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Contract and Fiscal Law Developments of 2001—The Year in Review

Major John J. Siemietkowski, Lieutenant Colonel Timothy J. Pendolino, Lieutenant Colonel Michael J. Benjamin, Major Thomas C. Modeszto; Major Kevin M. Walker, Major Karen S. White (USAF), Major Gregg S. Sharp, Colonel Jonathan H. Kosarin, Lieutenant Colonel Steven N. Tomanelli (USAF); Major Timothy M. Tuckey, Ms. Margaret K. Patterson

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Editor, Captain Erik L. Christiansen
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FOREWORD

The tragic events of 11 September 2001 overshadowed all other happenings during the past year. At one level, contract and fiscal law developments seem inconsequential in the face of the enormity of the terrorist attack and its aftermath. But surely those who died would want us to continue in their footsteps and, in our own small way, contribute to the new and continuing missions of the federal government. Our thoughts and prayers are with the victims and their families. Those thoughts and prayers go out as well to the men and women, from all agencies, on the front lines of Operations Noble Eagle and Enduring Freedom.

These recent events underscore the importance of contracting to the accomplishment of our missions. We must always remember that everything we do supports the soldier, sailor, airman, marine, and coast guardsman serving on the front line, whether that be deep in Afghanistan or in New York Harbor. Those who go into harm's way are the customers, and we should never forget that.

The past year in government contracting was relatively quiet, especially on the legislative front. While Congress imposed some new rules regarding service contracts, especially with respect to task orders under multiple award contracts, there were no major legislative changes this year.

Issues continue to develop, however, that could foreshadow some interesting and busy years to come. Outsourcing has become one of the centerpieces of the new Administration's efforts to streamline government. Issues relating to the conduct of outsourcing and, in particular, the standing of government employees and their unions to challenge outsourcing decisions in the federal courts and at the General Accounting Office (GAO), continue to garner congressional attention. We continue to believe that the inherent tension between the quest for contract efficiency (leading to contract bundling) and the need to provide opportunities for small business will result in legislation in the near future. Electronic commerce, implementation of the Section 508 requirements for access to information technology, management of service contracts and of the government's acquisition workforce all promise to keep us busy in the years ahead. Of course, the ongoing war against terrorism will present a myriad of challenges for acquisition and fiscal law attorneys throughout government and industry.

As usual, the courts, boards, and the GAO were busy issuing guidance touching on all aspects of our practice. In particular, it appears to us that the Court of Federal Claims (COFC) and the Court of Appeals for the Federal Circuit (CAFC) issued more procurement-related decisions this year than in years past. (Based solely on a feel, not on any empirical evidence!) In addition, there was a significant amount of rule-making activity covering the entire spectrum of contracting issues.

As always, this article is our[1] attempt to look back on the past year and pick the most important, most relevant, and (sometimes) the most entertaining, cases and developments of the past year. While we cannot possibly cover every decision or rule issued, we have attempted to address those with the most relevance to most practitioners. We hope that we have hit the mark and that you find this article both useful and enjoyable.

CONTRACT FORMATION

Authority

Too Bad, So Sad!

A basic rule of government contracting is that only an agent with actual authority may bind the government to a contract.[2] During this past year, three plaintiffs learned the hard way that apparent authority is a non-existent concept in public contracting.

In *Doe v. United States*,[3] the Drug Enforcement Agency (DEA) agreed to pay a confidential informant for his assistance in three criminal investigations.[4] The informant claimed that the DEA owed him more than $600,000 under this agreement.[5] Although the DEA had signed two written agreements with the informant,[6] and although a DEA agent had recommended an

1. The Contract and Fiscal Law Department would like to take this opportunity to thank our contributing authors from outside the Department: Colonel Jonathan Kosarin; Lieutenant Colonel Steven Tomanelli (U.S. Air Force); Ms. Margaret Patterson; and Major Timothy Tuckey. Their willingness to take time out of their hectic schedules to help the Department is appreciated more than they can know. Thanks to their efforts, this article is more comprehensive, timely, and relevant than we could make it on our own. Thanks for the help!

2. Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). *See also* Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 1 [hereinafter *2000 Year in Review*]. Moreover, potential contractors bear the responsibility of verifying the actual authority of the government agents with whom they negotiate. *Id.*

3. 48 Fed. Cl. 495 (2000).

4. *Id.* at 497.

5. *Id.* The informant's efforts led to the DEA's seizure of seventy-six pounds of amphetamine, $1.2 million in illicit cash, three vehicles valued at $35,650, and 1534 pounds of marijuana. *Id.* at 499.

6. *Id.* at 498.

award for the informant of 12.5% of the total property seized, the DEA refused to pay him.[7]

The COFC granted summary judgment for the government, holding that the DEA agents did not have actual authority to bind the government to a contract.[8] The court reasoned that the DEA *Agent's Manual* explicitly stated that agents may only recommend an informant for an award, and that the language of the written agreement itself made the granting of such awards purely discretionary.[9] The court went on to find that the DEA agents also lacked implied actual authority to bind the government.[10] The court concluded by finding that no one with actual authority had ratified the agents' agreement with the informant.[11]

Another unfortunate DEA informant met a similar fate in *Toranzo-Claure v. United States*.[12] In *Toranzo*, the informant sought $75,000 for assistance he provided the DEA and the Bureau of Alcohol, Tobacco, and Firearms (ATF). Although the informant had no written agreement with the government,[13] the DEA and the ATF had already paid the informant $71,890 for his undercover work in the United States and in Bolivia.[14]

Granting the government's motion for summary judgment, the court simply found that the government agents lacked actual authority to bind the government because its three witnesses stated so.[15] Though the court found no implied contract between the informant and the agencies, it never addressed the issue of implied actual authority.[16]

Though not an informant, a government contractor named Donald Brown also learned the hard way that only those with actual authority may bind the government to a contract. In *Starflight Boats v. United States*,[17] the Air Force awarded Mr. Brown's company, Starflight Boats, a contract to make and install runway edge markers. Shortly after performance began, the government's contracting officer's representative (COR) asked Mr. Brown to conspire with him to defraud the Air Force and then split any profits resulting from the fraud. Mr. Brown refused and reported the COR to the Air Force's Deputy of Contracting. According to Mr. Brown, the Deputy of Contracting then asked Brown to cooperate in a criminal investigation of the COR, and promised to reimburse Brown for all costs incurred in his cooperation.[18] After the government successfully prosecuted the COR, Mr. Brown filed a claim with the Air Force for $224,390 in performance delay costs. The Air Force rejected the claim.[19]

In adjudicating the government's motion for summary judgment, the COFC first noted that no statute or regulation gave the Deputy of Contracting actual authority to bind the Air Force to this agreement.[20] The court briefly added that the Deputy of Contracting also lacked implied actual authority.[21] Granting the summary judgment motion, the court emphasized that "even if plaintiff believed that [the Deputy of Contracting] had authority

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7. *Id.*

8. *Id.* at 501-02.

9. *Id.* at 502, 505.

10. *Id*. at 502. Government agents may have implied actual authority to enter a contract if their questionable acts, orders, or commitments are an integral or inherent part of the agent's assigned duties. H. Landau & Co., 886 F.2d 322, 324 (Fed. Cir. 1989); Confidential Informant v. United States, 46 Fed. Cl. 1, 7 (2000).

11. *Doe*, 48 Fed. Cl. at 504. Those within the government with actual contracting authority may ratify the unauthorized commitments of other government agents. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602-3 (June 1997) [hereinafter FAR]; Henke v. United States, 43 Fed. Cl. 15, 26 (1999).

12. 48 Fed. Cl. 581 (2001).

13. *Id*. at 583.

14. *Id*. at 582.

15. *Id*. at 583.

16. *Id*. at 584.

17. 48 Fed. Cl. 592, *appeal dismissed by* No. 01-5072, 2001 U.S. App. LEXIS 13224 (Fed. Cir. May 30, 2001).

18. *Id*. at 594.

19. *Id*. at 595.

20. *Id*. at 598.

21. *Id*. at 599. Though the court raised the issue of whether the Deputy of Contracting's agreement with Mr. Brown was an "integral part of his duties," the court never analyzed this issue. *See id*.

to bind the government in contract, plaintiff bore the burden of confirming through the government the exact reach of [the Deputy of Contracting's] authority."[22]

The holdings of these three cases seem to indicate that crime does not pay, or, more precisely, helping the government fight crime does not pay. One may wonder whether it is good public policy to ask for assistance in criminal investigations, promise reimbursement for that assistance, and then deny such reimbursement after the successful investigation is complete. Last year,[23] we wrote about *Confidential Informant v. United States*,[24] in which the COFC refused to grant the government's summary judgment motion, holding that the Federal Bureau of Investigation (FBI) and Internal Revenue Service (IRS) agents may have possessed implied actual authority to bind the government to rewards promised to a confidential informant. Unfortunately for that confidential informant, after a fact-finding hearing, the court held that the informant could not prove that the government agents possessed implied actual authority.[25] The lesson learned for those who seek reward for helping agencies catch criminals is to always ascertain the actual authority of those in the government who promise that "the check is in the mail."

Spies Like Us

In a case that reads more like "a plot for a made-for-TV movie than a typical contract dispute,"[26] the CAFC denied recovery to a plaintiff who claimed that a clandestine Central Intelligence Agency (CIA) agent borrowed $8 million from him. According to the complaint, a British solicitor had approached the plaintiff and stated that he worked for the CIA and needed money to help fund covert projects in Europe.[27] For undisclosed reasons, the CIA could not directly fund these projects, code-named "Ultima" and "Bluebook."[28] As consideration for the $8 million loan, the alleged CIA agent issued a promissory note to the plaintiff for $35 million.[29] "Perhaps unsurprisingly, neither [the solicitor, his boss], nor the CIA paid the note when it became due."[30] Interestingly, the plaintiff won a $35 million judgment in the British courts, but could not collect on it.[31] The plaintiff then sued in the COFC, where the court eventually granted the government's motion for summary judgment based on the argument that the alleged CIA agent lacked actual authority to bind the government to this agreement.[32]

On appeal, the CAFC agreed with the COFC that the plaintiff had not made even a prima facie showing of actual authority. Nonetheless, the court remanded the case, finding that the government's restrictions on plaintiff's discovery may have unreasonably denied the plaintiff an opportunity to establish his prima facie case.[33] The COFC therefore has the case again, though "the likelihood that plaintiffs can cobble together enough evidence to persuade the trial court that Savage (the alleged CIA agent) had actual authority to enter into this contract on behalf of the United States seems quite remote."[34]

Competition

When Congress passed the Competition in Contracting Act (CICA)[35] in 1984, it presumed that competition yielded cost savings and promoted innovation.[36] A growing trend seems to value efficiency over competition.[37] Soon after Senate confirmation, Angela Styles, the Administrator of the Office of Pro-

22. *Id*.

23. *2000 Year in Review*, *supra* note 2, at 2.

24. 46 Fed. Cl. 1 (2000).

25. No. 98-796 T, 2000 U.S. Claims LEXIS 141 (July 25, 2000).

26. Monarch Assurance v. United States, 244 F.3d 1356, 1358 (Fed. Cir. 2001).

27. *Id*. The plaintiff lived on the Isle of Man. *Id.*

28. *Id*. One wonders whether the alleged CIA agent was really a solicitor, as no right-thinking legal professional would ever code-name an operation "Bluebook."

29. *Id*. The only guarantor on the promissory note was an individual whom the solicitor worked for. The note made no mention of the CIA or the United States government. *See id.*

30. *Id*.

31. *See id*.

32. *Id*. at 1361. Apparently, the COFC never addressed the issue of the intellectual capacity of a plaintiff who would agree to loan a putative CIA agent $8 million.

33. *Id*. at 1362.

34. *Id*. at 1364-65.

35. The Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in various sections of 10 U.S.C., 31 U.S.C. and 41 U.S.C.).

curement Policy (OFPP), discussed this tension when asked about the challenges she anticipated as the OFPP Administrator:

> The challenge for this administration and OFPP will be to balance the obvious benefits of increased efficiencies with the maintenance of fundamental concepts of competition, due process, and transparency . . . . While [the 1990's procurement] reforms brought much needed efficiency, I am concerned that OFPP has not examined whether the "efficient procurement model" may have compromised competition, fairness, integrity and transparency. [38]

During the past year, the battle between competition and efficiency has been played out in various contexts.

Competition in Postal Purchasing: A Far Cry from the FAR

The CICA requires "with limited exceptions" that contracting officers "promote and provide for full and open competition in . . . awarding Government contracts."[39] Awarding a sole-source contract absent one of seven statutory exceptions is a violation of the CICA.[40] The CICA, however, does not apply to the U.S. Postal Service (USPS),[41] and the USPS appears to have no specific mandate to compete its transportation contracts. In *Emery Worldwide Airlines, Inc. v. United States*,[42] the CAFC subjected the USPS's $6.36 billion sole-source award of a transportation contract to an arbitrary and capricious standard of review.[43] Finding that the contract between the USPS and Federal Express (FedEx) "was rational, and statutory and procedural violations, if any, did not prejudice [the plaintiff], Emery," the CAFC affirmed the Court of Federal Claims' (COFC) decision[44] to dismiss Emery's complaint and order judgment for the United States.[45]

The USPS procurement passed CAFC's three-pronged rationality determination. The court determined that the USPS's "decision to contract out its priority, express, and first-class mail on a sole-source basis" was rational,[46] the agency's

36. See, e.g., ATA Defense Indus. v. United States, 38 Fed. Cl. 489, 499 (1997), discussing the CICA's legislative history:

> The CICA was enacted in part because of congressional concern that federal agencies were paying too high a price in their procurement of products and services. Congress was concerned that these agencies too often resorted to sole source procurements and did not take advantage of the lower prices that may result when a procurement is subject to full and open competition.

Id. See generally H.R. CONF. REP. NO. 98-861, at 1421 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2109 (legislative history of the Competition in Contracting Act).

37. This trend is evidenced, for example, in the increased use of simplified acquisitions (including micro-purchases using the government IMPAC card), multiple-award task and delivery order contracts, and multiple award schedules. *See generally* Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001). Discussing the tension between efficiency and other goals of the procurement system, Professor Schooner asserts:

> Surely, the Government saves agency resources (for example, time, energy, and money) when fewer competitors vie for specific contracts. Yet, in a less crowded market, it is more difficult to ensure that competitive pressure guarantees that the government receives the best value, in terms of price, quality, and contractual terms and conditions.

Id. at 710.

38. Gregory A. Smith, *Procurement Lawyer Talks with Angela B. Styles, Administrator, Office of Federal Procurement Policy, Office of Management and Budget*, 36 PROCUREMENT LAW. 4 at 1 (Summer 2001).

39. FAR, *supra* note 11, § 6.101(a) (referencing the CICA's competition requirements at 10 U.S.C. § 2304 and 41 U.S.C. § 253). "Full and open competition" means that "all responsible sources are permitted to compete." *Id*. § 6.003. Full and open competitive procedures include sealed bidding, competitive proposals, and two-step sealed bidding. *Id*. § 6.102.

40. *See* 41 U.S.C. § 253(c) (2000); 10 U.S.C. § 2304(c) (2000).

41. The USPS is exempt from all federal procurement laws not specifically enumerated in 39 U.S.C. § 410(a). United States v. Elec. Data Sys. Fed. Corp., 857 F.2d 1444, 1446 (Fed. Cir. 1988). Because the CICA is not specifically enumerated in 39 U.S.C. § 410(a), the CICA does not apply to the USPS and therefore the USPS is not subject to the CICA's competition requirements. Emery Worldwide Airlines, Inc. v. United States, No. 01-5075, 2001 U.S. App. LEXIS 19420, at *20 n.7 (Fed. Cir. Aug. 31, 2001).

42. 2001 U.S. App. LEXIS 19420.

43. *Id.* at *36.

44. Emery Worldwide Airlines, Inc. v. United States, 49 Fed. Cl. 211 (2001).

45. *Emery Worldwide*, 2001 U.S. App. LEXIS 19420, at *47-48.

requirements had a rational basis,[47] and the "decision to select FedEx as the sole-source awardee was rational."[48]

The CAFC also examined the procurement against the applicable statutes in title 39 of the U.S. Code (U.S.C.) and the *Postal Services Purchasing Manual*. Emery did not cite any specific statutory mandate for "competition." Instead, it alleged that the sole-source award violated section 101(f) of title 39, which provides: "In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service."[49] The court rejected Emery's claims that this provision prohibited awarding a transportation contract to a single provider or, alternatively, that the provision required competition before awarding the contract. The CAFC held:

> Fair and equitable distribution is not tantamount to "equal" distribution or distribution to multiple providers. Fairness and equity can be met by an award to a single entity. Further, fair and equitable distribution does not necessitate a competitive bidding procurement process; this statutory provision can be met by a non-competitive, sole-source contract that is based on rational requirements . . . .[50]

The court's analysis highlights the difference in competition requirements between the USPS's statutory and regulatory acquisition scheme and the requirements of the CICA. Because Congress "endeavored to provide the USPS freedom to act in a business-like manner,"[51] the Postal Service, like a commercial business, need not formally compete its transportation contracts. Rather, "in selecting modes of transportation, [USPS] procurement contract decisions" need only be "fair and equitable."[52]

Alphabet Soup: District Court OKs DOL's Software Buy from GTSI Using the NIH's ECSP IDIQ GWAC Proving FASA Trumps CICA[53]

In *Corel Corp. v. United States*,[54] the District Court for the District of Columbia looked at the relationship between the CICA's competition requirements and certain streamlined procedures in the Federal Acquisition Streamlining Act of 1994 (FASA).[55] In *Corel*, after conducting assessments and evaluations,[56] the Department of Labor (DOL) decided to standardize its software applications by purchasing Microsoft Office software produced by Microsoft Corp.[57] The DOL did not use full and open competitive procedures, but instead obtained quotes from several authorized Microsoft resellers.[58] Based on these quotes, the DOL intended to purchase the software from Government Technologies Services, Inc. (GTSI), a multiple award/delivery order contractor authorized to sell brand name computer products to federal government agencies through the "Electronic Computer Store Program,"[59] an indefinite delivery/

46. *Id.* at *40.

47. *Id.* at *41-42.

48. *Id.* at *42-43.

49. *Id.* at *44 (citing 39 U.S.C. § 101(f) (2000)).

50. *Id.* at *46-47.

51. *Id.* at *46 (citing H.R. Rep. No. 91-1104, at 5 (1970)).

52. *Id.* at *46.

53. Translation: District court okays Department of Labor's software buy from Government Technologies Services, Inc., using the National Institute of Health's Electronic Computer Store Program, indefinite delivery, indefinite quantity government-wide agency contract proving the Federal Acquisition Streamlining Act trumps the Competition in Contracting Act.

54. Corel Corp. v. United States, No. 99-3348 (D.D.C., Mem. Op. & Order filed Sept. 17, 2001), *at* http://www.dcd.uscourts.gov/99-3348.pdf.

55. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3409 (codified in various sections of 10 U.S.C. and 41 U.S.C.).

56. Around April 1998, the DOL created a Management Review Council and retained Abacus Technology Corp. (Abacus) to assess the DOL's "existing information technology infrastructure" and to recommend improvements. *Corel Corp.*, No. 99-3348, at 2. Over the next year, Abacus collected and analyzed information and issued several reports, leading to the selection of Microsoft Office. *Id.* at 2-5.

57. *Id.* at 5.

58. *Id.* at 6.

59. Now in its second iteration, the Electronic Computer Store II (ECS II) can be accessed at http://nitaac.nih.gov (ECS II icon).

indefinite quantity (IDIQ) government-wide agency contract (GWAC).[60] In July 1999, the DOL placed a $350,000 delivery order with GTSI.[61] In response, Corel Corp. (Corel) protested the sole-source delivery order to the GAO.[62] The GAO denied the protest.[63]

At the district court, Corel expanded the scope of its complaint and challenged not only the delivery order itself, but also the "overarching administrative decision to standardize to Microsoft Office in the first place."[64] The district court observed that the preliminary decision to standardize using Microsoft Office was not a "procurement" subject to the CICA's competition requirements.[65] Further, even if the CICA applied to this decision, "CICA specifies that its open competition requirements do not apply 'in the case of procurement procedures expressly authorized by statute.'"[66] The FASA is one such statute that falls under this "savings clause."[67] The FASA explicitly exempts "orders placed against task order and delivery order contracts entered into pursuant to subpart 16.5" from the CICA's full and open competition requirement.[68] Thus, the court concluded that the "DOL was under no duty to hold a full and open competition."[69]

GAO Sustains Two Protests of Sole-Source Procurements

In *Signals & Systems, Inc.*,[70] the Army justified a sole-source procurement of engine electrical start systems (EESS) based on an unusual and compelling urgency. The protestor, Signals and Systems, Inc. (SSI), mounted a three-pronged challenge to the Army's use of this exception to CICA's full and open competition requirement. First, SSI asserted that the Army did not have an unusual and compelling urgency. Second, even if the Army had such an urgency, it purchased more units than necessary to meet its urgent requirements. Finally, any urgency resulted from the Army's lack of advanced procurement planning. SSI prevailed on the latter two allegations.[71]

60. *Corel Corp.*, No. 99-3348, at 6-7.

61. *Id.* at 7. The agreement between the DOL and GTSI gave the DOL the right to place $2.8 million of delivery orders with GTSI over three years. *Id.* The "entire standardization process is expected to cost DOL $22.4 million over three years." *Id.*

62. *Id.* at 7. *See* Corel Corp., Comp. Gen. B-283862, Nov. 19, 1999, 99-2 CPD ¶ 90.

63. The GAO refused to consider an allegation that the DOL improperly purchased computer software on a sole-source basis. Because the contractual vehicle was a delivery order under an ID/IQ contract, the GAO found itself "without authority to consider protests connected to the issuance of delivery orders, regardless of the issuing agency's underlying determinations or conduct." *Corel Corp.*, 99-2 CPD ¶ 90 at 2.

64. *Corel Corp.*, No. 99-3348, at 17. Corel sought declaratory and injunctive relief to enjoin the DOL "from implementing its decision to standardize its software applications exclusively to software manufactured by Microsoft Corporation." *Id.* at 1.

65. *Id.* at 21.

66. *Id.* at 22 (citing 41 U.S.C. § 253(a)(1) (2000)).

67. *Id.* at 12. In a different context, the Court of Appeals for the Fourth Circuit also discussed the CICA's exception for "procurement procedures otherwise expressly authorized by statute." NISH v Cohen, 247 F.3d 197, 204 (4th Cir. 2001) (citing 10 U.S.C. § 2302(3)(A)). In *NISH v. Cohen*, the Fourth Circuit held that the Randolph-Sheppard Act, 20 U.S.C. § 107 (2000), is such a "procurement procedure." 247 F. 3d at 204. This article discusses this case in more detail, *infra* notes 1562-68 and accompanying text.

68. *Corel Corp.*, No. 99-3348, at 24.

69. *Id.* at 30. The court also rejected Corel's claim under the Administrative Procedures Act (APA), 15 U.S.C. §§500-596 (2000). The court noted that the FASA "contains a non-reviewability clause which bars bid protests connected to orders placed under task or delivery order contracts except for a protest on the ground that the order increases the scope, period or maximum value of the contract." *Corel Corp.*, No. 99-3348, at 13. Therefore, "FASA's bar against bid protests would appear to preclude" APA review. *Id.* at 32. In any case, the DOL's decision to standardize using Microsoft Office was not arbitrary or capricious. *Id.* at 33.

70. B-288107, 2001 U.S. Comp. Gen. LEXIS 149 (Sept. 21, 2001).

71. *Id.* at *2.

The Army's High Mobility Multi-Wheeled Vehicle (HMMWV) contains a "remote control switch that heats the engine's glow plugs . . . before the driver can start the engine."[72] In 1997, the Army decided to replace the initial remote control switch system with the EESS[73] and began designing the EESS' specifications.[74] Before the EESS could be fielded, however, the Army replaced the initial system with an interim system, designated "type-10."[75] For safety purposes, the "type-10" was soon replaced with the "version 14-0A."[76] Meanwhile, the specifications for the EESS were finally approved in December 2000.[77]

In March 2001, the Army issued a safety message requiring the replacement of all remaining type-10 systems.[78] The message required "deadlining"[79] all vehicles containing the type-10 system sixty days after the date of the message. At the time the Army issued the safety message (and up until the time of the protest) the Army did not know how many HMMWVs contained type-10 systems.[80]

As a result of the safety message requiring deadlining, the Army awarded KDS Controls, Inc. (KDS), a sole-source contract for EESSs.[81] The Army argued that the safety message's requirement to replace all type-10 systems or deadline HMMWVs within sixty days caused the "unusual and compelling urgency."[82]

The GAO addressed SSI's three allegations. First, the GAO held that "military mission readiness and personal safety are important considerations" in justifying an unusual and compelling urgency exception to full and open competition.[83] According to the GAO, it "is beyond cavil that an agency need not risk injury to personnel or property in order to conduct a competitive acquisition."[84] Therefore, the safety message's requirements "resulted in a tangible urgency requirement."[85] The Army, however, did not fare as well with SSI's final two allegations.

The GAO held that the "urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement."[86] Because the Army did not know how many type-10s needed to be replaced, the Army also could not know what "minimum quantity" of EESSs it needed. Therefore, the GAO sustained SSI's protest that the Army purchased more units than were necessary.[87] As a remedy, the GAO recommended that the Army "promptly undertake a review to determine the number of EESS units needed to satisfy its immediate urgent requirement . . . and not acquire more than that number."[88]

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72. *Id*. at *3. From the beginning of the HMMWV's fielding in the 1980s, the Army encountered problems with the initial remote control switch system. *Id.* at *4.

73. *Id*. at *4.

74. *Id*. at *8. The Army, along with its HMMWV prime contractor, AM General Corp. (AM General), began designing the EESS. *Id.* at *9.

75. *Id*. at *4-5.

76. *Id*. at *6. In April 2000, the Army acquired 22,360 EESS units through a sole-source procurement from KDS Control, Inc. This procurement was also premised on an unusual and compelling urgency, but was not challenged. *Id*. at *10. The Army fielded about 3000 of these EESS units. *Id*. at *26 n.17.

77. *Id*. at *10. The Army and AM General first developed design specifications in 1998. *Id.* at *8.

78. *Id*. at *11-12. Also in March 2001, the Army issued a request for proposals for the EESS. *Id*. at *10.

79. A "deadlined" vehicle cannot be used. *Id.* at *12.

80. *Id*. at *12-13. Some type-10s may have been replaced by the version 14A, but not returned to the U.S. Army Tank Automotive and Armaments Command. Some type-10s may have been replaced by the first procurement of EESS's and some type-10's may have been taken out and replaced by the older protective control box systems. The "Army has no way of knowing if a type-10 unit was replaced and if so, with what it was replaced." *Id.* at *25.

81. *Id*. at *14. The Army initially ordered 30,137 EESSs. As a result of the protest, the Army downsized its requirement and, at the GAO hearing, announced that it had decided to cap the procurement at 13,941, "the number of suspected [type-10] units in the field. *Id*. at *16-17.

82. *Id*. at *16.

83. *Id*. at *21-22.

84. *Id*. at *22.

85. *Id*. at *23.

86. *Id*. at *19.

87. *Id*. at *27.

88. *Id*. at *33.

Finally, the GAO agreed that the Army "failed to engage in reasonable advanced procurement planning."[89] The Army, according to the GAO, "lacked any sense of urgency to finalize a performance specification for the EESS that would allow the agency to conduct a competitive procurement."[90] Finding "substantial similarity between" the draft performance specifications and the final approved specification, the GAO concluded that "the Army failed to timely and diligently prepare the performance specification and that this resulted in the noncompetitive procurement of the EESS units."[91] In sum, the GAO found that the Army's lack of planning "created its urgent requirements."[92]

The GAO sustained another protest of a sole-source award in *Lockheed Martin Systems Integration—Owego*.[93] The protestor, Lockheed Martin Systems (Lockheed), designed and maintained an avionics support system, consisting of hardware and software, for two helicopter models used by the 160th Special Operations Aviation Regiment, Airborne (SOAR). Rockwell Collins, Inc. (Rockwell), designed and maintained a different system for three other models operated by the SOAR.[94] The SOAR aircraft are variants of the Army's Chinook and Blackhawk helicopters.[95] The Common Avionics Architecture System (CAAS) initiative was designed to standardize avionics software for all SOAR-operated helicopters. In addition, there was "interest" in using the SOAR requirement to field "a common cockpit architecture" for all Army Chinook and Blackhawk helicopters.[96] Thus, the CAAS program came to represent two different scopes of work to different government contract personnel—one to standardize SOAR models and another to standardize all Army Chinook and Blackhawk models.

After study, the agency decided that a full and open competition for the CAAS would not be reasonable, "because it would result in substantial duplication of costs."[97] The agency approached Rockwell and Lockheed and conducted several meetings with each "to discover the approximate cost and schedule involved in having either firm meet the CAAS requirement."[98] After the initial meetings, Lockheed developed an approach, designated the "first approach,"[99] for standardizing the systems of SOAR-operated helicopters by replacing both hardware and software.[100] At a later meeting, however, the agency informed Lockheed that it wanted a software-only solution that could be extended to other Army models.[101] As a result, Lockheed developed a more costly and complex "second approach."[102] The agency subsequently asked Lockheed for cost and schedule information for its second approach.[103]

Relying on the costly second approach figures, the agency concluded that Lockheed "was not a viable source for the requirement."[104] The agency executed a "Justification and Approval" (J&A) for "a sole-source contract to Rockwell on grounds Rockwell was the only source capable of meeting the agency's requirements."[105]

The GAO found that while including the other Army models may have been "desirable," it was "not necessary to meet

89. *Id.* at *27-28.

90. *Id.* at *31. "It took the Army about two years to prepare the performance specification. A comparison of the draft performance specifications with the final approved specification shows substantial similarity between the documents." *Id.*

91. *Id.* at *32.

92. *Id.* at *33.

93. B-287190.2, B-287190.3, 2001 U.S. Comp. Gen. LEXIS 103 (May 25, 2001).

94. *Id.* at *3-4.

95. *Id.* at *2.

96. *Id.* at *5.

97. *Id.* at *8.

98. *Id.*

99. In the published, redacted version of the GAO decision, "first approach'" and "second approach" were used in brackets to identify Lockheed's two proprietary approaches. *Id.* at *10.

100. *Id.*

101. *Id.* at *12.

102. *Id.* at *12-13.

103. *Id.* at *13.

104. *Id.*

SOAR's requirements."[106] Therefore, the agency misled Lockheed concerning its actual requirements.[107] The GAO held that when an agency relies on the CICA exception that only one source can satisfy the agency's needs, the agency must give other sources "notice of its intentions, and an opportunity to respond to the agency's requirements."[108] The agency must "adequately apprise" prospective sources of its needs so that those sources have a "meaningful opportunity to demonstrate their ability" to satisfy the agency's needs.[109] The GAO concluded that the agency's "misleading guidance . . . clearly prejudiced Lockheed."[110] Therefore, "the agency's sole-source determination was unreasonable."[111]

AFARS Change

The recently revised Army Federal Acquisition Regulation Supplement (AFARS)[112] imposes a new requirement on the exercise of certain options. Part 5106.303-1(e) provides, "[P]rior to exercising options included in a previously approved J&A, these options must be individually rejustified and approved in writing at the same level as the original J&A."[113] Current market research must justify exercise of the option. In addition, when an "unusual and compelling urgency" requires immediate exercise of a sole-source option, the contracting officer must submit the rejustification no later than fifteen days after the government exercises the option.[114] These requirements are not waivable.[115]

Competition: It Works

Government Accounting Office testimony[116] concerning the Army's purchase of black berets suggests that competition does, or at least sometimes can, result in lower prices for the government.

On 17 October 2000, the Army's Chief of Staff announced that all Army soldiers would be issued a black beret for wear on 14 June 2001. To procure five million berets in under eight months, the Defense Logistics Agency (DLA) non-competitively increased the existing supplier's production from 10,000 to 100,000 berets per month and non-competitively awarded contracts to two foreign sources.[117] The Army justified avoiding "full and open competition" based on an "unusual and compelling urgency."[118] The Army asserted that it "will be seriously injured if this action is not approved. The Army Chief of Staff has approved a uniform change for the entire Army and this action is imperative in order for this Command to support the service by the introduction date."[119] In December 2000, the Army competitively awarded contracts for a million berets to four more foreign sources. In February 2001, the Army exer-

105. *Id.* at *13-14.

106. *Id.* at *23.

107. *Id.* at *20.

108. *Id.* at *28 (citing the CICA exception at 10 U.S.C. § 2304(f) (2000)).

109. *Id.* at *28-29.

110. *Id.* at *30.

111. *Id.* The agency also sought to justify the sole-source award on schedule concerns. *Id.* at *30. The agency adopted an Army-wide schedule, more stringent than the SOAR required. By adopting the Army schedule, the agency may have been able to obtain some funding from an Army-wide appropriation, thus, saving SOAR funds. Lockheed may not have been able to meet the more stringent schedule. The GAO rejected the expedited schedule as a valid rationale for a sole-source procurement, because there would be "no actual savings to the government as a whole." *Id.* at *32. Further, the "CICA specifically proscribes using sole-source contracting methods where they are justified based on concerns related to the amount of funds available to the contracting agency or activity." *Id*. (citing 10 U.S.C. § 2304(f)(5)(A) (2000)). *See also* FAR, *supra* note 11, § 6.301(c).

112. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. (Oct. 2001) [hereinafter AFARS], *available at* http://acqnet.saalt.army.mil/library/AFAR/AFARS_OCTOBER_2001.pdf.

113. *Id*. § 5106.303-1(e).

114. *Id*.

115. *Id*.

116. GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: PURCHASE OF ARMY BLACK BERETS, REPORT NO. GAO-01-695T (statement of David E. Cooper, Director, Acquisition and Sourcing Management) (May 2, 2001) [hereinafter GAO REPORT 01-695T].

117. *Id.* at 2. The Buy American Act implications of the beret procurement are discussed *infra* notes 966-80 and accompanying text.

118. GAO REPORT 01-695T, *supra* note 116, at 2-3.

119. *Id.* at 3.

cised options with these four sources for an additional million berets.[120]

The beret price from one of the initial non-competitive awardees was fourteen percent higher than the price from the existing supplier. As the GAO testimony observes, "when competition was introduced into the process at a later date, prices declined. Specifically, the price on the single largest noncompetitive contract was 27 percent higher than the average competitive price."[121] This result should not surprise us. Competition is designed to yield cost-savings.

Collaterally Competition

Many issues discussed throughout the *Year in Review* have "competition" implications. This sub-section directs the reader's attention to several of those issues.

Publicizing contract actions is an important component of increasing competition.[122] The explosion of electronic commerce is bringing about major changes in publicizing contracts, as the *Commerce Business Daily* (*CBD*) is being phased out in favor of FedBizOpps.gov. The new rules, as well as two recent cases concerning electronic contract publicizing, are discussed in our section on electronic commerce.[123]

Although orders placed against multiple award schedules (MAS) are not subject to "full and open competition," certain competition requirements apply. Those competition requirements are discussed in our section entitled Multiple Award Schedules.[124]

Competition must be conducted on an equal basis. In *Systems Management, Inc.*,[125] the Air Force "overstated its minimum needs in requiring" a Federal Aviation Administration (FAA) certified weather observation system and then "either waived or relaxed this requirement" by awarding to a vendor whose system was not FAA-certified.[126] Our section on negotiated procurements discusses this CICA violation.[127]

Contract Types

The Final Chapter in the Saga of AT&T v. United States?

In last year's *Year in Review*,[128] we noted that the CAFC had held in *American Telephone & Telegraph Co.* that the improper use of a fixed-price contract for development work did not render the contract void and that the court further remanded the case to the COFC to determine what remedy was available to the contractor, American Telephone & Telegraph Co. (AT&T).[129] This past year, the COFC held that AT&T's contract with the Navy was enforceable as written and it dismissed AT&T's claim "for failure to state a claim on which relief can be granted."[130]

This time around, the COFC's decision and rationale was essentially the same as that used in *Northrop Grumman Corp. v. United States*.[131] In each of these cases, the court rejected the contractor's claims that the Navy's failure to comply with Defense Appropriations Act provisions which prohibited the DOD from entering into certain fixed-price contracts for major systems[132] entitled the contractor to relief. The COFC, citing language used by the CAFC in *AT&T*, specifically held that reformation was inappropriate because the statute did not create an enforceable interest for the contractor.[133]

120. *Id.*

121. *Id.*

122. *See* FAR, *supra* note 11, § 5.002.

123. *See infra* notes 381-439 and accompanying text (Electronic Commerce).

124. *See infra* notes 462-92 and accompanying text (Multiple Award Schedules).

125. Comp. Gen. B-287032.4, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85.

126. *Id.* at 8.

127. *See infra* notes 259-355 and accompanying text (Negotiated Acquisitions).

128. *See 2000 Year in Review*, *supra* note 2, at 6.

129. American Tel. & Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

130. American Tel. & Tel. Co. v. United States, 48 Fed. Cl. 156, 161 (2000).

131. 47 Fed. Cl. 20 (2000) (analyzing the issue of reformation for the first time after the CAFC's *AT&T* ruling).

132. *See, e.g.*, Defense Appropriations Act of 1987, Pub. L. No. 100-202, § 8118, 101 Stat. 1329-84 (1986) (prohibiting such contracts in excess of $10 million unless the Secretary makes a written determination that "program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties").

