No. 26-451

IN THE

Supreme Court of the United States

FOX LOGISTICS AND CONSTRUCTION CO.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Rule 15.8, petitioner respectfully calls the Court's attention to a decision issued after the petition was filed: the Memorandum Opinion of Bankruptcy Judge Craig T. Goldblatt in *In re Noble Supply & Logistics, LLC*, No. 26-11369 (CTG), D.I. 427 (Bankr. D. Del. Nov. 2, 2026) (Goldblatt, J.), also entered in *Noble Supply & Logistics, LLC v. Defense Logistics Agency*, Adv. Proc. No. 26-50885 (CTG) ("*Noble*"). The pages of the slip opinion cited in this brief are reproduced as Exhibit A. *Noble* is a decision of a bankruptcy court. It does not bind this Court or the Federal Circuit, and it remains subject to appeal. 28 U.S.C. § 158(a). *Noble* is significant because it squarely rejects the same Government position on which the decision below rests: that a payment obligation for work the Government received never matures unless the Government (or an intermediary) completes a formal acceptance or invoicing step. That is the question the presiding judge below identified as dispositive, and on which she pressed the Government at argument.

The Government on November 6, 2026 appealed Judge Goldblatt's bankruptcy court decision in Noble. *See Defense Logistics Agency v. Noble Supply & Logistics, LLC*, No. 26-1433 (D. Del.) (appeal from Bankr. D. Del., Adv. Proc. No. 26-50885). The intervening decision exposes a material tension in the treatment of governmental impediments to payment. In Noble, the Government's refusal to validate deliveries did not prevent payment obligations from maturing. Slip op. 34, 37, 40. In Fox, the absence of additional Lakeshore invoices was treated as defeating breach notwithstanding evidence concerning the Government-approved payment arrangement, its receipt of Fox's performance, and its possession of Fox's invoices. Pet. App. 7a–8a; Appx2139 ¶ 44. The cases arise under

different contractual arrangements and do not establish a circuit conflict. But Noble provides a concrete, intervening application of Kohler demonstrating why the legal effect of the Government's conduct and undertaking must be examined before an incomplete administrative procedure is treated as conclusive. That question warrants this Court's consideration.

ARGUMENT

At oral argument in *Fox Logistics and Construction Co. v. United States*, No. 24-2150 (Fed. Cir.) ("*Fox*"), Chief Judge Moore told counsel that the breach question was decisive and framed it this way: "If Lakeshore never invoiced the government and therefore the government did not fail to pay an invoice properly received, what did the government actually do that amounted to breach on behalf of the government?" Oral Arg. at 12:07. She added: "I don't know how I can hold somebody accountable for not paying something that they were never invoiced for." *Id.* at 13:01. But Chief Judge Moore also recognized that the work was done. When Government counsel answered that the Government's promise ran only to Lakeshore, she responded: "[P]romise to pay for work done, the work was done. Why hasn't the government paid someone?" *Id.* at 17:43. The panel ultimately affirmed on the ground that the Government paid the invoices Lakeshore submitted and "did what it agreed to do." Pet. App. 7a–8a.

In *Noble*, the Defense Logistics Agency withheld payment for 108 pre-termination deliveries. Slip op. 31–32. It took the position that "its acceptance of goods shipped is 'an affirmative act' and that unless and until it does so, no obligation can mature." *Id.* at 35. Because the agency had

not formally accepted the deliveries, the contractor could not invoice through the agency's electronic system, and the Government argued that no debt had matured. *Id.* at 33. The contractor's evidence showed that the Government had "refused to validate the proof of delivery . . . thereby preventing Noble from invoicing the DLA." *Id.* at 32. The court rejected the Government's position and ordered payment of $8,493,160.09. *Id.* at 34, 40–41. Its holdings track the question Chief Judge Moore posed.

