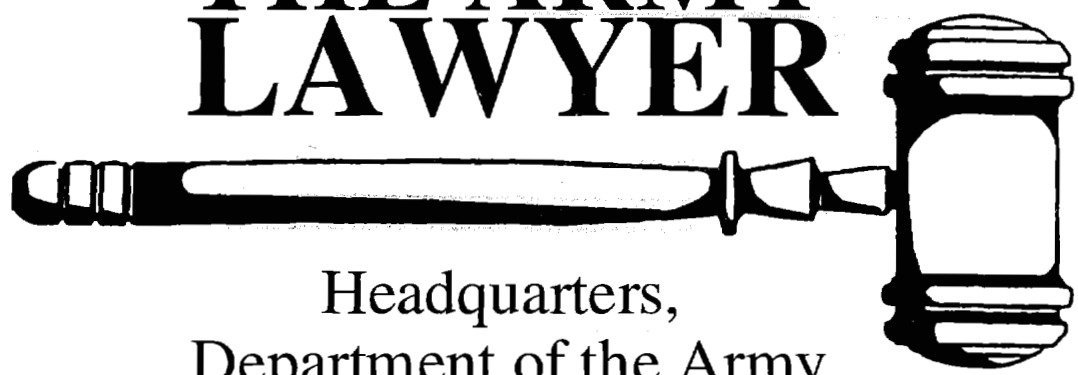
THE ARMY LAWYER



Headquarters,
Department of the Army

Department of the Army Pamphlet 27-50-290
January 1997

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Articles

This issue of *The Army Lawyer* is devoted to exploring Contract Law Developments in 1996. Due to its size and special nature, our regular features (TJAGSA Practice Notes, USALSA Report, Claims Report, GRA Items, CLE News, Current Materials of Interest) have been postponed until the February issue.

Erratum

Due to publisher error, the December 1996 issue of *The Army Lawyer*, was published with several mistakes. The lead article, by Major William K. Lietzau, "Using the Status of Forces Agreement to Incarcerate United States Service Members on Behalf of Japan," should have been titled, "A Comity of Errors: Ignoring Constitutional Rights of Service Members Awaiting Trial by Japan." On page 3, Major William K. Lietzau's duty description should have been Head, Law of Armed Conflict Branch.

The above changes also should have been reflected in the end of year index on page 57. On page 59 under the subject "TAX", Business Entertainment Expense Deductions by Service Members, COL Malcolm H. Squires, Jr., and LTC Linda K. Webster, Dec. 1996, appears at 13. Other minor typographical and style errors in the December issue were also the result of the publisher's failure to incorporate all our requested final changes.

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The Army Lawyer is published monthly by the Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be submitted on floppy disks to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army Charlottesville, Virginia 22903-1781. Footnotes should be typed double-spaced on a separate sheet. Articles should be double-spaced, in Courier New 10 point font, and Microsoft Word format. Other acceptable, though discouraged formats, include: WordPerfect, Enable, Multimate, DCA RFT, and ASCII. Articles should follow *A Uniform System of Citation* (16th ed. 1996) and *Military Citation* (TJAGSA, July 1992). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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DEVELOPMENTS OF 1996—THE YEAR IN REVIEW

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CONTRACT LAW DEVELOPMENTS OF 1996

THE YEAR IN REVIEW

I. FOREWORD.

Much like Tom Cruise in *Mission Impossible*, government contract law attorneys did not know their mission until they opened the envelope containing this year's new statutes, regulations and cases. Members of the government contracting community faced an enormous challenge in implementing this tidal wave of change which finally hit in the wake of the Federal Acquisition Reform Act (FARA) and the Federal Acquisition Streamlining Act (FASA). Government contract attorneys had to have nerves of steel and nimble minds to crack the "codes" and cases of 1996. From the demise of the General Services Board of Appeals (GSBCA) bid protest jurisdiction to the statutory expansion of Scanwell jurisdiction, change swept through the contracting community like the Channel Bullet Train!

This past year saw executive agencies implementing many of the changes set out by Congress in the landmark legislation of 1995 and 1996. This implementation gave life to the FARA and FASA legislation. In addition, we saw changes made in the areas of best value, alternative disputes resolution (ADR), and the operations and maintenance (O&M) construction dollar threshold. It remains to be seen where all this will take us.

This Year in Review analyzes the 1996 procurement related cases, statutes, administrative decisions, and regulations. We hope you will find this article useful. Best wishes for a happy and prosperous new year from the Contract Law Department, The Judge Advocate General's School, United States Army.

Contract Law Faculty
Contract Law Symposium
December 1996
The Judge Advocate General's School, United States Army

II. DEPARTMENT OF DEFENSE LEGISLATION.

A. *The National Defense Authorization Act.*

1. Introduction. On 23 September 1996, President Clinton signed the National Defense Authorization Act for Fiscal Year 1997 (1997 Authorization Act).[1] Some of the key provisions from the 1997 Authorization Act which follow highlight how the new Act will affect acquisitions and other operations within the Department of Defense (DOD).

2. Maintenance and Repair at Air Force Installations. The Secretary of the Air Force shall allocate research, development, test and evaluation (RDT&E) funds and operations and maintenance (O&M) funds for maintenance and repair of real property at Air Force installations whether or not the installation is funded by RDT&E or O&M funds. The Secretary may not combine RDT&E and O&M funds for an individual maintenance or repair project at an Air Force installation.[2]

3. A Technology Program Worth Its Salt. Congress has realized that one of the largest missions of the armed forces will be defending our allies in the Persian Gulf. In so doing, they have also realized that maintaining fresh drinking water is a difficult and expensive proposition. To make the supply of fresh drinking water less expensive and less difficult to obtain, Congress believes that the United States, should, in cooperation with its allies, promote and invest in technologies to reduce the costs of converting saline water into fresh water.[3] The 1997 Authorization Act directs the Secretary of Defense (SECDEF) to place greater emphasis on making funds available for research and development into this process.

4. Battling Gulf War Syndrome. Congress has set aside $10,000,000 to research the Gulf War Syndrome.[4] Also, the Comptroller General has been tasked with analyzing the effectiveness of related medical research programs and clinical care programs of DOD. This report is due to Congress by 1 March 1997.[5]

5. Will DOD Give the Olympics a Gold Medal? The SECDEF will evaluate the digital video network equipment used in the Olympics. He will determine whether the equipment would be appropriate for use as a test bed for the military application of commercial off-the-shelf advanced digital technology to link multiple continents, satellites, and theaters of operations.[6]

6. Is Your Ammo Recycled? Military specifications require that ammunition purchased by the military be made entirely from new components. This precludes the use of recycled ammunition. The Senate Armed Services Committee feels the prohibition, although appropriate for wartime ammunition, is unnecessary for training ammunition. In addition, the United States has large inventories of small caliber ammunition which is unsuitable for wartime or training use. It is expensive to destroy and to replace this ammunition. Unserviceable ammunition can, however, be recycled for training purposes. The Armed Services Committee directed the SECDEF to provide to the congressional defense committees by 31 January 1997, a reportoutlining current ammunition recycling programs under consideration by DOD and the financial, reliability, and safety concerns of using recycled ammunition.[7]

7. Unsportsmanlike Support to Sporting Events. The Senate Armed Services Committee expressed concern about the increasing cost of non-reimbursable DOD support to civilian sporting events. The committee estimated that DOD spent in excess of $50,000,000 to support the 1996 Olympics and Paralympics.[8] The 1997 Authorization Act includes a provision which allows DOD to enter into a reimbursement agreement with civilian authorities.[9] At the request of a local government, the SECDEF may authorize the installation commander to provide assistance for a civilian sporting event,[10] if the Attorney General certifies such assistance is necessary to meet essential security and safety needs. In order to provide this assistance, the requesting entity must agree to reimburse DOD.[11]

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[1] Pub. L. No. 104-201, 110 Stat. 2422 (1996).

[2] *Id.* § 261.

[3] *Id.* § 268.

[4] *Id.* § 743.

[5] *Id.* § 744.

[6] *Id.* § 269.

[7] S. REP. No. 104-267, at 103 (1996).

[8] *Id.* at 262.

[9] National Defense Authorization Act for 1997, Pub. L. No. 104-201, § 367, 110 Stat. 2422 (1996) (adding 10 U.S.C. § 2554, Provision of Support for Certain Sporting Events).

[10] 10 U.S.C. § 2554 specifically lists the World Soccer Games, the Goodwill Games, the Olympics, and other civilian sporting events.

[11] 10 U.S.C. § 2554 exempts sporting events for which funds have been appropriated before the date of enactment of the Act, *i.e.*, the Special Olympics and the Paralympics.

The Miscellaneous Receipts Statute[12] provides that any government official who receives money for the government from any source must deposit the money in the Treasury as soon as practicable. Although there are statutory exceptions to this rule,[13] no guidance was provided in this provision to indicate whether it is an exception to the Miscellaneous Receipts Statute. As such, it appears that the money would have to be deposited in the Treasury.

8. Field Grades Make the Grade. The Senate Armed Services Committee recommended a provision to permanently increase the grade ceilings of active duty majors, lieutenant commanders, lieutenant colonels, commanders, captains, and colonels. The Committee hopes that this will prevent unnecessary frocking to circumvent the statutory grade ceilings and will help specialty corps gain additional officer strength.[14] The 1997 Authorization Act adopted this provision.[15]

9. DOD Failed to Meet Procurement Goals for Small Business Concerns Owned by Women. DOD fell significantly short of the procurement goal[16] for small business concerns owned by women. As a result of this failure, the Senate Armed Services Committee directed DOD to submit a report by 31 March 1997 describing the current and past efforts as well as the detailed initiatives DOD has taken to achieve its goal.[17]

10. Dear Ol' DERA Abolished. In response to a legislative proposal submitted by DOD, the 1997 Authorization Act provides for the devolution of the Defense Environmental Restoration Account (DERA).[18] The new provision establishes separate accounts for the DOD, the Army, the Navy, and the Air Force. The fund's purpose remains to expend funds to carry out environmental restoration functions of the affected department. The funds will be budgeted separately each year by the President.[19] The separate accounts can be credited with amounts recovered under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[20] or any other amounts recovered from a contractor, insurer, surety, or other person to reimburse the department for any expenditure for environmental response activities. None of the funds appropriated to these accounts in fiscal years (FY) 1995-99 may be used to pay for fines or penalties unless the fine or penalty arises out of an activity funded by the account.[21]

11. Only Top Twenty Need Apply. DOD is required to submit an annual report to Congress which describes the reimbursement of environmental response action costs and the amount and status of pending requests for the top 100 defense contractors.[22] The 1997 Authorization Act reduces the reporting requirement to only the top twenty defense contractors.[23]

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[12] 31 U.S.C. § 3302.

[13] Revolving funds are not required to be deposited in the Treasury, and as such, are exceptions to the Miscellaneous Receipts Statute, 31 U.S.C. § 3202(d).

[14] S. REP. No. 104-267, at 278 (1996).

[15] Pub. L. No. 104-201, § 403, 110 Stat. 2422 (1996) (amending 10 U.S.C. § 523(a)).

[16] The Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3349, established a government-wide goal for participation of small business concerns owned and controlled by women at not less than five percent of the total value of all prime contact and subcontract awards for each fiscal year.

[17] S. REP. No. 104-267, at 312 (1996).

[18] Pub. L. No. 104-201, § 322, 110 Stat. 2422 (1996) (amending 10 U.S.C. § 2703).

[19] 31 U.S.C. § 1105 (1994).

[20] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1990) [hereinafter CERCLA].

[21] Compliance with mandated environmental standards, including the payment of fines is considered integral to the operation and maintenance of military installations. Consequently, installations must use Operation and Maintenance (O&M) funds to dispose of and treat wastes generated by the installation. *See* DEP'T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT, para. 6-15 (23 Apr. 1990) [hereinafter AR 200-1] and DEP'T OF AIR FORCE, AIR FORCE INSTRUCTION 32-7001, ENVIRONMENTAL BUDGETING (Mar. 1994) [hereinafter AFI 32-7001]. Industrial fund activities must fund environmental fines and penalties from the industrial fund. *See* 10 U.S.C. § 2208; DEFENSE FINANCE AND ACCOUNTING SERVICE—INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION (Sept. 1995) [hereinafter DFAS-IN 37-1], DEP'T OF AIR FORCE, AIR FORCE REG. 170-10, AIR FORCE INDUSTRIAL FUND (Apr. 1990) [hereinafter AFR 170-10]; and AR 200-1, *supra*, para. 6-15.

[22] S. REP. No. 104-267, at 342 (1996) (discussing the requirements of 10 U.S.C. § 2706 (1996)) ("top" is defined as the contractors with the largest dollar amount of defense contracts).

[23] Pub. L. No. 104-201, § 321, 110 Stat. 2422 (1996).

12. EPA Can Now Defer Federal Facilities from NPL. When a non-government site meets the criteria set forth in the hazardous ranking system,[24] the Environmental Protection Agency (EPA) has the discretion not to list the site on the National Priorities List (NPL). The EPA takes into consideration extenuating factors, such as cleanup actions already completed in response to state mandates, in making its determination to list.[25] CERCLA *requires* NPL listing of federal facilities after a preliminary assessment determines that the site meets the prerequisites for listing. EPA narrowly construed these provision to mean that a federal site must be listed on the NPL if the preliminary assessment indicates that the site meets the hazardous ranking system threshold.[26] Prior to the 1997 Authorization Act, there were no provisions for the EPA to defer placement of a federal facility on the NPL. The EPA has been willing to use a more flexible approach to private facilities than to federal facilities.

The disparate treatment of federal facilities causes unnecessary delays and an increase in the overall cost of cleanup.[27] The 1997 Authorization Act[28] amends CERCLA[29] to allow the EPA Administrator to use the same flexibility with federal and non-federal facilities in determining whether to place them on the NPL. An appropriate factor for the Administrator to take into consideration for all facilities is that the facility has arranged with the federal or state EPA to respond appropriately to the situation.

13. Imagine a New Combat Support Agency. The National Imagery and Mapping Agency, a new combat support organization, was established on 1 October 1996.[30] The new agency combines the Defense Mapping Agency, the Central Imagery Office, and the Defense Dissemination Program Office with the mission and functions of the CIA's National Photographic Interpretation Center.[31]

14. Dirty Installations For Sale — No Reasonable Offer Refused. CERCLA[32] requires the completion and installation of approved remedial designs and successful remediation action before transferring a contaminated federal facility to a new civilian owner or to the homeless. In most cases, this process takes many years and delays DOD's efforts to transfer installations set to be closed. This requirement does not apply to the transfer by non-federal owners of contaminated civilian property. These private owners are allowed to transfer contaminated property subject to a purchase agreement identifying the remedial liabilities of the parties.[33] The 1997 Authorization Act provides that contaminated federal property may be transferred prior to completion of required clean-up actions.[34] The property may be transferred if the provisions of sale contain guarantees that the responsible agency will complete all required remedial actions.[35]

15. A Free Lunch for New Recruits. The 1997 Authorization Act provides that funds appropriated by DOD for recruitment of military personnel may be expended for small meals and refreshments during recruiting functions.[36] Each military Secretary must establish specific guidelines for the implementation of this provision. Eligible recipients include persons who have enlisted under the Delayed Entry Program who are the focus of recruiting efforts, persons whose assistance in military recruiting efforts of the military departments is determined to be influential by the service secretary, members who are required to attend recruiting events, and other persons whose presence at recruiting efforts will contribute to that effort.[37]

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[24] CERCLA, § 120(d), 42 U.S.C. § 9620 (1990).

[25] S. REP. No. 104-267, at 256 (1996).

[26] Listing on the NPL initiates certain reporting and mandatory clean-up actions on a expedited level.

[27] S. REP. No. 104-267, at 256 (1996).

[28] Pub. L. No. 104-201, § 330, 110 Stat. 2422 (1996).

[29] 42 U.S.C. § 9620 (1990).

[30] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1102, 110 Stat. 2422 (1996).

[31] The imagery element of the Defense Intelligence Agency, the National Reconnaissance Office, and the Defense Airborne Reconnaissance Office also are combined.

[32] 42 U.S.C. § 9620(h)(3).

[33] S. REP. No. 104-267, at 257 (1996).

[34] Pub. L. No. 104-201, § 334, 110 Stat. 2422 (1996).

[35] *Id.*

[36] Pub. L. No. 104-201, § 361, 110 Stat. 2422 (1996) (to be codified at 10 U.S.C. § 520c, Recruiting Functions: Use of Funds).

[37] *Id.*

16. A Hardship Tour at St. Thomas University? Ask Your Boss to Send You. Each military Secretary is now authorized to enter into agreements or other arrangements for training of members of the uniformed services in non-government facilities.[38] Training may be at a state facility, a foreign government facility, a medical, or scientific, technical, educational, research or professional institution or foundation. The Secretary concerned may pay all or part of the fees including travel and per diem, transportation, tuition, library services, purchase or rental of books, materials, and supplies.

17. Congressional Doctors Give DBOF Two Years to Live. The 1997 Authorization Act requires the SECDEF to submit to Congress a plan to improve the management and performance of the industrial, commercial, and support activities that are currently managed through the Defense Business Operations Fund (DBOF).[39] The plan requires the following be addressed:

a. the ability of each department or agency to set working capital requirements and set charges at its own supply and industrial activities.

b. the desirability of separate business accounts for the management of both industrial and supply activities.

c. liability for operation losses at industrial and supply activities.

d. reimbursement to DOD by each department or agency of its share of the costs of legitimate common business support service provided by DOD.

e. the role of DOD in setting charges or imposing surcharges for activities managed by the business accounts of departments or agencies and what such charges should properly reflect.

f. the appropriate use of operating profits arising from the operations.

g. the ability of departments or agencies to purchase industrial and supply services from and provide them to other departments or agencies.

h. standardization of financial management and accounting practices.

Unless the DOD Secretary submits the plan and the plan is approved by Congress before 1 October 1999, DBOF will be repealed.[40]

18. Increase in Capital Asset Threshold Under DBOF. The capital asset threshold for DBOF has been increased from $50,000 to $100,000 to mirror that of non-DBOF activities.[41]

19. Food Donation Authority Increased. The 1997 Authorization Act[42] permits defense agencies[43] to donate food to eligible recipients. Eligible recipients include charitable nonprofit food banks, agencies designated by DOD or Health and Human Services, and Veterans Affairs organizations. Military and DOT secretaries may also conduct food donation programs at the service academies.[44]

20. A System Valued at $539,999,999.99 is Minor. The Act defines a major system for DOD as one that has either more than $115 million in RDT&E costs or a total procurement expenditure of $540 million.[45]

21. Increase in Simplified Acquisition Threshold for Humanitarian or Peacekeeping Operations. The simplified acquisition threshold for humanitarian or peacekeeping operations is increased to $200,000.[46] The term is defined as a military opera-

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[38] *Id.* § 362.

[39] *Id.* § 363.

[40] 10 U.S.C. § 2216a.

[41] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 364, 110 Stat. 2422 (1996) (amending 10 U.S.C. § 2216a (1996)). This mirrors the investment expense threshold, which was increased to $100,000 in the DOD Appropriations Act for 1996, Pub. L. No. 104-61, § 8065, 109 Stat. 636, 664 (1995).

[42] Pub. L. No. 104-201, § 365, 110 Stat. 2422 (1996) (amending 10 U.S.C. § 2485).

[43] *Id.* The statute substitutes "Secretary of Defense" for "Secretary of a Military Department."

[44] *Id.* § 374.

[45] *Id.* § 805 (amending 10 U.S.C. § 2302d).

[46] *Id.* § 807 (amending 10 U.S.C. § 2302(7) by adding the words "or a humanitarian or peacekeeping operation" after the words "contingency operations." Therefore, the simplified acquisition threshold for contracts to be awarded and performed or purchases to be made outside the United States in support of a contingency, humanitarian, or peacekeeping operation is twice the regular simplified acquisition threshold (currently $100,000)).

tion in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation.

22. You Might Get What You Pay For: Contractor Executives Get Pay Increase. During FY 1997, the head of an agency shall treat all executive salary costs in excess of $250,000 paid to one contractor executive officer as unallowable.[47]

23. Additional Waiver Authority for the Purchase of Foreign Goods. The federal government is constrained by miscellaneous limitations on procurement of foreign goods, such as buses, chemical weapons antidote, and ball bearings.[48] There are certain instances when these limitations may be waived, for example, the limitation would otherwise cause unreasonable costs or delays or the application would impede cooperative programs entered into between DOD and a foreign country.[49] The 1997 Authorization Act amends this section by allowing waiver of this restriction where it would otherwise "impede the reciprocal procurement of defense items."[50]

24. Federal Works Administrator May Enter Longer Contracts. The Federal Works Administrator may now enter into five year contracts for the inspection, maintenance, and repair of fixed equipment in federally owned buildings.[51]

25. The Millennium is Upon Us—May the Force Be With You! The SECDEF shall ensure that, as soon as practicable, all information technology acquired by DOD pursuant to contracts entered into after 30 September 1996, has the ability to process date and date-related data in the year 2000. Not later than 1 January 1997, the Secretary shall submit to Congress a detailed plan which covers a list of affected major systems, a description of how the plan will affect the U.S. national security, and an estimate and prioritization of how to implement the plan.[52]

26. Do You Have Small Arms? If the SECDEF determines that it is necessary to preserve the small arms production industrial base, he may limit procurement and require that any property or services providing repair parts and modifications be made only from firms in the small arms production industrial base.[53]

27. If You Have Small Arms, Can You Reach Your Cable Box? Cable television franchise agreements for the construction, installation, or capital improvement of cable systems at military installations are contracts under the Federal Acquisition Regulation (FAR).[54] Cable television operators at closing installations are entitled to recovery of their investments to the extent authorized by FAR Part 49.[55] DOD shall promptly issue a written notice of the termination for convenience of the contracts at these closing installations.[56]

28. Flags Are Politically Correct. DOD funds may not be used to prescribe or enforce any rule that arbitrarily excludes the official flag of any state, territory, or possession of the United States from any display of the flags of the states, territories, and possessions of the United States at an official DOD ceremony.[57]

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[47] *Id.* § 809 (This represents an increase in the cap on executive salaries imposed by FARA).

[48] 10 U.S.C. § 2534.

[49] 10 U.S.C. § 2531 provides the framework for entering into Memoranda of Agreement with foreign governments.

[50] Pub. L. No. 104-201, § 810, 110 Stat. 2422 (1996).

[51] *Id.* § 823 (amending 40 U.S.C. § 490(a) to extend the contract multi-year limitation from three to five years).

[52] *Id.* § 831.

[53] *Id.* § 832 (adding 10 U.S.C. § 2473).

[54] Department of Defense Cable Television Franchise Agreements, 36 Fed.Cl. 171 (1996). Section 823 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996) directed the Court of Federal Claims to give its opinion on two legal questions. The first question was whether it was within the power of the executive branch to treat cable television franchise agreements for the construction, installation, or capital improvement of cable television systems at military installations as contracts without violating title VI of the Cable Communications Policy Act of 1934, 47 U.S.C. § 521. The second question was how the executive branch would be required to treat such franchise agreements if the answer to the first question was yes. For additional discussion of this case *see infra* section III, C, 5 at p. 28.

[55] *Cable Television*, 36 Fed. Cl. at 171. The court concluded that the Cable Communications Policy Act, 47 U.S.C. § 522, did not preclude DOD from treating cable television franchise agreements for military installations as contracts subject to the FAR. As such, the cable operators were entitled to termination for convenience costs for unamortized and unreturned portions of their capital investments.

[56] Pub. L. No. 104-201, § 833, 110 Stat. 2422 (1996).

[57] *Id.* § 1071 (amending 10 U.S.C. § 2249b).

29. New Names for the New Act. On 30 September 1996, President Clinton signed the Omnibus Consolidated Appropriations Act,[58] which, in section 808, renames Divisions D and E of the FY 1996 Defense Authorization Act, the Federal Acquisition Reform Act (FARA) and the Information Technology Management Reform Act (ITMRA)[59] as the Clinger-Cohen Act. The action is a tribute to retiring members of Congress, Representative William Clinger (R-PA) and Senator William Cohen (R-Maine) who were major players in the implementation of the aforementioned statutes.

B. The DOD Appropriations Act.

1. Introduction. On 30 September 1996, President Clinton signed the Department of Defense Appropriations Act for Fiscal Year 1997 (1997 Appropriations Act).[60]

2. *OMB Circular A-76 Cost Studies Can't Be Funded After 24 Months.* Once again, Congress has limited the use of Appropriated Funds (APFs) for Office of Management and Budget (OMB) Circular A-76 studies.[61] No appropriated funds may be used to perform any single function cost study if the performance period exceeds 24 months. A multi-function activity cost study may be funded for up to 48 months.[62]

3. Cost-Effective Organization Analysis Necessary Prior to Conversion. As in previous years, appropriated funds may not be used to convert a DOD in-house activity performed by more than ten DOD civilians to contractor performance until a most efficient and cost-effective organization analysis is completed. After completion of the analysis, a certification of the analysis must be made to the House and Senate Appropriations Committees. This provision does not apply to commercial or industrial type functions that (1) are included on the procurement list;[63] (2) are planned to be converted to performance by a non-profit agency for the blind or handicapped; or (3) are planned to be converted to performance by a qualified firm of at least 51% Native American ownership.[64]

4. Location, Location, Location! No Relocation Funds Unless Waived. Not more than $500,000[65] of funds appropriated by the 1997 Appropriations Act may be used for any single relocation of an organization, unit, activity or function of the DOD into or within the National Capital Region. The SECDEF may waive this restriction on a case-by-case basis 90 days after certifying in writing to the House and Senate Defense committees that such a relocation is required in the best interests of the government.[66]

5. New Appropriation for Contingency Operations. Title II of the 1997 Appropriations Act[67] includes a new "Overseas Contingency Operations Transfer Fund." Congress appropriated $1,069,957,000 for "expenses directly relating to Overseas Contingency Operations by United States military forces." The 1997 Appropriations Act provides that the SECDEF "may transfer these funds only to operation and maintenance accounts" and that funds so transferred "shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred." The House report explains this provision by noting that, last year, "the Committee [on Appropriations] for the first time established the principle that whenever possible, ongoing, known operations should be budgeted and paid for "up front." The committee went on to state:

The Committee is gratified the Department recognized the soundness of this approach by including in its budget over $1 billion for such ongoing operations (Provide Comfort, Southern Watch, and Operation Joint Endeavor in Bosnia) and has fully funded the request for these activities. Without such advance financing, the military services would be forced to'raid' other operating accounts to sustain these missions pending approval

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[58] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[59] Pub. L. No. 104-106, 110 Stat. 186 (1996).

[60] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[61] OFFICE OF MANAGEMENT AND BUDGET CIR. A-76, (Aug. 1983); OFFICE OF MANAGEMENT AND BUDGET, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (Mar. 1996). The handbook provides that the government is to rely on the commercial sector to provide commercial products and services. When a cost comparison demonstrates that in-house performance would be cheaper than contractor performance, the government may retain an activity in-house. A cost comparison study must be done to justify maintaining the activity in-house.

[62] Pub. L. No. 104-208, § 8029, 110 Stat. 3009 (1996).

[63] Javits-Wagner-O'Day Act, 41 U.S.C. §§ 2, 47 (1996).

[64] Pub. L. No. 104-208, § 8015, 110 Stat. 3009 (1996).

[65] This amount was increased from $50,000 as contained in the DOD Appropriation Act for Fiscal Year 1996, Pub. L. No. 104-61, § 8035, 109 Stat. 636 (1996).

[66] Pub. L. No. 104-208, § 8027, 110 Stat. 3009 (1996).

[67] DOD Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

of additional funding, causing disruptions in planning and mission execution.

This funding should dramatically lessen the strain on DOD budgets as the services should no longer have to struggle with the cost of funding ongoing operations out of their operating budgets. However, new, unforeseen operations still must be funded on an *ad hoc* basis, whether out of this new appropriation or operating budgets, until additional funding can be secured.

C. The Military Construction Authorization Act.

1. Introduction. On 23 September 1996, President Clinton Signed the Military Construction Authorization Act for Fiscal Year 1997 (1997 Construction Act).[68] The 1997 Construction Act authorizes budgetary authority for specified military construction projects, unspecified minor military construction projects, and the military family housing program.[69]

2. Unspecified Minor Military Construction Funding. Congress decreased the total dollars available to the DOD during FY 1997 to carry out unspecified military construction projects. The 1997 Construction Act breaks out unspecified minor military construction funding as follows: $5,000,000 for the Army;[70] $5,115,000 for the Navy;[71] $9,328,000 for the Air Force;[72] and $21,874,000 for the DOD.[73] These figures represent a sharp decline in funding for the Army and the Navy.[74]

3. O&M Construction Threshold Increases. O&M funding for minor construction projects[75] and for reserve component facilities[76] has been amended from $300,000 to $500,000. This may have caused the decrease in unspecified minor construction funding.

4. Only Major Maintenance is Considered an Improvement. Section 2825 of 10 U.S.C.[77] is amended to provide that only major maintenance projects are included within the definition of improvement. "Such term does not include day-to-day maintenance and repair work" according to the new definition.[78] Funds may not be expended for the improvement of family housing units in excess of $50,000 ($60,000 for handicapped).[79] The 1997 Construction Act amends the section dealing with the limitation to include different factors the secretary must consider in determining the amount concerned. The appropriate secretary must now consider (in addition to utilities, roads, walks, grading, and drainage work) the construction or repair of drives and driveways. The service secretary need not consider any costs of activities undertaken beyond a distance of five feet from the repair project.[80]

5. Job Opportunity: Managing DOD's New Mobile Home Park. The Base Closure and Realignment Act (BRAC)[81] is amended to add a new section on the acquisition of manufactured housing.[82] The new section[83] adds a provision which allows the service secretary of the affected department to purchase the mobile home of a member of the Armed Forces or their spouse.

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[68] Pub. L. No. 104-201, 110 Stat. 2422 (1996).

[69] Congress passed the 1997 Construction Act as Division B of the 1997 Authorization Act for DOD, but provided it with its own short title.

[70] Pub. L. No. 104-201, § 2104(a)(3), 110 Stat. 2422 (1996).

[71] *Id.* § 2204(a)(3).

[72] *Id.* § 2304(a)(3).

[73] *Id.* § 2406(a)(10).

[74] The Military Construction Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996) provided $9,000,000 for the Army (§ 2104), $7,200,000 for the Navy (§ 2204), $9,030,000 for the Air Force (§ 2304), and $23,007,000 for DOD (§ 2405).

[75] *Id.* § 2801(a).

[76] *Id.* § 2801(b).

[77] Improvements to family housing units.

[78] Military Construction Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 2803, 110 Stat. 2422 (1996) (amending 10 U.S.C. § 2825(a)(2)).

[79] 10 U.S.C. § 2825 (b)(1)(A)-(B).

[80] *Id.* § 2803(b).

[81] 10 U.S.C. § 2687 (1996).

[82] The term "manufactured housing" refers to structures generally known as mobile homes. Removal of mobile home parks from military installations may result in an unanticipated savings in local O&M accounts. It is well known that a reduction in mobile homes results in a corresponding reduction in tornados. The mystery of this man-made effect on weather phenomena remains unsolved. It may, nonetheless, reduce the amount of O&M dollars expended on repair costs associated therewith . . . and you thought the plot line in the movie, *Twister*, was lame!

[83] Military Construction Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 2813, 110 Stat. 2422 (1996) (to be codified at 10 U.S.C. § 2687(f) (1996), Base Closures and Realignments).

This mobile home must be located at a mobile home park established at an installation closed or realigned under BRAC. The secretary may also authorize payment to the member or spouse to move to a new site. The secretary must make a determination that (1) it is in the best interests of the federal government to eliminate or relocate the mobile home park; and (2) the elimination or relocation of the mobile home park would result in an unreasonable financial burden to the owner. Any payment shall not exceed 90% of the purchase price of the mobile home plus the cost of any permanent improvements. The secretary shall dispose of the mobile home through resale, donation, trade, or otherwise within one year of acquisition.

6. Additional Base Closure Adjustment and Diversification Assistance. Additional areas of adjustment and diversification assistance[84] are added to BRAC.[85] The new section allows the SECDEF to make grants, conclude cooperative agreements, and supplement other federal funds in order to assist a state in enhancing its capacity to: (1) assist communities, businesses, and workers adversely affected by a base closure or realignment; (2) support local adjustment and economic diversification initiatives; and (3) stimulate cooperation between statewide and local adjustment and diversification efforts. This section restores the authority of the SECDEF which was inadvertently repealed in a prior year through a technical drafting error.[86]

7. For Those of You with Culture: A New Section Has Been Added. The 1997 Construction Authorization Act[87] provides for the authority to enter into cooperative agreements for the management of cultural resources on military installations. These cooperative agreements must be made with a state or local government for the preservation, management, maintenance, and improvement of cultural resources on military installations. The 1997 Construction Authorization Act also permits funding of research regarding the cultural resources. These activities shall be subject to the availability of funds to carry out the agreement. Cultural resource is defined as "a building, structure, site, district, or object eligible for or included on the National Register of Historic Places, cultural items,[88] archeological resources,[89] or an archaeological artifact collection."[90]

D. The Military Construction Appropriations Act.

1. Introduction. On 16 September 1996, President Clinton signed the 1997 Military Construction Appropriations Act (1997 MCA Act).[91] The 1997 MCA Act provides budget authority for specified military construction projects, unspecified minor military construction projects, and the family housing program.

2. Cost-Plus-Fixed-Fee Contracts. As in years past, Congress has prohibited the use of cost-plus-fixed-fee contracts for most MCA-funded projects.[92] This restriction applies to contracts for work performed within the United States, except Alaska, which have an estimated cost exceeding $25,000. The SECDEF may waive of this restriction. This restriction does not apply to contracts for environmental restoration at installations being closed or realigned when funding comes from a BRAC account.[93]

3. Contractors Better "Steel" Themselves for this Requirement. No funds may be used for the procurement of steel in any construction project for which American steel producers, fabricators, and manufacturers have been denied the opportunity to compete.[94]

4. New Account Established. The National Defense Authorization Act for fiscal year 1996,[95] established new authorities[96] to use the private sector and capital to improve unaccom-

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[84] 10 U.S.C. § 2391 (1996) provides that the Secretary of Defense may make grants, conclude cooperative agreements, and supplement funds available under federal programs administered by agencies other than DOD in order to assist state and local governments in planning community adjustment and economic diversification when bases are closed or realigned.

[85] Military Construction Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 2814, 110 Stat. 2422 (1996) (amending 10 U.S.C. § 2391(b)(5) (1996)).

[86] H.R. REP. No. 104-563, at 412 (1996).

[87] Military Construction Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 2862, 110 Stat. 2422 (1996) (to be codified at 10 U.S.C. § 2684).

[88] *As defined by* § 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3).

[89] *As defined in* § 3(1) of the Archeological Resources Protection Act of 1979, 16 U.S.C. § 470bb(1).

[90] *See* 36 C.F.R. § 79 (1996).

[91] Pub. L. No. 104-196, 110 Stat. 2385 (1996).

[92] Pub. L. No. 104-196, § 101, 110 Stat. 2390 (1996).

[93] *Id. See also* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. 236.271 (1991) [hereinafter DFARS].

[94] Military Construction Appropriations Act, 1997, Pub. L. No. 104-196, § 108, 110 Stat. 2385, 2390 (1996).

[95] Pub. L. No. 104-106, 110 Stat. 186 (1996).

[96] These authorities include direct loans, loan guarantees, leasing, rental guarantees, differential lease payments, interim leases, and conveying or leasing already constructed government property. 10 U.S.C. §§ 2872-79.

panied housing.[97] In order to implement these new provisions, a new account, "Department of Defense Military Unaccompanied Housing Improvement Fund", has been established in the 1997 Construction Appropriation Act for arrangements with private developers to provide affordable, timely housing for unaccompanied service members. Congress has provided DOD $5,000,000 to establish the fund. Subject to thirty days prior notification to the House and Senate Appropriations Committees, the SECDEF may transfer to the fund amounts appropriated for the acquisition or construction of military unaccompanied housing in "Military Construction" accounts.[98] The fund will be used to build or renovate unaccompanied housing, mixing or matching the various authorities contained in the authorization, and will utilize private capital and expertise to the maximum extent possible. The fund is to contain appropriated and transferred funds from military construction accounts, and the total value in budget authority of all contracts and investments undertaken may not exceed $150,000,000. Sources for transfers into the fund are solely to be derived from funds appropriated for the acquisition or construction of military unaccompanied housing.

5. Exercise-Related Construction. Congress has reiterated its concern regarding the use of construction funds in military exercises. The 1997 MCA Act requires the SECDEF to inform the appropriate committees, including the Appropriations and Armed Services Committees, of the plans and scope of any proposed military exercises involving United States personnel, when the Secretary anticipated expenditures for construction, either temporary or permanent, will exceed $100,000.[99]

6. No Money for New Bases. The 1997 MCA Act specifically provides that no money may be used to begin construction of new bases inside the United States without a specific appropriation[100] or overseas without prior notification to the House and Senate Appropriations Committees.[101]

7. American Preference Overseas Established. Military construction funds cannot be used to fund architect and engineer contracts greater than $500,000 for projects in Japan, any NATO member country, or in countries bordering the Arabian Gulf, unless such contracts are awarded to United States firms or United States firms in joint venture with a host nation firm.[102]

8. Use of Lapsed or Expired Funds. For construction projects being completed with lapsed or expired funds, those funds may be used to pay the cost of associated supervision, inspection, overhead, engineering and design.[103]

9. Use of Different FY Funds. Any construction funds appropriated to a defense agency may be obligated for a contract or project, at any time before the end of the fourth FY after the FY for which funds for such project were appropriated if the funds obligated for such project 1) are obligated from funds available for military construction projects, and 2) do not exceed the amount appropriated for such project, plus any amount by which the cost of such project is increased.[104]

10. Where Do Unobligated Monies Go? Unobligated balances of construction funds may be transferred into the "Foreign Currency Fluctuations, Construction, Defense" fund to be merged with and to be available for the same time period and for the same purposes as the appropriation for which transferred.[105]

11. Reports to Encourage Other Countries to Pay Their Share. The SECDEF is required to provide the House and Senate Appropriations Committees an annual report by 15 February 1997. This report must contain details of actions taken by DOD during FY 1997 to encourage other NATO countries, Japan, Korea, and United States Arabian Gulf allies to assume a greater share of the common defense costs.[106]

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[97] H.R. REP. No. 104-591, at 20 (1996).

[98] *Id.* at 2387.

[99] Military Construction Appropriations Act, 1997, Pub. L. No. 104-196, § 113, 110 Stat. 2385, 2391 (1996). Note that 10 U.S.C. § 2805(c)(2) prohibits the use of O&M funds for any exercise related unspecified military construction project coordinated or directed by the Joint Chiefs of Staff outside the United States.

[100] *Id.* § 104.

[101] *Id.* § 110.

[102] *Id.* § 111.

[103] *Id.* § 116. This represents an exception to the *bona fide* needs rule. The *bona fide* needs rule provides that the balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law. 31 U.S.C. § 1502(a).

[104] Military Construction Appropriations Act, 1997, Pub. L. No. 104-196, § 117, 110 Stat. 2385 (1996). The House Report explains this provision as allowing the obligation of funds from more than one FY to execute a construction project, provided that the total obligation for such project is consistent with the total amount appropriated for the project, H.R. CONF. REP. NO. 104-591 (1996).

[105] Military Construction Appropriations Act, 1997, Pub. L. No. 104-196, § 118, 110 Stat. 2385 (1996).

[106] *Id.* § 119.

III. CONTRACT FORMATION.

A. Authority.[107]

1. Interagency Wildfires. Houston Helicopters[108] involved an interagency contract with Houston Helicopters, Inc. (Houston) for "Call When Needed"[109] helicopter services. The Department of the Interior (DOI) and Forest Service contract was designed to provide the government with ready access to on call helicopters for suppression of wildfires and for other agency missions. The Forest Service conducted the procurement for both agencies. It awarded two identical contracts with different contract numbers. The contracting officer designated a DOI employee as the administrative contracting officer (ACO) and delegated to him the authority to dispatch helicopters. In practice, however, an interagency facility known as the Boise Interagency Fire Center (BIFC) acted as a dispatch center for fire suppression helicopters.

A dispute arose when Houston responded to a request from the BIFC to send a helicopter to Alaska to assist in fighting severe wildfires experienced during 1990. Houston had been assured by the BIFC dispatcher that its services could be used regardless of its lack of tundra pads. When Houston's aircraft arrived, however, it was grounded for lack of tundra pads. Although it promptly purchased the equipment, it was unable to secure the Federal Aviation Administration (FAA) approval needed to use it in flight. Eventually, the helicopter returned to the "lower 48" to fight other fires.

Houston eventually submitted a claim for the Alaska services, which was denied by a successor contracting officer, even though the original contracting officer had approved it for payment. In sustaining Houston's appeal, the board found that the BIFC dispatcher had implied actual authority to order the Alaska services and to waive the requirement for tundra pads. The board noted that many fires would rage out of control if the firefighters were forced to wait for written directions or confirmation from the ACO.

The board placed significant emphasis on the original contracting officer's approval of payment to Houston. It considered irrelevant the lack of publication of the approval document to Houston. The board noted prior decisions holding that an internal agency memorandum could bind the government, even if a funding request was subsequently denied by the approving employee's superior.[110] The board further determined that the actions of the contracting officer bound the DOI even though he was another agency's employee. In the words of the board:

> [t]he government should not be encouraged or permitted to establish an interagency organization, conduct an interagency procurement, award an interagency contract, and set up an interagency dispatch system to assist in responding to interagency fires, and then, after a contractor has followed orders and attempted to satisfy the interagency contract requirements, take 'nice,' almost committee like positions, on the lack of contractual authority of one interagency dispatcher or another or one interagency CO or another. At some point, in order to do business with third parties, the interagency personnel have to become interchangeable.[111]

2. Will the Real Contracting Officer Please Stand! An Air Force contract for electrical work at Wright-Patterson Air Force Base culminated in a termination for default for failure to perform by the required completion date.[112] The contractor, Jess Howard Electric Company, appealed the default termination claiming that the agency had extended the completion date. The Armed Services Board of Contract Appeals (ASBCA) agreed. The extension was granted by the contracting officer's representative (COR). The contracting officer's written delegation of authority denied the COR any authority to make changes to the contract. Nevertheless, the board found such authority, because the COR represented that he was the contracting officer and signed correspondence as such. All of this was done with the knowledge of the actual contracting officer. The board was somewhat astounded that the Air Force failed to dispute that the contract had previously been extended on a "day to day" basis and that the extension had been authorized by the same COR, who the agency later argued lacked authority.

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[107] *See also infra* section IV, F, 3, at p. 71, for a discussion of *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1995) (discussing the consequences of a contracting officer's abdication of his discretion under pressure from senior government officials).

[108] IBCA No. 3196, Jan. 31, 1996, 96-1 BCA ¶ 28,172.

[109] *Id.* at 140,606.

[110] *Id.* at 140,616, *citing* General Electric Co. v. U.S., 412 F.2d 1215, *reh'g den.*, 416 F.2d 1320 (Ct. Cl. 1969). *General Electric* was cited with approval in *Texas Instruments, Inc. v. United States*, 922 F.2d 810 (Fed. Cir. 1990). *See also* Appeal of Reliable Disposal Co., ASBCA No. 40100, 91-2 BCA ¶ 23,895.

[111] 96-1 BCA ¶ 28,172 at 140,616.

[112] Jess Howard Electric Company, ASBCA No. 44437, May 15, 1996, 96-2 BCA ¶ 28345. For further discussion of this case *see infra*, section V, L, 1, c, at p. 105.

3. Can You Make Out this Signature? In *Tri-Ark Industries, Inc.*,[113] the protester sought to eliminate the low bidder, Tolman, from the competition as nonresponsive due to irregularities in the signature and signature blocks contained on the bid and the certificate of procurement integrity. Tri-Ark alleged that the signature on its bid was that of the corporate secretary rather than the president as indicated by Tolman in the signature block on its bid. The protester also alleged that the signature block on the certificate of procurement integrity was incomplete and the signature itself illegible. The GAO was satisfied with Tolman's subsequent confirmation that the individual who signed the bid was authorized to bind the company and described the erroneous title in the signature block as "immaterial."[114]

B. Competition.

1. Urgent and Compelling. In *Bluestar Battery Systems Corp.*[115] the Army's Communications-Electronics Command (CECOM) orally solicited bids for over 400,000 BA-5590/U nonrechargeable lithium sulfur dioxide batteries. The battery is used in many types of tactical, soldier-operated communications equipment. The Army restricted the competition to the only two firms that had previously supplied the batteries despite the fact that Bluestar had specifically expressed an interest in competing for the procurement.[116] CECOM justified restricting the competition for two reasons. First, the Army had fielded a new simulation program which relied heavily on the batteries for its electronics. Second, the Army had experienced a dramatic increase in the number of "venting" incidents with the BA-5590/U. Venting is the controlled release of toxic materials through a weak spot in the cell container. Venting occurs when the batteries' internal pressure gets too high. Many of the incidents were reported as "violent venting."[117] The GAO found that CECOM was faced with a greatly increased need for the batteries in the field and an unreliable inventory. Under those circumstances restricting the competition to the only two previously qualified suppliers was justified.[118]

2. Defective Specifications. In *Inventory Accounting Service, Inc.*,[119] (IAS) the incumbent contractor protested, alleging that the specifications in a requirements contract for washer and dryer services at Fort Riley were defective. IAS claimed that the estimated quantities listed in the invitation for bids (IFB) were overstated and not based on the best information available to the agency. It also claimed that the specifications failed to provide enough information to permit bidders, other than itself, to calculate bids on an equal and competitive basis. IAS claimed that because it alone among the bidders, had information regarding certain unreimbursed costs, it was prejudiced. Specifically, IAS alleged that the defective specifications induced its competitors to bid too low, thereby defeating its accurate, reasonable—albeit, higher priced, bid. The GAO found that the estimates in the contract were reasonable[120] and that the solicitation provided for an equitable adjustment in unit prices if the total quantity of washers and dryers increased or decreased by more than 20%.[121] The GAO also noted that some risk is inherent in most contracts, especially in fixed-price contracts, "and the fact that the bidder in computing its bid must consider a variety of scenarios that differently affect its anticipated costs does not by itself render the IFB defective."[122] "[I]n fact, [an agency] may impose maximum risk on the contractor, in which case it is the bidder's responsibility to factor this risk potential into their bid prices."[123]

3. Restrictive Specifications.

a. Requiring Brand Names Can Be "Cool." In *Building Systems Contractors, Inc.*,[124] (BSC) the Air Force issued a solicitation to replace the heating, ventilating, and air conditioning

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[113] B-270756, Apr. 18, 1996, 96-1 CPD ¶ 194.

[114] *Id.* at 2.

[115] B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67.

[116] Prior to the emergency, CECOM had been preparing an unrestricted solicitation for a new generation of batteries. *Id.* at 3.

[117] *I.e.*, they exploded!

[118] The protester had never produced the battery for this country, and the agency had grave concerns about its capability to produce sufficient quantities of the batteries to meet the agency's urgent delivery schedule. *Id.* at 5.

[119] B-271483, July 23, 1996, 96-2 Comp. Gen. ¶ 35.

[120] *Id.* at 6.

[121] *Id.*

[122] *Id.* at 9, *citing* Westpac Serco, B-239203, July 23, 1990, 90-2 CPD ¶ 64.

[123] *Id.* at 9.

[124] B-266180, Jan. 23, 1996, 96-1 CPD ¶ 18.

(HVAC) system of two facilities at Bolling Air Force Base (Bolling). BSC protested that the requirement for a brand name computerized energy management control system (EMCS) was unduly restrictive of competition. The original IFB was issued as a brand name "or equal" requirement. BSC complained initially that the "or equal" language of the IFB was meaningless, because the compatibility requirements in the specification literally mandated the name brand. The agency reexamined its needs and, agreeing with BCS, amended the specifications by deleting the "or equal" language. In denying the protest, the GAO reaffirmed the rule that agencies may include provisions or conditions restrictive of competition only when required by the agencies' minimum needs.[125] However, an agency's determination of those minimum needs will not be questioned or overturned unless it lacks any reasonable basis.[126] Bolling had the brand name EMCS installed in 23 facilities on the base, and the equipment operated on a proprietary communication protocol that allowed sharing of information between facilities and remote locations. The Air Force reasonably determined that compatibility required limiting the procurement to the brand name equipment.

b. A Master's Degree in Crabgrass. In *Quality Lawn Maintenance,*[127] the GAO held that it was not unreasonable for the General Services Administration (GSA) to require a small business to employ an on-staff certified horticulturist to be considered qualified for its landscape maintenance contract. The contract was intended to service thirty installations in Washington, D.C., and Maryland, some of which included "cabinet-level agency headquarters buildings that serve as national showcases and are the subject of public scrutiny."[128] The agency explained that this was due to increased environmental requirements and a Presidential Directive.[129] The GAO concluded that "the requirement [was] legitimately and reasonably related to the type and quality of services to be provided, that it [was] not overly restrictive, and that there [was] no showing that it would unreasonably affect the cost of the contract."[130]

4. Evaluation Criteria.

a. Smile and Say "Cheese!" When ordering from the Federal Supply Schedule (FSS) an agency is required to order from the contractor offering the lowest overall price for products meeting its needs.[131] In *Imaging Technology Corporation*[132] the Federal Emergency Management Agency (FEMA) requested quotes for 15 computerized photographic identification card systems. The solicitation defined 32 features and capabilities required of the systems, but did not require any documentation concerning how a vendor's proposed system would meet the requirements. Award was to be made to the lowest-priced schedule vendor, Network Engineering Inc. (NEI). FEMA decided to award to NEI even though NEI failed to provide overall unit and extended prices for its system as required by the solicitation. NEI did, however, submit detailed, but unrequested, technical information and descriptive literature along with its proposal. The contracting officer evaluated NEI's line item charges and determined an overall price. By the contracting officer's computation, NEI was the lowest-priced offeror. Imaging Technology Corp. (ITC) protested, claiming the contracting officer's computation was wrong and that they were the low bidder. The GAO agreed with ITC.

b. "Dear Son, the Navy Called . . . Luv - Mom" In *Cromartie Construction Company,*[133] the Navy issued an RFQ for emerging small businesses. The RFQ solicited fixed-price quotations for new door locks and keys for a building in the Washington Navy Yard. The solicitation did not require submission of a technical package and listed price as the only evaluation factor. Cromartie Construction Company submitted a quotation of $3,795, which was a little more than half of the government estimate. The day after the deadline for submission of quotes, Mr. Cromartie called the contracting officer to inquire about the procurement. He was told the Navy was considering cancelling the solicitation. Nine days later, the Navy called

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[125] *Id.* at 2, *citing* Acoustic Sys., B-256590, June 29, 1994, 94-1 CPD ¶ 393.

[126] *Id.* at 2, *citing* Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389.

[127] B-270690.3, June 27, 1996, 96-1 CPD ¶ 289.

[128] *Id.* at 1.

[129] Presidential Directive, Federal Facilities Maintenance (Apr. 26, 1994). This directive centers around enhancing and ensuring environmentally and economically beneficial actions are practiced on federal landscaped grounds. The directive calls for the utilization of techniques that complement and enhance the local environment and seek to minimize the adverse effects that the landscaping will have on it, such as the use of regionally native plants and employing landscaping practices and technologies that conserve water and prevent pollution, using integrated pest management techniques that control the use of toxic chemicals, recycling green waste, and minimizing runoff.

[130] *Id.* at 2.

[131] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 8.404(B)(2) (1994) [hereinafter FAR]; The Mart Corp., B-254967.3, Mar. 28, 1994, 94-1 CPD ¶ 215.

[132] B-270124, Feb. 12, 1996, 96-1 CPD ¶ 68.

[133] B-271788, July 30, 1996, 96-2 CPD ¶ 48.

Cromartie and left a message with his mother, who assured them he would call back. The very next day the Navy awarded the contract to a large business for $6,894. The GAO recommended that the contract be awarded to Cromartie stating, "[w]here, as here, an RFQ seeks fixed-price quotations and identifies only price as an evaluation factor, a procuring agency may not ignore a responsive, low quotation from a responsible vendor in favor of a higher quotation submitted by another firm."[134] Mother Cromartie's response was unreported.

c. "Its Curtains for You, UNICOR, . . . and Window Tops!" Commercial Drapery Contractors, Inc. (CDC) protested the issuance of purchase orders by Federal Prison Industries, Inc. (UNICOR) to Contract Decor for cubicle curtains and decorative window top treatments for the Veterans Affairs (VA) Extended Care and Rehabilitation Center in Baltimore, Maryland.[135] CDC's protest alleged that the agency failed to make award to the vendor offering the lowest price under the Federal Supply System (FSS). UNICOR determined that the purchase orders were improperly issued because neither it nor the VA had considered prices from other FSS vendors as required by FAR 8.404(b)(c).[136] GAO dismissed the protest upon being informed by UNICOR that it intended to cancel the purchase orders. UNICOR then concluded that to ensure timely delivery of the draperies, competition for the fabric had to be restricted. UNICOR contacted CDC, Contract Decor and two other FSS vendors. Not surprisingly, only Contract Decor had the particular fabric in stock and was able to deliver it on time to meet the now "urgent" delivery schedule. Despite Contract Decor's higher price, UNICOR re-issued purchase orders to Contract Decor. CDC protested the second set of purchase orders claiming that the urgency used to justify these purchases was caused by UNICOR's improper issuance of the original purchase orders. The GAO agreed, "[T]he record shows that had UNICOR and VA employed proper procedures in the first place in ordering from the FSS, UNICOR would not have had to issue the second set of purchase orders to Contract Decor at a higher price . . . ."[137]

d. Competition Must be Intelligent, Not Risk Free. In *ANV Enterprises, Inc.*,[138] (ANV) the protestor, ANV, complained that the specifications contained in the IFB for a grounds maintenance service contract at Keesler Air Force Base in Mississippi were inadequate to permit intelligent competition. At the pre-bid conference, ANV submitted a list of seventy-seven questions dealing with alleged ambiguities in the specifications. The Air Force responded by letter to all prospective bidders and subsequently issued two amendments directly in response to additional questions by ANV. Additionally, the IFB provided for a site visit. Despite all of this, ANV protested, arguing that the specifications were defective and placed undo risk on bidders while giving the agency a competitive advantage in the cost comparison.[139] The GAO stated that an IFB need not be so detailed as to eliminate all performance uncertainties and risks.[140] It emphasized, "[w]e have recognized that grounds maintenance services by their nature, often require computing prices based on visual inspections and that the presence of some risk does not render a solicitation improper."[141] GAO determined that the specifications were not so uncertain as to impose an "unreasonable risk" on bidders when exercising "good business judgment" in preparing their bids.[142]

C. Contract Types.

1. Regulatory Changes.

a. New Rules for Task and Delivery Order Contracts. The Federal Acquisition Streamlining Act[143] (FASA) made major changes to the procedures for awarding indefinite quantity contracts.[144] In the latter part of 1995, the FAR Council issued regulations implementing these FASA changes.[145] These regula-

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[134] *Id.* at 4.

