FOREWORD

Acquisition Flexibility: Friend or Foe

In fiscal year (FY) 2003, the nation was at war, and the acquisition community mobilized to support the war. Today, the nation is reconstructing war-torn Iraq, prosecuting the global war on terror, transforming the Department of Defense (DOD), and executing the myriad of business-as-usual missions (which often are none too usual). Government procurement is playing a prominent role in those efforts. Now, more than ever, agencies need to procure goods, services, and construction quickly and efficiently. Hence the need for flexibility. Increased flexibility and discretion, however, increase the risks of fraud, waste or abuse; higher prices or lower quality goods and services; unequal treatment of contractors; or the appearance of these improprieties.

Nowhere is the tension between flexibility and rules more evident than in procurement in Iraq. On the one hand, the popular press criticizes the government for not acting fast enough to repair and rebuild Iraq's infrastructure. On the other hand, agencies are criticized for quickly awarding sole source (the press often refers to them as "no-bid") contracts to large corporations with political connections. With billions of dollars being awarded through numerous contracts, aberrations in all directions are inevitable.

This year's Government Contract and Fiscal Law Symposium, entitled "Acquisition Flexibility: Friend or Foe," was held from 2 – 5 December 2003, and addressed the issues of procurement flexibility and transformation from a variety of vantage points. The *Year in Review* article is the Contract and Fiscal Law Department's[1] effort to capture the most important, relevant, and (sometimes) thought-provoking, developments of the past FY. The *Year in Review* covers nearly fifty topics grouped around the following five major areas: contract formation, contract performance, special contracting topics, fiscal law, and legislation. Although the article is not written with the Symposium theme in mind, the reader may want to look at the matters discussed through the prism of "Acquisition Flexibility."

In the vast expanse of our practice, we could not cover every new decision or rule. We have tried, however, to discuss topics most relevant to our readers. I hope we have succeeded and that you find this article useful in your practice, thought provoking, and a "good read." If you have comments or suggestions, please email them to Contract-YIR@hqda.army.mil.

Lieutenant Colonel Michael Benjamin.

CONTRACT FORMATION

Authority

For It's Tommy this, an' Tommy that, an' "Chuck him out, the brute!"[2]

In 1890, Rudyard Kipling wrote this sad lament of the soldier once the need for his services has passed. A recent U.S. Court of Appeals for the Federal Circuit (CAFC) case reaffirms the timelessness of this lament. In *Schism v. United States*, a divided CAFC held that the promises of free and full lifetime medical care made by military recruiters to appellants did not bind the government, regardless of whether such statements reflected official DOD policy.[3] The case warrants examination because of the court's exhaustive analysis of the authority issue.

In *Schism*, two Air Force retirees sued the federal government seeking unlimited free medical care on the grounds of an implied-in-fact contract made by Air Force recruiters at the

---

1. The Contract and Fiscal Law Department is composed of seven Judge Advocates (this author, Major Karl Kuhn, Major Bobbi Davis, Major Steven Patoir, Major Gregg Sharp, Major Jim Dorn, and Major Kevin Huyser (USAF)) and our Secretary, Ms. Dottie Gross. Each officer has contributed sections to this work. We owe particular kudos to Major Kevin Huyser, this year's editor. Kevin's dedication to this project is unlimited; his attention to detail, absolutely unmatched; and his calm, friendly, yet determined demeanor, both reassuring and inspiring. He is the ideal editor in chief. The Department would like to thank our outside contributing authors: Ms. Margaret Patterson, Lieutenant Colonel Tim Tuckey, and Lieutenant Colonel John Siemietkowski. Their willingness to take time out to help the Department is greatly appreciated. Finally, the article has benefited immensely from diligent fine-tuning by *The Army Lawyer's* resident footnote guru, Mr. Chuck Strong, and from *The Army Lawyer* staff: Lieutenant Colonel Tim Tuckey, Captain Heather Fagan, and Captain Andras M. Marton. Thank you all!

2. The final two stanzas of Rudyard Kipling's poem *Tommy* read as follows:

> You talk o' better food for us, an' schools, an' fires, an' all:
> We'll wait for extra rations if you treat us rational.
> Don't mess about the cook-room slops, but prove it to our face.
> The Widow's Uniform is not the soldier-man's disgrace.
>
> For it's Tommy this, an' Tommy that, an' "Chuck him out, the brute!"
> But it's "Saviour of 'is country" when the guns begin to shoot;
> An' it's Tommy this, an' Tommy that, an' anything you please;
> An' Tommy ain't a bloomin' fool -- you bet that Tommy sees!

RUDYARD KIPLING, TOMMY (1890), *reprinted in* THE NORTON ANTHOLOGY OF POETRY 868 (3d ed. 1983), *quoted in* Schism v. United States, 316 F.3d 1259, 1301 (Fed. Cir. 2002) (Mayer, J., dissenting), *cert. denied*, Schism v. United States, 123 S. Ct. 2246 (2003).

3. *Schism*, 316 F.3d at 1300.

time of their enlistments. Specifically, appellants alleged that military recruiters, under the direction of the service secretaries, induced recruits to join the armed services during the World War II and Korean War eras by promising free lifetime medical care for them and their dependents if they served on active duty for at least twenty years. The plaintiffs alleged that the government breached this promise in 1995 when the government promulgated regulations implementing the TRICARE program.[4]

In the district court,[5] the government conceded the recruiters' promises were made in good faith and relied upon by the plaintiffs.[6] The government, however, argued that the individuals who made the free lifetime medical care promises lacked actual authority to bind the government, and that under the Constitution only Congress has the authority to make such promises. The district court granted the government's motion for summary judgment, and the veterans appealed to the CAFC.[7]

At the CAFC, the appellants showed that the recruiters made the lifetime healthcare promises at the service secretaries' direction,[8] and argued the offers were made in furtherance of the service secretaries' statutory duty to recruit and retain service-members.[9] The appellants also argued that the broad language of 5 U.S.C § 301[10] conferred authority on the secretaries to, *inter alia*, regulate and control recruitment in their departments, which included directing recruiters to promise free lifetime medical care.[11]

In response to the appellants' arguments, the court first noted that retirement benefits for military personnel, as well as civilian federal employees, "depend upon an exercise of legislative grace," not upon contract principles.[12] Therefore, the court concluded a contract-based analysis was entirely inappropriate in the present case.[13]

Even if a contract law analysis was proper, the court noted the retirees still did not have a valid contract because the recruiters who made the promises lacked actual authority to negotiate entitlements for full, free lifetime health care. The court reasoned that even if the service secretaries explicitly directed recruiters to make such promises, the service secretaries, and the Executive Branch as a whole, lacked the authority to do so.[14] As Commander-in-Chief, the President does not have the constitutional authority to promise lifetime entitlements because such authority would encroach on Congress's constitutional prerogative to appropriate funding. In addition to violating the Separation of Powers doctrine, the court observed that a promise of future funds would also violate the Anti-Deficiency Act.[15]

---

4. *Id.* at 1262-63 (explaining that under the TRICARE program, retirees over sixty-five must seek coverage under Medicare if they are unable to secure medical treatment on a space-available status at a military facility); *see also* 32 C.F.R. § 199.17 (1995).

5. Schism v. United States, 19 F. Supp. 2d 1287 (N.D. Fla. 1998). Plaintiffs brought their contract claim under the "Little Tucker Act," which provides concurrent jurisdiction in the U.S. district courts and the U.S. Court of Federal Claims (COFC) for money claims against the federal government based on, *inter alia*, "any express or implied contract with the United States" that does not exceed $10,000. 28 U.S.C.S. § 1346(a)(2) (LEXIS 2003).

6. *Schism*, 316 F.3d at 1265.

7. *Id*.

8. In support of their position, the retirees pointed to a 1945 letter written by James Forrestal, then-Secretary of the Navy, to "Naval Reserve and Temporary USN Officers." The letter encouraged reserve officers to transfer to active duty service. Attached to this letter was a recruitment brochure indicating that retired Navy personnel would receive free medical care. *Id.* at 1266.

9. *Id.* at 1278-79.

10. 5 U.S.C.S. § 301 (LEXIS 2003). The statute states, in relevant part:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

Id.

11. *Schism*, 316 F.3d at 1278-79.

12. *Id*. at 1268.

13. *Id*. After a belabored examination of the history of the law governing military healthcare, the court observed that since 1884, Congress has repeatedly exercised its authority by statutorily defining the extent of health care authorized for military members and their dependents. The court reasoned "Congress could hardly have intended a contract regime for military health benefits because . . . federal employees, both military and civilian, serve by appointment, not contract, and their rights to compensation are a matter of 'legal status' even where recruitment agreements are made." *Id*. at 1274-75.

14. *Id*. at 1277-78.

15. *Id*. at 1283. The Antideficiency Act states, in part, that "a federal employee . . . may not . . . involve [the government] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C.S. § 1341(a)(1)(B).

The appellants' final, and perhaps strongest argument was that Congress, by annually appropriating funds to the DOD for retiree healthcare, ratified the DOD's otherwise unauthorized conduct. The appellants argued that Congress acquiesced to the military departments by allowing them to spend appropriated funds on retiree healthcare, noting individual congressmen were aware of the recruiters' promises and further knew the military had kept the promises for many years. Congress' lack of intervention amounted to an implied ratification of the DOD's practice of providing free health care.[16]

In response, the court noted that Congress has, under limited circumstances, ratified agency conduct, "giving the force of law to official action unauthorized when taken."[17] When Congress ratifies an agency act through an appropriation, however, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed."[18] In this case, the court reasoned a series of "lump sum" DOD appropriation acts bestowed no such authority. Regarding congressional acquiescence, the court noted that the Supreme Court has repeatedly cautioned against using congressional silence alone to infer approval of an administrative interpretation. Further, the doctrine is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions.[19] The court observed that an important prerequisite for congressional acquiescence is that "Congress as a whole was made aware of the administrative construction or interpretation and did not act on contrary legislation despite having this knowledge."[20] In this case, the court stated this important element was missing, and dismissed the plaintiffs' argument as misplaced.[21]

The majority's opinion generated a spirited dissent from Chief Justice Mayer, who was joined by Judges Newman, Plager, and Gajarsa. After citing Kipling's poem *Tommy* as being particularly fitting, Chief Justice Mayer observed that Congress knew, or certainly should have known how the DOD was spending the billions of dollars Congress appropriated it for military medical care. To Chief Justice Mayer, "to suggest it was oblivious, that [Congress] did not know military officials were promising medical care in accordance with its appropriations is pure sophistry."[22] Chief Justice Mayer lamented "if it were otherwise, if Congress can appropriate billions for this aspect of national defense and not know how it is accounted for, then God save the Republic."[23]

Turning to the majority's analysis of the implied-in-fact contract issue, Chief Justice Mayer observed that the Court has held the government cannot deprive a party "of the fruits actually reduced to possession of contracts lawfully made."[24] By requiring military retirees to turn to Medicare for the shortfall in coverage, "the government wrongfully diminished the value of their contractual 'fruits,' and breached its implied-in-fact contract with them."[25] On the issue of authority, the dissent noted that though it is clear that one who deals with a government agent bears the burden of determining that the agent is authorized to bind the government, it is equally clear that the leadership of the military departments authorized and officially endorsed the recruiters' promises. Citing 5 U.S.C. § 301, the dissent argued that Congress delegated broad authority to the secretaries to govern their respective military departments. Promises of lifetime health care were well within the discretion and power of the secretaries, and funding by Congress of the military's health care system confirmed this broad delegation. To the dissent:

> Congressional delegation of authority along with the absence of any contrary statutes or regulations in force at the time the retirees entered military service . . . gives the promises of lifetime health care made by recruiters, under the authority of the secretaries, the force of law and creates a contract implied-in-fact binding upon the government.[26]

---

16. *Schism*, 316 F.3d at 1293-94.

17. *Id*. at 1290 (citing Swayne & Hoyt v. United States, 300 U.S. 297, 302 (1937)).

18. *Id*.

19. *Id.* at 1295-96 (referencing Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001); Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).

20. *Id*. at 1297.

21. *Id*.

22. *Id*. at 1301.

23. *Id*.

24. *Id*. (citing In re Sinking Fund Cases, 99 U.S. 700, 720 (1878)).

25. *Id*. at 1301.

26. *Id*. at 1305.

Unfortunately for the appellants, the dissent was the dissent, and with the Supreme Court's denial of *certiorari*, the opinion of the majority stands.[27]

The Rules of Fair Dealing Do Not Evaporate When the Government Is a Party[28]

In *Johnson Management Group CFC, Inc.* (*JMG*) *v. Martinez*,[29] a once again divided CAFC decided whether a contracting officer had authority to deviate from the requirements of the Federal Acquisition Regulation[30] (FAR) by inserting a clause in a contract that negated a contractor's duty to refund advance payments upon contract termination.[31] Although the majority opined that the clause was without legal effect, this decision met with a spirited dissent from Judge Newman.[32]

In *JMG*, the appellant contracted with the Department of Housing and Urban Development (HUD) to provide property management services for several HUD properties.[33] Although the contract incorporated by reference FAR section 52.232-12(d),[34] which required the contractor to return advance payments upon contract termination, the contracting officer inserted the following custom drafted Liquidation of Advance Payments clause into the contract:

> The payments advanced under this contract will be considered liquidated upon submission of invoices marked as paid by suppliers. Invoices shall be for the items listed in the Use of Advance Payments clause.[35]

During contract performance, JMG failed to comply with several contract requirements. Therefore, the contracting officer issued the appellant a cure notice and ultimately terminated the contract for default.[36] Following the default termination, the appellant submitted a claim for unpaid invoices totaling $119,758.53. The contracting officer's final decision stated the government held a lien on equipment purchased by JMG with the government provided advance payments, and demanded the equipment's return as required under the contract.[37] JMG appealed the contracting officer's final decision to the HUD Board of Contract Appeals, which held the government owed the appellant $78,500.83 for several unpaid claims. The board, however, also determined the government was entitled to offset this amount against "the unliquidated balance of advance payments owed to the Government by Appellant."[38]

JMG appealed the board's decision to the CAFC, where the legal status of the contract's Liquidation of Advance Payments clause was a point of contention between the majority and the dissent. The majority, citing black-letter law, reasoned "the government is not bound by the conduct of its agents acting beyond the scope of their authority."[39] Here, the contracting officer's custom-crafted clause clearly contradicted the FAR's Advance Payments clause in that it allowed the appellant to satisfy his advance payments debts by simply purchasing equipment for contract performance, in effect permitting JMG to improperly convert an intended loan into a gift. Given this clear conflict, the majority concluded the contracting officer exceeded her authority, and the clause was without legal effect.[40]

---

27. Schism v. United States, 123 S. Ct. 2246 (2003).

28. Johnson Mgmt. Group CFC, Inc. v. Martinez, 308 F.3d 1245 (Fed. Cir. 2002).

29. *Id*.

30. General Servs. Admin. et al., Federal Acquisition Reg. (July 2003) [hereinafter FAR].

31. *JMG*, 308 F.3d at 1259.

32. *Id*. at 1261.

33. *Id*. at 1249.

34. FAR, *supra* note 30, at 52.232-12(d).

35. *JMG*, 308 F.3d at 1254.

36. *Id*. at 1249. For a discussion of the default for termination aspects of the decision, see *infra* Section III.E. Terminations for Default.

37. *JMG*, 308 F.3d at 1249.

38. *Id*. (citing Johnson Mgmt. Group CFC Inc., HUD BCA Nos. 96-C-132-C15, 97-C-109-C2, 99-2 BCA ¶ 30520, at 150,713).

39. *Id*. at 1255 (citing Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998); Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1153 (Fed. Cir. 1983)).

40. *Id*. at 1256.

Judge Newman disagreed with the majority's analysis. Reasoning that reformation of the offending clause was the appropriate remedy, she argued it was "improper and unjust" to place on the contractor the full burden of the government's mistake.[41] To Judge Newman, "the laws of contract and the rules of fair dealing do not evaporate when the government is a party."[42] Rather, "when a contract provision becomes illegal, whether due to later-discovered error or statutory enactment, the party that produced the illegality is liable for the injury caused thereby."[43]

Institutional Ratification: A Blast from the Past?

The Court of Federal Claims (COFC) recently ruled the Air Force, through the acts of its employees, "institutionally ratified" a contract with the plaintiff, even though the individual making the initial commitment lacked actual authority to enter into the contract. In *Digicon Corp. v. United States*,[44] the COFC determined the Air Force, by issuing and accepting a task order, and benefiting from the products and services Digicon Corp. provided for sixteen months, confirmed its intent to treat the contract as a binding commitment.[45] Particularly important, the court noted the Air Force made over $16 million in payments under the contract, and attempted to terminate the agreement under the terms of the contract.[46]

The Air Force argued it was not bound to the commitment because the person who made it lacked actual authority. Further, the Air Force argued because an appropriate official with ratification authority never ratified the unauthorized contract, the terms of the agreement should not bind the Air Force.[47] Unpersuaded by the Air Force's arguments, the court concluded that even if actual authority did not exist, Air Force personnel ratified the contract through their actions and inactions.[48]

Can I Pay It Off a Little Bit at a Time?

In an amusing decision from the Armed Services Board of Contract Appeals (ASBCA), the board recently held a government-wide commercial purchase card (purchase card) holder lacked the authority to bind the government to a $225,000 procurement, even though the vender agreed to payments of $2500 per day until the purchase was paid off. In *Production Packing*,[49] Ms. Owens, the purchase cardholder, entered into a blanket purchase agreement (BPA) with appellant to provide various shipping containers to the Defense Distribution Depot at Hill Air Force Base in Utah. The total value of the order exceeded $225,000.[50] Per the terms of the order, Ms. Owen instructed the appellant to process purchase card payments up to her daily limit of $2500 every day of the week until the order was paid off.[51]

About a month after Ms. Owens made the procurement, she sought to speed-up the payment process by requesting authorization to make up to four $2500 purchase card transactions per day. This request alerted the contracting officer, who suspended the purchase card payments and subsequently initiated ratification procedures.[52] Approximately two months later, the Executive Director, Logistics Policy and Acquisition Management ratified the procurement, and thereafter, the government allowed the BPA to expire without making further purchases.[53] Dissatisfied with this arrangement, the appellant submitted a claim alleging, *inter alia*, the government unlawfully cancelled the BPA, and as a result appellant was due lost revenue as well as costs relating to "remaining inventory" and "lost opportu-

41. *Id*. at 1260.

42. *Id*. at 1261.

43. *Id*. In support of this proposition, Judge Newman cited *United States v. Winstar Corp*., 518 U.S. 839, 910 (1996). Given that the facts of *Winstar* differ considerably from the present case, one can argue Judge Newman's reliance on this precedent may be less than well placed.

44. 56 Fed. Cl. 425 (2003).

45. *Id*. at 426.

46. *Id*.

47. *Id*.

48. *Id*. The court's findings of fact were slim at best, however, it is apparent a contracting officer with unlimited contracting authority was directly involved in the implementation and oversight of the agreement. *Id*.

49. ASBCA No. 53662, 2003 ASBCA LEXIS 82 (July 23, 2003).

50. *Id*. at *2.

51. *Id*. at *2-3.

52. *Id*. at *3-4.

53. *Id*. at *4.

nity."[54] The contracting officer denied the claim, and on appeal to the ASBCA, the board held the BPA was not a contract, as Ms. Owens was without authority to enter into the $225,000 purchase.[55] The board further found that no contract existed until the agency ratified the improper commitment and the government was not in breach of the ratified contract.[56]

Major James Dorn.

Competition

The *2002 Year in Review* identified "consolidation of the purchasing function" as a trend to watch. Particularly, the article noted the Army's intention to consolidate purchases over $500,000 at the regional offices of the new Army Contracting Agency.[57] Consolidation, however, can conflict with the statutory mandate for competition. During the past FY, the Army's attempts to regionalize or consolidate met with mixed success before the General Accounting Office (GAO), as the Comptroller General sustained two of four protests stemming from Army plans to consolidate.[58]

These Army decisions, of course, are only a part of the competition section which includes discussions of unduly restrictive specifications, sole source decisions, publicizing in the FedBizOpps.com era, and a summary run down of decisions in which the GAO or COFC denied relief because the disappointed offerors failed to show "competitive prejudice."

Unduly Restrictive Specifications

During the past FY, the Comptroller General considered nine[59] protests alleging unduly restrictive specifications in violation of the Competition in Contracting Act of 1984 (CICA).[60] The GAO sustained the allegations in two of the nine protests.[61]

The "Other" Bundling:[62] *Combining Requirements and CICA*

One type of unduly restrictive specification is an improperly bundled specification. In FY 2002, protestors challenged three Army solicitations on the basis that in each case, the Army improperly bundled its requirements.[63] In response, the Army

54. *Id.* at *5. Appellant sought $100,000 in lost revenues, $50,000 for lost opportunity, $35,000 in remaining inventory, $2500 in interest due to late payment, $18,000 in attorney fees. *Id.* At the hearing, appellant also sought $300,000 in punitive damages. *Id.* at *11.

55. *Id.* at *7-8.

56. *Id.* at *8-10.

57. Major Thomas C. Modeszto et al., *Contract and Fiscal Law Developments of 2002 – The Year in Review,* ARMY LAW., Jan./Feb. 2003, at 1 [hereinafter *2002 Year in Review*].

58. The GAO sustained allegations in EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93 and Dep't of the Army Request for Modification of Recommendation, Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 and denied allegations in AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117 and USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224.

59. Am. Artisan Prods., Inc., Comp. Gen. B-292380, July 30, 2003, 2003 CPD ¶ 132; AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117; Prisoner Transp. Servs., LLC, Comp. Gen. B-292179, et al., June 27, 2003, 2003 CPD ¶ 121; EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93; Atl. Coast Contracting, Inc., Comp. Gen. B-291893, Apr. 24, 2003, 2003 CPD ¶ 87; MCI Worldcom Deutschland GmbH, Comp. Gen. B-291418, et. al., Jan. 2, 2003, 2003 CPD ¶ 1; USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224; ABF Freight Sys., Inc., Comp. Gen. B-291185, Nov. 8, 2002, 2002 CPD ¶ 201; Dynamic Instruments, Inc., Comp. Gen. B-291071, Oct. 10, 2002, 2002 CPD ¶ 183.

60. Specifications will "include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as authorized by law." 10 U.S.C.S. § 2305(a)(1)(B)(ii) (LEXIS 2003); 41 U.S.C.S. § 253a(a)(2)(B); *see also* FAR, *supra* note 30, at 11.002(a)(1) (providing, "agencies shall . . . [o]nly include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law").

61. Prisoner Transp. Servs., LLC, Comp. Gen. B-292179 et al., June 27, 2003, 2003 CPD ¶ 121; EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93.

62. *See* 15 U.S.C.S. § 631(j)(3). "Bundling" is a term that requires two related, but separate, analyses. First, the Small Business Act, requires federal agencies, "to the maximum extent practicable" to "avoid unnecessary and unjustified bundling of contract requirements." *Id.* For Small Business Act purposes, bundling "means consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern." *Id.* § 632(o)(2). The *Year in Review* discusses this type of bundling, *infra* Section II.K Socio-Economic Policies. A bundled procurement, even if it does not violate the Small Business Act, could violate the CICA:

> The reach of the restrictions against total package or bundled procurements in CICA is broader than the reach of restrictions against bundling under the Small Business Act . . . . Because procurements conducted on a bundled or total package basis can restrict competition, [the GAO] will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's needs.

USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224, at 4.

63. AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117; EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93; USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224.

asserted mission-related justifications for combining differing requirements. But the similarities end there. The GAO sustained one protest and denied the other two.

In *EDP Enterprises, Inc.*,[64] the Comptroller General sustained a protest alleging the Army improperly bundled food services with other logistic support functions, thereby unduly restricting competition.[65] The Army issued a Request for Proposals (RFP) under *Office of Management and Budget (OMB) Circular A-76*,[66] to determine the private sector competitor for "installation-level logistics support functions" at Fort Riley, Kansas.[67] The successful offeror under the solicitation would compete against the government's "most efficient organization" (MEO) for logistics services at Fort Riley.[68] The RFP bundled food services; "central issue facility operations; oil analysis laboratory operations; storage, warehouse, and distribution operations; hazardous material control center operations; transportation motor pool services; general and direct support maintenance services, including aviation maintenance services; ammunition supply point operations; bulk petroleum oil and lubricant operations."[69]

The Army issued the solicitation on 22 August 2001 as a total small business set-aside.[70] The solicitation required the contractor's employees to incur at least fifty percent of the contract's personnel costs.[71] EDP Enterprises argued, bundling food services,[72] with the "unrelated base, vehicle and aircraft maintenance services," violated the CICA.[73] In a decision very much reminiscent of last year's *Vantex Service Corporation*[74] protest, the GAO agreed with the protestor.

Bundling more than one requirement into a single solicitation has the potential to restrict competition by excluding contractors who cannot furnish all the government's needs. Because of this "restrictive impact," the GAO "will sustain a protest challenging a bundled solicitation, unless the agency has a reasonable basis for its contention that bundling is necessary."[75] According to the GAO, this is true even for A-76 competitions.[76]

Easily determining that the Army's bundled solicitation restricted competition,[77] the GAO focused on "whether the restriction reflect[ed] the agency's needs."[78] The Army asserted that food services, like the other services being sought,

---

64. Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93.

65. *Id*. at 1.

66. U.S. Office of Mgmt. & Budget, Circular No. A-76, Performance of Commercial Activities (1999) [hereinafter OMB Circular A-76]..

67. *EDP Enters., Inc.*, 2003 CPD ¶ 93, at 1.

68. *Id*. at 2-3.

69. *Id*. at 2.

70. *Id*. at 3. The Army initially issued the Fort Riley RFP on 1 December 1999. In March 2001, the agency conducted a cost comparison between the successful private-sector offeror and the government's MEO. The agency concluded that the MEO would perform more economically than the private offeror. The private sector offeror successfully appealed the agency's cost comparison, based on "ambiguities and deficiencies" in the RFP. *Id*. at 2. On 22 August 2001, the agency issued amendment 22 "to conduct a new competition." The GAO treated the amendment as a new competition. *Id*. at 3.

71. *Id*. at 2. The RFP incorporated FAR 52.219-14, Limitations on Subcontracting, which provides,

> (b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for -- (1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern.

FAR, *supra* note 30, at 52.219-14(b).

72. Food services comprised approximately fifteen percent of the total contract. *EDP Enterps., Inc*., 2003 CPD ¶ 93, at 4.

73. *Id*. at 4.

74. Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131 (ruling the bundling of portable latrine services with waste removal services unduly restricted competition and was not necessary to meet the government's needs); *see 2002 Year in Review, supra* note 57, at 6-7 (providing a discussion of *Vantex*).

75. *EDP Enters., Inc*., 2003 CPD ¶ 93, at 4.

76. *Id*. at 4-5. ("Thus, when an agency conducts an A-76 competition, that competition is subject to CICA's requirements that solicitations permit full and open competition and contain restrictions only to the extent necessary to satisfy the agency's needs.").

77. The bundled requirements, coupled with the mandate to provide fifty percent of the personnel costs, excluded EDP Enterprises and other food service providers from successfully competing for the contract. *Id*. at 5.

78. *Id*.

fall doctrinally under the Directorate of Logistics, and therefore the Deputy Chief of Staff, Logistics must administer them.[79] Without disputing the Army's classification of food services as a logistics function, the GAO rejected the Army's need to procure its varied logistics needs from one source. Parsing through the Army's argument, the Comptroller General found that the agency's justifications boiled down to administrative convenience, which "is not a legal basis to justify bundling requirements, if the bundling . . . restricts competition."[80] Further, the Army could not demonstrate a "reasonable basis for any efficiencies" stemming from bundling food services with the other services being procured.[81]

In *AirTrak Travel*,[82] the Army successfully justified a bundled small business set-aside for travel management services. As part of the DOD's "effort to reengineer the DOD travel process," the Army grouped eighty-nine travel locations into twenty-eight "travel areas."[83] Ultimately, the Army planned to integrate individual commercial travel offices into a DOD-wide automated travel support service system.[84] The protestors contended offering only a single multi-award procurement and grouping the travel locations for each award were unreasonable and were done "only for the purpose of administrative convenience."[85] Further, the protestors asserted, one large procurement "discourage[d] small business competition, even though this procurement was set-aside for small businesses."[86]

The Army offered cogent reasons rebutting the protestor's assertions. First, consolidating the procurement and regionalizing the offices supported the "legitimate requirement to reengineer the antiquated and costly DOD travel process."[87] Second, "this procurement approach allowed more choices by potential small business offerors to select the travel areas where they would be most competitive."[88] Finding these justifications reasonable, the GAO denied this protest allegation.[89]

In *USA Information Systems, Inc.*,[90] the Army successfully justified a "bundled"[91] procurement for a web-based information retrieval system as "critical to the agency's national defense mission."[92] The U.S. Army Aviation and Missile Command (AMCOM) issued a request for quotations for a web-based system to retrieve "an entire range of military and com-

---

79. Apparently seeking the deference that often accompanies a "mission need," the agency employed the following war fighting verbiage: "The Army is organized in the manner in which it goes to war. Feeding the troops, as well as clothing and equipping them, is a key war fighting competency." *Id.*

80. *Id*. at 6.

81. *Id*. Pointing to the results of the earlier A-76 cost comparison, the Army argued that "significant cost savings" would accrue from bundling the requirements. The GAO, however, firmly distinguished between savings resulting from the A-76 process and savings resulting from bundling. The GAO stated, "savings arising from the A-76 process are not relevant for purposes of reviewing the reasonableness of the agency's claim that bundling reflects its needs." *Id.* at 7.

82. Comp. Gen. B-292101, Dec. 30, 2002, 2002 CPD ¶ 224.

83. *Id*. at 5.

84. *Id*. at 5-6.

85. *Id*. at 17.

86. *Id*. at 16.

87. *Id*. at 17.

88. *Id*.

89. *Id*. at 1, 18. The Comptroller General sustained one of the many protestor allegations. After the Army received a first round of proposals, it issued an amendment to the solicitation. The amendment responded to small business concerns that the solicitation as initially structured placed undue risks on small businesses. *Id*. at 20. The amendment made two changes markedly reducing risk to the awardees. *Id*. The Army, however, did not reopen the competition to the field of offerors which had not submitted proposals. *Id*. at 9. The GAO held that failing to reopen the competition prejudiced the non-offeror protestors. Finding that "additional sources likely would have submitted offers had the substance of the amendment been known to them," the Army should have cancelled the solicitation and issued a new one. *Id*. at 19-21. According to the GAO,

> The purpose of this requirement is to ensure that all potential offerors are clearly aware of the changed agency requirements, so that they may have the opportunity to compete on the new basis and the government benefits from the competition from all offerors who decide to submit proposals based on the amended requirements.

Id. at 19-20.

90. Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224.

91. In *USA Info. Sys.*, the GAO found that the requested services were not bundled for purposes of the Small Business Act, but were bundled under the broader reach of the CICA. *Id*. at 4.

92. *Id*. at 1.

mercial documents, logistics/parts database services, and vendor catalogs" on-line.[93] In addition, AMCOM required the system to be "Haystack or equal."[94]

The protestor, USA Information Systems, Inc. (USAInfo), asserted that the requirement was improperly bundled to the disadvantage of small businesses. USAInfo asserted that the requirement should have been divided into four separate "lots."[95] The protestor argued that AMCOM could gather the multiple sources together on a single web page.[96] In response, the Army explained that having a "single, cohesively packaged" information retrieval system was "critical to AMCOM's mission."[97] Engineers, logisticians, and technicians, often in operational theaters, needed to access the entire spectrum of sources quickly to effectively accomplish their daily responsibilities for helicopter maintenance, safety investigations, and weapon system readiness. Thus, AMCOM needed a "one-stop shop" to "accomplish mission-critical needs."[98]

The GAO recognized that determining an agency's needs is primarily a matter of agency discretion. Further, an agency may seek to obtain not only reasonable results, but "the highest possible reliability and effectiveness" for requirements relating to national defense or human safety.[99] Therefore, the GAO concluded that AMCOM had a reasonable basis for purchasing its web-based information system retrieval system from a single source.[100]

The protestor also complained that the "Haystack or equal" purchase description, in effect, restricted award to the incumbent.[101] USAInfo did not argue that it was unable to meet any salient characteristic in the statement of work. Instead, it asserted that regulation required the agency to state its needs in a performance specification. Again, the GAO disagreed, finding no FAR requirement for performance specifications.[102]

Maybe the Third Time Will Be the Charm

The U.S. Marshals Service's (USMS) solicitation, in *Prisoner Transportation Services, LLC*,[103] to lease and maintain certain Boeing aircraft was unduly restrictive, when the agency conceded that both Boeing and certain McDonnell Douglas aircraft would meet its needs.

Between 2000 and 2002, the USMS conducted market research to determine the best aircraft to lease to transport prisoners and criminal aliens throughout the United States.[104] The market studies revealed that Boeing 737-300 and 737-400 aircraft, as well as McDonnell Douglas (MD) 83 through 90 series aircraft would meet the agency's needs. Each aircraft type had advantages and disadvantages.[105] Soon after conducting the studies, the USMS issued an RFP for the "long-term lease and maintenance of jet aircraft."[106] This solicitation did not specify a particular aircraft type.[107] After the receipt of proposals and selection of a contractor, the RFP was protested. The agency took corrective action and cancelled the solicitation.[108]

---

93. *Id*. at 2.

94. *Id*. at 3. The incumbent contractor, Information Handling Services, employed the "Haystack" system. *Id*. at 2.

95. *Id*. at 3. More specifically, the four separate lots include the following: "(1) military documents, (2) logistics parts database, (3) DOD-adopted and other adopted commercial standards, and (4) vendor catalogs on the World Wide Web." *Id*.

96. *Id*. at 5.

97. *Id*. at 4.

98. *Id*.

99. *Id*.

100. *Id*. at 5.

101. *Id*.

102. *Id*. at 5-6.

103. Comp. Gen. B-292179 et. al., June 27, 2003, 2003 CPD ¶ 121.

104. *Id*. at 2.

105. *Id*. For example, while the Boeing models were more cost-effective, the McDonnell-Douglas aircraft were more readily available, and therefore may cost less. *Id*.

106. *Id*.

107. *Id*.

108. *Id*. at 3.

In April 2003, the USMS again issued an aircraft lease and maintenance solicitation. This time, the solicitation required offerors to provide Boeing 737-300 or Boeing 737-400 model aircraft.[109] Prisoner Transportation Services, LLC, protested and asserted "limiting aircraft to only the Boeing . . . models unlawfully restricted competition, since both MD and Boeing aircraft" met the government's needs.[110]

The protestor argued the CICA requires full and open competition, rather than "adequate" competition as the USMS relied upon. Further, the protestor observed that the FAR views brand name specifications with particular skepticism. An agency may require a particular brand name or product only when the brand name or product is "essential to the Government's requirements."[111] The GAO found two reasons why obtaining a Boeing model was not essential. First, the agency conceded other models would meet its needs. Second, during the first competition the USMS found MD aircraft acceptable.[112] Therefore, finding that the agency had no reasonable basis to restrict competition, the GAO sustained the protest.[113]

Unduly Restrictive Specs, You Say – Denied, Denied, Denied

The GAO denied five additional protestor allegations that agencies unduly restricted competition. Two merit textual discussion.[114] In *MCI WorldCom Deutschland GmbH*,[115] the GAO determined legitimate agency needs supported the Defense Information Technology Contracting Organization—Europe's (DITCO-Europe) requirement that the appropriate National Long Lines Agency (NALLA) in North Atlantic Treaty Organization nations accredit telecommunications providers (TPs). Therefore, the limitation was not unduly restrictive of competition.[116]

The DITCO-Europe issued numerous solicitations for telecommunications circuits between various U.S. military installations in European NATO member nations.[117] Each NATO nation has a NALLA. The NALLAs are part of the ALLA system, and each NALLA maintains a list of accredited TPs.[118] Complying with the ALLA process yielded two major advantages. First, in the event of a disaster or war, ALLA-compliant circuits are accorded "preferential treatment" for purposes of restoring interrupted lines. Second, NALLA-accredited TPs employ only personnel with "the requisite security clearances."[119] The DITCO-Europe solicitations required contract-awardees and their subcontractors to be "accredited by NALLAs of [their] respective NATO countries."[120]

Despite apparently diligent efforts, MCI WorldCom Deutschland GmbH (WorldCom) could not become NALLA qualified in any nation besides the United Kingdom.[121] Thus, WorldCom protested the accreditation requirement as unduly restrictive of competition.[122]

The GAO found that the agency had the following two "legitimate needs:" (1) "preferential treatment" in an emergency; and (2) availability of TP personnel with appropriate clearances.[123] Further, WorldCom, a non-accredited TP could not meet these requirements.[124] Therefore, although the Comp-

109. *Id*.

110. *Id*.

111. *Id*. at 4 (citing FAR, *supra* note 30, at 11.105).

112. *Id*. at 4-5.

113. *Id*. at 5.

114. Other Comptroller General decisions in the past FY, concerning unduly restrictive specifications include the following: Am. Artisan Prods., Inc., Comp. Gen. B-292380, July 30, 2003, 2003 CPD ¶ 132 (requiring bid and performance bonds in an RFP for design, fabrication and installation of exhibits, did not unduly restrict competition when the agency, (1) imposed the requirements in good faith; (2) showed that the bonds were necessary to ensure timely completion and protect against default; and (3) reasonably demonstrated that the bonds were necessary to "keep the artists on the job"); ABF Freight Sys., Inc., Comp. Gen. B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 (holding, without explicitly mentioning, restrictive specifications in a multiple award contract for freight transportation services, shifting cost risk to the vendors for certain accessorial services was not unreasonable); Dynamic Instruments, Inc., Comp. Gen. B-291071, Oct. 10, 2002, 2002 CPD ¶ 183 (finding the agency's solicitation to upgrade or replace Helitune vibration analyzer system, did not give the original manufacturer an unfair advantage, nor unduly restrict competition, even though Helitune was the only contractor capable of upgrading the existing system).

115. Comp. Gen. B-291418 et al., Jan. 2, 2003, 2003 CPD ¶ 1.

116. *Id*.

117. *Id*. at 2.

118. Alliance Long Lines Activity (ALLA) is a NATO agency created to standardize the acquisition of telecommunications circuitry. The "ALLA" process requires NALLA-accredited TPs to install and maintain the circuits. *Id*.

119. *Id*. at 2-3.

120. *Id*. at 3-4.

troller General "appreciate[d] WorldCom's frustration regarding its inability to become accredited," such frustration provided "no basis on which to sustain the protest" when the agency established a reasonable basis for the restrictive provisions.[125]

The Comptroller General has had no qualms denying protests of apparently rigorous standards, so long as the agency properly justifies its requirements.[126] In *Atlantic Coast Contracting, Inc.*,[127] the GAO rejected the protestor's contention that a zero percent defect rate for the cleanliness of dinnerware and utensils unduly restricted competition for the Navy's food services contract at Guantanamo Bay, Cuba. The Comptroller General accepted the agency's contention that the cleanliness standard "directly related to the protection of the health of its personnel."[128] In addition, the fixed-price contract treated all offerors equally. Finally, at least five offerors had submitted proposals, demonstrating a willingness to accept the solicitation's quality assurance standards.[129] Denying the protest, the GAO concluded the performance specification did not exceed the agency's needs, nor unduly restrict competition.[130]

Competition Trumps Efficiency: Army's LOGJAMSS Faces Another Logjam

In *Department of the Army Request for Modification of Recommendation*,[131] the CICA's statutory mandate for competition set back the Army's attempt to "regionalize" base operations service contracting. This ruling was the second time the GAO rebuffed the Army's Logistical Joint Administrative Management Support Services (LOGJAMSS) contract.[132]

The LOGJAMSS are multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts "with a broad scope of work encompassing a wide range of logistical functions and supporting tasks."[133] The LOGJAMSS are the Army's attempt to "achieve savings" from "improved processes and economies of scale."[134] In 1998 and 1999, when the Army awarded nine umbrella contracts—"five to large businesses, two to small businesses, and two to small disadvantaged businesses"—the Army did not identify any particular projects or particular locations.[135]

At Fort Polk, small businesses had exclusively performed transportation motor pool services for the last ten years.[136] In May 2002, without coordinating with the Small Business

121. According to the GAO:

> protester asserts here, and the agency does not contend otherwise, that WorldCom has tried but been unable to become NALLA accredited in other NATO nations in Europe because the respective NALLAs lack "formal procedures, questionnaires, or forms . . . exhibit complete indifference and attach no importance to NALLA 'accreditation,' or are driven by a desire to preserve national carrier monopolies."

Id. at 4.

122. *Id*.

123. *Id*. at 5.

124. *Id*.

125. *Id*. at 7-8.

126. *See, e.g.*, Mark Dunning Indus., Inc., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46, at 3-4 (finding the agency's requirement for high technology garbage trucks was reasonably related to agency needs and therefore did not unduly restrict competition), discussed in *2002 Year in Review, supra* note 57, at 8-9.

127. Comp. Gen. B-291893, Apr. 24, 2003, 2003 CPD ¶ 87.

128. *Id*. at 3.

129. *Id*. at 3-4.

130. *Id*. at 4.

131. Comp. Gen. B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23.

132. *See* LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157 (sustaining a protest that the agency did not consider the application of FAR 19.502-2(b) when it transferred services previously provided by small businesses to a task order under an indefinite-delivery/indefinite quantity contract).

133. *Department of the Army Request for Modification of Recommendation*, 2003 CPD ¶ 23, at 2.

134. *Id*.

135. *Id*.

136. *Id*.

Administration, the Army solicited proposals from the LOGJAMSS' contractors for motor pool services at Fort Polk.[137] When LBM, Inc. learned that the Army intended to transfer the Fort Polk motor pool services from exclusive small business competition to the LOGJAMSS' contractors, it protested to the GAO. The Comptroller General sustained the protest, finding the Army's plan violated the small business set-aside requirement of FAR section 19.502-2(b), commonly known as the "rule of two."[138] The GAO recommended the Army consider whether "the transportation motor pool services at Fort Polk should be set-aside exclusively for small business participation."[139]

Upon receiving the GAO's recommendation, the Army asked the GAO to modify the recommendation to allow the Army to limit competition to "current small business LOGJAMSS contract holders."[140] The Army contended, first, while FAR section 19.502-2(b) requires exclusive small business participation, it does not specify "how" the agency should set-aside the requirement.[141] Further, according to the Army, the LOGJAMSS contracts ensure that small businesses receive a fair proportion of orders.[142]

The Army also advanced two policy arguments. First, the inability to limit the set-aside to LOGJAMSS contractors endangered the Army's contract regionalization approach.[143] Second, LOGJAMSS already provided a meaningful opportunity for small businesses to compete, and the LOGJAMSS program had a strong record of using small businesses to perform orders.[144]

The GAO disagreed with the Army's proposition that the law was silent regarding "how" to implement small business set-asides. While the CICA allows for the exclusion of non-small business concerns to further the Small Business Act, it still requires "competitive procedures" for small business set-asides. Such procedures must allow all responsible eligible business concerns (*e.g.*, small business concerns) to submit offers.[145] Accordingly, the GAO reasoned, the FAR treats a small business set-aside as a full and open competition after exclusion of sources.[146]

Nor was the GAO impressed with the agency's argument that the Army awarded the LOGJAMSS contracts using competitive procedures. Since the Fort Polk motor pool work was not evident from the LOGJAMSS solicitation, it was "irrelevant" to the small business "rule of two" that there was full and open competition for the LOGJAMSS contracts.[147]

The Army's policy arguments did not persuade the GAO. In short, the Army had no statutory or regulatory authority to limit competition to a designated group of small businesses.[148] The GAO denied the request for modification.[149]

Nothing Heroic About Lack of Advanced Planning: A Sad Sole Sourcing Saga

In *Heros, Inc.* (*Heros*),[150] the Army failed in its second attempt to procure engine overhaul services for T63-A-720 turbine engines used in the Army's OH-58A/C "Kiowa" helicopters. This saga began in January 2001 when the Army published a notice in the *Commerce Business Daily*[151] announcing its intent to award a sole-source contract to Rolls Royce Corporation (RRC) for the engineering overhaul services later at issue in *Heros*.[152] Sustaining a protest brought by Sabreliner

137. *Id*.

138. *Id*. at 3 (discussing FAR, *supra* note 30, at 19.505-2(b), which requires a contracting officer to set aside for small businesses acquisitions exceeding $100,000 if the contracting officer reasonably expects to receive at least two offers from responsible small businesses at a fair market price).

139. *Id*. at 4.

140. *Id*.

141. *Id*.

142. *Id*.

143. *Id*.

144. *Id*. at 5.

145. *Id*. (discussing 10 U.S.C. §§ 2302(2)(D), 2304(b)(2) (2000)).

146. *Id*. (referencing FAR, *supra* note 30, at 6.200, 6.203).

147. *Id*.

148. *Id*. at 6-7.

149. *Id*. at 7.

150. Comp. Gen. B-292043, June 9, 2003, 2003 CPD ¶ 111.

Corp., the Comptroller General found a litany of reasons negating the Army's justification for a sole-source contract. First, the Army's documents contained "so many inconsistencies and inaccuracies that they cannot reasonably justify the agency's intended sole-source contract."[153] Second, the agency's assertion that only RRC possessed the necessary information to perform the work was not reasonably supported.[154] Finally, because Army representatives testified that the Army could develop the data needed to compete the services within eight to ten months, the Comptroller General recommended that the Army develop the data and competitively acquire the overhaul services.[155]

In response to *Sabreliner*, the Army's new solicitation expanded the field of competition to RRC and to "RRC's authorized maintenance centers (AMCs)."[156] The Army asserted that RRC held certain, unknown, proprietary, secret information, necessary to accomplishing the overhaul services. According to the Army, RRC would provide that information only to an RRC AMC. The Army conceded that it did not know what proprietary data RRC would provide to a successful AMC.[157]

For many years, the Army retained an in-house ability to overhaul the T63-A-720 engines. Maintaining and updating a manual known as the Depot Maintenance Work Requirement (DMWR), supported the Army's capabilities and facilitated the "competitive procurements of engine overhauls from commercial vendors."[158] The Army last updated the DMWR in 1993.[159]

Underlying the Army's difficulties with properly procuring these overhaul services were inconsistency and confusion over the Kiowa helicopter's retirement date. The Army's projections "fluctuated radically" from as early as 2004 until as late as 2020.[160] A 2003 memorandum indicated that the OH-58 A/C fleet had been scheduled for retirement for fifteen years.[161]

Although the CICA normally requires full and open competition, an exception exists when only one responsible source can provide the agency's requirements.[162] Lack of advance planning cannot, however, justify noncompetitive procedures.[163] In *Heros*, the GAO recognized that contracting officers "must act affirmatively to obtain and safeguard competition; they cannot take a passive approach and remain in a sole source situation when they could reasonably take steps to enhance competition."[164]

The Comptroller General found that the Army failed to conduct reasonable advance planning. First, while the Kiowa aircraft were performing ongoing operational missions and there were plans to replace them, the Army acted as if retirement of the fleet was imminent. For instance, relying on the imminent retirement of the Kiowa helicopter, the Army failed to analyze the costs of obtaining competition compared to the savings that would result from competition.[165] Further, failing to update the DMWR, a document which could have served as the basis for competition, from at least ten years from the earliest retirement date, reflected a lack of advance planning.[166] Third, the Army could have conducted a full and open competition, without the

151. Ah, those were the good old days! For those brand new to government contracting, the *Commerce Business Daily* (CBD) was the hard-copy predecessor of FedBizOpps.gov.

152. *Heros*, 2003 CPD ¶ 111, at 2 (discussing Sabreliner Corp., B-288030, Sept. 13, 2001, 2001 CPD ¶ 170).

153. Further, agency procurement officials knew about the inaccuracies but made no effort to correct them. *Id.* (citing Sabreliner Corp., B-288030, Sept. 13, 2001, 2001 CPD ¶ 170, at 5).

154. *Id*.

155. *Id*.

156. *Id*.

157. *Id*. 2-3.

158. *Id*. at 4.

159. *Id*. at 4-5.

160. *Id*. at 5.

161. *Id*.

162. *Id*. at 6 (citing 10 U.S.C. § 2304(c)(1) (2000)).

163. *Id*. (citing 10 U.S.C. § 2304(f)(5)).

164. *Id*. at 7.

165. *Id*.

166. *Id*. at 8.

DMWR and without the RRC's "secret" information, "provided the Army performed qualification testing on the overhauled engines" produced pursuant to any new contract.[167]

Finally, the Army failed to consider alternative methods of acquiring the overhaul services. Specifically, since 1995, non-Army organizations have obtained OH-58A/C helicopters and have required overhaul of their T-63 engines. RRC has "expressly recommended" the engines "be overhauled using commercially available overhaul manuals" for a similar commercially available engine.[168] The Army never looked into this option.[169]

Sustaining the protest, the Comptroller General provided a recommendation akin to an acquisition plan. The GAO recommended the following to the Army: (1) determine the future of the OH-58A/C helicopter; (2) "conduct a documented cost/benefit analysis reflecting the costs" of a full and open competition; (3) obtain information from non-Army owners regarding their experiences overhauling the T63 engines or document how Army use differs from non-Army use.[170] At this rate, the Kiowa helicopters will be retired by the time the Army successfully awards the overhaul contract.

Sound Sole Sourcing X 2

In *Lyntronics Inc.*,[171] the Army's Communications-Electronics Command (CECOM) successfully justified increasing the ceiling quantity of a battery contract without further competition. The CECOM had an ID/IQ contract with Mathews Associates, Inc. (MAI) to supply BA-5347/U lithium manganese dioxide batteries. The government could order up to 75,000 batteries under the contract.[172] As a result of the Army's increased operational tempo, including Operation Enduring Freedom and Operation Iraqi Freedom, demand for the battery increased sharply. In March 2003, the Army executed a justification and approval (J&A) authorizing the purchase of up to 225,000 batteries from MAI under the contract.[173] Although CECOM had issued a "follow-on competitive acquisition to succeed MAI's contract," it was not expected to be awarded until September 2003, "with deliveries commencing in September 2004." The Army considered MAI the "only responsible source reasonably capable of meeting the immediate, interim requirements."[174]

According to the J&A, other manufacturers' batteries would be subject to First Article Testing (FAT) that would delay delivery for approximately one year from the award.[175] Challenging the sole source increase to the incumbent, Lyntronics asserted that it could provide the batteries for FAT in three to four weeks and begin delivering batteries one month after production approval.[176] Lyntronics did not provide any support for its assertions. The CECOM, on the other hand, had historical data illustrating that the lag time between ordering and delivery would be between ten and eighteen months.[177] The GAO found no reason to question the agency's determination that only the incumbent could provide the batteries when required.[178]

In *MFVega and Associates, LLC*,[179] (MFVega) the Army Corps of Engineers (COE) successfully explained that only one responsible source could fulfill its needs for support and consulting services for its program management information system, P2.[180] A multi-year effort, the P2 project was approximately sixty percent complete, and all the previous software licenses, software maintenance, and consultant services

167. *Id*. While qualification testing would add approximately a year to the acquisition process, the Army relied and would rely on RRC for longer than the one year required to institute testing. *Id*.

168. *Id*. at 8-9.

169. *Id*.

170. *Id*. at 10.

171. B-292204, 2003 U.S. Comp. Gen. LEXIS 106 (July 22, 2003).

172. *Id*. at *1-2.

173. *Id*. at *2-3.

174. *Id*. at *3.

175. *Id*.

176. *Id*. at *4.

177. *Id*. at *6-7.

178. *Id*. at *8-9.

179. Comp. Gen. B-291605.3, Mar. 25, 2003, 2003 CPD ¶ 65.

180. *Id*. at 1.

had been procured from Primavera.[181] MFVega, however, challenged the COE's intent to award Primavera a sole-source contract for various other support services in furtherance of the P2 system.[182]

MFVega first argued that the agency failed to provide a statement of work (SOW) in the pre-solicitation notice. The GAO recognized that "an agency must adequately apprise other prospective sources of its needs" so that those sources "have a meaningful opportunity to demonstrate their availability to provide what the agency" needs.[183] No particular format, however, is required to convey the agency's needs. Accordingly, the GAO reasoned the COE's pre-solicitation notice, that described the needed services, was adequate without a SOW.[184]

The protestor also contended that the agency unreasonably determined it was not an acceptable source.[185] The MFVega, however, did not have access to Primavera's software codes, which were necessary to perform the contract.[186] Thus, the GAO determined the agency acted reasonably in deciding that MFVega was not an acceptable source.[187]

DSCP Properly Sole Sources Automated Pharmacy Refill System

Extensive market research and a thorough J&A document, supported the decision of the Defense Logistics Agency, Defense Supply Center Philadelphia (DSCP) to sole source the procurement and installation of Innovation Associates, Inc.'s (IA) PharmASSIST robotic refill system at the U.S. Air Force Academy, Colorado Springs, Colorado.[188] To improve patient safety, the Air Force conducted market research into procuring an "automated medication dispensing system."[189] Ultimately, a "detailed independent report," confirmed the Air Force's own research that IA's system was the only system available that met the Air Force's minimum needs.[190] The protestor, McKesson, Inc. (McKesson), challenged DSCP's intent to award the contract to IA on a sole-source basis.[191]

The J&A listed four factors supporting the agency's determination that only IA's system would satisfy the Air Force's needs.[192] The GAO relied on two of those reasons to deny the protest. First, IA's PharmASSIST system was the only product that was expected to comply with the Air Force's communications security requirements at the time of system fielding.[193] To help ensure that the Air Force information technology systems were "secure, supportable, sustainable and compatible with the Air Force enterprise network," the agency required the automated pharmacy system to obtain an "Air Force Communications Agency Certificate of Networthiness (AFA CON)."[194] The process of obtaining an AFA CON takes twelve to eighteen months. IA began the process in November 2001 and obtained a signed final AFA CON on 24 December 2002.[195]

McKesson argued that the agency was using the communications security requirement as a "competitive barrier against the firm" and that McKesson had "only very recently been

181. *Id*. at 2.

182. *Id*. at 3.

183. *Id*. at 4.

184. *Id*.

185. *Id*.

186. *Id*. "An agency may properly take into account the existence of software data rights and licenses when determining whether only one responsible source exists." *Id*. (citing FAR, *supra* note 30, at 6.302-1(b)(2)).

187. *Id*.

188. McKesson Automation Sys., Inc., Comp. Gen. B-290969.2, Jan. 14, 2003, 2003 CPD ¶ 24.

189. *Id*. at 1-2.

190. *Id*.

191. *Id*. at 3.

192. The factors included the following: "(1) compliance with Air Force communications security requirements; (2) programmable dispensing units that eliminate the need to exchange/ship counting unit component(s); (3) availability of the optical original prescription image when checking the refilled prescription; and (4) no cross contamination between medications." *Id*. at 4.

193. *Id*. at 4-5.

194. *Id*.

195. *Id*.

pointed in the right direction" about this process.[196] The GAO found this latter assertion, "disingenuous" and noted that as early as October 2001, agency representatives recommended that McKesson start the AFA CON process. McKesson chose not to invest the time or resources to obtain the AFA CON.[197] The following Comptroller General opinion seemed to reflect some annoyance with McKesson's attitude towards the security requirements:

> To the extent that it creates a "competitive barrier" to McKesson's participation in this procurement, the record also shows that McKesson resisted the agency's early attempts to assist the firm in overcoming this barrier. By failing to begin the AFCA CON process when it was advised to do so, McKesson accepted the risk that the Air Force would release a solicitation containing a requirement it would not be able to meet . . . . McKesson has given us no basis to disagree with the agency's assertion that it cannot delay the project an additional 12-18 months simply because McKesson failed to initiate the AFCA CON process when it was advised to do so.[198]

Secondly, IA could provide "programmable dispensing units that eliminate[d] the need to exchange/ship counting unit components," but McKesson could not.[199] That is, when the pharmacy needs to dispense a new-sized pill, an agency representative can reprogram IA's system locally, while the agency needs to ship McKesson's components to the manufacturer for manual calibration. The latter process requires pharmacy personnel to manually count medications while awaiting return of the components. Manual counting has a "potential adverse impact on patient safety and efficiency."[200]

In the area of safety requirements, the Comptroller General allows an agency to set its minimum needs to achieve not only reasonable results, but to achieve the "highest possible reliability and effectiveness."[201] McKesson could not rebut the agency's explanation that programmable dispensing units were a minimum requirement for patient safety.[202] Therefore, finding that at least two justifications set forth in the agency's J&A reasonably supported the "agency's conclusion that only IA could meet its minimum needs,"[203] the GAO denied the protest.[204]

"Pursuant to CICA" Does Not Equal "Full and Open Competition"

Under authority in the FY 2002 DOD Appropriations Act, the Air Force synopsized its intent to award a sole-source contract to the Boeing Company for the lease and maintenance of four commercial Boeing 737 special mission aircraft (C-40B/C).[205] The Air Force's J&A "justified use of noncompetitive procedures on the basis that Boeing was the only source capable of furnishing" Boeing aircraft and the related services.[206]

The following FY's DOD Appropriations Act provided, "None of the funds appropriated by this Act may be used for leasing of transport/VIP aircraft under any contract entered into under any procurement procedures other than pursuant to the Competition [in] Contracting Act."[207] EADS North American, Inc., a supplier of Airbus aircraft, protested, asserting the Air Force's sole-source contract with Boeing violated the FY 2003 provision mandating CICA procedures.

196. *Id*. at 5.

197. *Id*. McKesson first told agency representatives that it would be "grandfathered in." After an agency consultant explained that the firm would not be "grandfathered in" for new purchases or upgrades, she was told that McKesson "would not invest the time—they could get local approval if they needed it." *Id*. at 5-6.

198. *Id*. at 6 (citations omitted).

199. *Id*. at 7.

200. *Id*.

201. *Id*. at 8.

202. *Id*.

203. *Id*.

204. *Id*. at 10.

205. EADS N. Am., Inc., Comp. Gen. B-291805, Mar. 26, 2003, 2003 CPD ¶ 51. Section 8159 of the FY 2002 DOD Appropriations Act provided as follows: "The Secretary of the Air Force may, from funds provided in this Act or any future appropriations Act, establish and make payments on a multi-year pilot program for leasing general purpose Boeing 767 aircraft and Boeing 737 aircraft in commercial configuration." *Id*. (citing DOD Appropriations Act for FY 2002, Pub. L. No. 107-117, § 8159(a), 115 Stat. 2230, 2284 (2002)).

206. *Id*. at 2.

207. *Id*. (citing Pub. L. No. 107-248, § 8147, 116 Stat. 1519, 1572 (2002)).

The GAO disagreed. The GAO reasoned, while the CICA generally requires an agency to obtain full and open competition, the statute explicitly provides exceptions to the competition requirement. One such circumstance is when only one responsible source can meet the agency's requirements.[208] The 2003 legislative language required the leasing process to comply with the CICA, but did not mandate "competitive procedures." Therefore, the 2003 statute did not prevent the Air Force from exercising one of CICA's statutory exceptions to full and open competition.[209]

Publicizing in the FedBizOpps.gov Era: Contractors Must Be Electronically Vigilant

Publicizing contract actions is designed to increase competition, broaden industry participation, and assist small business concerns.[210] Electronic commerce is causing the procurement world to apply traditional concepts to new media.

In *USA Information Systems, Inc.*,[211] the Comptroller General found that the protestor "failed to avail itself of every reasonable opportunity" to obtain a solicitation amendment announcing a short response time and thus denied its protest complaining about the agency's response period.[212] In mid-September 2002, the Air Force issued a presolicitation notice announcing its intent to award a sole source contract to Information Handling Services, Inc. (IHS), for a web-based information retrieval system.[213] Further, the agency announced that the acquisition was an electronic procurement pursuant to FAR subpart 4.5.[214]

As a result of concerns voiced by the protestor, USA Information Systems. Inc. (USAInfo), the Air Force twice amended the presolicitation notice, on 24 and 27 September, respectively, opening the solicitation to full and open competition. On 26 September, an Air Force representative informed USAInfo counsel that the agency needed to award the contract during the FY that ended on 30 September.[215] The 27 September amendment provided for a deadline of noon on 30 September.[216]

The Air Force did not specifically notify USAInfo that it had posted the 27 September amendment or that it had extended the deadline for proposals to 30 September.[217] USAInfo complained that it did not learn of the amendment until after the deadline, and that the agency's posting the amendment online with a three-day deadline without notifying the protestor was unreasonable.[218] The Air Force pointed out that USAInfo would have known this information had it either checked the FedBizOpps.gov website or registered for the FedBizOpps e-mail notification service.[219]

Relying on standards pre-dating the electronic era, the GAO stated, "prospective offerors have an affirmative duty to make every reasonable effort to obtain solicitation materials."[220] Because USAInfo failed to take reasonable efforts, it bore the risk of not receiving the amendment.[221]

---

208. *Id*. at 3 (citing 10 U.S.C. § 2304(a), (c) (2000)).

209. *Id*. at 4. The GAO dismissed the protest. Because EADS could not provide Boeing aircraft, EADS could not have been awarded the contract and hence EADS was not an interested party. *Id*. at 3.

210. FAR, *supra* note 30, at 5.002.

211. Comp. Gen. B-291488, Dec. 2, 2002, 2002 CPD ¶ 205.

212. *Id*. at 1.

213. *Id*. at 1-2.

214. *Id*. at 3 (referencing FAR, *supra* note 30, subpt. 4.5).

215. *Id*. at 2.

216. *Id*.

217. *Id*.

218. *Id*.

219. *Id*. at 3.

> The FedBizOpps site includes an e-mail notification service that allows vendors to fill out a subscription form in order to receive notices associated with particular procurements. When amendments are issued to posted solicitations, the websites automatically notify registered users of the change by e-mail. The e-mail also contains a link to the location that the user can access to locate and download the amendment.

Id.

220. *Id*. (citing Performance Constr., Inc., B-286192, Oct. 30, 2000, 2000 CPD ¶ 180, at 2; Am. Handling, Inc., B-281261, Jan. 19, 1999, 99-1 CPD ¶ 13, at 2).

Publicizing in the FedBizOpps.gov Era: Bye, Bye SF 129

The Civilian Agency Acquisition Council and Defense Acquisition Regulations Council (FAR Councils) have agreed to eliminate the Standard Form 129 (SF 129), Solicitation Mailing List.[222] In the paper-era, contracting offices used the SF 129 to gain information from potential offerors to develop solicitation mailing lists. Today, the Central Contract Registry,[223] "a centrally located, searchable database, accessible via the Internet," is a contracting officer's "tool of choice for developing, maintaining, and providing sources for future procurements."[224] FedBizOpps.gov[225] "through its interested vendors list, has the capability to generate a list of vendors who are interested in a specific solicitation."[226] Although the change amended a variety of FAR sections, it impacted part 14, Sealed Bidding, most directly.[227]

No Harm, No Foul?: Competitive Prejudice Quick Bits

Absent "competitive prejudice," the GAO will not sustain a protest. That is, even if the protestor is "right" regarding the substantive law, unless the protestor demonstrates that, "but for the agency's actions, the protestor would have had a reasonable chance of receiving the award," the Comptroller General will not recommend any action favoring the protestor.[228] The CAFC also takes this approach.[229]

A LEXIS search revealed seventeen Comptroller General decisions and nine COFC opinions in FY 2003 in which the lack of competitive prejudice (though not necessarily using that nomenclature) served, at least in part, as a basis to deny relief to a protestor.[230] The doctrine has differing impacts in various contexts. In certain decisions, the protestor did not show how its offer would have been different or improved had the alleged error not existed or had the error been fixed.[231] In other decisions, had the alleged error not existed or had it been fixed, the disappointed offeror still would not have had a substantial chance of receiving the award because its bid price would have been too high or its technical scores too low.[232] A third variant includes cases in which the error, if any, simply did not harm the protestor.[233] Further, if the protestor would otherwise have been ineligible for award, the GAO will not look at what impact the error would have had on the competition.[234] Finally, the doctrine has also allowed the GAO and the COFC to avoid reaching substantive issues[235] or to provide an alternative rationale for its decision.[236] Recent federal court cases treat competitive prejudice as a requirement for standing.[237]

---

221. *Id.*

222. Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application, 68 Fed. Reg. 43,855 (July 24, 2003).

223. *See Central Contractor Registration*, *available at* http://www.ccr.gov/ (last visited Jan. 15, 2004).

224. 68 Fed. Reg. at 43,855.

225. *See Federal Business Opportunities*, *available at* http://fedbizopps.gov/ (last visited Jan. 15, 2004) ("FedBizOpps.gov is the single government point-of-entry (GPE) for Federal government procurement opportunities over $25,000. Government buyers are able to publicize their business opportunities by posting information directly to FedBizOpps via the Internet.").

226. 68 Fed. Reg. at 43,855.

227. *Id.* The following FAR sections were amended or deleted: 1.106, 5.205, 5.403, 14.103-1, 14.201-6, 14.203-1, 14.205, 14.205-1 through 14.205-5, 14.211, 14.503-1, 19.202-2, 19.202-4, 19.402, 22.1009-2, 36.213-3, 52.214-9, 52.214-10, 53.214, 53.301-129. Fed. Reg. at 43,856.

228. *See, e.g.*, Datastream Sys., Inc., Comp. Gen. B-291653, Jan. 24, 2003, 2003 CPD ¶ 30, at 7; Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996) (serving as the seminal case that the GAO often cites in this area).

229. Statistica, Inc. v. Christopher, 102 F.3d at 1581.

> A protester must show not simply a significant error in the procurement process, but also that the error was prejudicial, if it is to prevail in a bid protest . . . . To establish competitive prejudice, a protester must demonstrate that but for the alleged error, there was a "substantial chance that [it] would receive an award--that it was within the zone of active consideration."

Id.

230. On 21 September 2003, the author ran a search in the LEXIS "Public Contracts Decs From Comptroller General, BCAs, All Federal Courts" database for the search term, ("Statistica" or (compet! w/5 prejudic!)) then reviewed the decisions from the past FY. In this discussion, the author did not include cases finding competitive prejudice.

231. *See, e.g.*, Computer Assoc. Int'l, Comp. Gen. B-292077.2, 2003 U.S. Comp. Gen. LEXIS 141, at *15 (Sept. 4, 2003) (stating that an allegedly improper change in the evaluation scheme, "might lead offerors to consider a change" was "insufficient to show any prejudice from the agency's allegedly improper decision not to allow revisions to the technical quotes."); Gamut Electronics, LLC, Comp. Gen. B-292347, 2003 U.S. Comp. Gen. LEXIS 115 (Aug. 7, 2003) (finding protestor did not show that it would have prepared its proposal differently had it known that agency considered the action a Broad Agency Announcement); Knightsbridge Constr. Co., Comp. Gen. B-29475.2, Jan. 10, 2003, 2003 CPD ¶ 5 (holding that even though agency improperly failed to conduct exchanges with protestor to learn the size and scope of prior projects, protestor's prior projects were inadequate).

It's Good to Be the Incumbent

When all else fails, a protestor often asserts that its nemesis, often the apparent awardee, has received an unfair competitive advantage. The most common form of this allegation is that the incumbent has an unfair advantage.

In cases involving incumbency, the Comptroller General looks to see if the incumbent has received an *unfair* advantage or preferential treatment; the inherent advantages of incumbency are not grounds for sustaining a protest, nor must an agency "equalize" an incumbent's advantages.[238] In *SeaArk Marine, Inc.*,[239] the apparent awardee of a contract for small commercial boats, SAFE Boats International, LLC (SAFE), had some of the advantages of an incumbent. SAFE held a separate contract for the same agency, the Department of Homeland Security (DHS), for "almost identical" boats.[240] The GAO observed, the DHS "did not tailor the specifications to accommodate" SAFE, SAFE did not assist the DHS with drafting the solicitation, and the agency did not have any improper communications with SAFE.[241] Finding no preferential treatment or improper conduct, the GAO denied the protest.[242]

---

232. *See, e.g.*, United Coatings, Comp. Gen. B-291978.2, 2003 U.S. Comp. Gen. LEXIS 136, at *24 (July 7, 2003) ("by protestor's own calculations" fixing the agency's errors would still have left the protestor's lower technically rated offer, priced higher than the awardee's offer); M.K. Taylor, Jr. Contractors, Inc., Comp. Gen. B-291730.2, Apr. 23, 2003, 2003 CPD ¶ 97, at 4 (fixing the agency's error would have reduced protestor's evaluated price by $100,270, "far less than" awardee's "$1.3 million price advantage"); Kolaka Noeau, Inc., Comp. Gen. B-291818, Apr. 2, 2003, 2003 CPD ¶ 67, at 8 (ranking methodology did not prejudice protestor "as the top-rated proposals in the five subtopics each received significantly higher technical merit scores than Kolaka's proposal, and none received lower commercial merit ratings"); Alpha Marine Serv., LLC, Comp. Gen. B-291721, Mar. 5, 2003, 2003 CPD ¶ 71; Datastream Sys., Comp. Gen. B-291653, Jan. 24, 2003, 2003 CPD ¶ 30; J.W. Holding Group & Assoc., Comp. Gen. B-285882.11, 2002 U.S. Comp. Gen. LEXIS 252 (Oct. 23, 2002).

233. *See, e.g.*, Innovative Mgmt., Inc., Comp. Gen. B-291375, Nov. 20, 2003, 2003 CPD ¶ 11 (ruling use of copies of transparencies, rather than originals, during oral presentation, did not prejudice protestor); Sabreliner Corp., Comp. Gen. B-290515.4, Nov. 20, 2003, 2003 CPD ¶ 10 (determining that where protestor's and awardee's proposals are flawed in the same manner, protestor was not prejudiced); Atl. Coast Contracting, Inc., Comp. Gen. B-291893, Apr. 24, 2003, 2003 CPD ¶ 87, at 2-3 (holding incumbent contractor, with "highly relevant experience," was not prejudiced by solicitation's past performance requirements); Gentex Corp.--West. Oper., Comp. Gen. B-291793, Mar. 25, 2003, 2003 CPD ¶ 66 (finding that improper release of evaluation slides had "no affect on the outcome of the source selection"); Jacobs Cogema, LLC, Comp. Gen. B-29125.2, Dec. 18, 2002, 2003 CPD ¶ 16.

234. *See, e.g.*, Main Bldg. Maint., Comp. Gen. B-291950, May 15, 2003, 2003 CPD ¶ 103 (ruling that in a two-step evaluation process, when the protestor was eliminated during step one, based on its technically unacceptable proposal, whether the agency properly evaluated the awardee's past performance (during step two) "could not have competitively prejudiced the protestor"); McKesson Automation Sys., Inc., Comp. Gen. B-290969.2, Jan. 14 2003, 2003 CPD ¶ 24; E.L. Hamm & Assoc., Comp. Gen. B-290783, Sep. 30, 2002, 2002 CPD ¶ 177.

235. *See, e.g.*, Sam Facility Mgmt., Inc., Comp. Gen. B-292237, 2003 U.S. Comp. Gen. LEXIS 120, at *19-20 (July 22, 2003) ("Our review of the record leads us to conclude that we need not resolve this dispute because, even if the protester is correct, we do not find any possible prejudice to the protester."); C Constr. Co., Inc., Comp. Gen. B-291792, Mar. 17, 2003, 2003 CPD ¶ 73, at 7-8 ("We need not determine whether the discrepancies would have resulted in the downgrading or elimination of the challenged proposals because, even if we agreed with CCI, it was not prejudiced by the agency's evaluation of the bonding capability of either of the challenged firms.").

236. *See, e.g.*, Gulf Group, Inc. v. United States, 56 Fed. Cl. 391, 398 (2003) ("[T]o cinch matters, protestor has failed to show that any prejudice resulted from the alleged error."); AllWorld Language Consults. Inc., Comp. Gen. B-291409.3, Jan. 28, 2003, 2003 CPD ¶ 31 at 3 ("Even if we . . ." agreed with the protestor, "to succeed in a claim of agency bias, the protestor must show that any agency bias translated into action that that unfairly affected the protestor's competitive position.").

237. *See, e.g.*, ABF Freight Sys. v. United States, 55 Fed. Cl. 392, 396 (2003) providing:

> The Federal Circuit has held that, in bid protests under the Tucker Act, the term "interested party" in § 1491(b) is to be construed in accordance with the standing requirements of the Competition in Contracting Act (CICA) . . . . Consistent with the standing requirements of CICA, the Federal Circuit has interpreted the term "interested party" under § 1491(b)(1) to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." To establish standing, "a potential bidder must establish that it had a substantial chance of securing the award."

Id. *See also* H.G. Prop. v. United States, 68 Fed. Appx. 192 (Fed. Cir. 2003) (unpublished) (No. 02-5029).

238. SeaArk Marine, Inc., Comp. Gen. B-292195, May 28, 2003, 2003 CPD ¶ 108, at 3-4 (referencing Crofton Driving Corp., Comp. Gen. B-289271, Jan. 30, 2002, 2002 CPD ¶ 32, at 6; Pacific Consol. Indus., Comp. Gen. B-250136.5, Mar. 22, 1994, 94-1 CPD ¶ 206, at 4). In *Gulf Group, Inc. v. United States*, 56 Fed. Cl. 391 (2003), the incumbent dredging company's experience caused the agency to rate its proposal highly. According to the COFC,

> That fact assuredly did not render the procurement improper -- while an agency may not unduly tip the scales in favor of an incumbent, it certainly may weigh the competitive advantages offered by that incumbent via its relevant experience and performance with the contract subject matter . . . . The short of it is that in government contracts, even as in politics, there are often some earned benefits of incumbency -- ones to which an agency need not turn a blind eye in the award calculus. Plaintiff should not be heard to complain otherwise.

Id. at 398 (citations omitted).

239. Comp. Gen. B-292195, May 28, 2003, 2003 CPD ¶ 108.

240. *Id*. at 3.

In *Main Building Maintenance, Inc.*,[243] the protestor alleged that the awardee had an unfair competitive advantage because it had "made a contingent offer of employment to a government employee performing some of the services being solicited."[244] In a solicitation for animal caretaker and kennel management services, the awardee, American K-9 Interdiction, LLC (AK-9), had previously "made a contingent offer of employment to an individual who, at the time proposals were submitted, was the agency's site manager for the kennel."[245] The agency asserted, and the protestor could not rebut, that the employee did not participate in drafting the SOW, nor was the employee privy to competitively sensitive information or any other information that could have provided an improper advantage to AK-9.[246] Denying the protest, the GAO concluded, "the mere employment of a current or former government employee familiar with the type of work required--but not privy to the contents of proposals or other inside agency information--does not confer an unfair competitive advantage."[247]

Two Helpful J&A Guides

In 2002, the Air Force dramatically reduced the size of its FAR Supplement. Much of the procedural guidance regarding J&As was deleted. It appears that a great deal of that information was moved to the *Air Force Guide to Developing and Processing Justification and Approval (J&A) Documents* (*AF Guide to J&As*),[248] which can be found at the Air Force's Contracting Toolkit website.[249] First published in June 2002 and revised in October 2002, the Air Force made the *AF Guide to J&As* mandatory in April 2003.[250] Another excellent source of guidance on preparing J&A's is the *Air Force Materiel Command Justification and Approval Preparation Guide and Template*.[251] It contains both substantive and format guidance on preparing J&As.

Lieutenant Colonel Michael Benjamin.

Contract Types

CACI Strikes Out But Is Still Entitled to Its Money

As one commentator has already pointed out,[252] *CACI, Inc. v. General Services Administration*[253] exemplifies a lack of understanding regarding time-and-materials contracts. In this case, the Government of the Virgin Islands (GVI) issued a purchase order to *CACI, Inc.* under a federal supply schedule (FSS) contract. The order was a replacement of GVI's computerized system that tracked and maintained specific data associated with GVI's implementation of the Women, Infant, and Children (WIC) Program.[254] Under the contract, which was set up on a time-and-materials basis, the government tasked CACI to mod-

241. *Id*. at 3-4.

242. *Id*. at 4. An incumbent's advantage was also an issue in the following protests: Omega World Travel v. United States, 54 Fed. Cl. 570, 575 (2003) ("An agency . . . is not obligated to equalize all other offerors with an incumbent . . . . Instead, the natural advantage that an incumbent may have is permissible." (citation omitted)); Galen Med. Assocs. v. United States, 56 Fed. Cl. 104 (2003) (holding that the fact that some of the incumbent-doctor's references sat on the evaluation panel was not improper bias or an unfair competitive advantage, but part of the natural advantages of incumbency); Gulf Group, Inc. v. United States, 56 Fed. Cl. 391 (2003) (finding incumbent dredging company's experience caused the agency to rate its proposal highly); MarLaw-Arco MFPD Mgmt., Comp. Gen. B-291875, April 23, 2003, 2003 CPD ¶ 85 (finding incumbent's "experience" advantages were outweighed by other aspects of its proposal); Dynamic Instruments, Inc., Comp. Gen. B-291071, Oct. 10, 2002, 2002 CPD ¶ 183 at 3 (determining that although the current equipment manufacturer "may have a competitive advantage over other offerors" in a solicitation to upgrade the equipment, "it is not the result of any unfairness on the part of the agency; accordingly, the protester's argument that the agency has failed to negate any unfair advantage accruing to the incumbent contractor is without basis.").

243. Comp. Gen. B-291950, May 15, 2003, 2003 CPD ¶ 103.

244. *Id*. at 1.

245. *Id*. at 8.

246. *Id*. at 9-10.

247. *Id*. at 10; *see* Tishman Constr. Corp., Comp. Gen. B-292097, May 29, 2003, 2003 CPD ¶ 94 (discussing "unfair competitive advantage" in the late bid arena, and discussed at Section II.J Electronic Commerce).

248. U.S. Dep't of Air Force, *Air Force Guide, Developing and Processing Justification and Approval (J&A) Documents*, Version 1.2 (Apr. 2003), *available at* http://www.safaq.hq.af.mil/contracting/toolkit/part06/word/5306-j-and-a.doc.

249. *See id*. The Air Force's contracting toolkit is an excellent resource, organized according to the FAR.

250. *Id.* at iii, summary of changes.

251. U.S. Dep't of Air Force, Headquarters, Air Force Materiel Command, *Justification and Approval Preparation Guide and Template* (Nov. 2002), *available at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/guides/jaguide.doc.

252. *See* Ralph C. Nash & John Cibinic, *Procurement Management: Time-And-Materials And Labor-Hour Contracts*, 17 NASH & CIBINIC REP. 2 ¶ 9 (2003).

253. GSBCA No. 15588, 03-1 BCA ¶ 32,106.

ify software, that had been developed to track identical data for New Mexico, to fit GVI's needs.[255]

For several months, CACI unsuccessfully attempted to perform these modifications. Since the GVI never received delivery of software that met its needs, the GVI refused to pay CACI's invoices totaling $141,589.50.[256] As a result, CACI filed a claim with the GVI, with a copy of the claim furnished to the General Services Administration (GSA). Eventually, CACI filed an appeal of the deemed denial of its claim with the GSA Board of Contract Appeals (GSBCA).[257] Before the GSBCA, the government argued that "it should not have to pay the invoices because [CACI] did not perform properly under the order."[258] The GSBCA quickly dispensed with this argument, noting that it was well-settled that a time-and-materials contract "requires only that the contractor use its best efforts to provide the goods or services at the stated price. The contractor is entitled to be paid its cost of performance, up to the contract ceiling, whether it succeeds in fully performing the contract requirements or not."[259]

Although the board ruled that CACI was entitled to compensation for services rendered, it did not rule on the entitlement since there was not enough evidence on record to determine how much of the services had actually been rendered.[260] The government subsequently conceded this latter issue.[261] It is critical for contracting officers—and those who advise contracting officers—to realize that time-and-materials and labor-hour contracts only require contractors to try their best to accomplish whatever is specified in the SOW. If they try their best and are unsuccessful, the government is still obligated to make the contractually specified payment. That is the risk involved in entering into such a contract and the reason why the FAR states that these types of contracts should only be entered into as a matter of last resort.[262]

Final Rule on Prompt Payment on Cost-Reimbursement Contracts

Section 1010 of the Floyd D. Spence National Defense Authorization Act for FY 2001 required agencies to pay an interest penalty if they made an interim payment under a cost-reimbursement contract for services more than thirty days after receipt of a proper invoice from the contractor.[263] The legislation also required the OMB to amend its Prompt Payment Act regulations to implement this mandate.[264] On 15 December 2000, the OMB published a proposed rule to accommodate this implementation.[265] The proposed rule mandated the payment of an interest penalty for invoices received on contracts awarded after 15 December 2000. It also permitted agencies, at their discretion, to pay the penalty for invoices received on contracts awarded before that date.[266]

Congress enacted section 1007 of the National Defense Authorization Act for FY 2002 to clarify that it intended for the penalty to apply to payments made on contracts awarded prior to the revisions to OMB's regulation.[267] Congress specifically

254. *Id*. at 158,751-52.

255. *Id*.

256. *Id*. at 158,752-53. This case noted the following:

> Correspondence authored by the Director of the VI WIC Program, in reply to CACI's inquiries concerning when payment would be forthcoming, essentially stated the position of the VI Government to be that CACI did not deliver the required services in accordance with mandatory deadlines and that no payment on those invoices would be made.

Id.

257. *Id*. at 158,753.

258. *Id*.

259. *Id*. at 158,754 (citing Gen. Dynamics Corp. v. United States, 671 F.2d 474, 480-81 (Ct. Cl. 1982); McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 295, 299 (1997)).

260. *Id*. at 158,755-56. The government argued that the contractor could not have performed at least a portion of the services listed on the reports accompanying the invoices. *Id*. at 158,755.

261. *Id*.

262. FAR, *supra* note 30, at 16.603-3.

263. Pub. L. No. 106–398, 114 Stat. 1654, 1654A-251 (2000).

264. *Id*.

265. Prompt Payment, 65 Fed. Reg. 78,403 (Dec. 15, 2000) (proposing to amend 5 C.F.R. pt. 1315).

266. *Id*.

stated the penalty should apply to "interim payments that are due on or after [December 15, 2000] under contracts entered into before, on, or after that date."[268] This past year, the OMB published a final rule that incorporated the clarifications made by section 1007 into the proposed rule.[269] The FAR Councils also published a final rule that implemented the OMB regulations within the FAR.[270]

Rule on Provisional Award Fee Payments

The DOD issued a proposed[271] and final rule[272] this past year amending the Defense Federal Acquisition Regulation Supplement (DFARS)[273] to sanction provisional award fee payments under cost-plus-award-fee contracts. The purpose behind the amendment is to mitigate the financial burden placed on contractors that would otherwise have to wait in-excess of six months after performing services before the government performs an award fee evaluation.[274]

Under the Allowable Cost and Payment clause, a cost-reimbursement contractor is already able to submit invoices for costs it has actually incurred in providing the underlying supplies and services.[275] Under the change, contractors may also submit an invoice for provisional award fee payments not more frequently than once a month. The amount of any such payment would be limited to a sum equal to eighty percent of the contractor's score for the prior evaluation period times the award fee pool available in the current period.[276] The DFARS amendment is effective for all solicitations issued on or after 13 January 2004.[277]

Final Rule on Progress Payments Under Indefinite-Delivery Contracts

The FAR Councils issued a final rule this past year that will require contractors to "account for and submit progress payment requests under individual orders as if each order constitutes a separate contract, unless otherwise specified in [the] contract."[278] Prior to the rule going into effect, FAR section 32.503-5(c) directed the contracting officer to treat each individual order as if it were a separate contract, but the Progress Payments clause[279] did not grant the contractor the flexibility to submit its payment requests as if the individual orders constituted a separate contract. This rule was issued to address that inconsistent treatment by adding a new subparagraph to the Progress Payments clause that specifically addresses indefinite-delivery contracts.[280]

Proposed Rule on Payment Withholding on T&M/L-H Contracts

This past year, the DOD issued a proposed rule indicating it intended to delete a requirement to withhold up to five percent of the amount due under a time-and-materials (T&M) or labor-hour (L-H) contract until the contractor gives the government a

267. Pub. L. No. 107–107, 115 Stat. 1012, 1204 (2001).

268. *Id.*

269. Prompt Payment, 67 Fed. Reg. 79,515 (Dec. 30, 2002) (amending 5 C.F.R. pt. 1315).

270. Federal Acquisition Regulation; Prompt Payment Under Cost-Reimbursement Contracts for Services, 68 Fed. Reg. 28,092 (May 22, 2003) (amending 48 C.F.R. pts. 2, 32, and 52).

271. Defense Federal Acquisition Regulation Supplement; Provisional Award Fee Payments, 67 Fed. Reg. 70,388 (Nov. 22, 2002) (proposing to amend 48 C.F.R. § 216.405–2).

272. Defense Federal Acquisition Regulation Supplement; Provisional Award Fee Payments, 68 Fed. Reg. 64,561 (Nov. 14, 2003) (amending 48 C.F.R. § 216.405–2).

273. U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. (July 2003) [hereinafter DFARS].

274. 68 Fed. Reg. at 64,562.

275. FAR, *supra* note 30, at 52.216-7 (Mar. 2000).

276. 68 Fed. Reg. at 64,568 (amending 48 C.F.R. § 216.405–2(b)(3)(A) and (B) and also noting that any provisional award fee payment made for the first period would be set at not more than fifty percent of the total available for that period).

277. *Id.* at 64,561-62 (noting that contracting officers may also either "apply the DFARS changes to solicitations issued before January 13, 2004, provided award of the resulting contract(s) occurs on or after January 13, 2004" or "apply the DFARS changes to any existing contract with appropriate consideration").

278. Federal Acquisition Regulation; Progress Payment Requests Under Indefinite-Delivery Contracts, 68 Fed. Reg. 13,206 (Mar. 18, 2003) (amending 48 C.F.R. pts. 32 and 52).

279. FAR, *supra* note 30, at 52.232-16 (Mar. 2000).

280. 68 Fed. Reg. at 13,208 (adding 48 C.F.R. sect. 52.232-16(m)).

release from liabilities at contract completion.[281] Currently the FAR requires contracting officers to withhold five percent of interim payments due under a T&M or L-H contract, up to a maximum of $50,000.[282] The proposed rule permits DOD contracting officers to deviate from this mandatory policy and grants them the discretion to determine, on a contract-by-contract basis, whether withholding is warranted.[283] The proposed rule also indicates that "[n]ormally, there should be no need to withhold payment for a contractor."[284]

Final Rule on Contract Types for Commercial Item Acquisitions

This past year, the FAR Councils issued a final rule that increases the potential types of contracts an agency may employ to acquire commercial items.[285] Prior to the rule going into effect on 17 April 2003, the FAR only authorized firm-fixed-price (FFP) and fixed-price with economic price adjustment (FP w/EPA) contracts to acquire a commercial item.[286] The final rule amends the FAR to also sanction the use—in tandem with FFP and FP w/EPA contracts—of award fee or performance or delivery incentives so long as they are based solely on factors other than cost. Under the proposed rule, T&M and L-H contracts would have also been authorized.[287] Because numerous comments indicated a great deal of confusion existed concerning the changes related to the T&M and L-H contracts, the FAR Councils elected not to address the use of T&M or L-H contracts in the final rule. The supplementary information accompanying the rule indicated that the FAR Councils would subsequently develop a proposed revision to the FAR to address the use of T&M and L-H contracts when acquiring commercial items.[288]

New Contract Types!

For the first time in many years,[289] the FAR Councils are proposing to amend FAR part 16 to recognize a new type of contract.[290] This year's proposed change authorizes and regulates "share-in-savings" contracts for information technology. Section 210 of the E-Government Act,[291] enacted this past year, authorizes federal agencies to enter into such contracts through the end of FY 2005.[292] A share-in-savings contract essentially gets the contractor to propose innovative processes and technology that result in cost savings for the government. Under such a contract, the contractor funds the proposed changes and, in return, the government pays the contractor an agreed to percentage of any eventual savings brought about by that investment.[293] To incentivize agencies to enter into these sorts of contracts, Congress has also permitted agencies to retain their portion of any savings.[294] The "share-in-savings" contracts are very similar conceptually to energy savings performance contracts that were first authorized by Congress in 1986.[295] The FAR did not address energy savings performance contracts until 2001 and even then, their coverage was not placed in FAR part 16.[296] The proposed rule issued this past year adds a new subpart 39.3 addressing share-in-savings contracting and also

281. Defense Federal Acquisition Regulation Supplement; Payment Withholding, 68 Fed. Reg. 9,627 (Feb. 28, 2003) (to be codified at 48 C.F.R. pts. 232 and 252).

282. FAR, *supra* note 30, at 52.232–7, Payments Under Time-and-Materials and Labor-Hour Contracts (Dec. 2002).

283. 68 Fed. Reg. at 9,628 (proposing to add DFARS 252.232–7XXX).

284. *Id*. (proposing to add DFARS 232.111).

285. Federal Acquisition Regulation; Contract Types for Commercial Item Acquisitions, 68 Fed. Reg. 13,201 (Mar. 18, 2003) (amending 48 C.F.R. pts. 12 and 16).

286. *See* FAR, *supra* note 30, at 12.207.

287. Federal Acquisition Regulation; Contract Types for Commercial Item Acquisitions, 65 Fed. Reg. 83,292 (Dec. 29, 2000) (proposing to add 48 C.F.R. § 16.207-2).

288. 68 Fed. Reg. at 13,201.

289. The last change in this area appears to have occurred on 17 March 1997 when the FAR Council sanctioned the use of award fees on fixed-price contracts. *See* Federal Acquisition Regulation; Performance Incentives for Fixed-Price Contracts, 62 Fed. Reg. 12,695 (Mar. 17, 1997).

290. Federal Acquisition Regulation; Share-in-Savings Contracting, 68 Fed. Reg. 56,613 (Oct. 1, 2003) (proposing to amend 48 C.F.R. pts. 16 and 39).

291. Pub. L. No. 107-347, 116 Stat. 2899, 2932-39 (2002) (codified at 10 U.S.C. § 2332 (LEXIS 2003) and 41 U.S.C. § 317).

292. 116 Stat. at 2934, 2936 (providing parallel terminations to the Title 10 and Title 41 authorities).

293. *Id*. at 2932-33 and 2934-35.

294. *Id*. at 2933, 2935.

295. Pub. L. No. 99-272, § 7201, 100 Stat. 82, 142 (1986) (codified as amended in Chapter 91 of Title 42 U.S. Code).

296. Federal Acquisition Regulation; Energy-Efficiency of Supplies and Services, 66 Fed. Reg. 65,351 (Dec. 18, 2001) (adding 48 C.F.R. § 23.204).

adds a cross-reference in FAR part 16 to both subpart 39.3 and the section dealing with energy savings performance contracts.[297] The proposal also requests comments on a variety of topics associated with share-in-savings contracts, including: negotiating share ratios, developing baselines from which the government can determine saving amounts, determining cancellation and termination costs, and determining ownership rights in the hardware and other property used to carry out the contract.[298]

It is also interesting to note that that neither the FAR Councils nor the Office of Federal Procurement Policy (OFPP) has issued any guidance on another type of contract that has rapidly been gaining popularity—the "award term" contract.[299] This contract type is similar to an award fee contract in that it attempts to motivate the contractor to perform at a higher level than the contract requires. The difference is the reward; under an award fee contract, the contractor earns more money for exceptional performance whereas under an award term contract, the contractor earns the right to have the contract's term or duration extended for an additional period of time.[300] Thus far, the only guidance on award term contracts appears to be coming from the Air Force. Readers are encouraged to consult the Air Force Materiel Command's (AFMC) "Contracting Policy" Website dedicated to award term contracts.[301] This website contains an Air Force-level as well as an AFMC-level guide to award fee contracts.

Major Gregg Sharp.

Sealed Bidding

It Just Makes You Wonder

It is well established that the documents accompanying a bid bond, particularly the power of attorney appointing an attorney-in-fact to bind the surety, must unequivocally establish, at bid opening, that the bond is enforceable against the surety.[302] The GAO has strictly required rejection of a bid as nonresponsive "if the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound . . . ."[303] In *All Seasons Construction, Inc. v. United States*,[304] the COFC agreed with the GAO, holding that

> photocopies of bid guarantee documents generally do not satisfy the requirements for a bid guarantee since there is no way, other than by referring to the originals after bid opening, to be certain that there have not been alterations to which the surety has not consented, and that the government would therefore be secured.[305]

All Seasons Construction, Inc. (All Seasons) submitted a bid in response to a Veterans Administration construction project.[306] The bid bond contained the original signatures of the company president and the attorney-in-fact for the surety.[307] The power of attorney submitted with the bid bond certified the attorney-in-fact's authority to bind the surety and authorized the use of mechanically applied signatures on the power of attorney.[308] At the bid opening, the contracting officer concluded the power of attorney was a photocopy and rejected the bid as nonresponsive.[309] In the bid protest to the GAO that followed, All Seasons argued the "power of attorney was a com-

297. 68 Fed. Reg. at 56,614-16.

298. *Id*. at 56,614.

299. *See generally* Ralph C. Nash & John Cibinic, *Acquisition Planning: "Award Term" Contracting: A New Idea*, 13 NASH & CIBINIC REP. 8 ¶ 42 (1999).

300. *Id*.

301. *See* U.S. Dep't of Air Force, Headquarters, Air Force Materiel Command, *HQ AFMC/PKP Contracting Policy Division*, *available at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/ (last visited Jan. 21, 2004).

302. FAR, *supra* note 30, at 14.404-2(j).

303. *See*, *e.g.*, Schrepfer Indus., Inc., Comp Gen B-286825, Feb. 12, 2001, 2001 CPD ¶ 23; Daley Corp.—California Commercial Asphalt Corp., J.V., B-274203.2, Dec. 9, 1996, 96-2 CPD ¶ 217.

304. 55 Fed. Cl. 175 (2003).

305. *Id*. at 180.

306. *Id*. at 176.

307. *Id*.

308. *Id*.

309. *Id*. at 177.

puter printer generated original document with mechanically applied signatures."[310] The GAO agreed with the contracting officer and concluded that the power of attorney "looks more like a photocopy than a document generated by a computer printer."[311] Subsequently, All Seasons filed suit in the COFC.

The COFC found the contracting officer reasonably concluded the power of attorney was a photocopy.[312] The court appeared sympathetic but unpersuaded by All Seasons' argument that the GAO's decisions on photocopied documents conflict with other areas of the law that allow duplicate copies unless there is a genuine issue regarding authenticity of the original.[313] While acknowledging powers of attorney provide authority for a period of time as opposed to a one-use document, the COFC held "it was not irrational for the Comptroller General to adopt a firm rule . . . ."[314] The court suggested the contractor seek an amendment to the FAR but the alternative is to simply follow the rules.[315] In its earlier ruling and recommendation, the GAO noted that the FAR authorizes original and computer generated powers of attorney.[316] When a bidder uses mechanically applied signatures, however, the GAO stressed that one should apply the signatures after printing the computer generated document.[317] The bid bond documents should also include documentation to verify that mechanically applied signatures are binding on the company.[318]

Won the Battle, Lost the War

This year, the COFC held a contractor's "careless" reliance on a subcontractor's quote that excluded a price for a portion of the work solicited is a correctable bid mistake.[319] In *Will H. Hall and Son, Inc. v. United States*,[320] the plaintiff construction contractor, solicited quotes from subcontractors for three metal specification sections: wall, roof, and composite panels.[321] Will H. Hall and Son, Inc. (Hall) assumed the subcontractor quote it submitted with its bid included a price for all three specification sections.[322] Six days after the bid opening, however, Hall realized the subcontractor's quote expressly excluded work for one of the sections.[323] Hall claimed the mistake occurred "in its haste to meet the bid deadline."[324] The contracting officer requested evidence of the mistake but later denied Hall's request to correct the mistake and awarded the contract to Hall at the original bid price.[325] After performance began, Hall requested the contracting officer reconsider the correction request.[326] The contracting officer acknowledged evidence of a mistake but denied the request "based on a lack of clear and convincing evidence of both the existence of a mistake and the intended bid."[327] Hall appealed to the COFC to reform the contract.[328]

The COFC held "a contractor is entitled to reformation or rescission of the contract only if the contractor establishes that its bid error resulted from a 'clear cut clerical or arithmetical

310. All Seasons Constr., Inc., Comp. Gen. B-291166.2, Dec. 6, 2002, 2002 CPD ¶ 212, at 3.

311. *Id*. at 4.

312. *All Seasons*, 55 Fed. Cl. at 182.

313. *Id*. The plaintiff argued that the GAO should allow photocopied documents under the Federal Rules of Evidence, the Federal Business Records Act, and other federal statutes. *Id*.

314. *Id*.

315. *Id*.

316. *All Seasons Constr., Inc.*, 2002 CPD ¶ 212, at 3.

317. *Id*.

318. *Id*. (citing Fiore Constr. Co., Comp. Gen. B-256429, June 23, 1994, 1994 CPD ¶ 379, at 3).

319. Will H. Hall and Son, Inc., v. United States, 54 Fed. Cl. 436 (2002).

320. *Id*. at 437.

321. *Id*. The contract included the base bid, three options, and thirteen alternate projects. The plaintiff received four quotes from subcontractors. The subcontractor quotes included prices for some or all of the specification sections for the base bid and the three options. *Id*. at 438.

322. *Id*. at 437.

323. *Id*.

324. *Id*.

325. *Id*. at 439. The plaintiff submitted computer generated bid summaries and copies of the four subcontractor quotes. *Id*.

326. *Id*.

error, or misreading of the specifications.'"[329] An error in business judgment, however, when the bidder has the necessary facts but makes "a conscious gamble with known risks" is not compensable.[330] The court decided Hall's mistake could not be characterized "as clerical, arithmetic, a misreading of the specification, a mistaken reliance on a subcontractor's firm quotation" or even gross negligence.[331] Because the COFC characterized Hall's "handling of the quote as careless . . . not deliberate, but inadvertent" the court concluded the mistake was the "type of bid mistake for which correction is possible."[332] Ultimately, however, Hall could not establish clear and convincing evidence of the mistake or the bid intended, and the court denied Hall's request to correct the mistake.[333] Hall next attempted to convince the court that the contracting officer committed "several prejudicial violations of the FAR . . . entitl[ing] it to the remedy of reformation of the contract."[334] An unconvinced COFC denied Hall's remedy and granted the government's motion for summary judgment.[335]

Surprise, Surprise

In a sealed bid procurement, a bid must comply in all material requirements with the invitiation for bids (IFB).[336] A contracting officer is required to reject a bid that fails to comply with the solicitation.[337] In *Tel-Instrument Electronics Corporation v. United States*,[338] the COFC sustained the contracting officer's decision that Tel-Instrument Corp's (*Tel-Instrument*) bid was nonresponsive because the bid attempted to impose conditions that would modify the material requirements of the IFB.[339] In *Tel-Instrument*, the Army utilized a two-step sealed bid procurement to acquire a portable radar test set.[340] The first step required bidders to submit samples for testing.[341] Bidders passing the performance test submitted bids in step two.[342] While Tel-Instrument submitted the lowest bid, the bid required the use of government-furnished equipment not provided for in the solicitation,[343] limited a bidder's standard commercial warranty and data rights,[344] and proposed a revised payment plan.[345] Accordingly, the contracting officer rejected the bid as nonre-

327. *Id*. In the original request for reconsideration, the contracting officer based the denial on Hall's failure to provide clear and convincing evidence of the intended bid. The contracting officer's final decision included Hall's failure to provide clear and convincing evidence of the mistake. *Id*.

328. *Id*. The plaintiff alleged the following: (1) the contacting officer failed to comply with FAR 14.407-3, Other Mistakes Disclosed Before Award; (2) the contracting officer unreasonably refused to permit the plaintiff to correct its bid; (3) the contracting officer's acceptance of the bid and refusal to permit withdrawal resulted in an unenforceable contract; and (4) enforcement of the contract was unconscionable given the "gross" mistake. *Id*.

329. *Id*. at 440 (citing Giesler v. United States, 232 F.3d 864, 869 (Fed.Cir. 2000)).

330. *Id*. at 441.

331. *Id*.

332. *Id*.

333. *Id*. at 442. Hall submitted uncorroborated affidavits. The worksheets did not establish that Hall was not aware that the subcontractor's quote excluded a section of the work. In addition, based on the number of subcontractor quotes submitted, Hall had at least six different subcontractor quote options it could have submitted. *Id*. Hall contributed to the inability to substantiate the intended bid by submitting four different values for the intended bid throughout the course of the dispute. *Id*. at 443.

334. *Id*. The plaintiff alleged the contracting officer failed to advise it of the option to withdraw the bid and provided other mistaken bid notification requirements. The COFC held the "claims of noncompliance are either based on misinterpretations . . . not supported by any evidence in the record, or not sufficiently prejudicial to support a claim for reformation." *Id*. at 444.

335. *Id*. at 446.

336. FAR, *supra* note 30, at 14.404-2.

337. *Id*.

338. 56 Fed. Cl. 174, 176 (2003). Prior to filing suit in the COFC, Tel-Instrument protested on similar grounds to the GAO, which similarly denied the protest. Tel-Instrument Electronics Corporation, Comp. Gen. B-291309, B-291309.2, Nov. 20, 2002, 2002 CPD ¶ 203.

339. *Tel-Instrument Elects.*, 56 Fed. Cl. at 178.

340. *Id*. at 176.

341. *Id*.

342. *Id*.

343. *Id*. Tel-Instrument alleged the solicitation implied the use of government-furnished equipment and that the equipment was commercially unavailable. In addition, Tel-Instrument argued the contracting officer should have waived the variance given the value of the equipment as compared to the overall contract price. Tel-Instrument retracted the government-furnished condition after bid opening and argued the contracting officer should have then declared the bid responsive. The COFC reminded Tel-Instrument that "clarifications or corrections after bids are opened do not convert a nonresponsive bid into a responsive one." *Id*. at 177.

sponsive and Tel-Instrument protested.[346] The COFC granted the government's motion for a summary judgment finding "the rationale for enforcing the responsiveness requirement is to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all the specifications and conditions in the invitation for bids."[347] The court held the bid qualifications varied materially from the solicitation, warranting the contracting officer's rejection of the bid as nonresponsive.

Major Bobbi Davis.

Negotiated Acquisitions

We May Have Lost Your Proposal, But We Do Have Some Good News, We Do Not Have a Systemic Problem

In *Shubhada, Inc.*,[348] the GAO reiterated the general rule that an agency's loss or misplacement of proposal information does not warrant relief, unless there is a "systemic failure" in the agency's procedures for receipt of submissions.[349] Shubhada Inc. (Shubhada) submitted an offer in response to the Defense Logistics Agency's (DLA) RFP for machine gun lock release levers. Because the agency planned to award the contract on a cost-technical tradeoff basis, the RFP required proposals to include technical and past performance information.[350] Although timely submitted, Shubhada's proposal did not include any of the required technical or past performance information, thus the DLA determined the proposal was technically unacceptable.[351] Shubhada challenged the determination claiming it had included the required information in one of two hand-delivered envelopes that comprised its proposal.[352] Deeming it unnecessary to resolve the "significant factual dispute" as to whether Shubhada submitted the required information, the GAO simply considered the information to have been lost, which was not a basis to sustain the protest.[353]

The GAO noted that agencies have a "fundamental obligation to have procedures in place to receive submissions" and "to reasonably safeguard" those submissions.[354] Yet such procedures and safeguards cannot guarantee an agency will not occasionally lose or misplace a submission. So even when an agency is negligent in the loss, generally the GAO will not grant relief.[355] While a "harsh result," the GAO stated that under such circumstances "allowing an offeror to establish the content of its lost proposal after the closing date has passed would be inconsistent with maintaining a fair competitive system."[356] The limited exception to the general rule applies not to isolated acts of negligence, "but rather arises out of a systemic failure in the agency's procedures that typically results in multiple or repetitive instances of lost information."[357] The GAO found no evidence to support the exception here and thus denied the protest.[358]

---

344. *Id.* at 178. The solicitation required bidders to incorporate their standard commercial warranty into the contract. Tel-Instrument qualified the warranty by refusing to warrant equipment modified by anyone other than Tel-Instrument. The solicitation also required Tel-Instrument to authorize use of source codes by the government and their contractors. Tel-Instrument only authorized the government use of the source. *Id.*

345. *Id.* The solicitation indicated payment would be made after delivery of accepted items. Tel-Instrument proposed payment by invoice based on milestones achieved. *Id.*

346. *Id.* at 176.

347. *Id.* at 177.

348. B-292437, 2003 U.S. Comp. Gen. LEXIS 144 (Sept. 18, 2003).

349. *Id.* at *9.

350. *Id.* at *2.

351. *Id.*

352. *Id.* at *4.

353. *Id.* at *6-7.

354. *Id.* at *7.

355. *Id.* (citing Am. Material Handling, Inc., B-281556, Feb. 24, 1999, 99-1 CPD ¶ 46, at 3; Marine Hydraulics Int'l, Inc., B-240034, Oct. 17, 1990, 90-2 CPD ¶ 308, at 3).

356. *Id.* at *7-8 (referencing *Marine Hydraulics Int'l, Inc.*, 90-2 CPD ¶ 308, at 3).

357. *Id.* at *8-9 (referencing S.D.M. Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288, at 4).

358. *Id.* at *9. Interestingly, the DLA received five offers in response to the RFP. Four of the five proposals, including Shubhada's, failed to provide the required technical information and were thus deemed technically unacceptable. *Id.* at *2. The GAO confirmed, however, that the other proposals were in fact incomplete, "ruling out the possibility that a systemic failure may have occurred here." *Id.* at *9 n.5. There is no further explanation for this apparent, albeit odd, coincidence.

CAFC Discusses "Discussions" and Attempts to Clarify "Clarifications"

Despite the drafters' intent to craft a rule "clearly defining when discussions begin,"[359] a recurring issue in negotiated procurements is the somewhat elusive distinction between "discussions" and "clarifications" under FAR part 15.[360] This year, the CAFC joined the fray in *Information Technology & Applications Corp. v. United States*,[361] affirming the lower court's determination that the Air Force had not improperly conducted "discussions" with only one offeror prior to award, but rather engaged in permissible "clarifications" under FAR section 15.306(a) or "communications" under FAR section 15.306(b).[362]

The protest involved an Air Force RFP for professional support services at the Space Warfare Center. Information Technology & Applications Corp. (ITAC) was one of three firms to submit a proposal in response to the RFP. At issue were three "evaluation notices (ENs)" the Air Force sent to RS Information Systems, Inc. (RSIS) seeking additional information on relevant past performance for several subcontractors included in RSIS's proposal.[363] The Air Force had labeled the ENs "FAR 15.306(a) Clarifications."[364] RSIS responded to the ENs explaining the subcontractors' support roles under its proposal and providing related past performance experience.[365]

The RFP also contemplated a cost realism analysis of proposals. While the Air Force performed the analysis on RSIS's proposal, it did not do the analysis on ITAC's proposal because the Air Force deemed it impractical due to the minimal and unrealistic labor hours ITAC proposed.[366] As a result of the cost realism analysis, the Air Force made upward adjustments to the labor hours for both RSIS and the third offeror, but no adjustment to ITAC's proposal.[367] Although ITAC and RSIS both received exceptional past performance ratings, because the Air Force rated RSIS's proposal higher in "cost/price" and two other categories, the source selection authority (SSA) directed award to RSIS.[368] ITAC protested arguing the Air Force impermissibly engaged in pre-award "discussions" with RSIS "regarding the weaknesses and deficiencies in RSIS's past performance" without doing the same for ITAC in its cost proposal, resulting in the Air Force declining to perform a cost realism analysis of ITAC's proposal.[369]

The CAFC began its analysis of the "discussions" versus "clarifications" debate by looking to the governing statute[370] because "[i]f the statutory language is plain and unambiguous, then it controls, and we may not look to the agency regulation for further guidance."[371] Determining the statute did not define the terms, the court assumed Congress intended "discussions" and "minor clarifications" to have their ordinary meaning, permitting the court to consult the dictionary.[372] But because the dictionary definitions did not "illuminate with any precision" the actual exchanges of information that would result in a "dis-

359. General Accounting Office, Federal Acquisition Regulation; Part 15 Rewrite; Contracting by Negotiation and Competitive Range Determination, 62 Fed. Reg. 51, 224, 51,229 (Sept. 30, 1997).

