so as to ensure the third party’s continued performance, the agent and by implication the government itself necessarily intend to benefit the third party. That intent gives rise to standing as a third-party beneficiary to enforce the prime contract.

424 F.3d at 1263. But in *Flexfab*, the Federal Circuit, reviewing a grant of summary judgment against a subcontractor suing under Fox’s theories, found that “[n]either the contract nor the modification show[ed] any intent by the contracting officers to benefit [the subcontractor] Flexfab by linking in any way the remittance address to Flexfab. Looking beyond the contract itself, Flexfab can point to no evidence of record that establishes such intent.” *Flexfab*, 424 F.3d at 1264. There, the plaintiff failed to prove that “one with authority

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to bind the government” had any intent to contract directly with the subcontractor. *Id.* at 1265.

Fox’s reliance on *Flexfab* is misguided because Fox knowingly entered the repayment plan agreement under which Lakeshore—not the Air Force—would continue to pay Fox. ECF No. 85-1 at 126-28. The evidence Fox has presented about a joint account does not support the contention that it was a joint account, or that the Air Force ever agreed to control the account. The documents cited in support of this assertion reflect only Lakeshore’s various proposals—they reflect no agreement by the Air Force (the crucial fact these documents are cited for).³ Fox similarly relies on a Lakeshore PowerPoint to support its assertion that the Contracting Officer “modif[ied] the remittance clause and assigned TO 42 funds to pay FOX 100% and LTC 0% from the funds disbursed by the Government to the special account that AFCEC would ‘actively view all incoming and outgoing activity to ensure proceeds are directed as agreed into each project.’” *E.g.*, ECF No. 86 at 7, 11, & 12; ECF No. 88 ¶ 40. Fox’s other

3. Fox cites six paragraphs of its statement of facts, ECF No. 88 ¶¶ 20-25, none of which evince an agreement to any terms by the Air Force: ¶ 20: Lakeshore proposes a method to make payments into a joint account. ¶ 21: Lakeshore reiterates its openness to discuss that proposal. ¶ 22: Lakeshore stating it lacks funds to pay subcontractors in TO 42. ¶ 23: Lakeshore proposes alternative payment mechanisms for TO 42. ¶ 24: Lakeshore asking if its proposal is possible. ¶ 25: Lakeshore’s statement that “We understand that due to the recurrence of delayed payments AFCEC has expressed the thought that perhaps a similar arrangement might be possible with Shindand [TO 42].”

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citation for this assertion is a portion of Capt. Ban's deposition where counsel for Fox asked her to read the same page of the PowerPoint into the record. ECF No. 88-2 at 51 (50:14-18). But the PowerPoint was a *proposal by Lakeshore*, not evidence of what the Air Force agreed to.

The record, however, is clear that Fox knew the Air Force would not pay it directly or control the special account. Fox's repayment plan with Lakeshore makes this plain. It states very clearly that Fox was agreeing to a payment mechanism whereby the Air Force would pay Lakeshore and Lakeshore would pay Fox: "*LES shall pay Fox* the above amounts on LES' submitted invoices 26, 27, 28 and 29 immediately upon receipt of funds from AFCEC which total \$3,309,890.01, leaving a balance of principal and interest in the amount of \$3,172,172.16 and imputed interest thereon." ECF No. 88-2 at 1081-82 (emphasis added). Fox tries to avoid this with Habibi's testimony that when he signed the repayment plan he was "relying upon the express promises FOX received from [Maj. Jajliardo, Capt. Knost, Lt. Col. Reich, and Lt. Col. Geer] . . . that FOX was not to be paid by Lakeshore, and instead AFCEC put into place a payment mechanism whereby all TO 42 payments were to be made by DFAS into a Special Account and from the Special Account to Fox." *Id.* at 321 ¶ 37. But Habibi knew what he was signing, and that it contained clear language that the Air Force would only pay Lakeshore. There is also another reason to conclude that Fox came back to work understanding it would be paid by Lakeshore. As discussed in detail below, *see infra* at B.3, Fox accepted more than \$4 million in

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payments (without complaint) directly from Lakeshore, not the Air Force.

Fox was also clearly aware that the Air Force had viewing rights to the special account. While Lakeshore's characterization in its February 3, 2014, letter to Fox may suggest something more than mere viewing rights, *Id.* at 380 ("Lakeshore has provided AFCEC viewing or other account rights that AFCEC shall request in order to monitor and/or control (at its discretion and choice) the proceeds . . ."), this is not evidence of what the Air Force agreed to. Moreover, the terms of Fox and Lakeshore's payment plan are that "LES . . . directs payment of all proceeds . . . [and t]his special bank account shall provide AFCEC with full access viewing rights to monitor all proceeds." *Id.* at 398. Fox has put forward no evidence the Air Force ever had the ability to control Lakeshore's special account or do anything more than view the account.