Don't Distribute the Wealth When You Have a Requirements Contract

In *T&M Distributors, Inc.*,[134] the Armed Services Board of Contract Appeals (ASBCA) partially sustained the appeal of a contractor who operated an auto parts store on behalf of the government under a requirements contract at Fort Carson, Colorado. The contract required the contractor to supply and stock auto parts and required selected organizations at Fort Carson to purchase all their requirements through the contractor. One exception carved out of the contract was for parts that the contractor could not deliver within certain designated time frames set forth in the contract.[135] Almost immediately after performance commenced, the contractor noticed it was not receiving the expected volume of part requisitions. The contractor eventually learned that several International Merchant Purchase Authorization Card (IMPAC) holders within one of the larger organizations on post were buying auto parts from other vendors.[136]

A few months after performance was completed, T&M Distributors, Inc. (T&M), filed a claim for nearly $1.2 million, its profit margin on its estimated volume of diverted sales from its requirements contract.[137] The contractor derived this diverted sales amount by comparing the monthly sales volume under the prior contract with the actual sales volume it experienced and presuming that diverted sales accounted for the difference. The only evidence of diverted sales were IMPAC statements and receipts that the cardholders still had in their possession and which the contractor had obtained under a Freedom of Information Act (FOIA) request.[138] T&M had asked the board to extrapolate the proportion of sales "known" to have been diverted by this one organization over the remaining organizations required to use the contract.[139]

The board rejected this assertion, however, because the government offered evidence that these other organizations experienced a change in the quantity and age of vehicles which accounted for a sizeable amount of the diminution in part requisitions.[140] The government also attempted to demonstrate that the "known" IMPAC purchases were only made when the contractor could not make timely delivery. The board rejected this argument for all except three IMPAC purchases because the government had no supporting evidence.[141] The clear message from the board is that the government needs to document clearly that it is acting under an exception when making purchases outside a requirements contract.[142]

Estimate, Who Needs an Estimate?

In one of the more controversial government contract decisions coming out of the CAFC this past year, the court overturned a General Services Administration Board of Contract Appeals (GSBCA) decision which held that an IDIQ contractor was entitled to lost business damages resulting from a defective government estimate.[143] In that case, the General Services Administration (GSA) awarded Travel Centre an IDIQ contract to provide travel management services for federal agencies in Maine, New Hampshire, and Vermont. Section A of the solicitation and the cover page of the solicitation advised bidders: "This is an indefinite-delivery, indefinite-quantity contract with guaranteed revenue minimum of $100. This differs significantly from a requirements contract." The solicitation also stated, however, that bidders "shall base their offers on [the previous fiscal year's travel service] figures" which were roughly $2.5 million for the year.[144] Before Travel Centre's submission of its final bid to the GSA, the incumbent contractor notified the GSA that certain DOD organizations as well as the Maine Air National Guard—which accounted for over half the prior year's service volume—would no longer use the GSA-contracted

133. *AT&T*, 48 Fed. Cl. at 156, 158-60 (holding that the DOD's failure to comply with the statute merely amounted to "governmental non-compliance with internal review and reporting procedures").

134. ASBCA No. 51279, 01-2 BCA ¶ 31,442.

135. *Id.* at 155,268.

136. *Id.* at 155,271-72.

137. *Id.* at 155,272.

138. *Id*. The furnished IMPAC statements showed that the government employees had made outside purchases in the amount of $328,569. *Id.*

139. *Id.* at 155,280-81.

140. *Id.*

141. *Id.* at 155,276-77.

142. *Id.* The board indicated that this could have been done in this case by attaching a copy of the unfilled requisition to the IMPAC receipt/statement. *Id.*

143. Travel Centre v. Barram, 236 F.3d 1316 (Fed. Cir. 2001), *rev'g* Travel Centre v. Gen. Servs. Admin., GSBCA No. 14057, 98-1 BCA ¶ 29,536.

144. *Id*. at 1317.

travel services. This information was never provided to any of the other bidders.[145]

The contract required Travel Centre to operate an office in the geographic region of operation. Travel Centre initially opened an office in Portsmouth, New Hampshire, to comply with this requirement, but upon realizing a much smaller revenue stream than anticipated and learning that many agencies had elected to not take part in the contract, it elected to close this office and provide the services from another office it maintained in Danvers, Massachusetts. The government terminated the contract for default based in large part on Travel Centre's failure to keep an office open within the serviced geographic region.[146] Previously, Travel Centre had argued and the GSBCA had determined that "by inducing Travel Centre to base its proposal on quantities that GSA knew or should have known were overstated, GSA breached its duty to deal with Travel Centre fairly and in good faith."[147]

The CAFC reversed, holding that "when an IDIQ contract . . . indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government's legal obligation under the contract."[148] This focus on the government's purchase obligation ignores the fact that the government has a general duty to deal in good faith[149] which still might have been breached by failing to advise bidders that certain agencies that had taken part in the contract in the past would now be opting out.

Contractor Gets 'Delta' Between Guaranteed Minimum and Ordered Amount in Breached IDIQ Contract

In *Delta Construction International, Inc.*,[150] the ASBCA has, for the first time, endorsed the view that a contractor may receive more than just anticipated profits when the government breaches an IDIQ contract.[151] In *Delta*, the contractor was awarded an IDIQ contract to replace rotten lumber in various Army buildings in Panama. The contract included a base period of nine months and two option periods of one year each. The contract stated that the estimated value for each of these periods was roughly $157,000, $110,000, and $77,000, respectively. The guaranteed minimum was $200,000, but it was not broken down by period of performance. The contract also required Delta Construction International, Inc. (Delta), to maintain a capability to perform a daily rate of work of $3000.[152]

The government exercised the first option. Subsequently, Delta submitted a claim seeking to recover for idle labor and anticipatory profits because the government had only ordered slightly more than $38,000 in work during the base period. In response, the contracting officer rejected Delta's claim because he stated it was "premature to project that the Government will not order the guaranteed minimum" and that "should the Government fail to order the guaranteed minimum, Delta . . . is not entitled to an adjustment on the basis of actual costs; the entitlement is the difference between the actual dollar volume ordered and the guaranteed minimum of $200,000."[153] Thereafter, the government elected not to exercise the second option and ultimately ended up ordering about $86,000 worth of work during the base and first option period.[154]

Delta consequently submitted a claim following completion of the contract for roughly $114,000 citing the contracting officer's initial claim rejection. This time the contracting officer denied the claim, except for $11,216 that he felt was reasonable for profit and general and administrative expenses on the unordered minimum quantity.[155] The ASBCA agreed that this measure of damages would be sufficient under IDIQ contracts in which there was no capability requirement, but it specifically held that the minimum guarantee served as the government's return consideration for the contractor's promise to maintain a minimum capability level. Consequently, Delta was entitled to the difference between the guaranteed minimum quantity and the actual orders placed.[156]

145. *Id.* at 1318.

146. *Id.* The default termination was later converted to a convenience termination. *Id.*

147. Travel Centre v. Gen. Servs. Admin., GSBCA No. 14057, 98-1 BCA ¶ 29,536 at 146,431.

148. *Travel Centre*, 236 F.3d 1316, 1319.

149. *See, e.g.*, Essex Electro Eng'rs, Inc. v. Danzig, 224 F.3d 1283 (Fed. Cir. 2000).

150. ASBCA No. 52162, 01-1 BCA ¶ 31,195, *modified on other grounds*, 01-1 BCA ¶ 31,242.

151. The first and, until *Delta* was decided, only other decision supporting this contention was *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988).

152. *Delta Constr. Int'l, Inc.*, 01-1 BCA ¶ 31,195 at 154,025.

153. *Id.* at 154,025-26.

154. *Id.*

155. *Id.*

In Search of a Partial Requirements Contract

The Federal Acquisition Regulation (FAR) does not either expressly authorize or prohibit the use of a partial, or non-exclusive, requirements contract. Two recent decisions, however, support such a notion.[157] In *Ace-Federal Reporters, Inc. v. Barram*,[158] the CAFC overturned a GSBCA opinion[159] holding that the MAS contracts covering court transcription services were not enforceable. The board had found the MAS contracts to be unenforceable because they: (1) did not require the contractor to provide a set level of services (and hence were not a definite-quantity contract), (2) did not establish a guaranteed minimum amount of services (and hence were not an IDIQ contract), and (3) did not grant any individual contractor exclusive rights to provide the transcription services to the government (and hence were not a requirements contract).[160] The CAFC reversed, finding that in return for the "contractors' promises regarding price, availability, delivery, and quantity," the government promised "that it would purchase only from the contractors on the schedule."[161] Consequently, even though the contracts did not "fit neatly into a recognized category," they were still valid and enforceable because there was both consideration and mutuality of obligation.[162]

The second of these decisions involved a license rather than a contract.[163] In that appeal, the licensor was one of thirty-one firms that agreed to provide a value-added network (VAN)[164] at no cost to the government. The intent behind the DOD's establishment of the VANs was to promote electronic commerce with the "tens of thousands of firms interested in conducting business with the Government."[165] The license agreement provided that in return for providing the VAN at no cost, the government would "require all contractors desiring to electronically conduct business to only do so [through] a participating, fully tested EDI [electronic digital imaging] VAN Provider."[166] The license agreement permitted VAN providers to charge a transaction fee to the firms who used the VAN to conduct electronic commerce.[167]

One of the providers, GAP Instrument Corp. (GAP), set up a VAN and complied with all the license terms, only to be stuck without much business when the DOD failed to require all small purchases to be conducted via the VAN.[168] Before the board, the government argued that GAP had not demonstrated damage because there was no requirement to use any specific VAN provider. The board rejected this contention, relying on the CAFC's decision in *Ace-Federal Reporters*.[169]

These two opinions clearly signify the government will not be able to evade its obligations merely because it enters into a non-exclusive requirements contract.

Proposed Restrictions on MACs/GWACs

On 23 August 2001, the FAR Council announced a proposed rule to strengthen the regulations dealing with task and delivery orders placed under either a Government-Wide Acquisition Contract (GWAC) or a Multi-agency Acquisition Contract (MAC).[170] One of the more critical proposed changes to the

156. *Id.* at 154,028.

157. *See* Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358.

158. 226 F.3d 1329 (2000).

159. Ace-Federal Reporters, Inc. v. Gen. Servs. Admin., GSBCA Nos. 13298, 13507-13511, 99-1 BCA ¶ 30,139.

160. *Id*. at 149,107-10.

161. *Ace-Federal Reporters, Inc*., 226 F.3d at 1332.

162. *Id.*

163. *See* GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358.

164. These VANs were gateways through which suppliers and vendors would electronically submit bids and offers on government requirements. *Id*. at 154,860.

165. *Id*.

166. *Id.* at 154,861.

167. *Id.* at 154,863-64.

168. *Id*. The board noted that the growth in the number of purchase card-holders as well as the ease with which such transactions could be completed and the growth of purchases from the internet created lower-cost alternatives to the VANs. *Id.*

169. *Id.* at 154,867 (citing Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000)). The board did not address quantum, merely entitlement. *Id*.

170. Federal Acquisition Regulation; Task-Order and Delivery-Order Contracts; Proposed Rule, 66 Fed. Reg. 44,518 (Aug. 23, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 8, 16, and 17).

FAR is to amend FAR 16.505 to both place greater restrictions on the use of such ordering procedures and to require agencies to appoint a task-and delivery-order ombudsman.[171] Curiously absent from the proposed amendments is any limitation on the ability to award a MAC or a GWAC.[172] Without further restrictions, we will continue to see agencies awarding MACs and GWACs for supplies or services in which they have no particular expertise and for which they have not been delegated any authority.[173]

Restrictions on Service Contracting Within the Army

The AFARS, dated October 2001, now requires all service contracts to be performance based and fixed-price.[174] Previous editions of the AFARS contained no such restriction and it is unclear when this revision went into effect. The provision appears to implement FAR 37.000, which requires "the use of performance-based contracting to the maximum extent practicable."[175] The AFARS provision permits Principal Assistants Responsible for Contracting and Heads of the Contracting Activities (HCAs) to waive these restrictions on a one-time basis for contracts worth up to $1 million and $10 million, respectively.[176]

Sealed Bidding

Although neither the GAO nor the COFC broke new ground in this field, these two fora issued a variety of sealed-bid decisions. Two areas received particular attention: responsiveness of bids that did not acknowledge solicitation amendments, and responsiveness of bids containing flawed bid bonds.

Material or Not Material, That Is the Question

Three GAO decisions addressed the responsiveness[177] of bids that did not acknowledge solicitation amendments.[178]

In *Christolow Fire Protection Systems*,[179] the government amended an invitation for bid (IFB) for inspection, maintenance, and repair of fire protection systems. The initial IFB contained conflicting requirements regarding contractor response times to agency service calls. The bid schedule required a fourteen-day response to a routine call. Section C (description/specifications) of the IFB required a seven-day response. Amendment 0001 corrected this ambiguity and required a seven-day response to routine calls. In addition, the amendment increased the number of emergency and routine service calls from ten each to twenty-four each per year. The bid schedule's estimated service call quantity, not the actual number of calls, determined payment under the contract.

171. *Id.* at 44,520.

172. The proposed rule would amend FAR section 2.101 to add definitions for both a MAC and a GWAC. *Id*. Both definitions imply that in order for an agency to award these sorts of contracts, it must have some sort of statutory authorization to do so. Nowhere in the FAR, however, does it expressly state that an agency is forbidden from awarding a GWAC or a MAC unless it has been delegated the authority to do so. *See* FAR, *supra* note 11.

173. *See* Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Great Concept, Poor Implementation*, 12 NASH & CIBINIC REP. 30 (1998) (noting that aside from the GSA's granted authority to issue Multiple Award Schedule contracts, the only authority to issue GWACs and MACs stems from the Clinger-Cohen Act and must specifically be delegated to the agency by the Office of Management and Budget).

174. AFARS, *supra* note 112. The latest version of the Code of Federal Regulations, revised on 1 October 2001, does not contain this provision. *See* 48 C.F.R. pt. 5137 (LEXIS 2001).

175. Unlike the FAR, which recognizes that certain types of services—such as architect-engineering, research and development, and transportation—are unique and will require different guidance and policies, the AFARS policy applies to all service contracts. *Compare* FAR, *supra* note 11, § 37.000, *with* AFARS, *supra* note 112, pt. 5137.1.

176. AFARS, *supra* note 112, pt. 5137.1. The regulation also permits the Deputy Assistant Secretary of the Army for Procurement to grant such waivers on contracts over $10 million. *Id*. The regulation does not define what a "one-time deviation" is, nor how it differs from an "individual deviation" which is defined in the FAR. *See* FAR, *supra* note 11, § 1.403.

177. FAR section 14.301(a) provides: "To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system." FAR, *supra* note 11, § 14.301(a).

178. The well-settled rule is:

> A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. An amendment is material however, only if it would have more than a trivial impact on the price, quantity, quality, delivery or the relative standing of the bidders.

Jackson Enters., Comp. Gen. B-286688, Feb. 5, 2001, 2001 CPD ¶ 25 (citations omitted).

179. Comp. Gen. B-286585, Jan. 12, 2001, 2001 CPD ¶ 13.

Because the protestor had not acknowledged Amendment 0001, the agency rejected the bid as nonresponsive.[180]

The GAO observed that the ambiguities in the solicitation presented the potential for litigation.[181] A contractor who did not acknowledge the amendment "could have argued it was entitled to a price increase" based on the increased number of service calls required in the amended schedule and could have argued that "it had 14 days to respond to routine service calls."[182] Because amendments "clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged," the GAO agreed with the agency that the protestor's bid was nonresponsive.[183]

Lumus Construction, Inc.,[184] provides a useful discussion about amendments that are not material. In *Lumus*, the Navy issued an amendment responding to bidders' questions concerning an IFB for replacement of a heating system.[185] One response explained that a symbol on a drawing represented a differential pressure switch. Another response, clarifying a drawing, stated that seventy-five feet of trench piping was required for a portion of the work.[186]

The GAO found that the responses did not make the amendment material for two reasons. First, neither response changed the IFB's requirements. They merely clarified aspects of the IFB.[187] Where an "amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation," the amendment is not material.[188] Second, even if the responses imposed new requirements, the changes would have "at most, a negligible effect on the bidder's overall price."[189] The agency therefore correctly waived the awardee's failure to acknowledge the amendment.[190]

Jackson Enterprises[191] also examined an amendment responding to contractor questions. The protestor in *Jackson Enterprises* failed to acknowledge an amendment that clarified items in a requirements contract solicitation for cleaning water treatment chambers, oil/water separators, and holding tanks.[192] As a preliminary matter, the GAO disagreed with the agency's assertion that "all responses to bidder questions may be presumed" material.[193] Instead, the GAO examined each question and response. As in *Lumus Construction*,[194] GAO again found that these responses were not material.[195] In response to a question regarding inspection methods, the government stated that "inspection is 100%."[196] Because the answer did not affect the "contractor's underlying obligation to perform" the contract's requirements, the answer was not material.[197] Another answer increased the number of tanks and number of cleanings required.[198] Unlike the changed requirements in *Christolow Fire Protection Systems*,[199] this change was not material because "prices were requested on a per cleaning basis" and

180. *Id.* at 1-3.

181. *Id.* at 4.

182. *Id.* at 3-4.

183. *Id.* at 4.

184. Comp. Gen. B-287480, June 25, 2001, 2001 CPD ¶ 108.

185. *Id.* at 1.

186. *Id.* at 2.

187. *Id.* at 2-3.

188. *Id.* at 2.

189. *Id.* at 3. The total additional costs, $2044, would have been less than one percent of the total bid price, $269,500. *Id.*

190. *Id.* at 3-4.

191. Comp. Gen. B-286688, Feb. 5, 2001, 2001 CPD ¶ 25.

192. *Id.* at 1.

193. *Id.* at 3.

194. *See supra* notes 184-90 and accompanying text.

195. *Jackson Enters.*, 2001 CPD ¶ 25 at 6.

196. *Id.* at 3.

197. *Id.* at 4.

therefore the changes would not impact bidders' pricing schemes.[200]

Variations on a Theme: Responsiveness of Bids with Flawed Bid Guarantees

This past year, the GAO had three occasions and the COFC one occasion to examine how missing or flawed bid bonds affected bid responsiveness.[201]

In *Interstate Rock Products, Inc. v. United States*,[202] the COFC seconded a long line of GAO decisions[203] holding that "the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive."[204] In *Interstate*, the bidder had obtained an adequate bid bond, but portions of it were illegible. The legible version, submitted by Interstate Rock Products, Inc. (Interstate), had a blank space where the penal sum should have been inserted.[205] Interstate argued that the agency should declare the bid responsive because "omission of the penal sum was a clerical error" and "it had previously executed a proper bid bond."[206] The relevant FAR section, however, provides that "noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid."[207] Further, "the government's determination as to whether a bid is responsive must be based solely upon the bid documents as they appear at the time of the opening."[208] Thus, the court held that omission of the penal sum "is a material defect for the reason that it would provide the surety and the contractor with a defense to enforcement."[209] The COFC denied Interstate's plea for relief.[210]

Questions concerning a bid bond's enforceability also served as the basis for the GAO's decision in *Schrepfer Industries, Inc*.[211] In *Schrepfer*, the protestor's bid bond was accompanied by a photocopy of the power of attorney "appointing an attorney-in-fact with authority to bind the surety."[212] The agency could not determine, without referring to the original power of attorney, if the submitted power of attorney had been altered. Therefore, the bid documents "did not establish unequivocally at the time of bid opening that the bond would be

198. *Id.* at 5.

199. *See supra* notes 179-83 and accompanying text.

200. *Jackson Enters.*, 2001 CPD ¶ 25 at 5-6. The GAO sustained the protest and recommended that the agency terminate the contract to the awardee and award to the protestor if the agency determined the protestor was otherwise eligible for award. *Id.* at *13. The GAO applied the same materiality analysis to a Government Printing Office (GPO) case. Although the GPO is not subject to the FAR, "the FAR and the GPOPPR [GPO Printing Procurement Regulation], in this instance, contain similar guidance." John D. Lucas Printing Co., Comp. Gen. B-285730, Sept. 20, 2000, 2000 CPD ¶ 154 at 3 n.1 (holding that an amendment correcting a patent ambiguity in the solicitation and imposing an additional material requirement is material and a bid must acknowledge the amendment to be responsive).

201. Generally, a

> bid bond is a form of guarantee designed to protect the government's interest in the event of default; that is, if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all reprocurement costs. A required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive . . . . If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected.

Schrepfer Indus., Comp. Gen. B-286825, Feb. 12, 2001, 2001 CPD ¶ 23 at 2.

202. 2001 U.S. Claims LEXIS 176 (Sept. 17, 2001).

203. *See, e.g.*, Kennedy Elec. Co., Comp. Gen. B-239687, May 24, 1990, 90-1 CPD ¶ 499; R.D. Constr., B-232714, 1988 U.S. Comp. Gen. LEXIS 1376 (Oct. 12, 1988); M/V Constructor Co., Comp. Gen. B-232572, Sept. 20, 1988, 88-2 CPD ¶ 272; F&F Pizano, Comp. Gen. B-219591, July 25, 1985, 85-2 CPD ¶ 88; Allen County Builders Supply, Comp. Gen. B-216647, May 7, 1985, 85-1 CPD ¶ 507.

204. *Interstate Rock Prods.*, 2001 U.S. Claims LEXIS 176, at *60.

205. *Id.* at *6.

206. *Id.* at *37-38.

207. FAR, *supra* note 11, § 28.101-4(a). The FAR provision includes nine exceptions to the general rule, none of which applied to Interstate. *See id.* § 28.101-4(a), (c).

208. *Interstate Rock Prods.*, 2001 U.S. Claims LEXIS 176, at *36.

209. *Id.* at *39.

210. *Id.*

211. Comp. Gen. B-286825, Feb. 12, 2001, 2001 CPD ¶ 23.

212. *Id.* at 2.

enforceable against the surety."[213] Therefore, the agency properly found the bond unacceptable and the bid nonresponsive.[214]

The next bid bond decision highlights one of the exceptions to the FAR's general requirement to reject bids with noncompliant bid guarantees.[215] In *South Atlantic Construction Co.*,[216] the penal sum of the awardee's bid bond, $600,000, fell short of the required twenty percent of the contract price.[217] According to FAR section 28.101-4(c)(2), noncompliance with a bid guarantee requirement "shall be waived" when "the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer."[218] Because the awardee's bid was $213,182.27 lower than the protestor's bid, the $600,000 penal sum was acceptable and the bid was responsive.[219]

Evaluating Prices of Bids with Options

In a sealed bid containing option items, the government evaluates bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is not in "the government's best interests."[220] In *Kruger Construction Inc.*,[221] the IFB contained a basic requirement for construction and two alternate option items for additional work. The options were alternative, because the government could exercise one, but not both options.[222] The government added both option prices to the basic price and determined that Danco Contractors, Inc. (Danco), was the lowest priced bidder.[223] Kruger Construction Inc's (Kruger) bid, however, would have been lowest[224] "if either option item . . . were considered, but not both."[225] Because the government could not *exercise* both options, the GAO found that the agency "could not reasonably determine that it was in the government's best interests to *evaluate* both of these alternative options to determine the total evaluated price."[226] The GAO recommended award to Kruger.[227]

TNT Industrial Contractors, Inc.,[228] also concerned evaluating bid prices involving options in a construction contract. In *TNT*, the two disputed options, if exercised, would have reduced the work scope and hence the price.[229] One option reduced the amount of paving on the project. The other option provided for installing a salvaged water treatment tank, rather

213. *Id.* at 3.

214. *Id.*

215. Noncompliance with a solicitation's bid guarantee requirement "shall be waived," if "the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer." FAR, *supra* note 11, § 28.101-4(c).

216. Comp. Gen. B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63.

217. *Id.* at 3. The awardee's bid actually contained inconsistent bid bond provisions. One provision indicated the penal sum was twenty percent of the bid amount. Another section provides that the penal sum is "not to exceed $600,000." *Id.* The GAO resolved the controversy in the awardee's favor using the lower, $600,000 figure. *Id.*

218. FAR, *supra* note 11, § 28.101-4(c)(2).

219. *S. Atlantic Constr.*, 2001 CPD ¶ 63 at 3. The third GAO decision concerning bid bonds held that an agency solicitation can require a bid bond, even if a bond is not otherwise required by statute or regulation. *See* Lawson's Enters., Inc., Comp. Gen. B-286708, Jan. 31, 2001, 2001 CPD ¶ 36. The Miller Act, 40 U.S.C. §§ 270a, 270d-1 (2000), and the FAR, *supra* note 11, § 52.228-15, only mandate payment and performance bonds for construction contracts that exceed $100,000. Nonetheless, because bid guarantees are creatures of procurement regulations and are "not mandated by statute," an agency may require bid guarantees on contracts below the statutory minimums. *Lawson's Enters*., 2001 CPD ¶ 36 at 2. If an agency requires a bond for a contract under $100,000, failure to provide the bond renders the bid nonresponsive. *Id. Lawson* is discussed in greater depth, *infra* notes 1149-1162 and accompanying text.

220. FAR, *supra* note 11, § 17.206. FAR section 17.206(b) provides: "The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer." *Id.*

221. Comp. Gen. B-286960, Mar. 15, 2001, 2001 CPD ¶ 43.

222. *Id.* at 1-2. The IFB actually contained five option items. Items four and five were mutually exclusive. Item four called for "demolition of building 103." Item five required "same as Option Item No. 4 except include crushing building rubble." *Id.* at 1-2. The two were mutually exclusive because "Building 103 could not be demolished twice." *Id.* at 2 n.1.

223. *Id.* at 3. Because Kruger was a small disadvantaged business (SDB) and Danco was not, the agency added ten percent to Danco's price, pursuant to FAR section 52.219-23, Notice of Price Evaluation Adjustment for SDB Concerns. *Id.* at 2-3. Danco was still the low bidder. *Id.* at 3.

224. Kruger would have been the lowest bidder after the SDB adjustment. *Id.* at 3.

225. *Id.* at 4.

226. *Id.* at 5 (emphasis added).

227. *Id.* ("if the agency otherwise concludes the bid price is fair and reasonable and that the firm is responsible").

than installing a new one. These "deductive options" were "intended to be exercised to scale back the project in the event that funds were not available."[230] At bid opening, the contracting officer determined that sufficient funds were available.[231] Therefore, the contracting officer decided that constructing a "fully modern water treatment plant"[232] and thus excluding the deductive options was in the government's best interests.[233]

If the contracting officer had added (or in reality subtracted) the prices for the two deductive options, TNT would have been the low bidder.[234] Instead, the contracting officer awarded to All Cities Enterprises, the low bidder when considering only the base amount.[235] The agency "made a 'best interests' determination" to exclude the option prices and obtained appropriate approval.[236] The GAO found that the agency reasonably awarded a contract for the maximum amount of work. Further, "once the agency decided to award a contract for the maximum amount of work, it was required to evaluate prices for that scope of work, which meant that it was prohibited from considering" the two deductive options.[237] The Comptroller General denied TNT's protest.[238]

If That's What We Wanted to Evaluate, That's What We Would Have Said

In *Hunot Fire Retardant Co.*,[239] the Department of Agriculture awarded a contract for long-term fire retardant. The solicitation included a standard clause from the agency procurement regulation concerning evaluating offers. The clause required the government to "apply the Offeror's proposed fixed prices/rates to the estimated quantities" and "add other direct costs if applicable."[240] The protestor argued that the agency should have added handling and clean up costs to the apparent low bidder's offer as "other direct costs."[241] The Comptroller General disagreed, finding that if an agency intends to consider any price-related factor other than bid price, the agency must expressly state so in the solicitation.[242] The solicitation's general language, "other direct costs," did not put prospective bidders on notice that the government would consider any price-related factors. Therefore the agency was correct in not adding handling or clean-up costs as "other direct costs."[243]

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228. B-288331, 2001 U.S. Comp. Gen LEXIS 146 (Sept. 25, 2001).

229. *Id.* at *2. The IFB included two contract line item numbers adding work and two reducing work. *Id.*

230. *Id.*

231. *Id.* at *4.

232. *Id.* at *5.

233. *Id.* at *4.

234. *Id.*

235. *Id.* at *6-7.

236. *Id.* at *7. FAR section 17.206(b) provides: "[T]he contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer." FAR, *supra* note 11, § 17.206(b).

237. *TNT Indus.*, 2001 U.S. Comp. Gen. LEXIS 146, at *6-7.

238. *Id.* at *8.

239. Comp. Gen. B-286679.2, May 21, 2001, 2001 CPD ¶ 94.

240. *Id.* at 1-2.

241. *Id.* at 2.

242. *Id.* at 2. FAR § 14.201-5 provides: "The contracting officer shall . . . [i]dentify the price-related factors other than bid price that will be considered in evaluating bids and awarding the contract." FAR, *supra* note 11, § 14.201-5(c).

243. *Hunot Fire Retardant*, 2001 CPD ¶ 94 at 2-3.

A Blank Space Does Not Equal Zero

In *New Shawmut Timber Co.*,[244] the protestor omitted a price for one of seven line items in a contract for sale of timber from the Forest Service and then argued that the missing bid was equivalent to a bid of zero. The GAO disagreed, finding that the blank line item "rendered the bid equivocal regarding whether New Shawmut intended to obligate itself to perform that element of the requirement."[245] Therefore, the bid was nonresponsive.[246]

In the World of Mistakes, What's Good for the Goose Is Good for the Gander

In *Aquila Fitness Consulting Systems, Ltd.*,[247] the DOL rejected a protestor's bid after refusing to allow the protestor to correct an alleged mistake.[248] After award, the agency discovered that the awardee, FMF Corporation (FMF), had made the same mistake. This time, the agency "reform[ed]" the contract and increased the contract price to remedy the mistake.[249] The GAO found that the DOL also should have rejected FMF's bid.[250]

The *Aquila* IFB advised bidders that five full-time positions were required to assist in operating a Wellness Program at the Mine Safety and Health Administration Academy.[251] Soon after bid opening, the contracting officer requested that the four lowest bidders, including Aquila Fitness Consulting Systems, Ltd. (Aquila), and FMF, verify their bids. Aquila's apparently low bid provided for three full-time positions and two part-time positions.[252] Soon after the agency advised Aquila of the discrepancy between its bid and the IFB, Aquila submitted an amended, corrected bid. The amended bid increased the contract price, but was still the low bid.[253] The DOL did not accept Aquila's amended bid. The GAO held that the agency properly rejected Aquila's request to amend its bid, because correcting a claimed mistake is not permitted "where the alleged mistake is based on an incorrect premise which a bidder discovers after bid opening."[254] The GAO agreed that the bid should have been rejected.[255]

Although the contracting officer reviewed FMF's worksheets before award, he "overlooked" the same mistake in FMF's bid.[256] The GAO found that the contracting officer "did not exercise reasonable care in his examination of FMF's worksheets."[257] The Comptroller General concluded that "while Aquila's bid was properly rejected for containing a mistake . . . the agency also should have rejected FMF's bid for the same reason."[258]

Negotiated Acquisitions

Proposal Reformatting Found Reasonable

In *Integrated Technology Works, Inc.*,[259] the GAO found unobjectionable the Navy's decision to reformat a proposal that

244. Comp. Gen. B-286881, Feb. 26, 2001, 2001 CPD ¶ 42.

245. *Id.* at 2.

246. *See id*.

247. Comp. Gen. B-286488, Jan. 17, 2001, 2001 CPD ¶ 4.

248. *Id.* Aquila based its bid on three full-time positions and two part-time positions, while the solicitation required five full-time positions. *Id*. at 1-2.

249. *Id.* at 3.

250. *Id.* at 4.

251. *Id.* at 1.

252. *Id.* at 2.

253. *Id.* at 2-3.

254. *Id.* at 3.

255. *Id.* In rejecting the bid, the agency stated that the bid was nonresponsive, "since there was nothing on the face of its bid which took exception to any of the IFB requirements." *Id.* But, according to the GAO, rejection was proper because "the bid could not be corrected as requested and evidenced an obvious yet uncorrectable error." *Id.*

256. *Id.* at 4.

257. *Id.*

258. *Id*.

259. B-286769.5, 2001 U.S. Comp. Gen. LEXIS 128 (Aug. 10, 2001).

was submitted in the wrong type size. The request for proposal (RFP) instructed offerors to submit proposals in "type not smaller than 12 pitch."[260] Integrated Technology Works, Inc. (ITW), submitted a proposal that the Navy found was not typed in twelve-pitch type as required by the RFP. Rather than reject the proposal, the agency retyped the proposal in twelve-point font, and determined that the proposal information relating to two of the subfactors fell outside the thirty-page limit. ITW protested this action, claiming that the original font used was equivalent to the required twelve-pitch type. The Navy agreed that twelve-pitch type is not equivalent to twelve-point type and agreed to take corrective action on the protest by reformatting ITW's entire proposal in twelve-pitch type and reevaluating any previously unevaluated information.[261]

Although the reformatting resulted in some of the information falling within the page limitation, some of it was still not evaluated, as it fell outside the thirty-page limit. As a result, the rating for one subfactor remained unacceptable, leading the Navy to find the award to ITW too risky. The Navy, therefore, reaffirmed the original award.[262] The GAO found the Navy's approach reasonable, as it was consistent with the requirements set forth in the RFP, and denied the protest.[263]

Late Is *Late!*

An offer received was late, and the contracting officer appropriately rejected a proposal received two days after the date established in the solicitation as the date for receipt of proposals.[264] The protestor claimed that the agency was responsible for confusion on the due date because it typed the due date in small print, which became distorted when faxed.[265] The GAO noted that, while certain circumstances allow for receipt of a late proposal, this did not fit any of the exceptions. The GAO believed that if the contractor was unsure of the due date, the burden to verify the date fell to the contractor.[266]

Euros Are "Local Currency" in Greece

The State Department unreasonably rejected an offer that was priced in euros, the GAO held in *Consortium Argenbright Security-Katrantzos Security.*[267] The RFP provided for submission of offers in "U.S. dollars or local currency."[268] The consortium Argenbright Security-Katrantzos Security priced its offer in euros, rather than Greek drachmas or U.S. dollars. The agency maintained that it intended "local currency" to mean Greek drachmas only, and evidenced that intention by notifying offerors in the RFP that it would pay foreign firms in "Greek Drachmae."[269] The GAO found that nothing in the RFP prohibited pricing an offer in euros, and found the rejection of the consortium's bid for that reason improper.[270]

$0 Is a Compliant Offer

A pricing scheme that proposes $0 for an individual service fee is compliant, so long as the offeror commits to providing the required service, the GAO held in *SatoTravel*.[271] SatoTravel protested the award of a contract for travel services to an offeror who included a service fee of $0, claiming that the proposal did not conform to the terms of the solicitation because it did not propose a service fee for the base year, and offered a "discount fee" for subsequent years. SatoTravel interpreted the term "service fee" in the RFP to require a positive fee amount. The GAO disagreed, however, highlighting the premise "that an offeror may elect not to charge for a certain item . . . if it indicates a commitment to furnish the item in question."[272]

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260. *Id.* at *2.

261. *Id.* at *3-4.

262. *Id.* at *4-5.

263. *Id.* at *7-9.

264. Centro Mgmt. Inc., Comp. Gen. B-287107, Mar. 9, 2001, 2001 CPD ¶ 52.

265. Instead of the normal eleven- or twelve-point type, the date was typed in six-point type on the solicitation form. *Id.* at 2.

266. *Id.* at 2 n.2.

267. B-288126, B-288126.2, 2001 U.S. Comp. Gen. LEXIS 153 (Sept. 26, 2001).

268. *Id.* at *2.

269. The agency argued that by pricing its offer in euros, the consortium was taking exception to the payment clause. *Id.* at *2.

270. *Id.* at *3.

271. Comp. Gen. B-287655, July 5, 2001, 2001 CPD ¶ 111.

272. *Id.* (citing Integrated Protection Sys., Inc., Comp. Gen. B-229985, Jan. 29, 1988, 88-1 CPD ¶ 92 at 2).

"Flexible" Delivery Schedule, However, Is Not Compliant

In contrast to a $0 offer being compliant, an offer which proposed a "flexible" delivery schedule as an alternate method of meeting the delivery schedule articulated in the RFP was a non-conforming offer, and ineligible for award. In *Farmland National Beef*, [273] the successful offeror took exception to portions of the Defense Commissary Agency (DECA) solicitation concerning the delivery schedule. When the contracting officer attempted to clarify that the offeror was planning to meet the delivery schedule set out in the RFP, the offeror confirmed that he was proposing a "flexible delivery schedule" which meant that "the shipment may deliver Tues[day] instead of Mon[day]."[274] The GAO noted that the delivery schedule was an integral part of the contract, because it "represent[ed] when the commissaries need the product."[275] Even with this explicit alteration to the delivery schedule, the contracting officer awarded to the non-compliant offeror. The GAO found that such an award was improper.[276]

Say What You Want, and Then Stick to It!