360. *See* Cubic Defense Sys., Inc. v. United States, 45 Fed. Cl. 450 (2000) (finding "mutual exchange" a key element in determining whether discussions have occurred); MG Indus., B-283010.3, Jan. 24, 2000, 2000 CPD ¶ 17 (focusing on whether the agency provided the offeror the "opportunity to revise"); *see also* Ralph C. Nash & John Cibinic, *Postscript III: Clarifications v. Discussions*, 17 Nash & Cibinic Report 4, ¶ 20 (2003); Ralph C. Nash & John Cibinic, *Postscript II: Clarifications v. Discussions*, 16 Nash & Cibinic Report 3, ¶ 13 (2002); Ralph C. Nash & John Cibinic, *Postscript: Clarifications v. Discussions*, 15 Nash & Cibinic Report 8, ¶ 41 (2001); Ralph C. Nash & John Cibinic, *Clarifications v. Discussions: The Obscure Distinction*, 14 Nash & Cibinic Report 6, ¶ 29 (2000).

361. 316 F.3d 1312 (Fed. Cir. 2003).

362. *Id*. at 1318 (citing 51 Fed. Cl. 340, 354-55 (2001)). Prior to pursuing its protest with the COFC, Info. Tech. & Applications Corp. (ITAC) filed a bid protest with the GAO that was similarly denied. *Id*. at 1317. The CAFC opinion makes no specific or further mention of the GAO's ruling. *See* Info. Tech. & Applications Corp., B-288510, B-288510.2, 2001 U.S. Comp. Gen. LEXIS 206 (Nov. 7, 2001) (ruling rather succinctly that the "limited exchanges" that occurred here fell within the "clarifications" provision in FAR 15.306(a)(2)).

363. *Id*. at 1316. The Air Force issued similar ENs to ITAC and the third offeror. *Id*.

364. *Id*.

365. *Id*.

366. *Id*. at 1316-17.

367. *Id*.

368. *Id*. at 1317.

369. *Id*. at 1317-18 (quoting Plantiff's Consol. Reply, Nov. 29, 2001).

370. Titles 10 and 41 state the basic rule that an agency may award a contract "based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification)." 10 U.S.C.S. § 2305(b)(4)(A)(ii) (LEXIS 2003); 41 § U.S.C.S. 253b(d)(1)(b).

371. *Id*. at 1320 (referencing Chevron U.S.A. v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984); Gallegos v. Principi, 283 F.3d 1309, 1312 (Fed. Cir. 2002)).

cussion" versus a "clarification," the court returned to interpreting the FAR's language.[373]

Noting the 1997 FAR part 15 re-write, the CAFC recognized that the FAR no longer limited "clarifications" to exchanges "for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal."[374] Instead, the FAR defined "clarifications" to include "limited exchanges between the government and offerors, that may occur when award without discussions is contemplated."[375] And the FAR's "clarifications" examples specifically included "the relevance of an offeror's past performance information . . . ."[376] The court then noted "discussions" involve "negotiations" after the establishment of a competitive range and permit offerors to revise their proposals, unlike "clarifications."[377] Finding the FAR's definitions represented a reasonable interpretation of the statutory terms, the court stated it would "defer to them" in applying the regulation to the facts of the case.[378]

The CAFC ruled that the exchanges here were not discussions as they did not occur in the "context of negotiations" because the Air Force "did not give RSIS the opportunity to revise its proposal."[379] RSIS had not been afforded the opportunity "to change the terms of its proposal to make it more appealing to the government."[380] The court deemed the exchange of information as clarifications, citing the FAR's example language permitting receipt of supplemental information regarding the relevance of past performance information.[381] While ITAC argued that the ENs could not be clarifications because they requested additional or new information necessary for the Air Force to evaluate the proposal, the CAFC rejected these contentions stating such a "cramped conception" of clarifications was "not in harmony with" the purpose of the FAR part 15 rewrite "to support[ ] more open exchanges between the Government and industry, allowing industry to better understand the requirement [sic] and the Government to better understand industry proposals."[382]

Stating that the FAR part 15 re-write "was designed to enhance convenience, but without diminution of fairness," the dissent focused on the Air Force's "unilateral increase of the labor hours" to RSIS's proposal, without disclosing to ITAC the agency's concern about its cost/price.[383] According to the dissent, the Air Force's "unusual procedure" simply could not be "rationalized as a mere 'clarification.'"[384] While arguing the Air Force treated ITAC unfairly, the dissent provides little discussion beyond the dictionary definitions in explaining the distinction between "clarifications" and "discussions." As the GAO has previously opined, when an agency requests a clarification from one offeror, there is no requirement for the agency to seek clarifications from all other offerors, as required with discussions.[385] The dissent may have been more persuasive had it focused on fundamental fairness in light of FAR section 15.306(e),[386] as the GAO did in the next case, or more generally FAR section 1.102-2(c).[387]

372. *Id*. (citing Pesquera Mares Australes LTDA v. United States, 266 F.3d 1372, 1382 (Fed. Cir. 2001); Int'l Bus. Machs., 201 F.3d 1367, 1371 (Fed. Cir. 2000)).

373. *Id*. at 1320-21.

374. *Id*. at 1321 (citing 48 C.F.R. § 15.601 (1991)).

375. *Id*. (quoting 48 C.F.R. § 15.306(a) (2002)).

376. *Id*.

377. *Id*. (referencing 48 C.F.R. § 15.305(c) and (d) (2002)).

378. *Id*. at 1322.

379. *Id*.

380. *Id*.

381. *Id*. at 1323.

382. *Id*. (quoting 62 Fed. Reg. 51,224 (Sept. 30, 1997)).

383. *Id*. at 1324.

384. *Id*.

385. *See, e.g.*, Landoll Corp., Comp. Gen., B-291381, B-291381.2, B-291381.3, Dec. 23, 2002, 2003 CPD ¶ 40. In *Landoll Corp*., the protestor claimed the agency treated offerors inequitably by requesting clarifications on subcontractor performance from the awardee only and not the protestor and other offerors. *Id*. at 7. The GAO denied the protest stating that unlike discussions, "clarification from one offeror does not trigger a requirement that the agency seek clarification from other offerors." *Id*. at 8 (referencing Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 7, 9, at 5; Global Assocs. Ltd., B-271693; B-271693.2, Aug. 2, 1996, 96-2 CPD ¶ 100, at 4). Though the GAO "recognized that a situation might arise in which it would be unfair to request clarification from one offeror but not from another," unfortunately for Landoll Corporation, such a "situation" did not present itself in its protest. *Id*. The situation did not apparently "arise" in ITAC's protest, which the GAO earlier had denied. *See supra* note 362 (referencing ITAC's prior protest at the GAO).

You Have to Play Fair

Whatever the exchange—be they discussions, clarifications, or communications—the agency must play fair and ensure it does not engage in conduct that "favors one offeror over another."[388] Yet in *Martin Electronics, Inc.*,[389] the GAO found the agency conducted exchanges that favored Pyrotechnic Specialties, Inc. (PSI) over Martin Electronics, Inc. (MEI).

The Army had issued an RFP seeking specified quantities of surface trip flares. Under the terms of the RFP, the Army would evaluate proposals based on manufacturing plan, past performance, and price. The technical factors were significantly more important than price and award was to be made on a "best value" basis.[390] After the initial evaluation and decision to award to PSI, MEI filed a protest challenging the past performance ratings but withdrew the protest after the Army agreed to conduct a second evaluation.[391]

Reevaluating MEI's past performance, the Army "made certain negative assessments regarding the timeliness" of deliveries under contracts listed in MEI's proposal that previously the Army had not considered "relevant."[392] But the Army neither sought additional information from MEI regarding these contracts, nor otherwise informed MEI of the revised past performance assessment.[393]

While revaluating PSI's past performance for timely delivery, the Army determined the record was incomplete as to certain prior PSI contracts with the Navy, so the evaluator contacted the Navy and PSI requesting additional documentation.[394] After receiving the documentation, "several questions remained" regarding delivery timeliness on PSI's prior contracts, so the evaluator telephoned PSI and clarified the questions that remained.[395] "[B]ased in part on the explanations provided by PSI's CEO," the Army evaluated PSI higher for on-time delivery than MEI and again determined PSI's proposal represented the "best value" to the government.[396]

MEI protested, arguing the Army improperly favored PSI when it conducted exchanges with PSI concerning PSI's delivery record, yet failed to have similar exchanges with MEI.[397] The GAO agreed citing FAR section 15.306(e)(1), which provides that when agencies conduct exchanges, government personnel "shall not engage in conduct that . . . favors one offeror over another."[398] By conducting exchanges with PSI on the matter of delivery timeliness, but failing to do so with MEI, the Army improperly favored PSI over MEI to MEI's prejudice.[399]

---

386. Referencing limits on exchanges, FAR 15.306(e) states that contracting officials "shall not engage in conduct that [f]avors one offeror over another." FAR, *supra* note 30, at 15.306(e). In its complaint to the COFC, ITAC alleged the Air Force contravened FAR 15.306(e)(1) when it improperly favored RSIS over ITAC by conducting exchanges with PSI regarding past performance deficiencies but not similarly requesting clarification from ITAC concerning ITAC's lower proposed labor rates. Info. Tech. & Applications Corp. v. United States, 51 Fed. Cl. 340, 346-347 (Fed. Cl. 2001). The COFC determined the solicitation specifically placed "the burden of proof as to cost credibility and realism" on the offerors. Therefore, the Air Force had no obligation to request additional information from ITAC. *Id*. at 347.

387. As a price realism adjustment is not a "clarification," the dissent may have cited the general language found in FAR 1.102-2(c)(3) which states, "The Government shall exercise discretion, use sound business judgment, and comply with applicable laws and regulations in dealing with contractors and prospective contractors. All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same." *Id*. at 1.102-2(c)(3); *see generally* Ralph C. Nash & John Cibinic, *Technical Leveling: Its Reincarnation as Fair Treatment*, 17 NASH & CIBINIC REP. 4 ¶ 21 (Apr. 2003).

388. FAR, *supra* note 30, at 15.306(e)(1).

389. Comp. Gen. B-290846.3; B-290846.4, Dec. 23, 2002, 2003 CPD ¶ 6.

390. *Id*. at 2.

391. *Id*. at 3.

392. *Id*. at 4. The solicitation stated the agency would consider "recent" and "relevant" past performance, defining the latter "as having previously produced like or similar items." *Id*. at 4 n.12.

393. *Id*. Because the Army had not communicated with MEI on this matter, the contracting officer stated she disregarded these particular contracts when she compared the MEI and PSI proposals. *Id*. at 6. Nevertheless, the overall rating did not change and the differing ratings for on-time delivery appeared to be the only distinction between the two proposals. *Id*.

394. *Id*. at 5.

395. *Id*. (quoting the Agency Report, Tab F, at 7). While the agency used the term "clarified" in reference to its exchanges with PSI on its past delivery record here, in a footnote elsewhere in the opinion, the GAO uses the term "discussions." *Id*. at 9 n.17. But the GAO does not analyze or characterize the exchanges as discussions, vice clarifications.

396. *Id*. at 5-6.

397. *Id*. at 8. MEI also contended the Army failed to consider various late deliveries by PSI that fell within the solicitation's definition of recent past performance. The GAO also sustained the protest on this basis. *Id*. at 6.

398. *Id*. at 9 (citing FAR 15.306(e); Chemonics Int'l, Inc., B-282555, July 23, 1999, 99-2 CPD ¶ 61).

To Attribute or Not Attribute an Affiliate's Experience or Past Performance—That Is the Question

A question that frequently arises in experience or past performance evaluations is whether to attribute an affiliate's experience or performance history to that of the offeror. In *U.S. Textiles, Inc.*,[400] the GAO addressed this issue in the context of the experience/past performance of a foreign company affiliated with a domestic offeror. The DLA's RFP for military berets contemplated award based on price and several technical factors, including experience/past performance, which was the most important technical factor.[401] Although Dorothea Knitting Mills U.S., Ltd.'s (DKMUS) proposed price was approximately 14.5 percent higher than U.S. Textiles, Inc.'s (UST) price, the DLA determined DKMUS's "far superior" technical proposal warranted paying the price premium.[402] Specifically, the DLA found DKMUS's experience/past performance "clearly superior" to UST's.[403] U.S. Textiles, Inc. protested DLA's award decision, arguing DKMUS's experience occurred outside the United States.

Focusing on whether the DLA reasonably attributed to DKMUS the experience/past performance of its Canadian affiliate, the GAO framed the question, as it has in past affiliation cases, as "whether the resources of the affiliate—its workforce, management, facilities or other resources—will be relied upon, such that it will have meaningful involvement in contract performance."[404] Here, DKMUS's proposal included "substantial involvement" by its Canadian affiliate to include the following: relocating "specialized equipment" to DKMUS's new U.S. facility; training senior DKMUS supervisors at DKM Canada's beret facility; and utilizing DKM Canada management and technical personnel in training at the new facility.[405] Given DKM Canada's "meaningful involvement in DKMU's contract performance," the GAO found the DLA reasonably attributed the affiliate's experience/past performance to DKMUS and denied the protest.[406]

Do Not Hold It Against Us, It Was Our Sub's Fault, Really

In *Delco Industrial Textile Corp.*,[407] the GAO found the DLA properly downgraded the protestor's past performance evaluation based on untimely deliveries, even though the protestor argued its subcontractor was at fault. Under this RFP for cargo nets, the DLA contemplated a "best value" procurement based on past performance, price, and other related factors.[408] As provided in the solicitation, the DLA relied in part upon its Automated Best Value System (ABVS) to assign quality and delivery scores when evaluating past performance. Though Delco Industrial Textile Corp.'s (Delco) slightly higher-priced proposal also received a higher ABVS delivery score than Weckworth Manufacturing (Weckworth),[409] the DLA downgraded Delco's delivery performance based on Delco's late deliveries on two current contracts for the same item.[410] As a result, the DLA awarded to Weckworth and Delco protested.

---

399. *Id*. The agency argued that MEI was not prejudiced because even without considering the contracts that resulted in MEI's past performance downgrade during the reevaluation, PSI's rating would have been higher. *Id*. The GAO disagreed concluding that if the agency had conducted similar exchanges between the parties, it was possible MEI's rating could have been enhanced. *Id*. The GAO recommended the Army reopen discussions and reevaluate the revised proposals prior to making a new award decision. *Id*.; *cf*. Knightsbridge Constr. Corp., Comp. Gen. B-291475.2, Jan.10, 2003, 2003 CPD ¶ 5. In *Knightsbridge Constr.*, although the agency improperly conducted exchanges only with the awardee on the size and scope of prior construction projects, the GAO said the protestor was not prejudiced because even if similar exchanges had occurred, the protestor could not provide the minimum number of qualifying past construction projects specified in the solicitation. *Knightsbridge Constr. Corp*., 2003 CPD ¶ 5, at 3.

400. Comp. Gen. B-289685.3, Dec. 19, 2002, 2002 CPD ¶ 218.

401. *Id*. at 1-2. Concerning the experience or past performance factor, the RFP required offerors to "describe their experience with producing the same or items of similar complexity within the past two (2) years." *Id*. at 2 (quoting RFP § L at 129).

402. *Id*.

403. *Id*. Whereas UST had never produced berets, DKMUS received a high experience/past performance rating based upon the prior work of its Canadian affiliate, DKM Canada, which had produced several thousand berets for the U.S. and Canadian militaries during the prior two years. *Id*.

404. *Id*. at 3-4 (referencing Perini/Jones, Joint Venture, B-285906, Nov. 1, 2002, 2002 CPD ¶ 68, at 4-5; NAHB Research Ctr., Inc., B-278876.2, May 4, 1998, 98-1 CPD ¶ 150, at 4-5; Physician Corp. of Am., B-270698 et al., Apr. 10, 1996, 96-1 CPD ¶ 198, at 13).

405. *Id*. at 4.

406. *Id*. Because only DKMUS "possessed experience with the specialized processes and equipment for the production of berets," the GAO also found reasonable DLA's determination that DKMUS's proposal was superior to UST's and warranted paying the price premium. *Id*.

407. B-292324, 2003 U.S. Comp. Gen. LEXIS 117 (Aug. 8, 2003).

408. *Id*. at *2-3.

409. *Id*. at *3-4.

410. *Id*. at *4-5.

Delco argued that the DLA unreasonably evaluated its delivery performance because the agency knew that the late deliveries resulting in the downgrade "were due, not to its own actions, but to late deliveries by its webbing supplier."[411] In denying the protest, the GAO noted that "[a]n agency's past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts."[412] Here, the DLA had no information beyond Delco's mere assertion that the information on the delinquencies was incorrect. Moreover, in a government contract, the prime contractor is generally responsible for the performance of its subcontractors.[413]

New Past Performance Guide(s)

For procurement practitioners looking for additional past performance guidance, the DOD's *A Guide to Collection and Use of Past Performance Information* (*DOD Guide*)[414] provides useful help. Compiled by the DOD Past Performance Integrated Product team, the revised *DOD Guide* provides "best practices" for the collection and use of past performance information (PPI).[415] Another good source on gathering and using PPI is the *Air Force's Past Performance Evaluation Guide* (*AF Guide*).[416] The updated *AF Guide* provides Air Force specific guidance regarding membership for and the function of performance risk assessment groups. The guide also contains helpful format and "how to" guidance, in addition to substantive instruction on PPI.

It's Fundamental—Do Not Evaluate Based on Unstated Minimums

The GAO sustained the protest in *Omniplex World Services Corp.*[417] because the Immigration and Naturalization Service (INS) improperly eliminated the protestor from the competitive range based on a minimum requirement not stated in the RFP. This RPF for custody officer services stated technical factors, when combined, were more important than price. Concerning the technical subfactor for experience, the RFP stated the following: "The Offeror's guard/custody experience that is similar in size, scope, and complexity will be evaluated to determine the capability to perform the work under this contract."[418] While defining "custody officer," the RFP did not define or otherwise distinguish the term "guard."[419]

Prior to the competitive range determination, the Technical Evaluation Panel (TEP) developed scoring criteria for the various technical factors and subfactors, which "were not shared with the offerors."[420] Regarding the experience subfactor, the TEP clearly distinguished the role of custody officers from that of guards. The former, the TEP explained, had "training and experience in dealing with a detained population," while the latter simply had "responsibility of ensuring the security of administrative buildings."[421] The TEP added that "guards are not acceptable substitutes for custody officers" and that "experience in physical security (i.e., administrative buildings) does not constitute experience for this solicitation."[422] Omniplex World Services Corp. (Omniplex) had twelve years experience providing guard and security services on numerous other INS and federal contracts, based on the TEP's scoring criteria. Omniplex's proposal, however, received zero points for the experience subfactor and an "unacceptable" rating overall

411. *Id*. at *5.

412. *Id*. at *7 (referencing Ready Transp., Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90, at 5).

413. *Id*. at *8 (citing ViaSat, Inc., B-291152, B-291152.2, Nov. 26, 2002, 2002 CPD ¶ 211, at 8; Neal R. Gross & Co., Inc., B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30, at 4).

414. Under Secretary of Defense (Acquisition, Technology, & Logistics), *A Guide to Collection and Use of Past Performance Information*, Version 3 (May 2003), *available at* http://www.acq.osd.mil/dpap/Docs/PPI_Guide_2003_final.pdf.

415. *Id*. at iv-v.

416. SAF/AQCP, *Past Performance Evaluation Guide, U.S. Air Force*, Version 1.1 (Mar. 2003), *available at* http://www.safaq.hq.af.mil/contracting/toolkit/part42/word/past-performance-guide-mar03.doc.

417. Comp. Gen. B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7.

418. *Id*. at 2 (citing the RFP, M.2(a)(1)).

419. *Id*. at 2-3. The RFP defined "custody officer" as the "[c]ontractor's uniformed unarmed employees responsible for the security, care, and supervision of detainees being detained or under INS proceedings. The officer is also responsible for the safety and security of the facility." *Id*. at 3 (quoting the RFP, C.1.D.).

420. *Id*. The TEP that developed the scoring criteria was "an entirely new TEP" established to re-evaluate the proposals as part of a corrective action taken in response to an earlier protest. *Id*.

421. *Id*. at 4 (quoting the Agency Report, Exh. G, Tab B, TEP Evaluation Documents, at 4-5).

422. *Id*. (quoting the Agency Report, Exh. G, Tab B, TEP Evaluation Documents, at 4-5).

because it lacked experience in providing detention/custody services.[423] Omniplex's protest followed.

Calling it "fundamental" that all offerors "be advised of the bases upon which their proposals will be evaluated,"[424] the GAO added it necessarily follows that "an evaluation based on unstated minimum requirements is improper."[425] Here, the INS eliminated Omniplex's proposal solely because it lacked experience in detention and custody services, effectively establishing such experience as a minimum agency requirement.[426] Unfortunately, the INS did not advise potential offerors of this requirement in the RFP.[427] Rather the RFP stated the INS would evaluate "guard/custody officer" experience, which "indicated that 'guard' or 'custody officer' experience, would be considered in evaluating experience . . . ."[428] Additionally, the RFP's definition of "custody officer," which included responsibilities for the safety and security of facilities, indicated "guard" experience would in fact be relevant.[429] As such, the GAO concluded guard experience should have been considered and that it was improper for the INS to eliminate Omniplex's proposal from the competitive range simply because it did not have custody officer experience.[430]

"Pass/Fail" Evaluation Methodology Does Not Permit Qualitative Distinctions with Unstated Evaluation Factors

In *Mnemonics, Inc.*,[431] the GAO sustained a protest in which the agency made qualitative distinctions, based on unstated evaluation criteria, even though the RFP provided for a "pass/fail" evaluation methodology. The RFP, issued for the development and production of Intel Broadcast Receivers (IBR), stated the Army would evaluate proposals on technical, business, and past performance, with the technical factors being "of paramount importance."[432] The solicitation listed seventeen technical factors, fourteen of which would be evaluated on a "pass/fail" basis.[433] For each listed factor, the RFP specified the requirements the proposal must meet to pass. In addition, the RFP stated "'proposal risk' would be integrated into the rating of each technical evaluation factor."[434]

Mnemonics, Inc. (Mnemonics) submitted a proposal that received a passing rating on each of the fourteen pass/fail technical factors.[435] The Army then performed a qualitative assessment of each of these factors, identifying proposal strengths, weaknesses, or deficiencies. Although Mnemonics' proposal met each of the stated requirements for the fourteen technical factors, the Army noted certain weaknesses and deficiencies and, as a result, the Army eliminated Mnemonics' proposal from the competitive range.[436] Mnemonics protested the decision arguing the agency's evaluation considered and applied undisclosed material criteria.[437] Though the Army argued the RFP informed offerors that the agency would perform a "pro-

423. *Id*.

424. *Id*. at 5 (citing H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203, at 4).

425. *Id*. (referencing RJO Enters., Inc., B-260126.2, July 20, 1995, 95-2 CPD ¶ 93, at 11; Sci-Tec Gauging, Inc.; Sarasota Measurements & Controls, Inc., B-2522406, B-252406.2, June 25, 1993, 93-1 CPD ¶ 494, at 7-8).

426. *Id*.

427. *Id*.

428. *Id*.

429. *Id*. The GAO noted that although the RFP did not require direct detention/custody experience, "it did indicate a preference, which reasonably would permit the agency to evaluate" such experience higher than other more generalized experience. *Id*. at 6 n.10. Agencies may take into consideration "specific, albeit not expressly identified, experience in making qualitative distinctions between competing proposals, so long as the specific experience is logically encompassed by or related to the RFP's requirements and stated basis for evaluation." *Id*. (citing Bulova Techs. LLC, B-281384.2, Feb. 3, 1999, 99-1 CPD ¶ 99, at 7-8).

430. *Id*. The GAO recommended the INS re-evaluate all proposals consistent with the stated evaluation criteria. If, however, direct detention/custody experience represented the agency's actual minimum needs, the INS should first amend the RFP and request revised proposals before re-evaluating. *Id*. at 6.

431. Comp. Gen. B-290961, Oct. 28, 2002, 2003 CPD ¶ 39.

432. *Id*. at 2 (quoting the Agency Report, Tab 3, RFP at 54).

433. *Id*. The remaining three technical factors were to be subjectively graded. *Id*. The opinion does not further discuss these subjectively graded technical factors.

434. *Id*. (quoting the Agency Report, Tab 3, RFP at 54).

435. *Id*. at 3.

436. *Id*. 4-5. By contrast, the Army identified various "strengths" in another offeror's proposal because it had exceeded the minimum performance requirements. *Id*. at 4.

posal risk" assessment, thus fulfilling its "obligation to disclose all of the evaluation criteria that it subsequently applied," the GAO disagreed.[438]

Restating the general rule that agencies must disclose all evaluation factors and subfactors, as well as their relative importance, to ensure a fair competition,[439] the GAO found the Army had essentially changed the "ground rules" as previously stated in the RFP.[440] Here, the RFP clearly informed offerors that fourteen of the seventeen technical factors would be objectively evaluated on a pass/fail basis as to whether the proposal met the stated performance requirements.[441] But, in practice, the Army made qualitative distinctions based on factors that "were neither disclosed, nor reasonably subsumed within the stated requirements."[442] The GAO found nothing in the RFP that reasonably notified offerors that, beyond the pass/fail evaluation on the fourteen technical requirements, "proposals would be credited with 'strengths' for exceeding those requirements in various undisclosed ways."[443] Sustaining the protest, the GAO recommended the agency review its requirements and amend the solicitation to permit weighing the relative strengths, weaknesses, or deficiencies of proposals.[444]

They May Be an Inch Short and Have a "Neutral" Rating But They Are Still the "Best Value"

Although the awardee failed to conform to a minimum specification in the solicitation and received a "neutral" past performance rating, the GAO found reasonable the agency's "best value" award decision in *Gulf Copper Ship Repair, Inc*.[445] The Navy's RFP for maintenance and repair of the *USS Heron* included just two evaluation factors, past performance and price, "with past performance being 'approximately equal to . . .[, but] more important' than price."[446] Additionally, the RFP required that the navigation channel leading to the ship's berthing area have a minimum water depth of twelve feet, one inch.[447]

The Navy received offers from Gulf Copper Ship Repair, Inc. (Gulf Copper) and Anteon Corp. (Anteon). The Navy assigned a "very good" past performance rating to Gulf Copper and a "neutral" past performance rating to Anteon.[448] Anteon's proposed price, however, was lower than Gulf Copper's.[449] As no past performance information indicated Anteon could not successfully perform the contract, the SSA determined the risk, if any, "does not justify paying the price differential necessary to award to Gulf Copper."[450] Gulf Copper protested the decision, arguing Anteon's proposal did not conform to the minimum water depth requirement and that Anteon had no relevant past performance.[451]

---

437. *Id*. at 5.

438. *Id*. at 6.

439. *Id*. at 5 (citing 41 U.S.C. § 253a(b)(1) (1994); FAR 15.203(a)(4)).

440. *See id*. at 6.

441. *Id*. at 5.

442. *Id*. at 6.

443. *Id*. at 6-7. To protect proprietary information, the opinion is heavily redacted. Although not factually clear, Mnemonics' proposal apparently included a "feature, item, technique or methodology" that, while technically acceptable under the various "pass/fail" factors, was nevertheless not a benefit to the Army. *See id*. at 4 n.6, 5 n.10.

444. *Id*. at 7.

445. B-292431, 2003 Comp. Gen. LEXIS 140 (Aug. 27, 2003).

446. *Id*. at *2 (quoting the RFP at M-2, 3).

447. *Id*. at *2-3. More specifically, the RFP required a water depth two feet greater than the "minimum vessel clearance at the mean low water (MLW) . . . ." *Id*. (referencing the RFP at L-9; Agency Report (AR), Tab 14, Standard Item 009-101, at 1; Tab 15, Drawing 845-6689699, at 4). As the GAO explained, "[t]he MLW is the average of all low tides over a particular period of time." *Id*. at *3 (citing Canaveral Maritime, B-231857.4, B-231857.5, May 22, 1989, 89-1 CPD ¶ 484, at 7). As the ship's clearance was ten feet, one inch, the required minimum water depth was twelve feet, one inch at the MLW throughout the navigation route. *Id*.

448. The Past Performance Evaluation Team (PPET) originally assigned a "marginal" rating to Anteon, finding that Anteon's four referenced contracts were not relevant. *Id*. While the Best Value Advisory Committee (BVAC) agreed with the PPET's finding that Anteon had no relevant past performance, it disagreed with the "marginal" rating and assigned a "neutral" rating instead, citing to the definitions of the terms in the Source Selection Plan. *Id*. at *4. The SSA agreed with the BVAC's finding and the "neutral" rating. *Id*. at *5.

449. *Id*.

450. *Id*. at *6 (quoting the Agency Report, Tab 6, Source Selection Assessment, at 1).

Generally, a proposal that fails to conform to one or more of the solicitation's material requirements is technically unacceptable and cannot form the basis for an award.[452] Here, the berthing plan and sketches Anteon submitted clearly showed that in two places along the navigation route, the minimum water depth was only twelve feet in depth—one inch short of the RFP's minimum requirement.[453] Nevertheless, the Navy considered this shortfall "negligible" and concluded that Anteon's water depth was "satisfactory."[454] While stating the Navy "essentially waived the requirement," the GAO found no prejudice to Gulf Copper.[455] The GAO stated the Navy reasonably determined the shortfall to be "negligible" and Gulf Copper had not demonstrated its proposal would have changed had the requirement been relaxed for them as well.[456]

The GAO also found the Navy's award decision reasonable, even though Anteon had no relevant past performance. Under the solicitation's past performance tradeoff basis for award, the Navy had to determine whether Gulf Copper's "very good" past performance rating was worth the higher price. While Anteon's referenced contracts were not relevant, the SSA had no indicia of prior performance deficiencies or other reason to question Anteon's ability to perform. Thus the GAO found reasonable the SSA's conclusion that Gulf Copper's higher rated past performance was not worth the extra cost and denied the protest.[457]

No Support for Elimination of Proposal from Phase Two of Private Sector Competition in A-76 Cost Comparison

In *Consolidated Engineering Servs., Inc.*,[458] the GAO found the DOD failed to support its decision to eliminate as technically unacceptable the lone proposal in the private sector competition in an *OMB Circular A-76* cost comparison for operation and maintenance services of the Pentagon Heating and Refrigeration Plant (H&RP). The DOD used a two-phased approach to determine which private sector offer would be compared to the government MEO's cost.[459] In phase one, the government issued a request for qualifications, evaluating past performance and management approach. Based on these evaluation factors, Consolidated Engineering Servs., Inc., (CESI) received an overall "significant confidence" rating, the only identified weakness being that CESI "had commercial, as opposed to industrial, experience."[460] Accordingly, the DOD selected CESI to participate in phase two of the competition.[461]

In phase two, the DOD issued an RFP with past performance again being one of the technical factors evaluated. The RFP instructed offerors that the phase two past performance submissions differed from phase one "in that they concentrate on 'specific past performance experience related to equipment and systems of similar size and complexity to that of the Pentagon [HR&P],' whereas phase 1 past performance submissions focused on corporate experience with similar size facilities and the qualifications of project personnel."[462] Evaluating CESI's proposal, the only proposal submitted in response to the RFP, the agency assigned the proposal a "little confidence" rating for past performance because CESI "had limited experience on equipment and systems of similar size and complexity of that found in the Pentagon [HR&P]."[463] As a result, the SSA eliminated CESI from further consideration. CESI protested arguing its proposal was technically acceptable and should have been selected to compete against the government's MEO.[464]

---

451. *Id*. at *6-8.

452. *See, e.g.*, Special Operations Group, Inc., B-287013; B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

453. *Gulf Copper Ship Repair, Inc.*, 2003 U.S. Comp. Gen. LEXIS 140, at *6.

454. *Id*. at *6-7 (citing the Agency Report at 11 n.5; Tab 17, Navy Discussions Re: Water Depth, at 3).

455. *Id*. at *7.

456. *Id*.

457. *Id*. at *9.

458. Comp. Gen. B-291345, B-291345.2, Dec. 23, 2002, 2002 CPD ¶ 220.

459. *Id*. at 2.

460. *Id*. at 5.

461. *Id*. Chem. & Eng'g Serv., Inc. (C&E) also submitted a proposal in response to the request for qualifications. Based on the request's evaluation criteria, the DOD assigned C&E a "confidence" rating for past performance and a "significant confidence" rating for management approach. *Id*. at 4-5. Selected to participate in phase 2, C&E, a small business concern, participated as a subcontractor under CESI's response to the RFP in phase two. *Id*. at 9.

462. *Id*. at 8 (quoting the RFP § L-5.1.2, at 139).

463. *Id*. at 10 (citing the Agency Report, Tab 13, TEC Consensus Evaluation Report, Aug. 1, 2002, at 8).

464. *Id*. at 11.

The GAO agreed with CESI finding no support in the contemporaneous record to support the DOD's determination.[465] First, the GAO noted that CESI provided relevant and satisfactory experience related to the thirteen equipment types and systems specified in the RFP.[466] Additionally, the GAO pointed out that under the RFP's terms, the DOD had found CESI's proposal technically acceptable. The DOD had assigned CESI's proposal a "little confidence" rating, which by definition under the RFP meant the proposal was "acceptable but undistinguished."[467] Moreover, in eliminating CESI on the basis that CESI had only "commercial, but not industrial, experience" the DOD used an unstated evaluation factor.[468] The GAO found it significant that the DOD had earlier in phase one assigned high marks and given "accolades" to CESI, and its subcontractor, based on the same experience records that the DOD rejected as lacking "industrial" experience in phase two.[469] Finally, the GAO found the record contained no "meaningful explanation" as to why "industrial" experience at the Pentagon should be distinguished from the "commercial" experience CESI had at other federal office buildings.[470] In fact, the RFP's requirements contemplated "experience similar to (as opposed to identical to) the Pentagon H&RP requirements . . . ."[471] Sustaining the protest, the GAO recommended reinstating CESI's proposal and conducting the cost comparison with the government's MEO cost estimate.[472]

You Only Have Ninety Minutes to Present, So Talk Fast

In *T Square Logistics Services Corp.*,[473] the GAO found unreasonable the agency's evaluation of the awardee's oral presentation, which failed to address two technical subfactors in the time prescribed. The Air National Guard's (ANG) RFP for fuel distribution services at Selfridge ANG Base, Michigan, stated the agency would base the evaluation and award on technical approach, past performance, and price, with technical approach and past performance being significantly more important than price.[474] The RFP required oral presentations during which offerors were to address each of the five equally weighted subfactors under technical approach.[475] The oral presentations could not exceed ninety minutes and although the RFP required offerors to submit oral presentation slides, "[t]he solicitation cautioned offerors that '[s]lides submitted but not briefed or portions of the presentation not completed within the time limit will not be considered for evaluation.'"[476]

During its oral presentation, Sankaty Capital Aviation Services (Sankaty) addressed only three of the five technical subfactors before the ninety minutes elapsed, at which time the agency stopped the presentation.[477] The two non-addressed subfactors were neither mentioned during the clarifications that immediately followed nor during formal discussions that preceded the receipt of final revised proposals (FRP).[478] Nonetheless, the agency rated Sankaty's technical approach as excellent overall. Considering this rating and its "very low risk" past performance rating, the SSA determined Sankaty's proposal represented the "best value" to the government, even though its price was 10.8 percent higher than T Square Logistics Services Corporation's (T Square) proposal, which had received lower technical and past performance ratings.[479] T Square protested the agency's evaluation and award to Sankaty.

Although the evaluators did not consider the slides for the subfactors Sankaty did not brief, the agency contended "the

465. *Id*.

466. *Id*. 11-12.

467. *Id*. 12-13 (referencing the Agency's Post-Hearing Comments at 9).

468. *Id*. at 13.

469. *Id*.

470. *Id*.

471. *Id*. at 13-14.

472. *Id*. at 14.

473. B-291851, 2003 U.S. Comp. Gen. LEXIS 153 (Apr. 15, 2003).

474. *Id*. at *2.

475. The five technical approach subfactors were in conformance to the SOW, management approach and administrative plan, quality control, phase-in plan, and safety plan. *Id.* at *2-3.

476. *Id*. at *4 (quoting the RFP at 21).

477. *Id*. at *9. The videotape of Sankaty's oral presentation showed that prior to discussing its phase-in plan and just fifteen seconds into presenting its safety plan, the allotted ninety minutes elapsed. *Id*.

478. *Id*. at *15 n.5.

evaluators 'relied on their handwritten notes taken during the presentation to arrive at their individual and ultimate consensus decision of [excellent] ratings in both of these subfactors.'"[480] The GAO agreed with the agency that Sankaty addressed certain aspects of its phase-in and safety plans when discussing the three other subfactors. The GAO, however, found few references and little support in the evaluators' handwritten notes to warrant an excellent rating.[481] Because Sankaty did not specifically address the phase-in and safety subfactors during its oral presentation, or otherwise "adequately address the requirements of these subfactors" when presenting the other subfactors, the GAO found the agency's evaluation unreasonable.[482] Thus, the GAO sustained the protest and recommended the agency reopen discussions with all offerors in the competitive range and request revised FRPs.[483]

Let's Be Real, or Is It Reasonable, When Evaluating Cost/Price

A negotiated procurement evaluation matter that received considerable attention this past year was evaluation of cost/price. While it is clear that agencies must evaluate cost/price in every solicitation, the distinction between price reasonableness and price realism determinations can make an otherwise seemingly simple evaluation requirement confusing. For example, in *CSE Construction*,[484] the GAO found the Army COE improperly evaluated the protestor's price as too low in a solicitation that did not provide for a price realism evaluation. CSE Construction (CSE) protested the award of a fixed-price contract to KCI Construction Co., Inc. (KCI) for the design and building of firing ranges at Fort Leonard Wood, Missouri. The RFP called for a cost-technical tradeoff, with the technical factors being more important than price. Concerning price evaluation, the RFP simply stated that price would be "subjectively evaluated for reasonableness" and that it was "possible that an offeror might not be selected because of an unbalanced or an unreasonable price proposal."[485] Although receiving a lower technical rating, CSE submitted the lowest price of $2.6 million. KCI submitted the next lowest price of $4.875 million. The government's estimate was $4.3 million.[486] Believing CSE's price was "too low" and "reflect[ed] a lack of understanding" of the project's requirements, the SSA selected KCI's higher priced and higher rated proposal for award.[487] CSE protested the agency's price evaluation, providing detailed cost information to support the reasonableness of its cost.

Agreeing with CSE, the GAO cited the FAR's general requirement for "fair and reasonable" price determinations in fixed-priced contract awards.[488] Such determinations, the GAO explained, "focus[] primarily on whether the offered prices are higher than warranted . . . ."[489] The GAO noted, however, that agencies may provide for "price realism analysis" in fixed-priced solicitations to assess whether unusually low prices reflect a lack of understanding of the work or performance risk.[490] But if an RFP in a fixed-price setting contains no "realism" or "understanding" factors, the determination that an offeror's price is unreasonably low "generally concerns the offeror's responsibility . . . ."[491]

479. *Id*. at *4.

480. *Id*. at * 10 (quoting the Agency Supplemental Report at 6).

481. *Id*. at *11-13.

482. *Id*. at *14.

483. *Id*. at *15.

484. Comp. Gen. B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207.

485. *Id*. at 2.

486. *Id*. at 3.

487. *Id*. at 4.

488. *Id*. (citing FAR, *supra* note 30, at 15.402(a)).

489. *Id*.; *see* Sterling Services, Inc., Comp. Gen. B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 ; SAMS El Segundo, LLC, Comp. Gen. B-291620.3, Feb. 25, 2003, 2003 CPD ¶ 48 (supporting the proposition set forth above); *see also* Nutech Laundry & Textiles, Inc., Comp. Gen. B-291739, Feb. 10, 2003, 2003 CPD ¶ 34 (finding the agency properly cancelled the solicitation after determining the protestor's proposed price, which was fifty percent more than the government estimate, was not fair and reasonable).

490. *CSE Constr.*, 2002 CPD ¶ 207, at 4 (referencing WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68, at 3; PHP Healthcare Corp., B-251933, May 13, 1993, 93-1 CPD ¶ 381, at 5). In *Rogers Travel, Inc.*, for example, the solicitation contemplated award of a fixed-price contract for the operation of a commercial travel office on Kirtland AFB, New Mexico. Comp. Gen. B-291875, Mar. 12, 2003, 2003 CPD ¶ 60. The RFP specifically provided for the evaluation of price reasonableness and realism, "to determine if the proposed transaction fee was realistic for the work to be performed and reflected a clear understanding of the government's requirements." *Id*. at 2. Noting the discretion agencies possess in price realism analyses, the GAO denied the protestor's assertion that the agency unreasonably determined the awardee's significantly lower price was realistic. *Id*. The protestor also alleged the price reasonableness evaluation of the awardee's low price was flawed, to which the GAO responded the purpose of the price reasonableness review is to ensure prices are not too high, as opposed to too low. *Id*. at 3 n.3; *see also* Science & Mgmt. Res., Inc., Comp. Gen. B-291803, Mar. 17, 2003, 2003 CPD ¶ 61.

The RFP here had no technical or price evaluation factor permitting the evaluation of whether offerors understood the requirements. Instead, the RFP only provided for a "reasonableness" determination of proposed prices (*e.g.*, whether the price was too high or unbalanced).[492] As a result, the GAO concluded the COE's concern with CSE's low price had to relate either to CSE's responsibility or to whether CSE made a mistake in its proposed price.[493] But because CSE was a small business, the COE had to refer any nonresponsibility determination to the Small Business Administration (SBA) under its certificate of competency procedures.[494] On the other hand, if the COE suspected CSE made a mistake, the agency should have followed the applicable FAR procedures to have CSE verify its price.[495] The GAO sustained the protest because in rejecting CSE's proposal price as too low, "the SSA did not consider CSE's significantly lower price to be an advantage to be weighed against the awardee's higher technical rating" under the RFP's cost-technical tradeoff award basis.[496]

In *Eurest Support Services*,[497] although the solicitation contemplated a price realism evaluation, the GAO determined the Marine Corps failed to adequately assess the price realism of the apparent low offeror in a fixed-price incentive contract for regional garrison food service. Under the solicitation, the agency included several provisions informing potential offerors that it would consider price realism.[498] Eurest Support Services (Eurest) protested the award to Sodexho Marriot Management (Sodexho), alleging the Marines failed to properly assess the price realism of Sodexho's offer, after Sodexho had apparently[499] dramatically reduced its staffing in its FRP.[500]

Sustaining the protest, the GAO explained that because the solicitation contemplated award of an incentive contract, the ultimate contract cost depended on whether the contractor met its "target cost," thus "the reliability of the price evaluation for purposes of comparing proposals depends to a large extent on the realism of that target cost" and "it follows that use of this contract type requires a realistic target cost estimate."[501] The Marines argued that "assessing the likelihood of offerors meeting their target cost" would cause it to violate the FAR's prohibition against adjusting proposed costs as a result of a cost realism analysis in a fixed-price incentive contract.[502] The GAO disagreed, however, noting that while the FAR prohibits adjustments, "it does not preclude agencies from performing a critical price evaluation that takes into account the extent to which a proposed price reflects the ultimate cost to the government."[503] Here, the Marines failed to consider the realism of Sodexho's target costs and thus lacked a reasonable basis to conclude Sodexho's price was lowest.[504]

In three other price evaluation related cases, each involving solicitations for cost-reimbursement contracts, the agencies'

---

491. *CSE Constr.*, 2002 CPD ¶ 207, at 4 (citing Possehn Consulting, B-278579, Jan. 9, 1998, 98-1 CPD ¶ 10, at 3; Envirsol, B-254223, Dec. 2, 1993, 93-2 CPD ¶ 295, at 5).

492. *Id*. at 5.

493. *Id*.

494. *Id*.

495. *Id*. (referencing FAR, *supra* note 30, 15.306; 14.407-3).

496. *Id*. CSE Construction also protested the COE's evaluation of proposals under the general management structure/plan subfactor, which the GAO also sustained. *Id*. at 6-7. The GAO recommended the COE reevaluate the proposals in accordance with the protest decision to include adherence to the FAR's verification procedures if the COE suspected CSE made a mistake or the SBA's certificate of competency procedures if the COE determined CSE nonresponsible. If CSE was found responsible, then the COE should perform a new cost-technical tradeoff, giving CSE credit for its low proposed price. *Id*. at 7. Complying with the GAO's recommendations, the COE ultimately determined CSE nonresponsible and referred the matter to the SBA for a certificate of competency determination. CSE Constr. v. United States, No. 03-789C, 2003 U.S. Claims LEXIS 277 (Aug. 26, 2003). Following its review, the SBA found CSE lacked sufficient capacity to complete the contract's requirements and determined CSE nonresponsible. *Id*. at *33. CSE protested and sought injunctive relief at the COFC. The COFC found the SBA's determination unreasonable and sustained the protest, denying the injunctive relief requested but awarding bid preparation costs. *Id*. at *109-110.

497. B-285813.3 et al., 2003 U.S. Comp. Gen. LEXIS 212 (July 2, 2001). Although decided in July 2001, the GAO did not publish the opinion until July 2003.

498. *Id*. at *4-5.

499. The opinion is heavily redacted.

500. *Id*. at *14.

501. *Id*. at *16 (referencing generally Universal Techs., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63, at 10).

502. *Id*. at *17. More specifically, the FAR provides that "[c]ost realism analyses may also be used on competitive fixed-price incentive contracts . . . [h]owever, . . . the offered prices shall not be adjusted as a result of the analysis." FAR, *supra* note 30, at 15.404-1(d)(3).

503. *Eurest Support Servs.*, 2003 U.S. Comp. Gen. LEXIS 212, at *17-18.

504. *Id*. at *32-33. The GAO recommended the agency reopen discussions, request revised proposals, and then reevaluate proposals. *Id*. at *33.

cost realism assessments were simply faulty. For example, in *ITT Federal Services International Corp.*,[505] the GAO found the agency's cost realism evaluation unreasonable due to the COE's failure to properly upwardly adjust the awardee's proposed costs to account for "unreasonably low rates of compensation for certain employees."[506] Similarly, the GAO sustained the protest in *SRS Technologies*.[507] Here, however, the GAO found the Missile Defense Agency (MDA) unreasonably increased the protestor's probable costs by removing the proposed savings from uncompensated overtime the protestor had included in its labor rates.[508] As "[n]othing in the RFP prohibited or limited proposals based upon the use of uncompensated overtime,"[509] the GAO found the MDA's cost realism analysis and the resulting source selection unreasonable.[510] Finally, in *United Payors & United Providers Health Services, Inc.*,[511] the COFC sustained the plaintiff's challenge to the Department of Health and Human Services' (HHS) cost realism analysis under an RFP for a cost-reimbursement contract to provide health care services to INS detainees.[512] Although the HHS expected at least 30,000 claims to be processed annually under the contract, the HHS accepted and failed to upwardly adjust the awardee's estimated costs, which were based on an assumed annual claims volume of less than 30,000.[513] As the HHS based the award decision "on data it knew was flawed" and otherwise failed to follow the procedures in FAR section 15.404-1(d)(2), the COFC sustained the protest and granted permanent injunctive relief.[514]

If You Are Going to Trade-Off, You Must Justify the Worth of Any Price Premium

The GAO sustained a protest against the Air Force in *Beautify Professional Services Corp.*,[515] in which the SSA "ignored the protestor's significantly lower price and, as a result, failed to justify the payment of a substantial price premium."[516] The Air Force had issued an RFP for custodial services at the Air Force Academy. A commercial item acquisition, the RFP identified past performance as being significantly more important than price.[517]

Beautify Professional Services Corp. (BPSC), the incumbent, Southway Servs. (Southway), and thirty-five other firms submitted timely proposals. The Air Force assigned Southway an "exceptional/high confidence" past performance rating, while BPSC received a "very good/significant confidence" rating.[518] Beautify Professional Services Corp. submitted the lowest price and was approximately twenty-five percent lower than Southway in price. Initially, because the agency did "not consider custodial services to be a highly technical/complex effort," the SSA selected BPSC for award, stating she could not justify paying the twenty-five percent premium to Southway for its "less significantly higher rating."[519] Southway protested the award decision to the GAO. Prior to submission of reports, the Air Force agreed to take corrective action by conducting a reevaluation of past performance.[520]

Reevaluating the proposals, the SSA specifically noted that Southway and another firm received "exceptional/high confi-

505. Comp. Gen. B-289863 et al., Dec. 16, 2002, 2002 CPD ¶ 216.

506. *Id*. at 3.

507. B-291618.2, B-291618.3, 2003 U.S. Comp. Gen. LEXIS 57 (Feb. 24, 2003).

508. *Id*. at *10-11.

509. *Id*. at *10.

510. *Id*. at *12.

511. 55 Fed. Cl. 323 (2003).

512. *Id*. at 324.

513. *Id*. at 330. Again, due to redactions in the opinion, the awardee's assumed volume of claims was not provided.

514. *Id*. at 330-331, 334.

515. B-291954.3, 2003 U.S. Comp. Gen. LEXIS 165 (Oct. 6, 2003).

516. *Id*. at *1.

517. *Id*. at *2.

518. *Id*. at *3-4.

519. *Id*. at *4 (quoting the Agency Report (AR), Tab 16, Original Source Selection Decision, Jan. 27, 2003, at 3).

520. *Id*. at *5-6.

dence ratings," but because Southway submitted the lower price, the SSA determined Southway represented the best value to the government.[521] More specifically, the SSA stated that "the high visibility and standards that the . . . Academy has set, as the 'show case' for the [Air Force]," justified selecting Southway.[522] The SSA made no mention of BPSC or its significantly lower price.[523] BPSC protested.

Noting the statutory and regulatory requirement to consider cost/price[524] and that in a past performance trade off, the role of the SSA "is to determine whether a proposal submitted by an offeror with a better past performance rating is worth a higher price," the GAO found the SSA's source selection decision here "materially flawed."[525] Highlighting the SSA's consideration of price as between Southway and the only other firm to receive an "exceptional/high confidence" rating without discussion of BPSC's significantly lower price and marginally lower "very good/significant" past performance rating, the GAO stated the SSA failed to justify "why it was worth paying a 25-percent price premium to Southway."[526] Sustaining the protest, the GAO recommended the Air Force conduct yet another past performance/price trade off.[527]

You Must Also Justify When Paying a Premium Is Not Worth It

In *Preferred Systems Solutions, Inc.*,[528] the agency failed to explain why a higher-rated, but higher-priced proposal in a cost-technical tradeoff was not worth the price premium. The Defense Information Systems Agency's (DISA) RFP contemplated award of an ID/IQ contract for technical support services. A "best value" procurement, the RFP stated "task order competence" was the most important evaluation factor, followed by "corporate past performance," and then cost/price.[529] More specifically, the RFP informed "that the Government is 'more concerned with obtaining superior technical skills than with making an award to the offeror with the lowest price.'"[530]

Following discussions with Preferred Systems Solutions, Inc. (PSS) and Aaron B. Floyd Enterprises, Inc. (ABF), the only two firms in the competitive range, the Source Selection Evaluation Board (SSEB) rated PSS's FRP "exceptional" under the RFP's task order compliance factor, while ABF received a "satisfactory" rating.[531] After reviewing the SSEB's evaluation, the Source Selection Advisory Council (SSAC) recommended award to ABF. The SSAC report and recommendation to the SSA made no mention "of the specific strengths identified by the SSEB in distinguishing the proposals . . . ."[532] Since either offeror could provide the required services, the SSAC report concluded ABF's lower price "became the discriminating factor in the source selection decision recommendation."[533] Based on the SSAC recommendation, the SSA selected ABF, stating that because the proposals received "nearly equivalent ratings in the non-cost areas, the cost proposed took on greater weight in the best-value analysis."[534] PSS protested the agency's evaluation and cost-technical trade off decision.

While recognizing SSAs have considerable discretion when evaluating proposals and are not bound by evaluation team ratings, "they are nonetheless bound by the fundamental require-

521. *Id*. at *10.

522. *Id*. (quoting the AR, Tab 8, Revised Source Selection Decision, Apr. 8, 2003, at 3).

523. *Id*.

524. *Id*. at * 11 (referencing 10 U.S.C. § 2305(a)(3)(A)(ii) (2000); FAR 15.101-1(c)).

525. *Id*. at *12-13.

526. *Id*. at *13-14. The GAO also noted that while the original source selection decision found no significant difference in performance risk between the "exceptional/high confidence" rating and the "very good/significant confidence" rating, the SSA provided no "meaningful explanation as to why she now believes that only a firm receiving an exceptional/high confidence rating could perform these commercially available custodial services." *Id*. at *14 n.5.

527. *Id*. at *14. Because BPSC's lone reference used an Army past performance report that addressed five general areas instead of the RFP questionnaire's twenty-two specific areas, the GAO also suggested the Air Force request the reference to complete the RFP questionnaire and reevaluate BPSC's past performance accordingly. *Id*. at *15 n.6. A similar issue arose in *Dismas Charities*, *infra* notes 541-54 and accompanying text.

528. B-292322, B-292322.2, B-292322.3, 2003 U.S. Comp. Gen. LEXIS 151 (Aug. 25, 2003).

529. *Id*. at *3-4.

530. *Id*. (quoting the RFP § M.3.c).

531. *Id*. at *7-8. Both firms received "blue" (i.e., excellent) ratings under the corporate past performance factor. *Id*.

532. *Id*. at *8-9.

533. *Id*. at *9 (quoting the Agency Report, Tab 13, SSAC Report, at 3).

534. *Id*. at *10 (citing the Agency Report, Tab 14, Source Selection Decision Memorandum, at 2-3).

ment that their own independent judgments be reasonable, consistent with the stated evaluation factors and adequately documented."[535] Here, the solicitation's cost-technical trade off evaluation methodology made cost/price secondary to technical considerations. As such, the selection of ABF's lower-priced proposal over PPS's higher-rated technical offer required "adequate justification" to show why PSS's offer was not worth the associated price premium.[536] Finding the source selection documents lacked "any meaningful analysis of the differentiating features of the two proposals," the GAO determined the DISA failed to adequately justify its cost-technical tradeoff decision.[537] Based on the source selection documents and the testimony of the SSAC chairman and SSA,[538] it appeared to the GAO that the DISA had "improperly converted the source selection to one based upon technical acceptability and low price, instead of one emphasizing technical superiority and skills as announced in the RFP . . . ."[539] Sustaining the protest, the GAO recommended amending the solicitation if the agency determined the solicitation did not adequately describe the agency's needs, reevaluate proposals, "and make and document a reasoned source selection determination in accordance with the stated evaluation factors for award."[540]

Sometimes Whatever Can Go Wrong Does Go Wrong, But Reevaluating in the "Heat of the Adversarial Process" Will Not Save You

In *Dismas Charities, Inc.*,[541] whatever could go wrong with the evaluation of proposals did go wrong. The Bureau of Prisons (BOP) issued an RFP for the establishment and operation of a community corrections center (or "halfway house") for federal offenders. The RFP listed past performance, community relations, technical, and management as non-cost/price factors, in descending order of importance, which when combined were significantly more important than cost/price.[542] Evaluating the proposals received, the BOP rated the technical proposals of Dismas Charities, Inc. (Dismas) and Alston Wilkes Society (Alston Wilkes) "substantially equal overall" and selected Alston Wilkes' proposal, which was lower in cost/price.[543] Dismas protested the award.

The BOP admitted numerous errors while conducting the procurement. First, although the technical subfactors should have received equal weight, the BOP actually gave twice as much weight to two of three subfactors.[544] Second, the BOP failed to consider letters Dismas submitted to demonstrate community support.[545] Third, regarding past performance, "the most heavily weighted evaluation factor," the BOP collected past performance information in a manner inconsistent with the RFP and among the offerors.[546] Instead of using the RFP-specified past performance questionnaire for all of Dismas' references, the BOP used a shorter questionnaire. Unfortunately, the shorter questionnaire differed significantly from the RFP's in that it did not permit references to give additional credit for work "over and above the [Statement of Work's] minimum requirements."[547] Finally, the BOP failed to comply with the requirements of FAR section 15.306(d)(3) by not discussing with Dismas adverse past performance information to which Dismas had not yet had an opportunity to respond.[548]

---

535. *Id*. at *12 (referencing Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88, at 6).

536. *Id*. at *13.

537. *Id*. at *13-14.

538. In addition to statements in the source selection documents that the proposals were nearly equal in the technical factors thus making cost/price more important, the SSAC chairman stated that quantifying the advantages of PSS's proposal was "nearly difficult and next to impossible" and that budget concerns made it difficult to justify paying a premium for the services required. *Id.* at *23-24 (quoting the Hearing Transcript at 55-56, 68).

539. *Id*. at *21. The GAO was also concerned with the rationality of the cost/price evaluation scheme used, finding unreasonable the agency's evaluation of one of the task order competence subfactors that appeared to be done on a "go/no go" basis even though the RFP contemplated a comparative evaluation. *Id*. at *26-27.

540. *Id*. at *30-31.

541. Comp. Gen. B-292091, June 25, 2003, 2003 CPD ¶ 125.

542. *Id*. at 1-2.

543. *Id*. at 3 (citing the Agency Report, Contracting Officer's Statement, at 12-13).

544. *Id*. at 4.

545. *Id*. at 5.

546. *Id*. at 6.

547. *Id*. (citing the Agency Report, Tab 7, Letter/Questionnaire, at 38).

548. *Id*. at 7.

While admitting the various errors, the BOP argued Dismas was not prejudiced because the agency had reevaluated the proposals in light of the identified flaws and based on this reevaluation concluded award should still go to Alston Wilkes.[549] The GAO disagreed, finding the BOP's post-protest reevaluation lacked credibility.[550] Citing a familiar case, the GAO explained that it generally gives little weight to post-protest activities because they are "prepared in the heat of an adversarial process," and "may not represent the fair and considered judgment of the agency."[551] In the BOP's reevaluation documentation and explanations, the GAO found "no rational support for having increased Alston Wilkes' past performance rating."[552] Similarly, the GAO found no "documented, objective" support for the BOP's "summary assertions that Dismas was not prejudiced by the agency's other procurement errors . . . ."[553] For example, had the BOP considered all of Dismas's community support letters and allowed it to respond to the adverse past performance information, the GAO concluded "Dismas's proposal could have been rated higher than [Alston Wilkes'] under a majority of the non-cost/price evaluation factors," in this cost-technical trade off procurement.[554]

How Many Hats Can a Source Selection Authority Wear?

While the SSA must exercise "independent judgment,"[555] the GAO ruled in *J. W. Holding Group & Associates, Inc.*,[556] that the requirement does not preclude an SSA from serving as the head of the price evaluation team. In this Marine Corps RFP for regional garrison food services, J.W. Holding Group & Associates, Inc. (J.W. Holding) argued the SSA's service as the head of the price evaluation team contravened the FAR's requirement that "the source selection decision shall represent the SSA's independent judgment."[557] The GAO disagreed, stating FAR section 15.308 "does not expressly preclude the SSA from participating in the evaluation process . . . ."[558] Moreover, the GAO saw nothing in the practice that would be "inconsistent with the exercise of independent judgment" and was "aware of no other applicable prohibition in this regard."[559]

Major Kevin Huyser.

Simplified Acquisitions

Back to the Basics

Simplified acquisitions are designed to "reduce administrative expense, promote efficiency and economy in contracting, and avoid unnecessary burdens for agencies and contractors."[560] An agency may seek quotations, but "there is no legal requirement" that the agency request technical proposals.[561] Agencies that utilize technical proposals must include the technical requirements and evaluation criteria or risk a sustained protest if the contracting officer alleges a technical proposal is "unresponsive."[562] In *SKJ & Associates, Inc.*,[563] the GAO sustained a protest after the agency, the HHS, rejected the protestor's proposal as technically unacceptable. Because the agency failed "to provide [vendors] any guidance as to the con-

549. *Id*. at 4.

550. *Id*. at 9.

551. *Id*. at 8 (citing Boeing Sikorsky Aircraft Support, Comp. Gen. B-277263, B-277263.2, Sept. 29, 1997, 97-2 CPD ¶ 91).

552. *Id*. at 9. During the reevaluation, the contracting officer had contacted some of Dismas' references to which the incorrect past performance questionnaire had been sent and found Dismas would have received the additional past performance points. *Id*. at 6-7. The contracting officer also contacted Alston Wilkes' references, however, none would have given Alston Wilkes additional points. *Id*. at 7. Reevaluating the past performance of each, the BOP increased Dismas' past performance rating, but without explanation, it also increased Alston Wilkes' rating. *Id*.

553. *Id*.

554. *Id*. The GAO recommended the BOP re-open discussions, obtain past performance information as specified by and consistent with the RFP, then reevaluate consistent with the stated evaluation criteria. *Id*.

555. FAR, *supra* note 30, at 15.308.

556. Comp. Gen. B-285882.3; B-285882.6, July 2, 2001, 2003 CPD ¶ 46.

557. *Id*. at 1-2.

558. *Id*. at 2.

559. *Id*. at 2-3.

560. Comp. Gen. B-291533, Jan. 13, 2003, 2003 CPD ¶ 3, at 4.

561. *Id*.

562. *Id*. at 5. The GAO will review such evaluations and source selections for reasonableness. In this case, the GAO held the RFQ defective on its face requiring a challenge to the solicitation prior to the quotation due date. *Id*. at 3.

tent requested in the technical proposals or the basis for evaluating them, any doubt . . . as to the acceptability of SKJ's technical proposal should be resolved in favor of the vendor."[564] The GAO recognized the agency could have requested a detailed plan to establish the vendors' qualifications, experience and understanding of the requirements, because "stating such desires and requirements is the purpose of evaluation criteria . . ." and provides transparency and fairness to the federal procurement process.[565] The Comptroller General recommended the agency amend the Request for Quotations (RFQ) to include the required content of the technical proposal and the evaluation criteria.[566] Clearly, the FAR gives contracting officers discretion in determining how to conduct a procurement and in developing appropriate evaluation procedures.[567] The GAO held, however, that it was "unfair for the agency, after the fact, to evaluate technical proposals based on criteria that the agency was required to identify before vendors submitted proposals."[568]

Consider All Quotes Received

The GAO continued its fairness theme in *Payne Construction* (*Payne*).[569] In *Payne*, the Forest Service issued a RFQ for tree clearing services at thirteen different work sites.[570] The contracting officer issued two amendments extending the original quotation due date after funding constraints prevented the agency from issuing a purchase order.[571] Only vendors who submitted quotes by the date established in the first amendment received the second amendment.[572] The second amendment extended the quotation due date to 7 October 2003.[573] Payne only submitted a quotation in response to the second amendment because it learned of the solicitation after issuance of the second amendment.[574] Although Payne submitted the lowest quote, the contracting officer did not consider the quote, concluding Payne was ineligible to compete because it had not submitted a quote by the due date established by the first amendment.[575] Following award to another vendor, Payne protested.

The agency argued that the second amendment's closing date reasonably excluded additional vendors, such as Payne, who failed to submit a quotation by the first amendment's due date.[576] The GAO found the agency's position legally unsupported in light of the standard requiring competition to the maximum extent practicable. This standard required the agency to consider all quotations unless the solicitation includes a provision expressly stating that quotations had to be received by the date specified to be considered.[577] The GAO stated that "if no substantial activity has transpired in evaluating quotations and other vendors would not be prejudiced," the agency should consider all quotations received. Here, the agency did not begin to evaluate the quotations until 7 October.[578] Therefore, the GAO recommended the agency evaluate Payne's quotation and

563. *Id*. The case involved a RFQ for training services for case managers assisting in the social security income and disability application process. *Id*. at 1. The RFQ included only price and price related factors as the basis for award. *Id*. at 4.

564. *Id*. at 5. The contracting officer's evaluation stated SKJ's experience was "tangentially related" to the RFQ's requirements but the proposal was "unresponsive" because it provided no plan or explanation of how the firm would accomplish the SOW. In addition, the contracting officer stated the proposal failed to indicate an understanding of the requirements or state the qualifications for the positions identified. *Id*. at 3.

565. Stating the required content of the technical proposal provides transparency in the procurement process and fairness to contractors competing for federal contracts. *Id*. at 6.

566. *Id*.

567. *Id*. (referencing FAR, *supra* note 30, at 13.106-2).

568. *Id*.

569. Comp. Gen. B-291629, Feb. 4, 2003, 2003 CPD ¶ 46.

570. *Id*. at 1. The RFQ contemplated the issuance of an order to the vendor whose quotation represented the best value to the government. *Id*.

571. *Id*. at 2.

572. The contracting officer decided to limit the competition pool to vendors who submitted proposals by the first amendment due date and did not post the amendment on FedBizOpps.gov. The contracting officer also divided the schedule of items requesting two separate quotations. *Id*.

573. *Id*.

574. *Id*. Payne learned of the RFQ from the agency's internet site, contacted the contracting office, and received the solicitation. Payne representatives also visited the contracting office and received detailed information about the job. *Id*.

575. *Id*. at 2-3.

576. *Id*. at 4.

577. *Id*. at 5.

award to Payne if the quotation represented the best value to the government.[579]

No Data to Evaluate the CI Test Program

The Bob Stump National Defense Authorization Act for FY 2003 required the GAO to assess the benefits of the special simplified acquisition procedures under the commercial item test program.[580] This past year, the GAO provided the first such assessment since the commencement of the test program in 1996.[581] Congress tasked the GAO to determine the extent of use of the program, the benefits of the program, and the competition impact.[582] Unfortunately, insufficient data inhibited the GAO's ability to assess the program.[583] The GAO recommended the development of evaluation mechanisms to test the benefits of the program before Congress permanently authorizes the program.[584]

Major Bobbi Davis.

Contractor Qualifications: Responsibility

The Times, They Have a Changed

As noted in last year's *Year in Review*,[585] the GAO proposed changing its Bid Protest Regulations to expand its review of agency affirmative responsibility determinations.[586] The GAO based the change on its desire for consistency with the review standard established by the CAFC in the case of *Impresa Construzioni Geom. Domenico Garufi v. United States*.[587] While the GAO's consideration of challenges to affirmative responsibility decisions is still limited, the final rule, applicable to all bid protests filed after 1 January 2003, permits GAO review of such challenges "that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation."[588]

While unwilling to provide specific examples of protests that would fall within the new review standard, the GAO stated the new requirement for challengers to "identify evidence raising serious concerns" was intended to cover protests evidencing contracting officer failure to consider information that would otherwise have had a "strong bearing" on the awardee's responsibility.[589] The new language excludes from consider-

578. *Id*.

579. *Id*. at 6.

580. Pub. L. No. 107-314, § 812, 116 Stat. 2458, 2609 (2002).

581. Gen. Acct. Off., Rep. No. GAO-03-1068, *Contract Management: No Reliable Data to Measure Benefits of the Simplified Acquisition Test Program* 1 (Sept. 2003).

582. *Id*. Congress mandated a review of all federal executive agencies and at a minimum required a review of the DOD. *Id*.

583. To assess the program, the GAO obtained data from the Federal Procurement Data System and the DOD's Defense Contract Action Data System. The GAO analysis revealed the systems contained unreliable test program data. *Id*. at 2.

584. The GAO recommended the DOD work with the OFPP to develop the test mechanisms. *Id*.

585. *2002 Year in Review*, *supra* note 57, at 129-30.

586. General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contract, 67 Fed. Reg. 61,542 (proposed Oct. 1, 2002). Previously, the GAO's Bid Protest Regulations provided:

> Because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of the government officials or that definitive responsibility criteria in the solicitation were not met.

4 C.F.R. § 21.5(c) (2002).

587. 67 Fed. Reg. at 61,542. In *Impresa*, the CAFC stated the standard of review in cases challenging agency affirmative responsibility determinations should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis." Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333 (Fed. Cir. 2001). Prior to the CAFC's ruling in *Impresa*, the COFC had generally followed the GAO "bad faith" standard regarding affirmative responsibility determinations. *See* Steven W. Feldman, *The Impresa Decision: Providing the Correct Standard of Review for Affirmative Responsibility Determinations*, 36 Procurement Law. 2 (2001).

588. General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, Government Procurement, 67 Fed. Reg. 79,833, 79,836 (Dec. 31, 2002) (codified at 4 C.F.R. pt. 21).

589. *Id*. at 79,834.

ation, however, mere "general and 'informational and belief' allegations not supported by the evidence" as well as protests identifying "minor, rather than significant, discrepancies" regarding the awardee's responsibility.[590]

The GAO declined to follow one commenter's suggestion that it review affirmative responsibility determinations similarly to negative responsibility determinations.[591] The GAO stated doing so would give "too little weight to the contracting officer's discretion" in such matters and create a "substantial unwarranted additional burden" on the agencies.[592]

In *Southwestern Bell Telephone Co.*,[593] the GAO relied on the new exception to entertain and sustain the protestor's challenge to a contracting officer's affirmative responsibility determination. Southwestern Bell Telephone Company (Southwestern Bell) protested the award of a commercial communication services contract at McConnell Air Force Base, Kansas, to Adelphia Business Solutions, Inc. (Adelphia). Among its challenge bases, Southwestern Bell contended the Air Force failed to consider adverse information about Adelphia's integrity and business ethics when making the required responsibility determination.[594] The adverse information included allegations and charges of fraud against the Rigas family, majority stockholders in Adelphia's former parent company, who retained voting control over Adelphia even after it spun off from the parent company in early 2002.[595]

The Air Force argued the contracting officer had sufficient information to find Adelphia responsible because, prior to making his determination, he was at least aware of the indictments against Adelphia's parent company and its principals.[596] Invoking the language of the specified exception, as well as the preamble to its revised Bid Protest Regulations, the GAO stated Southwestern's "well-documented, detailed protest raised serious concerns" as to whether the contracting officer considered relevant adverse information against Adelphia that, if true, would call into question the reasonableness of the contracting officer's responsibility determination.[597] By contrast, the Air Force's dismissal request in response failed to show the contracting officer "gave any consideration to Adelphia's record of integrity and business ethics . . . ."[598]

Citing the FAR's requirement for responsibility determinations, the GAO noted that, while contracting officers need not explain the basis for responsibility determinations, "documents and reports supporting a determination of responsibility and nonresponsibility . . . must be included in the contracting file."[599] Here, the contracting officer indeed was aware of Adelphia's alleged improprieties and even noted, in a pre-award survey request to the Defense Contract Management Agency (DCMA), the adverse information against Adelphia.[600] But the DCMA's pre-award audit report made no mention of the allegations and ultimately "recommended 'complete award.'"[601] The Air Force produced no other information to show that the DCMA considered the contracting officer's request or otherwise reviewed Adelphia's record for integrity and ethics.[602] Ultimately the GAO concluded that in relying upon the DCMA pre-award survey, the contracting officer "simply assumed" Adelphia was responsible.[603] The GAO added that the contract-

590. *Id*.

591. *Id*.

592. *Id*.

593. B-292476, 2003 U.S. Comp. Gen. LEXIS 169 (Oct. 1, 2003).

594. *Id*. at *13-14. Because the RFP stated the Air Force would evaluate the integrity and business ethics of firms as part of the past performance evaluation, Southwestern Bell, which received the same past performance rating as Adelphia, also challenged the reasonableness of the agency's past performance evaluation. *Id*. at *7-8. The GAO also sustained the protest on these grounds, finding the Air Force's past performance evaluation was unreasonable and inconsistent with the stated evaluation criteria. *Id*. at *11.

595. *Id*. at *8-9. While the Rigas family held a majority interest in Adelphia, the board of directors limited their influence by removing the Rigas from positions as officers and employees of the company in July 2002. *Id*. at *9 n.5. The agency record, however, lacked support showing the contracting officer considered this information prior to making his responsibility determination. *Id*.

596. *Id*. at *14.

597. *Id*. at *15.

598. *Id*. at *16-17.

599. *Id*. at *16 (quoting FAR 9.105-2(b)).

600. *Id*. at *16-17. The contracting officer added various notes to the "Remarks" section of the SF-1403, Pre-Award of Prospective Contractor, to put the DCMA Pre-Award Survey Monitor on notice of the allegations. *Id*.

601. *Id*. at *17 (quoting the Agency Report, Tab 14, Pre-Award Survey of Adelphia, at 2).

602. *Id*. at *17-18.

ing officer's "general recognition" of the alleged misconduct by the Rigas family and other principals in Adelphia's parent company was "not alone sufficient to establish that the contracting officer reasonably assessed the awardee's record of integrity and business ethics."[604]

The Times, They May Have Changed but the Results Will Not Always Be Different

Compare the Air Force's actions in *Southwestern Bell Telephone Co.* with the agency's actions in *Verestar Government Services Group*,[605] and it's clear that while the GAO has expanded its review of affirmative responsibility determinations, the impact of the change is limited. The protestor, Verestar Government Services Group (Verestar), challenged the National Oceanic and Atmospheric Administration's (NOAA) contract award to WorldCom Government Markets (WorldCom).[606] Reciting the numerous reports on WorldCom's 21 July 2002 filing for bankruptcy protection that raised "serious questions about WorldCom's integrity and business ethics and the admitted lack of credibility concerning its financial condition," Verestar argued the contracting officer clearly failed to consider such evidence in determining WorldCom responsible.[607] Additionally, Verestar asserted WorldCom failed to submit certified financial information required under the RFP.[608]

Referencing the recent change in its Bid Protest Regulations, the GAO also noted the preamble accompanying the revised rule limited its review to protests that "include[] specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible."[609] Although the GAO agreed with Verestar that there was "an abundance of readily available adverse information" relevant to a responsibility determination, the GAO found the agency record clearly demonstrated the contracting officer was well aware of the information, recognized its relevancy, and specifically considered it when determining WorldCom responsible.[610]

While it appears the GAO will still grant great deference to agency affirmative responsibility determinations, a well-documented agency record obviously helps. In contrast to the Air Force record in *Southwestern Bell Telephone Co.*, here the record documented, for example, the contracting officer's attendance at a GSA-sponsored, "bankruptcy summit conference" that addressed WorldCom's current and long-term financial capabilities.[611] Additionally, the record noted that the GSA had earlier exercised a contract option with WorldCom, that the Federal Aviation Administration had awarded WorldCom a new contract, and that WorldCom had many ongoing contracts with the DOD.[612] The record also noted that WorldCom had removed the offending WorldCom officials, but still had its infrastructure, communication licenses, and key personnel in place.[613] WorldCom also had eight years of satisfactory performance under the existing contract and, according to the NOAA, the "wherewithal" to provide the services under the follow-on contract.[614] Finally, though WorldCom submitted the RFP required certified financial, it did so prior to its bankruptcy filing.[615] The contracting officer recognized this fact and so researched and considered other information when assessing WorldCom's financial responsibility.[616] Thus, "in light of the developed record," the GAO denied the protest, stating Verestar

603. *Id*. *21.

604. *Id*. at *19. Sustaining the protest on multiple grounds, the GAO recommended a new responsibility determination if Adelphia remained eligible for award and was selected following a re-evaluation of proposals consistent with the RFP's past performance factor. *Id*. at *25.

605. B-291854, B-291854.2, 2003 U.S. Comp. Gen. LEXIS 56 (Apr. 3, 2003).

606. *Id*. at *5. Verestar also contended the agency failed to conduct a proper cost realism analysis of WorldCom's unrealistically low proposal price. Additionally, Verestar claimed the NOAA failed to conduct a proper cost-technical tradeoff. *Id*. at *5-6.

607. *Id*. at *8 (quoting the Protest, at 14).

608. *Id*. at *7.

609. *Id*. at *8 (citing 67 Fed. Reg. 79,833, 79,834 (2002)).

610. *Id*. at *8-9.

611. *Id*. at *9 (referencing the Agency Report, Tab 20, Post Negotiation Memorandum, at 17).

612. *Id*. at *9-10 (referencing the Agency Report, Tab 20, Post Negotiation Memorandum, at 17, 19).

613. *Id*. (referencing the Agency Report, Tab 20, Post Negotiation Memorandum, at 17).

614. *Id*. at *10 (referencing the Agency Report, Tab 20, Post Negotiation Memorandum, at 17).

615. *Id*. at *10-11.

616. *Id*. at *11 (referencing the Agency Report, Tab 20, Post Negotiation Memorandum, at 17).

"did not raise a serious concern that the contracting officer unreasonably failed to consider relevant information or otherwise violated statute or regulation."[617]

Possible Chapter 11 Bankruptcy Reorganization Not a "Panacea" for Nonresponsibility

While a prospective contractor is not necessarily nonresponsible just because it has filed for bankruptcy,[618] in *XO Communications, Inc.*,[619] the GAO ruled that a prospective contractor's possible reorganization under the bankruptcy code is not "a panacea that automatically cures a nonresponsibility determination."[620] The protestor, XO Communications, Inc. (XO) challenged an award to Qwest Corp. (Qwest) pursuant to a GSA-issued RFP for telecommunication services in the Salt Lake City area.[621] The RFP stated award would be made to the offeror with the lowest priced, technically acceptable proposal.[622] The GSA evaluated the proposals of both XO and Qwest, the only firms to submit offers, as technically acceptable. But although XO's offer was lower in price, the contracting officer determined the company's financial condition made it nonresponsible because it lacked adequate financial resources to perform the contract, or the ability to obtain them.[623]

The contracting officer based his determination on pre-award surveys, as well as Security Exchange Commission (SEC) filings, and financial information provided by XO. Interestingly, much of this information came from the nonresponsibility determination of another GSA contracting officer responsible for a similar procurement in the Seattle area.[624] The Seattle contracting office had determined that XO had no bank line of credit, it was in default or considering default on obligations, and had numerous lawsuits pending against it, including one alleging certain XO officials had made materially false and misleading statements concerning XO's financial position.[625] Relying upon and adopting this information, the Salt Lake City contracting officer also concluded XO's financial condition had further deteriorated in the time since the Seattle contracting officer's findings.[626]

XO did not dispute the facts contained in the determination or challenge the Seattle contracting officer's findings.[627] XO did, however, contend the Salt Lake City nonresponsibility determination was unreasonable because the contracting officer failed to consider subsequent developments, specifically, a restructuring plan under a Chapter 11 bankruptcy petition that XO had filed after the Seattle contracting officer's decision.[628] The protestor argued the contracting officer's effort fell short of the FAR's requirement that information on financial resources and performance capability be obtained or updated on as current a basis as is feasible up to the date of award.[629] The GAO disagreed, stating the bankruptcy reorganization plan was not a "panacea that automatically cures a nonresponsibility determination."[630]

The record established that, while the contracting officer's determination did not specifically reference XO's new restruc-

617. *Id.* at *11-12. Interestingly, after some internal debate at the GSA, as well as a GSA Inspector General investigation, the GSA proposed debarment for WorldCom on 31 July 2003, prohibiting it from competing for or entering into new federal contracts. *See, e.g.*, *Suspension and Debarment: GSA Proposes Debarment for MCI, Suspends Telecommunications Giant*, BNA Fed. Cont. Daily (Aug. 4, 2003). For additional discussion of the GSA's proposed debarment of WorldCom, see *infra* Section IV.P Procurement Fraud.

618. *Compare* Bender Shipbuilding & Repair Co. v. United States, 297 F.3d 1358 (Fed. Cir. 2002) (upholding contracting officer's affirmative responsibility determination though awardee and its parent company had filed for Chapter 11 bankruptcy reorganization), *with* Global Crossing Telecomms., Inc., Comp. Gen. B-288413.10, June 17, 2002 CPD ¶ 102 (upholding contracting officer's determination that a bankrupt protestor was not responsible because the bankruptcy increased the government's risk).

619. Comp. Gen. B-290981, Oct. 22, 2002, 2002 CPD ¶ 179.

620. *Id.* at 6.

621. *Id.* at 1.

622. *Id.*

623. *Id.* at 2; *see also* FAR, *supra* note 30, at 9.104-1(a).

624. *XO Communications*, 2002 CPD ¶ 179, at 3-4.

625. *Id.* at 4.

626. *Id.*

627. *Id.* at 5.

628. *Id.*

629. *Id.* at 5-6; *see also* FAR, *supra* note 30, at 9.105-1(b)(3).

630. *XO Communications*, 2002 CPD ¶ 179, at 6.

turing plan, he knew of the plan and XO's possible Chapter 11 bankruptcy filing.[631] The plan, however, depended on a "series of uncertain contingencies and approvals," which, as of the date of the GAO's decision, still had not occurred."[632] According to the GAO, the contracting officer was not required to "parse the financial minutiae" of XO's restructuring plan.[633] The fact the contracting officer was aware XO's possible restructuring plan but did not mention it in his determination, simply indicated to the GAO that the contracting officer gave the plan "little weight."[634]

Maybe the Rule Was Not Necessary After All

In December 2000, after many comments and much controversy, the FAR Council finalized a Clinton Administration contractor responsibility rule that clarified what constitutes a "satisfactory record of integrity and business ethics" under FAR part 9 responsibility determinations.[635] Just three months after issuing this final rule, the FAR Council stayed the rule government-wide.[636] Then on 27 December 2001, just one year after finalizing the rule, the FAR Council revoked the same, restoring the FAR text to the wording that existed prior to the December 2000 final rule (the revoked rule).[637] Because the revoked rule was so short-lived, its actual (or potential) impact on agencies and prospective contractors was never determined. Thus, Congress requested the GAO to assess the extent to which federal contractors had violated the specified areas of law under the revoked rule, as well as any implementation issues that agencies and federal contractors may have encountered had the revoked rule been applied.[638] After two years of research, the GAO issued its findings in a November 2002 report.[639]

To carry out its assignment, the GAO sought to review the types of contracts and law violations that would have been covered by the contractor certification requirement under the revoked rule.[640] Of the nearly 17,000 contractors awarded new federal contracts during FY 2000, the GAO identified just thirty-nine that had violated one or more of the specified laws, as determined by a federal court or an administrative law judge, board, or commission.[641] While the GAO's research identified an additional 3400 contractors alleged to have violated the specified laws, these cases settled prior to a court or administrative adjudication and were not considered a violation.[642]

631. *Id*.

632. *Id*.

633. *Id*.

634. *Id*.

635. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,256 (Dec. 20, 2000). Amending portions of FAR parts 9, 14, 15, and 52, the responsibility rule clarified that a "satisfactory record of integrity and business ethics" included a contractor's satisfactory compliance with tax, labor, environmental, antitrust, and consumer protection laws. *Id*. at 80,258. Additionally, prospective contractors had to certify in their bids/offers whether they had violated any of these laws within the prior three years. *Id*. According to the FAR Council, during the rule change process it received over 1800 comments on the merits of the rule, making the rule "the most controversial ever published by the FAR Council." Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings-Revocation, 66 Fed. Reg. 17,758 (Apr. 3, 2001). For prior *Year in Review* discussions of the Clinton Administration's responsibility rule, see Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001 – The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 54 [hereinafter *2001 Year in Review*], Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000 – The Year in Review*, ARMY LAW., Jan. 2001, at 77-78 [hereinafter *2000 Year in Review*], and Major Mary E. Harney et al., *Contract and Fiscal Law Developments of 1999 – The Year in Review*, ARMY LAW., Jan. 2000, at 18-19.

636. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 17,754 (Apr. 3, 2001). The FAR Council stated the stay was necessary because the effective date for the final rule (19 January 2001) provided insufficient time for training of contracting officers and for prospective contractors to develop a system to track compliance with the various applicable laws in order to properly complete the certification requirement. *Id*. On the same day, the FAR Council published a proposed rule revoking the December 2000 final rule, with a request for public comments. *Id*. at 17,758.

637. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 66,984 (Dec. 27, 2001). In revoking the final rule, the FAR Council noted that the statutory requirement for satisfactory business practices remained. The FAR Council determined, however, the existing suspension and debarment rules under the FAR provided a sufficient enforcement mechanism. *Id*.

638. *See* GEN. ACCT. OFF., REP. NO. GAO-03-163, *Government Contracting: Adjudicated Violations of Certain Law by Federal Contractors* 2 (Nov. 2003) [hereinafter GAO-03-163].

639. *Id*. at 5.

640. *Id*. at 3; *see id*. at app. I (containing a more detailed discussion of the scope and methodology of research employed by the GAO).

641. *Id*. at 5, 14. Of the thirty-nine contractors identified, eleven had adjudicated violations of environmental laws, twenty-seven had violations of labor and employment laws, and one was convicted for violating federal anti-trust laws. *Id*. at 17, 20, 22. No contractors had adjudicated violations of the federal consumer protection or tax laws. *Id*. at 24, 26. Under the GAO's analysis, only adjudicated violations resulted in a "violation found" determination, because under the revoked rule contracting officers were instructed to give the greatest weight to adjudicated violations. *Id*. at 4; *see also* Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,256, 80,265 (Dec. 20, 2000).

In addition to quantifying the incidence of contractor violations under the revoked rule, the GAO also identified several potential implementation issues.[643] First, the GAO noted that even among the contractors that had adjudicated violations, only seven would have had to report the violations per the certification requirement.[644] Twenty-two of the contractors did not involve felony convictions or willful violations. Therefore, they would not have met the reporting criteria under the reporting rule.[645] Similarly, settlement agreements resolving cases prior to adjudication were not reportable under the rule.[646] A second implementation issue the GAO identified involved the difficulties contracting officers would have encountered in obtaining and verifying contractor compliance histories.[647] Given the narrow focus of the certification requirement, few contractors would have had to report violations, placing the burden on contracting officers to search elsewhere to obtain and verify compliance information.[648] Few contracting officers had timely access to enforcement agency databases, and even if they did there would be difficulties matching contractor names to enforcement cases.[649] Finally, the GAO determined that the revoked rule would have imposed additional record keeping on some contractors in order to track compliance with the relevant laws.[650] In response to GAO requests, eighteen of forty-three contractors stated they did not have systems in place to identify or track the various types of violations.[651] Based on the GAO's findings perhaps the revoked rule was best short-lived.

Major Kevin Huyser.

Commercial Items

It's Always Something with FPI

Last year's *Year in Review* reported that federal agencies must conduct market research and then use competitive procedures to acquire products if the research reveals UNICOR (or Federal Prison Industries (FPI))[652] products are not comparable to private industry products in terms of price, quality, and time of delivery.[653] To further clarify several of the rule's requirements, Congress passed section 819 of the Bob Stump National Defense Authorization Act for FY 2003.[654] On 15 May 2003, the DOD issued a proposed rule to amend the DFARS to incorporate and update the competitive requirements for purchases from FPI.[655] The proposed rule clarifies several issues including the market research[656] and the competitive procedures requirements.[657] The proposed rule also indicates the contract-

642. GAO-03-163, *supra* note 638, at 5, 15. Reviewing the resulting settlement agreements of such cases, the GAO "did not construe contractors as conceding or admitting to law violations." *Id*. at 15 n.30.

643. *Id*. at 6, 27.

644. *Id*. at 6, 28.

645. *Id*. at 28.

646. *Id*. at 6, 29.

647. *Id*. at 6, 30.

648. *Id*. at 30.

649. *Id*. at 31. The GAO encountered such problems during its research because "contractor names can vary widely due to such factors as spelling, name combinations, and parent/subsidiary relationships." *Id*. at 3.

650. *Id*. at 6, 32.

651. *Id*. at 32.

652. *See* U.S. Dept. of Justice Fed. Prison Indus., Inc., *UNICOR, at* http://www.unicor.gov (last visited Jan. 21, 2004) (describing the products and services available through UNICOR). The FPI is part of the Justice Department's BOP. The FPI mission is to employ and provide skills to inmates confined within the BOP. The inmates of the self-sustaining program produce items for sale to other federal agencies. *Id.*

653. *2002 Year in Review, supra* note 57, at 55 (discussing section 811 of the National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001)).

654. Pub. L. No. 107-314, § 819, 116 Stat. 2612 (2002). Congress clarified the unilateral authority of contracting officers to determine whether FPI is comparable in price, quality, and time of delivery. In addition, once the contracting determines FPI is not comparable, the contracting officer must use competitive procedures to purchase the product or make a purchase under a multiple award schedule. *Id.*

655. Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases from a Required Source, 68 Fed. Reg. 26,265 (May 15, 2003) (to be codified at 48 C.F.R pts. 208, 219, and 252). On 26 April 2002, the DOD published an interim rule implementing section 811 of the National Defense Authorization Act for FY 2002 (Pub. L. No. 107-107, 115 Stat. 1012) which added 10 U.S.C. § 2410n (2000). Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases From a Required Source, 67 Fed. Reg. 20,687 (Apr. 26, 2002) (to be codified at 48 C.F.R. pts. 208, 210).

656. *See* 68 Fed. Reg. at 26,265. The proposed rule would amend DFARS section 208.602 to require the contracting officer to document all market research and include a written determination and supporting rationale if the FPI product is not comparable in price, quality, or time of delivery. *Id.*

ing officer has unilateral authority to make comparability determinations.[658] Finally, the rule proposes to add two sections. One section states contractors and subcontractors are not required to use FPI as a subcontractor.[659] The other section prohibits awarding a contract to FPI if the contract allows inmate access to classified or sensitive information.[660]

On a related topic, the FAR Councils issued a final rule on 22 May 2003 requiring agencies to evaluate FPI's contract performance.[661] This final rule requires agencies to rate FPI performance, compare it to the private sector, and provide FPI feedback on previously awarded contracts.[662] The information may be used to support a clearance request under FAR section 8.605.[663]

Additionally, the FAR now authorizes federal agencies to purchase FPI Schedule products, at or below the micro-purchase threshold, from private industry without obtaining a clearance.[664] The FPI Board of Directors (BOD) increased the FPI clearance exception from $25 to $2500.[665] The BOD also eliminated the ten-day delivery requirement.[666] In response, the FAR Council issued an interim rule amending the FAR.[667] On 20 June 2003, the DOD issued a final rule updating the DFARS to comport with the BOD's resolution.[668] For civilian agencies, purchases of FPI Schedule products above the $2500 threshold still require a clearance.[669] In the DOD, however, for purchases of FPI-offered products above the new clearance threshold, contracting officers must use the comparability determination procedures under 10 U.S.C. § 2410n.[670]

In a 15 August 2003 memorandum, the Director, Defense Procurement and Acquisition Policy, "reissue[d] 'interim' guidance" that in effect summarizes the proposed changes to the DFARS and other recent changes in the rules for purchasing items typically reserved for FPI.[671] The memorandum was issued in response to congressional concern that FPI's marketing staff had been "thwarting the intended implementation" of the recent legislative and regulatory changes, by erroneously advising contracting officers that buying activities required an

657. *See id*. If the FPI product is not comparable, the contracting officer can acquire the product using competitive procedures or order under a multiple award task or delivery order contract using the procedures in FAR section 16.505. *Id*. at 26,268; FAR, *supra* note 30, at 16.505. The contracting officer must include the FPI in the solicitation process and include the FPI in the procurements conducted using small business set-aside procedures. 68 Fed. Reg. at 26,266.

658. 68 Fed. Reg. at 26,268.

659. *Id*. at 26,269. The proposed rule prohibits requiring a contractor, or subcontractor at any tier, to use FPI as a subcontractor for performance of a contract by any means including: "(a) a solicitation provision requiring a potential contractor to make use of FPI products or services; (b) a contract specification requiring the contractor to use specific products or services (or classes of products or services) offered by FPI; or (c) any contract modification directing the use of FPI products or services." *Id*.

660. *Id*. The rule proposed adds DFARS section 208.671, which prohibits inmate access to "classified data," "personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual," "geographic data regarding the location of (1) surface and subsurface infrastructure providing communications or water or electrical power distribution; or (2) pipelines for the distribution of natural gas, bulk petroleum products, or other commodities." *Id*.

661. Federal Acquisition Regulation; Past Performance Evaluation of Federal Prison Industries Clearances, 68 Fed. Reg. 28,905 (May 22, 2003) (to be codified at 48 C.F.R pts. 8 and 42).

662. *Id*.

663. *Id*. Unless one of several listed exceptions apply, agencies must receive a "clearance," or waiver, from FPI before purchasing FPI Schedule supplies from other sources. *See* FAR, *supra* note 30, at 8.605, 8.606.

664. Federal Acquisition Regulation; Increased Federal Prison Industries, Inc. Waiver Threshold, 68 Fed. Reg. 28,094 (May 22, 2003) (to be codified at 48 C.F.R. pt. 8).

665. *Id*. at 28,095.

666. *Id*. Previously, a clearance was not required if the order totaled $25 or less and required delivery within ten days. *Id*.

667. *Id*.

668. Defense Federal Acquisition Regulation Supplement; Deletion of Federal Prison Industries Clearance Exception, 68 Fed. Reg. 36,944 (June 20, 2003) (to be codified at 48 C.F.R. pt. 208). DFARS section 208.606 previously authorized a blanket waiver for DOD purchases totaling $250 or less that required delivery within ten days. After the BOD resolution, the text of DFARS section 208.606 became obsolete and was therefore deleted. *Id*.

669. *Id*.

670. *See id*.

671. Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors, Defense Agencies et al., subject: Federal Prison Industries, Inc. (15 Aug. 2003), *available at* http://www.safaq.hq.af.mil/contracting/toolkit/part08/acrobat/dpap-memo-15aug03.pdf.

FPI "waiver," or clearance, before conducting competitive procurements under 10 U.S.C. § 2410n.[672]

Spring Cleaning

The FAR Councils issued several other final rules involving commercial item issues. On 18 March 2003, the councils updated[673] the commercial items contracts terms and conditions clauses[674] that limit the types of subcontracts applicable to the waiver of U.S. cargo preference statutes.[675] The FAR implements the statutory preference to use U.S. flag vessels in the transportation of supplies by sea.[676] These requirements are generally waived for commercial item acquisitions by subcontractors.[677] The final rule makes the preference to use vessels of or belonging to the United States for "the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps"[678] inapplicable to subcontracts for the acquisition of commercial items.[679] Because civilian agencies may purchase supplies for use by the military departments, not all subcontracts are excluded from the U.S. flag vessel preferences.[680]

In a related change, on 3 June 3 2003, the DOD issued a final rule adding "an alternative version of the Transportation of Supplies by Sea clause" to the list of clauses in DFARS 252.212-7001.[681] The addition corrects the inadvertent omission of the alternative from the previously published rule that requires contractors to use U.S. flag vessels to transport supplies by sea for contracts at or below the simplified acquisition threshold.[682]

Additionally, on 18 March 2003, the FAR Councils issued a final rule authorizing the use of award fees and performance or delivery incentives in commercial item acquisitions.[683] The rule only applies to either firm-fixed price or fixed-price with economic price adjustments contract types.[684]

To follow up on a proposed ruled reported on in last year's *Year in Review*,[685] on 22 May 2003, the FAR Councils issued a final rule that updates the FAR's clauses regarding commercial items contract terms and conditions to implement several changes brought about by recent statutory revisions and or the promulgation of Executive Orders.[686]

Although there are no new rules regarding FAR part 12 and construction contracts, the OFPP Administrator issued a memorandum severely limiting the application of FAR part 12 to construction contracts.[687] The memo indicates FAR part 36 is

672. *Id*.

673. Federal Acquisition Regulation; Preference for U.S. – Flag Vessels – Subcontracts for Commercial Items, 68 Fed. Reg. 13,202 (Mar. 18, 2003) (to be codified at 48 C.F.R. pts. 12, 13, 47, and 52).

674. *See* FAR, *supra* note 30, at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items; 52,213-4, Terms and Conditions—Simplified Acquisitions (Other than Commercial Items); 52-244-6, Subcontracts for Commercial Items and Commercial Components; 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels.

675. "10 U.S.C.S. § 2631 and 46 U.S.C.S. § 1241(b) provide a preference for use of U.S. flag vessels for ocean transportation of supplies purchased under Government contracts." Federal Acquisition Regulation; Preference for U.S.-Flag Vessels, 65 Fed. Reg. 66,920, (Nov. 7, 2000) (to be codified at 48 C.F.R. pts. 2,12,32,47, and 52).

676. 68 Fed. Reg. at 13,202.

677. *Id*.

678. 10 U.S.C.S. § 2631 (LEXIS 2003).

679. 68 Fed. Reg. at 13,202.

680. *Id*.

681. Defense Federal Acquisition Regulation Supplement; Transportation of Supplies by Sea – Commercial Items, 68 Fed. Reg. 33,026 (June 3, 2003) (codified at 48 C.F.R. pt. 252).

682. *Id*.

683. Federal Acquisition Regulation; Contract Types for Commercial Item Acquisitions, 68 Fed. Reg. 13,201 (Mar. 18, 2003) (to be codified at 48 C.F.R. pts. 12 and 16).

684. *Id*.

685. *2002 Year in Review*, *supra* note 57, at 56.

686. Federal Acquisition Regulation; Contract Terms and Conditions Required to Implement Statute or Executive Orders – Commercial Items, 68 Fed. Reg. 28,906 (May 22, 2003) (to be codified at 48 C.F.R. pt. 52).

687. Memorandum, Administrator, Office of Federal Procurement Policy, to Agency Senior Procurement Executives; subject: Applicability of FAR part 12 to Construction Acquisitions (July 3, 2003), *available at* http://www.acqnet.gov/Notes/far12construction.doc [hereinafter Applicability of FAR part 12 Memo].

more appropriate for new construction or complex alterations and repair work.[688]

Major Bobbi Davis.

Multiple Award Schedules

Lost the Battle, Won the War

At or below the micro-purchase threshold, agencies may place an order with any federal supply schedule (FSS) contractor.[689] Before placing an order that exceeds the micro-purchase threshold but not exceeding the maximum order threshold, agencies are required to take additional steps to ensure the order represents the best value.[690] Orders exceeding the maximum order threshold require agencies to go one step further to ensure the "order represents the best value and results in the lowest overall cost alternative . . . to meet the Government's needs."[691] The additional step for orders exceeding the maximum order threshold is the requirement to review the prices of at least three vendors in catalogs, pricelists, or on GSA Advantage!.[692] This year, the GAO held that any market research that the agency conducts to determine which vendors not to solicit is a basis for protest, reviewable by the GAO.[693]

Savantage Financial Services, Inc. (Savantage), an FSS vendor, protested the Department of Justice's (DOJ) decision not to solicit an RFQ from it.[694] The DOJ issued a survey and requested a demonstration from seven FSS vendors for commercial off-the shelf (COTS) financial management systems software.[695] Savantage and five other vendors submitted responses to the survey and provided a product demonstration.[696] After comparing the vendor submissions, the DOJ excluded Savantage from further competition, concluding Savantage "did not appear to provide the best value as compared to the other vendors . . . [and] . . . would have no reasonable chance of being selected for award over other schedule vendors . . . ."[697] When Savantage protested the decision, the DOJ argued the market research and product demonstration did not amount to a competition reviewable by the GAO.[698] The agency also argued excluding Savantage was not reviewable because the DOJ never issued a solicitation and the GAO may only review "best value" determinations based on a solicitation with evaluation criteria.[699] In the alternative, the DOJ argued the decision not to provide Savantage with the RFQ was reasonable.[700]

The GAO first tackled the jurisdictional issue. The GAO reasoned that its authority to decide protests challenging solicitations and awards of contracts included the solicitation and award of FSS orders. The GAO, therefore, determined it had jurisdiction over a protestor's challenge that an agency had been unreasonable in not soliciting it.[701] The GAO next tackled the DOJ argument that Savantage failed to state a valid basis for protest. In this regard, the GAO first reminded the DOJ that a valid basis for a protest would include an agency's violation of

688. *Id*. For further discussion of the memo's particulars, see *infra* Section IV.D Construction Contracting.

689. FAR, *supra* note 30, at 8.404(b)(1).

690. *Id*. at 8.404(b)(2).

691. *Id*. at 8.404(b)(3). The maximum order threshold shows when it is advantageous for the ordering office to seek a price reduction. *Id*.

692. *Id*. at 8.404(b)(3)(i). GSA Advantage! is an on-line shopping service. GSA Advantage!, *available at* https://www.gsaadvantage.gov/advgsa/main_pages/start_page.jsp (last visited Jan. 21, 2004).

693. Savantage Fin. Servs., Inc., Comp. Gen. B-292046; B-292046.2, June 11, 2003, CPD ¶ 113.

694. *Id*. at 1.

695. *Id*. at 2. The DOJ decided to replace several different financial management systems with one. The agency required a COTS product certified by the Joint Financial Management Improvement Program (JFMIP). The agency wanted to minimize customization and requested specific information regarding customization requirements. The survey consisted of 100 pages. *Id*.

696. *Id*. at 3.

697. *Id*. at 4. The DOJ's Director of Finance Staff (DOFS) based the decision on personal experience with DOJ previous implementations, professional knowledge of available financial management system products, other federal agencies' implementations, and personal knowledge of the products and implementations of vendors, including Savantage. The DOFS determined Savantage would require substantially more customizations and Savantage had less extensive experience on similar projects than selected vendors. *Id*.

698. *Id*. at 3. Savantage alleged "that DOJ's evaluation of the market research was unreasonable and unequal and that DOJ failed to consider price in selecting which firms would be solicited." *Id*. The DOJ argued the market research simply informs the agency about available products. *Id*. at 4.

699. *Id*. at 4.

700. *Id*. at 8.

701. *Id*. at 6.

a procurement statute or regulation, including the FAR.[702] The GAO noted that a condition precedent for using the FSS in lieu of conducting a full and open competition is the requirement for the agency to follow the procedures in subpart 8.4.[703] The GAO concluded that determinations under FAR section 8.404 (a) as to the government's needs and which products or services meet those needs at the lowest overall cost "are subject to review, and . . . in order to withstand review when challenged . . . the agency must be able to provide a reasonable basis for its determinations . . . ."[704] The fact that the DOJ did not provide evaluation criteria for its best value determination was not relevant considering the detailed submissions the DOJ received from the vendors.[705] Lastly, the GAO reviewed the detailed submissions to determine the reasonableness of DOJ's exclusion of Savantage.[706] Ultimately, the GAO concluded Savantage did not appear to offer the best value and denied the protest.[707] Although the GAO denied the protest, the teaching point is that agencies must have a reasonable basis to substantiate any competition that excludes a vendor from receiving a solicitation and ultimately submitting a quotation.

Show Us a Link

Last year's *Year in Review* reported the requirement to compete incidental acquisitions for items not on an FSS vendor's contract.[708] This year, the GAO reviewed two protests alleging agencies had awarded contracts to FSS vendors for supplies or services not on the vendors' FSS contract. In *Omniplex World Services Corp.*,[709] the GAO sustained a protest because the INS had awarded a blanket BPA to an FSS contractor for services not included in the vendor's schedule contract. The INS issued the RFP for investigative services.[710] The INS planned to award BPAs to the three vendors with FSS contracts who submitted the lowest priced technically acceptable proposals.[711] The RFP required offerors "to demonstrate immediate access to more than 500 investigators geographically disbursed throughout at least 40 states."[712] Five vendors submitted proposals.[713] The INS awards excluded Omniplex, who protested INS's award to B&W Technologies (B&W). Omniplex argued the BPA exceeded the scope of B&W's FSS contract and the GAO agreed, sustaining the protest.[714]

The GAO reviewed B&W's FSS contract to determine whether the services B&W offered to the INS were within the contract's scope.[715] Omniplex alleged that "B&W failed to link any of the services it proposed to perform for the INS to any of the services, labor categories or prices listed in its FSS contract."[716] The GAO agreed and further found that B&W's FSS contract did not include the oversight, management, or data management functions B&W proposed to perform.[717] In fact, there was "no evidence that the INS ever considered whether

702. *Id*.

703. *Id*.

704. *Id*. at 7.

705. *Id*. at 8.

706. *Id*.

707. *Id*.

708. *See 2002 Year in Review, supra* note 57, at 59 (discussing Federal Supply Order Disputes and Incidental Items, 67 Fed. Reg. 43,514 (June 27, 2002) (codified at 48 C.F.R. pts. 8 and 51)).

709. Comp. Gen. B-291105, Nov. 6, 2002, 2002 CPD ¶ 199.

710. *Id*. at 1. The INS provides certification to learning institutions that accept foreign students. Previously, these schools submitted the required documentation manually. The INS decided to implement a more rapid and centralized reporting system to track "more than one million foreigners who are in the United States to attend colleges, universities, and trade schools." To do so, however, the INS required an investigation of each school to determine the school's capability to gather and submit the information under the new requirements. *Id*. at 2.

711. *Id*. The INS selected a GSA schedule for general support services including "planning, recruitment and internal placement, pre-employment screening, position classification, personnel actions, training, employee assistance, employee relations and outplacement." *Id*.

712. *Id*. The RFP also required information sufficient to allow a comprehensive evaluation of the proposed prices. The solicitation indicated an analysis of price realism, reasonableness, and total evaluated price would be performed. *Id*. at 3.

713. *Id*.

714. *Id*. at 6. Omniplex also argued the INS improperly evaluated B&W's proposal as technically acceptable, and that B&W's pricing information failed to meet the solicitation requirements. *Id*. at 3.

715. *Id*. at 5. The GAO also reviewed whether the evaluation of B&W's proposal met the RFP requirement to have immediate access to at least 500 "trained" investigators in at least forty states and whether B&W's proposal included information sufficient to provide a comprehensive analysis to establish price reasonableness and realism. *Id*. at 7.

the services B&W and its subcontractor offered to provide were covered by B&W's FSS contract."[718] The GAO reminded contracting agencies that while the GSA's FSS program comports with the requirement for full and open competition, "non-FSS products and services may not be purchased using FSS procedures; instead their purchase requires compliance with the applicable procurement laws and regulations, including . . . the use of competitive procedures."[719] The GAO sustained the protest and recommended the INS make a new source selection decision based on a reevaluation of the technical and price proposals consistent with the solicitation's evaluation criteria.[720]

In *Simplicity Corporation*,[721] a second case involving the scope of FSS contracts, the GAO sustained a protest for reasons similar to those outlined in *Omniplex*. The Office of Personnel Management (OPM), however, declined to follow the GAO's recommendation to reevaluate proposals and make a new source selection decision based on the solicitation's evaluation criteria.[722] Originally, the GAO sustained the protest because the OPM used "the FSS ordering procedures to order services that are not contained on the vendor's schedule contract."[723] Specifically, the GAO found the OPM had failed to determine whether the quoted employment information services, labor categories, or other direct costs were within the scope of the vendor's FSS contract.[724] On the day after the GAO sustained the original protest, the awardee modified its FSS contract to include the two previously omitted labor categories and the OPM requested the GAO reconsider its earlier ruling.[725]

Although the OPM corrected the labor category issue, the GAO denied the reconsideration request because the OPM did not assert that it performed an analysis to determine whether the awardee's services were included in the FSS contract.[726] The OPM failed to recognize that by permitting the awardee to correct a deficiency, it allowed the vendor to make an unacceptable quote acceptable and therefore did not "treat competing vendors comparably."[727] Clearly, the lesson learned from the *Omniplex* and both *Simplicity* protests is that the first step when evaluating FSS vendor proposals is to review the vendor's proposed products or services to ensure they are included within that vendor's FSS contract.