A review of cases confirms that the changes here do not meet the heavy burden of establishing third-party beneficiary status. "[C]ases in which a subcontractor was found to have third-party beneficiary status involve a payment mechanism by which the subcontractor has direct access to payments made by the government." *Constructora Guzman, SA v. United States*, 161 Fed. Cl. 686, 694 (2022) (collecting cases). "Where a subcontractor seeks recognition as an intended beneficiary of a federal contract, it is possible to infer the requisite intent on the part of the government 'from the actions of the contracting officer and circumstances providing the contracting officer with appropriate notice that the contract provision at

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issue was intended to benefit the third party.” *G4S Tech. LLC*, 114 Fed. Cl. at 671 (quoting *Flexfab*, 424 F.3d at 1262). But “[n]otwithstanding this theoretical possibility, it is extremely difficult to establish status as an intended third-party beneficiary by inference in the context of a government contract.” *G4S Tech, LLC*, 114 Fed. Cl. at 671; see, e.g., *Flexfab*, 424 F.3d at 1263-65 (declining to infer contracting officer’s knowledge or intent based on actions of other contracting personnel); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1356 (Fed. Cir. 2001) (holding government’s cooperation with third-party insufficient to establish third-party beneficiary status); *O. Ahlborg & Sons, Inc. v. United States*, 74 Fed. Cl. 178, 189-90 (2006) (holding government’s involvement in negotiating subcontracts and program oversight insufficient to establish contractual privity with subcontractor); *JGB Enters., Inc. v. United States*, 63 Fed. Cl. 319, 334 (2004) (declining to infer contracting officer’s knowledge or intent based on actions of other contracting personnel).

In *Guzman*, the State Department negotiated a modification to a contract to renovate an embassy in Guyana that allowed the State Department to retain a portion of each payment due to the prime contractor in lieu of Miller Act bonding requirements. *Guzman*, 161 Fed. Cl. 686. The State Department then released the retainage amount to the prime contractor while the subcontractor went unpaid. The subcontractor sued, claiming third-party beneficiary status. The court held that the subcontractor was not a third-party beneficiary because the modification did nothing to alter the payor (still the prime contractor) and thus never created a relationship of direct payment

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between the State Department and the subcontractor. In other words, the State Department “neither expressly nor impliedly demonstrated any intent to be directly liable for payment to [the prime’s] subcontractors.” *Id.* at 695.

As in *Guzman*, the modification here did nothing to alter the payor or payee, and Fox has not presented evidence that the modification created a relationship of direct payment between the Air Force and the Fox. *See also G4S Techs.*, 114 Fed. Cl. 662. Instead, the undisputed evidence shows that under the modified payment mechanism, “as in *G4S Technologies*, all payments flowed from [the Air Force] to [the prime contractor], who was then required to pay its subcontractors.” *Guzman*, 161 Fed. Cl. at 695. Of course, this requirement of paying the subcontractors predated the post-February 7 Letter from the Contracting Officer.

Synthesizing applicable case law, the court in *Guzman* unified the holdings of a line of cases cited by the parties here. *See id.* at 694 (collecting cases). In *D & H Distributing Co. v. United States*, 102 F.3d 542, 547 (Fed. Cir. 1996), a subcontractor sued the United States after the contractor failed to pay the subcontractor under an explicit joint payment arrangement. The Federal Circuit ruled that while there was no implied-in-fact contract, the subcontractor was a third-party beneficiary due to the joint payment clause whose “entire purpose was to provide protection for [the subcontractor] by giving it a right to control the disbursement of the contract proceeds and thereby to ensure that its invoice to [the prime] would be paid.” *Id.* at 547. In *J.G.B. Enterprises, Inc. v.*

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United States, a subcontractor sued the United States for payment for hose assemblies on a DOD contract after the contractor became insolvent. 63 Fed. Cl. at 319. The Court of Federal Claims found the subcontractor was a third-party beneficiary because the government was contractually obligated to make payments into an escrow account accessible by a subcontractor; the Federal Circuit affirmed. *Id.* In *G4S Technology*, a subcontractor suing the United States under a third-party beneficiary theory appealed this court's grant of summary judgment for the Government, finding the subcontractor was not a direct beneficiary. 779 F.3d 1337. The payment mechanism at issue in *G4S* required the contractor to request funds attached to a specific purpose, such as payment to subcontractors and support its requests by documentation, such as subcontractor invoices, and the Department of Agriculture was to pay all subcontractors indirectly, *i.e.*, through payment to the contractor. The Federal Circuit affirmed, holding that the subcontractor was not a third-party beneficiary. *Id.*

That line of cases collected in *Guzman* only goes to show what did not happen here. The facts of these cases center on changes in payee or payor, or changes in the degree of subcontractor control over funds in the account used for payments. Unlike *Norwest Bank*, Fox did not condition continued work on the prime contractor's "assign[ment of] its payments on the contract to [the subcontractor's] bank." *Norwest Bank Ariz., N.A. v. United States*, 37 Fed. Cl. 605, 606 (1997). Although initially demanding direct payment, Fox agreed in writing that it would be paid by Lakeshore under the modification

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terms. ECF No. 88-2 at 380, 1081. Unlike *JGB*, the parties here did not agree to send the government's payments to an "escrow agent" who would "disburse them directly to [the subcontractor] as appropriate." *J.G.B. Enters. v. United States*, 497 F.3d 1259, 1260 (Fed. Cir. 2007).

In *D & H Distributing Co.*, a modification to a contract for computer hard disks included a joint payment mechanism, whereby the Government would thenceforth pay both the contractor and subcontractor. 102 F.3d. at 544. The National Security Agency then issued a check for the full contract price in the contractor's name only, in response to an invoice submitted by that contractor. The Federal Circuit held that the subcontractor—a third-party beneficiary whose "interests, specifically protected by the contract, would be impaired if the beneficiary were not accorded the right to obtain relief against the promisor in the event of a breach"—had standing to enforce the payment provision of the modification. *Id.* The breach in *D & H* was the Government's payment to the contractor only, a failure to comply with the joint-payee modification terms. *Id.* at 547. Unlike *D & H*, here the Air Force did not make Lakeshore and Fox "joint payees for the proceeds of the contract," *id.* at 544, nor is there any non-compliance by the Government with the terms of the modification that amounts to breach.