The GAO sustained protests in two cases where the government awarded contracts to offerors that complied with what the government needed, but did not meet the minimum standards set out in the RFPs.[277]

In *Systems Management, Inc.*,[278] the Air Force issued an RFP for a fixed-base weather observation system. The RFP set out a requirement that systems must have been "evaluated and certified by the FAA or similar foreign agency prior to submission of proposal."[279] The Source Selection Authority concluded that the offer submitted by Coastal Environmental Systems (Coastal) "effectively leveraged the latest commercial information technology," and this "significant technical merit" was worth the associated $5.1 million price premium.[280] Systems Management, Inc., and Qualimetrics, Inc., protested, claiming that the system proposed by Coastal was not certified by the FAA, and did not meet the minimum technical requirements of the RFP. The Air Force argued that the term "certified" really meant "operational" and that the purpose of the requirement was to ensure the vendor had experience and a proven technology.[281]

The GAO did not find the term "certified" ambiguous, and found a reasonable reading of the requirement would lead to the belief that a certification from an independent organization was required. The GAO recognized that the Air Force had overstated its minimum requirements, and then inappropriately relaxed the requirements in the RFP. The GAO recommended that the Air Force amend the RFP to represent its actual needs and then resolicit.[282]

In *Cortland Memorial Hospital*, [283] the Department of Veteran's Affairs (DVA) issued a solicitation for a community-based outpatient clinic that expressed a "preference" for "self-contained" facilities that provided service to DVA patients in one location. The RFP described "self-contained" as a facility that devoted space and services exclusively to DVA patients. The contracting officer, however, apparently decided that the preferences were not as important as the solicitation indicated, and in fact, considered one offeror's proposed dual locations as a significant advantage.[284]

The GAO found it "clearly improper" for the agency to treat two sites as preferable, given the specific preference for a single site articulated in the RFP. Although the agency argued any

273. Comp. Gen. B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31.

274. *Id.* at 6.

275. *Id.* at 5 (quoting from contracting officer's testimony at the GAO hearing on this case).

276. *Id.* at 11. The GAO recommended that the agency reconsider its need and determine what the actual needs were. If the agency changed its delivery requirement, the GAO recommended amending the solicitation and reopening negotiations. If the agency decided not to change the delivery schedule, the GAO recommended that it terminate the improper award. *Id.*

277. *See* Sys. Mgmt., Inc., Comp. Gen. B-287032.4, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85; Cortland Mem'l Hosp., Comp. Gen. B-286890, Mar. 5, 2001, 2001 CPD ¶ 48.

278. Comp. Gen. B-287032.4, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85.

279. *Id.* at 2 (citing the Technical Requirements Document section of the RFP).

280. *Id.* at 3.

281. *Id.* at 11.

282. *Id.*

283. Comp. Gen. B-286890, Mar. 5, 2001, 2001 CPD ¶ 48.

284. *Id.* at 8.

error in this area was immaterial, the GAO found it possible that other offerors would have proposed lower-priced solutions if the solicitation had not stated a single-site preference. The GAO recommended that the agency reevaluate its needs and amend the solicitation if the stated preferences did not meet its actual needs.[285]

Failure to Include Stated Minimum Requirement Constitutes Improper Waiver

In *Universal Yacht Services, Inc.*,[286] the Navy's Military Sealift Command awarded a contract for a personnel transfer vessel to conduct open ocean transfers of passengers and cargo between sea-borne submarines and the shore. The RFP requirements included a minimum transit speed of "9 knots in moderate weather @ 80% rated horsepower," which required that a vessel could travel at nine nautical miles per hour at eighty percent of the engine's maximum horsepower.[287] This requirement reflected the Navy's need for a reasonable transfer time between submarines and shore facilities, and ensured adequate reserve horsepower for emergencies. After discussions, the successful offeror submitted a final proposal without any reference to the "@ 80% rated horsepower" requirement of the RFP. The contract also had no reference to the requirement. Universal Yacht protested, claiming that the award improperly waived the minimum transit speed requirement. The GAO agreed, finding that award on the basis of the non-conforming proposal was an improper waiver of the stated minimum requirement.[288]

Don't Reject Me—COFC Holds Failure to Meet Minimum Requirements Does Not Require Rejection

Although agencies may not award to a non-compliant proposal, the fact that a proposal is non-compliant does not require automatic rejection of that proposal, the COFC held in *ManTech Telecommunications & Information Systems Corp*.[289] In this case, the Army solicited for a contract to provide operational, program management, design, engineering, and prototype development services at various continental United States (CONUS) and overseas locations. The solicitation established educational and experiential requirements for key personnel, and stated the requirements were the "minimum acceptable personnel qualifications."[290]

ManTech Systems argued that the personnel requirements were "mandatory minimum" requirements, and that the failure to meet the requirements for two of the key personnel should have rendered the successful offeror's proposal technically unacceptable. The government and intervenors disagreed, arguing that the evaluation scheme was not designed to eliminate from consideration any proposal that did not meet the requirement, but rather to assign them an adjectival rating that reflected such a deficiency.[291]

The court found that "mandatory minimum requirements" are "essentially pass/fail in nature" and must be clearly identified as such to "put offerors on notice" that failure to comply will lead to rejection of the proposal.[292] In this case, the court found that the personnel requirements were not mandatory minimum requirements, and the Army's consideration of the offer was appropriate.[293]

Oral Presentations Not All Oral—Some Record Required

To evaluate proposals adequately when oral presentations are used, agencies must prepare some record of the oral presentation. In *Checchi & Co. Consulting*,[294] a solicitation for technical assistance and training to the government of El Salvador included a provision for oral presentations/discussions with

285. *Id.*

286. Comp. Gen. B-287071, B-287071.2, Apr. 4, 2001, 2001 CPD ¶ 74.

287. *Id.* at 2.

288. *Id.* at 5. The GAO recommended that the agency reopen discussions, request another proposal from each of the firms, and make a new source selection decision. *Id.*

289. 49 Fed. Cl. 57 (2001).

290. *Id*. at 66. The RFP provided: "All resumés submitted in response to this RFP shall be in the following prescribed format. Any resumé submitted that does not contain the required information in the format specified will be rejected. Offerors with rejected resumés will be considered as not fulfilling RFP requirements for the position(s) in question." *Id.*

291. *Id.* at 67. The Evaluation Plan stated that an offeror would receive a rating of "excellent" if all the key personnel exceeded the minimum requirements, and a rating of "unacceptable" if the vast majority did not. *Id.*

292. *Id.* (citing Israetex, Inc. v. United States 25 Cl. Ct 223, 229 (1992); Cubic Def. Sys., Inc. v. United States, 45 Fed. Cl. 450, 460 (1999)).

293. The court found that instead of being a basis for exclusion, the lack of resumés provided a basis for discussion with the offeror designed to cure this deficiency. *ManTech Telecomms*., 49 Fed. Cl. at 72.

294. B-285777, 2000 U.S. Comp. Gen. LEXIS 223 (Oct. 10, 2000).

those offerors "determined to have a reasonable chance for award."[295] Before the oral presentation/discussion, the agency provided each of the offerors a list of the strengths and weaknesses of their proposal to assist in preparation for the oral presentations. The oral presentations addressed the technical approach with each offeror. The only record the agency kept of the oral presentation/discussions was the individual evaluators' score sheets and the presentation materials.[296]

The GAO stressed that although there is no particular method of recording oral presentation required by the FAR, "the fundamental principle of government accountability dictates that an agency maintain a record adequate to permit meaningful review."[297] Without such documentation, the agency could not establish a reasonable basis for downgrading Checci's proposal.[298]

Discussions About Price Not Always Required

"Meaningful discussions"[299] do not necessarily have to include price, even when award is based on price, the GAO held in *SOS Interpreting, Ltd.*[300] The RFP for translation and technical support services contemplated that price would play an increasingly important role in the source selection decision, as proposals were considered technically equal. During the evaluation process, the agency analyzed all proposed prices and found they were all competitive and comparable. SOS argued that the contracting officer had a duty to advise SOS that its price was too high during discussions. The GAO disagreed, citing the well-established rule that an agency is not required to discuss price when the agency does not consider price to be a significant weakness.[301]

Give It to Me Straight—Agencies Must Identify Deficiencies During Discussions

In two cases this year the GAO reminded us that when an agency finds a proposal unacceptable, the reason for that finding should be revealed to the offeror during discussions for the discussions to be meaningful.

In the first case, *SWR, Inc.*,[302] the Library of Congress (Library) awarded a contract for the repair of talking book machines. After discussions and receipt of revised proposals, the Library conducted on-site visits of the offerors' facilities. As part of the site visit, the Library asked to review SWR, Inc.'s (SWR) quality control documents and equipment tracking logs, which SWR provided to the site-visit team. At the conclusion of the site-visit, the evaluators concluded that SWR's revised proposal was inadequate because the documentation provided at the site-visit did not specifically address past-performance of component-level repair, which was one of the Library's concerns.[303]

SWR complained of the finding, stating that the Library failed to identify its concern about component-level repair experience at the site visit or during discussions, and therefore the evaluation was unreasonable. The GAO agreed, finding that the record established that the sole basis for the agency's decision not to award to SWR was the lack of documentation provided by SWR regarding component-level repair experience. The GAO found unsupported and unreasonable the agency's determination that SWR's proposal was technically unacceptable.[304]

In a similar case, *Bank of America*,[305] the GAO sustained a protest due to the lack of meaningful discussions where an agency clearly recognized the offeror had likely misunderstood the RFP's modified requirements, yet did not raise the issue

295. *Id.* at *5.

296. *Id.* at *13.

297. *Id.* (quoting J&J Maint., Inc., Comp. Gen. B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106 at 3; Delta Int'l, Inc., Comp. Gen. B-284364.2, May 11, 2000, 2000 CPD ¶ 78 at 4).

298. Although the agency produced declarations of one of the evaluators recalling portions of Checchi's oral presentation, the GAO reiterated the long-held position that it will accord greater weight to contemporaneous documentation than to the parties "later explanations, arguments, and testimony." *Id.* at *24.

299. *See* FAR, *supra* note 11, § 15.306(d)(3) ("The contracting officer shall . . . discuss . . . significant weaknesses, deficiencies, and other aspects of its proposal . . . that could . . . enhance materially the proposal's potential for award.").

300. Comp. Gen. B-287477.2, May 16, 2001, 2001 CPD ¶ 84.

301. *Id.* at 3 (citing Nat'l Projects, Inc., Comp. Gen. B-283887, Jan. 19, 2000, 2000 CPD ¶ 16 at 5; KBM Group, Inc., Comp. Gen. B-281919, B-281919.2, May 3, 1999, 99-1 CPD ¶ 118 at 8-9). The GAO had also cited these cases in an earlier 2001 decision regarding the same issue. *See* Cherokee Info. Svs., Comp. Gen. B-287270, Apr. 12, 2001, 2001 CPD ¶ 77 at 5.

302. Comp. Gen. B-286161.2, Jan. 24, 2001, 2001 CPD ¶ 32.

303. *Id.*

304. *Id.*

during discussions. In this case, the agency placed a page limitation on the offers, which it later modified through an amendment that prescribed double-sided pages and submission of technical proposals on compact disks.[306] Bank of America followed the original page limitation, submitting a 100-page proposal with a 50-page attachment. The other offeror submitted a proposal twice as large, following what they believed were the modified limits.[307]

The evaluators noted several areas in Bank of America's proposal that lacked sufficient detail, yet the agency failed to raise the repeatedly-expressed concerns regarding the level of detail. The evaluators also failed to determine whether Bank of America misunderstood the agency's interpretation that the RFP allowed for 200 pages of technical proposal with 100 pages of attachments if submitted on compact discs. The GAO found it unreasonable for the agency not to raise the concerns regarding the lack of detail and the potential page limit misunderstanding with Bank of America, finding that the agency did not hold meaningful discussions.[308]

What's Done Is Done—Reopening Discussions with Only One Offeror Improper

It is not a new rule—if an agency conducts discussions, it must hold discussions with all offerors in the competitive range.[309] In *International Resources Group*,[310] however, the agency improperly reopened discussions with just one offeror after receipt of final proposals, leading the GAO to sustain the protest.[311]

The Agency for International Development solicited for technical assistance and training to improve natural resource management in the Central Asian Republics of Kazakhstan, Kyrgyzstan, Turkmenistan, and Uzbekistan. The agency originally received seven proposals, finding three in the competitive range. The agency conducted discussions with each of the three and asked for final revised proposals. After receiving the final proposals, the contracting officer proceeded to engage in a series of communications with only one of the offerors, furnishing the offeror with a detailed list of technical and cost comments regarding its proposal and requesting a new response.[312]

While this communication with only one offeror was underway, the contracting officer notified International Resources Group (IRG) that it was no longer in the competitive range. IRG protested, arguing that it was improper for the agency to engage in further discussions with only one of the offerors. The GAO agreed, finding that the communications between the agency and the offeror were discussions because the offeror was given an opportunity to, and did, revise its proposal.[313]

"Best Value" Selection Requires Comparative Analysis of Proposals

In *Satellite Services, Inc.*,[314] the GAO reminded agencies that a "best value" selection must be made on the basis of a meaningful evaluation of proposals. In this case, the Navy solicited for multi-function support services, and anticipated a best-value award with four technical factors, which, when combined, were about equal to price.[315] Because the price was largely driven by the labor costs associated with the number of full-time equivalent (FTE) positions, the costs of the various proposals differed significantly, based on the dramatically different staffing levels proposed by the offerors. The agency performed a price evaluation on each offer, checking for mathematical errors in the extended prices and accuracy in the offerors' computations of labor rates, fringe benefits, and mate-

305. B-287608, B-287608.2, 2001 U.S. Comp. Gen LEXIS 127 (July 26, 2001).

306. The RFP stated that the technical proposal could not exceed 100 double-sided pages. The exhibits or attachments to the technical proposal were limited to fifty pages double-sided. The RFP also stated that "each 8 ½ by 11 page fold-out will be counted as one page." *Id* at *4. The RFP further acknowledged, however, that the compact disk versions of the technical proposals would not print double-sided and instead would print as 200 pages with a possible 100 pages of attachments and exhibits. *Id.* at *7.

307. *Id.*

308. The GAO recommended that the agency clarify the page limitation, conduct meaningful discussions, and evaluate the proposals in accordance with the stated requirements. *Id.* at *26.

309. FAR, *supra* note 11, § 15.306(d)(1).

310. Comp. Gen. B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

311. *Id.*

312. *Id.*

313. *Id.*

314. B-286508, B-286508.2, 2001 U.S. Comp. Gen. LEXIS 13 (Jan. 18, 2001).

315. *Id*. at *4. The four technical factors were: (1) past performance, (2) experience, (3) methods and procedures, and (4) corporate resources and management. *Id.*

rial costs. The price evaluation team did not evaluate the adequacy of the proposed number of FTEs. The agency awarded to NVT Technologies (NVT). Satellite Services, Inc. (Satellite), protested, claiming that the Navy did not meaningfully evaluate the different staffing levels.[316]

The GAO found two significant errors in the source selection. First, by simply accepting NVT's staffing levels as adequate based on NVT's use of a naval preventive maintenance manual's estimate of workloads, the Navy failed to evaluate NVT's approach to the work requirements.[317] Second, the source-selection authority simply adopted an evaluator's judgment about which proposal offered the best value without discussing his evaluation or questioning the basis for his judgment. This led to a failure to create a legally adequate cost-technical tradeoff between NVT and Satellite.[318] Based on the lack of an adequate cost-technical tradeoff, the GAO found that the record did not support the award to NVT and sustained the protest.[319]

"Fair and Reasonable" Is Not the Same as "Best Value"

In *Beacon Auto Parts*,[320] the GAO partially sustained a protest, finding that a determination that prices are fair and reasonable does not constitute a cost-technical tradeoff. In this case, the agency contemplated a cost-technical tradeoff, with non-cost factors[321] significantly more important than price. Beacon complained that the contracting officer made award based solely on Nash Auto and Body Shop's (Nash) higher rating, with no regard to Nash's $48,000 higher price. The GAO was not persuaded by the agency's argument "made in the face of a bid protest" that the agency had considered whether Nash's proposal was worth the additional cost, in light of the price negotiation memorandum which stated only that "Nash's Auto & Body Shop's proposal is considered the best value to the Government based on past performance and technical capability. Prices are considered fair and reasonable."[322]

"Best Value" Is Not the Same as Lowest-Price, Technically Acceptable

In *Special Operations Group, Inc.*,[323] the GAO found that it was inappropriate for a contracting officer to ignore the solicitation's basis for selection without notifying offerors of the change. The solicitation contemplated a cost-technical tradeoff between technical merit and cost, and advised offerors that technical merit was "more important than price." After receiving proposals and conducting discussions, however, the evaluation was based on essentially a pass/fail scheme and award was made on the basis of what the agency perceived to be the lowest priced-technically acceptable proposal. The GAO found it "improper to induce an offeror to prepare and submit a proposal emphasizing technical excellence, then evaluate proposals only for technical acceptability and make the source selection decision on the basis of technical acceptability and lowest cost."[324]

Contemporaneous Source Selection Decision Documentation Vital; Post-Protest Tradeoff Inadequate

In *Wackenhut Services, Inc.*,[325] the protestor successfully challenged an award decision where the agency failed to identify any aspects of the successful proposal that merited the price premium. The protestor argued that instead of a comparison of the benefits and costs, the award decision was based solely on overall point scores. Wackenhut Services, Inc., further challenged the agency's attempt to perform a post-protest tradeoff analysis, arguing such a tradeoff inappropriately relied on statements not available at the time of the source selection decision. The GAO agreed with the protestor, finding that "where there is inadequate supporting documentation for a source selection decision, there is no basis . . . to conclude that the agency had a reasonable basis for the decision."[326] The GAO again emphasized the weight it will give contemporaneous documentation as contrasted with "post-protest explanations," stressing such explanations must be "credible and consistent with the contemporaneous record."[327]

316. *Id.* at *5-10.

317. *Id.* at *14.

318. *Id.* at *19.

319. *Id.* at *23-24.

320. B-287483, 2001 U.S. Comp. Gen. LEXIS 111 (June 13, 2001).

321. The non-cost factors were technical capability and past performance. *Id.* at *3.

322. *Id.* at *14.

323. Comp. Gen. B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

324. *Id.* at 5 (citing Hattal & Assoc., Comp. Gen. B-243357, B-243357.2, July 25, 1991, 91-2 CPD ¶ 90 at 7-9).

325. Comp. Gen. B-286037, B-286037.2, Nov. 14, 2001, 2001 CPD ¶ 114.

How Much and What Type of Information Is Needed to Evaluate Past Performance?

Agencies often request that offerors submit a lot of different past performance data in response to government solicitations. Issues have arisen concerning how much and what type of information agencies should consider when evaluating past performance. In *OSI Collection Services, Inc.* (*OSI I*),[328] the Department of Education issued a request for proposals for private collection services for delinquent loans. Past performance was the most important evaluation factor, and offerors were required to submit relevant past performance information. The agency advised offerors that it would consider the following past performance information: "information obtained when checking references for all offerors; and, [f]or those companies with a current contract, the Department will use performance data we have on hand such as the CPCS [Competitive Performance and Continuous Surveillance][329] scores."[330]

The source evaluation board (SEB) considered three elements in evaluating offerors' past performance. First, it looked at the numerical scores given in the Dun and Bradstreet (D&B) past performance evaluation.[331] Second, it reviewed the subjective comments provided by offerors' past performance references, and especially considered the numerical scores given by those references.[332] Third, for incumbent contractors, like OSI Services, Inc. (OSI), the evaluators considered the CPCS scores over the life of the current contract.[333] The total past performance evaluation placed OSI at the "average or below" level, based primarily on the CPCS scores. Though OSI's customers were extremely satisfied with its performance, the agency found the CPCS scores were "the most relevant indicator of success."[334] OSI protested the agency's past performance evaluation, claiming that the agency improperly limited its consideration of performance data under the current contract to CPCS scores and that reliance on those scores alone was unreasonable.[335]

The GAO agreed that the agency's near total reliance on the CPCS scores was unreasonable. The evaluation documents for each offeror had nearly identical comments concerning the CPCS portion of the evaluation.[336] Those narratives lacked comments concerning the actual quality of the offerors' past performance. The GAO found that the

> contemporaneous evaluation documentation shows that the CPCS aspect of the agency's past performance evaluation contained virtually no analysis of the individual offerors' past performance, and that the agency limited its consideration of the performance data on hand to ranking the incumbents based upon the arithmetic total of each firm's seven periodic CPCS scores . . . . To the extent the agency performed any qualitative analysis, it is not documented.[337]

The agency's reliance on the cumulative CPCS scores was contrary to the solicitation's commitment to consider all data on hand. The GAO was concerned with the agency's "overly mechanical application" of the cumulative CPCS scores in its past performance evaluations, noting that " [p]oint scores can . . . only be aids in decision-making, and they must be used in a defensible way."[338] While the GAO recognized that "reducing

326. *Id.* at 5.

327. *Id.* (citing Jason Assocs. Corp., Comp. Gen. B-278689, Mar. 2, 1998, 98-2 CPD ¶ 67 at 6; ITT Fed. Servs. Int'l Corp., Comp. Gen. B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6).

328. Comp. Gen. B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18.

329. The CPCS evaluation was performed every four months and measured "the relative performance of each contractor on all accounts transferred under various performance indicators and was used to determine bonus payments and transfer of new accounts." *Id.* at 2. Under this methodology, the contractor performing best under a particular indicator received the highest number of points for that indicator. The remaining contractors received points in relation to their standing relative to the leading contractor. Each contractor's CPCS score is the sum of its scores for all performance indicators for the particular period. *Id.*

330. *Id.*

331. *Id.* D&B scores were on a one (satisfactory) to five (unsatisfactory) basis. *Id.*

332. *Id.* References gave numerical scores on a scale of one (extremely satisfied) to four (never satisfied). *Id.*

333. *Id.* This involved the arithmetic total of seven periodic CPCS scores available at that time. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 3.

337. *Id.* at 5.

338. *Id.* at 6.

past performance to a single score might result in a more streamlined evaluation," the "use of such a technique is no substitute for the reasoned judgment of evaluators in examining and comparing the actual past performance of offerors."[339] The GAO recommended that the agency "reevaluate the proposals with respect to past performance, giving appropriate consideration and weight to the past performance data in its possession."[340]

As recommended by the GAO, the agency conducted a reevaluation of all proposals. The reevaluation again resulted in OSI not receiving the award. OSI filed another protest, alleging improper evaluation of its past performance.[341] In its review of the reevaluation, the GAO found that the agency SEB had reviewed each offeror's CPCS scores and rankings "in the context of particularized facts about the contractor's performance in order to determine the underlying significance of the CPCS results."[342] The SEB had also considered the specific ratings and comments in the D&B past performance evaluations, the contractor reference surveys, and the past performance of key personnel, analyzed all of this past performance information, developed an overall assessment of each offeror's past performance, and assigned a past performance score. The Source Selection Authority's decision memorandum included a detailed narrative justification supporting the SEB's past performance rankings.[343]

In denying the protest, the GAO found that the agency gave careful consideration to the OSI I decision and how best to implement the GAO's recommendations. The SEB effectively considered all available information, performed a detailed evaluation of each offeror and fully supported its analysis with detailed narratives and a full explanation of its evaluation methodology.[344]

Is Telephonic Completion of a "Written" Questionnaire Sufficient?

When an agency says it will obtain past performance information through a specific medium, may the agency use a different method to gather the information? In *FC Construction Co.*,[345] the Air Force issued an RFP for base custodial services at Goodfellow Air Force Base. The RFP stated that "the agency's review of each offeror's past and present performance would be conducted using *written questionnaires*."[346] FC Construction Co. (FC) submitted references for American Building Management (ABM), a firm that would perform the work under any contract awarded to FC. Because FC had submitted no references for itself, the Air Force initially concluded FC had no past performance, assigned FC a neutral rating, and tentatively recommended award to another offeror who received an exceptional past performance rating.[347]

After reviewing this initial decision, the Air Force directed the contracting officer to reopen the evaluation, contact ABM's references, and assign a past performance rating based on those references. The contract administrator called all six references and reached two of them. She advised the two references that they would be allowed to answer the past performance questionnaire telephonically. The contract administrator read each of the references all of the questionnaire's twenty-six questions, recorded their answers and assigned a rating. After again reviewing all evaluations, the Air Force awarded the contract to another offeror.[348]

FC protested the award, alleging that the Air Force decided to "poll" the references telephonically instead of having them return written questionnaires, and failed to contact all listed references.[349] Moreover, FC alleged the Air Force either erroneously or intentionally misrepresented the references' responses. The Air Force contended that "any different treatment between FC and other offerors was due in large measure to problems that were created by FC, or requests made by its references."[350]

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339. *Id.* at 7.

340. *Id.*

341. OSI Collection Servs., Inc., Comp. Gen. B-286597.3, June 12, 2001, 2001 CPD ¶ 103.

342. *Id.* at 3.

343. *Id.*

344. *Id.* at 4-5.

345. Comp. Gen. B-287059, Apr. 10, 2001, 2001 CPD ¶ 76.

346. *Id.* at 1 (emphasis added).

347. *Id.* at 2.

348. *Id.* at 3.

349. *Id.* at 3.

The GAO found that the telephonic polling was used at the specific request of the two references. One of the references did not have a working facsimile machine and requested the telephonic interview after repeated failed attempts to fax the questionnaire to it. The other reference was "headed out the door" and asked for a telephonic interview.[351] The GAO found nothing unreasonable or improper about conducting telephone interviews under these factual circumstances. In following a long line of cases, the GAO also held that there is no requirement that agencies contact all past performance references in their review of past performance.[352]

The GAO next addressed FC's allegations that the Air Force misrepresented the references' responses. As part of its agency report, the Air Force included a statement from the contract administrator explaining how she conducted the telephone interviews and included the past performance questionnaires completed by the contract administrator containing the references' responses.[353] The responses ranged from "exceptional" to "very good" to "satisfactory," and the Air Force concluded that ABM's past performance rating was "satisfactory."[354]

FC claimed that both references advised it that virtually all of their responses to the questions described ABM's past performance as "exceptional." One reference produced an affidavit to that effect and the other reference offered to give testimony on the matter. As there was a direct conflict in the evidence, the GAO offered to convene a hearing to obtain testimony from the contract administrator and representative from the two references. The GAO offered to convene the hearings by teleconference at a location convenient to the references. For unknown reasons, the two references declined to give testimony. In supporting the Air Force's "satisfactory" past performance grade, the GAO found it unlikely that the contract administrator "erred in transcribing all 26 of the reference's responses" and noted that there was no evidence of bad faith in recording the responses.[355]

Simplified Acquisitions

Threshold Raised Overseas for Operation Enduring Freedom

On 9 October 2001, the Under Secretary of Defense (Acquisition, Technology, and Logistics) formally declared that Operation Enduring Freedom meets the statutory definition of "contingency operation"[356] for purposes of government contracting.[357] The next day, the Army formally raised the simplified acquisition threshold for Enduring Freedom from $100,000 to $200,000 in accordance with FAR 2.101.[358] Contracting personnel should note, however, that this threshold increase only applies to procurements made outside the United States in "direct support" of Enduring Freedom.[359]

New Charge Limits

Last year,[360] we wrote about the DOD's proposal to raise the purchase card purchase limit to $200,000 for contingency, humanitarian, or peacekeeping operations. This proposal became a final rule on 1 November 2001.[361] Army practitioners should note that the AFARS currently retains the $2500 limitation.[362]

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350. *Id.* at 4.

351. *Id.*

352. *Id.* (citing Advanced Data Concepts, Inc., Comp. Gen. B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 at 10; Dragon Servs., Inc, Comp. Gen. B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 8).

353. *Id.* at 5. The administrator stated she "read both references all 26 questions, as well as the definitions for the adjectival ratings to use in responding to the questions." *Id.*

354. The numbers for the responses were redacted from the decision. *See id*.

355. *Id.* at 6. The GAO's holding was also bolstered by the Air Force's serious concerns about FC's performance on two ongoing contracts. *See id*.

356. 10 U.S.C. § 101(a)(13)(B) (2000).

357. Memorandum, Under Secretary of Defense (Acquisition and Technology), to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Directors of Defense Agencies, subject: Authorization to Utilize Contingency Operations Contracting Procedures (9 Oct. 2001).

358. Memorandum, Acting Deputy Assistant Secretary of the Army (Procurement), to Army Major Commands, Army Program Executive Officers, and Army Principal Assistants Responsible for Contracting, subject: Simplified Acquisition Threshold Increase in Support of Operation Enduring Freedom (10 Oct. 2001).

359. *Id*.

360. *2000 Year in Review*, *supra* note 2, at 26.

361. Overseas Use of the Purchase Card in Contingency, Humanitarian, or Peacekeeping Operations, 66 Fed. Reg. 55,123 (Nov. 1, 2001) (to be codified at 48 C.F.R. pt. 213) (amending the Defense Federal Acquisition Regulation Supplement; U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 213.301(2) (Apr. 1, 1984) [hereinafter DFARS]).

"Required Sources" Means You Must Use Them!

FAR part 8 requires federal agencies to buy supplies and services from certain government supply sources.[363] Despite language which reads that "agencies shall satisfy requirements . . . through the sources and publications listed below,"[364] some in the DOD are apparently ignoring these required sources when making simplified acquisitions. On 7 June 2001, Deidre Lee, Director of Defense Procurement, issued a memorandum emphasizing the importance of buying from required sources.[365] Specifically addressing purchases from the Committee for Purchase from People Who Are Blind or Severely Disabled,[366] Ms. Lee wrote, "Military Departments and Defense Agencies must purchase listed items from JWOD [Javits-Wagner-O'day] sources unless the appropriate central JWOD agency specifically authorizes an exception in accordance with FAR 8.706."[367] Clearing up misperceptions common among some procurement personnel, Ms. Lee further stated, "Items on the list must be obtained from JWOD sources even when using the Governmentwide commercial purchase card or if the procurement is at or below the micro-purchase threshold."[368] Hopefully, Ms. Lee's memo will reinforce the mandatory nature of the required source list in FAR part 8, even when using the purchase card and when buying small-value items.

Let's Play Fair!

Under FAR 13.106-1(a)(2), contracting officers need not disclose in a solicitation the "relative importance assigned to each evaluation factor" in a simplified acquisition.[369] Despite this language in the FAR, the GAO recently held that "basic fairness" sometimes requires an agency to disclose relative weights in a simplified acquisition solicitation.[370]

In *Finlen Complex, Inc.*,[371] the Military Entrance Processing Station in Butte, Montana, issued an RFP for meals, lodging, and transportation services for its military recruits.[372] Although the RFP detailed the role of past performance in the award process, it was otherwise "silent on the relative weight of the non-price evaluation factors."[373] Despite the RFP's attention to past performance, the agency eventually only assigned a five percent importance rating to this factor.[374] Finlen Complex, Inc. (Finlen), protested the award to a competitor, arguing that, considering the RFP's focus on past performance, the agency should have disclosed its relative weight or assigned it a lesser weight.[375]

Agreeing with Finlen, the GAO first acknowledged that FAR 12.602(a) and 13.106-1(a)(2) do not, "on their face," require a contracting officer to disclose relative weights in a simplified acquisition solicitation.[376] The GAO found, however, that this solicitation looked a lot like a FAR part 15 nego-

362. The AFARS limits most card purchases to $2500. AFARS, *supra* note 112, § 5113.270.

363. FAR, *supra* note 11, pt. 8.

364. *Id.* at 8.001(a).

365. Memorandum, Director, Defense Procurement, to Assistant Secretary of the Army (Acquisition, Logistics, and Technology), Assistant Secretary of the Navy (Research, Development and Acquisition), Assistant Secretary of the Air Force (Acquisition), and Directors, Defense Agencies, subject: Application of Javits-Wagner-O'Day Act (7 June 2001) [hereinafter Lee Memorandum].

366. FAR, *supra* note 11, pt. 8.7, also known as "JWOD" after the requirement's congressional sponsors.

367. Lee Memorandum, *supra* note 365. Ms. Lee went on to say, "Exceptions may be authorized when no JWOD source can meet the required delivery schedule or produce the required quantities economically." *Id.* Other required sources also have waiver provisions. *See* U.S. Dep't of Justice, *Waiver Request Procedures*, UNICOR Marketplace, *at* http://www.unicor.gov/customer/waiverform/htm (last visited Dec. 21, 2001); Memorandum, Chief Operating Officer, Federal Prison Industries (FPI), to DOD Procurement Personnel, subject: Raising the Threshold for FPI Waiver Exceptions (24 Jan. 2000) (blanket DOD waiver for FPI purchases of $250 or less that require delivery within ten days).

368. Lee Memorandum, *supra* note 365.

369. FAR, *supra* note 11, § 13.106-1(a)(2).

370. *See* Finlen Complex, Inc., B-288280, 2001 U.S. Comp. Gen. LEXIS 152 (Oct. 10, 2001).

371. *Id.*

372. *Id.* at *2.

373. *Id.* at *3.

374. *Id.* at *11.

375. *Id.* at *9.

376. *Id.* at *22.

tiated procurement despite its simplified acquisition label.[377] Because part 15 requires the contracting officer to disclose the relative weights of evaluation factors,[378] the GAO reasoned that "withholding the relative weight of evaluation factors denied the offerors one of the basic tools used to develop the written, detailed proposals called for in the solicitation."[379] The GAO went on to say:

> While there are certainly circumstances in which agencies need not disclose the relative weight of evaluation factors when conducting a simplified acquisition, this procurement, in our view, is not one of them. Given these circumstances, we believe that *fairness* dictated that the Army disclose the relative weight of its evaluation criteria to offerors.[380]

For procurement officials, the lesson learned is "play fair" when conducting a simplified acquisition that looks like a negotiated procurement.

Electronic Commerce

The Explosion Continues

Electronic commerce continues to be an exploding area. The Comptroller General predicted that "e-government" efforts will account for forty percent of all federal capital investments by 2004.[381] The FAR Council announced that, beginning 1 January 2001, the GSA will only publish the FAR on-line and will no longer publish a paper copy.[382] The FAR Council also proposed amendments to the FAR to "clarify and encourage the use of electronic signatures in Federal procurement."[383] The GSA's Web site for surplus auctions[384] registered more than 19,000 bidders and sold more than $1.5 million in merchandise during its first two months of operation.[385] "Pay.gov" netted $1 billion in on-line collections for federal agencies.[386] The Navy began a program in San Diego that allows sailors to arrange Permanent Change of Station moves on-line without visiting a transportation office.[387] The Department of Justice (DOJ) issued *Legal Considerations in Designing and Implementing Electronic Processes: A Guide for Federal Agencies*.[388] Finally, the DOD swore in a new Chief Information Officer, Mr. John P. Stenbit. Mr. Stenbit will also be the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence.[389]

Reverse Auctions

Perhaps the fastest growing use of electronic commerce is reverse auctions.[390] The Federal Deposit Insurance Corporation sold $7 million in loans and $5 million in bad debt to the private sector in a reverse auction.[391] The Air Force Personnel Center[392] used a thirty-minute reverse auction to buy $1.13 million worth

377. *Id.* at *21.

378. FAR, *supra* note 11, § 15.304(d).

379. *Finlen Complex, Inc*., 2001 Comp. Gen. LEXIS at *23.

380. *Id*. (citations omitted; emphasis added).

381. Joshua Dean, *E-Gov Efforts Growing, but Lack Vision, Says GAO Chief*, GovExec.com (July 12, 2001), *at* http://www.govexec.com/dailyfed/0701/071201j1.htm.

382. *FAR Paper Copy*, West Group Briefing Papers, Jan. 2001, at 7. The electronic FAR is available at http://www.arnet.gov/far/.

383. Federal Acquisition Regulation; Electronic Signatures, 65 Fed. Reg. 65,698 (Nov. 1, 2000) (to be codified at 48 C.F.R. pts. 2, 4). The proposed rule specifies that a "signature" includes "an electronic signature." *Id*. (amending FAR, *supra* note 11, § 2.101). The Civilian Agency Acquisition Council is currently considering the language of the final rule. U.S. Dep't of Defense, *Open DFARS Cases*, Defense Acquisition Reg. Directorate, *at* http://www.acq.osd.mil/dp/dars/opencases/OpenFar.doc (last modified Jan. 16, 2002) [hereinafter *Open DFARS Cases*].

384. U.S. General Servs. Admin., *GSA Auctions*, *at* http://www.GSAAuctions.gov (last visited Jan. 16, 2002).

385. *GSA Auction Site Sells $1.5 Million in Two Months*, FEDtechnology.com Email Newsletter (Apr. 10, 2001) (on file with author).

386. Pay.gov, run by the Treasury Department's Financial Management Service, allows debtors to pay money owed to agencies for fees, fines, sales, leases, loans, and certain taxes. It debuted in October 2000. Kellie Lunney, *Pay.gov Collects $1 Billion for Federal Agencies*, GovExec.com (May 21, 2001), *at* http://www.govexec.com/dailyfed/0801/081301m1.htm; *Pay.gov Nets $1 Billion for Agencies*, 43 Gov't Contractor 31, at ¶ 326 (Aug. 22, 2001). The Treasury Department is also proposing to streamline the conversion of customer checks into electronic budget entries through use of the "Automated Clearing House" check processing system. Federal Government Participation in the Automated Clearing House, 66 Fed. Reg. 18,888 (Apr. 12, 2001) (to be codified at 31 C.F.R. pt. 210).

387. *Navy Expands Program to Allow Moves to be Arranged Online*, FEDtechnology.com Email Newsletter (July 24, 2001) (on file with author).

388. U.S. Dep't of Justice, *Legal Considerations in Designing and Implementing Electronic Processes: A Guide for Federal Agencies* (November 2000), *at* http://www.cybercrime.gov/eprocess.htm.