[135] B-271222.2, June 27, 1996, 96-1 CPD ¶ 290. This case is further discussed at *infra* section VI, E, 2, at p. 117.

[136] *Id.* at 2.

[137] *Id.* at 3.

[138] B-270013, Feb. 5, 1996, 96-1 CPD ¶ 40.

[139] The IFB was issued for the purposes of a cost comparison under an Office of Management and Budget (OMB) Circular A-76 study.

[140] B-270013, Feb. 5, 1996, 96-1 CPD ¶ 40 at 2, *citing* RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109.

[141] *Id.* at 4, *citing* Harris Sys. Int'l., Inc., B-224230, Jan. 9, 1987, 87-1 CPD ¶ 41.

[142] *Id.* at 4.

[143] Pub. L. No. 103-355, §§ 1004, 1054, 108 Stat. 3243, 3249, 3261 (1994).

[144] The FAR identifies three types of indefinite delivery contracts: definite quantity, requirements, and indefinite quantity. *See* FAR *supra* note 132, at 16.501-2.

[145] *See* 60 Fed. Reg. 49,723 (1995).

tions included guidance on multiple awards for requirements contracts and indefinite quantity contracts for the procurement of advisory and assistance services in excess of three years and $10,000,000.[146] The regulations also establish a preference for multiple awards of indefinite quantity contracts[147] and give guidance on placing orders under multiple-award contracts.[148] This year, the FAR Council issued a final rule clarifying some of these procedures.[149] The new rule provides that agencies may make class determinations[150] to make single awards for any class of contracts (i.e., this class of contracts would be exempt from the preference for multiple awards).[151] The rule also clarifies that the multiple award preference does not apply to architect-engineer services subject to FAR Subpart 36.6.[152] Finally, the rule amended FAR 16.505 to clarify that the contracting officer need not comply with FAR Subpart 42.15 when evaluating past performance for the award of individual orders.[153]

b. Fixed-Price Award Fee Contracts? On 20 June 1996, the FAR Council issued a proposed rule which would amend the FAR to allow the use of performance incentives in fixed-price contracts.[154] The proposed rule specifically authorizes the use of fixed-price award fee contracts if certain enumerated conditions are met.

2. *Exercising Options.*

a. It's OK if You Don't Like the Contractor! In *Pennyrile Plumbing, Inc.*,[155] the ASBCA considered a contractor's claim that the government declined to exercise an option on a contract because of animus against the contractor. The contract was for portable latrine and plumbing services and consisted of a base year and four option years. Pennyrile Plumbing, Inc. (PPI) submitted the winning bid for the contract. PPI's bid was well under cost for several contract line items (CLINs). All of its profit was contained in one CLIN for drain unstopping services. In preparing the contract, the government mistakenly failed to include an alternate to the basic Requirements clause.[156] This alternate clause would have obligated the government to order only those services beyond what it was capable of providing using government personnel. Because of this mistake, the government was obligated to order all of its requirements for drain unstopping services from PPI at a cost well above the government's in-house cost. When PPI refused to enter into a bilateral modification adding the alternate clause to the contract, the government refused to exercise the option. PPI filed a claim for anticipated profits and unrecovered start-up expenses which the contracting officer denied. In denying PPI's appeal, the board held that the exercise of the options was discretionary and reiterated that a contractor has no basis for relief unless the government's action was arbitrary, capricious, or an abuse of discretion. In this case, the board noted that the government's mistaken failure to include the alternate clause "was a serious [mistake] that would have been costly during the option years. Correcting that costly error was a reasonable basis for the determination not to exercise the option . . . ."[157] As for PPI's allegations of animus, the board stated that, "even if it were true that Government officials had animus towards PPI, the existence of such animus can not obviate the clear reasonable basis for permitting the contract to end without the exercise of options."[158]

b. Exercising the Option Doesn't Require You to Order. In a case dealing with options on an indefinite quantity supply contract, the ASBCA decided that simply exercising the option to extend the ordering period does not obligate the government to place any orders.[159] The Air Force structured a contract with

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[146] FAR 16.503(d); 16.504(a)(4)(vi).

[147] FAR 16.504(c).

[148] FAR 16.505. This provision requires contracting officers to provide each awardee "a fair opportunity to be considered for each order in excess of $2,500."

[149] 61 Fed. Reg. 39,203 (1996) (amending FAR Subpart 16.5).

[150] *See* FAR 1.703.

[151] This change addressed concerns over multiple awards for Job Order Contracts or Simplified Acquisition of Base Engineer Requirements (SABER) contracts. *See* 61 Fed. Reg. 39,202 (1996).

[152] The regulation clearly states, however, that multiple awards may be made for these services as long as the "selection of contractors and placement of orders is consistent with Subpart 36.6." FAR 16.500.

[153] This subpart provides policy and procedures for the collection and maintenance of contractor past performance information.

[154] 61 Fed. Reg. 31,798 (1996). Currently, performance incentives may be used only in combination with cost incentives. *See* FAR 16.402-1.

[155] ASBCA No. 44555, 96-1 BCA ¶ 28,044.

[156] FAR 52.216-21, Alt. I.

[157] 96-1 BCA ¶ 28,044 at 140,029.

[158] *Id.*

[159] Five Star Elec., Inc., ASBCA No. 44984, 96-2 BCA ¶ 28,421.

several CLINs for first article requirements. The contract contained options for yearly ordering periods for each CLIN. The contract also stated that the first article requirements constituted the guaranteed minimum quantity that the government was required to order and that any supplies to be furnished under the contract would be ordered by the issuance of delivery orders. The government issued an order for all of the first article requirements which were ultimately delivered, accepted, and paid for. The government exercised one option to extend the ordering period and did, in fact, order and pay for several units during that period. However, after exercising the option for a second period, the government failed to place any further orders. The contractor claimed that the government's failure to order was a breach of the contract. In granting the government's motion for summary judgment, the board held that, under the contract, the government was obligated only to order the specified minimum quantities. By ordering the first article requirements, the government satisfied this obligation. Because the contract did not specify any minimum for the option periods, the government was not obligated to place any orders. Although the matter was not directly in issue in this case, it appears that the ASBCA would have no problem with indefinite-quantity contracts in which the guaranteed minimums are limited to the base year.

3. Indefinite Delivery Contracts.

a. Scope of the Duty to Provide Accurate Estimates. Numerous decisions from courts and boards deal with the adequacy of the government's estimate of quantities to be ordered under an indefinite delivery contract.[160] Most of these decisions involve the estimated quantities included in the contract at the time of award. In *Celeron Gathering Corp. v. United States*,[161] however, the Court of Federal Claims (COFC) imposed a duty on the government to update its estimates *after* award. *Celeron* involved a purchase contract for crude oil.[162] At the time of contract award, the government was aware of problems with a wastewater well[163] which could impact its ability to provide the estimated quantities of crude oil. However, the court found no liability for a defective estimate at this time, because the government reasonably believed that it could overcome these problems with minimal impact on oil production. Unfortunately, shortly after contract award, the government experienced major problems with the wastewater well which sharply curtailed production. The government failed to disclose the extent of the problems to the contractor, who was forced to take oil from its reserves and to purchase from other sources to cover the shortfall. In holding for the contractor, the court stated:

> The government's failure to give Celeron an accurate, non-evasive assessment of the wastewater disposal problems . . . constituted a breach of the government's duty of fair dealing. Whether framed as a failure to cooperate, a failure to disclose superior knowledge, or even a failure to update an estimate, the government's conduct was simply unjustifiable.[164]

b. Trying to Have Your Cake and Eat it Too. In *Sea-Land Serv., Inc.*,[165] the GAO considered a protest involving a purported requirements contract. The request for proposals (RFP) contemplated the award of a requirements contract for ocean shipment of cargo. However, the RFP also contained a "Limitation of Government Liability" clause which essentially would absolve the government of any liability for ordering shipping requirements from some other source. The GAO sustained the protest against the terms of the RFP, stating, "we find that the government has assumed no legal obligation under the Interport Agreement and that the solicitation falls into the category of an illusory contract—a document which appears to contemplate a contract, but which lacks consideration and is therefore unenforceable."[166]

c. Requirements are Requirements are . . . . In 1993 Fort Carson awarded a requirements contract to MDP Construction, Inc. (MDP) for the replacement of baths in family housing. The contract was structured with a base year and three option years; the Army exercised the first two options on the contract. In 1995 the Army Corps of Engineers (COE) awarded a contract (to another contractor) for the refurbishing of officer family housing at Fort Carson. As you might expect, the COE contract included bathroom renovations. MDP filed a claim alleging that

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[160] *See, e.g.*, Pruitt Energy Sources, Inc., ENG BCA No. 6134, 95-2 BCA ¶ 27,840; Contract Mgmt., Inc., ASBCA No. 44885, 95-2 BCA ¶ 27,886.

[161] 34 Fed. Cl. 745 (1996).

[162] *Id.* Under the terms of the contract, Celeron was to receive an estimated 10,000 barrels of crude oil per day from the government.

[163] *Id.* A wastewater well is used to dispose of water subsequently separated from the crude oil with which it was originally pumped from the ground.

[164] 34 Fed. Cl. at 753.

[165] B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49.

[166] *Id.* at 5.

the work under the COE contract breached its requirements contract. When the contracting officer denied the claim, MDP appealed to the ASBCA.[167] The board sustained the appeal, rejecting the government's argument that there was no breach because the COE contract was of much broader scope than MDP's contract, making it a contract for essentially different work. The board held that "the fact that [the COE contract] duplicated only some of [MDP's contract] work . . . does not defeat liability for the duplicated work."[168] The board distinguished cases relied on by the government where "a requirement and price element for specialized personnel or equipment" had been an essential element in finding no breach of requirements contracts for similar items or services.[169]

4. Award Fee Disputes Revisited. Two years ago, we discussed a case in which the ASBCA assumed jurisdiction over a contractor's appeal of an award fee determination (under a cost plus award fee contract) in disregard of standard contract language stating that the determination was not subject to the Disputes clause.[170] Although the contractor won the initial battle of summary judgment, it lost the war in *Burnside-Ott Aviation Training Center*.[171] The case involved a cost-plus-award-fee contract for aircraft maintenance and repair. The contract contained performance criteria, which were tied to numerical weights.[172] Unlike previous and subsequent contracts for the same and similar services, this contract did not contain a formula for converting the point scores into percentages of the award fee pool which the contractor would receive.[173] In spite of this omission, the government used the conversion formula from the previous contracts to determine Burnside's award fee. When Burnside learned of the government's use of the conversion formula, it filed a claim seeking the increased fee it would have earned had the point scores in the contract correlated directly with the percentage of fee. In denying Burnside's appeal, the ASBCA noted that its review was limited to determining whether the government's actions were arbitrary or were an abuse of discretion. The board found that Burnside's interpretation of the contract, which could have led to a payment of up to 69% of the award fee for submarginal work, was unreasonable. The board pointed out that Burnside was aware that previous and subsequent contracts has contained the conversion formula. Therefore, Burnside should not have been surprised that the government used the formula on this contract. In response to Burnside's allegation that the government had violated FAR 15.402,[174] the board stated:

> *while inclusion of the conversion formula in the solicitation would have been informative*, consistent with prior practice and consonant with the intent of this general regulation, failure to include a conversion formula violated no specific statutory or regulatory requirement that it be included and did not rise to the level of arbitrary or capricious action on the part of the [government].[175]

Practitioners should heed this language and ensure that contracting personnel include an accurate description of the methodology the government will use to determine award fee payments in all solicitations for award fee contracts. It appears that the use of the conversion formula in prior contracts played a major role in the board's decision. These facts will not be present in all cases.

5. COFC Finds That Cable Franchise Agreements are Contracts Subject to the FAR. The 1996 DOD Authorization Act included a provision requesting that the Chief Judge of the COFC issue an advisory opinion as to whether cable television franchise agreements between cable operators and DOD were contracts covered by the FAR.[176] This issue arose due to the closure of military installations as a result of Base Realignment and Clo-

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[167] MDP Construction, Inc., ASBCA No. 49527, 96-2 BCA ¶28,525.

[168] *Id.* at 142,452.

[169] *Id. citing* Cleek Aviation v. United States, 19 Cl. Ct. 552 (1990) and Eastern Ambulance Svcs., VABCA No. 2078, 86-2 BCA ¶ 18,852.

[170] *See 1994 Contract Law Developments—The Year in Review*, ARMY LAW., Feb. 1995, at 25 (discussing the ASBCA's refusal to grant a government motion for summary judgment in Burnside-Ott Aviation Trng. Ctr., ASBCA No. 43184, 94-1 BCA ¶ 26,590).

[171] ASBCA No. 43184, 96-1 BCA ¶ 28,102.

[172] *E.g.*, for "submarginal" performance, the contractor would receive a point score ranging from 0-69.

[173] Under the conversion formula, the contractor would receive no award fee for "submarginal" or "minimum" performance.

[174] This section states in part: "Solicitations shall contain the information necessary to enable prospective contractors to prepare proposals or quotations properly."

[175] 96-1 BCA ¶ 28,102 at 140,267 (emphasis added).

[176] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 823, 110 Stat. 186 (1996).

sure (BRAC) actions. Cable operators are facing huge losses through unrecovered start-up and capitalization costs at installations scheduled for closure prior to the expiration of the cable franchise agreements. DOD had taken the position that the franchise agreements were not contracts for goods or services but, instead, merely granted the cable operators an easement to build and operate their systems. The COFC responded to Congress with an opinion dated 11 July 1996.[177] The court, after a lengthy analysis resulting in a finding that the Communications Policy Act of 1984 did not preclude the Executive Branch from treating the franchise agreements as FAR contracts, found that the agreements were, in fact, subject to the FAR. The court rejected the government's argument, finding that the franchise agreements were contracts for services:

> The franchise agreement also ensures access to service for all military personnel living in base housing, and this helps the military meet an important goal: providing suitable and attractive living arrangements and amenities for personnel living on-base. Thus this contract provides an important ancillary service for the military by helping the military fulfill their mission to provide good working and living conditions for base personnel. The military benefits, both directly and indirectly, from the franchise agreement.[178]

Congress implemented this decision in the 1997 DOD Authorization Act.[179] The major practical effect of this decision, of course, is that cable operators will be able to recover unamortized start-up and capitalization expenses through a termination for convenience settlement.

D. Sealed Bidding.

1. Responsiveness.

a. Nothin' from Nothin' Leaves Nothin'. In a scathing opinion, the COFC issued a permanent injunction against the Army Corps of Engineers' proposed award to the apparent low bidder on a contract to install railroad tracks at Fort Campbell, Kentucky.[180] At bid opening several defects were noted in the bid submitted by M.R. Dillard Construction Company (Dillard).[181] The announcement of the award to Dillard provoked an agency level protest by the second low bidder, Firth Construction Company (Firth). After obtaining a legal review[182] the contracting officer "cancelled"[183] the contract. This action prompted a successful protest to the GAO by Dillard.[184]

Firth struck back, seeking injunctive relief in the COFC. The COFC described the GAO's opinion as contrary to general principles of contract formation, the FAR, and GAO's own case precedent.[185] The bid had "no signature on an SF 1442,[186] no commitment to furnish a performance and payment bond, no pe-

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[177] *In re* the Dep't of Defense Cable Television Franchise Agreements, 36 Fed. Cl. 171 (1996).

[178] *Id.* at 178.

[179] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 833, 110 Stat 2616 (1996).

[180] Firth Construction Co., Inc. v. United States, No. 96-393C, 1996 U.S. Claims LEXIS 129 (July 22, 1996).

[181] *Id.* at *3-4. Among the defects noted was the lack of a completed Standard Form (SF) 1442 and the lack of completed representations and certifications.

[182] The COE's legal counsel advised that Dillard's bid was nonresponsive, because it lacked a signed SF 1442 or any other indication that the bidder intended to be bound. *Id.* at *7.

[183] The contracting officer sent a letter to Dillard indicating cancellation of the "invalid" contract. In addition, the contracting officer issued a modification indicating a recision of the award on the same basis. *Id.* at *7.

[184] M.R. Dillard Constr., B-271518,2, June 28, 1996.

[185] 1996 U.S. Claims LEXIS 129 at *29.

[186] Lack of a signature on the SF 1442 does not render a bid nonresponsive in every situation. Where the bid bond and certificate of procurement integrity are signed, the GAO has held that the bidder has sufficiently communicated its intent to be bound. *See* Peter J. O'Brien & Co., B-272267, Aug. 29, 1996, 96-2 CPD ¶ 91.

riod within which the 'bid' was valid, no signed amendment, and no signed bid bond."[187] The COFC determined that the GAO decision was "irrational."[188] Contracting, said the COFC, is a "sentient process,"[189] one in which "telepathy"[190] is not required. In granting the injunction, the court condemned the GAO's approval of what the court described as contract formation "*ex nihilo*."[191]

b. I Bid, Therefore, I Am! Two recent cases illustrate the complexity of determining whether the bidder is a legal entity capable of being bound in contract. *Sunrise International Group, Inc.*[192] dealt with a contract to feed and house applicants at the Military Entrance Processing Station (MEPS) in Detroit, Michigan. The incumbent submitted its bid under the trade name Ramada Hotel (Ramada). The protester argued that award could not be made to this bidder, because its identity remained uncertain. The protester argued that the Ramada's city business license was issued to an individual rather than a corporation, while the local property tax records showed the owner as "Days Hotel." The GAO dismissed the protest, finding that, under the circumstances, the bid submitted under a trade name was sufficient. The GAO noted that the bid was signed on behalf of Ramada by the general manager. The restaurant and hotel license was issued to "Ramada," and the underlying application was signed by the owner. The bidder had provided the agency with a standard form authorizing the general manager to sign its bid and identifying the bidder as a corporation with the owner as its president. The agency also produced a corporate certificate listing the owner as its president and designating the general manager as its agent.

The GAO also upheld award to a joint venture where one of the joint venture corporations had been dissolved by its licensing state at the time of bid opening.[193] The dissolution resulted from its failure to file an annual report. By the time of award, the corporation, Convention Marketing Services, Inc. (CMS), had obtained a reinstatement which, under state law, related back to the time of dissolution. The protestor argued that the bid was nonresponsive and cited GAO precedent[194] for the proposition that a bid was nonresponsive if it placed the bidder in a position such that it could choose whether to be bound by its bid. Without clear explanation, the GAO indicated that CMS "was never in a position in which it could have asserted its lack of capacity in order to avoid the contract award." The GAO based this assertion on the retroactive effect of the reinstatement. The opinion also emphasized the contracting officer's ignorance of the dissolution prior to the corporate reinstatement and prior to award.[195] The GAO cited cases in which it "recognized the propriety of a contract award in circumstances less clear cut than those present here."[196] While not clearly articulated in the opinion, it appears that the GAO adopted a similar legal fiction to that used by the state in making the corporate status retroactive. That is, when a protest is raised subsequent to the corporate reinstatement and after award, the relation back theory would prevent the bidder ever having been in a position to avoid its contractual obligations.

c. No Need to Throw the Baby Out with the Bath Water. In *PBM Construction, Inc.*,[197] (PBM) the Department of the Interior issued an IFB for construction work. Prior to bid opening the contracting officer erroneously advised several bidders that

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[187] 1996 U.S. Claims LEXIS 129 at *10.

[188] 1996 U.S. Claims LEXIS 129 at *11. The court explained the scope of its review as follows:

> The precise subject of review in this case is, of course, not the GAO decision. What this court is reviewing is the agency's announced intention to award the contract to Dillard. But whether that determination is arbitrary, capricious, or not in accordance with law, must be considered in light of the GAO recommendation. To the extent that the agency chooses to follow the advice of the GAO, the courts should only intervene if the advice the agency receives is "irrational." *Id., citing* Honeywell Inc. v. United States, 870 F.2d 644, 648 (Fed. Cir. 1989).

[189] *Id.* at *28. Sentient means "capable of feeling: CONSCIOUS" or "experiencing sensation or feeling." WEBSTERS II NEW RIVERSIDE UNIVERSITY DICTIONARY (1984).

[190] 1996 U.S. Claims LEXIS 129 at *11.

[191] *Id.* at *28. "Ex nihilo" means from nothing, as in the term "Ex nihilo nihil fit" meaning "From nothing comes nothing." BLACK'S LAW DICTIONARY 516 (5th Ed. 1979).

[192] B-266357, Feb. 12, 1996, 96-1 CPD ¶ 64.

[193] Tours, Lodging, & Conferences, Inc., B-270478, Mar. 8, 1996, 96-1 CPD ¶ 144.

[194] *Id.* at 2. The protester cited *Delaware East Wind, Inc.*, B-221314, Mar. 12, 1986, 86-1 CPD ¶ 246 and *Casper Constr. Co., Inc.*, B-253887, Oct. 26, 1993, 93-2 CPD ¶ 247.

[195] The GAO does not discuss the fact that the reinstatement resulted from voluntary actions on the part of the corporate officers. It is unclear whether the bidder could have declined to take the steps necessary to ensure reinstatement, thereby avoiding its liability.

[196] 96-1 CPD ¶ 144 at 2, *citing* Forbes Aviation, Inc., B-248056, July 29, 1992, 92-2 CPD ¶ 58. In this case, the GAO discussed a Kansas statute, which precluded a corporation from shirking its contractual duties due to lack of corporate capacity. The GAO fails to articulate how the facts in this case are "less clear cut."

[197] B-271344, May 8, 1996, 96-1 CPD ¶ 216, 1996 U.S. Comp. Gen. Lexis 248.

modifications could be submitted by facsimile.[198] The low bidder, Dunton Construction Company (Dunton), increased its bid price by a facsimile modification. PBM filed a pre-award, agency-level protest attacking the responsiveness of Dunton's bid. The contracting officer denied the protest, but modified the contract to reduce the price to that of Dunton's original bid.[199] In its subsequent protest to the GAO, PBM argued that Dunton's bid must be rejected as nonresponsive, claiming that the erroneous acceptance of its bid modification allowed Dunton to choose whether or not to be bound by its bid.[200] The protester also argued that the receipt of the modification served to put the agency on notice of a mistake in Dunton's bid.[201] The GAO denied the protest, holding that the ineffective modification had no effect on the original bid, which remained available for acceptance.[202]

2. Mistakes in Bid.

a. Clear and Convincing Evidence? Disappointed bidders continued to object to their competitors' correction of bid mistakes. Recent cases illustrate that considerable deference is afforded to a contracting officer's determination regarding the sufficiency of evidence of mistake.[203] In *Huber, Hunt & Nichols, Inc.*,[204] the GAO rejected an argument that a contractor's negligence in its bid preparation should preclude its correction of a mistake.

The GAO declined to require that a bidder, offering a computer generated spreadsheet as evidence of a mistake in bid, name its software or explain its software's operation.[205] The GAO also declined to require bidders to use perfect penmanship in making its handwritten entries on supporting documentation.[206]

The Eleventh Circuit upheld the Army's practice of disallowing correction of a mistake where the evidence consisted of uncorroborated statements of contractor personnel.[207] The Court stated:

To permit bidders to cure the nonresponsiveness of their bids merely on the basis of general, unsubstantiated allegations of inadvertent error would open the competitive bidding system to the possibility of manipulation. For example, a bidder could submit a flagrantly nonresponsive bid and then, depending on the outcome of the bidding results, seek to cure the nonresponsiveness as the bidder's interest so dictated.[208]

b. A Little Give and Take? In *Dynalectric Company*,[209] the Navy sought a contract for construction work at Camp Pendleton Marine Corps Air Station. One of numerous tasks to be required of the contractor was the performance of "core borings" underneath airfield taxiways. In its initial response to the Navy's request for bid verification, Dynalectric sought to withdraw its bid, claiming that it had failed to include the cost of the core borings. Dynalectric had a change of heart, however, when it realized that it had overcharged sales tax and could otherwise offset the original error.

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[198] The solicitation did not allow the submission of facsimile bids. As such, facsimile bid modifications were not permitted. *See* FAR 14.303. Nevertheless, the contracting officer orally notified all bidders who inquired that she would accept modifications submitted by facsimile. The GAO pointed out that this oral modification of the solicitation was improper. *Id.* at *2, *citing* Searle & Co., B-247077, Apr. 30, 1992, 92-1 CPD ¶ 406; Recreonics Corp., B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249; and Auto-X, Inc., B-241302.2, Feb. 6, 1991, 91-1 CPD ¶ 122.

[199] *Id.* at *3. The agency also counseled the contracting officer.

[200] A situation described by the protester as giving Dunton "two bites at the apple." *Id.* at *4.

[201] Dunton never claimed any mistake in its bid. Absent evidence of mistake, Dunton was obligated to perform at its initial bid price. *Id.*

[202] The protester relied on *CCL, Inc.*, B-251527, May 3, 1993, 93-1 CPD ¶ 354, *aff'd*, B-251527.3, Sep. 17, 1993, 93-2 CPD ¶ 178. In distinguishing that case the GAO pointed out that in *CCL, Inc.* "there was no viable offer extant on the basis of which the agency could properly have made an award." 1996 U.S. Comp Gen. Lexis 248, at *4.

[203] FAR 14.407(a) provides that evidence of mistake must be shown by clear and convincing evidence.

[204] B-271112, May 21, 1996, 96-1 CPD ¶ 246.

[205] Merrick Constr. Co., Inc., B-270661, Apr. 8, 1996, 96-1 CPD ¶ 181.

[206] The protester claimed that handwritten markings were illegible. *Id.* at 4.

[207] McKnight Constr. Co., Inc. v. Dept. of Defense, 85 F.3d 565 (11th Cir. 1996). The first challenge to the procurement was an agency-level protest from Connor Bros. Constr. Co., Inc. (Conner Brothers), alleging that McKnight's bid should be rejected as materially unbalanced. The agency was in the process of reviewing McKight's bid to determine whether it was materially unbalanced when McKnight first sought correction of its bid. McKnight's intended correction would have switched the prices for two of the bid's line items, but would have made no change to the overall bid price. As evidence of its mistake, McKnight submitted worksheets and affidavits, which were prepared after bid opening to "reconstruct" the "thought process" in determining line item prices for the bid. It failed to submit any underlying documentation such as subcontractor quotes. The agency's rejection of McKnight's bid was upheld by the GAO, whose decision was reversed by the district court. Connor Brothers appealed to the circuit court. *Id.* at 568.

[208] *Id.* at 570, *citing* Bill Strong Enterprises, Inc., B-22492.2, Aug. 11, 1986, 86-2 CPD ¶ 173.

[209] B-265762.2, Feb. 15, 1996, 96-1 CPD ¶ 97.

Dynalectric illustrated through its worksheets that it had included no calculation for the core borings. The challenge for Dynalectric was that, in order for its bid to remain low, it also needed to convince the agency that its subcontractor overestimated its price for the core boring work. This it could not do. Dynalectric argued that the Navy "should have accepted its reasonable estimate of the omitted cost and allowed it to waive its mistake."[210] The GAO denied the protest, finding that Dynalectric had not proven that its bid would have remained low. As to Dynalectric's contention that its bid could remain low by offsetting other errors in the bid, the GAO saw this practice as tantamount to correction of a bid which would displace the low bidder. As such, the mistake could not be proven by extrinsic evidence.[211]

c. The Mistake is Apparent from the Face of the Bid, Right!? The question presented in *Bay Pacific Pipelines, Inc.*,[212] was whether the contracting officer's request for the bidder's confirmation of an obvious mistake in bid[213] precluded correction of the bid. The bid in question was submitted by Klipper Construction Associates, Inc. (Klipper). Upon examining the bids, the contracting officer noticed a discrepancy between the unit price and extended price for street lights. Notwithstanding the IFB's provision that unit prices would control over extended prices, the contracting officer determined that Klipper had erroneously added an extra zero to its unit price. The contracting officer then notified Klipper and requested that it verify its price or confirm that a mistake had been made. Klipper agreed that an extra zero had been added to its unit price and provided documentation supporting that fact. The protester argued unsuccessfully that Klipper had displaced the low bidder using extrinsic evidence. The GAO noted that the contracting officer had appropriately compared Klipper's unit price to the government estimate and the other bidders. In doing so, the contracting officer had sufficient evidence to support the correction. The GAO dismissed the notion that the subsequent confirmation of the mistake tainted the original decision or rendered the original evidence insufficient.

3. Responsibility.

a. What Have You Done for Me Lately? A Government Printing Office (GPO) contracting officer's nonresponsiblity determination was upheld in *Information Resources Inc.*,[214] (IRI). The case involved a contract for "microfilm reproduction and distribution."[215] In its protest, IRI asserted that its performance record was no worse than those of its competitors, who had been found responsible. IRI also complained that its poor performance record could be attributed, in part, to the contracting officer's faulty contract administration. In particular, IRI suggested that the government had been overzealous in inspecting IRI's performance, had been quick to document every problem, and had negligently failed to send cure notices and show cause notices. The GAO focused its attention on the most recent 12-month period and found that IRI's performance was worse than that of its competitors when measured by lateness rate, rejection rate, and frequency of cure notices. Additionally, IRI failed to produce "virtually irrefutable evidence that the contracting agency directed its actions with the specific and malicious intent to injure the protester."[216]

The GAO was similarly unmoved by cries of unfairness from a disappointed bidder in *North American Construction Corp.*[217] In this case, the agency found reports of recent performance problems more compelling than numerous positive reports from earlier contracts. The contracting officer's nonresponsibility

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[210] *Id.* at 3. The GAO emphasized that the bidder could not show that its estimate for the length of the borings was reasonable, especially because its estimate was disputed by the agency and was smaller than its own subcontractor's quote.

[211] Dynalectric lost its status as the low bidder when it failed to prove by clear and convincing evidence that it would have remained low after the inclusion of the cost of the core borings. In seeking to "offset" the mistake with other errors, Dynalectric would be treated as a bidder wishing to displace the low bidder. As such, it would not be allowed to offer extrinsic evidence as evidence of the mistake. *See id.* at 4.

[212] B-265659, Dec. 18, 1995, 95-2 CPD ¶ 272.

[213] "[C]orrection of an obvious mistake is authorized notwithstanding displacement of a lower bidder, provided the existence of the mistake and the intended bid are apparent from the face of the bid." *Id.* at 2-3, *citing* Action Serv. Corp. B-254861, Jan. 24, 1994, 94-1 CPD ¶ 33.

[214] B-271767, July 24, 1996, 96-2 CPD ¶ 38.

[215] *Id.* at 1.

[216] *Id.* at 2, *citing* Shenker Panamerica (Panama) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67.

[217] B-270085, Feb. 6, 1996, 96-1 CPD ¶ 44.

determination was made after several telephonic inquiries and research of the Army Corps of Engineers Construction Contractor Appraisal System. One source described the contractor as a "change order artist" and reported that it was being investigated for fraud. Interestingly, the GAO had no specific comment on the contractor's description of this information as both "irrelevant" and "misleading."[218] The contractor's assertions that it had been found responsible on other contracts had "no bearing upon the nonresponsiblility determination at issue here. Such determinations are inherently judgmental and different contracting officers can reach opposite conclusions on the same facts, without either determination being unreasonable or the result of bad faith."[219]

In *Saft America*,[220] a CECOM contracting officer issued an IFB using accelerated procedures to procure a number of "urgently needed batteries."[221] The batteries were intended for use by soldiers in communications-electronics equipment. Two oral bids were received, and pre-award surveys were conducted for both bidders. The Defense Contract Management Area Office recommended that Saft be deemed nonresponsible due to its weak financial position, unsatisfactory production capability, and its prior late deliveries on similar contracts.[222] The contracting officer also knew that batteries supplied by Saft had experienced venting problems.[223] The protester argued that it could have demonstrated its financial strength if given more time. It also asserted that its delivery problems were caused by the developmental nature of the particular contracts. Saft explained that its batteries' venting problems were misreported or "exaggerated"[224] by soldiers and that it suspected soldiers of "abusing the batteries."[225] Saft expressed the opinion that the problem might be due to the government's specifications. The GAO nevertheless upheld the agency's decision, finding that it made a reasonable determination in light of the safety and national defense concerns. The GAO stressed that the agency had an urgent need for the batteries and that the competitors' batteries had not been the subject of similar complaints from the field.[226]

b. The Sun Will Come Out Tomorrow. The considerable deference given to the contracting officer's responsibility determination applies equally where a disgruntled bidder takes aim at its competitor's past performance. This was the case in *Mine Safety Appliances Company*.[227] The solicitation was for gas mask canisters. Two contractors, Mine Safety Appliances Company (MSA) and the Canadian Commercial Corporation/Racal Filter Technologies (Racal), have been the only competitors offering this product for many years.[228]

When the contract in question was awarded to Racal, MSA protested that Racal's past performance was such that a determination of responsibility must necessarily have been made in bad faith. In denying the protest, the GAO emphasized that performance history is only one factor to consider in making a responsibility determination. No *per se* finding of bad faith will result from an affirmative responsibility determination granted to a contractor with prior performance deficiencies.[229] Here, Racal's deficiencies had been discovered in 1992. The Army subsequently learned through first article testing of a subsequent contract that the problems remained. Finally, after receiving a cure notice, Racal produced a conforming canister and passed its first article test. A subsequent Inspector General's report revealed additional problems with Racal's products.[230] The most recent test results available to the contracting officer, however,

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[218] *See id.* at 4.

[219] *Id.* at 6, *citing* Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

[220] B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134.

[221] *Id.* at 1.

[222] *Id.* at 2.

[223] This case involved the same contract as that discussed in Bluestar Battery Systems Corp., B-270111.3, Feb. 12, 1996, 96-1 CPD ¶ 67. *See supra* note 115 and accompanying text.

[224] B-270111, Feb. 7, 1996, 96-1 CPD ¶ 134 at 4.

[225] *Id.*

[226] *Id.* at 5-6.

[227] B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86.

[228] One of the two corporations had been awarded every contract for approximately seven years. *Id.* at 1.

[229] *Id.* at 2, *citing* Gayston Corp.—Recon., B-223090.2, July 25, 1986, 86-2 CPD ¶ 8.

[230] It is interesting to note that the same investigation found problems with canisters produced by MSA. *Id.* at 3.

showed no failures of Racal's canister. MSA also complained, to no avail, that an informal responsibility determination was insufficient; a formal pre-award survey should have been required. The GAO granted the contracting officer "broad discretion"[231] in determining the method of examining contractor responsibility.

4. Late Bids.

a. FAR Council Proposes Amendment to Late Bid Rules. The FAR Council has finalized a rule[232] which allows agency consideration of a late handcarried bid in the event of government mishandling. The rule also expands the type of permissible evidence of receipt by the agency to include testimony or statements of government personnel. This proposed amendment to the FAR formally incorporates GAO case-made exceptions to the late bid rules.[233]

b. Mishandling of Hand Carried Bids. In *Kelton Contracting, Inc.*,[234] the low bidder, INCA Contracting Company (INCA), sent its bid by Federal Express. Although the bid was not addressed precisely as provided in the IFB, it arrived at the agency hours before bid opening and was placed on the desk of the employee whose duties included receipt of Federal Express packages. She was away from her desk, however, when the parcel was delivered. Without her knowledge, the bid was misdirected to another office's mail slot, where it was located after bid opening.[235] The GAO refused to penalize INCA for misaddressing the envelope, noting that, had normal procedures been followed, the bid would have arrived at the appropriate room on time. As the bid was out of the bidder's control at the time of bid opening, it was properly considered by the agency.

The GAO reached the same result in *Ed Kocharian & Company, Inc.*[236] where delivery was attempted several hours prior to bid opening. The contractor's representative went to the office where hand carried bids were to be delivered, but found it locked without explanation. He then proceeded to the contracting office and gave the bid to the contract specialist in charge of bid opening. The contract specialist forgot to take the bid to bid opening; she left it in her office. The GAO rejected the protester's contention that the contractor's representative should have waited until he could gain access to the locked office. The GAO found the contractor's reliance on the promises of the contract specialist to be reasonable under the circumstances.

Although the GAO has shown little reluctance to require consideration of mishandled hand carried bids, the bidder still bears the burden of proving that its bid was received by the agency prior to bid opening.[237] Inadequate proof of the agency's receipt of the bid was the downfall of D.L. Poulin Inc. (Poulin), a bidder on a Navy contract for construction of an aircraft hanger. Poulin's bid was sent by commercial carrier to the agency mailroom. After bid opening, Poulin's bid was mysteriously found under a yellow sheet of paper in the bottom of the agency's bid box. Although it was clear that the bid box was kept locked and that access thereto was limited, there was no evidence to explain how or *when*[238] the bid was placed therein. The agency determined that the bid could be considered. Key to the protester's successful challenge was the absence of evidence coming from government sources to establish the date of receipt by the agency. The GAO, while acknowledging that the evidentiary rules of the FAR[239] are technically inapplicable to late hand carried bids,[240] still declined to accept uncorroborated commercial carrier records as proof of receipt by the agency. In sustaining the protest, the GAO emphasized that accepting the bidder's proof of the time of receipt without corroboration from a government source would harm the integrity of the process.

5. Cancellation of the IFB.

a. Cancellation Proper When Contract would not Meet Government's Minimum Needs. An Army contract for painting

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[231] *Id.* at 5.

[232] 61 Fed. Reg. 69,292 (1996).

[233] *See infra* note 234-40 and accompanying text.

[234] B-262255, Dec. 12, 1995, 95-2 CPD ¶ 254.

[235] Delivery of the package was observed by an agency employee. Evidence concerning the subsequent whereabouts of the bid was supplied by the agency.

[236] B-271186, April 1, 1996, 96-1 CPD ¶ 170.

[237] J.C.N. Construction Co., Inc., B-270068, Feb. 6, 1996, 96-1 CPD ¶ 42.

[238] The bid had no time or date stamp or other indication of its receipt by the agency.

[239] FAR, *supra* note 131, at 14.304-1(c) establishes the agency's time/date stamp or other government maintained documentary evidence as the only permissible evidence to prove receipt by the agency.

[240] 96-1 CPD ¶ 42 at 3, *citing* Kelton Contracting, Inc. B-262255, Dec. 12, 1995, 95-2 CPD ¶ 254.

and minor repairs at Red River Army Depot was cancelled following a "complaint" from a bidder that its competitors should be found nonresponsive for failure to meet licensing requirements for lead and asbestos abatement.[241] Although the contracting officer believed that the complaint was without merit, he cancelled the IFB to clarify the issue and to correct other problems. The re-issued IFB included a clause allowing the Army to reject lead or asbestos abatement subcontractors and increasing tenfold the maximum dollar amount for delivery orders.[242] The GAO upheld the cancellation, citing the original contract's inablilty to fulfill the agency's minimum needs as the compelling reason for cancellation.

b. Government May Cancel to Take Advantage of Economic Purchase Quantities. HLC Industries[243] involved an IFB for the purchase of camouflage fabric. The original IFB included FAR 52.207-4[244] and was for a base year and four options. The IFB set a minimum quantity for total fabric but included no minimum for any of four particular types of fabric included in the IFB. The contracting officer examined the bids, including an alternate bid submitted IAW the Economic Purchase Quantity clause. The alternate bid "offer[ed] the agency a lower price if the contemplated contract were changed from a 5-year contract to a 2-year contract with a minimum order for each of the fabrics."[245] The contracting officer cancelled the IFB and resolicited, hoping to reduce its costs by following the scheme suggested in the alternate bid. The GAO upheld this determination, notwithstanding the fact that the agency could have satisfied its needs by awarding a contract in accordance with the original IFB.

c. Cancellation Proper to Correct Erroneous Government Estimate of Additional Services. In *Site Support Services, Inc.*[246] the DOD sought maintenance and repair services for the heating and air conditioning system for the Hoffman I building.[247] Site Support's low bid was rejected as materially unbalanced. Whether the government would achieve the lowest price was dependent on its requirement for certain "additional services," which Site Support offered at no cost. In examining the solicitation in light of Site Support's pricing scheme, the agency noted that it had mistakenly overestimated its need for additional services. It also became apparent that the solicitation allowed each bidder to determine its own cost for certain liquidated damages, because the liquidated damages were to equal the bidder's hourly rate for additional work.[248] The GAO upheld the cancellation, because the IFB contained incorrect estimated quantities, and because the "evaluation scheme [did] not ensure that award [would] in fact be based on the lowest cost to the government."[249]

E. Negotiated Acquisitions. FASA and FARA promised some major changes in the way the government does business. Significant changes in the areas of simplified acquisitions, information technology, and commercial items are already in place. This year, the first major effects of acquisition reform were felt in the area of negotiated acquisitions. In addition, the courts and the GAO were as busy as ever resolving disputes involving negotiated procurement.

1. FAR Part 15—Sea Change or Tinkering Around the Edges? Perhaps the biggest news in this area over the past year is the proposed rewrite of FAR Part 15.[250] On 12 September

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[241] Berendse & Sons Paint Co., Inc., B-262244, Nov. 21, 1995, 95-2 CPD ¶ 235.

[242] This was due to the agency's discovery of erroneous estimates for nine separate line items. The original IFB required the contractor to accept delivery orders until the total amount of work reached a price of $100,000 in any year. The corrected IFB capped the agency's orders at $1,000,000 per year. *Id.* at 2-3.

[243] B-265700, Nov. 17, 1995, 95-2 CPD ¶ 227.

[244] This clause, entitled "Economic Purchase Quantity—Supplies," states, in part, "The information requested in this provision is being solicited to avoid acquisition in disadvantageous quantities and to assist the Government in developing a data base for future acquisition of these items. However, the Government reserves the right to amend or cancel the solicitation with respect to any individual item in the event quotations received and the Government's requirements indicate that different quantities should be acquired."

[245] B-265700, Nov. 17, 1995, CPD ¶ 227 at 2.

[246] B-270229, Feb. 13, 1996, 96-1 CPD ¶ 74.

[247] The Hoffman I building is located in Alexandria, Virginia, and is the home of the Communications and Electronics Command Acquisition Center, Washington Operations Office (CACWOO), the agency formerly known as the Information Systems Selection and Acquisition Agency (ISSAA).

[248] Note that this would mean that Site Services would pay no liquidated damages. *Site Support*, 96-1 CPD ¶ 74 at 2.

[249] *Id.* at 3, *citing* S.W. Monroe Constr. Co., B-256382, June, 10, 1994, 94-1 CPD ¶ 362.

[250] FAR Part 15, Contracting by Negotiation.

1996, the FAR Council issued a proposed rule containing the first phase of the rewrite.[251] If the final rule resembles the proposed rule, those who deal with negotiated procurement will have to re-learn the rules of the game. Some of the key changes in the proposed rule are as follows:

a. FAR 2.101 would define "best value" as "an offer or quote which is most advantageous to the Government, cost or price and other factors considered."[252]

b. FAR Subpart 15.1 would describe four "acquisition processes and techniques" which the rule states could be used alone or together with other processes and techniques for source selections:

(1) Lowest price technically acceptable process;

(2) Tradeoff process;

(3) Multiphase acquisition technique; and

(4) Oral presentations.[253]

c. Requests for Proposals (RFP) would be prepared using a new, six-section, "model contract format (MCF) to the maximum extent practicable."[254]

d. One of the current issues in the use of past performance as an evaluation criterion is how to treat firms with no relevant performance history. Repeating the current FAR guidance that such firms should receive a "neutral evaluation,"[255] the proposed rule states "[a] neutral evaluation means any assessment that neither rewards nor penalizes firms without relevant performance history."[256]

e. Technical evaluators could compare offerors to each other as opposed to only the stated evaluation criteria.[257]

f. The FAR would implement FARA's authorization[258] to make "efficient" competitive range determinations. The contracting officer may determine, prior to issuing the solicitation, that the number of offerors who might otherwise make the competitive range would exceed the number which would allow for an efficient competition. In this case, the contracting officer must notify prospective offerors, via the solicitation, of the largest number of offerors that will be included in the competitive range.[259] If this procedure is followed, the contracting officer may, after evaluation of proposals, limit the competitive range to the specified number.[260] The proposed rule also would allow contracting officers to eliminate a proposal from consideration anytime the contracting officer determines that the proposal is no longer in the competitive range.

g. The encouragement of "communication" with offerors after receipt of proposals but prior to establishment of the competitive range "to obtain information to facilitate the Government's decision either to award without discussions or determine the competitive range."[261] The rule specifically states that such communications are not to be considered discussions.

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[251] 61 Fed. Reg. 48,380 (1996). Phase I of the rewrite addressed FAR Subparts 15.0, 15.1, 15.2, 15.3, 15.4, 15.6, and 15.10. Phase II will address the remaining Subparts.

[252] *Id.*

[253] This change would add a specific authorization for the use of oral presentations to the FAR for the first time. The proposed rule includes guidance on the use of oral presentations. *See* 61 Fed. Reg. 48,384 (1996).

[254] 61 Fed. Reg. 48,385 (1996). The MCF would replace the current uniform contract format.

[255] *See* FAR 15.608(a)(2)(iii).

[256] 61 Fed. Reg. 48,388 (1996).

[257] *Id.*

[258] Pub. L. No. 104-106, § 4103, 110 Stat. 186, 643 (1996) (amending 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b(d)) [hereinafter FARA].

[259] Alternate II to FAR Clause 52.215-1, Information to Offerors'--Competitive Acquisition, is to be used for this purpose.

[260] The FAR Council issued a separate proposed rule implementing this authority on 31 July 1996. 61 Fed. Reg. 40,116 (1996). According to one source, this rule was published "to ensure compliance with FARA's [September 8, 1996] deadline for issuance of proposed rules." *Proposed FAR Rule Would Allow Contracting Officers to Limit Size of Competitive Range*, 66 Fed. Cont. Rep. (BNA) 115, 116 (Aug. 5, 1996).

[261] 61 Fed. Reg. 48,389 (1996).

Contracting officers are not to permit changes in an offeror's proposal during these communications, other than to correct mistakes. However, communications are to be "conducted to obtain information that explains or resolves ambiguities or other concerns (e.g., perceived errors, perceived omissions, or perceived deficiencies) in the offeror's proposal."[262] In addition, communications need not be conducted with all offerors.

h. Elimination of the requirement for a common cutoff date for the end of discussions and the receipt of best and final offers. The proposed rule provides that a "contracting officer may request proposal revisions as often as needed during discussions."[263]

i. Implementation of the FARA requirement for pre-award debriefings.[264]

j. Relaxation (elimination?) of the prohibition on accepting late proposals. A proposal received after the stated closing time is late but could be considered if in the best interests of the government. There need be no showing of government fault or mishandling before a late proposal is considered.[265]

2. *Source Selection Decisions—Who Decides What Constitutes "Best Value"?—Part III.* For the past two years, we have discussed the issue of how much deference the General Services Board of Contract Appeals (GSBCA) gives, or should give, to an agency's source selection decision.[266] This year, the issue was finally settled in more ways than one.[267] In two decisions issued this year, the Court of Appeals for the Federal Circuit (CAFC) clearly stated the applicable standard of review. In *Widnall v. B3H Corp.*,[268] the court overturned a GSBCA decision finding that the Air Force had insufficient justification for award of a contract to a higher-priced offeror in a best value procurement.[269] The court stated, "the Board's task upon review of a best value agency procurement is limited to independently determining if the agency's decision is grounded in reason."[270] In a subsequent decision,[271] the court reiterated the "grounded in reason" standard in affirming a GSBCA decision[272] upholding award to a lower-priced, lower-technically-rated offeror.[273] What is the impact of these decisions now that the GSBCA is no longer a protest forum? First, these decisions should be considered persuasive authority by those district courts hearing protests under *Scanwell* jurisdiction.[274] More importantly, the CAFC's "grounded in reason" standard seems to mirror the standard applied by the GAO since its inception. This means the

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[262] *Id.*

[263] 61 Fed. Reg. 48,390 (1996).

[264] FARA § 4104, *supra* note 258 (amending 10 U.S.C. § 2305(b) and 41 U.S.C. § 253b). This is another instance where the FAR Council published a separate proposed rule in order to meet the FARA deadline. *See* 61 Fed. Reg. 32,580 (1996) and *supra* note 260.

[265] 61 Fed. Reg. 48,386-87 (1996).

[266] *See 1994 Contract Law Developments—The Year in Review*, ARMY LAW., Feb. 1995, at 32 *and 1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 26.

[267] As readers no doubt know, the Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, §§ 5001-5703, 110 Stat. 186, 679-703, eliminated the GSBCA's bid protest authority. The astute reader might think that this would make the question of the board's standard of review moot. Read on for an explanation of the reason for including this discussion.

[268] 75 F.3d 1577 (Fed. Cir. 1996).

[269] B3H Corp. v. Dep't of the Air Force, GSBCA No. 12813-P, 94-3 BCA ¶ 27,068.

[270] 75 F.3d at 1584.

[271] Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990 (Fed. Cir. 1996). *See infra* section IV, A, 2, b, at p. 63 for a discussion of the court's treatment of Grumman's claim that the solicitation was ambiguous.

[272] Grumman Data Sys. Corp. v. Dep't. of the Navy, GSBCA No. 12912-P, 95-1 BCA ¶ 27,314.

[273] Both the board and the court affirmed the decision even though the source selection authority had rejected a working group's finding that award to Grumman would have saved the agency between $98 and $242 million over the life of the contract. The board found, and the court agreed, that the working group's methodology was not sufficiently comprehensive to support such a finding. *See* 88 F.3d at 996.

[274] *See* Scanwell Labs, Inc. v. Shaffer, 424 F.2d 850 (D.C. Cir. 1970). This becomes more important with the passage of the Administrative Dispute Resolution (ADR) Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996), giving district courts pre-award and post-award bid protest jurisdiction for a four-year period. *See infra* section III, G, 1, at p. 46 for further discussion of the impact of this statute on the protest process.

government now enjoys one deferential standard of review for agency best value decisions. This should also mean that we should win most protests challenging our best value decisions, right?

Not so fast! Three GAO decisions illustrate the importance of documenting that our decision was grounded in reason. In *Morrison Knudsen Corp.*,[275] the GAO sustained a protest by a higher technically-rated contractor which had offered a slightly higher evaluated cost. According to GAO, the source selection authority (SSA) based his award decision on a perceived difference in subcontracting approach between the two offerors. In sustaining the protest, GAO found that the record failed to support this decision. In fact, the proposed subcontracting approach of the two vendors was substantially similar. GAO found that the SSA's source selection decision had relied on the difference in subcontracting approaches as the crucial difference in making his award decision. Although the evaluation record showed that there were other differences between the proposals which caused the agency concern, the SSA did not specifically refer to these differences as a significant concern in his source selection decision.

Likewise, in *Main Building Maintenance, Inc.*,[276] the SSA based his award decision on six value-added strengths he believed were present in the awardee's offer but absent from the protester's offer. GAO determined that the SSA was mistaken concerning four of the six value-added strengths (i.e., these strengths also were present to some degree in the protester's proposal) and sustained the protest.

Finally, in *TRW, Inc.*,[277] GAO found that the agency had failed to show why award to two higher-technically rated offerors was worth the extra cost associated with those offers. In sustaining the protest, GAO stated:

> Nothing in the record explains why the perceived technical advantages in SAIC's and BDM's proposals were deemed superior to the technical advantages in TRW's proposal. Absent such an explanation, it simply is not possible to conclude that the SSA reasonably decided that SAIC's and BDM's proposals were worth a cost premium of $4 million. We sustain the protest on this basis.[278]

The lesson from this year's cases is clear. While "grounded in reason" is a very deferential standard, we may still lose protests if we do not ensure that the "reason" is clear from the source selection decision.

3. Past Performance Evaluations. The FAR now requires the use of past performance as an evaluation factor in negotiated procurement exceeding $1,000,000.[279] The proper use of past performance has been an issue in numerous protests this year. The following discussion looks at three cases which provide an overview of the kinds of issues involved.