The Government in *Noble* relied on the Federal Circuit's decision in *M.C. & D. Capital Corp. v. United States*, 948 F.2d 1251 (Fed. Cir. 1991). Slip op. 35. The court held that *M.C. & D.* "does not establish that acceptance invariably requires an affirmative act by the Government." *Id.* at 36. It relied on the Federal Acquisition Regulation: "FAR 46.407(g) provides that '[n]otices of rejection must include the reasons for rejection and be furnished promptly to the contractor,' and expressly recognizes that untimely notice may result in acceptance being 'implied as a matter of law.'" *Id.* (quoting 48 C.F.R. § 46.407(g)). The court held that the commercial-item provisions of FAR Part 12 "do not categorically displace other FAR policies," and that nothing in them "conflicts with the recognition that acceptance may, in appropriate circumstances, be implied from the Government's conduct and failure to reject promptly." *Id.* (citing 48 C.F.R. § 12.102(c)). The court grounded that rule in Court of Claims precedent, *John C. Kohler Co. v. United States*, 498 F.2d 1360, 1365–67 (Ct. Cl. 1974), where the Government's prolonged possession and use of a boiler constituted implied acceptance even though it never performed a final inspection; the Government was "in no position to complain that it did not make a final inspection." Slip op. 36–37 (quoting *Kohler*, 498 F.2d

at 1366). *Kohler* establishes, the court explained, "that the Government's failure to complete an inspection or acceptance form does not necessarily prevent acceptance from occurring." *Id.* at 37. Court of Claims decisions are binding precedent in the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc).

Applying those principles, the court held:

> [T]he Government has retained the goods or received the services without identifying a defect or rejecting performance. . . . Despite the passage of substantial time, the Government has identified no deficiency requiring correction for these deliveries, and its unexplained refusal to validate delivery has prevented Noble from submitting invoices through the DLA system. In these circumstances, the Court concludes that the Government has impliedly accepted performance and cannot prevent the resulting payment obligations from maturing merely by withholding the administrative action necessary to permit invoicing.

Slip op. 37. The court likewise held that "a naked assertion that the Government will not accept delivery, without any reason offered for its refusal, does not prevent the debt from maturing," *id.* at 34, and that where the Government "essentially asserts a unilateral right to prevent a debt from maturing without taking any issue with whether the contractor has performed its contractual obligations," that is "a commercially implausible result" unsupported by any authority the Government cited, *id.* at 40. The court

drew the line in the right place. Where the Government offers evidence of a genuine dispute about performance, such as non-delivery or delivery to the wrong location, the matter is a contract dispute. *Id.* at 39–40. But where it raises no such dispute, the absence of a formal acceptance or invoice does not defeat a matured payment obligation. *Id.* at 34, 37, 40.

Noble applied *Kohler* where DLA's refusal to validate deliveries prevented invoicing. Slip op. 36–40. Its new significance is that it illustrates why the legal effect of the Government's conduct cannot invariably be displaced by an unfinished administrative step.

The Federal Circuit assumed, without deciding, that Fox was an intended third-party beneficiary, but held that the Government did not breach because it paid the invoices Lakeshore submitted. Pet. App. 5a, 7a–8a. That assumption required examining the entirety of the circumstances defining the undertaking Fox was assumed entitled to enforce. *D & H Distributing Co. v. United States*, 102 F.3d 542, 546–47 (Fed. Cir. 1996); *J.G.B. Enterprises, Inc. v. United States*, 497 F.3d 1259, 1261–62 (Fed. Cir. 2007). Those authorities illuminate the nature of the undertaking the panel assumed existed.

Fox placed into the record before the panel, in its supplemental appendix, which the panel accepted, Lt. Col. Erik M. Sell's October 9, 2014 report that the Government had inventoried Fox's work in place and was checking whether he was "allowed to release the invoices" to Fox—the same withholding of the administrative step needed for payment that *Noble* rejected. Fed. Cir. ECF No. 59; Pet. App. 7a n.2; Pet. 6, 15; Appx2139 ¶ 44; *Noble*, slip op. 37.