No matter how vocally Fox demanded direct payment, Fox signed a document saying it would not be paid directly by the Air Force. Given that the Air Force rejected the demands and Fox returned to work anyway, there was no

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condition precedent to Fox's performance. *See* ECF No. 88-2 at 380, 397-99, 1081.

3. No breach of the updated payment mechanism.

According to Fox:

The entire purpose of the AFCEC Special Account was to provide verification that the funds will be used to pay for the work for TO 42, and nothing more SOF 57 [sic] protection for FOX by having the Government retain the ability to access and monitor the Special Account and thereby to ensure that its invoice to LTC would be paid as it had demanded and to avoid the Government being left with "nothing". SOF 54 [sic] The rights conferred on FOX were designed to effectuate the payment of LTC's debt to it. This case therefore presents a particularly clear instance in which the creditor beneficiary's interests, specifically protected by the Contract, would be impaired if the beneficiary were not accorded the right to obtain relief against the promisor in the event of a breach. (citation omitted). Accordingly, FOX is entitled to enforce the payment provision of the Contract, and that [sic] the breach of that provision by the Government gave FOX a cause of action for damages.

ECF No. 86 at 24-25.

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Even assuming that Fox is a third-party beneficiary of the changed payment mechanism, Fox has not put forward any evidence that shows that the Air Force breached Task Order 42. That is, Fox has failed to establish “a non-performance of any contractual duty of immediate performance” by the Air Force., irrespective of the validity of Fox’s claim to third-party beneficiary status. Restatement (First) of Contracts § 312 (1932).

The Air Force processed the four invoices submitted by Lakeshore, paying Lakeshore \$4,052,085.01, as agreed. And Fox received all four payments owed to it under its agreement with Lakeshore.

- On February 27, 2014, AFCEC wired \$3,466,448.76 to Lakeshore for multiple invoices on two task orders (TO 32 and TO 42). The Air Force inadvertently sent this payment to Lakeshore’s general, pre-modification account. ECF No. 88-2 at 321 ¶ 39, 1093, 1104. The same day, Lakeshore reported the receipt of the funds in the wrong account in an email to Capt. Ban, adding that it had already “transferred it over” to the special account and “wired out the funds to the subcontractors as promised in our plan.” *Id.* Exs. 52-53; *see also* Ex. 54 (summary of transactions). At a meeting on March 5, Lakeshore and the Government explicitly worked to resolve the issue going forward so that payment on invoices would funnel directly to the Special Account.

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ECF No. 88-2 Ex. 61. “FOX was unaware at the time of AFCEC’s error” and did not find out about the mistake until it read Lara Schoenenberger’s Declaration dated April 1, 2019. ECF No. 85-1 at App90 ¶ 39. Regardless of the initial mistake, the funds ended up reaching Fox through the proper channels after Lakeshore’s correction. This mistake, which was so quickly cured and unknown to Fox until five years later, was harmless error. Along with two other subcontractors, Lakeshore paid Fox its portion, \$3,309,890.01, ECF No. 88-2 at 1106, with Fox receiving the net amount of \$3,309,855.00. ECF No. 85-1 at App90 ¶ 38.⁴

- On April 17, 2014, AFCEC made a payment of \$316,719.18 to Lakeshore. ECF No. 88-2 at 1112. That day, Lakeshore made two payments to Fox of \$117,836.79 and \$128,882.00. *Id.* at 1114. Fox reports that two days later it received the net amounts of \$117,801.79 and \$128,847.00, respectively. ECF No. 85-1 at App90 ¶ 38.
- Then on April 24, 2014, AFCEC paid Lakeshore \$565,616.22. ECF No. 88-2 at 1114. On April 28, Lakeshore paid Fox \$495,616.22. *Id.* Fox reports that the

4. The discrepancy between these two amounts is due to the cost of the wire transfer, which was borne by Fox.

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next day it received the net amount of \$495,581.22. ECF No. 85-1 at App90 ¶ 38.

Again, under its contract Lakeshore had a pre-existing duty to pay its subcontractors. Lakeshore's failure to pay its subcontractors placed it in default, prompting Government warnings of potential termination. The new payment arrangement—whether a contract modification or merely the exercise of Capt. Ban's existing authority to require additional information for approval of invoices under FAR 52.232-5—was a means of curing Lakeshore's default. The Air Force followed it faithfully. None of this amounts to a breach by the Government.

Lakeshore's collection of payment on invoices, declaration of Chapter 7 bankruptcy, and May 1, 2014, decampment from Afghanistan do not make the Government the appropriate party, nor this court the appropriate forum, for Fox to seek relief. ECF No. 85-1 at App91 ¶ 41; ECF No. 88-2 at 329-34. In Maj. Jajliardo's post-hoc estimation, "Lakeshore underbid numerous tsk [sic] orders in the (expected) final months of their solvency in order to leverage the credit capacity of the subs to invoice large quantities of work, receive payment, and then declare bankruptcy." ECF No. 88-2 at 330. Even accepting that to be true, that does not support a breach by the Air Force. Nobody contends or believes that Lakeshore was an ethical actor; in fact, the record detailed above demonstrates that Lakeshore was filing false certifications of subcontractor payment to get itself paid. But Lakeshore's filing bankruptcy, even with improper intent, does not convert the Air Force into a guarantor

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of Lakeshore's debt to Fox. If Lakeshore still owes Fox money for work performed under their subcontract, that is an issue for the bankruptcy court, not this one.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS the Government's motion for summary judgment, ECF No. 85, and DENIES Plaintiff's motion for summary judgment, ECF No. 86. The Clerk's Office is directed to enter judgment for the United States accordingly.