In *Excalibur Systems, Inc.*,[280] the GAO upheld an evaluation scheme which provided that offerors with no past performance history would be evaluated solely on price although, overall, the solicitation treated past performance as "essentially more important" than cost.[281] Perhaps more importantly, GAO used this case as an opportunity to express its views on the treatment of offerors with no past performance history.[282] GAO stated:

> In general, we do not view RFP evaluation schemes that specify a "neutral" rating for vendors with no past performance record . . . as precluding this same type of source selection decision-making. That is, we think that the use of a neutral rating approach, to avoid penalizing a vendor without prior experience and thereby enhance competition, does not preclude, in a best value procurement, a determination to award to a higher-priced offeror with a good past performance record over a lower-cost vendor with a neutral past performance rating. Indeed such a determination is inherent in the concept of best value.[283]

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[275] B-270703, Apr. 11, 1996, 96-2 CPD ¶ 86.

[276] B-260945.4, Sept. 29, 1995, 95-2 CPD ¶ 214.

[277] B-260788.2, Aug. 2, 1995, 96-1 CPD ¶ 11.

[278] *Id.* at 7.

[279] *See* FAR 15.605(b)(1)(ii). The threshold for requiring use of past performance as an evaluation factor will decrease to $500,000 on 1 July 1997 and to $100,000 on 1 January 1999. *Id.*

[280] B-272017, July 12, 1996, 96-2 CPD ¶ 13.

[281] Under this system, offerors with the highest past performance ratings would compete against those with no past performance rating on the basis of price alone.

[282] The FAR provides that agencies should give a "neutral" rating for past performance to offerors with no relevant past performance history. *See* FAR 15.608(a)(2)(iii).

[283] 96-2 CPD ¶ 13 at 3 (citations and footnote omitted).

In a footnote, GAO added: "It does, however, preclude *evaluation scoring* that penalizes an offeror for receiving neutral ratings."[284]

Cessna Aircraft Co.,[285] involved an allegation that agency evaluators had ignored ASBCA decisions which placed the blame on the government for some performance problems on a prior contract. According to the protester, the evaluators had a duty to use the most current information available and, therefore, should have taken these decisions into account before downgrading the protester's past performance score. GAO disagreed, stating that "[w]e are aware of no requirement, however (and the protester does not cite to any), that a contracting agency search for information that contradicts or mitigates accurate, but unfavorable, past performance information."[286] The decision also notes that the protester missed several opportunities during discussions to inform the agency of the ASBCA decisions.

GAO addressed the use of an evaluator's personal knowledge of an offeror's past performance when evaluating a proposal in *Omega World Travel, Inc.* (Omega).[287] The Patent and Trademark Office (PTO) issued a solicitation for travel services with customer satisfaction and past performance as primary evaluation factors. When Omega learned that the evaluators had downgraded its past performance score using their personal knowledge of both documented and undocumented complaints concerning Omega's performance, it filed a protest. GAO denied the protest stating that "[a]n evaluator's personal knowledge of an offeror may be properly considered in a past performance evaluation."[288] The decision further states; "More specifically, where the solicitation provides for references to be used in the evaluation, as here, the agency may consider the unsatisfactory past performance of an offeror under a recent contract with the agency, thus, in effect, furnishing its own reference."[289] However, GAO cautioned that, even though the agency is relying on its own knowledge of the offeror's performance, "the fundamental requirement that evaluation judgments be documented in sufficient detail to show that they are reasonable and not arbitrary still must be met."[290] GAO found that the evaluator's notes plus their affidavits, prepared in response to the protest, supported the reasonableness of the evaluation.

Ogden Support Services, Inc.[291] involved a solicitation for mail and courier services in which past performance was a stated evaluation criteria. In relation to the past performance factor, the solicitation advised offerors that they were required to identify at least three contracts for the same or similar services that they had received in the past three years. Although the awardee's proposal identified only two such contracts, it received a nearly identical rating to Ogden's perfect score for past performance. In sustaining Ogden's protest, GAO noted that there was "insufficient information and analysis in the record to establish"[292] whether the agency's scoring of the awardee's proposal was reasonable. Therefore, it was impossible for GAO to determine whether the agency's best value determination was reasonable. GAO recommended that the agency reevaluate the proposals to determine whether they were, in fact, technically equal.

4. Evaluating Proposals.

a. Can You Really Get an Excellent Past Performance Rating and a Poor Proposal Risk Rating? Madison Services, Inc.,[293] (Madison) involved a solicitation for housing maintenance services on an Air Force base. The solicitation's evaluation scheme included separate factors for past performance and for proposal risk.[294] Madison, which submitted the lowest-cost proposal, received a low performance risk rating based on its suc-

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[284] *Id.* n.3 (emphasis in original) (citations omitted).

[285] B-261953.5, Feb. 5, 1996, 96-1 CPD ¶ 132.

[286] *Id.* at 20.

[287] B-271262.2, July 25, 1996, 96-2 CPD ¶ 44.

[288] *Id.* at 4.

[289] *Id.*

[290] *Id.*

[291] B-270012.2, Mar. 19, 1996, 96-1 CPD ¶ 177.

[292] *Id.* at 5.

[293] B-271306, June 13, 1996, 96-2 CPD ¶ 11.

[294] Past performance was included as part of a performance risk factor. The proposal risk factor evaluated the likelihood of the offeror performing as stated in its proposal.

cessful performance of several similar contracts. However, it received a moderate proposal risk rating based on the evaluator's concerns that the proposed manning level was too low. Madison protested that this determination was unreasonable. GAO denied the protest, finding that the solicitation identified "proposal risk" as an independent factor under which past performance carried little weight. Accordingly, the agency was not unreasonable in assigning some risk to Madison's proposal even though Madison successfully had performed similar contracts in the past.[295]

b. Evaluation Records—Sometimes They Matter, Sometimes They Don't? The FAR requires agencies to keep records documenting their evaluations of contractors' proposals.[296] Two recent cases show that failure to comply with this requirement can be overcome.

The first case involved a contract for maintenance and other tasks associated with the sale of decommissioned ships.[297] Navy technical evaluators spent several months evaluating proposals and preparing several draft evaluation reports before forwarding a final technical evaluation report to the source selection advisory council (SSAC). For some reason, someone in the agency destroyed the evaluator's notes and the draft reports. Following award of the contract, two disappointed offerors protested. Both protesters argued that the absence of the evaluator's notes and the draft reports made it impossible for GAO to judge the "rationality" of the source selection decision. GAO explained the requirement for retention of evaluation records and noted that "[w]here an agency fails to document or retain evaluation materials, it bears the risk that there is inadequate supporting rationale in the record for the source selection decision and that we will not conclude that the agency had a reasonable basis for the decision."[298] After noting that it gave greater weight to contemporaneous records than to testimony and documents prepared to defend a protest, GAO nevertheless found that the testimony at hearing established the reasonableness of the source selection decision.

A district court had the opportunity to consider a similar argument by a protester.[299] Under the solicitation's evaluation scheme, evaluators were required to write narratives in support of all scores for factors or subfactors except for those rated "satisfactory." The protester argued that the lack of documentation supporting the satisfactory ratings precluded a determination that the evaluations were reasonable. The court disagreed, stating that "[t]he regulations do not require the evaluators to write narrative descriptions for satisfactory scores."[300]

5. Cost Realism. A unique, and oftentimes difficult, aspect of proposal evaluation is the evaluation of offerors' cost proposals. Judging by the number of recent protest decisions attacking cost evaluations, this is a contentious topic.

a. No Profit? No Problem! In *Akal Security, Inc.*,[301] GAO considered a protest involving several aspects of the agency's cost evaluation. Under a solicitation for security guard services, the agency awarded a contract to an offeror whose proposed price was significantly below the government estimate and that of the other offerors. The protester first alleged that the offered price did not provide for payments at Service Contract Act (SCA) wage rates. Denying this ground of the protest, GAO reiterated the rule that an offer for a fixed-price contract which is below SCA wage rates is acceptable unless the offeror takes exception to, or evidences an intent not to comply with, the SCA. The protester also argued that the technical evaluation was unreasonable, because it did not consider the effect of the awardee's low price on its technical capability. GAO denied this ground of the protest as well. Since the solicitation did not provide for the consideration of price in the technical evaluation, GAO held that the protester had not raised a valid basis for protest.

b. Fixed-Price Contracts—Cost Realism or Responsibility? Triple P Services, Inc.[302] concerned the terms of a solicitation for dining facility services. The RFP provided that cost realism would be used to evaluate the offerors' comprehension of the requirements and the validity of the offerors' approaches.

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[295] It appears, although not clear from the decision, that Madison performed these contracts, which were similar in scope to the contract at issue, with manning levels similar to those in its proposal. Apparently, GAO did not consider this an important factor in reaching its decision.

[296] *See* FAR 15.608(a)(3).

[297] Southwest Marine, Inc., B-265865.3, Jan. 23, 1996, 96-1 CPD ¶ 56.

[298] *Id.* at 10 (citations omitted).

[299] Delta Dental Plan of California v. Perry, No. C95-2462, 1996 U.S. Dist. LEXIS 2086 (N.D. Cal. Feb. 20, 1996).

[300] *Id.* at *42 (citations omitted).

[301] B-261996, Nov. 16, 1995, 95-2 CPD ¶ 216.

[302] B-271629.3, July 22, 1996, 96-2 CPD ¶ 30.

The protester argued that this provision improperly allowed the agency to reject a technically acceptable proposal solely because its price was too low. GAO first stated the general rule in this area as follows:

> As the protester correctly points out, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, . . . not technical acceptability. In other words, the fact that a firm's offer may be an attempted buy-in does not render the firm ineligible for award. This is so because below-cost pricing is not prohibited and the government cannot withhold an award from a responsible offeror merely because its low offer is below cost.[303]

Notwithstanding this general rule, GAO denied the protest, holding that:

> This does not mean, however, that an agency may never assess price reasonableness within the context of evaluating technical proposals under a solicitation that contemplates awarding a fixed-price contract. In this regard, as part of the technical evaluation, an agency may properly assess the reasonableness of a low price to evaluate the offeror's understanding of the solicitation requirements, *so long as the RFP provides for evaluation of the offeror's understanding of the requirements as part of the technical evaluation.*[304]

In *Valentec Systems, Inc.*,[305] the GAO demonstrated the amount of discretion a contracting officer has in deciding whether to evaluate cost on a fixed-price contract. The protester argued that, in a restricted competition to provide 120mm mortar rounds, the agency was required to conduct a cost analysis because the solicitation required the submission of cost and pricing data. GAO disagreed, stating, "Where, as here, a fixed-price contract is to be awarded and the agency concludes that adequate price competition has been obtained, the agency generally is not obliged to perform a cost analysis of the proposals even if offerors submit cost and pricing data."[306]

c. Moderate Proposal Risk—No Cost Adjustment?

In *Vinell Corp.*,[307] the protester argued that, because the agency had assigned a moderate proposal risk rating to the awardee's proposal, the agency also should have made an upward adjustment to the awardee's proposed costs during its cost realism analysis. The protester contended that, because the agency was concerned that the awardee's proposed computer management system might not work as advertised, the awardee might be forced to use additional labor to compensate, increasing its costs on the cost-plus-award-fee contract. The protester argued that the agency should have increased the awardee's proposed cost to take into account these potential additional costs. GAO disagreed and denied the protest. GAO stated that its review of an agency's cost realism determination "is limited to determining whether the agency's cost evaluation was reasonably based and not arbitrary."[308] Using this standard of review, GAO held that:

> The fact that there is some risk associated with an aspect of a proposal does not mean that an agency cannot regard the costs of performance, as proposed, as realistic, inasmuch as risk is simply a reflection of the degree to which what is proposed may or may not happen . . . . We see no reason why an agency should be required, in performing a cost realism analysis, to adjust costs to reflect what may not happen in circumstances where the agency believes that what is proposed is most likely to happen.[309]

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[303] *Id.* at 2 (citations omitted).

[304] *Id.* at 3 (emphasis added).

[305] B-270880, May 16, 1996, 96-1 CPD ¶ 231.

[306] *Id.* at *10.

[307] B-270793, Apr. 24, 1996, 96-1 CPD ¶ 271.

[308] *Id.* at 7.

[309] *Id.* at 12.

d. An Audit Alone May Not be Enough. ManTech Environmental Technology, Inc.[310] stands for the proposition that an agency cannot always simply rely on a Defense Contract Audit Agency (DCAA) audit in conducting a cost realism analysis. The case involved an Environmental Protection Agency (EPA) contract for scientific research services. The primary component of the agency's cost realism analysis was a review of the offerors' proposed direct labor rates. The protester argued that the EPA had failed to conduct an adequate cost realism analysis, alleging that the awardee's direct labor rates were unrealistically low. Noting that EPA had relied exclusively on a DCAA audit in this regard, GAO found that the DCAA's analysis contained several errors. Additionally, DCAA had qualified the audit, noting that it could not determine whether the proposed personnel met the technical qualifications of the RFP. GAO held that a contracting officer's determination based on incorrect information is not rendered reasonable because the incorrect information was supplied by another organization such as the DCAA. Sustaining the protest, GAO noted that a proper cost realism analysis may have resulted in an upward adjustment in the awardee's proposed costs, thereby resulting in a finding that the awardee was not the best value to the government.

6. Miscellaneous Cases.

a. An Effective Oral Amendment? Family Stress Clinics of America[311] involved yet another effect of last year's government shutdown. The Department of Health and Human Services (HHS) issued an RFP with a closing date of 29 December 1995. Because of the government shutdown, the HHS had a technical support contractor call all 125 firms on the mailing list and inform them that the closing date would be extended indefinitely and that written confirmation, including a new closing date, would follow. For some reason, HHS never issued a written confirmation and, in fact, did not extend the closing date. Family Stress protested, arguing that the oral amendment was effective. HHS argued the oral amendment could not be effective because there was no written confirmation as required by FAR 15.410(b). GAO agreed with the protester, stating that in exigent circumstances, such as those present in this case, an oral amendment is effective without written confirmation.

b. Evaluating Options—A Trap for the Unwary. The standard "Evaluation of Options"[312] clause provides that the government will evaluate offers by considering the price of the base year and all option years unless the government determines that evaluation of the option quantities would not be in its best interest. A Defense Logistics Agency (DLA) solicitation for health care services included this clause. At the time DLA issued the solicitation, it intended to evaluate the options. However, because of Base Realignment and Closure (BRAC) actions, DLA decided, prior to receipt of best and final offers (BAFOs), that it would not evaluate the options. DLA did not disclose this fact to the offerors. Upon learning of DLA's actions, Occu-Health, Inc. protested,[313] alleging that it would have structured its base-year pricing differently had it known that DLA was not evaluating the options. GAO first noted that, because of the language of the clause, it had previously been interpreted as allowing the government to elect either evaluation method. GAO sustained the protest, however, stating that the FAR provides an agency should use the "Evaluation of Options" clause only when it has determined that there is a reasonable likelihood the options will be exercised.[314] This requirement, combined with the "fundamental requirement that the government apprise offerors of its actual needs in a manner designed to achieve full and open competition and so that offerors may fairly compete on an equal basis,"[315] led GAO to conclude that, notwithstanding the language of the option clause itself, an agency lacks "unfettered discretion to decide not to evaluate options without advising offerors of this change under circumstances when the agency could reasonably provide that advice."[316]

c. Read the BAFOs First! Intown Properties, Inc.,[317] involved a Department of Housing and Urban Development (HUD) acquisition of real estate management services. During its initial evaluation of proposals, HUD found Intown's proposal technically unacceptable, primarily due to a lack of qualifications of two proposed key personnel. Although Intown submitted a best and final offer (BAFO) which included the name and qualifications of an individual who would replace the two unqualified individuals, HUD did not change its evaluation. GAO sustained Intown's protest, finding that there was no indication in the record that HUD had considered the qualifications of the individual pro-

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[310] B-271002, June 3, 1996, 96-1 CPD ¶ 272.

[311] B-270993, May 10, 1996, 96-1 CPD ¶ 223.

[312] FAR 52.217-6.

[313] Occu-Health, Inc., B-270228.3, Apr. 3, 1996, 96-1 CPD ¶ 196.

[314] *See* FAR 17.208(c)(4).

[315] 96-1 CPD ¶ 196 at 4.

[316] *Id.*

[317] B-262362.2, Jan. 18, 1996, 96-1 CPD ¶ 89.

posed in Intown's BAFO. Therefore, there was no way for GAO to assess the reasonableness of HUD's determination that Intown's proposal was technically unacceptable.

d Just Ignore My BAFO! The protester in *Touchstone Textiles, Inc.*,[318] (Touchstone) made the novel argument that the untimeliness of its BAFO submission required the agency to make contract award to the protester based on its initial proposal. The agency eliminated Touchstone from further consideration because its BAFO was late. Touchstone argued that the untimeliness of the BAFO made it invalid for all purposes; therefore, the agency should have proceeded as if it had received no submission and made award based on Touchstone's low-priced (at the time), technically-acceptable, offer.[319] GAO denied the protest, stating:

> Touchstone's BAFO set forth substantially different - and higher - pricing terms from its initial offer; although this submission was untimely and could not be considered a viable offer, it nonetheless demonstrated an intent by the protester to modify and replace its initial offer terms . . . . In our view, the changed terms in Touchstone's BAFO clearly operated as a revocation of its initial offer.[320]

Based on this analysis, GAO found that the agency had properly concluded that it could not consider Touchstone's initial offer.

F. Simplified Acquisitions.

1. FAR Implements FARA's Simplified Acquisition Rules. On 26 August 1996, Federal Acquisition Circular (FAC) 90-40 amended FAR Part 13 to implement the FARA provisions relating to simplified acquisitions. FAR Part 13 now allows agencies to use simplified acquisition procedures for procurement up to $100,000. The new rules removed the requirement that contracting offices be "interim" Federal Acquisition Computer Network (FACNET) certified before using simplified procedures for actions between $50,000 and $100,000.[321] However, the rule requires that contracting offices be "fully" FACNET certified by 31 December 1999 or face having the threshold reduced to $50,000.[322]

The Government-wide commercial purchase card, also referred to as the International Merchant Purchase Authorization Card (I.M.P.A.C. card), is now the preferred means to purchase and pay for micro-purchases.[323]

FACNET is no longer merely the "preferred" method for making simplified acquisitions. It is now the required method as long as it is "practical and cost effective."[324] If FACNET is not available, or an exemption applies[325] quotations may still be solicited through other appropriate means.[326]

Under Secretary of Defense Comptroller John Hamre has ordered the phased elimination of imprest funds for unclassified programs within the DOD. Effective 1 October 1996, the use of imprest funds will be prohibited at DOD activities within the Continental United States (CONUS) and, effective 1 October 1997, imprest funds will be prohibited outside the CONUS as well. Exceptions will be authorized for contingency operations and exceptional circumstances. In lieu of imprest funds, maximum use shall be made of the I.M.P.A.C. card for micro-purchases[327] of supplies and services; and the government-wide travel card (i.e., an agency central billed account) should be used to facilitate travel payments formerly made from the imprest funds. The DOD is currently investigating, with the GSA, the feasibility of making available VISA checks that would be charged to a cardholder's I.M.P.A.C. account.[328]

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[318] B-272230.4, Sept. 5, 1996, 96-2 CPD ¶ 107.

[319] The solicitation included a low-cost technically-acceptable basis for award.

[320] 96-2 CPD ¶ 107 at 2.

[321] Pub. L. No. 103-355, § 4201(a), 108 Stat. 3243, 3289 (1994) [hereinafter FASA] increased the simplified acquisition threshold from $25,000 to $100,000, but prohibited agencies from using simplified acquisition procedures for purchases between $50,000 and $100,000 until the contracting agency achieved "interim" certification to use the Federal Acquisition Computer Network (FACNET).

[322] For a description of what constitutes "full" FACNET capability, *see id.* § 9001 and FAR 4.505-1.

[323] FAR 13.103(e).

[324] FAR 13.103(G).

[325] FAR 4.506.

[326] FAR 13.106-2(a)(2).

[327] Purchases of $2,500 or less.

[328] Memorandum, Under Secretary of Defense Comptroller John J. Hamre, subject: Elimination of Imprest Funds (28 Mar. 1996).

2. *"Special Simple" Commercial Item Test Program.* FARA required amendment of the FAR to allow for "special" simplified acquisition procedures to be used for the purchase of commercial items that exceed the simplified acquisition threshold but fall below $5,000,000.[329] The FAR Council has proposed such rules for use when the contracting officer expects that offers will include *only* commercial items.[330] The contracting officer makes this determination based on the nature of the commercial items sought and on market research.[331] The new rules are part of a commercial item "test program" which expires on 1 January 2000. Under the proposed rules the contracting officer would be authorized to,

> (1) forego formal evaluation plans, scoring of quotes or offers, or a competitive ranges determination; (2) negotiate with one or more offerors, as appropriate, but not necessarily all offerors; (3) conduct comparative evaluations of offers; and (4) evaluate past performance based on such information as the contracting officer's knowledge and previous experience with the item or service being purchased, customer surveys, or other reasonable basis, without the existence of a formal database.[332]

The new rules would permit a modified "auction" when award is to be based on price and price related factors.[333] The contracting officer would post the lowest bid price received during the specified submission period, without revealing the offeror's identity. During the specified period offers may be revised at any time. At the end of the specified period, the contracting officer awards the contract to the responsible offeror submitting the lowest priced acceptable offer.[334] The proposed rule would also allow the contracting officer to independently establish a price that offerors will have to meet or better to be considered further in the competition. When awards are to be based on price and factors other than price the proposed rule states:

> (a) When conducting negotiations, the contracting officer may indicate to all offerors a price, contract term or condition, commercially-available feature, and/or requirement (beyond any requirement or target specified in the solicitation) that an offeror will have to improve upon or meet, as appropriate, in order to remain competitive.[335]

The synopsis requirements of CICA remain in effect, but the new rules would allow the contracting officer to establish a period shorter than the standard fifteen days between publication of the notice and issuance of the solicitation when the acquisition is for commercial items.[336] This proposed change is in addition to the use of the combination CBD notice/solicitation.[337] When the combination notice/solicitation is used, it is not necessary to publish a separate CBD synopsis fifteen days prior. When using the combination notice/solicitation, the contracting officer shall establish a response time in accordance with FAR 5.203(b),[338] but shall allow at least fifteen days response time from the date the combination notice/solicitation is published in the CBD.[339]

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[329] FARA § 4202, *supra* note 258.

[330] 61 Fed. Reg. 47,383 (1996).

[331] *Id.* at 47,388.

[332] *Id.* at 47,384.

[333] *Id.* at 47,389. According to an 1 April 1996 legal memorandum by Mr. Mike Gerich of the Office of Procurement Policy, these auction techniques would not run afoul of the Procurement Integrity Act provisions which forbid disclosure of bid prices prior to bid opening. Mr. Gerich is quoted as saying, "[i]f there is clear advance notice to would-be participants in a procurement that their prices would be disclosed as part of the process, and the participants agree to such disclosure by their participation in the procurement, the government can disclose the participating offerors' prices." *See* 65 FEDERAL CONTRACTS REPORTER 20 (May 27, 1996).

[334] *Id.*

[335] *Id.* at 47,389.

[336] *Id.* at 47,385.

[337] FAR 12.603(a).

[338] FAR 5.203. *Publicizing and response time.* . . . (b) The contracting officer shall establish a solicitation response time which will afford potential offerors a reasonable opportunity to respond to (1) each contract action, including actions via FACNET, in an amount estimated to be greater than $25,000, but not greater than the simplified acquisition threshold; or (2) each contract action for the acquisition of commercial items in an amount estimated to be greater than $25,000 (see Part 12). The contracting officer should consider the circumstance of the individual acquisition, such as the complexity, commerciality, availability, and urgency, when establishing the solicitation response time.

[339] FAR 12.603(3).

When the final rule was published in the Federal Register on 2 January 1997[340] the proposed language at 13.604-2, Alternative negotiation techniques, which introduced into the FAR an auctioning-like concept, had been removed for further study and analysis under new FAR case 96-024.[341] That was the bad news. The good news is that the new rule eliminates the language in FAR 12.603(3) that required contracting officers to allow "at least" fifteen (15) days response time when using the combination notice/solicitation format for the acquisition of commercial items.[342] The final rule only requires that the contracting officer establish a response time "in accordance with 5.203(b).[343]

3. New Cases.

a. "The Computer Ate My Bid!" In *S.D.M. Supply Inc.*,[344] (SDM) the U.S. Army Aviation Center issued an RFQ through FACNET for seven aerosol can puncturing systems.[345] The RFQ was also mailed to New Pig Corporation (New Pig) and to one other vendor. When no quotations were received through FACNET by bid closing, the purchasing agent issued the purchase order to New Pig. SDM protested, arguing that its quote was lower, and provided proof showing its quote had been acknowledged by the Standard Army Automated Contracting System (SAACONS) at Fort Rucker. During the hearing the SAACONS software technician explained that SDM's quote was "lost"[346] because of a transmission "bottleneck" located at the Fort Rucker computer system. GAO held that the agency had failed to promote competition to the maximum extent practicable by failing to maintain adequate procedures for receiving quotes through FACNET. The fact that all the quotes submitted through FACNET for this RFQ were lost, and that the problem with the computer had previously been identified, led the GAO to state that this was not just the case of "an occasional negligent loss of a quotation,"[347] which would not entitle the submitter to relief. Rather, this was a systemic failure which prevented the majority of offerors from competing; and, therefore, violated the Competition in Contracting Act (CICA).[348]

b. The "Ignorant Contracting Officer" Defense. The Rock Island Defense Megacenter appeared to be trying to avoid full and open competition requirements by incrementalizing a computer buy into 4 separate $49,900 simplified acquisitions.[349] The purchase of two central processing units (CPUs) and two expanded memory units was conducted one item at a time. During the first three weeks of September 1995, the requiring activity sent four separate requests to the contracting officer. The requirements packages for both CPUs and for both expanded memory units were identical. All four purchases were awarded to Amdahl Corporation. The board held that the record failed to support a conclusion that the contracting officer deliberately divided the requirements to avoid surpassing the simplified acquisition threshold. The contracting officer processed and completed the procurement on an individual basis, because that is how she received them from the megacenter. However, the fact that the contracting officer had no advanced knowledge of the megacenter's total requirements was not dispositive of the issue. The director of the megacenter did have knowledge of the concurrent need for all four items. All of these circumstances demonstrate that the acquisition of the two CPUs and two expanded memory units were, in fact, components of one requirement. In fashioning a remedy the board decided as follows:

> It would be wasteful and inconvenient to have respondent revert to using the previously dismantled [CPUs] while a procurement is conducted. Accordingly, respondent should conduct a competitive procurement in accordance with law and regulation, and replace the upgraded CPUs and expanded memory if another offeror is successful in that procurement.[350]

While the re-procurement is still ongoing, L.A. Systems filed for payment of protest costs on 10 May 1996.[351] On 18 July 1996 the Government stipulated to L.A. Systems' modified cost

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[340] 62 Fed. Reg. 262 (1997).

[341] *Id.* at 263.

[342] *Id.* at 264.

[343] *Id.*

[344] B-271492, June 26, 1996, 96-1 CPD ¶ 288.

[345] These devices are used to render discarded aerosol cans safe for incineration.

[346] 96-1 CPD ¶ 288, at 2.

[347] *Id.* at 3, *citing* Interstate Diesel Serv., Inc. Mar. 9, 1988, 88-1 CPD ¶ 244.

[348] 10 U.S.C. §§ 2301-06.

[349] L.A. Systems v. Dep't of the Army and Defense Information Systems Agency, GSBCA No. 13472-P, 96-1 BCA ¶ 28,220.

[350] *Id.* at 140,917.

[351] *Id.* at 28,454

application; and the board granted, in part, the request for costs in the amount of $137,917.83.[352] If the board-ordered reprocurement results in award to a vendor other than Ahmdahl Corp.,[353] the government could ultimately be liable for the cost of the reprocurement, L.A. Systems' protest costs, and a termination for convenience settlement with Ahmdahl Corp.

c. Deliberate Exclusion of Incumbent Must be "Reasonably Justified." In *Bosco Contracting Inc.*,[354] the Defense Information Technology Contracting Office (DITCO) failed to solicit Bosco, the incumbent contractor, for a 2-month interim contract for janitorial, recycling, and snow removal services. Bosco had previously expressed an interest in competing for any follow-on procurement. DITCO decided not to solicit Bosco because it believed "there was doubt on its ability to perform considering its prior record."[355] The GAO held that where an agency has deliberately excluded an interested firm, the test is whether the agency acted reasonably such that it has satisfied the requirement to obtain competition to the maximum extent practicable. "While poor past performance may support a decision not to solicit the incumbent contractor, the record here contains insufficient evidence to reasonably establish that Bosco's past performance was anything but acceptable."[356] Because performance had been completed, the GAO recommended that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorney's fees.[357]

G. Bid Protests.

1. Forget Scanwell![358] Congress Gives Federal Courts Broad Bid Protest Jurisdiction. Capping off a rather tumultuous year for the procurement community, on 30 September 1996, Congress passed the Administrative Dispute Resolution Act of 1996 (ADR Act).[359] Perhaps one of the most significant aspects of this new law is the greatly expanded authority it provides the federal judiciary to hear bid protests. Effective 31 December 1996, the ADR Act provides jurisdiction to both the COFC and the federal district courts to hear pre-award and post-award bid protests. The federal courts will apply an Administrative Procedure Act standard of review when hearing such cases.[360] Additionally, under this new authority, the courts may award "any relief that the court considers proper," to include declaratory and injunctive relief. The courts' monetary relief authority is limited to bid preparation and proposal costs. Finally, the ADR Act admonishes the courts to "give due regard to the interests of national defense and national security and the need for expeditious resolution of the action."[361]

2. Downsizing Impacts Protest Activity. As agencies continue to downsize, the level of contract litigation follows suit. For FY 1995, protest activity at the GAO fell for the second consecutive year.[362] The number of protests filed with the GAO fell by 11% from the previous year. In FY 1994, the GAO re-

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[352] *Id.* at 142,122.

[353] Amdahl Corp. was the putative awardee in the originally protested procurement.

[354] B-270366, Mar. 4, 1996, 96-1 CPD ¶ 140.

[355] *Id.* at 2.

[356] *Id.* at 3.

[357] *Id.* at 4.

[358] Shorthand descriptive term previously used to identify the jurisdictional basis relied on by federal district courts to hear bid protests. *See* Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

[359] Pub. L. No. 104-320, § 12,110 Stat. 3874 (1996).

[360] *Id. See also* 5 U.S.C. § 706.

[361] *Id.* (amending 28 U.S.C. § 1491). The ADR Act amends the Tucker Act to provide, in part:

> Both the United States COFC 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. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.
>
> *Id.* (adding 28 U.S.C. § 1491(b)(1)).

[362] *GAO Protests Down 11% in FY 1995; Sustain Rate Holds at 11%*, 65 Fed. Cont. Rep. (BNA) 44 (Jan. 22, 1996).

ceived 2809 protest actions.[363] In FY 1995, the number of protests actions dropped to 2529. The number of CICA overrides,[364] however, dropped significantly. In FY 1994, agencies continued contract performance despite a pending protest on 88 occasions.[365] In FY 1995, the number of overrides fell by 61%, to 34 instances. The number of protests sustained each year was approximately 11%. Finally, according to the GAO, the average processing time for a protest decided on the merits in FY 1995 was 79 working days, as opposed to 82 working days for FY 1994.[366]

Perhaps the most notable event to occur in the protest community during FY 1996 was the elimination of the General Services Administration Board of Contract Appeals (GSBCA) as a protest forum.[367] On 8 August 1996, the GSBCA's bid protest jurisdiction over information technology procurements ended. The board's life as a protest forum concluded on the eve of its loss of authority with a final protest decision, which followed a 14-day hearing on the merits.[368] In its new procedural rules, the GSBCA offers the services and expertise of its judges as an alternative dispute resolution (ADR) option.[369]

3. New Agency Protest Rules Released. In recognition of the renewed emphasis on ADR procedures and the recent interest in streamlining the protest process, new interim agency protest rules were released in late July 1996.[370] One of the most significant aspects of the agency protest rules is the fact that the protest filing deadline, unlike that for the GAO,[371] did *not* change. As a result we were left with a protest process that allows the protester fourteen days to file a protest with the agency but allows only ten days for filings with the GAO.[372] This apparent disconnect was remedied so that agency and GAO filing time tables are the same—10 calendar days.[373] Another significant element of the new rules is the requirement that agencies suspend contract performance on timely post-award protests. Previously, the decision to suspend work was left to the discretion of the contracting officer.[374] Finally, the new agency rules, for the first time, established a target date of thirty-five days within the protest filing date for agencies to render "well reasoned" decisions.[375]

4. GAO Publishes New Protest Rules. On the same day the revised agency rules were published, the GAO announced its new rules for processing protests.[376] The new rules were generated as a result of the statutory revisions mandated by the Federal Acquisition Reform Act of 1996 (FARA).[377] Under the new rules, which took effect 8 August 1996, 10 calendar days now operates as the "default rule" (taking the place of fourteen days)

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[363] This includes protest filings as well as requests for reconsideration.

[364] *See* 31 U.S.C. § 3553(c), (d); FAR 33.104(b), (c).

[365] Note that in those instances where the agency elects to override the mandatory stay and the protest is subsequently sustained, the GAO will make its recommendations "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 48 C.F.R. § 21.8(C) (1996).

[366] *GAO Protests*, *supra* note 362.

[367] *See* Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, §§ 5001-5703, 5101, 110 Stat. 186, 679-703.

[368] Sun Microsystems Fed., Inc. v. Dep't of the Army, GSBCA No. 13615-P, 1996 WL 490212 (Aug. 7, 1996) (protest granted in part).

[369] 61 Fed. Reg. 52,347-69, 52,369 (1996) (amending 48 CFR Part 6101). *See Information Technology Protests: FAA Denies Wilcox's Protest of $50M Sole Source WAAS Award to Hughes Under New Acquisition Management System*, Fed. Cont. Daily (BNA) d3 (Oct. 25, 1996) (FAA adopts recommendation made by GSBCA Judge Martha DeGraff, acting as a "special master" in the protest).

[370] 61 Fed. Reg. 39,219 (1996) (revising FAR 33.103). These "interim" rules have an effective date of 26 July 1996. Comments on the rules were due in September 1996.

[371] See discussion of GAO rule change in following section.

[372] *See also* Eagle Vision, B-272222, Sept. 3, 1996, 96-2 CPD ¶ 94 at 2.

[373] 61 Fed. Reg. 270 (1997) (amending FAR 33.103(e). This revision is effective 3 Mar. 1997).

[374] *Id.*

[375] *Id.*

[376] 61 Fed. Reg. 39,039 (1996) (revising 4 C.F.R. Part 21).

[377] Pub. L. No. 104-106, §§ 5001-5703, 5501, 110 Stat. 186, 679-703 (1996) (amending 31 U.S.C. §§ 3353-3354).

when determining the timeliness of protest filings. With respect to negotiated procurements, the protester is prohibited from filing a protest prior to the offered date of a "required" debriefing.[378] Last, the new rules now require that the agency provide the protester and the GAO earlier notice of the contents of the administrative file. Specifically, the agency must submit its report to the GAO within thirty days, down from thirty-five days. Additionally, the agency must provide all parties to the protest and the GAO a list of the agency report contents at least five days prior to filing the report. Parties then have two days from receipt of the list to object to the contents, or lack thereof, of the agency report.[379]

5. The Federal Circuit Finds Prejudice if Protester had a "Reasonable Likelihood" of Success. It is well settled that, for a protester to prevail, it must not only demonstrate that the agency committed "significant error" in its conduct of the procurement but that the error actually prejudiced the vendor.[380] In *Data General Corp. v. Johnson*,[381] the Federal Circuit clarified the degree of actual prejudice that the protester must establish. At issue was a procurement for information technology supplies and services. After a series of misstarts, protests, stops, and re-starts, the GSA made a contract award. Data General then protested to the GSBCA and contended, in part, that the agency had engaged in improper discussions with the awardee.[382] Following the board's denial, the contractor then filed an appeal with the Federal Circuit. In analyzing Data General's argument, the Federal Circuit looked to see whether the protester could establish it was actually prejudiced by the agency's actions. Describing its analysis as "a refinement and clarification" of previous case law, the circuit court held that to show prejudice, a protester must demonstrate that but for the alleged error, there existed a "reasonable likelihood" that it would have received the contract award.[383] On the record before it, the Federal Circuit concluded that Data General could not show that there was a reasonable likelihood that the GSA would have awarded it the contract absent the allegedly improper discussions.[384]

Strategic Analysis, Inc. v. Department of the Navy,[385] was one of the first cases to apply the Federal Circuit's "clarified" standard for prejudice. According to the protester, the Navy improperly conducted discussions with the awardee without calling for BAFOs from all competitors; in this case there were only two—protester and awardee. In response, the Navy argued that the pre-award communications with awardee did not rise to "discussions;" but, even if they did, the Navy contended that protester was not prejudiced by the agency's pre-award conduct. The D.C. District Court disagreed with the Navy on both counts. In finding that protester was prejudiced by the Navy's actions, the court placed significant weight on an affidavit submitted by protester's president averring that protester would have submitted the winning proposal as its BAFO.[386] The court further observed that but for these "discussions," the Navy might well have eliminated awardee from the procurement process altogether. In light of this evidence, the court directed the Navy to engage in a new round of discussions and request the submissions of BAFOs from both competitors.[387]

6. CICA Stay Overrides: The Air Force's "Best Interests" Are Not Reviewable. Whether an agency's decision to override a GAO CICA stay is subject to judicial review depends on the federal circuit in which the challenge is asserted.[388] This past

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[378] 61 Fed. Reg. 39,039, 39,043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(2)). *See* FAR 15.1004 for debriefing requirements. *See also* The Real Estate Center, B-274081, 96-2 CPD ¶ 74 (GAO dismisses protest filed before required debriefing).

[379] 61 Fed. Reg. 39,044 (1996).

[380] *See, e.g.*, Labarge Prods., Inc. v. West, 46 F.3d 1547, 1556 (Fed. Cir. 1995).

[381] 78 F.3d 1556 (Fed. Cir. 1996).

[382] *Id.* at 1556-59.

[383] The circuit court further noted that this new standard better reflected the important balance between (1) averting unwarranted interruptions of and interferences with the procurement process and (2) ensuring that protesters who have been adversely affected by allegedly significant error in the procurement process have a forum available to vent their grievances. *Id.* at 1563.

[384] *Id.*

[385] 939 F. Supp. 18 (D.D.C. 1996).

[386] The court dismissed the Navy's objection to consideration of the affidavit noting that the Federal Circuit "has recently indicated that the submission of an affidavit of a company executive under circumstances such as these is a proper way to demonstrate prejudice." *Id.* at *23 n.7, *citing* Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1563 (1996).

[387] "In deference to the Navy's expertise in these matters," the court refrained from directing the Navy to cancel the existing contract pending the conduct of a new round of discussions and review of the BAFOs. *Id.* at *24.

[388] *Compare* Foundation Health Fed. Servs. v. United States, No. 93-1717, 39 CCF ¶ 76,681 (D.D.C. 1993) *with* Management Sys. Applications Inc. v. Dep't of Health and Human Servs., No. 2:95cv320 (E.D. Va. Apr. 11, 1995).

summer, the Eastern District Court of Virginia denied a protester's request for a preliminary injunction to prevent work from commencing on an Air Force contract.[389] The contract required the development of the Joint Air-to-Surface Standoff Missile (JASSM) and was the subject of a GAO protest filed by Hughes Missiles Systems Co.[390] The Air Force made its override determination on the basis that continuation of this procurement represented the "best interests" of the agency.[391] The district court concluded that the Air Force's "best interests" determination was not reviewable and hence deferred to the agency.[392]

7. Intown Goes Downtown: Protest Is Timely After Agency Delays Post-Award Debriefing by Four Weeks. In a protest decision that preceded the new GAO rules,[393] the GAO may have provided agency counsel a "heads-up" on how it will handle protests tied to delinquent agency debriefings. At issue in the protest of *Intown Properties, Inc.*[394] was a post-award protest of a Housing and Urban Development (HUD) contract seeking real estate management services. Intown requested a debriefing within three days of receiving the agency notice of award.[395] HUD, however, did not conduct the debriefing until more than four weeks later. Meantime, Intown filed its protest just before the agency debriefing, or four weeks after receiving the notice of award. HUD challenged the protest as untimely, arguing that the debriefing provided Intown no new or additional information. GAO rejected HUD's argument and observed that protesters may generally delay filing a protest pending a timely requested debrief.[396] GAO further noted that a "disappointed offeror may not, however, await indefinitely for a response," and must file a protest within "a reasonable period of time." Given the circumstances surrounding this case, the GAO concluded that the four-week period taken by the protester was "not unreasonable."[397]

8. GAO Declines to Shrink the "Remedial Action Clock." The GAO will issue a declaration on the protester's entitlement to costs in each case where agencies take corrective action.[398] Agencies may avoid any liability by taking timely remedial action in response to a protest. If the agency unreasonably delays taking corrective action, however, the GAO will award protester fees and/or costs associated with pursuing the protest.[399] Recently, the GAO took the opportunity to reaffirm its general philosophy regarding such declarations. In *LORS Medical Corp.—Entitlement to Costs*,[400] the protester argued that the agency's remedial action was untimely. LORS asserted that the agency had im-

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[389] For a published account of this case, *see Court Denies Hughes' Request to Enjoin JASSM Contracts Pending Resolution of Protest*, 66 Fed. Cont. Rep. (BNA) 71 (July 22, 1996).

[390] *Id.*

[391] The head of the contracting activity may, on a nondelegable basis, authorize continued contract performance upon a written finding that,

(1) continued performance of the contract is *in the best interest of the United States;* or

(2) urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for the decision of the Comptroller General.

31 U.S.C. § 3553(c), (d); FAR 33.104(b), (c); DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. 33.104 (1996) [hereinafter AFARS]; DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. 5333.104 (1996) [hereinafter AFFARS].

[392] For an excellent overview of the CICA override standards *see* Saviano, *Overriding a Competition in Contracting Act Stay: A Trap for the Wary*, ARMY LAW., July 1995, at 22.

[393] *See* 61 Fed. Reg. 39039 (1996) (amending 4 C.F.R. Part 21) and the discussion of new GAO rules above.

[394] B-262236, Jan. 18, 1996, 96-1 CPD ¶ 89.

[395] *See* 4 C.F.R. 21.2(a)(2) (1996) ("the initial protest shall not be filed before the debriefing date offered to the protester, but shall be filed not later than 10 days after the date on which the debriefing is held").

[396] Note that under the current rules, it appears that the protester may have no choice but to refrain from filing a protest until the offered debrief date passes. *See* 4 C.F.R. 21.2(a)(2) (1996).

[397] 96-1 CPD ¶ 89 at 4-5. The GAO further noted that "it would be anomalous to consider Intown's [protest] untimely, merely because in Intown's case the agency chose not to act upon Intown's debriefing request; as Intown points out, such a decision by our Office would permit an agency to avoid a protest 'through the simple use of ignoring a request for debriefing until the time for protest expired.'" *Id.* n.4.

[398] 4 C.F.R. § 21.8(d) (1996).

[399] *See, e.g.*, Griner's-A-One Pipeline Servs., B-255078, July 22, 1994, 94-2 CPD ¶ 41 (corrective action taken 2 weeks following filing of agency report untimely).

[400] B-270269, Apr. 2, 1996, 96-1 CPD ¶ 171.

properly removed it from the competitive range. Following a review of the protest allegations, the government placed LORS back in the competitive range. The agency took this remedial action on the date its administrative report was due. LORS contended that the government's action was late, essentially arguing that it should be compensated for all protest costs regardless of when the agency takes remedial action. The GAO declined to adopt protester's argument and stated that if the agency takes corrective action by the due date for agency reports[401] it is generally considered to be prompt.[402] Consequently, the agency was not liable for protester's protest costs. The GAO further observed that the underlying policy for recognizing timely remedial action is to "encourage agencies to take corrective action in response to meritorious protests before protesters have expended additional unnecessary time and resources pursuing their protests."[403] To hold otherwise, according to the GAO, would not only greatly increase the protest costs paid by agencies but also would ultimately discourage quick remedial action by the government.[404]

9. Multiple Awardees Are Not Necessarily Interested Parties. At issue in *Recon Optical, Inc.*[405] was a Navy research and development cost-plus-fixed-fee contract for the development and testing of an airborne reconnaissance camera. An amendment to the request for proposals (RFP) informed potential offerors that the Navy reserved the right to make more than one award at different contract prices for the same work.[406] The Navy subsequently made two awards: one to Recon Optical, Inc. and one to Lockheed-Martin Corp., Fairchild Systems. Each vendor protested the award made to the other. The protesters essentially contended that the Navy's award determination was defective and did not comply with the solicitation's evaluation criteria. Underlying the protest, of course, was the belief shared by both protesters that the other's contract would siphon away funds that the Navy could otherwise channel to their own contract.[407] Unfortunately, the protesters could not provide adequate evidence to support their allegations. Since each vendor could not demonstrate that the other's contract "reduced, increased, or otherwise affected" their contract, the GAO concluded that neither protester had the necessary "economic interest" to qualify as an interested party.[408]

10. GAO Places Parties on Notice That It Will Not Suffer Violations of Protective Orders Lightly. In an unpublished letter, the GAO let the protest world know that it views violations of its protective orders as grave matters.[409] During the protest of *L.K. Comstock, Inc.*,[410] counsel for the protester apparently had "inadvertently" provided their client drafts of their comments to the agency report, which included the unit price and BAFO prices of competitors.[411] Although the GAO has in the past issued letters of reprimand for inadvertent disclosures, this time it imposed much more severe sanctions, to include prohibiting the offend-

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[401] Which is now within 30 days of when GAO telephonically notifies the agency of the protest. 4 C.F.R. § 21.3(c) (1996).

[402] 96-1 CPD ¶171 at 2-3. *See also* Kertzman Contracting, Inc., B-259461, May 3, 1995, 95-1 CPD ¶ 226 (agency's decision to take corrective action one day before agency report due was "precisely the kind of prompt reaction" GAO regulations encourage); Holiday Inn-Laurel—Entitlement to Costs, B-265646, Nov. 20, 1995, 95-2 CPD ¶ 233 (agency took timely corrective action five days after comments by protester). The GAO may also consider the complexity of the protested procurement in determining what is timely agency action. *See* Lynch Machinery Co., Inc., B-256279, July 11, 1994, 94-2 CPD ¶ 15 (protester's request for costs denied where agency corrective action taken three months following filing of protest complaint).

[403] *Id. See also* 4 C.F.R. § 21.8 (1996).

[404] *Id.*

[405] B-272239, July 17, 1996, 96-2 CPD ¶ 21.

[406] *Id.*

[407] *Id*

[408] *Id. See also* 4 C.F.R. §§ 21.1(c)(4), 21.1(i), 21.5(f) (1996). The GAO also noted that any challenge to the Navy's decision to make multiple award was untimely. Protests challenging amendments to solicitation, which contain defects apparent on their face, must be filed prior to the next closing date for receipt of offers. 4 C.F.R. ¶ 21.2(a)(1) (1996).

[409] *GAO Imposes Sanctions for Protective Order Violations in Bid Protest*, 38 The Gov't Cont. (Fed. Pubs.) 6, ¶ 205 (May 1, 1996) [hereinafter *Sanctions Article*].

[410] B-261711, Dec. 14, 1995, 96-1 CPD ¶ 4.

[411] *Sanctions Article, supra* note 409, at 7.

ing attorneys from entering into a protective order for three months following receipt of the letter.[412] Apparently, the protester's counsel informed the GAO that they believed they were entitled to *unilaterally* provide their clients redacted versions of their filings. Angrier than a nest of hornets, the GAO informed protester's counsel that not only was this belief incorrect but such a position effectively "render[s] meaningless the essential protection afforded by the . . . protective order—i.e., to give all other parties a fair opportunity to propose additional redactions of protectable information."[413] Despite these violations, the GAO sustained the protest. In light of these violations, however, the GAO recommended that the agency take those steps necessary to "ensure to the maximum extent practicable a level playing field among offerors."[414]

11. GAO Sustains Protest of Purchase Order. The Federal Emergency Management Agency (FEMA) issued a request for quotations (RFQ) leading to the purchase of 15 computerized photographic identification card systems—all of which were listed on Federal Supply Schedules (FSS).[415] The RFQ stated that award would be made to the lowest-priced schedule vendor; it did not require that interested vendors submit descriptive literature.[416] In this case, the contracting officer incorrectly calculated the offered prices. The record demonstrated that the protester offered the lowest prices. In response to the protest, FEMA attempted to argue that it could not ascertain the responsiveness of the protester's offer. The GAO rejected this argument and pointed out that since RFQs are "negotiated procurements," agencies "have a duty" to seek out the information necessary to ascertain the responsiveness of offers.[417]

12. Contingent Fee Arrangement With Non-Attorney Receives a GAO Stamp of Approval. Following a successful protest against the Navy, the protester claimed reimbursement for the costs of filing and pursuing the protest.[418] In this case, however, the protester was represented by a non-attorney, an employee of "Federal Contract Specialists, Inc." Additionally, protester and Federal Contract Specialists, Inc. had entered into a contingent fee agreement whereby protester was to foot the bill for prosecuting the protest only if the protester secured contract award or the GAO found the protester was entitled to costs.[419] The Navy objected to this arrangement as violating the proscription against contingent fees[420] and also objected to the hourly fee charged ($225).

The GAO disagreed with the Navy's interpretation of the contingent fee prohibition, concluding that it applied only to those situations where "a selling agency" is retained for "the express purpose of contacting government officials" so as to "solicit or obtain" a contract from a procuring agency. In this case, Federal Contract Specialists, Inc. was retained only to protest the Navy's procurement actions, which the GAO could not equate to the soliciting activity banned by law.[421]

With respect to the hourly fee, Federal Contract Specialists, Inc. argued that its rates compared favorably with those charged by "government contract lawyers in Washington, D.C." The only problem, however, was that Federal Contract Specialists, Inc. was apparently based in North Carolina. Thus, the GAO followed their general rule that fees are calculated by comparing

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[412] The GAO Bid Protest Regulations provide that "[a]ny violation of the terms of a protective order may result in the imposition of such sanctions as GAO deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before GAO." 4 C.F.R. § 21.4(d) (1996).

[413] *Id.*

[414] 96-1 CPD ¶ 4, at 7 n.6.

[415] Imaging Tech. Corp., B-270124, Feb. 12, 1996, 96-1 CPD ¶ 68.

[416] When ordering from the FSS, the agency must place its order with the schedule contractor offering the lowest overall price for the goods sought. *See* FAR 8.404(b)(2), (c)(1).

[417] *Id. See also* CEFCO Enters., Inc., B-227490, July 2, 1987, 87-2 CPD ¶ 10.

[418] E&R, Inc.—Claim for Costs, B-255868, May 30, 1996, 96-1 CPD ¶ 264.

[419] *Id.* at 2.

[420] *Id.* Specifically, the Navy claimed that the arrangement violated 10 U.S.C. § 2306(b) and FAR Subpart 3.4. 10 U.S.C. § 2306(b) provides in part:

> Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty . . . that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration. This subsection does not apply to a contract that is for an amount not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

[421] 96-1 CPD ¶ 264 at 3-4.

them to rates charged by other "similarly situated counsel for similar work in the community." Moreover, the GAO noted that since it was aware of the rates charged by "other non-lawyer protest representatives" the hourly fee of $150 was more than reasonable.[422]

13. Protester's "Goose Is Cooked": GAO Rejects Formalistic Approaches to Notifying Protester of Adverse Agency Action. Anyone who has worked with protests for a while knows that time is of the essence. Whether a protest filing meets applicable deadlines is crucial to the viability of the contractor's cause of action.[423] Recently, the GAO has released a couple of decisions which underscore this well established rule. In *Consolidated Mgt. Servs., Inc.—Recon.*,[424] the protester challenged the adequacy of notice given by the agency. The contracting officer informed protester of the adverse agency action via telephone conversation, which was followed up by written notification. The protester contended that filing a protest solely on the telephonic notice would be "purely speculative because it was based on oral information." Observing that *any* notice which fairly places the protester on notice of the basis for the agency's action is sufficient, the GAO rejected the requirement for written notification.[425]

Similarly, in *American Medequip—Recon.*,[426] the protester challenged the manner in which the agency made "official notification" of the adverse agency action. In this instance, the agency telefaxed its denial of the protester's agency-level protest. The GAO had little trouble dismissing protester's argument and noted that "in federal government contracting, facsimile documents are recognized as legitimate methods of communication and notice." Indeed, the GAO has repeatedly recognized the validity of protests filed by facsimile transmission—so what is good for the goose ought to be good for the gander.[427]

14. Attorneys' Fees Cap: GAO Reads the FASA as a "Bridge to the Future."[428] In *KPMG Peat Marwick, LLP—Claim for Costs*,[429] the successful protester sought payment of $22,927.98 in attorneys' fees associated with the firm's successful protest of an Advanced Research Projects Agency (ARPA) contract award decision. Peat Marwick filed a claim for $69,305 in attorneys' fees,[430] of which ARPA paid $46,425. ARPA did not challenge the number of billable hours, but instead argued that the FASA,[431] which had an effective date of 13 October 1994, capped compensable attorneys' fee at $150 per hour.[432] Since Peat Marwick submitted its claim after October 1994, ARPA contended that the FASA fee cap applied. The GAO disagreed, ruling that the FASA expressly allowed implementing regulations to establish the different effective date(s) of the specified amended statutes to include the provision which controlled protest attorneys' fees.[433] Hence, since GAO's regulatory implementation of the FASA amendments applied to claims and

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[422] *Id.* at 5-6.

[423] *See, e.g.*, 48 C.F.R. 21.2(b) (1996) (protests untimely on their face may be dismissed).

[424] B-270696, Feb. 13, 1996, 96-1 CPD ¶ 76.