The question is not whether knowledge of Fox's invoices eliminates every contractual condition, but whether the Government-approved change in payment mechanism and its subsequent conduct permit the absence of additional Lakeshore invoices, standing alone, to defeat breach of the undertaking assumed enforceable by Fox.

Noble does not decide Fox's beneficiary status or whether its special account satisfied the direct-benefit standard. It shows why the effect of the changed payment arrangement, acceptance, and invoicing must be considered together before concluding that no payment obligation matured. The panel's assumption of beneficiary status makes the nature of that undertaking, rather than the prime's ordinary billing practice alone, the relevant breach inquiry. Giving Fox the benefit of permissible inferences from the documented payment arrangement, the question is whether the Government's actual undertaking and acceptance of performance, rather than the absence of further prime-contractor invoice submissions alone, controls the breach inquiry. *Noble*, slip op. 34–40. *Noble* does not eliminate genuine disputes over performance or contractual payment conditions.

Noble examined 108 deliveries individually, required categorization of evidence already in its summary-judgment record, and distinguished genuine performance disputes from withheld administrative validation. Slip op. 8, 24, 31–40. Fox's discovery was limited to liability; damages discovery and an evidentiary examination of the later invoices did not occur. ECF No. 78 at 3–4; Appx10; Pet. App. 29a. Limited damages discovery alone does not defeat summary judgment on liability. But *Noble* newly illustrates why the existing liability record must be tested

against the entire undertaking before the missing formal invoice is treated as conclusive. That is the limited basis for reconsideration and, if necessary, remand.

Noble demonstrates that the Government's reliance on uncompleted acceptance or invoicing procedures presents a recurring procurement issue. Its application of *Kohler* supplies an intervening reason to reconsider whether the panel evaluated breach in light of the entirety of the Government's undertaking on the assumed-beneficiary premise.

The intervening decision in *Noble* also demonstrates the institutional importance of a predictable rule governing federal procurement when a prime contractor becomes financially incapable of performance. Military contracting officers must be able to preserve essential projects and supply chains without uncertainty concerning the legal consequences of payment arrangements undertaken for performing prime contractors. The governing standard must examine the entirety of the Government's undertaking and conduct, rather than permit an administrative formality, considered in isolation, to determine whether an enforceable obligation was breached. The question affects not merely private payment rights, but the reliability of federal procurement and the Government's ability to obtain continued performance when its missions depend upon it.

The Panel's opinion held that Fox is being assumed to be a third-party beneficiary. The Panel assumed that status and decided the prime breached its agreement with Fox. Once the Panel held Fox as the assumed third party beneficiary Fox was no longer acting by law as a

subcontractor. But was deemed a third Party beneficiary by law. Pet. App. 5a.

On that assumption, the only promisor whose breach was at issue was the Government, which knew the prime "lacked funding to perform on TO 42, to pay FOX, or any subcontractor on TO 42, from their own funds." Appx3491 ¶ 53; Appx2072; *see* Pet. 10–11. That assumption required the Panel and Trial Court to examine the entire undertaking Fox was entitled to enforce, *D & H Distributing Co.*, 102 F.3d at 546–47; *J.G.B.*, 497 F.3d at 1261–62, and *Noble* shows what that examination requires and demonstrates that Fox was prevented by the partial discovery conducted at the trial level to conduct a hearing on which invoices withheld were derived from work performed and accepted as was undertaken in Noble.

The two decisions now apply the same Government practice in opposite ways. In *Noble*, the Government's refusal to validate deliveries, which kept the contractor from invoicing through DLA's electronic system, did not stop the payment obligation from maturing. Slip op. 34, 37, 40. In *Fox*, the absence of further invoices, after the Government held Fox's invoices without processing them, was treated as a complete defense. Pet. App. 7a–8a. A contractor in privity and an intended beneficiary entitled to enforce the same kind of undertaking thus receive different answers to the same question, depending on the forum. The two cases also travel separate appellate paths: *Noble* is reviewable in the district court and the Third Circuit, 28 U.S.C. § 158(a), (d)(1), while Fox's claim lies exclusively with the Federal Circuit, 28 U.S.C. § 1295(a)(3). Only this Court can resolve that conflict and supply the uniform standard *Noble* applied. *See* Pet. 20.