389. *Stenbit Sworn in as DOD's New Chief Information Officer*, FEDtechnology.com Email Newsletter (Aug. 14, 2001) (on file with author).

of computers, saving $930,000 in the process.[393] The Coast Guard used a reverse auction to buy Falcon Jet aircraft parts.[394]

Because of this fast-pace growth in reverse auctions, the FAR Council is considering the need for FAR guidance on reverse auction techniques. On 31 October 2000, the FAR Council asked for public comments about whether the FAR should include guidance on reverse auctions.[395] To date, the Council has not yet decided whether such guidance is needed.

Considering the burgeoning nature of reverse auctions, it was no surprise there was finally a reported case in this area. In *Pacific Island Movers*,[396] the Navy solicited contract bids for packing and crating services on Guam.[397] The RFP provided for a reverse auction after submission of proposals. In the RFP, the Navy notified potential offerors that they could only make price revisions during the auction. The RFP also notified offerors that submission of a proposal implied consent to participate in the auction and to reveal the offeror's prices.[398] The RFP "promised to provide during the auction a real-time software analysis showing the offers' relative position in the competition."[399] Moreover, the RFP "also provided that the reverse auction would be conducted for 60 minutes, but that offers submitted within 5 minutes before the expiration of the auction would extend the auction for an additional 15 minutes."[400]

Two contractors, Pacific Island Movers (Pacific) and Dewitt Transportation Services of Guam (Dewitt), responded to the RFP. Though scheduled for sixty minutes, the reverse auction took two days because of the provision extending the auction for fifteen minutes for offers submitted in the last five minutes of the auction.[401] On the auction's second day, the Navy amended the RFP to close the auction that afternoon, regardless of the "last five minutes" rule. At the end of the auction, the Navy found that Pacific had submitted the lowest-priced proposal.[402]

The following week, Dewitt protested to the GAO, challenging the reverse auction.[403] Specifically, "Dewitt complained that, because of a malfunction, offerors did not have access to promised real-time analysis showing the offerors' relative position in the competition."[404] Dewitt also complained that the amendment ending the five-minute rule arbitrarily ended the auction, not allowing fair competition as contemplated in the RFP.[405]

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390. In reverse auctions, "contractors compete in real time over the Internet as they bid for government contracts." *2000 Year in Review*, *supra* note 2, at 28. *See* Scott M. McCaleb, *Reverse Auctions: Much Ado About Nothing or the Wave of the Future?*, PROCUREMENT LAW ADVISOR, Sept. 2000, at 1; Thomas F. Burke, *Online Reverse Auctions*, WEST GROUP BRIEFING PAPERS, Oct. 2000, at 1; *see also* Bob Tiedeman, *Breaking the Acquisition Paradigm: CECOM Acquisition Center Pilots Army's E-Auctions*, ARMY A.L. & T., Jan.-Feb. 2001, at 26.

391. Tanya N. Ballard, *FDIC Profits from Online Auction*, GovExec.com (Nov. 22, 2000), *at* http://www.govexec.com/dailyfed/1100/112200t1.htm.

392. Located on Randolph Air Force Base in San Antonio, Texas.

393. U.S. Dep't of Air Force, *Online Auction Saves AFPC Nearly $1 Million*, Air Force Link (Feb. 1, 2001), *at* http://www.af.mil/news/Feb2001/n20010201_0144.shtml.

394. *Coast Guard Uses Online Reverse Auction for Best-Value Procurement*, 42 GOV'T CONTRACTOR 6, ¶ 466 (Nov. 22, 2000).

395. Federal Acquisition Regulation; Reverse Auctioning, 65 Fed. Reg. 65,232 (Oct. 31, 2000). Interestingly, the FAR Council did not propose rules on reverse auctions, but rather sought comments on whether any rules are needed to begin with. *See id.*

396. B-287643.2, 2001 U.S. Comp. Gen. LEXIS 110 (July 19, 2001).

397. *Id.* at *2.

398. *Id.* at *3. The identity of the offerors, however, was to remain anonymous. *Id.*

399. *Id.*

400. *Id.* at *3-4.

401. *Id.* at 4. One of the morals of this story is not to include such a provision in the RFP.

402. *Id.*

403. *Id.*

404. *Id.* at *4-5.

405. *Id.* at *5.

In response to Dewitt's protest, the Navy canceled the results of the reverse auction and asked Dewitt and Pacific to submit revised proposals using "traditional negotiated competition."[406] Pacific then protested the Navy's action, arguing that it "was entitled to award based on the reverse auction."[407]

The GAO disagreed, finding that an "agency has broad discretion in a negotiated procurement to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition."[408] The GAO found that Dewitt's protest had raised "colorable challenges to the conduct of the reverse auction."[409] Specifically, the GAO found that "the undisputed software malfunctions and the arbitrary cut-off of the bidding . . . called into question the fairness of the competition."[410] Answering Pacific's complaint that asking for revised price proposals was unfair because their proposed prices had already been disclosed, the GAO stated:

> Under the unique circumstances of a reverse auction, we fail to see how the disclosure of the offerors' prices was unfair. Pacific and Dewitt expressly agreed to the disclosure of their proposed prices by participating in the reverse auction. Because both Pacific's and Dewitt's prices were disclosed through the reverse auction, the firms were in an equal competitive position at the time revised price proposals were requested . . . .[411]

This decision teaches several lessons. First, an agency should meticulously plan a reverse auction. It should conduct a dry-run to prevent any kind of software malfunction. It should think through the RFP, specifically avoiding clauses that could indefinitely extend the auction. Second, the GAO and courts may likely find that bidders forfeit their right to secret price disclosure when agreeing to participate in a reverse auction.[412] Finally, the GAO and courts may likely give agencies broad discretion in canceling the results of a reverse auction if the agency finds it is fair to do so.

Better Use the Portal!

Effective 1 October 2001, all agencies must use a single electronic portal to publicize government-wide procurements greater than $25,000.[413] Designated "FedBizOpps.gov," the Web site is "the single point where Government business opportunities greater than $25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public."[414] From 1 October 2001 until 1 January 2002, agencies must post their solicitations on FedBizOpps.gov and in the *CBD*. Beginning 1 January 2002, agencies need no longer post solicitations in the *CBD* and may rely solely on the Web site.[415]

And Make Sure You Check the Portal!

Just as agencies must use FedBizOpps.gov to publicize solicitations, so must potential contractors check the Web site if they want to compete for government contracts. In two separate decisions, the GAO imposed an affirmative duty on contractors to check the Internet for solicitation information posted by the government.[416]

In *Performance Construction, Inc.*,[417] the Navy issued a RFP for the renovation of family housing facilities at a base in Washington.[418] The Navy issued the RFP on the Internet and advised potential offerors that the solicitation, amendments, plans, and

406. *Id*.

407. *Id*. at *6.

408. *Id*. (citation omitted).

409. *Id*. at *7.

410. *Id*.

411. *Pacific Island Movers*, 2001 U.S. Comp. Gen. LEXIS 110, at *9.

412. As in this case, agencies should clearly state this in the RFP.

413. Electronic Commerce in Federal Procurement, 66 Fed. Reg. 27,407 (May 16, 2001) (to be codified at 48 C.F.R. pts. 2, 4-7, 9, 12-14, 19, 22, 34-36); *see* Major John Siemietkowski, *Open Sesame! FedBizOpps.gov Named Sole Procurement Entry Point*, ARMY LAW., Aug. 2001, at 19; *see also 2000 Year in Review, supra* note 2, at 28.

414. Electronic Commerce in Federal Procurement, 66 Fed. Reg. 27,409 (May 16, 2001) (to be codified at 48 C.F.R. § 2.101).

415. *Id*. at 47,408.

416. *See* Performance Construction, Inc., Comp. Gen. B-286192, Oct. 30, 2000, 2000 CPD ¶ 180; Wilcox Industries Corp, Comp. Gen. B-287392, Apr. 12, 2001, 2001 CPD ¶ 61.

417. Comp. Gen. B-286192, Oct. 30, 2000, 2000 CPD ¶ 180.

specifications would be available only on the Internet.[419] The RFP also cautioned that "it was the offeror's responsibility to check the website daily for amendments or other notices."[420] Performance Construction, Inc. (Performance), submitted its proposal late, and the Navy rejected it.[421]

Performance protested to the GAO, claiming that the solicitation Web site was inaccessible on the proposal closing date, thus thwarting Performance's ability to obtain an amendment, modify its proposal, and submit that proposal on time. Performance argued that the Navy should have extended its closing date after learning that Performance was having trouble accessing the site.[422] The Navy, in turn, provided evidence that the web site was accessible during the period in question.[423]

The GAO, relying largely on the Navy's technical evidence, rejected Performance's argument.[424] Stating that "[p]rospective offerors have an affirmative duty to make every reasonable effort to obtain solicitation materials," the GAO criticized Performance for not registering with the solicitation's Web site so it would receive e-mail notices of amendments.[425] The GAO further criticized Performance for not checking the Web site for notice of amendments.[426] In effect, the GAO found that an Internet solicitation, including its amendments, was sufficient to make the procurement opportunity available to all potential offerors.

The GAO reached a similar conclusion in *Wilcox Industries*.[427] In *Wilcox*, the Army's Communications-Electronic Command (CECOM) posted a solicitation for "aiming lights" on the on-line version of the *CBD* (CBDNet).[428] The RFP announced that the solicitation and all related documents would be available on a special Web site.[429] Wilcox Industries (Wilcox) apparently never accessed that Web site, never downloaded the solicitation, and never submitted a proposal in response to the RFP.[430] Wilcox then protested that CECOM should have posted the solicitation in the paper copy of the CBD.[431]

As in *Performance Construction*, the GAO disagreed with the protestor. Reasoning that "prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents," the GAO found that CECOM used reasonable methods to disseminate the necessary solicitation information.[432] The GAO criticized Wilcox for never checking the Web site to "keep current on the status of the procurement."[433] The GAO also rejected Wilcox's argument that CECOM should have notified Wilcox of the RFP because it was allegedly on a bidder's list. The GAO reasoned that, even if Wilcox was on a bidder's list, that did not excuse the contractor from availing itself "of every opportunity to obtain the solicitation."[434] Like in *Performance Construction*, the bottom line for the losing protestor was: *Check the solicitation Web site*!

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418. *Id.* at 1.

419. *Id.* at 1-2.

420. *Id.* at 2.

421. *Id.* The Navy received seven other timely proposals. *Id.*

422. *Id.* Performance also contended that it had told the Navy's contract specialist that it could not access the site. *Id.*

423. *Id.* at 3.

424. *Id.*

425. *Id.* (citation omitted).

426. *Id.*

427. Comp. Gen. B-287392, Apr. 12, 2001, 2001 CPD ¶ 61.

428. *Id.* at 1-2.

429. *Id.* at 2.

430. *Id.* at 3. At least Performance Construction claimed that it had tried to access the agency Web site; Wilcox never even tried.

431. *Id.* at 1.

432. *Id.* at 3.

433. *Id.*

434. *Id.* at 4.

Legislators Introduce E-Government Act of 2001

On 1 May 2001, Senator Lieberman introduced the E-Government Act of 2001 in the Senate.[435] On 11 July 2001, Representative Turner introduced the same bill in the House of Representatives.[436] The bill would create a Chief Information Officer within the Office of Management and Budget (OMB).[437] The bill also attempts to enhance citizen access to government information and services by requiring agency use of Internet-based information technology in a wide variety of areas.[438] Legislators are currently considering the bill in their respective chamber committees.[439]

Commercial Items

No More Identity Crisis

Last year,[440] we wrote about the FAR Council's proposal to expand the definition of "commercial item."[441] On 22 October 2001, the FAR Council published its final rule implementing the new definition.[442] The final rule defines a commercial item as "[a]ny item . . . that is of a type customarily used *by the general public or by non-governmental entities* for purposes other than governmental purposes."[443] "Purposes other than governmental purposes" means "those that are not unique to a government."[444] The new definition also clarifies that services ancillary to a commercial item, such as installation, maintenance, repair, training, and other support services, are considered a commercial service, regardless of whether the service is provided by the same vendor or at the same time as the item, if the service is provided contemporaneously to the general public under similar terms and conditions.[445]

Are You My Type?

Along with clarifying the definition of a "commercial item," the FAR Council is also trying to clarify what contract types are authorized for commercial item acquisitions. On 29 December 2000, the FAR Council published a proposed rule that specifies what contract types agencies may use when buying commercial items.[446] Adding a new section to FAR part 12.207, the proposed rule requires agencies to use, "to the maximum extent practicable, firm-fixed price contracts or fixed-priced contracts with economic price adjustment for the acquisition of commercial items."[447] The proposed rule continues, "These contract types may be used in conjunction with an award fee incentive and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost."[448] Regarding indefinite-delivery contracts, agencies may use them "when the task or delivery orders are issued under one of the authorized contract types in [FAR 12.207-1(a)]."[449] The proposed

435. S. 803, 107th Cong. (2001).

436. H.R. 2458, 107th Cong. (2001).

437. S. 803, 107th Cong., § 101 (2001).

438. *Id.* §§ 201-220.

439. *See* U.S. Library of Congress, *Bill Summary & Status for the 107th Congress, at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s.00803 (last visited Oct. 15, 2001).

440. *2000 Year in Review*, *supra* note 2, at 27-28.

441. Acquisition of Commercial Items, 65 Fed. Reg. 52,284 (Aug. 28, 2000) (to be codified at 48 C.F.R. pts. 2, 12, 46, 52) (amending FAR, *supra* note 11, § 2.101).

442. Acquisition of Commercial Items, 66 Fed. Reg. 53,477 (Oct. 22, 2001) (to be codified at 48 C.F.R. pts. 2, 12, 46, 52) (amending FAR, *supra* note 11, at §§ 2.101, 12.102).

443. *Id.* at *17 (italics indicating amended portion).

444. *Id.* at *18.

445. *Id.* at *16.

446. Federal Acquisition Regulation; Contract Types for Commercial Item Acquisitions, 65 Fed. Fed. 83,292 (Dec. 29, 2000) (to be codified at 48 C.F.R. pts. 12 and 16).

447. *Id.*

448. *Id.*

449. *Id.*

rule also prohibits "cost-type contracts or contracts with incentives based on cost."[450]

The proposed rule also addresses commercial *services* "available on a time-and-material or labor-hour basis."[451] When acquiring these type of commercial services, the government may use an "indefinite-delivery contract with established fixed hourly rates that permit negotiating orders (including any required material)" or "[s]equential contract actions that acquire the requirement in modular components."[452]

The DOD has approved this draft rule for publication as a final rule, but has not yet sent it to OMB's Office of Information and Regulatory Affairs.[453]

Help Is on the Way!

For those still confused about the role of commercial item acquisitions in the DOD's procurement program, the DOD has published a *Commercial Item Handbook*. Published in November 2001, readers may view the draft document on the Internet.[454]

GAO Criticizes the Test Program

Under the Commercial Item Test Program, the government may use simplified acquisition procedures to buy commercial items not exceeding $5 million.[455] Congress did extend it, as discussed in the Legislation Appendix to this article. In a report issued on 20 April 2001, the GAO criticized the effectiveness of the test program, stating that it may not be as effective as it could be.[456] In preparing its report, the GAO reviewed twelve commercial item contracts that used the test program.[457] Broadly speaking, the GAO's major concern was that agencies did not track the alleged efficiencies gained under the test program. Specifically, the report notes that agencies had not quantitatively measured "the extent to which (1) time required to award contracts was reduced, (2) administrative costs were reduced, (3) prices reflected the best value, (4) small business participation was promoted, or (5) delivery of products and services was improved."[458] The GAO also expressed a concern "about whether federal agencies were determining that prices paid were fair and reasonable for contracts awarded on a sole-source basis."[459] The GAO's conclusion urged Congress to extend the test program until 2005. The GAO also recommended that the Administrator of the OFPP develop a method for demonstrating the efficiencies of the test program during the extended period.[460]

Multiple Award Schedules

Not normally the subject of policy memoranda and reported decisions, the GSA's MAS program[461] received much attention during the past year.

Competition Among MAS Vendors?

Because orders placed against a MAS contract satisfy full and open competition,[462] "ordering agencies need not seek further competition, synopsize the requirement, make a separate

450. *Id*.

451. *Id*.

452. *Id*.

453. *See Open DFARS Cases*, *supra* note 383.

454. Office of the Deputy Under Secretary of Defense for Acquisition Reform, *Commercial Item Handbook* (November 2001), *at* http://www.acq.osd.mil/ar/doc/cihandbook.pdf.

455. FAR, *supra* note 11, § 13.500(a). Normally, the simplified acquisition limit is $100,000. *Id*. § 2.101.

456. General Accounting Office, Contract Management: Benefits of Simplified Acquisition Test Procedures Not Clearly Demonstrated, Report No. GAO-01-517 (Apr. 20, 2001).

457. *Id*. at 2.

458. *Id*. at 6.

459. *Id*.

460. *Id*.

461. FAR, *supra* note 11, pt. 8.4. The MAS is also called the Federal Supply Schedule (FSS). General Accounting Office, Report to Chairman and Ranking Minority Member, Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate, Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule, Report No. GAO-01-125, at 3 (Nov. 28, 2000) [hereinafter GAO MAS Report].

462. FAR, *supra* note 11, § 8.404(a).

determination of fair and reasonable pricing, or consider small business programs" when buying off a schedule contract.[463] Although this language seemingly eliminates the need for further competition, the FAR nonetheless requires some minimal competition among MAS vendors depending on the dollar value of the acquisition. Centered on "maximum order thresholds" (based on bulk buying), such minimal competition requires the government to compare catalogs and pricelists among schedule vendors, and sometimes negotiate price reductions with those vendors.[464]

According to the GAO, many DOD procurement officials are not aware of this requirement for minimal competition among MAS vendors. In a report released on 20 November 2000, the GAO stated that "[m]ost DOD contracting officers . . . did not follow GSA's established procedures intended to ensure fair and reasonable prices when using the Federal Supply Schedule [FSS]."[465] The report shows that seventeen out of twenty-two orders that the GAO examined "were placed without seeking competitive quotes from multiple contractors."[466] Complaining that contracting officers often limited their comparison to competing labor rates, the GAO explained that

> [r]elying on labor rates alone does not offer an agency a good basis for deciding which contractor is the most competitive since it does not reflect the full cost of the order or even critical aspects of the service being provided, such as the number of hours and mix of labor skill categories needed to complete the work.[467]

The GAO stated, however, that the "key reason that established procedures were not followed is that many contracting officers were not even aware of GSA's requirement to seek competitive quotes."[468] The GAO warned that failure to follow the competitive quotes requirement will cause the DOD to undermine significantly "its ability to ensure that it is getting the best . . . services at the best prices."[469]

To help correct these problems, the GAO recommended that the Administrator of the OFPP begin the process of revising the FAR to clarify the requirement to seek competitive quotes when buying off a MAS contract.[470] This recommendation, and indeed the entire report in general, should prompt DOD procurement officials to remember that minimal competition requirements exist even when buying off a schedule contract. Alternatively, the OFPP could ease some this confusion by eliminating these competition requirements. If the GSA "has already determined the prices of items under schedule contracts to be fair and reasonable,"[471] then ordering offices should not have to conduct further competition. Such further competition seems to contradict the schedule's intent of creating a "simplified process" [472] for obtaining commercial goods and services.

Give Credit Where Credit Is Due

The federal government encourages its agencies to award contracts to small, disadvantaged businesses.[473] According to a memo released by the OFPP on 2 October 2000, agencies may count MAS orders with 8(a) vendors against their 8(a) procurement goals.[474] Agencies may only count MAS orders against their 8(a) goals, however, if the vendor is designated as an 8(a) vendor on the schedule.[475] This program is a bonus for agencies because it allows them to satisfy the requirement to buy off the schedule,[476] while at the same time satisfying the small business requirement.[477]

463. *Id*.

464. *Id*. § 8.404(b)(1)-(3).

465. GAO MAS REPORT, *supra* note 461, at 4. Although the GAO report focused on information technology, the GAO conclusions apply to all MAS acquisitions. *See id*.

466. *Id*.

467. *Id*.

468. *Id*.

469. *Id*.

470. *Id*. at 10.

471. FAR, *supra* note 11, § 8.404(a).

472. *Id*. § 8.401(a).

473. 15 U.S.C. § 637(a) (2000); FAR, *supra* note 11, pt. 19.8.

474. Memorandum, Deputy Administrator (Acting) Office of Federal Procurement Policy and Acting Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, Small Business Administration, to Agency Senior Procurement Executives and the Deputy Under Secretary of Defense (Acquisition Reform), subject: 8(a) Credit for Multiple Award Schedule (MAS) Orders (2 Oct. 2000) (citing Memorandum of Understanding, U.S. Small Business Administration and the General Services Administration, subject: Multiple Award Schedule Program (7 June 2000)).

Should the MAS Program Expand Its Customer Base?

The MAS program is designed for use by federal agencies.[478] This past summer, however, Congressman Tom Davis of Virginia expressed an interest in opening up schedule contracts for technology products and services to state and local governments.[479] Congressman Davis believes that state and local governments ought to take advantage of the same "cooperative purchasing" that federal agencies enjoy.[480] Congress has not yet introduced any follow-on legislation.

A Negotiated-Procedures MAS Acquisition May Grant COFC Jurisdiction

Although negotiation-type procedures will not necessarily turn a MAS acquisition into a negotiated procurement,[481] use of such procedures may grant protest jurisdiction to the COFC. In *Labat-Anderson v. United States*,[482] the Immigration and Naturalization Service (INS) conducted "a competitive source selection process aimed at selecting a single offeror already holding a GSA FSS contract."[483] The losing bidder filed a GAO protest of the INS award to its competitor, and then appealed an adverse GAO decision to the COFC.[484] The awardee moved to dismiss the losing bidder's appeal, arguing that the court lacked jurisdiction because the Tucker Act[485] and the FASA[486] barred jurisdiction over an FSS dispute such as this one.[487] The court disagreed, holding that using negotiation procedures in a contract award to a MAS vendor may grant an unsuccessful bidder jurisdiction to challenge the award.[488]

I Didn't Really Mean That Protest . . .

As *Labat* demonstrates, the government must not inadvertently turn a MAS buy into a full-blown negotiated procurement. What happens, though, when the government *wants* to turn a MAS buy into a negotiated procurement, and a MAS vendor resists such a move? In *In re Cox & Associates*,[489] Cox & Associates (Cox) protested the Air Force's solicitation among MAS vendors for the acquisition of a budget information system. As a result of Cox's protest, the Air Force determined that the product it sought was too complicated for a MAS solicitation. It therefore decided to resolicit the requirement as a full and open competition under FAR part 15. Cox protested again because such a procurement would likely take much more time than a MAS procurement.[490]

The GAO denied the protest, stating that agencies have broad discretion to determine the best contracting device for meeting their procurement needs.[491] In words that must have had Cox kicking itself, the GAO added, "Given the scope and complexity of the services being acquired, we are unable to say that the agency acted unreasonably in concluding that more formal acquisition procedures should be used to ensure that the Air Force receives best value in obtaining these services."[492]

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475. *Id.* at 2.

476. *See* FAR, *supra* note 11, § 8.001(a)(1)(vi).

477. *See* 15 U.S.C. § 637(a) (2000).

478. FAR, *supra* note 11, § 8.401(a).

479. Shane Harris, *Lawmaker Seeks to Open GSA Schedules to States, Localities*, GovExec.com (July 25, 2001), *at* http://www.govexec.com/dailyfed/0701/072501h1.htm.

480. *Id.* The idea is that state and local governments could also benefit from the efficiencies and bulk discounts currently available to federal agencies. *See id.*

481. Ellsworth Assocs., Inc. v. United States, 45 Fed. Cl. 388, 391 (1999); *see 2000 Year in Review*, *supra* note 2, at 26.

482. No. 01-350C, 2001 U.S. Claims LEXIS 139 (July 27, 2001). For further discussion of this case, see *infra* notes 646-49 and accompanying text.

483. *Labat-Anderson*, 2001 U.S. Claims LEXIS 139, at *15.

484. *Id.* at *10-11.

485. 28 U.S.C. § 1491(b) (2000).

486. 41 U.S.C. § 253j(d) (2000).

487. *Labat-Anderson*, 2001 U.S. Claims LEXIS 139, at *13.

488. *Id.* at *15.

489. Comp. Gen. B-287272.2, B-287272.3, June 7, 2001, 2001 CPD ¶ 102.

490. *Id.* at 2-4.

491. *Id.*

Small Business

Adarand: *Maybe Gone, but Not Forgotten*

On 10 August 2001, the Office of the Solicitor General (OSG) filed a brief with the Supreme Court, arguing that the Department of Transportation's (DOT) disadvantaged business enterprise program is constitutional under the "strict scrutiny" standard.[493] The brief signals the beginning of the end for what has been a long-standing dispute challenging the constitutionality of provisions of DOT's Disadvantaged Business Enterprise (DBE) Program. Oral argument was heard on 31 October 2001. To provide context for a discussion of the OSG brief, a review of *Adarand's* history is necessary.

The dispute began with the Federal Highway Administration's (FHWA) use of a subcontracting compensation clause (SCC) in federal contracting to implement the DBE provisions of the Small Business Act.[494] The SCC provided a financial advantage to prime contractors that hired subcontractors who qualify as DBEs.[495] At the time of the award of the prime contract for a highway construction project in Colorado, use of the SCC was mandatory in federal contracts.[496] Federal law also required that SCCs impose an obligation on contractors to presume individuals of certain races or ethnic backgrounds were socially and economically disadvantaged and were therefore qualified as DBEs.[497]

The prime contractor awarded the subcontract for the guardrail portion of the contract to a DBE, Gonzalez Construction Company. Adarand Constructors (Adarand), a non-DBE subcontractor at that time, filed suit claiming that the presumption that certain groups were socially and economically disadvantaged discriminates on the basis of race in violation of the equal protection component of the Fifth Amendment's Due Process Clause.[498] The district court did not focus specifically on the SCC. Nonetheless, applying an intermediate standard of review, it granted the government's motion for summary judgment and upheld the constitutional challenge to the "DBE program as administered by the [Central Federal Lands Highway Division] within Colorado."[499] The Court of Appeals for the Tenth Circuit affirmed.[500]

In 1995, the Supreme Court, in *Adarand Constructors, Inc. v. Pena* (*Adarand I*),[501] set aside the Tenth Circuit's decision and directed the lower courts to apply a "strict scrutiny" standard when evaluating federal statutes that use race-based classifications.[502] In effect, the Supreme Court elevated Fifth Amendment equal protection scrutiny of federal race-based legislation to the same level as Fourteenth Amendment equal protection state race-based legislation.[503]

On remand, the district court held that even though the government had shown a compelling interest in ending discrimination in federal highway construction contracts, the SCC was not

492. *Id* at 3.

493. Brief for Respondent, Adarand Constructors, Inc. v. Mineta, No. 00-730, 2000 U.S. Brief 730 (S. Ct. Aug. 10, 2001) (LEXIS, Fed-U.S., S. Ct. Cases & Materials, S. Ct. Briefs) [hereinafter 2000 U.S. Brief 730].

494. 15 U.S.C. § 631 (2000). The programs dealing primarily with assisting small disadvantaged business are commonly referred to as "Section 8" programs. The Small Business Act specifically authorized federal agencies to provide incentives to contractors to encourage subcontracting with small business concerns owned and controlled by socially and economically disadvantaged individuals. *Id.* § 637(d)(4)(E). *See also* FAR, *supra* note 11, § 19.000.

495. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 209 (1995) [hereinafter *Adarand I*]. The pertinent provisions of the SCC are:

> The Contractor will be paid an amount computed as follows:
>
> 1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> 2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Id.

496. *Id.* at 205.

497. *Id*. (referring to the provisions in 15 U.S.C. § 637(d)(2)-(3)).

498. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992).

499. *Id.* at 244-45.

500. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1539 (10th Cir. 1994) (holding the SCC program constitutional "because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small Disadvantaged Business Enterprises").

501. 515 U.S. 200 (1995).

502. *Id*. at 227. *See generally* Major Timothy J. Pendolino et al., *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 36 (discussing *Adarand I* decision).

narrowly tailored to meet this compelling interest.[504] Adarand's self-certification as a DBE provided a distraction on the issues of "mootness" and "standing," for both the Tenth Circuit[505] and the Supreme Court.[506] Eventually, however, the case returned to the Tenth Circuit for a decision regarding the constitutionality of the DBE program.

In September 2000, the Tenth Circuit reversed the district court's decision, holding that the current SCC and DBE programs were constitutional under the strict scrutiny standard.[507] On 26 March 2001, the Supreme Court granted certiorari, and on 13 April 2001, limited the grant to the following two questions:

> 1. Whether the court of appeals misapplied the strict scrutiny standard in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination; and
>
> 2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.[508]

The OSG's brief begins by questioning Adarand's standing in the dispute because it "alleges no specific injury from DOT's current regulations."[509] The OSG observes that this may be so because the DOT does not use any race-conscious criteria or factors in federal procurement decisions in any jurisdiction in which Adarand conducts business. The OSG also argues that Adarand should be barred from challenging certain provisions of the Small Business Act program because it did not do so earlier.[510]

The OSG posits that the "compelling interest" promoted by the DOT's DBE program is "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[511] The allegation that the Government relied on insufficient and unreliable data to justify the need for the DBE program is rebutted by the OSG's observation that Congress authorized the DBE program only after race-neutral efforts to improve access to capital and ease bonding requirements had proven inadequate.[512]

Notwithstanding constitutional concerns with DOT's original DBE program, the OSG argues that the DOT's February 1999 DBE revisions[513] are designed to address some of the concerns mentioned in the Supreme Court's *Adarand I* decision. The OSG notes that the revisions target individuals who have suffered discrimination, regardless of race, because it uses the same race neutral definitions of "socially disadvantaged" and "economically disadvantaged" as the SBA.[514]

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503. The Court overruled its earlier decision in Metro Broad. v. Fed'l Communications Comm'n, 497 U.S. 547 (1990) (applying an intermediate standard of scrutiny to two race-based policies of the Federal Communications Commission).

504. Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556 (D. Colo. 1997). *See generally* Major David A. Wallace et al., *Contract Law Developments of 1997—The Year in Review*, ARMY LAW., Jan. 1998, at 41-42 (discussing the district court's application of the strict scrutiny standard).

505. *See* Adarand Constructors, Inc. v. Slater, 169 F.3d 1292, 1295 (10th Cir. 1999) (vacating the district court's decision because Adarand could no longer "assert a cognizable constitutional injury" because Adarand now held DBE status and was entitled to the benefits being challenged). *See generally* Major Mary E. Harney et al., *Contract and Fiscal Law Developments of 1999—The Year in Review*, ARMY LAW., Jan. 2000 [hereinafter *1999 Year in Review*], at 39-40 (discussing the Tenth Circuit's holding).

506. *See* Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) (reversing the Tenth Circuit's decision and returning the case to the Tenth Circuit). *See generally 2000 Year in Review, supra* note 2, at 30 n.301 (discussing the Supreme Court's conclusion that the Tenth Circuit had confused "mootness" with "standing").

507. Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (noting that several changes made to the SCC and DBE since the suit was first filed made those provisions sufficiently narrowly tailored). *See generally 2000 Year in Review, supra* note 2, at 30 (discussing the Tenth Circuit's decision).

508. 2000 U.S. Brief 730, *supra* note 493, at *I. The focus is on the DBE and not the SCC program because the DOT has discontinued the SCC program. *Id*. at *20 n.3.

509. *Id*. at *17.

510. *Id*. at *21-22 (specifically referring to the [federal] government-wide "goal setting" and "goal achievement mechanisms" implemented under the Small Business Act as provisions that Adarand should be barred from challenging.) *See* 15 U.S.C. § 637 (d)(4)-(6) (2000). The Supreme Court ultimately agreed with the OSG on these points, and on 27 November 2001, dismissed the writ of certiorari as improvidently granted. *See* Adarand Constructors, Inc. v. Mineta, 122 S. Ct. 511 (2001).

511. 2000 U.S. Brief 730, *supra* note 486, at *24 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (O' Connor, J., plurality)). *Croson* involved a determination that thirty of all city contracting work should go to minority-owned businesses. The Court held that the single standard of review for racial classifications under the Fourteenth Amendment's Equal Protection Clause should be "strict scrutiny." *Croson*, 488 U.S. at 493-94. The Court concluded that the city had no "strong basis in evidence for its conclusion that remedial action was necessary" and that the program was not "narrowly tailored to remedy the effects of prior discrimination." *Id*. at 500, 508.

512. 2000 U.S. Brief 730, *supra* note 493, at *24-32 (citing numerous studies and testimony before Congress).

513. *See* 49 C.F.R. § 26 (2000) (current DOT regulations implementing the DBE program).

The OSG highlights provisions preventing a penalty for failure to meet annual goals, the prohibition against inflexible quotas, and the waiver provisions as factors that make flexibility the "hallmark of the DBE program."[515] The OSG concludes that the DBE program is "designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible."[516]

Predicting how the Court would have decided the latest *Adarand* case, *Adarand Constructors, Inc. v. Mineta* (*Adarand III*),[517] is nearly impossible because the Court admitted that the decision in *Adarand I* to heighten scrutiny "alters the playing field in some respects."[518] On the other hand, the concurring and dissenting opinions of *Adarand I* may provide some insight into how the Court will react to the current DBE regulations and their application to federal and state highway projects.[519] The decision does little to dismiss previous concerns about decreasing SDB participation.[520] With no Supreme Court decision expected anytime soon, we leave you with the familiar national pastime lament: "Wait till next year!"[521]

Post Adarand I *Regulations—Are We Narrowly Tailored Yet?*

Two years after responding to *Adarand I* with a revamped DBE program, the DOT has issued a Notice of Proposed Rulemaking (NPRM) with more changes.[522] The proposed rules would no longer require DBE applicants to submit tax returns to prove that their net worth does not exceed the DBE personal net worth cap of $750,000.[523] Furthermore, the DOT proposes adding provisions making it more likely that prime contractors will timely pay retainage to subcontractors.[524] The NPRM also requested comment on the provision of the DBE program that allows a firm to remain certified as a DBE if it meets the size standard for one or more of its activities, but exceeds the size standard for another type of work.[525]

Another change is to the provision regarding proof of ethnicity for DBE applicants. Under the NPRM, DBE applicants must "obtain a signed, notarized statement of group membership from all persons who claim to own and control a firm applying for DBE certification and whose ownership and control are relied upon for a DBE certification."[526] The NPRM is clear that even in situations where additional documentation is needed because of a doubtful self-certification, "care should be

514. *See* 15 U.S.C. § 637(a)(5) (defining "socially disadvantaged" as those individuals "subjected to racial or ethnic prejudice or cultural bias because of [their] identity as a member of a group without regard to individual qualities"). *See also* 15 U.S.C. § 637(a)(6)(A) (defining "economically disadvantaged" individuals as those who have an impaired "ability to compete in the free enterprise system . . . due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged").

515. 2000 U.S. Brief 730, *supra* note 493, at *45 (citing 49 C.F.R. §§ 26.47, 26.43, 26.15).

516. *Id*. at *50.

517. 2000 U.S. Brief 730, *supra* note 493.

518. *Adarand I*, 515 U.S. at 237 (adding that "we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced"). *Id*.

519. *Adarand I* was a 5-4 decision. Three members of the majority (O'Connor, J., (who wrote the opinion); Rehnquist, C.J.; and Kennedy, J.) seem to agree that the federal government may have a compelling interest to enact race-based legislation although it is unclear how narrowly tailored the legislation has to be to remedy current and lingering effects of racial discrimination. Justices Scalia and Thomas, both of whom concurred in part and concurred in the judgment, held to their views that the government can never have a compelling interest to mandate race-based classifications. The four dissenters (Stevens, J.; Souter, J.; Ginsberg, J.; and Breyer, J.) all would have reaffirmed the intermediate scrutiny standard of review for federal affirmative action measures.

520. *See generally* Matthew Weinstock, *Agencies Get Low Grades for Small Business Contracting*, GOV'T EXECUTIVE MAG., Sept. 7, 2001 (discussing Representative Nydia Velaquez' (D-NY) concern with a decrease in contract dollars awarded to SDBs and Women Owned Small Businesses (WOSBs)).

521. The author, an admitted fanatic New York baseball fan, finds the lament apropos because it is most closely associated with the plight of the Brooklyn Dodgers, who several times throughout the 1940s and 1950s were stifled in their attempt to reach and win the World Series. It was the Dodgers who ended a discriminatory practice in our national pastime by breaking the racial barrier in Major League Baseball with the signing of Jackie Robinson, an African-American.

522. Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs; Memorandum of Understanding With the Small Business Administration; Uniform Forms and Other Revisions, 66 Fed. Reg. 23,308 (May 8, 2001) (amending 49 C.F.R. pt. 26 (1999)).

523. *Id*. at 23,210-11 (allowing instead for a notarized statement from a CPA who has reviewed the applicant's financial records).

524. *Id*. at 23,211. Subcontractors have complained that "they may finish all their work months or years before the end of the project the prime contractor is working, but the prime contractor does not pay them fully until after the recipient [agency] has paid retainage to them at the end of the project." *Id*. *See also* FAR, *supra* note 11, § 32.103 (describing "retainage" as allowing the withholding of no more than ten percent of a progress payment in a construction contract "[w]hen satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made").