[425] *Id. See also* 48 C.F.R. § 21.2(2) (1996) (in situations not involving required debriefs, the protester must file its protest when the basis of protest is known or should have been known, whichever is earlier).

[426] B-259474, Feb. 2, 1995, 96-1 CPD ¶ 173.

[427] *See* Laptops Falls Church, Inc., GSBCA No. 11322-P, 91-3 BCA 24,252 (discussing the "dangers" of relying solely on telefax transmission receipts to demonstrate the timeliness of communications).

[428] Apologies to Mr. Richard Morris, former political consultant for the Democratic Party, who was apparently partially responsible for use of the term "bridge to the future," first uttered at the 1996 Chicago Democratic National Convention.

[429] B-259479.4, July 25, 1996, 96-2 CPD ¶ 43.

[430] Peat Marwick's hourly rate for the protest ranged from $177 per hour (associate) to $256 per hour (partner) to $285 per hour (senior partner). *Id.* Yes, it is good to be in America.

[431] Pub. L. 103-355, § 1403(b)(2), 108 Stat. 3243, 3289 (1994) (amending 31 U.S.C. § 3554(c)(2)(B)). FASA *supra* note 321, § 1403(b)(2) provides:

> No party (other than a small business concern . . .) may be paid pursuant to a recommendation made [by the GAO] . . . .
>
> > (B) costs for attorneys' fees that exceed $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.

[432] ARPA contended that the fees cap was effective on FASA's date of enactment, i.e., 13 October 1994. *Id. See also* FASA, *supra* note 321, § 10001(a), which provides that "[e]xcept as otherwise provided . . . this Act and the amendments made by this Act shall take effect on the date of the enactment of the Act."

[433] *Id. Compare with* Advanced Technology Sys., Inc. v. Gen. Servs. Admin., GSBCA No. 13398-C, 96-2 BCA ¶ 28,452 (the GSBCA applies the FASA fee cap and limits claimed legal expenses to not more than $150).

requests for reconsideration filed on or after 1 October 1995, Peat Marwick's claim was not subject to the FASA limitation.

15. The GSBCA Supports Family Values. At issue in *International Data Prods. Corp. v. Department of the Navy*,[434] was a request for access to protected documents under the board's protective order by one of protester's counsel. The attorney happened to be the brother-in-law of the protester's two principals, the president and vice-president, who were also the majority stock holders of the firm. The attorney attempted to minimize his involvement with the protester, stating that he provided only "general legal services" to the firm and was not involved in the "competitive decision-making" process of the firm.[435] Counsel admitted, however, that his wife, who was the sister of the protester's principals, was also his sole law partner in his firm. Additionally, the attorney acknowledged that he frequently attended family gatherings but asserted that work issues were not "typically" discussed at those events.[436] Noting the "close familial relationship" of protester's counsel, the board had little trouble denying the attorney's request.[437]

H. Alternative Dispute Resolution.

1. Civil Justice Reform. On 5 February 1996, President Clinton issued Executive Order 12,988.[438] The purpose of the order was, in part, to encourage the use of ADR techniques to efficiently resolve civil claims involving the federal government. Specifically, the order provides that litigation counsel should suggest the use of ADR when its benefits can be derived. Finally, in order to facilitate and encourage the use of ADR, the order calls for the training of government litigation counsel[439] in ADR techniques.

2. DOD Directive Intended to Expand the use of ADR. On 22 April 1996, DOD issued DOD Directive 5145.5, "Alternative Dispute Resolution." The directive is DOD's effort to implement Executive Order 12,988. The directive mandates that each DOD component establish and implement ADR policies and programs. The directive specifically establishes an ADR coordinating committee which will be chaired by the DOD General Counsel and have specialists representing each of the services. DOD Directive 5145.5 contemplates the broad use of ADR in order to facilitate the just and efficient resolution of civil claims involving DOD.

3. COFC addresses the Issue of the Constitutionality of Binding Arbitration. In *Tenaska Washington Partners II, L.P. v. United States*,[440] a Washington state partnership brought suit against the Department of Energy's Bonneville Power Administration (BPA) for breach of a contract. The contract called for the development of electrical power, including the construction of a power plant. The government terminated the contract after construction began, but before the power plant was completed. At issue in the case was whether, under the terms of the contract, the government can compel the partnership to participate in the arbitration process. The contract contained an arbitration clause which provided for mandatory arbitration for dispute resolution.

The court ordered the partnership and the BPA to arbitrate. In making its ruling, the court relied heavily on a 7 September 1995 policy memorandum by the Department of Justice (DOJ) Office of Legal Counsel. The memorandum, in effect, reverses DOJ's longstanding position that the Appointments Clause of the United States Constitution bars the United States from submitting to binding arbitration.[441] The Appointments Clause sets

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[434] GSBCA Nos. 13587-P, 13590-P, 96-2 BCA ¶ 28,361.

[435] *Id.* at 141,613. *See also* U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984).

[436] In his request for access to protected material, counsel stated as follows:

> My relationship to the principals of IDP is as an attorney and brother-in-law. I see my in-laws approximately once a month at family dinners, holiday events, and birthday parties. At most family events, there are over 30 persons present.

GSBCA Nos. 13587-P, 13590-P, 96-2 BCA ¶ 141,613.

[437] *Id.*

[438] 65 Fed. Reg. 5 (1996).

[439] The order defines a litigation counsel as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or litigating division of the DOJ. Special Assistant United States Attorneys are included within this definition. Agencies authorized to represent themselves in court without the assistance from the Department of Justice are also included in the definition.

[440] 34 Fed.Cl. 434 (1995).

[441] U.S. CONST. art. II, § 1, cl. 2.

forth the exclusive mechanism by which an officer of the United States may be appointed. It has long been held that only an officer of the United States can bind the United States to an action or payment. Arbitrators, who are virtually never appointed under the procedures mandated by the Constitution, were viewed as non-officers, which presented a significant bar to federal government participation in binding arbitration.

In addition to reversing DOJ's position, the memorandum concluded that there were no other broad constitutional prohibitions preventing the government from entering into binding arbitration. In rendering its decision, the court specifically noted that the BPA's authority to enter into binding arbitration can be reasonably and justifiably inferred from a statute.[442] The authorizing language in the statute empowers the contracting officer to enter into binding arbitration as a direct result of the officer's power to settle any claim arising from contracts or agreements, because the authority to settle a claim includes the authority to do so by arbitration.[443] The court also closely evaluated the legislative history of 16 U.S.C. § 832a(f) in reaching its conclusion.[444]

Finally, the court specifically stated that "[a]bsent adequate assurances from the DOJ that the result of the proceeding will be fully binding on the government, the court will not remit the parties to arbitration."[445] The government counsel, speaking for the Attorney General, specifically, emphatically, and in a straightforward manner assured the court that the decision by the arbitrator would be fully enforceable.

4. GAO Will Use ADR Procedures in Bid Protests.[446] On 2 October 1996, the GAO, in a letter to federal agencies' senior procurement executives, announced that it will use ADR procedures to resolve bid protests. The GAO also announced that it will assist agencies by providing an advisory opinion about possible protests in connection with any pending procurement. The GAO's stated reasons for the use of ADR techniques are to eliminate unnecessary bid protest litigation and provide a vehicle for the inexpensive and expeditious resolutions of bid protests.

Under GAO's new plan, the GAO will implement ADR techniques at the request of any party as well as on their own initiative. The assigned GAO attorney will act as a neutral monitor and will attempt to guide the parties to a satisfactory resolution of the protest. If the ADR attempts prove unsuccessful, the protest will revert back to the normal procedures.

5. GSBCA Makes Services Available. On 7 October 1996, the GSBCA issued a procedural rule announcing that its services were available for ADR.[447] It stated that ADR was available regardless of the agency, the procurement, or the stage of the dispute. Obviously, the new rule is intended, in part, to fill the void created when GSBCA lost its bid protest jurisdiction.

I. Small Businesses.

1. President Clinton promotes "Empowerment Contracting." On 21 May 1996, President Clinton signed Executive Order 13,005.[448] The purpose of the order was to encourage qualified large businesses and qualified small businesses[449] to locate in economically distressed areas.[450] These incentives include a price or evaluation credit. The order specifically provided that the size of the qualifying business should be considered.

On 13 September 1996, the Department of Commerce issued proposed guidelines for the implementation of Executive

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[442] 16 U.S.C. § 832a(f) (1988).

[443] Dist. of Columbia v. Bailey, 171 U.S. 161, 171-72 (1898) (absent positive law to the contrary, the power to arbitrate would flow naturally from the ability of an officer to settle a claim.)

[444] The legislative history of section 832a(f) highlights the unusual mandate that Congress provided for in the BPA. Congress, in essence, envisioned that the BPA would act as a private business enterprise. H.R. REP. NO. 79-777 (1945).

[445] Tenaska Washington Partners II, L.P. v. United States, 34 Fed. Cl. 434, 443 (1995).

[446] *GAO to use ADR Procedures to resolve bid protests,* 66 FED. CONT. REP. 13 (Oct. 7, 1996).

[447] 61 Fed. Reg. 52,347 (1996).

[448] 61 Fed. Reg. 26,069 (1996).

[449] Qualified large and small business have similar definitions under the order. The order provides that qualified large or small business are for-profit or not-for profit trades or businesses that (1) employ a significant number of residents from the area of general economic distress; and (2) either have a significant physical presence in the area of general economic distress or have a direct impact on generating significant economic activity in the area of general economic distress.

[450] "Area of general economic distress" is defined as all urban and rural communities having a poverty rate of 20% or more or any designated Federal Empowerment Zone, Supplemental Empowerment Zone, Enhanced Enterprise Community, or Enterprise Community. Additionally, the Secretary of Labor may designate any rural or Indian reservation area after considering the following factors: (1) unemployment rate, (2) degree of poverty, (3) extent of outmigration, and (4) rate of business formation and growth.

Order 13005.[451] The proposed guidelines are applicable to unrestricted competition for contracts exceeding $100,000. The guidelines mandated the following: (1) an incentive structure, (2) monitoring and evaluation of results, and (3) the phased implementation of the guidelines.

Under the procedural rules both price and non-price incentives shall be available. The contracting officer will have the discretion to determine the type and size of the incentives for a particular procurement. Preferences in the form of incentives shall represent a price preference of five to ten percent or an evaluation credit of five to ten percent. Any preference a business receives under the guidelines shall be in addition to the preferences it receives pursuant to other statutory or regulatory programs.

The guidelines envision a two-phase implementation plan. The first phase will be a six-month test period. During this phase, the guidelines would be applied to a limited number of contracts. In the second phase, the program will be applied to a larger number of contracts. At the end of a five year period, the Department of Commerce will re-evaluate the program to ascertain whether it is stimulating economic activity in those areas of general economic distress and whether it has benefitted the federal procurement system. If the program meets those objectives, it will be expanded to additional industries for similar implementation and evaluation.

2. DOD Awards to Small Disadvantaged Businesses (SDB) Hits Record. The DOD has increased the amount of business it is doing with SDBs.[452] In fiscal year 1995, the DOD awarded a record $6.9 billion in prime contracts to SDBs.[453] This amounts to 6.2% of the $110 billion in prime contracts awarded by DOD. The FY 1995 figure amounted to an approximate increase of $800 over FY 1994.

The picture was just as bright for subcontracts with SDBs. DOD awarded $2.6 billion in subcontracts to SDBs during FY 1995. This amount surpassed the FY 1994 level by $350 million dollars.

3. Ninth Circuit Finds Army Anachronistic on SDB Determination.[454] Jet Investment (Jet) submitted a bid to the Army to provide lodging, meals, and transportation to personnel at the Military Entrance Processing Station in Oakland, California. The competition was restricted to small businesses.[455] Another bidder challenged Jet's status as a disadvantaged business. The contracting officer forwarded the protest to the Division of Program Certification and Eligibility ("DPCE") of the Office of Minority Development. The DPCE Director determined that Jet did not qualify for disadvantaged status because it violated regulatory standards governing the participation of non-disadvantaged individuals.

The owner of Jet, Juliana Breece, was a United States citizen of Asian Pacific descent.[456] Neither the Army nor the Small Business Administration (SBA) disputed the fact that Ms. Breece qualified as socially and economically disadvantaged.[457] The disputed issue was whether Jet was actually controlled by Ms. Breece or by her husband, a non-disadvantaged individual. The applicable regulation clearly prohibits nondisadvantaged individuals from exercising "actual control" or having "the power to control" the disadvantaged applicant or business.[458]

The DPCE director concluded that Mr. Breece controlled Jet, in part, based upon an alleged conversation between Ms. Breece and an SBA official. The SBA official alleged that Ms. Breece told him that she had transferred sole authority to Mr. Breece, as operations manager, to make business decisions for the company. Other evidence of Mr. Breece's "control" included a delegation of authority to obligate Jet to a lease.

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[451] 61 Fed. Reg. 48,463 (1996). The guidelines will serve as the basis for revisions to the FAR pursuant to the policies and procedures set forth in FAR Subpart 1.5.

[452] 10 U.S.C. § 2323 establishes preferences for SDBs. Moreover, it establishes a five percent government-wide goal for awarding contracts to SDBs.

[453] Of the $6.9 billion, $3.3 billion was awarded under the Small Business Administration's § 8(a) program and $2.2 billion was awarded directly.

[454] Jet Investment v. Dep't of the Army, 84 F.3d 1137 (9th Cir. 1996).

[455] The solicitation contained a provision that allowed for bids to be evaluated so as to accommodate a preference for SDBs. Ten percent was added to all bids except those from SDBs.

[456] Ms. Breece is of Philippine descent. Asian Pacific Americans (including individuals of Philippine descent) are presumptively "socially disadvantaged." 13 C.F.R. 124.105(b) (1996).

[457] Ms. Breece was 100% owner, and the President, Secretary, Treasurer, and sole member of the Board of Directors of Jet.

[458] 13 C.F.R. § 124.104(c)(1) (1996).

Jet filed suit in the district court contesting DPCE's status determination as arbitrary and capricious. The court granted summary judgment in favor of the SBA. The Ninth Circuit reversed and remanded. Initially, the court noted that there was nothing in the administrative record that supported the allegation that Ms. Breece ever made a statement regarding her husband's control of the company to an SBA official. As to entering into a lease, the court concluded that Mr. Breece was specifically authorized by Ms. Breece, as the sole member of the board of directors, to enter into the lease.

In the strongest language in the decision, the court rejected the idea that, simply because a wife delegates important responsibilities to her husband, she can no longer be considered the true owner and authority figure of the enterprise. According to the court, "any such argument, is, to put it politely, anachronistic."[459]

4. Certificates of Competency (COCs). In *Holiday Inn-Laurel,*[460] the Army issued a solicitation to award a fixed-price, indefinite quantity contract for the provision of meals, lodging, and transportation to support the Baltimore Military Entrance and Processing Station. The contracting officer determined that Holiday Inn-Laurel, a small business, was nonresponsible on the basis of its alleged poor performance on the prior contract for these services.[461]

Since the firm was a small business, the matter was referred by the Army to the SBA for a review under its COC procedures.[462] On 6 March 1996, the SBA declined to issue a COC. On 8 March 1996, SBA's area director had a telephone conversation with representatives from Holiday Inn-Laurel. During the conversation, a Holiday-Inn representative explained why it believed that the Army's nonresponsibility determination was unfounded. The area director concluded that the information was extremely compelling and warranted further review of the decision to deny the COC. That same afternoon, the SBA's acting supervisory industrial specialist called the contracting officer. The specialist, after confirming that the stop work order was still in place, asked the contracting officer for more time to review the decision not to issue the COC. The contracting officer agreed to keep the stop work order in place.

After performing an investigation, the SBA decided to issue a COC. The contracting officer then refused to authorize the reconsideration of the denial and told the SBA that she considered the denial final. She also lifted the stop work order. The protest followed.

In holding for Holiday Inn-Laurel, the GAO stated that once an agency delays contract performance to await the SBA's reconsideration of a COC request, it may not disregard the SBA's decision. SBA regulations governing the COC process state that, when a COC is denied, the firm is advised that it may meet with the SBA representative to discuss the reasons for denial.[463] That provision states that "such conference will be for the sole purpose of enabling the applicant to improve or correct deficiencies and will not constitute a basis for reopening the case in which the [COC] was denied."[464] The Army's position was that this language prohibited the SBA from reconsidering its denial of the COC. By contrast, the SBA interpreted the language solely as a notice to COC applicants that the debriefing was not intended as an appeal process; it was not a bar to further SBA review. The GAO found the SBA's interpretation reasonable. Specifically, the GAO concluded that the SBA was not prohibited from reviewing its initial denial of the COC while a stop work order remained in effect.[465]

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[459] The court noted that such an argument is even less palatable where, as in the instant case, the wife has extensive prior experience in the industry in which she now owns her own small business.

[460] B-270860.4, May 30, 1996, 96-1 CPD ¶ 259, 1996 WL 283958 (C.G.).

[461] *Id.* The contracting officer's determination was based on such problems as alleged overflow housing, menu selection, and failure to meet transportation requirements. Additionally, the contracting officer concluded there were recurring issues of discourteous treatment to applicants, including possible racial bias.

[462] FAR 19.602-1 provides the referral procedures for when a contracting officer must refer a non-responsibility determination to the SBA. FAR 19.601 provides that a COC is the certificate issued by the SBA stating that the holder is responsible (with respect to all elements of responsibility, including but not limited to capability, competency, capacity, credit, integrity, perseverance, and tenacity) for the purpose of receiving and performing a specific government contract. FAR 19.602-4(c) provides that the contracting officer shall proceed with the acquisition and award the contract to another appropriately selected and responsible offeror if the SBA has not issued a COC within 15 business days (or a longer period of time agreed to with the SBA) after receiving the referral.

[463] 13 C.F.R. ¶ 125.5(g) (1996).

[464] *Holiday Inn-Laurel*, 1996 WL 283958, at *6.

[465] The GAO noted that although the Army could have proceeded to lift the stop work order after it received the initial denial of the COC, it decided not to do so. FAR 19.602-4(c).

5. Post Adarand[466] *Challenges.* Since *Adarand*, several contractors have initiated suits challenging the constitutionality of government programs designed to assist socially and economically disadvantaged individuals, *e.g.*, SBA's 8(a) program. These contractors hit a "standing" brick wall. In *Dynalantic Corp v. Department of Defense*[467] the plaintiff, a non-minority owned small business, contended that SBA's 8(a) program unconstitutionally restricted bids and limited competition on a contract for the UH-1N Helicopter Aircrew Procedures Trainer (APT). Dynalantic argued that the 8(a) program excluded it from competition solely on the basis of race. The U.S. District Court for the District of Columbia rejected this argument. According to the court, non-minority contractors have been certified under the 8(a) program. Specifically, the court found that the 8(a) program is designed to benefit individuals that are socially and economically disadvantaged. As such, it is facially "race neutral." Accordingly, the court held that Dynalantic did not suffer any injury, because it failed to allege that it was excluded from membership in the 8(a) program in spite of being socially or economically disadvantaged.

The plot thickened in the *SRS Technologies v. Department of Defense*[468] case. In that case, a minority-owned business attacked the constitutionality of the 8(a) program. SRS, an incumbent subcontractor, lost its status as a SDB upon a challenge by another competitor. The nature of the challenge was that SRS was not economically disadvantaged; its net worth was approximately $4,000,000. SRS, now unable to compete under the 8(a) program, challenged its constitutionality. The court held that race had no impact on SRS's failure to obtain the instant contract. As such, SRS lacked standing to bring the action.

Similarly, in *Ellsworth Associates v. U.S.*,[469] the plaintiff argued that it was unable to compete for a follow-on computer support contract. The Department of Commerce reserved the contract for the 8(a) program. The plaintiff, a minority-owned contractor whose eligibility had expired, contended that the 8(a) program was unconstitutional in light of *Adarand*. The court held that "[b]ecause Ellsworth was ineligible to participate in the Program by virtue of the expiration of its eligibility rather than because of the alleged unconstitutionality of the regulation, the plaintiffs lack standing to challenge the Program or its administration by the federal defendants."[470]

In *C.S. McCrossan Construction Co., Inc. v. Cook*,[471] the plaintiff finally cleared the "standing" hurdle but still lost its challenge to the 8(a) program. C.S. McCrossan, a large nonminority-owned construction firm, sought a preliminary injunction to prevent the award of a contract under the SBA's program. McCrossan challenged its constitutionality arguing that 8(a) of the Small Business Act violated its right to the equal protection of laws under the Fifth Amendment. Moreover, it argued that it was denied the right to make contracts free from race discrimination as guaranteed by the Civil Rights Act of 1866.[472] The court denied the request for the preliminary injunction because McCrossan failed to demonstrate a substantial likelihood of prevailing on the merits. The court specifically noted that the defendants had "submitted significant evidence that the 8(a) program may survive strict scrutiny" as required by the Supreme Court in *Adarand*.[473]

As to regulatory changes, DOD issued a final rule on 29 April 1996 to enhance awards to SDBs. The rule changes the DFARS to (1) mandate the evaluation of a contractor's past performance regarding its follow through on its subcontracting plans for the use of small, small disadvantaged, and women-owned businesses; and (2) establish a test program "in which an SDB evaluation preference would remove bond cost differentials between SDBs and other businesses as a factor in most source selections for construction acquisitions."[474]

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[466] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). In this landmark United States Supreme Court case, the Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a "strict scrutiny" standard. Thus, only those affirmative action programs which are narrowly tailored to achieve a compelling government interest will pass constitutional muster.

[467] 894 F. Supp. 995 (D.D.C. 1995).

[468] 917 F. Supp. 841 (D.D.C. 1996).

[469] 937 F. Supp. 1 (D.D.C. 1996).

[470] *Id.* To have standing, a plaintiff must have suffered injury in fact, an invasion of a legally protected interest which is concrete and particularized and actual and imminent, not conjectural or hypothetical; there must be a causal connection between the injury and conduct complained of, that is, the injury has to be fairly traceable to the challenged action of the defendant and not the result of independent action of some third party not before the court. There must also be a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision.

[471] No. 95-1345-HB, 1996 WL 310298 (D.N.M., Apr. 2, 1996).

[472] 42 U.S.C. § 1981.

[473] *McCrossan*, 1996 WL 310298, at *9.

[474] *DOD: DFARS Mandates Evaluation of Primes' Subcontracting Compliance, New Test Program*, 65 Fed. Cont. Rep. 17 (Apr. 29, 1996).

On 23 May 1996 the DOJ issued proposed rules designed to reform affirmative action in federal contracting to ensure compliance with constitutional standards established in *Adarand*. The proposed reforms address five major topics: (1) certification and eligibility, (2) benchmark limitations, (3) mechanisms for increasing minority opportunity, (4) the interaction between the benchmark limitations and mechanisms, and (5) outreach and technical assistance. The comment period on the proposed rules ended on 22 July 1996.[475] To date, no action has been taken on the proposed rules; however, there has been sharp criticism of the proposed rules by some industry groups. Specifically, the Council of Defense Industry Associations contends that the proposed rules will likely discourage rather than encourage the use of SDBs.[476]

6. Small Business Regulatory Fairness.[477] On 29 March 1996, President Clinton signed the Small Business Regulatory Fairness Act (SBRFA) into law. The new law mandates congressional review of an executive agency's rules. Moreover, it authorizes small firms to seek judicial review of agency compliance with statutory requirements for regulatory flexibility analysis.

The new law requires that, where an agency puts forth a rule that is expected to have a significant economic impact on a substantial number of small businesses, the agency must also publish a guide to assist small businesses in complying with the rule. Further, the agency must implement a program for answering questions by small businesses about the rules.

The statute establishes an ombudsman at the SBA to process confidential complaints. Additionally, the SBRFA creates citizen review panels at the SBA to report on excessive enforcement actions targeting small businesses. Finally, the SBRFA allows small businesses to recover their legal expenses in certain situations involving agency regulators.

J. Labor Standards Developments.

1. The Continuing Saga of Helper Regulations. In the latest development in a political tug-of-war that began in 1982, the Department of Labor (DOL) published a proposed rule that would continue the suspension of so-called "helper regulations" until DOL determines whether these regulations should be amended.[478] The regulations, as issued in 1982, would allow the use of semi-skilled "helpers" on a construction project at prevailing wage rates lower than those paid to skilled journeymen.[479] In announcing the continuation of the suspension, DOL noted that a significant amount of time had passed since the initial promulgation of the regulations and that information gathered since that time shows that the use of helpers may not be as widespread as originally believed.[480] Accordingly, DOL believes that additional rulemaking and public comment is in order.

2. Wage Determinations Go High-Tech. On 3 April 1996, the Army and DOL entered into a Memorandum of Understanding (MOU) which allows electronic access to Service Contract Act (SCA) wage determinations.[481] The principal effect of the MOU is that contracting activities can now obtain SCA (and Davis-Bacon Act) wage determinations via the Internet. Under this new policy, activities will no longer have to submit a Standard Form (SF) 98 to DOL and wait for a wage determination. Instead, they can download the wage determination electronically and include it in the solicitation. Activities are required,

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[475] 61 Fed. Reg. 26,042 (1996).

[476] *Affirmative Action: CODSIA Says Administration's Adarand Proposal is Burdensome, will Discourage Use of SDBs,* 66 FED. CONT. REP. 7 (Aug. 12, 1996).

[477] Pub. L. No. 104-194, 110 Stat. 2356 (1996).

[478] *See* 61 Fed. Reg. 40,366 (1996).

[479] DOL regulations define a "helper" as:

> a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman . . . . A helper may use the tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

29 C.F.R. § 5.2(n)(4) (1993). This provision was indefinitely suspended effective 21 Oct. 93. *See* 58 Fed. Reg. 58,955 (1993).

[480] Readers interested in the full history of the fourteen-year effort to promulgate these regulations should see the *Background* and *Discussion* sections accompanying the proposed rule and the court's discussion in *Building and Trades Dept., AFL-CIO v. Martin*, 961 F.2d 269 (D.C. Cir. 1992). Those following developments in this area also should note that the Associated Builders and Contractors (an industry trade association) has filed suit against DOL for its alleged failure to enforce the helper regulations. *See Construction Contractor Group Sues DOL for Failing to Enforce Davis-Bacon Helper Regs,* 66 Fed. Cont. Rep. (BNA) 35 (July 8, 1996).

[481] *See* Memorandum, Assistant Secretary of the Army (Research, Development & Acquisition), subject: MOU Between DOL and DA to Obtain Wage Determinations Under the Service Contract Act (16 May 1996).

however, to submit an SF 98 *after* downloading the wage determination. Detailed implementing instructions and training packages are also available on the Internet.[482]

3. Executive Orders Continue to Make News.

a. Striker Replacements. Last year, we reported on the issuance of Executive Order (EO) 12,954[483] which permitted the Secretary of Labor to debar contractors who hired permanent replacements for lawfully striking workers.[484] This year the Court of Appeals for the District of Columbia Circuit struck down the EO,[485] finding that it was preempted by the National Labor Relations Act[486] which guarantees employers the right to hire permanent replacements. The final chapter in the battle over this EO apparently came to a close in May, when the court denied the government's request for a rehearing *en banc*.[487]

b. Illegal Aliens. This year President Clinton issued EO 12,989.[488] The EO is aimed at providing additional enforcement mechanisms for the Immigration and Naturalization Act's (INA) prohibitions on employment of illegal aliens.[489] Under the EO, when the Attorney General determines that a contractor is not in compliance with the INA's employment provisions, she must forward that determination to all agencies with which the contractor has contracts. Those agencies must then consider the contractor for debarment. The FAR Council has issued an interim rule implementing the EO[490] which adds receipt of the Attorney General's determination to the list of causes for debarment at FAR 9.406-2. This new provision also states that "[t]he Attorney General's determination is not reviewable in the debarment proceedings."[491]

4. Government Must Tell What it Knows About Wage Determinations. Midland Maintenance, Inc.[492] shows just how convoluted Service Contract Act (SCA) wage determination issues can become. The Army Corps of Engineers (COE) awarded a series of contracts for maintenance at parks to Midland Maintenance, Inc. (Midland). The work under the contract was covered by the SCA and the applicable wage determinations were included in the contract. Most of Midland's employees were classified as laborers and janitors, and Midland paid them the applicable SCA wage rates. However, some of these employees had to drive a pickup truck from place to place in the performance of their duties.[493] Unbeknownst to Midland (at least in the board's view), the COE and DOL had taken the position that these employees must be paid the SCA wage rate for truck drivers while actually driving the pickup truck. When Midland learned of this requirement after award, it filed a claim for the increased costs of paying truck driver wages. The board sustained Midland's appeal on superior knowledge and mistake in bid theories. Particularly important to the board was the fact that the COE had issued a letter to its field offices directing them to inform contractors of DOL's position regarding truck drivers, but the information was never provided to Midland until after award of the contracts.

5. Strict Liability for Incorrectly Interpreting Wage Determinations? Metrica, Inc.[494] involved a contract for automatic data

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[482] Activities that have not yet done so can access these materials, and the wage determinations, at <http://www.sarda.army.mil>.

[483] Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995).

[484] *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 40.

[485] Chamber of Commerce of the United States v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

[486] 29 U.S.C. §§ 141-187 (1988).

[487] Chamber of Commerce of the United States v. Reich, 83 F.3d 442 (D.C. Cir. 1996). *See Administration Will Not Seek Review of Executive Order on Striker Replacement*, 66 Fed. Cont. Rep. (BNA) 242 (Sept. 16, 1996).

[488] Economy and Efficiency in Government Procurement Through Compliance With Certain Immigration and Naturalization Act Provisions, Exec. Order No. 12,989, 61 Fed. Reg. 6091 (1996).

[489] *See* 8 U.S.C. §§ 1342a(a)(1)(A), 1342a(a)(2).

[490] 61 Fed. Reg. 41,472 (1996).

[491] *Id.*

[492] ENG BCA No. 6080, 96-2 BCA ¶ 28,302.

[493] For example, Midland employees would drive a pickup truck from trash can to trash can to collect garbage or from latrine to latrine to clean the facility.

[494] DOTBCA No. 2974, 96-2 BCA ¶ 28,409.

processing analysis and data entry services. The contract included the applicable SCA wage determinations. Although the wage determinations did not require a shift differential for night work, the contractor and the government agreed that employees working the night shift would receive a 3% differential. Upon exercise of the second option under the contract, a new wage determination became effective. This wage determination included a 10% differential in an endnote; however, both parties missed the fact that this differential applied only to a category of workers not involved in the contract. The parties incorporated the wage determination into the contract by modification and the contractor paid its employees the 10% differential for several months before the government realized that the differential did not apply. Upon discovering this fact, the government requested that the contractor agree to a modification retroactively reducing the differential to 3%. The contractor refused and the government unilaterally "reformed" the contract relying on a mutual mistake theory. The board sustained the contractor's appeal, finding that the government could not rely on mutual mistake to reform the contract, because regulations implementing the SCA "assign the risk of a mistake in applying a wage determination to the [g]overnment."[495] In reaching its decision, the board relied on the following language: "*[c]ontracting agencies* are responsible for insuring that only the appropriate wage determination(s) are incorporated in bid contract specifications and *for designating specifically the work to which such wage determinations will apply.*"[496] The board found that this language puts the responsibility on the government to correctly apply wage determinations. Therefore, according to the board, the government was liable for the parties' "mutual misinterpretation of the wage determination." Practitioners should expect to see this case cited by a contractor any time the application of a wage determination is in dispute.

6. Walsh-Healey Requirements. In a case which illustrates the dogged persistence of government contractors, the Federal Circuit upheld the Walsh-Healey Public Contracts Act (PCA)[497] regulations in effect prior to FASA.[498] Ernest L. Levine (Levine) wished to be included on a GSA schedule contract for the supply of mattresses to the federal government. GSA rejected Levine's application because he did not meet the manufacturer or regular dealer requirements of the PCA. After exhausting his administrative remedies, Levine filed suit in district court challenging the determination that he was not a regular dealer.[499] The district court granted the government's motion for summary judgment finding that Levine was not a regular dealer because he did not maintain an inventory of mattresses nor did he sell to customers other than government agencies.[500] Undaunted, Levine appealed to the Seventh Circuit and, after some procedural wrangling, ended up having his appeal heard by the Federal Circuit. The court denied the appeal finding the determination that Levine was not a regular dealer to be reasonable. The court closed with the following:

> Levine's complaint regarding the denial of 'regular dealer' certification has now been reviewed by the GSA, SBA, Department of Labor, the United States District Court for the Northern District of Illinois, the Seventh Circuit, and this court. His free-swinging allegations of 'vendettas' waged by 'bureaucrats' and inflammatory comparisons to Nazi Germany do not change the fact that he has failed to meet the requirements of regulations properly issued under authorizing legislation. *He who would do business with the government must meet the government's requirements.*[501]

Practitioners should note that FASA amended the PCA to eliminate the requirement that contractors be manufacturers or regular dealers of the items to be furnished under the contract.[502] DOL issued a final rule implementing this change on 5 August 1996 with an effective date of 4 September 1996.[503]

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[495] *Id.* at 141,857.

[496] *Id., quoting* 29 C.F.R. § 1.6(b) (1995).

[497] 41 U.S.C. §§ 35-45 (1988).

[498] Ernest L. Levine v. United States, No. 95-1399, 1996 U.S. App. LEXIS 971 (Fed. Cir. Jan. 19, 1996) (nonprecedential).

[499] *Id.* at *4.

[500] *Id.* The court noted, "of the 579 mattresses sold by Levine, the district court found that he sold 577 to a government agency, one to a furniture store, and another one to his nephew."

[501] *Id.* at *7-*8 (emphasis added).

[502] *See* FASA, *supra* note 321, § 7201.

[503] 61 Fed. Reg. 40,714 (1996). In the text accompanying the rule, DOL states: "[u]nder the PCA as amended, an eligible bidder includes, in addition to a manufacturer or regular dealer, any supplier or distributor of the materials, supplies, articles, or equipment to be manufactured or supplied under the contract." *Id.* Perhaps Mr. Levine will try again?

K. Bonds and Sureties.

1. GAO Will Not Refer Defaulted Miller Act Bond Claims to Congress Under the Meritorious Claims Act. In *Brad J. Hutchinson*,[504] subcontractors on a defaulted construction contract suffered a loss when the prime contractor's sureties defaulted on their Miller Act payment bonds.[505] The subcontractors requested that GAO refer their claims to Congress under the Meritorious Claims Act.[506] Although GAO had recently referred similar cases to Congress for payment, GAO decided that statutory remedial language was the appropriate vehicle for correcting recurring problems such as defaulting sureties. GAO felt that repeated referrals of subcontractor claims would establish a policy contravening the Miller Act provisions that surety bonds are the sole source of funds for subcontractor payment claims. GAO further noted that the types of cases that it refers to Congress generally involve equitable circumstances of an unusual nature.

2. Miller Act Bond Waivers Only Valid Prior to Contract Award. Defense Federal Acquisition Regulation Supplement (DFARS) 219.808-1 authorizes the DOD to waive Miller Act bond requirements for 8(a) contractors. This discretionary authority is valid only if the contracting officer grants the waiver prior to contract award. If the bond requirements are not waived prior to contract award, and the contractor fails to provide the required bonds, the contracting officer is authorized to terminate the contract for default.[507]

3. Final FAR Rule on Performance and Payment Bonds. The FAR Council issued a final rule on 26 July 1996 which made several changes to performance and payment bond requirements.[508] Contracting officers may waive a bid guarantee (when a performance bond or a performance and payment bond is required) if the contracting officer determines a bid guarantee is not in the best interests of the government for that acquisition. The rule specifies overseas construction, emergency acquisitions, and sole source contracts as examples of contracts for which it would be in the best interests of the government to waive the bid guarantee requirement.[509] Performance and payment bonds are required only if the contract price exceeds $100,000.[510]

4. Irrevocable Letters of Credit and Alternatives to Miller Act Bonds. On 20 June 1996, the FAR Council agreed to an interim rule that gives alternate protections to the government for contracts less than $100,000.[511] The interim rule amends FAR Parts 28 and 52 to provide for the use of irrevocable letters of credit as an alternative to corporate or individual sureties as security for these construction contracts and provides alternatives to Miller Act bonds for contracts valued between $25,000 and $100,000.[512] For contracts within this range, the contracting officer shall select two or more payment protections and place these options in the solicitation. In its bid, the contractor must select one of the two options. Particular consideration should be given to the inclusion of an irrevocable letter of credit as one of the alternatives. The alternatives also include a payment bond, a

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[504] B-230871, June 19, 1996, 1996 WL 335233 (C.G.).

[505] The Miller Act, 40 U.S.C. §§ 270a-270f, requires performance and payment bonds for any construction contract greater than $100,000. The requirement also applies if construction line items exceed $100,000, TLC Servs., Inc., B-254972, Mar. 30, 1994, 94-1 CPD ¶ 235. A performance bond ensures that the contractor fulfills its obligations after contract award. The amount of the bond must equal 100% of the contract price. FAR 28.102-2. Payment bonds protect the subcontractors. The amount of these bonds are dependent on the total contract price ($1 million or less, must be 50% of the contract price; $5 million or less, must be equal to 40% of the contract price; and greater than $5 million, must be $2.5 million). FAR 28.102. Failure to provide acceptable bonds justifies default termination. Pacific Sunset Builders, Inc., ASBCA No. 39312, 93-3 BCA ¶ 25,923.

[506] 31 U.S.C. § 3702(d). Under the Meritorious Claims Act, GAO may refer to Congress a claim that deserves consideration because of a substantial legal or equitable reasons but would not otherwise be payable.

[507] BellincCo, Inc., ASBCA No. 47307, 96-1 BCA ¶ 28,089.

[508] FAC 91-027, 61 Fed. Reg. 42649 (1996) (effective Sep. 24, 1996).

[509] Three new standard clauses, FAR 52.228-1, Bid Guarantee, FAR 52.228-15, Performance and Payment Bonds—Construction, and FAR 52.228-16, Performance and Payment Bonds—Other Than Construction, and a new Standard Form 1418, Performance and Payment Bonds—Other Than Construction were added.

[510] Prior to the implementation of § 4104(b)(1) of FASA, Miller Act performance and payment bonds were required for all contracts in excess of $25,000.

[511] FAC 90-39, 61 Fed. Reg. 31651 (1996) (effective 20 June 1996, implementing OFPP Policy Letter 91-4 and FASA § 4104(b), *supra* note 321).

[512] Contracts within this range are not subject to the Miller Act performance and payment bond requirements.

tripartite escrow agreement,[513] certificates of deposit, and the types of security listed in FAR 28.204-1 and 28.204-2.[514]

IV. CONTRACT PERFORMANCE.

A. Contract Interpretation.

1. Defective Specifications. In *JGB Enterprises, Inc.*[515] (JGB) the government issued a unilateral purchase order (PO) on 8 November 1993 for 79 screen platform racks at $24,983.75. Over two years later, after delivering no screens, the contractor filed a claim for $60,475.95. During the pendency of the contract, the contractor complained to the contracting officer three times about incomplete, illegible, and unclear drawings and technical data. Each complaint concerned a different part of the screen and each complaint was addressed by the contracting officer. On 23 September 1994, without notice to the contracting officer, JGB wrote to Headquarters, U.S. Army Armament, Munitions and Chemical Command, Armament Research, Development and Engineering Center in Watervliet, NY (Watervliet), identifying various problems with the drawings. The first the contracting officer heard of these "problems" was when he was contacted by Watervliet! When the contracting officer issued the third modification, presumably resolving the specification problems, JGB responded with a written complaint about the new delivery date. In the same letter, JGB notified the contracting officer (for the first time) that it had allegedly incurred research and development costs in attempting to resolve the aforementioned technical problems. The board stated that a contractor has the right to recover under the theory of an implied warranty of suitability of specifications based on the government's furnishing of defective specifications.[516] This is not true, however, where the contractor failed to give timely notice that it was experiencing problems but elected to work out the problem without the assistance of the government.[517] The board stated that a contractor who acts as a "volunteer" cannot be paid for extra work which is furnished on its own initiative.[518]

2. Ambiguous Specifications.

a. Diagnosis of "Contra Proferentem" Ruled Out. In *National Medical Staffing, Inc.*[519] (NMS) the Air Force issued a solicitation for sealed bids to furnish three physicians and three nurses to perform family practice services at Fairchild Air Force Base, located near Spokane, Washington. The Statement of Work (SOW) required "family practice physicians." It included the requirement that, "[t]he family practice physicians shall have completed a residency in family practice acceptable to the Surgeon General, HQ USAF, or shall be board certified by the American Board of Family Practice (ABFP)."[520] NMS had only one previous experience with a contract for the supply of physicians; that was with Madigan Army Medical Center (MAMC) at Fort Lewis, Washington. The MAMC contract, however, had been for "general medical physician services." That contract had only required an "acceptable residency" in *any* of the primary care specialties.

After the Air Force rejected the first NMS doctor, the conflicting interpretations came to light. The doctor had a year of residency in internal medicine, one of the primary care specialties. The Air Force informed NMS that for the purposes of the instant contract, the *only* "acceptable residency" was one in family practice. NMS maintained that the Air Force should have accepted physicians who were certified by the ABFP, but whose certification was made pursuant to a "grandfather" clause. The grandfather clause allowed qualification based on completion of a residency in any primary care specialty if the residency was completed prior to 1969. Prior to that date, family practice was not offered as a specialty. The contracting officer terminated NMS for default when it failed to provide physicians who met the contract specifications.

In sustaining the default termination, the board stated that while the contract's failure to address the "grandfather clause" in the ABFP's credentialing procedures may have been a latent ambiguity; the doctrine of *contra proferentem* did not apply, be-

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[513] In a tripartite escrow agreement, the prime contractor establishes an escrow account in a federally insured financial institution. The contractor then enters into an agreement with the financial institution, an escrow agent, and all of the suppliers of labor and material. The government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement.

[514] These include pledging contractor assets, certified or cashier's checks, bank drafts, money orders or currency.

[515] ASBA No. 49,493, Aug. 20, 1996, 96-2 BCA ¶ 28,498.

[516] *Id.* at 142,309, *citing* Radionics, Inc., ASBCA No. 22727, 81-1 BCA ¶ 15,011.

[517] *Id., citing* Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054.

[518] *Id., citing* West End Welding and Fabricating, Inc., ASBCA No. 40423, 96-1 BCA ¶ 28,151.

[519] ASBCA No. 45046, 96-2 BCA ¶ 28,483.

[520] *Id.* at 142,249.

cause it was clear from the record that NMS was ignorant of the provision at the time of bidding. At the time of bidding NMS' interpretation was based on its previous experience with contract physicians. It was only during performance that NMS developed the alternate interpretation, after having discussions with applicants who qualified under the grandfather provision. Under the doctrine of *contra proferentem* the contractor must have relied upon the interpretation at time of bidding, not merely during performance.[521]

b. One Million Evaluations Per Minute? In *Grumman Data Systems v. Dalton*[522] (GDS), the court analyzed the rules of contract interpretation. It concluded that GDS failed to prove that its interpretation of an admittedly ambiguous requirement was correct under the rules of *contra proferentem.*[523] In a best value competition for computer-aided design, manufacturing, and engineering technology, GDS argued that a computing speed requirement of "one million evaluations per minute" should be more narrowly defined. The government argued a more flexible interpretation was intended by the contract.[524] The court upheld the GSBCA's determination that the "one million evaluations per minute" requirement was susceptible to more than one reasonable interpretation[525] and, therefore, was ambiguous.[526] The court further analyzed the ambiguity as "patent."[527] In ultimately holding against GDS the court concluded that under the rules of *contra proferentem*, the protestor is obligated to seek clarification of any patent ambiguity before it can successfully support its interpretation of that ambiguity.[528] In this case, the court stated, "[t]here is no dispute that GDS did not seek clarification of the provision before the end of the procurement process."[529]

3. Allocation of Risk. In *Bart Associates, Inc.*[530] (BAI), the contractor contracted to build a 105-mile electrical transmission line for the Department of Energy's Western Area Power Administration (WAPA). The specifications provided for the optional use of either porcelain or polymer insulators on the line. The only stated limitation was that the polymer insulators had to be equal in mechanical strength and electrical characteristics to the porcelain insulators. BAI chose to use polymer insulators, which are easier to install. After the WAPA had accepted the work, a number of the polymer insulators failed. WAPA claimed that the polymer insulators contained "latent defects" that obviated acceptance. WAPA sought replacement costs. WAPA claimed that the specifications were performance specifications; therefore, the contractor was liable for the failure of the insulators. BAI contended that the specifications were design type and were warranted by the WAPA to produce an acceptable result.

The board held that characterizing the specifications as to type, while a common risk analysis shorthand, does not always provide all the answers. WAPA offered two acceptable options to the contractor—porcelain or polymer insulators. The contractor was entitled to assume that either of these specified methods would succeed. BAI complied with the only stated requirements for polymer insulators, i.e., that the insulators be of porcelain equivalent mechanical strength and electrical characteristics. The board noted that all the tests in the contract were designed for porcelain insulators and were unsuited for polymer ones. Furthermore, WAPA knew that polymer insulators were considered somewhat experimental, and had provided specific tests for them in previous contracts. The board stated that "specifications do not stand alone."[531] The government had drafted the contract in such a way as to assume the risk of both types of insulators. Offering the option of polymer insulators, and designating specific, inadequate requirements for them in the specifications made WAPA responsible for their suitability. When the specifications proved defective, WAPA bore the risk.

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[521] *Id.* at 142,257, *citing* Fruin-Colnon Corp. v. United States, 912 F.2d 1426, 1429 (Fed. Cir. 1990).

[522] 88 F.3d 990 (Fed. Cir. 1996).

[523] *Id.* at 998.

[524] *Id.* at 996.

[525] *Id.* at 997, *citing* Grumman Data Sys. Corp. v. Dep't of the Navy, GSBCA No. 12912-P, 95-1 BCA ¶ 27,314.

[526] *Id.*

[527] *Id.* at 998.

[528] *Id.* at 998, *citing* Grumman Data Systems v. Widnall, 15 F.3d 1044, 1047 (Fed. Cir. 1994) and 48 C.F.R. § 6101.5(b)(3)(i) (1994).

[529] *Id.* at 998.

[530] EBCA No. 9211144, 96-2 BCA ¶ 28,479.

[531] *Id.* at 142,235-3.

4. Contract Interpretation. In *Bay Ship & Yacht Company,*[532] (BS&YC) the Maritime Administration (MARAD) solicited sealed bids for the repair of the vessel, the Golden Bear. The contractor, BS&YC claimed $34,650 for the costs incurred in removing, allegedly unanticipated asbestos from the "port and starboard"[533] boiler floor refractories. MARAD denied the claim, relying on Article 44 of the Maritime Administration Master Lump Sum Repair Agreement (MLSRA). That provision put the contractor on notice that MARAD vessels often contain hazardous materials including asbestos. Article 44 further specified that the contractor would be liable for handling such material whether or not it is identified in the solicitation, and that MARAD would not allow any additional post-award charges for handling hazardous material in specified work. The specifications listed eighteen specific locations from which asbestos was to be removed.[534] The boiler refractories were neither on the list, nor was the list qualified in any way. The specifications further provided the dimensions of the asbestos to be removed and specified that the areas requiring asbestos removal would be marked in red fluorescent paint.[535] MARAD provided for a site inspection. The board held that the rules of contract interpretation required reading the contract as a whole, giving reasonable meaning to all of its terms.[536] In that the contract listed specific areas of asbestos in considerable detail without any indication that the list was other than all inclusive, the doctrine of *expressio unis est exclusio alterius* required that the general provisions of Article 44 be interpreted as requiring the contractor to remove unlisted asbestos only when it knew or should have known of its presence at time of bidding. The fact that the asbestos in question was under nine inches of slag and not visible or accessible for testing prior to contract award prevented the general language of Article 44 from shifting the liability for its removal to the contractor.

B. Contract Changes.

1. Sovereign Acts.

a. Supreme Court Affirms Winstar.[537] Last year the Court of Appeals for the Federal Circuit (CAFC) upheld claims by plaintiff savings and loan associations asserting that the federal government's passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) placed the Federal Home Loan Bank Board in breach of contract.[538] In affirming the judgment, the Court held that the Sovereign Acts defense did not apply in the case of FIRREA, because the statute had the purpose of eliminating the very accounting "gimmicks"[539] that the purchasers had been promised, and acted to abrogate the essential bargain of the contract. The Court also took note of the legislative history which indicated that Congress was well aware of the effect FIRREA would have on the government's contractual obligations.

b. "Slick" Legislation Puts Government in Breach of Contract. The Court of Federal Claims (COFC), relying on the Federal Circuit's decision in *Winstar*, ruled that the government is liable for breach of contract where subsequent legislation prohibited the Department of the Interior (DOI) from acting on applications for approval of exploration and development plans submitted by holders of federal oil and gas leases.[540] The Outer Continental Shelf Lands Act (OCSLA) authorized the DOI to sell leases permitting commercial exploration on the OCS, through a competitive bidding system.[541] The OCSLA required the lessees to obtain approval from DOI and any involved state and federal agencies before acting under the leases.[542]

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[532] No. 2913, Mar. 14, 1996, 96-1 BCA ¶ 28,236.

[533] Left and right.

[534] 96-1 BCA ¶ 28,236 at 140,989.

[535] *Id.*

[536] 96-1 BCA ¶ 28,236, at 140,99, *citing* Hol-gar Mfg. Corp. v. United States, 169 Ct. Cl. 384, 395 (1965).

[537] United States v. Winstar Corporation, 116 S. Ct. 2432 (1996).

[538] *See 1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 45.

[539] 116 S. Ct. at 2439.

[540] Conoco Inc. v. United States, 35 Fed. Cl. 309 (1996).

[541] *Id.* at 316.

[542] Prior to commencing actual exploration activity, each lessee had to submit for approval to DOI a plan of exploration (POE) containing a schedule of anticipated exploration activities, and other pertinent details. The Secretary of the DOI was required to approve the plan within thirty days if the requirements of the OSCLA and its implementing regulations were met. However, if the Secretary determines that the proposed activity would likely cause serious harm or damage to life, property, mineral deposits, the national security or defense, or the marine, coastal, or human environment, the Secretary would disapprove the plan. *Id.* at 317 n.4.

In August 1990, as a result of enhanced environmental concerns, Congress enacted the Outer Banks Protection Act (OBPA) as part of a more comprehensive oil spill legislative package.[543] Without specifically amending the OCSLA, the OBPA prohibited the DOI from approving any proposals or otherwise permitting any exploration, production, or development of the Outer Continental Shelf. The lessees alleged the government breached its contract, and sued claiming restitution for the money paid in bonuses and annual rental payments. In granting summary judgment on the breach of contract claims, the court held that, while the lessees had no guarantee that their plan of exploration (POE) would be approved, there is no doubt that the government was contractually obligated to at least consider them. Any contrary interpretation would render the lease bargain illusory and subject to unilateral forfeiture.[544] Concerning the government's "sovereign acts" defense, the court found that the OBPA specifically targeted plaintiffs and prevented them from exercising their lease rights. The Court stated:

> While the OBPA may have been the result of developing environmental concerns, it was not an act of public, general applicability. Further, the OBPA affected the public welfare incidentally at most. The act was 'principally and primarily' enacted to restrict the Secretary's ability to act on plaintiff's POEs, thus binding his hands.[545]

The Court went on to say that, "the [sovereign acts] doctrine . . . does not relieve the government from liability where it has specially undertaken to perform the act from which it later seeks to be excused."[546]

2. Warranty of Specifications. During the Vietnam Conflict, Hercules Inc. (Hercules) and Thompson Co. (Thompson) produced and sold Agent Orange[547] to the DOD. The contract provided detailed specifications for the formula the contractors were to use. Hercules settled a class action suit for injuries allegedly caused by exposure to the chemical.[548] Hercules and Thompson then filed suit in federal district court to require the government to pay their part of the settlement. The suit was based on the tort theories of contribution and noncontractual indemnification as well as the contract theory of breach of implied warranty of specifications. The court dismissed[549] and the Second Circuit affirmed[550] on the basis of the government contractor defense.[551]

Hercules and Thompson filed suit in the Claims Court which granted summary judgment in favor of the government.[552] They appealed and the Federal Circuit affirmed the Claims Court's decision. The court held that the contractors could have availed themselves of the government contractor defense, shielding them from liability, but by entering into the settlement, they failed to do so. By settling, they assumed liability for which the government was not legally vulnerable.

The contractors appealed to the Supreme Court which granted *certiorari*. The Court upheld the lower court decision.[553] The court stated that the jurisdiction of the COFC to hear claims against the government under the Tucker Act[554] extends only to

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[543] *Id.* at 318.

[544] *Id.* at 331.

[545] *Id.* at 336.

[546] *Id.* at 336, *citing* Freedman v. United States, 162 Ct.Cl. 390, 402 (1963).

[547] Agent Orange is a herbicide which was used as a defoliant. In the 1970s, Vietnam Veterans and their families filed lawsuits against the Agent Orange producers. The allegations included that exposure to dioxin, a toxic byproduct found in the herbicide, had caused great health problems. *Product Liability, Agent Orange*, 65 Fed. Cont. Rep. (BNA) (Mar. 11, 1996).

[548] Nearly 300 plaintiffs opted out of the class action suit and proceeded with their own claims. After the class action settled, the defendant manufacturers were granted summary judgment. The district court found that the plaintiffs failed to present credible evidence of a causal connection between the veterans' exposure and their injuries and the government contractor defense barred liability. Agent Orange Product Liability Litigation, 611 F.Supp 1223 (E.D.N.Y. 1985). The Court of Appeals affirmed on the basis of the government contractor defense. Agent Orange Product Liability Litigation, 818 F.2d 187 (D. Ariz. 1987).