CONCLUSION

The Court should grant the petition for a writ of certiorari. Alternatively, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Noble Supply & Logistics, LLC v. Defense Logistics Agency*.

Respectfully submitted,

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Supplemental Appendix —
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

Chapter 11
Case No. 26-11369 (CTG)
Related Docket Nos. 325, 327

IN RE: NOBLE SUPPLY & LOGISTICS, LLC, *et al.*,

Debtors.

Adv. Proc. No. 26-50885 (CTG)
Related Docket Nos. 3, 17, 23

NOBLE SUPPLY & LOGISTICS, LLC,

Plaintiff,

v.

DEFENSE LOGISTICS AGENCY,

Defendant.

Filed November 2, 2026

MEMORANDUM OPINION

Consider a circumstance in which Party A believes that it holds a claim against Party B worth as much as $1 billion. Party B, meanwhile, has delivered $15 million in goods to Party A, and payment is due. As a practical matter, Party A might refuse payment and sue on its larger claim, leaving Party B to counterclaim for the price of the goods. Once the parties' obligations were established and liquidated, setoff might permit payment of only the net balance. But the prospect of an eventual setoff does not itself establish a present right to withhold payment.

The Supreme Court described setoff in 1913 as the right "which one party has against another to use his claim in full or partial satisfaction of what he owes to the other."[1] That mechanism avoids "the absurdity of making A pay B when B owes A."[2] Section 553 of the Bankruptcy Code generally preserves qualifying nonbankruptcy setoff rights .[3]

This case presents that problem in concrete terms. The United States asserts substantial claims against Noble arising from alleged bid rigging and other alleged misconduct.[4] The Government anticipates that its claims

1. *Studley v. Boylston Nat'l Bank of Boston,* 229 U.S. 523, 528 (1913).

2. *Id.*

3. *Citizens Bank of Md. v. Strumpf,* 516 U.S. 16, 18 (1995).

4. Debtor Noble Supply & Logistics, LLC is referred to as the "debtor" or as "Noble."

may exceed $1 billion. Noble, in turn, seeks payment of approximately $14 6 million for goods and services it says it provided to the Defense Logistics Agency.[5] Noble is pursuing a sale of substantially all its assets, and the sale proceeds may leave little or nothing for unsecured creditors. The Government's concern that payment will impair its ability to recover on its claims is therefore understandable.

That concern does not, however, establish the legal entitlement the Government asserts. Under the ordinary common-law rule, the Government's disputed and unliquidated damages claims do not provide a present right of setoff. Although language in *United States v. Munsey Trust Co.* might support an argument for broader Government authority, the Government has not advanced that argument and the Court does not decide it.[6] On the arguments and record presented, the Government has not established an interest entitled to adequate protection. The particular relief it requests—an allowed superpriority administrative claim and priority over existing secured creditors—would also be unavailable for independent reasons.

The absence of an established setoff right does not mean that every amount Noble seeks is subject to turnover. Section 542(b) of the Bankruptcy Code requires payment of qualifying matured debts; it does not provide a means to adjudicate an underlying contract dispute.

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5. The Defense Logistics Agency is referred to as the "DLA."

6. 332 U.S. 234 (1947).

Section 106(a) expressly waives sovereign immunity for a proper turnover action. But the Court concludes that the Tucker Act does not waive immunity for Noble's separate breach-of-contract action in this forum.

Applying those principles to the existing summary-judgment record, the Court concludes that Noble has established matured payment obligations totaling $8,493,160.09. The Government's objections to those obligations do not identify a genuine dispute concerning Noble's performance. The remaining amounts involve unresolved disputes about delivery to the contractually required destinations and are not properly recoverable through turnover. The unresolved contract claims will be dismissed without prejudice.