I Thought You Knew!

In *Garner Multimedia, Inc.*,[728] the GAO sustained a protest because the Army failed to "include any guidance concerning the content of the technical proposal or list any evaluation criteria."[729] The agency had issued an RFQ to FSS vendors to provide internet based programs and support services for active duty, reservists, and their family members.[730] The six-page SOW contained program background information, objectives, and project tasks for the main task areas and required a detailed action plan within ten working days of receiving an order.[731] The RFQ required vendors to submit price and technical proposals in accordance with the SOW.[732] Although the RFQ stated award would be based on the technical proposal meeting the government's minimum needs at the lowest overall price, it

716. *Id*. at 4.

717. *Id*. B&W planned to perform some of the services and planned for a subcontractor to perform other services. The GAO acknowledged B&W's authority to use subcontractors for services included within the FSS contract but, like B&W, the subcontractor services offered must be on the FSS contract. *Id*. at 5.

718. *Id*. at 6.

719. *Id*. at 4-5.

720. *Id*. at 10. The GAO also sustained Omniplex's argument that B&W's proposal failed to meet the RFP's technical requirements and failed to include sufficient information for the agency to conduct a price reasonableness and realism analysis. *Id*.

721. Comp. Gen. B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 [hereinafter *Simplicity I*].

722. Comp. Gen. B-291902.2, May 19, 2004 (on file with author) [hereinafter *Simplicity II*].

723. *Simplicity I*, 2003 CPD ¶ 89, at 5. The GAO also found the OPM did not reasonably evaluate proposed system integration costs. *Id*. at 6.

724. *Id*. at 5. The awardee's FSS contract excluded two labor categories proposed for the OPM contract. *Id*.

725. *Simplicity II*, Comp. Gen. B-291902.2, at 2.

726. *Id*. The GAO recommended the agency perform the analysis as originally recommended, reopen discussions, and reevaluate revised quotations. *Id.*

727. *Id*. at 3.

728. Com. Gen. B-291651, Feb. 11, 2003, 2003 CPD ¶ 35.

729. *Id*. at 2.

730. *Id*. at 1. This program, the "Salute Our Services" pilot program, included the following main tasks: (1) the development and implementation of an interactive ".com website;" (2) the development of a mentoring program; (3) the development of an outreach partnership program with private sector corporations and businesses; and (4) the development and implementation of appropriate training to facilitate the use of the website by family and loved ones. *Id*.

failed to outline the content of the technical proposal or evaluation criteria.[733]

The Army received two quotations, one from Garner Multimedia, Inc. (Garner) and one from a higher priced vendor, Mountain Top Technologies, Inc (Mountain Top).[734] The Army awarded to Mountain Top based on the technical proposal's details, which included diagrams of the servers' technological aspects.[735] Garner submitted a thirty-six page proposal, but the Army alleged the proposal "simply restated" the SOW tasks and failed to include corroborating data or descriptions.[736] Garner protested the decision, arguing the RFQ failed to include the content requirements for the technical proposal.[737] In addition, Garner argued its technical proposal addressed the SOW and detailed the tasks, personnel, management skills, and corporate experience required to perform the contract.[738] The GAO agreed with Garner.

Because the Army used negotiated procurement procedures for the FSS competition, the GAO first reviewed whether the agency's evaluation was "fair, reasonable and consistent with the terms of the solicitation."[739] The GAO concluded the Army's RFQ failed to provide any detail of the technical proposal requirements or the basis for evaluating the proposals. Therefore, the Army failed to provide enough information to achieve a fair and intelligent competition.[740] The agency's argument that Garner's proposal simply restated the six-page SOW lacked credibility, particularly considering Garner's proposal contained thirty-six pages of "clearly more than a repetition of the . . . SOW."[741] The GAO concluded, "any doubt regarding the acceptability of a vendor's technical proposal should be resolved in favor of the vendor." Thus, the GAO sustained Garner's protest and recommended that the agency amend the RFQ and obtain revised quotes.[742]

Oh Those FSS/MAS Disputes—Who Should Decide?

Effective 29 July 2002, the FAR Councils amended FAR section 8.405-7 authorizing ordering contracting officers to issue final decisions in performance disputes under multiple award schedule (MAS) contract delivery orders. Disputes relating to the terms and conditions of schedule contracts must still be referred to the schedule contracting office for resolution.[743] Moreover, the change does not extend to MAS delivery order default determinations.[744] This past year, the FAR Councils issued a proposed rule to amend FAR section 8.405-5, Termination for Default, to authorize ordering contracting officers

731. *Id*. at 2.

732. *Id*. at 3.

733. *Id*.

734. *Id*.

735. *Id*.

736. *Id*. The agency alleged Garner failed to submit any corroborating data or a description of task performance. The agency also claimed Garner excluded the type of technology the company would use and therefore found Garner technically incapable of performing the contract. *Id*.

737. *Id*. at 2.

738. *Id*.

739. *Id*. at 3.

740. *Id*. The GAO required the Army to show the agency informed the vendors of the RFQ's essential requirements to ensure a fair and intelligent competition. The only guidance provided required the technical proposal "to be in accordance with the SOW." *Id*.

741. *Id*.

742. *Id.* at 4.

743. Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items, 67 Fed. Reg. 43,514 (June 27, 2002) (codified at 48 C.F.R. pts. 8 and 51).

744. In *United Partition Sys., Inc.*, the ASBCA acknowledged the confusion regarding who has the authority—the ordering contracting officer or the GSA schedule contracting officer—to decide disputes and terminate for cause delivery orders under a GSA FSS/MAS. ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264. The Air Force contracting officer terminated a delivery order for default and notified the contractor of the right to appeal to the ASBCA or the COFC, despite the FSS dispute clause language, which granted only the GSA contracting officer the authority to decide the contractor's allegations of excusable delay. *Id*. at 159,594-95. The ASBCA reviewed the applicable contract clauses and FAR regulations. They concluded the GSA contract default provision and the FAR termination provision required the Air Force contracting officer to refer the contractor's excusable delay claim to the GSA schedule contracting officer. *Id*. at 159,596-97. While the ASBCA mentioned the proposed rule to amend FAR sec. 8.405-5, Termination for Default, because the GSA contract and regulations required the Air Force contracting officer to refer the performance dispute to GSA's schedule contracting officer, the board dismissed the claim without prejudice for lack of jurisdiction. *Id*. at 159,597. For additional discussion of the jurisdictional matters in *United Partition Systems, Inc.*, see *infra* at Section III.H Contract Disputes Act (CDA) Litigation.

to terminate for cause and to simply notify the schedule contracting officer of the determination.[745] Such terminations for cause must comply with FAR section 12.403, Terminations.[746] The proposed rule considers contractor allegations of excusable failure as a contract dispute under FAR section 8.405-7.[747]

You Mean the Rules Apply to Services, Too?

The FAR Councils issued a proposed rule to amend the FAR to improve the application of the FSS rules for the acquisition of services.[748] Currently, the schedules focus primarily on the acquisition of products, but with the increased acquisition of services, "agencies have been inconsistent in adhering to certain basic acquisition requirements when buying services off the Multiple Award Schedules."[749] The proposed rules will add coverage on the use of SOWs when acquiring services from the schedules.[750] Also, the Councils proposed the following: (1) clarify and strengthen the procedures establishing BPAs against the schedules;[751] (2) reinforce general and sole source documentation requirements;[752] (3) highlight the availability of e-Buy;[753] (4) authorize all means of payment for oral or written orders;[754] (5) clarify the procedures for termination for cause and convenience;[755] and (6) reorganize the subpart text for easy use.[756]

Pay Less

The GSA issued a final rule granting GSA's FSS the unilateral right to change the Industrial Funding Fee (IFF) percentage rate in MAS contracts.[757] This rule amends the GSA Acquisition Regulation but does not specify the IFF percentage rate which the FSS will post on a website.[758] The IFF rate through December 2003 is 1% of reported sales.[759] The rate will decrease to 0.75%, effective 1 January 2004.[760] Future changes to the IFF will require the Federal Supply Service to first consult with the OMB.[761]

Major Bobbi Davis.

Electronic Commerce

Substance Rules

In *Tishman Construction Co.*,[762] the GAO found the agency unreasonably rejected protestor's paper proposal as late when the agency received a timely electronic version of the proposal.[763] The HHS RFP required offerors to submit an electronic and a paper version of their proposals.[764] The RFP designated the paper proposal as "the official copy for recording timely receipt . . . ."[765] Tishman Construction Co. submitted a timely electronic proposal but failed to submit a paper copy

745. Federal Acquisition Regulation; Federal Supply Schedules Services and Blanket Purchase Agreements (BPAs), 68 Fed. Reg. 19,294 (Apr. 18, 2003) (to be codified at 48 C.F.R pts. 8 and 48).

746. *Id*.

747. *Id*.

748. 68 Fed. Reg. at 19,294. The FAR Councils considered the findings and recommendations of a GAO report that assessed whether contracting officers follow established procedures to ensure fair and reasonable prices and whether guidance and regulations regarding purchases under the FSS are adequate. *Id*.; *see also* GEN. ACCT. OFF., REP. NO. GAO-01-125, *Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule* (Nov. 2000).

749. 68 Fed. Reg. at 19,294.

750. *Id*.

751. *Id*. at 19,296.

752. *Id*. at 19,297.

753. *Id*. at 19,295. GSA's electronic quote system is "e-Buy." The goal is to encourage transparency through electronic means. *Id.*

754. *Id*. at 19,297.

755. *Id*. at 19,298.

756. *Id*. at 19,294.

757. General Services Administration Acquisition Regulation; Consolidation of Industrial Funding Fee and Sales Reporting clauses; Reduction in Amount of Industrial Funding Fee, 68 Fed. Reg. 41,286, (July 11, 2003) (codified at 48 C.F.R. pts. 501, 538, and 552). The final rule limits the right to change the percentage fee to no more than once per year. *Id*. at 41,289. The final rule also consolidates the IFF and the Contractor's Report of Sales clauses to eliminate duplication, clarify sales reporting procedures, and describe procedures to implement the fee change. The new clause is entitled Industrial Funding Fee and Sales Reporting. *Id*. at 41,286. A notice of the current IFF is available at http://72a.fss.gov/. *Id*. at 41,289.

758. *Id*. at 41,286.

759. *Id*.

by the deadline.[766] The HHS rejected Tishman's proposal as untimely and Tishman protested.[767] Tishman conceded its paper proposal failed to meet the established deadline.[768] Because the HHS received a timely and identical electronic proposal, Tishman argued the HHS should waive the late paper proposal as a minor informality.[769] The GAO agreed and sustained the protest.

The GAO first reviewed the rationale for the late proposal rule and explained the "rule alleviates confusion, ensures equal treatment of offerors, and prevents" an unfair competitive advantage.[770] Next, the GAO reviewed *Abt Associates, Inc.* (*Abt*), where it ruled the agency "should not have . . . rejected" the protestor's proposal as late.[771] In *Abt*, the RFP required offerors to submit proposals at two alternate locations, but the protestor only timely filed a proposal at one location.[772] The GAO concluded that the agency should have waived the failure as a minor informality reasoning "Abt had not obtained an unfair competitive advantage by its failure to timely deliver its proposal at the second location."[773] Based on the rationale for the late proposal rule and the holding in *Abt*, the GAO concluded Tishman's failure to deliver a paper proposal was a minor informality.[774]

Unable to convince the GAO that the failure was more than a "minor informality," the HHS argued the contracting officer has discretion to decide whether to waive the failure as a minor informality.[775] The GAO agreed but added that the "CO's decision must have a reasonable basis."[776] Here, the HHS failed to identify a reasonable basis for the refusal to waive the late delivery of the paper proposal. Additionally, the agency failed to identify a reasonable basis for declining to waive what the GAO characterized as "this minor immaterial deviation from the solicitation requirements."[777] Therefore, the GAO sustained Tishman's protest and required the HHS to waive the late delivery of Tishman's paper version.[778]

---

760. *Id*.

761. *Id*.

762. Comp. Gen. B-292097, May 29, 2003, 2003 CPD ¶ 94. The GAO denied several electronic bid-proposal protests this year. *See* Integrated Bus. Solutions, Inc., Comp. Gen. B-292239, July 9, 2003, 2003 CPD ¶ 122; GROH GmbH, Comp. Gen. B-291980, Mar. 26, 2003, 2003 CPD ¶ 53; USA Info. Sys., Inc., Comp. Gen. B-29188, Dec. 2, 2002, 2002 CPD ¶ 205; Sea Box, Inc., Comp.Gen. B-291056, Oct. 31, 2002, 2002 CPD ¶ 181; PMTech, Inc., Comp. Gen. B-291082, Oct. 11, 2002, 2002 CPD ¶ 172. The COFC agreed with the GAO's denial of an electronic bid protest in Razorcom Teleph & Net, LLC, 56 Fed. Cl. 140 (2003).

763. *Tishman*, 2003 CPD ¶ 94, at 1.

764. *Id*. at 2. The HHS sought construction quality management services. *Id*. at 1.

765. *Id*. at 2.

766. *Id*.

767. *Id*.

768. *Id*.

769. *Id*.

770. *Id*. at 3 (referencing FAR subpt. 15.208).

771. *Id*. (citing Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513).

772. *Id*. (citing Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513).

773. *Id*. The HHS also argued the GAO's decision in *Inland Serv. Corp., Inc.*, Comp. Gen. B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 superseded the decision in *Abt* and "'refined' [the] explication of the policy behind the late proposal rule . . . to include the avoidance of confusion and unequal treatment of offerors as policy reasons underlying the late proposal rule." *Id*. The GAO disagreed pointing out the protestor in *Inland* failed to provide a complete copy of its proposal to any location by the established time. *Id.*

774. *Id*.

775. *Id*. at 4.

776. *Id*.

777. *Id*.

778. *Id*. The GAO also recommended the HHS reimburse Tishman for the cost of filing and pursuing the protest. *Id*.

Proposed, Interim or Finalized Rules

This past year, the FAR Councils finalized several electronic commerce (e-commerce) rules amending the FAR. On 22 May 2003, the Councils advanced the government's participation in e-commerce by authorizing agency acceptance of electronic signatures and records in connection with government contracts.[779] On 24 July 2003, the Councils eliminated the requirement to manually collect contractor data using the Standard Form 129, Solicitation Mailing List Application.[780] The goal is to "broaden the use and reliance on e-business applications."[781] Other vehicles such as the Central Contractor Registration (CCR) System and the interested vendor's list on FedBizOpps.gov provide contracting offices with the ability to develop and maintain contractor sources.[782] The requirement for contractors to register in the CCR database will facilitate this process. Effective 1 October 2003, contractors must register in the CCR database before receiving a contract, basic agreement, basic ordering agreement or blanket purchase agreement.[783] Also, on 1 October 2003, the Councils issued a final rule designating FedBizOpps as the single government-wide point of entry (GPE), replacing the Commerce Business Daily.[784] The rule also established the GPE as "the exclusive official source for public access to notices of procurement actions over $25,000."[785]

The FAR Councils also issued a final rule for an on-line directory of multiple-use agency contracts.[786] Under the rule, contracting activities must "input information in an online contract directory for government-wide acquisition contracts (GWACs), multi-agency contracts, federal supply schedule contracts, and other procurement instruments intended for multiple agency use including blanket purchase agreements (BPAs) under federal supply schedule contracts."[787] The directory provides easy access to information, supports informed acquisition planning and market research, and furthers the administration's efforts to create efficient, effective, and citizen-centric government.[788] By 31 October 2003, all existing contracts or other procurement instruments intended for use by multiple agencies must be in the data base, except for those expiring on or before 1 June 2004.[789]

The DOD issued an interim rule that requires contractors "to submit, and DOD to process, payment requests in electronic form."[790] There are six exceptions to the electronic submission

779. Federal Acquisition Regulation; Electronic Signatures, 68 Fed. Reg. 28,093 (May 22, 2003) (codified at 48 C.F.R. pt. 4). The rule became effective 23 June 2003. *Id*.

780. Federal Acquisition Regulation; Elimination of the Standard Form 129, Solicitation Mailing List Application, 68 Fed. Reg. 43,855 (July 24, 2003) (codified at 48 C.F.R. pts. 1, 5, 14, 19, 22, 36, 52, and 53). The rule became effective on 25 August 2003. *Id*.

781. *Id*.

782. *Id*.; *Federal Business Opportunities*, *supra* note 225.

783. Federal Acquisition Regulation; Central Contractor Registration, 68 Fed. Reg. 56,669 (Oct. 1, 2003) (codified at 48 C.F.R. pts. 1, 2, 4, 13, 32, and 52). The rule also requires "contracting officers to modify contracts whose period of performance extends beyond December 31, 2003, to require contractors to register in the CCR by December 31, 2003." *Id*. at 56,673. In addition, the rule revised the Simplified Acquisition Procedures source list of supplies. *Id*.

784. Federal Acquisition Regulation; Electronic Commerce in Federal Procurement, 68 Fed. Reg. 56,676 (Oct. 1, 2003) (codified at 48 C.F.R. pts 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 19, 22, 25, 34, 35, and 36). The final rule implements the National Defense Authorization Act for FY 1998, Pub. L. No. 105-85, 111 Stat. 1847 (1997) and the Floyd D. Spence National Defense Authorization Act for FY 2001, Pub. L. No. 106-398, 111 Stat. 1654A-209 (2000). Additionally, the GSA issued a proposed rule to charge members of the public who register to receive e-mail notices from selected organizations and product service classifications or who register to receive e-mail notices of all procurement notices on the site. The GSA planned to charge $30 per year for the service effective 1 October 2003. General Services Administration Acquisition Regulation; FedBizOpps Notice on Charging for E-mail Notification Service, 68 Fed. Reg. 1,358 (Jan. 9, 2003) (to be codified at 48 C.F.R. pt. 505).

785. 68 Fed. Reg. at 56,676.

786. Federal Acquisition Regulation; Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency, 68 Fed. Reg. 43,859 (July 24, 2003) (to be codified at 48 C.F.R. pts. 5, 7, and 10).

787. *Id*. The on-line directory is located at http://www.contractdirectory.gov. *Id*.; *see* Interagency Contract Directory, *available at* http://www.contractdirectory.gov (last visited Jan. 21, 2004) ("This site is a searchable directory of government wide acquisition contracts (GWACs), multi-agency contracts, Federal Supply Schedule contracts, or any other procurement instrument intended for use by multiple agencies, including Blanket Purchase Agreements (BPAs) against Federal Supply Schedule contracts.").

788. 68 Fed. Reg. 43,859.

789. *Id*.

790. Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 8,450 (Feb. 21, 2003) (to be codified at 48 C.F.R. pts. 232 and 252). Electronic form is defined as "any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail and scanned documents are not acceptable electronic forms." *Id*. at 8455. The rule also requires the DOD to transmit electronically within the DOD "any supporting documentation necessary for payment, such as receiving reports, contracts, contract modifications and required certifications." *Id*.

requirement[791] and four authorized electronic form submissions.[792]

GSA Update

The GSA also issued e-commerce rules this past year. In coordination with the OMB, the GSA issued a draft electronic authentication (e-authentication) policy, seeking comments to ensure trustworthy electronic transactions and compliance with privacy and security requirements.[793] E-authentication is the process of authenticating the identity of users who transmit sensitive personal or financial information.[794] The GSA policy proposes four security or assurance levels that create "a Government-wide standard framework for determining what is required to access a particular Government transaction online."[795] Agencies must complete a risk assessment and make the results available.[796] The draft policy updates previously issued OMB guidance that required agencies to provide electronic filing options and electronic signature capabilities.[797]

The GSA's Integrated Acquisition Environment (IAE) Program Office also issued a notice and request for comments regarding a pilot program to make federal contracts available on-line.[798] The program seeks to increase transparency in acquisitions and foster a "citizen-centric E-Government" by

---

791. Contractors are not required to submit payment in electronic form if the following criteria apply:

> (1) purchases are paid for with a Government-wide commercial purchase card;
> (2) awards are made to foreign vendors for work performed outside the United States;
> (3) . . . electronic . . . processing . . . could compromise the safeguarding of classified information or national security classified contract or purchases;
> (4) the contracts are awarded by deployed contracting offices officers in military operations . . , or contracts awarded by contracting officers in emergency operations, such as natural disasters or national or civil emergencies;
> (5) the purchases are to support unusual or compelling needs described in FAR 6.302-2, Unusual and compelling urgency; and
> (6) the contractor is unable to transmit, or DOD is unable to receive, a payment in electronic form and the contracting officer, the payment office and the contractor mutually agree to an alternative method.

Id.

792. The acceptable forms of transmission include the following:

> (1) Wide Area WorkFlow-Receipt and Acceptance available at https://rmb.ogden.disa.mil;
> (2) Web Invoicing System available at https://ecweb.dfas.mil;
> (3) American National Standards Institute available at http://www.X12.org (for information on EDI formats see http://www.dfas.mil/ecedi); or
> (4) an alternative electronic form if the contracting officer authorizes and the payment office and the contract administration office agree.

Id. at 8,455.

793. General Services Administration; E-Authentication Policy for Federal Agencies; Request for Comments, 69 Fed. Reg. 41,370 (July 11, 2003). "E-authentication is the process of establishing confidence in both identities and attributes after being electronically presented to an information system." *Id*. at 41,371.

794. *Id*. at 41,371. *See also* GEN ACCT. OFF., REP. NO. GAO-03-952, *Electronic Government: Planned e-Authentication Gateway Faces Formidable Development Challenges* 4 (Sept. 2003). Congress requested the GAO assess the progress and challenges of implementing the e-authentication initiative. The GAO concluded several challenges inhibit the ability to field a fully operational gateway by March 2004. The challenges include the following: establishing comprehensive policies and guidance; defining user authentication requirements; achieving interoperability among available authentication products; and fully addressing funding, security, and privacy issues. *Id*. at 2. The GAO also reviewed security challenges related to smart cards and the "challenges to successful adoption of smart cards throughout the federal government." GEN. ACCT. OFF., REP. NO. GAO-03-1108T, *Electronic Government: Challenges to the Adoption of Smart Card Technology* 1 (Sept. 2003).

795. 69 Fed. Reg. at 41,370. The four assurance levels represent ranges of confidence in an electronic identity. The levels are (1) minimal assurance, (2) low assurance, (3) substantial assurance, and (4) high assurance. The policy provides a description and examples to assist agencies in identifying what level of assurance is required to authorize a transaction. Each description has a risk profile that describes the consequential risks that may inure to participants when there is an authentication error. *Id*. at 41,372.

796. The policy outlines risk assessment completion dates according to categories. By 15 September 2004, agencies, with existing transactions or systems that require user authentication, must complete an e-authentication risk assessment and categorize the transaction or system into an assurance level. The policy establishes a timeline for agencies to complete the risk assessment. First, agencies with e-government initiatives that have already started the process outlined in the policy must complete the risk assessment by 1 October 2003. Second, agencies with systems classified as major have until 15 September 2004 to complete the risk assessment. Finally, new authentication solutions have within ninety days of the completion of the final e-authentication technical guidance to complete the risk assessment. *Id*. at 41,370. Agencies are required to publicize the results on an agency web site or in the *Federal Register*, or make the information available by other means such as by request. *Id*.

797. *Id*.; *see also* Memorandum, Office of Management and Budget, to Heads of Departments and Agencies, subject: OMB Procedures and Guidance on Implementing the Government Paperwork Elimination Act (25 Apr. 2000); Omnibus Consolidated and Emergency Supplemental Appropriations Act of FY of 1999, Pub. L. No. 105-277, § 1703, 112 Stat. 2681-749, § 1705, 112 Stat. 2681-750 (1999).

798. General Services Administration, Integrated Acquisition Environment Pilot; Posting Awarded Contracts on the Worldwide Web, 68 Fed. Reg. 33,950 (June 6, 2003). The IAE program office "is responsible for improving Federal acquisition processes through reliance on a technology- based integrated infrastructure." *Id*. at 33,951.

posting federal contracts on the worldwide web.[799] The program office requested comments to help identify implementing priorities, define the scope and availability of posted contracts, and develop posting guidance.[800]

The Electronic Government (E-Government) Act

On 17 December 2002, President Bush signed the E-Government Act of 2002 (E-Gov Act).[801] The E-Gov Act established a federal chief information officer (CIO) within the OMB to establish a framework to enhance e-government services and citizen access to internet-based information technology.[802] It further requires federal agencies to assist with the promotion of "an integrated Internet-based system of delivering Federal Government information and services to the public" through a federal internet portal.[803] The act also requires agencies to conduct a privacy impact assessment before "developing or procuring information technology that collects, maintains, or disseminates information" in an identifiable form or "initiating a new collection of information."[804] The OMB issued implementing guidance outlining the act's requirements on 1 August 2003.[805] The guidance highlights requirements for all agencies, CIOs, and the OMB,[806] and includes a table of requirements and completion dates.[807] On 26 September 2003, the OMB also issued guidance implementing the E-Gov Act's privacy provisions.[808]

DOD Supports Smart Buys

The DOD recently issued a memorandum to support the implementation of the government-wide SmartBUY initiative.[809] The memo establishes the DOD enterprise software initiative (ESI) team and outlines steps to ensure compliance with the SmartBUY program, such as acquiring commercial software from an exiting ESI agreement available on-line.[810] The memorandum reminds agencies that "all other commercial software acquisitions should be conducted as directed by DFARS subpart 208.74, Enterprise Software Agreements."[811]

Major Bobbi Davis.

---

799. *Id*.

800. *Id*. Specifically, the program office requested comments to the following questions:

> (1) Scope and availability. What parameters (factors) should guide the initial shape of the pilot (*e.g.*, size or type of contract's amount of competition sought; product or service purchased; awards related to specific Federal programs)? How long should contracts remain available after they have been posted?
>
> (2) Guidance. What, if any, type of guidance may be beneficial to ensure posting is consistent with applicable laws and regulations (*e.g.*, is there a need for guidance to address the redaction of proprietary information, the identification of contracts whose disclosure would compromise the national security, or the application of FOIA generally)?

Id.

801. Electronic Government Act, 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

802. *Id*.

803. *Id*. § 202.

804. *Id*. § 208.

805. Memorandum, Office of Management and Budget, to Department and Agency Heads, subject: Implementation Guidance for the E-Government Act of 2002 (1 Aug. 2003), *available at* http://www.whitehouse.gov/omb/memoranda/m03-18.pdf. To implement the President's goal of a citizen-centered government, agencies are expected to develop performance measures for e-government that are citizen and productivity-related, communicate policies within and across agencies through agency CIOs, and comply with section 508 of the Rehabilitation Act (29 U.S.C.S. § 794d (LEXIS 2003)).

806. Agencies must "make public regulatory dockets electronically accessible and searchable using Regulations.gov, . . . accept electronic submission online, conduct privacy impact assessments" and establish information technology training programs. *Id*.

807. *Id*. at attch. B.

808. Memorandum, Office of Management and Budget, to Heads of Executive Department, Agencies, subject: OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002 (26 Sept. 2003), *available at* http://www.whitehouse.gov/omb/memoranda/m03-22.pdf.

809. SmartBUY is a federal government-wide enterprise software-licensing project. Memorandum, Office of the Secretary of Defense, to Secretaries of the Military Departments et al., subject: Department of Defense (DOD) Support for SmartBUY Initiative (16 Sept. 2003), *available at* www.acq.osd.mil/dpap/policy/policydocs.htm [hereinafter DOD Support for SmartBuy Memo]. The GSA is the designated Executive Agent for negotiating government-wide enterprise licenses for software through the SmartBUY program. *See* Memorandum, Office of Management and Budget, to Heads of Departments and Agencies, subject: Reducing Cost and Improving Quality in Federal Purchases of Commercial Software (2 June 2003), *available at* http://www.whitehouse.gov/omb/memoranda/m03-14.html.

810. DOD Support for SmartBUY Memo, *supra* note 809; *see* Dep't of the Navy, *Enterprise Software Initiative*, *available at* http://www.doncio.navy.mil/(oha5nrjle2s4isutb42mat3r)/FolderDetail.aspx?ID=101(last visited Jan. 21, 2004).

Socio-Economic Policies

When Large Is Small

Large businesses receiving small business set-aside contracts was a big topic in 2003. In May, the GAO released a study concluding that "the predominant cause of misreporting of small business achievements is that federal regulations permit a company to be considered as a small business over the life of the contract – even if they have grown into a large business, merged with another company, or been acquired by a large business."[812] The GAO then noted that federal contracts could extend up to twenty years.[813]

To stop this trend and to increase the number of awards to genuinely small businesses, the SBA published a proposed rule that requires all awardees under the GSA's MAS Program to certify annually that the awardee remains a small business.[814] Awardees that fail to certify their small business size status will not receive additional option year awards or orders.[815] The SBA's proposed rule also requires procuring agencies to publish a list of re-certifications within ten days of receiving the re-certification and allow interested parties to challenge any certification.[816] If the re-certification is challenged, the SBA would then conduct a formal size-determination.[817] Comments to this proposed rule were due on 24 June 2003. Stay alert for future developments.

SBA Mentor Program

COMTek, a small business, learned that misrepresenting a teaming arrangement could cost a contract award. In *Integration Technologies Group, Inc.*, COMTek submitted a proposal to service computers and printers.[818] COMTek stated that it had a teaming arrangement with IBM for this contract. What COMTek did not explain was that it planned to subcontract more than fifty percent of the work to IBM and that it would finalize this arrangement after the contract award.[819] Integration Technologies Group (ITG) knew COMTek and IBM did not conclude a final teaming arrangement and protested immediately after the agency announced its intention to award to COMTek.[820] ITG challenged COMTek's representation that COMTek and IBM were team members.[821]

The GAO found that COMTek misrepresented IBM's status and that COMTek made a material misrepresentation in its proposal. The GAO sustained ITG's protest and directed the agency to re-open negotiations with all offerors in the competitive range. The GAO also stressed that the agency fully consider the availability of proposed subcontractors or team members.[822]

Poor, Poor Pitiful Me

The adage, "it's a cruel world out there" proves its timeless value in *Priority One Services, Inc - Costs*.[823] Priority One Ser-

---

811. DOD Support for SmartBUY Memo, *supra* note 809.

812. Gen. Acct. Off., Rep. No. GAO-03-740T, *Contract Management: Reporting of Small Business Contract Awards Does Not Reflect Current Business Size* (May 7, 2003).

813. *Id*. at introduction.

814. Size for Purposes of the Multiple Award Schedule and Other Multiple Award Contracts; Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 68 Fed. Reg. 20,350 (Apr. 25, 2003) (to be codified at 13 C.F.R. pts. 121, 124).

815. *Id*. CMS Info. Servs., Inc., Comp. Gen. B-290541.2, Nov. 13, 2002. In the protest arena, the GAO denied a request for reconsideration of its 7 August 2002 decision denying a protest challenging an agency's requirement that vendors certify their small business status every time a vendor submits a quotation. *Id*.; *see also Reconsideration: GAO Won't Reconsider Decision That Agency May Require Vendor to Recertify Size Status*, 78 BNA Fed. Cont. Rep. 20, at 613 (Nov. 26, 2002).

816. 68 Fed. Reg. at 20,350.

817. *Id.*

818. Comp. Gen. B-291657, Feb. 13, 2003, 2003 CPD ¶ 55, at 2.

819. *Id.* at 3. The solicitation included FAR 52.219-14(b)(1), which specifies that at least fifty percent of the cost of contract performance incurred for personnel must be expended for employees of the awardee. *See* FAR, *supra* note 30, at 52.219-14(b)(1).

820. ITG knew COMTek and IBM did not have a teaming arrangement because ITG was also negotiating a teaming arrangement with IBM. *Integration Techs. Group*, 2003 CPD ¶ 55, at 3.

821. In response to ITG's protest, COMTek acquiesced that it did not have an approved teaming arrangement with IBM when it submitted its proposal. COMTek, however, explained that it was arranging an acceptable teaming arrangement with IBM since receiving award. *Id.* at 5.

822. *Id.* at 6-7.

823. Comp. Gen., B-288836.5, Nov. 8, 2002, 2002 CPD ¶ 191.

vices, Inc. prevailed in a protest and was awarded costs (contract one). Subsequently, Priority One was awarded an unrelated contract (contract two). A disappointed offeror challenged Priority One's small business size status on contract two. The SBA determined that Priority One was not eligible for award of contract two because Priority One was not a small business. Priority One did not share this adverse-size determination with contract one's contracting office and continued to pursue its claim for costs. Somehow, the first contracting officer learned about this size determination and denied Priority One's claim for costs. Priority One pursued this denial with the GAO. In its decision, the GAO deferred to the SBA and reversed its finding in Priority One's protest of contract one. Acknowledging the SBA's determination, the GAO held that the protester was not a small business and therefore no longer an interested party entitled to costs.[824] After the dust settled, Priority One did not win either of these contracts and spent a great deal of money defending and pursuing protest actions.

SBA OHA Clarifies Mentor-Protégé Program Eligibility Rule

The SBA Office of Hearing and Appeals (OHA) clarified a misprint in the rules governing eligibility for SBA's Mentor-Protégé Program. Specifically, one rule restricted eligibility for the program only to small businesses[825] and two rules allowed large firms to participate as a mentor if the participating small firm qualifies as a small business in the procurement.[826] In *Size Appeal of Agbayani Construction Corporation*,[827] the SBA considered the inconsistency between these rules and looked to the draft legislation for elucidation. It discovered that the legislation's original draft language specified that only the protégé company had to qualify as a small business under the procurement and concluded that the change restricting the participation in the Mentor-Protégé Program to small businesses was inadvertently added during the printing of the statute.[828] The OHA allowed the joint venture between the large and small business to proceed under the Mentor-Protégé Program.[829]

Teaming Arrangements

An agreement between a small firm and a large firm to negotiate a teaming agreement does not constitute an affiliation. Effectively, this means that a small business does not lose its small business status simply because it has an arrangement to negotiate a teaming agreement. In *Size Appeal of PCCI, Inc*.,[830] PCCI protested an anticipated award to Pacific Shipyards Inc. (PSI) arguing that PSI, a self-certified small business, was ineligible for award because PSI exceeded the SBA's size standards. PCCI reasoned that because PSI had an agreement in principle to merge with a large business, PSI was affiliated with the large business.[831] The SBA denied PCCI's appeal explaining that PSI's agreement in principle to negotiate a merger with the large firm should not be given a present effect. Rather, it was merely an acknowledgement that the parties might engage in a future merger.[832]

Contract Bundling: Small Businesses Welcome?

Contract bundling continues to attract attention in business and political communities as the federal government tries to "strike a balance between encouraging contracting opportunities for small firms and promoting streamlined, high efficiency buying practices by federal agencies."[833] In October 2002, the OMB released a study reviewing the percentage of government contracts awarded to small businesses during the past ten

824. *Id.* at 4.

825. *See* 13 C.F.R. § 124.520(d)(1).

826. *See id*. §§121.103, 124.520(b).

827. No. SIZ-2003-01-13-04, 2003 SBA LEXIS 13 (Feb. 26, 2003).

828. *Id.* at *18.

829. *Id.* at *20.

830. *Size Appeal of PCCI, Inc*., 2003 SBA LEXIS 7 (Jan. 17, 2003); *see also Mere Agreement To Negotiate Merger Did Not "Affiliate" Small Business With Large Business, OHA Says*, 45 GOV'T CONTRACTOR 9, ¶ 105 (Mar. 5, 2003).

831. *PCCI*, 2003 SBA LEXIS 7, at *10. The SBA OHA explained when firms are affiliated and how to determine if an affiliation exists. It stated:

> Firms are affiliated when one firm controls or has the power to control the other. In determining whether affiliation exists, SBA may treat as one party two firms that have identical interests or substantially identical business or economic interests, such as firms that are economically dependent through contractual or other relationships.

Id.

832. *Id*. at *9-10.

833. *See Kerry, Wynn Reintroduce Bills Promoting Small Business; Contract Bundling Hearing Highlights Problems, Agency Inaction*, 45 GOV'T CONTRACTOR 12, ¶ 126 (Mar. 26, 2003).

years.[834] The OMB found that the number and size of bundled contracts reached record levels. In addition, the number of small businesses receiving government contracts has plummeted over the last ten years.[835]

On 20 October 2003, the FAR Councils amended the FAR to remedy the contract bundling shortcomings identified in the OMB study.[836] Significant changes include the following: a new definition of contract bundling; involvement of small business specialists in agency procurements; a revision of the threshold and documentation requirements for bundling activities; and a requirement for the Office of Small Business and Disadvantaged Utilization to conduct an annual review of agency records to ensure small businesses are receiving a fair share of government procurements.[837] Finally, it is important to highlight that contract bundling rules now expressly apply to orders placed against the FSS and another agency's government-wide acquisition contract.[838]

Caution: Bundling and OMB Circular A-76 Studies May Not Mix Well

The GAO held that the Army may not bundle different services into one *OMB Circular A-76* study even though conducting one large study and or administering one large contract is administratively convenient and consistent with the logistical, war-fighting mission of the Army.[839] In *EDP Enterprises Inc.*, the protester, a small business food service contractor, protested Fort Riley's decision to include its food services operation, previously a separate contract, in a large logistics study involving base, vehicle, and aviation maintenance.[840] The RFP required the prime contractor to perform at least fifty percent of the contract's work. Because the food service portion constituted fifteen percent of the overall work, the RFP precluded EDP Enterprises from competing because EDP Enterprises had to subcontract eighty-five percent of the work. The GAO held that the agency's decision to bundle the food service portion within the logistics *OMB Circular A-76* study violated the CICA's full and open competition requirement.[841] The GAO

---

834. Office of Management and Budget, *Contract Bundling: A Strategy for Increasing Federal Opportunities for Small Business* (Oct. 2002), *available at* http://www.acqnet.gov/Notes/contractbundlingreport.pdf.

835. *Id.* at 4. A comparison of contract actions between FY 1991 and FY 2001 revealed the following:

	FY 1991	FY 2001
New federal contracts awarded	86,243	86,243
Small business receiving federal contracts	26,506	11,651*
Expenditures under existing federal contracts	$21 billion	$72 billion

*FY 2000 figure

Id. The OMB study also highlights that "for every 100 bundled contracts, 106 individual contracts are no longer available to small businesses and that for every $100 awarded on a bundled contract, there is a $33 decrease to small businesses." *Id.* at 3.

836. Federal Acquisition Regulation; Contract Bundling, 68 Fed. Reg. 60,000 (Oct. 20, 2003) (codified at 48 C.F.R. pts. 2, 7, 10, 16, 19, and 42).

837. *Id.* at 60,004. The *Federal Register* notice summarized the changes as follows:

> The FAR changes will: (1) [c]larify the definition of "bundling" to indicate it applies to orders placed against Federal Supply Schedules and another agency's Government wide Acquisition Contracts or Multi-agency Contracts when those orders otherwise meet the parameters of the definition; (2) require the small business specialist to coordinate on agency acquisition strategies at specified dollar thresholds and notify the agency Office of Small and Disadvantaged Business Utilization when those strategies include contract bundling that is unnecessary, unjustified, or not identified as such by the agency; (3) reduce the threshold for "substantial bundling"; (4) revise the documentation requirements for substantial bundling to include identification of alternative acquisition strategies that would result in the bundling of fewer requirements, along with justification for not choosing those alternatives; (5) require contracting officers to provide bundling justification documentation to the agency Office of Small and Disadvantaged Business Utilization when substantial bundling is involved; (6) require contractor performance evaluations to include an assessment of contractor compliance with small business subcontracting goals; and (7) require the Office of Small and Disadvantaged Utilization to be responsible for conducting annual reviews to assess agency contract bundling requirements and the extent to which small businesses are receiving a fair share of Federal procurements.

Id.

838. *Id.* at 60,005.

839. EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93; *see also Food Services Improperly Bundled As "Logistics," Comp. Gen. Says*, 45 Gov't Contractor 21, ¶ 232 (June 4, 2003); *Contract Bundling: GAO Sustains Protest of Army Decision to Bundle Services at Ft. Riley*, 79 BNA Fed. Cont. Rep. 20, at 604 (May 20, 2003). For additional discussion of the *EDP Enterprises* decision, see *supra* Section II.B. Competition.

840. *EDP Enters.*, 2003 CPD ¶ 93, at 2.

reasoned the RFP restricted competition by excluding firms that could only perform a portion of the contract. Further, the agency could not justify bundling one procurement into all of the studied services.[842]

Case: GAO Finds Bundling Is Not Improper

In *USA Information Systems, Inc.*,[843] the GAO used a procurement's past to determine where to draw the bundling line. The protester challenged a RFQ for a web-based information retrieval system, claiming the Army improperly bundled four computer projects into one solicitation. The GAO found the procurement was not improperly bundled, in part, because the Army previously obtained these requirements through a single procurement.[844]

The GAO also determined the procurement did not violate the CICA's full and open competition requirement.[845] The agency explained that it needed to receive logistical and technical data for helicopters from one central location and that the dependable retrieval of this information was critical for the safety of the Army's soldiers. Assured that a single procurement was necessary to accomplish the agency's mission safely, the GAO denied the protest. The GAO explained that although the CICA permits restrictive specifications only to the extent necessary to satisfy the agency's needs, when it comes to national security or human safety, the government has discretion to acquire the most reliable and effective products available.[846]

HUBZone on the Hill

United States Senator Olympia J. Snowe led efforts to increase the funding for the SBA's Historically Underutilized Business Zone (HUBZone) program to $5 million.[847] Senator Snowe emphasized to congressional members that increased funding will enable the SBA to help HUBZone firms establish a non-governmental customer base; provide better outreach to additional firms and additional HUBZone communities; assist HUBZone firms in winning federal contracts; conduct critical program reviews and enforcement actions; and provide better training for federal agency acquisition professionals.[848]

Are Missing HUBZone Provisions Read In?

A case involving the Army COE at Fort Drum, New York is noteworthy.[849] In the case, the COE issued a RFP to build a road. The COE received and evaluated all proposals and awarded the contract to Delaney Construction Corp. (Delaney), which initially self-certified as a small business.[850] Tug Hill Construction Corp. (Tug Hill), a HUBZone contractor, protested the award, asserting that Delaney was not a small business and that the COE was required to increase Delaney's price by ten percent.[851] Tug Hill reasoned it was entitled to award because if Delaney's price had been adjusted as required, Tug Hill would be the lowest priced, technically acceptable offeror.[852]

Delaney conceded that it might not be a small business but still objected to Tug Hill's assertion that Delaney's price should

841. *Id.*

842. *Id.* at 4.

843. USA Info. Sys., Inc., B-291417, December 30, 2002, 2002 CPD ¶ 224; *see also Solicitation For Single Source, On-Line Information Retrieval System Did Not Violate The SBA's or CICA's Anti-Bundling Provisions*, 45 Gov't Contractor 3, ¶ 32 (Jan. 22, 2003). For additional discussion of the *USA Info. Sys.* decision, see *supra* Section II.B Competition.

844. *USA Info. Sys.*, 2002 CPD ¶ 224, at 3.

845. *Id.* at 4.

846. *Id.*

847. *HUBZone Firms Get A Helping Hand From Senator Snowe; GSA And DLA Increase Opportunities For Small Businesse*, 45 Gov't Contractor 17, ¶ 184 (Apr. 30, 2003). According to Senator Snowe (R-Maine), Chair of the Senate Committee on Small Business and Entrepreneurship, the HUBZone program is chronically under funded. "Although Congress has authorized $5 million to $10 million annually since FY 1998 for this program, actual annual funding has never exceeded $2 million." *Id.*

848. *Id.*

849. Delaney Constr., Corp., Tug Hill Constr., Inc. vs. United States, 56 Fed. Cl. 470 (2003); *see also HUBZone Price Preference Applies Despite Missing Contract Clause*, 45 Gov't Contractor 26, ¶ 288 (July 16, 2003).

850. *Delaney*, 56 Fed. Cl. at 472.

851. *Id.* Tug Hill based its argument on FAR 52.219-4 and its belief that Delaney was not a HUBZone small business or an otherwise successful small business offeror. *Id.* FAR 52.219-4 provides: "(b) Evaluation preference. (1) Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except- (i) Offers from HUBZone small business concerns that have not waived the evaluation preference; (ii) Otherwise successful offers from small business concerns." FAR, *supra* note 30, at 52.219-4.

be increased by ten percent.[853] Delaney argued that FAR section 52.219-4 was not included in the solicitation and should not be read into it. Delaney presented a two-fold argument. First, the absence of the HUBZone price evaluation preference clause in the RFP precluded the COE from using it.[854] Second, Tug Hill's argument that this evaluation preference clause should be read into the RFP was a pre-award matter and therefore, untimely.[855]

The COFC held that the HUBZone Act[856] provisions apply to all government procurements conducted on a full and open competition basis, regardless of whether FAR section 52.219-4 is specifically included in a solicitation.[857] Although not explicitly stated, the *Delaney* case appears to signal that the COFC will read HUBZone provisions into contracts even if they are not explicitly included in solicitations.

Certificate of Competency: Does the Size of the Competitive Field Affect the SBA's Role?

The GAO issued two opinions dealing with certificates of competency (COC) and nonresponsibility determinations this past year. In one case, the GAO sustained the protest finding that the SBA should have determined whether a COC was required. In a similar case, the GAO held that the SBA did not have to consider the matter. Did the size of the competitive field determine the outcomes in these cases?

In *Phil Howry Co.*,[858] the COE issued a RFP to construct a medical facility as a section 8(a) set-aside. Award would go to the company that offered the most advantageous proposal to the government. Past performance was one technical evaluation factor. Although Phil Howry Co. (PHC) was the only offeror, PHC did not receive the award because the COE rated PHC's past performance as "marginal/little confidence."[859] The COE found that PHC lacked adequate experience in projects of this size. PHC protested, claiming that the agency's rating constituted a de facto nonresponsibility determination. The GAO agreed and sustained the protest, explaining that the Small Business Act precludes agencies from finding a small business nonresponsible without first referring the matter to the SBA's COC program.[860] Noting that PHC's past performance was not compared to another offeror and was not graded on a sliding scale, the GAO concluded that this pass/fail methodology was an impermissible de-facto nonresponsibility determination. The GAO directed the COE to refer the matter to the SBA and to award the contract to PHC if the SBA issued PHC a COC.[861]

In *CMC & Maintenance Inc.*,[862] however, the GAO determined that the agency did not make a nonresponsibility determination even though the Air Force issued CMC & Maintenance Inc. (CMC) a "neutral/unknown confidence" past performance rating that effectively precluded CMC from winning the contract. Although CMC's proposal was the lowest priced offer submitted and forty-three percent cheaper than the government estimate, the Air Force awarded to a higher priced company with a better past performance record. The GAO found that a neutral past performance rating may be assigned when there is no record of relevant past performance and the agency cannot otherwise comment on a company's past performance. The GAO also noted that the RFP did not promise award to the lowest priced proposal, and held that the Air Force did not have to refer the matter to the SBA for a COC determination.[863]

Set Asides: Reasonableness Is a Two Way Street

Contracting officers should set aside contracts for small businesses when they reasonably believe that two small responsible businesses can perform the work at a fair market price.

852. *Delaney*, 56 Fed. Cl. at 472-73.

853. *Id.* at 473.

854. *Id.*

855. *Id.*

856. *See* 15 U.S.C.S. § 657a(b)(3)(A) (LEXIS 2003).

857. *Delaney*, 56 Fed. Cl. at 475.

858. Phil Howry Co., Comp. Gen., B-291402.3, Feb. 6, 2003, 2003 CPD ¶ 33; *see also Agency Past Performance Evaluation Trumped By SBA's COC Procedures*, 45 Gov't Contractor 6, ¶ 79 (Feb. 12, 2003).

859. *Howry*, 2003 CPD ¶ 33, at 2.

860. *Id*. at 6.

861. *Id*.

862. Comp. Gen. B-292081, May 19, 2003, 2003 CPD ¶ 107.

863. *Id.* at 4.

Failing to do so, risks protest, as one agency found out this past year.

In *Rochester Optical Manufacturing Co.*,[864] the Veterans' Administration (VA) issued a solicitation to acquire eyeglasses and fitting services on an unrestricted basis, because it did not expect to receive fair market price offers from at least two small businesses capable of performing the work.[865] The VA based this determination on the following three factors: (1) past small business offers were not the lowest priced offers received;[866] (2) the VA believed that eligible small businesses were not responsible;[867] and (3) the VA concluded that this acquisition should not be set aside because this acquisition was being awarded to one contractor, as opposed to four ID/IQ contracts under the prior procurement.[868]

The GAO sustained the protest, concluding that the VA did not reasonably determine if there was a likelihood of receiving fair market priced offers from at least two responsible small business concerns. Therefore, the GAO reasoned, this procurement could possibly be set aside. In reaching this conclusion, the GAO distinguished fair market price from lowest price and stated that the price of previous proposals was not a basis for concluding that small businesses were not responsible. In addition, the GAO noted that the agency previously determined these vendors were responsible before awarding the expiring ID/IQ contracts.[869] The GAO also explained that the VA's decision to switch from a few smaller ID/IQ contracts to one contract with a single vendor did not materially change the analysis to set aside this procurement.[870] Lastly, the GAO held that the contracting officer's market research was inadequate.[871]

Procuring agencies can cancel a solicitation if the proposed price is not reasonable. In *Nutech Laundry & Textiles, Inc.*,[872] the agency canceled its solicitation after the incumbent contractor, the only small business to submit a proposal, refused to lower its price which exceeded the government's estimate by fifty percent. Before canceling, the agency reopened discussions and advised Nutech Laundry & Textiles, Inc. (Nutech) that its price was "substantially excessive."[873] The agency also counseled Nutech that its proposed price was much higher than a similar contract Nutech had with the Navy in the immediate vicinity.[874] Instead of taking these subtle (or not so subtle) hints, Nutech continued to justify its price.[875] After the agency canceled the solicitation, Nutech appealed to the GAO seeking the contract award. The GAO concluded that the cancellation was reasonable, emphasizing that a determination of price reasonableness is a matter of agency discretion involving the reasonable exercise of business judgment.[876]

---

864. Rochester Optical Mfg. Co., B-292247; B-292247.2, 2003 U.S. Comp. Gen. LEXIS 116 (Aug. 6, 2003); *see also Improper Small Business Search Voids Unrestricted Solicitation*, 45 Gov't Contractor 30, ¶ 333 (Aug. 13, 2003)*; Small Business: GAO Finds VA Determination Not To Set Aside Procurement Was 'Seriously Flawed'*, 80 BNA Fed. Cont. Rep. 6, at 143 (Aug. 12, 2003).

865. *Rochester Optical*, 2003 U.S. Comp. Gen. LEXIS 116, at *8.

866. *Id.* at *9.

867. *Id.* at *10. The VA noted that under the current but expiring contract, one small business received a cure notice and a second small business subcontracted with a large business. *Id.*

868. *Id.* at *11.

869. *Id.* at *12.

870. *Id.*

871. *Id.* at *12-13. The GAO found that the contracting officer did not conduct an adequate geographic search and that the contracting officer incorrectly used $6 million dollars as the annual gross revenue receipts figure. *Id.*

872. Comp. Gen. B-291739, Feb. 10, 2003, 2003 CPD ¶ 34; *see also Similar Incumbent Contract Price Did Not Justify Finding That Proposed Price For Successor 8(a) Contract Was Fair and* Reasonable, 45 Gov't Contractor 6, ¶ 82 (Feb. 12, 2003).

873. *Nutech*, 2003 CPD ¶ 34, at 2.

874. *Id*. at 3.

875. *Id*.

876. *Id.* at 6.

Women Entrepreneurs: New Webpage to Increase Their Business Opportunities

The SBA launched a webpage to assist women-owned small businesses obtain more federal contracts. This webpage provides female small business owners with information that will help their businesses grow. Examples of available information include the following: access to capital; obtaining healthcare; learning about government procurement opportunities; obtaining retirement security; learning about technology issues; and participating in women entrepreneur events.[877]

It's My Rule Also —Oh Yea, Prove It!

Section 19.806 of the FAR requires the government to ensure that it does not pay more than the fair market value.[878] The provision, however, does not provide an 8(a) contractor with a basis for a claim, the COFC ruled in *D.V. Gonzalez Electric & General Contractors, Inc*.[879] D.V. Gonzalez Electric & General Contractors, Inc. (Gonzalez), an 8(a) contractor, submitted a certified claim for $478,677 alleging the government unlawfully forced it to reduce the price of its offer by that amount in order to make Gonzalez's offer conform to the government's independent estimate.[880] Gonzalez argued the government was required to conduct a pre-award audit and resolve any disparities between Gonzalez's price, the government's fair market price, and the independent government estimate (IGE).[881]

The COFC reviewed the legislative history of the regulations in question and concluded that the government was the intended and primary beneficiary of these two regulations.[882] Dismissing the lawsuit, the COFC emphasized that "if the primary intended beneficiary of a statue or regulation is the government, then a private party cannot complain about the government's failure to comply with that statute or regulation, even if that party derives some incidental benefit from compliance with it."[883] In this case, Gonzalez simply could not overcome the fact that the regulations at issue were designed to protect the government's interest by ensuring that the contracting officer does not pay more than a fair market price in a set aside acquisition.[884]

Post Adarand

Ever since the Supreme Court ruled that race based classifications must be analyzed using a strict scrutiny analysis, the business community has been challenging laws giving preference to minority owned businesses. As shown in the following two cases, 2003 was no different.

---

877. *See Women-Owned Small Businesses Get On-Line Help*, 45 GOV'T CONTRACTOR 10, ¶112 (Mar. 12, 2003); *see also* U.S. Dep't of Labor, *Women Entrepreneurship in the 21st Century, available at* http://www.women-21.gov/index2.asp (last visited Jan. 21, 2004) ("The U.S. Department of Labor and the U.S. Small Business Administration have partnered . . . [they] recently launched Women-21.gov, a premier one-stop federal resource for targeted information, registration for online programs, and networking opportunities to help women entrepreneurs navigate the ever-changing business world . . . .").

878. FAR, *supra* note 30, at 19.806. The provision, dealing with pricing of 8(a) contracts, states:

> (a) The contracting officer shall price the 8(a) contract in accordance with Subpart 15.4. If required by Subpart 15.4, the SBA shall obtain cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the reasonableness of the proposed price in a sole source acquisition, the contracting activity shall furnish it to the extent it is available.
> (b) An 8(a) contract, sole source or competitive, may not be awarded if the price of the contract results in a cost to the contracting agency which exceeds a fair market price.

Id.

879. 55 Fed. Cl. 447 (2003); *see also Small Business: COFC Finds Regs Intended to Benefit Government, Dismisses 8(a) Contractor's Breach Claim*, 79 BNA FED. CONT. REP. 14, at 431 (Apr. 8, 2003).

880. *Gonzalez*, 55 Fed. Cl. at 451. Gonzalez alleged the following:

> [1] the [Department of Veterans Affairs] relied upon an illegal price estimate and failed to follow applicable procurement regulations in negotiating reductions in the contract price; [2] the law required a cost plus fixed fee contract rather than a fixed price contract; or, [3] the Anti-Deficiency Act compelled the VA to force GEGC to reduce its contract price to stay within the appropriated funds.

Id.

881. *Id*. at 452. Gonzalez also argued that the VA failed to collaborate with the SBA and determine if the disparity between the IGE and Gonzalez's offered price required a revised IGE or is a legitimate differential which should be funded through the SBA business development account. *Id*.

882. *Id*. at 453; *see also* FAR, *supra* note 30, at 19.806; U.S. DEP'T OF VETERANS ADMIN., VETERANS ADMIN. ACQUISITION REG. § 819.806 (2002).

883. *Gonzalez*, 55 Fed. Cl. at 454.

884. *Id*. at 453.

Adarand *and Native American Procurement Programs*

Section 8014(3) of the FY 2000 DOD Appropriations Act created an outsourcing preference for firms in which Native Americans held a majority ownership interest.[885] The law prohibited the DOD from using appropriated funds to outsource any work previously performed by more than ten DOD employees unless the agency conducted a MEO study and sent to Congress a recommendation to outsource. As an exception, section 8014(3) allowed DOD agencies to avoid the MEO study and congressional reporting requirement if the agency contracted with firms that were majority owned by Native Americans.[886]

The Air Force used the preference to award a base services contract at Kirtland AFB, New Mexico, to a qualifying firm. After the Air Force awarded the contract, the plaintiffs filed a lawsuit claiming that the preference given to Native Americans violated the equal protection component of the due process clause and deprived them of an interest in federal employment.[887]

The Court of Appeals for the District of Columbia rejected the plaintiffs' argument. The court held that "Native American" was a political classification, not a race classification. As such, the proper constitutional standard to apply is the rational basis, not strict scrutiny. Denying the appeal, the court explained that the goal of "promoting economic development of federally recognized Indian tribes is rationally related to a legitimate purpose and is [therefore] constitutional."[888]

Post-Adarand *Challenge to Laws Favoring Minority and Woman-Owned Businesses*

In 1990, Denver's City Council passed an ordinance designed to increase the percentage of minority or woman owned businesses that participate in Denver's construction contracts. As per this ordinance, prime contractors and subcontractors that bid on city contracts were required to make a good faith effort to involve minority and woman owned businesses in the contracts. The ordinance prescribed goals, outlining the level of each group's participation.[889] The plaintiff challenged the ordinance's established participation goals for racial minorities and women as an unconstitutional violation of the Fourteenth Amendment's equal protection clause.[890] The plaintiff, a majority business owner who claimed he lost out on at least five contracts because of the law, argued that the statute should be subject to a strict scrutiny analysis and that it was not narrowly tailored to meet the government's compelling interest.

On appeal, the Tenth Circuit Court held that Denver "demonstrated a compelling interest in remediating racial discrimination in Denver's construction industry and an important governmental interest in remediating gender discrimination in that industry."[891] The court also concluded that Denver's affirmative action program is narrowly tailored. The court explained that Denver satisfied its burden because the city identified specific past or present discrimination and had ample evidence to support its conclusion that remedial action was necessary.[892]

Major Steven Patoir.

Foreign Purchases

The Trade Agreements Act and the Buy American Act

During the last two years, large portions of this section have addressed the Army's black-beret saga.[893] Fortunately, the beret incident has run its course. The headline news this year is a new DFARS rule authorizing a Trade Agreements Act (TAA)[894] exception to the Buy American Act (BAA).[895] In short, the new rule, which became effective 20 December 2002, helps U.S. manufacturers because it eliminates a competitive advantage that the TAA inadvertently gave to some foreign companies.[896]

885. *See* Pub. L. No. 106-259, 114 Stat. 656, 677 (2000).

886. Am. Fed'n of Gov't Employees (AFGE) v. United States, 330 F.3d 513 (D.C. Cir. 2003); *see also Affirmative Action: D.C. Courts Upholds DOD Native American Contracting Program Against Union Challenge*, 79 BNA Fed. Cont. Rep. 23, at 692 (June 10, 2003).

887. *AFGE*, 330 F.3d at 516. Plaintiffs in the case included the American Federation of Government Employees (AFL-CIO), an affiliated local union representing civilian DOD employees at Kirkland AFB, and two civilian DOD employees who were displaced when the Air Force outsourced the base services contract. *Id.*

888. *Id.* at 522-23.

889. Concrete Works of Colorado Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003); *see also Affirmative Action: Federal Appeals Court Upholds Denver's MBE and WBE Set*-Asides, 79 BNA Fed. Rep. 7, at 220 (Feb. 18, 2003).

890. *Concrete Works*, 321 F.3d 954. The U.S. Supreme Court denied a petition for writ of certiorari in *Concrete Works* on 17 November 2003. Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 2003 U.S. LEXIS 8457 (U.S. Nov. 17, 2003) (No. 02-1673).

891. *Id.* at 994.

892. *Id.* at 990. Denver proved the existence of racial discrimination with statistics showing the disparity between the number of qualified minority or women contractors and the number of these contractors employed by the city of Denver or Denver's contractors. *Id.*

893. *See 2002 Year in Review, supra* note 57, at 74-75; *2001 Year in Review, supra* note 635, at 76-77.

Prior to this new rule, foreign companies located in designated countries, the Caribbean Basin, or a North American Free Trade Agreement country were able to receive the fifty percent price evaluation preference given to "domestic end products" even though some of these "domestic end products" contained more than fifty percent of foreign components.[897] United States' manufacturers, subject to the BAA, could not receive this price evaluation preference.[898] The effect was that some foreign companies purchased inexpensive foreign components and used the TAA to avoid the BAA.[899] To remain competitive, U.S. manufacturers had to relocate their manufacturing facilities to a designated country, the Caribbean Basin, or a NAFTA country.[900] With the new DFARS rule, U.S. manufacturers can remain in the United States and contracting officers do not have to determine if a U.S.-made end product is also a domestic product.[901]

Major Steven Patoir.

Randolph-Sheppard Act

The RSA's Preference for the Blind Wields a Visible Presence

A contracting officer enjoys great latitude when determining price reasonableness and determining when to award a contract to an offeror who qualifies for the Randolph-Sheppard Act (RSA) preference. In *Cantu Services, Inc.*,[902] the GAO specified that a contracting officer's latitude in RSA awards should be at least as broad as the latitude contracting officers' exercise when deciding small business set aside issues.[903] Cantu Services, Inc. (Cantu) protested the Army's award of a food services contract to the South Carolina Commission for the Blind State Licensing Agency (SLA) arguing that the SLA should not have been included in the competitive range.[904] Cantu argued that the SLA's proposed cost exceeded Cantu's by sixteen percent or approximately $8.1 million.[905] The RFP, which contemplated a contract award using a best value evaluation, explained that technical factors were significantly more important than price. The GAO noted a number of key facts: the protester and the SLA were the only two entities that submitted proposals;[906] the SLA received a higher rating than the protester in the most important technical evaluation factor;[907] the SLA received substantially more excellent subfactor ratings than Cantu;[908] and, both proposals were lower than the independent government estimate.[909] The GAO then explained that where there are only

894. The Trade Agreements Act requires agencies to evaluate submissions from designated foreign countries, without the Buy American Act restrictions. *See* 19 U.S.C.S. §§ 2501 – 2581 (LEXIS 2003); *see also* FAR, *supra* note 30, subpt. 25.4.

895. The Buy American Act restricts the acquisition of supplies and construction materials to "domestic end products." *See* 41 U.S.C. §§ 10a-10d (2000); *see also* FAR, *supra* note 30, subpts. 25.1 and 25.2.

896. Defense Federal Acquisition Regulation Supplement; Trade Agreements Act – Exception for U.S. Made End Products, 67 Fed. Reg. 77,937 (Dec. 20, 2002) (codified at C.F.R. pts 225 and 252); *see also Regulations in Brief: Trade Agreements Act Exception to Buy American Act – DOD Final Rule*, 45 Gov't Contractor 1, ¶ 8 (Jan. 8, 2003) [hereinafter *Regulations in Brief*].

897. *Regulations in Brief*, *supra* note 896.

898. *Id*.

899. *Id*.

900. *Id*.

901. *Id*. Prior to the rule change, contracting personnel had to ascertain whether the cost of all domestic components exceeded the cost of all components by more than fifty percent. *Id*.

902. Comp. Gen. B-289666.2, B-289666.3, Nov. 1, 2002, 2002 CPD ¶ 189.

903. *Id*. at 4.

904. *Id*. at 1.

905. *Id*. at 3.

906. *Id*.

907. *Id*.

908. *Id*.

909. *Id*.

two technically acceptable proposals, the agency can keep both proposals in the competitive range.[910] After determining that the SLA should have been kept in the competitive range, the GAO stated that DOD regulations[911] required the Army to award to the SLA[912] and the GAO denied the protest.[913]

Major Steven Patoir.

Labor Standards

We Did Not Tell You to Do That

In *Engineering Services Unlimited, Inc*.,[914] the GAO denied a protestor's allegation that the National Aeronautics and Space Administration (NASA) improperly induced the protestor to increase its labor rates.[915] The agency issued a Request for Offers (RFO) for administrative support services.[916] Engineering Services Unlimited, Inc.'s (Engineering Services) initial proposal established a goal to hire ninety percent of the incumbent employees.[917] The competitive range included Engineering Services and four other offerors.[918] Prior to their discussions, NASA asked Engineering Services to explain how it planned to attract the incumbent's employees given a revised wage determination, the seniority of the incumbent staff, and Engineering Services' proposed labor rates.[919] When the SSA reopened discussions and requested revised proposals, the agency again questioned Engineering Services' labor rates.[920] The SSA pointed out the low labor rates in nine labor categories and asked how the contractor planned to mitigate performance risk if the low labor rates failed to obtain the incumbent workforce.[921] During the second round of discussions, Engineering Services responded by expressing a plan to hire 100% of the incumbent employees and raising labor rates for all labor categories.[922] Because the response did not answer the question, after the oral presentations, NASA again questioned Engineering Services' ability to meet the stated goal given the "materially lower" hourly wages for some labor categories.[923] The company president expressed a "pledge" to retain the incumbent workforce at or below the current rates but failed to provide any further explanation regarding the agency's concerns.[924] When NASA awarded the contract to a higher rated and lower priced contractor, Engineering Services protested alleging the agency "improperly induced it to raise its price."[925] The GAO disagreed and held that NASA did not coerce or mislead Engineering Services to raise its labor rates.[926] The agency expressed a legitimate concern regarding the inconsistency between Engineering Services' low rates and the proposal's stated goal to retain the entire incumbent work-

910. *Id*.

911. Department of Defense agencies are required to award food service contracts to blind vendors when a state licensing agency submits a proposal and falls within the competitive range. 32 C.F.R. § 260.3(g)(1)(ii) (2002).

912. The GAO also noted that in a best value analysis, a contracting officer has substantial discretion to determine when the value of a higher priced contract is worth the extra cost. *Cantu Servs., Inc.*, 2002 CPD ¶ 189, at 3.

913. *Id.* at 4.

914. Comp. Gen. B-291275; B291275.2, Dec. 17, 2002, 2003 CPD ¶ 15.

915. *Id*. at 7.

916. *Id*. at 1. The solicitation expressed the following three evaluation factors: "understanding the performance work statement (PWS) (also referred to as the baseline requirement), value characteristics, and price." The RFO stated award would be made based on best value "based on the agency's determination of the 'best combination of price and qualitative merit of the offers submitted.'" *Id*. at 2.

917. *Id*.

918. *Id.*

919. *Id*. The agency asked, "Given the revised [w]age determination . . . previously provided and the seniority level of the incumbent staff you anticipate retaining, are your proposal base labor rates sufficient to attract and retain those incumbent personnel?" *Id*.

920. *Id*. at 3. The evaluators' inability to agree on the evaluation of certain proposals required the SSA to reopen discussions. *Id*.

921. *Id*.

922. *Id*. Engineering Services felt that by hiring the entire incumbent workforce a "seamless transition" would mitigate any performance risk. *Id*.

923. *Id*. at 4.

924. *Id*.

925. *Id*. at 6. The awardee's labor rates averaged higher than Engineering Service's but Engineering Services' indirect cost and profit rates were higher. The awardee rated higher in program manager experience, program manager autonomy, contract phase-in experience, workforce management experience for over fifty employees, and demonstrated record of meeting financial obligations. Engineering Services' proposal exceeded the awardee's price by $167,806 on an $18 million dollar contract. *Id*. at 5.

force.[927] The GAO concluded that Engineering Services made a business decision to increase wages and the percentage of incumbent employees it intended to hire instead of providing "appropriate explanatory material in its final proposal revision to address NASA's concerns."[928] The GAO denied Engineering Services' protest concluding the agency did not act improperly.[929]

Another Executive Order Upheld

Last year's *Year in Review* reported on a case that upheld the constitutionality of Executive Order (EO) 13,202, which prohibited the required use of project labor agreements on a federal or federally funded construction project.[930] This year, in *UAW-Labor Employment and Training Corp. v. Secretary of Labor*,[931] the U.S. Court of Appeals for the District of Columbia (D.C. Court of Appeals) upheld an EO requiring contractors to post notices informing employees of their right not to be forced to join a union or pay mandatory dues for costs unrelated to representational activities.[932] Executive Order 13,201 applies to all government contracts exceeding $100,000 and stipulates contractors must require subcontractors to post the notices.[933] The UAW-Labor Employment and Training Corporation and three other unions (Unions) sued in district court arguing the National Labor Relations Act (NLRA)[934] preempted the EO.[935] Additionally, the Unions argued that the President had no authority to issue the EO under the Federal Property and Administrative Services Act of 1949 (Procurement Act).[936] The district court issued a permanent injunction barring enforcement of the EO.[937] The D.C. Court of Appeals, however, reversed and remanded the case, directing the lower court to grant summary judgment for the government.[938]

The D.C. Court of Appeals framed the issue as whether the EO was preempted under the *Garmon* doctrine, which prohibits the federal executive from regulating activities that are protected or prohibited under the NLRA.[939] The court concluded the EO is not protected or prohibited under *Garmon*, and, therefore, the right of an employer not to notify employees of their rights is not protected by the NLRA.[940] Also, the court held that the EO sufficiently connected its requirements to the Procurement Act's purpose of providing an economic and efficient government procurement system.[941] Acknowledging an attenuated link, the D.C. Court of Appeals held the lenient standards provided a nexus and reversed the district court.[942]

926. *Id*. at 6.

927. *Id*.

928. *Id*. at 7.

929. Engineering Services also alleged the agency's negotiating techniques led to an improper auction and protested the agency's evaluation of the proposal. The GAO also denied these protest grounds. *Id*.

930. *2002 Year in Review*, *supra* note 57, at 79 (discussing Bldg. Constr. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d. 28 (2002)).

931. 325 F.3d 360 (2003).

932. *Id*. at 367.

933. *Id*. at 362.

934. *See* 29 U.S.C.S. § 151 (LEXIS 2003).

935. *UAW-Labor Employment and Training* Corp., 325 F.3d at 362.

936. *Id*.; *see also* 40 U.S.C.S. § 101.

937. *UAW-Labor Employment and Training* Corp., 325 F.3d at 362.

938. *Id*. at 367.

939. *Id*. 363. Federal labor law preemption falls within one of two categories—*Garmon* or *Machinists*—named after the cases articulating the theories. *Id*. at 263 (referencing Int'l Ass'n of Machinist & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)). The "*Garmon* preemption applies to regulation (usually by states) of activities that are arguably 'protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8.'" *Id*. (quoting *San Diego Bldg. Trades Council*). The "*Machinist* preemption applies when a state attempts to regulate an activity that, although not necessarily protected or prohibited by the NLRA, is an 'economic weapon' the exercise of which Congress intended to leave unrestricted." *Id*. (discussing *Int'l Ass'n of Machinist & Aerospace Workers*).

940. *Id*. at 366.

941. *Id*.

942. *Id*. at 367.

Service Contract Act

We Will Get Back to You . . . Just Not "Anytime in the Near Future"

The GAO dismissed a protest challenging the application of the Service Contract Act (SCA)[943] to a Defense Commissary Agency (DeCA) RFP for delicatessen and bakery operations at six military commissaries.[944] Prior to issuing the solicitation on 23 May 2002, the DeCA requested a Department of Labor (DOL) determination on SCA applicability to the contract.[945] The DOL replied that a final decision regarding SCA applicability would not be made "anytime in the near future."[946] As a result, the DeCA notified potential offerors that the SCA would apply to the contract and the protestors objected.[947]

Initially, the DeCA requested that the GAO dismiss the protest because the DOL had issued a wage determination for the same work under a 1996 contract.[948] The GAO declined the request because the DOL had not issued a wage determination for the current procurement. Thus, the DeCA submitted an amended SF 98 to the DOL, which issued a new wage determination. The DeCA renewed its dismissal request, arguing the DOL was the only proper authority before which one could protest a wage determination.[949]

The GAO agreed with the DeCA, stating the DOL is responsible for interpreting and administering the SCA.[950] If the agency determines the SCA may apply to a planned procurement, the agency must notify the "DOL of the agency's intent to make a service contract so that DOL can provide the appropriate wage determination."[951] The GAO, however, will not review an agency's decision to comply with the DOL unless the decision is "clearly contrary to law."[952] Here, although the DOL had "made no 'official' determination" of the SCA's applicability, the DOL had confirmed the agency's authority to apply the wage determination issued.[953] The GAO dismissed the protest concluding the DOL regulations provided the means for challenging wage determinations and the applicability of the SCA.[954] As the protestors here had not yet sought review under DOL's regulations, the GAO found it inappropriate to render an opinion regarding the applicability of the SCA.[955]

Major Bobbi Davis.

Bid Protests

Changes to GAO's Bid Protest Regulations in FY 2003

The GAO implemented many changes to the rules governing bid protests this past year.[956] Some of the significant changes include the following: protesters are now allowed to file their protests electronically;[957] the GAO will review, on a limited basis, SBA decisions to issue or not to issue a certificate of competency;[958] the GAO will examine, on a limited basis,

943. *See* 40 U.S.C.S. § 351 (LEXIS 2003).

944. Northeast Military Sales, Inc. et al., Comp. Gen. B-291384, Nov. 20, 2002, 2002 CPD ¶ 195.

945. *Id.* at 2. The agency submitted the SF 98, Notice of Intention to Make a Service Contact Act and Response to Notice, on 2 April. The DOL requested additional information and the agency provided the information in early July. Subsequently, the DOL visited a commissary to observe the deli and bakery operations. On 20 August, the DOL informed the agency that a determination would not be made in the near future. *Id.*

946. *Id.*

947. The protestors alleged the primary purpose of the contract "was 'the provision of food, not services.'" *Id.*

948. *Id.*

949. *Id.* at 2-3.

950. *Id.* at 3.

951. *Id.*

952. *Id.*

953. *Id.*

954. *Id.*

955. *Id.* at 4.

956. General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, Government Procurement, 67 Fed. Reg. 79,833, 79,836 (Dec. 31, 2002) (codified at 4 C.F.R. § 21).

957. 4 C.F.R. § 21.0(g) (2003). Electronic protests should be sent to Protests@gao.gov. Protesters will receive an automatic receipt at their email accounts. Included in this receipt will be a file number and the name of the GAO attorney assigned to the case. *See GAO to Accept E-Mail Bid Protests; Update Policies Concerning Other Deliveries*, 45 Gov't Contractor 5, ¶ 50 (Feb. 5 2003).

agency affirmative responsibility determinations;[959] the GAO will not consider suspension and debarment issues;[960] the GAO will not entertain challenges to an agency's decision to include or keep a protester's proposal in the competitive range;[961] and the GAO clarified that a party or the GAO, on its own initiative, may request alternative dispute resolution procedures.[962] The GAO also made clear that any case, not just protests, will be dismissed if the subject matter is presently before a court or has been decided by a court.[963] Lastly, when an agency takes corrective action, protesters now have fifteen days to file a claim for costs. The fifteen-day limitation begins on the date on which the protester learned, or should have learned, that the GAO closed the protest in response to the agency's corrective action.[964]

GAO Releases Revised Bid Protest Handbook

This past year, the GAO also updated and released the seventh edition of its bid protest guidebook entitled *Bid Protests at GAO: A Descriptive Guide*.[965] This guidebook is a remarkably helpful tool for bid-protest practitioners.

Deployments and Delays in Taking Corrective Action

In *J&J/BMAR Joint Venture, LLB--Costs*,[966] the GAO held that Fort Campbell's nine-month delay in implementing promised corrective action did not create a basis for reimbursing the protester its protests costs.[967] Previously, J&J/BMAR Joint Venture protested a *OMB Circular A-76* decision to keep the work in-house.[968] After receiving a copy of the protest, the Army promised to take corrective action.[969] Soon after making this promise, Fort Campbell began implementing its corrective action[970] but then stopped because the 101st Airborne Division deployed to Iraq.[971] This deployment impeded the Army's ability to quickly implement the promised corrective action.[972] After waiting nine months for the corrective action, the protester filed a claim seeking recovery of its protest costs.[973] In denying the protest, the GAO explained that the Army did not unduly delay taking corrective action. Here, the Army began taking corrective steps within one month of its promise and continued to make progress prior to the Iraqi conflict.[974]

958. 4 C.F.R. § 21.5(b)(2).

959. *Id*. § 21.5(c). For additional discussion of this rule change and initial GAO bid protests invoking this review, see *supra* Section II.G Contractor: Qualifications Responsibility.

960. 4 C.F.R. § 21(i).

961. *Id.* § 21.5(j).

962. *Id.* § 21.10(e). For additional discussion of this rule change, see *infra* Section IV.A Alternative Dispute Resolution.

963. *Id.* § 21.11.

964. *Id.* § 21.8(d)(2)(e).

965. Gen. Acct. Off., GAO-03-539SP, *Bid Protests at GAO: A Descriptive Guide* (2003), *available at* www.gao.gov (last visited Jan. 21, 2004).

966. Comp. Gen. B-290316.7, July 22, 2003, 2003 CPD ¶ 129.

967. *Id*. at 3; *see also Costs: GAO: Army's 9-Month Delay in Completing Corrective Action Following A-76 Protest Does Not Warrant Costs Where War in Iraq Interrupted Action*, 80 BNA Fed. Cont. Rep. 4, at 107 (July 29, 2003); *War Deployments Excused Agency's Nine Month Delay Implementing Corrective Action: Protest Costs Denied*, 45 Gov't Contractor 29, ¶ 320 (Aug. 6, 2003).

968. *J&J/BMAR*, 2003 CPD ¶ 129, at 2-3.

969. *Id.* at 2. Because the Army promised corrective action, the GAO dismissed the initial protest as academic. *Id.*

970. *Id*. Prior to the deployment, Fort Campbell took several corrective steps to include the following: convening a new source selection evaluation board; re-evaluating revisions to the technical performance plan; holding additional discussions; reconvening the source selection advisory council; and briefing the source selection authority on the technical performance plan. *Id.*

971. *Id.* at 3. Based at Fort Campbell, Kentucky, the 101st Airborne Division deployed to Iraq in support of Operation Iraqi Freedom. *Id.*

972. *Id*. at 2-3.

973. *Id*. at 2.

974. *Id*. at 2-3.

In *Al Ghanim Combined Group Co.*,[975] the COFC found the Army violated procurement regulations[976] when it awarded an ID/IQ contract to build military housing facilities in Kuwait during the prelude to the Iraq war.[977] Although agreeing with the protester, the COFC refused to grant the protester's request for an injunction to halt contract performance.[978] The COFC came to this unusual conclusion because the nation was at war and agreed with the Army that "even the slightest delay in contract performance would jeopardize [the Army's] combat readiness."[979] The COFC reasoned that the nation's national security interests were paramount here and outweighed the procurement process violation.[980]

This case is also noteworthy because the government did not include a statement from a military official attesting to the merits of the national security issue. In a footnote, the COFC said that this is the first time the government raised a national security issue and did not support the issue with a statement from a cognizant military official.[981] The court noted that "our government is fighting a war [and indulges the assumption that our nation] doesn't have time to execute declarations."[982]

Legal advisors can help avert litigation and adverse rulings by thoroughly reviewing the contract file and ensuring contracting officers have based their conclusions on existing credible evidence and justified their findings in writing. In *AAR Aircraft Services*,[983] the Comptroller General awarded the protestor the reasonable cost of filing and pursuing its protest because the U.S. Marshall Service did not conduct a reasonable inquiry into the merits of the protester's allegations.[984] The Comptroller General also determined that the agency's failure to investigate the protester's allegations caused the protester "to expend unnecessary time and resources" in pursuing its protest.[985] The GAO found that the agency ignored credible evidence and relied on statements produced after the protest was filed.[986] The reader is left wondering if the agency simply presumed no one would protest the award.

In *Martin Electronics, Inc.*,[987] the GAO also awarded protest costs.[988] Here, nine days after the GAO ordered a hearing, the Army cancelled an award and announced that it would amend the solicitation and re-evaluate proposals.[989] In response, Martin Electronics requested the Comptroller General award them the costs of pursuing the protest.[990] In granting the request, the GAO determined that the agency lacked contemporaneous evi-

975. 56 Fed. Cl. 502 (2003); *see also National Security Concerns Trump Valid Protest Against Improper Contract Award*, 45 Gov't Contractor 25, ¶ 274 (July 9, 2003).

976. *See* FAR, *supra* note 30, at 15.404-1. All offers with separately priced line items have to be checked for unbalanced pricing structures. *Id.*

977. *Al Ghanim*, 56 Fed. Cl. at 509. Here, the ID/IQ contract had fifty-nine separate contract line items. Despite FAR 15.404-1, the Army evaluated the contract's total price versus each of the fifty-nine line items separately. *Id.*

978. *Id*. at 522.

979. *Id.*

980. *Id.* at 521. In a separate case, the COFC again deferred to the military when the court refused to reverse the Air Force's decision to override an automatic stay issued pursuant to the CICA. Here, the Air Force determined that proceeding with contract performance for pilot training was essential to the nation's defense. SDS Int'l, Inc. v. U.S., 55 Fed. Cl. 363 (2003); *see also Nation's Defense Justified CICA Stay Override, COFC Says*, 45 Gov't Contractor 9, ¶ 104 (Mar. 5, 2003).

981. *Al Ghanim*, 56 Fed. Cl. at 522.

982. *Id.*

983. Comp. Gen. B-291670.6, May 12, 2003, 2003 CPD ¶ 100.

984. *Id*. at 6. The solicitation sought a fixed price contract for the lease and maintenance of six large jet aircraft for up to ten years. AAR Aircraft Servs. alleged the proposed awardee's offer did not comply with the all of the scenarios listed in the solicitation. In its opinion, the GAO noted that many of the agency's statements were prepared after filing the protest and that the agency offered to take corrective action by canceling the award and re-soliciting the contract after the GAO ordered a hearing and directed all parties to bring their consultants. *Id*.

985. *Id.* at 9

986. *Id.* at 3.

987. B-291732.2, 2003 U.S. Comp. Gen. LEXIS 67 (Apr. 22, 2003).

988. *Id*. at 14. Martin Electronics filed its initial protest on 2 December 2002. After each party submitted all required comments, the agency announced on 13 February 2003 that it would take corrective action. *Id*.

989. *Id.*

dence to support its decision[991] and that the agency did not reasonably inquire into the protest's merits.[992]

Attorney Fees: GAO Awards Fees In Excess of the Statutory Cap, Relies on Cost of Living Adjustment

Sodexho Management, Inc.,[993] marks the first time the Comptroller General used the cost of living index[994] to exceed the statutory cap of $150 per hour for attorney fees.[995] The protestor required extensive research and efforts to successfully protest an *OMB Circular A-76* study and the Navy's decision to continue performance of various community services in-house. After prevailing in its protest, Sodexho Management, Inc. (Sodexho) submitted a claim to the Navy requesting reimbursement for legal fees at $180 per hour.[996] The Navy refused to do so, citing the $150 statutory cap on legal fees.[997] Sodexho then proceeded to ask the Comptroller General for an upward adjustment of legal fees.[998] Sodexho used the high cost of living in Washington, D.C., the current market rate for experienced government procurement attorneys, and the DOL's consumer price index to support its argument.[999]

The Comptroller General agreed that the Navy lacked authority to make this decision, but noted the GAO had authority to review these matters on a case-by-case basis.[1000] In this case, the GAO determined that an upward adjustment based on the government's own consumer price index was reasonable. Sodexho was awarded $174 per hour for legal fees.[1001]

Government practitioners should anticipate many protesters citing this case as precedent for collecting fees in excess of $150 per hour. The point to remember is that only the Comptroller General has the authority to exceed this statutory cap on an individual basis. Agencies are still bound by the statutory cap in 31 U.S.C. § 3554(c)(2)(B).

Non-Bidder Has Standing to File Post-Award Protest

In *Razorcom Telephone & Net*, the COFC ruled the protestor had standing to file a post-award protest even though the firm did not submit a proposal.[1002] After email communications between the contracting officer and Razorcom Telephone & Net (Razorcom) ceased, the contracting officer used a mass

990. *Id.* at 2. Martin Electronics based this claim on the theory that the agency's voluntary corrective action proved that Martin's protest allegations were clearly meritorious and that the agency delayed in taking timely corrective action. *Id.*

991. *Id.* at 21. The Comptroller General wrote:

> [T]he Army provided written post-protest information that was inconsistent with and had little or no nexus to the contemporaneous record, yet opted to forgo the hearing which might have permitted it to prevail in the protest. That being the case, the record before us stands as inadequately documented and insufficiently supportive of the source selection decision.

Id.

992. *Id.* at 20.

993. Comp. Gen. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136; *see also Costs: GAO Awards FASA Attorneys' Fee COLA, But Sodexho Loses Other Protest Costs Issues*, 80 BNA Fed. Cont. Rep. 7, at 165 (Aug. 19, 2003).

994. *Sodexho*, 2003 CPD ¶ 136, at 38. The cost of living allowance is based on the consumer price index. *Id.*

995. 31 U.S.C. § 3554(c)(2)(B) (2000). The statute provides:

> Attorney fees are capped at $150 per hour unless the agency determines based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

Id.

996. *Sodexho*, 2003 CPD ¶ 136, at 38. *Cf.* TRS Research – Costs, B-290644.2, June 10, 2003, 2003 CPD ¶ 112 (denying attorney fees calculated at $425 per hour—the protester did not document and establish the reasonableness of the amount claimed; noting that the protester did not submit a bill or an equivalent document establishing the protester's obligation to pay or submit a survey of rates charged by local law firms).

997. *Sodexho*, 2003 CPD ¶ 136, at 38; *see also* SKJ & Assocs., Inc., Comp. Gen. B-291533.3, July 24, 2003, 2003 Comp. Gen. CPD ¶ 130 (reducing the protester's claim by ninety-three perecent because the claim included profit based on the wages earned by the protester's president and denying all costs associated with pursuing an agency level protest); *Successful Protester's Claimed Protest Costs Must Exclude Profit, GAO Rules*, 45 Gov't Contractor 29, ¶ 323 (Aug. 6, 2003).

998. *Sodexho*, 2003 CPD ¶ 136, at 39.

999. *Id.*

1000. *Id.*

1001. *Id.* at 43.

email list to advise potential offerors of two new due dates for proposals and a contract amendment.[1003] During the solicitation phase of a negotiated procurement for telecommunication services, Razorcom and the contracting officer maintained email contact with each other.[1004] At some point, for an unknown reason, Razorcom stopped receiving emails from the agency.[1005] Razorcom did not receive the email with the solicitation amendment.[1006] Two days after the final date for receipt of proposals passed, Razorcom contacted the agency and inquired about the amendment.[1007] The agency advised Razorcom that the solicitation was closed.[1008] Razorcom objected to its exclusion and filed a protest.

Razorcom argued it was prejudiced because the agency did not send it the solicitation amendment, as required.[1009] Without this amendment, Razorcom did not know when to submit its offer. The COFC agreed and held that Razorcom had "standing to claim that its inability to bid was due to the agency's failure to send it a copy of the amended solicitation."[1010]

Despite finding that Razorcom had standing to protest, the COFC, after considering the case's merits, denied Razorcom's request for a preliminary injunction to stop contract performance and dismissed the complaint.[1011] In dismissing the complaint, the court found the agency made a good faith effort to notify all interested parties of the amendment[1012] and that the government cannot be a "guarantor of [email] deliver[ies]."[1013]

COFC Adopts GAO Bid Protest Timeline and Finds Protest Untimely

When analyzing the timeliness of a bid protest filed with the COFC, *ABF Freight System Inc. v. United States* (*ABF Freight*)[1014] offers helpful precedent to practitioners. In *ABF Freight*, five companies filed protests challenging terms in the solicitation after the contract award.[1015] Although the timeliness of this protest may look like a simple matter, the COFC does not always adopt GAO bid protest timelines. Here, how-

1002. 56 Fed. Cl. 140 (2003); *see also Agency Satisfied FAR Notice Requirements Despite E-mail Glitches*, 45 Gov't Contractor 16, ¶ 179 (Apr. 23, 2003).

1003. *Razorcom*, 56 Fed. Cl. at 141.

1004. *Id*. at 140.

1005. *Id*. at 141.

1006. *Id.* at 143. Razorcom's email address appeared in an abbreviated format in the email address window. Although this address was remarkably similar to Razorcom's actual address, the government's computer specialist could not explain why the protester's email address was rendered ineffective by an unnecessary hyphen. *Id.*

1007. *Id*. at 141. The date for receipt of proposals was 22 October 2002. Razorcom approached the contracting officer about the amendment on 24 October 2003. *Id*.

1008. *Id*.

1009. *Id*. at 142. The FAR provides the following:

> In lieu of initially forwarding complete bid sets, the contracting officer may send presolicitation notices to concerns. The notice shall . . . [n]ormally not include drawings, plans, and specifications. The return date of the notice must be sufficiently in advance of the mailing date of the invitation for bids to permit an accurate estimate of the number of bid sets required. Bid sets shall be sent to concerns that request them in response to the notice.

FAR, *supra* note 30, at 14.205-1(c).

1010. *Compare Razorcom*, 56 Fed. Cl. at 142, *with* EADS N. Am., Inc., Comp. Gen. B-291805, Mar. 26, 2003, 2003 CPD ¶ 51 (dismissing a protest because the protester lacked standing). In *EADS*, the FY 2002 DOD Appropriations Act authorized the Air Force to lease two specific Boeing airplanes. Later, the FY 2003 DOD Appropriations Act stated that none of the mentioned FY 2002 funds could be used unless any resulting contract complied with the CICA. Although the protester admitted it could not provide the specified Boeing airplanes, it argued the 2003 legislation allowed companies to compete by offering equivalent aircraft. The GAO disagreed, ruling that a sole source contract can comply with the CICA. As a result, the GAO determined the protester was not an interested party because it did not offer the product specified in the solicitation and therefore lacked standing. *EADS N. Am., Inc*., 2003 CPD ¶ 51. For additional discussion of the *EADS N. Am., Inc.* decision, see *supra* Section II.B Competition.

1011. *Razorcom*, 56 Fed. Cl. at 143.

1012. *Id.* The court also observed that Razorcom did not take any initiative to protect its interests when it failed to contact the agency after 10 October 2002, the last official closing date that Razorcom knew of. In addition, the court noted public interest favored treating this case as a closed procurement. Specifically, the court commented that the agency received five bids and that Razorcom was unlikely to reduce its initial offer sufficiently to win this award. The case was initially set aside for small businesses. The government cancelled the set aside distinction because Razorcom's bid grossly exceeded the government estimate. Razorcom, as the sole initial offeror, offered $321,368.44. The government's estimate was $90,000. Eventually, the government awarded this contract to Nextira for $96,926.40. *Id.* at 140.

1013. The court acknowledged that there may have been glitches in the email system but determined the government was not responsible for these issues. *Id.* at 143.

1014. 55 Fed. Cl. 392 (2003); *see also Post-Award Protests: COFC Applies GAO Timeliness Rule, Finds Protest of MTMC Solicitation Untimely*, 79 BNA Fed. Cont. Rep. 11, at 338 (Mar. 18, 2003); *Awardees Lacked Standing to Protest Solicitation Because They Were Not "Disappointed Bidders," COFC Also Rejects Protests Based On GAO Timeliness Rules*, 45 Gov't Contractor 12, ¶ 135 (Mar. 26, 2003).

ever, the COFC adopted the GAO's protest rules and carefully analyzed the issue. The court chronicled four actions. First, the COFC noted the agency received a joint protest before the original due date for proposals. Second, the GAO received the protest ten days after the agency denied the protest. Third, the parties then filed a lawsuit in district court seeking an injunction within three weeks of the GAO's denial and three days before the contract award.[1016] Fourth, the plaintiffs requested an injunction from the COFC four days after the contract award.[1017] The court also observed that the plaintiffs knew before the contract award that the COFC was the only forum available that could issue a preliminary injunction and that they knew this at least four weeks before the contract award.[1018] After noting these facts, the court applied the GAO timeliness rules and held that the protests were untimely.[1019]

COFC Rejects Argument that Protest Qualifies as a "Significant Issue"

In *EDP Enterprises, Inc.*,[1020] the protestor sought a temporary restraining order (TRO) from the COFC to stop an award of a short-term logistics support contract.[1021] The COFC rejected EDP Enterprises' (EDP) argument that the protest issue was a significant matter for the entire procurement community.[1022] Specifically, EDP asserted that board and court holdings should be consistent and stressed that issuing the TRO was appropriate because the issue was identical to one the GAO had sustained in EDP's earlier protest.[1023] The COFC rejected EDP's request and held that the protest was late as a matter of law.[1024] The COFC also noted that the equities in this case did not warrant the TRO because EDP did not file the protest until it was threatened with losing its subcontractor work.[1025]

Careful Out There—GAO Issues Warning About Violating Protective Orders

Violating protective orders is a risky proposition for counsel and protesters. In *Network Security Technologies, Inc.*,[1026] the protester retained counsel who had passed the bar exam forty-five days before requesting admission to information contained in the protective order issued in the case.[1027] Network Security Technologies, Inc. (NETSEC) immediately filed comments to the agency's report.[1028] Four days after gaining admission to the protective order, NETSEC's counsel withdrew from the case.[1029] NETSEC's comments to the agency report included several direct references that indicated NETSEC personnel saw information covered by the protective order.[1030] The two NETSEC employees involved in this protest and their retained counsel denied any wrongdoing. Based on the circumstantial evidence presented, the GAO concluded that "NETSEC's former counsel either disclosed protected information or did not adequately safeguard it from disclosure [and] violat[ed] [GAO's] protective order."[1031] The GAO chose not to dismiss the protest on grounds that NETSEC's attorney violated the protective order.[1032] Instead, the GAO denied the protest on the merits.[1033] The GAO, however, noting the importance of protecting the integrity of the procurement process, issued a clear warning to industry that it will dismiss future protests when it discovers that a protester intentionally subverts the bid protest process.[1034] Furthermore, the GAO noted on the record that it "will consider appropriate sanctions against NETSEC's former counsel as a separate matter."[1035]

COFC Overrides Agency's CICA Stay Override

In 2003, the COFC reviewed two challenges to agency decisions to override the CICA stays of contract performance.[1036]

1015. *ABF Freight*, 55 Fed. Cl. at 396. Of these five companies, three received an award. *Id.*

1016. *Id*. at 399-400.

1017. *Id*. at 400.

1018. *Id*.

1019. *Id*.

1020. 56 Fed. Cl. 498 (2003); *see also COFC Rejects "Significant Issue" Exception to Bid Protest Timeliness Rule*, 45 Gov't Contractor 23, ¶ 252 (June 18, 2003).

1021. *EDP Enters.*, 56 Fed. Cl. at 498.

1022. *Id*. at 500.

1023. *Id*.; *see also* EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93.

1024. *EDP Enters.*, 56 Fed. Cl. at 501.

1025. *Id*. at 501. The GAO observed that EDP could have avoided harm to itself and others by filing this protest during the preceding year. Instead, EDP did not seem concerned about the matter until it risked losing its subcontracting work to the proposed awardee. *Id*. at 501 (referencing EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93).

1026. Comp. Gen. B-290741.2, Nov. 13, 2002, 2002 CPD ¶ 193.

The opinions reached opposite conclusions, leaving the contracting community wondering whether the COFC defers to the agency's discretion when reviewing a CICA override based on the "best interest of the government" standard.[1037]

In *PGBA v. United States* (*PGBA*),[1038] the COFC clarified that 28 U.S.C. § 491[1039] gives it jurisdiction to review an agency's CICA stay override regardless of which standard the agency uses to invoke the override.[1040] In *PGBA*, the DOD, through its Tri-Care Management Activity (TMA), awarded a contract to manage its health care benefits program to Wisconsin Physicians Services Insurance Corp. PGBA protested this award to the GAO and obtained a CICA stay.[1041] The agency overrode the CICA stay and the TMA determined that immediate contract performance was in the best interest of the United States and that urgent and compelling circumstances would not permit waiting for a Comptroller General decision.[1042] PGBA challenged this determination in the COFC.[1043]

The TMA moved to dismiss PGBA's challenge. It asserted that the COFC lacked jurisdiction to review an agency's override decision when the agency uses the "best interests of the government" standard to justify the override.[1044] In essence, the TMA maintained that the law required courts to defer to the agency's discretion when the agency makes this "best interest" determination.[1045]

1027. *Id*. at 3.

1028. *Id*. NETSEC's contract administrator prepared the comments, which the company's senior vice president signed—not the retained counsel. *Id*.

1029. *Id*. at 7.

1030. *Id*. These references included comments about the awardee's protected proposal and comments regarding the awardee's unique cover page. *Id*.

1031. *Id*.

1032. *Id*. at 9.

1033. *Id*. at 11.

1034. *Id*. at 9.

1035. *Id*. at 8.

1036. *See* PGBA v. United States, 57 Fed. Cl. 655 (2003); SDS Int'l v. United States, 55 Fed. Cl. 363 (2003).

1037. *See* Ralph C. Nash & John Cibinic, *Postscript: Challenging an Override of a Protest Stay,* 17 NASH & CIBINIC REP. 5, ¶ 31 (2003).

1038. 57 Fed. Cl. 655 (2003); *see also CICA: COFC Enjoins Override of CICA Stay Pending Protest of Award of Tricare Fiscal Intermediary Contract,* 80 BNA FED. CONT. REP. 12, at 315 (Oct. 7, 2003).

1039. 28 U.S.C. § 1491 (2000). The statute provides:

> (b) (1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement . . . .
> (2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief . . . .
> (3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

Id.

1040. 31 U.S.C. § 3553. The two bases for overriding a CICA stay are that the override is in the best interests of the government or urgent and compelling circumstances warrant the override. *Id.*

1041. *PGBA*, 57 Fed. Cl. at 656.

1042. *Id*.

1043. *Id.* at 656. To obtain a preliminary injunction, PGBA had to establish (1) [its] likelihood of succeeding on the merits; (2) the harm to [PGBA] outweighs the harm to the [government]; (3) the public interest is served by enjoining [the government]; and (4) irreparable injury to [PGBA] if the [government] is not enjoined. *Id.*

1044. *Id.* at 658. The TMA conceded that the court has jurisdiction to review an agency's override decision that is premised on the "urgent and compelling" standard. *Id.*

1045. *Id.*

The COFC rejected the agency's argument and explained that the standard for overturning an override decision is whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[1046] The court delineated the following analysis to determine whether the agency's best interest determination was arbitrary and capricious: (1) verify whether the record supported the facts; (2) determine whether relevant facts were ignored; (3) determine whether the agency relied on factors that Congress did not intend it to rely on; and (4) determine whether the override decision was so implausible that it could not be credited to a difference in view or the product of agency expertise.[1047] In addition, the court dismissed as illogical and inconsistent with CICA's legislative history, the agency's argument that the court could review the "urgent and compelling" override standard, but not the "best interest of the government standard."[1048] The court also noted the government's argument, if granted, would give the agency a license to override stays at will.[1049]

After ruling it had jurisdiction to review the CICA stay overrides based on the "best interest of the government" standard, the court considered the facts of the case[1050] and the interests at stake.[1051] Ultimately, the COFC granted PGBA's request for an injunction and enjoined the government from overriding the stay and proceeding with contract performance.[1052]

In *SDS International*,[1053] the plaintiff also sought a TRO from the COFC to enjoin the Air Force from overriding a CICA stay and proceeding with contract performance. The COFC noted it had jurisdiction to consider the propriety of an agency's override decision and that historically the COFC uses two standards to review an override decision.[1054] The court then explained that agency override decisions should not be readily overturned, citing precedent that override decisions based on the "best interest" standard are not reviewable because the law defers to the agency's discretion.[1055]

The COFC rejected SDS' argument to enjoin contract performance, explaining that SDS did not establish specific irreparable injury that would occur if the court did not issue the TRO.[1056] The court concluded, it must defer to the agency's discretion and "give due regard to the interests of national defense and national security."[1057]

1046. This standard can also be inversely expressed as "the final decision reached by an agency [has to] be the result of a process which considers the relevant factors and is within the bounds of reasoned decision making." *Id.* at 657.

1047. *Id.*

1048. *Id*. at 660.

1049. *Id.* Such "license" was inconsistent with the CICA legislation. *Id.*

1050. *Id.* at 661-62. The court found that the record did not establish that the agency could not shorten the transition time between contracts if the override decision was enjoined; that funds at risk were not as large as the agency initially argued; and that the agency could reasonably expect to extend the incumbent contracts to ensure continuity of services while the GAO resolved the protest. *Id.*

1051. *Id.* at 663. The court found that when balancing the competing interests, the government did not establish that overriding the stay would cause TMA beneficiaries to lose services. Therefore, the balance of interests favored PBGA. In addition, the court held that the public interest favored protecting the integrity of the competitive process. *Id.*

1052. *Id.* at 661-62. The court concluded that overriding the stay would not necessarily cause a four-month delay in transitioning to a new benefits system. Also, the agency did not establish the alleged harm any delay in this transition would cause to potential beneficiaries and the government. The court also found that the efficiencies gained by the new system did not outweigh the harm to the competitive process. *Id.*

1053. 55 Fed. Cl. 363 (2003).

1054. *Id*. at 365. The two standards are (1) whether the override decision involved a gross impropriety, bad faith, fraud, or conscious wrongdoing; or (2) whether the override decision was arbitrary, capricious, an abuse of discretion, or not made in accordance with law. *Id*.

1055. *Id*. (citing Dairy Maid Dairy, Inc. v. United States, 837 F. Supp. 1370, 1377 (E.D. Va. 1993)).

1056. *Id*. SDS argued that the "Air Force will [if SDS succeeds in its ongoing protest at the GAO] disregard the GAO's order or otherwise act in bad faith" by refusing SDS access to the Air Force base. *Id*.

1057. *Id*. at 366.

2003 Shows an Increase in Bid Protests Filed with the GAO

Fiscal year 2003 was a busy year for bid protest filers. The following chart illustrates this point and the trends in the GAO's Bid Protest section during the last five years.[1058]

Major Steven Patoir.

CONTRACT PERFORMANCE

Contract Interpretation

Why Don't You Come to CAFC with Me on a Magic Carpet Ride?

Well, you don't know what we could see.
Why don't you tell your dreams to me?
Fantasy will set you free.[1059]

The Army must have been surprised when the CAFC reversed the COFC and ordered the Army to pay for the carpets at issue in *WDC West Carthage Associates v. United States*.[1060] Here, the plaintiff, WDC West Carthage Associates (WDC), managed four off-base military housing contracts for the Army at Fort Drum, New York. Carpeting in one of the units was damaged beyond ordinary wear and tear.[1061] WDC replaced the carpeting and submitted an invoice in accordance with the lease,[1062] which was the parties' prior practice under the contract.[1063] The Army paid WDC's invoice but deducted the depreciated value of the carpeting. WDC disagreed with the government's depreciation deduction and initiated this litigation.[1064]

The CAFC ultimately agreed with WDC on the following grounds:[1065] (1) the lease provision plainly stated that the government would replace the carpeting or reimburse WDC the full costs of repairs without deprecation;[1066] (2) the parties' past conduct demonstrated that WDC's argument was consistent

1058. E-mail from Mr. Louis A. Chiarella, General Accounting Office, Bid Protest Section, to Major Steven R. Patoir, Professor, The Judge Advocate General's School, U.S. Army (12 Nov. 2003) (on file with author).

	FY 2003	**FY 2002**	**FY 2001**	**FY 2000**	**FY 1999**
Cases Filed	1352 (up 12%)	1204 (up 5%)	1146 (down 13%)	1220 (down 13%)	1399 (down 11%)
Cases Closed	1244	1133	1098	1275	1446
Merit (Sustain + Deny Decisions)	290 (79 days)	256 (79 days)	311 (79 days)	306 (86 days)	347 (88 days)
Number of Cases Sustained	50	41	66	63	74
Sustain Rate	17%	16%	21%	21%	21%
ADR (cases used)	120	145	150	144	88
ADR Success Rate	92%	84%	84%	81%	92%
Hearings	13% (74 cases)	5% (23 cases)	12% (63 cases)	9% (54 cases)	9% (53 cases)

1059. Lyrics are slightly modified. *See* STEPPENWOLF, *Magic Carpet Ride*, *on* STEPPENWOLF THE SECOND (MCA Records 1968).

1060. 324 F.3d 1359 (Fed. Cir. 2003).

1061. *Id*. at 1360.

1062. The lease contained the following clause:

> Damages Caused by Occupants: Damages to a housing unit or to other improvements within the project which are beyond normal wear and tear and are caused by the Government or an occupant, his dependents, or invited guests, which are not corrected by Government or occupant, shall be repaired by the Developer. The cost of such repairs shall be billed to the Government . . . . Repair of damages which occur to the units or other improvements that cannot be attributed to the Government, his agents, officers, occupants, their dependents, or invited guests, shall be accomplished by the Developer at no cost to the Government.

Id. at 1360-61.

1063. *Id*. at 1364. Prior to this incident, the Army reimbursed WDC for damaged carpeting without depreciation. The COFC noted this fact, observing that the Army did not cite any contract language in support of its new position. *Id*.

1064. *Id*. at 1361.

1065. *Id*. at 1364.

with the parties' initial understanding;[1067] and (3) the Army's argument[1068] was weak because, if accepted, it would create a latent ambiguity by placing the two lease provisions in conflict.[1069] The CAFC further explained the rule of *contra proferentum* requires the court to construe the lease against the government because the government drafted the lease.[1070] Lastly, the court recognized that, although its opinion might give WDC an economic windfall, the court is not in the business of rewriting a lease to which the parties have agreed.[1071]

Remember the Basics

In *Abraham v. Rockwell International Corp.*,[1072] the government denied the plaintiff's approximately $10 million claim for expenses related to an environmental crimes investigation that never resulted in formal criminal charges against the company. The underlying contract had a specifically negotiated provision that allowed payment of this claim[1073] and a general provision that prohibited payment.[1074]

In resolving this case, the CAFC found that the specific environmental costs clause, which the parties negotiated and agreed to include in the contract, trumped the more general clause.[1075] Accordingly, the court ordered the government to pay the plaintiff's requested fees.[1076]

Major Steven Patoir.

Contract Changes

CAFC Finds Duress in Government's Actions

The *Donald H. Rumsfeld, Secretary of Defense v. Freedom N.Y., Inc.* case is unusual because the government was held responsible for causing the contractor to act under duress.[1077]

1066. *Id*. at 1361.

1067. *Id*. at 1363.

1068. The Army argued that it should not be responsible for the full cost of the carpet because WDC was ultimately responsible for replacing the carpet and the carpet was a few years old. If the court did not account for the past use of the carpet, the Army argued, it would give WDC an economic windfall. This argument is based on the following provision in the lease:

> The Developer shall, with the approval of the Government, establish a list of cleaning and repair costs for dwelling unit components which will establish the normal maximum amounts to be charged in the event of damage to property and equipment installed within a living unit over and above normal wear and tear.