It is so ORDERED.

s/ Edward H. Meyers
Edward H. Meyers
Judge

**APPENDIX C — Opinion and Order of the United
States Court of Federal Claims, No. 18-1395C, filed
September 25, 2019, reported at 145 Fed. Cl. 236**

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 18-1395 C

FOX LOGISTICS AND CONSTRUCTION COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPINION AND ORDER

Filed: September 25, 2019

Third-Party Beneficiary; Implied-In-Fact Contract; Duty
of Good Faith and Fair Dealing; Privity of Contract;
Tucker Act; 28 U.S.C. § 1491; Subject-Matter Jurisdiction;
RCFC 12(b)(1).

WHEELER, Judge

In this case, plaintiff Fox Logistics and Construction
Co. (“Fox”) alleges that it was a third-party beneficiary of
a contract between Lakeshore Engineering Services, Inc.

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(“Lakeshore”) and the Department of the Air Force. In the alternative, Fox claims that it had an implied-in-fact contract with the Air Force. In either event, Fox alleges that the Air Force breached its duty of good faith and fair dealing.

Fox’s claims are related to a construction contract between the Government and Lakeshore for the construction of Shindand Air Base in Afghanistan. Fox was one of Lakeshore’s subcontractors on the project, and alleges that it is owed approximately \$11.7 million in damages for unpaid work and other costs associated with the construction of the base.

Now before the Court is the Government’s motion to dismiss this case for lack of subject-matter jurisdiction. For the reasons that are discussed below, the Court STAYS consideration of the Government’s motion to dismiss, pending completion of limited discovery on the issue of the Court’s jurisdiction over this case.

Background

In April of 2006, the Air Force awarded Lakeshore a contract for heavy engineering repair and construction work at Shindand Air Base in Afghanistan. Compl. ¶ 5. The Air Force waived the usual bond requirements for the project because the base was located in a war zone. *Id.* ¶ 6. On August 23, 2012, the Air Force issued Task Order FA8903-06-D-8505-0042 (“TO 42”) to Lakeshore for infrastructure work on the air base. *Id.* ¶ 7. Lakeshore hired Fox as a subcontractor responsible for the TO 42 construction on October 12, 2012. *Id.* ¶ 8.

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By May of 2013, Lakeshore was behind on both construction and payments to its subcontractors. *See id.* ¶¶ 10-11. Between May 2013 and January 2014, the Air Force issued three Show Cause Notices to Lakeshore, requesting that Lakeshore provide assurances that it was willing and able to complete TO 42. *Id.* ¶¶ 10-13. Each of these Show Cause Notices resulted in part from Lakeshore's inability to pay its subcontractors. *See id.* Some subcontractors, including Fox, refused to continue work on Lakeshore's projects until they were paid. *E.g.*, Dkt. 15-1 at 3. The third Show Cause Notice, issued by Contracting Officer Captain Rebecca Ban on January 7, 2014, warned Lakeshore that unless it "submit[ted] acceptable assurances within ten . . . days" TO 42 could be terminated for default. Compl. ¶ 13.

On January 17, 2014, Lakeshore responded to the third Show Cause Notice. *Id.* ¶ 14. In its response, Lakeshore proposed creating a "designated holding account" into which the Air Force could deposit the funds for three task orders Lakeshore was working on, including TO 42. Dkt. 29-1 at 1. (In their course of dealing, the parties sometimes referred to the designated holding account as the "special account." *See, e.g.*, Compl. ¶ 21.) Lakeshore gave designated Air Force personnel view-only access to the account, so that they could monitor how funds were distributed from it. *Id.* ¶ 18.

In a February 7, 2014 memorandum, Captain Ban agreed to Lakeshore's proposal. *Id.* Captain Ban informed Lakeshore that future invoices must include "subcontractor payment certifications" and that Lakeshore must pay its

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subcontractors as soon as it received money from the Air Force. *Id.* Additionally, the Air Force required Lakeshore to create payment plans for each subcontractor for which it was in arrears. *Id.* These payment plans had to be signed by the subcontractor, include the amounts owed to the subcontractor, detail the amount that Lakeshore would actually be paying to the subcontractor, and include the date by which Lakeshore intended to pay all of the money it owed to the subcontractor. *Id.* Captain Ban also said that Lakeshore would not “be allowed to retain funds for their own in-country expenses” other than money necessary for “life support and security.” *Id.* Finally, Captain Ban warned Lakeshore that the Air Force would be monitoring the transactions out of the designated holding account, and that “[i]f at any time, transactions d[id] not occur in accordance with the approved subcontractor payment certification” the task order would “be immediately terminated for default.” *Id.*

Lakeshore contacted Mushtaq Habibi, Fox’s Director General, to explain these requirements, and obtain his consent to Lakeshore’s payment plan for Fox. *See* Dkt. 26-9 at 56-57. After consulting by email with two Air Force officers, Mr. Habibi consented to the payment plan. *Id.* at 56-57, 65, 67.