Part I of this Memorandum Opinion addresses the Government's request for adequate protection. Part II grants relief from the automatic stay so that the Government may exercise whatever nonbankruptcy termination rights it possesses, without adjudicating those rights. Part III addresses turnover and sovereign immunity. Part IV applies that framework to the 108 deliveries at issue.

* * *

arguments.[27] The Government sought to shorten notice on both of its motions so that they could also be heard on October 28, 2026.[28] The Court granted that motion.[29]

At the October 28, 2026 hearing, the Court indicated that it was inclined to: (a) deny the motion for adequate protection; (b) grant the motion for relief from stay; (c) consider the claim for turnover to the extent the debtor can establish the absence of any dispute of material fact with respect to a matured debt due from the Government; and (d) dismiss the remaining claim for breach of contract on sovereign immunity grounds. The Court then proceeded to consider the merits of the summary judgment record.

The core of the dispute between the parties related to various positions taken regarding 108 deliveries allegedly made by the debtor for which the Government has withheld payment. At the conclusion of that hearing, however, the Court determined that it required supplemental briefing to sort through the 108 deliveries to determine whether, in light of the disputes raised by the Government, the debtor was entitled to turnover. And the Court made clear that the supplemental briefing was limited to clarifying and categorizing evidence already in the summary judgment record. It was not an invitation to submit evidence that had not been previously included in the existing summary judgment record. The Court directed the parties to

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27. D.I. 23.

28. D.I. 20.

29. D.I. 28.

provide those supplemental briefs by October 30, 2026, with a view towards having the Court issue

* * *

up much authority that identifies a standard that a court should apply in making that assessment.

During the October 28, 2026 argument, the Court asked the parties about their position on this question. The Court posited that one approach could be to ask whether the factual record in support of the elements of turnover is established in a way that would support the entry of summary judgment for the debtor. The summary-judgment standard provides a familiar means of distinguishing an unsupported objection from a genuine factual dispute requiring adjudication. Its inquiry—whether "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law"—also fits the distinction drawn in *Inslaw* and *Charter* between enforcing an established payment obligation and liquidating a disputed contract claim.[64]

In response to the Court's questions during the October 28 argument, neither party identified authority prescribing a different standard or objected to the Court's proposed approach. The Court will accordingly use the

64. *See Nebraska v. Wyoming,* 507 U.S. 584, 590 (1993) ("Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.").

summary-judgment standard in this case to test whether the Government's asserted disputes prevent Noble from establishing a matured payment obligation under § 542(b). Where the record establishes the statutory elements as a matter of law, the Government's characterization of the obligation as disputed does not defeat turnover. Where resolution instead requires adjudication of an underlying dispute over contractual

* * *

that the Tucker Act must be read to mean what its language most naturally provides—that the waiver of sovereign immunity it grants is limited to suits in the Court of Federal Claims. For that reason, unlike the turnover action for which sovereign immunity is waived, the debtor's breach of contract action brought against the United States will be dismissed for lack of jurisdiction on account of federal sovereign immunity.[79]

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79. The Court separately raised with the parties the question whether they would prefer such counts to be transferred to the Court of Federal Claims rather than dismissed. They indicated that their (joint) preference was that those portions of the complaint be dismissed without prejudice so that they may be filed afresh in the Court of Federal Claims. That approach is agreeable to the Court.

IV. The undisputed record establishes that the debtor is entitled to turnover of approximately $8.5 million; the remaining $6 million are genuinely disputed and therefore are not subject to turnover.

The remaining question is which of the 108 pre-termination delivery orders give rise to payment obligations that Noble has established are matured and subject to turnover under § 542(b). It bears noting that the Court rejects the Government's contention that a dispute as to any delivery means that all amounts are disputed and that turnover therefore cannot be granted as to any delivery. As the Government correctly explained in its motion for stay relief, each "Delivery Order is a self-contained purchase."[80] The stay relief motion adds that the "price of one Delivery Order does not depend on other orders, and a missed delivery under one order is not, by itself, a breach of another order."[81] The logic of that position is that the question of whether the debtor is entitled to turnover must be examined on a delivery-by-delivery basis.