Id. at 1361.

1069. *Id*. at 1364.

1070. *Id*. In an unrelated case, the Department of Transportation Board of Contract Appeals held that a contractor was not entitled to partial relief because the contractor failed to seek clarification of a patent ambiguity. For a discussion of a contractor's duty to seek clarification, see *Blahnik Constr., Inc*, DOTBCA No. 4065 et. al., 03-2 BCA ¶ 32,323.

1071. *WDC*, 324 F.3d at 1363.

1072. 326 F.3d 1242 (Fed. Cir. 2003). The case contains a worthwhile discussion of basic contract interpretation principles. *Id.* at 1251-1255.

1073. The specific environmental contract clause, authorizing payment of the requested fees, provided:

> All costs incurred by the contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties (such as civil sanctions including fines), arising out of, or related to environmental, safety and health activities, including costs incurred with respect to investigation, removal, remedial action, ground and surface water or other clean up of hazardous, toxic or contaminated material(s), except for those costs that result from conduct identified in subparagraph (e)(17)(ii) of the clause entitled, "Allowable Costs, Base Fee and Award Fee."

Id. at 1247.

1074. *Id.* The general contesting action clause, which prohibited payment, stated:

> Legal, accounting, and consulting services and related costs incurred in connection with the preparation and issuance of stock rights, organization or reorganization, prosecution or defense of antitrust suits. Prosecution of claims against the Untied States, contesting actions of [sic] proposed actions of the United States, and prosecution or defense of patent infringements litigation.

Id. at 1248.

1075. *Id*. at 1254.

1076. *Id*. at 1255.

1077. 329 F.3d 1320 (Fed. Cir. 2003).

Freedom N.Y., Inc. (Freedom), a small business, manufactured Meals Ready to Eat (MREs).[1078] The government awarded Freedom a $17.2 million contract to manufacture MREs. The contract obligated the government to make progress payments. This contract was Freedom's only business, and the government was aware of this fact.[1079] Contract administration did not go well. Freedom alleged the government wrongfully interfered with its performance by withholding timely progress payments. The government, in response, accused Freedom of missing deadlines and explained that it withheld progress payments because Freedom was in default. In total, the parties modified the contract at least twenty-nine times.[1080]

In modification number twenty-five, the government extended Freedom's delivery schedule and upwardly adjusted the contract's price—Freedom dropped its claims against the government. Despite this effort, the disputes continued. In a final attempt to "clear the air," the parties signed modification number twenty-nine which released the government from "all manner of action, causes of action, suits, proceedings . . . damages, claims, and demands whatsoever, in law or equity or under administrative . . . proceedings" in exchange for an additional month for Freedom to complete performance.[1081] During negotiations, however, the government persuaded Freedom to sign modification twenty-nine by withholding a $700,000 progress payment.[1082]

Later the government terminated the contract for default and denied Freedom's subsequent claim for breach of contract, constructive change, and improper default termination. The case then proceeded to litigation, through the ASBCA to the CAFC.[1083]

Both the ASBCA and CAFC held that modification twenty-nine was invalid due to duress.[1084] The CAFC explained that for a contract to be void due to duress, the moving party "must establish that (1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts."[1085] Additionally, the CAFC found the government's actions were coercive. Specifically, the CAFC focused on the government's motive at the time of the action and concluded that substantial evidence existed to demonstrate the government withheld Freedom's $700,000 progress payment solely to pressure Freedom into signing modification twenty-nine.[1086] Based on this finding, the CAFC ruled that the government violated its duty of good faith and fair dealing. Accordingly, the court, over the government's objection, invalidated modification twenty-nine.[1087]

This case reminds agencies to always conduct business in a fair manner and not be overly aggressive in their actions.

Distinguishing Specification Types

In *Cable and Computer Technology, Inc.*, the ASBCA held that the claimant was entitled to an equitable adjustment from the Navy due to defective specifications.[1088] The Navy contracted with Cable and Computer Technology, Inc. (CCT) to develop "a set of commercially-based interface and protocol standards through which the Navy could procure standardized and interoperable hardware and software for future weapons systems."[1089] Initially, the parties found that the specifications were clear.[1090] As contract performance was underway, however, CCT encountered difficulties meeting the contract specifications. CCT continued to perform and eventually requested

1078. *Id*. at 1322; *see also Duress: Federal Circuit Says Contractor Was Coerced, Rules Contract Modification was Invalid,* 79 BNA Fed. Cont. Rep. 23, at 690 (June 10, 2003).

1079. *Freedom N.Y.,* 329 F.3d at 1322.

1080. *Id*. at 1324.

1081. *Id*.

1082. *Id*. at 1331. The government conceded that its withholding of the $700,000 progress payment caused Freedom to sign modification twenty-nine. *Id.* at 1330.

1083. *Id*. at 1324.

1084. *Id*. at 1326, 1331.

1085. *Id*. at 1329.

1086. *Id*. at 1322-23. The government knew this was Freedom's only contract and that Freedom was experiencing financial troubles. *Id*.

1087. *Id*. at 1329.

1088. ASBCA No. 47420, 03-1 BCA ¶ 32,237; *see also Specifications: Navy Interim Standards Didn't Shift Risk of Defects to Prototype Contractor, ASBCA Says,* 79 BNA Fed. Cont. Rep. 19, at 576 (May 13, 2003).

1089. *Cable and Computer Technology,* 03-1 BCA ¶ 32,237, at 159,373.

1090. *Id*. at 159,407.

an equitable adjustment for $2,790,957, alleging the Navy's defective specifications caused "a delay in performance, waste, disruption and extra-contractual work."[1091] The Navy denied CCT's request asserting its belief that this research and development contract contained performance specifications.[1092] The Navy concluded that CCT should have anticipated changes to the interim specifications and that CCT was required "to incorporate . . . changes to the interim [specifications] attached to the contract made subsequent to contract award."[1093]

The ASBCA disagreed and concluded that the contract contained both design and performance specifications. The ASBCA explained that when contracts contain both types of specifications, the board will review the "obligations imposed by the specification [and] determine the extent to which the [specification] is [a] performance or design [specification]."[1094] In applying this test, the ASBCA considered the following factors: (1) the interoperability nature of the contract;[1095] (2) the government's requirement that CCT develop, design and build systems in accordance with the contract's interim specifications; (3) that the Navy provided the interim specifications to CCT;[1096] (4) that other contractors[1097] holding the same contract identified the same problem earlier;[1098] and (5) that Navy personnel wrote in an office memorandum that all of the problems indicated the contract was released one year too early.[1099] After considering these factors, the ASBCA concluded that the specifications were defective and that CCT was entitled to recover its added costs.[1100]

Superior Knowledge Claims Versus National Security Matters

McDonnell Douglas Corporation and General Dynamics Corporation v. United States, an interesting default termination case, also involves the superior knowledge defense in contract changes.[1101] The government terminated the McDonnell Douglas contract for default because McDonnell Douglas failed to comply with the delivery schedule and failed to keep the stealth attack aircraft within the prescribed weight specifications.[1102]

One allegation McDonnell Douglas lodged was that the government detrimentally harmed McDonnell Douglas by not sharing the government's superior knowledge.[1103] The government moved to dismiss this allegation by asserting the military and state secrets privilege.[1104] The CAFC explained that when the government properly invokes the state secrets privilege, the only appropriate remedy is dismissal of the action.[1105] The CAFC also listed the following two prerequisites to invoke the

1091. *Id*. at 159,395.

1092. *Id.* at 159,409. When the government uses design specifications, the government provides "precise details of the materials to use and the manner in which the work is to be performed." *Id.* at 159,408. The government implicitly warrants that the contractor can rely on the specifications to perform the contract. When performance specifications are used, "an objective is established and the contractor may use its ingenuity to select the means to achieve that objective." *Id.* In performance specifications, the contractor assumes the risk of satisfying the contract's requirements. *Id*.

1093. *Id*. at 159,406.

1094. *Id*. at 159,408-09.

1095. *Id*. at 159,409.

1096. *Id*. at 159,410.

1097. Raytheon Corp. and Litton Corp. were also awarded the same contract as CCT. In fact, all three companies were required to make their systems interoperable. Like the Navy and CCT, Raytheon and Litton thought the specifications were achievable when they received their contract awards. *Id.*

1098. *Id*.

1099. *Id*. at 159,408.

1100. *Id.* at 159,411.

1101. 323 F.3d 1006 (Fed. Cir. 2003). For additional discussion of the default termination issues involved in this on-going case, see *infra* Section III.E Terminations for Default. *See also* Christopher Adams, *Default Termination: Boeing, GD Get Another Chance To Show Impropriety of A-12 Default Termination*, 79 BNA FED. CONT. REP. 12, at 364 (Mar. 25, 2003).

1102. *McDonnell Douglas*, 323 F.3d at 1011.

1103. *Id.* at 1020. In appropriate situations, the government has a duty to disclose information that will help a contractor avoid a ruinous course of action. When the government fails to share this information with a contractor, the contractor can pursue a claim based on the government's failure to share its superior knowledge of the situation. *Id.*

1104. *Id.* at 1021. This privilege allows the United States to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security. *Id*.

1105. *Id*. In the court's opinion, "[t]he privilege is absolute and no competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege." *Id*.

state secrets privilege: (1) a government official with adequate authority must invoke the privilege; and (2) there should be an independent judicial review of the circumstances.[1106]

In this case, the CAFC affirmed the lower court's opinion rejecting plaintiff's superior knowledge claim. The CAFC noted the Secretary of the Air Force appropriately invoked the privilege and that the COFC aptly decided that litigation of this claim would expose classified military information to the public.[1107]

Major Steven Patoir.

Inspection, Acceptance, and Warranty

I Demand My Right to an Inspection!

A typical inspection case involves an allegation that the government overreached its authority by over-inspecting contractor performance, or otherwise abused the inspection process.[1108] Only rarely does an appellant's entire claim rest on the government's alleged failure to inspect. Nevertheless, in *Lion Raisins Inc. v. United States*,[1109] this failure to inspect was the thrust of the plaintiff's case.

Lion Raisins, Inc. (Lion) processed and sold raisins to various buyers, including the U.S. government. Pursuant to the Agricultural Marketing Act,[1110] as well as other applicable regulations,[1111] all incoming and outgoing raisins handled by Lion required U.S. Department of Agriculture (USDA) inspection. The USDA charged an inspection fee of approximately $17-18 per ton of raisins it inspected.[1112]

Lion filed a two-count complaint against the USDA seeking a refund for the inspection fees it paid.[1113] In the first count of its complaint, Lion asserted that the USDA breached "an implied-in-fact" contract to perform "faithful, honest and accurate inspections" by, *inter alia*, "falsely claiming to have conducted inspections, failing to perform all of the required tests and fabricating test results, and preparing false inspection certificates."[1114] As a result of USDA's alleged breach, Lion insisted it paid for "inspection services . . . which were not faithfully performed, . . . or were not earned."[1115] In its second count, Lion alleged the inspection fees were an "illegal exaction" in that "government officials exacted money . . . [without] honestly and faithfully performing the services rendered in return for the consideration paid by Lion . . . ."[1116]

Examining Lion's argument that it had an implied-in-fact contract (the court noted to plead a contract claim under the Tucker Act), Lion had to show mutual intent to contract. But in the instant case, the requirement for the inspections was not the result of an agreement with an authorized government agent, as required to plead a contract claim under the Tucker Act.[1117] Rather, the inspections were required by regulation. And even though the regulation required Lion to engage the services of government personnel if it wished to sell raisins, under the

1106. *Id.*

1107. *Id.* at 1022.

1108. *See, e.g.*, The Libertatia Assocs., Inc. v. United States, 46 Fed. Cl. 702 (2000) (contracting officer representative told contractor's employees that he was Jesus Christ and the contracting officer was God); Gary Aircraft Corp., ASBCA No. 21731, 91-3 BCA ¶ 24,122 (holding "overnight change" in inspection standards was unreasonable); Donohoe Constr. Co., ASBCA No. 47310, 98-2 BCA ¶ 30,076, *motion for reconsideration granted in part on other grounds*, ASBCA No. 47310, 99-1 BCA ¶ 30,387 (finding government quality control manager unreasonably rejected proposed schedules, ignored contractor submissions for weeks, and told contractor he would "get even" with him).

1109. 54 Fed. Cl. 427 (2002).

1110. 7 U.S.C.S. §§ 601-626 (LEXIS 2003).

1111. *See* 7 C.F.R. § 989.58(d)(1) (LEXIS 2003).

1112. *Lion*, 54 Fed. Cl. at 428.

1113. *Id.*

1114. *Id.* at 429.

1115. *Id.*

1116. *Id.*

1117. *Id.* at 431.

> To plead a contract claim, whether express or implied, within Tucker Act jurisdiction, a complainant must allege mutual intent to contract including an offer, an acceptance, consideration and facts sufficient to establish that the contract was entered into with an authorized agent of the United States who "had actual authority to bind the United States."

Id. (citing Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997)).

Tucker Act, "such arrangements are treated as contracts for the purposes of remedy only."[1118]

Concerning Lion's claim that the inspection fees were an illegal exaction, the court observed it had jurisdiction over suits for "recovery of money illegally required to be paid on behalf of the government."[1119] Nevertheless, the court turned the table on Lion by noting the case was not about money required to be paid by plaintiff "on behalf of the government," but instead, about "money required to be paid by the plaintiff on it's own behalf."[1120]

Watch Out For "Deemed Acceptance," As Well As Custom-Drafted Commercial Items Clauses

A recent case from the Veterans Administration Board of Contract Appeals (VABCA) demonstrates that inserting custom-drafted acceptance clauses into commercial item buys can be fraught with peril. In *Fischer Imaging Corp*. (*Fischer*),[1121] the VABCA ordered the VA to convert a "termination for cause" to a "termination for convenience" after determining the VA's failure to timely inspect and reject an "Epic 32 Single Plane Electrophysiology System" (EP32) resulted in the "deemed acceptance" of the item.[1122] It did not help the VA's case that the VA did not begin inspections of the EP32 until fifty-three days after taking possession of the item, and then sought to terminate the delivery order for cause after using the EP32 for eighteen months.[1123]

In the most recent *Fischer* case, the VA awarded a delivery order (DO) to Fischer for an EP32 for $405,218.[1124] The solicitation for the DO included the standard FAR Inspection and Acceptance clause prescribed for ID/IQ quantity commercial items,[1125] but also contained a custom drafted clause that read as follows:

> Upon completion of installation the equipment will be turned over to the hospital for use . . . . Final acceptance of the equipment and installation will be based upon an inspection and test . . . within thirty (30) calendar days from date of receipt of request for inspection. If equipment passes inspection or if acceptance inspection is not conducted within thirty (30) calendar days from date of receipt of request for inspection, the Government shall accept installation with guarantee date commencing with date of receipt of notification for inspection . . . .[1126]

Shortly after installing the EP32, Fischer sent a letter to the contracting officer on 22 July 1998, requesting the VA inspect the item.[1127] The VA did not perform the inspection until 14 through 18 September 1998, at which time it noted fourteen deficiencies.[1128] Approximately eighteen months later, the contracting officer issued a termination for cause and ordered Fischer to remove the EP32. During this eighteen month time period, however, the VA and Fischer exchanged numerous correspondences concerning the deficiencies and Fischer made several warranty and maintenance calls at no expense to the VA. Prior to removing the item, the VA made full use of the EP32, albeit subject to a number of performance problems.[1129]

1118. *Id*. at 432 (citing Russell Corp. v. United States, 210 Ct. Cl. 596, 537 F.2d 474 (1976)).

1119. *Id*. at 433.

1120. *Id*. To prove a case of illegal exaction, Lion needed to establish that the USDA required Lion to pay money to the government that Lion was not, by law, required to pay. *Id.*; *see also* Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967). In this case, the court determined Lion's theory was misguided in that Lion did not allege it paid the USDA inspection fees that were unauthorized by law, but rather conceded applicable regulations and statutes required Lion to pay the fee if it wished sell raisins. *Lion*, 54 Fed. Cl. at 433. For a discussion of the Contract Disputes Act and Tucker Act aspects of the *Lion* decision, see *infra* Section III.G Contract Disputes Act (CDA) Litigation.

1121. VABCA Nos. 6343, 6344, 6346, 6360, 02-2 BCA ¶ 32,048.

1122. *Id*. at 158,384. *Fischer* is the second of two cases involving the sale of EP32 units to the VA. *See* Fischer Imaging Corp., VABCA Nos. 6125, 6126, 6127, 02-2 BCA ¶ 32,003.

1123. *Fischer*, 02-2 BCA ¶ 32,048, at 158,381-83.

1124. *Id.* at 158,375.

1125. *See* FAR, *supra* note 30, at 52.212-4.

1126. *Fischer*, 02-2 BCA ¶ 32,048, at 158,374-75.

1127. *Id.* at 158,375.

1128. *Id.*

1129. *Id.* at 158,383. Among the deficiencies cited by the VA were missing manuals, missing equipment, failure to meet performance standards, and poor "kvp fluoroscopic response time." *Id.*

Fischer appealed the VA's termination for cause to the VABCA. The board first addressed whether a deemed acceptance took place.[1130] The VA argued although the VA failed to inspect until fifty-three days after Fischer's request for inspection, its "deemed acceptance" was without contractual significance.[1131] The board disagreed, reasoning that adopting this argument would read the custom-drafted acceptance procedures clause out of the contract. This, the board was unwilling to do.[1132]

Having determined the VA accepted the EP32, the board examined whether the VA's termination was within the VA's post-acceptance rights. Citing the first *Fischer* case,[1133] as well as the Uniform Commercial Code (UCC),[1134] the board observed that the VA could validly revoke acceptance only if the cited deficiencies substantially impaired the EP32's value to the VA and the VA's acceptance was based on a reasonable expectation that Fischer would cure the deficiencies.[1135] The board noted, however, that the VA used the EP32 continually for approximately eighteen months after the VA became aware of the device's problems. This fact indicated that any alleged problems with the EP32 did not substantially impair the item's value to the VA, and for the board, "belied the existence of any valid basis . . . for the VA's revocation of its acceptance."[1136] Thus, the board found the VA's attempted revocation to be invalid and ordered the termination for cause converted to a termination for convenience.[1137]

Proposed DFARS Changes

The DOD has proposed amending DFARS section 242.1104.[1138] Presently, DFARS section 242.1104 requires the "cognizant contract administration office" to conduct a periodic risk assessment of each contractor to determine the degree of production surveillance needed for contracts awarded to that contractor and to develop a production surveillance plan based on the risk level determined during the risk assessment.[1139] The proposed amendment would eliminate the requirement that contract administration offices perform production surveillance on contractors that perform only "Criticality Designator C" (low-urgency) contracts.[1140] The change would allow contract administration offices to devote more resources to critical and high-risk contracts.[1141]

On a similar note, the DOD also proposed amending DFARS sections 246.402 and 246.404 to eliminate government source inspection requirements for contracts or delivery orders valued at less than $250,000, unless certain conditions exist.[1142] The proposed rule "focus[es] limited DOD contract management resources on high-risk areas, while providing flexibility for exceptions where needed."[1143]

1130. *Id.* at 158,381-82.

1131. *Id.*

1132. *Id.*

1133. Fischer Imaging Corp., VABCA Nos. 6125, 6126, 6127, 02-2 BCA ¶ 32,003.

1134. *See* U.C.C. § 2-606 (2002).

1135. *Fischer*, 02-2 BCA ¶ 32,048, at 158,382-83.

1136. *Id.*

1137. *Id.* at 158,383-84.

1138. Department of Defense, Proposed Rule with Request for Comments, 68 Fed. Reg. 162 (Aug. 21, 2003) (to be codified at 48 C.F.R. § 242).

1139. DFARS, *supra* note 273, at 242.1104.

1140. 68 Fed. Reg. at 162. "Criticality Designator C" is assigned to contracts that are not "critical contracts, including DX-rated contracts, contracts citing the authority in 6.302-2 (unusual and compelling urgency), or contracts for major systems, contracts . . . for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions or to meet user needs for nonstock items." *See also* DFARS, *supra* note 273, at 242.1105.

1141. 68 Fed. Reg. at 162.

1142. Department of Defense, Proposed Rule with Request for Comments, 68 Fed. Reg. 178 (proposed Sept. 15, 2003) (to be codified at 48 C.F.R. § 246). The proposed rule would eliminate requirements for government quality assurance at source on contracts or delivery orders valued below $250,000, unless (1) mandated by DOD regulation, (2) required by a memorandum of agreement between the acquiring department or agency and the contract administration agency, or (3) the contracting officer determines that certain conditions exist (that is, critical product features or characteristics have been identified). *Id.*

1143. *Id.*

Inspection, Acceptance, and Warranty Miscellanies

Several additional recent cases and developments warrant brief mention. In *G&C Enterprises, Inc. v. United States*,[1144] the plaintiff contracted with the Army to construct a hanger and a fuel dock at McGuire AFB in New Jersey. The plaintiff failed to insure the work site against storm damage, and needless to say, a windstorm damaged both projects. In response, the plaintiff filed a claim for expenses it incurred as a result of the storm damage, which the Army denied.[1145] At the COFC, the plaintiff argued the projects were ninety-nine percent complete at the time of the storm and that the Army had already begun to occupy the hanger building. Applying black-letter law, the COFC observed the contract clearly allocated the risk of loss to plaintiff until formal acceptance by the government, and regardless of the Army's use of the hanger, under the contract, the plaintiff clearly bore the risk of loss.[1146]

Northrop Grumman Corp. (Northrop) failed to persuade the ASBCA that the Navy could not establish causality in a $7.7 million warranty claim.[1147] The Navy's affirmative claim alleged that Northrop produced transducers that failed while still under warranty. Moving to dismiss the claim, Northrop argued that the Navy failed to show causality with respect to costs. Specifically, Northrop claimed the Navy "rolled-up" all costs from all transducer-related activities then charged the costs to Northrop.[1148] The board, however, found the Navy demonstrated that it had incurred some damage, and as such there was a genuine issue of liability.[1149]

An ASBCA case demonstrates that a policy of aggressive inspecting is sometimes warranted. In *Olympia Reinigung GmbH*,[1150] plaintiff contracted with the Army to provide cleaning services for an Army Hospital in Heidelberg, Germany. During performance, the Army documented numerous deficiencies in Olympia Reinigung GmBh's (Olympia) performance and after issuing a show-cause notice, terminated Olympia for default.[1151] Before the ASBCA, Olympia argued that the Army was hostile to the appellant and engaged in a course of inspection and review of work with the intent to terminate the contract. In particular, Olympia took issue with the Army's practice of placing paper punch-out holes on the floor of the hospital to determine if an area was being cleaned. The board observed "while it is clear the Government aggressively inspected the work, there is no evidence it did so with the intent to terminate."[1152] Concerning the practice of placing punch-out holes on the floor, the board commented that given the "enormous quantity of deficiencies found in the work prior to termination," this "littering of the floor" was insufficient to render the termination arbitrary and capricious.[1153]

On a final note, in February 2003, the AFMC issued its revised System Warranty Guide.[1154] The guide provides clear guidance on warranty planning and administration, as well as cost benefit analysis and warranty strategy. Anyone responsible for warranty development and implementation, both inside and outside the Air Force, may wish to review the guide.

Major James Dorn.

Contract Value Engineering Change Proposals

Do We Really Owe You If The Net Savings from Your Value Engineering Change Proposal Do Not Exceed Its Developmental Costs?

The answer to this question is absolutely not. The ASBCA in *Rig Masters, Inc.*,[1155] denied Rig Masters' claim for full

1144. 55 Fed. Cl. 424 (2003).

1145. *Id.* at 424-25.

1146. *Id.* at 427-28. Although the court granted the government's motion for summary judgment as it pertained to plaintiff's beneficial occupancy claim, the court refused to grant the government's motion for summary judgment over the plaintiff's claim that the storm destroyed the projects because the Army's plans and specifications were insufficient. *Id.* at 430-31.

1147. Northrop Grumman Corp., ASBCA Nos. 52785, 53699, 03-2 BCA ¶ 32,280.

1148. *Id.* at 159,709.

1149. *Id.* at 159,711; *see also Government Claims - ASBCA: Navy's Warranty Claim Survives Northrop Grumman's Summary Motion*, BNA Fed. Cont. Daily (July 10, 2003).

1150. ASBCA Nos. 50913, 51225, 51258, 02-2 BCA ¶ 32,050.

1151. *Id.* at 158,428-29.

1152. *Id.* at 158,429.

1153. *Id.* at 158,429-30.

1154. AFMC System Warranty Guide, February 2003, *available at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/guides/wtyguide.doc.

1155. ASBCA Nos. 52891, 54047, 03-2 BCA ¶ 32,294.

developmental costs instead of the "negative instant contract savings"[1156] awarded by the contracting officer.[1157] Rig Masters provided river drainage support and security services to the Army COE.[1158] During contract performance, in an attempt to save the government money, Rig Masters closed a couple of pumps and redirected water when the river reached a specified level.[1159]

By saving the government money, Rigmasters hoped to collect a percentage of these savings.[1160] Towards this goal, Rig Masters hired an engineering consultant to help develop their plan and to assist them in presenting it to the COE.[1161] The COE accepted Rig Masters' plan and implemented it soon thereafter.[1162] Much to Rig Masters' consternation, however, the water level only reached the required level twice and little savings resulted. Despite this fact, Rig Masters submitted a $357,605 claim requesting payment for savings in electricity, savings from a reduction in manpower hours, and for value engineering change proposal (VECP) development costs.[1163]

The government rejected Rig Masters' claim and calculated that it owed Rig Masters $4689.[1164] Rig Masters disagreed and appealed to the ASBCA. On appeal, the ASBCA considered two issues: whether Rig Masters was entitled to recover its full developmental costs; and whether Rig Masters was entitled to additional VECP savings.[1165]

Regarding Rig Masters' claim for recovery of its development costs, the ASBCA found credible the contracting officer's methodology of reviewing invoices and the contract's requirement for personnel and hourly rates. The board also agreed with the contracting officer's determination that the unit cost reduction was $79.52 and with the government's approach to resolving this claim. Specifically, the contracting officer multiplied the unit cost reduction by the number of contract units affected by the VECP (determined to be thirty-two hours). Multiplying these numbers, the contracting officer determined that the instant contract savings was $2545 (32 x $79.52 = $2545) and then subtracted Rig Masters' $7234 worth of development costs. Finding a negative savings of $4689 ($2545 - $7234 = negative $4689), the board upheld the government's decision to grant Rig Masters' an equitable adjustment equal to $4689.

Concerning Rig Masters' claim for additional VECP savings, the ASBCA noted that Rig Masters failed to submit documentation in support of its claim and upheld the contracting officer's denial.[1166]

CDA Requires Contract Certifications—Seriously

Schnider's of OKC, Inc. (Schnider's),[1167] is a quick reminder that valid claims must be written, properly certified, and submitted to the contracting officer for final decision. In *Schnider's*, the ASBCA dismissed Schnider's challenge of the contracting officer's final decision rejecting Schnider's VECP.[1168] In this short opinion, the ASBCA dismissed, without prejudice, Schnider's appeal and explained that the board lacked jurisdiction because Schnider failed to submit a certi-

1156. *Id.* at 159,763. Negative instant contract savings arise when the contractor's allowable development and implementation costs exceed the savings realized by implementation of the value engineering change proposals. *Id.*

1157. *Id.*

1158. *Id.* at 159,785.

1159. *Id.* at 159,789.

1160. *Id.* at 159,787 (quoting FAR, *supra* note 30, at 52.248-001). Rig Masters' contract included FAR 52.248-001, Value Engineering, which states: "The contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECPs) voluntarily. The contractor shall share in nay net acquisition savings realized from accepted VECPs, in accordance with the incentive sharing rates . . . ." *Id.*

1161. *Id.* at 159,788.

1162. *Id.*

1163. *Id.* Rig Masters' claim also included $7234 for the engineer who helped develop Rig Masters' plan and reviewed Rig Masters' value engineering proposal. *Id.*

1164. *Id.* at 159,792.

1165. *Id.*

1166. *Id.* at 159,793.

1167. ASBCA No. 53947, 03-1 BCA ¶ 32,160.

1168. *Id.* at 159,003. The government argued that Schnider's only submitted a request for reconsideration of its VECP. The government asserted the following points: (1) Schnider's did not seek a sum certain; (2) Schnider's VECP submission did not request a contracting officer's final decision; and (3) Schnider's did not certify its VECP claim. *Id.* The board, before considering all of the issues raised, dismissed Schnider's appeal because Schnider failed to certify its claim as required by 41 U.S.C. § 605(c)(1) (2000) and FAR sec. 33.201. *Schnider's*, 03-1BCA ¶ 32,160, at 159,793.

fied, written claim to the contracting officer for a final decision.[1169]

Major Steven Patoir.

Terminations for Default

A-12 Litigation: What Goes Up, Must Come Down . . . and Up and Down Again; But Haven't We Had Enough?

Unfortunately, while an A-12 stealth carrier-based aircraft never got off the drawing boards, the A-12 case has been up (to the CAFC) and down (to the COFC), twice. And, like a slow moving soap-opera plot, the longstanding, multi-billion dollar A-12 litigation lumbers on.[1170] Let's review the action in reverse chronological order. When we last tuned in (around September 2002), the Navy Comptroller had just demanded that the General Dynamics Corp. and Boeing Corp. (the successor to McDonnell Douglas) pay the Navy $2.3 billion dollars or the Navy would "refer the matter to the Defense Finance and Accounting Service for collection."[1171] That demand resulted from the 2001 COFC decision dismissing the plaintiffs' complaint and upholding the Navy's 1991 termination for default.[1172] The COFC's 2001 decision, in turn, resulted from a 1999 CAFC decision remanding the case to the COFC.[1173] The 1999 CAFC decision reached that appellate court from the earlier, 1996 COFC decision[1174] vacating the Navy's 1991 termination for default.

Now let's pick up where we left off last year. Unhappy about being $2.3 billion in debt to the government, Boeing and General Dynamics sought, and the COFC granted, a stay of its 2001 decision. The COFC ruled that the DOD was not entitled to immediately collect the $2.3 billion.[1175]

Meanwhile, the case was back at the CAFC. Here, some chronological background is necessary. In 1988, the Navy awarded McDonnell Douglas and General Dynamics a fixed price contract to develop a "stealth" aircraft.[1176] From the very beginning, the contractors had trouble meeting the schedule, complying with the weight specifications, and staying within the ceiling price.[1177] Despite negotiations, the parties could not agree on restructuring the contract or on a new delivery date. In August 1990, the Navy, therefore, unilaterally re-scheduled the "first flight and delivery date to December 31, 1991."[1178] In January 1991, in response to a cure notice, the contractors conceded that they could not meet the new delivery schedule, but asserted that the new schedule was invalid.[1179]

The Navy terminated the contract, on 7 January 1991, based on the contractors' failure to "prosecute the work so as to endanger performance"[1180] of the contract and demanded return of approximately $1.35 billion in unliquidated progress payments.[1181] In response, the contractors challenged the termination and the COFC, after "protracted litigation," converted the termination for default into a termination for convenience.[1182] The CAFC reversed and remanded the case "to determine whether default termination was justified."[1183]

1169. *Id.*

1170. The A-12 was a full-scale engineering and development contract for a carrier-based stealth aircraft. Awarded in 1988, the Navy terminated the A-12 contract for default on 7 January 1991. McDonnell Douglas Corp. and Gen. Dynamics Corp. sued for relief soon after. McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311, 314 (2001). A full discussion of the facts is found in *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1996).

1171. *2002 Year in Review*, *supra* note 57, at 107 (discussing the Letter from Dionel M. Aviles, Navy Comptroller, Office of the Assistant Secretary of the Navy (Financial Management and Comptroller) to Michael J. Mancuso, Senior Vice President and Chief Financial Officer, General Dynamics (Aug. 30, 2002), *available at* http://www.generaldynamics.com/news/press_releases/2002/Navy_A-12_Letter.pdf).

1172. *See 2001 Year in Review*, *supra* note 635, at 64-65 (discussing McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311, 314 (2001)).

1173. McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1322 (Fed. Cir. 1999).

1174. McDonnell Douglas Corp., 35 Fed. Cl. at 358.

1175. *COFC Stays A-12 Collection Effort After DOD Refers Matter to DFAS*, 44 Gov't Contractor 46 ¶ 491 (Dec. 11, 2002). *See also* News Release, Boeing, Federal Court Judge Grants Boeing A-12 Motion (Dec. 10, 2002), *available at* http://www.boeing.com/news/releases/2002/q4/nr_021210b.html.

1176. McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1010 (Fed. Cir. 2003).

1177. *Id.* at 1011.

1178. *Id.*

1179. *Id.* The contractors asserted the government selected date was unreasonable and therefore unenforceable. *Id.*

1180. *Id.*; *see also* FAR, *supra* note 30, at 52.249-9.

1181. *Id.*

1182. *Id.* The trial court held that contract performance was not the basis for the Navy's decision to terminate. *Id.*

On remand, the COFC interpreted the previous CAFC opinion as "limiting [the trial court's] inquiry to 'whether the Navy's unilateral modification establishing a new schedule for first flight was reasonable.'"[1184] Based on this interpretation, the COFC held in favor of the Navy, sustaining the default "based solely on the Contractor's failure to meet the December 1991 first flight date."[1185]

In the current opinion, the CAFC first determined that the COFC "misconstrued" the CAFC's mandate. Rather than directing the COFC to only examine the reasonableness of the new schedule, the CAFC intended the COFC to determine whether the Navy justifiably terminated the contract for default.[1186] Thus, the COFC's findings were both inadequate to support the judgment in favor of the United States and inadequate for the CAFC to finally dispose of the case. The CAFC vacated the trial court's judgment and remanded the case for further proceedings.[1187] According to the appellate court, on remand the issue that the COFC needed to decide is, "whether the government's default termination was justified."[1188]

The CAFC proceeded to lay out the black-letter law on what constitutes a failure to "prosecute the work so as to endanger performance" of the contract when time remains for performance.[1189] The parties asserted "drastically opposite interpretations" of this provision. The contractors contended, only a repudiation or impossibility of performance justifies a default termination. The government, conversely, argued "whenever a contractor raises concerns about its ability to satisfy a contractual requirement," the FAR permits termination.[1190]

Not surprisingly, the appellate court adopted a middle and well-worn path. The court reiterated the "pragmatic approach" adopted sixteen years earlier in *Lisbon Contractors, Inc. v. United States*.[1191] According to the court, the default provision required the contracting officer to have a "reasonable belief . . . that there was no likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance."[1192] This formulation struck "a balance between the judicial aversion to default terminations . . . and the fact that 'the Government, just as any other party, is entitled to receive that for which it contracted and has the right to accept only goods that conform to the specification.'"[1193] Further, this "standard is accepted and applied by the contract boards and trial courts in reviewing default terminations for failure to make progress."[1194]

The court observed that direct, tangible, and objective evidence must support the contracting officer's reasonable determination. Relevant factors may include "a comparison of the percentage of work completed and" the time remaining before completion is due; "the contractor's failure to meet progress milestones"; "problems with subcontractors and suppliers"; "the contractor's financial situation"; and the contractor's past performance.[1195] A reviewing court should consider the facts and circumstances leading up to the termination decision.[1196]

1183. *Id*.

1184. *Id*. at 1012.

1185. *Id*. at 1011. The CAFC noted that the court below:

> declined to base its determination of justified default on the Contractor's alleged financial inability to perform the contract, anticipatory repudiation, and failure to comply with weight and other specification requirements. Turning to the Contractor's defenses, the trial court rejected their arguments that the unilateral schedule was unreasonable and therefore unenforceable, or, if enforceable then the Navy waived the unilateral schedule and first flight date of December 1991; that the contract was commercially impossible to perform; and that the Navy had to disclose its alleged superior knowledge despite the assertion of the state secrets privilege.

Id.

1186. *Id*. at 1014.

1187. *Id*.

1188. *Id*.

1189. *Id*.; *see also* FAR, *supra* note 30, at 52.249-9.

1190. *Id*. at 1014-15.

1191. *Id*. at 1015 (discussing Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987)).

1192. *Id*. at 1016.

1193. *Id*. at 1015.

1194. *Id*. at 1016 n.2.

1195. *Id.* at 1016–17.

The appellate court then spelled out the underlying factual determinations that the COFC will need to make on remand. The trial court will first have to decide what encompassed "actual performance."[1197] In addition, the court will need to determine "the amount of time remaining for performance."[1198] After making those two findings of fact, the court could decide the ultimate issue: "whether the government has met its burden of proving that the contracting officer had a reasonable belief that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for performance."[1199]

The Air Force Higher Ups Would Like to Know

The Air Force Assistant Secretary (Acquisition) promulgated Contract Policy Memo 03-C-10 in May 2003.[1200] The memo implements two Air Force FAR Supplement (AFFARS) changes requiring "contracting officers to immediately notify SAF/AQCK and provide copies of cure/show cause notices and termination notices to SAF/AQCK for all ACAT I, II, and III programs" and other notices that could result in "high-level" interest.[1201] The memo explains that contract terminations "can have a great impact on the Air Force mission," can "significantly impact the economic viability of our contractors," and "often garners high levels of congressional interest."[1202]

T4D Done Right

In *Johnson Management Group, CFC, Inc.*,[1203] the federal circuit affirmed the Housing and Urban Development (HUD) Board of Contract Appeals' decision sustaining HUD's default termination of Johnson Management Group, CFC, Inc. (JMG). With one exception, the appellate court did not seem to find any difficult issues to confront.[1204] The HUD terminated JMG, a property management service company, for failure to perform certain provisions of the contract.[1205] Specifically, JMG repeatedly failed to submit subcontractor invoices in compliance with contract requirements and the government had given JMG sufficient opportunity to cure its deficiencies.[1206]

JMG advanced three arguments challenging the board's decision. First, JMG asserted that the board improperly relied on evidence submitted shortly before the hearing.[1207] The circuit court rejected this argument, finding the board's decision to consider the evidence was not an abuse of discretion.[1208] Second, JMG asserted that "whatever invoice problems" existed,

1196. *Id.* at 1016. The court found that "it would be impermissible to show that after the termination action events occurred which would have permitted the contract to be completed by the delivery date." *Id.*

1197. *Id.* at 1017. The parties disagreed over whether the contract required delivery of the prototype aircraft or the delivery of the production lot. *Id.*

1198. *Id.* The parties assertions ranged from "no such date existed" to "four to five years" to "missing the first aircraft delivery date was tantamount to failing to timely complete the contract." *Id.*

1199. *Id.* at 1018. The CAFC affirmed the lower court's other findings: that the unilateral schedule was reasonable; that the Navy did not waive the December 1991 delivery date; and that the contractors' superior knowledge allegation could not be litigated based on the Military and State Secrets privilege. *Id.* at 1018-24.

1200. Memorandum, Deputy Assistant Secretary (Contracting), to ALMAJCOM/FOA/DRU (Contracting), subject: Interim Revision of AFFARS 5349.402-3, Procedure for Default and 5349.403, Termination of Cost-Reimbursement Contracts for Default (30 May 2003) [hereinafter Interim Revision of AFFARS Default Provisions Memo].

1201. *Id.*; *see also* U.S. DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. sections 5349.402-3, 5349.403 (May 1, 2003) [hereinafter AFFARS].

1202. Interim Revision of AFFARS Default Provisions Memo, *supra* note 1200.

1203. 308 F.3d 1245 (Fed. Cir. 2003).

1204. *Id.* at 1253-59. In addition to examining the default termination, the court looked at several compensation issues: repayment of advance payments, *id.* at 1253-57; reimbursability of insurance costs, *id.* at 1257-58; and reduction of amounts claimed for lawn maintenance, *id.* at 1258-59. The majority found that an advance payment clause in the contract violated a FAR advance payment clause. The majority agreed with the board that the contract clause was "without force and effect" and that "the government is not bound by the conduct of its agents acting beyond the scope of their authority." *Id.* at 1255. Further, the government is not estopped from asserting the unauthorized nature of the contracting officer's actions when a contract provision directly conflicts with a FAR requirement. *Id.* at 1256. The dissent, however, vigorously disagreed. Judge Newman found the result "as unjust as it is unsupportable in the law of government contracting." *Id.* at 1259. According to Judge Newman, the government should not benefit from its own mistake and the government should be liable for the injury caused by its own illegal actions. *Id.* at 1260.

1205. *Id.* at 1250; *see also* FAR, *supra* note 30, at 52.249-8 (incorporating the contract by reference).

1206. *Id.* at 1251.

1207. *Id.* at 1251-52.

1208. *Id.* at 1252. "In particular, the board noted that the government had not acted in bad faith and that its actions had not resulted in undue prejudice, as JMG had been given an opportunity to request additional time to examine and inspect the additional reports but had not chosen to do so." *Id.*

they "could have been worked out."[1209] Further, JMG pointed to the efforts it took to remedy the invoice deficiencies.[1210] The court found "substantial evidence" to support the HUD and the board's determinations that JMG had sufficient time to overcome the deficiencies in the invoices, but failed to do so.[1211] Finally, JMG sought to shift blame to one of its, HUD-recommended, subcontractors. The court pointed out, however, "a contractor is responsible for the unexcused performance failures of its subcontractors."[1212]

Oh, Did I Say Rescission?

In *Griffin Services, Inc.*,[1213] the appellant claimed the government improperly terminated for default part of its Installation Support Services contract without a required cure notice.[1214] The appellant's responsibilities included preventative maintenance and repair of boiler and heating operations and chiller operations at Forts McPherson and Gillem. Certain buildings required contractor personnel to hold security clearances.[1215]

On 7 February 2002, the government issued a cure notice identifying certain deficiencies that were "endangering performance of the contract."[1216] The failures involved maintenance and repair of boiler, heating plants, and chiller operations. Throughout February and into early March, the parties exchanged correspondence concerning the deficiencies.[1217] Ultimately, Griffin Services, Inc. (Griffin) provided a plan to overcome the deficiencies that was acceptable to the government. As a result, on 23 April 2002, the government issued a "Rescission of Cure Notice."[1218] In early May, Griffin again experienced problems performing the contract. These problems resulted, primarily, from the lack of sufficient personnel with security clearances.[1219]

On 14 May 2002, the contracting officer terminated that part of the contract "associated with boiler operations at Fort McPherson and Fort Gillem, as well as operations and preventive maintenance of special facilities."[1220] The termination resulted from "non-performance of both the contract specifications and the plan appellant submitted in response to the cure notice." [1221] Before the ASBCA, appellant sought summary judgment as to whether the default termination should be converted to a termination for convenience because the Army failed to issue a required cure notice.[1222] Specifically, Griffin alleged that the "only CURE notice issued by the Army was *rescinded* by the Army" prior to the termination.[1223]

The board found that the contract required the government to issue a cure notice and provide at least ten days to cure the deficiencies before terminating the contractor for default.[1224] Because the Army rescinded the cure notice, it had failed to comply with this requirement. The Army offered two reasons justifying its failure to comply with the cure notice requirement. First, Griffin fraudulently induced the government into rescinding the cure notice. Second, the rescission was void, "because of the nonoccurrence of a condition precedent." That

1209. *Id.*

1210. *Id*.

1211. *Id.*

1212. *Id.*; *see* L & M Thomas Concrete Co., Inc., ASBCA Nos. 49198, 49615, 03-1 BCA ¶ 32,194 (finding that because performance deficiencies gave the government reasonable grounds to "question contractor's ability and willingness to complete performance" of an airfield ramp and taxiway repair contract "in a timely and specification-compliant manner, and since L&M failed to provide the items requested" in the cure notice, the default termination was proper).

1213. ASBCA No. 53802, 03-1 BCA ¶ 32,200.

1214. *Id*. at 159,161.

1215. *Id*. at 159,161-62.

1216. *Id*. at 159,162.

1217. *Id*. at 159,162-63.

1218. *Id.* at 159,163.

1219. *Id.* at 159,163-64.

1220. *Id.* at 159,163.

1221. *Id*. Interestingly, the termination notice recognized that "the Contracting Officer lifted the Cure Notice on 23 April 2002." *Id.*

1222. *Id.* at 159,161.

1223. *Id.* at 159,165.

1224. *Id.* at 159,164 (discussing FAR, *supra* note 30, at 52.249-6, Termination (Cost Reimbursement)).

condition was Griffin performing consistent with the plan it had offered to cure the deficiencies.[1225]

Regarding the fraud allegation, the Army contended that Griffin "misrepresented that appellant could perform its plan . . . when it submitted that plan without informing the Government that it lacked adequate staff with the requisite security clearances."[1226] To prevail, the board held that the government needed to show it had relied on a misrepresentation. The board found, however, "the government's cure notice did not specifically mention the lack of security clearances . . . as an item requiring correction."[1227] Therefore, "the government could not [have] reasonably [relied] on the plan as representing a cure for issues not addressed in the notice."[1228] Nor could the government prove that Griffin had agreed to make performance of the plan a condition precedent to rescission of the cure notice. The board granted the motion for summary judgment.[1229]

No Delivery Date? The Delivery Marks the Delivery Date

On a motion for summary judgment challenging a default termination, the appellant in *Aerometals, Inc.*,[1230] asserted the government improperly failed to provide a cure period prior to terminating Aerometals, Inc.'s (Aerometals) three supply contracts.[1231] The government maintained that the contractor failed to deliver conforming supplies within the time specified in the contract. The government, therefore, terminated the contract pursuant to subsection (a)(1)(i) of FAR 52.249-8, Default (Fixed-Price Supply and Service) that does not require a cure notice.[1232] The contractor, however, asserted that "because there were no delivery dates specified in the contracts" the government must have relied on either subsection (a)(1)(ii) or (a)(1)(iii), both of which require a cure notice and an opportunity to correct deficiencies.[1233]

The three contracts required Aerometals to supply the "initial purchase and stock replenishment of specified repair and spare parts" for three different helicopter series.[1234] The contract further required Aerometals to "maintain a minimum balance (M/B) of each part listed."[1235] The base periods of each contract had ended and the government had issued modifications to exercise option periods from 1 October 2001 through

---

1225. *Id*. at 159,165.

1226. *Id*. at 159,166.

1227. *Id*.

1228. *Id*.

1229. *Id*.

1230. ASBCA No. 53688, 2003 ASBCA LEXIS 74 (June 25, 2003).

1231. *Id*. at *1.

1232. *Id*. at *13. The clause incorporated into the contract provided, in relevant part:

> FAR 52.249-8 DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)
>
> (a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to--
>
> (i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;
>
> (ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or
>
> (iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

Id. at *9 (citing FAR, *supra* note 30, at 52.249-8).

1233. *Id*. at *12 (referencing FAR, *supra* note 30, at 52.249-8).

1234. *Id*. at *6-7.

1235. *Id*. at *7.

30 September 2002.[1236] In January 2002, the government discovered many parts that had been delivered and accepted were, according to the government, non-conforming.[1237] Soon thereafter, the Army terminated the contracts for default for "latent defects and fraud."[1238]

While the board could not resolve a number of issues on summary judgment,[1239] it did address the Army's right to terminate the contracts. The board was not persuaded by the contractor's argument that a "10 day cure notice was required because there was no delivery date in the contracts, merely a requirement for stock replenishment."[1240] Instead, the board found that in the absence of dates in the contract, "actual tenders of delivery" marked the "delivery date" and a failure to supply conforming goods at tender served as a basis for default.[1241] The board analogized to a similar set of facts: waiver of a delivery date. The board noted, "tender of delivery establishes a new delivery date even after the contract delivery date was foregone by waiver."[1242] Further, according to the board, delivery of substantially non-conforming goods provides a basis for termination despite waiver or timely delivery.[1243]

"I Will Not Make the Delivery Date" Is Not Necessarily Anticipatory Repudiation

In *Production Service & Technology, Inc*.,[1244] the appellant advised the government that due to delays in obtaining required raw materials, it would not meet the contract's delivery date.[1245] The government terminated the contract for cause, based on anticipatory repudiation.[1246] Production Service & Technology, Inc. (PST) challenged the termination, and the government moved for summary judgment on grounds that "appellant repudiated the contract, an act of default."[1247]

In a contract to supply split bow sheave weldments, PST encountered difficulties obtaining required bearings from the manufacturer selected by the weldment designer.[1248] About a month before the scheduled delivery date, PST informed the government, by letter and in conversations, that the manufacturer would not deliver the bearings to PST until after the contract's delivery date.[1249] Soon thereafter, the government terminated the order for the weldments due to "appellant's 'anticipated inability to make delivery on the specified date.'"[1250]

1236. *Id*. at *9-10.

1237. *Id*. at *10. The contract required supplies to be "FAA Certified or Aircraft Manufacturer approved." The government alleged that the parts were not so approved and that the lack of approval was a latent defect. *Id*. at *10-11.

1238. *Id*. at *11.

1239. The board found that genuine issues of fact existed as to the existence of a latent defect. Further, the board determined that the "meaning of 'Aircraft Manufacturer approved,'" was not yet ripe for decision on summary judgment. *Id*. at *18.

1240. *Id*. at *15.

1241. *Id*. at *16.

1242. *Id*. at *15.

1243. *Id*. The board concluded:

> The . . . effect of the failure to update the delivery date was to render the actual tenders of delivery . . . timely, thereby precluding default termination on the ground of late tender. Appellant, however, had a separate and additional obligation to then tender *conforming* supplies. If it failed to do so, the contract was subject to summary termination under para. (a)(i). [Emphasis in original].

Id. (citing Appli Tronics, ASBCA No. 31540, 89-1 BCA ¶ 21,555, at 108,519).

1244. ASBCA No. 53353, 02-2 BCA ¶ 32,026.

1245. *Id*. at 158,292.

1246. *Id*. at 158,293.

1247. *Id*.

1248. *Id*. at 158,291-92.

1249. *Id*. at 158,292. PST also had trouble getting necessary steel plates. The steel delays also impacted PST's ability to deliver the weldments on time, but the decision did not include any particular steel delivery dates. *Id*.

1250. *Id*. at 158,293.

The board was unwilling to grant the government summary to the government. The board found that the letters and conversations indicating PST would not be able to deliver on time did not constitute a "definite and unequivocal statement . . . refusing to perform the contract."[1251]

Timberrrrr! The CAFC Fells Lumber Contractor's Performance Defenses

The failure of a contractor to complete a timber contract allowed the CAFC to discuss and apply several performance defenses: force majeure, impossibility, commercial impracticability, and frustration of purpose.[1252]

In September 1980, Seaboard Lumber Co. (Seaboard) entered into a fixed price contract with the Forest Service to harvest timber. Between 1981 and 1983, the "government allowed interest rates to rise," in part, causing the housing market to "soften" and timber prices to fall.[1253] As a result, Seaboard encountered financial difficulties. Despite a two-year extension to the contract, Seaboard failed to complete the contract by the expiration date in late 1985.[1254] In 1987, the Forest Service resold the contract and sought damages from Seaboard for the difference between the value of Seaboard's contract and the lower resale price.[1255]

Seaboard conceded it failed to perform the timber contract. Seaboard argued, however, that "a force majeure clause" and "the doctrines of impossibility of performance, commercial impracticability, and frustration of purpose" excused performance.[1256] The COFC rejected Seaboard's defenses and the appellate court affirmed each issue.[1257]

The contract authorized an adjustment for delays resulting from "acts of Government."[1258] Seaboard argued that the government's monetary policy and deregulation of savings institutions in the 1980s "led to an increase in interest rates and a slump in the timber market."[1259] Such government acts, Seaboard asserted, qualified it for an adjustment under the force majeure clause. Seaboard argued that the Forest Service's refusal to adjust constituted a government breach, relieving Seaboard of liability.[1260]

The appellate court found, however, that the term "acts of Government" was not "so broad as to include government fiscal or monetary policy decisions."[1261] Further, a government policy must "preclude performance" and not solely affect profitability to be considered an act of government for force majeure purposes.[1262] The government policies did not prevent Seaboard from removing timber; at most, they made the contract unprofitable.[1263] Finally, the court introduced a factor relevant to each defense—risk. In fixed price contracts, the parties bear the risk that market prices will change. Here, when timber prices fell, "Seaboard must bear this market risk."[1264]

Next, the appellate court found that the fall in timber prices did not make performance of the contract either impossible or commercially impracticable. Because other similarly situated logging contractors successfully performed contracts during the same period, "the market fluctuation did not make Seaboard's contract impossible to perform, only unprofitable."[1265]

1251. *Id*. at 158,294. In fact, there were indicia that appellant intended to perform the contract: it requested progress or partial payments; PST sent letters to the bearings' manufacturer to "sort out" the delivery problems; and PST held a number of conversations with the government's contract specialist. *Id*.

1252. Seaboard Lumber Co., v. United States, 308 F.3d 1283 (Fed. Cir. 2002).

1253. *Id.* at 1287-88.

1254. *Id*.

1255. *Id*. at 1288.

1256. *Id*. at 1291.

1257. *Id*. at 1303.

1258. *Id*. at 1292.

1259. *Id*. at 1293.

1260. *Id*.

1261. *Id*.

1262. *Id*.

1263. *Id*. at 1294.

1264. *Id*.

1265. *Id*.

Based on the Supreme Court's *United States v. Winstar*[1266] decision, the circuit court identified four requirements to show commercial impracticability: "(i) a supervening event made performance impracticable; (ii) the non-occurrence of the event was a basic assumption upon which the contract was based; (iii) the occurrence of the event was not Seaboard's fault; and (iv) Seaboard did not assume the risk of occurrence."[1267] Honing in on the second requirement, the court found the non-occurrence of a fall in timber prices "was not a basic assumption" of the contract. Changing market prices is a foreseeable risk that both parties accept in a fixed price contract.[1268]

Finally, the court concluded, Seaboard's "frustration of purpose"[1269] defense also failed because Seaboard bore the risk of the change in market conditions.[1270] The CAFC affirmed the COFC's rejection of Seaboard's defenses.[1271]

Where's Waldo?

Termination for default issues often overlap with other *Year in Review* sections. To help avoid unnecessary searching, this section references a number of those cases. *Johnson v. All-State Construction* (*All-State*)[1272] involved progress payments and the government's common law right to set off amounts owed as liquidated damages. The government's exercise of this right did not breach the contract and could not "be the basis for defeating the default termination."[1273] We discuss *All-State* in our section entitled Construction Contracting.[1274] *American Renovations & Construction Comp*.[1275] concerned a "defective" default termination notice and the requirement for proof of detrimental reliance to toll the ninety-day statutory period to file an appeal at a board of contract appeals, and is discussed in our section on Contract Disputes Act (CDA) Litigation.[1276] *United Partition Systems, Inc.*[1277] involved the default termination of a delivery order under a GSA FSS contract. The ASBCA determined the board lacked jurisdiction to hear the case. We further discuss this case in our section covering Contract Disputes Act (CDA) Litigation.[1278]

Lieutenant Colonel Michael Benjamin.

1266. 518 U.S. 839, 904 (1996) (quoting Restatement (Second) of Contracts § 261).

1267. *Seaboard*, 308 F.3d at 1294.

1268. *Id*. at 1295.

1269. *Id*. at 1296. The court explained the difference between frustration and commercial impracticability:

> Although frustration and commercial impracticability are related, they deal with two different effects that unforeseen circumstances may have on performance. Under the frustration defense, the promissor's performance is excused because changed conditions have rendered the performance bargained from the promissee worthless, not because the promissor's performance has become different or impracticable. On the other hand, commercial impracticability excuses a promissor from performance because a supervening event changes the nature of the promissor's performance so that it has become commercially impracticable. Under frustration analysis the court is concerned with the impact of the event upon the failure of consideration, while under impracticability, the concern is more with the nature of the event and its effect upon performance.

Id.

1270. *Id.* The court identified three requirements to demonstrate frustration of purpose: a supervening event excused performance; contractor did not bear the risk of the event; and the "event rendered the value of the performance worthless" to the contractor. *Id.*

1271. *Id.* at 1288. In 1987, the Forest Service resold the contract and sought damages from Seaboard for the difference between the value of Seaboard's contract and the lower resale price. *Id.* Regarding the damages sought by the government on the reprocurement, the appellate court determined two issues. First, the holding in *United States v. Axman* did not bar recovery because the government did not resell the contract with materially different terms than those in the original contract. *Id.* at 1299 (citing United States v. Axman, 234 U.S. 36 (1914)). Second, the burden of proving that changed contract terms in a reprocurement contract affect the contract price is on the breaching contractor. *Id.* at 1301.

1272. 329 F.3d. 848 (Fed. Cir. 2003).

1273. *Id*. at 855.

1274. *See infra* Section IV.D Construction Contracting.

1275. ASBCA No. 54039, 03-1 BCA ¶ 32,296.

1276. *See infra* Section III.H Contract Disputes Act (CDA) Litigation. Another notice case is: *Stanley Mann v. United State*s, 334 F.3d 1048 (Fed. Cir. 2003) (holding that under public land management regulations, the government breached its lease with Mr. Mann by failing to provide him notice to the proper address prior to terminating the lease).

1277. ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264.

1278. *See infra* Section III.H. Contract Dispute Act (CDA) Litigation.

Terminations for Convenience

When "Residual" Is Everything

In *ITT Avionics Division* (ITT),[1279] the government terminated for convenience a supply contract with innovative warranty-like provisions. In a dispute over ownership of contractor-purchased materials, the ASBCA held a specially crafted contract clause "trumped" the standard FAR Termination for Convenience and Progress Payment clauses.[1280]

The Naval Air Systems Command (NAVAIR) awarded a fixed price contract to ITT to produce Airborne Self-Protection Jammers (ASPJ) and to provide "reliability assurance and service" for the ASPJs.[1281] The "Reliability Assurance Program" (RAP) "required ITT to repair ASPJ units that failed" during use.[1282] The RAP, however, was not simply a warranty program. The RAP contained several provisions that were both innovative and potentially risky to the contractor.[1283] The program encouraged ITT to reduce the failure rate by "building reliability into the ASPJ systems" and by enhancing reliability through engineering changes.[1284] The parties reasoned, fewer failures meant fewer repair calls. Fewer repairs would result in a higher profit for ITT because NAVAIR procured RAP on a fixed-price basis.[1285] In addition, the RAP required ITT to provide spares for failed units, without any price increase. Further, according to the RAP, if ITT failed to meet repair "turnaround deadlines," the RAP performance period would be extended, again without a price increase.[1286] Therefore, the contract incentivized ITT to develop a product requiring few repairs and to perform any needed repairs quickly.

To perform repairs in a timely manner, ITT purchased and stocked "lay-in materials" in advance.[1287] ITT also "implemented an asset tracking and warranty conformance process."[1288] Later, when NAVAIR terminated the contract for convenience,[1289] both parties laid claim to the approximately $2.7 million worth of lay-in materials previously purchased by ITT.[1290]

Asserting title to the lay-in materials, NAVAIR cited both the Progress Payments clause and the Termination for Convenience clause.[1291] Further, the government argued "the term 'residual' in clause J-8 refer[red] only to materials left at the end of the completed contract. Therefore, because the contract was terminated prior to completion, the material that remained at the termination was not 'residual.'"[1292]

The board determined that ITT owned the materials. The board found that even had ITT purchased the lay-in materials with progress payments, the Progress Payments clause did not mandate that the materials become government property.[1293] Paragraph (d)(3) of the clause provides, "although title to property is in the Government under this clause, other applicable clauses of this contract . . . shall determine the handling and disposition of property."[1294] For the board, J-8 was just such an

1279. ASBCA Nos. 50403, 50961, 03-1 BCA ¶ 32,238.

1280. *Id*. at 159,418-19.

1281. *Id*. at 159,414. The contract contained three separate elements: "produce 50 ASPJ units and selected spares on a fixed-price incentive basis"; "provide additional spares on a firm fixed-price basis"; and perform warranty-like work on a firm fixed-price basis. *Id.*

1282. *Id*.

1283. *Id*. at 159,417.

1284. *Id*. at 159,414.

1285. *Id*. at 159,417.

1286. *Id*.

1287. *Id*. at 159,414.

1288. *Id*.

1289. The ASPJs failed a required operational test and evaluation. As a result, Congress withdrew funding for the system "except for payment of the costs of terminating existing contracts." *Id*. at 159,415. NAVAIR soon thereafter terminated the contract. When NAVAIR terminated the contract, ITT had delivered most of the ASPJs. Essentially, only the RAP remained. *Id*.

1290. *Id*. at 159,415-16.

1291. *Id*. at 159,414 (citing FAR, *supra* note 30, at 52.232-16, 52.249-2).

1292. *Id*. at 159,418.

1293. *Id*. at 159,418-19.

1294. *Id*. (citing FAR, *supra* note 30, at 52.232-16).

"applicable clause."[1295] Further, the board found J-8 and the standard termination-related clauses "complementary."[1296] The FAR provides that a "termination inventory 'does not include . . . materials that are subject to a . . . special contract requirement governing their use or disposition."[1297] The J-8 clause, however, governed the lay-in material's disposition.[1298] Finally, the board held the materials became "residual" when the contract ended; regardless of how the contract ended.[1299]

ITT pointed to clause J-8 of the contract which specifically provided, the "Government will have no right to, or property interest in any residual material procured by the Contractor as part of the repair material lay-in."[1300] This provision was one of several incentives to help the contractor meet the reliability requirements and to ensure the government had fixed costs for repairs.[1301] Further, during contract negotiations, ITT sought to have the government purchase the lay-in materials.[1302] The government refused. As a compromise, the parties agreed to J-8, allowing ITT to purchase excess lay in materials, "with the understanding that ITT would have ownership of the material and could resell" materials not needed to complete the contract.[1303]

Ultimately, the board appeared swayed by the purpose of clause J-8 and the distribution of risk that J-8 represented. The government insisted upon a challenging and risky requirement for the contractor: operational units without extended delays and without any government responsibility for repair.[1304] Further, the government would not purchase the lay-in material.[1305] The RAP, for a firm fixed-price, gave the government greater assurance that ITT could meet the requirement.[1306]

The trade off for ITT was that it assumed all responsibility for repairing the units in a timely fashion. In order to do that, ITT had to be free to lay in repair material as it felt necessary to meet any repair demands, even while tying-up funds from the fixed-price contract. In return, the parties agreed to clause J-8.[1307]

T4C or Deductive Change and Why do we Care?[1308]

Jimenez, Inc.,[1309] involved a $2 million construction contract between Jimenez and the Department of Veterans Affairs (VA) for renovation of patient wards at the VA Medical Center in Nashville, Tennessee. The construction project, scheduled to be completed within one year, was well into its third year[1310] when the VA ended the contract under the Inspection of Construction clause.[1311]

On several occasions, the VA informed Jimenez of construction deficiencies. Jimenez corrected some, but not all of the deficiencies.[1312] Ultimately, when the contract was ninety-eight percent complete, the VA informed Jimenez under FAR section 52.246-12, Inspection of Construction, that the government would "correct all remaining defective work."[1313] Further, the government intended to charge Jimenez the costs incurred to correct the deficiencies.[1314] The VA directed Jimenez to vacate the area and remove all construction materials.[1315]

1295. *Id*. at 159,419.

1296. *Id*.

1297. *Id*.

1298. *Id*.

1299. *Id*. "This is so whether the RAP is concluded by completion of the contract or termination." *Id*.

1300. *Id*. at 159,418.

1301. *Id*.

1302. *Id*. at 159,417-18.

1303. *Id*.

1304. *Id*.

1305. *Id*.

1306. *Id*.

1307. *Id*. at 159,418. The ASBCA denied reconsideration of this case in *ITT Avionics Div.*, ASBCA Nos. 50403, et al., 2003 ASBCA LEXIS 99 (Sept. 30, 2003).

1308. For a comprehensive discussion of deductive changes, see John C. Person, *Deductive Changes*, 01-01 Briefing Papers 1 (2001).

1309. VABCA Nos. 6351, 6352, et al., 02-2 BCA ¶ 32,019.

1310. The VA issued the Notice to Proceed, effective 14 July 1997, and the contract required completion within 365 days. *Id*. at 158,236.

On appeal, Jimenez claimed that the direction to stop work was a default termination motivated by government bad faith, or alternatively, a constructive termination for convenience.[1316] Finding that Jimenez failed to overcome the presumption that public officials act in good faith, the board refused to treat the case as an improper termination for default.[1317]

Jimenez sought to characterize the contract close out as a termination for convenience to obtain termination settlement costs not provided under the Inspection of Construction clause.[1318] The board held, however, that neither the government, nor the contractor can arbitrarily determine which clause applies. "Rather, the choice is determined by the extent of the work being deleted."[1319] The Termination for Convenience clause governs deletions of "major portions of the contract work," while "minor deletions" are treated as deductive changes.[1320] Because only two percent of the work remained, the board found the government acted properly using the Inspection of Construction clause and denied Jimenez' convenience termination settlement cost claim.[1321]

Lieutenant Colonel Michael Benjamin.

Contract Disputes Act (CDA) Litigation

Jurisdiction

Come Back When You Can Show Some Harm

The Supreme Court recently had an opportunity to examine whether the Contract Disputes Act (CDA)[1322] applied to National Park concession contracts. Unfortunately for those expecting a decision defining the CDA's scope, the Court dismissed the case after determining the dispute was not yet ripe for adjudication.

In *National Park Hospitality Ass'n v. Department of the Interior* (Nat'l Park),[1323] the petitioner challenged the validity of a National Park Service (NPS) regulation that purported to place park concession contracts outside the scope of the CDA.[1324] The district court[1325] found the regulation legal. Applying the principle of "deference," as articulated by the Supreme Court in *Chevron v. Natural Resources Defense Council*,[1326] the district court determined the CDA's language was ambiguous as to whether the statute applied to concession contracts[1327] and concluded the NPS' regulatory interpretation of the CDA was reasonable.[1328] The Court of Appeals for the District of Columbia Circuit affirmed the district court's ruling,[1329]

1311. *Id*. at 158,249 (discussing FAR, *supra* note 30, at 52.246-12). The FAR provision provides, in part,

> (f) The Contractor shall, without charge, replace or correct work found by the Government not to conform to contract requirements, unless in the public interest the Government consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.
>
> (g) If the Contractor does not promptly replace or correct rejected work, the Government may:
>
> (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor; or
>
> (2) terminate for default the Contractor's right to proceed.

FAR, *supra* note 30, at 52.246-12.

1312. *Jimenez*, 02-2 BCA ¶ 32,019, at 158,238-46.

1313. *Id*. at 158,249 (discussing FAR, *supra* note 30, at 52.246-12).

1314. *Id*.

1315. *Id*.

1316. *Id*. at 158,253.

1317. *Id*. at 158,253-54.

1318. *Id*. at 158,250. Jimenez sought approximately $29,417. *Id*.

1319. *Id*. at 158,254.

1320. *Id*.

1321. *Id*.

1322. 41 U.S.C.S. § 601-613 (LEXIS 2003).

1323. 123 S. Ct. 2026 (2003).

noting that the NPS does not administer the CDA, thus it has no interpretative authority over the Act's provisions.[1330] Nonetheless, placing no reliance on *Chevron*, the court agreed with the NPS' reading of the CDA and found the regulation reasonable and consistent with the CDA.[1331]

In November 2002, the Supreme Court granted certiorari to consider whether the CDA applies to contracts between the NPS and concessionaires. Because the petitioner brought only a "facial challenge" to the regulation and was not litigating an actual dispute with the NPS, the Court concluded the controversy was not yet ripe for judicial resolution.[1332] The Court held that determining whether an administrative action is ripe requires examining the issue's fitness for judicial decision, as well as evaluating the hardship the parties might suffer should the Court withhold consideration of the dispute.[1333] In this case, the Court observed the NPS lacked authority to amend or administer the CDA. Rather, the task of administering contract disputes within NPS rested with agency contracting officers and the BCAs, as well as the federal courts. As such, the Court concluded the NPS regulation is nothing more than a "general policy statement designed to inform the public of NPS' views on the CDA's proper application."[1334] Thus, the regulation did not create any "adverse effects of a strictly legal kind," as required for a showing of hardship.[1335] Because nothing in the regulation prevented concessionaires from following the CDA's procedures once a dispute arose, the Court concluded the case was not ripe for judicial action.[1336]

Trust Me, I'm the Government (I Think)

A recent case demonstrates that a foundation's acceptance of federal funds does not convert that foundation into a federal agency for purposes of the CDA. In *Morgan v. United States*,[1337] Johnny Morgan, the owner of a crop-dusting service, entered into several contracts with the Southeastern Boll Weevil Eradication Foundation (Foundation) to perform crop-dust-

1324. *Id.* at 2029. The regulation states:

> A *concession contract (or contract)* means a binding written agreement between the Director and a concessioner . . . . Concession contracts are not contracts within the meaning of 41 U.S.C. 601 *et seq.* (the Contract Disputes Act) and are not service or procurement contracts within the meaning of statutes, regulations or policies that apply only to federal service contracts or other types of federal procurement actions.

36 C.F.R. § 51.3 (LEXIS 2003).

1325. *Nat'l Park*, 123 S. Ct. at 2029 (citing Amfac Resorts, L.L.C. v. Dep't. of Interior, 142 F. Supp. 2d 54, 80-82 (2001)).

1326. 467 U.S. 837 (1984). In *Chevron*, the Court held that if a statute was silent or ambiguous with respect to the specific issue, the question for a court was whether the agency's action was based on a permissible construction of the statute. In this examination, considerable weight is to be accorded to an agency's construction of a statutory scheme. *Id.*

1327. The CDA applies to contracts entered into by an executive agency for:

> (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property.

41 U.S.C.S. §§ 601-613 (LEXIS 2003); *see also 2002 Year in Review, supra* note 57, at 191.

1328. *Nat'l Park*, 123 S. Ct. at 2029 (citing *Amfac*, 142 F. Supp. 2d at 80-82).

1329. *Id.* (citing Amfac Resorts, L. L. C. v. Dept. of Interior, 282 F.3d 818 (2002) [hereinafter Amfac II]).

1330. *Id.* (citing *Amfac II*, 282 F.3d at 835).

1331. *Id.*

1332. *Id.* at 2030.

1333. *Id.* (citing Abbot Lab. v. Gardner, 87 S. Ct. 1507, 1507 (1967)).

1334. *Id.* at 2031.

1335. *Id.* (citing Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998)).

1336. *Id.* at 2032. The *National Park* decision generated a concurrence from Justice Stevens, as well as a dissent from Justices Breyer and O'Connor. In his concurrence, Justice Stevens observed that the NPS regulation created uncertainty as to whether the CDA applies to petitioners, and there is no doubt as to the importance of this case to petitioners. Justice Stevens, however, concluded that petitioners failed to identify any "specific injury that would be redressed by a favorable decision on the merits of the case." *Id.* at 2034-35. Justices Breyer's and O'Connor's dissent noted that the NPS, following the regulation, will likely determine that disputes arising under the concession contracts are not protected by the provisions of the CDA. Therefore, "[i]n the circumstances present here, that kind of injury, though a future one, is concrete and likely to occur." *Id.* at 2035.

1337. 55 Fed. Cl. 706 (2003).

ing services.[1338] The Foundation, a non-profit corporation, carried out "programs to destroy and eliminate cotton boll weevils in infested areas in the United States."[1339] Pursuant to a cooperative agreement between the Foundation and the U.S. Department of Agriculture (USDA), the USDA provided thirty percent of the Foundation's costs. In exchange, the Foundation complied with a federally-mandated scheme involving federal supervision and control of the Foundation's boll weevil eradication efforts.[1340]

The Foundation terminated the plaintiff's contracts, after which Morgan sued the Foundation in district court.[1341] The Foundation sought dismissal asserting Morgan should have brought his claims before the COFC. The Foundation theorized it was a federal agency, and thus not subject to suit in district court. The district court agreed with the Foundation's argument and dismissed the complaint for lack of jurisdiction. The court reasoned the claims were within the COFC's jurisdiction pursuant to the CDA because the Foundation "is furthering a Congressional mandate and is under Federal governmental control as to how that mandate is carried out."[1342]

Needless to say, Morgan brought his action to the COFC, but unfortunately for Morgan the COFC respectfully disagreed with the district court's assessment of the COFC's jurisdiction.[1343] In granting the government's motion to dismiss, the court observed that simply because the Foundation complied with a federally-mandated regulatory scheme in spending federal monies that did not convert the Foundation into a government agency. For the court, "federal control and supervision do not convert a private entity or an instrumentality of local government into the United States for purposes of determining privity of contract."[1344]

Lack of Privity Can Be a Problem

A recent case demonstrates how difficult it can be for an appellant lacking privity of contract with the government to establish jurisdiction under the CDA. In *Globex Corp. v. United States* (*Globex*),[1345] the plaintiff attempted to establish "deemed privity" with the government under the theory the government and the prime contractor were "concurrently responsible" for inspecting and accepting the subcontractor's work.[1346] In *Globex*, Sandia Corp. (Sandia) entered into a contract with the Department of Energy to manage and operate a government-owned laboratory.[1347] Sandia subsequently entered into a contract with Globex under which Globex provided Sandia crane and hoist inspection and preventive maintenance services.[1348] Shortly after award, Sandia terminated the Globex contract for convenience. In accordance with the contract's termination clause, Globex submitted a settlement proposal to Sandia seeking $386,974.15. Sandia and Globex tentatively agreed on a settlement, but the settlement was contingent upon Sandia obtaining the government's approval. The government did not approve the settlement agreement, and Globex filed suit against the government.[1349] Globex argued that even though the plaintiff had contracted directly with Sandia, the government was "ultimately responsible and liable" under the contract.[1350] Upon examining Globex's argument, the court concluded that Globex failed to "connect the dots" as to why the government's contract with Sandia equated to privity of contract between Globex and the government.[1351] "The mere conclusory allegation that 'Department of Energy was ultimately responsible and liable,' unsupported by any factual assertions," was not, in the court's view, enough to establish privity between Globex and the government.[1352]

Two recent ASBCA cases demonstrate that allegations of prime contractor fraud cannot overcome a lack of privity. In *Coastal Drilling Inc*.[1353] and *Marine Contractors Inc*.,[1354] the

1338. *Id*. at 706-07.

1339. *Id*. at 707.

1340. *Id*.

1341. *Id*.

1342. *Id*.

1343. *Id*.

1344. *Id*. at 708.

1345. 54 Fed. Cl. 343 (2002).

1346. *Id*. at 345.

1347. *Id*.

1348. *Id*.

1349. *Id*. at 345-46. Globex first filed its complaint in the U.S. District Court for the District of Columbia. The district court determined it did not have subject matter jurisdiction and transferred the case to the COFC. *Id*.

Army Corps of Engineers (COE) awarded a contract to Airport Industrial Park, Inc., dba P.E.C. Contracting (PEC) for the construction of a dock front at Neville Island, Pennsylvania.[1355] PEC then entered into a contract with Coastal Drilling for receipt of drilling equipment, labor, and other materials needed for the project.[1356] PEC also entered into a contract with Marine Contractors for additional equipment and labor.[1357]

PEC failed to make adequate progress on the project, so the COE terminated PEC for default. Approximately a year later both Coastal Drilling, Inc. and Marine Contractors submitted claims to the COE contracting officer for $380,000[1358] and $301,695[1359] respectively. The contracting officer informed both appellants the COE would not issue final decisions on the claims because as subcontractors they did not have standing to bring claims directly to the government. The contracting officer also informed the appellants he would only consider the claims if they were sponsored by PEC.[1360] The appellants appealed the contracting officer's "decision" to the ASBCA, which queried whether the appellants, as subcontractors, had standing to bring their appeal. In response to a government motion to dismiss the case for lack of standing, both subcontractors asserted they were defrauded by PEC, and in the face of clear evidence that the prime contractor was untrustworthy, the subcontractor should not be forced to seek the sponsorship of the prime.[1361] Unmoved by the appellants' arguments, the board refused to make findings of fact concerning the allegations of fraud. For the board, "even if the allegations were proven, the decision on this motion would be the same."[1362] The board granted the government's motion to dismiss, holding that the appellant's arguments concerning fraud were irrelevant to the issue of jurisdiction.[1363]

Won't Somebody Please Take This Package!

Two recent board cases demonstrate that the ninety-day deadline for filing an appeal before the boards can be unforgiving.[1364] In *Tiger Natural Gas, Inc.*,[1365] the GSA awarded Tiger a contract for to install a propane backup system at the Fort Worth Federal Center.[1366] In a decision dated 19 September 2002, the contracting officer determined Tiger owed the GSA $39,783.17 under the contract.[1367]

Tiger disagreed with the contracting officer's decision, and on 19 December 2002, Tiger's attorney gave a package containing a notice of appeal to Federal Express for next-day delivery to the General Services Administration Board of Contract Appeals (GSBCA).[1368] The package listed the board's street address, but did not provide the name of a recipient, the board's room number, or a telephone number.[1369] Under the CDA's ninety-day appeal rule, the GSBCA's deadline to receive the

1350. *Id.* at 348.

1351. *Id.*

1352. *Id.*

1353. ASBCA No. 54023, 03-1 BCA ¶ 32,241.

1354. ASBCA No. 54017, 03-1 BCA ¶ 32,240.

1355. *Coastal Drilling*, 03-1 BCA ¶ 32,241, at 159,426; *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,424.

1356. *Coastal Drilling*, 03-1 BCA ¶ 32,241, at 159,426.

1357. *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,424.

1358. *Coastal Drilling*, 03-1 BCA ¶ 32,241, at 159,426.

1359. *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,424.

1360. *Coastal Drilling*, 03-1 BCA ¶ 32,241, at 159,426; *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,424.

1361. *Coastal Drilling*, 03-1 BCA ¶ 32,241, at 159,426; *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,424.

1362. *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,425.

1363. *Coastal Drilling*, 03-1 BCA ¶ 32,241, at 159,427; *Marine Contractors*, 03-1 BCA ¶ 32,240, at 159,425.

1364. Under the CDA, a board lacks jurisdiction over a case if the appeal is filed more than ninety days after the contractor's receipt of a contracting officer's valid final decision. 41 U.S.C.S. § 606 (LEXIS 2003).

1365. BCA No. 16039, 03-2 BCA ¶ 32,321.

1366. *Id.* at 159,909.

1367. *Id.*

appeal notice was 23 December 2002. Federal Express, however, did not successfully deliver the package until 30 December 2002.[1370]

On appeal, the government moved to dismiss because Tiger failed to deliver its appeal notice within the ninety-day deadline.[1371] At the hearing, the appellant provided a statement from a Federal Express courier noting that on 20 December 2002 she was physically present in the GSA building and attempted to deliver the package. She was unable to complete the delivery, however, because without a specific recipient's name, no one she spoke to would accept delivery of the package. She made similar delivery attempts to the board on 23 and 24 December 2002, as well as on 26 and 27 December 2002. In each case, she was unable to complete delivery because she could not find anyone willing to accept the shipment. On 30 December 2002, the courier finally located someone at the GSA who was willing to sign for delivery of the package.[1372]

Tiger argued that its appeal was timely because the notice of appeal was physically presented to the board, even though the notice was refused.[1373] Unimpressed with appellant's argument, the board observed that under its rules, a notice of appeal "is filed upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed."[1374] Because Tiger did not mail the appeal notice, but sent it by commercial courier instead, the filing date was the date of the Clerk's Office receipt. The board observed that "receipt" means "taking possession or delivery of something."[1375] Although the courier may have "been in the neighborhood" of the Clerk's Office on 20 and 23 December, the evidence did not satisfy the board that the courier ever attempted to give that package to the Clerk. Given that the "the deadline for filing an appeal is unforgiving,"[1376] the board granted the government's motion to dismiss for lack of jurisdiction.[1377]

In *American Renovation & Construction Co.* (*ARC*),[1378] the appellant filed an appeal with the ASBCA 457 days after receipt of the contracting officer's final decision.[1379] ARC sought to avoid the mandatory ninety-day limit because the contracting officer failed to inform appellant of the time limit and erroneously cited the contract's disputes clause in the termination letter.[1380] The ASBCA granted the government's motion to dismiss for failure to timely submit the claim. The government had submitted a second default termination letter to ARC on a different contract shortly after the defective termination notice. The second termination notice correctly stated appellant's appeal rights under the CDA.[1381] Therefore, it was apparent to the board that ARC had actual knowledge of its appeal rights and did not act in detrimental reliance on the defective notice.[1382]

1368. *Id.*

1369. *Id.*

1370. *Id.* Although the board did not receive the original copy of the appeal notice until 30 December 2002, the appellant transmitted a facsimile copy of the notice to the clerk of the board on 27 December 2003. Under the board's rules, receipt of the facsimile copy constituted "notice," however, the board's receipt of the facsimile was still beyond the ninety-day deadline. *Id.* at 159,913; *see also* GSBCA Rule 101(b)(5)(ii).

1371. *Tiger*, 03-2 BCA ¶ 32,321, at 159,909.

1372. *Id.* at 159,909-10.

1373. *Id.* at 159,910-11.

1374. *Id.* at 159,911; *see also* GSBCA Rule 101(b)(5)(i).

1375. *Tiger*, 03-2 BCA ¶ 32,321, at 159,911.

1376. *Id.* at 159,910.

1377. *Id.* at 159,913.

1378. ASBCA No. 54039, 03-2 BCA ¶ 32,296.

1379. *Id.* at 159,802.

1380. *Id.* Instead of citing to FAR clause 52.233-1, Disputes, the letter cited a nonexistent clause at FAR 52.333-1. *Id.*; *see also* FAR, *supra* note 30, at 52.233-1.

1381. *ARC*, 03-2 BCA ¶ 32,296, at 159,802.

1382. *Id.* at 159,804.

If You Don't Have Authority, We Don't Have Jurisdiction

The FAR Councils recently amended the FAR to allow ordering agency contracting officers to hear disputes relating to contractor performance of delivery orders (DO) placed under MAS contracts.[1383] In *United Partition Systems, Inc.* (*UPSI*),[1384] however, the ASBCA opined that this change does not extend to MAS DO default determinations, which must be decided (for the time being) by the MAS contracting officers, with appeals going to the MAS contracting officer's board of contract appeals (i.e., the GSBCA).[1385]

In *UPSI*,[1386] the Air Force awarded the appellant a DO for various construction services under a GSA Federal Supply Schedule/MAS.[1387] The Air Force terminated the DO for default due to poor performance.[1388] In response, UPSI submitted a claim to the Air Force contracting officer alleging wrongful termination. The Air Force contracting officer issued a decision that denied the appellant's claim, and asserted a claim against UPSI for excess reprocurement costs. The appellant appealed the default termination as well as the Air Force's affirmative claim to the ASBCA.[1389] The Air Force moved to dismiss the case for lack of jurisdiction, alleging that the appeals were untimely filed under the CDA.[1390]

The board, sua sponte, asked whether it had jurisdiction to decide the appeals on the grounds the Air Force should have referred the appellant's claim to the GSA for a GSA contracting officer's decision. The board observed that even though FAR section 8.405-7 had been changed to allow ordering contracting officers to resolve disputes concerning performance, under FAR section 8.405-5, the appellant should have submitted its claim that the MAS DO termination was wrongful to the "schedule contracting office."[1391] Because the Air Force contracting officer did not have authority to determine whether UPSI's failure was excusable, the ASBCA determined there was no valid contracting officer's decision, as required by the CDA. Thus, the board lacked jurisdiction to hear the case.[1392]

Be Careful What You Ask For, You Might Just Get It

The COFC recently held that a letter from a subcontractor, when attached to a cover letter from the prime contractor together constituted a "claim" under the CDA. In *Clearwater Constructors, Inc. v. United States*),[1393] the COE awarded Clearwater Constructors, Inc. (Clearwater) a contract on 20 February 1986 to construct a hangar.[1394] Clearwater subcontracted much of the work to Fleming Steel Company, Inc. (Fleming).[1395] Shortly after award, the COE issued a modification that specifically required explosion proof control panels in the hangar.[1396]

1383. In July 2002, the FAR Councils amended FAR section 8.405-7 to read:

> (a) *Disputes pertaining to the performance of orders under a schedule contract*. (1) Under the Disputes clause of the schedule contract, the ordering office contracting officer may- (i) Issue final decisions on disputes arising from performance of the order . . . or (ii) Refer the dispute to the schedule contracting officer . . . .

See FAR, *supra* note 30, at 8.405-7.

1384. ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264.

1385. The FAR reads, in relevant part: "Should the contractor claim that the failure was excusable, the ordering office shall promptly refer the matter to the schedule contracting office . . . ." *See* FAR, *supra* note 30, at 8.405-5(a)(2). On 18 April 2003, the FAR Councils announced a proposed amendment to the rule under which "[i]f the contractor claims that the failure was excusable, the ordering agency contracting officer shall consider the question of the failure to be a contract dispute . . . ." Under the proposed change, disputes involving performance under a GSA MAS could be appealed to the ordering agency's board of contract appeals. *See* General Services Administration et al., Federal Acquisition Regulation; Federal Supply Schedules Services and Blanket Purchase Agreements (BPA), 68 Fed. Reg. 19294 (Apr. 18, 2003).

1386. *UPSI*, 03-2 BCA ¶ 32,264, at 159,594.

1387. *Id.* at 159,595.

1388. *Id.* at 159,597.

1389. *Id.*

1390. *Id.* UPSI filed its notice of appeal with the ASBCA ninety-one days after it had received the contracting officer's denial decision. *Id.*

1391. *Id.*

1392. *Id.*

1393. 56 Fed. Cl. 303 (2003).

1394. *Id.* at 304.

1395. *Id.*

Fleming sought guidance from Clearwater and the COE. The COE responded the "modification was merely a clarification of a contract requirement,"[1397] and Fleming must perform the work at no extra cost to the COE.[1398] In a 16 September 1986 letter, Fleming formally documented its disagreement with the COE. Fleming's letter detailed its interpretation of the contract clauses in dispute and concluded by stating Fleming should not have to suffer for the mistakes of the COE.[1399] On 30 September 1986, Clearwater submitted Fleming's letter, as well as its own cover letter, to the COE contracting officer. Clearwater's cover letter stated that it disagreed with the contracting officer's interpretation of the contract, and requested a formal "review and decision" from the contracting officer.[1400] On 21 July 1987, the contracting officer issued a "final decision" that concluded Fleming was not entitled to an equitable adjustment for work required under the modification.[1401] Almost ten years later, on 14 March 1997, Clearwater submitted a certified claim for costs associated with the modification to a COE contracting officer. The contracting officer denied the claim, and Clearwater appealed the decision to the COFC.[1402]

Before the COFC, the government moved to dismiss for lack of jurisdiction.[1403] The government contended that Fleming's letter, when attached to Clearwater's cover letter, constituted a valid non-monetary claim, and the claim had already been addressed in the contracting officer's 21 July 1987 decision.[1404] In response, Clearwater argued that Fleming's letter was intended simply as a "'formal protest of the Corps' actions and a summary of Fleming's position."[1405] Clearwater argued, because it had not submitted a valid claim on 30 September 1986, the contracting officer's 21 July 1987 decision was not valid and did not trigger the time period within which it could file an appeal.[1406]

The court noted that a claim submitted pursuant to the CDA "does not depend upon any particular language or conformity to any specific format."[1407] Rather, to submit a valid non-monetary claim, a contractor need only submit a "written demand . . . seeking as a matter of right . . . the adjustment or interpretation of contract terms," and must submit the request to the contracting officer for a decision.[1408] In this case, the letters from Fleming and Clearwater "offered a precise and well-explained rationale" why they did not agree with the COE's contract interpretation.[1409] Given that the letters, when read together, offered a clear statement of the plaintiff's disagreement with the government, and a "written demand seeking, as a matter of right, interpretation of that contract modification," the court determined the letters together constituted a "claim" under the CDA.[1410] Accordingly, the court determined it lacked jurisdiction to entertain the case because the appeal was filed more than nine years after the contracting officer's final decision.[1411]

Left Out in the Cold: Sureties, NAFIs, and Litigious Raisin Vendors

This has not been a good year for sureties, nonappropriated fund instrumentalities (NAFIs), or litigious raisin vendors trying to establish jurisdiction under the CDA or Tucker Act.[1412] In *Fireman's Fund Insurance Co. v. England* (*Fireman's*

1396. *Id.* at 304-05.

1397. *Id.* at 305.

1398. *Id.*

1399. *Id.* at 305-06.

1400. *Id.* at 306.

1401. *Id.*

1402. *Id.* at 306-07.

1403. *Id.* at 307.

1404. *Id.* at 308.

1405. *Id.*

1406. *Id.*

1407. *Id.* at 309.

1408. *Id.* (citing GPA-I, PL v. United States, 46 Fed. Cl. 762, 767).

1409. *Id.* at 311.

1410. *Id.*

1411. *Id.* at 313.

Fund),[1413] the CAFC affirmed an ASBCA decision stating the board had no jurisdiction under the CDA to hear a surety's equitable subrogation claim.[1414] The court observed that although a surety can sue the government before the COFC under the non-contractual doctrine of equitable subrogation,[1415] the CDA only covers "claims by a contractor against the government relating to a contract."[1416] Because a surety is not a "contractor" under the CDA, the boards lack jurisdiction over such claims.[1417]

In *Core Concepts of Florida, Inc. v. United States*,[1418] the CAFC upheld a COFC decision that it lacked jurisdiction over a claim involving a Federal Prison Industries (FPI) contract (FPI).[1419] The CAFC held that the FPI is a NAFI because FPI functioned as a self-sufficient corporation and did not receive any federal appropriations.[1420] Since the Tucker Act only confers jurisdiction to the COFC over cases where the judgment is to be paid from appropriated funds, the CAFC determined the COFC had no jurisdiction over the case.[1421]

Finally, in *Lion Raisins Inc. v. United States* (*Lion*),[1422] the COFC held it lacked jurisdiction to entertain a claim by an appellant involving an alleged breach of an implied-in-fact contract between Lion and the USDA. As a raisin vendor, Lion was required by regulation to submit for inspection raisins it bought and sold to the USDA.[1423] The USDA charged Lion a fee of approximately $17 to $18 for each ton of raisins inspected.[1424] Lion alleged the USDA failed to perform all required tests.[1425] As a result of USDA's alleged "breach," Lion insisted the USDA forced it to pay for raisin inspection services that were "not faithfully performed."[1426] Examining Lion's argument that it had an implied-in-fact contractual "right" to be inspected, the court noted that the inspection requirement did not result from an agreement with an authorized government agent, as required to plead a contract claim under the Tucker Act.[1427] Rather, the inspections were required by regulation. Even though the regulation required Lion to engage the services of USDA personnel if it wished to sell raisins, under the Tucker Act, "such arrangements are treated as contracts for the purposes of remedy only."[1428]

1412. *Id.* The Tucker Act confers jurisdiction on the COFC over claims against the federal government founded either upon the Constitution, any act of Congress, any regulation of an executive department, or on any express or implied contract with the federal government. 28 U.S.C.S. § 1491(a)(1) (LEXIS 2003). This grant of jurisdiction is limited by the requirement that judgments awarded against the government be paid out of appropriated funds. Absent a specific provision to the contrary, the COFC generally lacks jurisdiction over actions in which appropriated funds cannot be obligated. *Id.*

1413. 313 F.3d 1344 (Fed. Cir. 2002).

1414. *See* Ins. Co. of the West v. United States, 243 F.3d 1367, 1370 (Fed. Cir. 2001). The doctrine of equitable subrogation is a non-contractual doctrine of equity that allows a surety that "takes over contract performance" or "finances completion of the defaulted contract" to "succeed to the contractual rights of a contractor against the government." *Id.*

1415. *Fireman's Fund*, 313 F.3d at 1351.

1416. *Id.* (citing 41 U.S.C. § 605(a) (2000)).

1417. *Id*. For discussion of the surety aspects of the *Fireman's Fund* decision, see *infra* Section IV.E Bonds, Sureties, and Insurance.

1418. 327 F.3d 1331 (Fed. Cir. 2003).

1419. *Id.* at 1339.

1420. *Id.* at 1334.

1421. *Id*. at 1339. For additional discussion of the *Core Concepts* decision, see *infra* Section IV.S Nonappropriated Funds (NAF) Contracting.

1422. 54 Fed. Cl. 427 (2002).

1423. Under 7 C.F.R. § 989.58(d)(1) (2003), raisins sold in the United States must be USDA inspected.

1424. *Lion*, 54 Fed. Cl. at 428.

1425. *Id.* at 429.

1426. *Id.*

1427. *Id.* at 431.

> To plead a contract claim, whether express or implied, within Tucker Act jurisdiction, a complainant must allege mutual intent to contract including an offer, an acceptance, consideration and facts sufficient to establish that the contract was entered into with an authorized agent of the United States who "had actual authority to bind the United States.

Id. (citing Trauma Serv. Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997)).

Remedies and Defenses

Please (Don't) Release Me, (Don't) Let Me Go

A recent CAFC case shows the grief that can result from a poorly drafted release. In *Metric Constructors, Inc. v. United States*,[1429] the CAFC reversed a COFC decision that a release between the subcontractor and the prime barred the subcontractor's claim for equitable adjustment. For the CAFC, the release document's ambiguous wording made the release anything but "iron-bound."[1430]

In 1991, the National Aeronautics and Space Administration (NASA) entered into a contract with Metric Constructors, Inc. (Metric) to build a Space Station Processing Facility.[1431] Metric subcontracted much of the work to Meisner Electric, Inc. (Meisner).[1432] During contract performance, NASA ordered a number of contract changes, and Meisner forwarded several claims for equitable adjustment to Metric. Metric informed Meisner it could not make any payments on the change orders until a dispute between Meisner and another subcontractor was resolved.[1433]

In March 1995, NASA issued a change order that increased the cost of Meisner's work.[1434] Meisner sought Metric's aid in requesting an equitable adjustment for expenses resulting from the increased work. Several months later, Metric filed a claim with NASA for the work, and on 17 April 1996, Metric and NASA reached a settlement on the claim. NASA agreed to pay Metric $39,000 for the work, of which Metric agreed to pay Meisner $36,000.[1435] Shortly thereafter, Metric and Meisner entered into a "Liquidation Agreement." Under the agreement, Metric agreed to pay Meisner $74,751, which represented money Metric had withheld because of the dispute between Meinser and the other subcontractor. The agreement purported to "establish the procedure for adjudication of [Meisner's claims] and for establishing and releasing [Metric's and Meisner's] respective liabilities" as to those claims.[1436] Further, Metric agreed to present Meisner's other claims to NASA, subject to Metric retaining a portion of any recovery for itself.[1437] The day the parties signed the Liquidation Agreement, Meisner presented Metric a form titled "Affidavit and Release" and subtitled "Partial Payment." The document invoiced the $74,751 payment by Metric to Meisner, and stated that Meisner released Metric "and the owners of the project [i.e., NASA] from all claims whatsoever arising out of or relating to the subcontract or purchase order to the extent of payments actually received."[1438]

In May 1996, NASA issued another change order to Metric that provided for another payment of $39,000.[1439] In accordance with the earlier agreement with Meisner, Metric passed on $36,000 to Meisner as compensation for its work. Upon receiving this payment, on 15 July 1996, Meisner issued Metric another document similar to the April 1996 release. As with the April 1996 release, this document contained language releasing Metric and the project owner (NASA) from "all claims whatsoever arising out of or relating to the subcontract or purchase order to the extent of payments actually received."[1440]

1428. *Id.* at 432 (citing Russell Corp. v. United States, 210 Ct. Cl. 596, 537 F.2d 474 (1976)). For additional discussion of the inspection aspects of the *Lion Raisins* decision, see *supra* Section III.C. Inspection, Acceptance, and Warranties.

1429. 314 F.3d 578 (Fed. Cir. 2002).

1430. *Id.* at 582.

1431. *Id.* at 579.

1432. *Id.*

1433. *Id.* at 580.

1434. *Id.*

1435. *Id.*

1436. *Id.*

1437. *Id.*

1438. *Id.* at 580-81.

1439. *Id.* at 581.

1440. *Id.*

A year and a half later, Metric submitted another claim to NASA for equitable adjustment on Meisner's behalf. The claim sought compensation for a number of direct costs, as well as alleged disruptions to Meisner's performance.[1441] The contracting officer denied most of the claim, whereupon Metric appealed the contracting officer's decision to the COFC.[1442] At the COFC, the government argued that under the *Severin*[1443] doctrine, the release of Metric by Meisner served to release the government from any liability under the claim. Examining the language of the July 1996 release, the court held the language of the document was unambiguous and constituted "an iron-bound release of both Metric and the Government."[1444]

On appeal, the CAFC viewed the release documents as being less than "iron-bound," and remanded the case back to the COFC to make further findings of fact.[1445] The CAFC observed the documents' subtitle, "partial payments," suggested the release form was intended to be applicable only to partial payments, and not to limit final payments on the contract.[1446] The court also examined the wording of the release document under state law and observed that such partial releases are not used in connection with final payment under a contract.[1447] Finally, the court noted that Metric's and Meisner's actions were consistent with their expectation that they would pursue further claims on the project. The court concluded the government failed to meet its burden of showing that Meisner intended to release both Metric and the government from further liability pursuant to the release documents.[1448]

Major James Dorn.

SPECIAL TOPICS

Alternative Dispute Resolution

ADR Is Officially In the Books

The GAO finalized a proposed rule, commented on in last year's *Year in Review*,[1449] making "alternative dispute resolution" (ADR) the official lexicon within the GAO Bid Protest Regulations.[1450] While the GAO had been engaging in "outcome prediction" and other ADR techniques for some time, previously there had been no official reference to ADR in the GAO's Bid Protest Regulations.[1451] The final rule, effective 1 January 2003, adds "alternative dispute resolution" to its list of definitions, as previously proposed.[1452] Additionally, in response to a commenter's suggestion, the GAO clarified in paragraph (e) of section 21.10 that "flexible alternative procedures," which include ADR techniques, "may be invoked by GAO on its own initiative or at the request of the parties."[1453]

Additional Air Force ADR Guidance

Consistent with its "ADR First" policy announced and implemented in recent years[1454] and to further encourage early resolution of contract controversies, the Air Force amended relevant AFFARS sections on the use of ADR.[1455] Specifically, the changes reduce the monetary thresholds at which contracting officers must notify the Air Force Material Command Legal Office Contract Dispute Resolution Directorate (AFMCLO/

1441. *Id.*

1442. *Id.*

1443. *Id.* The *Severin* doctrine provides that "if a subcontractor in a government contract has released the general contractor form liability on a claim, the general contractor cannot pursue that claim against the government." *Id.* (citing Severin v. United States, 99 Ct. Cl. 435 (1943)).

1444. *Id.* at 581-82.

1445. *Id.* at 584.

1446. *Id.* at 582.

1447. *Id.* at 582-83. The court cited section 713.06 of the Florida statute that "when any payment becomes due to the contractor on the direct contract, except the final payment," and the payment is not sufficient to pay the bills of all lienors, the lienors shall be paid pro rata, and lienors receiving money "shall execute partial releases . . . to the extent of the payment received." *Id.* at 582 (citing FLA. STAT. ANN. § 713.06(3)(c)(2) (LEXIS 2002)).

1448. *Id.* at 583.

1449. *2002 Year in Review, supra* note 57, at 129-30.

1450. Final Rule; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, Government Procurement, 67 Fed. Reg. 79,833 (Dec. 31, 2002) (codified at 4 C.F.R. pt. 21).

1451. *2002 Year in Review, supra* note 57, at 129-30.

1452. *Id.* at 79,835 (codified at 4 C.F.R. § 21.0(h)).

1453. *Id.* (codified at 4 C.F.R. § 21.10(e)).

1454. *ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements*, BNA FED. CONT. DAILY (Apr. 28, 1999).

JAB) and the Air Force General Counsel Dispute Resolution Office (SAF/GCD) when unassisted negotiations on requests for equitable adjustments (REA) reach an impasse.[1456] For all REA exceeding $500,000 that have reached impasse, the contracting officer must refer the case to the AFMCLO/JAB and notify the SAF/GCD "to develop a dispute resolution strategy."[1457] Additionally, prior to finally deciding a claim or termination for default, contracting officers must continue to refer the proposed final decision to the cognizant legal office and the AFMCLO/JAB for "advice, ADR suitability and appropriate dispute resolution strategies."[1458] But if the action involves a claim on a PEO program, a claim in excess of $500,000, or a termination for default with reprocurement costs in excess of $500,000, the contracting officer must provide the proposed final decision to the SAF/GCD.[1459]

Major Kevin Huyser.

Competitive Sourcing

As noted rhetorically in last year's *Year in Review*,[1460] competitive sourcing never seems to have an "off" year. And this past year was certainly no different. Indeed, in FY 2003, one of the hottest topics in government contracting was (and continues to be) competitive sourcing. The OMB made big news in November 2002 when it published its proposed revisions[1461] to the *OMB Circular A-76*[1462] and *Revised Supplemental Handbook* (*RSH*).[1463] After considering the comments of more than 700 individuals and organizations in response to the proposed changes, the OMB made even bigger news when it issued the *Circular A-76 (Revised)* [*Revised A-76*] in May 2003.[1464] Add to this significant development and the associated controversy the various other competitive sourcing related cases and issues and it is clear that competitive sourcing continues (and will continue) to be a topic of importance to government contract law attorneys.

Out With the Old and In With the New, But Don't Throw the Baby Out With the Bath Water, and Remember Dogs Bark But the Caravan Moves On . . . and Many More Clichés

Recall that last year's *Year in Review* reported on the findings and recommendations of the congressionally mandated Commercial Activities Panel (CAP).[1465] Among many suggested changes, the panel's key recommendation to "level the playing field" between public and private competitors was for the government to "shift, as soon as possible, to a FAR-type process under which all parties compete under the same set of rules."[1466] With the issuance of the *Revised A-76*, the OMB incorporated many of the panel's principles and recommendations[1467]– meaning significant changes to the competitive sourcing process.

1455. *See* AFFARS, *supra* note 1201, pt. 5333; *see also* Air Force Federal Acquisition Circular 2003-0402 (Apr. 2, 2003), *available at* http://farsite.hill.af.mil/reghtml/changes/afac/afac2003-0402.htm.

1456. AFFARS, *supra* note 1201, at 5333.290.

1457. *Id.* Previously, the threshold for consulting with the AFMCLO/JAB and notifying SAF/GCD had been $1,000,000. U.S. DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. pt. 5333 (June 2002) [hereinafter 2002 AFFARS].

1458. AFFARS, *supra* note 1201, at 5333.291(b).

1459. *Id*. Again, previously the monetary threshold for notifying the SAF/GCD had been $1,000,000. 2002 AFFARS, *supra* note 1457, pt. 5333.

1460. *2002 Year in Review, supra* note 57, at 133.

1461. Office of Mgmt. & Budget, Proposed Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 67 Fed. Reg. 69,769 (Nov. 19, 2002).

1462. OMB CIRCULAR A-76, *supra* note 66.

1463. U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (1996) [hereinafter RSH].

1464. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003); U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter OMB REVISED A-76].

1465. *2002 Year in Review, supra* note 57, at 138-40. Section 832 of the FY 2001 National Defense Authorization Act directed the Comptroller General to convene a panel of experts to review competitive sourcing policies and procedures and report back to Congress its findings and recommendations. Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221 (2000). On 30 April 2002, the panel issued its report, providing ten sourcing principles to guide federal competitive sourcing policy, identifying strengths and weaknesses in the *OMB Circular A-76* process, and making specific recommendations for improving the process. GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT (2002)) [hereinafter CAP REPORT].

1466. *Id*. at 10.

1467. *See* GEN. ACCT. OFF., REP NO. GAO-03-943T, *Competitive Sourcing: Implementation Will be Key to Success of New Circular A-76* 3-4 (June 2003) (stating the *Revised A-76* "is broadly consistent with the [panel's] sourcing principles and recommendations and, as such, provides an improved foundation for competitive sourcing decisions in the federal government").

The *Revised A-76* entirely supercedes the prior *OMB Circular A-76* and the *RSH*.[1468] A three-page document describing "the overarching policy tenets and the scope of agency responsibilities," the *Revised A-76* also includes three attachments that explain the procedures for carrying out the policy and a fourth attachment that provides a glossary and explanation of terms.[1469] According to the OMB, the changes make more transparent the development of inherently governmental and commercial activities inventories, strengthen competition, incorporate additional FAR principles and procedures, and increase agency accountability to taxpayers.[1470] Each of these general changes obviously includes many details (and many more questions) that are highlighted in the discussion below.

While Attachment A to the *Revised A-76* is a mere four pages in length, it makes several changes in the requirements for inventorying inherently governmental and commercial activities and has already stirred controversy.[1471] Exceeding the statutory requirements of the Federal Activities Inventory Reform Act (FAIR Act),[1472] the *Revised A-76* requires agencies to prepare and submit two annual inventories categorizing functions as either inherently governmental or commercial.[1473] Additionally, agencies must now submit an inventory summary, to include aggregate data for military members and foreign nationals performing inherently governmental functions.[1474] After review and consultation with the OMB, agencies must provide both inventories to Congress and the public "unless the inventory information is classified or otherwise protected for national security reasons."[1475]

The *Revised A-76* also reduces to six the number of reason codes used to explain why government personnel are performing a commercial activity.[1476] Most importantly, if agencies apply reason code A, which exempts commercial activities from private sector performance, the agency competitive sourcing official (CSO)[1477] must justify in writing the exemption and make available the written justification to the public upon request.[1478] The *Revised A-76* also permits challenges to an agency's application of a reason code.[1479]

While dropping the proposed *OMB Circular A-76's* presumption that all agency activities are commercial unless justified as inherently governmental,[1480] the OMB nonetheless created controversy by defining inherently governmental activities as those that involve the "exercise of *substantial* discretion in applying government authority and/or in making decisions for the government."[1481] Some argued the use of "substantial" as a qualifier represented a major policy shift, however, the

---

1468. OMB Revised A-76, *supra* note 1464, at 1. The *Revised A-76* also supercedes Office of Mgmt. & Budget, Transmittal Memoranda 1 through 25, "Performance of Commercial Activities" and Office of Fed. Proc. Policy Letter 92-1, subject: Inherently Governmental Functions (Sept. 23, 1992) [hereinafter OFPP Policy Letter 92-1]. *Id*.

1469. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,135 (May 29, 2003). The four attachments are: Attachment A, Inventory Process; Attachment B, Public-Private Competition; Attachment C, Calculating Public-Private Competition Costs; and Attachment D, Acronyms, Definitions, and Index. *Id*.

1470. *Id*. at 32,134.

1471. OMB Revised A-76, *supra* note 1464, attch. A. Prior inventory guidance from the OMB and the OFPP, which the *Revised A-76* supercedes, exceeded twenty pages in length. *See* RSH, *supra* note 1463, pt. I, ch. 1, ¶¶ B & C, app. 2; OFPP Policy Letter 92-1, *supra* note 1468. For the objections voiced by the National Treasury Employees Union (NTEU) and the American Federation of Government Employees (AFGE), see discussion *infra* notes 1483-86 and accompanying text.

1472. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (codified at 31 U.S.C. § 501 note). The FAIR Act only requires agencies to submit to the OMB and make available to Congress and the general public a list of commercial activities. *Id*. § 2(a).

1473. OMB Revised A-76, *supra* note 1464, attch. A, ¶ A.1.

1474. *Id*. attch. A, ¶ A.2.