525. *Id*. (citing the rule at 49 C.F.R. § 26.65(a)).

526. *Id*. (referring to "groups" benefiting from the rebuttable presumption of social and economic disadvantage as outlined in 49 C.F.R. § 26.67(a)).

taken to ensure that particular ethnic group members are not forced to meet a higher level of proof than members of other groups."[527]

Another Fifth Amendment Case: CAFC Remands to District Court with Instructions to Walk the "Adarand" Walk

Adarand does not stand alone as the major Fifth Amendment challenge to the federal government's Small Disadvantaged Business (SDB) program. In *Rothe Development Corp. v. U.S. Department of Defense*,[528] the CAFC vacated a district court decision in a suit challenging the constitutionality of section 1207 (the 1207 program) of the National Defense Authorization Act (NDAA) of 1987.[529] The 1207 program provision at issue authorizes the DOD to raise the bids of non-SDBs by ten percent (for evaluation purposes) to attain the five percent contracting goal.[530]

Rothe Development Corp. (Rothe) was the low bidder on a DOD contract to operate and maintain the network control center and the switchboard operations functions at Columbus Air Force Base in Mississippi. Under the statutory preference authorized by the 1207 program, the DOD increased all non-SDB bids by ten percent. All of the parties agreed that as a result of the price evaluation, the contract was awarded to International Computer and Telecommunication (ICT), a Korean-American owned business.[531]

Rothe alleged that the application of the 1207 program violated its right to equal protection under the Fifth Amendment. The DOD responded that the preference satisfies the strict scrutiny standard established in *Adarand I*.[532] The district court agreed with the DOD, concluding "that a thorough examination of the statutory scheme at issue and its application . . . reveals no illegitimate purpose, no racial prejudice, and no racial stereotyping. Rather . . . [it] is designed to address a societal ill that has been identified by Congress on the basis of extensive evidence, and the program is narrowly tailored to that purpose."[533]

The CAFC disagreed with two elements of the district court's analysis. First, it took issue with the district court's willingness to temper strict scrutiny analysis by giving Congress deference "in articulating a compelling purpose . . . [and in showing] that its action is narrowly tailored to that purpose."[534] The CAFC rejected the notion of "lesser scrutiny," and ordered the district court to "undertake the same type of detailed, skeptical, non-deferential analysis taken by the *Croson* Court, but specifically to account for the factual differences between this program and that at issue in *Croson*."[535]

The CAFC also disagreed with the district court's "cursory analysis of the evidence before Congress at the time of the [1992] reauthorization of the 1207 program," in which it merely listed, but did not discuss pre-reauthorization studies.[536] The CAFC noted that the district court instead relied mostly on post-reauthorization evidence, specifically a 1998 *Benchmark Study* published by the Department of Commerce (DOC).[537] The CAFC concluded that the district court should have relied on pre-reauthorization evidence, stating "that the quantum of evidence that is ultimately necessary to uphold racial classifications must have actually been before the legislature at the time of enactment [of the 1207 program]."[538]

The CAFC set out several factors the district court must consider on remand.[539] The lower court's first step in the "compelling interest" analysis is to determine if the 1207 program is "remedial" in nature. If it is remedial, it must then determine if

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527. *Id*. at 23,212.

528. 2001 U.S. App. LEXIS 18751 (Aug. 20, 2001). The district court granted defendant DOD's motion for summary judgment and dismissed the case. *See* Rothe Dev. Corp. v. U.S. Dep't of Defense, 49 F. Supp. 2d 937, 954 (W.D. Tex. 1999). The appeal was transferred to the CAFC from the Court of Appeals for the Fifth Circuit. *See* Rothe Dev. Corp. v. U.S. Dep't of Defense, 194 F.3d 622 (5th Cir. 1999) (denying the government's motion to dismiss the appeal, but granting the government's motion for alternative relief by transferring the appeal to CAFC).

529. Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986) (codified at 10 U.S.C. § 2323 (2000)).

530. *See* FAR, *supra* note 11, pt. 19.11. The district court explained the statutory scheme as follows:

> Section 1207 of the NDAA (the 1207 Program) sets a statutory goal for DOD of 5 percent participation by socially and economically disadvantaged businesses. *See* 10 U.S.C. § 2323. The 1207 Program points to section 8(d) of the Small Business Act in order to define socially and economically disadvantaged businesses. *See* 10 U.S.C. § 2323 (a)(1)(A) and 15 U.S.C. § 637(d).

Rothe, 49 F. Supp. 2d at 941.

531. *Id*. (noting that "[t]he parties agree that Rothe lost the bid for the contract *only* as a result of the application of an [price] evaluation preference" (emphasis added)).

532. *Id*.

533. *Id*. at 948-49.

534. *Rothe*, 2001 U.S. App. LEXIS 18751, at *27 (quoting *Rothe*, 49 F. Supp. 2d at 949).

535. *Id*. at *31-32. For a brief discussion on *Croson*, see *supra* note 511.

the remedy is designed "to correct present discrimination or only to counter the lingering effects of past discrimination."[540] If the court determines that the 1207 program is designed to correct the lingering effects of past discrimination, it must then "make an assessment . . . whether the effects of past discrimination have attenuated over time, or if in determining the constitutionality of the 1207 program as applied, whether the lingering effects are still present or were present in 1998 when the 1207 program was applied to Rothe's and ICT's bids."[541] The CAFC also required the lower court to show "that Congress had before it some evidence of discrimination against Asian-Pacific Americans in general," although it did not require a showing of discrimination against sub-groups of racial classes, in this case Korean-Americans.[542]

The CAFC instructed the lower court to abandon its lesser scrutiny standard of review and to reassess "whether the 1207 program is narrowly tailored, both as reauthorized and as applied, under a non-deferential version of strict scrutiny."[543] First, it should investigate the efforts and results of race-neutral alternatives before the reauthorization of the 1207 program in 1992.[544] Second, the lower court must determine if there was any "pre-authorization evidence linking the numerical [five percent minority participation] goal with the appropriate [industry] pool."[545] Finally, the lower court "must strictly scrutinize whether the 1207 program was overinclusive by determining whether each of the five minority groups presumptively included in the 1207 program suffered from the lingering effects of discrimination so as to justify inclusion in a racial preference program extending to the defense industry."[546]

Although the controversy continues, the price evaluation adjustment in DOD contracts is on a respite.[547] *Rothe*, however, likely will follow *Adarand* to the Supreme Court regardless of the decisions by the district court and the CAFC or the reinstatement of the price evaluation adjustment. It is a high-profile case that challenges the DOD's ability to implement measures designed to encourage SDBs to compete for contracts. *Adarand III* may leave unanswered, or unclear, matters regarding the type and extent of evidence of racial discrimination needed to justify race-based classifications challenged under

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536. *Id*. at *32. Explaining the reauthorization process, the CAFC stated:

> The 1207 program was initially enacted as a three-year pilot program. In 1989, Congress extended the program from 1990 until 1993, with the hope that the "additional three years would provide the DOD, and the defense industry, with the opportunity to vigorously pursue the program's fundamental objective: to expand the participation of small disadvantaged business concerns . . . in the defense marketplace." . . . Despite the continuation of the program beyond its initial period of authorization, in the first five years of the program, the DOD did not meet the goal of increasing participation of SDBs to five percent of its total dollar amount allocated for contracts and subcontracts. As a result, in 1992, Congress *reauthorized* the program for seven more years, through fiscal year 2000. . . . In every year since the 1992 *reauthorization*, the DOD has met the five percent goal.

Id. at *6-7 (emphasis added).

537. *Id*. at *32. The *Benchmark Study* is an economic analysis of the federal government's contracts with SDBs in 100 markets. Based on its results, the DOC determined "that a price evaluation adjustment of ten percent [should] be employed" in fifty-nine different industries. *See* Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 [hereinafter Benchmark Study]. *See also* FAR, *supra* note 11, § 19.201(a). The solicitation at issue in *Rothe* involved one of those industries ("Business Services") selected for a price adjustment. *See* Benchmark Study, *supra* at 35,716.

538. *Rothe*, 2001 U.S. App. LEXIS 18751, at *50.

539. *Id*. at *53-66.

540. *Id*. at *54.

541. *Id*. at *54-55.

542. *Id*. at *57-58.

543. *Id*. at *60.

544. *Id*. at *61.

545. *Id*. at *63. It is noteworthy that the CAFC opined that the evidentiary record as presented by the district court might be insufficient even if the 1207 program was evaluated "under the more lenient standard of rational basis scrutiny." *Id*. at *40 n.17.

546. *Id*. at *63-64. The five groups are: Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent-Asian Americans. *See* 13 C.F.R. § 124.105(c)(1)(i) (1998). Effective 11 October 2000, SDB applicants from each group must submit a narrative statement of purported economic disadvantage. *See* FAR, *supra* note 11, § 19.703.

547. For the second consecutive year, the price evaluation adjustment for SDBs has been suspended for DOD procurements because the DOD exceeded its five percent goal for contract awards to SDBs. *See* 10 U.S.C. § 2323(e)(3)(B)(ii) (2000). The suspension applies to all solicitations from 24 February 2001 to 23 February 2002. *See* Memorandum, Deidre A. Lee, Director of Defense Procurement, to Directors of Defense Agencies et al., subject: Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (Jan. 25, 2001) (on file with author).

Fifth Amendment equal protection grounds.[548] That void may very well be left for *Rothe* to fill.

Contract Bundling—Protecting the Big Bullies or Just Good Business?

The interim rule implementing the bundling provisions of the Small Business Authorization Act became final on 26 July 2000.[549] The final rule clearly attempts to strike a balance between fiscal responsibility and encouraging small business participation. Yet concern persists over recent studies concluding that bundling causes more harm than benefit.

One such study released by the Small Business Administration (SBA) in November 2000 concluded that over the previous ten years, small businesses were awarded only nine percent of bundled contract dollars, whereas small firms received about twenty-three percent of unbundled contract dollars.[550] The study showed the following comparisons during fiscal year 1999: large contractors received 67% of all prime contract dollars and small businesses received 18.7% of all total prime contract dollars,[551] large contractors received 74% of all bundled prime contract dollars and small businesses received 15.7% of all bundled prime contracts dollars.[552] Another more recent study (the LMI study) focused on DOD procurements and concluded that the DOD should implement measures that would track the benefits of bundling, mitigate its adverse effects, and encourage contracts that maximize competition to counter bundling's long-term effects.[553]

Congress has not been reluctant to voice concerns from both sides of the aisle over bundling or to take the DOD to task over its willingness to consolidate contracts. Senator Kit Bond, the ranking Republican on the Senate Small Business Committee, described the LMI study as offering "little comfort for small contractors who have felt that the small business community is being denied a fair slice of the pie."[554] Another vocal opponent to bundling, Representative Nydia Vasquez, Democrat of New York, has introduced for the second consecutive year the Small Business Contract Equity Act,[555] a bill designed to prohibit bundling if agencies fail to meet small business participation goals. If a testy exchange between a member of the House Small Business Committee and the Director of Defense Procurement, Deidre Lee, is any indication, Representative Vasquez will not be alone in urging the bill's reintroduction during the next Congress.[556]

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548. *Rothe* poses an evidentiary challenge that may not be uncommon among financially successful SDBs. Rothe, a non-SDB, is a Texas corporation. ICT, a SDB with annual revenues of about $13 million, is a Maryland Corporation. The solicitation was offered from Oklahoma and the contract was to be performed in Mississippi. The district court has already characterized requiring findings of discrimination to a specific geographic region as unworkable, at least under these circumstances. *Rothe*, 49 F. Supp. 2d n.7.

549. See *2000 Year in Review*, *supra* note 2, at 31, for a discussion of the final rule.

550. U.S. SMALL BUSINESS ADMINISTRATION, THE IMPACT OF CONTRACT BUNDLING ON SMALL BUSINESS: FY 1992-FY 1999 (Sept. 12, 2000) [hereinafter SBA CONTRACT BUNDLING STUDY], *available at* http://www.sba.gov/advo/research/rs203tot.pdf. The study, commissioned by the SBA, was conducted by Eagle Eye Publishers. *See id*.

551. The 18.7% figure fails to meet President Clinton's 23% small business contracting goal set out in Executive Order 13,170. *See* 65 Fed. Reg. 60,828 (2000).

552. *See* SBA CONTRACT BUNDLING STUDY, *supra* note 550.

553. The study was conducted by a federally-funded research and development center, LMI, which "conceded that its six-month study on contract consolidation and the narrower universe of contracts qualifying as 'bundled' under the Small Business Reauthorization Act offered no definitive answers on the overall effect of those practices on small business participation in DOD work." The study also did "[not] reveal the true savings and benefits to DOD from consolidation." *See* 43 GOV'T CONTRACTOR 18, ¶ 189 (May 9, 2001).

554. *Id*. Senator Bond also sponsored a bill designed to increase the independence of the SBA's Office of Advocacy. *See* Independent Office of Advocacy Act, S. 395, 107th Cong. (2001). The bill comes on the heels of a GAO report revealing that the government failed to meet its goal of awarding five percent of all federal contracts to WOSBs. *See* 43 GOV'T CONTRACTOR 10, ¶ 109 (Mar. 14, 2001). *See also* GENERAL ACCOUNTING OFFICE, FEDERAL PROCUREMENT: TRENDS AND CHALLENGES IN CONTRACTING WITH WOMEN-OWNED SMALL BUSINESS, REPORT. NO. GAO-01-346 (Feb. 16, 2001). *See also* SBA CONTRACT BUNDLING STUDY, *supra* note 550 (concluding that only six of twenty-three federal agencies that award more than $100 million in prime contracts met the Government goal of providing five percent of prime contract dollars to WOSBs).

555. H.R. 1324, 107th Cong. (2001). See *2000 Year in Review*, *supra* note 2, at 32-33, for a discussion of related legislation offered by Representative Vasquez in the 106th Congress. This year's bill, like last year's, was never enacted. The last action related to House Bill 1324 appears to be on 17 April 2001, when the bill was referred to the House Subcommittee on Technology and Procurement Policy. For a status update, see U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/bss/d107query.html (last visited Oct. 15, 2001).

556. *See* Jason Peckenpaugh, *Small Business Committee Blasts Pentagon for Contract Bundling*, GOV'T EXECUTIVE MAG., June 21, 2001 [hereinafter Peckenpaugh], *available at* http://www.govexec.com/dailyfed/0601/062101p1.htm. Noting that the Pentagon fell short of its small business procurement goals despite employing 19,000 procurement officials, Representative Donald Manzullo (R-IL) responded, "Maybe we should have an oversight hearing on what these people are doing." Ms. Lee responded that the Pentagon's acquisition Corps has been downsized from 30,000 to 19,000 since the mid-1990s. *Id*. Ms. Lee also cited several statistics that showed an increase of awards to small businesses in FY 2000, and outlined several DOD initiatives designed to increase small business participation. Although defending the DOD's pursuit of bundling, Ms. Lee "pledged" to block bundling contracts if they failed to provide substantial benefits and would ensure "small business participation in bundled contracts at the sub-contract level." *See* 43 GOV'T CONTRACTOR 24, ¶ 254 (June 27, 2001).

GAO Rejects SBA's Complaints of "Hey, Not So FAST!"

The most high-profile bundling case decided by the GAO this year upheld a $7.4 billion solicitation for up to six IDIQ task order supply and support contracts.[557] The contract package, known as the Flexible Acquisition Sustainment Tool (FAST), covered unplanned weapons maintenance requirements for all Air Force managed weapons systems.[558] The solicitation advised all offerors, including small businesses, that they would be considered for one of the four unrestricted awards. After these selections, two previously unselected small businesses would be considered for award of up to two contracts reserved for small businesses. The SBA challenged the procurement as improperly bundled, first complaining to the contracting officer, and then to the HCA. Both rejected the SBA's request to unbundle the solicitation. The SBA filed its protest with the GAO, and Phoenix Scientific Corporation (Phoenix) intervened in the protest.[559]

The SBA and Phoenix argued that the solicitation "improperly bundled requirements in a manner that precluded maximum participation by small businesses," thereby violating the specific restrictions against bundling set forth in the Small Business Act.[560] The GAO disagreed, stating that the restrictions against bundling under the Small Business Act are not absolute if "measurably substantial benefits" are derived from the consolidation.[561] The GAO concluded that the FAST procurement did not fall under the Small Business Act's bundling restrictions because the "requirements here cannot be termed 'unsuitable for award to a small-business concern' under the Small Business Act."[562] The GAO viewed it significant that the Air Force had reserved at least two of the six anticipated awards for small businesses, and would permit those awardees to compete for future task orders. The GAO also noted that at least fifteen percent of the total value of all task orders would be awarded to small business prime contractors. The record also showed that other small businesses did not consider the solicitation "unsuitable" for small businesses as witnessed by their expressed interest and proposals to the Air Force on the FAST solicitation.[563]

The GAO next turned its attention to the pertinent bundling provisions in the CICA. In contrast to the "measurably substantial benefits" standard for justifying bundling under the Small Business Act, the CICA permits restrictive provisions and conditions only to the extent necessary "to satisfy the needs of the agency."[564] Under its CICA analysis, the GAO looked to both cost and non-cost benefits of the procurement. As for cost, the GAO found that although the agency met the threshold of saving at least ten percent of the cost of the requirements, these administrative savings would occur regardless of the contract vehicle. Other savings had more to do with its decision to solicit as a multiple-award contract than it did with its decision to bundle the contract.[565]

The GAO ultimately decided the non-cost benefits justified the bundling. Specifically, it recognized that the FAST program would improve aircraft and readiness despite more than fifty percent in staff reductions over the previous decade. The Air Force also explained that despite the reductions in personnel, there were increasing operational demands on an aging fleet of aircraft, and that the C-5 transport aircraft has more than 3000 parts with no known vendor. The GAO agreed that unforeseeable needs for these parts could be met quickly under the program.[566]

Although the GAO claimed that its decision would not preclude it from denying future challenges under the CICA bun-

557. Phoenix Scientific Corp., Comp. Gen. B-286817, Feb. 24, 2001, 2001 CPD ¶ 24.

558. *Id*. at 2. The Statement of Work (SOW) advises that the focus of FAST "is the sustainment of all Air Force managed weapon systems, support systems, subsystems, and components. This requirement includes services, modifications, spares, and repairs. FAST does not include Military Construction (MILCON), Civil Engineering, or Base Operating Support. In addition, FAST will not be used for new development programs." *Id*. at 3.

559. *Id*. at 4. Phoenix's status as an interested party was challenged by the Air Force. The Air Force argued that before the solicitation, Phoenix had received only one Air Force contract and had never held a contract as either a prime or sub-contractor on any Air Force weapon system falling within the disputed solicitation's SOW. The GAO eventually concluded that Phoenix was an interested party based on Phoenix documents showing its intention to participate in future Air Force procurements. *Id*. at 4 n.3. Considering Phoenix' previous track record, its owner's remark at a House Small Business Committee hearing that his company has been "devastated" by the FAST program is curious. *See* Peckenpaugh, *supra* note 556.

560. *Phoenix Scientific*, 2001 CPD ¶ 24 at 7-8.

561. *Id*. at 6. *See* 15 U.S.C. § 644(e)(2)(B) (2000) (listing the benefits).

562. *Phoenix Scientific*, 2001 CPD ¶ 24 at 7.

563. *Id*. at 9. One of the participants in the GAO hearing was an actual small business offeror, who testified that the GAO should not conclude the solicitation unsuitable for small business. This offeror, Modern Technologies Corporation, was eventually selected as one of three small businesses to be prime contractors for the FAST program. *See Air Force Announces Six FAST Contractors, Including Three Small Businesses*, BNA FED. CONT. REP. (July 24, 2001).

564. *See* 10 U.S.C. § 2305(a)(1) (2000).

565. *Phoenix Scientific*, 2001 CPD ¶ 24 at 11.

566. *Id*. at 12.

dling restrictions, the scope of the decision appears to be very broad.[567] The decision displeased members of Congress who have been fiercely opposed to bundling.[568] Whether or not that opposition will coalesce into passable legislation is yet to be seen.

Honing the HUBZone: New Rules and New Tools

There are several notable changes in the HUBZone Program[569] designed to ease eligibility rules and clarify the scope of the program.[570] The new rules added a subparagraph which states that the HUBZone Program does not apply to state and local governments. State and local governments that use similar programs are, however, allowed to use the "[l]ist of qualified HUBZone [small business concerns]" to identify qualified businesses.[571] The definition of "principle office" was changed for businesses in service and construction "primary industr[ies]" because their employees are dispersed at numerous job sites.[572] Qualified businesses are now allowed to have affiliates, and "non-manufacturers" are no longer required to demonstrate that they would provide products manufactured by HUBZone-certified businesses.[573] More rules are sure to follow, as the SBA has announced that it is changing rules designed to "end the confusion over the order between [HUBZone businesses and SDBs]."[574] In addition to the new rules, the SBA has revamped its electronic application process through the use of added help features and links.[575] The SBA believes that the added features "will shorten its decision-making process [from thirty to twenty days]" and "further its goal of certifying 4,000 small businesses as HUBZone companies by the end of the year."[576]

Labor Standards

Davis-Bacon Act

Supreme Court Upholds "Little Davis-Bacon Act" Provisions

Many states have passed prevailing wage laws applicable to state-financed construction projects that are very similar to the federal Davis-Bacon Act (DBA).[577] In *Lujan v. G&G Fire Sprinklers, Inc.*,[578] the Supreme Court upheld California's prevailing wage statute against a constitutional due process challenge. G&G Fire Sprinklers, Inc. (G&G), was a subcontractor on three California public works projects. The California Division of Labor Standards Enforcement (DLSE) determined that

567. *See, e.g.*, Jason Peckenpaugh, *Air Force Contract Bundling Effort Upheld*, GOV'T EXECUTIVE MAG., Feb. 26, 2001 (quoting J. Hatcher Graham, attorney for Phoenix, as stating, "This decision is an excellent roadmap for how to get around the bundling provisions of the [Small Business Act] and [CICA] rules. Every agency will start drafting their [acquisition proposals] based on the decision."), *available at* http://www.govexec.com/dailyfed/0201/022601p1.htm.

568. *See* 43 GOV'T CONTRACTOR 7, ¶ 79 (Feb. 21, 2001) (noting that Representatives Nydia Vasquez (D-NY) and Albert Wynn (D-MD) sent a letter to the GAO, urging it to recommend that the Air Force cancel the solicitation and divide it into smaller ones so that companies such as Phoenix could compete).

569. *See* 15 U.S.C. § 657(a) (2000). *See also* FAR, *supra* note 11, pt. 19.13. The purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns located in historically underused business zones in an effort to increase employment opportunities. *See* HUBZone Program, 66 Fed. Reg. 4643 (Jan. 18, 2001).

570. *See* HUBZone Program, 65 Fed. Reg. 58,963 (Oct. 3, 2000) (proposed amendments to 13 C.F.R. pt. 126). *See also* HUBZone Program, 66 Fed. Reg. 4643 (Jan. 18, 2001) (final rule amending 13 C.F.R. pt. 126). The final rule became effective on 20 February 2001. Although the proposed amendments included language that would specifically add the Departments of Commerce, Justice and State to the list of federal agencies subject to the HUBZone Act, the final rule excluded the language based on the comment that one provision already specifically lists the agencies subject to the Act and another provision "makes clear that after September 30, 2000, the HUBZone program applies to *all* federal agencies that hire one or more contracting officers." *Id*. at 4644. Retaining the old provision would clarify which agencies were subjected to the Act prior to 30 September 2000. *Id*.

571. *Id*. at 4645 (amending 13 C.F.R. § 126.101(c) (2001)).

572. *Id*. (amending 13 C.F.R. § 126.103).

573. *Id*. (revising 13 C.F.R. §§ 126.204, 126.206; amending § 126.601).

574. *See SBA Changing Rules to Clarify Parity Between HUBZone, 8(a) Program*, BNA FED. CONT. REP. (Aug. 21, 2001). A recent GAO report makes it likely that there will be proposed changes to another one of the SBA's programs designed to assist small businesses. The GAO report on the "Mentor/Protégé" Program concluded that the DOD lacks data to measure the success of the program and to determine if funds are needed to encourage major defense contractors to establish business relationships with SDBs. *See* GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: BENEFITS OF THE DOD MENTOR-PROTÉGÉ PROGRAM ARE NOT CONCLUSIVE, REPORT NO. GAO-01-767 (July 19, 2001).

575. *See* U.S. Small Business Administration, *Applying for HUBZone Certification*, HUBZone Empowerment Contracting Program, *at* https://eweb1.sba.gov/hubzone/internet/application/dsp_apps_home.cfm (last modified 19 Oct., 2001).

576. *See* 43 GOV'T CONTRACTOR 11, ¶ 119 (Mar. 21, 2001).

577. 40 U.S.C. §§ 276a to a-7 (2001).

578. 121 S. Ct. 1446 (2001).

G&G was not paying the prevailing wage required by California law to its employees working on these contracts and directed the relevant state agencies to withhold funds under all three contracts.[579] G&G filed suit against the DLSE and other state agencies and officials alleging that withholding of these funds without a hearing violated the Due Process Clause of the Fourteenth Amendment.[580]

Reversing a decision by a divided panel of the Court of Appeals for the Ninth Circuit,[581] the Court held that the provisions of California law entitling a contractor such as G&G to file suit to recover unpaid funds provided sufficient due process.[582] Significant to the Court's decision was its determination that G&G did not have a "present entitlement" to the withheld funds but only a claim that the funds were due it under the contract.[583] This case is important to federal practitioners because the withholding provisions of the Davis-Bacon Act are very similar to those in the California statute.[584] Therefore, this decision should foreclose any similar constitutional challenges to the withholding of funds for Davis-Bacon Act violations under federal contracts.

Helpers at Last?

After nearly twenty years of trying, the DOL has once again published a final rule attempting to define the place of "helpers" under the DBA wage classification scheme.[585] Following years of litigation and congressional action, the DOL essentially has codified its existing practice with respect to helpers. Under the final rule, wage determinations will include a distinct classification of "helper" when:

> (i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
>
> (ii) The use of such helpers is an established prevailing practice in the area; and
>
> (iii) The helper is not employed as a trainee in an informal training program. A "helper" classification will be added to wage determinations pursuant to § 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.[586]

Given the tortured history of this matter, it remains to be seen whether this final rule will survive intact. [587]

The DBA and Contract Options—FAR Coverage at Last!

On 9 December 1992, the DOL issued *All Agency Memorandum Number 157* (*AAM 157*) requiring the incorporation of a DBA wage determination at the exercise of each option to extend the term of a construction contract, or a contract that includes substantial and segregable construction work.[588] After a lengthy period of some controversy regarding the DOL's authority to issue *AAM 157*, the matter was resolved and the DOL published *AAM 157* in the *Federal Register* for public information.[589] On 22 October 2001, the FAR Council published a final rule containing FAR provisions implementing *AAM 157*.[590] Perhaps the most important feature of the final

579. *Id.* at 1448.

580. *Id.* at 1449.

581. *See* G&G Fire Sprinklers, Inc. v. Bradshaw, 204 F.3d 941 (9th Cir. 2000).

582. *Lujan*, 121 S. Ct. at 1450.

583. *Id.* at 1451.

584. *See* 40 U.S.C. § 276a (2001).

585. Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts, 65 Fed. Reg. 69,674 (Nov. 20, 2000) (to be codified at 29 C.F.R. pts. 1 and 5). The DOL first published a final rule attempting to deal with helpers in 1982. *See* Procedures for Predetermination of Wage Rates, 47 Fed. Reg. 23,644 (May 28, 1982). "Helpers" are defined as persons who "[h]elp [craft worker] by performing duties of lesser skill. Duties include using, supplying or holding materials or tools, and cleaning work area and equipment." 65 Fed. Reg. at 69,681.

586. *Id.* at 69,693.

587. For example, on 23 May 2001, Representative Charles W. Norwood (R-GA) introduced a bill (H.R. 1972) that would create a helper classification by statute. Representative Norwood's bill contains a much less restrictive definition of "helper" than that found in the DOL final rule. On 25 July 2001, the bill was referred to the Subcommittee on Workforce Protection of the House Committee on Education and the Workforce. To date, there has been no subsequent action on the bill in the House. *See* U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov (last visited Oct. 12, 2001).

588. *See* Guidance to All Government Contracting Agencies of the Federal Government and the District of Columbia Concerning Application of Davis-Bacon Wage Determinations to Contracts With Option Clauses, 63 Fed. Reg. 64,542 (Nov. 20, 1998).

589. *Id.*

rule is that it provides four alternative methods a contracting officer could use to adjust the contract price when exercising an option to extend the term of a construction contract:

> 1. No adjustment in contract price (because the option prices may include an amount to cover estimated increases);
>
> 2. Price adjustment based on a separately specified pricing method, such as application of a coefficient to[591] an annually published unit pricing book incorporated at option exercise;
>
> 3. A percentage price adjustment, based on a published economic indicator; and
>
> 4. A price adjustment based on a specific calculation to reflect the annual increase or decrease in wages and fringe benefits as a result of incorporation of the new wage determination.[592]

To accomplish these changes, the rule amends FAR 22.404-1 to clarify that both project and general wage determinations are effective for the life of a contract, unless the contracting officer exercises an option to extend the term of the contract.[593] Next, the rule adds a provision explaining when a wage determination potentially applicable to the option period will be effective.[594] Finally, the rule adds three new solicitation provisions and contract clauses to the FAR that explain how the four price adjustment options quoted above are meant to work: "Davis-Bacon Act—Price Adjustment (None or Separately Specified Method),"[595] "Davis-Bacon Act—Price Adjustment (Percentage Method),"[596] and "Davis-Bacon Act—Price Adjustment (Actual Method)."[597]

The Service Contract Act

Successor Contractor Notification Provisions Spell Success for Contractor's Price Adjustment Claim

A case from late last year once again highlights the importance of understanding and following the myriad of contract clauses that implement the Service Contract Act (SCA).[598] This is particularly true in cases dealing with option exercises and the successor contractor provisions of section 4(c) of the SCA.[599]

The ASBCA wrestled with these issues in *Tecom, Inc.*[600] In this case, Tecom, Inc. (Tecom), had a grounds maintenance

590. Application of the Davis-Bacon Act to Construction Contracts With Options to Extend the Term of the Contract, 66 Fed. Reg. 53,478 (Oct. 22, 2001) (to be codified at 48 C.F.R. pts. 1, 22, and 52).

591. As in the original rule; probably should be "from."

592. 66 Fed. Reg. 53,479.

593. *Id.* at 53,480 (amending 48 C.F.R. § 22.404-1).

594. *Id.* (amending 48 C.F.R. § 22.404-6). The rule adds a new subparagraph (d) to FAR section 22.404-6 which reads as follows:

> (d) The following applies when modifying a contract to exercise an option to extend the term of the contract:
>
> (1) A modified wage determination is effective if—
>
> (i) The contracting agency receives a written action from the Department of Labor prior to exercise of the option, or within 45 days after submission of a wage determination request (22.404-3(c)), whichever is later; or
>
> (ii) The Department of Labor publishes notice of modifications to general wage determinations in the Federal Register before exercise of the option.
>
> (2) If the contracting officer receives an effective modified wage determination either before or after execution of the contract modification to exercise the option, the contracting officer must modify the contract to incorporate the modified wage determination, and any changed wage rates, effective as of the date that the option to extend was effective.

Id.

595. *Id.* at 53,482 (adding 48 C.F.R. § 52.222-30).

596. *Id.* (adding 48 C.F.R. § 52.222-31).

597. *Id.* (adding 48 C.F.R. § 52.222-32).

598. 41 U.S.C. §§ 351-358 (2001).

599. *See id.* § 353(c).

support contract with the Air Force. Tecom entered into a successorship collective bargaining agreement (CBA) with its employees during the base year of the contract. Tecom did not notify the government of this fact.[601] Because the contracting officer was unaware that Tecom had a CBA with its employees, she failed to provide the notice of intent to exercise an option required by FAR 22.1010(a).[602] Nearly two months into the option year, Tecom and the union concluded a new CBA, forwarded that CBA to the contracting officer, and requested that the contracting officer incorporate into the contract, retroactive to option exercise, the rates in the new CBA.[603] Because the contracting officer was unaware of the successorship agreement between Tecom and the union, she denied Tecom's request on the basis that it was not a successor contractor within the meaning of section 4(c) of the SCA.[604]

Ultimately, Tecom appealed the denial of its claim for $155,755.51 to the ASBCA.[605] The board granted Tecom's motion for summary judgment based on the contracting officer's failure to provide the mandatory notices regarding option exercise. Specifically, the board found that, in the absence of timely notice from the government, the deadlines in FAR 22.1012-3(b) do not apply.[606] Therefore, Tecom was entitled to retroactive application of the new CBA. Interestingly, though the board noted Tecom's failure to follow the FAR requirements for contractor notice to the government in its findings of fact, that failure appears to have played no role in the board's decision.

Cleaning Up—Laundry Contractor Gets Price Adjustment!

In *Penn Enterprises, Inc.*,[607] the ASBCA again found itself wrestling with application of the SCA price adjustment clauses. Penn Enterprises, Inc. (Penn), had a contract consisting of a base year and four option years with the Army for laundry and dry cleaning services. During the base year, the applicable wage determination was based on the collective bargaining agreement between the employees and Penn's predecessor on the contract.[608] Also during the base year, Penn and the union representing the employees entered into a new CBA and Penn provided the proper notices to the contracting officer. The new CBA obligated Penn to pay employees for accrued sick leave on the first regularly scheduled payday after each anniversary date of the contract or termination of the contract.[609] On the first payday following exercise of the first option, Penn paid its employees a little over $20,000 for unused sick leave. When the government refused to pay this amount, Penn filed a claim. This appeal followed the contracting officer's final decision denying the claim.[610]

In denying the claim, and in response to Penn's appeal, the government argued that the unused sick leave paid to the employees accrued during the base period. The government reasoned that, because the requirement to pay employees for unused sick leave did not arise until the new CBA became effective (the first option year), Penn was not entitled to a retroactive price adjustment.[611] The board rejected this argument and sustained Penn's appeal. The board distinguished this case from those where the contractor seeks a price adjustment for cost increases required under a CBA that became effective during a period of performance (for example, the base year of a contract).[612] The CBA at issue here did not change the amount

600. ASBCA No. 51591, 01-1 BCA ¶ 31,156.

601. *Id.* at 153,896. *See* FAR, *supra* note 11, § 22.1008-3, regarding the contractor's obligation to forward a copy of the CBA to the contracting officer.

602. *Id.* at 153,897. Federal Acquisition Regulation section 22.1010(a) requires the contracting officer to provide both the contractor and the employees' collective bargaining agent written notice of intent to exercise an option under the contract at least thirty days before the option exercise. FAR, *supra* note 11, § 22.1010(a).

603. *Tecom, Inc.*, 01-1 BCA ¶ 31,156 at 153,897.

604. *See* FAR, *supra* note 11, § 22.1012-2 to -3.

605. *Tecom, Inc.*, 01-1 BCA ¶ 31,156 at 153,898.

606. *Id.* at 153,902.

607. ASBCA No. 52234, 01-1 BCA ¶ 31,244.

608. *Id.* at 154,196.

609. This new CBA became effective for the first option period under the DOL regulations implementing the SCA. *See* 29 C.F.R. §§ 4.143, 4.145 (2001). The DOL issued a wage determination based on the CBA, which the contracting officer incorporated into Penn's contract by modification effective at the beginning of the option period. *Penn Enters., Inc.*, 01-1 BCA ¶ 31,244 at 154,196.

610. *Id.* at 154,197.

611. The government relied primarily on the provisions of FAR section 52.223-.243. *Id.*

612. *See, e.g.*, Ameriko, Inc., ASBCA No. 50356, 98-1 BCA ¶ 29,505.

of sick leave employees accrued, or require Penn to make payments during the base year. Instead, the board found the CBA required Penn to pay for accrued sick leave during the first option period. Because the CBA was effective for that option period, Penn was entitled to the price adjustment.[613]

Successor Contractor Executive Order Revoked

On 20 October 1994, President Clinton issued Executive Order (EO) 12,933, *Nondisplacement of Qualified Workers Under Certain Contracts*.[614] The executive order required that all service contracts for "public buildings"[615] include a clause applying to a contractor that succeeds another contractor under a contract for the performance of similar services in the same building. Such a successor contractor was required to offer qualified employees of the predecessor contractor the right of first refusal for employment under the new contract.[616] The requirements of the executive order were incorporated into DOL regulations[617] and into the FAR.[618]

On 17 February 2001, President Bush issued EO 13,204 revoking EO 12,933.[619] Executive Order 13,204 also required the Secretary of Labor, the FAR Council, and the heads of executive agencies to rescind "promptly" any orders, rules, regulations, guidelines or policies implementing or enforcing EO 12,933.[620] Significantly, EO 13,204 also required the Secretary of Labor to terminate immediately any investigations or other compliance actions based on EO 12,933.[621] Both the DOL[622] and the FAR Council[623] have issued rules implementing EO 13,204.

Bid Protests

Jurisdiction

The Scanwell *Sun Has Set—but the Temperature Remains the Same*

In the absence of an extension by Congress and under the Administrative Dispute Resolution Act of 1996 (ADRA),[624] district court jurisdiction over bid protests ended on 1 January 2001.[625] Hence the long line of *Scanwell* cases marches into the sunset.[626] It does not follow, however, that the standard of review applied in *Scanwell* and its progeny will no longer provide warm comfort to bid protestors.