Noble's position is set forth in a declaration filed by Robert Albergotti, who is the debtor's chief transformation officer.[82] He explains that "Noble delivered certain goods to the contractually agreed-upon destinations or provided services to the appropriate party through the date of the DLA's purported termination on August 27, 2026, and

80. Main Case D.I. 325 at 3.

81. *Id.*

82. D.I. 5.

the Government retained possession of such goods."[83] For some of those goods, "a representative of the Government signed a receiving report."[84] For others, Noble does not have a signed receiving report, but has "obtained proof of delivery from a shipper or freight forwarder."[85] In addition, Albergotti states that the "Government has not raised any defects or nonconformities with respect to the goods and services associated with the Pre-Termination Delivery Orders."[86] Nevertheless, Albergotti states, "the DLA has refused to validate the proof of delivery or provision of services rendered for $14,566,268.02 of Pre-Termination Delivery Orders, thereby preventing Noble from invoicing the DLA for such orders."[87] Albergotti's declaration includes an exhibit that lists the 108 deliveries that he says give rise to the approximately $14.6 million receivable, indicating for each delivery, among other things, the invoice number, a description of the goods and services provided, the date of delivery, and the amount he contends is due.[88]

In response, the Government attaches to its brief a declaration submitted by John S. Cuorato, Jr., of the DLA.[89] Cuorato helpfully worked off of Albergotti's

83. *Id.* ¶ 17.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. D.I. 5-1 at 202-205.

89. D.I. 19-3.

chart of the 108 deliveries, adding additional columns to provide further information, such as the date when the Government received proof of delivery and whether that proof of delivery was in a form that was acceptable to the Government.[90] He also asserts that for some of the deliveries, the location of the delivery differed from the location that was contractually agreed.[91]

At bottom, in view of the undisputed facts on which the parties' declarations agree, the disputes between them seem to boil down to a handful of issues. *First,* the Government contends that it has not formally "accepted" delivery of any of the 108 deliveries. For that reason, Noble cannot invoice the Government using the electronic system through which the DLA is invoiced by vendors. Because the Government contends that this formal acceptance must occur in order for a debt to mature, it asserts that turnover is not available for any of these amounts.

Second, the Government states that there are some deliveries for which proof of delivery was provided after the date of termination. The Government contends that it is not required to accept a proof of delivery that comes after it terminated the contract.

Third, the Government contends that for certain of the deliveries, the proof of delivery provided by Noble was not acceptable to the DLA. The Government does not, however, offer reasons why those proofs of delivery were not acceptable.

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90. *Id.* at ¶¶ 9-17.

91. *Id.* ¶ 12.

And *fourth,* the Government contends that certain of the goods were delivered to locations that differed from those specified in the parties' contract.

For the reasons set forth below, the Court concludes that: (1) a naked assertion that the Government will not accept delivery, without any reason offered for its refusal, does not prevent the debt from maturing; (2) while the Government may not be required to accept delivery of goods provided after the termination date, where Noble delivered the goods before termination, nothing about the fact that the proof of delivery was received afterwards prevents the Government's obligation from maturing; (3) to the extent the DLA has simply announced that proof of delivery is not acceptable, but has failed to offer a reason or rationale in support of its conclusion, the doctrine of constructive acceptance applies, and the obligation to pay those invoices has accordingly matured; and (4) to the extent Noble cannot demonstrate on the existing summary-judgment record that it has delivered the goods to a contractually agreed location, a material disputed fact renders turnover unavailable. Applying these principles, the Court concludes that Noble holds a debt of $8,493,160.09 from the DLA that is matured and subject to turnover. The remaining amounts Noble seeks give rise to genuine contractual disputes such that turnover is unavailable. Exhibit A to this Memorandum Opinion is a chart that categorizes each of the 108 deliveries in light of this analysis. Exhibit B to this Memorandum Opinion is an explanation for that categorization.