At first, the new plan appeared to be working. Between February and May of 2014, Lakeshore paid Fox \$4,052,085.01. *See* Compl. ¶ 27. Unfortunately, on May 1, 2014, Lakeshore abandoned TO 42. *Id.* ¶ 28. The next day it filed for bankruptcy in the United States. *Id.* ¶ 29. At the time it declared bankruptcy, Lakeshore still owed

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Fox more than \$3,000,000. *Id.* ¶ 47. Fox has incurred more than \$8,000,000 in uncompensated expenses since then. *Id.* Fox attempted to recover the money it was owed during Lakeshore’s bankruptcy proceeding, but was unsuccessful. *See id.* ¶ 31. Fox then filed a certified claim with Captain Ban, asking to be paid the money it was owed under TO 42. *Id.* ¶ 31. Captain Ban denied Fox’s claim on October 24, 2017. *Id.* ¶ 32.

On September 13, 2018, Fox filed this suit. On April 15, 2019, the Government filed a motion to dismiss Fox’s complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). Fox filed a response to the motion to dismiss on June 28, 2019, and the Government filed its reply on August 6, 2019. The Court heard oral argument on the motion on September 4, 2019.

Discussion**A. Standard of Review**

Whether the Court has jurisdiction to decide the merits of a case is a threshold matter. *See PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1365 (Fed. Cir. 2007). When deciding a Rule 12(b)(1) motion to dismiss, a court must assume all the undisputed facts in the complaint are true and draw reasonable inferences in the non-movant’s favor. *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016). Further, the plaintiff bears the burden of establishing facts sufficient to invoke this Court’s jurisdiction by a preponderance of the evidence.

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Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988). In determining whether a plaintiff has met this burden, courts may look “beyond the pleadings and ‘inquire into jurisdictional facts’ in order to determine whether jurisdiction exists.” *Lechliter v. United States*, 70 Fed. Cl. 536, 543 (2006) (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). When jurisdictional facts are in dispute, jurisdictional discovery is appropriate. *Hopi Tribe v. United States*, 113 Fed. Cl. 43, 50 (2013) (citing *Samish Indian Nation v. United States*, No. 2-1383L, 2006 WL 5629542, at *4-6 (Fed. Cl. 2006); *E. Trans-Waste of Md., Inc. v. United States*, 27 Fed. Cl. 146, 148 n.1 (1992)).

B. Plaintiff’s Claims

For this Court to have jurisdiction over a breach of contract claim against the United States, there must be privity of contract between the plaintiff and the Government. *Cent. Transp. Int’l, Inc. v. United States*, 63 Fed. Cl. 336, 338 (2004). “Absent privity . . . there has been no waiver of sovereign immunity” and the Court does not have jurisdiction over the claim. *Id.* However, a plaintiff need not be in direct privity; status as a third-party beneficiary to a contract with the Government will suffice to give the Court jurisdiction. *See Anderson v. United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003). The Court also has jurisdiction to hear claims relating to implied-in-fact contracts with the Government. *Id.* at 1351 n.2 (citing *Maher v. United States*, 314 F.3d 600, 603 n.1 (Fed. Cir. 2002)).

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In its complaint, Fox asserts that it was a third-party beneficiary of the contract between Lakeshore and the Government. In the alternative, Fox claims that it had an implied-in-fact contract with the Government. Either theory, if supported by a preponderance of the evidence, would give the Court jurisdiction to hear Fox’s claims.¹ See *Turping v. United States*, 913 F.3d 1060, 1065 (Fed. Cir. 2019).

1. Third-Party Beneficiary

It is not easy for a plaintiff to prove that it is a third-party beneficiary of a contract. The third party is “entitled to a benefit promised in a contract . . . only if the contracting parties so intend.” *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 117, 131 S.Ct. 1342, 179 L.Ed.2d 457 (2011). The parties’ intent to benefit the third party can be either “express or implied,” but it must be “fairly attributable to the contracting officer.” *G4S Technology LLC v. United States*, 779 F.3d 1337, 1340 (Fed. Cir. 2015) (quoting *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001); *Flexfab, L.L.C. v. United*

1. In its complaint, Fox also alleges a third claim for relief: that the Government breached the implied duty of good faith and fair dealing it owed to Fox as a third-party beneficiary of the contract between the Government and Lakeshore. Compl. ¶¶ 62-63. For the reasons discussed more fully below, this claim is derivative of Fox’s third-party beneficiary claim. Since the Court has STAYED consideration of the Government’s motion to dismiss the third-party beneficiary claim, it also STAYS consideration of the motion to dismiss Fox’s claim for breach of the implied duty of good faith and fair dealing.

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States, 424 F.3d 1254, 1263 (Fed. Cir. 2005)). The parties to the contract must intend to benefit the third party directly; incidental benefits are not enough. *See id.* at 1341; *Glass*, 258 F.3d at 1354. The Government's intention to benefit a third party can be established by circumstantial evidence. *G4S*, 779 F. 3d at 1341.