On 3 January 2001, the CAFC reversed a COFC decision regarding a protestor's dispute with a contracting officer's affirmative responsibility determination.[627] The CAFC's decision to reverse in part and remand to the COFC for further findings regarding the contracting officer's affirmative responsibility determination hinged on its conclusion that the ADRA requires

613. *Penn Enters., Inc*., 2001-1 BCA ¶ 31,244 at 154,198.

614. Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (Oct. 24, 1994).

615. Because the definition of "public building" contained in the executive order excluded buildings on a military installation, the executive order had little effect on most military activities. *See id*.

616. Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (Oct. 24, 1994).

617. 29 C.F.R. pt. 9, 62 Fed. Reg. 28,176 (May 22, 1997).

618. Federal Acquisition Circular (FAC) 97-01, 62 Fed. Reg. 44,823 (Aug. 22, 1997) (interim rule); FAC 97-11, 64 Fed. Reg. 10,545 (Mar. 4, 1999) (final rule); FAC 97-15, 64 Fed. Reg. 72,450 (Dec. 27, 1999) (added clause to the commercial item clause list at FAR section 52.212-5).

619. Exec. Order No. 13,204, 66 Fed. Reg. 11,228 (Feb. 22, 2001).

620. *Id.*

621. *Id.*

622. *See* Nondisplacement of Qualified Workers Under Certain Contracts; Rescission of Regulations Pursuant to Executive Order 13,204, 66 Fed. Reg. 16,126 (Mar. 23, 2001) (removing 29 C.F.R. pt. 9).

623. *See* Federal Acquisition Regulation; Executive Order 13,204, Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts, 66 Fed. Reg. 27,416 (May 16, 2001) (removing FAR subpt. 22.12, § 52.222-50; amending FAR § 52.212-5).

624. 28 U.S.C. § 1491(b)(1) (2000).

625. *See 2000 Year in Review, supra* note 2, at 36-38 (discussing the end of bid protest jurisdiction in district courts). The ADRA granted concurrent jurisdiction of bid protests to COFC and district courts. *See* 28 U.S.C. § 1491(b).

626. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

627. Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Fed. Cir. 2001). For further discussion of the court's treatment of the affirmative responsibility determination, see *infra* notes 696-715.

courts to review an agency's award decision under the standards set forth in the Administrative Procedure Act (APA).[628] The result was a more favorable standard of review for the protestor—from one requiring fraud or bad faith, to one requiring lack of rational basis or a procurement procedure involving a violation of a regulation or procedure.[629]

What Is a "Federal" Agency?

Another CAFC case, *Emery Worldwide Airlines, Inc. v. Federal Express Corp.*,[630] not only thoroughly covered the history of bid protest jurisdiction, it also provided insight on when an agency would be considered a "federal" agency under the ADRA. The case involved an award by the USPS of a seven-year, $6.36 billion dollar contract awarded to FedEx for air transportation network services.[631] The USPS negotiated the contract on a sole-source basis. Emery Worldwide Airlines, Inc., protested the award to the COFC, which granted the government's motion for summary judgment upholding the contract.[632]

On appeal, the government argued that it is not subject to COFC jurisdiction because the USPS was not a "federal agency" as specified by the ADRA.[633] The CAFC observed that the USPS is statutorily defined as an "independent establishment of the executive branch of the United States."[634] Consequently, it concluded that the USPS is a federal agency unless "*context* shows that such term was intended to be used in a more limited sense."[635] The court added that "[n]either the statutory text of the word 'context' nor the text of any related congressional act clearly indicates that 'agency' was not meant to include the USPS."[636]

Is There Anything You Won't Hear?

Emery illustrates the scope of the COFC's bid protest jurisdiction over any federal agency, absent explicit congressional intent for an exemption.[637] This attitude extends as well to the type of procurement. In cases decided a day apart, the COFC held that the ADRA granted jurisdiction over cases involving the award of a long-term lease of government-owned property[638] and an award of a Blanket Purchase Agreement (BPA) issued under the FSS.[639]

In *Catholic University*,[640] the plaintiff attempted to enjoin the Armed Forces Retirement Home from issuing a solicitation to lease a forty-nine-acre tract adjacent to its campus.[641] The government contended that the COFC's injunctive authority does not extend to suits involving the procurement process of the sale or lease of government-owned real property.[642] The COFC

628. *See* 5 U.S.C. § 706 (2000).

629. The latter standard of review is derived from the APA and is the same as that previously applied in the district courts under the *Scanwell* line of cases. *See Impresa*, 238 F.3d at 1331-32. The former standard of review was used in the COFC and its predecessor court under its grant of jurisdiction pursuant to the Tucker Act. *See* 28 U.S.C. § 1491(b)(1), (4) (2000). Consistent with the standard of review imposed by the APA, CAFC ordered that the contracting officer be deposed to place on the record "the basis for the contracting officer's responsibility determination." *Impressa*, 238 F.3d at 1339.

630. 2001 U.S. App. LEXIS 19420 (Aug. 31, 2001). For a discussion of the competition aspects of this case, see *supra* notes 39-52 and accompanying text.

631. *Id*. at *2.

632. Emery Worldwide Airlines, Inc. v. United States, 49 Fed. Cl. 211 (2001). *See* 43 GOV'T CONTRACTOR 12, ¶ 126 (Mar. 28, 2001) (discussing the COFC decision).

633. *Emery*, 2001 U.S. App. LEXIS 19420, at *21-22. In effect, the CAFC understood the practical effect of the government's theory to be that "no judicial body possesses jurisdiction to judicially review pre-award protests involving the USPS," a result they clearly were not willing to accept. *Id.* at *32.

634. *Id*. at *22 (citing 39 U.S.C. § 201 (1994)).

635. *Id*. at *23-24 (citing 28 U.S.C. § 451 (Supp. V 1999)) (emphasis added).

636. *Id*. at *25. The CAFC cited a Supreme Court case that stated Congress could have always used a more "spacious phrase, like 'evidence of Congressional intent' instead of 'context' if it had intended a broader interpretation." *See* Rowland v. California Men's Colony, 506 U.S. 194, 199 (1993). It also cited an earlier federal claims case involving the USPS that concluded "the context of the [Postal] Reorganization Act does not require a limited reading of the term 'independent establishment' for our jurisdictional purposes." *See* Butz Eng'g Corp. v. United States, 499 F.2d 619, 624 (Ct. Cl. 1974).

637. *Id*. at *30 (deferring to the plain text of the statute "unless overcome by a persuasive showing from the purpose or history of the court") (quoting Lutheran Mut. Life Ins. Co. v. United States, 602 F.2d 328, 331 (Ct. Cl. 1979)).

638. Catholic Univ. of America v. United States, 49 Fed. Cl. 795 (2001).

639. Labat-Anderson, Inc. v. United States, 50 Fed. Cl. 99 (2001). In both *Labat-Anderson* and *Catholic Univ.*, the COFC denied the plaintiff's request for an injunction.

640. 49 Fed. Cl. 795.

641. *Id*. at 797.

rejected the argument, concluding that the ADRA's amendment to the Tucker Act broadened the scope of jurisdiction to post-award challenges to government solicitations.[643] The COFC observed that its predecessor, the United States Claims Court, exercised injunctive jurisdiction over pre-award claims relating to the government's disposition of its assets.[644] Therefore, the COFC reasoned that post-award disputes regarding the solicitation of government assets were now within its jurisdiction under the ADRA.[645]

In *Labat-Anderson*,[646] the COFC held that it exercised jurisdiction over an award of a BPA for "records management and forms processing services at the four INS Service Centers" because the transaction was a "procurement" under the Tucker Act. The court looked to outside sources to define the term "procurement" because the Tucker Act did not. It concluded that the phrase "all stages of the process of acquiring property and services" included this award because issuing BPAs was "one of the stages" in acquiring the services solicited by the Request for Quotations.[647]

The COFC has restrained its jurisdictional reach in cases that call for a review of the validity of government statutes and regulations, leaving those issues for the federal district courts.[648] It also will not entertain a dispute based on a termination for convenience when it is presented as a bid protest action.[649] Nonetheless, the government is on notice that the COFC will be generous in extending its warm embrace to contractors and therefore should be prepared to defend all actions related to all types of solicitations.

Time's Not on Your Side

Fairness and common sense should remain a contracting officer's guide, even with the increasing use of electronic mail (e-mail) filings of protest documents.[650] As one contracting officer found out the hard way, the GAO tolls time for "required debriefing" purposes when the protestor actually receives the bad news, not when it is transmitted or entered into a contractor's e-mail system.[651]

In *International Resources Group*,[652] an offeror, International Resources Group (IRG), requested a debriefing six days after being excluded from the competitive range. The GAO decided that the debriefing was "required" even though it did not meet the FAR deadline.[653] The agency sent out its notice of exclusion to IRG shortly before midnight on Friday, 1 September. The notice did not enter IRG's computer system until 12:15 a.m. the following day. Due to the Labor Day holiday weekend, IRG did not receive notice of its exclusion from the competitive range until Tuesday, 5 September. On Thursday, 7 September, it requested a pre-award briefing.[654] The debriefing was offered and held on 12 October. The protest was filed on Monday, 23 October. The agency argued that IRG should have filed its protest no later than 11 September, i.e., within ten days of when it claimed IRG had knowledge of the basis for its pro-

642. *Id.* at 799.

643. *Id*. at 799-800.

644. *Id.* at 799.

645. *Id* at 800. The COFC cited language from the ADRA's principal sponsor, Senator Cohen of Maine, and concluded, "It is apparent from the text of Senator Cohen's remarks that the amendment of § 1491 was not intended to narrow the court's injunctive authority but, rather, to expand that authority to embrace post-award challenges to government solicitations." *Id*. *See also* Government of Harford County, Maryland, B-283259, B-283359.3, Oct. 28, 1999, 99-2 CPD ¶ 81. In *Harford*, the GAO extended jurisdiction over an award that included the transfer of real property, because it was so intertwined with the procurement of services. *See 2000 Year in Review*, *supra* note 2, at 40 (discussing *Harford*).

646. *Labat-Anderson*, 50 Fed. Cl. 99 (2001). For a discussion of the substantive claims involved in this case, see *supra* notes 482-88 and accompanying text.

647. *Id*. at 104. The court specifically cited the Office of Federal Procurement Policy Act, 41 U.S.C. § 403(2) (1994), and the Competition in Contracting Act, 10 U.S.C. § 2302(3)(A) (1994).

648. *See, e.g.*, Automated Communication Sys., Inc. v. United States, No. 01-65C, 2001 U.S. Claims LEXIS 107 (June 22, 2001). For a discussion of the COFC's conclusion that the Randolph-Sheppard Act preference carries greater weight than the HUBZone preference in the military vending procurement process, see *infra* notes 1557-68 and accompanying text.

649. Griffey's Landscape Maintenance L.L.C., No. 01-309C, 2001 U.S. Claims LEXIS 161 (Aug. 27, 2001).

650. *See 2000 Year in Review, supra* note 2, at 39 (discussing a pilot program for the electronic filing of certain protest documents with the GAO).

651. *See* Int'l Resources Group, Comp. Gen. B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

652. *Id*.

653. A pre-award debriefing becomes "required" when the contractor requests a debriefing in writing within three days after receipt of notice of exclusion from competition. *See* FAR, *supra* note 11, § 15.505(a)(1).

654. *Int'l Resources Group*, 2001 CPD ¶ 35 at 5.

test. IRG argued that the "required" debriefing extended the date for a timely filing until 10 days after the debriefing.[655] The GAO sided with the protestor, concluding that construing notification as having occurred when the notification enters the recipient computer system after business hours would under these circumstances reduce the time to request a debriefing from three days to one.[656]

How "Interested" Are You Really?

The sub-title refers to the requirement that a party be "interested" to have standing to file a protest.[657] An "interested" party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."[658] So how can a party be interested even though it did not actually submit a proposal because of its inability to meet one of the requirements? In *McRae Industries, Inc.*,[659] a protestor alleged that it would have submitted a proposal but for tests that the contracting officer waived.[660] After waiving the test requirements, the contracting officer awarded the contract to two awardees without modifying the RFP and resoliciting. The GAO held that the protestor was an interested party based on its assertion that it would have submitted a proposal under the relaxed requirements.[661]

EAJA—Prevailing Party Claims
COFC Finds Supreme Court's View of "Catalyst Theory" Inapplicable to EAJA Claim

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[662] the Supreme Court rejected the "catalyst theory"[663] of prevailing party claims under the Fair Housing Amendments Act (FHAA) of 1988[664] and the Americans with Disabilities Act (ADA) of 1990.[665] In *Buckhannon*, the plaintiff, who operated assisted living care homes, brought suit in federal court, alleging that West Virginia's "self-preservation" [666] requirements violate both the FHAA and the ADA. While the case was pending, the West Virginia legislature enacted two bills that eliminated the "self-preservation" requirements. The case was dismissed and the plaintiffs requested attorney's fees as the "prevailing party" under the FHAA and the ADA.[667] The *Buckhannon* Court rejected the theory that a party can be "prevailing" because of a defendant's voluntary change in conduct. Instead, it held that entitlement to relief on the claims would have to be shown on the merits, either in the trial court or on appeal.[668]

Buckhannon set the stage for an Equal Access to Justice Act (EAJA) claim made by a protestor after the Navy cancelled its original IFB and resolicited under another IFB. The Navy took this corrective action after hearing the trial court's remarks at a temporary restraining order (TRO) hearing in the case of *Brick-*

655. A protest to the GAO is timely if it is filed within ten days after the basis for the protest is known, unless the protest is filed within ten days after the offered date for the "required" debriefing. *See* 4 C.F.R. § 21.2(a)(2) (2001).

656. *Int'l Resources Group*, 2001 CPD ¶ 35 at 5. Notably, the agency's contracting officer in *IRG* was based in Kazakhstan, a Central Asian nation in a time zone eleven hours ahead of IRG's office in Washington, DC. Although the contracting officer did not attempt to use the time differential as an excuse for the late-night notification, it is highly unlikely GAO would have considered it in their decision given their overriding concern for an offeror's or protestor's right to request a pre-award debriefing after actually receiving knowledge of its exclusion from competition. The GAO did make clear, however, that they would have considered the message received on the first business day after it was sent and received in IRG's system, even if it was not read until later. *Id*. at 5 n.7.

657. 31 U.S.C. § 3551(1) (2000); 4 C.F.R. § 21.1(a) (2000).

658. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a).

659. Comp. Gen. B-287609.2, July 20, 2001, 2001 CPD ¶ 127.

660. *Id*. The tests were for leakage and toe adhesion requirements of cold or wet boots with removable insulated booties. *Id.* at 2-3.

661. *Id*. at 3. The GAO ultimately denied the protest because although the tests were no longer required, the standard requirements were. Because McRae admittedly could not meet the requirements, it could not show the required "prejudice" in order to have the protest sustained. *Id*. at 5-6.

662. 121 S. Ct. 1835 (2001).

663. The Supreme Court described the "catalyst theory" as a situation when the plaintiff is a "prevailing party" for the purposes of obtaining attorney's fees "because the lawsuit brought about a voluntary change in the defendant's conduct." *Id*. at 1837.

664. 42 U.S.C. § 3613(c)(2) (2000).

665. *Id.* § 12205.

666. *Buckhannon*, 121 S. Ct. at 1838. The "self-preservation" requirements forbid the boarding of residents who could not remove themselves from dangerous situations such as fire. *Id*.

667. *Id*.

668. *Id*. at 1840.

wood Contractors, Inc. v. United States (*Brickwood II*).[669] Before the Supreme Court's decision in *Buckhannon*, the COFC had held in *Brickwood I* that plaintiff Brickwood was a "prevailing party" under the EAJA.[670] The *Brickwood I* court discussed the term "prevailing party" under the "catalyst theory," in which it concluded that a party may be entitled to costs under the EAJA if the plaintiff's suit is a "causal, necessary, or substantial factor in obtaining the result plaintiff sought."[671] In other words, no findings on the merits were needed.

After *Buckhannon*, the Navy filed a motion of relief from judgment, alleging that the *Buckhannon* decision invalidated the *Brickwood I* finding that the plaintiff was a prevailing party. The COFC disagreed, noting that the *Buckhannon* Court specifically excluded the EAJA from the breadth of their holding. It then observed that the underlying issue in *Buckhannon* was resolved independently by the West Virginia legislature, with no discernible role played by the plaintiff's lawsuit.[672] This was in contrast to the facts in *Brickwood I*, in which the Navy took corrective action after hearing the trial court's serious reservations about the Navy's handling of the solicitation.[673] It also compared the "prevailing party" language in the EAJA with that in the FHAA and ADA that the Supreme Court dealt with in *Buckhannon.* It concluded that in the latter statutes, broad discretion was left to the court to determine if a plaintiff was a "prevailing party."[674] The EAJA, however, made clear that a "prevailing party" was entitled to "fees and other expenses . . . *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."[675]

Substantial Justification Negated by "11th Hour" Revelations

Even if the government's position in a bid protest is "substantially justified," it still may have to pay fees under the EAJA. In a Court of Appeals for the Eleventh Circuit decision, *Maritime Management, Inc. v. United States*,[676] the Navy was required to pay an unsuccessful protestor EAJA fees because it had acted in "bad faith" during the discovery process while the protest was being pursued at GAO. The Navy's lack of disclosure did not come to light until the protestor filed its federal suit. The Navy stated that the administrative record was complete, an assertion challenged by the protestor. The day before the discovery motion in the district court, the government produced seven additional documents. The district court ordered these documents into the administrative record. The documents did not help Maritime Management, Inc. (Management), though, as the district court ordered a rebidding of the contract, and not an award to Maritime as it requested.[677]

The district court did, however, grant Maritime's motion for attorneys' fees and costs under the EAJA. The order granting fees was based on the government's bad faith in failing to submit a complete administrative record. The Eleventh Circuit upheld the "bad faith" determination because the government had waited until the "eleventh hour" to produce the documents after consistently maintaining that the administrative record was complete. Because the district court based the EAJA award on the "bad faith" prong of the statute, substantial justification by the government to resist the suit was irrelevant.[678]

The *Maritime* court did agree with the government's contention that EAJA fees should not include costs incurred as part of the GAO protest, even though the GAO made its recommendation on an incomplete record.[679] Of course, that does not mean that the HCA cannot authorize the payment of costs without a GAO recommendation. In *Inter-Con Security Systems, Inc.*,[680] The GAO had dismissed a protest as academic after the Department of State (DOS) took corrective action. The DOS then inexplicably requested the GAO to make a recommendation that DOS pay the two protestors their protest costs.[681] The GAO was quick to oblige the DOS request, but mentioned in its rec-

669. 49 Fed. Cl. 738 (2001) [hereinafter *Brickwood II*].

670. *See* Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 148 (2001) [hereinafter *Brickwood I*].

671. *Brickwood I*, 49 Fed. Cl. at 154.

672. *Brickwood II*, 49 Fed. Cl. at 744.

673. *Id*. at 748-49.

674. *Id*. at 745.

675. *Id*. at 746.

676. 242 F.3d 1326 (11th Cir. 2001).

677. *Id.* at 1329-30.

678. *Id*. at 1330-33.

679. *Id*. at 1336 (reasoning that EAJA fees only apply to "civil actions," and not to GAO proceedings).

680. Comp. Gen. B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54.

ommendation that HCAs have the discretion and authority to reimburse protestors under the FASA.[682]

Playing the Odds

Although the number of bid protests filed at the GAO declined for the twelfth year in a row, FY 2001 statistics may be an "early sign of a leveling off in the [declining] number of protests filed."[683] The total amount of bid protests fell six percent in FY 2001, from 1220 protests filed in FY 2000 to 1146 filed in FY 2001.[684] The rate of decrease is about half of that in the previous two years.[685] The decline changed the total number of merit decisions only slightly, from 306 in FY 2000 to 313 in FY 2001.[686]

The GAO protest-sustain rate increased slightly, from twenty-one percent in FY 1999 and FY 2000, to twenty-two percent in FY 2001.[687] Protestors at the COFC have not experienced nearly the same success at the COFC. As of 5 September 2001, the COFC had not sustained any of the twenty-six post-award protests it decided during 2001.[688] With odds like these, protests filed at the GAO may actually increase during FY 2002.

Contractor Qualifications: Responsibility

Never Mind: Contractor Responsibility Rules Go Final, Then Get Suspended and Proposed for Revocation

Eighteen months and 1800 comments after the initial proposed rule,[689] the Clinton Administration's controversial contractor responsibility rule became final on 20 December 2000, with an effective date of 19 January 2001.[690] A mere twelve days after the rule became effective, the Civilian Agency Acquisition Council authorized civilian agencies to suspend the rule.[691] Less than three months later, on 3 April 2001, the FAR Council stayed the rule government-wide for 270 days and proposed the rule's revocation.[692] On 27 December 2001, the FAR Council terminated the stay and revoked the 20 December 2000 rule.[693] So today, the responsibility rules are the same as before the Council published the 20 December 2000 final rule.[694] The rules are back to square one—where many believe the responsibility rules should stay.[695]

681. *Id.* at 3.

682. *Id.* at 4 (citing 41 U.S.C. § 253b(1) (Supp. IV 1998)). *See also* FAR, *supra* note 11, § 33.102(b).

683. *See GAO Protest Docket Down 6 Percent, Sustain Rate 22 Percent in FY 2001*, BNA FED. CONT. REP. (Oct. 16, 2001).

684. *Id.*

685. *Id.* In FY 1999, the rate of decline was eleven percent (1399 protests filed). In FY 2000, the rate of decline was thirteen percent (1220 protests filed). The GAO received more than 3300 protests at its peak in FY 1989. *Id.*

686. *Id.*

687. *Id.* In FY 1999, the GAO sustained seventy-four protests; in FY 2000, sixty-three protests; and in FY 2001, sixty-eight protests. *Id.*

688. *See Court of Federal Claims Still Has Not Sustained a Postaward Protest in 2001*, BNA FED. CONT. REP. (Oct. 2, 2001).

689. 64 Fed. Reg. 37,360 (1999). *See also 2000 Year in Review*, *supra* note 2, at 77; *1999 Year in Review*, *supra* note 505, at 18.

690. FAC 97-21, FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,255 (Dec. 20, 2000). The new rule included the following revisions: FAR section 9.104-1(d) added language stating that a "satisfactory record of integrity and business ethics" included compliance with "'tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws," *id.* at 80,264; FAR section 52.209-5 required offerors to certify whether they had any criminal or administrative violations in these areas; FAR parts 14 and 15 included provisions requiring contracting officers to notify an offeror determined nonresponsible, FAR section 31.205-21 made unallowable costs incurred for activities that assisted, promoted or deterred unionization. and FAR section 31.205-47 made unallowable costs incurred in civil or administrative proceedings brought by a government where the contractor violated a law or regulation, *id.* at 80,625.

691. Letter 2001-1, Civilian Agency Acquisition Council, subject: Class Deviation from Federal Acquisition Circular 97-21, Final Rule, FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (31 Jan. 2001). The letter authorized class deviations from FAC 97-21. *Id.* Numerous civilian agencies issued class deviations. 43 GOV'T CONTRACTOR 6, ¶ 65 (Feb. 14, 2001). The General Services Administration first issued a class deviation followed soon thereafter by the National Aeronautics and Space Administration, the Environmental Protection Agency, and the Departments of Health and Human Services, Transportation, and Interior. *Id.*

692. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. 17,758 (Apr. 3, 2001). The FAR Council issued two rules regarding the final rule announced on 20 December 2000. First, an interim rule published under FAR case 1999-010 stayed the final rule for 270 days. Second, a proposed rule, FAC Case 2001-014, would revoke the 20 December 2000 final rule. *Id.*

693. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 66,984 (Dec. 27, 2001).

Federal Circuit Splits with GAO Over Affirmative Responsibility Review Standard

The CAFC's recent decision in *Impresa Construzioni Geom. Domenico Garufi v. United States*[696] gives new hope to unsuccessful offerors challenging a contracting officer's affirmative responsibility determination. Although the FAR requires a contracting officer to make an "affirmative determination of responsibility"[697] before awarding a contract, a disappointed offeror challenging such a determination has previously found the contracting officer's determination nearly unassailable. The relevant GAO bid protest regulation provides:

> Because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met.[698]

General Accounting Office opinions typically dispose of affirmative responsibility allegations with little analysis beyond recitation of the rule.[699] Before *Impresa*, COFC decisions were equally inhospitable to a challenge regarding an affirmative responsibility determination.[700]

In *Impresa*, the CAFC stated the standard of review should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis."[701] The appellant, Impresa Construzioni Geom. Domenico Garufi (Garufi), an unsuccessful offeror, challenged award of a contract to Joint Venture Conserv (JVC). JVC was a joint venture composed of three companies. Carmelo La Mastra controlled two of the companies, while La Mastra's brother-in-law controlled the third company. Before issuance of the RFP, an Italian court found that La Mastra "had engaged in bid rigging and was involved in a Mafia organization."[702] As a result, the court placed all three companies under a "receivership run by a legal administrator."[703] Later, La Mastra was indicted for his involvement in a "Mafia-type association" and for involvement in bid-rigging.[704]

JVC's proposal certified "that during the three-year period preceding its offer, neither it nor its principals had been convicted or had a civil judgment against them for certain offenses

694. Personnel should use the pre-FAC 97-21 FAR. Older versions of the FAR are posted electronically under "FAR (Archived) HTML" at http://www.arnet.gov/far/.

> To be determined responsible, a prospective contractor must: (a) have adequate financial resources . . . ; (b) be able to comply with the . . . delivery or performance schedule; (c) have a satisfactory performance record . . . ; (d) have a satisfactory record of integrity and business ethics; (e) have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . . ; and (g) be otherwise qualified and eligible . . . under applicable laws and regulations.

FAR, *supra* note 11, § 9.104-1.

695. *See* 66 Fed. Reg. 17,758 (Apr. 3, 2001).

> The two proposed rules were the most controversial ever published by the FAR Council. Adverse comments were made by individuals within the Government itself, as well as by the public. After publication of the final rule, the FAR council has continued to receive information that the rule is not in the best interests of industry or the Government.

Id.

696. 238 F.3d 1324 (Fed. Cir. 2001).

697. FAR, *supra* note 11, § 9.103(b).

698. 4 C.F.R. § 21.5(c) (2001). *See generally* Steven W. Feldman, *The Impresa Decision: Providing the Correct Standard of Review for Affirmative Responsibility Determinations*, 36 PROCUREMENT LAW. 2 (2001) [hereinafter Feldman] (arguing that the GAO regulation should be revised to mirror the *Impresa* court's standard).

699. *See, e.g.*, SatoTravel, B-287655, 2001 Comp. Gen. LEXIS 101 (July 5, 2001) (citing and applying the rule with little additional analysis).

700. *See, e.g.*, Trilon Educ. Corp. v. United States, 578 F. 2d 1356 (Cl. Ct. 1978); News Printing Co., Inc. v. United States, 46 Fed. Cl. 740, 746 (2000) ("General responsibility determinations will not be overturned, absent allegations of fraud or bad faith."). *See also* Feldman, *supra* note 698, at 6 ("Before the recent Federal Circuit *Impresa* decision, Court of Claims decisions followed the GAO standard.").

701. *Impresa*, 238 F.3d at 1333.

702. *Id.* at 1327-28. The Italian court found that La Mastra "had been involved in intimidating a competitor into withdrawing from a bid for a Contract . . . and that 'probably in connection with that [same] bid the owner of another firm . . . was killed.'" *Id.* at 1328.

703. *Id.* at 1328.

704. *Id.*

including 'commission of a fraud or criminal offense' and were not presently indicted for such offenses."[705] The CAFC could not determine the relationship between La Mastra and his two companies during the receivership.[706] Without explanation, the contracting officer signed a responsibility determination, noting that JVC had "a satisfactory record of performance, integrity, and business ethics."[707]

Garufi's protest in the COFC alleged that the contracting officer made an "arbitrary and capricious responsibility determination."[708] The COFC, finding no allegations of fraud or bad faith by the contracting officer, limited its review to the documentary record before the contracting officer. On this evidence, the COFC "held that the responsibility determination was not arbitrary or capricious."[709]

The CAFC explicitly rejected the government's argument that "'absent allegations of fraud or bad faith' by the contracting officer, the responsibility determination . . . is immune from judicial review,"[710] thereby distinguishing the federal standard of review from the GAO's standard. The court then announced that "the traditional APA standard adopted by the *Scanwell*[711] line of cases allows for review of an agency's responsibility determination if there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis."[712]

Using the rational basis standard, the CAFC determined that it did "not know whether the contracting officer's determination was valid . . . because the contracting officer's reasoning supporting that determination is not apparent from the record,"[713] and ordered the contracting officer deposed to determine the basis for the his responsibility determination. Specifically, to decide whether a rational basis for the responsibility determination existed, the CAFC needed to know: "(1) whether the contracting officer, as required by 48 C.F.R. § 9.105-1(a), possessed or obtained information sufficient to decide the integrity and business ethics issue, including the issue of control, before making a determination of responsibility; and (2) on what basis he made the responsibility determination."[714]

The *Impresa* decision will likely result in greater scrutiny of affirmative responsibility challenges in federal court. Further, since the *Impresa* standard differs from the GAO standard, protestors may engage in "forum shopping . . . seeking the best possible treatment."[715]

CONTRACT PERFORMANCE

Contract Interpretation

Omitted Specifications Read into Contract

Demonstrating how truly burdensome the government contracting process can be, a recent COFC decision has held that a construction contractor is required to comply with architectural details that were included in contract drawings but not in the specifications. In *Centex Construction Co. v. United States*,[716] the contractor sought an adjustment for having to install channel bracing around metal door openings. Two of the contract drawings indicated the need to install this channel bracing, but the specifications made no mention of any bracing.[717] The government's argument against giving the contractor an adjustment was simple: the contract, like most construction contracts, contained a FAR clause[718] that indicated "[a]nything mentioned in the specifications and not shown on the drawings, or shown on

705. *Id.* at 1329.

706. *Id.* at 1337 ("[N]either the Court nor the parties had sufficient knowledge of Italian law to understand all aspects of how the preventive sequestration affected the companies involved.").

707. *Id.* at 1329.

708. *Id.*

709. *Id.* at 1330.

710. *Id.* at 1333.

711. Scanwell Labs., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

712. *Impresa*, 238 F.3d at 1330, 1333. For further discussion regarding jurisdiction under the *Scanwell* standard, see *supra* notes 624-29 and accompanying text.

713. *Id.* at 1337.

714. *Id.* at 1339.

715. Feldman, *supra* note 698, at 8.

716. 49 Fed. Cl. 790 (2001).

717. *Id.* at 791-92.

718. FAR, *supra* note 11, § 52.236-21 (Specifications and Drawings for Construction).

the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both."[719]

The contractor contended, however, that "notwithstanding this standard clause, it is unreasonable to hold it to every minute detail in the voluminous drawings attached to the contract," especially because this type of detail normally would have been found in the specifications.[720] Therefore, its omission from the specifications "would lead a reasonable contractor to conclude that channel bracing was not required."[721] The court rejected this contention, noting its approval of a 1967 Court of Claims case that rejected the "notion that the scope of the specifications and drawings is limited by some overarching concept of commercial reasonableness."[722] This holding is of some significance to construction contractors because construction contracts often contain large numbers of drawings and lengthy specifications.

Meaningless Interpretation

This past year, the CAFC decided *Program & Construction Management Group, Inc. v. United States*,[723] a case in which it held that deletion of the one and only provision in a solicitation that expressly required a cafeteria to remain open during construction did not imply the cafeteria could be closed.[724]

In 1994, the GSA issued a solicitation to upgrade the heating, ventilation, and air conditioning system at a Department of Energy building in Germantown, Maryland. The solicitation repeatedly stated that the building had to remain open during the upgrade. It also stated that work in the cafeteria could not occur on weekdays between 5:00 a.m. and 2:00 p.m. There was only one place in which it mentioned, however, that the cafeteria within the building had to remain open. This reference was contained in a note to an architectural drawing, which also discussed the need to keep the inside temperature between a certain range during construction.[725]

During a preproposal conference, Program & Construction Management Group, Inc. (PCMG), told the government that keeping the building within the set temperature range during construction would be a significant cost that would depend upon the time of year construction was to take place. It asked for further details on the timeline for when the GSA would issue a notice to proceed. Because the government had not worked out its timelines yet, it ultimately decided to delete the temperature range requirement from the contract. PCMG asserted that, during this preproposal conference, it had also inquired whether the cafeteria could be closed.[726] For some reason, rather than amending the aforementioned note to remove the requirement to keep the temperature within a set range, the government deleted the entire note.[727]

PCMG claimed that, because specific language took precedence over general language, the deletion of the only specific requirement to keep the cafeteria open should be interpreted to mean that the cafeteria would be closed despite the remaining language requiring that work not occur during certain weekday hours.[728] The CAFC instead focused on the fact that the weekday workhour proscription would be meaningless under such an interpretation since such a proscription would only be needed if the cafeteria were to remain open during construction.[729]

Creating an Ambiguity Using Extrinsic Evidence

In a second CAFC decision addressing contract interpretation principles, *Jowett, Inc. v. United States*,[730] the court held

719. 49 Fed. Cl. at 791.

720. *Id.* at 793.

721. *Id.*

722. *Id.* (citing Unicon Mgmt. Corp. v. United States, 375 F.2d 804, 805 (Ct. Cl. 1967)).

723. 246 F.3d 1363 (Fed. Cir. 2001), *aff'g* Program & Constr. Mgmt. Group, Inc. v. Gen. Servs. Admin., GSBCA Nos. 14178, 14757, 00-1 BCA ¶ 30,641.

724. *Id.* at 1364.

725. *Id*. at 1364-65.

726. *Id.* at 1365-66. Neither the court nor the board stated whether PCMG had met its burden of proof on this issue or whether it would have any bearing on interpreting the intrinsic evidence.

727. *Id.*

728. Program & Constr. Mgmt. Group, Inc. v. Gen. Servs. Admin., GSBCA Nos. 14178, 14757, 00-1 BCA ¶ 30,641 at 151,302. The CAFC did not specifically address this issue.

729. *Program & Constr. Mgmt. Group, Inc*., 246 F.3d at 1366.

730. 234 F.3d 1365 (Fed. Cir. 2000).

that a contractor may not use extrinsic evidence to create an ambiguity if there is no ambiguity upon reviewing all the intrinsic evidence.[731] In 1996, the Corps of Engineers (COE) awarded Jowett, Inc. (Jowett), a contract to construct a three-story office building. The contract required Jowett to construct suspended ceilings between the floors through which it would run duct work and wiring. It also required Jowett to install insulation around the cold air supply ducts, return air ducts, and plenums; an exception to that requirement indicated that insulation should be omitted from return air ducts and plenums in the suspended ceiling. During construction, Jowett contended it was not required to insulate the cold air supply ducts located in the ceiling. After the contracting officer directed Jowett to install insulation around all supply ducts, it submitted a claim for an additional $84,000.[732]

Before the CAFC, Jowett argued that "even if there is no ambiguity in the contract's language on its face, [the court] should resort to trade practice to interpret its terms."[733] Because standard industry practice was to not insulate supply ducts located in ceiling spaces, Jowett felt the contract should be interpreted to be missing any requirement to provide such insulation. The CAFC rejected this argument, distinguishing Jowett's circumstances from those found in *Metric Constructors, Inc. v. National Aeronautics and Space Administration*.[734] The CAFC noted that in *Metric* the contract contained a term that had an accepted industry meaning that differed from its ordinary meaning and that the court permitted extrinsic evidence to demonstrate this inconsistency within the intrinsic evidence. The CAFC determined that Jowett could not resort to extrinsic evidence in this case because even after considering such evidence, Jowett still could not demonstrate that the contract was ambiguous on its face.[735]

Changes

Army Spends an Extra $19.5 Million to Prevent Expiration of Funds

The ASBCA ruled that the Army knew its technical data package (TDP) for the Chaparral missile guidance section was defective, yet failed to disclose this superior knowledge to a second-source developer.[736] Ford Aerospace Corp. (Ford) was the initial producer of the guidance sections. In 1988, the Army awarded a contract to Hughes Missile Systems Company (HMSC) to act as a second source for the guidance sections.[737] The second-source request for proposals stated that the "guidance section is a build-to-print item."[738] Before the board, both parties indicated the term "build-to-print" meant that the guidance section would work if the contractor built it in accordance with the TDP.[739]

Despite this government representation that the contract was for a "build-to-print" component, there were several indicators that the TDP was deficient. First, an internal government memorandum dated one week before issuance of the RFP indicated that the TDP was "not fully mature."[740] Given these reservations, the government attempted to have an independent contractor validate the TDP. The independent contractor report stated that it could not validate the TDP because portions of the guidance section "will require redesign . . . to correct deficiency."[741] In addition, a Ford vice president sent a letter to the Army, dated fifteen days before award was made to HMSC, remarking that over 200 engineering change requests had not yet been incorporated into the TDP and that a number of these "represent significant design changes."[742]

731. *Id.* at 1368.

732. *Id.* at 1366-67.

733. *Id.* at 1368.

734. 169 F.3d 747 (Fed. Cir. 1999).

735. *Jowett, Inc.*, 234 F.3d at 1368-70.

736. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245.

737. *Id.* at 154,199.

738. *Id.*

739. *Id*.

740. *Id*.