Supplemental Appendix

A. The Government cannot prevent a debt from maturing simply by refusing to "accept" delivery without providing a reason.

The Government takes the position that its acceptance of goods shipped is "an affirmative act" and that unless and until it does so, no obligation can mature.[92] In support of that proposition, it relies on the Federal Circuit's decision in *M.C. & D. Capital Corporation*.[93] There, the Army Corps of Engineers entered into an agreement for the installation of a rubber membrane roof and underlying rigid insulation on the roofs of four buildings containing sophisticated and sensitive electronic defense equipment. The applicable contract expressly stated the Government's possession or use of the work "shall not be deemed an acceptance of any work under the contract."[94] The work, however, was deficient. IS] erious defects in construction appeared, involving numerous breaches of the roofs' water-tight barriers due to peeling patches, as well as other defects in workmanship."[95] The Government accordingly terminated the contract for default.

The Federal Circuit found that the Government had not finally accepted the work. In view of the express provision in their contract stating that possession is not acceptance

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92. D.I. 42 at 3.

93. *See M.C. & D. Cap. Corp. v. United States,* 948 F.2d 1251, 1255-1256 (Fed. Cir. 1991).

94. *Id.* at 1255.

95. *Id.* at 1254.

and the termination on account of specific defects in the work, the court found it "difficult to understand MC & D's argument that the Government's taking possession of the work constituted acceptance."[96] Indeed, the Federal Circuit added, "the argument makes no sense, since one reason for this standard 'use and possession' provision is to enable the Government to examine and test substantially complete work before accepting it to insure that it meets the contractual requirements."[97]

The outcome in that case does not establish that acceptance invariably requires an affirmative act by the Government. FAR 46.407(g) provides that "[n]otices of rejection must include the reasons for rejection and be furnished promptly to the contractor," and expressly recognizes that untimely notice may result in acceptance being "implied as a matter of law."[98] Although these contracts incorporate the commercial-items provisions of Part 12, those provisions do not categorically displace other FAR policies.[99] Nothing in the commercial-items acceptance provision conflicts with the recognition that acceptance may, in appropriate circumstances, be implied from the Government's conduct and failure to reject promptly.

---

96. *Id.* at 1255.

97. *Id.*

98. 48 C.F.R. § 46.407(g).

99. *See* 48 C.F.R. § 12.102(c).

The Court of Claims applied that principle in *John C. Kohler Co. v. United States*.[100] There, the Government took possession of and operated a boiler for almost three months without formally accepting it. The court rejected the Government's reliance on an unperformed final inspection, explaining that the Government was "in no position to complain that it did not make a final inspection."[101] Its prolonged custody and operation of the boiler constituted implied acceptance.[102] That decision does not establish that delivery alone constitutes acceptance. It does, however, establish that the Government's failure to complete an inspection or acceptance form does not necessarily prevent acceptance from occurring.

Here, for the deliveries as to which Noble has established performance without a genuine factual dispute, the Government has retained the goods or received the services without identifying a defect or rejecting performance. Noble's evidence also establishes that the DLA ordinarily validates proof of delivery, or identifies a specific deficiency, within approximately one week.[103] Despite the passage of substantial time, the Government has identified no deficiency requiring correction for these deliveries, and its unexplained refusal to validate delivery has prevented Noble from submitting invoices through the DLA system. In these circumstances, the Court concludes that the Government has impliedly accepted performance and cannot prevent the resulting

100. 498 F.2d 1360, 1365-67 (Ct. Cl. 1974).

101. *Id.* at 1366.

102. *Id.* at 1367.

103. D.I. 5 ¶ 13.

payment obligations from maturing merely by withholding the administrative action necessary to permit invoicing.

B. So long as the goods were delivered before termination, the proof of delivery may be delivered afterwards without preventing the debt from maturing.