1475. *Id*. attch. A, ¶ A.4. Similarly, the agency must make the annual inventory summary report available to the general public unless national security reasons prevent doing so. *Id*. attch. A, ¶ A.5.

1476. *Id*. attch. A, ¶ C. Previously, the *RSH* provided nine such codes. RSH, *supra* note 1463, app. 2, ¶ E.

1477. Under the *Revised A-76*, the CSO is an agency assistant secretary or equivalent level official responsible for implementing the circular. OMB Revised A-76, *supra* note 1464, ¶ 4.f. The CSO may delegate specific responsibilities to senior-level officials, unless otherwise provided in the circular. *Id*. For the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The CSO is comparable to the agency "9.a official" under the prior circular. *See* OMB Circular A-76, *supra* note 66, ¶ 9(a).

1478. OMB Revised A-76, *supra* note 1464, attch. A, ¶ C.2.

1479. *Id*. attch. A, ¶ D.2.

1480. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,138 (May 29, 2003).

OMB explained that *OFPP Policy Letter 92-1* previously included the adjective "substantial" when discussing inherently governmental activities.[1482] But the criticism has continued and the *Revised A-76's* definition of inherently governmental has already spawned two lawsuits claiming the new definition contravenes the FAIR Act, which states the term includes activities that require the mere "exercise of discretion."[1483]

As with agency applications of reason code A to commercial activities, when categorizing an activity as inherently governmental, the CSO must justify the categorization in writing and make the justification available to the public upon request.[1484] Similarly, the *Revised A-76* originally allowed challenges to an agency's "*reclassification* of an activity as inherently governmental or commercial . . . ."[1485] Recognizing the term "reclassification" had created some confusion, on 15 August 2003, the OMB issued a technical correction to the *Revised A-76* "to make clear that interested parties may challenge the inclusion or exclusion of an activity on the inventory, regardless of whether the activity's classification as commercial or inherently governmental has changed from the prior year or has remained the same."[1486]

While making procedural modifications in the commercial activities inventory process, the *Revised A-76's* most significant changes occur in the policy and procedures related to competition. For example, to emphasize the importance of competition in determining the best service provider for commercial activities, the *Revised A-76* "deletes a longstanding statement that the government should not compete with its citizens."[1487] According to the OMB, this "deletion is simply meant to avoid a presumption that the government should not compete for its work to meet its own needs."[1488] Further emphasizing competition, the *Revised A-76* eliminates the use of "direct conversions,"[1489] as well as the term "cost comparison,"[1490] and requires agencies to use one of two competition types when determining the best service provider for commercial activities—the "standard competition" or the "streamlined competition."[1491]

Under the *Revised A-76*, agencies "shall" use the new "standard competition" procedures for commercial activities currently performed by more than sixty-five full-time equivalent (FTE) employees.[1492] Significantly, the *Revised A-76's* standard competition eliminates the prior circular's two rounds of competition, in which private offerors first competed against each other to determine the offer that represented "the best overall value to the Government," then would compete against the government's in-house cost estimate to determine the "winner" of the cost comparison study.[1493] With the new standard competition procedures, the government's most efficient organization

1481. OMB Revised A-76, *supra* note 1464, attch. A, ¶ B.1.a (emphasis added).

1482. Performance of Commercial Activities, 68 Fed. Reg. at 32,138; *see also* OFPP Policy Letter 92-1, *supra* note 1468, ¶ 7(a).

1483. *See NTEU Files Suit Asking Court to Declare Revised OMB Circular A-76 Illegal*, 79 BNA Fed. Cont. Rep. 25, at 749 (June 24, 2003) [hereinafter *NTEU Files Suit*] (referencing Nat'l Treasury Employees Union v. United States Office of Mgmt. and Budget, D. D.C., No. 1:03CV01339); *AFGE is Second Federal Worker Union to File Lawsuit Challenging A-76 Revisions*, 80 BNA Fed. Cont. Rep. 1 (July 8, 2002) [hereinafter *AFGE Challenging A-76 Revisions*] (referencing AFGE v. Styles, E.D. Pa., No. 03-3944); *see also* 31 U.S.C.S. § 501 (note) (LEXIS 2003).

1484. OMB Revised A-76, *supra* note 1464, attach. A, ¶ B.1.

1485. *Id*. attach. A, ¶ D.2 (emphasis added). *Compare* 31 U.S.C.S. § 501 (note) (permitting "a challenge of an omission of a particular activity from, or an inclusion of a particular activity on" the annual commercial activity inventory list required under the FAIR Act), *with* Performance of Commercial Activities, 68 Fed. Reg. at 32,138 (May 29, 2003) (stating simply that "an agency's classification of an activity as inherently governmental may be challenged"). The NTEU and AFGE also challenged in their lawsuits the *Revised A-76's* use of the term "reclassification." *See NTEU Files Suit*, *supra* note 1483; *AFGE Challenging A-76 Revisions*, *supra* note 1483. The lawsuits claim the *Revised A-76* contravenes the FAIR Act's inventory challenge procedures by restricting challenges to reclassifications of jobs from "commercial" to "inherently governmental" or vice versa. *Id*.

1486. Office of Mgmt. & Budget, Technical Correction to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 48,961 (Aug. 15, 2003). The technical correction revised paragraph D.2 of Attachment A of the *Revised A-76* by deleting the word "reclassification" and inserting "classification." *Id*. at 48,962.

1487. Performance of Commercial Activities, 68 Fed. Reg. at 32,136; *see also* OMB Circular A-76, *supra* note 66, ¶ 4.a.

1488. Performance of Commercial Activities, 68 Fed. Reg. at 32,136.

1489. In general, under prior policy implementation guidance, if ten or fewer full-time equivalents (FTEs) performed a commercial activity, the agency could directly convert the function to private sector performance without conducting a cost-comparison study. *See* RSH, *supra* note 1463, pt. I, ch. 1, ¶ D.5. For additional discussion of the elimination of direct conversions under the *Revised A-76* and the impact on the DOD, see *infra* notes 1551-55 and accompanying text.

1490. *See* RSH, *supra* note 1463, pt. I, ch. 3.

1491. *See generally* 68 Fed. Reg. at 32,134.

1492. OMB Revised A-76, *supra* note 1464, attch. B, ¶ A.5.a.

1493. RSH, *supra* note 1463, pt. I, ch. 3, ¶ H.

(MEO) competes with all private offerors in a single competition.[1494] This change is consistent, at least in principle, with the commercial activities panel's recommendation to move to a FAR-based, integrated competition approach.[1495]

In standard competitions, the government must submit an "agency tender" in response to the solicitation.[1496] One of many new terms introduced by the *Revised A-76*, the agency tender not only responds to the solicitation's requirements but also includes the MEO, the MEO phase-in and quality control plans and any MEO subcontracts, as well as a certified agency cost estimate.[1497] The "agency tender official (ATO)" designates the MEO team members and is charged with developing, certifying, and representing the agency tender as a "directly interested party."[1498] As with the other "competition officials,"[1499] the ATO must be an inherently governmental agency official.[1500] And in clear recognition of the organizational conflicts of interest issues experienced under the prior circular,[1501] the *Revised A-76* requires the ATO to be independent of the contracting officer, source selection authority (SSA), source selection evaluation board (SSEB), and performance work statement (PWS) team.[1502]

Assisting the ATO and MEO team members in developing the agency tender is another competition official—a human resource advisor (HRA).[1503] The HRA is a human resource expert and, like the ATO, must be independent of the contracting officer, SSA, SSEB, and the PWS team.[1504] In addition to participating on the MEO team, the HRA is also responsible for many employee and labor-relations requirements such as communicating with directly affected employees and their union representatives throughout the competition,[1505] providing post-employment restrictions to employees in the event of job loss, and informing the contracting officer of adversely affected employees regarding the right of first refusal pursuant to FAR 7.305(c).[1506]

While the *Revised A-76* treats the government's MEO like a private offeror in many respects, the standard competition procedures also take into account "legitimate special considerations that need to be addressed to ensure a level playing field. . . ."[1507] For example, the solicitation will contain certain unique provisions applicable to the agency tender, such as no requirement for the agency tender to submit a subcontracting goal plan, participation of small disadvantaged businesses plan, or past performance information.[1508] Additionally, like all private sector offerors, the ATO must submit the agency tender within the time prescribed in the solicitation.[1509] If the ATO anticipates the agency tender will not be submitted by the due date for bids or proposals, the ATO must notify the contracting officer, who in turn must consult with the CSO to determine whether "amending the solicitation closing date is in the best interest of

1494. *See* OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.5.

1495. *See supra* notes 1465-66 and accompanying text.

1496. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.4.a.

1497. *Id*.

1498. *Id*. attch. B, ¶ A.8.a.

1499. *Id.* The CSO appoints in writing the various "competition officials" and holds them "accountable for the timely and proper conduct of streamlined or standard competitions through the use of annual performance evaluations." *Id.* attch. B, ¶ A.8. The competition officials include the ATO, contracting officer, performance work statement (PWS) team leader, human resource advisor (HRA), and source selection authority (SSA). *Id.*

1500. *Id*.

1501. *See* Department of Navy – Reconsideration, Comp. Gen. B-286194.7, May 29, 2002, 2002 CPD ¶ 76; Jones/Hill Joint Venture, Comp. Gen. B-286194.4, B-286194.5, B-286194.6, Dec. 5, 2001, 2002 CPD ¶ 194; DZS/Baker LLC; Morrison Knudsen Corp., B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19.

1502. OMB Revised A-76, *supra* note 1464, attch. B, ¶ A.8.a. Similarly, if directly affected civilian employees and/or their representatives participate on the MEO team, "to avoid any appearance of a conflict of interest," they may not participate on the PWS team. *Id*. attch. B, ¶ D.2.b.

1503. *Id*. attch. B, ¶ A.8.d.2.

1504. *Id*. attch. B, ¶ A.8.d.

1505. Prior to and during *OMB Circular A-76* competitions, the DOD also has a statutory requirement to notify and consult with civilian employees and their union representatives. 10 U.S.C.S. § 2467(b) (LEXIS 2003).

1506. OMB Revised A-76, *supra* note 1464, attch. B, ¶ A.8.d.1.

1507. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,141 (May 29, 2003).

1508. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.3.a.(4). The agency tender must submit past performance information if it is based on an MEO previously implemented pursuant to the procedures of the *Revised A-76* or the prior circulars. *Id*.

the government."[1510] Given the criticism and controversy that would follow if the "late is late" rule[1511] were strictly enforced against an agency tender, it is hard to imagine a circumstance when a contracting officer and CSO would not determine amending the solicitation closing date is in the "best interest of the government."

The *Revised A-76* also seeks to move away from the prior procedures' "cost-centric process" by providing agencies greater flexibility to consider non-cost factors and use alternative source selection procedures in standard competitions.[1512] Sealed bid procedures under FAR part 14 remain available when price and price related factors alone will be considered and negotiations are unnecessary.[1513] In accordance with FAR part 15's negotiated procurement rules, however, the *Revised A-76* not only allows for award on a traditional lowest-price, technically acceptable basis,[1514] but it also permits a "phased evaluation source selection,"[1515] as well as a "tradeoff source selection" in prescribed cases.[1516]

While the phased evaluation and tradeoff selection procedures give agencies greater flexibility to consider and evaluate non-cost factors, cost/price will likely still be the determinative factor in an agency's source selection decision,[1517] particularly within the DOD. Under the tradeoff source selection process, for example, the *Revised A-76* still requires cost/price to "be at least equal to all other evaluation factors combined unless quantifiable performance measures can be used to assess value and can be independently evaluated."[1518] Additionally, the "10 percent/$10 million conversion differential" must still be added to the non-incumbent service provider in all standard competitions, regardless of the award basis.[1519] Finally, as with certain other provisions in the *Revised A-76*, legislation limits the DOD's ability to conduct tradeoff source selections. Specifically, section 2462 of title 10 states the DOD must acquire commercial activities from the private sector source if a contractor can provide the service at a cost lower than government employees.[1520] Thus, DOD agencies arguably cannot rely on a technical tradeoff source selection if award is to be made to a higher cost/priced private sector proposal.

In another OMB effort to make the standard competition more like a FAR-based acquisition, the *Revised A-76* states contracting officers "may conduct exchanges, in accordance with FAR subpart 15.306 and this attachment, to determine the technical acceptability of each offer and tender" when using any one of the negotiated procurement methods.[1521] Additionally, the *Revised A-76* contemplates the possibility (at least in theory, if not in practice) that an agency tender may be excluded from the standard competition due to a "material deficiency."[1522] Of course, prior to excluding the agency tender, the contracting officer must afford the ATO the opportunity to revise the tender

1509. *Id*. attch. B, ¶ D.4.a.(2).

1510. *Id*.

1511. *See* FAR, *supra* note 30, at 14.304(b)(1), 15.208(b)(1).

1512. *See* Performance of Commercial Activities, 68 Fed. Reg. at 32,139.

1513. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.5.a.

1514. *Id*. attch. B, ¶ D.5.b.(1).

1515. In the first phase of a "phased source selection evaluation" the contracting officer evaluates the technical proposals of all offerors and the agency tender. If an offer or agency tender proposes an "alternate performance standard" that the agency finds "necessary" and accepts, the contracting officer must amend the solicitation, identify the new performance standard, and request the resubmission of offers and tenders in response. In phase two, the contracting officer performs a cost realism analysis of the technically acceptable offers and tenders. *Id.* attch. B, ¶ D.5.b.(2).

1516. *Id*. attch. B, ¶ D.5.b.(3). The tradeoff source selection method, in which award may be made to other than the lowest priced source, is limited to competitions for information technology activities, commercial activities performed by a private sector source, new requirements, or segregable expansions. Tradeoff source selections may also be used when the CSO, without delegation, approves the use in writing and notifies the OMB. *Id*.

1517. *See generally* Performance of Commercial Activities, 68 Fed. Reg. at 32,139.

1518. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.3.a.(3)(b).

1519. *Id*. attch. B, ¶ D.5.c.(4)(c) and attch. C, ¶ A.5. Though "not intended to discourage agencies from selecting other than the lowest cost provider . . . the conversion differential is intended to ensure that cost is given meaningful consideration . . . ." Performance of Commercial Activities, 68 Fed. Reg. at 32,139. For discussion of the non-applicability of the cost conversion differential in "streamlined competitions" under the *Revised A-76*, as well as conflicting legislative language for DOD practitioners, see *infra* notes 1567-71 and accompanying text.

1520. *See* 10 U.S.C.S. § 2462 (LEXIS 2003).

1521. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.5.b.(1).

1522. *Id*. attch. B, ¶ D.5.c.(3). Private sector offerors and public reimburseables may also be excluded from further participation in the competition for "material deficiencies." *Id.*

and the CSO must determine if committing additional resources to the agency tender will correct the deficiency.[1523] If the CSO determines additional resources cannot correct the material deficiency, "the CSO may advise the SSA to exclude the agency tender from the standard competition."[1524]

The *Revised A-76* also dumps the separate administrative appeals procedures developed under prior *OMB Circular A-76* guidance[1525] and establishes instead "contest" procedures governed by FAR section 33.103.[1526] The new guidance gives a "directly interested party" the right to "contest" various aspects of the standard competition, such as the solicitation or its cancellation, a determination to exclude an offer/tender from the competition, compliance with the costing provisions and other elements of the agency's evaluation, and terminations of a contract or letter of obligation.[1527] Responding to complaints regarding the definition of "directly interested party" under the proposed *OMB Circular A-76*,[1528] the *Revised A-76* definition now also includes "a single individual appointed by a majority of directly affected employees as their agent."[1529] While more expansive than the proposed definition, the term "directly interested party" is still not as broad as the prior *OMB Circular A-76's* definition that included "federal employees (or their representatives)."[1530]

The *Revised A-76's* implementation of competition performance decisions represents another significant development and introduces a new term. Under the new rules, if the standard competition results in a decision to implement the agency tender, the contracting officer must "establish an MEO letter of obligation with an official responsible for performance of the MEO."[1531] Unfortunately, the circular provides meager guidance as to the form and substance of the "letter of obligation," stating only that it will "incorporate appropriate portions of the solicitation and the agency tender . . . ."[1532]

To further enhance post-competition accountability, the *Revised A-76* also requires option year determinations, specifies follow-on competitions, and permits terminations for failure to perform.[1533] Regardless of the service provider, the contracting officer must now make option year determinations in accordance with FAR section 17.207.[1534] Thus, in theory, it is possible a contracting officer could determine not to exercise the option of a MEO's letter of obligation. Further, when the competition results in MEO performance, the agency must complete a follow-on competition by the end of the last performance period, unless the CSO (without delegation) grants a waiver.[1535] Finally, if a contractor or a MEO fails to perform, the *Revised A-76* states the contracting officer, after issuing "cure notices and show cause notices," shall "issue a notice of termination, consistent with FAR Part 49."[1536] While the prior *OMB Circular A-76* contemplated similar termination action for failure to perform,[1537] the *Revised A-76's* termination proce-

1523. *Id*.

1524. *Id*.

1525. *See* RSH, *supra* note 1463, pt. I, ch. 3, ¶ K.

1526. OMB Revised A-76, *supra* note 1464, attch. B, ¶ F.1.

1527. *Id*.

1528. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,142 (May 29, 2003). The proposed *OMB Circular A*-76 limited government employee participation in the "administrative appeal process" because the definition of "interested party" included only the ATO as a "directly interested party." Office of Mgmt. & Budget, Proposed Revised to Office of Management & Budget Circular No. A-76, Performance of Commercial Activities, 67 Fed. Reg. 69,769, attchs. B, ¶ 6.a.(1) and F (Nov. 19, 2002).

1529. OMB Revised A-76, *supra* note 1464, attch. F. Practitioners should note that the *Revised A-76* also includes and uses the term "interested party" separately. The *Revised A-76* defines the term "interested party" the same as under the FAIR Act and applies it only to challenges concerning the commercial activities inventories. *Id*.; *see also* 31 U.S.C.S. § 501 (note) (LEXIS 2003).

1530. RSH, *supra* note 1463, pt. I, ch. 3, para. K (defining "eligible appellant" under the administrative appeals process).

1531. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.6.f.

1532. *Id*. attch. B, ¶ D.6.f.(3).

1533. *Id*. attchs. B, ¶ E.5, 6.

1534. *Id*. attch. B, ¶ E.5.a.

1535. *Id*. attch. B, ¶ D.3.a.(7). The *Revised A-76* establishes three years as the minimum performance period and five years as the maximum, unless the CSO receives prior approval from the OMB to exceed this time frame. *Id*. The CSO may grant an extension for "high performing organizations" (not further defined), if the CSO determines continued cost savings justify the extension and the extension will not exceed three years from the last performance period. *Id*. attch. B, ¶ E.5.b. For competitions resulting in contractor performance, the contracting officer follows the FAR rules for follow-on competitions. *Id*.

1536. *Id*. attch. B, ¶ E.6.a.(2).

dures clearly are more "FAR-like," at least in word if not in deed.

If the *Revised A-76's* source selection changes and adoption of more "FAR-like" principles and terms are insufficient to expedite standard competitions, the OMB hopes the circular's new time standards will provide the needed "motivation."[1538] While prior *OMB Circular A-76* guidance also provided time goals,[1539] a frequent complaint from many was that the cost comparison process took too long.[1540] As a result, to "motivate agencies" and "instill greater confidence that agencies will follow through with their plans,"[1541] the *Revised A-76* establishes twelve months from the "public announcement (start date)" to the "performance decisions (end date)" of a standard competition as the new time standard.[1542] The CSO, without delegation, may extend this time by an additional six months, but only if the CSO determines that the competition is "particularly complex" and notifies the OMB prior to public announcement of the time extension.[1543]

Given the DOD's average time to complete studies in the recent past, many question whether the *Revised A-76's* time standards are reasonable.[1544] Yet the DOD's numbers demonstrate that considerable time, eighteen months in the DOD, is spent in efforts leading up to solicitation issuance.[1545] Thus the key to remaining within the *Revised A-76's* time frame appears to be preliminary planning. Indeed, prior to the "public announcement (start date)" of the competition, the *Revised A-76* expects agencies to engage in preliminary planning, such as scoping the functions to be competed, determining the availability of workload data and establishing data collection systems, if necessary, and appointing the various "competition officials."[1546] If an agency exceeds the *Revised A-76's* time standard, the CSO, without delegation, must notify the OMB.[1547]

Department of Defense practitioners must also keep in mind applicable congressional notifications, which trigger funding limitation timelines. Specifically, section 2461 of title 10 requires the DOD to notify Congress prior "to commencing the analysis of a commercial activity."[1548] The DOD's "congressional announcement date" is important because it is generally considered the "start date" for applicable fiscal law strictures.[1549] While one could argue that the *Revised A-76's* "public announcement date" and DOD's "congressional announcement date" are mutually exclusive, the DOD has yet to provide spe-

1537. *See* RSH, *supra* note 1463, pt. I, ch. 3, ¶ L.7.

1538. *See* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,136 (May 29, 2003).

1539. The RSH stated "[c]ost comparisons should be completed within eighteen months for a single activity (or thirty-six months for multiple activities) from the cost comparison start date, i.e., public or union notification and designation of the study team." RSH, *supra* note 1463, pt. I, ch. 3, ¶ A.4.

1540. CAP Report, *supra* note 1465, at 43. For example, the CAP found that cost comparison studies within the DOD from FY 1997 to FY 2001 took on average twenty-five months to complete. *Id*. at 23, 43.

1541. Performance of Commercial Activities, 68 Fed. Reg. at 32,136.

1542. OMB Revised A-76, *supra* note 1464, attch. B, ¶ D.1.

1543. *Id*.

1544. *See* Performance of Commercial Activities, 68 Fed. Reg. at 32,136 and Gen. Acct. Off., Rep No. GAO-03-1022T, *Competitive Sourcing: Implementation Will be Challenging for Federal Agencies* 5 (July 2003) [hereinafter GAO-03-1022T].

1545. CAP Report, *supra* note 1465, at 43.

1546. OMB Revised A-76, *supra* note 1464, attch. B, ¶ A.1-.9.

1547. *Id*.

1548. 10 U.S.C.S. § 2461 (LEXIS 2003).

1549. *See* U.S. Dep't of Defense, Instr. 4100.33, Commercial Activities Program Procedures ¶ 5.3.1.1 (9 Sept. 1985) [hereinafter DOD Instr. 4100.33]. A recurring provision in the DOD Appropriations Act has prohibited the use of appropriated funds to perform competitive sourcing studies if the government exceeds twenty-four months to perform a study of a single function activity, or forty-eight months to perform a study of a multi-function activity. *See, e.g.*, FY 2003 DOD Appropriations Act, Pub. L. No. 107-248, § 8022, 116 Stat.1519, 1541 (2002). In this year's Act, Congress further limited the availability of funds for studies of multi-function activities to thirty months. FY 2004 DOD Appropriations Act, Pub. L. No. 108-87, § 8022, 117 Stat. 1054, 1077 (2003). This change jeopardized and halted numerous on-going DOD competitive sourcing studies that were almost complete but past or near the new thirty-month deadline. *See* Jason Peckenpaugh, *Pentagon to Get Authority to Finish Stalled Job Competitions*, Gov't Exec. Com., Dec. 9, 2003, *at* http://www.govexec.com/dailyfed/1203/120903p1.htm. It appears, however, that the DOD will be granted some relief. Language in the conference report accompanying H.R. 2673 (the "Consolidated Appropriations Bill") states the new thirty-month limitation will not apply to multifunction competitive sourcing studies in which the DOD agency had issued a solicitation prior to the enactment of the DOD Appropriations Act (i.e., 30 Sept. 2003). H.R. Conf. Rep. No. 108-401, div. H, Miscellaneous Appropriations and Offsets, § 111 (2003). Senate passage of the Consolidated Appropriations Bill is not anticipated until late January 2004. *See* Jason Peckenpaugh, *Pentagon to Get Authority to Finish Stalled Job Competitions*, Gov't Exec. Com., Dec. 9, 2003, *at* http://www.govexec.com/dailyfed/1203/120903p1.htm.

cific guidance as to the relationship and interplay of these two provisions. Though uncomfortable for a CSO to notify the OMB that an agency has exceeded the *Revised A-76's* time standard, the "penalty" pales in comparison to the loss of appropriated funds and potential Antideficiency Act[1550] issues that may occur within the DOD if a component fails to comply with Congress' time limitations.

As noted earlier, in addition to the many changes associated with the development of the new "standard competition," the *Revised A-76* emphasizes competition by eliminating the use of "direct conversions."[1551] It is unclear, however, what impact the language will have upon the DOD in certain direct conversion cases. In recent years, and again this FY, Congress has authorized the DOD to convert commercial activities to performance by the Javits-Wagner-O'Day (JWOD) Act firms[1552] or majority-owned Native American firms, regardless of the number of DOD civilians performing the function without first developing a "most efficient and cost-effective organization."[1553] Because this authority is merely permissive, presumably the DOD will comply with the OMB's regulatory guidance and emphasis on competition and not "directly convert" even in cases in which eligible JWOD or Native American owned firms could provide the services. The section 8014 authority may be more attractive to the DOD, however, based on new and additional language included in this year's DOD Appropriations Act.[1554] Under the new measure, the DOD receives credit "toward any competitive or outsourcing goal, target or measurement" if converting performance based on the authority granted in section 8014.[1555]

While the *Revised A-76* eliminates direct conversions, the OMB also recognized that "the current processes for public-private competition are often time-consuming, costly, and burdensome" in those situations where agencies typically use direct conversions.[1556] Thus, the OMB permits agencies to use a new "streamlined competition" process, if "65 or fewer FTEs and/or any number of military personnel" perform a commercial activity.[1557] Under the streamlined competition procedures, the *Revised A-76* provides flexibility to agencies in determining the relative costs of agency and private sector performance. Agency performance costs, for example, may be based on the cost estimate of the existing organization, although the *Revised A-76* encourages agencies to create a "more efficient organization, which may be an MEO."[1558] Section 8014 of the FY 2004 DOD Appropriations Act limits the DOD's flexibility here, however, by requiring DOD agencies to develop a "most efficient and cost-effective organization plan" prior to converting to contractor performance a commercial activity performed by more than ten DOD civilian employees.[1559] Congress does not further define or explain the meaning of a "most efficient and cost-effective organization plan" but presumably it is more akin to establishing an MEO under the *Revised A-76* than a "more efficient organization," and certainly more involved than simply basing the agency's performance costs on the existing organizational structure.[1560]

The *Revised A-76* also grants agencies flexibility in estimating the performance costs of the private sector in streamlined competitions. Documented market research or solicitations in

1550. *See* 31 U.S.C.S. § 1341 (prohibiting the use of funds in advance of or in excess of available appropriations).

1551. *See supra* note 1489 and accompanying text.

1552. *See* 41 U.S.C.S. §§ 46-48c.

1553. *See, e.g.*, FY 2004 DOD Appropriations Act, § 8014(b), 117 Stat. at 1074 (2003).

1554. *See* Jason Peckenpaugh, *Defense Could Get A-76 Credit Without Competition Under Bill*, Gov't Exec. Com., July 15, 2003, *at* http://www.govexec.com/dailyfed/0703/071503p1.htm.

1555. 2004 DOD Appropriations Act, § 8014(c), 117 Stat. at 1074. The measure may provide less incentive to the DOD than originally planned given that the OMB has dropped its government-wide competitive sourcing quotas and revised its grading criteria for evaluating compliance with the Administration's competitive sourcing initiative. *See OMB Scraps Outsourcing Quotas*, 45 GOV'T CONTRACTOR 306 (July 23, 2003). Previously, the OMB had instructed agencies to compete at least five percent of the commercial activities identified on the FAIR Act inventories by the end of FY 2001, an additional ten percent by the end of FY 2003, and ultimately fiftypercentofthelistedcommercialactivities.*See*U.S.OFFICEofMGMT.&BUDGET,COMPETITIVESOURCING:CONDUCTINGPUBLIC-PRIVATECOMPETITIONINAREASONED AND RESPONSIBLE MANNER 4-5 (July 2003). The OMB had evaluated and graded agencies on their progress based on the achievement of these goals. *See id.* at 5. With the elimination of the competitive sourcing quotas, the OMB has developed new evaluation criteria that will grade agency "competition plans" and the use of the new standard and streamlined competition procedures under the *Revised A-76*. *Id.* at 7-8.

1556. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134, 32,137 (May 29, 2003).

1557. OMB REVISED A-76, *supra* note 1464, attch. B, ¶ A.5.b. In such cases, the *Revised A-76* states agencies "shall use either a streamlined or standard competition . . . ." *Id*. For commercial activities performed by more than sixty-five FTEs, the agency must use the standard competition procedures. *Id*. attch. B, ¶ A.5.a.

1558. *Id.* attch. B., ¶ C.1.a. The *Revised A-76* does not define "more efficient organization." But the OMB's word choice makes clear that a "more efficient organization" may or may not be a "most efficient organization." *See id.*

1559. 2004 DOD Appropriations Act, § 8014(a)(1), 117 Stat. at 1074. The requirement for a "most efficient and cost-effective organization plan" does not apply when the DOD agency converts performance of a commercial activity to an eligible JWOD or Native American owned firm. *Id*. § 8014(b).

1560. *See id.*; OMB REVISED A-76, *supra* note 1464, attch. B, ¶ C.1.a.

accordance with the FAR suffice in establishing an estimated contractor performance price.[1561] In the *Federal Register* notice announcing the *Revised A-76's* issuance, the OMB explained that agencies may rely upon Multiple Award Schedules and other simplified acquisition methodologies in obtaining private sector proposals.[1562]

To add transparency and fairness to the new streamlined competition procedures, the *Revised A-76* requires agencies to formally and publicly announce the start and end dates of a streamlined competition.[1563] Additionally, agencies must document and certify the costs of the competition on the Streamlined Competition Form (SLCF), which will be made available to the incumbent service provider prior to a performance decision announcement, as well as to the public, if requested.[1564] The *Revised A-76* also requires a "firewall" between the individual(s) developing the agency cost estimate and those individual(s) establishing the private sector cost estimate.[1565] In fact, the *Revised A-76* requires three separate agency officials to complete the SLCF certifications.[1566]

Though streamlined competitions give agencies greater flexibility, aspects of the new procedures have been criticized and, at least in the DOD, altered.[1567] Specifically, while the agency must adjust the private sector cost of performance in streamlined competitions by including "contract administration costs,"[1568] the agency does not add in the "10 percent/$10 million conversion differential," as required in the *Revised A-76's* standard competitions[1569] and the prior circular's "streamlined cost comparison" procedures.[1570] The conversion differential has made a comeback in DOD streamlined competitions, however, based on a measure in the FY 2004 DOD Appropriations Act that requires the DOD to apply the conversion differential in all competitions involving more than ten civilian employees.[1571]

Another criticism is that the *Revised A-76* does not permit appeals, or "contests," in streamlined competitions.[1572] Under the prior *OMB Circular A-76* and DOD implementation guidance, affected government employees, unions, as well as contractors, had agency-level appeal rights in streamlined cost comparisons.[1573] The OMB's *Federal Register* notice accompanying the issuance of the *Revised A-76* provides scant explanation as to why "contests" are not permitted in streamlined competitions, other than to say "agencies will be held accountable for performance decisions" in such competitions by the new circular's post-competition accountability provisions.[1574]

1561. OMB Revised A-76, *supra* note 1464, attch. B, ¶ C.1.a.

1562. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities," 68 Fed. Reg. 32,134, at 32,137 (May 29, 2003).

1563. *Id*.; *see also* OMB Revised A-76, *supra* note 1464, attch. B, ¶ B.

1564. OMB Revised A-76, *supra* note 1464, attch. B, ¶ C.3.

1565. *Id*. attch. B, ¶ C.1.d.

1566. *Id*. attch. B, ¶ C.3, attch. C. ¶ A.12, fig. C-3. The separate individuals certify the estimated cost of agency performance, estimated cost of private sector performance, and the adjusted cost of private sector performance. *Id*.

1567. *See, e.g.*, GAO-03-1022T, *supra* note 1544, at 3-4; Jason Peckenpaugh, *Defense Opposes Union-Backed Changes to Job Competition Process*, Gov't Exec. Com., July 23, 2003, *at* http://www.govexec.com/dailyfed/0703/072303p1.htm.

1568. OMB Revised A-76, *supra* note 1464, attch. C. ¶ A.12, fig. C-3.

1569. *Id*. attch. C, ¶ A.5. For additional discussion of the applicability of the conversion differential in standard competitions, see *supra* note 1519 and accompanying text.

1570. *See* RSH, *supra* note 1463, pt. II, ch.5, ¶ B.6. Interestingly, the CAP, in its report to Congress, identified the conversion differential as a positive element under the prior policy guidance.

1571. FY 2004 DOD Appropriations Act, Pub. L. No. 108-87, § 8014(a)(2), 117 Stat. 1054, 1074 (2003); *see also Peckenpaugh*, *supra* note 1567.

1572. The *Revised A-76* specifically states, "[n]o party may contest any aspect of a streamlined competition." OMB Revised A-76, *supra* note 1464, attch. B, ¶ F.2. While noting certain safeguards in streamlined competitions that ensure and improve transparency and accountability, the Comptroller General, in testimony before Congress on the *Revised A-76's* changes, stated he is "concerned that the absence of an appeal process [in streamlined competitions] may result in less transparency and accountability." GAO-03-1022T, *supra* note 1544, at 7.

1573. *See* RSH, *supra* note 1463, pt. I, ch. 3, ¶ K; DOD Dir. 4100.33, *supra* note 1549, ¶ 5.7.2; U.S. Dep't of Army, Pam. 5-20, Commercial Activities Study Guide ¶ 7-14 (31 July 1998); U.S. Dep't of Navy, Instr. 4860.7C, Navy Commercial Activities Program pt. I, ch. 1, para. D (7 June 1999); U.S. Marine Corps, Order 4860.3D, w/Ch1, Commercial Activities Program para. 17 (14 Jan. 92); *cf.* U.S. Dep't of Air Force, Instr. 38-203, Commercial Activities Program ¶ 13.3.12 (19 July 2001) (stating the administrative appeal procedures only apply to streamlined cost comparisons where a formal solicitation has been issued). Again, the CAP report had identified the administrative appeals process that applied to all cost comparisons as a positive element that provided a "measure of accountability." CAP Report, *supra* note 1465, at 38.

As with standard competitions, the *Revised A-76* imposes time standards for completing streamlined competitions. Under the new rules, a streamlined competition must be completed within ninety calendar days of public announcement.[1575] The CSO may grant a waiver to extend the time limit by no more than forty-five days, however, the CSO must grant such a waiver prior to public announcement and only when the agency expects to create an MEO or issue a solicitation.[1576] If the agency cannot timely complete the streamlined competition, the agency must convert to a standard competition[1577] or request additional time from the OMB using the *Revised A-76's* deviation procedures.[1578]

Although the *Revised A-76* has definitely made it an "on" year for competitive sourcing, the ultimate impact, not to mention implementation, of the changes remains in doubt. While the effective date of the *Revised A-76* is 29 May 2003, the revised circular established a "transition period" to accommodate on-going studies under the prior procedures.[1579] The *Revised A-76's* rules apply to all inventories and competitions initiated after the effective date and require that all streamlined cost comparisons and direct conversions be converted to the new procedures.[1580] But the circular permitted agencies to continue under the prior circular for on-going cost comparisons in which the solicitation had been issued, unless the agency elected to convert to the *Revised A-76's* procedures.[1581] As the DOD had a number of on-going cost comparisons at the time the OMB issued the *Revised A-76*, participants in DOD competitive sourcing projects will have to remain familiar with and have access to the prior *OMB Circular A-76*. Moreover, as noted above, Congress has become increasingly interested and active in the competitive sourcing process.[1582] While the OMB has backed off its quotas under the administration's competitive sourcing push, it appears the administration will continue to fight to implement the *Revised A-76*.[1583] Time will only tell whether competitive sourcing will have an "off" year next year, but the chances are rather slim.

Does This Mean We Have Standing?

A frequent criticism of the *OMB Circular A-76* process has been that only private sector firms have the right to protest agency cost comparison decisions at the GAO or in the courts.[1584] Both the CAFC and the GAO have ruled that federal employees and their union representatives are not "interested parties" under the CICA and therefore lack standing to protest competitive sourcing decisions.[1585] Shortly after the OMB issued the *Revised A-76*, the GAO published *Federal Register* notice seeking comments on whether the "cumulative legal impact" of the changes to the circular should result in a different conclusion regarding standing for the in-house entity at the GAO and, if so, who should represent such entity.[1586]

The GAO highlighted that under the OMB's new rules, the government MEO must submit an "agency tender" in response to the solicitation that will be evaluated at the same time as the private sector offers.[1587] Also, unlike the prior *OMB Circular A-76*, if the agency's performance decision favors the MEO, the new rules require the contracting officer to establish an "MEO letter of obligation, . . . which appears intended to bind the in-house entity, in at least a quasi-contractual way, to the terms of the solicitation and agency tender."[1588] The GAO also noted that if an MEO fails to perform in accordance with the letter of

1574. Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003). The post competition accountability provisions include requirements for monitoring performance, making option year exercise determinations, conducting follow-on competitions, and terminating contracts/letters of obligation for failure to perform. *See* OMB Revised A-76, *supra* note 1464, attch. B, ¶ E.

1575. OMB Revised A-76, *supra* note 1464, attch. B ¶ C.2.

1576. *Id*.

1577. As noted previously, agencies generally have twelve months from the public announcement date to complete a standard competition. *Id*. attch. B, ¶ D.1.

1578. *Id*. ¶ attch. B, ¶ C.2. An example of OMB's centralization of authority under the *Revised A-76*, the "deviation procedure" states that "[t]he CSO (without delegation) shall receive prior written OMB approval to deviate from this circular (e.g., time limit extensions, procedural deviations, or costing variations . . . or inventory process deviations)." *Id*. ¶ 5.c.

1579. *Id*. ¶ 6; *see also* Performance of Commercial Activities, 68 Fed. Reg. at 32,134.

1580. OMB Revised A-76, *supra* note 1464, ¶ 7.

1581. *Id*.

1582. *See, e.g.*, discussion *supra* notes 1559-60 and accompanying text.

1583. *See* Amelia Gruber & Pether Cohn, *White House Steps Up Effort to Block Job Competition Changes*, GovExec.Com., Nov. 19, 2003, *available at* http://www.govexec.com/dailyfed/1103/11903cdam2.htm.

1584. CAP Report, *supra* note 1465, at 43.

1585. *See* Am. Fed'n of Gov't Employees et al. v. United States, 258 F.3d 1294 (Fed. Cir. 2001); Am. Fed'n of Gov't Employees, AFL-CIO et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87.

obligation, the contracting office can terminate the agreement.[1589] Moreover, the *Revised A-76* specifically included in its definition of "directly interested party" for purposes of contests, not only the ATO, but also a "single individual appointed by a majority of directly affected employees."[1590]

In addition to the *Revised A-76's* various changes, the GAO noted two recent bid protest opinions that could be relevant to the legal analysis on this issue. First, the GAO recently found that a public entity could be considered an interested party under the CICA, even though the public entity would not be awarded a contract if it were successful in the competition.[1591] Additionally, the GAO has previously opined that even under the prior *OMB Circular A-76*, the MEO team members essentially "function . . . as competitors" in the process.[1592]

While the GAO may be open to altering its position on standing for in-house competitors, it appears those interested in competitive sourcing will have to wait for an answer. Whereas comments were due to the GAO by 16 July 2003,[1593] the GAO has yet to provide any final announcement.[1594]

"Cumulative Impact" of Army's TIM and "Third Wave" Initiatives Tubes A-76 Cost Comparison

In *Satellite Services, Inc.*,[1595] the GAO found reasonable the Army's cancellation of a *OMB Circular A-76* cost comparison because nearly two-thirds of the positions under study faced exemption from competition due to Army management initiatives and reorganization directives implemented after issuance of the solicitation. The case provides a good overview of the Army's Transformation of Installation Management (TIM) and "Third Wave" management initiatives and exemplifies the frequent complaint that *OMB Circular A-76* cost comparisons take far too long.[1596]

The Army originally issued the RFP on 29 November 1999 for a multi-function cost comparison study of the Redstone Arsenal Support Activity (RASA), which provided installation support services to the Army Aviation and Missile Command (AMCOM) and other organizations located on or near the Redstone Arsenal in Huntsville, Alabama.[1597] When the Army issued the solicitation, the PWS covered the support activities provided by approximately 315 FTEs.[1598]

1586. Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,412 (June 13, 2003). In its notice, the GAO also seeks comments regarding additional changes under the *Revised A-76*. First, under the prior *OMB Circular A-76*, the GAO generally ruled, "based on comity and efficiency," that it will not consider a contractor's bid protest until after the agency administrative appeals process. *Id.* at 35,413 (referencing Intelcom Support Servs., Inc., B-234488, Feb. 17, 1989, 89-1 CPD ¶ 174; Direct Delivery Sys., B-198361, May 16, 1980, 80-1 CPD ¶ 343). The *Revised A-76*, however, replaces the agency administrative appeals process with "contests" conducted in accordance with FAR 33.103. *Id.* As the GAO's current Bid Protest Regulations do not require a protestor to exhaust such procedures before pursuing a bid protest, the GAO also seeks input on whether it should continue to apply the "exhaustion doctrine" under the *Revised A-76* rules. *Id*. Additionally, while the *Revised A-76* does not permit a party to contest a streamlined competition decision, the GAO asks whether it may have a legal basis to consider protests of such decisions, if the agency issued a solicitation in the competition. *Id.*

1587. *Id*. at 35,412.

1588. *Id*.

1589. *Id*.

1590. *Id*.

1591. *Id*. (referencing Federal Prison Indus., Inc., B-290546, July 15, 2002, 2002 CPD ¶ 112).

1592. *Id*. (citing Dep't of the Navy – Recon., B-286194.7, May 29, 2002, 2002 CPD ¶ 76, at 4).

1593. *Id*. at 35,411.

1594. It may be that Congress will make the decision for the GAO. On 12 November 2003, House and Senate conferees on the Department of Transportation/Treasury Appropriations Bill agreed to language that would allow protests at the GAO by a representative selected by a majority of directly affected employees in *OMB Circular A-76* competitions. *See* Amelia Gruber, *Hill Negotiators Agree to Revamp Job Competition Process*, GovExec.Com., Nov. 13, 2003, *at* http://www.govexec.com/dailyfed/1103/111303a1.htm. Prior to conference report's filing, however, the conferees removed the language granting protest rights to federal employees. *See* Amelia Gruber, *White House Wins Deal to Undo Job Competition Revisions*, GovExec.Com., Nov. 25, 2003, *at* http://www.govexec.com/dailyfed/1103/112503a2.htm. As the Department of Transportation/Treasury Appropriations Bill is now included as part of the "Consolidated Appropriations Act," final congressional decision on this matter is not anticipated before late January 2004, when the Senate is expected to renew consideration of the bill. *See id*.; Peckenpaugh, *supra* note 1549.

1595. B-288848.3, 2003 Comp. Gen. LEXIS 70 (Apr. 28, 2003).

1596. *Id*. at *23. Factoring in the study's work prior to the solicitation issuance, such as developing the PWS, the subject cost comparison study had been on-going for nearly six years before the Army cancelled the solicitation. *Id*.

1597. *Id*. at *2.

1598. *Id*. at *6.

Satellite Services, Inc. (SSI) prevailed in the private-sector competition round, but lost the head-to-head cost comparison with the government MEO, which was approximately $7.9 million lower in price.[1599] An agency administrative appeal and bid protest from SSI followed challenging the ability of the MEO to perform the prescribed workloads. Prior to the GAO hearing, however, the agency agreed to take corrective action.[1600]

After taking the corrective action and adjusting the MEO, the Army determined the in-house cost estimate was still $3.7 million less than SSI's offer and announced the decision in June 2002.[1601] After a second administrative appeal failed, SSI again protested to GAO arguing the MEO had not been properly adjusted to ensure the same level of performance as SSI's offer.[1602] But just prior to the protest hearing, and more than three years after issuing the RFP, the Army cancelled the solicitation in January 2003.[1603] In response, SSI filed yet another protest challenging the reasonableness of the contracting officer's cancellation decision.[1604]

In support of the cancellation, the contracting officer cited the Army's TIM[1605] and Third Wave[1606] initiatives and the impact of these changes on the workload and covered FTE positions under study.[1607] More specifically, she explained that TIM significantly changed the command and control of the RASA and other installation support organizations, which would now be managed through the Installation Management Agency (IMA) regional office instead of AMCOM and its major command.[1608] Along with this organizational change, funding and budget channels for base operation functions would move from AMCOM to the IMA.[1609] The cumulative effect of the reorganization "substantially changed the workload for the organizations listed in the original A-76 solicitation."[1610] Similarly, the contracting officer explained, the Army's Third Wave initiative and recent changes in the DOD's guidance on FAIR Act reason codes resulted in 204 of the study's 315 positions being classified as "'non-contractable' functions."[1611] More specifically, the garrison had received information "that the IMA had 'submitted blanket exemptions'" for several of the functions under study and "'and were under review now for blanket exemptions.'"[1612] Ultimately the contracting officer concluded these changes "reflected a 66 percent change in the scope of work of the original A-76 solicitation."[1613] Referencing FAR section 15.206(e), the contracting officer determined that issuing a solicitation amendment to capture the changed workload

1599. *Id*. at *3.

1600. *Id*. at *4.

1601. *Id*. at *5.

1602. *Id*.

1603. *Id*. at *6.

1604. *Id*.

1605. In late 2001, the Army announced its TIM initiative to centralize installation management activities. *Id*. at *9. As part of this initiative, beginning 1 October 2002, the Army established the Installation Management Agency (IMA), which took over responsibility for installation management through seven geographically aligned regional offices. *See* Secretariat of the Army, Gen. Orders No. 4 (22 Aug. 2002).

1606. Issued in October 2002, the Army's Third Wave initiative required commands to develop plans for "privatizing, divesting, competing using A-76, outsourcing using 'alternatives to A-76,' converting military spaces to civilian or contract, or transferring to other government agencies non-core functions . . . ." Memorandum, Secretary of the Army, to Assistant Secretary of the Army (Acquisition, Logistics, and Technology) et al., subject: Non-Core Competencies Working Group and the Third Wave (4 Oct. 2002). As such, Army commands were to identify and include in their plans all "non-core spaces (i.e., spaces potentially eligible for private sector performance)," unless an approved exemption, "based on disruption to core missions," existed. *Id.* The memo provided guidance and approval authority, as well as deadlines, for exemption requests. *Id.* encl. 2, at 1. Ultimately, the Army anticipated more than 213,000 civilian and military positions would be reviewed and possibly subjected to competition. *See id*. encl. 2, at 2. Two prior "waves" of public-private competitions in the 1980s and late 1990s preceded the "Third Wave," which was to be "bigger and faster." *Id*.

1607. *Satellite Servs., Inc.*, 2003 U.S. Comp. Gen. LEXIS 70, at *9.

1608. *Id*. at *15. The RASA was renamed the U.S. Army Garrison, Redstone Arsenal and moved under the control and authority of the IMA Southeast Region Office at Fort McPherson, Georgia. *Id.* at *9.

1609. *Id*. at *6. Beginning in FY 2004, garrisons and their regional support commands will receive their funding directly from the HQ IMA. Janet C. Menig, *Creation of Installation Management Agency as Part of Transformation of Installation Management Program*, Armed Forces Comptroller 13 (June 22, 2002).

1610. *Satellite Servs., Inc.*, 2003 U.S. Comp. Gen. LEXIS 70, at *16 (quoting the Cancellation Memorandum, at 1-2).

1611. *Id*. at *16 (quoting the Cancellation Memorandum).

1612. *Id*.

1613. *Id*.

"would be an amendment of such substance and magnitude that the cancellation of the solicitation was mandatory . . . ."[1614]

Recognizing the broad authority of agencies to cancel solicitations, the GAO ruled that as long as the Army had a reasonable basis to exercise this authority, it could cancel the solicitation regardless of when the information precipitating the cancellation surfaced.[1615] The GAO was critical of the Army for providing "scant evidence" justifying cancellation on any one basis alone.[1616] In the GAO's view, however, "when the implications of these factors are combined with the uncertainty raised by the pending exemption requests and their potential impact on the scope of this procurement, we cannot conclude that the cancellation decision was clearly unreasonable."[1617] Therefore the GAO denied the protest and put to rest an *OMB Circular A-76* cost comparison that began nearly six years prior.

Major Kevin Huyser.

Privatization

DOD Must Better Track Progress in Housing Privatization and Associated Support Costs

In an October 2003 report, the GAO identified areas for improving the DOD's tracking and reporting of progress being made in its Military Housing Privatization Initiative[1618] and the associated support costs.[1619] The GAO noted that while the DOD reports quarterly to Congress the status of all military housing privatization projects, the reported data does not reflect the number of privatized units that have actually been renovated or newly constructed.[1620] While recognizing private developers need time to renovate existing homes and construct new ones, the GAO found that the DOD was not collectively tracking and reporting "data regarding this process" to Congress.[1621] Without such information, Congress cannot accurately "determine how quickly the [Military Housing Privatization Initiative] is creating adequate family housing and improving the living conditions of the servicemembers and their families."[1622]

The GAO also reviewed the costs of DOD consultants used in support of military housing privatization efforts.[1623] Specifically, the GAO found the DOD's consultant costs amounted to a little less than half of the total privatization support costs.[1624] The GAO went on to note, however, that because the DOD lacks a common definition of consultant and privatization support costs, the services vary in the costs they include in their reports and budgeting requests for support expenses.[1625] As a result of such inconsistencies, Congress has reduced some service privatization support budgets.[1626]

Based on its findings, the GAO recommended that the DOD begin tracking and periodically report to Congress the number of privatized housing units that have been renovated or newly constructed. Additionally, the GAO recommended the DOD provide a common and consistent definition of privatization support costs and consultant costs for use by the military services.[1627] In response, the DOD's Housing and Competitive

---

1614. *Id*. at *17.

1615. *Id*. at *18 (citing Rice Servs., Ltd., B-284997.5, Mar. 12, 2002, 2002 CPD ¶ 59, at 4; IT Corp., B-289517.3, July 10, 2002, 2002 CPD ¶ 123, at 3; Lackland 21st Century Servs. Consol., B-285938.7, Dec. 4, 2001, 2001 CPD ¶ 197, at 5).

1616. *Id*. at *25.

1617. *Id*. at *33.

1618. National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 2801, 110 Stat. 544 (1996) (codified at 10 U.S.C. §§ 2871-2885), as amended by National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 2805, 115 Stat. 1012, 1306 (2001).

1619. GEN. ACCT. OFF., REP. NO. GAO-04-111, *Military Housing: Better Reporting Needed on the Status of the Privatization Program and the Costs of its Consultants* (Oct. 2003).

1620. *Id*. at 6. For example, as of March 2003, the DOD reported to Congress that the services had privatized approximately 28,000 family housing units. *Id*. Of these units, however, the private developers had renovated 3,184 homes and constructed 4,396 new units. *Id.* at 7.

1621. *Id*. at 8.

1622. *Id*.

1623. *Id*. at 5. The DOD relies upon consultants to provide expertise and assistance on the many financial, budgetary, and other "unique" issues prior to closing privatization agreements. *Id*. at 5.

1624. *Id*. at 8. For example, in FY 2002 the DOD's consultant costs were approximately $24 million of the $57 million in total support costs. *Id.*

1625. *Id*. at 10. For example, unlike the Army and the Air Force, the Navy does not include the costs for environmental assessments as privatization support costs. *Id.*

1626. *Id*. at 11. The DOD reported that because the Army and the Air Force privatization support costs appeared "unreasonably high when compared with the Navy's," the Congress reduced the budgets of the former. *Id*.

Sourcing Office (HCSO) noted that "it has initiated steps to track important project and program data in its semi-annual Program Evaluation Plan (PEP) report, . . . including renovated and newly constructed units."[1628] The HCSO will also coordinate with the DOD Comptroller to define privatization support costs and consultant costs.[1629]

Air Force Water Systems Exempt from Utilities Privatization If Water Rights Impacted

The Air Force recently announced a policy to exempt water systems from utilities privatization when such privatization will adversely impact Air Force water rights.[1630] The policy letter states "Air Force installations should only privatize their water systems when they can do so without relinquishing or transferring water rights as a condition of privatization."[1631] The policy letter notes that if privatization would cause the Air Force to relinquish or transfer water rights, "we will consider the privatization evaluation to be complete" and "submit a statement of exemption from utilities privatization for national security reasons."[1632]

Major Kevin Huyser.

Construction Contracting

This year, the CAFC handed down three decisions involving contractor home-office standby delay claims. In doing so, the court shed a small measure of light on the often-cited *Eichleay*[1633] formula.

P.J. Dick: A Glass Half Full Does Not a Standby Make

The first case in the *Eichleay* trilogy is *P.J. Dick, Inc. v. Principi* (*PJD*).[1634] In *PJD*, the contractor failed to establish to the CAFC's satisfaction that it was on standby during periods of government-caused delays for purposes of the *Eichleay* formula.[1635]

In *PJD*, the Department of Veterans Affairs (VA) awarded PJD a firm-fixed price contract to construct an addition to a medical center. During contract performance, the government issued over 400 change orders, resulting in various delays to different aspects of the project.[1636] The VA also granted PJD 107 days of additional contract performance time. In accepting the additional days to complete the contract, PJD reserved its right to seek additional suspension costs. Ultimately, PJD completed the contract, albeit 260 days after the original contract completion date, and 153 days after the revised date.[1637]

As a result of the government-caused delays, PJD presented the contracting officer with several claims seeking additional relief. The contracting officer denied the claims, and PJD appealed the claims to the VA Board of Contract Appeals (VABCA).[1638] PJD sought costs relating to unabsorbed home office overhead (e.g., *Eichleay* damages), as well as a time

1627. *Id*. at 15.

1628. *Id*. at 20.

1629. *Id*.

1630. Memorandum, SAF/IEI, to Deputy Under Secretary of Defense (Installations and Environment), subject: Exemption of Air Force Water Systems – Water Rights (15 Sept. 2003).

1631. *Id*.

1632. *Id*. As reported in last year's *Year in Review*, the DOD established 30 September 2005 as a revised goal by which "Defense Components shall complete a privatization evaluation of each utility system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law." *2002 Year in Review, supra* note 57, at 142 (quoting Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002)).

1633. *See* Eichleay Corp. ASBCA No. 5183, 60-2 BCA ¶ 2,688, *recons. denied*, 61-1 BCA ¶ 2,894; *see also* West v. All State Boiler, Inc., 146 F.3d 1368, 1377 (Fed. Cir. 1998) ("Recovery under the Eichleay formula is an extraordinary remedy designed to compensate a contractor for unabsorbed overhead costs that accrue when contract completion requires more time than originally anticipated because of a government-caused delay."). Under the *Eichleay* formula, unabsorbed overhead is calculated by multiplying the total cost incurred during the contract period, times the ratio of billings for the delayed contract to total billings of the firm during the contract period. To get the daily contract overhead rate, the allocable contract overhead is divided by the days of contract performance. The amount recoverable is determined by multiplying the daily contract overhead times the numbe of days of government-caused delay. *See* Cap. Elec. Co. v. United States, 729 F.2d 743 (Fed. Cir. 1984).

1634. 324 F.3d 1364 (Fed. Cir. 2003).

1635. *Id*. at 1376.

1636. *Id*. at 1368.

1637. *Id*.

1638. *Id*.

extension and damages under the contract's Suspension of Work (SOW) clause. Although the board granted PJD's request for a time extension and damages under the SOW clause, it denied PJD's claim for *Eichleay* damages.[1639] Both parties appealed the board's holding to the CAFC. The court upheld the board's determination that PJD failed to establish it was on standby during government-caused periods of delay for purposes of the *Eichleay* formula.[1640]

The court used the case as an opportunity to clarify the *Eichleay* standby requirement. The first step in the analysis is to determine whether a contracting officer has issued a written order suspending all work on the contract for an uncertain duration *and* requires the contractor to remain ready to resume work on immediate or short notice. If so, the contractor does not need to offer further proof of standby. In cases in which the contracting officer has not issued a written standby order, the contractor must prove standby by indirect evidence, which requires the contractor establish three things.[1641]

First, the CAFC opined that the contractor must show that the government-caused delay was not only substantial but was of an indefinite duration.[1642] The court noted that when the government suspends all work on the contract, but informs the contractor that work will begin again on a specified date, the contractor is not on standby for purposes of *Eichleay.*[1643]

Second, the court observed the contractor must show that during the period of delay, it was required to be "ready to resume work at full speed as well as immediately."[1644] Thus, "where the government gives the contractor a reasonable amount of time to remobilize its work force once the suspension is lifted, the contractor cannot be said to have been on standby."[1645]

Third, the contractor must show an effective suspension of most, if not all, of its work on the contract.[1646] Here, the court noted that its 1996 *Altmayer v. Johnson*[1647] decision has been "mistakenly interpreted" as standing for the proposition that "a contractor has been placed on standby merely because a government-caused delay of uncertain duration occurred, at the end of which the contractor must be ready to resume work."[1648] To the court, "*Altmayer*, oft cited for that proposition, held no such thing. *Altmayer* merely held that a contractor's performance of 'minor tasks' during a suspension does not prevent it from recovering *Eichleay* damages."[1649] The court noted that every case that it has held a contractor to have been on standby involved "a complete suspension or delay of all the work or at most continued performance of only insubstantial work on the contract."[1650]

Here, the court ruled that PJD's *Eichleay* claim failed the third prong of the analysis. PJD was able to progress on other parts of the government project during the time it alleges it was suspended.[1651] The court observed that during the worst period of delay, PJD billed fifty-three percent less than it had the month before. But to the court, that showed that PJD was able to perform forty-seven percent of the work during the delay

---

1639. *Id.* The Board granted PJD a time extension for the 260 days, but concluded that only sixty days were due under the contract's Suspension of Work (SOW) clause. PJD then issued a motion for reconsideration. In response, the VABCA revised that number upward to sixty-five days. The board granted PJD field overhead costs for the days damages were due under the SOW clause. It determined, however, that PJD was not entitled to damages for unabsorbed home office overhead under *Eichleay* because, *inter alia*, PJD failed to establish it was on standby—one of prerequisites for entitlement to *Eichleay* damages. *Id.*

1640. *Id.* The court also upheld the board's holding that PJD was able to establish it was entitled to damages under a SOW clause in the contract, but remanded the case back to the board because of a flaw in the board's method for counting delay days. *Id.* at 1368-69.

1641. *Id.* at 1371.

1642. Id.

1643. *Id.*

1644. *Id.*

1645. *Id.*

1646. *Id.* at 1371-72.

1647. 79 F.3d 1129, 1134 (Fed. Cir. 1996).

1648. *PJD*, 324 F.3d at 1372.

1649. *Id.*

1650. *Id.* In the court's summary of the *Eichleay* analysis, it noted that once a contractor has satisfied this three-part standby test, the burden of production shifts to the government, which must show that it was not impractical for the contractor to take on replacement work and thereby mitigate its damages. If the government meets its burden of production, the burden shifts back to the contractor, who must persuade the court or board that it was impractical for it to obtain sufficient replacement work. "Only where the above exacting requirements can be satisfied will a contractor be entitled to *Eichleay* damages." *Id.* at 1373.

1651. *Id.* at 1373-74.

period. Taking a "glass half full" rather than "half empty" view of the situation, the court concluded that PJD was able to perform substantial amounts of work on the contract during the suspension periods and as such failed to show it was on complete standby.[1652]

Charles G. Williams Construction: Extraordinary Means Extraordinary

The second case in the CAFC *Eichleay* troika is *Charles G. Williams Construction, Inc. v. White* (*Williams*).[1653] In *Williams*, the government awarded the appellant a fixed-price contract to improve and repair a government building.[1654] The contract required performance in two phases, covering the building's south and north portions.[1655] The contract specified a date for project completion and the parties agreed the government would vacate a portion of the building while that phase was under construction.[1656] Williams encountered substantial delays in performance, for which the ASBCA assigned both Williams and the government responsibility. The board concluded that there were defects in the government's specifications as well as deficiencies in the performance of Williams and its subcontractors. Additionally, the government failed to vacate the southern portion of the building as required, which caused substantial delays in the project. The government also issued a large number of change orders, many of which provided for additional payment.[1657] As a result of these problems, Williams completed phase one of the project ninety-three days after an extended completion date, and the government "terminated for convenience" phase two of the project.

Williams filed various claims, some of which the ASBCA allowed. The board, however, denied Williams' *Eichleay* claim.[1658] At the hearing, the board determined that Williams failed to prove the government suspended or significantly interrupted its performance during the period involved.[1659] Of note, a government auditor testified that Williams, through an admission by one of its consultants, could not show that they had a reduction in the flow of direct costs during the period in question.[1660] The Board found Williams' daily reports supported the auditor's testimony, which showed that Williams manned the site without significant interruption during the contract performance period.[1661]

On appeal to the CAFC, Williams argued "a contractor is entitled to Eichleay damages if, as a result of government delay, the contract cannot be performed as efficiently or effectively as it was understood it should have been performed."[1662] The court disagreed, stating,

> [A]s long as the contractor is able to continue performing the contract, although not in the same way or as efficiently or effectively as it had anticipated it could do so, it can allocate a portion of its indirect costs to that contract. There is accordingly no occasion in that situation to resort to "recovery under the *Eichleay* formula," which is "an extraordinary remedy."[1663]

1652. *Id*. at 1374-75. Although the court determined that PJD was not entitled to damages under the *Eichleay* analysis, the court determined that entitlement to recovery under the SOW clause required a less demanding standard of entitlement, and upheld the board's holding as to entitlement under the clause. *Id*.

1653. 326 F.3d 1376 (Fed. Cir. 2003).

1654. *Id*. at 1377-78.

1655. *Id*. at 1377.

1656. *Id*.

1657. *Id*.

1658. *Id.* This case is actually the second occasion the CAFC examined Williams' delay claim. In the prior opinion, the CAFC remanded the case back to the ASBCA after the board failed to state in its opinion why it adopted a government auditor's finding that overhead for the entire period of the contract performance "was fully absorbed by the basic contract." Charles G. Williams Constr., Inc. v. White, 271 F.3d 1055 (Fed. Cir. 2001). On remand, the board found that the appellant failed to establish he was on standby, and gave a detailed statement of findings to that effect. Charles G. Williams Constr., Inc., 2002-1 B.C.A. ¶ 31833; *see also 2002 Year in Review*, *supra* note 57, at 191.

1659. *Williams*, 326 F.3d at 1378.

1660. *Id*

1661. *Id*.

1662. *Id*. at 1380.

1663. *Id*. at 1380-81 (citing West v. All State Boiler, Inc., 146 F.3d 1368, 1377 (Fed. Cir. 1998)).

Nicon: Extraordinary, But Not Necessarily Exclusive

The final case in the *Eichleay* trio stands for the proposition that unabsorbed home office overhead is not necessarily unrecoverable simply because the claim does not fit neatly into the *Eichleay* formula. In *Nicon, Inc. v. United States* (*Nicon*),[1664] the CAFC reversed a COFC decision that denied recovery for home office expenses because the contractor never initiated performance under the contract.[1665] The case is notable because this is the first time the CAFC has departed from its position that the *Eichleay* formula is the exclusive method of calculating unabsorbed home office overhead.[1666]

On 30 March 1998, the Army COE awarded Nicon a $ 1.4 million contract to repair a dormitory at MacDill Air Force Base in Florida. Soon after, a disappointed bidder filed a bid protest with the GAO, and the COE suspended action on the contract before Nicon commenced work.[1667] The government notified Nicon of the protest on 24 April 1998, and instructed Nicon to "take no further actions as to the preparation and forwarding of submittals to the Resident Office."[1668] The GAO dismissed the bid protest on 15 July 1998, however, the government never ordered Nicon to proceed with the contract. Nicon wrote a letter to the government on 14 October 1998 complaining about the government's delay in issuing the notice to proceed, yet Nicon received no response to this letter. On 12 November 1998, Nicon again wrote to the government requesting permission to proceed. Again, the government failed to issue a notice to proceed.[1669] On 12 January 1999, the government terminated the contract for convenience. The termination occurred before the government issued Nicon a notice to proceed.[1670]

After the government issued the termination, Nicon submitted a termination settlement proposal to the contracting officer. In its proposal, Nicon sought direct costs and associated overhead and profit, as well as unabsorbed home office overhead for the time period between award of the contract and termination.[1671] In support of its claim, Nicon developed a modified version of the *Eichleay* formula to calculate its unabsorbed home office overhead damages.[1672] After negotiations, the contracting officer awarded Nicon $184,757 for direct costs, related overhead, and profit. The contracting officer, however, denied Nicon's $387,513 claim for unabsorbed home office overhead.[1673] Nicon appealed the contracting officer's decision to the COFC, seeking recovery of the unabsorbed overhead damages.[1674] Both parties filed motions for summary judgment and the COFC granted summary judgment in favor of the government. The court held that it could not apply an alternative version of the *Eichleay* formula as requested by Nicon.[1675]

On appeal to the CAFC, the court noted that the COFC correctly observed that "constructive figures" cannot be substituted into the *Eichleay* formula, and that "use of the formula is limited to situations in which contract performance has begun and has been suspended by the government, causing the performance to take longer than originally anticipated."[1676] The court observed "the formula is not intended to simply compensate for any government-caused delay; rather, *Eichleay* damages are only available when the delay causes contract performance to require more time than originally anticipated." [1677] But the court reasoned that if a contractor is required to remain on standby because of a government-caused delay, but is never allowed to begin performance, the contractor may be entitled to some compensation from the government. This compensation

1664. 331 F.3d 878 (Fed. Cir. 2003).

1665. Nicon, Inc. v. United States, 51 Fed. Cl. 324 (2001); *see also 2002 Year in Review*, *supra* note 57, at 148-49.

1666. *See Feature Comment: Federal Circuit Limits Entitlement to* Eichleay *Damges*, 45 Gov't Contractor 1, ¶ 289 (July 23, 2003).

1667. *Nicon*, 331 F. 3d at 881.

1668. *Id.*

1669. *Id.* at 881-82.

1670. *Id.* A period of 107 days elapsed between the award of the contract to Nicon and the dismissal of the bid protest. Another 181 days elapsed from the date the protest was dismissed before the government terminated the contract. The total time from award to termination was 288 days. *Id.*

1671. *Id.* at 882.

1672. *Id.*

1673. *Id.*

1674. *Id.* Nicon's complaint contained two counts: Count I was for pre-termination delay damages and Count II was for post-termination delay damages. *Id.*

1675. *Id.* at 883. The COFC refused to substitute the original contract price for "contract billings" in the formula and refused to substitute the anticipated period of performance for "days of performance." *Id.*

1676. *Id.* at 884.

1677. *Id.*

is for unabsorbed home office overhead as part of its termination for convenience settlement by some other method of allocation.[1678] The court acknowledged that on several occasions it had said the *Eichleay* formula was the "only proper method of calculating unabsorbed home office overhead" and that "no other formula may be used."[1679] The court, however, noted these cases were not applicable to situations when a contract is terminated before a contractor is allowed to commence performance.[1680] Given that "fairness to the contractor is the touchstone"[1681] in the termination for convenience setting, the court reasoned it would be inappropriate to "rigidly apply a formula developed in different factual circumstances and thereby deny the contractor fair compensation for unabsorbed home office overhead."[1682]

Remanding the case back to the COFC, the court listed the requirements a contractor had to show to establish entitlement in this type of situation. First, the contractor must show that prior to the government's termination, there was "a period of government-caused delay of uncertain duration."[1683] Given there was a bid protest during the first period of delay in the case, the court commented that it was "questionable that this portion of the delay was solely the fault of the government."[1684] As a second hurdle, the court required the contractor to show it was on standby during the period of delay, and that this period of standby gave rise to the unabsorbed overhead. The court noted that Nicon took on other contracts during the period of delay. Therefore, the CAFC reasoned that the CFC must determine on remand if these contracts qualify as replacement work that prevented Nicon from being on "standby."[1685] As a third requirement, the court stated a contractor must establish there is a reasonable method of allocating some portion of the contractor's unabsorbed overhead for the delay period to this contract.[1686] Finally, a contractor must demonstrate it took reasonable steps to protect itself against damages resulting from a period of pre-performance delay.[1687] Given the hurdles a contractor must overcome to sustain a pre-performance delay claim, it appears the CAFC has created at most, a narrow exception to the circuit's longstanding rule that the *Eichleay* formula is the exclusive method for calculating unabsorbed home office overhead.

All State: Right to Set-Off Trumps Progress Payment Clause

Moving on from *Eichleay* to progress payments, the CAFC recently reversed an ASBCA decision holding that the government breached a contract by retaining excessive progress payments. In reversing the board, the CAFC held in *Johnson v. All-State Construction* (*All-State*)[1688] that the government was entitled to withhold progress payments pursuant to the government's common-law right to set-off pending liquidated damages.

In *All-State*, the Navy awarded All-State Construction (All-State) a fixed-price contract valued at $982,000 to construct a hazardous waste storage facility.[1689] The contract required All-State to complete work by 13 May 1995. The Navy, however, extended the period for completion to 12 September 1995, in part based on the unavailability of the site during a portion of that period.[1690] The project was not completed by the extended completion date. All-State provided revised construction schedules. This prompted the Navy to send two letters informing All-State that the Navy was forbearing termination for default while reserving the right to later terminate the contract for default and to assess liquidated damages. The second letter

1678. *Id.*

1679. *Id.* (referencing Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999); Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994)).

1680. *Id.*

1681. *Id.* at 886.

1682. *Id.* at 886-87.

1683. *Id.* at 887.

1684. *Id.*

1685. *Id.*

1686. *Id.* The court observed that Nicon, in its brief asserted that "[a] comparison of the value of Nicon's various contracts can be made to allocate a fair portion of its overhead costs to the contract in question at bar." The CAFC instructed the COFC that it must determine on remand if the facts of this case permit the allocability of the unabsorbed overhead, "keeping in mind the fairness principles that govern in the termination for convenience context." *Id.*

1687. *Id.* at 887-88.

1688. 329 F.3d. 848 (Fed. Cir. 2003).

1689. *Id.* at 850.

1690. *Id.*

provided a revised completion date of 14 November 1996. In a 4 October 1996 show cause notice, however, the Navy indicated "at present it is apparent that the work will not be completed by 14 November 1996."[1691] The notice also stated that since All-State had failed to make progress toward completing the work, the government was considering terminating the contract for default.[1692]

On 9 October 1996, All-State submitted an invoice to the Navy requesting payment of $120,878.67. This amount represented compensation for completing thirty-four percent of the project, less reimbursement the Navy had already paid.[1693] Although All-State had earned the progress payment, the Navy had a pending liquidated damages claim against All-State for $180,900. On 16 October 1996, the contracting officer informed All-State that he was recommending termination for default. Two days later, the Navy contracting officer refused payment of All-State's invoice because the amount retained for liquidated damages exceeded the invoice amount. The Navy terminated All-State for default on 26 November 1996.[1694]

After the Navy terminated the contract, All-State appealed the decision to the ASBCA.[1695] Before the ASBCA, All-State moved for summary judgment, arguing, inter alia, the Navy's failure to make progress payments constituted a breach of contract. The board granted summary judgment in favor of All-State, finding the Navy breached the contract by retaining thirty-eight percent of the amount that All-State had otherwise earned. The board held that FAR section 52.232-5(e),[1696] incorporated in the contract, limited the Navy's permissible retention of progress payments to ten percent of the amount earned. The board ordered the termination converted to a termination for convenience, and the Navy appealed the board's decision to the CAFC.[1697]

Before the CAFC, the government argued its common law right of set-off entitled it to withhold progress payments.[1698] In response, All-State conceded that the government has broad set-off rights under the law, but argued the FAR payments clause, which limited retention of payment otherwise due to ten percent, defeated the government's set-off right.[1699] The court noted the government's broad set-off right can only be defeated by explicit statutory or contractual language.[1700] The court, however, observed the retainage clause does not "contain explicit language defeating the government's common law set-off right, but rather narrowly limits the scope of the government's retainage rights 'if satisfactory progress has not been made . . . [to] a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved.'"[1701] The court stated that the purpose of the retainage clause is two-fold. While it serves as an incentive for contractors to complete work under a contract, it also serves to protect the interests of the government against potential contractor default.[1702] The court also observed no proof is required that the contractor breached the contract because government withholding is permitted to

1691. *Id.*

1692. *Id.*

1693. *Id.* at 850-51.

1694. *Id.*

1695. *Id.* at 851 (citing All-State Constr., ASBCA No. 50586, 02-1 BCA ¶ 31,794).

1696. FAR 52.232-5(e) states, in relevant part:

> If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved.

FAR, *supra* note 30, at 52.232-5(e).

1697. *All-State*, 329 F.3d. at 851 (referencing All-State Constr., 02-1 BCA ¶ 31,794 at 157,021). Surprisingly, the board gave short attention to the government's common-law set-off argument, simply stating the "Government clearly limited that right with respect to excessive withholding . . . when it entered into the contract . . . with the FAR payments clause." All-State Constr., 02-1 BCA ¶ 31,794, at 157,021. The board's decision focused primarily on what legal effect, if any should be given to a custom-drafted clause the Navy inserted into the contract. The clause, on its face, gave the contracting officer almost unlimited discretion to withhold progress payments pending resolution of claims the government may have under the contract. The board found that the clause the Navy drafted contradicted the clear wording of the FAR Payments clause. Since regulation mandates the FAR payments clause, the board concluded the government could not benefit by inserting a contradictory clause. As such, the board determined the clause was without legal effect, and further determined that the Navy's retaining of progress payments otherwise due to All-State constituted a government breach of the contract. *Id.*; *see also 2002 Year in Review*, *supra* note 57, at 147-48.

1698. *All-State*, 329 F.3d. at 852.

1699. *Id*. at 853.

1700. *Id.*

1701. *Id.* at 854 (quoting FAR, *supra* note 30, at 52.232-5(e)).

secure against possible future breaches or undiscovered prior breaches.[1703]

Finally, the court reasoned that the common law set-off right serves an entirely different purpose: "to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."[1704] For the court, "the set-off right is not an indemnity against a possible future breach, but rather offsets a current payable debt."[1705]

Concerning the present case, the court concluded that the government's assessment of liquidated damages was a "current payable debt." In support, the court cited FAR section 49.402-7, which states: "if a contract is terminated for default or if a course of action in lieu of termination for default is followed . . . the contracting officer shall promptly ascertain and make demand for any liquidated damages to which the Government is entitled under the contract."[1706] One of the allowable courses of action under FAR section 49.402-4 included "permit[ing] the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule."[1707] Therefore, the court concluded the contracting officer's assessment of liquidated damages using the set-off procedure was proper, even though the government had not issued a final default termination notice at that time.[1708]

Construction and FAR Part 12: Whose Idea Was This Anyways?

On 3 July 2003, the OFPP Administrator issued a memorandum stating that FAR part 12,[1709] Acquisition of Commercial Items, "should rarely, if ever be used for new construction acquisitions or non-routine alteration and repair services."[1710] Rather, "in accordance with long-standing practice, agencies should apply the policies of FAR part 36 to these acquisitions."[1711]

The memorandum noted that FAR part 36 incorporates provisions and clauses that are generally consistent with customary commercial practices in the construction industry. By contrast, "FAR Part 12 lacks clauses for handling critical circumstances common to construction efforts, especially those involving new construction or non-routine alteration and repair services."[1712] Further, construction projects, as well as complex alterations and repairs often "involve a high degree of variability," such as site requirements, weather and physical conditions, labor availability, and schedules. "The current coverage in Part 12 fails to allocate risk in a manner that takes into account the nature of these activities."[1713]

The memorandum was not intended to limit the goal of FAR part 12, "which is to ensure agencies are effectively positioned to take full advantage of the commercial marketplace and the value and efficiencies the marketplace generates."[1714] Indeed, the memorandum stated that part 12 acquisitions are generally well suited for certain types of construction activities "that lack the level of variability found in new construction and complex alteration and repair," such as routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services.[1715]

Major James Dorn.

1702. *Id.*

1703. *Id.*

1704. *Id.* (citing Gratiot v. United States, 40 U.S. 336, 370 (1841)).

1705. *Id.*

1706. FAR, *supra* note 30, at 49.402-7(a).

1707. *Id.* at 49.402-4(a).

1708. *All-State*, 329 F.3d. at 854-55.

1709. FAR, *supra* note 30, at 12.000.

1710. Applicability of FAR part 12 Memo, *supra* note 687.

1711. *Id.*

1712. *Id.*

1713. *Id.*

1714. *Id.*

1715. *Id.*

Bonds, Sureties, and Insurance

Equitable Subrogation? Not In My Board You Don't!

A surety seeking recovery against the government under an equitable subrogation theory should avoid the boards and take its case to the COFC.[1716] In *Fireman's Fund Insurance Co. v. England* (*Fireman's Fund*),[1717] the CAFC affirmed an ASBCA decision stating the board had no jurisdiction under the CDA to hear a surety's equitable subrogation claim.[1718]

In *Fireman's Fund*, the Navy entered into a contract with Summit General Contracting Corp. (Summit) in 1988 to construct a government building.[1719] Summit's surety, Fireman's Fund , provided performance and payment bonds for the project. As part of the transaction, Summit and Fireman's Fund entered into a "General Indemnity Agreement," which provided that in the case of contract breach, Summit assigned to Fireman's Fund "all of their rights under the contracts."[1720] The Navy was not a party to this agreement.[1721]

Summit failed to complete the project by the completion date, and on 16 January 1990 the government terminated the contract for default.[1722] The government and Fireman's Fund then entered into a takeover agreement on 17 April 1990, under which Fireman's Fund agreed to complete the project. Summit was not a party to the takeover agreement. Further, the takeover agreement did not mention the indemnity agreement or Summit's assignment of claims to Fireman's Fund.[1723]

Fireman's Fund alleged the government delayed performance of work both before and after the takeover agreement and submitted several claims to the contracting officer seeking an "equitable adjustment and/or recission of assessed liquidated damages."[1724] After the contracting officer denied the claims, Fireman's Fund appealed to the ASBCA.[1725] The government filed a motion to dismiss all claims that arose prior to the takeover agreement. The board granted the motion, holding Fireman's Fund was not a "contractor" under the CDA,[1726] and thus the board lacked jurisdiction over those claims.[1727] Also, the board ruled that the Anti-Assignment Act barred Summit's assignment of claims to Fireman's Fund.[1728] Finally, the board

---

1716. The doctrine of equitable subrogation is a non-contractual doctrine of equity that entitles a surety that "takes over contract performance" or "finances completion of the defaulted contract" to "succeed to the contractual rights of a contractor against the government." *See* Ins. Co. of the West v. United States, 243 F.3d 1367, 1370 (Fed. Cir. 2001).

1717. 313 F.3d 1344 (Fed. Cir. 2002).

1718. 41 U.S.C.S. § 605(a) (LEXIS 2003).

1719. *Fireman's Fund*, 313 F.3d at 1346.

1720. *Id.*

1721. *Id.*

1722. *Id.*

1723. *Id.* at 1346-47.

1724. *Id.* at 1347

1725. *Id.*

1726. *See* 41 U.S.C.S. § 605(a) (LEXIS 2003) (stating the CDA provides a mechanism for appealing "all claims by a contractor against the government relating to a claim").

1727. *Fireman's Fund*, 313 F.3d at 1347.

1728. The Anti-Assignment Act consists of two statutory provisions. The relevant provisions in title 41 provide as follows:

> no contract . . . or any interest therein, shall be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned.

41 U.S.C.S. § 15(a). Subsection (b) of that provision states as follows:

> the provisions of subsection (a) . . . shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof . . . are assigned to a bank, trust company, or other financing institution, including any Federal lending agency.

41 U.S.C.S. § 15(b). Section 3727 of title 31 provides that an "assignment of any part of a claim against the United States Government or of an interest in the claim . . . may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C.S. § 3727(a)(1). Subsection (c) makes subsection (a) inapplicable "to an assignment to a financing institution of money due or to become due under a contract." 31 U.S.C.S. § 3727(c); *See also Fireman's Fund*, 313 F.3d at 1349.

rejected Fireman's Fund's claim of equitable subrogation, determining the doctrine was inapplicable.[1729]

On appeal to the CAFC, the court first addressed Summit's assignment of claims to Fireman's Fund.[1730] The court observed the Anti-Assignment Act clearly prohibits a contractor from transferring its rights under a contract involving the federal government to another party. Although the indemnity agreement purported to assign to Fireman's Fund Summit's rights under the contract, the court concluded that under the Anti-Assignment Act[1731] the agreement was clearly invalid.[1732]

Next, the court focused on the appellant's equitable subrogation argument. The appellant argued that once a surety has taken over performance of a government contract, it may assert a claim against the government under the contract,[1733] and in that capacity is a "contractor" under the CDA.[1734] The court disagreed. Observing that while "long established that a surety can sue the Government in the Court of Federal Claims under the non-contractual doctrine of equitable subrogation,"[1735] the CDA (and thus the ASBCA's jurisdiction) covers "all claims by a contractor against the government relating to a contract."[1736] Because the government was not a party to the indemnity agreement between Summit and Fireman's Fund, Fireman's Fund could not be a "contractor" under the CDA. Therefore the board correctly concluded it had no jurisdiction over Fireman's Fund's claims for the pre-takeover agreement period.[1737]

"As We Are Shorn of Jurisdiction . . . ."

Shortly after the CAFC decided *Fireman's Fund*, the ASBCA was afforded the opportunity to apply the decision in *United Pacific Insurance Co.*[1738] In *United Pacific Insurance Co.* (UPI), the appellant issued performance and payment bonds to Castle Abatement Corp. (Castle), to whom the Air Force awarded a construction contract on 21 September 1995.[1739] The Air Force terminated the contract for default on 21 July 1997 and neither Castle nor UPI contested the termination.[1740] The Air Force and UPI then entered into a takeover agreement on 5 August 1997.[1741] UPI continued performance on the contract, but prior to providing a release, it submitted several claims to the contracting officer. The claims alleged UPI's performance costs increased due to government caused changes, delays, improper inspections, and similar reasons. UPI also alleged the Air Force failed to withhold a progress payment to Castle shortly before it defaulted.[1742]

After the contracting officer denied the claims, UPI appealed the decision to the ASBCA.[1743] The government asserted the board lacked jurisdiction to resolve portions of the case involving the parties' conduct prior to the signing of the takeover agreement.[1744] The board agreed with the government, noting that except for appeals arising directly from work under a takeover agreement, when the surety becomes a contractor, the board's assumption of jurisdiction has generally been based on the principles of equitable subrogation. The board, however, observed the right of subrogation is not founded on contract, but rather "is a creature of equity; is enforced solely for the pur-

1729. *Id.*

1730. *Id.*

1731. *See* 31 U.S.C.S. § 3727(a)(1).

1732. *Fireman's Fund*, 313 F.3d at 1349.

1733. *Id.* at 1350 (referencing Admiralty Constr., Inc. v. Dalton 156 F.3d 1217 (Fed. Cir. 1998)).

1734. *Id.* at 1349-50.

1735. *Id.* at 1351 (citing Transamerica v. United States, 989 F.2d 1188 (Fed. Cir. 1993); Balboa Ins. Co. v. United States, 775 F.2d 1158, 1160 (Fed. Cir. 1985)).

1736. *Id.* (quoting 41 U.S.C.S. § 605(a)).

1737. *Id.* For additional discussion of the CDA aspects of the *Fireman's Fund* decision, see *supra* Section III.H Contract Disputes Act (CDA) Litigation.

1738. ASBCA No. 53051, 2003 ASBCA LEXIS 57 (June 4, 2003).

1739. *Id.* at *3-4.

1740. *Id.* at *20.

1741. *Id.* at *26.

1742. *Id.* at *43.

1743. *Id.* at *57.

1744. *Id.* at *57-58.

pose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties."[1745] Given the CAFC's holding in *Fireman's Fund*,[1746] the board concluded "we are shorn of jurisdiction over the surety's equitable subrogation claims," and dismissed this portion of the case.[1747]

It Was Only Dicta: A Story From the Wild, Wild West

In *Insurance Co. of the West v. United States* (*West*),[1748] the COFC held that once a surety discharged the outstanding bills of subcontractors, it could subrogate to the rights of the defaulted contractor and pursue a direct claim for funds that it alleges the government wrongfully distributed.[1749] The court came to this conclusion despite language from the CAFC that a payment bond surety who pays its principle's subcontractors is subrogated only to the subcontractor's rights against the government.[1750]

In *West*, the Air Force awarded P.C.E. Ltd. (PCE) a contract on 28 August 1997 for the replacement of automatic doors in the commissary at Hickam AFB, Hawaii.[1751] On 4 September 1997, West provided performance and payment bonds for the project.[1752] In a letter dated 21 November 1997, however, PCE's president notified the Air Force that PCE was financially unable to complete its ongoing construction contracts. The letter stated that West would assure completion of projects and that West would assist PCE in completing the outstanding contracts. In the letter, PCE's president also directed that "all contract funds currently remaining due" be paid to West.[1753] Thereafter, West dispatched several more letters to the contracting officer, requesting the contracting officer make all payments to West and not to PCE.[1754] West financed PCE's performance, and PCE subsequently completed the project.[1755] During the period of performance, however, PCE submitted three invoices to the Air Force, all of which the Air Force paid to PCE.[1756] On 29 May 1998, PCE executed a release with the government, and approximately six months later, West notified the Air Force in writing that it had not received any payments under the contract. The contracting officer responded that since West refused to enter into a formal assignment agreement, the Air Force disbursement office issued all payments directly to PCE.[1757]

After filing suit in district court against PCE, West filed a complaint against the Air Force in the COFC seeking the amount paid to PCE under a theory the funds were wrongfully disbursed to PCE.[1758] The government moved to dismiss the plaintiff's complaint arguing the Supreme Court's decision in *Army v. Blue Fox, Inc.* (*Blue Fox*),[1759] ended the COFC's jurisdiction to hear claims brought by sureties under the doctrine of equitable subrogation. According to the government, *Blue Fox* stood for the proposition that the United States had not waived its sovereign immunity against such claims under the Tucker Act.[1760] The COFC disagreed with the government's reasoning, observing that CAFC has explicitly held that a surety may assert the doctrine of equitable subrogation in the COFC.[1761] It

1745. *Id.* at *58

1746. 313 F.3d 1344 (Fed. Cir. 2002) (holding that no CDA jurisdiction exists over a surety's pre-takeover claims based on the doctrine of equitable subrogation).

1747. *UPI*, 2003 ASBCA LEXIS 57, at *83.

1748. 55 Fed. Cl. 529 (2003).

1749. *Id.* at 544.

1750. Ins. Co. of the West v. United States, 243 F.3d 1367 (Fed. Cir. 2001) [West II].

1751. *West*, 55 Fed. Cl. at 531.

1752. *Id.*

1753. *Id.*

1754. *Id.*

1755. *Id.* at 531-32.

1756. *Id.* at 532.

1757. *Id.*

1758. *Id.*

1759. *Id.* at 535 (citing 525 U.S. 255 (1999)).

1760. *Id.* (citing 28 U.S.C.S. § 1491(a) (LEXIS 2003)).

1761. *See* Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985).

also held that this precedent was "undergirded by years of decisions from the Federal Circuit and the Court of Claims reiterating the same holding."[1762] The COFC dismissed the government's motion, but granted the government's request for an interlocutory appeal to the CAFC.[1763]

On appeal, the CAFC observed that while there is no privity of contract between the government and a surety, sureties have traditionally asserted claims against the government under the equitable doctrine of subrogation.[1764] The court noted this approach "dates back at least to 1896."[1765] Analyzing *Blue Fox*, the court concluded that the case stood for nothing more than the proposition that "'sovereign immunity bars subcontractors and other creditors from enforcing liens on Government property or funds to recoup their losses.'"[1766] In denying the government's motion, the court made a short statement in dicta that on remand to the COFC became a point of contention for all parties: "[I]t is well-established that a surety who discharges a contractor's obligation to pay subcontractors is subrogated only to the rights of the subcontractor. Such a surety does not step into the shoes of the contractor and has no enforceable rights against the government."[1767]

On remand, the government argued the CAFC's comment was an accurate reflection of the scope of equitable subrogation. Following the logic of the CAFC's statement, West could "not step into the shoes of the contractor," thus West had no standing to pursue the appeal.[1768] West responded that the quoted language was dicta and was not central to the court's holding. West further argued that the quoted language only made sense if viewed as referring only to the sureties of subcontractors; otherwise it would be inconsistent with the holdings in the majority of such cases decided by the various courts.[1769] Examining the issue, the COFC determined the language was not central to the CAFC's holding in *West II* and should be disregarded. The court observed that the CAFC dicta "should be read in the light of the court's central holding and the controlling facts in that case."[1770] Since the central holding of *West II* was that sovereign immunity does not bar a surety's claim against the government, the COFC observed the dicta was not central to the CAFC's holding. Because the statement was not supported by the weight of precedent the court chose to respectfully ignore it.[1771]

Bonds? We Don't Need No Stinking Bonds! (Or Do We?)

Last year's *Year in Review*[1772] reported the protest of *Apex Support Services, Inc.*[1773] In *Apex*, the GAO sustained a bid protest because the GSA failed to articulate why it was requiring potential offerors to post a bid guarantee and a performance bond to compete for a non-construction contract.[1774] This year, in *American Artisan Productions, Inc.* (*AAP*) [1775] the GAO denied a bid protest where the protestor argued the Bureau of Land Management (BLM) improperly imposed a bond requirement in a non-construction RFP.[1776]

In *AAP*, the BLM issued an RFP seeking proposals for the design and installation of exhibits depicting the Lewis and Clark expedition.[1777] The RFP required offerors to provide a bid guarantee and a performance bond.[1778] AAP protested the RFP to the GAO, arguing the bond requirement was a "ploy to

1762. *West*, 55 Fed. Cl. at 532.

1763. *Id*. at 531-32.

1764. *West II*, 243 F.3d at 1370.

1765. *Id*. (citing Prairie State Bank v. United States, 164 U.S. 227, 231 (1896)).

1766. *Id*. (quoting Army v. Blue Fox, 525 U.S. 255, 265 (1999)).

1767. *Id*.

1768. *West*, 55 Fed. Cl. 529, 534 (2003).

1769. *Id*. at 534-35 (citing, *inter alia*, Pearlman v. Reliance Ins. Co., 371 U.S. 132 (1962); United States v. Munsey Trust Co., 332 U.S. 234 (1947)).

1770. *Id*. at 535 (citing F. Alderete Gen. Contractors, Inc. v. United States, 715 F.2d 1476, 1479 (Fed. Cir. 1983)).

1771. *Id.* at 534. In dismissing the government's motion, the court reserved for trial two issues: first, the reasonableness of the Air Force's payments to PCE; and second, the issue of whether West's recovery of funds from district court litigation could be attributed to the progress payments the Air Force made to PCE. *Id.*

1772. *2002 Year in Review, supra* note 57, at 152.

1773. Comp. Gen. B-288936; B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202.

1774. *Id*. at 4.

1775. B-292380, 2003 U.S. Comp. Gen. LEXIS 112 (July 30, 2003).

1776. *Id*. at *4.

eliminate small businesses from participating" in the procurement.[1779] In response to AAP's allegation, the BLM stated that the bond requirement was necessary to "keep artists on the job."[1780] The BLM also noted timely completion of this project was critical to the agency, given the project's great historical significance.[1781]

Citing FAR section 28.103-1,[1782] the GAO observed that an agency should generally not require performance bonds for non-construction contracts. The GAO observed, however, "the FAR does permit their use when, as here, they are found necessary to protect the government's interest."[1783] In the GAO's view, the BLM sufficiently explained its need to ensure completion of the exhibits before the bicentennial celebration. Thus, the bonding requirement was reasonable and not an abuse of discretion.[1784]

Major James Dorn.

Cost and Cost-Accounting Standards

Would Reducing Administrative Costs for Contractors and Improving Employee Morale Increase Costs to the Government If Lump-Sum Reimbursement Is Allowed for Relocation Costs?

Last year's *Year in Review* reported that the FAR Councils issued a final rule increasing the limit for lump-sum reimbursement of miscellaneous relocation costs from $1000 to $5000.[1785] Concerned about increasing government costs, the councils had maintained a ceiling on the lump-sum reimbursement method.[1786] This year, the councils announced they are considering a giant leap forward by allowing an appropriate lump-sum reimbursement for all relocation costs under FAR section 31.205-35.[1787] This expansion would presumably reduce administrative costs for contractors and improve contractor employee morale. The councils, however, cited concern "that permitting lump-sum payments in lieu of actual costs may result in an increase in costs to the Government."[1788] Accordingly, the councils invited interested parties to provide comments by 23 December 2002 concerning the potential costs and benefits of the lump-sum reimbursement for relocation costs.[1789]

Defense Authorization Act for FY 2003 Clamps Down on CAS Waivers

By memorandum dated 31 January 2003,[1790] the Director of Defense Procurement and Acquisition Policy, Ms. Deidre A. Lee, notified DOD components that the "Defense Authorization Act for FY 2003 provides some significant limitations on the use of" Cost Accounting Standards (CAS) waivers under FAR section 30.201-5.[1791] Ms. Lee provided a reminder that CAS waivers, under FAR section 30.201-5 and the limitations imposed by section 817 of the FY 2003 Defense Authorization Act, are granted under exceptional circumstances. Accord-

1777. *Id.* at *1-2.

1778. *Id.* at *2.

1779. *Id.*

1780. *Id.*

1781. *Id.*

1782. FAR, *supra* note 30, at 28.103-1. This provision provides: "[g]enerally, agencies shall not require performance and payment bonds for other than construction contracts." *Id.*

1783. *American Artists*, 2003 U.S. Comp. Gen. LEXIS 112, at *3.

1784. *Id.*

1785. *2002 Year in Review*, *supra* note 57, at 154 (discussing Federal Acquisition Regulation; Relocation Costs, 67 Fed. Reg. 43,516 (June 27, 2002), which amended the relocation cost allowability rules at FAR 31.205-35).

1786. Federal Acquisition Regulation; Relocation Costs, 67 Fed. Reg. 43,516 (June 27, 2002).

1787. *See* Federal Acquisition Regulation; Reimbursement of Relocation Costs on a Lump-Sum Basis, 67 Fed. Reg. 65,468 (Oct. 24, 2002).

1788. *Id.*

1789. *Id.*

1790. Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies et al., subject: Waivers of Cost Accounting Standards (31 Jan. 2003) [hereinafter CAS Waiver Memo]; *see also* Bob Stump National Defense Authorization Act for FY 2003, Pub. L. No. 107-314, § 817, 116 Stat. 2610 (2002). For additional guidance regarding Truth in Negotiations Act related pricing data and information, and the DOD's response, see *infra* Section IV.R Contract Pricing.

1791. CAS Waiver Memo, *supra* note 1790.

ingly, agencies may grant CAS waivers only if all of the following conditions are met:

> 1. The property or services cannot reasonably be obtained under the contract, subcontract, or modification, as the case may be, without the granting the waiver;
> 2. The price can be determined to be fair and reasonable without the application of the cost accounting standards; and
> 3. There are demonstrated benefits to granting the waiver.[1792]

Ms. Lee also noted that revised DFARs language reflecting the section 817 requirements will be forthcoming.[1793]

Just Give Us a Good Guesstimate of Your Unallowable Costs

The FAR Councils proposed to amend FAR section 31.201-6, Accounting for Unallowable Costs, by adding a new paragraph that allows statistical sampling identification of unallowable costs and acceptability criteria for contractor sampling methods.[1794] The proposed change is part of an ongoing review of the cost principles in FAR part 31, given the evolution of generally accepted accounting principles.[1795]

Allowable "Big Dog" Pay is Capped at $405,273 for FY 2003

The OFPP Administrator issued a determination establishing $405,273 as the maximum compensation for senior executives allowable in FY 2003 government contractsr.[1796] This compensation limitation is referred to as the "benchmark compensation amount" and is required in accordance with section 39 of the OFPP Act codified at 41 U.S.C. § 435.[1797] The updated benchmark compensation amount increased approximately $17,500 from the FY 2002 amount of $387,783.[1798]

Major Karl Kuhn.

Deployment and Contingency Contracting

Contracting Support for the Coalition Provisional Authority (CPA)

By memorandum dated 19 August 2003, the Deputy Assistant Secretary of the Army for Policy and Procurement, Ms. Tina Ballard, noted that "the Deputy Secretary of Defense, Paul Wolfowitz, designated [the] Army as the DoD Executive Agent to support the rebuilding mission in Iraq and assigned responsibility to provide administrative, logistics, and contracting support to the Coalition Provisional Authority (CPA)."[1799] Ms. Ballard also noted that the Assistant Secretary of the Army for Acquisition, Logistics and Technology, had "established a Head of Contracting Activity (HCA) responsible for the contracting effort in Iraq to support reconstruction and rebuilding of the Iraqi government."[1800] A U.S.-based Contract Support Office located in the National Capitol Area was also established to provide dedicated support to the CPA Contract Agency based in Baghdad, Iraq. Ms. Ballard requested that the Army and DOD activities and organizations provide necessary support personnel and other ancillary support upon request by the CONUS Contract Support Office.[1801]

1792. *Id*. (citing the Bob Stump National Defense Authorization Act for FY 2003, Pub. L. No. 107-314, § 817, 116 Stat. 2610 (2002)).

1793. *Id*.

1794. Federal Acquisition Regulation; Application of Cost Principles and Procedures and Accounting for Unallowable Costs, 68 Fed. Reg. 28,108 (May 22, 2003) (to be codified at 48 C.F.R. pt. 31).

1795. *Id*.

1796. Office of Federal Procurement Policy; Determination of Executive Compensation Benchmark Amount Pursuant to Section 808 of Pub. Law No. 105-85, 68 Fed. Reg. 23,501 (May 2, 2003).

1797. *Id*. (referencing 41 U.S.C. § 435, as amended and added by the National Defense Authorization Act for FY 1998, Pub. L. No. 105-85, § 808 (1997)).

1798. *Id*.

1799. Memorandum, Deputy Assistant Secretary of the Army for Policy and Procurement, to Distribution, subject: Principal Assistant Responsible for Contracting (PARC) Support for Coalition Provisional Authority (CPA) Iraq (19 Aug. 2003).

1800. *Id*.

1801. *Id*.

The CPA Issues the "Iraqi FAR"

Ambassador Paul Bremer, CPA Administrator, issued CPA Memorandum Number 4 (CPA Memo) establishing procedures for the execution of Iraqi contracts and grants that are funded with vested and seized Iraqi funds.[1802] The CPA Memo procedures are applicable to contracts and grants executed by the CPA Regional Directors, Interim Iraqi Ministry Officials, and the CPA HCA or designees. The procedures, however, do not apply to Iraqi Ministries and governmental agencies if the contracts or grants are executed for requirements approved through an Iraqi national budget process and the CPA Administrator determines the Iraqi Ministry contracting procedures ensure transparent use and management of Iraqi funds.[1803]

The CPA Memo establishes various competition thresholds that are similar to those found in the FAR. These thresholds include Micro-Purchases (valued at $5000 or less), Small Purchases (valued greater than $5000 but less than or equal to $500,000), and Large Purchases (valued greater than $500,000).[1804] Micro-Purchases do not require competition if the "Contracting Officer determines that the offered price and terms are fair and reasonable."[1805] Small Purchases require, when possible, at least three competitive offers. Oral solicitations may be used if the purchase is valued less than or equal to $25,000. For Small Purchases greater than $25,000, written solicitations are required. Additionally, Small Purchases greater than $10,000 require public posting and other advertising methods to foster competition. Not unlike the FAR, BPAs are also identified as a Small Purchase type.[1806] Large Purchases require competition through public posting and advertising, "to the maximum extent practicable, with a goal of obtaining at least three competitive offers."[1807] Other CPA Memo procedures similar to FAR procedures include the following: appointment of contracting officers,[1808] prohibitions against conflicts of interest[1809] and project splitting,[1810] negotiations through RFPs,[1811] authority to use sealed bid procedures based upon similar *Racal* factors,[1812] and the protection of confidential acquisition information.[1813]

Contractors Accompanying the Force (aka Contractors on the Battlefield)

On 8 September 2003, the Office of the Assistant Secretary of the Army for Acquisition, Logistics and Technology (ASA(ALT)) issued the *Army Contractors Accompanying the Force (CAF) Guidebook*.[1814] As noted by the ASA(ALT) Director for Procurement and Industrial Base Policy, Ms. Emily Clarke, the *CAF Guidebook* was necessary because of "new policy . . . coming from myriad sources almost daily as we approached the war in Iraq."[1815] Ms. Clarke also noted that there had been numerous problems with deployment of contractor personnel and inconsistent treatment of contract requirements between Army contracts providing deploying personnel.[1816] Accordingly, the Army developed the *CAF Guidebook* to provide template contract language, background

1802. Memorandum, Administrator Coalition Provisional Authority, subject: Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq (19 Aug. 2003) [hereinafter CPA Memo].

1803. *Id*. at 2 (entitled sect. 2, Applicability).

1804. *Id*. at 8 (entitled sect. 7, Contracts).

1805. *Id*.

1806. *Id*. at 8-9.

1807. *Id*. at 9.

1808. *Id*. at 4.

1809. *Id*. at 7.

1810. *Id*.

1811. *Id*. at 9.

1812. *Id*. at 10. The *Racal* factors, used to determine if sealed bid procedures are preferable to negotiated procedures, were identified in *Racal Filter Technologies, Inc.*, Comp. Gen. B-240579, Dec. 4, 1990, 90-2 CPD ¶ 453.

1813. CPA Memo, *supra* note 1802, at 13.

1814. Office of the Asst. Secretary of the Army (Acquisition, Logistics, & Technology), Guidebook, Army Contractors Accompanying the Force (CAF) (8 Sept. 2003) [hereinafter CAF Guidebook].

1815. *Id*. at 2 (foreword and acknowledgements).

1816. *Id*.

information on frequently occurring issues, and current resources.[1817]

The *CAF Guidebook* includes approximately twenty topics that address such current interest items as the wearing of military style uniforms, issuance of weapons, and accountability of contractor personnel in the theater of operations. Concerning uniforms, contractor personnel may be issued protective Organizational Clothing and Equipment (OCIE), such as ballistic or chemical protective gear, but may not wear distinctive military uniform items. An exception for distinctive military uniform items, such as Battle Dress Uniforms (BDUs) or Desert Camouflage Uniforms (DCUs), requires a Department of the Army waiver.[1818] Combatant Commanders may allow contractor personnel to voluntarily carry a military issue firearm for defensive purposes. Generally, the Army Force Commander would issue the weapon, ammunition, and provide training to contractor personnel allowed to carry a weapon.[1819] Contractor personnel accountability is accomplished through an army personnel accounting system—The Civilian Tracking System or CIVTRACKS. In accordance with a January 2003 Army message,[1820] information on deployed contractor personnel must be input to CIVTRACKS.[1821] Accordingly, theater commanders will have visibility through CIVTRACKS on contractor personnel deployed to the theater of operations.[1822]

The *CAF Guidebook* cites various references and resources, with emphasis upon two draft regulations and a draft DOD Directive that should be issued shortly. A draft Army FAR Supplement clause, entitled Contractors Accompanying the Force, is included as Appendix A to the *CAF Guidebook*.[1823] The draft revision of Army Regulation 715-9, also appropriately entitled *Contractors Accompanying the Force*, is referenced throughout the *CAF Guidebook*.[1824] Appendix B of the *CAF Guidebook* contains the draft DOD Directive entitled *Management of Contractor Personnel in Support of Joint Operations and Declared Contingencies*.[1825]

Field Manual (FM) 3-100.21, Contractors on the Battlefield, *Supersedes* FM 100-21

Although issued on 3 January 2003, the newly revised and newly numbered FM 3-100.21[1826] did not incorporate the new term, Contractors Accompanying the Force, as the guidebook and other draft regulations have done. Field Manual 3-100.21, *Contractors on the Battlefield*, provides greater detail than the *CAF Guidebook*, allowing commanders "to fully understand their role in planning for and managing contractors on the battlefield and to ensure that their staff is trained to recognize, plan for, and implement contractor requirements."[1827]

Of particular note in FM 3-100.21 is Chapter 6, Force Protection. Paragraph 6-4 provides that "[p]rotecting contractors and their employees on the battlefield is the commander's responsibility."[1828] Paragraph 6-27 also provides that contractor employees "will not wear military uniforms or clothing except for specific items required for safety or security, such as chemical defense equipment (CDE), cold weather equipment, or mission-specific safety equipment."[1829] Any contractor clothing deemed necessary to promote a uniform appearance should be "distinctly not military and . . . set[] them apart from the forces they are supporting."[1830] Paragraph 6-29 provides that the combatant commander may allow contractor employees to use issued military-specification sidearms for self-defense purposes, if the contractor's company policy permits employees to use weapons and the employee agrees to carry the weapon.[1831]

1817. *Id*.

1818. *Id*. at 13.

1819. *Id*. at 14.

1820. Message, 161410Z Jan 03, Headquarters, Department of the Army, subject: Army Contractor Personnel Accounting.

1821. CAF GUIDEBOOK, *supra* note 1814, at 23.

1822. *See id*. at 23.

1823. *Id*. at 27.

1824. *Id*. at 5 (providing a web site for the draft regulation).

1825. *Id*. at 31.

1826. U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (3 Jan. 2003).

1827. *Id*. at 1-1.

1828. *Id*. at 6-2.

1829. *Id*. at 6-6.

1830. *Id*.

Continuing Update of Special Authorities Invoked in the Wake of the September 11th Attacks

As noted in prior *Years in Review*,[1832] a number of special authorities were invoked in response to the 11 September 2001 terrorist attacks. To recap, President Bush declared a national emergency on 14 September 2001 through the issuance of Proclamation 7463.[1833] He also issued Executive Order (EO) 13,223, which authorized the Service Secretaries to order any unit or member of the Ready Reserve of the Armed Forces to active duty for not more than twenty-four months and other stop loss authorities for active and reserve forces.[1834] President Bush continued the original national emergency declaration for an additional year by issuing a notice dated 12 September 2002.[1835] This past year, President Bush issued a notice dated 10 September 2003 for a one-year continuation of the national emergency with respect to the terrorist threat.[1836]

As a result of the President's declaration of a continuing national emergency, operations in Afghanistan to combat terrorism (i.e., Operation Enduring Freedom) continue to be a contingency operation as defined by 10 U.S.C. § 101(a)(13)(B).[1837] Because the national emergency authority invoked by EO 13,223 also applies for operations in Iraq, Operation Iraqi Freedom is also a contingency operation. Accordingly, the simplified acquisition threshold defined at FAR section 2.101[1838] is increased from $100,000 to $200,000 for acquisitions using the procedures of FAR part 13[1839] in support of the contingency operations in Iraq and Afghanistan.[1840]

Major Karl Kuhn.

Environmental Contracting

Environmental Remediation Services Now Eligible for Multiyear Contracting

Effective 22 July 2003, the DOD issued an interim rule permitting DOD agencies to enter into multiyear contracts for environmental remediation services for military installations.[1841] Section 827 of the National Defense Authorization Act for FY 2003[1842] amended current laws to add environmental remediation services for military installations to the list of services eligible to utilize multiyear contracting methods.[1843]

1831. *Id*.