There is a thin line between a contract that directly benefits a third party and one that does not. This is especially true because "the government's conduct should be evaluated in the context of its responsibility to protect the public interest." *Id.* The cases that evaluate this issue often turn on fine distinctions, such as the method used to pay the third party. For instance, in *D & H Distributing Co. v. United States*, the Federal Circuit held that a subcontractor was a third-party beneficiary to a contract because the Government made payments into an account held jointly by the prime contractor and the subcontractor. 102 F.3d 542, 546-48 (Fed. Cir. 1996). Similarly, in *J.G.B. Enters., Inc. v. United States*, the Circuit held that the contract created a direct benefit because the Government's "payments to the prime contractor were held in escrow for the third-party subcontractor." 497 F.3d 1259, 1260, 1261 n.1 (Fed. Cir. 2007). In contrast, the Circuit found that there was no direct benefit in *G4S Technology LLC v. United States*, because in that case payment was made directly to the prime contractor's general fund, even though the Government knew that the prime contractor owed subcontractors money for work done on the contract. 779 F.3d at 1342.

The Federal Circuit's decision in *G4S* illustrates how fact intensive the inquiry into whether a contract directly

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benefits a third party is. In that decision, the court considered each of the government's public and private statements about the contract, as well as the specific details of how the subcontractor was paid. *See id.* at 1338-43. Only after considering the complete factual record before it did the Circuit conclude that the subcontractor, G4S, did not directly benefit from the contract because the Government did not "provide[] guarantees directly to G4S" or "arrange[] to pay G4S itself." *Id.* at 1343.

This Court, too, recognized the need to fully develop the factual record in *G4S*. Initially, the Government filed a motion to dismiss for lack of subject-matter jurisdiction, based on what it claimed was the lack of privity between itself and G4S. *See G4S Tech. LLC v. United States*, 114 Fed. Cl. 662, 668 (2014). Judge Firestone determined "that G4S had raised a non-frivolous claim," and ruled that the Court had jurisdiction over the case if G4S was a third-party beneficiary of the contract between the Government and the prime contractor. *See G4S*, 779 F.3d at 1339-40; *G4S*, 114 Fed. Cl. at 668. Accordingly, she "ordered discovery on the limited issue of whether G4S could establish a contractual right to recovery against the United States." *G4S*, 114 Fed. Cl. at 668.

Judge Firestone's reasoning is persuasive in this case. Like G4S, Fox raises non-frivolous claims in its complaint. It is undisputed that the Government was concerned about Lakeshore's repeated failures to pay its contractors. *See* Dkt. 26-1 at 1. As counsel to Fox acknowledged during oral argument, the original contract between Lakeshore and the Government was not intended to directly benefit

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Fox or any other subcontractor. However, Fox argues that the Government modified its contract with Lakeshore in March of 2014 with the intention of specifically benefitting Fox. Compl. ¶ 45. To support this contention, Fox cites Captain Ban's February 7, 2014 memorandum to Lakeshore approving the creation of the holding account and specifying how the funds from the account were to be distributed. *Id.* ¶ 40. Fox claims that Captain Ban used this memorandum "to modify TO 42" with the "intent[] to protect and benefit Fox." *Id.*

Fox provides some objective evidence to support this claim. For instance, Mr. Habibi says that he relied "on the verbal and written statements of Contracing [sic] Officer's Representatives Capt. Benjamin Knost, Maj. Karlo Jajliardo, Lt. Col. Greg Reich, and Lt. Col. Michael Greer," who apparently told him that the Government "would take appropriate measures to directly pay Fox . . . thereby bypassing the cash flow problems Lakeshore [faced]." Dkt. 26-8 at 6. Major Jajliardo later sent Mr. Habibi another email, in which he asked for updated information on how much money Lakeshore owed Fox. *Id.* The Major "stress[ed] how importation this info [was]," and implied that it would be applied to "useful purposes." *Id.*; see also Dkt. 26-9 at 47.

Mr. Habibi understood these and other actions by the Government to indicate that it had assented to his demand that the Government control Lakeshore's holding account before Fox would go back to work—that is, that the Government intended to directly benefit Fox. Dkt. 26-8 at 7-8; Dkt. 26-9 at 44, 52. Fox alleges throughout its

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complaint that Captain Ban was aware of and specifically authorized communications between Air Force officers and Fox. *E.g.*, Compl. ¶¶ 23, 26, 37-38.

The Government maintains that it never modified its contract with Lakeshore, and that if it did, it did not do so with the express intention of benefitting Fox. In support of this contention, the Government provided as Exhibit A to its motion to dismiss the declaration of Lara Schoenenberger,² a project manager for the Air Force who oversaw Lakeshore's work on TO 42. *See* Dkt. 15-1 at ¶¶ 7, 10, 12. However, Ms. Schoenenberger was neither the contracting officer nor one of the Air Force officers that directly contacted Fox. She therefore is not able to deny that Captain Ban intended to directly benefit Fox or that Captain Ban was aware of and authorized the communications between the Air Force officers and Fox.

It may well be that after the factual record is more fully developed, Fox is unable to demonstrate that it is a third-party beneficiary of the contract between Lakeshore and the Government. However, Fox has raised a non-frivolous claim that it is a third-party beneficiary and is entitled to additional discovery on this point. Therefore,

2. In a motion filed with the Court on September 13, 2019, Fox moved to exclude eleven paragraphs of Ms. Schoenenberger's declaration, or in the alternative for the Court to hold a hearing to supplement the evidentiary record before the Court ruled on the Government's motion to dismiss. Dkt. 31 at 13-14. Given the Court's decision to STAY consideration of the Government's motion to dismiss until after the completion of jurisdictional discovery, Fox's motion is DENIED as moot.

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the Government's motion to dismiss Count One of Fox's complaint is STAYED pending the completion of jurisdictional discovery.