The termination notices that the Government delivered to Noble contain the following language:

> Delivery of material after the date of this notice will not be considered for Goods Receipt posting and Proof of Delivery's indicating delivery of material after the date of this notice will not be accepted or reviewed by DLA.
>
> Excepting the above: Delivery Orders with partial performance will have their outstanding balances terminated. Any receipted balance will remain receipted, and if an invoice has not been submitted to date, Noble must invoice for the outstanding amount that has been receipted. If Noble has already submitted an invoice for that receipted balance, no further action is needed.[104]

The Government reads this language to mean that it is not required to pay in cases in which proof of delivery is received after the date of termination. That reading is

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104. D.I. 5-1 at 191.

incorrect. To be sure, its notice tells the contractor that it should not deliver new goods after the termination date. That is what is meant by the sentence stating that "[d]elivery of material after the date of this notice will not be considered for Goods Receipt posting and Proof of Delivery's indicating delivery of material after the date of this notice will not be accepted or reviewed by DLA." The reference to "receipted" balances preserves the invoicing process for balances already recorded. The Court therefore rejects the contention that otherwise acceptable proof of pretermination delivery is ineffective merely because Noble submitted it after termination.

Nothing in the statement, moreover, suggests that the Government is not obligated to pay for goods that were delivered before the termination date. Indeed, the contrary is suggested by the statement that "if an invoice has not been submitted to date, Noble must invoice for the outstanding amount that has been receipted." The Court accordingly rejects the Government's contention that, where Noble delivered the goods before termination, and has provided acceptable proof of delivery, that the debt fails to mature because the proof of delivery was delivered after the termination of the contract.

C. The mere declaration that proof of delivery was not acceptable, without any articulation of a reason to support the conclusion, does not prevent a debt from maturing.

For another category of invoices, the Government states that the proof of delivery was not acceptable. For these deliveries, Noble's declaration establishes that it has provided a shipper's proof of delivery to the required destination. The Government does not deny receipt, identify a discrepancy in the delivery documents, or explain any other deficiency in that evidence. Its unexplained designation of the proof as unacceptable therefore does not identify a genuine factual dispute concerning delivery.

The Government's unsupported assertion that the proof of delivery was unacceptable raises essentially the same issue as its contention that it never affirmatively accepted the goods. To be sure, had the Government come forward with a declaration that states "notwithstanding the shipper's statement that goods were delivered, we have not received the goods," this would be a different case. That circumstance would likely present a genuine dispute of fact regarding the delivery of the goods. That would therefore be a contract dispute that is not amenable to resolution through a turnover action. But the Government has said no such thing. Rather, it essentially asserts a unilateral right to prevent a debt from maturing without taking any issue with whether the contractor has performed its contractual obligations. That is a commercially implausible result and therefore, unsurprisingly, is not supported by any of the authority to which the Government points.

D. Noble is not entitled to turnover for deliveries where there is a genuine dispute regarding the location of the delivery.

For a final category of goods, the Government contends that the location where the shipper reports delivering the goods differs from that specified in the contract. Noble's counsel responds that delivery to a different destination would have occurred only upon the Government's written consent or direction. But Noble identifies no such authorization in the existing summary-judgment record for these deliveries. The discrepancy between the required and reported destinations therefore presents an unresolved question of contractual performance. Under the approach explained in Part III.B, Noble has not established an entitlement to turnover of those amounts.

Conclusion

For the foregoing reasons, the Government's motion for adequate protection will be denied and its motion for relief from the automatic stay will be granted. The Court will enter summary judgment in favor of Noble, in part, and deny summary judgment, in part, on its claim for turnover. The Government will be directed (unless, of course, this Court's orders are stayed or reversed before then) to make payment to Noble on the $8,493,160.0§9 on which judgment is entered in Noble's favor by November 9, 2026. The Government's motion to dismiss Noble's claim for breach of contract on federal sovereign immunity grounds will be granted. The parties are directed to settle forms of order so providing.

Supplemental Appendix

Dated: November 2, 2026

/s/ Craig T. Goldblatt
Craig T. Goldblatt
United States Bankruptcy Judge