1832. *See 2002 Year in Review, supra* note 57, at 98-99; *2001 Year in Review, supra* note 635, at 159.

1833. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

1834. Executive Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001). Executive Order 13,253 later amended Executive Order 13,223 to grant the Secretary of Transportation similar authority to call up members of the Coast Guard to active duty. Executive Order 13253, 67 Fed. Reg. 2791 (Jan. 16, 2002).

1835. 67 Fed. Reg. 58,317 (Sept. 12, 2002).

1836. 68 Fed. Reg. 53,665 (Sept. 12, 2003).

1837. The statute states:

> The term "contingency operation" means a military operation that-- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
>
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title [10 U.S.C. §§ 331-335], or any other provision of law during a war or during a national emergency declared by the President or Congress.

10 U.S.C.S. § 101(a)(13)(B) (LEXIS 2003).

1838. *See* FAR, *supra* note 30, at 2.101.

1839. *See id*. pts. 2, 13.

1840. *See, e.g.*, Memorandum, Deputy Assistant Secretary of the Air Force (Contracting) and Assistant Secretary of the Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Emergency Acquisitions in Direct Support of U.S. or Allied Forces Deployed in Military Contingency Operations during Operation Iraqi Freedom (21 Mar. 2003).

1841. Defense Federal Acquisition Regulation Supplement; Multiyear Procurement Authority for Environmental Services for Military Installations, 68 Fed. Reg. 43,332 (July 22, 2003) (codified at 48 C.F.R. pt. 217).

1842. Pub. L. No. 107-314, 116 Stat. 2458, 2617 (2002) (amending 10 U.S.C. § 2306c (2000)).

B.J. Thomas Sings, "Oh, Those Gas Drops Keep Fallin' on My Head"

Last year's *Year in Review* described how Cross Petroleum (Cross) and the U.S. Forest Service were litigating responsibility for the remedial cleanup costs for 2000 gallons of spilled gasoline.[1844] Allegedly, a Cross employee pumped this gasoline into a perforated monitoring well, believing that the well was an underground gasoline tank.[1845] On 31 October 2002, the COFC held that the agency incorrectly terminated its contract with Cross; that Cross was liable for paying the reasonable costs of remediation; and, that the government had the initial burden of justifying its remediation expenditures.[1846] If the government met this burden, then Cross bore the burden of establishing that the government's costs were unreasonable.[1847] The COFC then left it up to the parties to resolve the damages issue themselves or proceed to trial on 24 February 2003.[1848] The parties could not resolve the matter prior to trial, so they let the COFC resolve this case. The COFC held Cross responsible for $975,000[1849] worth of the total $1,265,401.50[1850] in remedial clean up costs.

Spent Nuclear Fuel Is a Hot Potato

Commonwealth Edison Co. (Edison), a utility company, contracted with the U.S. Government for disposition of nuclear waste produced at Edison's nuclear power plant. Under the contract, the government agreed to take title to, transport, and dispose of the nuclear waste stored at the utilities' facilities beginning not later than 31 January 1998.[1851] Edison agreed to pay the Department of Energy (DOE) a one-time fee based on the amount of electricity generated before 7 April 1983 and an ongoing fee based on the amount of electricity generated thereafter.[1852] Accordingly, Edison paid the DOE more than one billion dollars.[1853] Despite the enormous size of Edison's fee, the DOE announced in 1994 that it would not be able to begin disposing of the waste until at least 2010.[1854] Edison sued; alleging that the government breached its contract to dispose of Edison's spent nuclear energy.[1855] The government, argued that the contract obligated the agency only to begin accepting spent nuclear fuel and that the contract did not bind the government to any minimum quantities.[1856] The COFC resolved this issue in favor of Edison, finding that the government's argument rendered the

---

1843. With the change, environmental remediation service contracts are eligible for multiyear contracting when the head of an agency finds that:

> (1) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;
> (2) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and,
> (3) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies of scale in operation.

DFARS, *supra* note 273, at 217.171 (a)(3). Other services eligible for multiyear contracting under DFARS 217.171 include: (i) Operation, maintenance, and support of facilities and installations; (ii) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment; (iii) Specialized training requiring high quality instructor skills (for example, training for pilots and aircrew members or foreign language training); (iv) Base services (for example, ground maintenance, in-plane refueling, bus transportation, and refuse collection and disposal).

1844. *2002 Year in Review, supra* note 57, at 163-64.

1845. Cross Petroleum, Inc. v. United States, 57 Fed. Cl. 34, 35 (2003) (citing Cross Petroleum, Inc., 51 Fed. Cl. 549, 550 (2002)).

1846. Cross Petroleum, Inc. v. United States, 54 Fed. Cl. 317, 347 (2002).

1847. *Id.*

1848. *Id.*

1849. *Cross Petroleum*, 57 Fed. Cl. at 51. The COFC noted the government unlawfully terminated Cross' contract, exacerbated the unjustifiably long remediation work, and did not adequately explain why it was reasonable to continue the clean up beyond the year 2000. Therefore, the court adjusted the government's claim downward and did not order Cross to pay for remediation costs past the year 2000. *Id.*

1850. *Id.* at 47. The COFC gave weight to the consistently "stalwart" testimony the contracting officer, Ms. Capp, provided. The COFC noted that throughout the six years of litigation, Ms. Capp always showed an itemized breakdown of the remediation costs through documentation such as transaction registers, salary reports, purchase orders, contracts, and miscellaneous purchases. *Id.*

1851. Commonwealth Edison Co. v. United States, 56 Fed. Cl. 652, 654-55 (2003). For an environmental clean-up case involving an open-ended indemnification agreement and the application of the Anti-Deficiency Act (ADA), see *infra* Section V.C Antideficiency Act and the discussion of *E.I. DuPont De Nemours v. United States*, No. 99-101C, 2002 U.S. Claims LEXIS 302 (Nov. 13, 2002) (Turner, Senior).

1852. *Edison*, 56 Fed. Cl. at 655.

1853. *Id.* at 665.

1854. *Id.* at 655. This delay was necessitated by a setback in the construction of the DOE's storage repository. *Id.*

1855. *Id.* at 654. Edison sued for partial breach of contract and sought damages for the government's taking of its real property without just compensation. *Id.*

contract illusory and unenforceable.[1857] The court concluded by directing the parties to submit a joint proposal or separate proposals to resolve any issues involving damages.[1858]

Major Steven Patoir.

Government Information Practices

The Disclosure Provisions of FOIA Supersede the FAR's Requirement to Avoid Appearances of Impropriety

Almost twelve months after the COFC decision in *R & W Flammann GmbH v. United States* (*Flammann I*),[1859] the CAFC reversed the lower court in *R & W Flammann GmbH v. United States* (*Flammann II*).[1860] In doing so, the CAFC reaffirmed the broad disclosure requirements of the Freedom of Information Act (FOIA)[1861] and clarified the relationship between the provisions of the FOIA and the FAR.[1862] This decision also begins to settle the ripples caused by *Flammann I* within "an already unsettled pool of unit price decisions."[1863]

In *Flammann I*, the incumbent German contractor R & W Flammann GmbH (Flammann) sought to enjoin the U.S. Army's awarding of a maintenance contract to SKE GmbH (SKE), one of Flammann's competitors, after the government "released the plaintiff's unit prices for the current and [unexercised] future (option) years" to SKE.[1864] The plaintiff argued that its unit prices were exempt from public disclosure under the Trade Secrets Act[1865] and FOIA Exemption 4[1866] and asserted that under the *National Parks*[1867] test, "it would suffer substantial competitive harm in the re-solicitation for a new contract covering largely the same time period and scope of work because it would be forced to 'ratchet down' its prices, and/or otherwise could be underbid" by competitors.[1868] On the other hand, the government argued that Flammann was "in no way disadvantaged by disclosure of 'historical contract' information" since "the entire contract has been in the public domain since the day of bid opening."[1869]

The court understood the government's position and agreed that in this case it is undisputed that sealed bids upon bid open-

---

1856. *Id*. at 665.

1857. *Id*. at 664-65. The government argued that Edison was required to pay in full before 31 January 1998 and that the DOE only had to start accepting the spent nuclear fuel before 31 January 1998. Additionally, the government claimed that mandatory minimum quantities were consciously omitted from the contract and that it could complete contract performance at its leisure. *Id.*

1858. *Id*. at 668.

1859. 53 Fed. Cl. 647 (2002) [hereinafter Flammann I]. Pursuant to a protective order from the CAFC, this case was filed under seal 28 August 2002. Because neither party filed a notice or proposed redactions, the court's opinion was published on 23 September 2002.

1860. 339 F.3d 1320 (Fed. Cir. 2003) [hereinafter Flammann II].

1861. 5 U.S.C.S. § 552 (LEXIS 2003). The FOIA requires the government to release information upon request unless that information is exempt from release under the provision of one or more of the statute's exemptions. *Id*.

1862. FAR, *supra* note 30.

1863. *2002 Year in Review*, *supra* note 57, at 173. For a general discussion and analysis of the development of governmental policy changes related to the releaseability of contract unit prices, see Major Timothy M. Tuckey, *The Changing Definition of Unit Prices: Another Blow to the Government's Efforts to Keep the Public Informed?*, Army Law., Dec. 2001, at 13.

1864. *Flammann I*, 53 Fed. Cl. at 648. According to the appellate court,

> [t]he Army gave Flammann submitter notice of SKE's FOIA requests and Flammann objected. Based partly on its determination that Flammann's unit prices were in the public domain because the bid had already been publicly opened, the Army provided SKE, by Contract Line Item Number ("CLIN"), Flammann's unit price information for the incumbent contract's base year and unexercised option years.

Flammann II, 339 F.3d at 1322.

1865. 18 U.S.C.S. § 1905.

1866. 5 U.S.C.S. § 552b(4). Exemption 4 permits the government to withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *Id.*

1867. National Parks and Conservation Ass'n. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). In *National Parks*, the court outlined a test to determine whether information submitted to the government merited protection as "confidential" commercial or financial information under FOIA Exemption 4. The *National Parks* test, which is customarily viewed as consisting of two disjunctive prongs, provides Exemption 4 protection to information the disclosure of which would impair the government's future ability to obtain necessary information or cause substantial harm to the competitive position of the submitter. *See generally* Office of Information and Privacy, U.S. Department of Justice, Justice Department Guide to the Freedom of Information Act (2002), at 189-269, *available at* http://www.usdoj.gov/oip/exemption4.htm.

1868. *Flammann I*, 53 Fed. Cl. at 652.

ing become publicly available, as did Flammann's incumbent contract, on 8 January 2001. For that reason alone, the plaintiff's unit prices do not fit within Exemption 4 of FOIA, because publicly available information cannot meet part one of the *National Parks* "confidential" standard.[1870]

"Under the peculiar facts at bar,"[1871] however, the court decided against the government. The court opined that the "goal of an open, unbiased and impartial competition applies to each and every stage of the procurement process" and that the "public accessibility" provisions of the FOIA "is a shield, not a sword; that is, public access serves to guard against impropriety and should not therefore be used to create the very thing it was designed to prevent."[1872] In this case, the court determined that the government improperly wielded the FOIA as a sword against Flammann. The court was clear that, at least in this case, the contracting officer's "general" duty to ensure fairness[1873] was more important than that officer's specific duty to disclose the results of the earlier sealed bid.[1874]

Moreover, the court concluded that the government's conduct created an appearance of impropriety. First, the court referred to the FAR's "fairness" provisions[1875] and the procurement official's requirement to "provide a level playing-field for all bidders."[1876] Then the court suggested that *NFK Engineering, Inc. v. United States*[1877] provided support for the position that the contracting official should have taken steps to avoid even the appearance of impropriety.[1878] "Given . . . the fact that the unit prices of plaintiff are unfairly already in the hands of at least one of the bidders,"[1879] the court concluded that the government's actions were arbitrary and capricious.

On appeal, the court first noted that "[c]ontracting officers are given broad discretion in their evaluation of bids,"[1880] and "when an officer's decision is reasonable a court may not 'substitute its judgment for that of the agency.'"[1881] Next the court affirmed that the "FOIA's broad policy is one of disclosure, as a 'check against corruption and to hold the governors accountable to the governed,'"[1882] and that "government agencies have a 'general obligation . . . to make information available to the public.'"[1883] Then, tipping its hand, the court added that "[e]ven if information meets the standards of an otherwise valid exemption, FOIA logically requires that if it is already in the public domain 'the government may not . . . justify withholding [such] information.'"[1884] In this case it was clear to the court that "the incumbent contract's bids were publicly opened and became immediately available to the public as required by FAR."[1885]

The court then dispatched the plaintiff's other contentions. First, the court ruled that the nondisclosure provisions of the Trade Secrets Act[1886] were inapplicable. The government's disclosure of Flammann's unit prices "did not violate the Trade Secrets Act because FOIA, also approved by Congress, logically authorizes release of information already within the public domain."[1887] The court then focused its attention on the crux

1869. *Id.*

1870. *Id.* at 653 (citations omitted).

1871. *Id.* at 654.

1872. *Id.*

1873. *Id.* at 655 (alluding to FAR, *supra* note 30, at 1.602-2).

1874. *Id.* (alluding to FAR, *supra* note 30, at 14.402).

1875. FAR, *supra* note 30, at 1.602. This FAR provision outlines the contracting officer's responsibilities, including "ensuring performance of all necessary actions for effective contracting, . . . safeguarding the interests of the United States . . ." and ensuring "that contractors receive impartial, fair, and equitable treatment." *Id.* at 1.602-2b.

1876. *Flammann I*, 53 Fed. Cl. at 656.

1877. 805 F.2d 372 (Fed. Cir. 1986).

1878. *Flammann I*, 53 Fed. Cl. at 656. According to the court, "[t]he *NKF Engineering* court was concerned only with the *appearance* of impropriety, not whether there was an actual impropriety, such that even an otherwise legally allowable FOIA release can appear to bestow an unfair competitive advantage on the recipient." *Id.*

1879. *Id.*

1880. *Flammann II*, 339 F.3d at 1322 (citing E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996)).

1881. *Id.* (citing Ray v. Lehman, 55 F.3d 606, 608 (Fed. Cir. 1995)).

1882. *Id.* at 1323 (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978)).

1883. *Id.* (citing Chrysler Corp. v. Brown, 441 U.S. 281, 292 (1979)).

1884. *Id.* (citing Students Against Genocide v. Dep't of State, 257 F.3d 828, 836 (D.C. Cir. 2001)).

of the lower court's reasoning: the notion "that the Army's conduct tainted the integrity of the procurement process."[1888]

The plaintiff-alleged "taint" related to two of the contracting officer's obligations: "the proposition that procurement officers must act to prevent even an appearance of impropriety in order to meet FAR requirements of 'safeguarding the interests of the United States in its contractual relationships,'"[1889] and the requirement to "ensur[e] that 'contractors receive impartial, fair, and equitable treatment.'"[1890] In the "peculiar factual circumstances" of the case, the lower court found that the contracting officer had a regulatory "duty to preclude any and all access to plaintiff's pricing information" and that the release of this information to the FOIA requestor "irrefutabl[y]" constituted an appearance of impropriety.[1891] On appeal, however, the court saw neither taint nor impropriety.

Instead, the appellate court declared that a "disinterested observer knowing all the facts and the applicable law would see nothing improper in the actions of the Army, and neither do we."[1892] While the appellate court did not address the lower court's failure to apply traditional statutory or legislative construction rules to the conflict between general and specific provisions of the FAR,[1893] it did highlight the manner in which the lower court held regulatory compliance to be more important than compliance with a statute.[1894] The appellate court was clear: contracting officers should comply with the spirit of the FAR, but they should not have to "violate a statute in order to meet these regulatory requirements."[1895] The FOIA's disclosure requirement "supercedes purportedly contradictory regulatory requirements found within" the FAR.[1896] In other words, a "procurement officer's general regulatory duty to ensure fair treatment under FAR is therefore superceded by FOIA's mandatory disclosure requirement."[1897] Moreover, to the extent that the regulation "contravenes a statute," the regulation "is invalid."[1898] Consequently, there was neither an improper violation of the FAR's fairness rules nor the creation of an appearance of impropriety.[1899]

1885. *Id*. (citing FAR, *supra* note 30, at 14.402-1(a)) (requiring the bid opening officer to "personally and publicly open all bids"); 14.402-1(c) (providing for the "[e]xamination of bids by interested persons"). Even the lower court correctly noted that "plaintiff's unit prices do not fit within Exemption 4 of FOIA, because publicly available information cannot meet part one of the *National Parks* "confidential" standard." Specifically, the court stated that "'to the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality – a *sine qua non* of Exemption 4.'" *Flammann I*, 53 Fed. Cl. at 653 (citing CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987)).

1886. 18 U.S.C. § 1905 (2000). The Trade Secrets Act provides:

> Whoever, being an officer or employee of the United States, . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential status, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

Id.

1887. *Flammann II*, 339 F.3d at 1323. In *Flammann I*, the lower court noted that "at least two circuit courts have ruled that unit price information does not fall under [the Trade Secrets Act] because overhead, profit margin, and other cost multipliers cannot be derived from unit prices." *Flammann I*, 53 Fed. Cl. at 654 (citing Acumenics Research & Technology v. Dept. of Justice, 843 F.2d 800, 808 (4th Cir. 1988) (holding that "there are too many unascertainable variables in the unit price calculation for a competitor to derive accurately Acumenics' multiplier")). The *Flammann I* court, however, did not rule on the applicability of the Trade Secrets Act to the facts.

1888. *Flammann II*, 339 F.3d at 1323.

1889. *Id*. at 1324 (citing FAR, *supra* note 30, at 1.602-2).

1890. *Id*. (citing FAR, *supra* note 30, at 1.602-2(b)).

1891. *Flammann I*, 53 Fed. Cl. at 655.

1892. *Flammann II*, 339 F.3d at 1324.

1893. *See supra* text accompanying notes 1873-74.

1894. *Flammann II*, 339 F.3d at 1324.

1895. *Id*.

1896. *Id*.

1897. *Id*.

1898. *Id*. (referencing United States v. Vogel Fertilizer Co., 455 U.S. 16, 26 (1982) (invalidating regulation that does not "harmonize[ ] with [a] statute's 'origin and purpose'")).

Most government attorneys and contracting officers likely welcomed the appellate court's reversal of *Flammann I*. As expected, the decision relies upon commonly understood rules of construction. The court confirmed that the FOIA's broad disclosure rules trump the FAR's general "fair-play" rules. Moreover, the decision validates the Army's commitment to release nonexempt information. What remains unpredictable is the impact that this predictable decision will have on the uncertainty that surrounds the release of contractors' unit prices under the FOIA.

Lieutenant Colonel Timothy Tuckey.

Information Technology (IT)

Good Enough for Government Work?

In 2001, the *Year in Review* reported on legislation prohibiting "the setting of a minimum experience or educational requirement for proposed contractor personnel in solicitations for information technology services, unless a contracting officer determines a need for the requirement, or the agency requires use of a non-performance-based contract."[1900] The FAR incorporates this prohibition at section 39.104.[1901] In December 2002, the GAO reported on whether agencies were complying with this legislative and regulatory prohibition.[1902] The GAO reported good news. Out of 161 performance-based solicitations reviewed, only one did not comply with the FAR requirement.[1903]

Get Smart (Cards)

Last year's *Year in Review* reported on developments in smart card technology and their potential uses in the government.[1904] Many developments occurred this year as well. In October 2002, the Navy awarded a three-year, $6 million contract to Anteon International Corporation to issue access-cards.[1905] In January 2003, the GAO reported that, as of November 2002, eighteen agencies had started sixty-two smart card projects.[1906] The DOD has the largest smart card program, intended for use by "about 4 million military and civilian personnel."[1907] The GAO noted benefits to the DOD's smart card program, such as "significantly reducing the processing time required for deploying military personnel, tracking immunization records of children, and verifying the identity of individuals accessing buildings and computer systems."[1908] The GAO also discussed challenges to smart card technology implementation, such as expense, interoperability among systems, and maintaining security and privacy of personal information.[1909] The GAO elaborated upon these benefits and challenges later in the year in a subsequent, more detailed, report.[1910]

IT Ain't Going Away!

In a February 2003 letter to Congress, the GAO reported that federal IT spending increased from $9 billion in FY 1997 to more than $17 billion in FY 2001.[1911] Spending on IT "through GSA's federal supply schedule program grew from about $405 million to $4.3 billion."[1912] In FY 2001, large businesses received sixty-two percent of federal IT dollars, with medium

---

1899. *Id.* As the court noted, "where the 'basic objective of [FOIA] is disclosure,' there can be no appearance of impropriety because the Army was required to disclose Flammann's publicly available unit price information to any interested party, including Flammann's other competitors for the resolicited bid contract." *Id.* (citing Chrysler Corporation v. Brown, 441 U.S. 281, 292 (1979)).

1900. *2000 Year in Review, supra* note 635, at 117 (citing National Defense Authorization Act for FY 2001, Pub. L. No. 106-398, § 813, 114 Stat. 1654 (2000)).

1901. FAR, *supra* note 30, at 39.104.

1902. Gen. Acct. Off., Rep. No. GAO-03-32, *Information Technology Services: Agencies Complying with Revision to Federal Acquisition Regulation* (Dec. 2002).

1903. *Id.* at 2.

1904. *2002 Year in Review, supra* note 57, at 174.

1905. *Navy Awards Anteon Access-Card Contract*, Fed. Times, Oct. 7, 2002, at 34-35.

1906. Gen. Acct. Off., Rep. No. GAO-03-144, *Electronic Government: Progress in Promoting Adoption of Smart Card Technology* (Jan. 2003), at 1.

1907. *Id.* at 2.

1908. *Id.*

1909. *Id.* at 2-4.

1910. Gen. Acct. Off., Rep. No. GAO-03-1108T, *Electronic Government: The Challenges to the Adoption of Smart Card Technology* (Sept. 2003). On this same day, the GAO also issued congressional testimony describing the background of and challenges in using biometrics as part of access technology. Gen. Acct. Off., Rep. No. GAO-03-1137T, *Information Security: Challenges in Using Biometrics* (Sept. 2003). Biometrics aid in the identification of people through "one or more of their distinct physical or behavioral characteristics." *Id.* at 1.

1911. Gen. Acct. Off., Rep. No. GAO-03-384R, *Contracting for Information Technology Services* (Feb. 2003), at 1.

businesses taking in twenty-one percent and small businesses grabbing fourteen percent.[1913] Because this amount will likely grow substantially,[1914] the GAO has encouraged the DOD to focus more on lessons learned from outsourcing IT services and "shar[e] the lessons learned from IT outsourcing projects across the department."[1915]

Keep IT Safe!

On 23 May 2003, the DOD published a proposed amendment[1916] to the DFARS to "address requirements for information assurance in the acquisition of information technology."[1917] The proposed DFARS amendment defines "information assurance" as "measures that protect and defend information and information systems by ensuring their availability, integrity, authentication, confidentiality, and non-repudiation. This includes providing for the restoration of information systems by incorporating protection, detection, and reaction capabilities."[1918] Although the proposed amendment reflects "existing Government policy pertaining to requirements for information assurance in the acquisition of information technology,"[1919] it nonetheless reminds the DOD to "ensure that information assurance is provided for information technology in accordance with [several enumerated] current policies, procedures, and statutes . . . ."[1920] The GAO picked up on this theme and issued a similar reminder to the DOD in testimony before Congress on 24 July 2003.[1921] Although focusing on the DOD, GAO's Director of Information Security Issues stated that GAO's "recent analyses of audit and evaluation reports [of all federal agencies] . . . continued to highlight significant information security weaknesses that place a broad array of federal operations and assets at risk of fraud, misuse, and disruption."[1922]

It's Still All Right to Be Itty Bitty

On 31 December 2002, the DOD, the GSA, and the NASA published an interim rule extending the section 508[1923] micropurchase[1924] exception until 1 October 2004.[1925] The DOD, GSA, and NASA made this extension a final rule on 24 July 2003.[1926]

1912. *Id.*

1913. *Id.*

1914. Gen. Acct. Off., Rep. No. GAO-03-371, *Information Technology: DOD Needs to Leverage Lessons Learned from Its Outsourcing Projects* (Apr. 2003), at 1.

1915. *Id.* at 4.

1916. Defense Federal Acquisition Regulation Supplement: Information Assurance, 68 Fed. Reg. 28,187 (May 23, 2003) (to be codified at 48 C.F.R. pts. 239 and 252).

1917. *Id.*

1918. *Id.*

1919. *Id.*

1920. *Id.* at 28,187-188.

1921. Gen. Acct. Off., Rep. No. GAO-03-1037T, *Information Security: Further Efforts Needed to Fully Implement Statutory Requirements in DOD* (July 2003).

1922. *Id.* at 2-3. As examples of potential problems, the GAO stated that:

> [R]esources, such as federal payments and collections, could be lost or stolen; sensitive information, such as taxpayer data, social security records, medical records, and propriety business information, could be inappropriately disclosed, browsed, or copied for purposes of espionage or other types of crime; and critical operations, such as those supporting national defense and emergency services, could be disrupted.

Id. at 3.

1923. Section 508 refers to the requirement to make most government electronic and information technology accessible to those with disabilities. *See generally* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508, 87 Stat. 355 (codified as amended by the Workforce Investment Act of 1998 at 29 U.S.C. § 794d (2000)); U.S. Gen. Servs. Admin., *Section 508*, *available at* http://www.section508.gov (last visited Sept. 17, 2003); *see also* Major John Siemietkowski, *Procurement Disabilities Initiative Takes Effect*, Army Law., Sept./Oct. 2001, at 27.

1924. In most instances, the micropurchase limit is $2500. FAR, *supra* note 30, at 2.101.

1925. Federal Acquisition Regulation: Section 508 Micro-Purchase Exception Sunset Provision, 67 Fed. Reg. 80,321 (Dec. 31, 2002) (to be codified at 48 C.F.R. pt. 39).

1926. Federal Acquisition Regulation: Section 508 Micro-Purchase Exception Sunset Provision, 68 Fed. Reg. 43,872 (July 24, 2003) (codified at 48 C.F.R. pt. 39).

Career Civil Servant to be E-Gov Czar

On 3 September 2003, President Bush announced his intention to nominate Ms. Karen Evans as "the federal government's technology chief."[1927] A career civil servant, Ms. Evans has been working as the Energy Department's Chief Information Officer.[1928]

Homeland Security Grants "CERT"

On 15 September 2003, the Department of Homeland Security announced the formation of a federal Computer Emergency Response Team (CERT).[1929] Currently, Carnegie Mellon University runs the federal CERT through funding from the DOD.[1930] The CERT is an early-warning system designed to detect cyber security threats such as computer viruses and worms.[1931]

Lieutenant Colonel John Siemietkowski.

Major Systems Acquisition

5000 Series Revisions

On 12 May 2003, the DOD issued a revised 5000 series of regulations intended to give program managers more flexibility. The previous 5000 series had been redrafted in 2000 but they were considered overly prescriptive. Since the 2000 guidance did not "foster[ ] efficiency, flexibility, creativity, and innovation," Deputy Secretary of Defense Paul Wolfowitz cancelled them.[1932]

In their place, the Under Secretary of Defense for Acquisition, Technology, and Logistics, the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) and the Director, Operational Test and Evaluation jointly developed a much more streamlined policy. The revised directive is just over seven pages in length.[1933] Its predecessor was fifteen pages.[1934] The revised instruction is now thirty-six pages long.[1935] The previous version[1936] was forty-six pages. Most significantly, the DOD replaced[1937] the prior regulation,[1938] a 193-page document with an *Interim Defense Acquisition Guidebook (Interim Guidebook)*.[1939] The *Interim Guidebook* "is NOT mandatory, but should be used for best practices, lessons learned, and expectations."[1940] The *Interim Guidebook* contains the exact same text as the old DOD 5000.2-R and will continue to do so until the Defense Acquisition Pol-

1927. *See* Amelia Gruber, *Bush Selects Career Civil Servant as New E-Gov Leader*, GovExec.com (Sept. 3, 2003), *at* http://www.govexec.com/dailyfed/0903/090303al.htm.

1928. *Id.*

1929. *See* Drew Clark, *Government Unvails Computer Emergency Response Team*, GovExec.com (Sept. 15, 2003), *at* http://www.govexec.com/dailyfed/0903/091503tdpml.htm.

1930. *Id.*

1931. *Id.*

1932. Memorandum, Deputy Secretary of Defense, to Director, Washington Headquarters Services, subject: Cancellation of DOD 5000 Defense Acquisition Policy Documents (30 Oct. 2002), *available at* http://www.acq.osd.mil/dpap/Docs/5000cancel.pdf [hereinafter Cancellation of DOD 5000 Memo].

1933. U.S. Dep't of Defense, Dir 5000.1, The Defense Acquisition System (12 May 2003), *available at* http://dod5000.dau.mil/DOCS/DoD%20Directive%205000.1-signed%20(May%2012,%202003).doc [hereinafter DOD Dir. 5000.1 (2003)].

1934. U.S. Dep't of Defense, Dir. 5000.1, The Defense Acquisition System (23 Oct. 2000), *available at* http://www.acq.osd.mil/ap/d50001p.pdf [hereinafter DOD Dir. 5000.1 (2000)].

1935. U.S. Dep't of Defense, Instr. 5000.2, Operation of the Defense Acquisition System (12 May 2003), *available at* http://dod5000.dau.mil/DOCS/DoDI%205000.2-signed%20(May%2012,%202003).doc [hereinafter DOD Instr. 5000.2 (2003)].

1936. U.S. Dep't of Defense, Instr. 5000.2, Operation of the Defense Acquisition System (5 Apr. 2002), *available at* http://dod5000.dau.mil/DOCS/Master.020405.Instruction.doc [hereinafter DOD Instr. 5000.2 (2002)].

1937. Cancellation of DOD 5000 Memo, *supra* note 1932, para. 2 (calling for elimination of the regulation).

1938. U.S. Dep't of Defense, Reg. 5000.2-R, Mandatory Procedures For Major Defense Acquisition Programs (MDAPS) And Major Automated Information System (MAIS) Acquisition Programs (5 Apr. 2002), *available at* http://dod5000.dau.mil/DOCS/Master.020405.Regulation.doc.

1939. U.S. Dep't of Defense, Interim Defense Acquisition Guidebook (30 Oct. 2002), *available at* http://dod5000.dau.mil/InterimGuidebook.doc.

1940. *Id.* at foreword.

icy Working Group creates a streamlined guidebook.[1941] The revised directive and revised instruction both give program managers and milestone decision authorities flexibility to further tailor the information reporting requirements retained in the revised series.[1942] This streamlining parallels the ongoing DFARS Transformation efforts.

In addition to streamlining the 5000 series to remove restrictions, the revised series contains several substantive changes worth mentioning. First, the revised instruction emphasizes that evolutionary acquisition would continue to be "the preferred DoD strategy for rapid acquisition of mature technology for the user."[1943] Enclosure 8 to the revised instruction also institutionalized the service acquisition policy that Secretary Aldridge signed last year.[1944] Further, both the revised directive and the revised instruction attempt to improve the department's financial management oversight by integrating acquisitions with the Financial Management Enterprise Architecture.[1945] The revised directive discourages cost-sharing or forcing contractors to bear part of the development costs, except in cases in which the contractor will be able to apply the technology commercially.[1946] It also places greater emphasis on supportability.[1947]

The DOD also modified the acquisition model found in the instruction. First, the "Interim Progress Review" was converted into a "Design Readiness Review."[1948] In addition, the revised instruction incorporates several changes made by the Joint Chiefs of Staff when they replaced the old Requirements Generation System (RGS) with the Joint Capabilities Integration and Development System (JCIDS).[1949] The JCIDS fundamentally changes requirements development. Under the prior RGS, requirements were developed bottom-up and the DOD had to integrate, after development, the diverse requirements generated at the program level. JCIDS is a top-down development of requirements so presumably the requirements will not be so diverse. This shift in mentality triggers the development of a new document in the revised instruction entitled the "Initial Capabilities Document" (or ICD) which replaces the "Mission Need Statement" and is designed to analyze the alternate materiel approaches.[1950] The "Operation Requirements Document" found in the old instruction[1951] has also been replaced with two new documents: a "Capability Development Document" (or CDD)[1952] and a "Capability Production Document" (or CPD).[1953] The user must complete a CDD before a program can be initiated.[1954] Prior to entering production, the program must complete a CPD, specifying the production performance requirements.[1955]

Those readers desiring a more thorough review of the new 5000 series as well as the new Joint Chiefs documents should take a look at the DOD 5000 Series Resource Center.[1956] It contains the revised documents plus briefings and a video on the

---

1941. *Id*.

1942. DOD Dir. 5000.1 (2003), *supra* note 1933, para. 4.3.1; DOD Instr. 5000.2 (2003), *supra* note 1935, para. 1.4.

1943. DOD Instr. 5000.2 (2003), *supra* note 1935, para 3.3.1 (listing spiral development and incremental development as the key approaches to achieving evolutionary acquisition); *see also* Memorandum, Under Secretary of Defense, to Secretaries of the Military Departments et al., subject: Evolutionary Acquisition and Spiral Development (12 Apr. 2002), *available at* http://www.acq.osd.mil/dpap/Docs/ar/1_multipart_xF8FF_2_EA%20SD%20Definitions%20final.pdf (containing the DOD's initial guidance on this concept); For furthe DOD guidance on evolutionary acquisition see *infra* notes 1957-58 and accompanying text.

1944. DOD Instr. 5000.2 (2003), *supra* note 1935, encl. 8; *see also* Memorandum, Under Secretary of Defense, to Secretaries of the Military Departments et al., subject: Acquisition of Services (31 May 2002), *available at* http://www.acq.osd.mil/dpap/Docs/AldridgeSAmemo.pdf.

1945. *See* DOD Dir. 5000.1 (2003), *supra* note 1933, paras. 5.1 E.1.7; DOD Instr. 5000.2 (2003), *supra* note 1935, paras. 4.2.8, 4.2.9.

1946. *See* DOD Dir. 5000.1 (2003), *supra* note 1933, para. E.1.6.

1947. *See id.* paras. 4.1 and E.1.29.

1948. *Compare* DOD Instr. 5000.2 (2002), *supra* note 1936, para. 4.7.3.2.5 *with* DOD Instr. 5000.2 (2003), *supra* note 1935, para. 3.7.4.

1949. Chairman Joint Chiefs of Staff, Instr. 3170.01C, Joint Capabilities Integration and Development System (24 June 2003), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/3170_01.pdf; Chairman Joint Chiefs of Staff, Man. 3170.01, Operation of the Joint Capabilities Integration and Development System (24 June 2003), *available at* http://www.dtic.mil/cjcs_directives/cdata/unlimit/m317001.pdf.

1950. DOD Instr. 5000.2 (2003), *supra* note 1935, para. 3.4.1.

1951. DOD Instr. 5000.2 (2002), *supra* note 1936, para. 4.6.2.3.1.

1952. DOD Instr. 5000.2 (2003), *supra* note 1935, para. 3.6.7.

1953. *Id*. para. 3.8.2.

1954. *Id*. para. 3.6.7.

1955. *Id*. para. 3.8.2.

changes made as well as a tutorial that overviews the revised DOD Acquisition Process.

Guiding Evolution

To accelerate the flow of technology to the warfighter, the DOD issued a lengthy guidebook stressing the need to share technology, especially given the Department's increased emphasis on evolutionary acquisition.[1957] The guide stresses the need to use existing, commercially available technology. It also discusses the tools, challenges, and lessons learned associated with flowing technology: (1) from the government to industry; (2) from industry to the government; and (3) between government programs.[1958]

Major Gregg Sharp.

Intellectual Property

If You Don't Play By Our Rules, We'll Take the Ball and Leave (Even If It's Your Ball)!

One of the most talked about[1959] board decisions issued this past year dealing with intellectual property was *Campbell Plastics Engineering & Manufacturing (Campbell)*.[1960] This decision epitomizes why many contractors involved in research and development enter into contracts with the federal government cautiously. At issue was when and to whom within the government an invention had to be disclosed in order to prevent forfeiture of title to the patent.

The contractor in *Campbell* entered into an 8(a) contract on 25 September 1992 to design and manufacture various components that would be included in chemical and biological masks.[1961] The contract incorporated by reference FAR section 52.227-11 which governs contractor rights and responsibilities should it conceive or reduce to practice an invention while performing work under the contract.[1962] This clause requires the contractor to disclose in writing any such invention to "the Federal agency within 2 months after" the contractor discloses the invention to the personnel who handle their patent matters.[1963] A supplemental contract clause mandated this disclosure be on a DD Form 882[1964] and required the contractor to submit this report on an annual basis even if there was no invention to be reported.[1965] The Patent Rights clause also gives the contractor the right to take title to such inventions as long as it provides notification of its intent within two years of the previously discussed disclosure.[1966] It also gives the government a license to use that invention and enables the government to permit others to use that invention on the government's behalf.[1967] Most importantly, the Patent Rights clause provides the government with the ability to elect to take title to any invention that the contractor did not timely disclose to the government.[1968]

During performance of the contract, Campbell determined that using a sonic weld would greatly reduce leakage of the assembled parts. It began to send faxes and monthly progress reports to the contracting officer's representative on 14 December 1992 providing details about the sonic weld technique.[1969] In 1992, 1993, and 1994, Campbell filed DD Form 882s that indicated there were no inventions to be reported; thereafter it did not file any DD Form 882s.[1970] In September 1995 and June

1956. Dep't of Defense, *DOD 5000 Series Resource Center, available at* http://dod5000.dau.mil (last visited Jan. 29, 2004).

1957. Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), Defense Procurement and Acquisition Policy, Manager's Guide to Technology Transition in an Evolutionary Environment (Version 1.0) (Jan. 31, 2003), *available at* http://www.acq.osd.mil/dpap/Docs/AQ201S1v10Complete.pdf.

1958. *See generally id*.

1959. *See, e.g.*, Ralph C. Nash & John Cibinic, *Forfeiture of Title to Patent: A Clear Abuse of Discretion*, 17 NASH & CIBINIC REP. 5 ¶ 25 (2003); David W. Burgett, *Feature Comment: ASBCA Issues Wake-Up Call About the Dire Consequences of Failing to Report Subject Inventions*, 45 GOV'T CONTRACTOR 14 ¶ 149 (2003); *Absent Proper Disclosure, Contractor Forfeited Patent Rights, ASBCA Rules*, 45 GOV'T CONTRACTOR 13 ¶ 146 (2003).

1960. ASBCA No. 53319, 03-1 BCA ¶ 32,206.

1961. *Id*. at 159,273-74.

1962. FAR, *supra* note 30, at 52.227-11, Patent Rights – Retention by the Contractor (Short Form) (June 1989).

1963. *Id*. at 52.227-11(c)(1).

1964. Report of Invention and Subcontract, DFARS, *supra* note 273, at 253.303-882; *see also id*. at 227.304-1 (mandating use of this form in defense contracts).

1965. *Campbell*, 03-1 BCA ¶ 32,206, at 159,274.

1966. FAR, *supra* note 30, at 52.227-11(b), (c)(2).

1967. *Id*. at 52.227-11(b), (f).

1968. *Id*. at 52.227-11(d).

1969. *Campbell*, 03-1 BCA ¶ 32,206, at 159,275.

1997, Army personnel involved in the program published two different reports that discussed the sonic weld technique.[1971] In August, 1997, Campbell contacted an attorney to inquire about the patentability of the sonic weld technique. This attorney subsequently filed an application for patent on 9 October 1997. The application correctly noted that the government had a license to use the invention.[1972] On or before 30 January 1998, the U.S. Patent Office asked the Army to review the application to determine whether the Army desired to block issuance of the patent because of security concerns.[1973]

On 20 April 1999, Campbell obtained a patent on the sonic weld technique and it notified the Army of such on 28 April 1999. In response, the contracting officer notified Campbell that it failed to comply with the disclosure requirements contained in the Patent Rights clause and demanded that title to the patent be conveyed to the government.[1974] At this point, Campbell and the government entered into a series of correspondence dealing with the disclosure and ownership of the invention. In one of the government's letters, dated 6 July 2000, the Army asserted that government employees deserved to be included as co-inventors on the invention and permitted Campbell to retain title if it added these government employees to the list of inventors. Campbell refused to do so and consequently, the contracting officer issued a final decision, on 15 December 2000, indicating Campbell had forfeited title to the invention for failure to comply with the requirements of the Patent Rights clause.[1975]

Before the board, Campbell argued that it had made the required disclosure, albeit not on the proper form, when it provided the faxes and monthly progress reports to the contracting officer's representative. The board noted that even if the board could waive the form used for the disclosure, such waiver would not help Campbell because the reports and faxes did not provide all of the information required by the Patent Rights clause to be contained in this disclosure.[1976] Campbell also argued that the June 1997 government report disclosed all the information required by the Patent Rights clause. The board rejected this argument too, holding the report did not meet the requirements of the Patent Rights clause since the government, not the contractor, had written the report.[1977] Similarly, Campbell argued disclosure was made when the Patent Office sent the Army the request to review the patent application to determine whether the Patent Office should impose a secrecy order. Once again, the board held such notice could not suffice since it came from the Patent Office and not the contractor.[1978]

Lastly, Campbell argued that forfeiture of title was a draconian penalty that the board should not enforce. Regarding this argument, the board noted that the contract's clause was clear and unambiguous. It then reviewed section 229 of the Restatement (Second) of Contracts which permitted an excusal of forfeiture but only upon a finding of unconscionability.[1979] The board felt the circumstances did not merit such a finding here since the Patent Rights clause at issue was based on Congress' intent that a failure to disclose an invention could result in a forfeiture of title.[1980] Although Campbell did not argue an abuse of discretion by the government, the board decided to address this issue anyway. The board noted that the underlying statute permitted, but did not require, the government to obtain title in the event of a failure to properly disclose an invention. It held, however, that there was no basis to find the contracting officer acted with subjective bad faith.[1981]

The importance of this case cannot be overstated for government contractors: if you have any doubt as to whether you have a patentable invention that was conceived or reduced to

1970. *Id*. at 159,274-75.

1971. *Id*. at 159,276.

1972. *Id*.; *see also supra* note 1967 and accompanying text for a discussion of this requirement.

1973. *Campbell*, 03-1 BCA ¶ 32,206, at 159,276; *see also* 35 U.S.C. ch. 17 (2000) (permitting agencies to block issuance of any patents that would be detrimental to the nation's security interests).

1974. *Campbell*, 03-1 BCA ¶ 32,206, at 159,276-77.

1975. *Id*.

1976. *Id*. at 159,277 (noting that "the actions taken by Campbell were of limited utility *vis-à-vis* patent rights since Campbell failed to identify the sonic welding technique as an invention").

1977. *Id*. at 159,278.

1978. *Id*.

1979. *Id*. at 159,278-79.

1980. *Id*. at 159,279 (citing 35 U.S.C. § 202). The statute only states that the disclosure must be within a reasonable time. *See* 35 U.S.C.S. § 202(c)(1) (LEXIS 2003). In implementing this statute, the government established a reasonable time to be sixty days in the Patent Rights clause. *See* FAR, *supra* note 30, at 52.227-11(c)(1). The contractor did not attempt to argue sixty days was unreasonable. *See Campbell*, 03-1 BCA ¶ 32,206, at 159,280.

1981. *Campbell*, 03-1 BCA ¶ 32,206, at 159,280.

practice under a government contract, play it safe and disclose the item to the contracting officer. And if the contract is with the DOD, disclose it on DD Form 882. The case is also important for the government. As other commentators have pointed out, one could argue the government wanted to obtain title to the invention in *Campbell* out of revenge for the contractor's unwillingness to list the government personnel as co-inventors.[1982] The board specifically noted that Campbell had not tried to hide the invention from the government. Even though the contractor's failure to disclose the invention could have had negative repercussions on the government, it does not seem fair to punish Campbell by demanding forfeiture since that potential never actually played out. It especially seems unfair considering how many contractors do not clearly understand their responsibilities under the clause[1983] and the fact that Campbell was a small business. Perhaps Congress ought to revise the underlying statute to provide more guidance on when the government should exercise its discretion to obtain title.

USPS Doesn't Zip-It on Zipster Plus, But It's Still Not a Taking

In *PI Electronics Corp. v. United States (PI)*,[1984] the COFC determined that when a government employee improperly discloses a trade secret given to the government by one of its contractors, the government is not liable for any resultant harm under a takings analysis. In *PI*, the contractor provided the U.S. Postal Service (USPS) in 1985 with a prototype for a free-standing, automated mail processing kiosk called the Zipster. Along with this prototype, the contractor submitted a proposal. Two years later, the USPS notified the contractor that the Zipster did not "warrant further investigation."[1985]

Over the next four years, the USPS contracted with two other vendors of automated kiosks in an attempt to procure an automated postage and mailing center. During this same time, PI developed a refined version of its kiosk, which it called the Zipster Plus. The revised kiosk allowed customers to weigh items, buy the correct amount of postage based upon the weight of the items, and then mail those items.[1986] In May 1991, the USPS found out about PI's revised kiosk, and, a month later, USPS representatives visited PI's facility for a day-long demonstration and overview of the Zipster Plus. Prior to the demonstration, the USPS personnel assured PI that they "were bound by federal guidelines prohibiting the disclosure of confidential information."[1987]

The USPS representatives were favorably impressed with the Zipster Plus. As a result, the USPS proposed to enter into a market test contract in which the USPS would deploy several machines to test their functioning.[1988] The USPS demanded that PI create a statement of work (SOW) and deposit an operational prototype of the Zipster Plus with the USPS for further study. The contractor agreed to these demands in return for assurances that the submissions would be kept in confidence by the USPS and accessed only by USPS personnel who would be involved in the evaluation of the Zipster Plus.[1989] The contractor submitted the SOW along with drawings and an operational prototype as requested, and, in October 1991, PI and the USPS entered into the market test contract. Unfortunately for PI, the market test did not work well. Consequently, after sixteen months of testing, the USPS removed the test kiosks from the field.[1990]

Thereafter, the USPS allegedly revealed several of the Zipster Plus's unique features and capabilities to PI's competitors. Supposedly, the USPS also allowed representatives of other companies to operate and inspect the prototype that had been deposited with the USPS and had also prepared an automated mail kiosk SOW that was derived from the Zipster Plus SOW that was distributed to PI's competitors. PI filed a complaint against the USPS contending these actions amounted to a breach of contract, an improper disclosure of confidential information, and a loss of trade secret.[1991] One week prior to trial, PI sought to amend its complaint to include a takings claim, which it felt was encompassed by the existing claims in its complaint. Initially, the court did not grant the amendment due to the lateness of the request. During trial, however, it became apparent that one of the key witnesses for the USPS was committing perjury. This individual had prepared the USPS-generated auto-

1982. *Nash & Cibinic*, *supra* note 1959; *Burgett*, *supra* note 1959.

1983. Testimony Before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives, Intellectual Property, Industry and Agency Concerns Over Intellectual Property Rights, Statement of Jack L. Brock, Jr., Managing Director, Acquisition and Sourcing Management, GAO-02-723T (May 10, 2002).

1984. 55 Fed. Cl. 279 (2003).

1985. *Id*. at 281.

1986. *Id*.

1987. *Id*.

1988. *Id*. at 281-82.

1989. *Id*. at 282.

1990. *Id*.

mated mail kiosk SOW, which PI alleged was a revised version of the Zipster Plus SOW. Because the court did not believe the USPS employee's claim that he had prepared his SOW before receipt of the Zipster Plus SOW, the court permitted PI to proceed with its takings claim.[1992]

The USPS moved to dismiss the takings claim, arguing that a breach of contract claim should be PI's exclusive remedy. The court noted that PI's property interest in the proprietary information that USPS personnel allegedly disclosed existed prior to and independent of the contract between PI and the USPS. Consequently, the court determined that the existence of a contract between PI and the USPS did not prevent PI from recovering under a takings analysis.[1993] The USPS then argued that a compensable taking can only occur if the government action was authorized, and here any disclosure of PI's proprietary information by USPS employees was unauthorized since it was in contravention of 18 U.S.C. § 1905.[1994]

The court cited a 1949 Supreme Court case for the proposition that when a government employee's "powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions."[1995] PI cited a Navy takings case that involved a temporary taking of land near a gunnery range for the proposition that illegal action could still be deemed to be a compensable taking.[1996] In the Navy case, U.S. Navy employees—wrongly believing the property in question belonged to the Navy—lobbed bombs onto the property and told the property's caretakers that they would arrest them if they stepped foot on the property.[1997] The COFC distinguished that prior case on the basis that Congress had given the Navy the authority to acquire leaseholds in property and the Navy's actions were "an imputed exercise of [that] lawful authority."[1998] Without addressing the fact that Congress has given federal agencies the authority to acquire contractors' proprietary information, the court stated: "If [PI's complaint] were construed to plead a taking, the Government would be at the mercy of renegade employees and required to answer as an insurer to a takings claim."[1999] The court, therefore, determined that "unauthorized actions cannot predicate liability for a taking" and dismissed that portion of PI's complaint related to a taking.[2000]

This decision has to frighten contractors who submit unsolicited proposals to the federal government. It essentially says that if an unauthorized disclosure of proprietary information occurs, the contractor's recovery is limited to a breach of contract analysis. It is important to note that PI submitted much of its proprietary information as well as the prototype prior to the formation of any contract. It is unclear what, if anything, the contract said about protection of this previously submitted information. *PI* illustrates why contractors deserve greater statutory and/or regulatory protection of their proprietary information.[2001] Realistically, the optimal solution is to amend 28 U.S.C. § 1498 to permit a cause of action for improper use of trade secrets similar to what is currently available under this statute for improper use of patent and copyright.[2002]

1991. *Id*. at 282-83. In a prior decision, the COFC ruled against PI on the improper disclosure claim since PI failed to establish that the government did not already know that same information prior to PI's delivery of the information pursuant to the contract. *See* PI Elecs. Corp. v. United States, 54 Fed. Cl. 56, 64-70 (2002). The COFC also granted summary judgment against PI on the loss of trade secret claim apparently based upon a lack of subject matter jurisdiction. *See PI*, 55 Fed. Cl. at 283 (discussing this earlier unreported ruling).

1992. *Id*. at 283-84.

1993. *Id*. at 285-86.

1994. *Id*. at 288-89. This statute prohibits a government employee from disclosing trade secrets.

1995. *Id*. at 290 (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), a case that did not involve a takings issue).

1996. *Id*. (citing Eyherabide v. United States, 170 Ct. Cl. 598 (1965)).

1997. *Id*. at 290-91.

1998. *Id*. at 291.

1999. *Id*.

2000. *Id*.

2001. Currently, the only statutory protection is found in 18 U.S.C.S. §§ 1831-1832, 1905 (LEXIS 2003) (making it a crime to knowingly disclose proprietary information). These statutes did not deter the USPS employees in *PI*. *See supra* note 1987 and accompanying text (indicating the USPS employees were aware of a prohibitions on the disclosure of proprietary information). These statutes also do nothing to compensate contractors for the diminution in value of intellectual property that is wrongfully disclosed. The DOD is considering revisions to the DFARS to provide greater protection under certain circumstances. *See* Dep't of Defense, *Defense Procurement, available at* http://www.acq.osd.mil/dp/Proprietary_Data.htm (containing a discussion paper and notice of a public meeting concerning this issue).

2002. 28 U.S.C.S. § 1498(a), (b) (LEXIS 2003) (permitting patent and copyright owners who have had their patents or copyrights infringed by the federal government or by a contractor working on behalf of the federal government to file suit in the COFC and recover compensatory damages).

FAR Part 27 Rewrite

This past year, the FAR Councils proposed the most extensive set of revisions to FAR part 27 in more than a decade.[2003] Although the proposed rule undertakes several substantive changes to the regulations and clauses, its main purpose was "to make the various policies and procedures . . . more succinct and understandable to the reader."[2004]

Significantly, the proposed rule provides a definition for commercial computer software. The proposed rule seeks to define this term as "any computer program, computer data base, or documentation that has been sold, leased, or licensed to the general public."[2005] This definition differs from the definition used in the DFARS[2006] and also seems to conflict with the statutorily-prescribed definition for the term "commercial item."[2007]

The proposed Rights in Data clause[2008] retains the same timelines found in the current clause for contractors to justify or correct data that the government alleges is mismarked. Both the current and proposed clause require a contracting officer to give the contractor at least thirty days to respond to an allegation that data was mismarked.[2009] By statute, however, Congress has mandated that this period be not less than sixty days.[2010]

An additional proposed change is the deletion of the "Long Form" Patent Rights clause.[2011] The council proposed this deletion because "the Department of Defense is apparently the only agency using [that] clause."[2012] Another significant proposed change was the specific exclusion of data bases from the definition of computer software.[2013] The current FAR includes data bases within the definition of computer software,[2014] but this treatment is at odds with how the DFARS currently treats databases.[2015] The proposed revision to the FAR is very fortunate as it represents a significant attempt to harmonize the treatment of intellectual property in the FAR and DFARS.

The proposed rewrite also updates the treatment of copyrighted information[2016] to bring it into accordance with the post-Berne Convention copyright law.[2017] The FAR currently requires a contractor to "establish" the existence of a copyright.[2018] It also currently requires the contractor to place a copyright notice on any data in which it claims a copyright.[2019] The proposed change recognizes that an original work is now copyrighted as soon as it is placed into a tangible medium. As a result, the revision does not require a notice. It likewise does

2003. Federal Acquisition Regulation; FAR Part 27 Rewrite in Plain Language, 68 Fed. Reg. 31,790 (May 28, 2003) (proposing to amend 48 C.F.R. pts. 2, 19, 27, and 52).

2004. *Id*.

2005. *Id*. at 31,792 (proposing to amend FAR 2.101).

2006. DFARS, *supra* note 273, at 252.227-7014(a)(1)(ii), (iv) (defining commercial computer software to include software that has merely been offered to the general public and software that has been modified for government use).

2007. 41 U.S.C.S. § 403(12)(A)(ii), (C) (LEXIS 2003) (defining commercial items to include items that have been merely offered to the general public and items that have been modified to meet government requirements).

2008. 68 Fed. Reg. at 31,81-14 (proposing to amend FAR 52.227-14).

2009. FAR, *supra* note 30, at 52.227-14(e)(1); 68 Fed. Reg. at 31,814.

2010. 41 U.S.C.S. § 253d(b)(2).

2011. 68 Fed. Reg. at 31,811 (proposing to remove FAR 52.227-12).

2012. *Id.* at 31,791. The DOD has also opened a separate case indicating that it will add a clause identical to FAR 52.227-12 to the DFARS upon that clause's elimination from the FAR. *See* DFARS case number 2001-D015, *available at* http://www.acq.osd.mil/dp/dars/opencases/ActDfars.doc.

2013. 68 Fed. Reg. at 31,801 (listing FAR 27.401); *see also id*. at 31,802 (noting that under proposed FAR 27.404–2(c)(3): "If data that would otherwise qualify as limited rights data is delivered as a computer data base, the data shall be treated as limited rights data, rather than restricted computer software.").

2014. FAR, *supra* note 30, at 52.227-14(a).

2015. *See* DFARS, *supra* note 273, at 252.227-7013(a)(5) (defining computer software to include data bases).

2016. 68 Fed. Reg. at 31,803 (proposing to add FAR 27.404–3).

2017. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised Paris, July 24, 1971, art. 5(2), 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221. In 1886, the Berne Convention—an international treaty on copyright issues—banned signatory countries from requiring copyright notices. *Id.* The United States became a signatory of that Treaty in 1988. *See* Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (deleting any requirement to place a copyright notice on works after March 1989).

2018. FAR, *supra* note 30, at 27.404(f)(1)(iv), (v).

not require the contractor to establish a copyright; instead it merely requires the contractor to assert the existence of a copyright.[2020]

Wechsberg

In *Wechsberg v. United States*,[2021] the COFC ruled on an issue of first impression concerning copyright infringement by the federal government. In 1975, Peter Wechsberg created and directed a film entitled "Deafula," an adaptation of the Dracula legend tailored for the deaf and hearing-impaired. In 1977, Wechsberg contracted with the Department of Health, Education, and Welfare (HEW) to provide it with twelve 16mm prints of this film for $20,000. At some point prior to 1 October 1995, the contractor who administered the free film circulation program within the Department of Education (DOEd)—the successor to the HEW—copied the film from the 16mm format to videotape format. Thereafter, the film circulation program distributed these videotapes to various library patrons.[2022] Wechsberg became aware of these unauthorized copies and their distribution sometime in 1998. Wechsberg also registered the film with the U.S. Copyright Office on 13 October 1998. On 24 February 2000, Wechsberg submitted a claim for copyright infringement with the DOEd.[2023] The DOEd and Wechsberg communicated with one another for several months concerning the claim, but there was ultimately no resolution. As a result, Wechsberg filed suit in the COFC.[2024]

The issue, a matter of first impression, involved the running of statute of limitations under 28 U.S.C. § 1498(b) when there is a series of infringing acts, such as the copying and repeated distribution of Wechsberg's film. The government argued that accrual of a copyright infringement cause of action should occur on the date of the first infringement, as is the case with a patent infringement cause of action.[2025] Wechsberg contended and the COFC agreed that although the two causes of action were addressed by the same statute,[2026] that did not mean Congress intended for the two to be mirror images of one another.[2027] The court noted that the Senate Report associated with the bill adding section 1498(b) stated: "The bill [H.R. 4059] is based, *generally*, upon provisions *similar* to those now existing in federal law for patents, but with modifications appropriate to the nature of copyright property."[2028] The court then pointed out one obvious modification. Congress used a three-year statute of limitations for copyright actions in lieu of the six-year period established for patent actions since three-years was the period generally established for copyright actions not involving the federal government.[2029] The COFC then held, without citation to any precedent involving non-federal government infringement of copyright,[2030] that it would be too harsh to require a cause of action to be brought within three-years of the first infringing act.[2031]

Wechsberg also argued that since his suit was brought within three-years of the last infringing act, the court should apply a "continuing wrong" theory and calculate his damages based upon the related infringing acts that occurred outside of that three-year window. The court rejected this argument. This time, the court cited general copyright law decisions which it felt weighed against a continuing wrong theory of liability.[2032] The court also noted that the "continuing wrong" theory was "tortious in nature" and it had no jurisdiction to hear cases sounding in tort.[2033]

2019. *Id*. at 27.404(f)(2)(ii), (iii).

2020. 68 Fed. Reg. at 31,803 (proposing to add FAR 27.404–3).

2021. 54 Fed. Cl. 158 (2002).

2022. *Id*. at 159.

2023. As is the case with patent infringement, there is no government-wide regulation providing guidance on filing a claim for copyright infringement. *But see* DFARS, *supra* note 273, subpt. 227.70 (containing guidance on submitting a claim when the infringement occurs on a defense contract).

2024. *Wechsberg*, 54 Fed. Cl. at 159-60.

2025. *Id*. at 160-61 (citing Starobin v. United States, 662 F.2d. 747 (Ct. Cl. 1981) and noting that per that decision a taking of an invention may only occur one time—the first such occurrence).

2026. 28 U.S.C.S. § 1498(a) (LEXIS 2003) (governing patent infringements); 28 U.S.C.S. § 1498(b) (governing copyright infringements).

2027. *Wechsberg*, 54 Fed. Cl. at 161-62.

2028. *Id*. at 162 (quoting S. Rep. No. 1877, 86th Cong., 2nd Ses. 1960, *reprinted in* 1960 U.S.C.C.A.N. 3444, 3446).

2029. *Id*. at 162 n.10.

2030. Governed by 17 U.S.C.S. § 507.

2031. *Wechsberg*, 54 Fed. Cl. at 162-63.

2032. *Id*. at 163-64.

Nevertheless, the court ultimately ruled against awarding any damages to Wechsberg. Under general copyright law, an author of an original work need not register that work to control use or distribution of the work.[2034] Registration is a prerequisite, however, to recovery of any statutory damages.[2035] Since Wechsberg could not demonstrate that the government had made any VHS copies of or distributed the VHS copies of his film after 13 October 1998—the date he registered it with the Copyright Office—the court held he was not entitled to any damages.[2036]

This decision demonstrates the general lack of understanding of the copyright laws. First, although not emphasized by the court, apparently counsel for the government was not aware of the requirement to register a work to receive statutory damages.[2037] More importantly, apparently the government and contractor personnel who operated the HEW film circulation program thought that by virtue of their purchase of the 16mm prints, they had the right to copy those prints into videotape format for circulation as well. What HEW procured, when it entered into the license agreement with Wechsberg in 1977, was the right to use those twelve print copies of the film. It did not obtain the right to copy those prints into another medium. The owner of the film—the copyrighted work—retained all other rights to the film, including the right to block anyone from making or distributing unauthorized copies of the film. If the government wanted videotape versions of the film, it needed to acquire such rights from a second license agreement.

Toxgon

Another decision this past year demonstrating the lack of understanding of intellectual property is *Toxgon Corp. v. BNFL, Inc*.[2038] That case involved a radioactive waste treatment contract that the defendant had entered into with the Department of Energy (DOE). Toxgon brought suit in the District Court for the Eastern District of Washington alleging the defendant and one of its subcontractors infringed one of Toxgon's patents in performing this waste treatment effort. In its response, BNFL filed a motion to dismiss the case under Federal Rule of Civil Procedure (FRCP) 12 (b)(1) based upon a lack of subject matter jurisdiction. BNFL asserted the infringement occurred under a government contract and with the authorization and consent of the government and, therefore, jurisdiction could be had only in the COFC pursuant to 28 U.S.C. § 1498(a).[2039] The district court granted BNFL's motion to dismiss and Toxgon appealed.[2040]

The CAFC noted that a long series of cases, including one from the Supreme Court, had held that "section 1498(a) is an affirmative defense rather than a jurisdictional bar."[2041] As a result, the CAFC determined that the district court erred by dismissing the case. The CAFC stated that if BNFL sufficiently pled a defense demonstrating that it was infringing on Toxgon's patent with the authorization of the government, then the district court should have resolved the matter with a motion for summary judgment under FRCP 56.[2042] Although on remand BNFL may be able to avail itself of the defense provided under section 1498(a), this case demonstrates the lack of understanding of both the district court judge and BNFL's attorneys. The case is also significant in terms of burden of proof: under FRCP 12(b)(1), the plaintiff bears the burden to show the district court has subject matter jurisdiction, but under FRCP 56, BNFL bears the burden to show that that subject matter jurisdiction does not exist.[2043]

Cygnus

Not to be outdone, the ASBCA also demonstrated its lack of understanding regarding the overlap between ownership of and rights in technical data this past year in *Cygnus Corp., Inc.* (*Cygnus*).[2044] *Cygnus* involved a 1996 Department of Health

2033. *Id*. at 164 n.12 (citing 28 U.S.C. § 1491(a)(1)).

2034. 17 U.S.C.S. § 106.

2035. *Id*. §§ 411-12.

2036. *Wechsberg*, 54 Fed. Cl. at 167.

2037. *Id*. at 165 n.16 (noting that neither party had addressed that issue).

2038. 312 F.3d 1379 (Fed. Cir. 2002).

2039. *Id*. at 1380.

2040. *Id*.

2041. *Id*. at 1381.

2042. *Id*. at 1382.

2043. *Id*. at 1383.

2044. ASBCA No. 53618, 03-1 BCA ¶ 32,140.

and Human Services (HHS) contract to operate a telephone helpline designed to allow people to phone in and ask about and request help on eliminating the use of illegal drugs from the workplace.[2045] The contract incorporated by reference FAR section 52.227-14[2046] as well as FAR section 52.215-33.[2047] The SOW specifically required Cygnus to develop a call logging system as well as training and program operating manuals. It also stated that the call logging system and the manuals would be the property of and had to be delivered to the government.[2048]

When the government demanded delivery of these items at the end of the contract, Cygnus responded that there was a conflict between the Rights in Data clause and the SOW. Cygnus argued that under the SOW, it had to deliver the telephone logging software and the user/training manuals to the government. It also argued that under the Rights in Data clause, it was directed to refrain from delivering data and software to which it was not granting the government unlimited rights. As a result, it contended the Order of Precedence clause dictated this inconsistency should be resolved by giving precedence to the Rights in Data clause over the SOW.[2049] Cygnus, therefore, refused to deliver any of the items, prompting the contracting officer to issue a final decision demanding delivery of the items, in turn leading to an appeal.[2050]

In reaching its decision, the board attempted to interpret the contract to give meaning to all parts of the contract and not to interpret one portion so as to render another inoperative.[2051] To prevent rendering either the Data Rights clause or the SOW inoperative, the board ruled the Data Rights clause dealt only with "usage rights where the Government does not have preemptive ownership rights."[2052] The board determined the SOW controlled ownership the data and therefore ruled against Cygnus, thus requiring the contractor to turn over the data.[2053]

As one commentator has already pointed out,[2054] both the parties and the judge demonstrated their lack of knowledge on data rights in this decision. The judge erred by narrowing her focus to the corresponding portions of the Data Rights clause and the SOW that dealt with rights in delivered data, which did not conflict. All parties should have focused on the portions of the SOW and Data Rights clause dealing with delivery of data. The decision never identified whether the contract contained Alternate II or Alternate III of the Data Rights clause. If the government wanted the contractor to deliver data or software to which the contractor would not be willing to give the government unlimited rights, then the government should have included one or both of these alternates.[2055] Had these alternates been in the contract, the government should have highlighted their inclusion to demonstrate the lack of any conflict concerning delivery requirements. Had these alternates not been in the contract, then there really was a conflict—not over ownership of the manual and software but over whether they should have been turned over by Cygnus.[2056] The end result, had there been no alternates in the contract, would be a scenario in which the government obtained ownership of the data and software but did not gain possession of these items. This potential outcome highlights the need for both the government and contractors alike to understand that rights in software and data are separate and distinct from possession of the data. If the government wants to effectively use data, it will likely have to require delivery of the data as well as a license to use that delivered data.

Major Gregg Sharp.

2045. *Id*. at 158,914.

2046. FAR, *supra* note 30, at 52.227-14, Rights in Data – General (June 1987).

2047. *Id*. Order of Precedence (Jan. 1986).

2048. *Cygnus*, 03-1 BCA ¶ 32,140, at 158,915-17.

2049. *Id*. at 158,918.

2050. *Id*.

2051. *Id*. at 158,919.

2052. *Id*.

2053. *Id*. at 158,919-20.

2054. Ralph C. Nash & John Cibinic, *Computer Software: Ownership of Property vs. Rights*, 17 NASH & CIBINIC REP. 4 ¶ 23 (2003).

2055. FAR, *supra* note 30, at 27.409(c), (d) (requiring use of one of the Alternate clauses if the government determines it wants delivery of the data).

2056. *Id*. at 52.227-14(g)(1). The case indicates the following:

> When data . . . are specified to be delivered under this contract and qualify as either limited rights data or restricted computer software, if the Contractor desires to continue protection of such data, the Contractor shall withhold such data and not furnish them to the Government under this contract.

Id.

Non-FAR Transactions and Technology Transfer

Proposed STTR Program Policy Directive

Last year's *Year in Review* noted that the SBA had issued a revised policy directive dealing with the Small Business Innovative Research (SBIR) Program as a result of several changes mandated by Congress when it reauthorized the program in 2000.[2057] Congress mandated similar changes to the Small Business Technology Transfer (STTR) Program when it reauthorized that program in 2001.[2058] Congress created the STTR Program in 1992 to stimulate small business involvement in federally funded research and development beyond the incentives provided in the SBIR Program.[2059] The main difference between the two programs is that under the SBIR Program, a company has to qualify as a U.S. small business with no more than 500 employees; under the STTR Program, the company also must be engaged in a cooperative research project involving a university, a federally funded research and development center, or a nonprofit research institute.[2060]

This past year, the SBA issued a notice indicating it intended to revise its STTR Program Policy Directive to incorporate these prescribed changes as well as some others.[2061] Some of the notable changes include the following: (1) requiring participating agencies to double the percentage of their budgets they set aside for the STTR Program in FY 2004;[2062] (2) increasing the funding ceiling for Phase II awards[2063] to $750,000;[2064] (3) requiring the use of the government-wide point of entry (GPE) for issuance of synopses and solicitations;[2065] (4) requiring agencies to report to the SBA whenever it determined a Phase III award would not be practicable;[2066] (5) clarifying the level of rights the government has in data generated during any of the phases;[2067] and (6) requiring agencies to submit information to both a publicly and non-publicly searchable database to enable better dissemination of information related to past awards.[2068]

Proposed SBIR Rule

The SBA also proposed to revise its small business size regulations to correct an unintended restriction on eligibility for SBIR awards.[2069] To be eligible for the SBIR Program, a for-profit business concern must meet the following criteria: (1) be at least fifty-one percent owned and controlled by U.S. citizens or permanent resident aliens; and (2) have, including affiliates, no more than 500 employees.[2070] In addition, the current regulations state any small business concern which is more than fifty percent owned or controlled by another business is ineligible for an SBIR award even if the parent entity met the above size and ownership restrictions.[2071]

2057. *2002 Year in Review, supra* note 57, at 182. Some of the more notable changes included the following: (1) requiring the SBA to clarify that the government's rights in data apply to data generated in any of the three contract phases; (2) creating a database which would enable the public to search through information related to past SBIR awards; (3) requiring an applicant for a Phase II award to describe their commercialization plan; (4) requiring an agency to make a report to the SBA whenever it determined that a Phase III award would not be practicable; and (5) creating the Federal and State Technology (FAST) Partnership, which adds state and local entities into the SBIR process. *Id*.

2058. Small Business Technology Transfer Program Reauthorization Act of 2001, Pub. L. No. 107-50, 115 Stat. 263 (2001) (extending the program through 30 Sept. 2009).

2059. Small Business Technology Transfer Act of 1992, Pub. L. No. 102-564, 106 Stat. 4250 (1992).

2060. *Compare* 15 U.S.C.S. § 638(e)(4) (LEXIS 2003) *with* 15 U.S.C.S. § 638(e)(5).

2061. Small Business Technology Transfer Program Policy Directive, 68 Fed. Reg. 35,748 (2003).

2062. *Id*. at 35,755 (adding para. 2(d)).

2063. The statute that authorized the SBIR Program permits the funding of up to three different phases of research. The first phase is designed to determine to the extent possible the "scientific and technical merit and feasibility of ideas that appear to have commercial potential . . . ." 15 U.S.C.S. § 638(e)(4)(A). The second phase is designed to further develop the concepts perceived to have the greatest commercial potential. *Id.* § 638(e)(4)(B). The third phase is typically reserved for concepts that have been developed to the point of being imminently capable of commercial utilization or at least refined to the point that other outside, non-federal government, capital investment is being made in the item. *Id.* § 638(e)(4)(C).

2064. 68 Fed. Reg. at 35,760 (adding para. 7(i)).

2065. *Id*. at 35,755 (adding para. 2(f)(1)).

2066. *Id*. at 35,757-58 (adding para. 4(c)(8)).

2067. *Id*. at 35,760 (adding para. 8(b)).

2068. *Id*. at 35,764 (adding paras. 11(e)(9) and (10)).

2069. Small Business Size Regulations; Small Business Innovation Research Program, 68 Fed. Reg. 33,412 (June 4, 2003).

2070. 13 C.F.R. § 121.702 (2003).

This latter restriction creates a potential for inconsistent treatment of affiliated entities. Take, for instance, a subsidiary corporation that had fifty employees and a parent corporation that had 100 employees. Assume both entities were at least fifty-one percent owned and controlled by U.S. citizens or permanent resident aliens. Under the SBA's current rules, the parent corporation would definitely be eligible for an SBIR award since it had a total of 150 employees and met the ownership requirements. The subsidiary's eligibility depends upon how much it is owned by the parent entity. If that ownership level is more than fifty percent, the subsidiary becomes ineligible for the SBIR award. The SBA proposed rule partially corrects this oversight. It allows the subsidiary to remain eligible for the SBIR award, but only if it were 100% owned by the parent corporation.[2072] Apparently, the SBA does not believe subsidiaries who are fifty-one to ninety-nine percent owned by a parent corporation should be eligible for an SBIR award.

GAO Report on Agency Efforts in Transferring and Reporting New Technology

The GAO released a report this past year that generally indicates federal agencies need to improve reporting on their technology transfer programs.[2073] The Technology Transfer Commercialization Act of 2000[2074] required the GAO to issue a report at least every five years reviewing how well agencies are implementing the various technology transfer legislation.[2075] The e Commercialization Act of 2000 also required agencies to submit, beginning with their FY 2003 budget submissions, a report to the OMB concerning their technology transfer efforts.[2076] The GAO report noted that only one out of the nine agencies it reviewed had submitted the required information on time.[2077] In addition, the report found that the submissions were incomplete, inaccurate, and utilized different data elements. To improve the usefulness of future agency submissions, the GAO report recommended that the OMB and the Department of Commerce revise their guidelines and procedures to ensure consistency in data reporting.[2078]

Grant Me Some More Changes

Last year's *Year in Review*[2079] also discussed the Federal Financial Assistance Management Improvement Act[2080] that directed the OMB to streamline the regulations dealing with grants and to establish standardized ways of awarding and administering grants among the various agencies. The OMB responded by issuing a series of proposed rules that were described in last year's article.[2081] One of those rules proposed establishing a standardized format for announcing discretionary grant and cooperative agreement funding opportunities and a standardized location for posting those announcements.[2082] This past year, the OMB finalized that rule and made it effective for announcements made on or after 23 July 2003.[2083] One difference between the proposed and final rules is that the location for posting announcements was changed from FedBizOpps to Grants.gov.[2084] A second proposed rule issued last year dealt

2071. *Id*.

2072. 68 Fed. Reg. at 33,412-13 (proposing to amend 32 C.F.R. § 121.702(a)).

2073. Gen. Acct. Off., Rep. No GAO-03-47, *Intellectual Property: Federal Agency Efforts in Transferring and Reporting New Technology* (Oct. 2003)) [hereinafter GAO-03-47].

2074. Pub. L. No. 106-464, 114 Stat. 1742 (2000).

2075. *Id*. § 10(b), 114 Stat. 1742, 1749 (to be codified at 15 U.S.C. § 3710c(c)).

2076. *Id*. § 10(a), 114 Stat. 1742, 1747 (to be codified at 15 U.S.C § 3710(f)(1)).

2077. GAO-03-47, *supra* note 2073, at 4.

2078. *Id*.

2079. *2002 Year in Review, supra* note 57, at 182.

2080. Pub. L. No. 106-107, 113 Stat. 1486 (1999).

2081. *2002 Year in Review, supra* note 57, at 182.

2082. Standard Data Elements for Electronically Posting Synopses of Federal Agencies' Financial Assistance Program Announcements at FedBizOpps, 67 Fed. Reg. 52,554 (Aug. 12, 2002).

2083. Office of Federal Financial Management Policy Directive on Financial Assistance Program Announcements, 68 Fed. Reg. 37,370 (June 23, 2003); Standard Data Elements for Electronically Posting Synopses of Federal Agencies' Financial Assistance Program Announcements at Grants.gov FIND, 68 Fed. Reg. 37,379 (June 23, 2003).

2084. 68 Fed. Reg. at 37,379; Grants.gov, *available at* http://www.grants.gov/ ("Grants.gov Resources enables organizations to access useful grants-related information and links.").

with revisions to *OMB Circular A-133*, entitled Audits of States, Local Governments, and Non-Profit Organizations.[2085] The OMB finalized that rule, which increased from $300,000 to $500,000 the threshold that such organizations have to annually expend before they are required to have an audit.[2086]

One additional proposed rule that the OMB issued late last year required all grant and cooperative agreement recipients to have a Dun & Bradstreet Universal Numbering System (DUNS) number to be eligible for assistance awarded after 1 October 2003.[2087] That rule was finalized this past year.[2088]

NASA Grant and Cooperative Agreement Handbook Revisions

The National Aeronautics and Space Administration (NASA) issued a final rule this past spring requiring the prior approval of the Assistant Administrator for Procurement for any award of a grant or cooperative agreement that will exceed both $5 million and five years in duration.[2089] This final rule aligns the approval requirements for grants and cooperative agreements with those already established for contracts.[2090]

Proposed EPA Rule on Participation by Disadvantaged Business Enterprises in EPA Financial Assistance Agreements

The Environmental Protection Agency (EPA) issued a notice this past year[2091] indicating it intended to delete provisions in two of its regulations[2092] and develop a new regulation to bring its treatment of women and minority business enterprises into accordance with the Supreme Court's decision in *Adarand Constructors, Inc. v Pena*.[2093] The notice showed that *Adarand* extended strict judicial scrutiny to procurement programs that used race or ethnicity as a selection criteria and also noted that such programs had to be narrowly tailored to survive such scrutiny.[2094]

Congress has tasked the EPA, like most agencies, to strive to award a certain percentage of its funds to disadvantaged businesses. In response, the EPA has set up a Minority Business Enterprise (MBE) Program and a Women's Business Enterprise (WBE) Program, administered under two EPA regulations dealing with grants and cooperative agreements.[2095] The EPA proposes to merge the MBE and WBE Programs into a single Disadvantaged Business Enterprise (DBE) Program.[2096] It also proposes to create a new regulation that deals solely with the DBE.[2097] A proposed change in the new regulation discontinues self-certification.[2098] Instead, the EPA would have to evaluate a business to determine if it qualified as a DBE.[2099] Additionally, the new regulation establishes net worth eligibility ceilings. To qualify as a DBE under the new EPA regulation, a business

2085. Audits of States, Local Governments, and Non-Profit Organizations, 67 Fed. Reg. 52,545 (Aug. 12, 2002).

2086. Audits of States, Local Governments, and Non-Profit Organizations, 68 Fed. Reg. 38,401 (June 27, 2003).

2087. Notice of Proposed Requirement for Use of a Universal Identifier by Grant Applicants, 67 Fed. Reg. 66,177 (Oct. 30, 2002).

2088. Use of a Universal Identifier by Grant Applicants, 68 Fed. Reg. 38,403 (June 27, 2003).

2089. NASA Grant and Cooperative Agreement Handbook—Approvals and Reviews, 68 Fed. Reg. 14,535 (Mar. 26, 2003) (codified at 14 C.F.R. pts. 1260, 1274).

2090. *See* National Aeronautics and Space Admin., Federal Acquisition Reg. Supp. 1817.204 (2003).

2091. Participation by Disadvantaged Business Enterprises in Procurement Under Environmental Protection Agency (EPA) Financial Assistance Agreements, 68 Fed. Reg. 43,824 (July 24, 2003).

2092. *See* 40 C.F.R. pt. 30, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (2003); 40 C.F.R. pt. 31, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (2003).

2093. 115 S. Ct. 2097 (1995).

2094. 68 Fed. Reg. at 43,824.

2095. 40 C.F.R. pt. 30, Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (2003); 40 C.F.R. pt. 31, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (2003).

2096. 68 Fed. Reg. at 43,824.

2097. *Id*. at 43,826.

2098. *Id*. at 43,828-29 (proposing to add 40 C.F.R. § 33.204).

2099. *Id*. at 43,829 (proposing to add 40 C.F.R. § 33.205).

must be owned and controlled by an individual with a net worth of less than $750,000.[2100]

Proposed DODI on Cost Sharing in Assistance Agreements

The DOD also proposed[2101] a new instruction governing the use of cost-sharing in research projects carried out through grants and cooperative agreements.[2102] The notice indicated the proposed instruction implemented Executive Order 13,185[2103] which sought to provide consistent guidance across the various federal agencies on funding research efforts. The instruction itself contains guidance on cost sharing[2104] that is similar to the guidance found in DOD Directive 5000.1.[2105] It essentially discourages cost sharing except when the resultant research has commercial application. The instruction does permit an agency to evaluate an assistance applicant's proposal to share costs, but the program announcement must state the review criteria and the acceptable types of cost sharing.[2106]

Madey v. Duke

This past year, the CAFC decided *Madey v. Duke University,*[2107] which appears to be a case of first impression regarding the use of "authorization and consent" in assistance agreements. The dispute in *Madey* centered on the university's use of lab equipment that incorporated two of the plaintiff's patents. The plaintiff was initially a professor at Stanford University when he developed an innovative laser research program dealing with free electron lasers (FEL).[2108] As a result of this research, Madey eventually obtained two patents dealing with the FEL processes. His notoriety in the field attracted the attention of Duke University which recruited Madey to work at its physics department. In 1989, Madey moved his FEL laboratory equipment to Duke.[2109] After Madey's arrival at Duke, the university and Madey performed additional research work associated with the FEL under a federal grant awarded by the Office of Naval Research (ONR).[2110] During the course of performing this work, the relationship between Madey and the university deteriorated and eventually Madey resigned from his position. When the university continued to perform under the grants using the equipment that incorporated his patents, Madey sued in district court for patent infringement.[2111]

Ordinarily, a patent owner is able to bring a cause of action in district court against the alleged patent infringer seeking an injunction blocking the infringer from further using the patent and or damages for the illegal use.[2112] Madey utilized this statutory remedy to bring the district court action.[2113] At the district court, however, Duke argued that because it was using the invention on behalf of the federal government, Madey's sole remedy was to sue the federal government in the COFC under 28 U.S.C. § 1498(a).[2114] Duke argued the district court should dismiss Madey's cause of action. The district court agreed and partially dismissed Madey's cause of action.[2115]

2100. *Id*. at 43,828 (proposing to add 40 C.F.R. § 33.202). Neither of the current EPA regulations contain a net worth limitation.

2101. Cost Sharing in Department of Defense Research Programs Using Assistance Agreements, 68 Fed. Reg. 38,314 (June 27, 2003).

2102. U.S. Dep't of Defense, Instr. 3200.dd, Cost Sharing in DoD Research Programs Using Assistance Instruments (undated), *available at* http://www.acq.osd.mil/ddre/research/draftcostsharing.pdf (last visited Jan. 29, 2004) [hereinafter DOD Instr. 3200.dd].

2103. Federal Government-University Research Partnership, 66 Fed. Reg. 701 (Jan. 3, 2001).

2104. DOD Instr. 3200.dd, *supra* note 2102, at encl. 3.

2105. DOD Dir. 5000.1 (2003), *supra* note 1933, para. E.1.6. For additional discussion of this regulation, see *infra* Section IV.K Major Systems Acquisition.

2106. DOD Instr. 3200.dd, *supra* note 2102, paras. E3.1.3.1.2, E3.1.3.2, E3.1.5.

2107. 307 F.3d 1351 (Fed. Cir. 2002), *cert. denied*, Duke Univ. v. Madey, 123 S. Ct. 2639 (2003).

2108. *Id*. at 1352.

2109. *Id*. at 1352-53.

2110. Madey v. Duke Univ., 1999 U.S. Dist. LEXIS 21379, at *4 (M.D. N.C. 1999).

2111. *Madey*, 307 F.3d at 1352-53.

2112. 35 U.S.C.S. § 281 (LEXIS 2003).

2113. Madey v. Duke Univ., 266 F. Supp. 2d 420, 429 (M.D. N.C. 2001).

2114. *Madey*, 307 F.3d at 1352-53.

2115. *Madey*, 1999 U.S. Dist. LEXIS 21379, at *19.

Madey appealed that dismissal to the CAFC. On appeal, Madey argued that the district court improperly granted the partial dismissal because the court had not determined that Duke's use of the inventions was for the government.[2116] In addition to covering jurisdiction, section 1498(a) further provides that

> the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.[2117]

Since the district court had not determined that the government had authorized or consented to Duke's use of the inventions, the CAFC agreed with Madey and held the partial dismissal to be in error.[2118]

Madey also argued that unlike work performed under FAR-based contracts,[2119] work performed under a grant could never be considered done with the authorization or consent of the government. The CAFC rejected this argument, however.[2120] It therefore remanded to the district court with a directive to have further proceedings that would determine whether the government had authorized or consented to the invention's use.[2121] As an anecdote, although the district court did not determine whether the government gave Duke its authorization or consent to use Madey's inventions in the ONR grant, it is unlikely the grant's terms did in fact cover this issue since the DOD regulation on grants does not specify inclusion of such a clause.[2122]

Now That's a Bona Fide Grant

The Comptroller General applied the bona fide needs rule to grants and cooperative agreements in *U.S. Department of Education's Use of FY Appropriations to Award Multiple Year Grants*.[2123] The Department of Education (DOE) requested approval to use its appropriations to award grants of up to five years. Prior DOE practice had been to award grants for one year at a time.[2124] The Comptroller's analysis began by noting that prior opinions distinguished between severable and non-severable services. The Comptroller noted a 1985 opinion that held awarding a grant that spanned three FYs using one-year appropriations violated the bona fide needs rule.[2125] A subsequent, apparently contradictory opinion determined the SBA had not violated the bona fide needs rule in awarding a cooperative agreement on the last day of the FY even though the assistance recipients would not use the money until the following FY.[2126] The SBA opinion reasoned that unlike the purpose of a contract, the statutory purpose of grants and cooperative agreements—to financially assist the awardee—was fulfilled upon the award of the grant or cooperative agreement. It did not matter when the recipient began or completed the tasks funded by the award.[2127] In the instant case, the Comptroller General overturned the 1985 opinion. He also concluded that severability was irrelevant for grants and cooperative agreements and that so long as the assistance instrument furthered the statutorily authorized purposes of the program, an agency merely had to award it during the period of availability to satisfy the bona fide needs rule.[2128]

2116. *Madey*, 307 F.3d at 1358-59.

2117. 28 U.S.C.S. § 1498(a).

2118. *Madey*, 307 F.3d at 1358-59.

2119. FAR, *supra* note 30, at 52.227-1, Authorization and Consent (July 1995) (providing contractors involved in a FAR-based contract such authority to use inventions).

2120. *Madey*, 307 F.3d at 1359.

2121. *Id*. at 1364.

2122. U.S. Dep't of Defense, Reg. 3210.6-R, Grant and Agreement Regulations (13 Apr. 1998), *available at* http://www.dtic.mil/whs/directives/corres/html/32106r.htm.

2123. Comp. Gen. B-289801, Dec. 30, 2002 (unpub.), *available at* http://www.gao.gov/decisions/appro/289801.pdf. For additional discussion of this ruling, *see infra* Section V.B Time.

2124. *Id*. at 1-3.

2125. *Id* at 4-5 (citing The Honorable Lowell Weicker, Jr., B-217722, 64 Comp. Gen. 359 (1985)).

2126. *Id*. at 5-6 (citing Small Business Administration Questions about Funding of Small Business Development Centers, B-229873, 1988 U.S. Comp. Gen. LEXIS 1433 (Nov. 29, 1988)).

2127. *Id*. at 6.

Proposed & Final DOD "Other Transaction for Prototype" Rules

As discussed in last year's *Year in Review*,[2129] Congress, in 1947, began giving the DOD the authority to engage in research projects using contractual methods that did not have to comply with the normal statutory and regulatory government contract rules. Congress first enacted section 2358 of Title 10 giving the DOD the authority to engage in research efforts through either a cooperative agreement or a grant. Then in 1989, Congress enacted section 2371 of Title 10, giving the DOD the authority to use "other transactions" to engage in such research.[2130] Neither of these authorities permitted the DOD to acquire an actual product. They only allowed the DOD to make investments to stimulate research in scientific fields of interest to the DOD with the expectation that the research may actually be fielded in one or more of the DOD's weapons systems. In 1993, Congress also gave the DOD the authority to enter into "other transactions" in which the DOD could acquire limited amounts of prototype items rather than just the underlying research. This sort of other transaction is alternatively referred to as an "Other Transaction for Prototype" or an "845 Agreement" because it arose out of section 845 of the National Defense Authorization Act for FY 1994.[2131]

This past year, the DOD issued three rules concerning Other Transactions for Prototype. It issued a final rule that established the DOD's policy regarding when it could conduct audits on those projects.[2132] The final audit rule was less onerous than the proposed rule[2133] in several respects. First, the final audit rule generally authorizes government audits only if the other transaction is a cost-type and is in excess of $5 million.[2134] The final audit rule also generally limits applicability of the audit policy to subawardees that receive payments in excess of $5 million[2135] whereas under the proposed rule this threshold was established at $300,000.[2136] The final audit rule also permits the agreements officer to "deviate" from applying this policy to non-traditional defense contractors if he documents an adverse impact on the government.[2137] The department also eliminated sample clauses from the final audit rule because they would unnecessarily reduce flexibility.[2138]

The DOD also issued two proposed rules dealing with Other Transactions for Prototype[2139] and implementing section 822 of the National Defense Authorization Act for FY 2002.[2140] That legislation amended section 845 of the National Defense Authorization Act for FY 1994[2141] to permit the DOD to enter into follow-on production contracts with the awardees of an Other Transaction for Prototype without having to use compet-

2128. *Id*. at 10. The Comptroller General also noted that one of DOEd's appropriations used in awarding the grants would "remain available through September 30, 2003, for academic year 2002-2003." *Id*. at 7-8. With regards to grants that the DOEd awarded from this particular appropriation, the Comptroller General determined that the grants' duration had to be limited to the academic year in order "to give meaning to Congress' words." *Id*. at 8.

2129. *2002 Year in Review, supra* note 57, at 180.

2130. Pub. L. No. 101-189, § 251, 103 Stat. 1352, 1403 (1989).

2131. Pub. L. No. 103-160, 107 Stat. 1547, 1721 (1993).

2132. Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 68 Fed. Reg. 27,452 (May 20, 2003) (amending 32 C.F.R. pt. 3).

2133. Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 66 Fed. Reg. 58,422 (Nov. 21, 2001).

2134. 68 Fed. Reg. at 27,458 (adding 32 C.F.R. § 3.8(a)(2)). *Cf*. 66 Fed. Reg. at 58,422 (containing no such threshold). The DOD indicated that based upon historical data, this threshold would enable it to audit eighty-nine percent of the government dollars being spent on cost-type agreements yet would also exempt seventy-eight percent of such agreements from mandatory application of the policy. *See* 68 Fed. Reg. at 27,454 (providing a summary of public comments regarding applicability).

2135. 68 Fed. Reg. at 27,458 (adding 32 C.F.R. § 3.8(a)(3)).

2136. 66 Fed. Reg. at 58,424 (proposing to add 32 C.F.R. § 3.7(b)(2) and (d)(3)(ii)(B)).

2137. 68 Fed. Reg. at 27,458 (adding 32 C.F.R. § 3.8(b)(1)). The government may also deviate from this policy for traditional defense contractors, but the approval for such a deviation has been set at the Head of the Contracting Activity (HCA) level and the justification standards have been set much higher. *Id*. (adding 32 C.F.R. § 3.8(b)(2)).

2138. *Id*. at 27,456 (providing a summary of public comments regarding the sample audit clauses); *see also* 66 Fed. Reg. at 58,424-25 (proposing to add 32 C.F.R. § 3.7(g) which contained the four sample clauses). The more recent *Federal Register* entry also notes that the DOD would continue to maintain the sample clauses at its "Other Transactions" website located at http://www.osd.mil/dp. 68 Fed. Reg. at 27,458. That website was replaced by the following website: http://www.acq.osd.mil/dpap/specificpolicy/index.htm. Unfortunately, the guide is being updated. *See* U.S. Dep't of Defense, *Defense Procurement and Acquisition Policy, available at* http://www.acq.osd.mil/dpap/specificpolicy/index.htm (last visited Jan. 29, 2004).

2139. Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 68 Fed. Reg. 27,497 (May 20, 2003) (proposing to amend 32 C.F.R. pt. 3) and Defense Federal Acquisition Regulation Supplement; Follow-On Production Contracts for Products Developed Pursuant to Prototype Projects, 68 Fed. Reg. 33,057 (June 3, 2003) (proposing to amend 48 C.F.R. pt. 206).

2140. Pub. L. No. 107–107, 115 Stat. 1012, 1182-83 (2001).

2141. Pub. L. No. 103-160, 107 Stat. 1547, 1721 (1993); *see also supra* note 2131 and accompanying text for an overview.

itive procedures. The legislation contains several prerequisites to awarding a non-competitive, follow-on contract. These include the following: (1) the use of competitive procedures to award the other transaction; and (2) the establishment and evaluation of the price and quantity of units to be purchased under the production contract at the time the other transaction was awarded.[2142] The first proposed rule sought to implement this statutory authority by amending the regulations dealing with other transactions.[2143] The second proposed rule sought to amend the competition requirements established in the DFARS.[2144]

DHS and Other Agencies Obtain OT Authority

When Congress established the Department of Homeland Security (DHS) in late 2002, it granted DHS the authority to enter into Other Transactions (OTs).[2145] The DHS' authority derives from authority Congress has given the DOD to enter into OTs.[2146] The only substantive difference between the authorities granted to these two agencies is DHS's authority is limited to a five-year pilot program.[2147] In the DOD National Defense Authorization Act for FY 2004,[2148] Congress further extended the authority to enter into OTs to any agency "who engages in basic research, applied research, advanced research, and development projects."[2149] The latter, comprehensive authorization is restricted to those transactions that "have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack."[2150] The global authorization is also limited to a five-year pilot program. When Congress issued the global authorization, it also mandated that OMB prescribe a regulation before any agency could enter into an OT under this global authority.[2151]

Major Gregg Sharp.

Payment and Collection

Get a Move On There Buddy

Last year's *Year in Review* commented on two memoranda issued by the Director of Defense Procurement concerning the improper use of fast payment procedures and the necessity for contracting officers to provide proper payment and delivery information in contracts.[2152] In an on-going effort to reform the payment process, the Director of Defense Procurement, Ms. Deidre Lee, and the Deputy Chief Financial Officer, Ms. JoAnn Boutelle, issued a joint memorandum dated 18 July 2003 noting that "a significant number of contracts cannot be closed because they require additional funds."[2153] Ms. Lee and Ms. Boutelle asked that agencies provide additional funding requirements for expeditious closeout and that managers provide personal oversight of the contract closeout process.[2154] Specifically, they noted that resource managers or fund holders should "quickly respond to contracting officer requests for additional funds."[2155] Further, contracting officers should provide a timely response to contractors after receiving notice that they need additional funds to complete the contract.[2156]

2142. 115 Stat. 1012, 1182-83 (adding section 845(f)).

2143. 68 Fed. Reg. at 27,497; *see also* 32 C.F.R. pt. 3 for the actual regulation.

2144. 68 Fed. Reg. at 33,057; *see also* 48 C.F.R. pt. 206 for the actual regulation.

2145. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 831, 116 Stat. 2135, 2224-25 (2002) (to be codified at 6 U.S.C. § 391).

2146. *Id*. (stating that "the Secretary may exercise the same authority (subject to the same limitations and conditions) . . . as the Secretary of Defense may exercise under section 2371 of title 10, United States Code . . . .").

2147. *Id*.

2148. Pub. L. No. 108-136, 117 Stat. 1392 (2003).

2149. *Id*. at § 1441, 117 Stat. at 1441.

2150. *Id*.

2151. *Id*. Apparently, the DOD and the DHS would not have to follow this OMB regulation since they each have authority that is independent of the authorization provided in the National Defense Authorization Act for FY 2004.

2152. *See 2002 Year in Review, supra* note 57, at 184-85.

2153. Memorandum, Director, Defense Procurement and Acquisition Policy, and Deputy Chief Financial Officer, to Distribution, subject: Contract Closeout – Additional Funds (18 July 2003).

2154. *Id*.

2155. *Id*.

2156. *Id*.

"Paid Cost Rule" Eliminated for Cost Reimbursement Contracts

"The 'paid cost rule' is the requirement that a large business must actually pay (not just incur) costs for supplies and services purchased directly for the contract and financing payments to subcontractors before including the payments in its billings to the Government."[2157] Inadvertently, the total elimination of the "paid cost rule" from payment clauses was not accomplished with prior FAR case 1998-400.[2158] Accordingly, the final rule, effective 23 December 2003, eliminated the remaining "paid cost rule" application for cost reimbursement contracts using FAR payment clauses 52.216-26 and 52.232-7.[2159] The final rule also amended FAR section 32.1003 to allow performance-based payments on fixed-price type contracts prior to definitization.[2160]

Calling for Back Up

The DOD Inspector General Office (DOD IG) reported that the DOD failed to adequately administer performance-based payments on forty-three of sixty-seven reviewed contracts.[2161] The report found that the forty-three contracts "had poorly defined event schedules, . . . lacked performance criteria; or did not document event dependence."[2162] Noting that performance-based payments are based upon demonstrated performance rather than incurred costs, the DOD IG found that inadequately administered performance-based payments allowed for payments based merely upon contract award and resulted in advance payments that were not supported by contract performance or incurrence of costs. Specifically, the DOD IG found that "$4.1 billion (including a possible $900 million in accelerated payments) of the $5.5 billion in performance-based payments lacked adequate documentation to ensure the payments were for demonstrated performance."[2163]

A Paper-less Invoicing and Payment Future with Wide Area Workflow Implementation?

Wide Area Workflow (WAWF) serves as the DOD's electronic acceptance and invoicing system. On 6 February 2003, the Under Secretary of Defense for Acquisition, Technology and Logistics and the Under Secretary of Defense, Comptroller, jointly issued a memorandum calling for WAWF implementation.[2164] They noted that the DCMA is currently deploying the WAWF system to contractors with large volumes of receiving reports and invoices. The military departments also have pilot programs implementing the WAWF.[2165] The memo notes that implementation results thus far include the virtual elimination of late payments and associated interest penalties, as well as the reduction of DOD administrative costs through elimination of manual processing, and lost documents.[2166] The WAWF benefits contractors by eliminating mailing and processing times for hardcopy documents, while having electronic "documentation arrive securely and on-time at the [DFAS] payment office."[2167] The WAWF will also assist with recovery audits for overpayments through the auditors' anytime/anywhere access to electronic payment documentation. The Under Secretaries direct the Military Agencies to https://rmb.ogden.disa.mil for further information.[2168]

In an update to the Council of Defense and Space Industry Associations, the DCMA reported that 1100 contractors currently use the WAWF system with DCMA.[2169] From March 2002 through May 2003, the DCMA reported that 31,000 transactions valued at over $1.5 billion were processed through the

2157. Federal Acquisition Regulation; Financing Policies, 67 Fed. Reg. 70,516 (Nov. 22, 2002) (codified at C.F.R. pts. 32 and 52).

2158. *Id*. at 70,520 (referencing 65 Fed. Reg. 16,274 (Mar. 27, 2000)).

2159. *Id*.

2160. *Id*.

2161. Office of the Inspector General of the Dep't of Defense, Rep. No. D-2003-106, *Administration of Performance-Based Payments Made to Defense Contractors* (June 2003).

2162. *Id*. at 2.

2163. *Id*. at i.

2164. Memorandum, Under Secretary of Defense, Acquisition, Technology and Logistics, and Under Secretary of Defense, Comptroller, to Secretaries of the Military Departments et al., subject: Wide Area Workflow Implementation (6 Feb. 2003).

2165. *Id*.

2166. *Id*.

2167. *Id*.

2168. *Id*.; U.S. Dep't of Defense, *DOD Paperless Contracting, Wide Area WorkFlow, available at* https://rmb.ogden.disa.mil (last visited Jan. 29, 2004).

2169. *DCMA Updates CODSIA on WAWF Progress*, 45 Gov't Contractor 20, ¶ 217 (May 21, 2003).

WAWF.[2170] Compared to $314,000 in interest payments for comparable paper-based transactions, the DCMA experienced only $54.86 in interest payments for the $1.5 billion WAWF electronic payment transactions due to a 99.9% on-time payment-processing rate.[2171]

**!@# the Paper Forms—Full Speed Ahead*

In February 2003, the DOD issued an interim rule "requir[ing] contractors to submit, and DOD to process, payment requests in electronic form."[2172] In response to comments from an earlier proposed rule,[2173] the DOD made substantive changes and issued the interim rule to revise an exemption to the general requirement for contractors to electronically submit invoices and supporting documentation.[2174] The proposed rule would have required the Secretary of Defense to make a determination that electronic submission would be unduly burdensome. The revised interim rule allows the contracting officer to exempt contractors from submitting electronically, if the following requirements are met: "The contractor is unable to submit, or DOD is unable to receive, a payment request in electronic form; and The contracting officer, the payment office, and the contractor mutually agree to an alternate method."[2175] Accordingly, the interim rule allows much greater flexibility for "unique payment situations to ensure that contractors are paid on time for work they have performed."[2176]

To implement section 1008 of the National Defense Authorization Act for FY 2001,[2177] the Secretary of Defense determined that urgent and compelling reasons authorized the interim rule before the opportunity for public comment.[2178] The legislation required "contractors to submit, and DOD to process, payment requests in electronic form" by 1 October 2002.[2179] The DOD, however, was unable to meet the deadline because the "automated payment systems were limited to certain types of payment requests."[2180] On the 21 February 2003 publication date of the interim rule, the DOD expected that nearly 100% of payment request types could be processed electronically by 1 March 2003.[2181]

The interim rule at DFARS 232.7003 also provides three primary means to transmit electronic forms as follows:

> (1) Wide Area WorkFlow-Receipt and Acceptance (see Web site–https://rmb.ogden.disa.mil);
> (2) Web Invoicing System (see Web site – https://ecweb.dfas.mil); and
> (3) American National Standards Institute (ANSI) X.12 electronic data interchange (EDI) formats (see Web site – http://www.x12.org for information on EDI formats; see Web site – http://www.dfas.mil/ecedi for EDI implementation guides).[2182]

The interim rule at DFARS section 232.7003(b) also permits contracting officers to authorize payment requests using other electronic means if the payment and the contract administration offices concur.[2183]

2170. *Id*.

2171. *Id*.

2172. Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 8450 (Feb. 21, 2003) (to be codified at 48 C.F.R. pts. 232 and 252).

2173. *See* Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 67 Fed. Reg. 38,057 (May 31, 2002).

2174. 68 Fed. Reg. at 8450.

2175. *Id*. at 8455 (listing the interim DFARS 232.7002(a)(6)).

2176. *Id*. at 8450.

2177. Pub. L. No. 106-398, § 1008, 114 Stat. 1654, 1654A-249 (2000) (codified at 10 U.S.C. § 2227 (2000)).

2178. 68 Fed. Reg. at 8454.

2179. *Id*.

2180. *Id*.

2181. *Id*.

2182. *Id*. at 8455 (listing the interim DFARS section 232.7003).

2183. *Id*.

The Overpayment Saga Continues

Congress remains interested in the identification and recovery of improper payments by government agencies. As noted in last year's *Year in Review*, section 831 of the National Defense Authorization Act for FY 2002[2184] required executive agencies to establish payment error identification and recovery programs.[2185] Subsequently, on 6 June 2002, Representative Stephen Horn (R-Cal.) introduced a bill[2186] that Congress later enacted as the Improper Payments Information Act of 2002 (2002 IPIA).[2187] Among other things, the 2002 IPIA defines the term "improper payment" as:

> (A) [] any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements; and
>
> (B) includes any payment to an ineligible recipient, any payment for an ineligible service, any duplicate payment, payments for services not received, and any payment that does not account for credit for applicable discounts.[2188]

The 2002 IPIA also requires each agency to annually identify all "programs and activities that may be susceptible to significant improper payments" and report an annual estimate of improper payments to Congress.[2189] For annual estimates that exceed $10 million, the agency must also report "what actions the agency is taking to reduce the improper payments . . . ."[2190] The 2002 IPIA also requires the OMB to provide implementing guidance within six months of the IPIA's enactment.[2191]

The GAO also remains interested in the improper payment challenge. In testimony before the House of Representatives Government Reform Committee, the GAO found that agency financial statements recognized approximately $20 billion per year in improper payments for FYs 2001 and 2002.[2192] The GAO also noted, however, in subsequent testimony before the same committee, that the amounts in agency financial statements are not a complete picture of government improper payment problems. Specifically, the GAO referenced an OMB estimate of $35 billion annually.[2193] Compounding the problem, the GAO found that "existing [agency] guidance did not require or offer agencies a comprehensive approach to measuring improper payments, developing and implementing corrective actions, or reporting on the results of the actions taken."[2194] Accordingly, the GAO described the two recent important pieces of legislation – the 2002 IPIA and section 831 of the National Defense Authorization Act for FY 2002—that should help resolve the improper payments problem. Specifically, implementation of the 2002 IPIA "should significantly increase the number of agencies analyzing their programs and activities for improper payments . . . [and assigns] responsibility for establishing procedures for assessing agency and program risks of improper payments."[2195] Concerning section 831 of the National Defense Authorization Act for FY 2002, the GAO noted that the recovery auditing requirement not only recovers funds but also identifies internal control weaknesses to help prevent improper payments.[2196] The GAO defined recovery auditing as "examining payment file information to identify possible duplicate or erroneous payments and taking recovery action."[2197] The GAO also noted that agencies can use recovery

2184. *See* National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 831, 115 Stat. 1012, 1186 (2001).

2185. *See 2002 Year in Review, supra* note 57, at 185-86 (discussing the section 831 requirement).

2186. *See id*. at 185 n.18 (referencing H.R. 4878, 107th Cong. (2002)).

2187. Pub. L. No. 107-300, 116 Stat. 2350 (2002).

2188. *Id*. § 2(d)(2), 116 Stat. 2351.

2189. *Id*. § 2(a), 116 Stat. 2350.

2190. *Id*. § 2(c), 116 Stat. 2350.

2191. *Id*. § 2(f), 116 Stat. 2351.

2192. Gen. Acct. Off., Rep. No. GAO-03-572T, *FY 2002 U.S. Government Financial Statements: Sustained Leadership and Oversight Needed for Effective Implementation of Financial Management Reform* (Apr. 2003).

2193. Gen. Acct. Off., Rep. No. GAO-03-750T, *Financial Management: Challenges Remain in Addressing the Government's Improper Payments* (May 2003).

2194. *Id*. at 3 (citing Gen. Acct. Off., Rep. No. GAO-02-749, *Financial Management: Coordinated Approach Needed to Address the Government's Improper Payments Problems* (Aug. 2002)).

2195. *Id*. at 4.

2196. *Id*. at 5. The GAO also noted that section 831 allows agencies to retain recovered funds for improper payment recovery programs and credit any remainder back to the original appropriation. *Id*.

audit techniques to analyze supporting payment data and prevent improper payments before they occur.[2198]

The Helping Hand of the Government from a Different Perspective

The FAR councils issued a final rule, amending FAR sections 12.215 and 32.008 (and associated contract clauses), which requires contractors to notify the contracting officer when an overpayment occurs on an invoice or financing payment.[2199] The final rule also requires contracting officers to promptly provide the contractor instructions concerning disposition of the overpayment.[2200]

Original Invoice and "Clean Hands" Required for Prompt Payment Act to Accrue

Although the interest rate for late payments under the Prompt Payment Act is fairly low and recently dropped even lower,[2201] two recent ASBCA and Department of Transportation Board of Contract Appeals (DOTBCA) cases show that the government has an interest in avoiding the late payment interest penalty. In *Production Packing*, the ASBCA held that a $225,000 order placed by an ordering officer with a $2500 order limitation was unauthorized and not binding on the government until ratified.[2202] Presumably, the contractor should have known that the ordering officer exceeded his purchasing authority when it agreed to process daily $2500 government purchase card payments until the total $225,000 order was paid.[2203] Accordingly, Prompt Payment Act interest was not due for late payment of the suspended $2500 payments, and the agency would only have to pay interest if payment was made thirty days after ratification of the unauthorized order.[2204]

In *General Construction Co.*,[2205] the DOTBCA also dealt with a Prompt Payment Act interest accrual issue. The DOTBCA held that a faxed invoice is not an original under the Prompt Payment Act and is therefore not a proper invoice for application of Prompt Payment Act interest.[2206] In subsequent discussions with the contracting officer, however, the contractor reasonably believed that the faxed invoice would be considered an original. Accordingly, the DOTBCA held that Prompt Payment Act interest would be due if payment was made thirty days after these discussions.[2207]

Major Karl Kuhn.