[549] "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985).

[550] "Agent Orange" Product Liability Litigation, 818 F.2d 187 (D. Ariz. 1987).

[551] The government contractor defense shields contractors from tort liability for products manufactured for the government in accordance with government specifications, if the contractor warned the government about any hazards known to the contractor but not the government. Boyle v. U.S., 487 U. S. 500 (1988).

[552] Hercules v. United States, 25 Cl. Ct. 616 (1992); Thompson v. United States, 26 Cl. Ct. 17 (1992).

[553] Hercules v. United States, 116 S. Ct. 981 (1996).

[554] 28 U.S.C. § 1491.

contracts, either express or implied-in-fact, and not to claims on contracts implied-in-law. For the contractors to prevail, they must establish that, at the time of contract award, there was an implied agreement between the parties to provide indemnification. The contractor had immunity, not indemnity. As to the implied warranty of specifications theory, the Court concluded:

> Neither an implied contractual warranty of specifications nor United States v. Spearin, [citations omitted] the seminal case recognizing a cause of action for breach of such a warranty, extends so far as to render the United States responsible for costs incurred in defending and settling the veterans' tort claims. Where, as here, the Government provides specifications directing how a contract is to be performed, it is logical to infer that the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. However, this inference does not support a further inference that would extend the warranty beyond performance to third-party claims against the contractor. Thus the Spearin claims made by petitioners do not extend to post-performance third-party costs as a matter of law.[555]

The government met the implied contractual warranty of specifications for Agent Orange when the contractor was able to follow the government furnished design and produce a deadly toxin that performed as anticipated.

3. Constructive Changes. In *International Maintenance Resources, Inc.*,[556] (IMR), the contractor contracted to provide grass cutting services at Fort Leonard Wood, Missouri. When bids were opened, IMR's bid was almost $6,000,000 less than the highest bid and approximately 25% lower than the next lowest bid.[557] IMR responded in the affirmative to the contracting officer's request for confirmation of bid price. Almost immediately IMR got behind in completing delivery orders, often cutting barely one-half of the ordered acreage.[558] The contracting officer held a meeting to discuss IMR's deficiencies. IMR stated it was in the process of hiring additional workers and acquiring additional equipment, even though it "claimed it had enough workers and equipment to perform the contract."[559] When IMR continued to fall behind, it blamed the delays on excessive rainfall despite the fact the record showed rainfall to be roughly average for that time of year. IMR later complained about the amount of debris littering the gunnery ranges, and claimed it was unable to safely use its large mowers because of the "telephone poles, . . . hand grenade casings, and empty ammunition shells"[560] hidden in the grass. After being informed that the government did not intend to exercise its option, IMR filed a claim for constructive acceleration costs and another claim based on the government's "superior knowledge" of the gunnery range conditions. In denying both claims the board stated that when IMR got behind in completing delivery orders it voluntarily stated its intent to hire more crews and acquire more equipment. This was not done in response to prompting from the government, and there was no evidence to show that IMR ever informed the government that it was accelerating its efforts in an attempt to complete performance. The board stated that IMR had failed to establish the elements required for a constructive acceleration claim.[561] Additionally, the board stated that IMR failed to conduct a reasonable site inspection. "As a result, appellant's failure to provide itself of necessary knowledge of some of the conditions for performing the contract of which it now complains, compels us to deny this claim under a superior knowledge theory."[562]

C. Value Engineering Change Proposals (VECPs).

1. Final Score: Air Force - 5, Bianchi - 2! Last year it appeared that the CAFC, in an unpublished opinion, had written the final chapter in a series of long running disputes over five VECPs.[563] Proving once again, however, that persistence pays

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[555] 116 S. Ct. at 986.

[556] ASBCA No. 48157, 96-2 BCA 28,436.

[557] *Id.* at 142,050.

[558] *Id.* at 142,052.

[559] *Id.* at 142,051.

[560] *Id.* at 142,053.

[561] For a discussion of the elements, *See* Titan Pacific Construction Corp., ASBCA No. 24148, 87-1 BCA ¶ 19,626.

[562] *Id.* at 142,055.

[563] *See 1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996 at 47.

off, Bianchi finally succeeded in winning an award of $12,362.58 plus interest for one of two additional VECPs it had proposed under the same contracts.[564] Bianchi claimed that during its contract to manufacture and ship coats for the Air Force, it had submitted two VECPs suggesting more economical ways to ship the coats. The government rejected the VECPs. However, Bianchi subsequently learned that the government had accepted a similar VECP proposed by a competitor. Bianchi then claimed royalties for its VECPs. On appeal the CAFC held that, because the ASBCA had restricted its hearing only to quantum, Bianchi had been denied the opportunity to present evidence on its allegations that the government had rejected its VECPs in bad faith, and that the government had constructively accepted its VECPs before the end of the contractual relationship.[565] On remand, the board determined that because Bianchi had not invoiced the government for its final shipment of 670 women's pantsuit coats, and had not received final payment, the contractual relationship still existed.[566] Therefore, the board found, ten months after the shipment, the government's acceptance of the identical VECP of another contractor constituted a constructive acceptance of Bianchi's original VECP.[567] The board limited Bianchi's recovery to the same amount paid to the competitor, since the constructive acceptance took effect at the time the subsequent proposal was accepted and both contracts called for the same catchment period.[568]

2. "Tautologically Correct" Result Stiffs Innovative Contractor. In a case highlighting one of the challenges of joint-service procurement programs, a contractor lost out on three years worth of royalty payments.[569] The Navy issued a contract for Fuse Demolition Kits (FDKs). The Navy was responsible for the technical data package (TDP), and the procurement of the FDK which was a component of a mine clearing charge used by both the Army and the Marines. The contractor submitted four VECPs which were accepted and incorporated into a newly designated FDK. The U.S. Army Armament, Munitions, and Chemical Command (AMCCOM) was the designated "single manager" for all DOD mine clearing charges, and had participated in the evaluation and testing of the newly configured FDK. Later, AMCCOM took over the TDP and procurement responsibility for the FDK, and issued several contracts for mine clearing charges which incorporated the newly configured FDK. When the contractor filed for its royalty payments based on those new sales, AMCCOM denied the request. AMCCOM claimed it was not the "successor contracting office" as defined by the regulation in effect at the time and therefore was not liable for the VECP award.[570]

The ASBCA held that a transfer of procurement authority was necessary before a successor contracting office could be established. As the designated single manager for the end item incorporating the FDK, AMCCOM had always had that authority, therefore, no transfer had occurred.[571] AMCCOM could not, stated the ASBCA, "succeed itself."[572] The contractor argued that, if that were the case, then AMCCOM's role in developing, and managing the FDK made it the actual contracting office, which would also make AMCCOM liable for the payments. The board was equally certain, however, that while AMCCOM was

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[564] M. Bianchi of California, ASBCA No. 37029, 96-2 BCA 28,410 (this appeal concerned Bianchi's VECP suggesting an increase in the size of the box used to ship women's pantsuit coats to accommodate more coats per box and its VECP suggesting simply filling the same size box with twice as many coats).

[565] M. Bianchi v. Secretary of Defense, 31 F.3d 1163, 1169 (Fed. Cir. 1994).

[566] 96-2 BCA 28,410 at 141,861.

[567] *Id.*

[568] *Id.* at 141,863.

[569] Ordnance Devices, Inc., ASBCA No. 42709, 96-2 BCA 28,437.

[570] The instant case was decided under the authority of the Armed Services Procurement Regulations (ASPR) 1-706.1:

> Sharing of Acquisition Savings (a) The sharing base for acquisition savings is the number of affected end items on contracts of the contracting office which approved the VECP or its successor. The Head of the Contracting Activity (HA) may extend the sharing base from the contracting office throughout the activity if the HA determines in writing that it would be more equitable or would significantly increase the contractor's incentive. The sharing base may be further expanded by the Secretary concerned. However, FAR Part 48.001 currently defines "Acquisition savings" as "savings resulting from the application of a value engineering change proposal (VECP) to contracts awarded by the same contracting office or *its successor* for essentially the same unit." [emphasis added].

[571] *Id.* at 142,058.

[572] *Id.*

not a successor, the Navy was definitely the contracting office through which the VECP configured fuse had been purchased. This left the contractor without recourse against either service.

The dissenting opinion responded that while the majority's opinion that AMCCOM cannot "succeed itself" is tautologically[573] correct, it is based on a flawed premise since the board admits that the Navy was the contracting agency that awarded the original contract. The dissent found unpersuasive the determination that the designation of a successor contracting office required a transfer of procurement authority.[574]

D. Pricing of Adjustments.

1. Standby Test under Eichleay Formula[575] Does Not Require Idle Contractor's Workforce. In *Altmayer v. Johnson*,[576] the CAFC stressed that the standby test for recovery under *Eichleay* does not require that the contractor's work force be idle on the instant contract.[577] The GSA leased space in a building owned by Altmayer for a period of ten years. Prior to lease commencement Altmayer was required to "build out" the space which was to be used by the local United States Attorney. Altmayer subcontracted the renovation work to Haas Construction, Inc. In August 1992, Haas established a critical path for the work.

An important step on the critical path was the GSA's carpet selection, because the manufacturer of the carpet required six to eight week notice prior to delivery. An equally important step was the selection of wood trim for the space. The government delayed construction on the project for an extended, uncertain period of time due to its indecision on the wood trim and carpet. Notwithstanding the GSA delay, Haas was able to perform some minor work on the contract.

Altmayer submitted a certified claim to the contracting officer for amounts due as a result of the delay. On 30 August 1993, the contracting officer denied the claim in its entirety. Altmayer appealed that decision to the GSBCA. The GSBCA found that the government delay was the sole reason for the contract's late completion. The board found that Altmayer was entitled to direct costs associated with the delay, but denied recovery of extended home office overhead calculated under *Eichleay*. In reversing the board's decision, the CAFC held that the linchpin of entitlement to home office overhead costs under the *Eichleay* formula is uncertainty of contract duration caused by government delay or disruption. The contractor's recovery under the *Eichleay* formula is not precluded by a contractor's continued performance of minor tasks through the period of government delay.[578] The CAFC stressed that the standby test does not require the contractor's work force be idle.[579]

2. CAFC reverses ASBCA in Sippial Electric & Construction Company, Inc. v. Widnall,[580] *(Sippial)* In *Sippial*, the Air Force ordered Sippial to suspend all work on its two construction contracts.[581] Once the suspensions were lifted, the contractor finished work under the contracts. Sippial requested delay damages calculated in accordance with the *Eichleay* formula. Sippial claims were audited by DCAA which questioned significant portions of each claim. The owner of Sippial filed a *pro se* appeal to the ASBCA.

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[573] Tautology: 1. Needless repetition of an idea in different words, as in "widow woman." RANDOM HOUSE COLLEGE DICTIONARY (Revised Edition 1982).

[574] In a previous decision, the board had concluded that this same appellant was entitled to VECP payments under this contract—but only for FDK purchases that were made for the Navy; and not for purchases of the same redesigned FDK made for the benefit of the Army. Ordinance Devices Inc., ASBCA No.42709, 93-2 BCA ¶ 25,794.

[575] *See* Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688 (1960), *aff'd on recon.*, 61-1 BCA ¶ 2894 (1961).

[576] 79 F.3d 1129 (Fed. Cir. 1996).

[577] *Id.* at 1132. In order to be entitled to damages under the Eichleay formula, the contractor must establish (1) a government-caused delay; (2) that it was on "standby"; and (3) that it was unable to take on other work.

[578] In *Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230, 235 (D.C. Cir. 1991), the D.C. Circuit rejected the argument that the *Eichleay* formula is only applicable to contract suspensions as opposed to contract extensions. The court stated, "It may be true that when a project is extended (not suspended), the work will be ongoing and thus income from the project will continue to be applied to home office overhead costs. On the other hand, when work is extended, the project income will be spread over a longer period of time and, consequently, less of the income will be allocated to home office overhead costs. Thus, an extended project—like a suspended project—may result in reduced income vis-a-vis overhead costs."

[579] In *Interstate Gen. Gov't Contractors v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993), the CAFC noted that proper application of the standby test focuses on the delay of contract performance for an uncertain duration during which the contractor is required to remain ready to perform. The CAFC also stated that there is no requirement that a contractor be suspended before it is entitled to recover under *Eichleay*.

[580] 69 F.3d 555 (Fed. Cir. 1995).

[581] *Id.* The contracts were suspended because the specifications were discovered to be defective.

The board denied all recovery for delay in both contracts.[582] The board held that the contractor must establish, with reasonable certainty, that it was damaged as a result of the disruption or delay. Further, the contractor must show that home office overhead costs were not properly absorbed, and that during the delay, the labor force could not be shifted to other work. The board thus declined to apply the *Eichleay* formula. The board held that Sippial had not proved actual damages for either contract.

The CAFC held that proof of actual loss by the contractor during the delay was not required. Moreover, the court held that a contractor which establishes that the government forced it to remain on "standby" and that the government delay was "uncertain" establishes a *prima facie* case of entitlement to *Eichleay* damages. The burden then shifts to the government to establish, if it can, that the contractor was not harmed by the delay.

E. Inspection, Acceptance, and Warranty.

1. We Can Get the License. In *AAA Engineering & Drafting, Inc.*,[583] the ASBCA determined that the Air Force's acceptance of software could be revoked based upon a latent defect. The defect was the software's incompatibility with Air Force computers which could only be overcome by the additional use of a data base management program for which the Air Force had no license. The Air Force discovered the defect when the delivered software could not be accessed on its computers. In determining that the software was defective, the ASBCA found the contractor's assurances that it could obtain a use license for the necessary additional program to be "immaterial."[584] Nor was the ASBCA persuaded that payment for the software waived the requirement that the software interface with the Air Force system. The board determined that, according to the terms of the contract, inspection was to be made after delivery and before acceptance. Additionally, the board noted that the quality assurance block on the DD Form 250[585] was signed, but that it contained no indication of acceptance. This evidenced the parties' intent that the DD Form 250 was not "intended to be regarded as a receipt for delivery, or the government's acceptance of AAA's software program."[586]

2. Use of Data in Design Review Implies Acceptance. The Air Force contracted with Ateron Corporation (Ateron) for "depot utility small testers (DUST) used to test F-16 aircraft circuits."[587] Although the contractor delivered certain required data items, it failed to produce a "first article, first article test report, or production hardware items" as required by the contract. Eventually, the Air Force terminated Ateron's contract for default. In doing so, the Air Force also sought the return of unliquidated progress payments. In its appeal, Ateron asserted that many of the CLINS had been accepted, so no repayment was due to the government. While denying most of the appeal, the board held that the government's use of data items in the performance of design reviews constituted implied acceptance and obligated the government to pay for those items.

3. Quality Management Services Contract is Not Equivalent to a Warranty. In *Walk, Haydel, & Associates*,[588] (Walk Haydel). The GSA attempted to recover damages from its quality management services contract for shoddy work performed by a construction contractor. The underlying construction contract with Grinnell Fire Protection Systems Company (Grinnell) required the installation of a fire protection system. Walk Haydel was to inspect the work pursuant to a delivery order. Walk Haydel noted numerous deficiencies throughout the construction project. A GSA Contracting Officer's Representative (COR) determined that the project was substantially complete without consulting Walk Haydel which subsequently submitted a report of deficiencies noted in the acceptance test. During the following months, the fire safety system performed miserably and the GSA contracted for additional quality management services. Eventually the GSA made final payment to the contractor, but after doing so informed Walk Haydel that it intended to withhold (from Walk

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[582] ASBCA Nos. 43,993, 43,994, 93-2 BCA ¶ 25,572.

[583] ASBCA No. 44,605, Feb. 8, 1996, 96-1 BCA ¶ 28,182.

[584] *Id.* at 40,681.

[585] *See* DFARS 253.3-1.

[586] 96-1 BCA ¶ 28,182 at 140,680. *See also* Autek System Corp. v. United States, 82 F.3d 434 (Fed. Cir. 1996) (full payment does not constitute acceptance *per se* where contract provided for acceptance conditioned on successful completion of specified testing).

[587] Ateron Corp., ASBCA No. 46,867, Feb. 5, 1996, 96-1 BCA ¶ 26,165.

[588] GSBCA No. 13,233, Dec. 4, 1995, 96-1 BCA ¶ 28,121.

Haydel's payments) amounts for damages caused by its quality management services related to the work done by Grinnell. The board found no deficiency in Walk Haydel's performance. Furthermore, the board pointed out that recovery for defects in a service contract are priced as a reduced value of services performed. Here the agency erroneously sought to quantify its recovery as the cost of the additional quality assurance work it required. Furthermore, the board held that the additional quality assurance work was the result of GSA's own decisions which were contrary to the advice of Walk Haydel.

F. Termination for Default.

1. Air Force Downed in the Appeal of Vought Aircraft Company.[589] Vought was to design, fabricate, install, and test Low Altitude Night Attack (LANA) systems for selected aircraft from two Air National Guard squadrons. On the evening of 27 March 1987, while performing a test flight under the contract, one of the aircraft crashed, killing the test pilot and completely destroying the aircraft as well as the LANA equipment that was being tested.

On 7 April 1988, the government advised Vought that the evidence suggested that Vought's negligence was the cause of the crash. Accordingly, the government asserted a claim for the aircraft and installed components in the amount of $4,816,000. Vought denied that it was negligent. On 14 September 1988, the contracting officer terminated the contract for default for Vought's failure to deliver within the required time.

The government's position was simple. The contractor unilaterally established the date of the crash as the delivery date by presenting various documents such as a DD 250, the Certificate of Completion, and invoices. Because the contract was free on board (FOB) Origin, and delivery was therefore evidenced by the above documents, the government asserted that the contractor tendered delivery. Given the fact that the goods were unusable, i.e., destroyed in the crash, the government argued that its termination was justified on the grounds that the contractor tendered delivery of non-conforming goods.

The board found no merit to this argument. Specifically, it stated that the contractor never represented in any of the documents that it was delivering items that conformed to the contract. Rather, both parties were aware, and the various documents specifically stated, that the LANA components were the ones that were totally destroyed in the crash. The board noted that it was apparent that neither party knew exactly how close the contract was to completion regarding these LANA components. In submitting the above documents to the government, Vought was merely attempting an alternative approach to documenting the work that it completed. The board specifically noted that Vought was seeking payment based upon its understanding that it was entitled to payment under the Ground and Flight Risk clause,[590] not based on a position that it had delivered conforming goods.

2. This "Phoenix"[591] *Did Not Rise from the Ashes.* On 4 September 1990, the Defense Fuel Supply Center (DFSC) entered into an indefinite quantity contract with Phoenix for the supply of up to 10,000,000 gallons of JP-4 jet fuel per month between 1 October 1990 and 30 September 1991. DFSC issued nine orders for 21,420,000 gallons between 1 October 1990 and 15 January 1991. Phoenix failed to make any deliveries. On 15 January 1991, the contracting officer terminated the contract for default.

Most contractors have a million excuses why they cannot perform under a contract. This contractor was no different. Among its excuses, the contractor contended that the contracting officer merely gave "lip service" to FAR factors.[592] Phoenix argued that a contracting officer is required to consider these factors before terminating a contractor for default.[593] According to Phoenix, the contracting officer did not consider the adverse impact that the termination would have on the people and the economy of West Virginia, Phoenix's prior history of timely deliveries under other contracts, and Phoenix's commitment to deliver.

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[589] ASBCA No. 38,092, Apr. 30, 1996, 96-2 BCA ¶ 28,321.

[590] DFARS 52.228-7001.

[591] Phoenix Petroleum Company, ASBCA No. 42763, 96-2 BCA ¶ 28,284.

[592] FAR 49.402-3(f).

[593] *Id.* The contracting officer is required to consider the following factors before terminating a contract for default: (1) the terms of the contract and applicable laws and regulations; (2) the specific failure of the contractor and the excuses for the failure; (3) the availability of the supplies or services from other sources; (4) the urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contract; (5) the degree of essentiality of the contractor in the government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts; (6) the effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and (7) any other pertinent facts and circumstances.

In addressing Phoenix's argument, the board noted that even if the considerations mentioned by Phoenix were relevant, the record revealed that Phoenix failed to provide the contracting officer with any information on these factors prior to the termination. Moreover, the board stated that the contracting officer's mandate was to sustain a steady supply of JP-4 to DFSC's customers. Given the potential drain on JP-4 resulting from the war in the Middle East, the board concluded that the contracting officer's focus on finding a reliable source to replace Phoenix was well placed. Judge Elizabeth A. Tunks' majority opinion in the subject appeal is important because it provides a clear, cogent application of the FAR factors as well as a strong government-oriented opinion on excusable delay and waiver.

3. "Nightmare on Elm Street" — the A-12 Case.[594] On 19 December 1995, the COFC, without opinion, converted the default termination to a termination for convenience in the litigation over the A-12 contract. On 8 April 1996, Judge Robert H. Hodges issued a lengthy opinion supporting his earlier ruling. Judge Hodges' opinion provides a less than positive portrayal of the government's conduct. The contract called for a carrier-based, low observable (Stealth) attack aircraft known as the A-12.[595] The McDonnell Douglas/General Dynamics team contracted to produce eight developmental aircraft with an option for production units.

In evaluating the government's decision to terminate the contract, Judge Hodges noted that procurement officials must use their own judgment in deciding whether to terminate a contract for default; they cannot act as "automatons." The contracting officer failed to make the termination decision based on the merits of the contractor's performance. Judge Hodges also found that the contracting officer was improperly influenced by senior DOD officials in terminating the contract. Therefore, according to Judge Hodges, the contracting officer did not exercise his independent judgment thus constituting an abdication of his discretion.

4. You're Terminated, "Cause I Said So!"[596] A contractor terminated for default for failure to deliver "release parachutes" in a timely manner argued that its failure should be excused because the contracting officer's show cause notice did not contain every reason subsequently advanced in support of the termination. Accordingly, the contractor contended that it was not afforded an opportunity to respond before the termination.

In sustaining the termination, the board noted that the contracting officer was under no legal obligation to issue a show cause notice to the contractor.[597] The record indicates that the only reason the contracting officer issued the show cause notice was to provide the contractor with an opportunity to furnish any information demonstrating the default was excusable. Accordingly, the contractor had no basis to complain about the quality or quantity of information set forth in the show cause notice.

5. Termination for "Cause" for Commercial Items. The FAR Council issued final rules[598] implementing the FASA[599] reforms on the use of commercial items in federal contracting on 18 September 1995. The new rules are designed to align the government's acquisition of commercial items more closely with customary commercial practices.[600]

One of the more noteworthy changes relates to terminations for default. The new "Contract Terms and Conditions-Commercial Items" clause replaces the Default clause used in traditional supply contracts with the innovative concept of "Termination for Cause."[601]

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[594] McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1995).

[595] *Id.* The contract was an incrementally funded, fixed-price contract. The contract had a ceiling of $4,777,330,294 and a target price of $4,379,219,436. Judge Hodges noted that one of the other teams competing for the contract had produced an Air Force bomber which incorporated stealth technology. That contract refused to agree to a fixed-price contract and its cost proposal exceeded the McDonnell Douglas/General Dynamics team by over $400 million.

[596] Sach Sinha and Associates, Inc., ASBCA No. 46,916, 96-2 BCA ¶ 28,346.

[597] FAR 49.402-3(e)(1) provides that if termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of a termination.

[598] 60 Fed. Reg. 48,231 (1995).

[599] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[600] FAR 12.301(b)(3).

[601] FAR 52.212-4(m). This provision provides as follows:

> Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Much has changed under the new approach. The traditional government contract procedures for terminations for default[602] do not specifically apply under the new rules.[603] The new rules provide that contracting officers may continue to use FAR Part 49 as guidance to the extent that it does not conflict with FAR 12.403 and FAR 52.212-4.[604]

Under the broad new rules, a contractor may be terminated for cause, "[I]n the event of any default by the contractor, or if the contractor fails to comply with any contract terms or conditions, or fails to provide the government, upon request, with adequate assurances of future performance."[605] By contrast, the grounds for default under the standard supply contract Default clause are (1) the failure to perform or deliver on time, (2) the failure to make progress so as to endanger performance, and (3) the failure to perform any other provision of the contract.[606] In sum, it appears that the grounds for a termination for cause differ from those of a termination for default in two respects. First, termination for cause incorporates a previously considered common law ground for a default termination, i.e., demand for assurances, into the regulatory scheme.[607] Second, the three regulatory grounds in the default clause are subsumed by the termination for cause grounds.

As to delinquency notices, FAR 12.403(c)(1) provides that the contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery.[608] This is similar to the requirements for a cure notice under FAR 52.249-8(a)(2). As to a show cause notice, FAR 12.403(c) specifically notes that contractors are required to notify the contracting officer as soon as possible after the commencement of any excusable delay. The rule further notes that in most situations, the requirement for the contractor to affirmatively notify the contracting officer of any excusable delay should eliminate the need for a show cause notice prior to terminating the contract.

Terminations for cause are different in a variety of other ways from terminations for default. Practitioners should become familiar with the changes contained in FAR 52.212.4(m) and FAR 12.403.

6. Contractor gets "TOW" stubbed in Termination for Default.[609] In September 1984, the United States Army Missile Command (MICOM) awarded Triad Microsystems, Inc. (Triad) a contract for the production 1,432 TOW Missile[610] Vehicle Power Conditioners.[611] By letter dated 9 May 1988, the contracting officer informed Triad that he was terminating the contract for default on the grounds that Triad had delivered defective goods and had falsified the contract.[612]

Shortly after the termination for default, Triad filed for protection under the federal bankruptcy laws. In June and September 1988, the government filed proofs of claim against Triad in the bankruptcy proceeding seeking approximately $6,000,000 in unliquidated progress payments. By letter dated 3 January 1990, the contracting officer sent Triad a final decision seeking the return of the progress payments.[613]

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[602] FAR Part 49.

[603] FAR 12.403(a).

[604] *Id.*

[605] FAR 52.212-4(m).

[606] FAR 52.249-8.

[607] Engineering & Professional Servs., Inc., ASBCA No. 39164, 94-2 BCA ¶ 26,762.

[608] FAR 52.212(m) does not make mention of a cure notice. This is in stark contrast to the standard supply contract default clause which specifically provides for a "cure notice."

[609] Daff, Trustee in Bankruptcy for Triad Microsystems Inc. v. United States, 78 F.3d 1566 (Fed. Cir. 1996).

[610] *Id.* at 1569. TOW missiles are wire guided missiles.

[611] *Id.* at 1569. A TOW Missile Vehicle Power Conditioner is a device that allows the missile to interface with a vehicle, such as a jeep.

[612] *Id.* at 1572. The contracting officer's letter stated two separate and distinct grounds for the default termination. The first ground was the delivery by Triad of "defective and non-operational hardware" as a result of solderers who worked on the contract not having received "the minimum required level of training." The second ground was the alleged falsification of required records relating to the certification of solderers. The court specifically noted that it read the contracting officer's letter as terminating the contracting because Triad failed to perform in the contract in accordance with its requirements and because the contractor committed fraud.

[613] *Id.* at 1570. On 7 September 1990, the bankruptcy court held that it lacked subject matter jurisdiction over the government's claims and transferred the case to the COFC.

On 20 November 1990, Triad formally brought suit in the COFC challenging the contracting officer's decisions of 9 May 1988 and 3 January 1990. On 12 November 1991, Triad submitted a claim to the contracting officer seeking to have the default termination converted to a termination for convenience and requesting the payment of approximately $6,000,000 in convenience termination costs. The contracting officer did not issue another final decision. Triad amended its complaint at the COFC to join the termination for convenience claim with its pending challenges to the default termination and the government demand for the return of the unliquidated progress payments. In response, the government alleged that, as an affirmative defense, Triad's claims were barred by fraud and illegality. Moreover, the government sought civil penalties and damages against Triad.[614]

Interestingly, Triad shifted gears and challenged the COFC jurisdiction over both its claims and the government's counterclaims based upon various alleged deficiencies in the contracting officer's 9 May 1988 final decision.[615] Specifically, Triad contended that the contracting officer lacked the authority to issue a Contract Disputes Act type termination decision on the basis of allegations of fraud. Triad pointed to 41 U.S.C. § 605(a)[616] and FAR § 33.010[617] in support of its argument. The COFC rejected Triad's jurisdictional argument and sustained the termination for default.[618]

On appeal, the CAFC sustained the COFC. In response to Triad's argument, the Federal Circuit noted that the contracting officer's default termination letter stated two separate grounds, one for failing to perform in accordance with the contract requirements, and the other for committing fraud.[619]

G. Terminations for Convenience.

1. "Actual Knowledge" Required under Torncello[620] Analysis. In *Advanced Materials, Inc. v. United States*,[621] the plaintiff was awarded a contract for the development of a decontamination agent.[622] The contract stated that safety concerns regarding the mixing of particular components of the agent had been investigated by the government and that no problems were observed. However, unbeknownst to the procurement personnel, the requiring activity changed the formula before award, replacing one chemical component with another.[623] After award, but before performance, the requiring activity informed the procuring contracting officer that it was encountering technical problems with the formula. The procuring contracting officer (PCO), now armed with the knowledge of the formula's modification, terminated the contract for convenience.

The plaintiff conceded that the PCO was unaware of the problems with the formula prior to award. However, the plaintiff contended that the PCO should have known about the problems. In addressing the issue of "actual knowledge," the court held that *Torncello* does not impose legal liability on the government absent actual knowledge by the PCO that the contract is going to be terminated for convenience prior to award.[624]

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[614] The False Claims Act provides that any person who presents a false claim is liable for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the government sustains. 31 U.S.C. § 3729(a).

[615] 78 F.3d at 1570. Triad's argument was interesting particularly in light of the fact that it originally contended that the COFC had jurisdiction under both the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994) and the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613.

[616] This provision states that "[a]ll claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud."

[617] Under this provision, a contracting officer's authority to decide or settle all claims arising under or relating to a contract does not extend to a contract involving fraud.

[618] The COFC directed Triad to pay unliquidated progress payments in the amount of $5.6 million and imposed a $5,000 civil penalty and $600,000 in treble damages under the False Claims Act.

[619] The trial judge interpreted the contracting officer's letter more narrowly than the CAFC. The trial judge held that the default termination was premised on the alleged falsification of records and that no other ground was offered. The Federal Circuit read the letter to include another separate and distinct ground as the basis for the termination.

[620] Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).

[621] 34 Fed. Cl. 480 (1995).

[622] The agent is for the decontamination of equipment exposed to chemical or biological agents.

[623] The formula was changed by replacing one solvent with another because the original formula produced false positive tests for contaminants.

[624] *Torncello* stands for the proposition that when the government enters into a contract knowing full well that it will not honor the contract, it cannot avoid a breach claim by averting to the convenience termination clause. In *Torncello*, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another contractor. When the contractor complained that the government was satisfying its requirement from the cheaper source and ordering nothing from it, in breach of the contract, the government claimed its actions amounted to a constructive termination for convenience. The court held that the government could not avoid the consequences of breach by hiding behind the termination for convenience clause.

2. CAFC Weighs-In on Torncello "Change of Circumstances" Test. In *Krygoski Construction Company, Inc. v. United States,*[625] the plaintiff was awarded a contract to demolish an abandoned Air Force missile site in Michigan. During a predemolition survey, the plaintiff identified additional areas not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal (approximately 33% of the contract price), the contracting officer decided to terminate the contract for convenience and reprocure the requirement. The plaintiff sued in the COFC alleging breach of contract. Relying on *Torncello*,[626] the trial court found the government improperly terminated Krygoski's contract. The trial court found the government abused its discretion in terminating the contract under the *Kalvar*[627] standard. CAFC reversed and remanded, holding that the COFC incorrectly relied upon dicta in the plurality opinion in *Torncello.*[628] Specifically, the CAFC concluded that the trial court improperly found the change in circumstances insufficient to justify termination for convenience. Although arguably the government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard, the court declined to reach that issue because *Torncello* only applies when the government enters a contract with no intention to fulfill its promises.[629]

3. One Year Means One Year. In *RBW & Associates,*[630] the Animal and Plant Health Inspection Service (APHIS), Department of Agriculture, awarded a contract to RBW & Associates for brewer's yeast to feed medflies. A controversy arose regarding whether certain shipments met contract specifications. Further, APHIS was having difficulty rearing the number of medflies it desired. The APHIS inquired whether the contractor could ship torula yeast rather than the brewer's yeast.[631] The contractor told the contracting officer that it would not be able to provide the torula yeast. The contracting officer then terminated the contract for convenience on 28 June 1993. In a contracting officer's final decision dated 19 April 1994, the contracting officer found that the termination for convenience was in the government's interest. The contractor appealed this decision and, in a complaint dated 12 July 1994, for the first time, asserted monetary claims in the amount of $121,860.[632]

The government pointed out to the board that these claims had never been presented to the contracting officer and lacked certification as required by the Contract Disputes Act.[633] The board dismissed the appeal for lack of jurisdiction.[634] On 21 March 1995, the contractor presented a "termination for convenience settlement proposal" totaling $42,483.50 to the contracting officer.[635] The contracting officer then notified the contractor that its termination settlement proposal was untimely under the Termination for Convenience clause[636] which required that such a proposal be submitted within one year of the effective date of the termination.[637]

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[625] No. 95-5136, 1996 WL 434322 (Fed. Cir. 1996).

[626] *Id.* at *5. The *Torncello* court interpreted the termination for convenience clause to require some change in circumstance of the bargain or in the expectation of the parties.

[627] Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (1976) *cert. denied,* 434 U.S. 830 (1977). The *Kalvar* standard provides that if the government terminates a contract for convenience in bad faith or by abusing its discretion, the action will be considered a breach of contract by the government. Note that the burden of proof by the contractor in these cases is very weighty.

[628] In *Torncello,* 681 F.2d at 772, a plurality of judges articulated, in dicta, a broader test for gauging the sufficiency of a convenience termination. The plurality stated that the Navy could not invoke a convenience termination unless it was justified by some change in circumstances between the time of award and termination.

[629] *Krygoski,* 1996 WL 434322, at *9.

[630] AGBCA No. 95-208-1, 96-2 BCA ¶ 28,416.

[631] *Id.* The APHIS determined that torula yeast, rather than the brewer's yeast was preferable for use in the larval diet.

[632] *Id.* The contractor asserted seven claims in its complaints.

[633] *See* 41 U.S.C. § 605.

[634] AGBCA No. 94-185-1, Order of Dismissal, Dec. 14, 1994 (unpub.).

[635] The contractor had not previously presented a termination proposal to the contracting officer, and had not requested an extension.

[636] FAR 49.109-7.

[637] The FAR imposes post-termination obligations on the contractor. Specifically, the contractor is expected to prepare and present a termination settlement proposal to the contracting officer promptly, but not later than one year from the date of the termination. The purpose of the requirement is to permit the government to close out the contract within a reasonable period of time, to budget its money, and to enable it to gather evidence concerning the pricing of the contractor's claims. *See* FAR 49.104(h); *The Nash & Cibinic Report* No. 5 ¶ 27 (May 1994).

The board stated that a contractor's failure to timely file a termination for convenience settlement proposal precludes it from asserting all claims arising prior to the termination, irrespective of whether they are related to the termination.[638]

H. Contract Disputes Act (CDA) Litigation.

1. Final Decisions and Defective CDA Appellate Advice: The Federal Circuit Clears the Deck and the ASBCA Follows Suit. How many times have government counsel been confronted with this issue? A contracting officer issues a final decision which, unfortunately, improperly advises the contractor of its appellate rights under the CDA.[639] This error is brought to our attention and, like one of Pavlov's dogs, we immediately advise the contracting officer to re-issue a new final decision so we can properly trigger the "CDA appeals clock." Right? Well, not any more.

In *Decker & Co. v. West*,[640] the Army terminated a construction contract for default. The termination notice informed Decker that it could appeal the decision to the ASBCA within 90 days *or* to the COFC within 12 months. When the notice was issued, however, the COFC had no jurisdiction over default terminations.[641] Approximately two *years* later, Decker filed its appeal with the ASBCA. Finding that the Army had improperly advised the contractor of its CDA appeal rights, the board asserted jurisdiction over Decker's appeal. The ASBCA subsequently upheld the Army's termination decision.[642]

On appeal to the Federal Circuit, Decker challenged the board's decision. In response, the Army not only defended the board's decision regarding the termination, but it also contended that Decker's appeal was untimely. Specifically, the Army asserted that Decker had failed to show that it detrimentally relied on the inaccurate advice provided with the termination notice.[643] Overruling years of ASBCA case law, the Federal Circuit agreed with the Army![644] The court observed it could not condone a position that "permit[s] a contractor . . . an indefinite amount of time, capped only perhaps by laches, in which to challenge a default termination." Specifically, the Federal Circuit held that the contractor must demonstrate that it was "actually prejudiced" by the government's faulty advice before the CDA appeals limitation period will be extended.[645]

Following *Decker*, the ASBCA has addressed other fact scenarios involving defective appellate rights advice. In *TPI Int'l Airways, Inc.*,[646] the late appeal challenging a default termination did not result in dismissal, because contractor's testimony showed that it detrimentally relied on incorrect appellate rights

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[638] The general rule is that following a termination for convenience, all of the contractor's outstanding claims are "merged" into the pricing provisions of the Termination for Convenience clause. As such, the determination of specific costs attributable to such claims are superfluous unless a loss contract is alleged or an increase in the contract price is sought by the contractor.

[639] 41 U.S.C. §§ 601-613 (1996).

[640] 76 F.3d 1573 (Fed. Cir. 1996). The court began its decision with one of its more memorable openings:

> This is one of those messy government contract dispute cases in which, during the performance of the contract, neither of the parties acquitted themselves with pure grace. Working through the detailed record of such a case causes one to understand better the ancient curse of a plague o' both their houses. *See* William Shakespeare, *Romeo and Juliet*, act 3 sc. 1. Nevertheless, since the parties could not resolve their dispute, we must.

Id. at 1575 (footnote omitted). Whether this language was provided so as to guarantee the circuit court a degree of notoriety in this year's article is not certain.

[641] In 1992, Congress amended the Tucker Act to provide the COFC jurisdiction over nonmonetary contract disputes, to include default terminations. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, Title IX, 106 Stat. 4506, 4519. The Act also changed the name of the Claims Court to the United States Court of Federal Claims.

[642] ASBCA No. 41089, 94-2 BCA ¶ 26,759.

[643] At the oral argument before the Federal Circuit, Decker's counsel admitted that he was not aware of any "record evidence" indicating that the appellant detrimentally relied on the deficient advice. 76 F.3d at 1580.

[644] Although it cited numerous board decisions in support of Decker's assertion, the court pointed out that not only had it never adopted such a position, but earlier decisions by its predecessor, the Court of Claims, actually took the opposite view. *Id.* at 1579, *citing* Philadelphia Regent Builders, Inc. v. United States, 634 F.2d 569 (Ct. Cl. 1980). As noted below, finding no evidence of detrimental reliance, the circuit court specifically refused to consider the argument of whether the appellant's error *could* have been the result of relying on this case law. *Id.* at 1580.

[645] *Id.*

[646] ASBCA No. 46462, 96-2 BCA ¶ 28,373.

advice.[647] The final decision, which was issued in August 1990, incorrectly advised the appellant it that could file an appeal with the (then) United States Claims Court.[648] The contractor testified that, had it known this advice was incorrect, it would have submitted its appeal to the board. The ASBCA concluded that this action "without a doubt" constituted detrimental reliance.[649]

In *SRM Manufacturing Co.*,[650] the appellant unsuccessfully argued that it was prejudiced by defective appeal rights advice which allowed for relief by the (then) Claims Court. Following a termination for default, appellant's counsel advised the contractor that it could refrain from appealing the termination until the government submitted its claim for excess costs of reprocurement.[651] Instead of seeking any potential reprocurement costs, however, the government opted to demand repayment of *unliquidated progress payments*. In response, and more than two years after the termination for default, the contractor attempted to challenge the government demand as well as the underlying termination. The board specifically found that the contractor's decision to delay appealing the default termination was not attributable to the availability (or lack thereof) of the Claims Court to hear the contractor's appeal. Rather, the contractor erroneously gambled that it could challenge the default termination action when the government claimed excess reprocurement costs. Hence, the appeal was dismissed as untimely.[652]

2. Termination for Convenience Settlement Proposals Ripen Into CDA Claims. Taking one of the final steps in the long marathon of cases addressing the definition of CDA claims,[653] the Federal Circuit concluded that a termination for convenience settlement proposal can qualify as a CDA claim. At issue in *James M. Ellett Constr. Co. v. United States*[654] was a Forest Service contract to build a 2.7 mile logging road in Oregon. The Forest Service subsequently terminated the contract for convenience. In response, Ellett submitted a termination proposal seeking $494,826.[655]

After waiting approximately ten months for action by the Forest Service, Ellett informed the contracting officer that it would obtain relief by filing an appeal with the COFC if its proposal was not acted upon soon. This prompted the Forest Service to respond with a settlement offer of $120,649, which the contractor countered with an offer of $250,000. The Forest Service rejected Ellett's offer and the contractor then requested that the contracting officer settle its claim.[656] Ellett appealed the contracting officer's settlement determination to the COFC. The court dismissed the appeal, in part, because Ellett's termination proposal was only an "invitation to negotiate" a settlement and not a CDA claim. Additionally, the court pointed out that the contractor's submission did not expressly seek a contracting officer's final decision, which is a key factor for identifying a

[647] The government provided notice to the contractor of the termination for default in August 1990. Three years later the contractor filed its appeal with the board. *Id.* at 141,694.

[648] *Id.* The Federal Courts Administration Act of 1992 subsequently expanded the jurisdiction of the court to include the adjudication of nonmonetary claims, such as appeals from default terminations. Title IX, Pub. L. No. 102-572, 106 Stat. 3921, 4519.

[649] *Id.* at 141,694-95.

[650] ASBCA No. 44750, 96-2 BCA ¶ 28,487.

[651] Appellant's counsel was apparently relying on what is known as the "Fulford doctrine." Under this doctrine, a contractor may dispute the underlying, unappealed, default termination as part of a timely appeal from a government demand for *excess reprocurement costs*. *See* Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); Kellner Equip., Inc., ASBCA No. 26006, 82-2 BCA ¶ 16,077 (applying Fulford to CDA appeals).

[652] *SRM Manufacturing*, 96-2 BCA ¶ 28,487, at 142,264.

[653] The tortuous "marathon" of cases involving the definition of the term "claim" under the CDA arguably began with *Mayfair Constr. Co. v. United States*, 841 F.2d 1576 (Fed. Cir. 1988) which led to the now notorious *Dawco Constr., Inc. v. United States*, 930 F.2d 480 (Fed. Cir. 1990). In 1995, and after some 200 board and court cases relying on *Dawco* were decided, the CAFC overruled the *Dawco* case. Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1580 (Fed. Cir. 1995) (Federal Circuit eliminates pre-existing dispute requirement for CDA claims). *See also 1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 53.

[654] 93 F.3d 1537 (Fed. Cir. 1996).

[655] Initially, the contractor submitted its settlement proposal by letter. The contracting officer returned the letter and requested that Ellett submit its settlement proposal in the format prescribed by FAR Part 49. In particular, the FAR requires the contractor to use a specific form (in this case SF 1436). (This form contains a preprinted certification, which the Federal Circuit held sufficiently met the CDA requirement that all claims in excess of $100,000 be certified.) *Id.* at 1540; *see also* 41 U.S.C. § 605(c)(6).

[656] The FAR provides that the contracting officer "shall settle a settlement proposal by determination only when it cannot be settled by agreement." FAR 49.103.

submission as a CDA claim. Ellett then appealed to the CAFC, which reversed the lower court.

The CAFC began its analysis by studying whether the settlement proposal qualified as a CDA claim; specifically, whether the proposal was a routine or non-routine submission.[657] Finding it "difficult to conceive of a less routine demand for payment," the court concluded that Ellett's settlement proposal was non-routine.[658] Next, since "not every nonroutine submission constitutes a CDA claim," the Federal Circuit asked whether Ellett's failure to expressly seek a contracting officer's final decision was significant.[659] The court noted that when a settlement proposal is initially submitted, "it is for the purpose of negotiation, not for a contracting officer's final decision."[660] Under the procedures prescribed by the FAR, however, the court noted that once the parties reach an impasse, a request that the contracting officer render a final decision is "implicit" in the contractor's settlement proposal.[661] Finding that the FAR "envisions a direct appeal of the contracting officer's determination," the Federal Circuit found that a termination settlement proposal can indeed ripen into a CDA claim.[662]

3. Federal Circuit "Squeezes the Sharman." In *Sharman Co. v. United States*,[663] the CAFC restricted the ability of a contracting officer to render a final decision on a claim that is already the subject of litigation, holding that only the DOJ has authority to act on that claim.[664] The scope of the *Sharman* decision was tested in *Case, Inc. v. United States*.[665] At issue were two claims involving the manufacture of fire-resistant overalls. The contractor experienced problems in performing the contract, which caused delayed shipments, and ultimately resulted in the government terminating the contract for default. The contractor initially appealed the termination action and the government's request for repayment of unliquidated progress payments to the COFC (Case I). Later, while Case I was still pending, the contractor submitted a claim for delay costs and lost profits. After the contracting officer failed to issue a final decision, the contractor appealed the "deemed denial" to the COFC (Case II). The claims underlying both appeals were grounded on the same contract and the same alleged specification defects. The government argued that, under *Sharman*, since the contracting officer was without authority to issue a final decision, there could be no "deemed denial" which could confer CDA jurisdiction.[666]

The Federal Circuit rejected the government's argument as overly expansive. The appeals court noted that *Sharman* involved two claims asserting entitlement over the "same money based on the same partial performance [arguments], only under a different label."[667] In other words, the claims were the "mirror images" of each other.[668] At issue in Case I and Case II, however, were different pots of money and claims founded upon different theories of entitlement. Thus, according to the Federal Circuit, the

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[657] FAR 33.201 defines a CDA claim as a nonroutine submission by one of the contracting parties that is a (1) written demand or assertion, (2) seeking as a matter of right, (3) the payment of money in a sum certain or other appropriate relief. 93 F.3d at 1542; *citing* Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995). *See also* FAR 33.201. Note that "routine submissions" such as "invoices, vouchers, or other routine requests for payments," must be in dispute before they constitute CDA claims. FAR 33.201.

[658] 93 F.3d at 1542.

[659] *Id.* at 1543; *citing* Bill Strong Enterprises Inc. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995) and FAR 33.206.

[660] *Id.* at 1543.

[661] *Id.* at 1544. *See also* National Interior Contractors, Inc., ASBCA 46012, 96-2 BCA ¶ 28,560 (contractor utterly failed to show that the parties had reached an impasse); Mid-America Eng'g and Mfg., ASBCA No. 48831, 96-2 BCA ¶ 28,558 (CDA claim existed where, following agency failure to meet with contractor regarding termination settlement proposal, appellant expressly requested a contracting officer's final decision).

[662] Importantly, however, the CAFC observed that even though a settlement proposal may eventually mature into a claim, such a "claim" is not entitled to interest under the CDA. 93 F.3d at 1545.

[663] 2 F.3d 1564 (Fed. Cir. 1993).

[664] *Id.* at 1571.

[665] 88 F.3d 1004 (Fed. Cir. 1996).

[666] *Id.* at 1006-08.

[667] *Id.* at 1010, *citing* Sharman, Co. v. United States, 2 F.3d at 1573.

[668] *Id.*

claim underlying Case II was not already in litigation and the contracting officer was not precluded from rendering a final decision. Given these facts, the COFC properly asserted jurisdiction over the Case II appeal.[669]

4. The COFC Takes a Dim View of Valley View. How broad is the jurisdictional authority of the COFC to hear "nonmonetary disputes?" That was the issue in *Valley View Enterprises, Inc.*[670] In 1992, the United States Military Academy (West Point) entered into a contract with Valley View Enterprises, Inc. (Valley View) for replacement of steam lines on the installation. The contract contained the standard disputes clause[671] and gave Valley View four years to complete the work.[672] By 1994, Valley View stated that it had completed the contract work. Subsequent testing by West Point, however, disclosed that some of the work was defective and needed correction before final acceptance. In response, Valley View asserted that the corrective work was outside the scope of contract work and, thus, it was entitled to an equitable adjustment. The contractor also requested a contracting officer's final decision to this effect. When no final decision was issued, Valley View appealed the "deemed denial" to the COFC.[673]

Valley View then asked the court to find that it had no obligation to continue work absent a contracting officer's modification assenting to its request for an equitable adjustment.[674] The contractor further contended that the Federal Courts Administration Act of 1992 (FCAA)[675] extended the COFC's jurisdictional authority to cover "nonmonetary disputes" such as the one between it and West Point. The court disagreed, stating that the expanded jurisdiction afforded by the FCAA did not vitiate the contractor's "duty to proceed" as required by the disputes clause. The COFC noted that to hold otherwise would interfere "with the contracting officer's right to unilaterally direct performance under the Changes clause."[676] Instead, the court concluded that such issues are more appropriately matters of contract administration and judicial intervention ought to wait until after the work is performed. Hence, Valley View's "claim" was "premature" and the court dismissed the appeal for lack of jurisdiction.[677]

5. Contrary to Yogi, It Ain't "Deja Vu All Over Again!"[678] Ever wonder about the precedential value of a CDA appeal processed under the board's abbreviated rules? The ASBCA addressed this issue in *Fossitt Groundwork, Inc.*[679] The case involved a contractor that had taken over work on a contract previously terminated for default by the Navy. As part of its proposal for the follow-on contract, the contractor inserted a provision which changed the wage rates for the laborers performing the contract work. When the contractor submitted a claim for increased costs (approximately $202,000),[680] the Navy denied it and asserted that the terms of the original contract controlled. Fossitt then appealed this decision to the ASBCA. As this appeal was being processed, the ASBCA issued a decision under the expedited procedures allowed by Board Rule 12.2.[681] The decision involved

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[669] The CAFC, however, affirmed the COFC's decision that the dispute in Case II was barred by the doctrine of *res judicata* since it was subject to the same issue of accord and satisfaction adjudicated in Case I. *Id.* at 1011.

[670] 35 Fed. Cl. 378 (1996).

[671] The disputes clause provides, in part: "(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer." FAR 52.233-1.

[672] 35 Fed. Cl. at 380.

[673] *Id.*

[674] Although submitted as a "summary judgment" motion, the court subsequently characterized the contractor as seeking declaratory judgment. *Id.* at 386.

[675] Pub. L. No. 102-572, Title IX, 106 Stat. 3921.

[676] 35 Fed. Cl. at 384.

[677] *Id.* at 386.

[678] Former New York Yankee, Mr. Yogi Berra, was once heard to say, "It's Deja Vu All Over Again." Only Mr. Berra really knew what he meant. *See e.g., Pearls of Wisdom—Memorable Words from Casey Stengal and Yogi Berra*, U.S. NEWS & WORLD REP., Aug. 29, 1994.

[679] ASBCA No. 45,358, Sept. 3, 1996, 96-2 BCA ¶ 28,527.

[680] Interestingly, the total price of the contract, when awarded, was only $346,000. *Id.*

[681] Board Rule 12.2 provides for the expedited processing of "small claims" (i.e., appeals involving claims valued at less than $50,000). Under this rule, the ASBCA must render a one-judge decision within 120 days of receiving appellant's election. *See* DFARS, Appendix A, Rules 12.1-12.2.

a separate claim by Fossitt but also addressed the issue of whether the terms of the contractor's proposal were incorporated into the contract. In the unpublished decision issued for this expedited appeal, the board concluded that Fossitt was correct and the provisions contained in its proposal were incorporated into the follow-on contract. Flushed with victory, Fossitt contended that this expedited decision collaterally estopped or precluded the Navy from raising the issue before the board in the present appeal. The ASBCA rejected Fossitt's argument, noting that the Board Rules,[682] legislative history, and established case law all provide that appeals adjudged under the board's expedited procedures have limited precedential value.[683]

6. "Reflect On" This: Government Deduction Qualifies as a CDA Claim. The concept of government claims and the requirement for final decisions continues to trouble some offices. The ASBCA takes the position that the agency is required to give the contractor prior notice and an opportunity to comment on, or "dispute," a government claim before issuing a final decision.[684] In light of *Reflectone, Inc. v. Dalton*,[685] however, whether this "pre-existing dispute" requirement still holds true is unclear.[686] The GSBCA and the ASBCA hold opposite views on the matter. In *Sprint Comm. Co. v. General Servs. Admin.*,[687] the contracting officer took a $50,000 deduction from Sprint's monthly invoices arising from a telecommunications services contract. In a letter to the appellant, the contracting officer stated that the deduction was the result of alleged "shortcomings" involving the access by government personnel to data terminals, for which the contractor was responsible. Nowhere did this letter indicate that it was a contracting officer's final decision; nor did it contain any "boilerplate language" addressing CDA appellate rights.[688] Sprint subsequently appealed this action to the GSBCA, asserting that the contracting officer's deduction letter constituted a government claim. Rejecting the agency's argument that it was "merely adjusting the contract price for services not received," the board found that the deduction letter met all the basic elements required for a CDA claim. Specifically, the board concluded that when *a contracting officer* determines both liability and damages, as in this case, such action qualifies as a CDA claim.[689]

7. What's Wrong With This Picture? ASBCA Lacks Jurisdiction Over Intentionally Defective CDA Certification. One would think that submitting a claim with the proper CDA certification language would be relatively simple, especially with the board giving appellant's counsel step-by-step, "cookbook" instructions—right? Well, the appeal of *Production Corp.*[690] proved to be one of those cases involving facts that you can only shake your head over. Appellant was represented by counsel who had limited experience and knowledge regarding the CDA appeals process. Appellant had apparently submitted a number of unidentified "claims" to the Navy and received no action on them. This was news to the Navy attorney who, during a teleconference with the board judge, asked appellant's counsel to obtain copies of the claims from his client so he could examine them. Once the claims documentation was located, the board, in a second teleconference, directed appellant's counsel to case law that laid out the elements of CDA claims, to include the certification requirement. The contractor's attorney subsequently submitted a "claim" for $150,000—with an affidavit that lacked the required CDA certification language.[691]

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[682] Board Rule 12.2 provides that a decision rendered under this rule "shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside. DFARS, Appendix A, Rule 21.2(d).