2. Implied-In-Fact Contract

Implied-in-fact contracts with the Government are also difficult to prove. Implied-in-fact contracts are contracts inferred by a court when “the light of the surrounding circumstances” demonstrates a meeting of the minds between the parties, even if the agreement was never formalized. *Turping v. United States*, 913 F.3d 1060, 1065 (Fed. Cir. 2019) (quoting *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003)). In order to establish an implied-in-fact contract, the plaintiff must demonstrate the same elements needed for an express contract. *Id.* Specifically, the plaintiff must prove “(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.* (quoting *Hanlin*, 316 F.3d at 1328). Plaintiffs must prove “by objective evidence, the existence of an offer and a reciprocal acceptance” in order to show the “mutuality of intent” necessary for the formation of an implied-in-fact contract. *Id.*

As both parties have acknowledged, the Court must contemplate similar facts when considering Fox's third-party beneficiary and implied-in-fact contract claims. *See* Compl. ¶ 49; Dkt. 15 at 21. As with its third-party beneficiary claim, Fox raises a non-frivolous claim that the contracting officer intended to enter into a contract with it.

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The Government asserts that Fox’s claim for breach of an implied-in-fact contract should be dismissed because Fox cannot show “mutuality of intent, an unambiguous offer and acceptance, or an exercise of actual authority on the part of . . . the contracting officer.” Dkt. 15 at 21. In contrast, Fox claims that Captain Ban’s February 7, 2014 memorandum to Lakeshore approving the creation of the holding account and specifying how the funds from the account were to be distributed created the implied-in-fact contract between the Government and Fox. The Government, Fox says, “manifested its intent to accept Fox’s offer to return to work in exchange for the [Government] . . . taking steps to protect and compensate Fox.” Compl. ¶ 56.

Fox points to at least some objective evidence to support its claims. As discussed more fully above, Mr. Habibi says that he had extensive verbal and written communications with Contracting Officer’s Representatives who assured him that the Government was taking steps to ensure that Fox was paid for its work. Dkt. 26-8 at 6. Fox asserts that these communications were specifically authorized by Captain Ban, the Contracting Officer. Compl. ¶¶ 23, 26, 37-38. Fox has provided the Court with a number of emails that partially corroborate its version of events. The Government disputes Fox’s account, but ultimately it fails to fully refute it. Without sworn statements from Captain Ban or her Representatives specifically denying Fox’s assertion that Captain Ban intended to contract with Fox, the Court must take Fox’s allegations—supported by some evidence—as true.

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On this claim, too, Fox may ultimately be unable to prove that the Court has jurisdiction. However, Fox has raised a non-frivolous claim that it had an implied-in-fact contract with the Government, and is entitled to more fully develop the factual record before the Court rules on the Government's motion to dismiss. Therefore, the Government's motion to dismiss Count Two of Fox's complaint is STAYED pending the completion of jurisdictional discovery.

3. **Breach of the Implied Duty of Good Faith and Fair Dealing**

In its complaint, Fox also alleges a third claim for relief: that the Government breached the implied duty of good faith and fair dealing it owed to Fox as a third-party beneficiary of the contract between the Government and Lakeshore. Compl. ¶¶ 62-63. The Federal Circuit has held that “[e]very contract, including one with the federal government, imposes upon each party an implied duty of good faith and fair dealing in its performance and enforcement.” *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019). However, the implied duty “cannot expand a party’s contractual duties beyond those in the express contract.” *Id.* (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). Therefore, if Fox was not an intended third-party beneficiary of the contract between the Government and Lakeshore, it cannot recover for a breach of the implied duty of good faith and fair dealing. The Court has STAYED consideration of the Government’s motion to dismiss Fox’s third-party beneficiary claim, so it will

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not address whether Fox's implied duty claim should be dismissed at this time.

The Government's motion to dismiss Count Three of Fox's complaint is therefore also STAYED pending the completion of jurisdictional discovery.

Conclusion

For these reasons, the Government's motion to dismiss is STAYED pending the completion of limited discovery on the issue of jurisdiction. Additionally, Fox's motion to exclude portions of Ms. Schoenenberger's declaration is DENIED as moot. The parties shall file a joint status report no later than Friday, October 11, 2019, proposing a schedule for jurisdictional discovery, and for supplemental briefing following the completion of discovery.

IT IS SO ORDERED.

s/ Thomas C. Wheeler
Thomas C. Wheeler
Judge

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**APPENDIX D — Order of the United States Court of
Appeals for the Federal Circuit Denying Petitioner’s
Motion for Leave to File Petition for Panel
Rehearing Out of Time, No. 2024-2150 (ECF No. 69),
filed July 30, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2024-2150

FOX LOGISTICS AND CONSTRUCTION CO.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Filed July 30, 2026

ORDER

NOTE: This order is nonprecedential.

Appeal from the United States Court of Federal
Claims in No. 1:18-cv-01395-EHM, Judge Edward H.
Meyers.

ON MOTION

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Appendix D

Before MOORE, *Chief Judge*, PROST, *Circuit Judge*,
and SEEBORG, *District Judge*.¹

PER CURIAM.

ORDER

Upon consideration of Fox Logistics and Construction Co.'s motion for leave to file its petition for panel rehearing out of time,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

July 30, 2026
Date

1. Honorable Richard Seeborg, District Judge, United States District Court for the Northern District of California, sitting by designation.