741. *Id.* at 154,200. Coincidentally, Raytheon Co., which subsequently acquired HMSC ten years later, was the firm hired to perform this independent validation. *Id*.

742. *Id*.

Following award to HMSC, 379 changes were incorporated into the contract to correct TDP deficiencies. On 17 January 1995, the government terminated the contract for convenience. At termination, the contract price was $60.4 million and HMSC's total costs were $83 million. The estimated cost to complete the contract was $95.2 million.[743] The contractor submitted a $27 million claim based upon both impossibility of performance and superior knowledge.[744] The contracting officer allowed just over $12 million for "discrete events" caused by the TDP deficiencies that increased HMSC's costs.[745]

Because the board held in favor of Raytheon Company on the superior knowledge claim and awarded it an additional $7.4 million, the overall adjustment caused by the TDP deficiencies amounted to nearly $19.5 million.[746] The board's opinion definitely implies that the government knew it was buying into a future claim when it awarded the contract. The board also implied that the only rationale for proceeding in this manner was to use funds before they expired.[747]

COFC Fells Forest Service

The COFC held that the Forest Service (FS) breached its implied duty to cooperate on fourteen timber sale contracts by representing that it had identified all measures necessary to protect endangered species when it had not in fact done so.[748] The court also held that the FS breached its implied duty not to hinder eleven of the same fourteen timber contracts by suspending them for an unreasonable period of time.[749] At issue were claims amounting to over $13 million.[750]

The timber contracts each gave the FS the right to interrupt or delay operations to "comply with a court order."[751] They also included a FS clause, entitled "Protection of Endangered Species," which allowed the FS to modify or cancel the timber contracts to provide additional protection for endangered or threatened species.[752] This latter clause specifically stated that "[m]easures needed to protect such areas have been included elsewhere in the contract or are as follows" without any mention of measures taken to protect FS lands inhabited by the Mexican spotted owl.[753] When the Fish and Wildlife Service (FWS) listed the Mexican spotted owl as an endangered species in April 1993, the Endangered Species Act (ESA) required the FS to consult with the FWS before making any "irreversible or irretrievable commitment of resources in order to insure the protection of endangered and threatened species."[754] Region 3 of the FS (Region 3) believed that the ESA only applied to future actions and that any decisions to sell timber in already existing Land and Resource Management Plans (LRMP) did not require consultation with the FWS. It therefore elected not to consult with the FWS on LRMPs covering the contracts at issue.[755]

Unfortunately for the FS, a federal district court had ruled on 25 October 1993 that the FS had to consult with the FWS on "LRMPs that existed prior to the listing of a species under the ESA."[756] After this decision, Region 3 still did not consult with

743. *Id*. at 154,201.

744. *Id.* at 154,201-02. The board rejected the impossibility argument on the basis that roughly half of the guidance sections had already been built by the contractor and accepted by the government. *Id.* at 154,204. The contractor also contended there had been a mutual mistake by the parties, but the board rejected this argument because the government "knew the true condition of the TDP and misrepresented it as one for a build-to-print item." *Id.* at 154,205.

745. *Id.* at 154,202. The board did not clearly define how the "discrete events" basis of liability differs from the superior knowledge basis.

746. *Id.* at 154,205.

747. *Id.* at 154,200. The decision does not discuss whether this was an incrementally funded contract, so it is unclear exactly how much of the contract was funded with these about-to-expire funds, and whether, in hindsight, the elected course of action was economically prudent.

748. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001). These were contracts in which the government sold the right to harvest trees from FS lands to private firms. *Id*. at 37.

749. *Id.* at 70-72.

750. *Id.* at 51. There was at least thirty-eight other timber sale contracts that were suspended in similar circumstances. *Id.* at 47. The COFC decided only liability, not quantum. *See id*. at 73-74.

751. *Id.* at 40.

752. *Id.*

753. *Id.*

754. *Id.* at 41.

755. *Id.* at 42-43.

756. *Id.* at 43 (citing Pacific Rivers Council v. Robertson, 854 F. Supp. 713, 723 (D. Or. 1993)).

the FWS, believing that the district court's ruling should be appealed to the Court of Appeals for the Ninth Circuit.[757] Meanwhile, several environmental groups filed suit in an Arizona district court seeking an injunction against timber harvesting in Region 3 because the FS had not consulted with the FWS.[758] The district court granted this injunction on 24 August 1995, and the FS suspended all timber sale contracts in the region the following day.[759] About 2.5 months later, the FS began formal consultation with the FWS. Several months later, the FWS issued a draft Biological Opinion (BO) that was later determined to be legally insufficient. Finally, on 4 December 1996, a final BO was issued allowing commencement of logging activities in Region 3 once again.[760]

The COFC held that the Protection of Endangered Species clause created an express warranty that the FS "had disclosed all protective measures required to comply with the ESA that it knew were necessary or should have known were necessary."[761] The court accepted the FS's position that it had a "genuine legal argument" not to to consult on its existing LRMPs when the Mexican spotted owl was listed as an endangered species. The court also held, however, that the FS should have known that consultation was necessary by the time the Ninth Circuit made its ruling. The court concluded that the FS's breach of this express warranty amounted to a breach of an implied duty to cooperate.[762] It also held that the FS's delay in commencing formal consultation with the FWS after the Ninth Circuit's decision as well as its part in developing a legally deficient BO, which both stalled resumption of logging, were unreasonable and amounted to a breach of its implied duty not to hinder contractual performance.[763]

Old, but Not Forgotten

On contracts that are awarded after 1 October 1995, the Contract Disputes Act requires claims to be submitted "within 6 years after the accrual of the claim."[764] On pre-1995 contracts, the claim merely had to be submitted within a reasonable time, which typically meant it could not be delayed so long as to prejudice the government in some manner. This past year, in *LaForge and Budd Construction Co. v. United States*,[765] the COFC held that the government failed to demonstrate it was prejudiced by a contractor's claim submission seven years after accrual. In *LaForge*, the contractor was a small business that entered into a contract with the COE to build a munitions storage facility at Tinker Air Force Base in Oklahoma.

The contractor submitted undisputed evidence that the COE's Area Engineer did not get along with the contractor and had instructed his inspectors to "tighten down on those bastards and run them off Tinker Air Force Base within thirty days."[766] Subsequent government practices resulted in the contractor alleging government interference and delays. Unfortunately, the contractor did not submit a claim until seven years after completion of its efforts.[767]

At trial, the government argued that the claim should be barred by *laches* because it was prejudiced by the delayed filing. The COFC disagreed, noting that the government was not entitled to a presumption of prejudice and it had failed to present adequate evidence of actual prejudice. The government had alleged it lost track of two government employees who had first-hand knowledge of the events and that it had lost daily inspection reports dealing with the events. The court, however, felt this was insufficient to demonstrate prejudice because the government could not explain what information these reports and witnesses would provide.[768]

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757. *Id.* at 43. The Ninth Circuit ultimately affirmed the lower court's holding on 7 July 1994. *Id.* at 44 (citing Pacific Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994)). Again, the FS attempted to avoid having to consult on existing LRMPs. It unsuccessfully petitioned for a writ of certiorari to the Supreme Court in February 1995. *Id.* at 46 (citing Thomas v. Pacific Rivers Council, 514 U.S. 1082 (1995)).

758. *Id.* at 45.

759. *Id.* at 46.

760. *Id.* at 49.

761. *Id.* at 66.

762. *Id.* at 65-70.

763. *Id.* at 70-72.

764. *See* 41 U.S.C. § 605(a) (2000); *see also* FAR, *supra* note 11, § 33.206(b) (implementing this statutory requirement).

765. 48 Fed. Cl. 566 (2001).

766. *Id.* at 567-68.

767. *Id.* at 568-69.

Inspection, Acceptance, and Warranties

This Is Nothing Personal, Just Business

Federal agencies often have long-standing and sometimes warm relationships with contractors. Such relationships, however, should never hinder the government from asserting its legitimate contract rights. The Air Force learned that lesson the hard way in *Perkin-Elmer's Corp. v. United States*.[769]

In 1986, the Air Force awarded Perkin-Elmer's Corp. (Perkin) a contract to produce a "portable wear metal analyzer (PWMA)."[770] The Air Force accepted 133 PWMAs between 1988 and 1990. In 1991, an independent testing firm informed the Air Force that the PWMAs failed to meet contractual requirements. In 1991 and 1992, the Air Force informed Perkin that it might exercise its contractual rights against Perkin. During 1993, the Air Force tried to negotiate a settlement of the defects with Orbital Science Corporation, a company that bought Perkin.[771] Between this time and 1995, the Air Force failed to settle the dispute and initiated a False Claims Act[772] investigation against Perkin. In 1996, the Air Force revoked acceptance of the PWMAs and demanded $8,315,253.80 from Perkin. In 1997, the Air Force hired an expert to pinpoint the defect in the PWMAs, and then repeated its demand for $8,315,253.80.[773]

At the COFC, Perkin moved for summary judgment, arguing that the government's six-year delay in revoking acceptance was unreasonable, thus prohibiting government recovery on its claim.[774] The Air Force countered that six years was a reasonable time "given its contractual relationship and lengthy history with Perkin-Elmer."[775] The court disagreed, focusing on the initial report from the testing firm in 1991: "[T]he government's revocation, which came more than six years after it first learned of the alleged defect, was not timely."[776]

The lesson is that agencies should exercise their revocation rights even if pursuing other alternatives. That may be difficult to do, especially during settlement negotiations. Nonetheless, failure to timely exercise revocation rights may waive a contractual remedy.

Better Eat Your Wheaties

Federal agencies may use warranties to allow for contractual remedies for defects discovered after acceptance.[777] The Defense Personnel Support Center relied on such a warranty to revoke acceptance of defective oatmeal in *Shelby's Gourmet Foods*.[778] In *Shelby*, a Department of Agriculture inspector accepted the proffered oatmeal on behalf of the government, but a "subsistence quality auditor" later rejected the same oatmeal.[779] Specifically, the food auditor found that the oatmeal cans had defects such as "incomplete tucks and improper crimping" and had failed the "bell jar test."[780] When the government revoked its earlier acceptance based on these defects, the contractor protested, arguing that the government's original acceptance was conclusive.[781] The board disagreed, holding that "the warranty clause survives final acceptance and provides remedies to the government in addition to those provided by the standard inspection clause."[782] Practitioners should use this case as a reminder to rely on any available remedies when seeking to revoke acceptance of proffered goods or services.

768. *Id.* at 572-73. The court also specifically noted that throughout the seven-year period the government was aware the contractor would be filing a claim, implying that it should have preserved its evidence better. *Id.* at 573.

769. 47 Fed. Cl. 672 (2000).

770. *Id*. at 673. "PWMAs are instruments designed to evaluate the condition of aircraft engines by analyzing the concentration of various metals in the engines' oil." *Id*.

771. *Id*. at 673.

772. 31 U.S.C. § 3729 (2000).

773. *Perkin-Elmer's*, 47 Fed. Cl. at 673.

774. *Id*. at 675.

775. *Id*. The Air Force also argued that it did not learn the precise reason for the defect until it received the expert report in 1997. *Id.*

776. *Id*. at 676.

777. FAR, *supra* note 11, § 46.702(b)(1).

778. ASBCA No. 49883, 01-1 BCA ¶ 31,200.

779. *Id*. at 154,040. As military service members, we wonder why a DOD entity was buying anything from a purveyor of "Gourmet Foods."

780. *Id*.

781. *Id*.

Pricing of Adjustments

Heads I Win, Tails You Lose?

The CAFC this past year upheld the COFC's decision to grant *quantum valebant* relief on a contract that contained an invalid Economic Price Adjustment (EPA) clause.[783] In *Barrett*, the contractor had four contracts with the Defense Fuel Supply Center to supply jet fuel. Each of the contracts was for a fixed price, but contained an EPA clause that was based upon the monthly average sales price of refined petroleum. The contractor instigated litigation before the COFC to have these EPA clauses invalidated because the FAR does not permit adjustments based upon cost indexes for the end-product itself.[784] Once the COFC held that the clauses were invalid, the government argued that the entire contract was invalid because that left the price term indefinite.[785] The COFC and the CAFC disagreed and held that the parties had a valid contract containing an "implied-in-fact promise by the government to pay at least fair market value for the fuel."[786]

Be Careful What You Propose

This past year's decision in *NavCom Defense Electronics, Inc.*,[787] serves as a reminder of just how difficult it is for contractors to demonstrate they are entitled to a jury verdict method of proof.[788] In that case, the Navy awarded NavCom Defense Electronics, Inc. (NavCom), a contract to produce the follow-on to the AN/UPM-137A, Identification of Friend or Foe Radar Test Set.[789] During production, NavCom submitted a request for equitable adjustment in which it alleged the government had given it defective government furnished equipment (GFE) and technical manuals covering the GFE and that it had to modify its designs and order different materials to compensate for these defects.[790]

The board ruled in favor of NavCom on several of the alleged defects,[791] but also ruled that NavCom was not entitled to rely upon the jury verdict method when it came to computing entitlement on the claim.[792] The board specifically noted that as "a part of its proposal, NavCom described a project management system it planned to use" on the contract, which, according to a government expert witness, should have been sufficient to document and track the costs associated with the changed work.[793]

COE's Project Was All Wet, Justifying Use of Modified Total Cost Method

The COFC decision in *Baldi Brothers Constructors v. United States*,[794] stands in stark contrast to the *NavCom* decision discussed previously. In *Baldi Brothers*, the COFC, without difficulty, decided the contractor could make use of the modified total cost method to prove its damages. The Navy had

782. *Id*. at 154,041. Incidentally, because of this case's lengthy litigation, "after the expiration of the 18 month shelf life of the oats, the entire shipment was destroyed." *Id.*

783. Barrett Refining Corp. v. United States, 242 F.3d 1055 (Fed. Cir. 2001), *aff'g* 45 Fed. Cl. 166 (1999).

784. Barrett Refining Corp. v. United States, 45 Fed. Cl. 166, 167 (1999). The FAR permits adjustments based upon indexes, but only for labor or material indexes, not the end-product itself. *See* FAR, *supra* note 11, § 16.203-1.

785. *Barrett Refining Corp*., 242 F.3d at 1059.

786. *Id*. at 1059-60 (citing *Barrett Refining Corp*., 45 Fed. Cl. at 170). Thus far, all the litigation in this area has been brought by contractors seeking to obtain a larger adjustment than they would have otherwise been entitled to under the invalid EPA clauses. It would be interesting to see how a court or board would handle a scenario in which the government was seeking to invalidate an EPA clause in order to achieve a smaller adjustment where fair market values are less than the EPA adjusted amount.

787. Nos. 50767, 52292-98, 2001 ASBCA LEXIS 318 (July 25, 2001).

788. There are actually four methods of proving damages: (1) the actual cost method where the contractor submits actual cost data to demonstrate its additional costs associated with a change; (2) the estimated cost method where the contractor does not have actual cost data and submits estimates of those costs instead; (3) the total cost method where the contractor submits all costs—not just those associated with the change—and asserts the government is liable for the total cost incurred by the contractor; and (4) the jury verdict where the contractor submits competent evidence of its damages, but the government counters with conflicting evidence which questions the accuracy of the contractor's computations. *See* Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 321-24 (1989), *aff'd* 909 F.2d 1495 (Fed. Cir. 1990).

789. *NavCom Defense Electronics*, 2001 ASBCA LEXIS 318, at *4.

790. *Id.* at *175.

791. *Id.* at *221-22.

792. *Id.* at *235-39.

793. *Id.* at *224-27.

794. 50 Fed. Cl. 74 (2001).

hired Baldi Brothers Constructors (Baldi Bros.) to construct a tank training range at Camp Lejeune in North Carolina. This range consisted of a control tower, firing positions, impact berms, and tank trails for the tanks to drive upon. The tank trails required the removal of dirt and the impact berms required the addition of dirt. The boring logs accompanying the bid documents portrayed the site as a well-graded silt and sand mixture that could be excavated easily using conventional earthmoving equipment.[795]

Post-award, the government told Baldi Bros. that about eighty percent of the site was federally protected wetlands and that it would not be able to transport dirt through these areas. The soil condition in the non-protected portion of the site was also super-saturated.[796] This forced the contractor to use alternate earthmoving equipment, caused a lot of its equipment to become stuck in the soil, caused the work to be halted while the government developed new designs for the site, and required a large amount of the work to be re-done due to soil collapses.[797]

The court found that Baldi Bros. had met the prerequisite requirement of showing the impracticability of proving its actual losses because,"due to the snowball effect of the wetlands on the project plans, it would be easier for plaintiff to identify the items of contract performance that proceeded as planned, rather than the difference in costs between all aspects of the original plan and the work that the deviations occasioned."[798] The court faulted Baldi Bros., however, for using an overly optimistic earthmoving rate that assumed the optimal rather than average soil and surface conditions. The court, therefore, revised Baldi Bros.'s bid to reflect an average earthmoving rate.[799] As a result, the contractor was entitled to only $838,651.40 out of its claimed $1,528,537.[800]

Value Engineering Change Proposals

Contractor Entitled to Healthy Share of Implied Cost Savings

In April 1995, the Navy awarded a contract to Sentara Health System (Sentara) to operate two Tricare health clinics in the Tidewater, Virginia, area. The Navy owned one of these clinics and Sentara owned the other.[801] The contract required Sentara to use a government-installed automated information system, the Composite Health Care System (CHCS), to make appointments and to generate and maintain patient records at the government-owned clinic. It also gave Sentara the option to use this system at the clinic it owned.[802] Sentara elected instead to use a self-designed Patient Management System (PMS) at the contractor-owned clinic that performed these same functions except that it used different data fields. The contract required Sentara to generate monthly patient statistic reports covering both clinics. Sentara developed a patch that converted the PMS data into CHCS format to generate these statistical reports.[803]

795. *Id.* at 75.

796. *Id.* at 76-77. The contractor was unable to discover this differing site condition pre-award because the site was inaccessible due to thick vegetation that surrounded the site. *Id.* at 76 n.7.

797. *Id.* at 80.

798. *Id.*

799. *Id.* at 82-83. The Navy requested a bid revision to reflect the actual, poor surface/soil conditions, but this was rejected by the court. *Id*.

800. *Id*. at 78, 85.

801. Sentara Health Sys., ASBCA No. 51540, 00-2 BCA ¶ 31,122, *motion for reconsideration denied,* 2001-1 BCA ¶ 31,198.

802. *Id*. at 153,719.

803. *Id.* at 153,720.

Post-award, the DOD developed the Ambulatory Data System (ADS) which involved additional data fields beyond those contained in CHCS. The DOD forced the Navy to implement the ADS at all of its health clinics, including contractor-owned clinics operated by DOD contractors.[804] The Navy, in-turn, notified Sentara of this "proposed change" to the information system requirements and asked it to submit a proposal covering that change. Sentara's proposal included a one-time training cost of $27,707 and an annual implementation cost of over $2 million, which the contracting officer believed was excessive. As the contract contained FAR 52.248-1, Value Engineering, Sentara also indicated in its change order proposal that it could use an alternate approach to the ADS system that would "save the government about $2 million."[805] This alternate approach involved modifying the PMS slightly and then using the modified PMS at both clinics.[806]

The contracting officer believed that the ADS implementation cost was excessive and, therefore, did not actually modify the contract to direct its implementation. Sentara, on it own initiative and without cost to the government, coordinated with DOD Tricare officials and determined a way PMS could be used in lieu of the ADS. Upon learning that Sentara had successfully tested the modified PMS system, the contracting officer sent Sentara a change order directing it to use the modified PMS system for the required automatic information system at both clinics.[807]

Sentara complied with the modification, but submitted a Value Engineering Change Proposal (VECP) in which it calculated it had generated annual cost savings for the government of $1.18 million by using the modified PMS in place of the ADS. The contracting officer rejected Sentara's VECP because the government had never modified the contract to include any requirement to implement the ADS. According to the contracting officer, without any contractual requirement to implement the ADS, there were no savings realized by the use of the modified PMS.[808]

The ASBCA disagreed, holding that although the obligation to implement the ADS was never expressly placed into the contract, Sentara nevertheless had an implied obligation to do so. Consequently, it had a "contractual obligation to provide the work that its proposal eliminated" which resulted in cost savings to the government, and justified the government paying Sentara a portion of those savings under the Value Engineering clause.[809]

Terminations for Default

A-12 Termination Upheld—Is This Finally the End?

Over ten years after McDonnell Douglas and General Dynamics first challenged their default termination,[810] the COFC dismissed the plaintiffs' complaint and entered judgment for the government in *McDonnell Douglas Corp. v. United States*.[811] On remand, the CAFC directed the COFC to determine a relatively narrow issue—whether the plaintiffs were in default at the time the government terminated the contract. Within the constraints set by the appellate court, Judge Hodges upheld the Navy's 1991 default, finding that the "Navy's unilateral modification establishing a new schedule . . . was reasonable" and that a "Contracting Officer acting with discretion rationally could have determined that the contractors would not have" met the newly established deadline.[812]

In 1988, McDonnell Douglas and General Dynamics "contracted with the Navy to produce eight A-12 stealth aircraft."[813] The multi-billion dollar, fixed-price, incrementally funded contract required the contractors to deliver the first aircraft in June 1990.[814] The contractors experienced performance difficulties from the beginning, requiring a delivery schedule extension.

804. *Id.*

805. *Id.* at 153,720-21.

806. *Id.* at 153,721.

807. *Id.* at 153,722.

808. *Id.* at 153,722-24.

809. *Id*. at 153,724.

810. *See* McDonnell Douglas Corp., v. United States, 35 Fed. Cl. 358 (1996) [hereinafter *McDonnell Douglas I*]. The Navy terminated the A-12 contract on 7 January 1991. McDonnell Douglas and General Dynamics sued for relief soon after. The A-12 was a full-scale engineering and development contract for a carrier-based stealth aircraft. *Id.* See *McDonnell Douglas I* for a full discussion of the facts.

811. McDonnell Douglas Corp. v. United States, 50 Fed. Cl. 311, 314 (2001) [hereinafter *McDonnell Douglas III*].

812. *Id*. at 313.

813. *Id.*

814. McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1322 (Fed. Cir. 1999) [hereinafter *McDonnell Douglas II*].

When the parties could not agree to a new delivery date, the Navy unilaterally issued a schedule modification on 17 August 1990, calling for "first flight" by 31 December 1991.[815]

In November 1990, the contractors requested that the government restructure the contract as a cost reimbursement type contract.[816] After a series of high-level discussions, reaching the President of the United States,[817] the Secretary of Defense refused to restructure the contract. The Navy then terminated the contract for default in January 1991.[818]

The plaintiffs challenged the termination, and in 1996 the COFC vacated the default termination and converted it to a termination for convenience. Judge Hodges found that the termination was improper because, due to political pressure, the contracting officer "was not permitted to exercise reasoned discretion" and the termination was "not related to performance."[819] On appeal, the CAFC reversed, finding that the government's default termination was performance-related.[820] The CAFC directed the COFC to determine whether the contractors were in default.[821]

On remand, the government argued that the "contractors were not making progress toward the December 1991 first flight schedule."[822] The plaintiffs argued that the "Navy's unilateral schedule was unreasonable and therefore unenforceable."[823] Alternatively, the plaintiffs argued that the government had waived the new schedule.[824]

Courts will only enforce a unilaterally imposed schedule change if the time for performance is reasonable.[825] On remand, the COFC reviewed the Navy program manager's efforts to impose a reasonable schedule. The COFC considered the information the program manager had, the efforts the program manager took to obtain this information, and the persons with whom the program manager coordinated.[826] In addition, the COFC seemed to give considerable weight to the subjective intent of the Navy officials. For example, the COFC quoted the program manager's testimony that he interpreted secretarial guidance on the scheduling issue to be:

> [D]on't go out and try to be a big hero and have a schedule to get somewhere that is not achievable. Make sure you build in the type of contingency and buffer time that's necessary to ensure that in going forward in a restructuring we've allocated enough time that we don't need to go back and restructure and reschedule again. Give yourself the room in this first restructuring, one bite at the apple more or less.[827]

That the "Navy wanted a reasonable schedule"[828] was an important factor in the COFC's finding that the schedule was, in fact, reasonable. Because the contractors conceded they were not going to make the first flight deadline, the COFC sustained the default termination.[829]

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815. *McDonnell Douglas III*, 50 Fed. Cl. at 313.

816. *Id. See also McDonnell Douglas II*, 182 F.3d at 1322.

817. In late 1990, Secretary of Defense Cheney briefed the President of the United States. Later, the Office of the Secretary of Defense sent a memorandum to the Navy directing the Navy to "show cause by January 4, 1991, why the Department should not terminate the A-12 program." *McDonnell Douglas III*, 50 Fed. Cl. at 313-14. As a result, the Navy sent a cure notice to the contractors on 17 December 1990. The contractors responded by denying they were in default and requesting "equitable restructure" under the President's authority under Public Law Number 85-804 (authorizing extraordinary relief to promote national defense). *Id.* at 314. "Secretary Cheney met with Navy Secretary Garrett, Under Secretary Yockey, and the Chairman of the Joint Chiefs of Staff and decided not to grant 85-804 relief." *Id*. The next day, the Navy's contracting officer terminated the contract. *Id.*

818. *Id.*

819. *Id.* at 314-15.

820. *Id.* at 315. *See also McDonnell Douglas II*, 182 F.3d at 1326.

821. *McDonnell Douglas III*, 50 Fed. Cl. at 315.

822. *Id.*

823. *Id.*

824. *Id.*

825. *Id.* at 316 (citing DeVito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969)).

826. *Id.* at 316-19.

827. *Id.* at 317.

828. *Id.*

Federal Circuit Rejects Economic Duress Defense to Contract Reinstatement

In *Balimoy Manufacturing Co. of Venice v. Caldera*,[830] the CAFC considered appellant's economic duress defense to a contract reinstatement following a default termination. The government awarded appellant, Balimoy Manufacturing Co. of Venice (Balimoy), a contract to produce two million twenty-millimeter ammunition shells. Balimoy missed the delivery deadlines, and the government terminated the contract.[831]

The government reinstated the contract, "but only to the extent of one million shells."[832] Both parties signed Modification P00001 reinstating the contract.[833] The modification stated that it was: a "partial termination,"[834] a "compromise between the parties," and a "full release and accord and satisfaction as to any and all claims . . . arising under or related to the Notice of Termination."[835] After several additional modifications and deadline extensions, Balimoy failed to the meet the revised delivery schedules. The government terminated the remainder of the contract. Initially, the government terminated the contract for default, but later changed this second termination to a convenience termination.[836] Each party proposed a settlement agreement that the opposing party rejected.[837]

Balimoy alleged that Modification P00001 was unenforceable due to economic duress arising from three sources: (1) an improper first default termination, (2) undue pressure to accept Modification P00001 "in lieu of a threat" of continued termination, and (3) the government's alleged "prohibiting of Balimoy's performance to obtain Balimoy's acquiescence to Modification P00001."[838]

The CAFC found that economic duress required (1) involuntary acceptance of another's terms, (2) lack of other reasonable alternatives, and (3) coercive acts by the opposite party.[839] The court did not address the substance of Balimoy's duress allegations, that is, the coerciveness of the government's acts. Instead, the CAFC found that Balimoy's acceptance of the modification was voluntary, "being motivated by a desire to remove the stigma of the termination for default."[840] In addition, Balimoy had two alternatives to agreeing to the modification: "appealing the first default termination" and "further negotiating the price of the reinstated quantity."[841] The CAFC, therefore, affirmed the board's finding that there was no economic duress.[842]

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829. *Id.* at 319. McDonnell Douglas also argued that the government waived the new schedule. *Id.* Although there was some evidence that Navy officials would have accepted a later first flight date, "the Government does not relinquish its right to terminate a contract merely because in this case the Navy wanted the plane." *Id.* at 319 n.11. In addition, an element of waiver is reliance and there was "no evidence that the contractors relied" on a later "deadline to their detriment." *Id.* at 319.

830. No. 99-1037, 2000 U.S. App. LEXIS 26702 (Fed. Cir. Sept. 29, 2000).

831. *Id.* at *1-2.

832. *Id.* at *2.

833. *Id.* Federal Acquisition Regulation section 49.102(d), Reinstatement of Terminated Contracts, provides:

> Upon written consent of the contractor, the contracting office may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that—
>
> (1) Circumstances clearly indicate a requirement for the terminated items; and
>
> (2) Reinstatement is advantageous to the Government.

FAR, *supra* note 11, § 49.102(d).

834. The document failed to explicitly disclose whether the parties intended a partial termination for convenience or a partial termination for default. The court found that the parties' course of dealing indicated this was a partial termination for default. *Balimoy,* 2000 U.S. App. LEXIS 26702, at *10-11.

835. *Id.* at *2.

836. *Id.* at *3.

837. *Id.* at *3-4. Balimoy rejected the government's expense figures and appealed to the ASBCA. Balimoy then submitted its own settlement claim to the government. The government did not respond and "was therefore deemed to have denied" the claim. Balimoy appealed the deemed denial and the board consolidated the two appeals. *Id.* at *4.

838. *Id.* at *12-13.

839. *Id.* at *13 (citing Sys. Tech. Assocs. v. United States, 699 F.2d 1383, 1387 (Fed. Cir. 1983)).

840. *Id.* Because the modification was a partial default termination, Balimoy would have avoided only the stigma of a complete termination.

841. *Id.*

Plaintiffs rarely allege economic duress in government procurement cases. *Balimoy* does not provide any additional incentive to make use of the defense.

Defective Specifications and Relaxed Treatment of Reprocurement Contractor Invalidate Default Termination

In *Marshall Associated Contractors, Inc.*,[843] the Bureau of Reclamation (BOR) established a prima facie case for a termination for default, when the contractor, Marshall Associated Contractors, Inc. (Marshall), failed to deliver the contracted amount of sand by the contract delivery dates.[844] The Department of the Interior Board of Contract Appeals (IBCA), nonetheless, converted the default termination to one for convenience because the board found four grounds showing that the default termination decision was an abuse of discretion.[845]

First, the board found that defective design specifications severely hampered Marshall's ability to perform in a timely manner.[846] Second, the contracting officer denied Marshall's earlier claims (concerning defective specifications and differing site conditions) without "the fully considered evaluation they deserved."[847] Third, Marshall's failure to deliver the contracted sand amount did not prejudice the government because the government had sufficient sand to meet its then-current requirements. Finally, the IBCA observed three ways in which the BOR treated the reprocurement contractor, Fisher Sand and Gravel (Fisher), much better than it had treated Marshall.[848]

First, the BOR "substantially relaxed and improved upon its specifications" in the reprocurement contract.[849] Second, the reprocurement contract paid Fisher three times Marshall's price to deliver less sand in the same amount of time. Finally, even though Fisher also "fell seriously behind schedule," the BOR did not default Fisher or seek liquidated damages.[850] This disparate treatment, coupled with the other factors, compelled the board to find that the contracting officer abused his discretion in terminating Marshall's contract.

Contract Administration Flaws Cause Reversal of Postal Service Default Termination

In *Abcon Associates, Inc.*,[851] the contractor missed two construction deadlines, causing the government to terminate the contract for default.[852] The COFC found, however, that the USPS breached its duty of good faith, thereby excusing the contractor's default.[853] The construction contract was divided into two phases.[854] After the contractor missed the phase one completion date, the government assessed liquidated damages (LDs).[855] The *USPS Procurement Manual*, however, only authorized the government to assess LDs after the final completion date, absent a special clause in the contract. This contract did not specially authorize imposing LDs after a missed phase deadline.[856] The improper imposition of LDs "substantially impeded plaintiff's ability to perform" the contract.[857] Addi-

842. *Id.*

843. IBCA Nos. 1091, 3433-3435, 01-1 BCA ¶ 31248.

844. *Id.* at 154,256.

845. *Id.* at 154,260.

846. *Id.* at 154,258-59.

847. *Id.* at 154,259.

848. *Id.*

849. *Id.*

850. *Id.*

851. 49 Fed. Cl. 678 (2001).

852. *Id.* at 686.

853. *Id.* at 690.

854. *Id.* at 679.

855. *Id.* at 683.

856. *Id.* at 688-89.

857. *Id.* at 689.

tional USPS actions fell "below the standard of good faith."[858] A "mindless directive" from the on-site engineer, coupled with the government's failure to respond to repeated requests for information, "precipitated a long delay."[859] In all, the COFC found that "neither party lived up to its responsibilities under the contract."[860] Therefore, the court converted the default termination to a convenience termination.[861]

Anticipatory Repudiation and Adequate Assurances After CAFC's Danzig v. AEC Corp.

Last year, discussing *Danzig v. AEC Corp.*,[862] the *Year in Review* highlighted a CAFC decision upholding a default termination for the contractor's failure to provide adequate assurance of timely performance.[863] This year, in *Omni Development Corp.*,[864] the Department of Agriculture Board of Contract Appeals made it clear that, even after *Danzig*, when the government bases a default termination on inadequate assurances of timely performance, the "inadequate assurance" must relate to performance of the whole contract. The government cannot default terminate a contract for anticipatory repudiation when a contractor represents that it will miss interim deadlines, but asserts it will complete the contract on time.[865]

Much Ado About Nuts

In *Giesler v. United States*,[866] the CAFC reversed the COFC's order rescinding a contract between appellant, doing business as Central Park Co. (Central Park), and the government. In January 1995, the DLA issued a solicitation for "Nuts. Mixed, Shelled . . . CID A-A-20164."[867] As appellant's president knew, CID stood for "Commercial Item Description." This particular code specified a "mixed nut composition containing not more than 10% peanuts by weight."[868]

Acting through a broker, the appellant identified Flavor House as its nut supplier for this solicitation.[869] Apparently neither Central Park nor Flavor House read the specification setting the maximum peanut content at ten percent.[870] In February 1995, Central Park submitted the low bid, and upon government request, verified its bid price.[871] In March, the government conducted a pre-award survey of Flavor House. Soon after the pre-award survey, Flavor House faxed the government specifications that indicated that Flavor House's mixed nuts included sixty percent peanuts. Not perceiving the discrepancy between the solicitation and Flavor House's proposal, the government awarded the contract to Central Park in April 1995. A government inspection in June indicated that Flavor House's nut mix was nonconforming. Unable to renegotiate the contract, the appellant failed to deliver the nuts on schedule. The DLA terminated the appellant's contract for default.[872] Central

858. *Id.* at 690.

859. *Id.*

860. *Id.*

861. *Id.* at 690-91.

862. 224 F.3d 1333 (Fed. Cir. 2000).

863. *2000 Year in Review, supra* note 2, at 50.

864. AGBCA Nos. 97-203-1, 98-182-1, 01-2 BCA ¶ 31,487.

865. *Id*. at 155,462 ("*Danzig* does not hold that a contractor who fails to meet or who advises the Government that it cannot precisely meet an interim deadline set by the Government in a cure notice, is per se subject to a termination for default, without more."). At least three Board of Contract Appeals decisions this year cited *Danzig* for the traditional proposition that a "default termination is justified if the contractor repudiates the contract and fails to give reasonable assurances of performance in response to a validly issued cure notice." G&G Western Painting, ASBCA No. 50492, 01-2 BCA ¶ 31,492 at 155,484 (quoting from *Danzig). See also* EFG Assocs., Inc., ASBCA Nos. 50546, et al., 01-1 BCA ¶ 31,324 at 154,729 (abandonment coupled with contractor's express assertions that contract was terminated "was tantamount to an unequivocal refusal to perform . . . otherwise known as an 'anticipatory repudiation,' which was a legally supportable basis" to default terminate); Graham Int'l, ASBCA No. 50360, 01-1 BCA ¶ 31,222 at 154,111(citing *Danzig* as an example of a valid anticipatory repudiation and holding that "[b]y stopping work, . . . notifying the government that it 'hereby stops all work' the next day, releasing its work force and twice encouraging a default termination," the contractor manifested a "positive, definite, unconditional, and unequivocal intent not to render the required performance").

866. 232 F.3d 864 (Fed. Cir. 2000).

867. *Id.* at 867.

868. *Id.* at 870.

869. *Id.* at 867.

870. *Id.* at 870.

871. *Id.* at 867-68.

Park challenged the termination at the COFC. The COFC found that

> although Central Park had erred in failing to read the specification, the government's receipt of the March 29, 1995 facsimile from Flavor House gave it constructive knowledge that Central Park intended to supply a non-conforming nut mix. The trial court determined that the government had a duty to notify Central Park of this error, and that because the government failed to do so, Central Park should be granted rescission of the contract.[873]

According to the CAFC, a contract may be reformed or rescinded only if a contractor establishes that a bid error resulted from a "clerical or arithmetical error, or a misreading of the specifications."[874] Even if an error is otherwise inexcusable, "if the government has breached its explicit regulatory duty to examine the contractor's bid for mistakes," then a court may rescind a contract.[875]

In the instant case, however, the court found that "Central Park's conduct was not an excusable 'misreading' of the specification, but rather amounted to gross negligence in failing to read the specification and a clear error in business judgment."[876] The court continued, "[W]e cannot imagine any circumstance in which a non-reading can be a 'misreading.'"[877] Concerning the government's conduct, the court found "the government's duty to examine contractors' submissions for mistakes only pertains to errors contained in contractors' bids. Under the FAR, this duty does not extend to errors that may be contained in a contractor's subsequent filings."[878] The CAFC concluded that the COFC erred in holding that Central Park deserved rescission of the contract.[879]

Terminations for Convenience

No Monday Morning Terminating: CAFC Rejects Retroactive Constructive Convenience Termination

The government's right to terminate a contract for convenience is broad, but not boundless. In *Ace-Federal Reporters Inc. v. Barram*,[880] the CAFC limited the government's right to retroactively terminate a contract for convenience. In *Ace-Federal Reporters*, the CAFC found that the government breached a partial, or non-exclusive, MAS requirements contracts for transcription services.[881] The government violated the terms of these novel contract types by contracting for covered services with companies that were not parties to the schedule contracts.[882]

Ace-Federal brought a claim to the GSBCA for breach of contract and sought lost profits. Regarding damages for the contract breach, the government argued that the breach should be treated as a constructive termination for convenience and that the termination for convenience clause precluded recovery of lost profits.[883] The government asserted that the GSBCA should have "impose[d] a constructive termination for convenience . . . to the extent unauthorized off-schedule purchases were made, in effect multi-, mini- terminations for conve-

872. *Id.* at 868.