[683] *Fossitt*, 96-2 BCA ¶ 28,527 at 142,457-8.

[684] The ASBCA has ruled that there must be a pre-existing dispute involving a government claim before a "procedurally valid" contracting officer's final decision can be issued. Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237. *See also* Keystone Coat & Apron Mfg. Corp. v. United States, 150 Ct. Cl. 277 (1960) (absent a dispute, a letter from a contracting officer demanding payment from the contractor is not a final decision). *See also* NASH & CIBINIC, ADMINISTRATION OF GOVERNMENT CONTRACTS 1279 (1995).

[685] 930 F.2d 872 (Fed. Cir. 1995).

[686] *See* Knight's Piping, Inc., ASBCA No. 46988, 96-1 BCA ¶ 27,948 (ASBCA expressly avoids considering "the effect, if any," of *Reflectone* on the "longstanding requirement" for a dispute between the Government and the contractor).

[687] GSBCA No. 13182, 96-1 BCA ¶ 28,068.

[688] Nor did the contracting officer afford the contractor an opportunity to comment, or "dispute," the government claim before issuing his "final decision." *Id.* at 140,170.

[689] The board distinguished this case from those instances where the deductions are the result of a decision by a person other than a contracting officer. *See, e.g.*, Iowa-Illinois Cleaning Co. v. Gen. Servs. Admin., GSBCA No. 12595, 95-2 BCA ¶ 27,628 (deductions made by field office manager instead of contracting officer do not constitute a final decision). *Id.* at 140,171, n.1.

[690] ASBCA No. 49122-812, 96-1 BCA ¶ 28,053.

[691] The affidavit stated, in part, that the contractor's "expenses are accurate and valid expenditures to the best of my knowledge." *Id.* at 140,080.

Although the board did not expressly rule on the adequacy of the affidavit as a CDA certificate, appellant's counsel filed a second submission with the contracting officer, this time seeking $168,702. Again, this request was accompanied by an affidavit which, like the first, contained no language "regarding good faith, the accuracy and completeness of the supporting data, or that the claim accurately reflects the amount for which the Government is liable."[692] Along with this request, appellant submitted what the board referred to as "an application for an order directing the contracting officer to issue a final decision."[693] In a third teleconference with the board, appellant's counsel stated that he had intentionally omitted the CDA certification language from the "claim" because he was not certain his client could sign such a certification.[694]

Reviewing the legislative history behind the CDA certification requirement, the board concluded that while defective certification language does not generally deprive it of jurisdiction over a CDA claim, the intentional avoidance of all the fundamental elements of the certification language rendered the claim invalid.[695] The board ruled that to hold otherwise would not only run counter to the "important objective of discouraging the submission of unwarranted claims," but put the contracting officer in the position of being "forced" to consider claims where the good faith, accuracy, and belief of government liability were deliberately omitted. The request for a board-directed final decision was denied.[696]

8. ASBCA Quashes Subpoenas to Cost Accounting Standards (CAS) Board Staff: Post Hoc Testimony On Rule-Making Irrelevant. At issue in *Gould, Inc.*,[697] was whether appellant had complied with cost rules governing the adjustment and allocation of pension costs.[698] The government intended to have a CAS Board employee testify as an expert witness regarding the interpretation of CAS 413. Apparently, in response to this, Gould obtained board subpoenas to depose the executive secretary and two other members of the CAS Board regarding the promulgation of the cost standard. Both the government and the CAS Board objected to the subpoenas.

In a fairly detailed opinion, the board quashed the subpoenas on two grounds.[699] First, the ASBCA pointed out that Gould sought to depose the CAS Board members not as experts but to obtain information regarding the promulgation of the pension rules.[700] Hence, the board ruled that such *post hoc* testimony of a rulemaker regarding the intent of a rule is not normally considered relevant. The board also quashed the subpoenas because they sought information covered by the "deliberative process privilege." Taking note of a declaration from the Chairman of the CAS Board,[701] the ASBCA concluded that the "mental processes" of personnel functioning in the same capacity of legislative rulemakers was privileged and not subject to disclosure.

9. "Houston, We've Got a Problem": The ASBCA Sanctions an Errant Space Craft. To prevail on a motion to dismiss for failure to prosecute, the movant must show that the offending party has demonstrated "an intention not to continue the prosecution . . . of an appeal."[702] As reflected in the facts underlying the appeal of *Space Craft, Inc.*,[703] this is an exacting burden of proof which requires that the party's intent be clear and unequivo-

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[692] *Id.* at 140,081.

[693] *See* ASBCA Rules of Procedure, Rule 1(e), DFARS, *supra* note 93, Appendix A.

[694] 96-1 BCA ¶ 28,053 at 140,081.

[695] *See* Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506.

[696] 96-1 BCA ¶ 28,053 at 140,082.

[697] ASBCA No. 46759, 96-2 BCA ¶ 28,520.

[698] The contracting officer concluded that as a result of its noncompliance with CAS 413, Gould would have to pay the government approximately $11.4 million. *Id.* at 142,430. *See also* 48 C.F.R. § 9904.413 (1994).

[699] The board opinion also provides a brief overview of the composition and role of the CAS Board. *Id.* at 142,431.

[700] The board also limited the government's use of a CAS Board member as an expert witness, to the extent that his testimony addressed the drafting of CAS 413. *Id.* at 142,434.

[701] The Chairman of the CAS Board is Dr. Steven Kelman, who is also the Administrator of the Office of Federal Procurement Policy (OFPP).

[702] ASBCA Rules of Procedure, Rule 31, DFARS, *supra* note 93, Appendix A.

[703] ASBCA No. 47997, 96-2 BCA ¶ 28,485.

cal. Appellant failed to complete all government discovery requests, exchange witness and exhibit lists in accordance with a board order, and repeatedly failed to make a witness available for deposition, as ordered by the board.[704] The ASBCA subsequently conducted a teleconference call to resolve these issues and the appellant failed to participate because of "time zone confusion." Despite the absence of appellant at the teleconference, the board set a specific date for the deposition; and, again, appellant's witness failed to show. Additionally, the board noted that appellant offered no excuse for not complying with the board's order on witness and exhibit lists. Despite its unwillingness to comply with board orders or cooperate with government counsel, however, appellant stated that it intended to appear at the hearing. In light of this latest statement, the ASBCA denied the Air Force's motion to dismiss for failure to prosecute, finding that appellant had not demonstrated a clear intent to abandon the appeal. But, displeased with the contractor's pre-hearing antics, the board imposed stringent sanctions on the appellant's ability to further participate in the appeal. The board restricted appellant from presenting any testimonial or documentary evidence at the hearing. Instead, the board ordered that the appellant could only cross-examine government witnesses during the hearing and then file a post-hearing brief with the board.[705]

10. "Is Nothing Sacred?": Rule 4 File Falls Victim to a Train Wreck. Among the events the first session of the 104th Congress will be remembered for are the government shut-downs that occurred as a result of the fiscal differences between Congress and the President. To this day, the impact of that stand-off still is being felt. The disruption to the otherwise smooth flow of government was evident in a variety of ways and apparently affected the processing of CDA appeals. For example, in *Cadell Constr. Co.*,[706] the appellant moved for summary judgment because the agency, the DOJ, failed to supply the Rule 4 file within 30 days of the notice of appeal. The agency attributed the delay to the shut-down and the resulting government-wide furlough. Although the contracting officer was not furloughed, the attorneys assigned to defend against the appeal were. Hence, the contracting officer could not obtain legal counsel as he was preparing the Rule 4 file. The board noted unpublished orders in which it had afforded parties to other unrelated appeals latitude in satisfying its filing obligations under board rules. Thus, given the "severity" of a summary dismissal and the fact that this was the agency's "first offense,"the board denied the appellant's motion.[707]

11. Gaffny's "Gaff" Pays Off. Ya gotta love it, and only in America! It is well settled that the Equal Access to Justice Act (EAJA) affords prevailing parties compensation for their success in lawsuits against the government.[708] In *Gaffny Corp.*,[709] the ASBCA was faced with an EAJA request where the appellant was represented by one of its corporate officers, who was subsequently admitted to a state bar. The record of the case reveals that when the contractor initially filed its appeal, it was represented by its vice president, Mr. Gaffny, who was not a licensed attorney. Mr. Gaffny was also the on-site construction superintendent as well as the contractor's principal witness at the trial. Almost two years after the contractor filed its appeal, Mr. Gaffny was apparently licensed to practice law, and assumed the additional position as "in-house counsel" for the contractor. The case was ultimately tried, and, with Mr. Gaffny's testimony comprising "75 percent of the trial testimony from appellant's witnesses," the ASBCA sustained most of the contractor's appeals.[710]

Gaffny Corporation then requested that it be compensated under the EAJA for expenses associated with prosecuting its appeal. Acting on this request, the ASBCA found the majority of the contractor's attorney fees and expenses recoverable. The trial judge, however, dissented from this finding. The dissent pointed out that throughout the appeal, Mr. Gaffny neither represented himself to be an attorney nor did he ever enter an appearance as counsel for the appellant.[711] Indeed, all parties and the board treated Mr. Gaffny as acting solely in his capacity as cor-

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[704] *Id.* at 142,261.

[705] *Id.*

[706] DOT BCA No. 2967, 96-1 BCA ¶ 28,235.

[707] The board also observed, however, that it "expects, as a courtesy if not an obligation, that any motion to extend to the due date will be filed sufficiently before that date arrives to afford counsel an opportunity to timely perfect the filing if the motion to extend is denied." *Id.* at 140,988.

[708] There are certain conditions which must be met before a prevailing party is entitled to remuneration under the EAJA. *See* 5 U.S.C. § 504.

[709] ASBCA No. 39740, 96-1 BCA ¶ 28,060.

[710] *Id.* at 140,125.

[711] The dissent further notes that the ASBCA has previously dismissed appeals where appellants have failed to properly identify who was representing them during the appeal. *See* Rule 26, ASBCA Rules of Procedure. Clearly frustrated with the majority's holding, the dissent remarks that "[t]his is the first time that the sanction for violating our Rules is an award of attorney fees." 96-1 BCA ¶ 28,060 at 140,126.

porate vice president. Additionally, the dissent pointed out that since Mr. Gaffny provided the bulk of the contractor's testimonial evidence, to accede to this request for compensation, the board would also have to recognize that he violated the advocate-witness rule. This ethical rule prohibits counsel from acting as an attorney in cases where they will be an essential witness.[712] By granting Mr. Gaffny's request, the dissent concludes that the board has "necessarily . . . [found] him to have acted unethically."[713]

12. Expert Witness Fees. In *C&C Plumbing & Heating*,[714] the ASBCA addressed the appellant's request for compensation of fees charged by the contractor's expert witness. The expert's fee was based on seven hours associated with his appearance as a witness during the hearing. Noting that "an expert witness may not be compensated at a rate in excess of the highest rate paid for expert witnesses by the agency," the board determined that the maximum allowable hourly pay rate was limited to the maximum pay level for a General Schedule (GS)-15 during the year in which the services were rendered, or $40.15 per hour.[715]

V. SPECIAL TOPICS.

A. Bankruptcy

1. Jurisdiction Of Bankruptcy Courts. Federal district courts have original and exclusive jurisdiction over all bankruptcy "cases,"[716] and have original but not exclusive jurisdiction over all "civil proceedings" arising under the Code, or arising in or related to a bankruptcy case.[717] However, unlike in other forms of federal litigation, the scope of bankruptcy court jurisdiction after the case is over continues to be controversial. Most courts hold that bankruptcy courts should exercise jurisdiction after confirmation only over controversies involving interpretation and enforcement of the reorganzation plan.[718] Although jurisdiction must be defined by statute, some bankruptcy courts continue to assert that their jurisdiction post-bankruptcy is defined by the terms of the reorganization plan.[719] When the debtor post-bankruptcy asserts a cause of action based on a government contract, whether it was adjudicated in the bankruptcy court or the COFC, jurisdiction may rest on what theory the bankruptcy court follows.

2. Executory Contracts. The Bankruptcy Code grants debtors special rights concerning executory contracts.[720] While the Code does not define executory contracts, most courts hold that they are contracts with future mutual performance required of both parties.[721] Whether the government must obtain the bankruptcy court's permission prior to terminating an executory government contract with an entity in bankruptcy is controversial. While most courts have held that such permission is required,[722] commentators argue that unique governmental rights make such permission unnecessary for government contracts.[723]

Among the rights given to a debtor is the right to assume or reject an executory contract. However, this decision may be long delayed. Among the most controversial areas of bankruptcy law is the status of the non-debtor party to the contract pending the

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[712] *Id. citing* Rule 3.7, ABA Model Rules of Professional Conduct.

[713] *Id.* at 140,127.

[714] ASBCA No. 44270, BCA 96-1 ¶ 28,100.

[715] *See* DFARS *supra* note 93, at 237.104(f)(i) which, with a few exceptions, limits compensation of expert or consultant fees to no more than the highest rate payable to a GS-15. *See also* 31 U.S.C. § 3554(c)(2) (protests and applicable fee rate).

[716] 28 U.S.C. § 1334(a).

[717] *Id.* § 1334(b).

[718] *In re* Polar Molecular Corp., 195 B.R. 548, 552-56 (Bankr. D. Mass. 1996) (a trustee's complaint demanding the reorganized debtor remit certain income generated post-confirmation was a cause of action to enforce the plan of reorganization and, hence, the bankruptcy court had jurisdiction); *In re* Spiers Graff Spiers, 190 B.R. 1001, 1007 (Bankr. N.D. Ill. 1996) (The "[j]urisdictional authority of a bankruptcy judge is sharply reduced following confirmation . . . . [J]urisdiction is retained to a limited extent post-confirmation to ensure that reorganization plans are implemented").

[719] *In re* Friedberg, 192 B.R. 338, 341 (S.D.N.Y. 1996); *In re* The Landing, 192 B.R. 501, 502 (Bankr. E.D. Mo. 1996) (both holding that bankruptcy court jurisdiction post-confirmation is determined by the terms of the reorganization plan).

[720] 11 U.S.C. § 365.

[721] *In re* Spectrum Information Technologies, Inc., 190 B.R. 741, 747-48 (Bankr. E.D.N.Y. 1996) ("Contracts where one party has completed performance are excluded from the ambit of section 365 . . . . [W]here the only performance that remains is the payment of money, the contract will not be found to be executory").

[722] *In re* Elder-Beerman Stores Corp., 195 B.R. 1019, 1023-24 (Bankr. S.D. Ohio 1996) (a creditor's effort to terminate an executory contract violates the automatic stay even if the contract contains an "at will" termination clause); *In re* National Environmental Waste Corp., 191 B.R. 832, 834 (Bankr. E.D. Cal. 1996) (executory contracts are property of the bankruptcy estate and termination of an executory contract requires relief from the automatic stay; termination of a contract without relief from the stay is an exercise of control over property of the estate which violates 11 U.S.C. § 362(a)(3)).

[723] *See, e.g.*, Samuel R. Maizel and Tracy J. Whitaker, *The Government's Contractual Rights and Bankruptcy's Automatic Stay*, 25 PUBLIC CONTRACT LAW JOURNAL 4 (Summer 1996).

debtor's decision whether to assume or reject. In 1996, bankruptcy courts were deferential to debtors. In *In re El Paso Refinery L.P.*,[724] the court held that the "non-debtor is bound by the contract's terms." The government frequently argues that equity and the principle of mutuality of obligation requires that the debtor must similarly comply with the contract's terms if it wants to receive the contract's benefits. In *El Paso*, the court rejected that approach and held that (1) the trustee has standing to sue for breach of an unassumed executory contract, and (2) although "the [Bankruptcy] Code places an independent duty on the nondebtor to continue the performance of an executory contract until it is assumed or rejected . . . the Code relieves the debtor of his duty to perform . . . . [W]hether the debtor performs or not, the non-debtor must perform until assumption or rejection. Thus [the nondebtor] cannot rely on [the debtor's] failure to perform as a defense to the estate's breach of contract claim because the estate was under no duty to perform by operation of federal law!"[725] Under this court's theory a debtor could argue that the United States must pay under a contract for delivery of widgets even though the debtor never produced or delivered any widgets!

The unique rights concerning executory contracts only accrue to contracts already in existence at the time the bankruptcy case commences; contracts the debtor enters into post-petition are not subject to bankruptcy court oversight in the same manner.[726]

3. The Automatic Stay. Creditors, including governmental agencies, concerned about potential bankruptcy filings of contractors have begun to insert contract clauses purporting to waive the automatic stay. In *Matter of Pease*[727] the court concluded that such waivers are "unenforceable, *per se*, because (1) the waiver is invalid due to debtors' lack of capacity to act on behalf of the debtor in possession; (2) the waiver is unenforceable under specific provisions of the Bankruptcy Code . . . ; and (3) the Bankruptcy Code extinguishes the private right of freedom to contract around its essential provisions."[728] However, even this court conceded that the trend is to enforce such provisions.

4. Setoff. Whether governmental agencies are permitted to setoff obligations among themselves in bankruptcy proceedings remained controversial. However, the emerging trend seems to accept that "federal government agencies, with the exception of those acting in a distinctly private capacity, are a single entity for purposes of setoff under § 553."[729] Despite governmental arguments that setoff is mandatory, most courts continue to hold that "setoff under [the Bankruptcy Code] is merely permissive and subject to the discretion of the bankruptcy court."[730]

Sometimes funds subject to setoff are mistakenly paid to trustees or debtors-in-possession. Many courts have held that, like a private creditor, setoff rights against those funds are waived on the ground that the payment of the monies extinguished the mutuality of the debts between the United States and the estate. However, an important decision in 1996 held that the United States' setoff rights are not lost by such payments. In *McCarty v. Nat'l Bank of Alaska (In re United Marine Shipbuilding)*,[731] the district court affirmed the Department of Transporation's (DOT) right to setoff a tax refund due a corporation in bankruptcy. The DOT had commenced an adversary proceeding for determination of its setoff rights, and had notified the IRS to freeze the funds subject to setoff. Nevertheless, the IRS mistakenly sent the tax refund without deducting the amount subject to setoff to

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[724] 196 B.R. 58, 71-72 (Bankr. W.D. Tex. 1996).

[725] *Id.* at 74.

[726] Terry Oilfield Supply Co. v. American Security Bank, N.A., 195 B.R. 66, 73-74 (S.D. Tex. 1996) (Bankruptcy courts "cannot tell the parties what a contract means much less alter it at will. Although the bankruptcy courts have the power to impair the obligations of pre-petition contracts, it [sic] does not have the power to impair post-petition contracts. All it can do is approve or disapprove the post-petition contract. The debtor in possession is liable according to the explicit terms of its contract").

[727] 195 B.R. 431 (Bankr. D. Neb. 1996).

[728] *Id.* at 433.

[729] *In re* HAL, Inc., 196 B.R. 159, 165 (B.A.P. 9th Cir. 1996). *Compare In re* Turner, 84 F.3d 1294 (10th Cir. 1996) (*en banc*) ("We are convinced that the presence or absence of a bankruptcy proceeding does not affect the United States' status as a unitary creditor." Moreover, the definitional sections of the Code "in no way demonstrate an intent to erode the right of administrative offset that exists outside of bankruptcy . . . .") with Lopes v. HUD, 197 B.R. 15 (Bankr. D.R.I. 1996) (*appeal pending*) (federal agencies are not mutual for setoff purposes in bankruptcy proceedings) and *In re* William Ross, Inc., 199 B.R. 551, 555-56 (Bankr. W.D. Pa. 1996) ("Interagency offset is not permitted by the Bankruptcy Code under either § 106(a) or § 553(a)").

[730] *In re* Securities Group 1980, 74 F.3d 1103, 1114 (11th Cir. 1996).

[731] 198 B.R. 970, 976-79 (Bankr. W.D. Wash. 1996).

the debtor. The court held that the debtor had to return the funds because they would be subject to setoff.

5. Recoupment. Recoupment, i.e., the right of a creditor to adjust amounts owed under a single transaction, was the subject of considerable litigation in 1996. Several circuit courts discussed the application of the doctrine with mixed results. Most held that recoupment is allowed in bankruptcy proceedings and "that recoupment does not violate the ratable distribution of assets among a bankrupt debtor's creditors."[732] Most rejected "the argument that recoupment is only available in cases involving overpayments."[733] However, the standard for when recoupment is available is controversial. The government has frequently argued that the common law standard, based on the logical relationship of the obligations and including obligations arising out of an integrated contract, should apply equally in bankruptcy cases. Some courts accepted such a standard.[734] However, most courts rejected as "too simplistic" the argument that "claims involving the same contract . . . arise out of the same transaction" and are suitable for recoupment.[735] In place of that well recognized non-bankruptcy standard, the court in *In re Peterson Distributing, Inc.*, held that recoupment "is only applicable to claims that are so closely intertwined that allowing the debtor to escape its obligation would be inequitable notwithstanding the Bankruptcy Code's tenet that all unsecured creditors share equally in the debtor's estate."[736]

6. Equitable Subordination. The Bankruptcy Code provides that a bankruptcy court may, "under the principles of equitable subordination, subordinate for purposes of distribution, all or part of an allowed claim . . . ."[737] Bankruptcy courts had frequently subordinated governmental noncompensatory penalty claims to the claims of general unsecured creditors despite those claims being entitled to a priority in the distribution of assets in the bankruptcy case. In two decisions this year, the Supreme Court greatly limited a debtor's ability to subordinate governmental claims to those of other creditors. In *United States v. Noland*[738] and *United States v. Reorganized CF&I Fabricators of Utah, Inc.*[739] the Supreme Court held that bankruptcy courts could not alter the relative ranking of creditors' claims because of their "nature." The Court stated that such decisions result in courts substituting their judgment for that of the Congress in establishing the priority of claims. This applies equally where the governmental claim should be treated similarly to all those of other general unsecured creditors but the bankruptcy court subordinated it merely because the government's claim was a penalty.

7. Bankruptcy Review Commission. In late 1994, Congress created a National Bankruptcy Review Commission to identify and analyze issues relating to the bankruptcy system. In 1996, after a slow start, the commission began holding hearings throughout the nation. The DOJ and other governmental agencies have been working with the commission to ensure that its recommendations maintain an appropriate balance between providing debtors with a "fresh start" and maintaining important government interests. The commission's report and recommendations for reform are expected by October 1997.

B. Government Furnished Property.

1. DOD FAR Class Deviation for Rental Charges. The DOD proposed a FAR class deviation that simplifies the method of determining rental charges for government property.[740] The

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[732] Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1400 (9th Cir. 1996); Matter of U.S. Abatement Corp., 79 F.3d 393, 398 (5th Cir. 1996) (Recoupment is an "exception to standard rules governing [the Bankruptcy Code's] priority scheme").

[733] *Newbery Corp.*, 95 F.3d at 1401; *U.S. Abatement Corp.*, 79 F.3d at 398 n.11 (The court rejects the district court's ruling that recoupment is only permissible to recover some prior overpayment, noting that "[t]he [district] court cited no authority that substantiates this 'overpayment requirement' and we have found none").

[734] *Newbery Corp.*, 95 F.3d at 1403; *U.S. Abatement Corp.*, 79 F.3d at 399 (Court holds that the district court erred by denying recoupment where the "terms of the contract between [the parties] not only govern" the existence of one obligation but also impose the basis for the countervailing obligation. In such circumstances the obligations arise from the same transaction); *In re* Abbey Financial Corp., 193 B.R. 89, 94-96 (Bankr. D. Mass. 1996) (The court notes that "transaction" is a broader term than "contract" although "the case law is not uniform on that point" and holds that recoupment is not permissible where the creditor's conduct was "sufficiently outside the terms of the parties agreement so as to make its debit . . . an act of setoff").

[735] *See, e.g., In re* Peterson Distributing, Inc., 82 F.3d 956 (10th Cir. 1996).

[736] 82 F.3d 956 (10th Cir. 1996).

[737] 11 U.S.C. § 510(c).

[738] 116 S. Ct. 1524 (1996).

[739] 116 S. Ct. 2106 (1996).

[740] 61 Fed. Reg. 24,473 (1996) (revising a previous notice of proposed class deviation on Sept. 6, 1995, 60 Fed. Reg. 46,259, after receipt of substantive comments).

proposed class deviation will allow defense contractors to propose rental charges for the commercial use of government property and real property while FAR revisions are drafted. The deviation authorizes DOD to deviate from FAR 52.245-9 to expedite implementation of simplified government property rental procedures.[741] The clause permits contractors to request that the government consider alternate rental charge methods for either real or other property if the contractor considers a time-based rental to be unreasonable or impracticable.

2. Christian Doctrine Does Not Incorporate Optional GFP Clauses. The NASA FAR supplement contains a clause[742] entitled Liability for Government Property Furnished for Repair or Other Services.[743] NASA contracted with *Computing Application Software Inc.*[744] (CAST) to upgrade a satellite system. The system was damaged during shipping between CAST and its subcontractor. NASA directed CAST to repair the system. CAST submitted a claim for payment. Although the clause was not referenced in the contract, NASA denied the claim citing the clause. NASA argued that the *Christian* Doctrine,[745] incorporated the clause into the contract by operation of law, because the NASA FAR Supplement requires its inclusion. The ASBCA determined that the *Christian* Doctrine does not incorporate every required clause, but applies only to mandatory clauses which "express a significant or deeply ingrained strand of public policy."[746] The board stated that clauses that are less fundamental or significant and are written to benefit the party seeking incorporation are not incorporated by reference under the *Christian* Doctrine.[747] The ASBCA noted that the NASA clause contravenes the FAR policy by increasing contractor liability. The board found that the clause was for NASA's benefit and determined that it did not express significant or deeply ingrained public policy. As such, the ASBCA stated that it could not be incorporated by reference under the *Christian* Doctrine.

C. Payment and Collection.

1. Prompt Payment Act (PPA) Applicability Overseas. On 20 June 1996, the interim rule on PPA applicability overseas which had been issued on 3 July 1995, was adopted as final.[748] The ASBCA in *Held & Baukittengesellschaft*[749] decided that the Prompt Payment Act[750] was applicable to contracts awarded to foreign contractors for work performed outside the United States. The interim rule made the government liable for payment of interest and interest penalties under the PPA for contracts with foreign contractors for work performed or supplies delivered overseas.[751] The interim rule was converted to a final rule without change.

2. Assignment of Claims Act (ACA).

a. Assignment Need Not Comply With Notice Requirement. Although submission of a lease assignment does not com-

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[741] The clause requires contractors, for real property and associated fixtures, to obtain certified property appraisals that compute a monthly, daily, or hourly rental rate for comparable commercial property. Rental charges would be determined by multiplying the rental time by an appraisal rental rate expressed as a rate per hour. For other government property, rental charges are based upon the property's acquisition costs and the actual rental time.

[742] NASA FAR Supplement, Clause 18-52.245-72.

[743] This clause shifts the risk of loss to the contractor for property provided to the contractor for repair if the contractor fails to exercise due care and diligence.

[744] ASBCA No. 47554, 96-1 BCA ¶ 28,204.

[745] G.L. Christian Assoc. v. U.S., 312 F.2d 418, *aff'd on reh'g* 320 F.2d 345 (Ct. Cl. 1963). If a mandatory clause is omitted from the contract, it will be read into the contract by operation of law.

[746] *Id.*, *citing* General Eng'g & Machine Works v. O'Keefe, 991 F.2d 775 (Fed. Cir. 1993).

[747] The board was citing the language contained in *Chris Berg, Inc. v. United States*, 426 F.2d 314, 317, 192 Ct. Cl. 176 (1970). The clause covers such a narrow area which is not covered by the guidance provided in FAR Part 45.

[748] 61 Fed. Reg. 31,658 (1996).

[749] ASBCA No. 42463, 92-1 BCA ¶ 24,712.

[750] 31 U.S.C. § 3901 (1996).

[751] FAR sections 32.901 and the clauses at 52.232-5, 52.232-26, and 52.232-27 were amended by the interim rule to remove the statements that no interest penalty will be paid on contracts awarded to foreign vendees and to remove the definition of foreign vendor.

ply with the notice requirement of the ACA,[752] the GAO held that since the agency was aware of, assented to, and recognized the assignment of the payments under the lease, the agency must make the payments to the assignee.[753] The ACA requires notice to both the contracting officer and the disbursing officer. The statute must be strictly construed to accomplish the purposes of preventing multiple claims on the government and of making unnecessary the investigation of alleged assignments. Although the GAO recognized this strict compliance policy, and even though the assignor failed to notify the disbursing officer of the assignment, the GAO found that prior decisions have consistently allowed the government to recognize an assignment notwithstanding the bars of the ACA.[754] The GAO held that the assignment notification by the assignor to the contracting officer made the assignment binding. The GAO further stated that if the disbursing officer erroneously pays the assignor, it must pay the assignee and recover the improper payments. When an agency pays the wrong party following a recognized assignment, the agency pays at its own risk. The assignee is entitled to prompt payment regardless of the status of the agency's collection efforts.

b. Disbursing Officer Can Be Relieved of Financial Liability for Erroneous Payment. Where an assignment was properly executed and notice given in accordance with statutory requirements, the assignee is entitled to payment. If an agency, with notice of a valid assignment nevertheless pays the assignor, the agency is still liable to pay the assignee the amount of the erroneous payment. A disbursing officer who, pursuant to an invoice that was approved by the contracting officer, makes an erroneous payment to a contractor may be relieved of financial responsibility if the loss did not occur as a result of bad faith or lack of due care.[755] In requesting an advance decision by GAO,[756] the Defense Finance and Accounting Service (DFAS) questioned an assignment made by a contractor prior to an executed contract modification. GAO stated that the ACA[757] only requires the assignee to provide written notice of the assignment and a copy of the assignment, not a copy of the contract modification.

c. Delegation of President's Authority to Invoke No Set-Off Provision. On 28 June 1996, the FAR Council issued a final rule to implement and provide guidance on the Presidential delegation of authority dated 3 October 1995.[758] Formerly, agencies required a Presidential proclamation[759] to use a no-setoff provision.[760] This final rule delegates this authority to the head of the agency. Use of the no-setoff provision may be appropriate to facilitate the national defense, in the event of a national emergency or natural disaster, or when the use of a no-setoff provision may facilitate private financing of contract performance. The agency head may invoke this provision after publishing notice of the determination in the Federal Register.[761] If the offeror is significantly indebted to the government, this information should be considered in making the determination.[762]

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[752] Under the ACA, a contractor may assign monies due or to become due under a contract if all of the following conditions are met: The contract must specify payments aggregating $1,000 or more. The contractor must make the assignment to a bank, trust company, or other financing institution. The contract does not prohibit the assignment. The assignment (unless the contract expressly permits otherwise) covers all unpaid amounts payable under the contract, is made only to one party, and is not subject to further assignment. The assignee must send a written notice of assignment together with a true copy of the assignment instrument to the contracting officer or agency head, to the surety on any bond applicable to the contract, and to the disbursing officer designated in the contract to make payment. 31 U.S.C. § 3727 (1996).

[753] *Id.*

[754] DFAS: Making Payments to Assignees Under a Lease Agreement After Improper Payment Has Been Made to Assignor, B-270715, July 23, 1996, 1996 WL 413248 (C.G.).

[755] 31 U.S.C. § 3527(c).

[756] Request for Advance Decision from DFAS, B-270801, Mar. 19, 1996, 96-1 CPD ¶ 159.

[757] 31 U.S.C. § 3727(c)(3).

[758] 61 Fed. Reg. 18,920 (1996).

[759] Previously, a Presidential proclamation of war or national emergency was required. FAR 52.232-23.

[760] One avenue available for the contracting officer to collect from the contractor debts owed the United States is to "set-off" the money owed the government against any monies owed the contractor. If the contract contains a no-setoff commitment clause, the assignee will receive contract payments free of reduction or setoff for any liability of the contractor arising independent of the contract and certain liabilities arising under the same contract, such as fines, penalties, and withheld taxes. FAR 32.804.

[761] 41 U.S.C. § 15.

[762] No guidance is provided on how the agency head should use this information, but after reading the entire final rule, the rule indicates that this information should be used as a basis for not including the no set-off provision.

3. Payment by Electronic Funds Transfer (EFT) or the Check's in the Mail. On 29 August 1996, the FAR Council issued an interim rule to amend FAR Parts 32 and 52 and address the use of electronic funds transfers (EFT) for contract payments.[763]

The revised FAR 32.902 provides the definitions of "payment date" and "specified payment date." "Payment date" is defined as the date on which a check for payment is dated, or for an EFT, the specified payment date. The "specified payment date" is defined as the date on which the government placed the EFT payment transaction instruction given to the Federal Reserve system as the date on which the funds are to be transferred to the contractor's account by the financial agent. If no date has been specified in the instruction, the specified payment date is three business days after the payment office releases the EFT payment transaction instruction.

For PPA purposes, the specified payment date, included in the government's order to pay the contractor, is the date of payment, whether or not the Federal Reserve System actually makes the payment by that date, and whether or not the contractor's financial agent credits the contractor's account on that date.[764] However, a specified payment date must be a valid date under the rules of the Federal Reserve System.[765]

Payment by EFT is the preferred method of contract payment except: (1) for contracts awarded outside the United States (unless that is how the contractor wants to be paid), (2) for contracts denominated or paid in other than United States dollars, (3) for classified contracts where EFT payment could compromise the safeguarding of classified information or national security or where arrangements for appropriate EFT payments would be impractical due to security considerations, and (4) for contracts executed by deployed contracting officers in the course of military operations.[766]

A contractor must still initiate a proper assignment of claims.[767] The use of EFT payment methods is not a substitute for a properly executed assignment of claims. EFT information which shows the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information.[768]

Unless instructed otherwise by the cognizant payment office or agency guidance, the contracting officer shall insert FAR 52.232-33, Mandatory Information for Electronic Funds Transfer Payment, in all solicitations resulting in contracts which will not be paid through the use of the government-wide commercial purchase card and are not otherwise excepted. The clause may be inserted in other contracts if the contractor requests payment by EFT and the payment office concurs. In contracts where FAR 52.232-33 is not inserted, the contracting officer will insert FAR 52.232-34, Optional Information for Electronic Funds Transfer Payment.

Payments, either invoice or finance, may be made by check or EFT at the option of the government. If payment is made by EFT, the government may also forward the associated payment information by electronic transfer. The contractor is required to provide the government with the necessary information to make the EFT. If the contractor certifies its inability to accept EFT, the government must use another payment method. The government is not required to make any payment until the required information or certification is provided. The contractor shall designate a single financial agent capable of receiving and processing the EFT. The contractor shall pay all the fees and charges for receipt and processing of transfers.[769]

In the area of risk of loss of funds transferred by EFT, the EFT Payment Clauses provide as follows:

1. If an uncompleted or erroneous transfer occurs because the government failed to use the contractor-provided EFT information in the correct manner, the government remains responsible for making a correct payment, paying any prompt payment penalty due, and recovering any erroneously directed funds.

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[763] FAC 90-42, 61 Fed. Reg. 45,770 (1996) (implementing the requirements of Public Law 104-134, the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Chapter 10, the Debt Collection Improvement Act of 1996 which amended 31 U.S.C. § 3332).

[764] FAR 32.903.

[765] For example, if the Federal Reserve System requires two days notice before a specified payment date to process a transaction, release of a payment transaction instruction to the Federal Reserve Bank one day before the specified payment date could not constitute a valid date.

[766] FAR 32.1101.

[767] *See supra* note 757.

[768] FAR 32.1102.

[769] FAR 52.232-33, 52.232-34.

2. If an uncompleted or erroneous transfer occurs because the contractor provided incorrect EFT information and if the funds are no longer in control of the payment office, the government is deemed to have made payment and the contractor is responsible for recovery of any of the erroneously-directed funds.

3. If the funds remain under the control of the payment office (the funds have not been taken out of their account), the government retains the right to either make payment by mail or suspend the payment.

Does EFT meet the requirements of the PPA?[770] A payment shall be deemed to have been made in a timely manner in accordance with the PPA if the EFT payment transaction given to the Federal Reserve System specifies the date for settlement of the payment on or before the prompt payment due date.

4. New DFARS Finance Rules. On 24 January 1996, DOD published a proposed rule to amend the DFARS to reflect recent FAR changes pertaining to contract financing.[771] DFARS 232.102, Description of Contract Financing Methods, was amended to read that progress payments based on percentage or stage of completion are authorized only for contracts for construction, shipbuilding, and ship conversion, alteration, or repair.

DFARS 232.102-70 provides that the contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the government under undefinitized letter contracts contemplating a fixed price contract, orders under basic ordering agreements, spares provisioning documents annexed to contracts, unpriced equitable adjustments on fixed-price contracts, and orders under indefinite delivery contracts. Provisional delivery payments shall be used sparingly, priced conservatively, and reduced by liquidating previous progress payments. Provisional delivery payments shall not include profit, exceed funds obligated for the undefinitized contract action, or influence the definitized contract price.

DFARS 232.202-4 now provides that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but be insufficient as security for commercial contract financing. The proposed rule also establishes prompt payment rules for commercial purchase payments.[772] The standard prompt payment time for commercial advance payments and commercial delivery payments is 30 days and for commercial interim payments 14 days.[773] Performance based payments have a prompt payment time standard of 14 days.[774]

D. Defective Pricing: Truth In Negotiations Act (TINA). To prevail on a defective pricing claim the government must make the following showing: (1) the disputed information constitutes cost or pricing data; (2) the contractor failed to supply that data to the government, or provided it in a non-understandable form; and, (3) the government detrimentally relied on the information in negotiating the contract price with the contractor.[775]

At issue in *Motorola, Inc.*[776] was a government claim focusing on the second element—the failure of a subcontractor (Aydin) to adequately divulge cost or pricing data. The government had issued two final decisions alleging defective pricing by Aydin. One sought $784,219 based on faulty data regarding Aydin's general and administrative (G&A) rates. The other claimed $798,504 attributable, in part, to Aydin's failure to supply information regarding a facilities capital charge.[777] The record revealed that Aydin had, in fact, allowed the government access to its G&A data. This included access to documents which revealed

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[770] 31 U.S.C. §§ 3901-06.

[771] 61 Fed. Reg. 1,889 (1996).

[772] Financing options for commercial contracts include commercial advance payments, commercial interim payments, and commercial delivery payments. Commercial advance payments and commercial interim payments are not subject to PPA interest. The establishment of standard prompt payment times does not change the status of these payment types. FAR Part 32.2.

[773] DFARS 232.202-4(f)(i) and (ii).

[774] DFARS 232.10.

[775] *See* Litton Sys., Inc., ASBCA No. 36509, 92-2 BCA ¶ 24,842.

[776] ASBCA No. 48841, 96-2 BCA ¶ 28,465.

[777] The remainder of this claim was founded on the decrease in subcontractor's G&A rates subsequent to the execution of a contract modification. *Id.* at 142,170.

an internal dispute within Aydin as to the appropriate G&A rate.[778] Consequently, the board sustained that part of Aydin's appeal which related to the G&A rates. With respect to the claim founded on facilities capital charges, however, the board ruled that Aydin had failed to inform the auditors of a key corporate policy instructing its officials not to assert such charges on government contracts.[779]

E. Costs and Cost Accounting.

1. Lack of Travel Cost Documentation Sends the Contractor Packing. On 20 June 1996, the FAR Council issued a final rule, effective 19 August 1996, that specifies the documentation required to support the allowability of contractor travel costs.[780] Travel costs may be based on mileage rates, actual costs incurred, or a combination thereof, provided that the method used results in a reasonable charge. Lodging and meal costs may be based on per diem, actual expenses, or a combination of the two provided the method results in a reasonable charge.[781] The contractor must provide a receipt for all expenses greater than twenty-five dollars. Finally, costs are allowable only if the contractor provided the date and place of the trip, the purpose of the trip, the traveller's name and relationship to the contractor.

2. Bad Boys, Bad Boys, What 'Ya Gonna' Do? The FAR Council published a proposed FAR rule to clarify the allowability of legal costs incurred for *qui tam* suits in which the government declines to intervene, as well as the maximum amount the contractor will be paid for legal costs related to settlement agreements.[782]

Under the proposed rule, FAR 31.205-47(b) would be revised to disallow contractors' costs incurred in connection with any proceeding brought by a federal, state, local or foreign government for violation of, or a failure to comply with, law or regulation by the contractor and costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act.[783] Such costs are unallowable under certain circumstances.[784] The current rule does not include actions taken under the False Claims Act.

The proposed FAR 31.205-47(c) provides that in the event of a settlement of a *qui tam* action in which the United States did not intervene, reasonable costs incurred by the contractor may be allowed if the contracting officer determines that there was very little likelihood that the third party would have been successful on the merits.[785]

The new FAR 31.205-47(e) would provide that settlement agreements reached under paragraph (c)[786] shall be subject to an 80% limitation of costs. If the agreement explicitly states the amount of the otherwise allowable incurred legal fees and limits the allowable recovery to 80% or less of the stated legal fees, no additional limitation is necessary. Otherwise, the amount of the reimbursement allowed for legal costs shall be determined by the cognizant contracting officer but shall not exceed 80% of otherwise allowable legal costs incurred.

3. FAR Council Rates by Directly Giving Indirect Rates. Procedures relating to final indirect cost rates are to be revised by the FAR Council in a proposed rule published 28 May 1996.[787]

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[778] It was this difference of opinion on which the government auditors relied in asserting that Aydin was overcharging the government. Unfortunately, the board determined that Aydin had provided the auditors full access to this information before the completion of contract negotiations. Further, it did not help the government's case that a contract specialist had cancelled Motorola's request that Aydin's proposal under the contract be audited. *Id.* at 142,169.

[779] The board noted that absent the memorandum disclosing this corporate policy, "there is no indication that DCAA had, or should have had, any inkling of the 'kind and content' of the charge." *Id.* at 142,171.

[780] FAC 90-39, 61 Fed. Reg. 31,657 (1996) (The rule amends FAR 31.205-46 and is based on a recommendation by the Office of Procurement Policy SWAT Team on Civilian Agency Contracting in its 3 December 1993 report, "Improving Contracting Practices and Management Controls on Cost-Type Federal Contracts.").

[781] Required documentation is in accordance with the contractor's established practices.

[782] 61 Fed. Reg. 31,790 (1996) (The proposed rule would amend FAR 31.205-47).

[783] 31 U.S.C. § 3730.

[784] These circumstances are: (1) in a criminal proceeding, a conviction; (2) in a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct; (3) a final decision to debar, rescind the contract, or T4D; (4) disposition of the matter by consent or compromise if the result would have been the same as 1, 2, or 3; or (5) where costs are otherwise unallowable.

[785] The rule fails to give guidance on how the contracting officer and\or legal advisor are to decide whether "there was very little likelihood that the third party would have been successful on the merits." FAR 31.205-47(c).

[786] This refers to agreements between the contractor and the government referee discussed in FAR 31.205-47(c) and in the preceding paragraph.

[787] 61 Fed. Reg. 26,766 (1996) (The proposed rule would amend FAR Subpart 42.7 to permit increased interim payments to contractors. It also would revise FAR 52.216-7 and 52.216-13 to establish a timeframe for contractor's final voucher submission. FAR 52.216-8 through FAR 52.216-10 would be revised to require release of 75% of all fee withholds under physically completed cost-type contracts and to permit release of 90% of all withholds).

The proposed rule would change FAR 42.704(e) to read "when the contractor provides to the cognizant contracting officer the certified final indirect cost rate proposal in accordance with 42.705-1(b)[788] or 42.705-2(b),[789] the contractor may bill the proposed indirect cost rates, as approved by the government to reflect historically disallowed amounts from prior years' audits, until the proposal has been audited and settled."[790]

The proposed FAR 42.705 states that final indirect cost rates shall be established on the basis of the contracting officer determination procedure or the auditor determination procedure. Within 120 days after settlement of the final indirect cost rates, the contractor shall submit a completion invoice or voucher reflecting the settled amounts and rates on all contracts physically completed in the year covered by the proposal.

For fixed fee supply and service contracts, the contracting officer shall release 75% of all fees withheld under the contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of the contract. The contracting officer may release up to 90% of the fees withheld based on the contractor's past performance related to the submission and settlement of final indirect cost rate proposals.[791]

Fixed fee construction contracts[792] and incentive fee contracts[793] would operate in the same manner. Upon approval of an invoice or voucher submitted by the contractor, the government shall pay any balance of allowable costs.[794]

4. Want to Avoid the Cost Accounting Standards (CAS)? Buy Commercial Items. On 29 July 1996, the CAS board issued an interim rule that exempts from CAS firm fixed-price contracts and subcontracts for the acquisition of commercial items.[795] The rule only addresses firm fixed-price contracts, because under current regulations, commercial item contracts are limited to fixed-price contracts. The board stated that if that rule changes it will implement guidance addressing the change. The phrase in CAS 201-1, "contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public," has been replaced with the phrase "contracts or subcontracts for the acquisition of commercial items."[796]

5. Will Contractors Protest Final Pre-award and Post-award Protest Costs Rules? Effective 7 Oct. 1996, the rule concerning the allowability of pre-award and post-award protest costs was final.[797] The final rule adds to FAR 31.205-47(f) another category of unallowable costs. Costs in connection with protests, the defense of protests, solicitations or contract awards are disallowed. The costs of defending against a protest that are incurred pursuant to a written request from the contracting officer are allowable as exceptions to FAR 31.205-47(f).

6. Any "Interest" in Revisions to the Interest Clause? The FAR Council issued a final rule to clarify that certain CAS clauses provide for using differing interest rates under different circumstances.[798] FAR 32.610 is amended to read:

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[788] Contracting Officer Determination Procedure. In accordance with the Allowable Cost and Payment clause at FAR 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor, a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

[789] Auditor determination procedures. After the contractor submits the final indirect cost rate to the contracting officer and the auditor, the auditor shall audit the proposal and seek agreement with the contractor, prepare an indirect cost rate agreement, and prepare an audit report.

[790] 61 Fed. Reg. 26,766 (1996).

[791] FAR 52.216-8 as proposed to be amended.

[792] FAR 52.216-9 as proposed to be amended.

[793] FAR 52.216-10 as proposed to be amended.

[794] FAR 52.216-13 as proposed to be amended.

[795] 61 Fed. Reg. 39,360 (1996) (The interim rule implements the requirements of FARA § 4205, *supra* note 258 which amended 41 U.S.C. § 422) (the interim rule rescinds the CAS Board's "memorandum for Agency Senior Procurement Executives" dated 19 December 1995).

[796] 48 CFR 9903.201-1 (1996) as amended.

[797] FAC 90-41, 61 Fed. Reg. 41,476 (1996) (FAR Council issued final rule on 8 Aug. 1996) (the final rule amends FAR 31.205-47(f)).

[798] FAC 90-38, 61 Fed. Reg. 18,921 (1996) (effective date 28 June 1996) (the rule revised FAR 32.610(b)(2), 32.613(h)(3), 32.414-1(c), and 52.232-17 to clarify that FAR 52.230-2 and 52.230-3 provide for the use of differing interest rates under differing circumstances).

> Notification that any amounts not paid within 30 days from the date of the demand will bear interest from the date of the demand, or from any earlier date specified in the contract, and that the interest rate shall be the rate established by the Secretary of the Treasury, for the period affected. . . In the case of a debt arising from a price reduction for defective pricing, or as specifically set forth in a CAS clause in the contract, that interest will run from the date of overpayment by the government until repayment by the contractor at the underpayment rate established by the Secretary of the Treasury, for the periods affected.[799]

FAR 52.232-17 is amended by changing the first sentence to read:

> except as otherwise provided in this contract under a Price Reduction for Defective Cost or Pricing Date clause or a Cost Accounting Standards clause, all amounts that become payable by the contractor to the government under this contract . . . shall bear simple interest from the date due until paid unless paid within 30 days of becoming due.[800]

7. Can the Contractor Be Paid for that Personal Service Masseuse?— There's The Rub! On 26 July 1996, the FAR Council published its final rule clarifying the regulations concerning the allowability of personal services[801] compensation costs.[802] The following definitions were added to FAR 31.001:

> - Job—a homogenous cluster of work tasks, the completion of which serves an enduring purpose for the organization. Taken as a whole, the collection of tasks, duties, and responsibilities constitutes the assignment for one or more individuals whose work is of the same nature and is performed at the same skill/responsibility level, as opposed to a position which is a collection of tasks assigned to a specific individual. Within a job, there may be pay categories which are dependent on the degree of supervision required by the employee while performing assigned tasks which are performed by all persons with the same job.
>
> - Job class of employees—employees performing in positions within the same job.
>
> - Labor market—a place where individuals exchange their labor for compensation. Labor markets are identified and defined by a combination of geography, education and/or required technical background, experience required by the job, licensing or certification requirements, occupational membership, and industry.

FAR 31.205-6 is revised and discusses allowable compensation. Compensation for personal services includes all monies paid in whatever form and whether paid immediately or not for services rendered by employees to the contractor during the period of contract performance. It includes salaries, wages, bonuses, stock bonuses, incentive awards, insurance, and other fringe benefits. Compensation for personal services is allowable if:

(1) it is for work performed within the current year and is not a retroactive adjustment of prior years' salaries or wages; and

(2) it is reasonable for the work performed. Compensation is considered reasonable if it generally conforms with the compensation practices of other firms for the same size and industry, represents the general labor market, and is appropriate for the work performed.

8. Individual Compensation D-Fined by DFARS. On 10 July 1996, the Director of Defense Procurement issued an interim rule concerning individual compensation.[803] DFARS 231.205-6, Compensation for Personal Services, is amended to state:

> Costs for individual compensation in excess of $250,000 per year are unallowable under DOD contracts that are awarded after 15 April 1995, and are funded by FY 1995 appropriations. Costs for individual compensation in excess of $200,000 per year are unallowable under DOD contracts that are awarded after

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[799] *Id.* at 18,922.

[800] *Id.*

[801] The use of the term "personal services" here is different than that contemplated in FAR Part 37. FAR Part 37 states that, except in statutorily excepted circumstances, the government cannot contract for personal service contracts.

[802] FAC 90-40, 61 Fed. Reg. 39,217 (1996) (the rule has an effective date of 24 Sept. 1996) (the rule amends FAR 31.001 and FAR 31.205-6).

[803] 61 Fed. Reg. 36,305 (1996) (the interim rule amends DFARS Subpart 231.2, 231.3, 231.6, and 231.7 and implements National Defense Appropriations Act for Fiscal Year 1996, Public Law 104-61, § 8086, 109 Stat. 636).

July 1, 1996, and are funded by FY 1996 appropriations.[804]

The above limitations also apply to DFARS 231.205-6.

9. Are You Unsettled About the Final Settlement of Contractor Overhead Rates?[805] The FAR Council, on 29 July 1996, issued a proposed rule to improve the process of final settlement of contractor overhead rates.[806] Cost reimbursement and fixed-price incentive contracts require contractor overhead rates be settled prior to establishment of final contract prices. Currently, the contractor is required to submit a certified indirect cost rate proposal within 90 days after the end of its FY. A final audit is required before establishing the contractor's final rate. There is no sanction or penalty for late submissions. The proposed rule extends the submission date from 90 days to 6 months. The contracting officer has the discretion to consider that contractors who are delinquent in the submittal of final incurred cost proposals do not have an adequate accounting system. FAR 52.216-7, 52.216-13, and 52.216-15 are amended to change the submission time requirements to six months.[807]

10. Are Selling Costs Foreign To You? A proposed rule,[808] published by the FAR Council on 20 June 1996, would change the ceiling on government reimbursement of contractor's foreign selling costs from $2.500,000 to $5,000,000.[809]

11. Are Overhead Certification Rules Over Your Head? On 29 March 1996, the FAR Council published a proposed rule to clarify costs related to gifts and entertainment.[810] FAR 31.205-1, Public Relations and Advertising Costs, is amended to remove any reference to other cost principles. That is the entire change. By deleting the reference to other cost principles, the proposed rule attempts to comply with recommendations by GAO to establish which cost principle would control. By removing the reference to other cost principles, the guidance found in FAR 31.205-1 is controlling in this area.

12. Can You Restructure Your Thoughts Concerning Contractor Restructuring Costs? The DFARS is amended concerning reimbursement of external restructuring costs associated with business combinations.[811] DFARS 231-205.70 gives definitions of business combination, external restructuring activity, restruc-

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[804] *Id.* at 36,306.

[805] Paragraph number three of this section also discusses a proposed rule dealing with indirect cost rates. The proposed rule in paragraph number three discusses how and when the contractor may bill the government after the final indirect rate is established. The proposed rule discussed here deals with the process of how the contractor arrives at a final indirect cost rate.

[806] 61 Fed. Reg. 39,518 (1996) (the proposed rule would amend FAR Parts 4, 42, and 52 and implements recommendations of the Contract Administration Services Reform Process Action Team).