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**APPENDIX E — Orders of the United States
Court of Appeals for the Federal Circuit on
Supplementation of the Record, No. 2024-2150: Order
Directing Petitioner to Submit a Corrected Motion to
Supplement the Record (ECF No. 58),
filed April 28, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2024-2150

FOX LOGISTICS AND CONSTRUCTION CO.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Filed April 28, 2026

ORDER

NOTE: This order is nonprecedential.

Appeal from the United States Court of Federal
Claims in No. 1:18-cv-01395-EHM, Judge Edward H.
Meyers.

ON MOTION

Appendix E

Before MOORE, *Chief Judge*, PROST, *Circuit Judge*,
and SEEBORG, *District Judge*.¹

PER CURIAM.

ORDER

At Oral Argument, Fox Logistics and Construction Co. was presented an opportunity to supplement the record before this court, with the government's consent, if there exists evidence within the record below of invoices which the government refused to pay. Fox moves to file a supplemental appendix. ECF Nos. 52–53, 56. The government moves for an extension of time to respond. ECF No. 54. This court issued two Notices of Non-Compliance concerning Fox's motion to supplement the record. ECF No. 55, 57.

Upon consideration thereof,

IT IS ORDERED THAT:

Fox shall submit a corrected version of its motion to supplement the record (ECF Nos. 52–53, 56) that (1) addresses the issues identified by this court's Notice of Non-Compliance (ECF No. 57), (2) is free of argument, and (3) clearly identifies the evidence that Fox seeks to submit, with appropriate citations to the exact record.

1. Honorable Richard Seeborg, District Judge, United States District Court for the Northern District of California, sitting by designation.

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The corrected filing must be submitted within four (4) business days from the date of this Order.

The government's motion to extend time (ECF No. 54) is denied-as-moot with leave to renew upon submission of Fox's corrected filing.

FOR THE COURT

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court

April 28, 2026
Date

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**APPENDIX F — Statutory, Regulatory,
and Other Authorities**

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

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Appendix F

28 U.S.C. § 1295(a)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

* * *

(3) of an appeal from a final decision of the United States Court of Federal Claims;

* * *

*Appendix F***28 U.S.C. § 1491(a)(1)**

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

*Appendix F***40 U.S.C. § 3131**

(a) **Definition.**—In this subchapter, the term “contractor” means a person awarded a contract described in subsection (b).

(b) **Type of Bonds Required.**—Before any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

(1) **Performance bond.**—A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.

(2) **Payment bond.**—A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

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(c) Coverage for Taxes in Performance Bond.—

(1) In general.—Every performance bond required under this section specifically shall provide coverage for taxes the Government imposes which are collected, deducted, or withheld from wages the contractor pays in carrying out the contract with respect to which the bond is furnished.

(2) Notice.—The Government shall give the surety on the bond written notice, with respect to any unpaid taxes attributable to any period, within 90 days after the date when the contractor files a return for the period, except that notice must be given no later than 180 days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(3) Civil action.—The Government may not bring a civil action on the bond for the taxes—

(A) unless notice is given as provided in this subsection; and

(B) more than one year after the day on which notice is given.

(d) Waiver of Bonds for Contracts Performed in Foreign Countries.—A contracting officer may waive the requirement of a performance bond and payment bond for work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish the bonds.

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(e) Authority To Require Additional Bonds.—This section does not limit the authority of a contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases, specified in subsection (b).

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48 C.F.R. § 28.102-1(a)

(a) 40 U.S.C. chapter 31, subchapter **III**, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding \$150,000, except that this requirement may be waived—

(1) by the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond, or

(2) As otherwise authorized by the Bonds statute or other law.

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48 C.F.R. § 32.112-1

Subcontractor assertions of nonpayment.

(a) In accordance with Section 806(a)(4) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355 (10 U.S.C. 4601 note prec.), upon the assertion by a subcontractor or supplier of a Federal contractor that the subcontractor or supplier has not been paid in accordance with the payment terms of the subcontract, purchase order, or other agreement with the prime contractor, the contracting officer may determine—

(1) For a construction contract, whether the contractor has made—

(i) Progress payments to the subcontractor or supplier in compliance with Chapter 39 of Title 31, United States Code (Prompt Payment Act); or

(ii) Final payment to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor;

(2) For a contract other than construction, whether the contractor has made progress payments, final payments, or other payments to the subcontractor or supplier in compliance with the terms of the subcontract, purchase order, or other agreement with the prime contractor; or

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(3) For any contract, whether the contractor's certification of payment of a subcontractor or supplier accompanying its payment request to the Government is accurate.

(b) If, in making the determination in paragraphs (a)(1) and (2) of this subsection, the contracting officer finds the prime contractor is not in compliance, the contracting officer may—

(1) Encourage the contractor to make timely payment to the subcontractor or supplier; or

(2) If authorized by the applicable payment clauses, reduce or suspend progress payments to the contractor.

(c) If the contracting officer determines that a certification referred to in paragraph (a)(3) of this subsection is inaccurate in any material respect, the contracting officer shall initiate administrative or other remedial action.

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Restatement (First) of Contracts § 133(1) (1932)

(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is . . . :

(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;

(b) a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, or a right of the beneficiary against the promisee which has been barred by the Statute of Limitations or by a discharge in bankruptcy, or which is unenforceable because of the Statute of Frauds;

(c) an incidental beneficiary if neither the facts stated in Clause (a) nor those stated in Clause (b) exist.

* * *

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Restatement Second Contracts § 302(1)(A) and (1)(B)

Section 302 of the Restatement distinguishes between an “intended” and an “incidental” beneficiary as follows:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.