Performance-Based Service Contracting (Acquisitions)

Approval Requirements Established for Contracts/Task Orders Not Performance-Based

To implement section 801(b) of the National Defense Authorization Act for FY 2002,[2208] the DAR Council issued an interim rule adding DFARS section 237.170, Approval of Contracts and Task Orders for Services.[2209] Effective 1 October 2003, the rule prohibits DOD service contracts or task orders

2197. *Id*.

2198. *Id.*

2199. Federal Acquisition Circular 2001-16; Introduction, 68 Fed. Reg. 56,668 (Oct. 1, 2003).

2200. *Id*. at 56,668-69.

2201. Renegotiation Board Interest Rate; Prompt Payment Interest Rate; Contract Disputes Act, 68 Fed. Reg. 39,185 (July 1, 2003). Currently the rate is 3.125%, and recently dropped from 4.25%. *Id*. The 3.125% interest rate applies from 1 July through 31 December 2003. *Id*. The preceding 4.25% interest rate applied to the period 1 January through 30 June 2003. Renegotiation Board Interest Rate; Prompt Payment Interest Rate; Contract Disputes Act, 67 Fed. Reg. 78,566 (Dec. 24, 2002).

2202. ASBCA No. 53662, 2003 ASBCA LEXIS 82 (July 23, 2003). For additional discussion of the ASBCA's opinion in *Production Packing*, see *supra* Section II.A Authority.

2203. *See id*. at *7-8.

2204. *Id*. at *11.

2205. DOTBCA No. 4137, 03-1 BCA ¶ 32,102.

2206. *Id*. at 158,687.

2207. *Id.* at 158,692.

2208. Pub. L. No. 107-107, § 801(b), 115 Stat. 1012, 1175 (2001) (adding section 2330 to title 10 and establishing a number of requirements relating to the management of services acquisitions in the DOD).

2209. Department of Defense, Defense Federal Acquisition Regulation Supplement; Approval of Service Contracts and Task Orders, 68 Fed. Reg. 56,563 (Oct. 1, 2003) (to be codified at 48 C.F.R. pt. 237).

that are not performance-based, unless appropriate approval is obtained.[2210] For such acquisitions greater than $50 million, the senior procurement executive is the approval authority.[2211] Non-performance based acquisitions at or below the $50 million must be approved "by the official designated by the department or agency."[2212]

Use of 821(b) Authority Unknown, but Nonetheless Extended and Expanded

In section 821(b) of the Floyd D. Spence National Defense Authorization Act for FY 2001, Congress granted the DOD temporary authority to treat certain performance-based service contracts and task orders as "commercial item" acquisitions, thus permitting the use of the streamlined acquisition procedures under FAR part 12.[2213] As required by the legislation, the GAO reviewed the DOD's implementation and use of this temporary authority over the past year and determined that the "DOD does not know the extent to which the authority has been used."[2214]

According to the report, while the DOD has implemented regulatory guidance for the use of the authority, the DOD lacks a reporting system or other tracking mechanism, thus data on the use of this temporary authority was neither collected nor available.[2215] In response to general queries from the GAO, Navy and Air Force officials could provide no data regarding use of the authority within their departments, while Army officials "believed a minimal number of contracting personnel had used the authority" for services such as plumbing and electrical motor repair services.[2216]

The DOD offered two explanations for the minimal use of the section 821(b) authority. First, the perception among some DOD contracting personnel that section 821 (b) provided no new authority, believing incorrectly that the authority "could only be used to acquire services that already met the definition of commercial item."[2217] Second, the DOD suggested section's requirement that the contract be firm-fixed price acted "as an impediment to use of the authority."[2218] For example, while hourly-based services could be treated as commercial items under the temporary authority,[2219] the DOD reported that the firm-fixed price requirement "made the authority less attractive."[2220]

Despite the DOD's scarce use of the section 821(b) authority, Congress not only renewed but also expanded the authority

2210. *Id*. at 56,564. The rule also prohibits the acquisition of services through any contract or task order awarded by other than a DOD agency, unless approved in accordance with department or agency procedures. *Id*. The Under Secretary of Defense (Acquisition, Technology, and Logistics) issued a policy memorandum on 31 May 2002 establishing a review structure and process for service acquisitions. *See* Memorandum, Acquisition of Services, Under Secretary of Defense (Acquisitions, Logistics, and Technology), to Secretaries of the Military Departments et al., subject: Acquisition of Services (31 May 2002). As required by the memo, each of the military departments has developed a "Management and Oversight of Acquisition of Services Process." 68 Fed. Reg. 56,563-64. For example, in the Army, for services acquisitions of $500 million or more, an Army Services Strategy Panel (ASSP) at the Headquarters, Department of Army (HQDA) level must review and approve; for services acquisitions valued between $100 million and $500 million, Program Executive Offices, Direct Reporting Program Managers, and Heads of Contracting Activities must conduct ASSPs mirroring the HQDA-level procedures; and for services acquisitions valued at less than $100 million "a review and approval process shall be implemented consistent with operational impact and risks associated with the service acquisition." Memorandum, Deputy Assistant Secretary of the Army (Policy and Procurement), to Secretary of the Army et al., subject: Management and Oversight of Acquisition of Services Process (9 Oct. 2003). For recent Air Force guidance on oversight and management of services acquisitions, see Memorandum, Associate Deputy Secretary of the Air Force (Contracting) and Assistant Secretary of the Air Force (Acquisition), to ALMAJCOM/FOA/DRU (Contracting), subject: Oversight and Management Process for Services Acquisitions (26 Nov. 2003) (issuing interim changes to AFFARS, *supra* note 1201, pts 5304 and 5337).

2211. 68 Fed. Reg. 56,563-64.

2212. *Id*.

2213. Pub. L. No. 106-398, § 821, 114 Stat. 1654, 1654A-217 (2000). To qualify as a "commercial item" and for the use of the FAR part 12 procedures, the performance-based contract or task order must be a firm-fixed price with a value of $5 million or less, define the work in measurable, mission-related terms, identify specific end products or output, be awarded to a contractor that provides similar services to the general public under terms and conditions similar to those in the federal contract, and not use the procedures in FAR subpart 13.5, Test Program for Certain Commercial Items. *See* DFARS, *supra* note 273, at 212.102 (July 1, 2003); *see also 2002 Year in Review*, *supra* note 57, at 187-88.

2214. Gen. Acct. Off., Rep. No. GAO-03-674R, *Contract Management, Use of Legislative Incentive for Performance-Based Contracting Unknown* (May 2003) [hereinafter GAO-03-674R].

2215. *Id*. at 3.

2216. *Id*.

2217. *Id*.

2218. *Id*.

2219. *Cf*. FAR, *supra* note 30, at 2.101 (defining commercial items to exclude "services that are sold based on hourly rates without an established catalog or market price for a specific service performed").

2220. GAO-03-674R, *supra* note 2214, at 4.

this past year. Section 1431 of the FY 2004 Defense Authorization Act adds section 41 to the Office of Federal Procurement Policy Act,[2221] which not only renews, in effect, the section 821(b) authority, but also increases from $5 million to $25 million the threshold for treating performance-based contracts and task orders as commercial item acquisitions.[2222] The new provision extends the availability of this authority through 24 November 2013.[2223] The firm-fixed price requirement, identified by the DOD as an impediment to the authority's usage, remains.[2224] Section 1431 does specify that regulations implementing the authority must "require agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items" and requires within the next two years a report from OMB on the authority's use.[2225]

If You Can't Meet 'Em, Change'Em (Definitions, That Is)

Last year's *Year in Review* commented on a GAO report discussing the use of performance-based service contracts (PBSCs) in federal agencies.[2226] The GAO reviewed twenty-five service contracts that agencies had characterized as performance-based to determine whether the contracts actually contained performance-based attributes, based upon Office of Federal Procurement Policy (OFPP) guidance.[2227] While concluding agencies were using PBSCs, the GAO expressed "concern" as to whether agencies fully understood or knew how to take advantage of performance-based methods and suggested agency officials need better criteria for determining which contracts should be labeled "performance-based."[2228]

In July 2003, an interagency working group, established by the OFPP to improve understanding of performance-based service acquisition (PBSA), issued a report making several recommendations to give agencies greater "flexibility in applying PBSA effectively, appropriately, and consistently."[2229] The group's recommendations focused on changes to the FAR, modifications of reporting requirements, and improvements in the quality and availability of guidance.

Concerning changes to the FAR, the group found too "restrictive" the general description and discussion of the required elements of PBSA currently found in the FAR.[2230] The group noted the current description does not permit agencies to apply PBSA principles (or, perhaps more importantly, "receive credit for goaling purposes"), "if the work is described in terms of outcomes, but one of the other elements (e.g., a price decrement formula) is not present."[2231] To broaden the scope of PBSA (and, no doubt, increase the likelihood of receiving credit for "goaling purposes"), the group recommended revising FAR section 37.601 to allow for greater agency discretion in adhering to PBSA basics.[2232] For example, the proposed revision does not include a requirement for a price-decrement formula, but would state instead that "PBSA contracts may include incentives to promote contractor achievement of the

2221. *See* 41 U.S.C.S. §§ 403-436 (LEXIS 2003).

2222. Pub. L. No. 108-136, § 1431, 117 Stat. 1392 (2003). Part of the Services Acquisition Reform Act of FY 2003, section 1431 actually repeals and supercedes the section 821(b) authority provided in the National Defense Authorization Act for FY 2001. *Id*.

2223. *Id*.

2224. *Id*.

2225. *Id*.

2226. *2002 Year in Review, supra* note 57, at 188.

2227. Gen. Acct. Off., Rep. No. GAO-02-1049, *Contract Management: Guidance Needed for Using Performance-Based Service Contracting* 3-4 (Sept. 2002) [hereinafter GAO-02-1049]. Based on the OFPP's guidance, the GAO evaluated the contracts for the following attributes:

1. Describe the requirements in terms of results required rather than the methods of performance of work;
2. Set measurable performance standards;
3. Describe how the contractor's performance will be evaluated in a quality assurance plan;
4. Identify positive and negative incentives when appropriate.

Id. For similarly worded PBSC attributes/elements, see FAR, *supra* note 30, at 37.601.

2228. GAO-02-1049, *supra* note 2229, at 8. Of the twenty-five contracts reviewed, the GAO determined nine "clearly exhibited" PBSC attributes, four more could have but did not include all of the elements, and the remaining twelve incorporated some PBSC attributes but also included detailed specifications or other measures to ensure government oversight. *Id*. at 4, 6-7. The GAO noted the latter twelve contracts involved more complex or technical contracts. *Id*. at 7.

2229. Federal Office of Management and Budget, Office of Federal Procurement Policy, *Performance-Based Service Acquisition: Contracting for the Future* (July, 2003) [hereinafter *Performance-Based Service Acquisition*]. Among the group's several recommendations, it proposed use of the term "PBSA . . . to provide common terminology throughout the government." *Id*. at 5.

2230. *Id*. For a general description of the PBSA elements found in FAR sec. 37.601, see *supra* note 2227.

2231. *Performance-Based Service Acquisition, supra* note 2229, at 5.

results . . . . Incentives may be of any type, including positive, negative, monetary, or non-monetary."[2233] Additionally, quality assurance plans (QASP) would need only be as complex as the acquisition required. For example, contracting officers could rely upon "the inspections clause in a simplified acquisition purchase or order without requiring a detailed QASP."[2234]

The group also recommended altering FAR section 37.102(a) to exclude term type[2235] service contracts from the requirement to use PBSA to the maximum extent practicable.[2236] Because contractors agree only to a specified level of effort under term type contracts and PBSA requires achieving an outcome in accordance with prescribed performance standards, the working group concluded term-type contracts conflicted with PBSA principles.[2237]

The final proposed changes would alter FAR parts 2 and 11. The group recommended adding to FAR part 2 definitions the terms "performance work statement (PWS)," "statement of work (SOW)," and "statement of objectives (SOO)." Currently these terms are not defined in FAR part 2.[2238] Additionally, noting the difficulty associated with converting traditional SOW to a performance-based approach, the group stated using SOOs would allow agencies to implement PBSA principles more easily.[2239] To incorporate the use of SOOs, the group recommends revising the order of preference for requirements documents at FAR section 11.101 to state it is appropriate to use "[p]erformance- or functionally-oriented" specifications.[2240]

In addition to these FAR changes, the working group also recommended modifying current reporting requirements and procedures. Believing that "reducing the universe of eligible (i.e., appropriate) services will increase use of PBSA," the working group suggested removing several service codes from the "eligible services" categories listed in the Federal Procurement Data System (FPDS) manual.[2241] Removal of these service codes from the FPDS manual does not prohibit agencies from using PBSA on such contracts, however, for data collection purposes it means agencies will not be evaluated on the use of PBSA.[2242] For reporting and evaluation purposes, the group also recommended revising the FPDS instructions to have agencies code contracts and orders as PBSA if more than fifty percent of the requirement is performance-based, instead of the current eighty percent requirement.[2243]

Finally, the working group recommended rescinding the outdated 1998 Best Practices Guide developed by the OFPP,[2244] and developing web-based guidance for implementing PBSA government-wide.[2245] Identifying "The Seven Steps to Performance-Based Service Acquisition Guide"[2246] as good basic

---

2232. *Id*.

2233. *Id*. at 3-4.

2234. *Id*. at 3.

2235. A "term" type contract "describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated period of time." FAR, *supra* note 30, at 16.306(d)(2).

2236. *Performance-Based Service Acquisition*, *supra* note 2229, at 3, 6. Currently, only architect-engineer services, construction, utility services, and services incidental to supply purchases are excluded from the PBSA requirements. FAR, *supra* note 30, at 37.102(a)(1).

2237. GAO-03-674R, *supra* note 2229, at 6.

2238. *Id*.; *see also* FAR, *supra* note 30, pt. 2.

2239. *Performance-Based Service Acquisition*, *supra* note 2229, at 6. When using SOOs, agencies summarize requirements, identify constraints, and request submission of a performance-based approach, along with metrics and a QASP. *Id.* (citing *The Seven Steps to Performance-Based Service Acquisition, Step 4, available at* http://www.acqnet.gov (last visited Jan. 29, 2004)).

2240. *Id*. at 2, 6. Currently, the FAR only specifies "[p]erformance-oriented documents." FAR, *supra* note 30, at 11.101(a)(2).

2241. *Performance-Based Service Acquisition*, *supra* note 2229, at 7-8. The FPDS manual is available at http://www.fpdc.gov/fpdc/rm2002.pdf. The group believed a "large universe of potential [PBSA] could result in 'force-fitting' some requirements when doing so might not be in the government's best interest." *Id*. at 7. As an example, medical research, in which the outcome is unknown and the contractor's success/failure is not necessarily indicative of the results achieved, would not be appropriate as a PBSA. *Id*.

2242. *Id*. at 1.

2243. *Id*. at 1, 8.

2244. *See* Office of Federal Procurement Policy, *A Guide to Best Practices For Performance Based Contracting, available at* http://www.arnet.gov/Library/OFPP/BestPractices/PPBSC/BestPPBSC.html (last visited Jan. 29, 2004).

2245. *Performance-Based Service Acquisition*, *supra* note 2229, at 1, 9.

2246. *See supra* note 2239.

information, the working group stated it would develop a web-based PBSA site for guidance, samples, and templates.[2247]

In response to the working group's report, the DOD issued a 19 August 2003 memo discussing the department's goals and policies regarding PSBA.[2248] Noting the DOD awarded more than twenty percent of service requirements in FY 2002 using performance-based specifications, the memo restates the DOD's goal "to award 50 percent of contract actions and dollars using performance based specifications by FY 2005."[2249] Consistent with the report, the memo excludes several services "with low opportunities for utilizing PBSA" from the established goals.[2250] As suggested by the working group, the memo also encourages the DOD components to use SOOs in the transformation to PBSAs.[2251] Finally, the memo emphasizes the need for increased training of personnel responsible for preparing SOWs for services. To this end, the memo establishes a requirement that fifty percent of such personnel receive appropriate performance-based training by 30 September 2004, with the remainder receiving similar training by 30 September 2005.[2252] According to the memo, the DOD was in the process of developing a PBSA distance learning course to be available by October 2003.[2253]

Major Kevin Huyser.

Procurement Fraud

Municipalities Are People Too

In a unanimous decision delivered by Justice Souter, the Supreme Court decided that for purposes of liability under the False Claims Act (FCA),[2254] municipalities and other local governments are subject to *qui tam* actions under the Act. The Court's decision in *United States, ex rel. Janet Chandler v. Cook County (Chandler)*[2255] follows on the heels of a 2000 Court decision involving the status of states under the FCA. In *Vermont Department of Natural Resources v. United States ex rel. Stevens (Stevens)*,[2256] the Court decided that states are not "persons" amenable to suit under the FCA. The Court based that decision, in part, on the "longstanding interpretive presumption" that a "person" does not include the "sovereign" (i.e., a sovereign state).[2257] The Court further concluded the FCA imposed damages "that are punitive in nature."[2258] The *Stevens* decision left open the question of whether units of local government could be "persons" for purposes of the FCA.

In *Chandler*, Dr. Janet Chandler brought a *qui tam* action against Cook County, alleging misconduct in the handling of a $5 million federal research grant provided to the Cook County Hospital to study the treatment of drug-dependent pregnant women. Her allegations of misconduct included the treatment of "ghost" participants who did not exist, and tampering with test protocol.[2259] At the district court, Cook County filed a

2247. *Performance-Based Service Acquisition, supra* note 2239, at 1.

2248. Memorandum, Acting Under Secretary of Defense (Acquisition, Technology, and Logistics), to Secretaries of the Military Departments, subject: Performance Based Service Acquisitions 7,8 (19 Aug. 2003), *available at* http://www.fpdc.gov/fpdc/rm2002.pdf (last visited Jan. 29, 2004).

2249. *Id*. at 1. The memo establishes interim goals of twenty-five percent of service dollars awarded for FY 2003 and thirty-five percent of service dollars awarded for FY 2004. *Id*.

2250. *Id*.

2251. *Id*. at 2.

2252. *Id*.

2253. *Id*.

2254. 31 U.S.C.S. §§ 3729-33 (LEXIS 2003). The FCA is often considered the primary civil remedy available for combating procurement fraud. It imposes liability on any "person" who "knowingly presents or causes to be presented," a false or fraudulent claim, or conspires to defraud the government by having a false or fraudulent claim allowed or paid. The act allows for treble damages, in addition to civil penalties in the amount of five to ten thousand dollars per claim. The FCA also allows an individual to bring suit under the *qui tam* provisions of the FCA in the name of the United States. *Id.*

2255. 123 S. Ct. 1239 (2003).

2256. 529 U.S. 765 (2000).

2257. *Id.* The Court reasoned that the presumption of sovereignty could not be disregarded absent an affirmative showing of statutory intent to the contrary. The Court could not find any affirmative indications that the term "person" included states for purposes of *qui tam* liability in either the FCA's text or its legislative history. For the Court, this conclusion was further supported by the rule of statutory construction that if Congress intended to alter the usual constitutional balance between the states and the federal government, Congress must make its intention to do so unmistakably clear in the statute's language. *Id.* at 786-88.

2258. *Id*. at 784-88. Specifically, the Court held "the current version of the FCA imposes damages that are essentially punitive in nature," and as such are "inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.*

2259. *Chandler*, 123 S. Ct. at 1243.

motion to dismiss on the grounds that the county was not a "person" for purposes of the FCA.[2260] The county argued that the FCA's treble damages provision was punitive, and thus violated the long-standing common law rule against assessing punitive damages against municipal units of government.[2261] The judge denied the county's motion, concluding that the FCA treble damages provision was not punitive, and as such did not infringe on municipalities' traditional immunity from punitive damages.[2262]

On appeal to the Seventh Circuit,[2263] the court painstakingly analyzed the Supreme Court's *Stevens* decision and concluded that the reasoning of *Stevens* did not protect municipalities from liability under the FCA. Specifically, the Seventh Circuit held that the presumption that a "person" does not include a state for FCA purposes "cuts the other way for municipalities" because "the Supreme Court has never imposed the same requirement on Congressional efforts to make municipal entities amenable to federal legislation."[2264] The Seventh Circuit's holding conflicted with two other circuits, which held that local governments were not "persons" under the Act.[2265]

The Supreme Court first addressed the term "person" as it was understood with the passage of the original FCA in 1863.[2266] After a brief though thorough examination of the status of municipal corporations at the time of the FCA's passage, the Court concluded "municipal corporations, like private ones, should be treated as natural persons for virtually all purposes of constitutional and statutory analysis," to include potential liability under the FCA.[2267] The Court then examined whether the original Act's criminal provisions[2268] were "inherently inconsistent with local government liability."[2269] The Court quickly dismissed this argument, noting that it was "not anomalous" to require that municipalities comply with the substantive standards of federal laws that impose both civil and criminal sanctions on natural persons.[2270]

The most contentious issue facing the Court was whether the Act's treble damages and potential fines were "punitive" in nature, and if so whether a municipality could be subject to such damages.[2271] The Court noted that even though the punitive character of the treble damages provision was a reason not to read "person" to include a state "it does not follow that the punitive feature has the show of force to show congressional intent to repeal implicitly the existing definition of that word, which included municipalities."[2272] The Court went on to observe that the FCA's damages-multiplier has a compensatory function as well as a punitive one, and that liability beyond actual damages is often necessary for full recovery, since the FCA has no separate provision for consequential damages. In the Court's view, even though the FCA's treble damages and fines are punitive, "the force of this punitive nature in arguing against municipal liability is not as robust as if it were a pure penalty in all cases."[2273]

2260. Chandler v. Hekteon Inst., 35 F. Supp. 2d 1078, 1084 (N.D. Ill. 1999).

2261. *Id.* at 1084-85.

2262. *Id.* at 1087. Shortly after the Supreme Court decided the *Stevens* case, Cook County filed a motion requesting the district court reconsider its decision. In light of the *Stevens* decision, the district court held the treble damages provision of the FCA was punitive, and dismissed the case against Cook County. Doctor Chandler subsequently appealed the second decision to the Court of Appeals for the Seventh Circuit. *See Chandler*, 123 S. Ct. at 1243.

2263. Chandler v. Cook County v. Hekteon Inst., 277 F.3d 969 (7th Cir. 2002).

2264. *Id.* at 980-81.

2265. *See* United States *ex rel*. Dunleavy v. County of Delaware, 279 F.3d 219 (3d Cir. 2002); United States *ex rel.* Garibaldi v. Orleans Parish School Bd., 244 F.3d 486 (5th Cir. 2001).

2266. *Chandler*, 123 S. Ct. at 1243-44.

2267. *Id.* at 1244 (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 687-88 (1978)).

2268. The original act imposed potential criminal liability for "any person not in the military or naval forces of the United States." *Id.* at 1245 (citing Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 12 Stat. 696-98).

2269. *Id.*

2270. *Id.*

2271. The question as to whether the FCA's damages provisions were punitive was central to the county's appeal in that it argued that even if it was a "person" as understood in 1863, the general rule today is that punitive damages may not be assessed against a public municipality unless expressly authorized by statute. *Id.* at 1246.

2272. *Id.* at 1245; *see also False Claims Act: Cities, Counties Open to Treble Damages In Qui Tam Suits Under False Claims Act*, BNA Fed. Cont. Daily (Mar. 11, 2003).

2273. *Chandler*, 123 S. Ct. at 1247.

And Yes, Federal Employees Are Also People (In the Tenth Circuit at Least)

A second case involving the question of standing under the FCA has established, in the Tenth Circuit at least, that a federal employee can bring a *qui tam* suit, even when the alleged misconduct was discovered during the course of the employee's duties. In *United States ex rel Holmes v. Consumer Insurance Group*,[2274] Mary Holmes, the postmaster in Poncha Springs, Colorado brought a *qui tam* suit against the Consumer Insurance Group for falsely certifying bulk mail weight in order to get cheaper rates. Shortly after Holmes filed suit, the government intervened and moved in district court to dismiss Holmes as a party for lack of subject matter jurisdiction under the FCA.[2275] The government asserted, inter alia that Holmes did not qualify as an "original source" of the information contained in her complaint because at the time she filed suit, her allegations were the subject of an ongoing investigation.[2276] The district court granted the government's motion to dismiss Holmes as a party to the suit.[2277]

On appeal before the Tenth Circuit Court of Appeals, the court held that Holmes was not a proper *qui tam* plaintiff.[2278] The court reasoned that under her duties as a government employee, Holmes was part of the then ongoing government investigation of the fraud allegations, and as such was not entitled to pursue the *qui tam* suit.[2279] The court emphasized that it did not hold that federal employees could never be *qui tam* plaintiffs, but that under the facts of this case, the FCA precluded Holmes from pursuing this suit.[2280]

After this decision, Holmes requested a rehearing en banc, and upon rehearing, a split court vacated the prior opinion and reversed the judgment of the district court.[2281] The government argued for the first time that a government employee, who obtains information about fraud in the scope of her employment, is required to report that fraud. Thus, the employee is not a "person" entitled to bring a suit under the FCA "because the acquisition of such information within the scope of a federal employee's job eliminates the critical distinction between the government and the individual *qui tam* plaintiff."[2282] The majority was not impressed with this line of reasoning, holding that even though Holmes

> may have been acting "as the government," i.e., in her official capacity, when she obtained the information that now forms the basis of her *qui tam* complaint, it is apparent that she is acting as a "person," i.e., in her individual capacity, in filing and pursuing this *qui tam* action.[2283]

In the majority's view, "Holmes brought this action in her individual capacity, even though she became aware of the alleged fraud in her capacity as a government employee."[2284]

In her dissent, Chief Circuit Judge Tacha took issue with the majority's conclusion that Holmes could act in her government capacity for purposes of the investigation, but then act in her individual capacity in pursuing the suit.[2285] She reasoned that when an employee obtains information about possible fraud, that employee obtains that information as the government, in which case "the distinction between the individual federal employee and the government disappears."[2286]

2274. 318 F.3d 1199 (10th Cir. 2003) (en banc).

2275. *Id.* at 1201-02.

2276. United States *ex rel.* Holmes v. Consumer Ins. Group, 279 F.3d 1245, 1249 (10th Cir. 2002). The district court reasoned that the government's ongoing investigation demonstrated that the government was capable of pursuing the allegations without the assistance of the relator. Therefore, the court held that allowing a *qui tam* suit would not serve the purposes of the FCA and dismissed Holmes from the suit. *Id.*

2277. *Id.*

2278. *Id.* at 1258.

2279. *Id.* at 1252. Specifically, the court reasoned "that allowing a *qui tam* action to proceed where the relator is a government employee acting as part of an ongoing investigation would destroy the statute's distinction between the government and relator, would contravene the purpose of the FCA, and would create impermissible conflicts of interest for federal employees pursuing such suits." *Id.*

2280. *Id.* at 1258.

2281. United States *ex rel.* Holmes v. Consumer Ins. Group, 318 F.3d 199, 1200 (10th Cir. 2003).

2282. *Id.* at 1210.

2283. *Id.*

2284. *Id.*

2285. *Id.* at 1217-18.

Other Qui Tam *Tidbits*

Although the *Chandler* decision takes the prize for this year's biggest *qui tam* development, the *Year in Review* would not be complete without mention of the *Swift*, *Southland Management* and *Bledsoe* cases. In *Swift v. United States*,[2287] the Supreme Court denied certiorari and let stand a District of Columbia (D.C.) Circuit ruling that the government's decision to dismiss a *qui tam* suit over a relator's objections is not reviewable by a court. In *Swift*, the relator (a former Department of Justice attorney) brought a *qui tam* action in D.C District Court for alleged violations of the FCA. Without moving to intervene, the government moved to dismiss, citing the low dollar value of the case as grounds for dismissal.[2288] The district court then dismissed the complaint and the relator appealed. On appeal, the relator asserted the government denied her a fair hearing on the government's decision to dismiss her claims. The D.C. Circuit was unimpressed and held that the FCA provision authorizing the government to dismiss a *qui tam* suit over a relator's objections[2289] was entirely within the discretion of the government, and could not be second-guessed by a court.[2290]

In *United States v. Southland Management Corp.* (*Southland*),[2291] the Fifth Circuit held that false certifications concerning the habitability of subsidized housing units did not constitute a false claim under the FCA because under the housing assistance payment (HAP) contract, the owners were otherwise entitled to assistance payments. In *Southland*, defendants executed a HAP contract with the Department of Housing and Urban Development (HUD) under which Southland Management Corp. (Southland) promised to keep several housing units "in good repair and condition" in exchange for subsidies and other benefits.[2292] During the course of the HAP contract, Southland repeatedly certified the housing units were in a "decent, safe, and sanitary" condition, even though HUD declared the condition of the units unsatisfactory several times. Although HUD knew the units were in substandard condition, HUD never withheld any subsidies or otherwise declared the units not in good repair and condition. As a result, Southland continued to receive subsidies from HUD until financial problems forced Southland to sell the units.[2293]

Upon contract termination, the government initiated a FCA suit against *Southland* on the grounds that the vouchers submitted between 1995 through 1997 falsely certified the properties were "decent, safe, and sanitary."[2294] The district court held that the government had presented no evidence that the statements Southland made about the housing units' condition were material, because HUD made the payments regardless of their condition. The district court also held that Southland did not knowingly make false claims because Southland knew that HUD knew about the condition of the apartments.[2295] On appeal, the Fifth Circuit affirmed the district court's judgment. Specifically, the court concluded that because the HAP contract provided that Southland continued to be entitled to housing assistance payments until HUD notified it in writing that the housing assistance payments would be abated (which HUD never did), Southland was entitled to the housing assistance payments sought. Thus, it made no false claims under the FCA as a matter of law.[2296]

Finally, in *Bledsoe v. Community Health Systems Inc.*,[2297] the government refused to intervene in a relator's *qui tam* whistleblower suit, and subsequently entered into a settlement agreement with the subject of the suit, Community Healthcare Systems, Inc. (CHS).[2298] The settlement agreement provided the government would receive over $30 million from CHS as

2286. *Id.* at 1218.

2287. 318 F.3d 250 (D.C. Cir. 2003), *cert. denied*, 123 S. Ct. 2622 (2003).

2288. *Id.* at 251.

2289. *See* 31 U.S.C.S. § 3730(c)(2)(A) (LEXIS 2003).

2290. *Swift*, 318 F.3d at 253-54; *see also False Claims Act: High Court Lets Stand Ruling That Government Decision To Dismiss FCA Lawsuit Is Not Subject to Review*, BNA Fed. Cont. Daily (July 7, 2003).

2291. 326 F.3d 669 (5th Cir. 2003).

2292. *Id.* at 672-73.

2293. *Id.* at 673-74.

2294. *Id.* at 674.

2295. United States v. Southland Mgmt. Corp., 95 F. Supp. 2d 669, 684 (S.D. Miss. 2000).

2296. *Southland*, 326 F.3d at 677. For further discussion of the *Southland* decision *see* Ralph C. Nash & John Cibinic, *False Claims: The Effect of a Contract* Remedy, 17 Nash & Cibinic Rep. 6, ¶ 35 (2003); *see also* United States v. Taber Extrusions, 2003 U.S. App. LEXIS 17896 (8th Cir. 2003) (reversing the judgment against defendant contractor because genuine issues existed as to the government's knowledge and whether the defendant's alleged fraudulent actions caused the government to make progress payments).

2297. 342 F.3d 634 (6th Cir. 2003).

compensation for Medicare overpayments, but expressly excluded the relator, Dr. Robert Adams, from collecting any share of the settlement.[2299] In district court, Dr. Adams filed a motion seeking a share of the settlement.[2300] The district court denied the motion, however, on appeal the Sixth Circuit reversed the district court, holding the government's settlement negotiations amounted to an "alternate remedy" under the FCA.[2301] Given that the government pursued an "alternate remedy" in lieu of intervening in the suit, the wording of the FCA preserved the relator's rights to share in the proceeds of the settlement.[2302]

Another Year for Record Recoveries

In December 2002, the DOJ announced that during FY 2002, the United States recovered a record $1.2 billion from lawsuits and investigations of fraud against the federal government, primarily under the FCA.[2303] While this is a considerable amount of money, during FY 2003, the DOJ tallied a record $2.1 billion from such settlements.[2304]

Topping the list for this year's recovery is HCA Inc. (HCA), which on 26 June 2003 agreed to pay the federal government $641 million to settle numerous suits alleging HCA systematically defrauded Medicare, Medicade, and other federally funded healthcare programs through numerous schemes dating back to the late 1980s.[2305] Since 2000, HCA has agreed to pay the federal government a total of $1.7 billion to settle various civil, administrative, and criminal allegations.[2306] Commenting on the latest settlement, Senate Finance Committee Chairman Charles E. Grassley (R-Iowa) stated "there's no way to know exactly how much HCA pocketed. This case is so complicated, and so huge, that no one will ever know exactly how much HCA took."[2307]

Just a notch down on the fraud settlement list is AstraZeneca. On 20 June 2003, AstraZeneca announced it would pay the federal government $355 million to settle criminal and civil charges that it gave physicians free samples of its prostate cancer drug Zoladex knowing that doctors would then bill Medicare for the wholesale price of the drug.[2308] Abbott Laboratories (Abbott), one of AstraZeneca's competitors, did not have long to gloat. Three days later, Abbott agreed to pay the federal government a $400 million civil settlement and $200 million in criminal fines stemming from an elaborate undercover federal investigation into durable medical equipment fraud.[2309] Bayer and GlaxoSmithKline were also in the settlement mode, having agreed to pay the federal government a combined total of $344 million to settle allegations they illegally repackaged drugs and then sold the drugs at prices below those paid by the federal government and state Medicaid programs.[2310] And on 12 June 2003, the DOJ announced that Endovascular Technologies would plead guilty to ten felony charges and pay $92.4 million to settle criminal and civil charges that it covered up thousands of incidents in which a medical device it manufactured malfunctioned.[2311]

2298. *Id.* at 639.

2299. *Id.*

2300. *Id.* at 639-40.

2301. *Id.* at 649; *see* 31 U.S.C.S. § 3730(c)(5) (LEXIS 2003). The code provides in relevant part:

> [T]he Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

31 U.S.C.S. § 3730(c)(5).

2302. *Bledsoe*, 342 F.3d at 649.

2303. *False Claims Act: DOJ Announces Recovery of $1.2B From False Claims Lawsuits, Investigations*, BNA Fed. Cont. Daily (Jan. 2, 2003).

2304. *See* Press Release, Department of Justice, Justice Dept. Civil Fraud Recoveries Total $2.1 Billion for FY 2003, False Claims Act Recoveries Exceed $12 Billion Since 1986 (Nov. 10, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm.

2305. *Id.*

2306. *False Claims Act: DOJ Settles Largest Healthcare Fraud Case; HCA Inc. to Pay Record Total of $1.7Billion*, BNA Fed. Cont. Daily (June 30, 2003).

2307. *Id.*

2308. *Healthcare Fraud: AstraZeneca Will Pay $355M to Settle Drug Pricing, Marketing Charges*, BNA Fed. Cont. Daily (July 11, 2003).

2309. *Medicare Fraud: Abbott Agrees to Pay $600 Million After Nutritional Products Bundling Sting*, BNA Fed. Cont. Daily (July 24, 2003).

2310. *Healthcare Fraud: Two Drug Companies Will Pay $344M To Settle Whistleblower Allegations*, BNA Fed. Cont. Daily (Apr. 28, 2003).

Although most of this year's big settlements involve the healthcare industry, there are a few notable defense industry standouts. On 10 June 2003 Northrop Grumman (Northrop) announced it agreed to pay the government $111.2 million to settle a *qui tam* suit alleging it improperly shifted various costs from non-DOD to DOD contracts. The relator in this case, Richard Bagley, is slated to receive $27.2 million, or 24.5 percent of the total recovery.[2312] On 20 August 2003, Northrop also agreed to pay the government $80 million to settle charges it sold defective equipment to the Navy and misclassified costs on government contracts.[2313] On 29 August 2003, Lockheed Martin agreed to pay the government $37.9 million to settle allegations it inflated costs associated with four Air Force contracts.[2314]

MCI/WorldCom (Finally) Suspended

Last year's *Year in Review* reported the GSA's suspension of Enron and Arthur Andersen from future government procurements.[2315] The GSA's decision had little impact because neither Enron nor Arthur Andersen did much business with the federal government. But adding to the controversy of this action was the GSA's decision not to suspend or disbar MCI/WorldCom, who was, and still is a major government contractor.[2316] Over one year later, on 31 July 2003, the GSA announced it had suspended WorldCom from future federal procurements, pending debarment proceedings. The reasons cited for the suspension were weaknesses in "accounting controls" and "integrity and business ethics."[2317]

No one within the government procurement community can say this action was a surprise. Many GSA critics have accused the agency of dragging its feet on the matter.[2318] In response to the GSA's announcement, Senator Susan Collins (R-Maine), Chairman of the Senate Governmental Affairs Committee stated, "I was very surprised that the General Services Administration did not undertake this analysis earlier."[2319]

Ironically, one of the GSA's most vocal critics, Sprint Corp., was facing possible disbarment over what Sprint insists was an "unintentional billing error."[2320]

Cheaters Never Prosper: Air Force Strips Boeing of $1 Billion in Potential Revenue

On 24 July 2003, the Air Force announced its suspension of three Boeing Integrated Defense System business units and three former Boeing employees from future government contracts.[2321] The Air Force also reduced, from nineteen to twelve, Boeing's "Buy I" launches under the Evolved Expendable Launch Vehicle (EELV) contract. These launches are to be transferred to Lockheed Martin. The decision is expected to cost Boeing approximately $1 billion in lost revenue.[2322] The suspensions came a month after the government formally charged two former Boeing managers with conspiracy to steal Lockheed Martin trade secrets related to the multi-billion dollar EELV program.[2323]

According to the criminal complaint, Kenneth Branch and William Erskine were each charged with conspiracy, theft of trade secrets, and violating the Procurement Integrity Act.[2324] Branch and Erskine were former managers of Boeing's EELV program, which is a rocket launch vehicle system used to transport commercial and government satellites into space.[2325]

2311. *See* Press Release, Department of Justice, United States Attorney's Office, Northern District of California, (untitled) (June 12, 2003), *available at* http://www.usdoj.gov/usao/can/press/html/2003_06_12_endovascular.html. In pleading guilty, the defendant admitted that it failed to file 2628 Medical Device Reports, each representing an incident in which the "Ancure" device malfunctioned or its use was associated with death or serious injury. This figure was out of a total of 7632 medical devices that were sold. Among the unreported incidents were twelve deaths and fifty-seven emergency procedures. *Id.*

2312. *False Claims Act: Northrop Grumman Pays $111 Million to Settle Qui Tam Case Involving TRW*, BNA Fed. Cont. Daily (June 10, 2003).

2313. *False Claims Act: Northrop Grumman Pays $80 Million to Settle 2 Whistleblower Cases*, BNA Fed. Cont. Daily (Sept. 11, 2003).

2314. *False Claims Act: Lockheed Martin to Pay $37.9 Million in LANTIRN Contract Whistleblower Case*, BNA Fed. Cont. Daily (Aug. 29, 2003).

2315. *2002 Year in Review, supra* note 57, at 191.

2316. MCI/WorldCom's federal revenue this FY is estimated to be at about $800 million. *See* Shane Harris, *GSA Bars MCI from Federal Contracts*, Gov't Exec. Mag., July 31, 2003, *at http://www.govexec.com/dailyfed/0703/073103h2.htm*.

2317. *Suspension and Debarment: GSA Proposes Debarment for MCI, Suspends Telecommunications Giant*, BNA Fed. Cont. Daily (Aug. 4, 2003).

2318. *Id.*

2319. *Id.*

2320. *Suspension and Disbarment: GSA Weighing Whether to Debar Sprint For Overcharging on Telecom Contract*, BNA Fed. Cont. Daily (Aug. 6, 2003).

2321. *Suspension and Debarment: Air Force Suspends Boeing Contracts In Wake of Charges It Stole Lockheed Data*, BNA Fed. Cont. Daily (July 28, 2003).

2322. *Id.*

In 1997, the Air Force announced that it wanted to procure EELV services from both Boeing and Lockheed Martin. Because of the substantial potential profits to be made by using EELVs to launch private communication satellites, the Air Force wanted both aerospace companies to invest their own money in the program. The Air Force agreed to provide both Boeing and Lockheed Martin $500 million each for development costs associated with their respective EELV programs, and both Boeing and Lockheed Martin agreed to pay any additional development costs.[2326]

According to an affidavit in support of the criminal complaint, Erskine recruited Branch away from rival Lockheed Martin in 1996. In exchange for the proprietary Lockheed Martin documents, Branch received employment at Boeing at a higher salary.[2327] On 20 July 1998, Boeing and Lockheed Martin submitted bids for the twenty-eight EELV Air Force contracts. The total value of the contracts was approximately $2 billion. On 16 October 1998, based largely on price and risk assessment, the Air Force awarded Boeing nineteen out of the twenty-eight contracts. Lockheed Martin received the other nine.[2328] In mid-June 1999, Erskine told another Boeing employee that he had hired Branch because Branch came to him with an "under-the-table" offer to hand over the entire Lockheed Martin EELV proposal presentation in exchange for the position at Boeing. Later in June 1999, a Boeing attorney assigned to interview Branch and Erskine regarding allegations that they possessed proprietary Lockheed Martin documents conducted a search of Erskine's and Branch's offices. According to the affidavit, the attorney found a variety of documents marked "Lockheed Martin Proprietary/Competition Sensitive." In early August 1999, Boeing terminated the employment of Branch and Erskine.[2329]

According to U.S. Attorney Debra W. Yang, "by covertly using a competitor's secret information, they caused harm not only to Lockheed Martin, but also to the Air Force and taxpayers who finance government operations. Their improper conduct had huge ramifications because of the value of the contract."[2330] If Branch and Erskine are convicted on all three counts in the complaint, both could face a maximum penalty of fifteen years in federal prison and fines up to $850,000. In the mean time, Boeing has been stripped of approximately $1 billion in potential revenue, and faces a separate lawsuit filed by Lockheed Martin.[2331]

"Alleged" No More: Colonel Moran Pleads Guilty, Sentenced

Last year's *Year in Review* also reported on an alleged bribery scheme whereby Colonel (COL) Richard Moran purportedly received more than $750,000 in bribes from at least two Korean contractors in exchange for his influence in awarding several government contracts.[2332] Colonel Moran subsequently plead guilty to several charges and has been sentenced to fifty-four months in federal prison.[2333]

According to the indictment, the scheme encompassed three contracts that were awarded to Aulson and Sky Construction Co., Ltd. (A&S), a Korean contractor. The contracts involved

2323. Press Release, Department of Justice, United States Attorney's Office, Central District of California, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets From Lockheed Martin (June 25, 2003), *available at* http://www.usdoj.gov/criminal/cybercrime/branchCharge.htm [hereinafter DOJ Press Release]; *Trade Secrets: U.S. Attorney Charges Boeing Managers With Stealing Lockheed Martin Secrets*, BNA FED. CONT. DAILY (June 27, 2003) [hereinafter *U.S. Attorney Charges Boeing Managers*].

2324. DOJ Press Release, *supra* note 2323.

2325. *Id.*

2326. *Id.*

2327. *Id.*

2328. *Id.*

2329. *Id.*

2330. *Id.*

2331. *See U.S. Attorney Charges Boeing Managers*, *supra* note 2323. From an examination of recent events, one may argue that suspensions are not what they used to be. On 29 August 2003, the Air Force waived the suspension of the Boeing business units and awarded Boeing a $56.7 million contract to deploy a Delta II rocket carrying a Global Positioning Satellite. The Air Force cited a "compelling need," explaining "this award required an exception to the existing suspension of the three Boeing business units." *See Suspension and Debarment: Air Force Extends Boeing Contract Despite Ban on More Government Work*, BNA FED. CONT. DAILY (Sept. 3, 2003); *see also* Renae Merle, *Boeing Gets Waiver From Air Force*, *Wash. Post*, Aug. 30, 2003, at E1. On 1 October 2003, the Air Force waived the suspension a second time and awarded Boeing a contract to launch a spy satellite. The Air Force stated the mission was critical to national security, and "Boeing is the only launch provider that can currently meet the requirements of the mission." *See* Renae Merle, *Boeing Wins Contract Despite Suspension*, WASH. POST, Oct. 1, 2003, at E3.

2332. *2002 Year in Review*, *supra* note 57, at 191.

2333. Press Release, Federal Bureau of Investigations, U.S. Army Colonel Sentenced to Prison For Taking Bribes From South Korean Companies Seeking Military Contracts (June 9, 2003), *available at* http://losangeles.fbi.gov/2003/la060903-2.htm [hereinafter FBI Press Release].

family housing at Osan Air Base, as well as barracks at Camp Carroll and several facilities collectively called "Area I." Even though A&S's original bids were not the lowest on any of the contracts, Moran influenced the award of the contracts after A&S agreed to pay Moran several bribes. The total value of the contracts was nearly $25 million.[2334] The government awarded a second company mentioned in the indictment, IBS Industries Company, Ltd. (IBS), a $14 million portion of a $112 million contract to provide security guards at several U.S. military bases in Korea.[2335]

By pleading guilty on 29 January 2003, Moran acknowledged that he agreed to receive more than $750,000 in bribes from A&S in exchange for the family housing contract, the Camp Carroll contract, and the Area I contract. The Army Criminal Investigation Division found more than $700,000 when investigators executed a search warrant at Moran's residence on Yongsan Army Base on 16 January 2002. Most of this cash was in $100 bills found in Moran's bed.[2336]

District Judge Alicemarie Stotler sentenced Moran on 9 June 2003 to fifty-four months in federal prison. Judge Stotler stated that although Moran had a "stellar military record," his bribery schemes rendered him a "profound disappointment to society." Moran's wife, Gina Moran, who was also involved in the bribery scheme, was sentenced to two years of probation.[2337]

Close, But No Cigar

Finally, a recent ASBCA case reminds the government that fraud is a ground for default only if the fraudulent conduct is specific to the contract being terminated. In *Giuliani Associates, Inc.*,[2338] the National Aeronautics and Space Administration (NASA) defended its termination for default of one of the appellant's contracts based on a conviction for false statements[2339] involving another NASA contract. NASA argued since Giuliani Associates performed both contracts at the same time, at the same place, with the same personnel, the appellant's false statement concerning one contract tainted the other.[2340]

The ASBCA was unconvinced, noting "[r]espondent has not cited, and our research has not uncovered, any decision dismissing an appeal or suit, or sustaining a default termination, on the basis of a fraud-tainted contract other than the contract in issue in the pending appeal or suit . . . ."[2341]

Major James Dorn.

Taxation

Texas Sale for Resale Exemption Broadened to Include Overhead Items

Since 1975, federal contractors in Texas have been exempt from paying sales tax on their purchases of items charged as direct costs to federal contracts (sale for resale exemption).[2342] Recently, the Texas Court of Appeals, in *Strayhorn, et al. v. Raytheon E-Systems Inc., et al.*,[2343] broadened that exemption to include purchases of overhead items charged as indirect costs.

The Texas Comptroller argued that Raytheon E-Systems Inc.'s (Raytheon) purchases of tangible overhead items charged as indirect costs to multiple federal contracts did not qualify for the sale for resale exemption because Raytheon purchased these items for its own consumption and use and there is insufficient evidence of transfer of title to the federal government.[2344]

Raytheon maintained that it sells its overhead items to the federal government, pointing to the title vesting provisions of the Progress Payments clause[2345] for its fixed price contracts and the Government Property clause[2346] for its cost-type contracts.

2334. *Id; see also Corruption: Army Colonel, Wife, Sentenced In South Korean Bribery Case*, BNA Fed. Cont. Daily (June 11, 2003).

2335. FBI Press Release, *supra* note 2333. After the government awarded that portion of the contract to IBS in October 2001, the company's chief executive officer paid a co-conspirator, Joseph Hur, $20,000 in cash, half of which was given to Moran. Later, Hur demanded additional payments from IBS. IBS paid Hur in Korean Won checks, and Hur again gave half the proceeds to Moran. *Id.*

2336. *Id.*

2337. *Id.*

2338. Giuliani Assocs., Inc., ASBCA Nos. 51672, 52538, 2003 ASBCA LEXIS 92 (Sept. 9, 2003).

2339. *See* 18 U.S.C.S. § 1001 (LEXIS 2003).

2340. *Giuliani*, 2003 LEXIS 92, at *39-40.

2341. *Id.* at *41.

2342. Tex. Tax Code Ann. § 151.302(a) (2002); Day & Zimmerman, Inc. v. Calvert, 519 S.W.2d 106, 110 (Tex. 1975).

2343. 101 S.W.3d 558 (Tex. App. 2003).

2344. *Id*. at 562-63.

The court rejected the comptroller's arguments, noting that the Texas tax code does not require a sale to hinge on control and use of items and that the passage of title under the terms of the contract amounts to a sale. The court concluded that Raytheon was entitled to a sales tax refund under the sale for resale exemption for purchases of tangible overhead items charged as indirect costs to contracts with the federal government.[2347]

Ambiguous Tax Information Raises Duty to Inquire

In *C.W. Over & Sons, Inc. v. United States*,[2348] a solicitation issued by the National Security Agency (NSA), contained a non-standard tax clause notifying offerors that certain transactions under the contract may be exempt from state or local taxes and provided offerors with the procuring office's Maryland State Tax Exemption Certificate Number.[2349] The standard tax clause for fixed-price contracts[2350] was also included. The contractor did not include an allowance for sales tax in its portion of the price,[2351] having interpreted the special tax clause to mean that the entire project was exempt from sales tax. The contractor sought reimbursement for sales taxes it absorbed, on the basis that its proposal made it clear that it was not including sales tax, and that the NSA had a duty to correct the contractor's misunderstanding.

The court found that the contractor's interpretation of the special tax clause was unreasonable because the clause did not purport to suggest that the NSA is entirely tax exempt. Further, because the court believed that the special tax clause, when read in conjunction with the standard tax clause (stating that the contract price includes all applicable state taxes)[2352] created a patent ambiguity, this raised a duty on the contractor to inquire. Having failed to do so, the patent ambiguity must be construed against the contractor.

Italian Employment Tax Credit

An Italian joint venture, Servizi Aeroportuali, Srl (SA), challenged an award of a contract to provide air terminal services at Sigonella Naval Air Station, Italy.[2353] SA referred in its offer to savings from an unexplained Italian "Employment Tax Credit." In evaluating SA's proposal, the contracting officer contacted a local law firm and learned that not only would such a credit not be permitted under Italian law but that acceptance of such a plan could subject agency representatives to criminal prosecution. When SA was subsequently so informed, it eliminated the credit and revised its price upward.[2354]

In its protest against award of the contract to another firm, SA complained of disparate treatment, because the contracting officer never discussed the Employment Tax Credit with the other offeror.[2355] The Comptroller General disagreed, finding this a reasonable exercise of judgment on the part of the contracting officer, given that the other offeror's proposal contained no reference to this tax credit, and noting that during the course of the protest, the successful offeror provided a declaration that its proposal did not rely on any Italian Employment Tax Credit.[2356]

Utility Gross-Up Fee is Not an Unconstitutional Tax

The Comptroller General recently addressed a request from the Architect of the Capitol (AOC) on the availability of appropriated funds to pay Potomac Electric Power Company (Pepco)

2345. FAR, *supra* note 30, at 52.232-16(d). Under the clause, title to property acquired or produced by the contractor that is properly chargeable to the contract, vests in the government. *Id*.

2346. *Id*. at 52.245-5(c). Pursuant to the clause, title to property, the cost of which is reimbursable to the contractor, vests in the government. *Id*.

2347. *Strayhorn*, 101 S.W.3d at 570.

2348. 54 Fed. Cl. 514 (2002).

2349. Why it was deemed necessary to include this information is unclear; this would have documented the procuring agency's status as a tax-exempt entity, rather than establish tax-exempt status for the contractor.

2350. FAR, *supra* note 30, at 52.229-3, Federal, State, and Local Taxes.

2351. *C.W. Over & Sons*, 54 Fed. Cl. at 514. The contract was an ID/IQ Job Order Contract, in which the NSA supplied part of the price in a Unit Price Book (UPB) and part was to be supplied by the contractor. The case also involved an issue, not discussed here, as to whether the UPB included taxes. *Id*.

2352. *Id*.

2353. Servizi Aeroportuali, Srl, B-290863, 2002 U.S. Comp. Gen. LEXIS 215 (Oct. 15, 2002).

2354. *Id*. at *9.

2355. *Id*. at *10.

2356. *Id*.

for the relocation of its facilities on Capitol grounds and to pay a "gross-up" fee assessed on the costs of relocation.[2357] The Comptroller General held that the amount specified as a "gross-up" fee represents the cost of Pepco's additional income taxes and is not a direct tax on the AOC. The legal incidence of any additional state or local income taxes falls upon the utility as "vendor" and not upon the federal government.[2358] Thus, to the extent Pepco is permitted by the District of Columbia Public Service Commission to recover such costs through assessment of a "gross-up" fee, appropriated funds are available for such a purpose.[2359]

Munitions Services Not Taxable in New Mexico

Vendors in New Mexico are allowed a deduction from their gross receipts tax[2360] for receipts from services provided to out-of-state buyers.[2361] The deduction does not apply, however, if the out-of-state buyer either makes initial use of, or takes delivery of, the "product of the service" in New Mexico. TPL, Inc. (TPL) claimed the deduction for receipts from its contract with the Army Industrial Operations Command (IOC) to demilitarize and dispose of weapons.[2362] The weapons were shipped from the IOC into New Mexico, where TPF performed the demilitarization at a decommissioned military base and later disposed of the weapons.

TPL lost at the administrative and lower court level. The New Mexico Supreme Court, however, relying in large part on the fact that the IOC is located in Rock Island, Illinois, found that the IOC neither made initial use of or took delivery of the product or service in New Mexico because the IOC had no office, employees, or agents in New Mexico and the IOC was not in New Mexico when TPL completed its services.[2363]

Mrs. Margaret Patterson.

Contract Pricing

Congress Enacts Guidance Requirements for TINA Waivers

The Truth in Negotiations Act (TINA), allows contracting officers, under certain conditions, to request certified cost and pricing data to determine if the contract award or modification is reasonably priced.[2364] Last year's *Year in Review* noted that the GAO had reported that "[t]here was a wide spectrum in the quality of the data and analysis being used" to determine price reasonableness when the head of the contracting activity (HCA) waived certified cost or pricing data.[2365] Well, Congress listened to its investigative arm. Section 817 of the Bob Stump National Defense Authorization Act for FY 2003 requires "the Secretary of Defense . . . [to] issue guidance on the circumstances under which it is appropriate to grant an exceptional case exception or waiver with respect to certified cost and pricing data."[2366] Section 817 also requires that the guidance include the following determination requirements for granting an exception for certified cost and pricing data:

> (1) the property or services cannot reasonably be obtained under the contract, subcontract, or modification, as the case may be, without the grant of the exception or waiver;
> (2) the price can be determined to be fair and reasonable without the submission of certified cost and pricing data . . . and
> (3) there are demonstrated benefits to granting the exception or waiver.[2367]

Congress also required an annual report from the DOD on the commercial item exceptions and the exceptional case exceptions granted during the year for those contracts, subcontracts, or modifications greater than $15,000,000.[2368] The report should include the basis for the exception and "the specific steps taken to ensure price reasonableness."[2369]

2357. Use of Appropriated Funds to Pay for the Relocation of Utilities, Comp. Gen. B-300538, Mar. 24, 2003. For additional discussion of this opinion, see *infra* Section V.D Construction Funding.

2358. *Id*. As noted by the Comptroller General in his opinion, the imposition of federal taxes upon federal entities does not raise constitutional concerns. *Id.*

2359. *Cf.* United States v. Delaware, 958 F.2d 555 (3d Cir. 1992) (finding a similar tax unconstitutional when it was passed on to governmental customers).

2360. A gross receipts tax is a tax levied on total receipts of business, which is generally passed on to the consumer.

2361. NMSA 1978, sec. 7-9-57 (1989, prior to 1998 & 2000 amendments).

2362. TPL, Inc. v. New Mexico Taxation & Revenue Dep't, 64 P.3d 474 (N.M. 2003).

2363. *Id*.

2364. *See* 10 U.S.C.S. § 2306a (LEXIS 2003); 41 U.S.C.S. § 254b.

2365. *2002 Year in Review, supra* note 57, at 203 (quoting and discussing Gen. Acct. Off., Rep. No. GAO-02-502, *Contract Management: DOD Needs Better Guidance on Granting Waivers for Certified Cost or Pricing Data* (Apr. 2002)).

2366. Pub. L. No. 107-314, § 817, 116 Stat. 2610 (2002).

2367. *Id.*

Sugar Daddy Talks—DOD Listens and Complies

Subsequent to Congress' direction for the DOD to provide guidance on TINA waivers, the Director of Defense Procurement, Ms. Deidre Lee, issued a memorandum dated 11 February 2003 providing guidance "regarding the circumstances under which it is appropriate to grant such a waiver."[2370] Noting that FAR section 15.403-1(c)(4) authorizes an HCA to waive the requirement for submission of certified cost or pricing data in exceptional cases, Ms. Lee directed HCAs to comply with the three determination requirements established through section 817 of the FY 2003 Defense Authorization Act.[2371] Ms. Lee also required the memo's addressees to submit an annual report to her office identifying all TINA waivers granted during the FY valued at $15 million or greater.[2372] The DOD will consolidate these reports for an annual reporting requirement to Congress in accordance with section 817.[2373]

Ms. Lee also took the opportunity to address a matter related to the GAO's concern that "[t]here was a wide spectrum in the quality of the data and analyses used to support TINA waivers."[2374] Citing the GAO's concerns, she addressed the two following issues: "(1) whether a TINA waiver can be granted for part of a proposed price. And (2) whether unpriced options can be the subject of TINA waivers."[2375] Ms. Lee determined that agencies could grant TINA waivers for some elements of a contractor's proposed price if that portion of the cost proposal can be clearly identified "as separate and distinct from the balance of the contractor's proposal."[2376] She reminded the HCAs, however, that in compliance with the latest TINA waiver guidance, they "must address why it is in the government's best interests to partially waive TINA, given that the contractor has no objection to certifying the balance of its cost proposal."[2377]

Ms. Lee then addressed the GAO's second issue by concluding that "an unpriced option cannot be subject to TINA certification requirements" because there is no cost or pricing data to certify.[2378] Accordingly, HCAs could only consider waivers after the contractor submits its price proposal.[2379]

The Air Force Preps the TINA Waiver Battleground

By memorandum dated 26 March 2003, the Air Force Assistant Secretary for Acquisition, Mr. Charlie E. Williams, Jr., provided supplemental guidance to Ms. Lee's TINA waiver guidance.[2380] Mr. Williams noted that, in the past, the Air Force had granted waivers for certified cost or pricing data because price reasonableness determinations could be made using price analysis techniques and there was a benefit in saving proposal costs or time. Referencing the three required determinations for TINA waivers established by Ms. Lee's memo, Mr. Williams noted that the Air Force's past practice fulfilled the second and third determinations as follows: "the price can be determined reasonable without submission of cost or pricing data and . . . there are demonstrated benefits to granting the waiver."[2381] He noted, however, that the first determination (e.g., "the property or service cannot reasonably be obtained without the waiver") may limit the Air Force's ability to grant future TINA waivers.[2382] Accordingly, Mr. Williams directed that to justify a waiver, "[t]here must be compelling rationale

2368. *Id*.

2369. *Id.*

2370. Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors, Defense Agencies et. al., subject: Exceptions and Waivers to the Truth In Negotiations Act (11 Feb. 2003) [hereinafter TINA Exceptions/Waivers Memo].

2371. *Id*.

2372. *Id*.

2373. *Id*.

2374. *See 2002 Year in Review*, *supra* note 57, at 203 (quoting and discussing Gen. Acct. Off., Rep. No. GAO-02-502, *Contract Management: DOD Needs Better Guidance on Granting Waivers for Certified Cost or Pricing Data* (Apr. 2002)).

2375. TINA Exceptions/Waivers Memo, *supra* note 2370.

2376. *Id*.

2377. *Id*.

2378. *Id*.

2379. *Id*.

2380. Memorandum, Air Force Deputy Assistant Secretary, Contracting, and Assistant Secretary, Acquisition, to ALL MAJCOM/FOA/DRU (Contracting), subject: Exceptions and Waivers to the Truth In Negotiations Act – Contract Policy Memo 03-C-08 (26 Mar. 2003).

2381. *Id*.

and documentation that demonstrates that obtaining cost or pricing data is not reasonable . . . ."[2383]

Major Karl Kuhn.

Nonappropriated Funds (NAF) Contracting

Again I Say: UNICOR Is a NAFI

Last year's *Year in Review* reported that the COFC had determined UNICOR[2384] was a nonappropriated fund instrumentality (NAFI), and, therefore, the court lacked jurisdiction to decide a complaint against the organization.[2385] This year, in *Core Concepts of Florida, Inc. v. United States*, the CAFC agreed.[2386] The CAFC examined the COFC's jurisdiction under the Tucker Act and concluded that "Tucker Act jurisdiction exists unless there is a 'firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts of the agency."[2387] The CAFC concluded UNICOR "does not operate with appropriated funds" but is a self-sufficient corporation.[2388] Interestingly, the critical question for the CAFC in determining UNICOR's NAFI status was not whether UNICOR was self-sufficient, but rather whether Congress clearly expressed its intent to keep UNICOR funds separate from the general federal revenues.[2389] The CAFC reviewed UNICOR's enabling legislation[2390] and concluded Congress had manifested such an intent since the legislation requires UNICOR funds to "be deposited into the U.S. Treasury to the credit of" UNICOR's operating fund.[2391]

The court rejected Core Concepts' of Florida (Core Concepts) reliance on two GAO opinions. The first opinion characterized UNICOR's operating fund as a continuing appropriation.[2392] The other opinion stated "that all 'revolving funds,' including the Prison Industry Fund, are appropriations."[2393] The CAFC held, however, that the GAO opinions were not relevant in determining jurisdiction under the Tucker Act and concluded "Core Concepts' reliance on the GAO's view that all revolving funds are appropriations is misplaced."[2394] Core Concepts' final attempt to establish Tucker Act jurisdiction, through the Contract Disputes Act's (CDA) reimbursement provision, also failed.[2395] The court reiterated that the CDA only applies to NAFIs specifically identified in the Tucker Act. The CAFC affirmed the COFC ruling and concluded UNICOR contracts "are not expressly deemed contracts with the United States" and therefore the COFC lacked jurisdiction over Core Concepts complaint.[2396] The CAFC later denied Core Concepts' request for a panel rehearing and a rehearing en banc.[2397]

2382. *Id*.

2383. *Id*.

2384. UNICOR is the brand name for Federal Prison Industries (FPI), a government owned corporation operated by the Justice Department's Federal Bureau of Prisons. The FPI program provides work simulation programs and training opportunities for inmates. The corporation primarily derives its funds from product sales. *See also supra* Section II.F. Simplified Acquisitions.

2385. *2002 Year in Review, supra* note 57, at 210.

2386. 327 F.3d 1331 (Fed. Cir. 2003).

2387. *Id*. at 1334.

2388. *Id*. at 1335. Core Concepts of Florida, Inc. (Core Concepts) argued UNICOR's operating fund, the Prison Industry Fund (PIF), originally derived from appropriated funds. The CAFC noted, however, that subsequent to UNICOR's inception in 1934, it repaid the debt and "has never received any appropriations from Congress since that time." *Id.*

2389. *Id*. at 1336.

2390. 18 U.S.C.S. § 4126 (LEXIS 2003).

2391. *Core Concepts*, 327 F.3d. at 1336.

2392. *Id*. at 1337.

2393. *Id*. A revolving fund is "a single account to which receipts are credited and from which expenditures are made -- is composed of appropriated funds that are available for expenditure without further congressional action." *Id*. at 1338.

2394. *Id*. The court reasoned that Core Concepts' reliance on the GAO opinion did not change the conclusion that a judgment against UNICOR would only obligate UNICOR's funds, which are distinct from the Treasury's general fund. *Id.*

2395. *Id*.

2396. *Id*. at 1339.

2397. Core Concepts of Florida, Inc. v. United States, 2003 U.S. App. LEXIS 13904 (June 17, 2003).

Maybe It Is, Maybe It Isn't

Last year, in *American Management Systems, Inc. v. United States*,[2398] the COFC held the Federal Retirement Thrift Board (Thrift Board) is not a NAFI, and, therefore, the COFC will hear disputes arising under contracts with the Thrift Board.[2399] Specifically, the COFC concluded "the Thrift Board is a governmental agency whose administrative expenses are payable out of public funds made available through a congressional appropriation" and thereforeit is not a NAFI.[2400] The Thrift Board failed to convince the court that it is not granted any appropriations of its own. While the funds originate as appropriations from employer contributions, the funds lose their character as appropriated funds and become the property of the fund participants once applied to employee accounts.[2401]

This year, in A*merican Management Systems, Inc, v. United States*,[2402] however, the COFC granted the Thrift Board's motion for certification of an interlocutory appeal. The issue was whether the Thrift Board really is an appropriated fund instrumentality when access to appropriated funds for payment of the Thrift Board's administrative expenses is conditional and limited.[2403] The COFC ruled the jurisdictional issue is an appropriate question for certification.[2404]

A History Lesson

For an analysis of the origin of NAFIs, NAFI case law development, and what constitutes an appropriation, *AINS, Inc. v. United States* (*AINS*)[2405] is a good read. In *AINS*, the U.S. Mint (Mint) awarded a contract to AINS for computer services.[2406] AINS alleged the Mint breached the contract and so sought an equitable adjustment.[2407] The Mint moved to dismiss the complaint, arguing that because the Mint was a NAFI, the COFC lacked jurisdiction.[2408] After a lengthy review of the doctrine of sovereign immunity, the COFC ultimately concluded the Mint was a NAFI.[2409] The court recognized the hardship the decision created for AINS but also acknowledged "it is not the duty of a court in our republic to act as a super-legislature, as a Platonic Guardian, to cure the ills of constitutional democracy."[2410] The COFC did suggest, however, that "it is perhaps time for Congress to revisit the issue" because the last time Congress amended the Tucker Act authorizing COFC jurisdiction to certain NAFIs was 1970.[2411]

Major Bobbi Davis.

FISCAL LAW

Purpose

Light Refreshments Just Got Lighter
(at Least for Some Conference Attendees)

Over the past few years, agencies have become accustomed to providing light refreshments at government-sponsored conferences under the authority of 5 U.S.C. § 5702. This statute authorizes an agency to pay its employees a per diem amount or to reimburse them the actual expenses incurred while traveling

2398. 53 Fed. Cl. 525 (2002). In *Am. Mgmt. Sys.*, the Federal Retirement Thrift Investment Board (Thrift Board) awarded a $30 million contract to American Management Systems to design, develop, and implement an automated record-keeping system. The Thrift Board terminated the contract after numerous delays and substantial cost increases. American Management Systems challenged the termination, and the Thrift Board moved to dismiss alleging it is a NAFI and therefore the COFC lacked jurisdiction. *Id*. at 526.

2399. *Id*. at 529.

2400. *Id*.

2401. *Id*. at 527.

2402. 2003 U.S. Claims LEXIS 4 (Jan. 9, 2003).

2403. *Id*. at *2. Access is conditional because appropriated funds are authorized for payment of the board's expenses only when the funds are available from forfeited government contributions. If those funds are insufficient to pay the administrative expenses, the expenses are paid from nonappropriated funds—the net earnings. *Id.*

2404. *Id*. at *11.

2405. 56 Fed. Cl. 522 (2003).

2406. *Id*. at 524.

2407. *Id*.

2408. *Id*. at 526.

2409. *Id*. at 543.

2410. *Id*.

2411. *Id*. at 544.

on official business.[2412] The statute requires agencies to calculate the allowable reimbursable expenses in accordance with a government-wide set of regulations promulgated by the GSA.[2413] Prior to January 2000, the Comptroller General objected to the practice of reimbursing employees for expenses associated with refreshments consumed at conferences since the GSA travel regulations did not cover such items.[2414]

In January 2000, however, the GSA amended its travel regulations to include a discussion on conference planning.[2415] This amendment specifically permitted agencies to pay for light refreshments.[2416] Although the amendment did not address whether light refreshments could be provided to non-travel status personnel, the GSA created a "Travel Management Policy's Frequently Asked Questions(FAQ) Webpage" which sanctioned the purchase of light refreshments for non-travelers as long as the majority of conference attendees were on travel status.[2417]

On 27 January 2003, the Comptroller General determined that the GSA exceeded its authority when it sanctioned the use of appropriated funds to pay for light refreshments consumed by personnel not on travel status.[2418] The Comptroller General stated the following:

> Important, nevertheless, are the statutory limitations on the application of the travel regulation . . . . GSA's statutory basis for the regulation is 5 U.S.C. § 5702, which authorizes agencies to use appropriated funds to pay the costs of subsistence for employees on official business away from their official duty stations. GSA's authority does not extend to employees who are not in travel status.[2419]

This decision is an important reminder that government personnel *cannot* always rely upon regulations to justify expending appropriated funds; they need to ensure those regulations either properly implement statutory authority or are proper reflections of the *necessary expense test*[2420] and they do not conflict with statute.

Though ruling the GSA exceeded the authority in 5 U.S.C. § 5702, the Comptroller General was also careful to point out that several other authorities exist which potentially justify paying for food at conferences for non-travelers. The decision only determined that 5 U.S.C. § 5702 could not be construed to permit paying for food for non-travelers.[2421]

What Are We Going to Do About Those Darn Cell Phones?

Given the massive reliance on cell phones in our society, it is no surprise that the GAO has started issuing opinions regarding the propriety of using appropriations to purchase cell phone equipment and services. The first such opinion was actually issued in October 2001.[2422] That opinion was sparked by a

---

2412. 5 U.S.C.S. § 5702(a)(1)(A), (B) (LEXIS 2003).

2413. *Id*. § 5702(a)(1).

2414. *See*, *e.g.*, To Mr. Paul J. Grainger, B-167820, 1969 U.S. Comp. Gen. LEXIS 2032 (Oct. 7, 1969).

2415. Federal Travel Regulation; Conference Planning, 65 Fed. Reg. 1326 (Jan. 10, 2000) (codified at 41 C.F.R. pts. 301–11 and 301–74).

2416. *Id*. at 1328 (codified at 41 C.F.R. § 301–74.11). In question and answer format the notice included the following:

> May we provide light refreshments at an official conference? Yes. Agencies sponsoring a conference may provide light refreshments to agency employees attending an official conference. Light refreshments for morning, afternoon or evening breaks are defined to include, but not be limited to, coffee, tea, milk, juice, soft drinks, donuts, bagels, fruit, pretzels, cookies, chips, or muffins.

Id.

2417. Gen. Services Admin., Travel Management Policy's Frequently Asked Questions (FAQ) Webpage, *available at* http://www.gsa.gov/Portal/content/offerings_content.jsp?contentOID=118763&contentType=1004 (answering Frequently Asked Question No. 5).

2418. Use of Appropriated Funds to Purchase Light Refreshments at Conferences, Comp. Gen. B-288266, Jan. 27, 2003 (unpub.), *available at* http://www.gao.gov/decisions/appro/288266.pdf [hereinafter Purchase of Light Refreshments].

2419. *Id*. at 6.

2420. *See*, *e.g.*, Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (stating that "an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function . . . .").

2421. *Purchase of Light Refreshments*, Comp. Gen. B-288266, at 6-8.

2422. Reimbursing Employees' Government Use of Private Cellular Phones, Comp. Gen. B-287524, Oct. 22, 2001 (unpub.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=287524.pdf&directory=/diskb/wais/data/gao_comptroller_general.

request from the Western Area Power Administration (WAPA) to approve the reimbursement of expenses incurred by their employees' usage of personally-owned cell phones to make government-related calls. To minimize the administrative costs of this reimbursement process, the WAPA proposed to reimburse its employees a flat amount each month rather than tying the reimbursement amount to the costs incurred in making the government-related calls.[2423] The WAPA analogized its proposed flat rate reimbursement method to the flat rate travel reimbursements, such as paying one flat rate for mileage regardless of what it costs to operate a given vehicle on a per mile basis or paying one flat rate for the meal and incidental portions of the per diem allowance. The Comptroller General noted, however, that Congress had specifically authorized the flat rate method of travel reimbursement and concluded that without similar statutory authority, the WAPA could not pay their employees a flat amount each month to cover their expenses of using personal cell phones for government-related calls.[2424] The Comptroller General stated, however, that reimbursement of actual expenses was authorized.[2425]

The Comptroller General had the chance to elaborate on what actual expenses he considered to be reimbursable this past year in *Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones.*[2426] That opinion involved a request by the Nuclear Regulatory Commission (NRC) to reimburse its employees for the following: (1) the actual costs of maintaining personal cell phone service; and (2) any incremental cost the employee incurred for making official calls on that personal cell phone.[2427] The NRC has incident response teams (IRT) that the NRC can reach twenty-four hours a day, 365 days a year in the event of an emergency at one of the nation's nuclear facilities. The NRC practice had been to purchase cell phones for these IRTs, but it proposed instead to have the individual employees purchase the cell phones and cell phone service and then to reimburse them.[2428]

Under the NRC plan, it would reimburse employees for cell phone activation fees and monthly services that met the NRC's minimum needs.[2429] In addition, the NRC proposed to pay for "any additional charges that the employee incurred for official calls actually made or received, including air time and roaming charges."[2430] The NRC's request also noted that it would limit any reimbursement to the amount "that NRC would have paid had it procured the [cell phone] services itself."[2431] The Comptroller General endorsed NRC's reimbursement plan, and in so doing, specifically emphasized that the NRC would "adjust" the activation costs to deduct out the value of any free equipment.[2432]

While it appears that more and more appropriated funds will be used to reimburse employees for using personal cell phones to make official calls, the DOD thus far has not issued any regulation on this subject. Currently, the only DOD regulations dealing with cell phones govern when organizations may purchase and use government-procured cell phones.[2433]

Does Augmentation Have to Involve Money?

The Comptroller General somewhat cursorily decided this past year that to have an augmentation, one needs to have an inflow of money into an agency's appropriation.[2434] In *General Services Administration: Real Estate Brokers' Commissions*, the GSA had a contract in place in which it paid real estate brokers a fee in exchange for them providing the GSA with assis-

2423. *Id*. at 1-2.

2424. *Id*. at 3-4.

2425. *Id*. at 4. He also acknowledged that a flat rate reimbursement system would likely be more cost-effective and efficient, but indicated Congress would have to enact legislative authority for that to occur. *Id.*

2426. Comp. Gen. B-291076, Mar. 6, 2003 (unpub.), *available at* http://www.gao.gov/decisions/appro/291076.pdf.

2427. *Id*.

2428. *Id*. at 1-2.

2429. *Id*. at 2. The opinion specifically noted that voice mail capability was something the agency designated as part of its minimum needs. *Id.*

2430. *Id*.

2431. *Id*.

2432. *Id*. at 3. The opinion did not mention, however, how the NRC would make this calculation.

2433. *See, e.g.*, U.S. Dep't of Army, Reg. 25-1, Army Information Management para. 6-3aa (31 May 2002), *available at* http://www.usapa.army.mil/pdffiles/r25_1.pdf; U.S. Dep't of Air Force, Instr. 33-111, Telephone Systems Management para. 25 (22 Oct. 2002), *available at* http://www.e-publishing.af.mil/pubfiles/af/33/afi33-111/afi33-111.pdf (both indicating that cellular service should be used only where regular phone service will not meet the organization's needs and both dealing only with government-purchased or leased cellular phones). *But see* U.S. Dep't of Air Force, Instr. 33-106, Managing High Frequency Radios, Personal Wireless Communication Systems, and the Military Affiliate Radio System para. 4.9.4 (9 Jan. 2002), *available at* http://www.e-publishing.af.mil/pubfiles/af/33/afi33-106/afi33-106.pdf (sanctioning the purchase of "dual-number capable cellular phones" in which the agency activates and pays for the services associated with one of those numbers for official calls and the employee is able to elect to activate and pay for the services associated with the second number for personal usage).

tance in finding suitable real estate to lease. The GSA requested the Comptroller General sanction a different type of contractual relationship in which real estate brokers would represent the GSA in certain geographic regions, and in exchange for these services the brokers would be paid not by the GSA but rather by the property owners with whom the GSA ultimately entered into real estate leases. The GSA queried whether such relationship would either: (1) violate the Miscellaneous Receipts Statute; (2) be an improper augmentation; or (3) constitute an acceptance of voluntary services.

The Comptroller General answered each question in the negative. First, he noted that the Miscellaneous Receipts Statute[2435] only governs what agencies must do with monies they might receive outside of the normal appropriations process. The Comptroller General then noted that since the GSA would be accepting real estate brokerage services—not money—neither the Miscellaneous Receipts Statute nor the rule against augmentation would come into play.[2436] The Comptroller General subsequently noted that since brokers would render these services under a formal contract, they did not constitute voluntary services prohibited by law.[2437]

The determination that the Miscellaneous Receipts Statute does not apply involved nothing more than a straight-forward reading of that statute since the statute deals only with *monies* received. There should have been more discussion concerning the augmentation issue, however, because the rule is not statutorily-based, but rather is a GAO-created corollary to the Appropriations clause within the Constitution.[2438] Although most GAO opinions dealing with augmentation have involved an in-flux of monies into an appropriation from another source, that has not universally been the case.

In *Community Work Experience Program—State General Assistance Recipients at Federal Work Sites*,[2439] the Comptroller General determined that a receipt of gratuitous services violated the rule against augmentation even though it did not violate the prohibition on voluntary services.[2440] This issue was also addressed in *Carrier-Provided Computers For Electronically Filing Tariffs With the Interstate Commerce Commission*.[2441] In that opinion, the Comptroller General determined that the Interstate Commerce Commission (ICC) could permit private carriers to install computer equipment that the carriers had purchased at the ICC's headquarters for purposes of allowing ICC staff to view electronically filed tariffs that were statutorily required. Although the Comptroller General determined the ICC usage of those privately purchased computers to view the electronic tariffs did not improperly augment its appropriations, he did caution that any other use of the computers by ICC personnel would amount to an improper augmentation.[2442] Given the inconsistent treatment in prior opinions, it is unclear why the Comptroller General did not take the opportunity in *Real Estate Brokers' Commission* to expressly overturn the prior precedent or at least take the opportunity to discuss how the immediate situation was distinguishable.[2443]

More ORF Morphs

Last year's *Year in Review* noted that the DOD had reissued its regulation dealing with official representation funds (ORF).[2444] Shortly thereafter, the DOD issued a memorandum that was intended "to emphasize that ORF should be expended judiciously, in a fiscally responsible manner . . . ."[2445] This memorandum also pointed out that the cap on the amount of money that could be spent on gifts for visiting dignitaries had been raised to $285.[2446] The memorandum also stated that

2434. General Services Administration: Real Estate Brokers' Commissions, Comp. Gen. B-291947, Aug. 15, 2003 (unpub.), *available at* http://www.gao.gov/decisions/appro/291947.pdf [hereinafter Real Estate Brokers' Commissions].

2435. 31 U.S.C.S. § 3302(b) (LEXIS 2003).

2436. Real Estate Brokers' Commissions, Comp. Gen. , B-291947, at 3.

2437. *Id*. at 3-4 (citing 31 U.S.C.S. § 1342). For a discussion of the difference between voluntary services and gratuitous services, see *infra* note 2440 and accompanying text.

2438. U.S. Const. art. I, § 9, cl. 7 (stating, "No money shall be drawn from the treasury, but in consequence of appropriations made by law. . .").

2439. B-211079.2, 1987 U.S. Comp. Gen. LEXIS 1815 (Jan. 2, 1987).

2440. *Id.* at 2-3 (finding that the services were gratuitous since it was "clearly established by written agreement or by statute that no compensation [was] due or expected" in return for the services).

2441. B-239903, 70 Comp. Gen. 597 (June 28, 1991).

2442. *Id*.

2443. One distinguishable fact in the *Community Work Experience Program* opinion was that the grant recipients would be doing services that government employees would otherwise have had to perform. *See* 1987 U.S. Comp. Gen. LEXIS 1815, at *6. The brokerage services at issue in *Real Estate Brokers' Commissions* would not likely have been performed by government employees.

2444. *2002 Year in Review, supra* note 57, at 215 (discussing U.S. Dep't of Defense, Dir. 7250.13, Official Representation Funds (10 Sept. 2002) [hereinafter DOD Dir. 7250.13]).

mementos costing less than $40 could be given to the DOD officials listed in Enclosure 1 to the directive.[2447] Previously, the DOD prohibited giving gifts of any sort to any DOD officials.[2448] The memorandum also made clear that such mementoes had to be purchased with ORF and not with Operation and Maintenance or Morale, Welfare, and Recreation funds.[2449]

CAFC Determines HHS Must Give a Little More

The CAFC rarely has an opportunity to decide a case dealing directly with appropriations law. This past year, the CAFC got such an opportunity in *Thompson v. Cherokee Nation of Oklahoma (Cherokee)*.[2450] The issue in *Cherokee* focused on whether the Department of Health and Human Services (HHS) had breached its contracts with the Cherokee Nation of Oklahoma (CNO) by failing to pay the full amount specified in those contracts.

Pre-1975, the federal government ran nearly all of the service programs supporting the various Indian tribes. Over time, Congress came to believe this type of environment inhibited the progress of the Indian people and their ability to realize self-government. Consequently, Congress enacted the Indian Self-Determination Act in 1975 to transfer the administration and operation of those service programs to the tribes.[2451] The legislation required the HHS to enter into contracts with any tribe that desired to take over such services. Initially, the amount paid by the HHS under these contracts was set at the amount the HHS would have spent had it performed those services. Many Indian tribes elected to take over performance of the service programs. By 1988, however, a number of tribes had complained to Congress that their contract amounts were insufficient since they had to carry out additional activities after the transfer of responsibility that the HHS did not have to worry about.[2452] In response, Congress passed the Indian Self Determination Amendments of 1988, which required the HHS to cover tribes' indirect costs of administering the programs.[2453] The amended statute permitted the HHS to avoid paying these indirect administration costs if it had no available appropriations or if paying these costs would force the HHS to reduce funding to other tribes.[2454]

Beginning in 1983, the HHS and the CNO entered into a series of annual contracts under which the CNO agreed to operate hospitals and other medical clinics that were formerly run by the HHS. For the contracts in 1994, 1995, and 1996, the HHS did not pay the CNO most of the indirect costs of running the medical facilities because it alleged there was a lack of available funds.[2455] On 27 September 1996, the CNO submitted a claim in the amount of $6,369,009, representing the unpaid portion of the indirect costs that the contracting officer denied on 31 October 1997. This decision was appealed to the Interior Board of Contract Appeals, which granted summary judgment to the CNO.[2456]

The CAFC's *Cherokee* decision resulted from the HHS' appeal of the board decision. To determine whether the HHS breached its contract with the CNO by not paying it the full indirect administrative costs, the court first reviewed what it labeled to be "several fundamental principles of appropriation law."[2457] First, it noted that if Congress places a statutory

2445. Memorandum, Director of Administration and Management, Office of the Secretary of Defense, to Under Secretaries of Defense et al., subject: Official Representation Funds (ORF) (23 Dec. 2002) [hereinafter ORF Memo].

2446. *Id*. at 2 (referencing rather confusingly "Title 41, Section 102-42.10" as the location to find the changed ceiling). The Directive actually references 22 U.S.C.S. § 2694 (LEXIS 2003), which in turn cross references 5 U.S.C.S. § 7342. DOD Dir. 7250.13, *supra* note 2444. This latter statute directs the GSA to update the ceiling once every three years to take inflation into account. The GSA provided notice of a final rule 4 September 2002 indicating it was revising 41 C.F.R. pt. 102-42 to change the ceiling to $285. *See* Change in Consumer Price Index Minimal Value, 67 Fed. Reg. 56,495 (Sept. 4, 2002).

2447. ORF Memo, *supra* note 2445, at 2.

2448. DOD Dir. 7250.13, *supra* note 2444, para. E2.4.2.10 (stating that "ORF shall not be used to fund gifts for DoD officials unless otherwise authorized by this Directive").

2449. ORF Memo, *supra* note 2445, at 2.

2450. 334 F.3d 1075 (Fed. Cir. 2003).

2451. *Id*. at 1079-80 (citing Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended 25 U.S.C.S. §§ 450-456)).

2452. *Id*. at 1080-81 (listing financial audits as an example).

2453. *Id*. at 1081 (citing Pub. L. No. 100-472, 102 Stat. 2285).

2454. *Id*. at n.10.

2455. *Id*. at 1081-83.

2456. *Id*. at 1083 (citing Cherokee Nation of Oklahoma, IBCA No. 3877-3879, June 30, 1999, 99-2 BCA ¶ 150,488, 150,494).

2457. *Id*. at 1084.

restriction on the amount of appropriations that are available for a program, then an agency is not able to exceed that limit. Next, it stated that for such a statutory cap to be binding, it must be in the legislation itself rather than merely in the legislative history. The court also held that if Congress appropriates a lump-sum without any restrictive caps, then the agency is free to reprogram those funds within the limits of its reprogramming authority. It also added that agencies are required to exercise their discretion to reprogram if doing so is necessary to meet its obligations.[2458]

The appropriations acts at issue did not contain any restrictions on the amount available to fund the contracts at issue. The House and/or Senate Appropriations Committee reports associated with each of these acts, however, contained various ceilings. Although the HHS argued these ceilings were binding upon it, the court held to the contrary. The court found that it was well-settled that legislative history did not have the force of law and therefore could not restrict an agency's use of its appropriated funds.[2459]

The HHS next argued that even if the committee reports did not bind the agencies when they were initially issued, they subsequently became binding when Congress enacted a subsequent appropriations act in 1999 that stated the prior amounts listed in those committee reports were "the total amounts available for FYs 1994 through 1998."[2460] The court did not rule on this precise issue, holding instead that the CNO's right to payment under the contracts vested before Congress passed the 1999 legislation.[2461]

Major Gregg Sharp.

Time

No Objection to the Department of Education's Use of One-Year Appropriations to Fund Multiple Year Grants

On 30 December 2002, the Comptroller General released an opinion concerning the Department of Education's (DOEd) use of one-year appropriations to fund multiple-year grants.[2462] The Comptroller General found no objection to the practice, provided the DOEd awarded the grants consistent with the programs' legislation and appropriations, and the grants were awarded during the funds' period of availability.[2463]

Among its missions, DOEd administers and coordinates federal assistance involving education in the United States.[2464] As such, DOEd awarded grants under the Gaining Early Awareness and Readiness for Undergraduate Program (GEAR UP)[2465] and the Early Childhood Educator Professional Development Program.[2466] Congress has generally financed both discretionary grant programs with one-year appropriations. Specifically, Education's lump sum "Higher Education" appropriation funds the GEAR UP program, [2467] while the DOEd's lump sum "School Improvement Programs" appropriation funds the Early Childhood Educator Program.[2468]

In the past, DOEd awarded GEAR UP grants for one FY at a time. Education would impose a one-year term on the grantees' use of grant funds. At DOEd's discretion, it would award continuation grants for additional years, one year at a time for up to five years, using funds current at the time of the award for the grants.[2469] The DOEd changed this practice in FY 2001 and began awarding recipients five-year GEAR UP grants, charging the full amount of the grant to its FY 2001 appropriation. For

2458. *Id*. at 1084-86.

2459. *Id*. at 1087.

2460. *Id*. at 1090-91 (citing Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1999)).

2461. *Id*. at 1091.

2462. U.S. Department of Education's Use of FY Appropriations to Award Multiple Year Grants, Comp. Gen. B-289801 (Dec. 30, 2002) (unpub.) [hereinafter Multiple Year Grants].

2463. *Id*. at 1.

2464. *Id*. at 1-2.

2465. GEAR UP is a discretionary grant program authorized under Title IV of the Higher Education Act of 1965. The Act seeks to "increase the number of disadvantaged students that continue on to postsecondary education by providing early support services and assurances of financial assistance that enable students to prepare to pursue a college education." *Id.* at 2 (citing 20 U.S.C.S. § 1070a (LEXIS 2003)).

2466. The Early Childhood Educator Program is authorized under Title II of the Elementary and Secondary Education Act of 1965. It is also a discretionary grant program, and its goal is to "enhance the school readiness of young children, particularly disadvantaged children, through grants of financial assistance to improve the knowledge and skills of early childhood educators who work in communities with high concentrations of children living in poverty." *Id.* (citing 20 U.S.C.S. § 6651(e)).

2467. *Id*. (citing Pub. L. No. 107-116, 115 Stat. 2206 (2002); Pub. L. No. 106-554, app. A, 114 Stat. 2763A-38 (2000)).

2468. *Id*. (citing Pub. L. 107-116, 115 Stat. 2202-03 (2002); Pub. L. No. 106-554, app. A, 114 Stat. 2763A-33-34 (2000)).

2469. *Id*.

the Early Childhood Educator Program, the DOEd awarded two-year grants in FY 2001, funding the full amount with that year's appropriation. The DOEd reasoned it had the authority to issue multiyear grants because the two programs "represent single nonseverable undertakings, and [were] thus a bona fide need of the FY appropriation."[2470]

The Comptroller General first examined the bona fide needs rule in light of the principle of severability.[2471] Observing that "where continuous and recurring services are needed on a year-to-year basis, contracts for the services are severable and must be charged to the fiscal year in which they are rendered."[2472] When the nature of the service is "nonseverable" however, the Comptroller General has routinely permitted agencies to award contracts using funds with a one-year period of availability for services that are part of a "single undertaking that fulfills an agency need of the fiscal year charged," regardless of the fact that services would be rendered and funds would be spent during following FYs.[2473] In such cases, the focus is whether the services are "part of a single undertaking" and thus nonseverable, or are "severable in nature and fulfill a recurring need of the agency from fiscal year to fiscal year."[2474]

In the present case, the Comptroller General noted the legislation for the Early Childhood Educator Program states the "[t]he [Department] shall award grants . . . for periods of not more than 4 years."[2475] Although he concluded this language permits Education to award four-year grants using one-year funds, the Comptroller General also noted the program's FY 2002 appropriation restricted this authority by limiting the duration of some of the grant funds to only one year.[2476] Concerning these limited funds, the Comptroller General concluded that Education was only permitted to award Early Childhood Educator grants for a period encompassing the academic year 2002-2003. For the funds not so limited, Education could fund grants up to four-years in duration.[2477]

Concerning the GEAR UP program, the Comptroller General noted the program's authorizations did not provide Education with explicit authority to award multiple year grants.[2478] The Comptroller General, however, determined that "[DOEd's] award of multiple year grants was in accordance with the authority Congress provided DOEd under the program."[2479] The Comptroller General observed that, inter alia, the program's legislation seeks to ensure that students who have received services under GEAR UP continue to receive GEAR UP services through the 12th grade.[2480] In the Comptroller General's opinion, "[DOEd's] award of 5-year grants was consistent with program objectives and within the agency's discretion under the program's legislation."[2481]

Major James Dorn.

Antideficiency Act

"Shocking" but True—"Open-Ended" Indemnification Clause Violates ADA

In *E.I. DuPont De Nemours v. United States*,[2482] the COFC held that "regardless of how shocking or disappointing the outcome,"[2483] the broad indemnification and reimbursement provisions in a 1940 contract between the Army and E.I. DuPont De

2470. *Id.* (documenting its position in a letter from Brian W. Jones, General Counsel, U.S. Department of Education, to Susan A. Poling, Associate General Counsel, GAO, (Mar.18, 2002)).

2471. The bona fide needs rule stands for the proposition that agencies may obligate appropriated funds only for properly incurred expenses during the period of availability of the appropriation. *See* 31 U.S.C.S. § 1502(a); Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (Apr. 18, 1995); Magnavox—Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, 33 Comp. Gen. 57 (1953).

2472. *Multiple Year Grants*, Comp. Gen. B-289801, at 2-3 (citing The Honorable Lowell Weicker, Jr., 64 Comp. Gen. 359, 364 (1985)).

2473. *Id.* at 3 (citing Incremental Funding of Multiyear Contracts, 71 Comp. Gen. 428 (1992)).

2474. *Id.*

2475. *Id.* at 5 (citing 20 U.S.C.S. § 6651(e)(2)(B)(i)).

2476. *Id.* The "School Improvement Programs" appropriation for 2002, which funds the Early Childhood Educator grant program, is funded from three separate appropriations. One of these appropriations stated the funds were available to fund grants for only "academic year 2002-2003." *Id.* (citing Pub. L. No. 107-116, 115 Stat. 2206 (2002)).

2477. *Id* at 6.

2478. *Id.* at 5 (citing 20 U.S.C.S. § 1070a; Pub. L. No. 106-554, app. A, 114 Stat. 2763A-33-34 (2001)).

2479. *Id.* at 5-6.

2480. *Id.* at 6 (citing 20 U.S.C. § 1070a-21(b)(2)(B) (2000)).

2481. *Id.* at 6-7.

2482. No. 99-101C, 2002 U.S. Claims LEXIS 302 (Nov. 13, 2002) (Turner, Senior).

Nemours (DuPont) were unenforceable because they violated the Antideficiency Act (ADA).[2484] DuPont had sought reimbursement of costs it incurred under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)[2485] at the Morgantown Ordnance Works (MOW), a chemical production facility that the company had built and operated for the United States during World War II.[2486] Under the terms of the cost-plus-fixed-fee (CPFF) contract to design, build, and operate the MOW facility, the government included broadly worded indemnification and reimbursement clauses.[2487] The government terminated the contract for convenience in 1946. In the 1980s, however, the Environmental Protection Agency notified DuPont that it was considering listing the MOW on its priorities list for environmental clean-up under the CERCLA.[2488] Eventually, DuPont paid approximately $1.3 million in attorney and consultant fees for a remedial investigation and feasibility study of the environmental issues related to the site.[2489] DuPont argued that based on the contract's indemnification and reimbursement clauses, the government was ultimately responsible for the CERLCA costs it incurred.[2490]

Considering the broad language used in the subject clauses of this CPFF contract, the court determined that, "in exchange for the contractor's performance during a time of critical need, the government agreed to an allocation of risks that put those burdens primarily upon itself."[2491] Further the court found that these clauses should be interpreted to cover the costs and liabilities not specifically excluded from the contract, as such interpretation would be consistent with the parties' intent to have the government bear all costs and risks of the contract.[2492] Because the government could have included exceptions to liability but did not,[2493] the COFC concluded the contract's indemnification and reimbursement clauses "were drafted broadly enough to be properly interpreted to place the risk of unknown liabilities on the government, including liability for costs incurred under CERCLA."[2494] Unfortunately for DuPont, the COFC's analysis did not end there.

Not surprisingly, the government argued the open-ended indemnification clause violated the ADA[2495] because it would obligate funds in advance of an available appropriation—an argument, the court stated, "we must reluctantly accept."[2496] The COFC first considered prior decisions in which the courts refused to imply indemnification clauses into contracts because of the ADA's bar.[2497] The court found the discussion in *Johns-Manville Corp. v. United States* particularly instructive [2498] DuPont argued, like the plaintiffs in that case, that the First War Powers Act[2499] and Executive Order No. 9001[2500] "authorized

2483. *Id*. at *33.

2484. *See* 31 U.S.C.S. §§ 1341(a), 1512(1), 1523(b) (LEXIS 2003).

2485. *See* 42 U.S.C.S. §§ 9601-9675.

2486. *E.I. DuPont De Nemours*, 2002 U.S. Claims LEXIS 302, at *1.

2487. *Id*. at *2-3.

2488. *Id*. at *4.

2489. *Id*.

2490. *Id*. at *6.

2491. *Id*. at *17.

2492. *Id*. at *23 (citing United States Rubber Co. v. United States, 142 Ct. Cl. 42 (1958); Houdaille Indus. Inc. v. United States, 138 Ct. Cl. 301 (1957); United States v. Cartridge Co., 198 F.2d 456 (8th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953)).

2493. *Id*. at *24. The government only excepted from liability losses, expenses, damages or liabilities due to the failure of DuPont officers or representatives to exercise good faith or due care. *Id*.

2494. *Id*.

2495. 31 U.S.C.S. § 1341(a)(1)(B) (LEXIS 2003). More specifically, the ADA's provision is that a U.S. government officer or employee "may not . . . (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . . ." *Id.*

2496. *E.I. DuPont De Nemours*, 2002 U.S. Claims LEXIS 302, at *26.

2497. *Id*. at *27-28 (citing Hercules Inc. v. United States, 516 U.S. 417 (1996); California-Pacific Utils. Co. v. United States, 194 Ct. Cl. 703 (1971)).

2498. 12 Cl. Ct. 1 (1987) (finding the ADA barred implying an indemnification clause into government contracts with asbestos manufacturers).

2499. Pub. L. No. 77-354, 55 Stat. 838 (1941).

2500. 6 Fed. Reg. 6787 (Dec. 27, 1941).

the entering into contracts without regard to the ADA."[2501] Agreeing with the *Johns-Manville Corp*. court, the COFC determined that while the First War Powers Act granted the president authority that could be construed to make the ADA irrelevant to wartime contracts, Executive Order No.9001 "unequivocally limited the Act by delegating contracting authority only 'within the limits of the amounts appropriated therefor . . . .'"[2502]

As the prior court decisions involved plaintiffs seeking to imply indemnity provisions, the COFC also considered whether DuPont's contract, which expressly included an indemnification clause, could be distinguished.[2503] Unfortunately for DuPont, the COFC concluded it was a "distinction without a difference."[2504] Looking to both pre- and post-World War II Comptroller General opinions, the COFC concluded that open-ended indemnification clauses "included in government contracts without appropriation or express statutory authority were considered void and unenforceable."[2505] In a sympathetic conclusion, the court stated that the current state of the law compelled its decision. Yet, the "result is so totally at odds with the agreement the parties clearly made . . . and plaintiff is so clearly entitled to the indemnity it seeks under the plain language of the contract . . . made during truly emergency, wartime conditions" that DuPont should consider seeking potential relief in a congressional reference case under the law.[2506]

It's "Shocking" But True at the ASBCA, Too

The ASBCA also considered a claim arising out of a World War II-era contract with an indemnification provision, and, like the COFC, determined the clause violated the ADA. In *National Gypsum Co.*,[2507] the National Gypsum Company (National Gypsum) received a CPFF contract to build and operate an ordnance facility. The contract contained an open-ended indemnification clause and cited the WPA and Executive Order 9001 as authority.[2508] National Gypsum argued that "these assurances, within the contract, in and of themselves, override the [ADA's] prohibition against contracts in excess of appropriated funds."[2509] The board disagreed.

Even assuming the "authorized by law" language in the contract referred to the indemnity provision, the board ruled "the Government is not estopped by the representations or assurances of its agents, whether intentional or unintentional, that have the effect of nullifying a statutory requirement or are contrary to an express authority limitation affecting payment of money from the Treasury."[2510] While National Gypsum also argued the government should be held liable under a fraudulent inducement theory, the ASBCA stated it had no jurisdiction over tort claims and also noted the Supreme Court's comment in *OPM v. Richmond*.[2511] The Court states "it would 'be most hesitant to create a judicial doctrine of estoppel that would nullify a congressional decision against authorization of the same class of claims.'"[2512]

2501. *E.I. DuPont De Nemours*, 2002 U.S. Claims LEXIS 302, at *29.

2502. *Id*. at 29-30 (citing Executive Order No .9001, 6 Fed. Reg. 6787 (Dec. 27, 1941)).

2503. *Id*. at *31.

2504. *Id*.

2505. *Id*. at *32-33 (referencing To The Administrator, General Services Administration, B-117057, 1955 U.S. Comp. Gen. LEXIS 234 (Aug. 12, 1955); To Secretary of War, A-21633, 1928 U.S. Comp. Gen. LEXIS 53 (Feb. 21, 1928)). *Cf.* Ralph C. Nash & John Cibinic, *The Promise to Pay for Contingent Liability: Retroactive Interpretation of the Anti-Deficiency Act*, 17 NASH & CIBINIC REP. 3, ¶ 16 (2003) (criticizing the COFC's interpretation of prior GAO rulings relating to the ADA and indemnification provisions).

2506. *E.I. DuPont De Nemours*, 2002 U.S. Claims LEXIS 302, at *36-37 (citing 28 U.S.C. §§ 1492, 2509 (2000)). The COFC, Senior Judge James F. Merow presiding, also considered a similar claim for reimbursement of CERCLA costs arising out of a World War II-era contract in *Ford Motor Co. v. United States*, 56 Fed. Cl. 85 (2003). The court dismissed the complaint, however, because the plaintiff failed to first exhaust the contract's Disputes clause procedures prior to bringing suit. *Id*. at 96. Even if the plaintiff had properly initiated its suit under the Contract Settlement Act of 1944 (Act), 41 U.S.C. § 113, the COFC concluded the contract's reimbursement provisions for "unknown claims" were not intended to be unlimited. *Id*. at 97. Based on the Act's provisions, the COFC found the contract's "unknown" claims clause covered only claims "where liability accrued during the contract performance period and costs [were] in temporal proximity to contract termination . . . ." *Id.* at 98. Because the CERLCA did not exist until a number of years later, the liability and costs associated with its application "lack[ed] the temporal proximity to contract performance required for recovery as a Contract Settlement Act of 1944 claim . . . ." *Id*. In a footnote, the COFC also mentioned that to read the contract's "unknown claims" clause to mean unlimited liability "would raise serious issues as to its viability in view of the Anti-Deficiency Act . . . ." *Id.* (referencing Hercules, Inc. v. United States, 516 U.S. 417 (1996); California-Pacific Utils. Co. v. United States, 194 Ct. Cl. 701, 715; 719-21 (1971)).

2507. Nos. 53259, 53568, 2002 ASBCA LEXIS 121 (Oct. 25, 2002).

2508. *Id*. at *1-3.

2509. *Id*. at *13-14 (quoting the Appellant's Supplemental Reply Brief at 4).

2510. *Id*. at *14.

2511. *Id.* at *14-15 (referencing 496 U.S. 414, 430 (1990)).

"Mandatory" Options, Not Only Oxymoronic But Violate the ADA, Too

In *RCS Enterprises v. United States*,[2513] the COFC found an Army multi-year contract that made the exercise of options for future commissions "mandatory," violated the ADA.[2514] Because RCS Enterprises (RCS) had performed under the contract, the COFC reserved for trial whether damages may still be due to the contractor.[2515]

The subject claim arose out of a 9 January 1998 contract between the Army Signal Command (ASC) and RCS. The contract required RCS to audit the telephone services at the White Sands Missile Range (WSMR), identifying past overcharges and recommending changes that could be made for future money savings. Under the terms of the agreement, RCS was to receive fifty percent of the refunds and savings it generated.[2516] "[T]o provide compensation for future recommendations and cost reduction strategies," the contract included two option years, stating the options "will be exercised by separate contract modifications . . . ."[2517] RCS alleged the ASC breached the contract by obtaining savings based on RCS recommended changes but without compensating RCS.[2518]

The Army moved to dismiss the "future savings" claim, arguing the contract violated the ADA given the contract required the government to exercise the two option years, thus "obligat[ing] the Government to expend funds beyond a single year . . . ."[2519] Relying upon *Cray Research, Inc. v. United States*,[2520] RCS argued the contract did not violate the ADA because the Army retained the option to renew the contract beyond the base year.[2521] The COFC, however, agreed with the Army that "[t]he mandatory language of the contract, . . . *required* the Government to exercise the two option years," thus eliminating the government's discretion and violating the ADA by requiring the Army to pay RCS "future savings" over a two-year period.[2522]

RCS nevertheless sought to enforce the contract against the Army, contending the Army "caused" the potential ADA violation as the "ASC primarily wrote the contract."[2523] The COFC rejected this argument, noting again that the contract was illegal and finding "no precedent to suggest an illegal contract may be enforceable depending on which party 'caused' the contract to contain the illegal terms."[2524] The court added, however, that the government's failure to follow applicable regulations "does not render a contract void *ab initio*."[2525] Indeed, the courts disfavor invalidating a contract after the contractor has fully performed.[2526] Here, RCS sought future savings for one year's performance. Noting the availability of reformation as a remedy, the COFC denied the Army's motion to dismiss RCS' claim based on future savings for one year's performance.[2527]

Major Kevin Huyser.

2512. *Id*. at *15 n.2 (quoting OPM v. Richmond, 496 U.S. 414, 430 (1990)).

2513. 57 Fed. Cl. 590 (2003) (*RCS III*). The case has a long procedural history beginning with *RCS I*, in which the COFC dismissed without prejudice the majority of RCS's complaints for lack of subject matter jurisdiction. RCS Enters. v. United States, 46 Fed. Cl. 509 (2000). After RCS Enterprises (RCS) re-filed its complaint, the COFC in *RCS II* granted the government's motion for partial summary judgment and dismissed other counts within the complaint based on the doctrine of *res judicata*. RCS Enters. v. United States, 53 Fed. Cl. 303 (2002). RCS filed an amended complaint on 29 October 2002. *RCS III*, 57 Fed. Cl. at 592.

2514. *Id*. at 595.

2515. *Id*. at 596.

2516. *Id*. at 591.

2517. *Id*. at 594.

2518. *Id*. at 593. RCS claimed $337,061.88 in "future savings" that the ASC should have paid under the agreement. *See id*. at 591.

2519. *Id*. at 594.

2520. 44 Fed. Cl. 327 (1999).

2521. *RCS III*, 57 Fed. Cl. at 594.

2522. *Id*. at 595.

2523. *Id*. at 595-96.

2524. *Id*. at 596.

2525. *Id*. (referencing Am. Tel. & Telegraph Co. v. United States, 177 F.3d 1368, 1376 (Fed. Cir. 1999)).

2526. *Id*. (referencing *Am. Tel. & Telegraph Co*., 177 F.3d at 1376).

2527. *Id*. at 598.