[807] The proposed rule lists the required supporting data as:

(1) the schedule of proposed rates for each expense pool,

(2) the statement of pool and base costs for each proposed indirect expense rate, listing the proposed amount by account with unallowable costs specifically identified and excluded from the proposed pool,

(3) the schedule of allowable direct costs,

(4) the schedule of allocation base amounts,

(5) the schedule of hours and costs proposed on time-and-materials and labor hours contracts,

(6) the schedule of government contract participation in the indirect expense pools,

(7) the schedule of facilities capital cost of money factors computations, and

(8) the schedule of allowable R & D costs.

[808] 61 Fed. Reg. 31,800 (1996) (The proposed rule would revise FAR 31.205-38(c)(2)(ii)).

[809] FAR 31.205-38(a) defines selling as a generic term encompassing all efforts to market the contractor's products or services. Selling activity includes advertising, corporate image enhancement including broadly targeted sales efforts, bid and proposal costs, market planning, and direct selling.

[810] 61 Fed. Reg. 14,216 (1996) (*In Contract Pricing: Unallowable Costs Charged to Defense Contracts*, GAO/NSIAD-93-79, Nov. 20, 1992, GAO pointed out many instances where contractors had proposed questionable gift and entertainment costs. GAO recommended FAR 31.205-1, Public Relations and Advertising Costs; FAR 31.205-13, Employee Morale, Health, Welfare, Food Service, and Dormitory Costs and Credits; and FAR 31.205-14, Entertainment Costs, be revised to state which cost principle was controlling.)

[811] 61 Fed. Reg. 16,881 (1996) (this final rule implements the National Defense Authorization Act for Fiscal Year 1995, § 818, Pub. L. No. 103-337 which restricts DOD from reimbursing external restructuring costs associated with a business combination undertaken by a defense contractor unless certain conditions are met) (the rule revised DFARS 231.205-70 and 242.1204).

turing activity, restructuring costs, and restructuring savings. Restructuring costs associated with external restructuring activities[812] are not allowed unless:

(1) such costs are allowable;

(2) an audit of projected restructuring costs and restructuring savings is performed;

(3) the cognizant administrative contracting officer reviews the audit report, the projected costs, the projected savings, and determines that overall reduced costs should result for DOD, and negotiates an advance agreement;[813] and

(4) a certification is made by the Under Secretary of Defense (Acquisition & Technology) that projections of future restructuring savings for DOD resulting from the business combination are based on audited cost data and should result in overall reduced costs for DOD.

F. Fraud.

1. Supermex, Inc. v. United States[814]*—"Taint a Pretty Sight."* The Navy awarded Supermex a contract to construct a Detection Systems Laboratory at the Naval Weapons Center, China Lake, California. The value of the contract was $4,250,000. During the performance of the contract, the President of Supermex bribed the Navy's Assistant Residence Officer in Charge of Construction. Supermex's President gave the officer money on four separate occasions.

The contractor filed suit in the COFC seeking damages for equitable adjustment claims it submitted on the contract. The government entered a special plea in fraud calling for the dismissal, with prejudice, of all of Supermex's claims.[815] The government argued that Supermex's perpetration of fraud upon the United States during contract performance should result in the forfeiture of all claims in relation to the contract.[816] Moreover, the government counterclaimed for civil damages in the form of treble damages. Supermex contended that those parts of its claim(s) which were not related to the established fraud should be allowed even if some of the claim(s) were forfeited.

The court rejected Supermex's argument. The court found that the forfeiture statute[817] is intended to act as a preventive measure to guard against those who perpetrate fraud against the United States during the course of contract performance. Supermex's bribe placed a stigma upon the entire contract and on all claims arising under the contract. As such, the claims were unenforceable. The court noted that public policy considerations, in particular, concerns for the integrity of the procurement process, precluded the enforcement of government contracts tainted by bribery, kickbacks, or conflicts of interest. According to the court, the principal concern should be not how much damage was done by the act of bribery, but how the corruption in the administration of the contract engenders suspicion about the integrity of the entire course of dealings.

2. Not Good for the Home Team—Defense Contract Audit Agency (DCAA) found Negligent on Case that Led to Fraud Indictments.[818] General Dynamics brought a Federal Tort Claims Act[819] suit against the United States alleging that DCAA committed professional negligence in performing audit work in connection with the Army's Divisional Air Defense Gun System (DIVAD). DIVAD was designed as a tank-like weapon intended to engage enemy helicopters and fixed-wing aircraft. On 25 March 1996, a federal district court found the government liable to General Dynamics in the amount of $26,000,000 for DCAA's auditing malpractice.

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[812] These are defined as:

> restructuring activities occurring after a business combination that affect the operations of companies not previously under common ownership or control. They do not include restructuring activities occurring after a business combination that affect the operations of only one of the companies not previously under common ownership or control, or, when there has been no business combination, restructuring activities undertaken within one company. External restructuring activities are a direct outgrowth of a business combination. They normally will be initiated within 3 years of the business combination. *Id.*

[813] In accordance with DFARS 231.205-70(d)(8), *supra* note 93.

[814] 35 Fed. Cl. 29 (1996).

[815] *Id.* at 41.

[816] *Id.* at 35.

[817] 28 U.S.C. § 2514.

[818] General Dynamics Corp. v. United States, No. CV89-6762JGD, 1996 WL 200255, at *1 (C.D. Cal. Mar. 25, 1996).

[819] 28 U.S.C. § 1346.

An audit report issued by DCAA in February 1984 alleged that General Dynamics fraudulently mischarged $8,400,000 in costs related to the contract. The matter was then referred to the DOJ. Incredibly, DCAA incorrectly assumed that the contract was a firm-fixed price contract. Rather, the contract was a "firm fixed-price (best efforts)" type of contract. The court noted that DCAA was negligent in reviewing and briefing the contract.

Specifically, the court stated that a reasonably prudent auditor performing the DIVAD audit should have briefed the contract including the statement of work and the best efforts special provisions, documented and analyzed those provisions in his work papers, and obtained the technical assistance necessary to understand the significance of those provisions. DCAA auditors failed to do any of these. Additionally, the court found DCAA negligent in other ways. These included: (1) failure to employ procedures and achieve standards; (2) failure to understand the purpose of the audit; (3) failure to properly prepare the audit program; (4) failure to conduct entrance conferences; and (5) failure to properly prepare working papers among others.

A number of senior General Dynamics individuals were indicted by a federal grand jury based on the information provided by DCAA. Approximately 18 months later, the DOJ realized that the information provided by DCAA was seriously flawed. The DOJ then voluntarily dismissed the indictments as well as a pending civil fraud suit.

3. Fraudulent Conduct by Contracting Officer Does Not Undo Termination for Default in Autek System Corp. v. United States.[820] The Marine Corps contracted with Autek System Corporation (Autek) to manufacture electronic testheads, i.e., microprocessor-based devices that test electronic components.[821] The Marine Corps eventually terminated Autek for default for failure to make progress under the contract. During the course of Autek's contract performance, the supervisory contracting officer engaged in fraud on a separate contract with another contractor for the software requirements for the electronic testhead.[822]

At the COFC, Autek argued that, because the contracting officer committed fraud during the course of contract performance, it should not be held liable for its failure to meet the contract specifications. The COFC rejected Autek's argument. It specifically found that there was no causal link between the contracting officer's fraud and Autek's termination for default. Further, the court stated that if there was a link, it did not make Autek's performance impossible or impractical.[823] The Federal Circuit also rejected Autek's argument. The Federal Circuit held that absent evidence that the illegal acts of the contracting officer affected Autek's ability to perform under the contract, the COFC's decision on the fraud issue must be sustained.[824]

4. Qui Tam Cases.

a. Ninth Circuit Rules on False Claims Act's (FCA) Tolling Provisions. In *United States ex rel. Hyatt v. Northrop Corp.*,[825] the Ninth Circuit held that the FCAs tolling provisions apply to *qui tam* plaintiffs as well as the federal government. Michael Hyatt, the *qui tam* plaintiff, worked for Northrop Corporation as an engineer from 1981 through 1986. In 1982, Hyatt raised concerns about the design of the inertial measurement of the MX Peacekeeper missile. In October 1986, prior to enactment of the 1986 FCA Amendments, Hyatt filed a *qui tam* action against Northrop. The FCA's general statute of limitation is six years from the date of the violation.[826] At issue before the Ninth Circuit was the specific tolling provision at 31 U.S.C 3731(b)(2). That provision states that an FCA civil action may not be brought more than three years after the date when material facts related to the cause of action are either known or should reasonably have been known by the official of the United States charged with responsibility to act under the circumstances, but in no event more than ten years after the date of the violation. The Ninth Circuit held that there was no distinction in the statute between civil actions brought by the government under Section 3730(a) and those brought by *qui tam* plaintiffs under Section 3730(b). The court cryptically noted that had Congress intended the equitable tolling provisions apply only to the government, it could have easily have said so.

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[820] 82 F.3d 434 (Fed. Cir. 1996).

[821] *Id.* at 434. The testheads are an integral part of the Marine Corps Automated Test Equipment System (MCATES). The contract required the production of 95 testheads. Under the contract, Autek was responsible for the hardware components of the contract and Northrop Corp. was responsible for the software.

[822] The supervisory contracting officer received a bribe from Whittaker Command and Control Systems, Inc. to steer the software portion of the contract to it.

[823] 82 F.3d at 435.

[824] *Id.*

[825] 91 F.3d 1211 (9th Cir. 1996).

[826] 31 U.S.C § 3731(b)(1).

b. Attorney Fees Should be Paid Directly to Counsel. The Ninth Circuit held that attorney fees awarded pursuant to a *qui tam* action should be paid directly to the attorney representing the plaintiff. The False Claims Act[827] provides that a successful *qui tam* relator shall receive attorney fees and costs. According to the court, in the *qui tam* arena, it is clear that attorneys fees must go to the attorney rather than to the plaintiff. If they did not, a wrong would be perpetrated upon the government. If the amount went to plaintiff, it would be a compensatory payment which really belongs to the United States subject to allocation of a portion to the plaintiff.[828]

c. Not "Fine and Dandy" Says Ninth Circuit on Government Employee Relators. The two recent cases on the issue of government employee relators,[829] *United States ex rel. Fine v. Chevron U.S.A., Inc.* and *United States ex rel. Fine v. University of California*,[830] originated with the same relator, Harold R. Fine, and were decided jointly by the Ninth Circuit. The Department of Energy employed Mr. Fine as an assistant manager of a regional audit office. He was responsible for auditing government contractors and supervising other auditors performing that function. Fine retired from his position in 1992. He was disgruntled because his supervisors either could not or would not take action against every perceived fraud violation that he brought to their attention.

From 1992 to 1993, Fine filed seven *qui tam* actions in various district courts throughout the western United States. Counsel for the University of California Board of Regents and Chevron successfully moved to dismiss their suits in the United States District Court for Northern California.[831] On appeal, a Ninth Circuit panel reversed and remanded. An *en banc* court re-heard the case *de novo*. In a seven to two vote, the court vacated the reversal and affirmed the district court's dismissal.[832]

In determining that Fine could not be a *qui tam* relator because of his position, Judge Cynthia Holcomb Hall stated that the statute[833] provides that a relator seeking to avoid the bar against suits based upon public disclosure must show that he has direct and independent knowledge of the information on which the allegation was based, and that he voluntarily provided the information to the government before filing an action. Further, she concluded that the district court was correct in concluding that Fine was no volunteer. He was a salaried government employee, compelled to disclose fraud by the terms of his employment. According to Judge Hall, he was no more voluntarily providing the information than federal judges voluntarily hear arguments and draft dispositions.

d. Supreme Court Grants Certiorari on Qui Tam case.[834] On 15 October 1996, the Supreme Court decided to hear its first *qui tam* case since the enactment of the 1986 Amendments to the FCA.[835] The Supreme Court will limit its review to two issues: (1) whether monetary damage to the government is a prerequisite to a *qui tam* action; and (2) whether the disclosure on the alleged fraudulent conduct constituted "public disclosure" within the meaning of the jurisdictional provisions of the False Claims Act.

William J. Schumer, a former manager at Hughes Aircraft Company (Hughes), filed suit against Hughes under the *qui tam* provisions of the False Claims Act.[836] Schumer contended that Hughes had defrauded the United States by entering into illegal "commonality agreements"[837] to allocate certain costs of projects over more than one subcontract.

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[827] 31 U.S.C. § 3730(d)(1).

[828] United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc., 89 F.3d 574 (9th Cir. 1996).

[829] A "government employee relator" is a present or former government employee who initiates a *qui tam* action based upon information learned during the course of his federal employment.

[830] 1995 U.S. App. LEXIS 35022 (9th Cir. Dec. 12, 1995).

[831] *Id.* at 3. The district court concluded that in the case against Chevron that "it makes no sense" to permit Mr. Fine to bring a *qui tam* action. In the case against the University of California, the court issued a published opinion, *Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993). In that opinion, the district court held that Fine was not an original source and that inspector general auditors should be barred from bringing *qui tam* actions springing from inspector general audits.

[832] *Id.* Although it was a seven to two vote, three judges wrote concurring opinions.

[833] 31 U.S.C. § 3730(e)(4)(B).

[834] Hughes Aircraft Co. v. U.S. ex rel. Schumer, 63 F.3d 1512 (9th Cir. 1995), *cert. granted*, 65 USLW 3292 (U.S. Oct. 15, 1996) (No. 95-1340).

[835] 31 U.S.C. § 3729 (1996).

[836] *Id.*

[837] *Id.* at 1515. Hughes, a large defense contractor, developed and produced a variety of different systems for the armed forces including the radar systems for the F-15 and F-18 fighter planes. In 1982, Hughes agreed serve as the subcontractor for Northrop Corporation for the development of the radar system for the B-2 bomber program. Hughes found that certain components that it developed for the B-2 radar system had utility for other projects that it was under contract to develop. Accordingly, Hughes program managers entered into internal "commonality agreements" by which Hughes committed to allocate the costs of development of such common components to either the B-2 or F-15 account.

After the F-15 program experienced major cost overruns in the mid-1980s, Northrop requested a government audit of Hughes' accounting practices. The results of the audits raised concerns whether Hughes had properly allocated costs between the contracts and whether Hughes had properly obtained the permission of the Air Force and Northrop prior to shifting the costs. As a consequence of the audits, the government withheld $15 million in payments to Hughes under the B-2 contract.

After Schumer's suit, the government conducted a sixteen month investigation of the matter, but decided not to intervene in the case. The government's rationale for not intervening was that the commonality agreements had actually saved the government money.

At the district court, Hughes filed a motion for summary judgment. The court found that Hughes had properly informed and secured the approval of the Air Force and all but one of the relevant contractors for the commonality agreements. Further, the court held that any failure to provide the information was attributable to security concerns related to the B-2 project. Accordingly, the district court concluded that there was no genuine issue of material fact as to whether Hughes submitted a false claim.[838]

On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded. The court held, among other things, that the district court had subject matter jurisdiction because disclosure to employees was not public disclosure within the meaning of the *qui tam* provisions of the FCA.[839] Additionally, the availability of audit reports through the Freedom of Information Act[840] was also not public disclosure.

The Ninth Circuit concluded that Schumer's attack on Hughes' failure to disclose its commonality accounting procedures *per se* stated a cause of action regardless of government monetary savings. Hughes had argued that the False Claims Act requires a false claim against the Government. According to Hughes, a technical violation of a government contracting standard does not result in such a claim. Hughes cited 31 U.S.C. § 3731(c) for the proposition that damages are an essential element of the cause of action.

The Supreme Court will consider these two issues early in 1997. Oral arguments are presently scheduled for February 1997.

G. Taxation.

1. Whose Electricity Is It Anyway? In *United States v. Lohman*,[841] the federal government brought action challenging the Missouri Department of Revenue's imposition of sales taxes on electricity used by the Federal Army Ammunition Plant. The district court for the Western District of Missouri granted summary judgment in favor of the government. Missouri appealed. The Court of Appeals held that, (1) for purposes of determining the existence of federal immunity from imposition of Missouri sales taxes, the legal incidence of the sales tax fell on the purchaser, and (2) the federal government was the "purchaser" of electricity sold to the plant, rather than the contractor who operated the facility; consequently the imposition of the sales taxes on electricity used by the facility was an unconstitutional direct tax. "[A] state may not, consistent with the Supremacy Clause, lay a tax directly upon the United States."[842] Missouri argued that the Missouri sales tax law does not require passing the tax on to the purchaser. However, the court was impressed by the section of the law which prohibited sellers from:

> advertis[ing] or hold[ing] out or stat[ing] to the public or to any customer directly or indirectly that the [sales] tax . . . required to be collected by him, will be assumed or absorbed by the [seller] or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any party thereof will be refunded.[843]

The court concluded, "[t]his ban against public display of a seller absorbing the tax suggests that Missouri intended for the tax to fall upon the purchaser."[844]

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[838] *Id.* at 1516.

[839] 31 U.S.C. § 3730(e)(4)(A). Under the 1986 jurisdictional provisions of the False Claims Act, a *qui tam* action is barred if it is "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or General Accounting Office report, hearing, audit or investigation, of from the new media, unless . . . the person bringing the action is an original source of the information."

[840] 5 U.S.C. § 552.

[841] 74 F.3d 863 (8th Cir. 1996).

[842] *Id.* at 866, *citing,* U.S. CONST. art. VI, cl. 2.; Mayo v. United States, 319 U.S. 441 (1943).

[843] *Id.* at 867, *citing,* MO. REV. STAT. § 144.080.5 (1994).

[844] *Id.* at 867.

2. Credit Unionists Experience Complete Congruence in Disneyland! In *California Credit Union League v. City of Anaheim*[845] the Ninth Circuit held that credit union employees who stayed at the Disneyland Hotel while attending a credit union seminar in Anaheim, California, were immune from the city's 13% transient occupancy tax. The court explained that the traditional constitutional analysis which focuses on whether the incidence of the tax falls on the individual or the federal government is moot when the individual is a dependent entity of the United States and "actually stands in the government's shoes."[846] The Ninth Circuit concluded by saying that, "federal employees are constituent parts of the United States, at least with respect to their professional duties. When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete."[847] Although the granting of *certiorari* has not been decided, federal travelers in Ninth Circuit states should consider using this case to resist state and local room taxes and probably taxes on rental cars!

H. Freedom of Information Act (FOIA).[848]

1. New FOIA (b)(3) Withholding Statutes Limit Release of Contractor Proposals Under the Freedom of Information Act (FOIA).[849] Effective upon signature, the 1997 Authorization Act created two statutes that permit FOIA (b)(3) exemption withholding status.[850] These new statutes prohibit the release of contractor proposals pertaining to most federal acquisitions, but only to the extent that the proposals are not incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.[851] Generally, proposals not selected for award are exempt from release under this statute. The awardee's proposal, however, is not afforded the same protection. A proposal, as defined in both statutes, means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.[852]

This legislation eliminates the submitter notice requirements, detailed in DOD Regulation 5400.7-R, paragraph 5-207, and Executive Order 12,600, for those contractor proposals defined by the statute.[853] These statutes do not remove the requirement for submitter notice, and determinations of confidentiality under National Parks and Critical Mass for exemption (b)(4).[854]

The Office of the Assistant Secretary of Defense recommends that agencies use the following language when denying FOIA requests for these specifically identified types of contractor proposals:

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[845] 95 F.3d 30 (9th Cir. 1994).

[846] *Id.* at 31.

[847] *Id.* at 32.

[848] 5 U.S.C. § 552.

[849] *See* Prohibition on Release of Contractor Proposals Under the Freedom of Information Act, National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 821, 110 Stat. 2422 (codified at 10 U.S.C. § 2305 for proposals pertaining to armed services acquisitions, and 41 U.S.C. § 253b for proposals pertaining to civilian agency acquisitions).

[850] A FOIA exemption (b)(3) permits withholding of information prohibited from disclosure by another federal statute if the statute "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, *or* (B) establishes particular criteria for withholding *or* refers to particular types of matters to be withheld." *See* OFFICE OF INFORMATION AND PRIVACY, U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 100 (Sept. ed. 1996) (citing 5 U.S.C. § 552(b)(3) (1994) (emphasis added). *See generally, id.* at 99-122.

[851] *See* 10 U.S.C. § 2305(g)(2) and 41 U.S.C. § 253b(m)(2), respectively.

[852] *See* 10 U.S.C. § 2305(g)(3) for armed services acquisitions, and 41 U.S.C. § 253b(m)(3) for civilian agency acquisitions.

[853] *See* Letter from A.H. Passarella, Director, *Freedom of Information and Security Review, Office of the Assistant Secretary of Defense* (Oct. 17, 1996).

[854] *Id.* Generally, (b)(4) protects certain categories of business records from release. These categories include trade secrets, as defined under *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983) and confidential commercial or financial information provided to the government from a person. Confidentiality of commercial or financial information is determined by criteria established in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) for information the government "requires" from the submitter, and under *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 1579 (1993), for information "volunteered" to the government. Under the *National Parks* test, the government may withhold requested information if release would impair the government's ability to obtain similar quality information in the future, or if release would result in substantial competitive harm to the submitter. Under *Critical Mass*, the government may withhold requested information if the submitter volunteered the information to the government and the submitter did not customarily disclose the information to the public. *See generally,* Office of Information and Privacy, U.S. Department of Justice, Freedom of Information Act Guide & Privacy Act Overview 123-72 (Sept. ed. 1996).

> [NAME], [TITLE], an Initial Denial Authority, has determined the document you requested is exempt from release. The information withheld is exempt by a statute establishing particular criteria for withholding, specifically, Title 10 U.S.C. § 2305(g), which permits no discretion in the release of proposals in the possession and control of the DOD, unless the proposal is set forth or incorporated by reference in a contract entered into between the DOD and the contractor that submitted the proposal. Therefore, this information is withheld pursuant to Title 5 U.S.C. § 552(b)(3).[855]

2. Amendments to the Freedom of Information Act. On 2 October 1996, President Clinton signed the "Electronic Freedom of Information Act Amendments of 1996" into law.[856] These amendments are intended to improve the public's right to access and retrieve agency records in electronic format. Highlights of this legislation include:

> (1) A definition of 'record' that includes any information maintained by an agency in any format, including an electronic format.[857]
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> (2) A requirement that agencies provide records in any form or format requested if the record is readily reproducible by the agency in that form or format, and must make reasonable efforts to maintain records in forms or formats that are reproducible for this purpose.[858]
>
> (3) A requirement that each agency make reasonable efforts to search for the records in electronic form or format, except when such efforts significantly interfere with the operation of the agency's automated information system.[859]
>
> (4) A requirement to make records available for public inspection and copying, regardless of form or format, if the agency determines they are likely to become subject to subsequent requests, unless the materials are published and offered for sale.[860] In addition, agencies must maintain a general index of these records.[861] This index must be available by computer telecommunications by 31 December 1999.[862]
>
> (5) A lengthening of the time in which an agency must respond to a proper FOIA request from 10 workdays to 20 workdays.[863] The amendment specifically addresses extensions of time for unusual circumstances.[864] The increase in response time is effective 31 March 1997.

I. Environmental Law.

1. Agency May Mandate Environmental Remediation Method. In environmental remediation contracts, an agency may use a combination of performance and design specifications as long as the combination meets the agency's minimum and legitimate needs.[865] The COE awarded an environmental remediation contract to clean up the discharge of a degreasing desolvent into

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[855] *See Passarella, supra* note 853.

[856] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552). *See also,* Eric C. Stamets, Information Paper—Freedom of Information Act Amendments from Eric C. Stamets, Legislation Branch, Administrative Law Division, Office of The Judge Advocate General (Oct. 7, 1996).

[857] 5 U.S.C. § 552(f)(2).

[858] *Id.* § 552(a)(3)(B).

[859] *Id.* § 552(a)(3)(C). The new amendment requires the agency to "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." *Id.* § 552(a)(3)(D).

[860] *Id.* § 552(a)(D). This amendment applies to reading room records created on or after 1 November 1996. The effective date of this provision is 1 November 1997.

[861] *Id.* § 552(a)(2)(E).

[862] *Id.*

[863] *Id.* § 552(a)(6)(A)(i).

[864] *Id.* § 552(a)(6)(B).

[865] Purification Environmental, B-270762, Apr. 22, 1996, 96-1 CPD ¶ 203.

a local sewer system. The contract required the contractor to design, install, and operate a water treatment system using advanced ultraviolet oxidation and hydrogen peroxide. The IFB prohibited the contractor from the use of any other treatment system. Purification Environmental protested stating that it was improper for the agency to require a specific design when Purification Environmental could meet contract requirements with another clean-up method. GAO held that where the government specifies a certain design, the risk of design failure is on the government. The government may specify the remediation method to meet the agency's minimum needs.

2. If IFB Requires Waste Contractor Be State Registered, Contractors Not Registered Should Not "Waste" Their Chance For Contract Award By Failing to Submit Bid. In *Health Care Waste Services*,[866] the Department of Veterans Affairs (VA) issued an IFB requiring the contractor to be registered with the New Jersey Department of Environmental Protection and Energy as a regulated medical waste transporter. After being held nonresponsive on another matter, Health Care protested the award to Stericycle, because it was not a registered medical waste transporter. GAO ruled that the solicitation did not require the contractor's registration be valid pre-award. As written in the IFB, the registration or licensing requirement imposed a performance obligation rather than a prerequisite to award such as a definitive responsibility criterion or a matter to be considered as part of a technical evaluation. GAO found the contracting officer's responsibility determination to be reasonable.

3. Variation in Estimated Quantity (VEQ) Clause Unaffected by Environmental Concerns. ThermoCor was awarded an environmental clean-up contract to excavate and process contaminated soil.[867] ThermoCor discovered that more soil had to be cleaned than estimated. An equitable adjustment claim was filed with the COE under the Variation in Estimated Quantity Clause.[868] The contracting officer failed to act on the claim, and ThermoCor brought suit in the COFC. ThermoCor claimed the VEQ clause was ambiguous. If the actual amount of work is greater than 115% of the estimated amount, ThermoCor was automatically entitled to an equitable adjustment.[869] ThermoCor alleged that the equitable adjustment is based on the actual costs plus a reasonable profit for the overruns, even if the unit costs remain unchanged.

The COFC grappled with the question of whether the language in the clause "increase or decrease in costs due solely to the variation" meant the difference between the actual costs of the overrun as compared to the contract unit price or the difference between the actual costs of the overrun and the actual costs of the base quantity.[870] ThermoCor claimed that an equitable adjustment for work on quantities greater than 115% of those estimated in the contract is automatically due and should be based on the costs associated with the overrun quantities, equaling actual costs plus a reasonable profit. The court determined that the contractor was not entitled to an equitable adjustment under the VEQ only if it could prove its unit costs changed due to work in excess of 115% of the government estimate. The court did not conclude that the clause allowed a repricing of overruns without adequate evidence of changes in costs due to excess work. The court ruled that the equitable adjustment shall be based on any increase or decrease in costs due solely to the variation.[871]

4. Relaxed Demister Requirements "Mist"ifies Contractor. Through competitive negotiation, the Army awarded a supply contract for demisters to McLaughlin as the lowest-priced technically acceptable offeror.[872] The solicitation required offerors to furnish information showing that their demister met or exceeded specified federal and California state emission standards and had been in satisfactory operation for at least five years. Acceptable proof included EPA labeling or a written certificate from any approved, nationally recognized testing agency. HHI Corp. protested the contract award, because the contracting officer failed to require McLaughlin to furnish compliance proof at contract award. GAO found that the Army had relaxed the contract compliance requirements. Despite this finding, GAO

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[866] B-266302, Jan. 19, 1996, 96-1 CPD ¶ 13.

[867] 35 Fed. Cl. 480 (1996).

[868] FAR 52.212-11.

[869] The VEQ clause states that if the actual quantity of unit-priced items varies more than 15% above or below estimated quantities, an equitable adjustment in contract price shall be made on demand of either party and then equitable adjustment shall be based on any increase or decrease in costs due solely to the variation above 115% or below 85%.

[870] In other words, to which amount is the contractor entitled in an equitable adjustment, the difference between what the contract was expected to cost and what it cost with the overruns, or the difference between the cost of the individual overrun items and the cost of the individual contract base items?

[871] In other words, the difference in price between producing one overrun item as compared to producing one contract base item.

[872] HHI Corp., B-266041, Jan. 25, 1996, 96-1 CPD ¶ 21.

denied the protest, because HHI did not establish competitive prejudice[873] as a result of the waiver.[874]

5. Inquiring Minds Have the Right to Know About Toxic Chemical Releases. The FAR Council published a final rule requiring federal agency contractors to publicly report on toxic chemicals released into the environment.[875] The rule requires owner/operators of a facility subject to the Emergency Planning and Community Right to Know Act (EPCRA)[876] and the Pollution Prevention Act (PPA)[877] report and file Toxic Chemical Release Inventory Forms (Form R) with the Environmental Protection Agency (EPA). Offerors must submit certifications regarding only those facilitates that the offeror owns or operates and that the contractor intends to use in performing a government contract. The rule requires that solicitations for competitive contracts, expected to exceed $100,000 including all options, include as an award eligibility criterion, a certification by the offeror. The certification must state that if awarded a contract, either (1) as the owner or operator of facilities to be used in the performance of the contract, the offeror will file and continue to file the Form R; or (2) the facilities to be used in the contract are exempt.[878]

6. Was this Article Published on Double-Sided Copies? On 20 June 1996, the FAR Council adopted a final rule which encourages contractors to maximize the use of double-sided copying on recycled paper when submitting written documents related to an acquisition.[879] The rule encourages contractors to use high-speed copier paper, offset paper, computer printout paper, carbonless paper, file folders, white woven envelopes, and other uncoated printed and writing paper made with a minimum of 20% post-consumer (recycled) content.

7. Is Your Contractor's Head in the Ozone? The FAR Council, on 20 June 1996, adopted a final rule on ozone depleting substances (ODS).[880] The rule requires that new contracts provide that any acquired products which contain or are manufactured with ozone-depleting substances (ODS) are labeled as such. The definition of ODS has also been changed. ODS is now defined as "any substance designated as Class I by the EPA, including but not limited to chloroflourocarbons, halons, carbon tetrachloride, and methyl chloroform; or any substance designated as Class II by the EPA, including but not limited to hydrochloroflourocarbons."[881] The change adds Class II ODS to the definition.

J. Ethics.

1. FAR Part 3 Revised. The FAR Council amended FAR Part 3[882] to conform to the new provisions of the Procurement Integrity Act (PIA).[883] The new rules would apply to all government contracts, new and ongoing.[884] The new post-government employment restrictions, however, apply only to those who leave

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[873] Competitive prejudice requires the contractor to show that had it known of the relaxed requirements, it would have altered its proposal to its competitive advantage.

[874] GAO cited *Laser Diode, Inc.*, B-249990, Dec. 29, 1992, 93-1 CPD ¶ 18 in making this determination.

[875] FAC 90-41, 61 Fed. Reg. 41,473 (1996) (the rule amends FAR Parts 23 and 52 to implement Executive Order 12,969 and is effective 7 October 1996).

[876] Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C. § 11001, makes producers/storers of toxic chemical subject to the reporting requirements.

[877] Pollution Prevention Act of 1990, 42 U.S.C. § 13101, subjects industries with certain Standard Industrial Classification (SIC) codes who deal with toxic chemicals to the reporting requirements.

[878] Exemptions include: (1) the contractor does not process, manufacture, or use toxic chemicals, (2) the contractor does not have ten or more full time employees, or (3) the contractor does not fall within the requisite SIC Codes.

[879] FAC 90-39, 61 Fed. Reg. 31,616 (1996) (amending FAR 4.301 and FAR 52.204-4) (The rule implements the provisions of Executive Order 12,873, Federal Acquisition, Recycling and Waste Prevention, 58 Fed. Reg. 54,911 (1993) which encourages the use of double-sided copying on recycled paper for documents printed within the government and under government contracts).

[880] FAC 90-39, 61 Fed. Reg. 31,645 (1996) (the rule implements the requirements of Executive Order 12,843, Procurement Requirements and Policies for Federal Agencies for Ozone-Depleting Substances, 58 Fed. Reg. 21,881 (1993) and Clean Air Act, §§ 612, 613, 42 U.S.C. § 7401 (1995).

[881] FAR 23.802.

[882] 62 Fed. Reg. 226 (1996).

[883] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 659-665 (1996) (amending 41 U.S.C. § 423). For a discussion of the provisions of this statute, *See The FY 1996 DOD Authorization Act: Real Acquisition Reform in Hiding?* ARMY LAW., Apr. 1996, at 10.

[884] The effective date of implementation of the statute will be 1 January 1997, unless implementing regulations specify an earlier date. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 678 (1996).

government service on or after 1 January 1997. Those who left government service prior to that date are governed by the rules in effect at the time of their departure.[885] The rule eliminates an agency's authority to deny an employee's recusal request.[886]

In addition, the rule creates a due process requirement for release of information marked by the contractor as "proprietary" or as "contractor bid or proposal information."[887] The contractor must be given notice and an opportunity to respond prior to the release.

Finally, contracting officers must report actual or possible violations of specified PIA provisions.[888]

2. Guardian's Angel is Devil in Disguise. Guardian Technologies International[889] (Guardian) stands out as one of few recent successful protests based upon the awardee's hiring of a former government employee.[890] *Guardian* involved an FBI procurement of body armor for its SWAT teams. At the time of the protest, the president of the proposed awardee, Progressive Technologies of America, Inc. (Progressive), was David M. Pisenti, a former FBI employee. Prior to his retirement, Pisenti was "regarded as the FBI's expert in the field of body armor."[891] In fact, he had worked on the development of the specifications for the procurement. The FBI conceded that Pisenti was a procurement official for this procurement. The greatest blow to the agency's case, however, occurred when Pisenti refused to testify. The absence of his testimony became more damaging as other evidence revealed that he had access to the government estimate and possibly to the source selection plan.[892] Additionally, the GAO noted the suspicious coincidence that Progressive's price per item, for each quantity range, was just $42 over the government estimate.[893] Also damaging were conflicts between Pisenti's response to interrogatories and the testimony of witnesses. These conflicts caused the GAO to determine that Pisenti, at best, misunderstood the questions or, worse, was "not credible."[894] This case may portend a tougher stand by the GAO against potential procurement integrity abuses. It is more likely, however, the product of bad facts. In any case, it highlights the damage which can result if the agency fails to perform an aggressive and well documented investigation of alleged improprieties.

3. No Presumption of Unfair Competition for Proposing Former COTR as Project Manager. The GAO denied a protest against an Air Force award of a contract to provide engineering support for space program missions and commercial satellite programs.[895] In its proposal, the awardee named the government contracting officer's technical representative (COTR) for the predecessor contract as its project manager. The protester asserted that the employment of the former COTR violated the FAR.[896]

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[885] Well informed government employees who plan to leave government service may decide to delay their departure until 1997. Many employees who would be subject to a two-year ban on providing assistance to the awardee in accordance with 41 U.S.C. § 423(f) will see their employment restriction shortened or eliminated under the new rules.

[886] Of course, the employee cannot choose to participate in a procurement while continuing employment negotiations as such action would violate 18 U.S.C. § 208. An employee who violates conflict of interest regulations by acting in his official capacity in matters affecting his financial interests is subject to removal from federal employment. *See* Smith v. Dept. of Interior, 6 M.S.P.R. 84 (1981). A federal employee who refuses to terminate employment discussions is subject to administrative actions. *See* FAR 3.104-11(c).

[887] The term "contractor bid or proposal information" is defined in the text of the amended Procurement Integrity Act. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 662. The due process requirement of the proposed FAR provision is already required by case law interpreting the Freedom of Information Act. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979); *see also* CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), *cert den.* 485 U.S. 917 (1988).

[888] Those violations triggering a reporting requirement are as follows: improper release or improper obtaining of protected information; failure of a government employee to report employment contacts and to reject or disqualify himself/herself from further personal and substantial participation in the procurement; and prohibited post-government employment. The recipient of the report is determined by the contracting officer's conclusion about the effect of the violation on the procurement. If the contracting officer believed that the violation would impact the procurement, the report must go to the Head of the Contracting Activity (or designee). If the contracting officer perceived no impact on the procurement, the report would be made to an individual designated by the agency.

[889] B-270213, Feb. 20, 1996, 96-1 CPD ¶ 104.

[890] *See Contract Law Developments of 1995—The Year in Review,* ARMY LAW., Jan. 1996, at 76-77 (discussing Stanford Telecommunications, Inc., B-258662, Feb. 7, 1995, 95-1 CPD ¶ 50 and Caelum Research Corp., GSBCA No. 13139-P, 95-2 BCA ¶ 27,733, unsuccessful protests based upon hiring of a former government employee).

[891] *Guardian,* 96-1 CPD ¶ 104 at 4.

[892] *Id.* at 7.

[893] *Id.* at 10.

[894] *Id.* at 7.

[895] Creative Management Tech., B-266299, Feb. 9, 1996, 96-1 CPD ¶ 61.

[896] The protester alleged a "personal conflict of interest" in violation of FAR 3.104. *Id.* at 6. FAR 3.104 implements the PIA, 41 U.S.C. § 423.

The protester also argued that the employee should be presumed,[897] based on his subsequent employment, to have assisted the awardee either by providing undisclosed source selection information or by assisting in writing the RFP to intentionally favor his new employer.[898]

In upholding the award decision, the GAO emphasized that the former employee had not participated in any of the pre-award functions listed in FAR 3.104-4(h).[899] As such he was not a "procurement official" within the regulatory definition.[900] Furthermore, the employee had advised the Air Force of his discussions with the proposed awardee and had obtained an ethics advisory opinion permitting his future employment. There was no evidence to show that he had taken official action on the contract while engaged in employment discussions.[901] The GAO found that the agency's award was "well documented," reasonable, and "in accordance with the evaluation criteria"[902] and refused to impute bias on the basis of "inference or suspicion."[903]

4. Three Strikes and Protester is Out in CHAMPUS TRICARE Contract. In *Physician Corp. of America,*[904] (PCA) the protester attempted to disqualify the awardee of the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) TRICARE contract.[905] The protester alleged that its competitor, Humana Military Healthcare Services, Inc. (Humana), obtained an unfair competitive advantage. The protester, PCA, objected to employment by the awardee of two former government employees. Both individuals were procurement officials for previously awarded TRICARE contracts for other regions. PCA also attempted to establish that Humana had gained an unfair advantage through its receipt of a government employee's résumé. The résumé contained the independent government cost estimate for the protested contract.

Humana's CEO was a retired Air Force colonel. He had been the chief of the managed care division at the Air Force Surgeon General's office. In that capacity he had helped formulate Air Force policies for TRICARE and had helped draft the statement of work for another region's TRICARE contract. Humana's utilization management director had served as the chief of utilization management in the managed care division of the Air Force Surgeon General's Office. She had also participated in the evaluation of a third firm's BAFO for a previously awarded TRICARE contract. She was hired by Humana to assist in the preparation of its BAFO.

The GAO found no advantage to Humana as the result of its CEO's assistance in preparing the statement of work (SOW) for a similar contract. The GAO concluded that the details of the SOW had already been made public during the previous procurement.[906] As to the utilization management director, the GAO found that neither her involvement in a similar source selection nor her general familiarity with the type of work created a *per se* competitive advantage. The GAO felt it unlikely that she could have remembered the detailed evaluation criteria, especially in light of the agency's efforts to safeguard all copies of the evaluation plan.[907] The GAO emphasized that the increase in the utilization management portion of Humana's BAFO score could be

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[897] The protester argued that these improprieties "must have" occurred. The opinion cites no evidence presented in support of the protester's argument. Apparently, the protester maintained that the improprieties should be inferred based solely on the awardee's hiring of the former government employee. 96-1 CPD ¶ 61, at 6-7.

[898] Had the employee drafted the RFP to benefit his future employer, his conduct would create an organizational conflict of interest prohibited by FAR 9.5.

[899] This FAR provision defines the term "Procurement Official."

[900] 96-1 CPD ¶ 61 at 7.

[901] Had he done so, his actions would have violated FAR 3.104-1(b)(2), which prohibition is based on 18 U.S.C. § 208.

[902] 96-1 CPD ¶ 61 at 8.

[903] *Id.*

[904] B-270698, Apr. 10, 1996, 96-1 CPD ¶ 198.

[905] The TRICARE contract required offerors to propose a health care system in which "CHAMPUS beneficiaries could obtain services: (1) from providers of their own choosing on a fee-for-service basis, (2) from members of the contractor's preferred provider organization (PPO), or (3) from a contractor-established Health Maintenance Organization (HMO)." *Id.* at 2.

[906] In evaluating the alleged improprieties related to employment of former government employees, the GAO considers two issues: Did the former employee have "access to competitively useful insider information?" Is the employee's new position one in which he or she would be likely to have disclosed such information? *See id.* at 4-5, *citing* Central Texas College, B-245233.4, Jan. 29, 1992, 92-1 CPD ¶ 121 and Textron Marine Sys., B-255580.3, Aug. 2, 1994, 94-2 CPD ¶ 63.

[907] *See* Stanford Telecommunications, Inc., B-258662, Feb. 7, 1995, 95-1 CPD ¶ 50 (information to which former government employee had access was so voluminous that it was unlikely that he could have remembered it).

directly attributed to issues raised in discussions or to the inclusion of information already contained in other parts of Humana's proposal. In considering Humana's receipt of a resumé which revealed the independent government cost estimate,[908] the GAO held that the agency's communication of the same information to all offerors mitigated any potential taint.[909]

5. Paranoia Will Destroy Ya. Hughes Space and Communications Company (Hughes) filed an imaginative and amusing, though unsuccessful, protest of NASA's award of a large contract related to NASA's Mission to Planet Earth project.[910] Among its protest grounds, Hughes took issue with a meeting between NASA's administrator and a representative of the awardee, TRW, Inc. (TRW).[911] At the meeting, TRW's representative attempted to discuss the RFP but was rebuffed by the NASA administrator who declined to discuss the topic other than to emphasize NASA's commitment to cost realism. The issue of cost realism was dealt with again in a letter from the contracting officer to all offerors.[912] Hughes attempted to disqualify TRW from award, claiming not only that the meeting violated NASA's internal "blackout policy," but also alleging that the letter from the contracting officer contained "encrypted or encoded messages" which helped TRW.[913] The GAO, while stating its general reluctance to review internal policy violations, failed to find a violation and stated "there is nothing inherently improper about an agency head meeting routinely with representatives of industry, even if such meetings occur during an ongoing procurement in which the industry is participating."[914] As to the alleged encrypted message, the GAO was unconvinced.

6. Where There's Smoke . . . In *IGIT, Inc.*,[915] an Army contracting officer excluded the incumbent from the competition for a laundry and dry cleaning contract. The contracting officer notified IGIT of its exclusion after learning that it was in possession of the government's estimate.[916] The protester claimed to have found a document containing the government estimate taped to the door of his laundry facility. The Army doubted this explanation, but could provide no evidence to the contrary.[917] The GAO sustained the protest. Under such circumstances, the contracting officer must balance the government's interest in safeguarding the integrity of the procurement against its duty to treat contractors fairly. In discussing the circumstances of this case, the GAO made it clear that it is more likely to support a harsh remedy where contractor wrongdoing can be shown. Here, the GAO deemed IGIT's exclusion from the competition unreasonable, because it had done no wrong and because IGIT's advantage could be eliminated by providing the same information to all offerors. The GAO recommended another round of proposals following provision of this information to all offerors.

K. Information Technology Management Reform Act of 1996 (ITMRA).[918]

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[908] The resumé was sent to Humana by a co-chairperson of the source selection evaluation board for the contract in question. The resumé described the contract's magnitude by referring to it as a "$ 4.5 billion managed care contract." Upon learning of his actions, the agency relieved him of his duties and conducted an investigation of his conduct.

[909] The contracting officer sent a letter to each offeror advising them of the information and relating that it had been extracted from a document which had been inadvertently provided to one of the offerors. The protester argued, to no avail, that only Humana could benefit from the information, because it was the only offeror who knew its source and could, therefore, judge its credibility.

[910] Hughes Space & Communications Co., B-266225.6, 96-1 CPD ¶ 199. This project involved the development of a data base on the earth's environment.

[911] The meeting's agenda dealt with the future potential for Congressional support of NASA's programs.

[912] In the letter, NASA advised offerors of its plan to penalize those who proposed unrealistic costs. *Id.* at 15, 16.

[913] *Id.*

[914] *Hughes*, 96-1 CPD ¶ 199 at 17, *citing* Universal Automation Labs, Inc. v. Dep't of Transp., GSBCA No. 12370-P, 94-1 BCA ¶ 26,323.

[915] B-271823, Aug. 1, 1996, 1996 U.S. Comp. Gen. LEXIS 406.

[916] The contracting officer learned that fact as a result of a Congressional inquiry by IGIT's president and owner who alleged that the agency's decision to re-solicit the contract rather than exercise an option was the result of racial bias.

[917] Army officials were suspicious that the Small and Disadvantaged Business Utilization (SADBU) specialist was the source of the inside information. IGIT's owner named the SADBU specialist as the source of some of his other documentation. Additionally, some of IGIT's documents were saved on the SADBU specialist's computer. The suspicions had been reported to the Army Criminal Investigation Division. Nevertheless, the agency could not rebut IGIT's owner's assertion that he innocently received the document from an unknown source.

[918] Pub. L. No. 104-106, Division E, § 5101, 110 Stat. 680 (1996).

ITMRA repealed the Brooks Act for Automated Data Processing Equipment[919] and eliminated the GSA's central role in the management of federal information technology (IT) resources. At midnight on 7 August 1996, the GSA abolished its Federal Information Resources Management Regulation (FIRMR). Likewise, the GSA's bid protest jurisdiction ended on 8 August 1996 when ITMRA became effective. The GAO became the sole administrative protest forum outside the procuring agency.

1. OMB Now in Charge. The Office of Management and Budget (OMB) will now play a top-level executive branch information technology (IT) oversight role. ITMRA focuses OMB (and agency) oversight on the requirements identification, budgeting, and ongoing "management" decision making processes related to federal government IT acquisitions and operations, as opposed to the focus on the procurement processes that formerly characterized GSA's stewardship.[920] OMB will evaluate the IT policies and practices of the various federal agencies, other governments, and the private sector, and encourage heads of agencies to develop best practice guides to take advantage of the best management practices available.[921] ITMRA mandates business process re-engineering (BPR) prior to any new IT acquisition. As part of this process, OMB's guidance to federal agencies will require consideration of whether a function can be better performed by the private sector before an investment is made in a new information system.[922] OMB's enforcement authority includes the ability to adjust the budgets of agencies that do not appropriately manage their IT programs and the power to designate an "executive agent" who would contract for an agency's IT or information resources management support.[923] OMB will analyze and evaluate the risks and results of major IT investments through the budget process to ensure agencies procure and manage IT in a cost-effective manner.[924]

2. Agencies Have the IT Ball. With the elimination of the GSA's centralized authority, ITMRA also eliminated the requirement for Delegations of Procurement Authority (DPAs), although DPAs for existing contracts and solicitations remain in effect unless amended or terminated by the proper agency official.[925] ITMRA gives heads of executive agencies the authority to procure IT for their agency.[926] It also requires agency heads to promulgate guidance concerning the determination of cost benefits, risks, and evaluative criteria for acquisitions.[927] Agency heads must also develop goals for using IT effectively in their agency and must report to Congress, as part of the agency's budget submission, on the agency's progress toward its goals.[928] Also, agency heads, with OMB approval, are authorized to enter into multi-agency acquisitions for IT, except for the FTS 2000 program and its follow-ons which the ITMRA leaves under the supervision of GSA.[929]

3. Chief Information Officers. ITMRA also created the position of Chief Information Officer (CIO) within each executive agency to assist agency heads in performing their IT management duties.[930] The DOD and the military departments have their own CIOs. The CIO for DOD is the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence. The Army CIO is the Director of Information Systems for Command, Control, Communications, and Computers. Although many of ITMRA's provisions do not apply to National Security

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[919] 40 U.S.C. § 759 (repealed).

[920] Information Technology Management Reform Act of 1996, Pub. L. No. 104-106, § 5113, 110 Stat. 681-83 (1996) [hereinafter ITMRA].

[921] *Id.* §§ 5112(f), (g).

[922] *Id.* § 5113(b)(2)(B).

[923] *Id* § 5113(b)(5).

[924] *Id.* § 5112(b).

[925] 61 Fed. Reg. 38,450 (1996)

[926] ITMRA §§ 5121, 5124(a), *supra* note 920.

[927] *Id.* § 5122.

[928] *Id.* § 5123.

[929] *Id.* § 5124.

[930] *Id.* § 5125(b).

Systems (NSS),[931] CIO oversight of agency IT programs does extend to NSS.[932] The definition of NSS is similar to the description of items covered by the Warner Amendment to the now defunct Brooks Act.[933] However, this provision applies to all government agencies, not just DOD. Interestingly, unlike the Brooks Act, ITMRA does *not* exclude radar, sonar, radio, or television from its coverage.

4. FAR Must be "Simple, Clear, and Understandable." Finally, ITMRA mandates that the FAR Council prescribe regulations that, to the maximum extent practicable, make the information technology (IT) acquisition process "a simplified, clear, and understandable process that specifically addresses the management of risk, incremental acquisitions, and the need to incorporate commercial information technology in a timely manner."[934]

L. Construction Contracting.

1. Liquidated Damages.

a. Liquidated Damages Cannot Be Based on Unlikely Contingent Penalties The U.S. District Court for the District of Columbia decided that liquidated damages clauses are unenforceable penalties if, in calculating the liquidated damages,[935] the agency includes amounts for penalties it knows will not be assessed.[936] The court went further to state that a board of contract appeals may not reform the clause to reflect an appropriate rate of liquidated damages. Only actual damages are recoverable.

In *Kingston Constructors Inc. v. Washington Metropolitan Area Transport Authority*,[937] the agency enforced a liquidated damages clause that included a contingency against a possible EPA penalty. The agency, however, knew that no penalty would be assessed. Kingston appealed the agency's assessment.[938] The board found the assessment of liquidated damages to be improper, because it included the unlikely EPA penalty and reduced the assessment from $1,000 to $500. Kingston appealed the board's reformation of the contract to the district court. The court held that it was improper for the board to reform the contract to reduce the liquidated damages amount to an amount the board considered reasonable. A liquidated damages clause must be stricken as an unenforceable penalty where the amount is not a reasonable forecast of expected damages. Where a liquidated damages clause is stricken, only actual damages may be recovered.

b. Liquidated Damages Assessment Must Exclude Time When Site Unavailable. In *Atlantic Maintenance Co.*,[939] the Navy awarded a contract to replace coils in a gas cooler. The contract specified a completion date and provided for liquidated damages in the amount of $100 per day. The contractor completed the project 146 days after the completion date. The contracting officer assessed liquidated damages. Prior to assessing liquidated damages, the Navy supplied the contractor with a 90 day window when the site was available for the coil replacement. The contractor was not able to install the coils during this time period and was granted an additional 90 day window. Although the contractor failed to install the coils during either 90 day window, the board found that the contractor should not be penalized for times when the site was unavailable outside the 90-day windows. Accordingly, the board found it unfair to assess any liquidated damages for the days the site was unavailable.

c. Default Termination Converted When Contracting Officer Waived Completion Date and Contractor Paid Liquidated Damages. In *Jess Howard Elec. Co.*,[940] the board ruled

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[931] ITMRA defines "national security system" as any government-operated telecommunications or information system whose functions or operations involve intelligence and cryptologic activities, command and control of military forces, equipment that is an integral part of a weapons system, or is critical to the direct fulfillment of a military mission (except routine administrative functions). ITMRA § 5142, *supra* note 920.

[932] *Id.* §§ 5141, 5142.

[933] 40 U.S.C. § 759(a)(3) (repealed).

[934] ITMRA § 5201, *supra* note 920.

[935] The government may assess liquidated damages if the parties intended to provide for liquidated damages at contract inception, anticipated damages attributable to untimely performance were uncertain or difficult to quantify at time of award, and the liquidated damages bear a reasonable relationship to the anticipated government losses resulting from the delayed contract completion. FAR 11.502, FAR 36.206, FAR 52.211-12, and DFARS 211.5.

[936] Unreasonable liquidated damages are unenforceable. D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840.

[937] 930 F. Supp 951 (Fed. Cir. 1996).

[938] Kingston Constructors, Inc., ENGBCA No. 6006, 95-2 BCA ¶ 27,841.

[939] ASBCA No. 40454, 96-2 BCA ¶ 28,323.

[940] ASBCA No. 44437, 96-2 BCA ¶ 28,345.

that a default termination must be converted to a termination for convenience when the original contract completion date was waived[941] by the contracting officer, and the contractor was allowed to continue to perform as long as satisfactory progress was made, and liquidated damages were paid.

The contractor was hired to perform electrical work at Wright-Patterson AFB, Ohio. Prior to termination, the contractor received a cure notice.[942] The contractor had supplier problems and requested an extension of the delivery schedule. The Air Force allowed the contractor to continue on a day-to-day basis and the contractor was required to meet certain milestones and pay liquidated damages. After a few months, the contractor experienced problems and proposed a revised completion date which was accepted by the contracting officer. Later that same month, the contracting officer terminated the contractor for default because the contractor did not meet certain milestones. The contractor appealed the termination for default claiming the government had waived the delivery schedule. The board held that when liquidated damages are assessed by the government, the contractor faces a higher burden to show the completion date was waived by the government. However, the board found that the contractor met this burden, because the evidence showed that the government had extended the completion date and the contractor had excusable delays.

2. *Two-Phase Design Build Rules.*[943] The FAR Council, on 7 August 1996, issued a proposed rule to the FAR implementing two-phase design-build selection procedures.[944] The proposed rule amends FAR Part 36 as follows:

FAR Part 36.102 is amended to add new definitions:

"Design" encompasses defining the construction requirement (including the functional relationships and technical systems to be used, such as architectural, environmental, structural, electrical, mechanical, and fire protection), producing the technical specifications and drawing, and preparing the construction cost estimate.

"Design-bid-build" is defined as the traditional method of construction contracting, where design and construction are sequential and contracted for separately with two contracts and two contractors.

"Design-build" is defined as combining design and construction in a single contract with one contractor. "Two-phase design-build" is one type of design-build construction contracting in which a limited number of offerors (normally five or less) are selected during Phase One to submit detailed proposals for Phase Two.

Implementation of design-build rules are provided by the new rule. The two-phase design-build method shall be used when the contracting officer determines it is appropriate and (1) three or more offers are anticipated, and (2) a substantial amount of design work will be performed by offerors before developing cost proposals that may result in offerors incurring substantial expenses in preparing offers. In making this decision, the contracting officer must consider (1) the extent to which the project requirements have been adequately defined; (2) the time constraints for delivery of the project; (3) the capability and experience of potential contractors; (4) the suitability of the project; and (5) the capability of the agency to manage the two-phase selection process.

One solicitation may be issued covering both phases or two solicitations may be issued in sequence. Proposals in Phase One will be evaluated to determine which offerors will submit proposals for Phase Two. One contract will be awarded using competitive negotiation.

Phase One of the solicitation shall include the scope of work, and the Phase One evaluation factors (including technical approach but not detailed design or technical information, specialized experience and technical competence, capability to perform, past performance and other appropriate factors excluding cost). Phase Two evaluation factors, and a statement of the maximum offerors that will be included in the competitive range and invited to submit Phase Two proposals must be also included. The maximum number specified shall not exceed five unless the contracting officer determines, for the particular solicitation, that a number greater than five is in the government's interest and is consistent with the purposes and objectives of two-phase design-build contracting. Cost factors cannot be evaluated in Phase One. This prevents the contracting officer from deciding which contractor will be included in the competitive range based on cost. The competitive range should include the five contractors with the most innovative design which meets the government's minimum needs.

The Phase Two solicitation shall be prepared in accordance with FAR Part 15, including phase-two evaluation factors which are developed in accordance with FAR 15.605. The offerors are required to submit separate technical and price proposals. These proposals will be evaluated separately.

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[941] The general rule is that waiver does not apply to construction contracts. *See* Nexus Constr. Co., ASBCA No. 31070, 91-3 BCA ¶ 24,303.

[942] FAR 49.402-3.

[943] Prior to this new rule, the contracting officer could not award a construction contract to the firm who designed the project unless the agency head or delegee approved. Lawlor Corp., B-241945.2, Mar. 28, 1991, 70 Comp. Gen. 375, 91-1 CPD ¶ 335.

[944] FAR Case 96-305, 61 Fed. Reg. 41,212 (1996) (this proposed rule was put forth to implement Section 4105 of the FY 1996 Defense Authorization Act).

3. Additive Items and Availability of Funds. If a construction contract has additive items,[945] contracting officers must evaluate the additive items properly. The contracting officer shall award to a bidder who submits the low bid for the base project and for additive items which, in order of priority, provide the most features within the amount of available funds.[946] GAO addressed the issue of whether it is proper to award to the bidder submitting the lowest base bid, even though that bid is not the lowest aggregate bid inclusive of an additive item where the available funds are sufficient only to cover the base bid. The answer was yes.[947]

In *Applicators Inc.*, Applicators protested an award to the low bidder, Fort Meyer, on an Air Force construction contract. The IFB sought prices for two contract line items which were listed as the base item. The IFB also sought prices for construction of drainage, an additive item. Applicators submitted the low bid considering the base item and the additive item. Fort Meyer submitted the low bid considering just the base item. After bid opening and prior to award, the Air Force received additional funds which were sufficient to award a contract for the base item and half of the additive item. Fort Meyer remained the low bidder for this work and was awarded the contract. Applicator argued that the Air Force incorrectly determined the contract amount after bid opening and improperly split the award for half of the additive items. The Air Force agreed that it improperly split the award and would terminate that portion of the award and re-solicit. GAO also ruled that award to a bidder who submits the lowest base bid is proper even though the bid was not the lowest aggregate bid inclusive of an additive items. The clause requires contract award be made to the low offeror.[948] Prior to bid opening, the government must determine the amount of funds available for the project.[949] The contracting officer must use the list of priorities in the bid schedule only to determine the low offeror. After determining the low offeror, an award may be made on any combination of items if it is in the best interest of the government, funds are available at the time of award, and the low offeror's price for the combination to be awarded is less than the price offered by any other responsive, responsible offeror.[950] Accordingly, GAO ruled that although Fort Meyer was not the overall low bidder when the additive items were evaluated, it was the low bidder on the base item which at the time of bid opening was the only item that fit within the available funding.

4. No Orders Equals No Variations. The COE issued a contract to Westland Mechanical to replace steam and condensate systems at Fort Carson, Colorado. The contract included 44 work items and estimated quantities for each item. The contract included a variation of estimated quantities (VEQ) clause.[951] The bidding schedule provided that "the items listed herein do not obligate the government to purchase any given item in any minimum quantity, nor do the items limit the maximum quantities of any given item, which may be required under a given delivery order."[952] The government did not issue any delivery orders for any work under the contract. Westland submitted a certified claim in the amount of $177,175.90 for additional compensation under the VEQ clause.[953] The contracting officer decided the contractor was entitled to the guaranteed minimum amount and would be paid upon proper invoice from the contractor. The contractor appealed to the ASBCA. The board ruled that since the government placed no orders under the contract, there was no variation between actual quantities ordered and estimated quantities. The

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[945] Additive items are contract line items that the contracting officer will award if the amount of funding will support the contract award. DFARS 252.236-7007. For instance, if a requiring activity requests a guard house be constructed, the base item will be the guard house. The contracting officer may include in the solicitation that if funding is available, the government could award a contract for the base item plus, in order of priority, additive items such as paving, landscaping, or exercise area. If the base bid comes in below the available funding, the contracting officer could award the contract for the additive items which fall within the remaining funding.

[946] DFARS 252.236-7007.

[947] Applicators Inc., B-270162, Feb. 1, 1996, 96-1 CPD ¶ 32.

[948] The low offeror is the offeror who offers the lowest aggregate amount for the base bid item plus those additive items that provide the most features within the funds determined to be available. DFARS 252.236-7007.

[949] DFARS 252.236-7007(a)(2).

[950] DFARS 252.236-7007(b).

[951] FAR 52.212-11. The clause provides that a fixed-price contract may include estimated quantities for unit-priced items of work. If the actual quantity of a unit-priced item varies more than 15% above or below the estimated quantity, the contracting officer shall equitably adjust the contract.

[952] Westland Mechanical, Inc., ASBCA No. 48844, 96-2 BCA ¶ 28,419.

[953] *Id.*

contractor was not allowed to recover under the VEQ clause.[954] The board interpreted the contract to obligate the government to pay the minimum contract amount. The board stated further that the grant of an equitable adjustment requires proof of an increase or decrease in costs due solely to a variation above or below the estimated quantities in the contract. The clause does not allow recovery of the contract price for work not ordered. The clause requires recovery be based on actual increased cost caused by an underrun of work ordered.

5. Defective Drawings—Yes; Differing Site Conditions Recovery—No. The ASBCA ruled that a Type I differing site conditions claim[955] based on defective drawings is barred by the failure of the contractor to perform a reasonable site investigation.[956] This appeal concerned a contract to construct volleyball and basketball courts as part of a barracks renovation. The drawings indicated that the area sloped upward. The contractor performed a site visit and noticed that the site sloped upward but did no actual measurements of the degree of slope. After work commenced, the contractor submitted a claim for increased costs because the slope increase was greater than the drawing indicated. The board decided that although a reasonable site investigation would not have revealed the actual elevation of the site, it would have revealed that the site continued to slope upwards beyond that indicated in the drawings. The contractor assumes the risk of drawing deficiencies that were or should have been discovered during a reasonable site investigation.

6. Contractor Equipment May Standby. In *J.D. Shotwell Co.*,[957] the ASBCA ruled that a contractor could recover standby costs if it demonstrates that its equipment was employed or could have been employed on another contract but was instead reasonably or necessarily set aside for performance on the suspended contract. Does this mean that a contractor cannot recover equipment standby costs unless it proves that the equipment could have been used on another contract? According to the COE Board of Contract Appeals in *Dillon Constr. Inc.*[958] the answer is no. Use on another contract is only one indication that the equipment possessed an economic value beyond the suspended contract. If the equipment must standby for use on the suspended government contract and the circumstances prevent its use on another contract, the contractor can recover standby costs. In *Dillon*, the equipment was easily transportable and moved on short notice, but because of the short duration of the anticipated suspension, it could not reasonably be moved and then be ready for contract performance.

7. Construction Contractors Nonresponsive Upon Submission of Materially Unbalanced Bid. The FAR Council issued a final rule, effective 19 August 1996, to provide a contract clause to inform offerors under construction solicitations that government agencies may reject materially unbalanced bids as nonresponsive.[959] The FAR was previously amended to include unbalanced bidding provisions for supplies and services procured under sealed bidding and negotiated procurements.[960] These

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[954] *Id.*

[955] This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition. There are two types of differing site conditions. Consolidated Constr., Inc., GSBCA No. 8871, 88-2 BCA ¶ 20,811. To recover for a Type I condition, the contractor must prove that the contract indicated a particular site condition, the contractor reasonably interpreted and relied on the indications, the contractor encountered latent or subsurface conditions which differed materially from those indicated in the contract, and the claimed costs were attributable solely to the differing site condition. To recover for a Type II condition, the contractor must prove that the conditions were unusual physical conditions unknown at the time of award and the conditions differed materially from those ordinarily encountered.

[956] Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516.

[957] ASBCA No. 8961, 65-2 BCA ¶ 5243.

[958] ENGBCA No. PCC-101, 96-1 BCA ¶ 28,113.

[959] FAC 90-39, 61 Fed. Reg. 31,663 (1996) (The rule makes final the amendments to FAR 52.214-19, Contract Award—Sealed Bidding—Construction).

[960] FAR 52.214-10, Contract Award—Sealed Bidding, and FAR 52.215-16, Contract Award, for Supplies and Services.

clauses were not made applicable to construction contracts. By implementing the final rule,[961] the FAR Council makes unbalanced offers in construction contracts nonresponsive.[962]

M. Commercial Items.[963]

1. Federal Catalog System on CD Rom. In *U.S.A. Information Systems, Inc. v. Government Printing Office*[964] the GSBCA determined that the Government Printing Office had complied with the recently mandated preference for commercial items.[965] The case involved the procurement of the Federal Catalog System on CD-ROM. In 1985 and 1986, the protester, U.S.A. Information Systems (USA), had developed a commercial version of the supply catalog. The government maintained its version on microfiche.[966] The commercial version was apparently a good product; it was purchased by government agencies and government contractors alike. In 1991, the Defense Logistics Agency (DLA) decided to procure a CD-ROM version of the catalog.[967] During the following five years, the DLA modified the contract 87 times. Through these modifications, the government's product came to more closely resemble those commercially available catalogs. Nevertheless, the government chose to solicit a product with additional unique features rather than procuring a commercial version.

USA alleged that the government had failed to comply with the statutory requirement to conduct market research to determine whether a commercial item or nondevelopmental item could meet the agencies' needs.[968] The GSBCA found itself "at somewhat of a loss as to what USA [was] complaining about."[969] The protester had proposed a modified version of its commercial product, but apparently preferred to limit its modification to the inclusion of restricted data. It did not want to comply with the solicitation's requirement to provide multiple versions to run with Local Area Network, Windows, and UNIX; nor did it wish to provide user assistance.[970] The GSBCA denied the protest, because USA had not shown that "better planning might have resulted in a less restrictive or more 'commercial-friendly' solicitation."[971]

2. A Coherent Look at Commercial Items Definition. The designation of a laser as a commercial item was contested in *Coherent, Inc.*, (Coherent) where the solicitation sought a brand name or equal "single frequency titanium sapphire ring laser."[972]

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[961] FAR 52.214-19, Contract Award—Sealed Bidding—Construction.

[962] The clause states "the government may reject a bid as nonresponsive if the prices bid are materially unbalanced between line items or subline items. A bid is materially unbalanced when it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the government even though it may be the low evaluated bid, or if it is so unbalanced as to be tantamount to allowing an advance payment." *Id.*

[963] *See supra* § III, F, 2 at p. 44. (dealing with special simplified acquisition procedures for commercial items); *see also supra* § V, E, 4 at p. 90 (dealing with inapplicability of cost accounting standards to commercial items purchases), and *supra* § IV, F, 5 at p. 71 (discussing terminations for cause, a new concept dealing with commercial items procurements). *See also* The Government Contractor, Vol. 38, No. 31, Aug. 14, 1996 at 9 (discussing a proposed rule which would make it easier for commercial items sellers to claim exemptions from the Truth in Negotiations Act).

[964] GSBCA No. 13535-P, 13560-P, Apr. 8, 1996, 96-2 BCA ¶ 28,315.

[965] *See* 10 U.S.C. § 2377(c)(2).

[966] The government's version contained additional restricted North Atlantic Treaty Organization (NATO) information as well as certain proprietary information.

[967] The procurement was conducted by the Government Printing Office.

[968] 10 U.S.C. § 2377(c)(2) was enacted as part of the Federal Acquisition Streamlining Act of 1994.

[969] *U.S.A. Information Systems*, 96-2 BCA ¶ 28,315 at 141,372.

[970] There were additional modifications required by the specifications as well. The protester's motives are not evident from the opinion. Perhaps it wished to retain a separate commercial market for an enhanced product while providing the government with a version which would not compete with it.

[971] *Id.* at 141,373.

[972] B-270998, May 7, 1996, 96-1 CPD ¶ 214, 1996 Comp. Gen. LEXIS 246.

The solicitation required that offerors propose a commercial item.[973] The item proposed by the awardee was certified as one that had "not been sold or licensed, but [had] been offered for sale or license to the general public."[974] The protester, Coherent, maintained that the agency was required by FAR 11.006[975] to request additional information, including previous sales data, rather than relying on the offeror's certification. The GAO read the requirement as permissive rather than mandatory, indicating that the acceptance of an item as a commercial item was a matter within the contracting officer's discretion. Additionally, the GAO determined that an objection to the agency's failure to request such information should have been raised prior to award.

3. Minor Modifications--How Major Can they Be? Two recent cases have addressed the extent to which an item can be modified without losing its character as a commercial or nondevelopmental item. The definitions of commercial item and nondevelopmental item both allow for minor modifications to meet the government's needs. While the determination of whether an item meets the definition is "largely within the discretion of the contracting officer,"[976] it must, nevertheless, be a reasonable determination.[977]

In this regard, the GAO upheld a Defense Nuclear Agency contracting officer's determination that a radiation detection system offered with new software remained a commercial item.[978] The GAO stressed that the detection system had a prior sales record, which confirmed its "commercial nature;[979] that the substituted software was commercially available and that the substitution changed only the way the results were reported. It did not "alter the function or the physical characteristics of the monitor."[980]

The Army, on the other hand, failed in its attempt to characterize a modified hand held global positioning system (GPS) as a nondevelopmental item.[981] The Army's intent was to procure an improved GPS for its Special Operations forces. Both Rockwell Collins, Inc. (Rockwell) and the protestor, Trimble Navigation, Ltd. (Trimble), had completed prior contracts in which each had developed a new prototype system. When award was made to Rockwell, Trimble protested alleging that, while its own offer proposed a modified version of its prototype, Rockwell had proposed a different model which was a substantial redesign of the Army's standard GPS. In its decision, the GAO instructs that the extent of a modification should be determined in light of "both the technical complexity of the change and the degree of risk associated with it."[982] Still, the GAO's decision to sustain the protest seemed to turn as much on the following: (1) conflicting testimony of the SSA and the test evaluation board (TEB) chairman, (2) the lack of contemporaneous documentation of consideration of the item's nondevelopmental status, and (3) testimony from the TEB chairman (upon whom the SSA claimed to have relied) that showed that he misunderstood the definition. An item developed from existing technology does not necessarily qualify as nondevelopmental. It appears that this might be a procurement where solicitation of a nondevelopmental item is inappropriate.[983]

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[973] *See* DFARS 252.211-7012.

[974] *Coherent,* 1996 Comp. Gen. LEXIS 246, at *3.

[975] Defense Acquisition Circular 91-9 (Nov. 30, 1995) deleted this provision. *See id.* at n.1.

[976] Canberra Industries, Inc., B-2710116, June 5, 1996, 96-1 CPD ¶ 269, 1996 U.S. Comp. Gen. LEXIS 302.

[977] Trimble Navigation, Ltd., B-271882, Aug. 26, 1996, 96-2 CPD ¶ 102, 1996 U.S. Comp. Gen. LEXIS 445.

[978] *Canberra*, 1996 U.S. Comp. Gen. LEXIS 302.

[979] *Id.*

[980] *Id.* at *11.

[981] *Trimble*, 1996 U.S. Comp. Gen. LEXIS 445.

[982] *Id.* at *10, *citing* TRW Inc. Systems Research and Applications Corp., B-260968.2, Aug. 14, 1995, 95-2 CPD ¶ 101.

[983] The GAO rejected the agency's position that modifications in the specifications were sufficient to put both offerors on notice that substantial modifications would be accepted. It made similar short work of the agency's contention that the term NDI was a "generic" term, "not clearly defined," which would allow it to accept major modifications. In its recommendation, the GAO states, "Here, the requirement that offered receivers qualify as [nondevelopmental items] NDIs is a material requirement, which the agency does not contend no longer reflects its minimum needs; the SSA affirmed in his hearing testimony that, 'as far as I know,' the NDI requirement was still required." *Id.* at *15.

N. Commercial Activities/Service Contracts.

1. Performance Based Service Contracting And Other Proposed Changes. On 1 August 1996, the FAR Council issued a proposed rule to establish the policy for the government's acquisition of services through the use of performance-based contracting methods.[984] The proposed rule makes performance-based contracting the preferred means of acquiring services from the private sector. It requires the use of performance-based service contracting to the maximum extent possible. Performance-based contracting is defined as structuring all aspects of an acquisition around the purpose of the work to be performed, as opposed to the manner in which the work is to be performed or broad and imprecise statements of work (SOWs). Performance-based contracts[985] describe the requirements in terms of required results as compared to required methods of performing the work.

By stating that performance-based methods are to be used to the maximum extent practicable, the proposed rule gives contracting officers more discretion. This compares to the 1992 Office of Federal Procurement Policy (OFPP) rule[986] which required contracting officers to justify the use of any method other than performance-based contracting.

Under the new rules, SOWs must define requirements in clear, concise language identifying specific work to be accomplished. They must be individually tailored to consider the period of performance, deliverable items, and the desired degree of performance flexibility. Agencies must use competitive negotiation when appropriate to ensure the selection of services that offer the best value to the government. The contracting officer must choose contract types most likely to motivate contractors to perform at optimal levels.[987] Performance incentives, positive or negative, must be incorporated into the contract to encourage contractors to increase efficiency and maximize performance. The rule also implements 10 U.S.C. § 2331, requiring the SECDEF to prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of services provided.

2. Times For Temporary Services Increased. The OPM issued final regulations authorizing federal agencies to use private sector temporary personnel for 120 workdays instead of 120 calendar days.[988] The rule delegates to the agency the authority to extend the use of private sector temporaries for up to an additional 120 workdays. The regulations also added two new prohibitions against the use of temporary help services. First, agencies are not permitted to use such services to circumvent controls on employment levels. This means agencies could not use temporary help services merely because hiring was frozen or ceiling levels were insufficient. Second, agencies are not permitted to use temporary help services instead of appointing surplus or displaced federal employees.

3. Proposed FAR Amendments—Guidance on Service Contract Management. Proposed amendments to the FAR to provide guidance on the management of service contracts were published on 3 April 1996.[989] Agency heads or designees must now ensure that service requirements are clearly defined, appropriate performance standards are developed, and contracts are awarded and administered within budget and in a timely manner.

The proposed amendments increase the use of "best practices" in acquisitions. Best practices are defined as techniques agencies may use to help detect problems in the acquisition, management, and administration of service contracts. These are practical techniques gained from experience. Agencies may use best practices to improve the procurement process. Use of best practices is required by the agency head and contracting officer.

4. Inherently Governmental Functions. On 26 March 1996, the FAR Council issued a final rule[990] implementing OFPP Policy Letter 92-1, Inherently Governmental Functions.[991] The rule prohibits agencies from contracting for inherently governmental functions.[992] It defines an inherently governmental function as one

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[984] FAR Case 95-311, 61 Fed. Reg. 40,284 (1996) (the proposed rule implements Office of Federal Procurement Policy Letter 91-2, Service Contracting).

[985] This requires the contractor to use measurable performance and quality assurance plans, provide for reduction of the award fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements, and include performance incentives where appropriate.

[986] FAR Case 91-85, 59 Fed. Reg. 47,112 (1994).

[987] No additional guidance was provided as to what contract types would "most likely motivate contractors to perform at optimal levels."

[988] 61 Fed. Reg. 19,509 (1996) (effective date of the final regulation is 3 June 1996).

[989] 61 Fed. Reg. 14,946 (1996) (the proposed rule implements the guidance of OFPP Policy Letter 93-1, Management Oversight of Service Contracts, 59 Fed. Reg. 26,818 (1994)).

[990] FAC 90-37, 61 Fed. Reg. 2627 (1996).

[991] 57 Fed. Reg 45,096 (1992).

[992] FAR 37.102(b).

so intimately related to the public interest as to mandate performance by government employees. The rule gives examples of inherently governmental functions. Common functions include direct conduct of criminal investigations, control of prosecutions, performance of adjudicatory functions, command of military forces, conduct of foreign relations and foreign policy, determination of agency policy, decisions on budget requests, direction and control of federal employees, employment decisions, government property disposal, source selection board membership, awarding contracts, termination of contracts, determination of contract costs, and federal licensing actions. The rule also provides examples of functions that are not inherently governmental. These include: ADR, inspections, non-law enforcement and security, technical and advisory services, regulation development, evaluation of contractor performance, and non-criminal legal advice.

5. A-76 Supplement Revises to Contracting Out Requirements. On 1 April 1996, OMB published a revised supplemental handbook[993] to OMB Circular A-76.[994] It expands the exceptions to the requirement for cost comparisons and reduces reporting and other administrative burdens. The revised handbook is intended to balance the interests of the parties involved, provide a level playing field between public and private sector offerors, seek the most cost effective means of obtaining commercial products and services that are needed on a recurring basis, and provide new administrative flexibility in the government's make or buy decision process.

Significant changes to the handbook include:

- Exempting national security activities, mission critical core activities, and temporary emergency requirements from the cost comparison process.

- Broadening an agency's authority to waive cost comparisons by permitting delegation of the waiver decision below the secretary level. A waiver may now be granted provided that the conversion will result in a significant service quality improvement, the conversion will not serve to significantly reduce the level or quality of competition in the future award or performance of work, or the in-house or contract offers have no reasonable expectation of winning a competition. Waivers remain subject to public review and administrative appeals.

- Permitting conversion decisions based upon the comparison of performance measures or standards such as allowing for consideration of best value and past performance. No additional guidance was provided to explain how to apply best value or rate the government's past performance.

- Requiring agencies to conduct post-performance review on not less than 20% of all functions retained or converted to in-house performance as a result of a cost comparison, to confirm that the most efficient organization decision was properly estimated and implemented.

- Refining the factors for costing in-house performance in order to ensure a level playing field, including requiring a standard overhead cost factor of 12 percent of direct labor costs for the government. Annual labor hour rates, overhead rates, cost of capital, contract administration, minimum differentials, gain or loses of assets, and prorating of assets have also been changed.

- Establishing a streamlined process for activities involving less than 65 full time equivalent federal employees.[995] As the number of activity employees decreases, the process becomes more streamlined. The streamlined procedures include using existing contracts to determine competitive private sector costs thereby eliminating the need for a cost comparison study.

- Decisions involving business management practices, the development of joint ventures, asset sales, the devolution of activities to state and local governments, the termination of obsolete services or the decision to exit an entire business line are not subject to the cost comparison requirements of the circular.

6. A-76 Decisions for Laundry Services are Dirty Work. Crown Healthcare Laundry Services, Inc. protested the Air Force's decision to have the VA perform laundry services for Keesler Air Force Base, Mississippi, instead of continuing to contract with Crown for those services.[996] The IFB indicated that an A-76[997] cost comparison study would be conducted and included a performance work statement. The VA provided its cost information to the Air Force. The Air Force used the cost data to formulate the in-house cost estimate. The VA was considered to be the "in-house" bid. After a cost comparison with the in-house bid and Crown's bid,[998] the Air Force determined it

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[993] 61 Fed. Reg. 14,338 (1996).

[994] OMB Cir. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983); FAR 7.302.

[995] Some agencies have a more stringent number (less than the 65 listed in the supplement). Be aware of your agency regulations, in that, the more stringent requirement would need to be followed.

[996] Crown Healthcare Laundry Services, Inc., B-270827, Apr. 30, 1996, 96-1 CPD ¶ 207.

[997] OMB Cir. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (Aug. 4, 1983).

[998] The low priced commercial bid was withdrawn based upon a mistake, leaving only the VA in-house bid and Crown's bid.

would be cheaper to retain the work in-house. Crown appealed to the agency citing errors in the comparison.[999] The Air Force denied the appeal. Crown protested to the GAO.

The GAO stated that in an A-76 cost comparison, the government and the bidders should compete on the basis of the same scope of work.[1000] A-76 requires government agencies to prepare in-house cost estimates based on the most efficient in-house operation necessary to accomplish the agency's needs.[1001] GAO reviews agency decisions to retain services in-house exclusively to determine whether the agency followed the requirements in the IFB. GAO found that the protestor failed to show that the Air Force's methodology was unreasonable or inconsistent with A-76.

VI. FISCAL LAW.

A. Purpose.

1. Electronic Tax Filing is a Personal Expense—Except for IRS Employees. The New Orleans Federal Executive Board[1002] (the Board) requested an opinion from the GAO concerning the propriety of using appropriated funds to pay for computer hardware and related expenses to allow federal employees to electronically file their federal tax returns.[1003] The idea was generated by an IRS employee, who told Board members about the GAO decision allowing the IRS to fund such a program.[1004] The GAO determined that the filing of income tax returns is a personal expense. The GAO noted that individual taxpayers have a statutory duty to file returns[1005] and declared that, "Unless the agency can show that the expense primarily benefits the government, personal expenses of employees are not payable from appropriated funds absent specific statutory authority."[1006]

2. Accounting for Embezzled Funds. In *Appropriation Accounting Refunds and Uncollectibles*,[1007] the GAO held that embezzled funds recovered from a fraudulent contract were refunds and, as such, fell within an exception to the Miscellaneous Receipts Act[1008] requirement for deposit into the general fund. Such funds can be credited to the appropriation from which the funds were disbursed, unless the appropriation has closed.[1009] Once the appropriation is closed, the refunded amounts go to the Treasury. The GAO further explained that if such amounts were determined to be uncollectible, the adjustment to write them off must be made to a current appropriation.

3. Personal Expenses—Still a Personal Problem. Several recent cases discussed the improper use of appropriated funds for personal expenses. In *Pension Benefit Guaranty Corporation-Provision of Food to Employees*,[1010] the GAO condemned the use of appropriated funds to purchase continental breakfasts, coffee break refreshments, candy, and snacks for participants at management training seminars. Although it recognized that the providing of the food might have accomplished a desirable pur-

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[999] Crown contended that the VA's cost estimates underrepresented the actual costs of having the VA do the work. Crown alleges that the cost estimates were based on the VA doing less work than stated in the performance work statement. Crown also alleged that the Air Force failed to add contract administration costs to the VA estimate but added those costs to Crown's estimate.

[1000] DynCorp, B-233727, June 9, 1989, 89-1 CPD ¶ 543 was cited by GAO to support this proposition.

[1001] *Id., citing* Tecom, Inc., B-253740, July 7, 1994, 94-2 CPD ¶ 11.

[1002] "The New Orleans Federal Executive Board is a quasi-governmental organization composed of the chief federal executives in the New Orleans area. The board coordinates governmental policy on matters impacting the New Orleans federal community and provides leadership in the sharing of services between agencies." Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129 at 1.

[1003] *Id.*

[1004] *Id.* at 1-2. *See* Internal Revenue Service—Use of Appropriated Funds for an Employee Electronic Tax Return Program, 71 Comp. Gen. 28 (1991) (IRS could use appropriated funds to allow its employees to file electronic tax returns, where the benefit to agency was to publicize its benefit, familiarize employees with system, and allow the agency to refine the system.)

[1005] Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129 *citing* 26 U.S.C. §§ 6011, 6012.

[1006] *Id.* at 2, *citing* Utility Costs Under Work at Home Programs, 68 Comp. Gen 502, 505 (1989).

[1007] B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130.

[1008] 31 U.S.C. § 3302(b).

[1009] In the Contract Law Department, closed accounts are referred to as "graveyard dead!"

[1010] B-270199, Aug. 6, 1996, 1996 U. S. Comp. Gen. LEXIS 402.

pose, it did not accomplish an official one. The agency's justification that the food was necessary to reward the participants and to motivate their punctual attendance was insufficient. According to the GAO, "[t]hose are elements of job performance that all government employees are expected to achieve, without recourse to free food, rewards or other inducement beyond their salary."[1011] The GAO was similarly unconvinced of: (1) the Department of Energy's need to purchase baseball caps to support its goal of recruiting a diverse work force,[1012] (2) the VA's need for novelty recruitment items, patches for an Explorer Post, gifts for prizes during Women's Equality Week, and attendance of personnel at a local sporting event,[1013] and (3) the COE's need to enroll its employee team in a corporate fun run.[1014]

4. Epidemic Outbreak? Take Two Aspirin and Call Me in the Morning—From Your Duty Phone. The Centers for Disease Control and Prevention (CDC) sought unsuccessfully to convince the GAO that installation of telephone and facsimile lines in its director's residence should qualify as exceptions to the general statutory prohibition against using appropriated funds for funding telephone lines in private residences.[1015] Although the GAO has made exceptions, such as allowing installation of telephones for Nuclear Regulatory Commission (NRC) officials for response to nuclear emergencies,[1016] it declined to do so in this case. In comparing the CDC's justification to that of the NRC, the GAO found that the NRC had presented "compelling evidence of calamitous consequences for the public that could result if it were to fail to respond quickly to manage and control nuclear accidents."[1017] The CDC, however, provided no evidence of such dire public consequences absent its immediate response. The GAO also examined the statutory mission of the CDC in responding to public health emergencies.[1018] By statute, CDC was required to respond to the Secretary of Health and Human Services requests to award grants and contracts to investigate, treat, and prevent such emergencies. This statutory mission was insufficient to compel the GAO to ignore the plain language of the statute forbidding the use of appropriated funds for residential telephones.[1019]

B. Time.

1. Bona Fide Need. In *Funding of Maintenance Contract Extending Beyond Fiscal Year*,[1020] the Comptroller General supported the Air Force's reading of 10 U.S.C. 2410a to allow funding of 15 months worth of services with the same FY's funds. During the third option year of a fixed price contract for vehicle maintenance services, Kelly Air Force Base issued an amendment shortening the contract period of the third option so that the contract would expire on 31 August 1994. This was done in an effort to move some contract actions off the strict FY cycle, and thereby reduce the end of the year workload. FY 1994 funds were only sufficient to fund the first four months of the fourth option year 1 September 1995 through 31 December 1995), so the contract was further modified to provide for a "subject to availability of funds" contingency covering the final eight months. This resulted in the Air Force funding one eleven month contract (option) and one four month contract (option) with FY 1994 funds. The certifying officer at the Air Force base questioned whether that violated the authority of 10 U.S.C. § 2410a which allows use of current FY money to fund "twelve months" worth of certain services, beginning anytime during the FY. She reasoned that the base had funded fifteen months (eleven months of option year three plus four months of option year four) out of one annual appropriation. The GAO agreed with the Air Force that the statutory phrase "for 12 months" modified "contracts" and not "payments." The GAO further explained that, "[F]iscal year appropriations have long been available to make payments for more than 12 months to liquidate valid obligations. We know of no reason for Congress to enact legislation to limit payments on valid obligations to only 12 months."[1021]

[1011] *Id.* at *6-7.

[1012] Purchase of Baseball Caps by the Department of Energy, B-260260, Dec. 28, 1995, 96-1 CPD ¶ 131.

[1013] Expenditures by The Department of Veteran Affairs Medical Center, Oklahoma City, Oklahoma, B-247563.3, Apr. 5, 1996, 96-1 CPD ¶ 190.

[1014] Mr. John F. Best, B-262008, Oct. 23, 1996, 1996 U. S. Comp. Gen. LEXIS 1706.

[1015] Centers for Disease Control and Prevention—Use of Appropriated Funds to Install Telephone Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180. The statute discussed is 31 U.S.C. § 1348(a)(1).

[1016] *Id.* at 2, *citing* Installation of Government Telephones in the Residence of Nuclear Regulatory Commission Officials, B-223837, Jan. 23, 1987, 1987 U.S. Comp. Gen. LEXIS 1706.

[1017] *Id.* at 3.

[1018] *Id.* at 2, *citing* 42 U.S.C. § 247d(a).

[1019] Practitioners should note that an amendment to that statute allows the SECDEF to authorize such an expenditure for national defense purposes. *See* 31 U.S.C. § 1348(d).

[1020] B-259274, May 22, 1996, 96-1 CPD ¶ 247, 1996 WL 276377 (C.G.).

[1021] *Id.* at *2.

2. *Presidential Management Intern Program is Nonseverable Training.* In *EEOC—Payment for Training of Management Interns*,[1022] the GAO decided that the two year Presidential Management Intern Program (PMI) constituted a nonseverable service, and, as such, could be paid for out of funds current at the time of the interns appointment.[1023] Prior to 1993, OPM charged each agency participating in PMI on an annual basis for each intern the agency hired. In May 1993, however, OPM informed participating agencies that in the future they would be required to pay for the costs of both years of the program in advance.[1024] The GAO concluded that the conditions of the program supported the conclusion that it should be viewed as an "entirety."[1025] Interns must finish the full two-year program to be eligible for permanent employment, and no substitution of interns during the program is allowed. Finally, it is only when the intern has received all of the OPM training and is eligible to be hired permanently that the agency receives a benefit.[1026] The program also meets the key elements under the training exception to the *bona fide* needs rule. The training actually begins in the current FY, so there is no unreasonable delay of performance, and the scheduling of the training is beyond the control of the agency.[1027]

C. *The Antideficiency Act.*

1. *How Long is Your Contract?* The GSBCA took a tentative step into the morass that is fiscal law in a case involving the termination for convenience of a contract.[1028] The appellant claimed that it had a five-year contract; the GSA argued the contract consisted of a base year and four option years which were subject to the availability of funds.[1029] Although the contract stated that it was subject to annual appropriations, it also stated in several places that it was for a five-year term. The board found that the contract was for a five-year term and that the GSA would have to calculate termination for convenience costs on that basis, as opposed to a one-year contract.[1030] For those of you wondering where the fiscal law is in this story, consider the following. GSA may have avoided an Antideficiency Act (ADA) violation in this case because it was dealing with a no-year working capital fund. Had the contract been funded with annual appropriations, the result might have been different. Activities must be careful to ensure that their contracts are structured with a base year with options, fall under one of the statutory authorizations for the use of multi-year contracts funded with annual appropriations,[1031] or that the contract is a true indefinite delivery contract. Otherwise, there is a real danger of violating the "in advance of" prohibition of the ADA.[1032]

2. *SAF Restriction Avoids ADA Violation.* Contracting officers frequently use a subject to the availability of funds (SAF) clause of some type[1033] to allow the issuance of solicitations or the award of contracts before funds are available. The GAO has consistently held that contracts awarded in advance of the availability of funds do not create an ADA violation if those contracts contain a SAF clause.[1034] This year, the GAO considered a case

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[1022] B-257977, 1995 WL 683813 (C.G. Nov. 15, 1995).

[1023] The PMI is a recruitment and career development training program designed to attract individuals with graduate or professional degrees into federal service. Under the program, universities nominate students who then submit applications to the OPM. The successful candidates are referred to participating agencies that may then appoint them as interns.

[1024] *EEOC*, 1995 WL 683813 at *1.

[1025] *Id.* at *2.

[1026] *Id.*

[1027] *See* Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991).

[1028] Pulsar Data Sys. v. Gen. Svcs. Admin., GSBCA No. 13223, 96-2 BCA 28,407.

[1029] GSA had terminated the lease due to lack of funding since the working capital fund which funded the lease had a negative cash balance for the year.

[1030] The contractor had entered into five-year leases for equipment it would use to perform the contract, assigning proceeds of the contract to pay for these leases.

[1031] *See, e.g.*, 10 U.S.C. § 2306(g).

[1032] 31 U.S.C. § 1341(a)(1)(B). This is because the contract would be for the *bona fide* needs of future fiscal years, for which funds are not yet available.

[1033] *See, e.g.*, FAR 52.232-18.

[1034] *See, e.g.*, To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 U.S. Comp. Gen. LEXIS 1485.

where the Air Force exercised a twelve-month option, with funds available for only the first four months, and the remainder of the performance period subject to the availability of funds.[1035] In finding there was no ADA violation, GAO stated: "we are persuaded that the Availability of Funds clause included in the contract converted the government's obligation for the remaining 8 months of the fourth option period contract to no more than a 'negative' obligation not to procure maintenance services elsewhere should such services be needed."[1036] While this conclusion is not startling in light of previous decisions, this case may be important because, in reaching this conclusion, GAO took the opportunity to express its view regarding what it called "contractual obligations" as follows: "we see no reason to disturb the implicit holding of A-60589, 2 July 1935, namely, that a naked contractual obligation that carries with it no financial exposure to the government does not violate the Antideficiency Act."[1037] While this language should be considered dicta, it may be of great value in resolving the issue of whether "multiple-year" indefinite delivery contracts are permissible from a fiscal law perspective.[1038]

D. Continuing Resolutions: How Much Is Available? In a letter to the Chief Financial Officer for the District of Columbia, the Comptroller General reaffirmed the general understanding of an agency's access to funds under a continuing resolution.[1039] At issue was the District's ability to make statutorily required payments to various retirement funds. The Chief Financial Officer, in a letter dated February 1996, requested guidance in light of the fact that Congress had not yet enacted the District's appropriations for FY 1996. Instead, the District, like many other government agencies that year, was financing its activities through a series of continuing resolutions. The Comptroller responded that none of the continuing resolutions applicable to the District had changed its obligation to the retirement funds. Additionally, the resolving clause for each continuing resolution made it clear that it appropriated to the District the full annual amount for the entire FY, regardless of the "life" of the continuing resolution.[1040] Finally, the continuing resolution provided that appropriations are available to the District "to the extent and in the manner which would be provided by the pertinent appropriations act that has yet to be enacted."[1041]

E. Intragovernmental Acquisitions.

1. Ordering Activity on the Hook to Pay Ten-Year Old Economy Act Bill. Picture this, if you will: almost 17 years ago your activity (the Department of Interior) entered into an Economy Act agreement with the Department of Energy (DOE) for it to provide analysis and maintenance work. Under the Economy Act, your office is viewed as the "ordering agency" and DOE is the "performing agency." The work extended from 1979 to 1983, with your office paying for the work as it was performed; in this case the total came to about $5,867,500. Ten years later, or so, you get a call from the Department of Energy. It seems that the Energy Department finally completed an audit of the work performed under this Economy Act agreement and discovered that the contractor was entitled to an additional $27,763—which DOE paid using no-year appropriations. The Energy official is now on the phone seeking reimbursement.[1042] You, no doubt struggling to repress the urge to tell the gentleman to call back in another ten years, wonder whether you are still liable after all this time and, if so, what year's funds you should

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[1035] Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247. This case also is important for its analysis of the Air Force's use of 10 U.S.C. § 2410a as authority for funding fifteen months of performance from one year's operation and maintenance (O&M) appropriation. *See* § VI, B, 1, *supra.* at p. 114, for a discussion of this aspect of the case.

[1036] 96-1 CPD ¶ 247 at 6.

[1037] *Id.*

[1038] *See* 10 Nash & Cibinic Report (Fed. Pubs.) ¶ 31 (June 1996) for an excellent discussion on this point. Readers also should be aware that the Army General Counsel's Office (Deputy General Counsel for Fiscal Law and Ethics) has taken the position that such contracts are permissible *from a fiscal law perspective.*

[1039] Mr. Anthony Williams, B-271304, 1996 WL 128039 (C.G. Mar. 19, 1996).

[1040] The Comptroller observed that the "temporary nature of the continuing resolution serves to limit the time period during which District officials may incur obligations against the appropriation. . . . Nevertheless, a continuing resolution appropriates the full annual amount regardless of its period of duration." *Id.* at *4. *See, e.g.,* Continuing Appropriations for the Fiscal Year 1996, which provides, "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, . . . for the fiscal year 1996 . . . ." Pub. L. No. 104-31, 109 Stat. 278 (1996).

[1041] *Williams,* 1996 WL 128039 at *2.

[1042] Such were the facts in *Economy Act Payments After Obligated Account Is Closed,* B-260993, Jun. 26, 1996, 96-1 CPD ¶ 287.

tap into. To prevent an unauthorized augmentation of the appropriations, the Comptroller General concluded that the Economy Act requires the ordering agency to reimburse the performing agency its actual costs.[1043] Moreover, in light of the fact that the original appropriations used by the ordering agency were, in all likelihood, expired and closed, the Comptroller advised the Department of Interior to pay the bill using current funds available for the same purpose.[1044] Perhaps the next telephone call you make to DOE will be collect.

2. *Required Sources, Federal Prison Industries: GAO Questions the Propriety of a "Curtain Call."* Ever wonder about the interplay between the requirement to use Federal Supply Schedules (FSS)[1045] and other required sources of supply or services such as the Federal Prison Industries, Inc.?[1046] The protest of *Commercial Drapery Contractors*,[1047] involved a simple procurement for the purchase and installation of curtains at a new VA rehabilitation center. The contracting officer determined that under the FAR, he was obligated to procure the curtains through the Federal Prison Industries, Inc. (d/b/a UNICOR).[1048] For this transaction, since UNICOR would only manufacture the draperies, it permitted the ordering activity to specify an FSS contractor to supply the fabric and perform the installation work. UNICOR would thus act as a "purchasing agent" for the VA. Since he was conducting this purchase through UNICOR, the contracting officer believed that he did not have to comply with the competition requirements otherwise applicable for FSS buys.[1049] The GAO concluded otherwise, finding that either the VA or UNICOR was obligated to consider whether the government was satisfying its needs at the overall lowest cost. Since neither agency made such a determination, the protest was sustained.

F. Liability of Accountable Officers.

1. "Unexplained Losses:" Comptroller Not Impressed With the "If I Told You, I'd Have to Kill You" Defense. It is well recognized that the Comptroller General demands that government officials take appropriate measures to safeguard and protect the taxpayers' dollar. Accountable officers are strictly and automatically liable for losses or erroneous payment of public funds.[1050] Lack of fault or negligence may afford the accountable officer relief, but the burden is on that official to make such a showing.[1051] In a letter to the director of the Department of Agriculture's Financial Management Division, the Comptroller was faced with a case involving the unexplained loss of approximately $13,900.[1052] A finance report disclosed that the "retired former National Program Leader for the Agricultural Research Service (ARS) Narcotics Program" had failed to provide vouchers, receipts, or otherwise close out a "field party fund" account under his control.[1053] Unable to track down the retired official, the agency offered up a number of defenses. First, the agency contended that the official's work and trips were "highly classified" and, as a result, "for security reasons it is 'very possible' that some of the documentation [underlying the expenditure of the funds was] missing."[1054] Second, the agency maintained that just prior to his retirement, the official was in very poor health, which prevented him from organizing and submitting the necessary documentation accounting for the missing funds. Last, the Agricultural Department argued that its own regulations regard-

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[1043] *Id.* at 4. *See also* Nonreimbursable Transfer of Administrative Law Judges, B-221585, 65 Comp. Gen. 635 (Jun. 9, 1986); Bureau of Land Management—Disposition of Water Resources Council Appropriations Advanced Pursuant to the Economy Act, B-250411, 72 Comp. Gen. 120 (Mar. 1, 1993) (performing agency must refund overpayments made under the Economy Act to ordering agency).

[1044] *Economy Act*, 96-1 CPD ¶ 287 at 3. *See also* 31 U.S.C. § 1553(b).

[1045] *See* FAR Subpart 8.4.

[1046] *See* FAR Subpart 8.6.

[1047] B-271222.2, June 27, 1996, 96-1 CPD ¶ 290.

[1048] FAR 8.602(a) requires agencies to purchase a scheduled list of supplies from the Federal Prison Industries, Inc. "at prices not to exceed current market prices."

[1049] Specifically, the contracting officer concluded that he need not concern himself with whether the vendor he specified for providing the fabric and installing the curtains met the agency's needs "at the lowest overall cost." 96-1 CPD ¶ 290, at 3. *See also* FAR 8.404(b)(2).

[1050] *See* United States v. Prescott, 44 U.S. 578 (1845); Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (1974).

[1051] Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979).

[1052] B-272613, Oct. 16, 1996, 1996 WL 590509.

[1053] This fund apparently covered expenses of scientists attending international meetings sponsored by ARS. *Id.*

[1054] *Id.*

ing who was responsible for the funds were "vague and ambiguous."[1055] The Comptroller General rejected all three defenses, ruling that neither the arguably sensitive nature of the official's activities nor his health absolved him of his responsibility to account for the funds provided to him. Finally, after review of agency regulations, the Comptroller concluded that applicable agency directives "clearly outlined" the official's responsibilities and liability.[1056]

2. Disbursing Officer Not Liable for Error Made by Contracting Officer. At issue in *Request for Advance Decision from Defense Finance and Accounting Service*[1057] was an erroneous payment to a contractor following an assignment requiring monies due under the contract be paid to a financial institution.[1058] The record in this case shows that Boston Financial properly provided the Navy with notice of the contractor's assignment. Although the contracting office had notice of the assignment, the contracting officer endorsed the contractor's invoice for payment to his supporting disbursing office. Unfortunately, the disbursing office had not yet received notice of the assignment and, so, was unaware of the contracting officer's error. Under such circumstances, the Comptroller concluded that the disbursing officer involved had "no reason to doubt the correctness of the voucher" and was entitled to relief from liability for the loss of funds.[1059]

G. Nonappropriated Fund Issues.

1. Travel Office Contribution to MWR Account Violates the Miscellaneous Receipts Act. In keeping with DOD policy, the Defense Construction Supply Center issued a solicitation seeking official and unofficial travel services.[1060] The contract was to be structured such that the concession fees for official travel would be deposited in the Treasury and those fees for unofficial travel would be deposited in the Morale, Welfare, and Recreation Account. The Court of Appeals for the District of Columbia found this practice to violate the Miscellaneous Receipts Act[1061] and remanded the case to the circuit court for declaratory and injunctive relief.[1062]

2. Phones in the Barracks. The protester in *LDDS Worldcom*[1063] (LDDS) objected to a Navy Exchange Service (Exchange) RFP for personal telephone services. The RFP contemplated that the Exchange would select a licensee to provide phone services for barracks, pay telephones, long distance calling centers, and other similar services. The licensee would provide necessary equipment and renovations at its own expense and would recover its cost from user charges. The RFP provided that, upon termination of the agreement the installed property would belong to the government. LDDS argued that this matter was inappropriately handled by the exchange. Because it would involve improvements to real property, LDDS contended that the work must be accomplished in accordance with an appropriation from Congress.[1064] The GAO dismissed the protest for lack of jurisdiction, based upon the general rule that GAO protest jurisdiction is limited to procurements conducted "by" a federal agency,[1065] a term which has been interpreted to exclude procurements conducted by nonappropriated fund instrumentalities.[1066] The GAO found no evidence that the exchange was acting as a conduit for the Navy, nor did it find pervasive Navy

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[1055] *Id.*

[1056] *Id.*

[1057] B-270801, Mar. 19, 1996, 96-1 CPD ¶ 159.

[1058] The Assignment of Claims Act permits an assignment of monies due from the United States under a contract to a financial institution. 31 U.S.C. § 3727(c). In a case such as this, the United States pays the contractor (in lieu of the financial institution) at its own peril. *See* Central Bank of Richmond, Virginia v. United States, 117 Ct. Cl. 389 (1950).

[1059] The decision makes no mention of what liability, if any, ought to be assigned to the contracting officer. *Central Bank*, 117 Ct. Cl. at 389.

[1060] Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense, 87 F.3d 1356 (D.C. Cir 1996).

[1061] 31 U.S.C. § 3302(b) (1994).

[1062] For a more detailed discussion of this case, *see* Litig. Div. Note, *Scheduled Airlines Traffic Office v. Dep't of Defense*, ARMY LAW., Oct. 1996 at 44.

[1063] B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45.

[1064] Protester relied on 10 U.S.C. § 2801(a), which states, "The term 'military construction' as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation."

[1065] *Id.* at 3, *citing* Americable Int'l., Inc. B-251614, Apr. 20, 1993, 93-1 CPD ¶ 336.

[1066] *Id.* at 3, *citing* Military Equip. Corp. of Am., B-253708, June 11, 1993, 93-1 CPD ¶ 455 and University Research Corp., B-22895, Dec. 29, 1987, 87-2 CPD ¶ 636.

participation, circumstances which would also have conferred jurisdiction on the GAO.[1067] As to the potential benefit to Navy real property, the GAO dismissed it as "incidental."[1068]

3. Thumbs Up to Noncompetitive Procurement of USO Always Home Brand Items. The Defense Commissary Agency (DECA) got the nod from the GAO in an advance decision concerning its proposed noncompetitive purchase of USO "Always Home" brand items for resale.[1069] CICA allows an agency to use noncompetitive procedures to purchase brand-name commercial items for resale.[1070] This provision applies where there is a "demonstrated customer preference."[1071] The question presented by DECA was whether a "need" for items could be shown where the items had never been sold in the commercial market under the USO "Always Home" name. The USO "Always Home" brand-name was proposed for use only in the military exchange stores. Other DECA suppliers maintained that these items could not be purchased noncompetitively. In approving a noncompetitive procurement, the GAO noted that there was neither a statutory definition of the term "brand-name commercial items" nor was there regulatory guidance. Absent any such guidance, the GAO had no objection.

4. Withered on the Vine. A recent change to the Army Federal Acquisition Regulation Supplement (AFARS) deleted the short lived provision formerly found at AFARS 13.9003(k), which permitted the use of government credit cards to make purchases in CONUS exchanges up to $2,500 and OCONUS up to $25,000. The former provision was somewhat controversial in light of GAO case law.[1072] OCONUS purchases, although no longer set out in the AFARS, would appear to be permissible in accordance with statutory guidance.[1073]

VI. CONCLUSION.

The events of 1996 brought us one step closer to attaining the world class procurement system advocated by proponents of reform.[1074] Relaxed and innovative new rules for procuring commercial items and information technology should empower agencies to get more bang for their proverbial bucks. These reforms came none too soon as budgets continue to shrink and missions continue to grow.

A calm seems to have settled following last year's best value storm, as the CAFC recognized that subjective decisions cannot always be quantified. The GAO has also shown considerable willingness to defer to well reasoned decisions concerning offeror's past performance, agencies' minimum needs, and the need to restrict competition. In a well reasoned, common sense decision, the CAFC decided to exalt substance over form in the area of CDA rights advisements. The CAFC's refusal to extend the CDA appeals time period indefinitely represents a significant step forward in the application of common sense to the procurement process.

Still, the year brings us some potential new pitfalls. The saga of DCAA's audit of General Dynamics' DIVAD contract reminds us all that a small mistake can have dire consequences. New debriefing rules should keep everyone on their toes, and forum shopping is alive and well with the statutory expansion of *Scanwell* jurisdiction.

We hope you enjoyed this article and learned a few things along the way. We wish you the highest level of success in accomplishing your own "*Mission Impossible*" during the coming year. Once again, we wish you and your loved ones a Happy Holiday Season and a terrific 1997—both fiscal and calendar!

[1067] *Id.* at 3, *citing* Compugen, Ltd., B-261767, Sept. 5, 1995, 95-2 CPD ¶ 103; Premier Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8.

[1068] *Id.* at 4.

[1069] Defense Commissary Agency—Request for Advance Decision, B-262047, Feb. 26, 1996, 96-1 CPD ¶ 115.

[1070] 10 U.S.C. § 2304(d)(5).

[1071] *Defense Commissary Agency*, 96-1 CPD ¶ 115 at 2. The requirement for a "demonstrated customer preference" appears to be DECA's interpretation of the agency's "need" for a brand-name commercial item. 10 U.S.C. § 2304(c)(5) allows an agency to use other than competitive procedures when "the agency's need is for a brand-name commercial item for authorized resale." *See also*

[1072] *See* Obtaining Goods and Services from Nonappropriated Fund Activities through Intra-Departmental Procedures, B-148581, Nov. 21, 1978, 78-2 CPD ¶ 353; Department of Agriculture Graduate School—Interagency Orders for Training, B-214810, 64 Comp. Gen. 110 (1984); Department of the Army and Air Force, Army and Air Force Exchange Service, B-235742, Apr. 24, 1990, 90-1 CPD ¶ 410. *See* DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE AND RECREATION ACTIVITIES, para. 7-34c (29 Sept. 95).

[1073] *See* 10 U.S.C. § 2424.

[1074] Change is good!

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