Construction Funding

I Guess We Have a Fix of Sorts: The Latest Development in the Frustrating and as of Now Resolved Saga of Combat and Contingency Related O&M Funded Construction

In September 2003, *The Army Lawyer* published a Practice Note explaining the history of the DOD's use of Operations and Maintenance (O&M) funds for combat and contingency related construction, and how the FY 2003 Emergency Wartime Supplemental Appropriations Act[2528] severely curtailed the military's use of these funds for construction projects in support of such missions.[2529] With the passage of the FY 2004 Emergency Supplemental Appropriation Act (ESAA),[2530] Congress provided the DOD some relief in this area. Congress, however, would not be Congress unless it attached a number of strings to this spending authority. Section 1301 of the ESAA provides "temporary authority" for the use of O&M funds for military construction projects during FY 2004 where the Secretary of Defense determines the following:

> (1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forcers in support of Operation Iraqi Freedom or the Global War on Terrorism; (2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-tern presence; (3) The United States has no intention of using the construction after the operational requirements have been satisfied; and, (4) The level of construction is the minimum necessary to meet the temporary operational requirements.[2531]

Under the ESAA, this funding authority is limited to $150 million.[2532] The ESAA also requires that the DOD report quarterly to Congress detailing the use of this authority.[2533] And lest one conclude the DOD gained a permanent authority to spend O&M funds on contingency and combat related construction, the ESAA makes it abundantly clear this is a "temporary authority" limited to FY 2004 O&M funds.[2534] The ESAA further buttresses the temporary and limited nature of this authority by stating,

> [T]he temporary authority provided by this section, and the limited authority provided by section 2805(c) of title 10, United States Code . . . are the only authorities available to the Secretary of Defense . . . to use appropriated funds available for operation and maintenance to carry out construction projects.[2535]

How this will affect the DOD in future years—or when the $150 million runs out—is an open question.

Aren't We Talking About Pulling Out of Here? The GAO Recommends Reevaluation of U.S. Construction Plans in South Korea

In July 2003 the GAO issued a report recommending the DOD reevaluate its construction plans in Korea.[2536] In the report, the GAO examined the U.S.-South Korean Land Partnership Plan (LPP), which was signed in March 2002 and was intended to "consolidate U.S. installations and training areas, improve combat readiness, enhance public safety, and strengthen the U.S.-Korean alliance by addressing some of the causes of periodic tension associated with the U.S. presence in South Korea."[2537]

The GAO identified a number of "key challenges" that could adversely affect implementation of the LPP. First, the GAO noted that the plan relies on various sources of anticipated funding, including "substantial amounts of funding" which the U.S. and South Korean governments expected to realize through land sales of installations returned by the United States. The

---

2528. Emergency Wartime Supplemental Appropriations for FY 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003).

2529. Major James M. Dorn, *So How Are We Supposed to Pay For This? The Frustrating and as of Yet Unresolved Saga of Combat and Contingency Related O&M Funded Construction*, Army Law., Sept. 2003, at 35.

2530. Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004, Pub. L. No.108-106, 117 Stat. 1209 (2003).

2531. *Id.* § 1301(a).

2532. *Id.* § 1301(b).

2533. *Id.* § 1301(d).

2534. *Id.* § 1301(b).

2535. *Id.* § 1301(e).

2536. Gen. Acct. Off. Rep. No. GAO-03-643, *Defense Infrstructure: Basing Uncertainties Necessitate Reevaluation of U.S. Construction Plans in South Korea* (July 15, 2003).

GAO noted that the extent to which these sources of funding will be available for future infrastructure change is currently unclear.[2538] The GAO also observed that implementing the LPP involves phasing out some facilities while simultaneously phasing in and expanding others. In light of the broader repositioning of forces in South Korea, U.S. forces were still developing a plan to manage this complex task.[2539] Given the current state of flux, the GAO recommended the Secretary of Defense reassess planned construction projects in South Korea, and prepare "a detailed South Korea-wide infrastructure master plan" to manage changing infrastructure plans for U.S. forces in South Korea.[2540]

Appropriated Funds Available to Pay for the Relocation of Utilities

On 24 March 2003, the Comptroller General released an opinion stating that unless otherwise addressed by statute, regulation, or governing agreement, appropriated funds may be used to pay for costs associated with relocating utility facilities when the utility facilities are located on federal lands to serve the federal government and are not present as part of the utility company's right-of-way.[2541]

The Architect of the Capitol (AOC) requested the opinion after receiving a request for reimbursement from a utility company for costs associated with relocating high-voltage feeders. Previously, the AOC asked the company to relocate the feeders to accommodate construction of a new Capitol Visitor Center.[2542] Answering the AOC's request, the Comptroller General observed that traditionally, when a utility operates a facility on federal land under a federal grant of right-of-way, absent a specific statute or authority to the contrary, the utility is responsible for all costs associated with relocation should the government ask the utility to move its facilities. Under such circumstances, the federal government is exercising its role as the sovereign by granting the utility access to federal lands.[2543] When the federal government is the primary customer, however, and the government asks the utility to move its facilities so the government can be better served, the federal government is acting as a customer of the utility company. As such, appropriated funds are available to pay for the costs associated with utility relocations.[2544]

Major James Dorn.

Intragovernmental Acquisitions (IGA)

Business Rules for IGAs

The OMB issued business rules for intragovernmental transactions.[2545] The OMB issued the rules in response to the President's management agenda to "address the most apparent deficiencies where the opportunity to improve performance is greatest."[2546] Noting that the GAO had previously classified intragovernmental transactions as a government-wide material weakness,[2547] the OMB identified a "lack of standardization in processing and recording" as the "major factor in the Government's inability to account for intragovernmental transactions."[2548] To resolve the issue, the OMB issued business rules for intragovernmental exchange transactions and intragovernmental fiduciary transactions.[2549] The business rules for intragovernmental exchange transactions require agencies that acquire or provide goods or services to another federal agency

2537. *Id.* at 7. The LPP encompassed about $2 billion of the $5.6 billion that the U.S. military and South Korean government planned to spend to improve U.S. military infrastructure in South Korea between 2002 and 2011. The LPP was intended to resolve forty-nine of the eighty-nine separate land disputes (fifty-five percent) that were pending between the United States and Korea. *Id.* at 2-3. Yet, the LPP does not address the potential relocation of U.S. forces from Yongsan Army Garrison in Seoul—the most politically contentious issue facing U.S. – Korean relations. *Id.*

2538. *Id*. at 3.

2539. *Id.* at 3-4.

2540. *Id.* at 4-5.

2541. Use of Appropriated Funds to Pay for the Relocation of Utilities, Comp. Gen. B-300538, March 24, 2003, a*vailable at* http://www.gao.gov/decisions/appro/300538.pdf.

2542. *Id.* at 1.

2543. *Id.* at 5.

2544. *Id.* at 8.

2545. Memorandum, Office of Management and Budget, to Heads of Departments and Agencies, subject: Business Rules for Intragovernmental Transactions (4 Oct. 2002), *available at* http://www.whitehouse.gov/omb/memoranda/m03-01.html [hereinafter Business Rules Memo].

2546. *Id*.

2547. *Id*. The inability to properly account for intragovernmental transactions inhibits cost transparency, impedes a clean opinion of the U.S. Consolidated Financial Statements, and consumes resources in attempts to identify, reconcile, and resolve differences. *Id*.

2548. *Id*.

to obtain and use Dun & Bradstreet Universal Numbering System (DUNS) numbers.[2550] Federal agencies were required to register their DUNS number in the Central Contractor Registration (CCR) database by 31 January 2003.[2551] Additionally, the new rules required, by 31 October 2003, that certain purchases, equaling or exceeding $100,000 per order or agreement, be transmitted via the intragovernmental electronic commerce portal.[2552] The business rules for intragovernmental exchange transactions became effective 1 January 2003.[2553] The business rules for intragovernmental fiduciary transactions became effective 1 October 2003.[2554]

On 14 October 2003, the Office of the Secretary of Defense issued guidance regarding OMB's requirement for federal agencies to obtain a DUNS number.[2555] The memorandum announced that the OMB authorized the DOD "to use DOD Activity Address Codes (DoDAACs) preceded by the alpha characters 'DOD' as . . . the unique trade partner number (TPN) for intragovernmental transactions."[2556] The authority to use the DOD TPN was effective immediately.[2557]

E-gov and IGA

On 4 August 2003, the Office of the Secretary of Defense issued a memorandum proposing the establishment of an Integrated Process Team within the DOD to develop an electronic portal for the transmission of intragovernmental transactions.[2558] The initiative supports the President's management agenda to improve financial performance and expand the electronic government (e-gov).[2559] The team will consist of members of the Defense Logistics Agency, the military departments, the Defense Finance and Accounting Service, and Networks and Information Integration.[2560] The goal of the initiative is to solve long-standing financial management problems in the area of intragovernmental transactions.[2561]

Reauthorize the Franchise Funds?

The Government Management Reform Act of 1994[2562] (GMRA) authorized intragovernmental revolving (IR) funds as self-supporting business entities to provide common administrative services on a refundable basis.[2563] The GMRA "authorized the Office of Management and Budget (OMB) to designate six franchise fund pilots."[2564] These pilots are types of IR funds and "function under the title or label of 'working

2549. *Id.* The OMB also indicated that the business rules achieve the President's electronic government vision. The rules will be used "to develop an electronic commerce portal enabling the exchange of acquisition and payment data to execute an intragovernmental transaction." *Id*.

2550. *Id*. at attch. A, para. 1. The DUNS number is a nine-digit identification sequence that identifies single business entities and links corporate family structures together. It is used, recognized, or "required by more than 50 global, industry and trade associations, including the United Nations, the U.S. Federal Government, the Australian Government and the European Commission." The DUNS number is the standard for tracking the world's businesses. Dun & Bradstreet, *What is a D&B D-U-N-S Number?*, *available at* http://www.dnb.co/US/duns_update/duns_update_print.asp.

2551. Business Rules Memo, *supra* note 2545, at attach. A, para. 2.

2552. *Id*. at attch. A, para. 5. The OMB will issue additional guidance regarding the transactions required to use the portal. *Id*.

2553. *Id*. at 1.

2554. *Id*.

2555. Memorandum, Office of the Secretary of Defense, to Assistant Secretary of the Army (Acquisition, Logistics and Technology) et al., subject: Implementation of the Department of Defense (DOD) Trading Partner Number (TPN) for Intra-governmental Transactions (14 Oct. 2003), *available at* http://www.acq.osd.mil/dpap/policy/policydocs.htm.

2556. *Id*. The DODAAC file is known as the DOAAF. The DODAAC is the basis for the DOD TPN file and is transmitted daily to the federal register module of the Business Partner Network (BPN) as part of the electronic government Integrated Acquisition Environment initiative. *Id*.

2557. *Id*.

2558. Memorandum, Office of the Secretary of Defense, to Directors, Defense Agencies et al., subject: Integrated Process Team for Intragovernmental Transactions (4 Aug. 2003).

2559. *Id*.

2560. *Id*.

2561. *Id*.

2562. *See* Pub. L. No. 103-356, § 403, 108 Stat. 3410, 3413-14 (1994).

2563. Gen. Acct. Off., Rep. No. GAO-03-1069, *Budget Issues: Franchise Fund Pilot Review* 3 (Aug. 2003).

capital fund' . . . revolving funds, supply funds, and franchise funds."[2565] Congress is considering whether to reauthorize the pilot program and requested the GAO to evaluate the program.[2566] The GAO opined that "neither [the franchise funds'] legal authority nor their operation makes franchise funds unique compared to other IR funds."[2567] The GAO did recognize, however, the unique authority of franchise funds to retain four percent of their total annual income.[2568] But "Congress could and has, given this authority to other IR funds."[2569] The review suggested that Congress determine whether to authorize a fund on a "case-by-case basis" using the criteria required to establish a franchise fund.[2570] Other criteria identified by the GAO that Congress could consider included "top-level commitment at the agency"; "strong leadership at the fund level"; "well-developed business-like operating philosophy"; and "commitment of staff to customer satisfaction."[2571] If Congress decides to reauthorize the program, the GAO recommended that Congress grant a longer duration on such authorization.[2572] If Congress decides not to reauthorize, the GAO concluded many programs would continue under other authorities.[2573]

Major Bobbi Davis.

Revolving Funds

Economy Act No Parking Zone

Last year's *Year in Review* highlighted the impropriety of banking funds that would otherwise expire at the end of the FY.[2574] The Under Secretary of Defense (Comptroller) recently issued a memorandum reminding federal agencies that while some agencies have separate legal authority to provide services without the need to return unobligated funds at the end of a FY, other agencies do not.[2575] The Under Secretary specifically noted that "[o]rders under an interagency agreement must be based on a legitimate, specific, and adequately documented requirement representing a bona fide need of the year in which the order is made."[2576] Although the Economy Act[2577] requires servicing agencies to obligate the funds in the year the order is placed,[2578] other authorities[2579] permit servicing agencies to retain and obligate funds in the subsequent FY.[2580] The memorandum emphasized, however, that requiring agencies may not use interagency agreements solely to prevent funds from expiring.[2581] The memorandum further indicated that violations of

2564. *Id*. "The OMB designated pilots at the Departments of Commerce, Veterans Affairs(VA), Health and Human Services(HHS), the Interior, the Treasury and the Environmental Protection Agency (EPA)." *Id*.

2565. *Id*. at 4. The funds provide "common services, such as acquisition management, financial management services, and employee assistance programs." *Id*. at 3. The GAO identified fifty-eight IR funds within the various agencies—thirty-four provide common services and twenty-four provide unique services to their agencies. *Id*. at 4.

2566. *Id*. at 1. The pilot program originally expired 30 September 1999 but Congress extended the authority until 30 September 2003. The Treasury Franchise Fund is authorized through 30 September 2004 "and the EPA has permanent authorization." *Id*. at 3.

2567. *Id*. at 2.

2568. *Id*.

2569. *Id*.

2570. *Id*. The OMB and the Chief Financial Officers (CFO) Council outlined twelve business operating principles as operating criteria. The GAO also noted the importance of accounting for full costs and suggested that agencies consider the usefulness of audited financial statements at the fund level. *Id.*

2571. *Id*.

2572. *Id*. at 6. The GAO recommended authorization beyond one to two years.

2573. *Id*.

2574. *2002 Year in Review*, *supra* note 57, at 227.

2575. Memorandum, Under Secretary of Defense (Comptroller), to Chairman of the Joint Chiefs of Staff et al., subject: Fiscal Principles and Interagency Agreements (25 Sept. 2003) [hereinafter Fiscal Principles Policy Memo].

2576. *Id*. The memorandum specifically mentioned the Department of Interior's GovWorks and the GSA's Federal Technology Services. These programs "provide services--including contracting services, but they are not intended solely to extend an appropriation's period of availability." *Id*.

2577. 31 U.S.C. §§ 1535-36 (LEXIS 2003).

2578. *See id*. § 1535(d) (requiring a deobligation of funds "to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation . . . .").

2579. The Project Order Act authorizes agencies to treat orders placed with government-owned establishments as obligations in the same manner as provided for orders or contracts placed with commercial manufacturers. 41 U.S.C.S. § 23.

2580. Fiscal Principles Policy Memo, *supra* note 2575.

the rules may result in "disciplinary action, adverse media attention, additional congressional limitations and oversight department wide."[2582]

Waiving Sovereign Immunity

By statute, DOD Working Capital Funds may sell goods and services to commercial customers.[2583] Prior to 23 December 2001, the statute required "non-Government purchasers of articles and services from working capital funded industrial facilities of the armed forces to agree to hold the Government harmless from claims for damages or injury arising out of the contract (except for willful misconduct or gross negligence)."[2584] The FY 2002 Defense Authorization Act allowed "the Government's commercial customers to make claims for damages caused by the Government's poor contract performance, the same as with other commercial vendors of goods and services."[2585] The Under Secretary of Defense (Acquisitions, Logistics, and Techonology) issued guidance on 30 December 2002 reminding contracting officers to negotiate appropriate contractual remedies.[2586] The guidance also announced the establishment of a working group to develop implementing guidance based on the revised statute.[2587]

Can't Live With Them, Can't Live Without Them

The GAO issued several reports this past year highlighting improvements required for military depots.[2588] A GAO review of the DOD's core depot maintenance policy found that the "policy is not comprehensive and the implementing procedures and practices provide little assurances that core maintenance capabilities are being developed as needed to support future national defense emergencies and contingencies."[2589] A review of the services' compliance with "the 50-percent funding limitation on private-sector workloads . . . [revealed a] continuing weakness in DOD's gathering and reporting processes" as a result of errors and omissions in data.[2590] To assist the DOD's data collection requirements, the GAO recommended using a third-party review to validate the fifty-fifty data.[2591] Another GAO report found that while the number of public-private partnerships has increased, current partnerships only represent "two percent of DOD's FY 2002 $19 billion depot maintenance program."[2592] Understated budget and gross carryover amounts hindered Congress' and the DOD's ability to provide adequate funding levels.[2593] The GAO also found a need to improve the reliability of future maintenance workload projects in all DOD maintenance depots.[2594] The reports amplify the improvements required to ensure the services' fighting units have the repair

2581. *Id*.

2582. *Id*.

2583. 10 U.S.C.S. § 2563.

2584. Memorandum, Under Secretary of Defense (Acquisitions, Technology, and Logistics), to Under Secretary of Defense (Comptroller) et al., subject: Guidance on Public-Private Business Arrangements per 10 U.S.C. 2536 (30 Dec. 2002), *available at* http://www.acq.osd.mil/dpap/Docs/PublicPrivateBusinessArrangementsGuidance.pdf [hereinafter PPBA Guidance Memo].

2585. Pub. L. No. 107-107, § 343, 115 Stat. 1012, 1061 (2001).

2586. PPBA Guidance Memo, *supra* note 2584.

2587. *Id*.

2588. *See* Gen. Acct. Off., Rep. No. GAO-02-105, *Defense Logistics: Actions Needed to Overcome Capability Gaps in the Public Depot System* (Oct. 2002) [hereinafter GAO-02-105]; Gen. Acct. Off., Rep. No. GAO-03-16, *Deport Maintenance: Change in Reporting Practices and Requirements Could Enhance Congressional Oversight* (Oct. 2002) [hereinafter GAO-03-16]; Gen. Acct. Off., Rep. No. GAO-03-423, *Depot Maintenance: Public-Private Partnerships Have Increased, but Long-Term Growth and Results Are Uncertain* (Apr. 2003) [hereinafter GAO-03-423]; Gen. Acct. Off., Rep. No. GAO-03-668, *Navy Working Capital Fund: Backlog of Funded Work at the Space and Naval Warfare Systems Command Was Consistently Understated* (July 2003) [hereinafter GAO-03-668]; Gen. Acct. Off., Rep. No. GAO-03-682, *Depot Maintenance: Key Unresolved Issues Affect the Army Depot System's Viability* (July 2003) [hereinafter GAO-03-682]; Gen. Acct. Off., Rep. No. GAO-03-1023, *Depot Maintenance: DOD's 50-50 Reporting Should Be Streamlined* (Sept. 2003) [hereinafter GAO-03-1023].

2589. GAO-02-105, *supra* note 2588, at 2. section 2466(a), title 10, mandates that

> not more than 50 percent of the funds made available in a FY to a military department or a Defense Agency for depot-level maintenance and repair workload may be used to contract for the performance by non-Federal Government personnel for such workload for the military department or the Defense Agency.

10 U.S.C.S. § 2466(a) (LEXIS 2003).

2590. GAO-03-16, *supra* note 2588, at 2. The report found the Army and Navy below the fifty-percent funding limitation and the Air Force above the limitation. *Id.*

2591. GAO-03-1023, *supra* note 2588, at 17. The GAO also recommended that Congress amend the requirement to collect fifty-fifty data "to require only one annual 50-50 report to cover the prior, current, and budget years for which data are generally more reliable and potential impacts more immediate." *Id*. at 17.

2592. GAO-03-423, *supra* note 2588, at 2. Congress and the DOD have encouraged partnerships with the private sector to combine the best commercial processes and practices with the DOD's extensive maintenance capabilities. *Id*. at 1.

and manufacturing capabilities to meet future contingency and wartime requirements.[2595]

Major Bobbi Davis.

Operational and Contingency Funding

Seized Iraqi Property Accountability

As Operation Iraqi Freedom unfolded and Baghdad fell, concerns developed about the proper uses and accountability of "state- or regime-owned cash, funds, or realizable securities"[2596] seized or found in Iraq. By memorandum dated 30 April 2003, President Bush directed the Secretary of Defense that these seized funds be "appropriately accounted for, audited, and used only for . . ." assisting "the Iraqi people and support[ing] the reconstruction of Iraq."[2597] Subsequently, by memorandum dated 29 May 2003, Deputy Secretary of Defense Paul Wolfowitz delegated the authority and responsibility for Iraqi seized funds to the Administrator of the CPA, Ambassador Paul Bremmer.[2598] Deputy Secretary Wolfowitz' delegation reiterated that the seized funds be used only for "the benefit of the Iraqi people" and that the delegated authority "be exercised in accordance with DOD procedures developed in consultation with the Department of the Treasury, the Department of State, and the Office of Management and Budget."[2599] In addition to the reiterated requirements, however, he also noted that:

> DOD officials remain responsible for [seized funds] under their control . . . [and] ensure the property will be (1) secured at all times; (2) used only for purposes authorized by law; (3) provided only to recipients who are entitled to such payments; and (4) subjected to appropriate accounting and auditing controls.[2600]

Along with Deputy Secretary Wolfowitz' delegation, a document entitled *Procedures for Administering, Using and Accounting for Vested and Seized Iraqi Property* (Procedures) was also provided.[2601] The Procedures apply to both vested and seized Iraqi funds and include detailed requirements on responsibilities, accountability, receipt, transportation, authorized uses, and reporting for these Iraqi funds. Interestingly, the Procedures specifically noted that the vested and seized funds "are not considered U.S. Government appropriated funds."[2602]

The CERP—Commander's Tool for Humanitarian Assistance

In order to use the seized funds for the benefit of the Iraqi people, the Commander's Emergency Response Program (CERP) was created.[2603] As explained by Fragmentary Order 89 (FRAGO 89), the CERP "is a CPA funded authority provided for reconstruction assistance to the Iraqi people."[2604] Reconstruction assistance is defined primarily as "building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq."[2605] The same paragraph in

---

2593. GAO-03-668, *supra* note 2588, at 2.

2594. GAO-03-682, *supra* note 2588, at 26. The GAO recommended the Army Material Command and the Army acquisition community:

> develop and implement standard business rules and procedures for identifying and reporting Army depot workload projections from the Army acquisition community and require the DOD depot maintenance community to develop and implement ways to improve the identification and reporting of depot inter-service workload projections across all the military services using standard business rules and procedures.

Id.

2595. *Id*. at 1.

2596. Memorandum, President, to Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003).

2597. *Id*.

2598. Memorandum, Deputy Secretary of Defense, to Administrator of the Coalitional Provisional Authority, subject: Certain State- or Regime-Owned Property in Iraq (29 May 2003).

2599. *Id*.

2600. *Id*.

2601. *See* Memorandum, Under Secretary of Defense (Comptroller), to Secretary of Defense, subject: Delegation of Authority to Seize Certain State- or Regime-Owned Property in Iraq and Procedures Applicable to Vested and Seized Iraqi Property (20 May 2003).

2602. *Id*. attach B, para. 10.

2603. Combined Joint Task Force–7, Fragmentary Order 89 to Operations Order 03-036, Commander's Emergency Response Program (CERP) (19 June 2003) [hereinafter FRAGO 89].

2604. *Id*. para. 3.B.4.

FRAGO 89 also lists some fairly broad examples of reconstruction assistance, to include: financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and interestingly, "purchase or repair of civic support vehicles."[2606] Those familiar with the DOD's established humanitarian assistance authorities, such as 10 U.S.C. §§ 401, 2561, and 402, may recognize that the CERP is a much broader authority with higher funding levels. Very recently in the FY 2004 Emergency Supplemental Appropriations Act (ESAA),[2607] Congress has expanded the CERP's capabilities by providing appropriated funding.[2608]

FY 2004 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Planning and Execution Guidance Issued

By message dated 10 March 2003, the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) provided "policy guidance for FY04 OHDACA planning and execution, including the humanitarian mine action program."[2609] The funding for OHDACA activities is provided annually through the DOD Appropriations Act for programs provided under 10 U.S.C. §§ 401, 402, 404, 2547, and 2561.[2610] Humanitarian and civic assistance costs authorized under 10 U.S.C. § 401 (with the exception of demining activities), however, are not funded with the OHDACA appropriation but are funded with the general O&M appropriation.[2611]

The recent message provided guidelines for the execution of DOD's humanitarian assistance program and for commands to "evaluate the appropriateness of potential projects."[2612] The message also noted that the DOD humanitarian assistance projects are a "tool for achieving U.S. security cooperation objectives" and "can help secure or enhance DOD access and influence while addressing humanitarian needs and generating goodwill."[2613] While the projects "must further U.S. national security interests," they must also "provide tangible benefit to DOD."[2614] Overall, the message provided the following key evaluation criteria for OHDACA projects:

> (A) Contributes to the war on terrorism;
> (B) Promotes the specific operational readiness skills of the members of the armed forces who participate in the activities;
> (C) Improves DOD access/influence with military and civilian host nation counterparts;
> (D) Builds/reinforces security and stability in a host nation or region;
> (E) Generates positive public relations and goodwill for DOD that enhances our ability to shape the regional security environment; and
> (F) Bolsters host nation capacity to respond to natural or manmade disasters, thereby reducing the likelihood that future disasters will require a significant DOD response.[2615]

Although criteriion B is a statutory requirement in 10 U.S.C. § 401 and not statutorily required for the other Title 10 humanitarian assistance authorities funded with the OHDACA appropriation, this criterion should be interpreted in conjunction with paragraph 9C of the message. Paragraph 9C requires that all humanitarian assistance projects "involve visible U.S. military participation to ensure that the projects are effective security cooperation tools" and that the "DOD's role must not be reduced simply to providing funding."[2616]

Major Karl Kuhn.

2605. *Id.*

2606. *Id.*

2607. Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003) [hereinafter 2004 ESAA].

2608. *Id.* § 1110. For additional discussion of this provision, see *infra* Appendix A, DOD Legislation for FY 2004.

2609. Message, 100935Z Mar 2003, Secretary of Defense, subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities [hereinafter FY04 OHDACA Message].

2610. *See, e.g.*, DOD Appropriations Act for FY 2004, tit. II, Pub. L. No. 108-87, 117 Stat. 1054 (2003).

2611. *See, e.g.*, *id*. § 8009.

2612. FY04 OHDACA Message, *supra* note 2609, para. 2.

2613. *Id.* para. 3.

2614. *Id.* paras. 3, 6.

2615. *Id.* para. 6.

2616. *Id.* para. 9.C.

Liability of Accountable Officers

That Was Close

Last year's Y*ear in Review* reported on an opinion involving the GAO's inability to grant or deny the agency's request for relief from liability because the U.S. Department of State had failed to provide the GAO with sufficient information.[2617] This year, the GAO granted the agency's request in *Relief of Accountable Officer Sally Slocum – American Embassy, Brazzaville, Republic of the Congo*.[2618] The opinion involved the certification of a payment for pet evacuation services by Ms. Slocum.[2619] The fund from which this payment was to be made, however, did not contain any money.[2620] Ms. Slocum questioned the authority to use the fund prior to certifying the funds.[2621] Personnel at another embassy location, however, assured Ms. Slocum the payment was authorized.[2622] Also, the airline required the payment before the airline would provide evacuation services for embassy personnel to escape civil unrest in the Congo.[2623] Based on the additional information provided,[2624] the GAO concluded Ms. Slocum exercised reasonable diligence and, given the circumstances, requesting further documentation would have been an undue burden.[2625] The GAO did suggest that the Department of State develop detailed policies and procedures and require certifying officers to request verification of account amounts before initiating payments.[2626]

Lost in the Mail

The GAO relieved a U.S. Forest Service (Forest Service) collection officer from liability for the loss of funds even though the accountable officer failed to comply with U.S. Treasury Department (Treasury) procedures.[2627] In *Request for Relief from Financial Liability for Mick Barrus*,[2628] Mr. Barrus followed Forest Service regulations and mailed campground checks and a cashier's check for deposit to a bank.[2629] The regulations required Forest Service accountable officers to comply with both the Forest Service and the Treasury regulations for handling funds.[2630] The Treasury procedures required Mr. Barrus to maintain sufficient information to initiate a stop payment if required.[2631] Forest Service regulations excluded this requirement.[2632] When the funds failed to reach the bank or be returned as undeliverable, a tracer failed to locate the funds.[2633] Because Mr. Barrus did not comply with the Treasury procedures, he did

2617. *2002 Year in Review, supra* note 57, at 231 (discussing *Relief of Accountable Officers—American Embassy Brazzaville, Republic of Congo*, Letter from the U.S. General Accounting Office to Mr. Ronald L. Miller, Chairperson, Committee of Inquiry into Fiscal Irregularities, U.S. Department of State (May 29, 2002)). The GAO needed additional information regarding the Kinshasa Suspense Deposit Abroad (SDA) account's control procedures, the State Department or Embassy policies governing the account, the identity of the individual who provided guidance to Ms. Slocum, and the identify of the disbursing official who made the improper payment. *Id*. at 2.

2618. Letter from the U.S. General Accounting Office to Mr. John P. Markey, Jr., Acting Chairperson, Committee of Inquiry into Fiscal Irregularities, U.S. Department of State (Mar. 7, 2003), *available at* www.gao.gov.

2619. *Id*. at 1. Brazzaville Embassy personnel evacuated their household pets on Agence Air Afrique airlines when the embassy employees left due to widespread violence resulting from a military mutiny. *Id*.

2620. *Id*. at 2. Ms. Slocum paid the airline from an account established by the Department of Treasury for the Department of State. The account, the Kinshasa SDA "is a fund maintained at overseas posts from which payments of personal expenses can be made on behalf of and as directed by the depositors, including Embassy employees . . . ." *Id*.

2621. *Id*. at 2. Ms. Slocum relied "on the Kinshasa embassy official's instruction to pay the voucher using Kinshasa fiscal data for its SDA account . . . ." *Id*. Ms. Slocum certified $27,634.07 for payment to Air Afrique. *Id*. at 2. "According to the record, all but $5,701.43 has been collected and of this amount, $2,326.07 is considered non-recoverable as there is insufficient information to identify the persons owing these payments." *Id*. at 4.

2622. *Id*. at 2.

2623. *Id*. at 1.

2624. *Id*. at 3. The GAO concluded the government is required to reimburse any deficiency in the SDA account and, therefore, Ms. Slocum, as a certifying officer, would be liable for improper payments. The information submitted also substantiated that embassy employees often transmitted fiscal data via the telephone. Other employees corroborated that Ms. Slocum obtained approval prior to certifying the funds. *Id*.

2625. *Id*.

2626. *Id*.

2627. Letter from the U.S. General Accounting Office to Mr. Dale Bosworth, Chief, Forest Service, U.S. Department of Agriculture (Mar. 11, 2003), *available at* www.gao.gov.

2628. *Id*.

2629. *Id*. at 1. The fees collected included numerous personal checks in the amount of $6433 and a cashier's check in the amount of $7919.58. *Id*. at 1.

2630. *Id*. at 2.

not have sufficient information to initiate a "stop payment and obtain a duplicate check . . . ."[2634] The Forest Service recommended Mr. Barrus' relief from liability because he followed the Forest Service regulations applicable at the time.[2635] The GAO granted the requested relief but reminded the agency of the requirement to inform all accountable officers to comply with Treasury procedures particularly when the agency regulations are less stringent.[2636] The Forest Service adopted new rules to comply with the Treasury requirements.[2637]

World Trade Center

In *United States Secret Service Relief of Accountable Officer for Funds Lost in the Destruction of the World Trade Center*,[2638] a cashier for the U.S. Secret Service New York Field Office requested relief from liability for the physical loss of a confidential fund.[2639] Mr. Convery, an Assistant Special Agent, kept the funds in a locked safe in the U.S. Secret Service offices in the World Trade Center.[2640] The funds were physically lost after the World Trade Center was destroyed in a terrorist attack.[2641] Although accountable officers are presumed negligent for the physical loss of funds, unforeseen or emergency events beyond the control of the accountable officer is a basis for relief.[2642] The GAO relieved Mr. Convery from liability after determining Mr. Convery could not predict or prevent the events of 11 September and he committed no fault or negligence to cause the loss.[2643]

Major Bobbi Davis.

2631. *Id*.

2632. *Id*.

2633. *Id*. at 1.

2634. *Id*. at 2.

2635. *Id*.

2636. *Id*. at 3.

2637. *Id*. at 2.

2638. Letter from the U.S. General Accounting Office to Ms. Margie Gallahan, Chief, Financial Branch, Financial Management Division, U.S. Secret Service (June 19, 2003) (on file with author).

2639. *Id*. at 1. The confidential fund consisted of $22,646.20 and provided payment of expenses and rewards for services and information incurred in investigations, unforeseen emergencies, protective intelligence information, and security for Secret Service protectees. *Id*.

2640. *Id*.

2641. *Id*.

2642. *Id*. at 2.

2643. *Id*.

Appendix A

Department of Defense (DOD) Legislation for Fiscal Year (FY) 2004

DOD APPROPRIATIONS ACT FOR FY 2004

President Bush signed into law the fiscal year (FY) 2004 DOD Appropriations Act (Appropriations Act) on 30 September 2003.[1] The Appropriations Act provides approximately $368.7 billion to the DOD.[2] This is approximately $13.6 billion more than Congress appropriated for FY 2003, but about $3.6 billion less than President Bush had requested for FY 2004.[3]

Emergency and Extraordinary Expenses and Commander-In-Chief (CINC) Initiative Funds

Congress continued to authorize the Secretary of Defense (SECDEF) and the Service Secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses."[4] In addition, Congress gave the SECDEF the authority to make $40 million of the Defense-wide O&M appropriation available for the CINC initiative fund account.[5]

Overseas Contingency Operations Transfer Fund (OCOTF)

Congress appropriated just $5 million again this year for "expenses directly relating to Overseas Contingency Operations by U.S. military forces . . . ."[6] As in past years, funds appropriated to the OCOTF remain available until expended. Additionally, the SECDEF may transfer these funds to military personnel accounts, O&M accounts, the Defense Health Program appropriation, procurement accounts, RDT&E accounts, or to working capital funds.[7] Further, transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is prohibited, and the SECDEF must submit a report each fiscal quarter detailing certain transfers to the congressional appropriations committees.[8]

---

1. Department of Defense Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-87, 117 Stat. 1054 (2003) [hereinafter 2004 DOD Appropriations Act]. The joint conference report accompanying the Appropriations Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate Reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 108-87, at 59 (2003); *see also* H.R. REP. NO. 108-187 (2003); S. REP. NO. 108-87 (2003).

2. H.R. CONF. REP. NO. 107-732, at 346 (2003). The conference report breaks down the appropriations as follows:

Military Personnel	$98,453,681,000;
Operations and Maintenance	$115,914,877,000;
Procurement	$74,656,047,000;
Research, Development, Test, and Evaluation	$65,217,884,000;
Revolving and Management Tools	$1,641,507,000;
Other DOD Programs	$18,228,339,000.

Id. at 61, 94, 138, 230, 331-32.

3. *Id*. at 346.

4. 2004 DOD Appropriations Act, *supra* note 1, tit. II. Congress capped this authority at $11,034,000 for the Army, $4,463,000 for the Navy, $7,801,000 for the Air Force, and $40,000,000 for the DOD. *Id*; *see also* 10 U.S.C.S. § 127 (LEXIS 2003) (authorizing the SECDEF, the DOD Inspector General, and the Secretaries of the military departments to provide for "any emergency or extraordinary expense which cannot be anticipated or classified").

5. 2004 DOD Appropriations Act, *supra* note 1, tit. II (Operation and Maintenance, Defense-Wide); *see also* 10 U.S.C.S. § 166a (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the CINC Initiative Fund to combatant commanders for specified purposes). The Appropriations Act also provides $4,700,000 "for expenses relating to certain classified activities." 2004 DOD Appropriations, *supra* note 1, tit. II (Operation and Maintenance, Defense-Wide). The funds remain available until expended and the SECDEF is granted authority to transfer such funds to O&M appropriations or research, development, test and evaluation (RDT&E) accounts. *Id.* The $250,000 ceiling on investment items purchased with O&M funds does not apply under these circumstances. *Id*. *Cf. id*. § 8040. Under the 2004 DOD Authorization Act, the CINC Initiative Fund has been re-designated the "Combatant Commander Initiative Fund." *See infra* note 160 and accompanying text.

Overseas Humanitarian, Disaster, and Civic Aid

Congress appropriated $59 million for the DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.[9] These funds are available until 30 September 2005.[10]

Former Soviet Union Threat Reduction

Congress appropriated $450.8 million for assistance to the republics of the former Soviet Union.[11] This assistance is limited to activities related to the elimination and the safe and secure transportation and storage of nuclear, chemical, and other weapons in those countries, including efforts aimed at non-proliferation of these weapons.[12] Of the amount appropriated, $10 million is required for dismantling and disposal of nuclear submarines, submarine reactor components, and warheads in the Russian Far East.[13] Congress included the authority to use these funds for contacts and grants.[14] These funds are available until 30 September 2006.[15]

Drug Interdiction and Counter-Drug Activities

The DOD received approximately $835.6 million for drug interdiction and counter-drug activities.[16]

End-of-Year Spending Limited

Congress again limited the ability of the SECDEF and the Service Secretaries to obligate funds during the last two months of the FY to twenty percent of the applicable appropriation.[17]

Multi-year Procurement Authority

Congress continued to prohibit the Service Secretaries from awarding a multi-year contract that: (1) exceeds $20 million for any one year of the contract; (2) provides for an unfunded contingent liability that exceeds $20 million; or (3) is an advance procurement which will lead to a multi-year contract in which procurement will exceed $20 million in any one year of the contract unless the Ser-

---

6. 2004 DOD Appropriations Act, *supra* note 1, tit. II (Overseas Contingency Operations Transfer Fund). Congress appropriated $50 million in FY 2002 and nearly $4 billion in FY 2001. *See* Department of Defense Appropriations Act for Fiscal Year 2002, Pub. L. No. 107-117, div. A, tit. II, 115 Stat. 2230, 2235 [hereinafter 2002 DOD Appropriations Act] (Overseas Contingency Operations Transfer Fund); Department of Defense Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-259, 114 Stat. 656, 661 (2001). These continued reductions reflect Congress' belief that funds for operations in such places as the Balkans and in Southwest Asia, previously provided through the OCOTF, should be funded through the Services' O&M and military personnel appropriations. *See* H.R. CONF. REP. NO. 107-350, at 209 (2001).

7. 2004 DOD Appropriations Act, *supra* note 1, tit. II (Overseas Contingency Operations Transfer Fund).

8. *Id*. § 8113.

9. *Id*. tit. II (Overseas Humanitarian, Disaster, and Civic Aid). The DOD provides humanitarian, disaster, and civic aid to foreign governments under several statutes. *See, e.g.*, 10 U.S.C.S. §§ 401-02, 404, 2547, 2551.

10. 2004 DOD Appropriations Act, *supra* note 1, tit. II (Overseas Humanitarian, Disaster, and Civic Aid).

11. *Id*. tit. II (Former Soviet Union Threat Reduction).

12. *Id*.

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*. tit. VI (Drug Interdiction and Counter-Drug Activities, Defense).

17. *Id*. § 8004. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officers' Training Corps (ROTC) cadets. *Id*.

vice Secretary notifies Congress at least thirty days in advance of award.[18] Additionally, Congress continues to prohibit the Service Secretaries from awarding multi-year contracts in excess of $500 million unless Congress specifically provided for the procurement in the Appropriations Act.[19] Congress specifically provided for four multi-year procurements for the Navy in this year's Appropriations Act: the F/A-18 aircraft, the E-2C aircraft, the Tactical Tomahawk missile, and the Virginia Class submarine.[20]

Commercial Activities Studies

Under current law, if a DOD agency desires to convert a function it currently performs in-house to contractor performance, the agency must notify Congress of its intent then conduct a cost analysis to determine whether it will be cheaper to perform via a contractor.[21] In this year's Appropriations Act, Congress has again granted a waiver to that study requirement and permits agencies to make direct conversion of their functions if performance of that function will go to: (1) a firm that is listed on the procurement list by the Javits Wagner-O'Day (JWOD) Act[22] which employs severely handicapped or blind employees or is planned to be converted by a qualified nonprofit agency in accordance with that Act; or (2) a firm that is fifty-one percent under the control of an American Indian tribe or Native Hawaiian organization.[23] Congress also continued the prohibition on the use of funds to perform *Office of Management & Budget (OMB) Circular A-76* studies if the government exceeds twenty-four months to perform a study of a single function activity.[24] Congress, however, reduced to thirty, from forty-eight, the number of months to perform a study of a multi-function activity.[25]

Military Installation Transfer Fund

Congress again authorized the SECDEF to enter into executive agreements that permit the DOD to deposit into a separate account the funds it receives from North Atlantic Treaty Organization (NATO) member nations for the return of overseas military installations to those nations.[26] The DOD may use this money to build facilities which Congress approved to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.[27]

Small Business Subcontracting Credit

This year's Appropriations Act provides continual authority for businesses to receive subcontracting credit when purchasing from a "qualified nonprofit agency" for the blind or severely handicapped.[28] Only agencies approved by the Committee for the Purchase from the Blind and Other Severely Handicapped under the JWOD Act are "qualified nonprofit agencies."[29]

---

18. *Id*. § 8008. Congress continued the requirements for a present-value analysis to determine whether a multi-year contract will provide the government with the lowest total cost as well as an advance notice of at least ten-days prior to terminating a multi-year procurement contract. *Id*.

19. *Id*.

20. *Id*. The Secretary of the Navy may only enter into a multi-year contract for one Virginia Class submarine per year. *Id*.; *see also infra* notes 66-74 and accompanying text.

21. *See* 10 U.S.C.S. § 2461 (LEXIS 2003).

22. *See* 41 U.S.C.S. §§ 46-48c.

23. 2004 DOD Appropriations Act, *supra* note 1, § 8014. Under the *Revised Circular A-76*, however, the OMB has eliminated the use of "direct conversion" procedures. For additional discussion of this legislative provision in relation to *OMB Circular A-76* studies, see *supra* Section IV.B Competitive Sourcing.

24. *Id*. § 8022.

25. *Id*. This change jeopardized and halted numerous on-going DOD competitive sourcing studies that were almost complete but past or near the new thirty-month deadline. *See* Jason Peckenpaugh, *Pentagon to Get Authority to Finish Stalled Job Competitions*, Gov't Exec. Com., Dec. 9, 2003, *at* http://www.govexec.com/dailyfed/1203/120903p1.htm. It appears, however, that the DOD will be granted some relief. Language in the conference report accompanying H.R. 2673 (the "Consolidated Appropriations Bill") states the new thirty-month limitation will not apply to multifunction competitive sourcing studies in which the DOD agency had issued a solicitation prior to the enactment of the 2004 DOD Appropriations Act (i.e., 30 Sept. 2003). *See id*.; H.R. CONF. REP. NO. 108-401, div. H, Miscellaneous Appropriations and Offsets, § 111 (2003). Senate passage of the Consolidated Appropriations Bill is not anticipated until late January 2004. *See* Jason Peckenpaugh, *infra* note 25.

26. 2004 DOD Appropriations Act, *supra* note 1, § 8018.

27. *Id*.

Investment/Expense Threshold

In prior years, Congress has permitted the DOD to use its O&M appropriations to purchase investment items having a unit cost less than a specified threshold.[30] In this year's Appropriations Act, Congress increased the investment/expense threshold to $250,000 for the purchase of investment items.[31] Congress originally sanctioned the use of the increased threshold, for purchases made after 20 February 2003, in the consolidated appropriations legislation.[32]

Limit on Transfer of Defense Articles and Services

The Appropriations Act again prohibits the transfer of defense articles or services (other than intelligence services) to another nation or international organizations during peacekeeping, peace-enforcement, or humanitarian assistance operations without advance congressional notification.[33]

Limitation on Training of Foreign Security Forces

Unless the SECDEF determines that a waiver is required, no funds available under the Appropriations Act may be used to support training programs of foreign country security forces units when "credible information" exists that the unit has committed a gross violation of human rights.[34]

Required Actions of DOD Chief Information Officer

No funds appropriated in the 2004 DOD Appropriations Act are available for a mission critical or mission essential information technology system until it is registered with the DOD Chief Information Officer (CIO).[35] In addition, for major automated information systems, the CIO must certify that the system is compliant with the Clinger-Cohen Act of 1996[36] prior to Milestone I, II, or III approval.[37]

Matching Disbursements with Obligations

Section 8106 of the 1997 DOD Appropriations Act,[38] required the DOD, before making a disbursement in excess of $500,000, to match that intended disbursement with an obligation. Congress again extends that requirement to cover disbursements made in FY 2004.[39]

---

28. *Id*. § 8025.

29. *Id*; *see also* 41 U.S.C.S. § 46 (LEXIS 2003).

30. *See, e.g.*, Department of Defense Appropriations Act for Fiscal Year 2003, Pub. L. No. 107-248, § 8040, 116 Stat. 1519, 1545 (2003) [hereinafter 2003 DOD Appropriations Act] (establishing the threshold at $100,000).

31. 2004 DOD Appropriations Act, *supra* note 1, § 8040.

32. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-007, div. M, § 106, 117 Stat. 533 (2003).

33. 2004 DOD Appropriations Act, *supra* note 1, § 8065. The notification must occur fifteen days prior to the transfer. This provision originally appeared in the DOD Appropriations Act for Fiscal Year 1996. Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995).

34. *Id*. § 8077. This same provision has been included in DOD Appropriations Acts since FY 1999. *See* Department of Defense Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998).

35. 2004 DOD Appropriations Act, *supra* note 1, § 8084(a). The Department of Defense Appropriations Act for FY 2000 first required registration with the Chief Information Officer. Pub. L. No. 106-79, § 8121(a), 113 Stat. 1212, 1261 (1999).

36. *See* 40 U.S.C.S. §1401 (LEXIS 2003).

37. 2004 DOD Appropriations Act, *supra* note1, § 8084(c).

38. Pub. L. No. 104-208, 110 Stat. 3009, 3111 (1996).

Funds for the War on Terrorism

Last year, the DOD Appropriations Act specified that of the O&M funds appropriated under Title II, not less than $1 billion was available for prosecuting the Global War on Terrorism.[40] This year Congress provided that of the O&M funds appropriated under Title II, $20 million is available for the Regional Defense Counter-Terrorism Fellowship Program.[41] The purpose of the program is to fund the education and training of foreign military officers, ministry of defense civilians, and other foreign security officials, to include the U.S. military officers and civilian officials whose participation directly contributes to the education and training of these foreign students.[42]

Financing and Fielding of Key Army Capabilities

The Appropriations Act again directed the DOD and the Department of the Army to make budget and program plans to fully finance the Non-Line of Sight Objective Force cannon and resupply vehicle program to ensure the system is fielded in the 2008 time-frame.[43] The Appropriations Act further directs the Army to ensure program and budget plans provide for the fielding of no fewer than six stryker brigade combat teams between 2003 and 2008 to ensure an interim capability of light and medium forces prior to deployment of the objective force.[44]

No Funds for Terrorism Information Awareness Program

Congress prohibits obligating any funds appropriated by this year's Appropriations Act for the Terrorism Information Awareness Program.[45] This funding limitation does not apply to the program authorized for "processing, analysis, and collaboration tools for counterterrorism foreign intelligence" provided for in the Classified Annex accompanying the Appropriations Act.[46]

Prohibition Against Divesting Army Corps of Engineers' Missions

The Appropriations Act prohibits the use of funds appropriated for purposes of studying or implementing any plans to privatize, divest, or transfer any of the Army Corps of Engineers' civil works missions or responsibilities.[47]

Government Purchase and Travel Cards

Last year's Appropriations Act required the DOD to evaluate the creditworthiness of individuals before issuing government purchase or travel cards and prohibited the DOD from issuing such cards to individuals found not creditworthy.[48] This year's Act continues these requirements for FY 2004.[49]

---

39. 2004 DOD Appropriations Act, *supra* note 1, § 8092.

40. *See* 2003 DOD Appropriations Act, *supra* note 30, § 8114.

41. 2004 DOD Appropriations Act, *supra* note 1, § 8120.

42. *Id*.

43. *Id*. § 8107.

44. *Id*.

45. *Id*. § 8131.

46. *Id*.

47. *Id*. § 8136.

48. 2003 DOD Appropriations Act, *supra* note 30, § 8149(b).

49. 2004 DOD Appropriations Act, *supra* note 1, § 8144. For discussion of guidance in the 2004 DOD Authorization Act regarding creditworthiness evaluations before issuing government travel cards, see *infra* notes 181-84 and accompanying text.

EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT FOR FISCAL YEAR 2004

President Bush signed into law FY 2004 Emergency Supplemental Appropriations Act (ESAA) on 6 November 2003.[50] The ESAA provides approximately $87 billion for purposes of defense and for reconstruction activities in Iraq and Afghanistan.[51]

Iraq Freedom Fund

The ESAA provides the DOD approximately $2 billion in additional funds for authorized "Iraq Freedom Fund"[52] purposes.[53] These additional funds remain available for transfer until 30 September 2005. Additionally, the SECDEF may transfer these funds to accounts for military personnel, O&M, OHDACA, procurement, military construction, the Defense Health Program, and working capital funds.[54] This authority requires the SECDEF to notify Congress at least five days prior to transferring funds and to submit a report each fiscal quarter summarizing the details of any transfer from the fund.[55]

Commander's Emergency Response Program

Congress authorizes the DOD during the current fiscal year to use $180 million in O&M funding provided by the ESAA to fund the Commander's Emergency Response Program (CERP).[56] The CERP funds are available to military commanders "to respond to urgent humanitarian relief and reconstruction . . . by carrying out programs that will immediately assist the Iraqi people, and to establish and fund a similar program to assist the people of Afghanistan."[57]

Temporary Authority to Use O&M Funds for Military Construction

The ESAA authorizes the DOD to use O&M funds during FY 2004 to carry out construction projects upon the SECDEF's determination the "construction is necessary to meet urgent military operation requirements . . . in support of Operation Iraqi Freedom or the Global War on Terrorism," as well as other conditions.[58] Under the ESAA, this funding authority is limited to $150 million in FY 2004 and the DOD must submit a quarterly report to Congress detailing the use of this authority.[59]

Iraq Relief and Reconstruction Fund

Congress appropriated approximately $18.6 billion for purposes of the Foreign Assistance Act for security, relief, rehabilitation and reconstruction in Iraq.[60] These funds are available until 30 September 2006.[61]

---

50. Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003) [hereinafter 2004 ESAA].

51. H.R. CONF. REP. NO. 108-337, at 63 (2003).

52. The Emergency Wartime Supplemental Appropriations for Fiscal Year 2003 established a special "Iraq Freedom Fund" and provided approximately $16 billion to remain available for transfer until 30 September 2004 for expenses for ongoing military operations in Iraq and other activities related to the Global War on Terrorism. Pub. L. No. 108-11, tit. I, 117 Stat. 559, 563 (2003).

53. 2004 ESAA, *supra* note 50, tit. II (Iraq Freedom Fund).

54. *Id*.

55. *Id*.

56. *Id*. § 1110.

57. *Id*.

58. *Id*. § 1301(a). For additional discussion of this provision and its impact upon contingency construction funding, see *supra* Section V.D. Construction Funding. section 2808 of the FY 2004 DOD Authorization Act provides a similar authority. *See infra* notes 232-37 and accompanying text.

59. *Id*. § 1301(b), (c).

60. *Id*. tit. II (Iraq Relief and Reconstruction Fund).

Afghanistan Freedom Support Act of 2002

The ESAA amends the Afghanistan Freedom Support Act of 2002[62] by increasing the authorized funding available to carry out the Act's developmental and assistance programs in support of Afghanistan.[63] Specifically, the ESAA increases from $425 million to $1.825 billion the authorized appropriations for FY 2004.[64]

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2004

On 24 November 2003, the President signed into law the National Defense Authorization Act for FY 2004.[65]

Procurement

Multi-Year Procurement Authority

Congress authorized the Navy to enter into a multi-year contract beginning FY 2005 for the procurement of F/A-18E, F/A-18F, and EA-18G aircraft.[66] The Authorization Act also authorizes the Navy to enter into multi-year contracts beginning FY 2004 for the procurement of Tactical Tomahawk cruise missiles,[67] Virginia-class submarines,[68] E-2C and TE-2C aircraft,[69] and the Phalanx Close In Weapon System program.[70] Additionally, Congress authorizes the Navy to begin a pilot program of flexible funding of conversions and overhauls of cruisers.[71] Last year's Authorization Act authorized the Air Force to enter into a multi-year contract for the procurement of up to forty C-130J aircraft in the CC-130J configuration and up to twenty-four C-130J aircraft in the KC-130J configuration.[72] This year's Authorization Act eliminates the quantity limitations on the Air Force's multi-year procurement authority for C-130J aircraft.[73] The Authorization Act limits the obligation authority for the procurement of F/A-22 aircraft until certification requirements are met.[74]

Multi-Year Aircraft Lease Pilot Program[75]

After much debate, Congress authorized the Air Force to enter into a multi-year lease contract beginning in FY 2004 for up to twenty tanker aircraft.[76] In addition, the Secretary of the Air Force is authorized to enter into a multi-year procurement program, using incremental funding, for up to eighty aerial refueling aircraft.[77] The Authorization Act also requires the SECDEF to study alter-

---

61. *Id*.

62. Pub. L. No. 107-327, 116 Stat. 2797 (2002) (codified at 22 U.S.C. § 7518 (2000)).

63. *See* 2004 ESAA, *supra* note 50, § 2214.

64. *Id*.

65. Pub. L. No. 108-136, 117 Stat. 1392 (2003) [hereinafter 2004 DOD Authorization Act].

66. *Id*. § 121.

67. *Id*. § 122.

68. *Id*. § 123.

69. *Id*. § 124.

70. *Id*. § 125.

71. *Id*. § 126.

72. Pub. L. No. 107-314, § 131, 116 Stat. 2458, 2475 (2002).

73. 2004 DOD Authorization Act, *supra* note 65, § 131.

74. *Id*. § 133. Specifically, $136 million may not be obligated until the certification is submitted. *Id.*

75. Originally, Congress authorized the Air Force to establish a multi-year aircraft lease pilot program to lease up to 100 Boeing 767 aerial refueling aircraft. *See, e.g.*, 2002 DOD Appropriations Act, *supra* note 6, § 8159.

native means for meeting the long term requirements of the Air Force, for the maintenance and training in the operation of aerial refueling aircraft leased or procured through the program.[78]

Research, Development, Test, and Evaluation

DOD Test Resource Management Center

Last year's Authorization Act established a DOD Test Resource Management Center (TRMC) that is a field activity and headed by a director, who is a three-star officer.[79] This year's Authorization Act authorizes the selection of a civilian employee as Director, who is equivalent to a three-star officer.[80]

Future Combat Systems Non-Line-Of-Sight Cannon

The Authorization Act directs the SECDEF to submit a report on the Future Combat Systems program and wait thirty days before obligating or expending funds appropriated for the program.[81] Congress further directed the Director of Defense Research and Engineering to submit a report on the implementation of the program.[82]

Ballistic Missile Defense

The 2003 Defense Authorization Act amended section 224(e) of Title 10 concerning follow-on research, development, test, and evaluation of the Missile Defense Agency.[83] Congress required the SECDEF to ensure that "for each" such program transferred to one of the services, "responsibility for research, development, test, and evaluation related to system improvements for that program remains with the Director [of the Missile Defense Agency]."[84] This year the Authorization Act further authorizes the Missile Defense Agency to develop and field an initial set of ballistic missile defense capabilities.[85] In addition, Congress added to Title 10, a new section 233(a) entitled Ballistic Missile Defense Programs: Procurement.[86] The section requires the SECDEF to specify production rate capabilities, initial fielding availability dates, and estimated transfer dates to the military departments.[87] The new section also requires the SECDEF to include future procurement estimates for the program.[88]

---

76. 2004 DOD Authorization Act, *supra* note 65, § 135.

77. *Id*. The program may not exceed ten years. *Id*.

78. *Id*.

79. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 231, 116 Stat. 2458, 2487 (2002) [hereinafter 2003 DOD Authorization Act]. The TRMC is responsible for reviewing and certifying proposed DOD budgets for test and evaluation activities, developing and maintaining a strategic plan for DOD test and evaluation resources, and administering the Central Test and Evaluation Investment Program and the DOD program for test and evaluation science and technology. *Id*.

80. 2004 DOD Authorization Act, *supra* note 65, § 212.

81. *Id*. § 214.

82. *Id*.

83. 2003 DOD Authorization Act, *supra* note 79, § 222. The 2003 Defense Authorization Act also referenced the change in name from the Ballistic Missile Defense Organization to the Missile Defense Agency. *Id.* § 225.

84. *Id*.

85. 2004 DOD Authorization Act, *supra* note 65, § 222.

86. *Id*. § 223.

87. *Id*.

88. *Id*.

Technology Initiatives

The Authorization Act amends section 2192 of Title 10 and authorizes the SECDEF to enter into contracts and cooperative agreements, grant financial assistance, provide cash awards, accept voluntary services, and support national judging competitions with eligible entities that support educational programs in science, mathematics, engineering, and technology.[89] In another technology effort, Congress directs the SECDEF to develop a program to promote the research and development of high-speed, high-bandwidth communication capabilities for support of network-centric operations by the Armed Forces.[90] The Authorization Act also directs the DOD to develop a system to track U.S. and friendly forces during combat operations.[91] The SECDEF, acting through the U.S. Joint Forces Command, must demonstrate and evaluate joint tracking technologies during FY 2004 and submit the results to Congress.[92]

Operation & Maintenance

Sikes Act Reauthorization

The Authorization Act reauthorizes the Sikes Act[93] through FY 2008 and requires the SECDEF to ensure sufficient numbers of trained professional natural resource management and law enforcement personnel perform tasks necessary for the preparation and implementation of integrated natural resource management plans.[94] The Authorization Act also provides for the incorporation of an integrated natural resources management plan for the management, control, and eradication of invasive species for the military installations in Guam.[95]

Transportation of Humanitarian Relief Supplies to Foreign Countries

This year's Authorization Act clarifies the authority to transport humanitarian relief supplies to foreign countries in response to environmental emergencies.[96] The SECDEF is authorized to transport humanitarian relief supplies, to a foreign county, intended for use to respond to, or mitigate the effects of an event, that threatens serious harm to the environment only if other transportation sources are not readily available.[97] The same rule applies to the authority to provide transportation assistance in response to man-made or natural disasters to prevent serious harm to the environment, if human lives are not at risk.[98] In either case, the SECDEF is authorized to require reimbursement for costs incurred.[99]

Environmental Restoration Relocation Repeal

Effective 1 October 2003, Congress repealed the authority to use environmental restoration account funds for the relocation of a contaminated facility because of a release or threatened release of hazardous substances, pollutants, or contaminants.[100] Agreements in effect on 30 September 2003 remain in effect and are subject to the terms of that agreement.[101]

---

89. *Id*. § 233. Eligible entities include department or agencies of the federal government, state, political subdivisions of a state, an individual, not for profit and other private sector organizations. *Id*.

90. *Id*. § 234.

91. *Id*. § 235. The tracking initiative is known as "blue forces." *Id*.

92. *Id*.

93. 16 U.S.C.S. § 670f (LEXIS 2003). The Sikes Act is the conservation and rehabilitation program of natural resources on military installations. *Id*.

94. 2004 DOD Authorization Act, *supra* note 65, § 311.

95. *Id*.

96. *Id.*; *see id*. § 402 (authorizing the SECDEF, under certain conditions, to transport to any country, without charge on a space available basis, supplies which have been furnished by a nongovernmental source and which are intended for humanitarian assistance). *Id.* § 312.

97. 2004 DOD Authorization Act, *supra* note 65, § 312.

98. *Id*.

99. *Id*.

Wetland Mitigation Banks

The Authorization Act authorizes the DOD to make payments to a wetland mitigation banking[102] program or in-lieu-fee mitigation[103] sponsor if a defense agency is engaged in an authorized activity that may or will result in an adverse impact or destruction of a wetland.[104] The in-lieu-fee mitigation sponsor must be approved in accordance with the Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks or the Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation or any successor administrative guidance or regulation.[105] The Secretary of the Army, through the Chief of Engineers, must issue a regulation establishing performance standards and criteria within two years of the enactment of the Authorization Act.[106]

Restoration Advisory Boards

The Authorization Act requires the SECDEF to amend restoration advisory board regulations to prescribe the establishment, characteristics, composition, and funding of the board.[107] Documentation made available to, prepared for or by the board must be accessible for public inspection and copying.[108] The minutes of each meeting must be certified by the chairperson and include the persons present, matters discussed, conclusions reached, and reports received, issued or approved.[109] Because of the new requirements, Congress exempted the board from the Federal Advisory Committee Act, which requires advisory committees to discharge committee responsibilities openly and publicly.[110]

Firefighter Service Contract Exemptions

This year's Authorization Act amends section 2465(b) of title 10 by granting an additional exemption to the general prohibition against contracting for the performance of firefighting functions at military installations.[111] Congress authorizes firefighter service contracts if such contracts are for a period of one year or less and cover only firefighting functions that, in the absence of the contract, would be performed by military members who are not available for firefighting due to a deployment.[112]

Competition Exemption for Depot-Level Maintenance

Depot-level maintenance and repair work by DOD activities may not be changed to another DOD depot-level activity or contractor performance unless merit-based selection procedures for competitions among all DOD depot-level activities or competitive proce-

---

100. *Id*. § 313.

101. *Id*.

102. "Mitigation banking" includes wetland restoration, creation, enhancement, and preservation undertaken to compensate for unavoidable wetland losses in advance of development. Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, 60 Fed. Reg. 58,605, 58,606 (Nov. 28, 1995). Wetland mitigation banks provide compensation for adverse impacts to wetlands and other aquatic resources. *Id.* at 58,605.

103. "In-lieu-fee mitigation" involves funds paid to a natural resource management entity for implementation of specific or general wetland or other aquatic resource development projects. *Id*. at 58,613. While in-lieu-fee mitigation is not mitigation banking because compensatory mitigation is not typically provided in advance of project impacts, it may be appropriate in some circumstances. *Id*.

104. 2004 DOD Authorization Act, *supra* note 65, § 314. The authorization adds section 2694b to Title10.

105. *Id*.

106. *Id*.

107. *Id*. § 317.

108. *Id*.

109. *Id*.

110. *Id*. The Federal Advisory Committee Act implements the same general requirements. 5 U.S.C.S. app. §10 (LEXIS 2003).

111. 2004 DOD Authorization Act, *supra* note 65, § 331; *see also* 10 U.S.C.S. § 2465.

112. 2004 DOD Authorization Act, *supra* note 65, § 331.

dures for competitions among private and public sector entities are utilized.[113] This year, Congress authorized an exception to the competition requirement for public-private partnerships if the depot-level maintenance and repair work is performed at a Center of Industrial and Technical Excellence (CITE).[114]

Requirement for Resources-Based Completion Schedules in Competitive Sourcing Studies

The Authorization Act states that deadlines or other schedule-related milestones for competitive sourcing studies shall be based "solely on the . . . considered research and sound analysis regarding the availability of sufficient personnel, training, and technical resources to the Department of Defense to carry out such competition in a timely manner."[115] Additionally, if the DOD official responsible for managing the competition determines that the available personnel, training, or technical resources are insufficient, the official must extend any established deadline or milestone.[116]

Delayed Implementation of OMB Circular A-76

Congress delayed the implementation of the OMB's *Revised Circular A-76* within the DOD, until forty-five days after the SECDEF submits a report to Congress on the effects of the revisions.[117]

Best Value IT Services Pilot Program

The Authorization Act authorizes the SECDEF to implement a pilot program for the procurement of information technology services using best-value criteria in the source selection process.[118] To determine whether DOD civilian employees or a private contractor should perform the information technology services function, the SECDEF must demonstrate that private sector performance will result in the best value to the government over the life of the contract and that certain benefits exist, in addition to price, that warrant private sector performance at a higher cost than DOD performance.[119] Thus, the pilot program is an exemption from the general requirement that the DOD purchase services from the private sector if the services are cheaper.[120] The authority for the pilot program ends 30 September 2008.[121]

High Performing Organization Pilot Program

In another *Revised Circular A-76* provision, Congress requires the SECDEF to establish a pilot program to "create, or continue the implementation of, high-performing organizations through the conduct of a Business Process Reengineering initiative."[122] The

---

113. 10 U.S.C.S. § 2469.

114. 2004 DOD Authorization Act, *supra* note 65, § 333. Centers of Industrial and Technical Excellence serve as recognized leaders in a core competency throughout the DOD and in the national technology and industrial base by providing support to armed forces users and enhancing readiness by reducing repair equipment time. 10 U.S.C.S. § 2474. Section 2474(b)(2) encourages the SECDEF and the Service Secretaries to enter into public-private cooperative arrangements for work related to CITE core competencies and use CITE facilities or equipment of the Center not fully utilized for a military departments production or maintenance requirements. *Id*. § 2474(b)(2). The objectives of the public-private cooperative arrangements are to maximize CITE utilization, reduce or eliminate CITE ownership costs, reduce production costs, leverage private sector investment, and foster cooperation between the armed forces and private industry. *Id*.

115. 2004 DOD Authorization Act, *supra* note 65, § 334.

116. *Id*.

117. *Id*. § 335. For additional discussion of the *Revised Circular A-76*, see *supra* Section IV.B Competitive Sourcing.

118. 2004 DOD Authorization Act, *supra* note 65, § 336.

119. *Id*. The pilot program excludes the cost examination requirements of 10 U.S.C. § 2461(b)(3)(A), Commercial or Industrial Type Functions: Required Studies and Reports Before Conversion to Contract Performance. 10 U.S.C.S. § 2461 (LEXIS 2003).

120. 2004 DOD Authorization Act, *supra* note 65, § 336; *see also* 10 U.S.C. S. § 2462(a).

121. 2004 DOD Authorization Act, *supra* note 65, § 336.

122. *Id*. § 337.

effect of a high-performing organization's participation in the pilot program is that agencies may not require such organizations to undergo Circular A-76 competitions during the organizations participation in the pilot program.[123]

Commercial Identifiers for the Federal Cataloging System

The Authorization Act requires the SECDEF to coordinate with the Administrator, General Services, Defense Supply Management, to enable the use of commercial identifiers for commercial items within the federal cataloging system.[124]

Navy-Marine Corps Intranet Contract

This year, Congress authorized the sale of working capital funded services of the Defense Information Systems Agency outside the DOD for use in the performance of the Navy-Marine Corps Intranet contract.[125] Reimbursement is required for the cost of the services sold.[126]

Authority to Purchase Prepaid Phone Cards

The SECDEF is immediately authorized to purchase prepaid phone cards for military personnel, at no cost to military members, to make telephone calls.[127] The authority applies only to military personnel stationed outside the United States who are eligible for the combat zone exclusion due to their service in direct support of Operation Enduring Freedom and Operation Iraqi Freedom.[128] The SECDEF may not award a commercial contract to procure the phone cards but is authorized, if resources are available, to competitively award commercial contracts to provide additional telephones to facilitate use of the telephone calling benefits.[129] The value of the phone card benefit per month may not exceed $40 or 120 calling minutes, provided the cost does not exceed $40.[130] The authority for the program ends 30 September 2004 and the SECDEF may choose not to implement the program if taking action would compromise DOD military objectives or missions.[131]

Military Personnel Authorizations

Expanded Authority to Increase Active-Duty End Strengths

Congress authorized increased active duty end strengths for the Army and Air Force beginning 30 September 2004, amending section 691(b) of Title 10.[132] Congress authorized an increase of 2400 and 300 personnel, respectively, for each service.[133] The end strength for the Navy, however, decreased by 1900 personnel.[134] The Authorization Act also amends section 115 of Title 10 by adding a section requiring the SECDEF to submit proposed end-of-quarter end strengths with the DOD budget submissions.[135] The SECDEF

---

123. *Id*.

124. *Id*. § 341.

125. *Id*. § 342.

126. *Id*.

127. *Id*. § 344.

128. *Id*.

129. *Id*. The SECDEF may also accept donations from foreign governments and from U.S. or foreign private or charitable organizations. *Id*.

130. *Id*.

131. *Id*.

132. *Id*. § 402.

133. *Id*.

134. *Id*.

must also prescribe end-of-quarter strength levels for the first three quarters of the fiscal year that new end strength levels are authorized and annually establish maximum permissible variance of actual end strengths for the armed forces, excluding the Coast Guard.[136]

Military Personnel Policy

Frocking Approval

The Authorization Act requires SECDEF approval and a report to Congress before officers selected for promotion to a grade above colonel or, in the case of Navy officers, to a grade above captain, may wear the insignia of the higher grade.[137]

Use of Reserves to Defend Against Terrorism

Amending section 12304 of Title 10, the Authorization Act authorizes the use of Reserves to respond to a terrorist attach or threatened terrorist attack in the United States if the attack results in or could result in a "significant loss of life or property."[138] Additionally, Congress added a new paragraph providing that prior to ordering reserve components to active duty, the President must determine the requirements for responding to the emergency have or will exceed the response capabilities of local, state, and federal civilian agencies.[139]

Permanent Authority for Building and Maintaining Strong Families

Last year, the Appropriations Act authorized the Service Secretaries to use available FY 2003 O&M funds in support of chaplain-led programs that assisted in building and maintaining a strong family structure.[140] Covered costs included "transportation, food, lodging, supplies, fees, and training materials for members of the Armed Forces and their family members while participating in such programs, including participation at retreats and conferences."[141] Adding section 1789 to Title 10, Congress this year provided permanent authority to support these chaplain-led programs.[142]

Concurrent Deployment of Dual Military Families

Within 180 days of the Authorization Act's enactment, the SECDEF must "prescribe the policy of the [DOD] on concurrent deployment to a combat zone of both spouses in a dual-military family with one or more minor children."[143]

---

135. *Id*. § 403.

136. *Id*.

137. *Id*. § 509. The SECDEF must wait thirty days after submission of the report before authorizing wear of the insignia. *Id*.

138. *Id*. § 515. The section previously required a "catastrophic loss of life or property." Bob Stump 2003 NDAA, *supra* note 79, § 514.

139. 2004 DOD Authorization Act, *supra* note 65, § 515.

140. 2003 DOD Appropriations Act, *supra* note 30, § 8116.

141. *Id*.

142. 2004 DOD Authorization Act, *supra* note 65, § 582.

143. *Id*. § 585.

Compensation and Other Personnel Benefits

Basic Pay Increases

Effective 1 January 2004 all members of the uniformed services will receive a 3.7 percent increase to their monthly base pay.[144] Also effective 1 January 2004, the monthly basic pay rates for members of the uniformed services will increase each year based on the Employment Cost Index (ECI).[145]

Family Separation Allowance

The Authorization Act temporarily increases the family separation allowance from $100 per month to $250 per month for the period beginning 1 October 2003 and ending on 31 December 2004.[146]

Hostile File and Imminent Danger Pay

Congress also temporarily increased the hostile fire and imminent danger pay from $100 per month to $225 per month beginning 1 October 2003 and ending 31 December 2004.[147] The Authorization Act also authorizes the SECDEF to pay hostile fire or imminent danger pay to Armed Forces members on duty from 19 March 2003 to 11 April 2003, in a specified area in connection with Operation Iraqi Freedom.[148]

Health Care Provisions

The Authorization Act amends section 1091(a)(2) of Title 10 and grants permanent authority to enter into personal services contracts for the performance of health care responsibilities at locations other than military medical treatment facilities.[149]

Acquisition Policy, Acquisition Management, and Related Matters

Contract Consolidation Requirements

Adding section 2382 to Title 10, the Authorization Act requires DOD agencies to ensure that decisions regarding consolidation of contract requirements be "made with a view to providing small business concerns with appropriate opportunities to participate in [DOD] procurements" as prime contractors and subcontractors.[150] The new provision specifically defines "consolidation of contract requirements" and "consolidation" as follows:

> use of a solicitation to obtain offers for a single contract or multiple award contract to satisfy two or more requirements of a department, agency, or activity for goods or services that have previously been provided or performed under two or more separate contracts, smaller in cost than the total cost of the contract for which the offers are solicited.[151]

---

144. *Id*. § 601.

145. *Id*. § 602. The ECI consists of the wages and salaries of private industry workers published by the Bureau of Labor Statistics. The increase is the percentage, rounded to the nearest one-tenth of one percent, by which the ECI for the base quarter of the year before the preceding year exceeds the ECI for the base quarter of the second year before the preceding calendar year, if at all. For FYs 2004 through 2006, the increase will be one-half of one percentage point higher than the percentage that would otherwise be applicable. *Id*.

146. *Id*. § 606.

147. *Id*. § 619.

148. *Id*. § 620. The area specified includes "the Mediterranean Sea east of 30 degrees East Longitude (sea area only)." *Id*.

149. *Id*. § 721.

150. *Id*. § 801. The Authorization Act requires the SECDEF to ensure the Secretary of each military department, head of each Defense Agency and head of each DOD Field Agency ensures the deciding officials complies with the contract consolidation requirements. *Id*.

151. *Id*.

If the total value of the contract exceeds $5 million, the Senior Procurement Executive (SPE) may not consolidate a contract unless the SPE conducts market research, identifies alternative contracting approaches that would involve a lesser degree of contract consolidation, and determines consolidation is necessary and justified.[152] The new provision further requires the SECDEF to revise DOD's data collection systems to ensure consolidated procurements in excess of $5,000,000 meet the contract consolidation policies and restrictions.[153]

Iraq Competitive Award Requirements

Concerning contracts awarded for reconstruction activities in Iraq, the Authorization Act requires the DOD to award such contracts in accordance with the laws and regulations on competition.[154] Additionally, the SECDEF must submit a report, not later than thirty days after the Authorization Act's enactment, explaining why the 8 March 2003 contract for the reconstruction of the Iraqi oil industry has not been re-awarded competitively.[155]

Unreliable Sources of Defense Items and Components

Effective 24 November 2003, the Authorization Act prohibits the SECDEF from procuring items or components contained in a military system if manufactured in a foreign country that restricts the provision or sale of military goods or services to the United States because of U.S. counterterrorism or military operations.[156] Existing contracts must comply with the restriction within twenty-four months of the effective date.[157] The SECDEF may waive the prohibition if the need for the items is of such an unusual and compelling urgency that the DOD would be unable to meet national security objectives.[158] The SECDEF must also notify Congress.[159]

Purchase of Capital Assets Manufactured in the United States

The Authorization Act also amends section 2435 of Title 10, requiring defense contractors for major defense acquisition programs to use only machine tools produced in the United States.[160] Congress further directs the SECDEF to establish an incentive program to ensure the source selection process includes consideration of offers with eligible capital assets.[161]

Berry Amendment Exceptions

Congress adds an exception to the requirement to buy certain articles from American sources by excluding procurements of covered items in support of contingency or combat operations.[162] The Authorization Act also excludes from the requirement to buy from American sources the procurement of waste and by-products of cotton and wool fiber for use in the production of propellants and explosives.[163]

---

152. *Id.* Contract consolidation is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches. Savings in administrative or personnel costs alone do not constitute a sufficient justification unless the total amount of the cost savings is expected to be substantial in relation to the cost of the procurement. *Id.*

153. *Id.*

154. *Id.* § 805.

155. *Id.*

156. *Id.* § 821.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* § 822. The requirement applies to contracts entered into eighteen months from the date of the Authorization Act's enactment. *Id.*

161. *Id.*

Additional Personal Services Contract Authority

This year's Authorization Act provides additional authority to enter into personal services contracts with individuals outside the United States if such services directly support a DOD defense intelligence component, counter-intelligence organization, or a special operations command mission.[164]

Limitation Period for Task and Delivery Order Contracts

The 2003 DOD Authorization Act made the multi-year contract provisions of section 2306c of Title 10, "including the authority to enter into contracts for periods of not more than five years," applicable to task and delivery order contracts.[165] This year's Authorization Act repeals that provision, but amends section 2304a of Title 10, authorizing the head of an agency to enter into a task or delivery order contract for not more than five years under the authority provided in section 2304a.[166]

Acquisition Authority for Commander, Joint Forces Command

Amending section 167a of Title 10, the Authorization Act authorizes the SECDEF to delegate acquisition authority to unified combatant commanders to develop and acquire equipment to facilitate the use of joint forces in military operations or enhance the interoperability of equipment used by components of joint forces.[167] The delegation authority applies through FY 2006.[168]

Contracting with Employers of Persons with Disabilities

Congress eliminated the application of the Randolph-Sheppard Act[169] to Javits-Wagner-O'Day[170] dining facility contracts, if the contract is in effect before 24 November 2003, including contact extensions.[171] The Authorization Act does, however, authorize a demonstration project to provide contracting opportunities for the severely disabled.[172]

---

162. *Id*. § 826. Covered items include the following:

> (1) an article or item of food, clothing, tents, tarpaulins, covers, cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fabrics and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials; (2) specialty metals, including stainless steel flatware; (3) hand or measuring tools.

10 U.S.C.S. § 2533a (LEXIS 2003).

163. 2004 DOD Authorization Act, *supra* note 65, § 827.

164. *Id*. § 841. The SECDEF must determine the non-U.S. employees, regardless of their nationality, are necessary and appropriate for supporting the activities and programs of the DOD outside the United States. *Id*.

165. 2003 DOD Authorization Act, *supra* note 79, § 811.

166. 2004 DOD Authorization Act, *supra* note 65, § 843.

167. *Id*. § 848. The provision authorizes combatant commanders to acquire equipment for battle management command, control, communications, intelligence, and equipment the commander determines is necessary and appropriate for facilitating the use of joint forces in military operations or enhancing the interoperability of equipment used by the various components of joint forces. *Id*.

168. *Id*.

169. 20 U.S.C.S. § 107 (LEXIS 2003).

170. 41 U.S.C.S. 48.

171. 2004 DOD Authorization Act, *supra* note 65, § 852.

172. *Id*. § 853.

DOD Organization and Management

Re-designation of CINC Initiative Fund

The Authorization Act re-designates the "CINC Initiative Fund" as the "Combatant Commander Initiative Fund."[173]

Transfer of Investigative Functions

This year's Authorization Act authorizes the SECDEF to transfer the personnel security investigations function performed by the Defense Security Service to the Office of Personnel Management (OPM).[174] Before transferring the functions, however, the SECDEF must ensure OPM is capable and has undertaken the necessary steps to ensure expeditious handling of the function.[175]

Defense Acquisition Workforce Freeze

Congress implemented a workforce freeze for defense acquisition and support personnel for FY 2004.[176] The number of acquisition and support personnel may only vary by no more than one percent, up or down, as a result of normal hiring and firing flexibility.[177] The SECDEF has authority to waive this limitation if the waiver is necessary to protect a significant U.S. national security interest.[178]

Integration of Defense Capabilities

The Authorization Act requires the DOD, as part of the transformation efforts within the department, to fully integrate the intelligence, surveillance, and reconnaissance capabilities and coordinate the developmental activities of the military departments, the DOD intelligence agencies, and relevant combatant commands.[179]

General Provisions

Authority for Short-Term Leases to Cross Fiscal Years

Amending section 2410a of Title 10, the Authorization Act re-establishes the authority for short-term leases of real or personal property, including the maintenance of such property when contracted for as part of the lease, to cross fiscal years.[180]

Defense Travel Cards

Last year's Authorization Act added a new section 2784a to Title 10 in an effort to improve the management of the government travel card program.[181] This year, Congress amended section 2784a(a) of Title 10 to now require the disbursement of travel allowances directly to government travel card creditors.[182] The Authorization Act also requires creditworthiness evaluations of military

173. *Id.* § 902.

174. *Id.* § 906.

175. *Id.*

176. *Id.* § 907. The baseline number is the number of acquisition and support personnel as of 1 October 2003. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* § 923.

180. *Id.* § 1005.

181. 2003 DOD Authorization Act, *supra* note 79, § 1008.

members and DOD employees prior to the issuance of the government travel card.[183] The SECDEF must also prescribe regulations to ensure appropriate disciplinary action is taken against personnel for improper, fraudulent, or abusive use of the card.[184]

Annual Military Construction Request

This year, Congress amended section 113a(b) of Title 10 requiring the submission of the annual military construction authorization request within thirty days of the date the President transmits the budget request to Congress.[185]

Matters Relating to Other Nations

Small Business Opportunities in Efforts to Rebuild Iraq

Congress requested the SECDEF ensure outreach procedures are in place to provide information to small, minority-owned, and women-owned businesses regarding the requirements and contract opportunities for rebuilding Iraq.[186]

Re-Deployment of U.S. Forces to Europe

Given the number of countries that have joined the North Atlantic Treaty Organization (NATO) since its inception, Congress believes the expansion of the NATO Alliance provides the opportunity for other nations to assist with ensuring the peace, prosperity, and democracy of Western Europe.[187] Therefore, Congress suggested the SECDEF and the Secretary of State re-evaluate the current posture of U.S. forces stationed in Europe and evaluate the advantages of basing and training opportunities in the newly admitted states.[188]

Services Acquisition Reform Act

Congress included at Title XIV within this year's Authorization Act, the Services Acquisition Reform Act (SARA) of 2003.[189] Significant provisions of the SARA are discussed below.

Definition of Acquisition

The SARA amends section 4 of the Office of Federal Procurement Policy Act[190] by defining the term acquisition.[191] The new definition encompasses the entire spectrum of acquisition, starting with the development of an agency's requirements through management and measurement of contract performance.[192]

---

182. 2004 DOD Authorization Act, *supra* note 65, § 1009. The SECDEF may waive the direct disbursement "in any case the Secretary determines appropriate." *Id.*

183. *Id.*

184. *Id.* Last year's Appropriations Act contained similar guidance regarding creditworthiness evaluations and establishing disciplinary guidelines. *See* 2003 DOD Appropriations Act, *supra* note 30, § 8149. This year's Appropriations Act continues the requirement for creditworthiness evaluations in FY 2004. 2004 DOD Appropriations Act, *supra* note 1, § 8144; *see also supra* notes 48-49 and accompanying text.

185. 2004 DOD Authorization Act, *supra* note 65, § 1044.

186. *Id.* § 1205.

187. *Id.* § 1233.

188. *Id.*

189. *Id.* § 1401.

190. 41 U.S.C.S. § 403 (LEXIS 2003).

Acquisition Workforce Training Fund

The SARA establishes an acquisition workforce training fund to ensure the federal acquisition workforce adapts to fundamental changes in the nature of federal acquisitions associated with the changing roles of the federal government and to ensure the workforce acquires new skills and a new perspective in the changing 21st century.[193] The fund will be financed by depositing five percent of the fees collected by various executive agencies under their government-wide contracts and will only be used to train civilian government agencies.[194] This section does not apply to the DOD acquisition workforce, thus the DOD is exempt from making contributions to the fund.[195]

Acquisition Workforce Recruitment Program

The SARA authorizes the head of a department or agency to recruit and appoint employees for federal acquisition position shortages.[196] The authority for this hiring policy expires after 30 September 2007.[197] Congress also required the OPM and the Administrator for Federal Procurement Policy to submit a report documenting the recruitment program's implementation.[198]

Architectural and Engineering Acquisition Workforce

Congress also directs the development and implementation of a plan to ensure the federal government maintains the necessary capability to contract effectively for the performance of architectural and engineering services.[199]

Chief Acquisition Officer and Council

The SARA also requires the appointment of a non-career employee as the Chief Acquisition Officer (CAO) for each executive agency other than the DOD.[200] The primary duty of the CAO is acquisition management with the responsibility for advising and assisting the head of the agency and other agency officials to ensure that the agency's mission is achieved through the management of the agency's acquisition activities.[201] The SARA also creates a Chief Acquisition Officers Council to monitor and improve the

---

191. 2004 DOD Authorization Act, *supra* note 65, § 1411. The SARA defines "acquisition" as follows:

> the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and includes: (1) the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated; (2) the description of requirements to satisfy agency needs; (3) solicitation and selection of sources; (4) award of contracts; (5) contract performance; (6) contract financing; (7) management and measurement of contract performance through final delivery and payment; and (8) technical and management functions directly related to the process of fulfilling agency requirements by contact.

Id.

192. *Id*.

193. *Id*. § 1412.

194. *Id*.

195. *Id*.

196. *Id*. § 1413.

197. *Id*.

198. *Id*.

199. *Id*. § 1414. Congress directs the Administrator for Federal Procurement Policy, in consultation with the SECDEF, the Administrator of General Services, and the OPM Director, to ensure that government employees have the expertise to (1) determine agency requirements for architectural and engineering acquisition services; (2) establish priorities and programs (including acquisition plans); (3) establish professional standards; (4) develop scopes of work; and (5) award and administer contracts for such services. *Id*.

200. *Id*. § 1421.

federal acquisition system.[202] The council's membership includes the agency CAOs, the Under Secretary of Defense (Acquisitions, Technology, and Logistics), the senior procurement executives for each of the military and the OFPP Administrator. The council will be chaired by the OMB's Deputy Director for Management.[203]

Advisory Panel

Additionally, the Administrator for Federal Procurement Policy must establish an advisory panel to review the laws and regulations regarding the use of commercial practices, performances-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of government-wide contracts.[204] Within a year of its establishment, the panel must submit a report containing a detailed statement of its findings, conclusions, and recommendations to the OFPP Administrator and Congress.[205]

Franchise Funds

Congress extended the authority for the franchise fund program until 31 December 2004. Previously, the authority for the funds expired on 1 October 2003.[206]

Telecommuting Authority for Contract Employees

Congress also mandates that the FAR Council amend the FAR to permit telecommuting by federal government contract employees.[207] Solicitations for the acquisition of property or services may not eliminate or reduce the evaluation score of an offer that includes a plan permitting the offeror's employees to telecommute, unless the contracting officer determines the requirements of the agency cannot be met or establishes that the agency requirements would be adversely impacted due to the telecommuting.[208]

Performance of Services Contracts

To create further incentive to use performance-based service contracts, the SARA adds section 403 to Title 41, which now authorizes commercial item treatment of performance-based contracts or performance-based task orders for the procurement of services that do not exceed $25 million.[209] Such contracts or task orders must be defined in measurable and mission related terms, identify specific end products or outputs to be achieved, contain firm fixed prices for specific tasks to be performed or outcomes to be reached, and the services performed for the government must be similar to the services provided to the general public.[210] This authority for commercial item treatment expires in ten years.[211]

---

201. *Id*.

202. *Id*. § 1422.

203. *Id*.

204. *Id*. § 1423. Congress requires the establishment of the panel not later than ninety days after the Authorization Act's enactment. Members of the panel will include at least nine individuals recognized as experts in government acquisition law and policy. The panel is required to review all federal acquisition laws and regulations, make recommendations for modification of the laws, regulations, or policies, ensure the continuing financial and ethical integrity of federal government acquisition, and amend or eliminate any provisions that are unnecessary for the effective, efficient, and fair award and administration of federal government contracts for goods and services. *Id.*

205. *Id*.

206. *Id*. § 1426.

207. *Id*. § 1428.

208. *Id*.

209. *Id*. § 1431. The regulations implementing this authority must require agencies to collect and maintain reliable data sufficient to identify the contracts or task orders treated as contracts for commercial items using this authority. *Id*.

210. *Id*.

Additional Authority for Commercial Contract Types

The SARA also provides authority for time and material contracts or labor hour contracts to be used for the acquisition of commercial services commonly sold to the general public provided the contracting officer executes a determination and finding that other contract types are not suitable.[212] Congress noted this new authority does not change the statutory preference for performance-based contracts and performance-based task orders established by the 2001 Defense Authorization Act.[213]

Defense Against or Recovery From Terrorism or Nuclear, Biological, Chemical, or Radiological Attack

Congress authorized the OMB Director to grant selected civilian agencies the authority to enter into transactions and to carry out prototype projects that have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack.[214] This authority does not apply to the Secretary of Homeland Security while section 831 of the Homeland Security Act of 2002 remains in effect.[215]

Public Disclosure of Iraqi Contracts

Congress also requires agencies to report on the justification for awarding contracts for reconstruction of the infrastructure in Iraq without full and open competition on all contracts entered into on or after 1 October 2002.[216] For such contracts, agencies must publish in the Federal Register or Commerce Business Daily within thirty days after entering the contract the amount of the contract, a description of the contact, and a discussion of how the agency identified the contractor.[217] This reporting requirement does not apply to contracts entered into after 30 September 2005.[218]

Special Emergency Procurement Authority

The SARA also adds section 428a to Title 41 and grants special emergency procurement authority to the DOD and civilian agencies for the procurement of services in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States.[219] For procurements to which this special emergency authority applies, the $2500 micro-purchase threshold[220] increases to $15,000.[221] Additionally, the emergency authority increases the simplified acquisition threshold[222] to $250,000 for qualifying contracts and purchases inside the United States and $500,000 for such purchases outside the United States.[223] For commercial item procurements to which the special authority applies, the $5 million simplified acquisition threshold[224] increases to $10 million.[225] The DOD has yet to implement these increased thresholds.

---

211. *Id.*

212. *Id.* § 1432.

213. *Id.*; *see also* Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 821, 106 Stat. 398, 1654A-217 (2000).

214. DOD Authorization Act, *supra* note 65, § 1441. The authority is subject to the same restrictions and conditions outlined in section 2371 of Title 10, Research Projects: Transactions Other Than Contracts and Grants. 10 U.S.C.S. § 2371 (LEXIS 2003).

215. 2004 DOD Authorization Act, *supra* note 65, § 1441; s*ee also* Homeland Security Act of 2002, Pub. L. No. 107-296, § 831, 116 Stat. 2135, 2224 (granting the Secretary of Homeland Security for a period of five years a similar authority to carry out prototype projects that have the potential to facilitate defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack).

216. 2004 DOD Authorization Act, *supra* note 65, § 1442. This provision includes all contracts for the repair, maintenance, as well as construction of Iraqi infrastructure. *Id*.

217. *Id*. For contracts entered into prior to the enactment of the Authorization Act, the reporting requirements apply as if the contract had been entered into on the date of the Authorization Act's enactment. *Id*.

218. *Id*.

219. *Id*. § 1443.

220. *See* 41 U.S.C.S. 428 (c), (d), (f) (LEXIS 2003).

221. 2004 DOD Authorization Act, *supra* note 65, § 1443.

222. *See* 41 U.S.C.S. §§ 259(d), 403(11).

Continuation of Simplified Acquisition Procedures Authority for Commercial Items

Finally, the SARA extended the "test program" authorizing agencies to use simplified acquisition procedures to acquire certain commercial items; the authority now expires 1 January 2006.[226]

Military Construction Authorizations

Definitional Changes

Stating "[t]he scope and duration of the operational requirement necessitating military construction does not affect the definition,"[227] Congress amended the definition of "military construction" found in section 2801 of Title 10 by adding "whether to satisfy temporary or permanent requirements."[228] Related, the Authorization Act also modifies section 2801's definition of "military installation," making the term applicable "without regard to the duration of [DOD's] operational control."[229]

Increase in Authorized Annual Emergency Construction

The Authorization Act also amends section 2803 of title 10 to increase from $30 million[230] to $45 million the annual amount a Service Secretary may obligate for emergency military construction projects not otherwise authorized by law.[231]

Temporary, Limited Authority to Use O&M Funds for Construction

Similar to the FY 2004 Emergency Supplemental Appropriation Act (ESAA),[232] the Authorization Act provides "temporary, limited authority" to the DOD to use O&M funds for construction projects outside the United States provided the SECDEF make certain determinations.[233] While the Authorization Act establishes a $200 million limit on this authority,[234] under the ESAA, this funding

---

223. 2004 DOD Authorization Act, *supra* note 65, § 1443.

224. *See* 10 U.S.C.S. § 2304(g)(1)(B); 41 U.S.C.S. §§ 253(g)(1)(B), 427(a).

225. 2004 DOD Authorization Act, *supra* note 65, § 1443.

226. *Id*.

227. H.R. Conf. Rep. No. 108-354, at 814 (2003).

228. 2004 DOD Authorization Act, *supra* note 65, § 2801.

229. *Id*.

230. 10 U.S.C.S. § 2803(c)(1) (LEXIS).

231. 2004 DOD Authorization Act, *supra* note 65, § 2802.

232. 2004 ESAA, *supra* note 50. For additional discussion of this provision and its impact upon contingency construction funding, see *supra* Section V.D. Construction Funding.

233. 2004 DOD Authorization Act, *supra* note 65, § 2808. To rely upon this limited, temporary authority, the SECDEF must determine:

> (1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation; (2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-tern presence; (3) The United States has no intention of using the construction after the operational requirements have been satisfied; and, (4) The level of construction is the minimum necessary to meet the temporary operational requirements.

Id. While section 1301(a) of the 2004 ESAA has nearly identical requirements, the ESAA states the urgent military requirement must be "in support of Operation Iraqi Freedom or the Global War on Terrorism" vice "in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation; . . ." *Cf*. 2004 ESAA, *supra* note 50, § 1301(a).

234. 2004 DOD Authorization Act, *supra* note 65, § 2808(c).

authority is limited to $150 million.[235] Additionally, both the Authorization Act[236] and the ESAA[237] require that the DOD report quarterly to Congress detailing the use of this authority.

Major Bobbi Davis.

235. 2004 ESAA, *supra* note 50, § 1301(b).

236. 2004 DOD Authorization Act, *supra* note 65, § 2808(d).

237. 2004 ESAA, *supra* note 50, § 1301(d).

Appendix B

Contract & Fiscal Law Websites and Electronic Newsletters

The first table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields utilize most often. If you are viewing this document in an electronic format, you can click on the web address in the second column and open the requested website. I have **"bolded"** the websites that I find to be particularly valuable.

The second table on the final page below contains links to websites that allow you to subscribe to various electronic news-letters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your email address. These electronic newsletters are convenient methods of keeping informed about recent and/or upcoming changes in the field of law. Major Sharp.

Website Name	Web Address
A	
Acquisition Network (AcqNet)	http://www.arnet.gov
Acquisition Reform Virtual Library	http://www.arnet.gov/Library/
Acquisition Review Quarterly (from DAU)	http://www.dau.mil/pubs/arqtoc.asp
Acquisition Sharing Knowledge System (formerly the Defense Acquisition Deskbook)	http://deskbook.dau.mil/jsp/default.jsp
Acquisition Streamlining and Standardization Information System (ASSIST)	http://dodssp.daps.mil/assist.htm
ACQWeb (Office of Undersecretary of Defense for Acquisition Logistics & Technology)	http://www.acq.osd.mil
Agency for International Development	http://www.usaid.gov/
Air Force Acquisition	http://www.safaq.hq.af.mil/
Air Force Acquisition Training Office	http://www.safaq.hq.af.mil/acq_workf/training/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mil
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force Contracting	**http://www.safaq.hq.af.mil/contracting/**
Air Force Contracting Toolkit	**http://www.safaq.hq.af.mil/contracting/toolkit/**
Air Force FAR Site	**http://farsite.hill.af.mil**
Air Force FAR Supplement	http://farsite.hill.af.mil/vfaffar1.htm
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/vfafmc1.htm
Air Force Materiel Command Homepage	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/
Air Force Materiel Command Contracting Toolkit	**https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm**
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Home Page	http://www.af.mil/
Air Force Logistics Management Agency	https://www.aflma.hq.af.mil/
Air Force Materiel Command	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command Contracting Toolkit	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm
Air Force Materiel Command Staff Judge Advocate	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/

Air Force Publications	**http://www.e-publishing.af.mil/**
American Bar Administration (ABA) Legal Technology Resource Center	http://www.lawtechnology.org/lawlink/home.html
American Bar Administration (ABA) Network	http://www.abanet.org/
American Bar Administration (ABA) Public Contract Law Journal (PCLJ)	http://www.law.gwu.edu/pclj/
American Bar Administration (ABA) Public Contract Law Section	**http://www.abanet.org/contract/**
American Bar Administration (ABA) Public Contract Law Section Webpage on Agency Level Bid Protests	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Armed Services Board of Contract Appeals (ASBCA)	http://www.law.gwu.edu/asbca
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/
Army Acquisition Corps	http://asc.rdaisa.army.mil/default.cfm
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://aca.saalt.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.hq.usace.army.mil/cecc/maincc.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command	http://www.amc.army.mil/
Army Materiel Command Command Counsel	**http://www.amc.army.mil/amc/command_counsel/**
Army Portal	https://www.us.army.mil/portal/portal_home.jhtml
Army Publications	http://www.usapa.army.mil
Army Single Face to Industry (ASFI)	https://acquisition.army.mil/asfi/

B

Bid Protests Webpage from the American Bar Administration (ABA) Public Contract Law Section	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Boards of Contract Appeals Bar Association	http://www.bcabar.org/
Budget of the United States	http://w3.access.gpo.gov/usbudget/index.html

C

Central Contractor Registration (CCR)	http://www.ccr.gov/
Checklist (AF Electronic Systems Command Contract Review Checklist)	**https://centernet.hanscom.af.mil/JA/CRG/checklist.htm**
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	**http://www.access.gpo.gov/nara/cfr/cfr-table-search.html**
Electronic Code of Federal Regulations (eCFR)	**http://www.access.gpo.gov/ecfr**
Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm

Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Decisions via GPO Access	**http://www.gpoaccess.gov/gaodecisions/index.html**
Comptroller General Legal Products	**http://www.gao.gov/legal.htm**
Comptroller General Principles of Federal Appropriations Law	**http://www.gao.gov/legal.htm**
Comptroller General Principles of Federal Appropriations Law Update Service (A Commercial Source)	http://www.managementconcepts.com/publications/financial/ALMGAO.asp
Congressional Bills	http://www.gpoaccess.gov/bills/index.html
Congressional Documents	http://www.gpoaccess.gov/legislative.html
Congressional Documents via Thomas	**http://thomas.loc.gov/**
Congressional Record	http://www.gpoaccess.gov/crecord/index.html
Contract Pricing Reference Guides	http://www.acq.osd.mil/dp/cpf/pgv1_0/pgchindex.html
Contract Review Checklist (AF Electronic Systems Command)	**https://centernet.hanscom.af.mil/JA/CRG/checklist.htm**
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards (CAS – found in the Appendix to the FAR)	http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/farapndx1.htm
Cost Accounting Standards Board (CASB)	http://www.whitehouse.gov/omb/procurement/casb.html
Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
Court of Federal Claims (COFC)	http://www.uscfc.uscourts.gov/

D

Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Deskbook (now known as the Acquisition Knowledge Sharing System)	**http://deskbook.dau.mil/jsp/default.jsp**
Defense Acquisition Regulations Directorate (the DAR Council)	**http://www.acq.osd.mil/dp/dars/**
Defense Acquisition University (DAU)	**http://www.dau.mil/**
Defense Competitive Sourcing & Privatization	http://www.acq.osd.mil/installation/csp/
Defense Comptroller	http://www.dtic.mil/comptroller/
Defense Contract Audit Agency (DCAA)	http://www.dcaa.mil/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Procurement and Acquisition Policy (DPAP) Electronic Business	http://www.acq.osd.mil/dpap/ebiz/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
Defense Finance and Accounting Service (DFAS) Electronic Commerce Home Page	http://www.dfas.mil/ecedi/
Defense Logistics Agency (DLA) Electronic Commerce Home Page	http://www.supply.dla.mil//Default.asp
Defense Procurement and Acquisition Policy (DPAP)	http://www.acq.osd.mil/dpap/
Defense Standardization Program	http://dsp.dla.mil/

Defense Technical Information Center	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.ogc.doc.gov/ogc/contracts/cld/cld.html#ContractLaw
Department of Energy Acquisition Guide	http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Guide?OpenDocument
Department of Energy Acquisition Regulation	http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation?OpenDocument
Department of the Interior Acquisition Regulation	http://www.ios.doi.gov/pam/aindex.html
Department of Justice	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Labor Acquisition Regulation	http://www.dol.gov/dol/allcfr/OASAM/Title_48/Part_2901/toc.htm
Department of State Acquisition Regulation	http://www.statebuy.gov/dosar/dosartoc.htm
Department of Transportation Acquisition Regulation	http://www.dot.gov/ost/m60/tamtar/
Department of Transportation Acquisition Manual	http://www.dot.gov/ost/m60/earl/tam.htm
Department of Veterans Affairs	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals	http://www.va.gov/bca/index.htm
Directorate for Information Operations and Reports Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Acquisition Reform (DUSD(AR)) (has been merged into the DPAP site)	http://www.acq.osd.mil/dpap/
DOD Busopps (has been merged into the FedBizOpps site)	http://www.dodbusopps.com/
DOD Contract Pricing Reference Guide	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DOD E-Mall	https://emall.prod.dodonline.net/scripts/emLogon.asp
DOD Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.osd.mil
DOD Instructions and Directives	**http://www.dtic.mil/whs/directives/**
DOD Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
DoD Single Stock Point for Military Specifications, Standards and Related Publications	http://www.dodssp.daps.mil/
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/

E

ESI, International	http://www.esi-intl.com/public/contracting/governmentcontracting.asp
Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.gpoaccess.gov/wcomp/index.html
Executive Orders (alternate site)	http://www.archives.gov/federal_register/executive_orders/disposition_tables.html
Export Administration Regulations	http://w3.access.gpo.gov/bis/index.html

F

FAR Site (Air Force)	http://farsite.hill.af.mil
Federal Acquisition Institute (FAI)	http://www.faionline.com/kc/login/login.asp?kc_ident=kc0001
Federal Acquisition Regulation (FAR) (GSA)	http://www.arnet.gov/far/
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE)	https://aflsa.jag.af.mil/flite/home.html
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	https://www.fpds.gov/
Federal Publications	http://www.fedpubseminars.com/seminar/gcplist.html
Federal Register via GPO Access	**http://www.gpoaccess.gov/fr/index.html**
Federally Funded R&D Centers (FFRDC)	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations	**http://www.dod.mil/comptroller/fmr/**
FindLaw	http://www.findlaw.com
FirstGov	http://www.firstgov.gov/

G

General Accounting Office (GAO) Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
General Accounting Office (GAO) Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
General Accounting Office (GAO) Comptroller General Decisions via GPO Access	**http://www.gpoaccess.gov/gaodecisions/index.html**
General Accounting Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
General Accounting Office (GAO) Principles of Federal Appropriations Law	http://www.gao.gov/legal.htm
General Accounting Office (GAO) Principles of Federal Appropriations Law Update Service (A Commercial Source)	http://www.managementconcepts.com/publications/financial/ALMGAO.asp
General Accounting Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
General Accounting Office (GAO) Home Page	http://www.gao.gov
General Services Administration (GSA) Acquisition Manual	http://www.arnet.gov/GSAM/gsam.html
General Services Administration (GSA) Advantage	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13827
General Services Administration (GSA) Federal Supply Service (FSS)	http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=10322&contentType=GSA_BASIC
General Services Administration Board of Contract Appeals (GSABCA)	http://www.gsbca.gsa.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Contracts Resource Guide	http://www.law.gwu.edu/burns/research/gcrg/gcrg.htm
Government Online Learning Center	http://www.golearn.gov/

Government Printing Office (GPO)	http://www.gpo.gov
GPO Access	**http://www.gpoaccess.gov/index.html**
Government Printing Office Board of Contract Appeals (GPOB-CA)	http://www.gpo.gov/contractappeals/index.html

J

JAGCNET (Army JAG Corps Homepage)	**http://www.jagcnet.army.mil/**
JAGCNET Contract & Fiscal Law publications (must have a password)	https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Civil+Law/klaw1.nsf
JAGCNET (The Army JAG School Homepage)	**http://www.jagcnet.army.mil/TJAGSA**
Javits-Wagner-O'Day Act (JWOD)	http://www.jwod.gov/jwod/index.html
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/jel/jointpub.htm
Joint Travel Regulations (JFTR/JTR)	http://www.dtic.mil/perdiem/trvlregs.html

L

Library of Congress	http://lcweb.loc.gov
Logistics Joint Administrative Management Support Services (LOGJAMMS)	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm

M

Marine Corps Home Page	http://www.usmc.mil
Marine Corps Regulations	https://www.doctrine.quantico.usmc.mil/
MEGALAW	http://www.megalaw.com
Mil Standards (DoD Single Stock Point for Military Specifications, Standards and Related Publications)	http://www.dodssp.daps.mil/
MWR Home Page (Army)	http://www.ArmyMWR.com

N

NAF Financial (Army)	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Aeronautics and Space Administration (NASA) Aquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Contract Management Association	http://www.ncmahq.org/
National Industries for the Blind (NIB)	www.nib.org
National Industries for the Severely Handicapped (NISH)	www.nish.org
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	http://govinfo.library.unt.edu/npr/index.htm
Naval Supply Systems Command (NAVSUP)	http://www.navsup.navy.mil/npi/

Navy Acquisition Reform	http://www.acq-ref.navy.mil/index.cfm
Navy Electronic Commerce On-line	http://www.neco.navy.mil/
Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy Financial Management Career Center	http://www.nfmc.navy.mil/index.htm#HomepageLogo
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Regulations	http://neds.nebt.daps.mil/
Navy Research, Development and Acquisition	http://www.hq.navy.mil/RDA/
North American Industry Classification System (formerly the Standard Industry Code)	http://www.osha.gov/oshstats/sicser.html

O

Office of Acquisition Policy within GSA	http://hydra.gsa.gov/staff/ap.htm
Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.acqnet.gov/Library/OFPP/BestPractices/
Office of Government Ethics (OGE)	http://www.usoge.gov
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/

P

Per Diem Rates (CONUS)	http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.shtml
Per Diem Rates (Military)	http://www.dtic.mil/perdiem/
Per Diem Rates (OCONUS)	http://www.state.gov/m/a/als/prdm/
Producer Price Index	http://www.bls.gov/ppi/
Program Manager (a periodical from DAU)	http://www.dau.mil/pubs/pmtoc.asp
Public Contract Law Journal	http://www.law.gwu.edu/pclj/
Public Papers of the President of the United States	http://www.access.gpo.gov/nara/pubpaps/srchpaps.html
Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm

R

Rand Reports and Publications	http://www.rand.org/publications/

S

SearchMil (search engine for .mil websites)	http://www.searchmil.com/
Service Contract Act Directory of Occupations	http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm
Share A-76 (DOD site)	http://emissary.acq.osd.mil/inst/share.nsf

Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR)	http://www.acq.osd.mil/sadbu/sbir/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner/

T

Travel Regulations	http://www.dtic.mil/perdiem/trvlregs.html

U

U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov/usc.htm
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
U.S. Department of Agriculture (USDA) Graduate School	http://grad.usda.gov/
UNICOR (Federal Prison Industries, Inc.)	http://www.unicor.gov/

W

Where in Federal Contracting?	http://www.wifcon.com/

Air Force Materiel Command (AFMC) Contract Update	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/e-sign-up.htm
Army Acquisition Policy	http://dasapp.saalt.army.mil/register.htm
Defense and Security Publications via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=gpo-defpubs-l&A=1
Defense Federal Acquisition Regulation Supplement (DFARS) News	http://www.acq.osd.mil/dp/dars/dfarmail.htm
DOD Acquisition Initiatives (DUSD(AR))	http://acquisitiontoday.dau.mil/
Federal Acquisition Regulation (FAR) News	http://www.arnet.gov/far/mailframe.html
Federal Register via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=fedregtoc-l&A=1
General Accounting Office (GAO) Reports Testimony, and/or Decisions	http://www.gao.gov/subtest/subscribe.html
Navy Acquisition News	http://www.acq-ref.navy.mil/listserv/index.cfm
Public Laws Issued	http://hydra.gsa.gov/cgi-bin/wa?SUBED1=publaws-l&A=1