873. *Id.* at 868-69.

874. *Id.* at 869.

875. *Id.*

876. *Id.* at 870-71.

877. *Id.* at 871.

878. *Id.* Federal Acquisition Regulation section 4.407-1 provides,

> After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake.

FAR, *supra* note 11, § 14.407-1.

879. *Giesler*, 232 F.3d at 877.

880. 226 F.3d 1329 (Fed. Cir. 2000).

881. *Id.* at 1333. The contracts did not "fit neatly" into the commonly recognized contract types: definite quantity, ID/IQ, or requirements. *Id.* at 1332. In essence, the contracts were multiple, or non-exclusive, requirements contracts. Nonetheless, the court found them valid and enforceable. *Id.* This facet of the case is discussed in further detail in this article *supra* notes 158-62 and accompanying text.

882. *Ace-Federal*, 226 F.3d at 1331.

nience."[884] The court, however, firmly rejected the government's assertion that a fully and properly performed contract could be terminated for convenience retroactively.[885] Apparently exasperated with the government's reluctance to accept responsibility for its breach of contract, the court concluded:

> We see no reason in law or logic to impose a retroactive constructive termination for convenience here. The concept is a fiction to begin with, but there has to be some limit to its elasticity. The contractors stood ready to perform throughout, did perform those orders placed, and the contract ended.[886]

The message to the government is, if you are going to develop novel contract types, comply with the contract terms, and if you do not, be prepared to pay lost profits.[887]

Settlement Proposal Due Dates: How Do You Measure a Year?[888]

Following a convenience termination, contractors have one year "from the effective date of termination" to submit a termination settlement proposal to the government or to request an extension in writing.[889] In *Swanson Group*,[890] the plaintiff challenged the government's default termination at the ASBCA. The board, on 7 November 1997, sustained the plaintiff's appeal and converted the default termination to a termination for convenience. The board mailed a copy of the decision that the plaintiff received on 17 November 1997. In a 10 November 1998 letter, the plaintiff requested a one-year extension to submit its settlement proposal.[891]

The board rejected the government's argument that the plaintiff's deadline was 6 November 1998, one year from the date of the board's original decision. Instead, the board found that the 10 November 1998 extension request was timely, because the one-year period began to run upon notice of termination, which occurred on 17 November 1997, when the plaintiff received the board's decision.[892]

Another ASBCA decision points out that the government risks waiving the untimeliness of a settlement proposal. In *Consolidated Defense Corp.*,[893] the government moved for summary judgment, arguing that the appellant failed to submit its settlement proposal in a timely manner.[894] Although the government conceded that appellant submitted an interim termination for convenience settlement proposal (TFCSP) within the one-year time limit, the government rejected the interim TFCSP as "incomplete or incorrect."[895] The agency did not receive a TFCSP acceptable to it within one year. The board found that the interim TFCSP was not "so flawed" as to be "meaningless" and therefore, "based on continued negotiations, partial payments, and [a] delayed assertion of an untimely TFCSP" the "Government waived any alleged untimeliness."[896]

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883. *Id.* at 1331.

884. *Id.* at 1333.

885. *Id.*

886. *Id.* at 1333-34.

887. In traditional requirements contracts, purchasing supplies or services from an entity other than the awardee is sometimes referred to as diversion. A recent ASBCA case, citing *Ace-Federal*, held that "diversion is not remediable under the termination for convenience clause in a contract after the contract has been performed." T&M Distrib., ASBCA No. 51279, 01-2 BCA ¶ 31442 at 59 (June 5, 2001). *T&M* emphasized that "allegations of bad faith, abuse of discretion, or arbitrary or capricious action are not essential for a claim for lost profits for improper diversions under a requirements contract." *Id.* at 60. For further discussion of the *T&M* decision, see *supra* notes 134-42 and accompanying text.

888. CAST OF RENT, *Seasons of Love*, *on* RENT (Dreamworks 1996).

889. *See* FAR, *supra* note 11, § 52.249-2(e), -3(e), -6(f). If the contractor fails to submit a proposal, the contracting officer may unilaterally determine the amount due the contractor. *Id.* The effective date of termination means: "the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination means the date the notice is received." *Id.* § 2.101.

890. ASBCA No. 52109, 01-1 BCA ¶ 31,164.

891. *Id.* at 153,928.

892. *Id.* at 153,930.

893. ASBCA Nos. 52315, 52719, 01-2 BCA ¶ 31,484.

894. *Id.* at 155,428.

895. *Id.* at 155,430.

896. *Id.* at 155,430-31.

Convenience Termination Expenses

In *Walsky Construction Co.*,[897] the ASBCA, on the government's motion for summary judgment, ruled on three elements of appellant's claim for convenience termination expenses. First, the board reiterated the "well-settled" rule that "post-termination unabsorbed overhead is not recoverable."[898] Conversely, the board found some authority for recovery of "standby or idle equipment costs after" termination.[899] Finally, the board held that legal expenses to defend against a default termination are not "reasonably necessary for the preparation of termination settlement proposals," and therefore are not recoverable as part of a termination claim.[900]

Definitional Housekeeping

On 15 August 2001, the FAR Council issued a proposed rule moving the definitions of "continued portion of the contract," "partial terminations," and "terminated portion of the contract" from FAR section 49.001 to FAR section 2.101.[901] The rule also replaces the abbreviated definition of "termination for convenience" in FAR section 17.103[902] with a fuller definition to be placed at FAR section 2.101: the "exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the government's interest."[903] The proposed rule moves the remainder of FAR section 17.103, explaining the distinction between cancellation and termination for convenience, to the newly created FAR section 17.104(d). Finally, the proposed rule adds a definition of "termination for default": the "exercise of the Government's right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual provisions."[904] As the Council intended, these amendments do not appear to "make any substantive changes to the FAR."[905]

Contract Disputes Act Litigation

Jurisdiction

CDA Not a One-Stop Shop

The Contract Disputes Act (CDA),[906] unlike the Tucker Act, allows for interest on a claim calculated from the date on which the claim was filed with the contracting officer until the date of judgment.[907] Hence, it is attractive to disgruntled contractors who seek redress on government contracts, especially those with high dollar-value claims. As the next few cases illustrate, not all government contract claims, however, are CDA claims.

In *Florida Power & Light Co. v. United States*,[908] the COFC rejected the argument that claims against the Department of Energy (DOE) involving the transfer of title of mined uranium from several utilities to the DOE was a "procurement" of property within the meaning of the CDA.[909] The contracts provided for the transfer of title of uranium to the DOE, who would enrich it and provide the enriched uranium to the utilities in their electricity-producing operations. The government was

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897. ASBCA No. 52772, 01-2 BCA ¶ 31,557.

898. *Id*. at 155,857 (citing Nolan Bros., Inc., 437 F.2d 1371 (Ct. Cl. 1971); J.W. Cook & Sons, Inc., ASBCA No. 39691, 92-3 BCA ¶ 25,053; Chamberlain Mfg. Corp., ASBCA No. 16877, 73-2 BCA ¶ 10,139; Tech., Inc., ASBCA No. 14083, 71-2 BCA ¶ 8956). Post-termination unabsorbed overhead includes, for example, home office overhead costs incurred after termination. *Id*.

899. *Id*. (citing *Nolan Bros., Inc*., 437 F.2d 1371; Fiesta Leasing & Sales, Inc., ASBCA No. 29311, 87-1 BCA ¶ 19,622, *modified on other grounds*, 88-1 BCA ¶ 20,499). *See also* FAR, *supra* note 11, § 31.205-42(b).

900. *Walsky Construction Co.*, 01-2 BCA ¶ 31,557 at 155,858.

901. Federal Acquisition Regulation; Definition of "Claim" and Terms Relating to Termination, 66 Fed. Reg. 42,922 (Aug. 15, 2001) (to be codified at 48 C.F.R. pts. 2, 17, 33, 49, and 52).

902. Termination for convenience refers to the "procedure which may apply to any Government contract, including multi-year contracts." FAR, *supra* note 11, § 17.103.

903. 66 Fed. Reg. 42,922-23.

904. *Id.*

905. *Id.* at 42,922.

906. 41 U.S.C. §§ 601-613 (2000).

907. *Id*. § 611.

908. 49 Fed. Cl. 656 (2001).

909. *Id*. at 670. The CDA applies to contracts entered into by an executive agency for: "(1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or, (4) the disposal of personal property." 41 U.S.C. § 602(a).

responsible for disposing leftover depleted uranium if the utilities chose not to take it.[910] The court concluded that the transfer of title was "incidental" to the enrichment services and did not rise to the level of "procurement" or disposal" of property.[911] The court also found that the disposal of depleted uranium was an "illusory" government obligation because the utilities could elect to acquire the depleted uranium.[912]

If the Shoe Fits Someone Else, Let Them Wear It

The courts also will not hesitate to preclude CDA jurisdiction if the contract and surrounding circumstances indicate that claims under a government contract are better adjudicated under other statutes. In *Marine Logistics, Inc. v. Secretary of the Navy*,[913] the CAFC found a dispute between the Navy's Military Sealift Command and a cargo transporter to be within the scope of admiralty jurisdiction because the contract to ship cargo was "wholly maritime" in nature.[914] The court concluded that the dispute was better resolved under the Suits in Admiralty Act.[915] Therefore, the CAFC transferred the case to the district court.

In *Inter-Coastal Xpress, Inc. v. United States*,[916] the plaintiff entered into a four-year contract with DOD to deliver perishable goods to various locations. A dispute arose over holdover charges incurred by the plaintiff when shipments were held overnight.[917] After the plaintiff filed suit at COFC, the government moved to dismiss the claims, alleging that jurisdiction fell under the Interstate Commerce Act (ICA),[918] not the CDA.[919] The COFC agreed, noting that the tender agreements in the contract specifically referred to the ICA and that the ICA made no mention of the CDA.[920] In addition, the COFC noted that the ICA defines the general jurisdiction of the Surface Transportation Board as extending "over transportation by motor carrier and the procurement of that transportation."[921]

Bingo, I Win!

Except for specific exceptions applicable to military and National Aeronautics and Space Administration (NASA) exchanges, the CDA ordinarily will not apply to Nonappropriated Fund (NAF) contracts.[922] The government, however, may opt to include a disputes clause in non-military or non-NASA exchange NAF contracts to provide a quick and familiar forum in which to address any disputes. Is the government bound by a disputes clause in these situations even if it fails to respond to a claim? According to the ASBCA, the answer is yes.

In *Charitable Bingo Associates, Inc.*,[923] the board held that it had jurisdiction over a dispute between a NAF procurement office and an operator of bingo games because the contract included a disputes clause. The government, which had not issued a final decision on the claim for over a year, argued that the ASBCA had no jurisdiction because the contract did not

910. *Florida Power*, 49 Fed. Cl. at 658. The dispute arose over billing for uranium enrichment services provided by the U.S. Enrichment Corp. after it undertook the enrichment services previously provided by DOE. *Id.*

911. *Id*. at 671.

912. *Id*. About a month before this case was decided, the CAFC rejected the plaintiffs' attempt to circumvent the COFC's jurisdiction by seeking only "declaratory and injunctive relief" and then filing suit in the District Court for the Southern District of New York. *See* Consol. Edison Co. v. U.S. Dep't of Energy, 247 F.3d 1378 (Fed. Cir. 2001). The plaintiffs did so after the CAFC handed down a decision that made success of any sort unlikely in the Federal Circuit. *See* Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

913. No. 00-1528, 2001 U.S. App. LEXIS 20327 (Fed. Cir. Sept. 12, 2001).

914. *Id*. at *4.

915. 46 U.S.C. § 742 (2000).

916. 49 Fed. Cl. 531, 533 (2001).

917. *Id*. at 533.

918. 31 U.S.C. § 3726 (2000).

919. *Inter-Coastal*, 49 Fed. Cl. at 534-35. The government alleged that under the ICA, the suit was barred by the three-year ICA statute of limitations. *Id*.

920. *Id*. at 539.

921. *Id*. The government's victory was partial. The court held that some of the claims were not barred by the three-year statute of limitations imposed by the ICA. *Id*. at 542.

922. 41 U.S.C. § 602 (2000). *See, e.g.*, Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001) (holding that the Federal Housing Finance Board is a NAF that is precluded from CDA jurisdiction). For further discussion of the *Furash* decision, see *infra* notes 1759-63 and accompanying text. *See also* 28 U.S.C. §§ 1346, 1491 (2000) (exceptions to general rule for military and NASA exchanges).

923. ASBCA No. 53249, 01-2 BCA ¶ 31,478.

specifically include the language from the CDA that provides for appeals on deemed denials.[924] The ASBCA disagreed, noting that it had taken jurisdiction over disputes in the past that existed for a long period without a final decision.[925] It was unsympathetic to the NAF's contention that it needed information from the U.S. Army Criminal Investigation Command, which was conducting an investigation into Charitable Bingo Associates, Inc.'s, activities.[926] The important point is that the boards will read the inclusion of the disputes clause in a contract as granting them jurisdiction, even when the contract explicitly states that the contract is not subject to the CDA.[927]

What Time Zone Am I In?

A contractor must meet a deadline to file an appeal of a contracting officer's final decision whether it appeals to the COFC or to the ASBCA.[928] As the next two cases demonstrate, the contractor better not delay filing an appeal past those deadlines, regardless of what anyone tells them.

In *International Air Response v. United States*,[929] the COFC granted the government's motion to dismiss on the grounds that the contractor did not file its appeal until nineteen months after the final decision. The contractor argued that a month after the final decision, an Arizona district court with jurisdiction over False Claims Act (FCA) allegations related to the contract issued an order "staying the enforcement of the action by the contracting officer and staying any deadlines pertinent to that order for appeal or review."[930] In October, ten months after the final decision, the Arizona district court lifted the stay, noting that the issues in its case were different from those under the CDA. The contractor did not file its claim until July of the following year.[931]

Although the COFC acknowledged that the All Writs Act[932] allows courts to take action to facilitate their jurisdictions, "nothing in the All Writs Act gave the district court power to derogate from the jurisdiction of the COFC, or otherwise to affect the CDA's limitations provisions."[933] The court was unsympathetic to the contractor's contention that it was the district court's action that led to the late filing. It noted that the contractor had over six weeks after the stay was lifted to meet the deadline, that it had not done so until seven months after the stay was lifted, and that the district court's order lifting the stay had included language acknowledging different issues in the CDA suit and the FCA action.[934]

It Takes Two to Reconsider

In *Propulsion Controls Engineering*,[935] the ASBCA was steadfast in applying the ninety-day deadline despite the contractor's argument that the contracting officer's reconsideration extended the period for filing. The board, however, saw no evidence of reconsideration or that the contractor had been led to believe its claim was under reconsideration.[936] The board would not accept that the request, standing alone, was objective evidence that the contracting officer was reconsidering.

But beware. A contracting officer may take actions that can be construed as reconsidering a claim which could inadvert-

924. *Id*. at 155,411. Although the board held that it had jurisdiction over this appeal based on the disputes clause, it had earlier denied Charitable Bingo's petition for an order directing the NAF to issue a final decision. The denial was based on a contract provision that explicitly stated the contract was not subject to the CDA. *See* Charitable Bingo Assocs., Inc., ASBCA No. 52999-883, 01-1 BCA ¶ 31,194.

925. *Charitable Bingo*, 01-2 BCA ¶ 31,478 at 155,412.

926. *Id*. *But see* Laumann Mfg. Corp., ASBCA No. 50246, 01-2 BCA ¶ 31,441 (denying the government's motion for reconsideration to dismiss an appeal without prejudice because there was an ongoing grand jury investigation relating to the contractor's performance on the contract).

927. The disputes clause in the contract made clear that the contractor could appeal a contracting officer's final decision to the ASBCA. The disputes clause in the contract did not, however, mention a contractor's right under the CDA to request that the board direct a contracting officer to issue a final decision. *See* 41 U.S.C. § 605(c)(4).

928. The deadline for an appeal to the COFC is twelve months. *See id.* § 609(a). The deadline for an appeal to the ASBCA (or any board) is ninety days. *See id.* § 606.

929. 49 Fed. Cl. 509 (2001).

930. *Id*. at 511.

931. *Id.*

932. 28 U.S.C. § 1651 (2000).

933. *Int'l Air Response*, 49 Fed. Cl. at 512.

934. *Id*. at 515.

935. ASBCA No. 53307, 01-2 BCA ¶ 31,494.

936. *Id*. at 155,507.

ently extend the filing deadline. In *Arono v. United States*,[937] a contracting officer responded several times to inquiries from the contractor-lessor's attorney. At one point the contracting officer indicated that the "government looks forward to an amiable resolution of the problem."[938] Based on this and other correspondence that indicated the contracting officer was reconsidering his final decision, the COFC held that the appeal was timely filed nineteen months after the final decision.

The Prime Can Stand Even When the Sub Can't

It is well established that a prime contractor whose company has been liquidated through bankruptcy proceedings generally does not have standing to pursue an appeal. In *Triad Microsystems, Inc.*,[939] the board found a prime contractor lacked standing to pursue an appeal when it attempted to do so nearly two years after its Chapter 7 liquidation proceedings. The board looks to the bankruptcy law of the state in which a company is incorporated to determine whether it has standing to pursue its appeal after Chapter 7 liquidation proceedings.[940]

But what happens in a situation where a prime contractor sponsored a claim for a subcontractor who has since filed and completed liquidation proceedings? The ASBCA decided that the subcontractor's solvency does not really matter. In *Stan's Contracting Inc.*,[941] a prime contractor sponsored an appeal on behalf of a subcontractor who had encountered differing site conditions. The subcontractor was later indicted, partly because he used his company to evade income taxes. Eventually the subcontractor's company was liquidated under Chapter 7.[942] The board held that its jurisdiction "is dependent upon the status of the prime contractor and not on that of the subcontractor."[943]

Dirty Hands, Empty Pockets

In *Stan's Contracting*, allegations of misconduct were made against the subcontractor, not the prime contractor.[944] But can an unscrupulous prime contractor draw from the well after he's been caught defrauding the government?

In *AAA Engineering and Drafting, Inc.*,[945] a *qui tam* suit was brought against a contractor after he had submitted an appeal related to 8080 work orders. The suit, alleging that some of the work orders were fraudulent, ended with a judgment against the contractor.[946] A total of eighty work orders were admitted into evidence. The government moved to dismiss the appeal, claiming that the CDA precluded it from acting on a claim involving fraud.[947] The ASBCA disagreed with the government, concluding that it did have jurisdiction to consider AAA Engineering and Drafting's (AAA) excessive work claim even though "fraud allegedly may have been practiced in the drafting or submission of such claim."[948] Nonetheless, it denied the appeals, concluding that the doctrine of res judicata barred AAA from relitigating issues concerning the false work orders. The board found that it would be impossible to segregate the valid claims from the fraudulent ones because the "falsification of work orders in the instant appeals permeated the entirety of the claims."[949]

See a Trend Coming?

On 9 October 2001, the District of Columbia Board of Contract Appeals became the first such board to permit electronic filings (e-filings) of pleadings and other documents. The e-filing will be optional and documents containing protected and sensitive information will continue to be filed on paper. The

937. 49 Fed. Cl. 544 (2001).

938. *Id.* at 547.

939. ASBCA No. 52759, 01-2 BCA ¶ 31,440.

940. *See, e.g.*, Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under pertinent New York law).

941. ASBCA No. 51475, 01-2 BCA ¶ 31,556.

942. *Id.* at 155,852.

943. *Id.*

944. *See id.*

945. ASBCA Nos. 47940, 48575, 48729, 01-1 BCA ¶ 31,256.

946. *Id.* at 154,365. The contractor was found liable by a jury for three false claims in a *qui tam* lawsuit brought under the False Claims Act in the district court in the Western District of Oklahoma. On appeal, the Tenth Circuit affirmed. *See* AAA Engineering and Drafting, Inc., 213 F.3d 519 (10th Cir. 2000).

947. *Id.* at 154,366. Under 41 U.S.C. § 605(a) (2000), an agency head is not authorized to "settle, compromise, pay, or otherwise adjust any claim involving fraud."

948. *Id.* at 154,366 (citing Anlagen-und Sanierungstechnik, GmbH, ASBCA No. 37878, 91-3 BCA ¶ 24,128 at 120,753).

949. *Id.* at 154,367.

system will be implemented through a partnership with CourtLink Corp. (CourtLink). Attorneys are required to have an "E-File Subscriber Agreement" on file with CourtLink to use the system. The D.C. Superior Court, the GAO, and the COFC are also experimenting with e-filings. The advantages are time and cost savings.[950] It is just a matter of when, not if, the BCA nearest you jumps on the e-filing bandwagon.

SPECIAL TOPICS

Alternative Dispute Resolution

ADR—Not Just an "Alternative" Anymore?

Almost two years ago, the Air Force began some systematic changes designed to increase the use of alternative dispute resolution (ADR) procedures as the preferred method for resolving contract disputes.[951] Building on the success she saw in the use of ADR, Mrs. Darleen Druyen, Principal Deputy Assistant Secretary of the Air Force (Acquisition and Management), expanded the role of ADR through seven new proposals.[952] One of these proposals, to include timely identification and resolution of items in controversy in contractor past performance evaluations, drew some resistance from the National Defense Industrial Association (NDIA). The NDIA argues that considering ADR participation as a past performance evaluation factor may not be legally enforceable because it is "unnecessarily coercive and perhaps counterproductive."[953]

In a less controversial step intended to increase the use of ADR, the DLA issued a final rule that establishes ADR as the initial dispute resolution method under DLA contracts.[954] The rule adds a new solicitation provision which states that parties will agree to negotiate to resolve disputes that arise under the contract, and if unassisted negotiation is unsuccessful, the parties will use ADR techniques to attempt to resolve the issue.[955] Further, the provision requires the parties to discuss use of ADR before either party determines that ADR is inappropriate. Documentation rejecting ADR must be signed by an official authorized to bind the contractor, or by the contracting officer (if the government is rejecting ADR), and must be approved at a level above the contracting officer after consulting with the ADR specialist and legal counsel.[956] The provision does allow the offeror to opt out of the clause, but there is no guidance on how the DLA will evaluate an offeror's decision to opt out of the clause.

The COFC also announced a new pilot ADR program.[957] Under the court's new program, all cases (with the exception of bid protest cases) assigned to Chief Judge Baskir, Judge Nancy Firestone, Judge Bohdan Futey, or Judge James Turner will be simultaneously assigned to one of four ADR judges.[958] For each case in the pilot program, the COFC will issue an order requiring early neutral evaluation after the parties file their joint preliminary status report, and again at the end of discovery. The goal of the pilot program is to explore whether early neutral evaluation by a settlement judge will help effect settlement. Additionally, parties may ask the trial judge to allow ADR whenever the parties believe it will be beneficial. All information and documents submitted to an ADR judge will be kept confidential and will not be included in the official court file, nor disclosed to anyone not participating in the ADR process.[959]

Binding Arbitration at FAA

The DOJ concurred with the FAA's Office of Dispute Resolution for Acquisition (ODRA) plan to allow parties to use binding arbitration in bid protests and contract disputes.[960] The

950. *D.C. Contract Appeals Board to Allow E-Filings of Pleadings, Post Decisions on Web*, BNA FED. CONT. REP. (Sept. 18, 2001).

951. Joe Diamond, Air Force program executive officer for weapons, Remarks to the Air Force Alternative Dispute Resolution Conference, San Antonio, Texas (Apr. 17, 2001) (transcript on file with author).

952. *Id.* The seven initiatives are: (1) amending past performance guidance to include tracking the timely identification and resolution of issues in controversy, (2) requiring program managers to identify and report on issues pending more than twelve months to determine if ADR can speed up the resolution, (3) creating a pilot program for funding settlements less than $10 million, (4) increasing access to the judgment fund and flexibility in reimbursement of the fund, (5) challenging industry to develop joint training in negotiation skills and ADR, (6) establishing a recognition program for ADR excellence, and (7) promoting more uniform use of ADR within the DOD. *Id.*

953. *See NDIA Weighs in Against Air Force's Plan to Use ADR Participation in Past Performance Evaluations*, 43 GOV'T CONTRACTOR 21, ¶ 224(d) (June 6, 2001).

954. DLA Acquisition Directive: Alternative Dispute Resolution, 66 Fed. Reg. 27,474 (May 17, 2001).

955. *Id*. (adding provision 5452.233-9001 to the DLA FAR Supplement).

956. *Id.*

957. *See COFC Kicks Off ADR Pilot Program*, 43 GOV'T CONTRACTOR 14, ¶ 149 (Apr. 11, 2001).

958. The ADR judges are Senior Judge Thomas Lydon, Senior Judge Wilkes Robinson, Senior Judge Moody Tidwell, and Judge Christine Miller. United States Court of Federal Claims, *Notice of ADR Pilot Program*, *available at* http://www.contracts.ogc.doc.gov/fedcl/docs/adr.html (last visited Oct. 12, 2001).

959. *Id.*

FAA guidance stresses that the decision to arbitrate must be voluntary, and sets out an informal process for holding a binding arbitration in an ODRA proceeding.[961] The FAA's program for binding arbitration is the first program specifically intended for acquisition-related disputes to receive DOJ concurrence.[962]

First Things First, Confidentiality Rules Key to Successful ADR

Confidentiality of ADR proceedings is a key component of a successful ADR program. In late 2000, the DOJ issued guidance to agencies on the nature and limits of confidentiality in federal ADR programs.[963]

While the DOJ guidance acknowledges a significant issue regarding the relationship between the ADR Act confidentiality guarantees[964] and other laws or regulations that authorize access to certain types of information,[965] it does not give agencies specific guidance on how to handle such problems.

Foreign Purchases

Black Berets: A Controversial Birthday Gift

The FY 2001 procurement that holds the dubious honor for the most congressional scrutiny and notoriety is that which has been characterized as "symbolic of our commitment to transform this magnificent Army into a new force—a strategically responsive force for the 21st century."[966] In light of the stir this procurement caused Congress and American small business interests, the ordeal may have left some longing for a more deliberative, methodical procurement process.[967]

Congress Blows Its Lid

The controversy began with the Chief of Staff's decision to have all Active, National Guard, and Reserve Army personnel begin wearing the new black berets as part of their standard headgear on 14 June 2001, the Army's first birthday in the new millennium.[968] The purchasing agency, the DLA, took several actions to meet the deadlines. After amending a contract with the current domestic supplier of berets, the DLA awarded contracts to two foreign suppliers, and then made competitive awards to four additional foreign suppliers.[969] The first three contract actions, all non-competitive procurements, were justified based on an "unusual and compelling urgency," i.e., to meet the Chief of Staff's deadline.[970] In addition, the DLA neglected to seek a review of these actions from the Small and Disadvantaged Business Utilization Office to determine the feasibility of small business participation.[971]

The noncompetitive contracts were not the only problem. The "Berry Amendment"[972] restricts the DOD's expenditure of funds on clothing to purchases from domestic firms.[973] A

960. *See FAA's ODRA to Offer Binding Arbitration*, 43 GOV'T CONTRACTOR 31, ¶ 326(d) (Aug. 22, 2001) [hereinafter *FAA's ODRA to Offer Binding Arbitration*]. The Administrative Dispute Resolution Act of 1996 requires agencies to issue guidance on binding arbitration in consultation with the Attorney General. *See* 5 U.S.C. § 575(c) (2000).

961. *See* Office of Dispute Resolution for Acquisition, *Proposed Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996* (May 2001), *available at* http://www.faa/gov/agc/guidnce.htm.

962. *See FAA's ODRA to Offer Binding Arbitration*, *supra* note 960.

963. *See* Federal Alternative Dispute Resolution Council, Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000). This document was created by a subcommittee of the Federal ADR Steering Committee, and approved by the Federal ADR Council. *See id*.

964. *See, e.g.*, 5 U.S.C. § 574(a) (2000) (providing, in general, that neutrals and parties may not voluntarily disclose or be compelled to disclose dispute resolution communications).

965. The ADRA anticipates that some dispute resolution communications may be subject to disclosure under other statutory schemes. For example, disclosure under the FOIA is a circumstance where disclosure is not prohibited by the ADRA. 5 U.S.C. § 574(a)(2), (b)(3). Likewise, there are some other statutes, such as the Clean Air Act, which require certain records, reports or information obtained from regulated entities be made available to the public. 42 U.S.C. § 7414(c) (2000).

966. General Eric K. Shineski, Army Chief of Staff, Address at the Association of the U.S. Army Annual Convention (October 17, 2000). A small excerpt of the address, as well as other beret-related information, appears in pdf form at http://www.dtic.mil/soldiers/HotTopics/HTApril2001.htm.

967. *See, e.g.*, Rowan Scarborough, *Army Gives China the Order for Berets*, WASH. TIMES, Mar. 9, 2001, at 1.

968. *See* GAO REPORT 01-695T, *supra* note 116.

969. The six foreign suppliers were from Canada, Romania, South Africa, Sri Lanka, India and China. The Chinese supplier, Kangol, LTD, was actually a United Kingdom contractor. Kangol's participation caused the most controversy in light of the prolonged standoff between the United States and China over a downed Navy surveillance plane. *Id*. at 1-2 and app. I.

970. *Id.*

971. *Id*. One of the non-competitive awards was at a price fourteen percent higher than the domestic source. The price on the single largest noncompetitive contract was twenty-five higher than the average competitive price. *Id*.

waiver is possible "if it is determined that a satisfactory quality and sufficient quantity . . . cannot be acquired as and when needed at U.S. market prices."[974] Eventually, the DLA approved waivers[975] for all of the foreign companies, citing the 14 June 2001 deadline as the "emergency" for the waivers.[976]

Complaints by legislators and contractors about the DLA's reliance on foreign suppliers caused an internal review by the DLA's Philadelphia Defense Supply Center.[977] On 2 May 2001, the House Small Business Committee (HSBC) held a hearing to determine whether the Army had violated the Berry Amendment. The Army announced at the hearing that it would not outfit any of its 3 million troops with berets from foreign sources, particularly from Chinese manufacturers contracting with the British company Kangol, Ltd.[978] The Chinese-made berets will be characterized as surplus property, a result described by one commentator as "replacing one symbolic gesture with another."[979]

The Hat Is on the Other Foot—Small Businesses Are Invited to the Beret Ball

There is hope that the latest beret-related procurement news will be far more palatable to Congress and the American public. The DLA agreed to two small business set-aside contracts worth $50 million to supply 3.9 million berets to the Army. The contracts will include options to extend production by another 7 million berets over three years. The solicitation will be open until 9 October 2001.[980] At least for the time being, the set-asides should curtail any further angst among concerned leaders, businesses, and citizens.

Classified Contracting

Back in Black: The Army Issues Newly Revised Secure Environment Contracting Guidance[981]

In an attempt to administer classified contracting within the Department of the Army better, the Secretary of the Army issued a revised regulation covering classified contracting actions.[982] The regulation uses the term "Secure Environment Contracting" or "SEC."[983] Secure Environment Contracting procedures are required to support special access programs,[984] sensitive compartmented programs,[985] contracting when using intelligence contingency funds, top secret contracting actions, simplified purchase methods,[986] and other approved contracting actions related to classified requirements.[987] The previous version of the regulation contained classified information. The revised regulation removes all classified material,[988] making it a more useful and readily available reference tool.

The regulation provides in-depth guidance on the "nuts and bolts" of SEC actions. The regulation also includes guidance on contract administration support,[989] criminal investigative support,[990] and security support.[991] The rest, of course, is classified![992]

May the Best Courier Win!

In *Special Operations Group, Inc.*,[993] the GAO reviewed an award by the DOS to provide personnel to safeguard classified material while that material is in-transit to diplomatic missions. Special Operations Group, Inc. (SOGI), protested the award of a contract to Triumph Technologies, Inc. (Triumph), arguing that Triumph's proposal failed to comply with the solicitation

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972. *See* 10 U.S.C. § 2241 (2000). *See* DFARS, *supra* note 361, § 225.7002-1.

973. *See* GAO REPORT 01-695T, *supra* note 116, at 3.

974. *Id*.

975. The Deputy Commander of the DLA's Defense Supply Center-Philadelphia approved the first two waivers on 1 November 2000 and 7 December 2000. The DLA's Senior Procurement Executive approved a third waiver on 13 February 2001. *Id*. On 1 May 2001, the Deputy Secretary of Defense cancelled any redelegation of this authority previously granted by service secretaries. As a result, only the service secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority. *See* Memorandum, Deputy Secretary of Defense, to the Under Secretary of Defense for Acquisition, Technology, and Logistics, and Secretaries of the Army, Navy and Air Force, subject: The Berry Amendment (May 1, 2001) (on file with author).

976. *See* GAO REPORT 01-695T, *supra* note 116, at 3. *See generally* 43 GOV'T CONTRACTOR 15, ¶ 158 (opining that the emergency was more a by-product of an "arbitrarily selected" deadline rather than a true emergency).

977. *See* GAO REPORT 01-695T, *supra* note 116, at 1.

978. 43 GOV'T CONTRACTOR 18, ¶ 191.

979. *Id*. The author, Associate Professor Steven L. Schooner, George Washington University Law School, further describes the Army's response to congressional pressure as "the worst possible result." *Id*.

980. *See DLA Reserves Army Beret Contracts for Small Business*, BNA FED. CONT. REP. (Aug. 21, 2001).

981. AC-DC, *Back in Black*, *on* BACK IN BLACK (1980). Classified activities are commonly referred to as "black" or "black operations." Unclassified activities are referred to as "white operations." *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 53, 470 (15 Oct. 2001).

requirements, and that the agency failed to make its source-selection decision on the basis of the criteria specified in the solicitation.[994] The GAO agreed with SOGI and sustained the protest on both grounds.[995]

The DOS issued an RFP for a competitive set-aside for SDBs under the SBA's section 8(a) program. The RFP identified the position of project manager as the only "key personnel" for this solicitation. The RFP required the offerors to submit the resumé of the proposed project manager, if currently employed by the offeror, or a signed copy of a letter of intent if the proposed project manager was not currently employed by the offeror. The RFP also set forth two evaluation criteria: experience and past performance, with experience being more important. Technical merit was identified as more important than cost.[996]

The DOS received six offers that were evaluated on the basis of ten evaluation criteria. The evaluator used an acceptable/unacceptable evaluation scheme and the DOS reduced the competitive range to four proposals.[997] After discussions, the DOS requested final revised proposals. Again, these proposals were evaluated acceptable/unacceptable against ten evaluation criteria. The contracting officer then awarded on the basis of "lowest price, technically acceptable offer."[998]

SOGI protested the award on the basis that the DOS awarded to Triumph despite the fact that Triumph's proposal failed to comply with the solicitation requirements, and that the DOS failed to make its selection on the basis of the criteria specified in the solicitation. The GAO determined that Triumph had failed to submit a signed copy of a letter of intent from the proposed project manager.[999] Under the RFP as issued, the DOS could not award to Triumph.[1000]

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982. U.S. DEP'T OF ARMY, REG. 715-30, SECURE ENVIRONMENT CONTRACTING (undated draft) [hereinafter AR 715-30], a*vailable at* http://acqnet.saalt.army.mil/library/AR_715-30_Draft_Revised.pdf. Although technically still in draft form, the Deputy Assistant Secretary of the Army (Procurement) notified Army contracting activities in the Web site notice that accompanied the release of *AR 715-30* that the draft publication "should be treated as interim guidance" and that the draft version will be used on upcoming field surveillance visits. Army Acquisition Web Site, *AR 715-30 **DRAFT** Secure Environment Contracting*, Hotlist (May 8, 2001), *at* http://acqnet.saalt.army.mil/hotlist/default.htm. The announcement also stated that the required reporting requirements found in the draft regulation should be followed. *See id.*

983. AR 715-30, *supra* note 982, glossary, sec. II (undated draft).

984. *Id.* paras. 3-12 to -13. *See also* U.S. DEP'T OF ARMY, REG. 380-381, SPECIAL ACCESS PROGRAMS (SAPS) (12 Oct. 1998). Special Access Programs are security programs established under the provisions of EO 12,958 and are required to employ extraordinary security measures to protect extremely sensitive information. *Id.* para. 3-1. Special Access Programs are categorized into one of three types: Acquisition, Intelligence, or Operations and Support. *Id.* para. 3-2. The compromise of a SAP would result in grave damage to national security. *Id.* para. 3-3.

985. AR 715-30, *supra* note 982, para. 3-14 to -15.

986. *Id.* para. 3-18 to -21.

987. *Id.* para. 3-16 to -17.

988. *Id.* at Summary of Changes (inside front cover).

989. *Id.* para. 3-22.

990. *Id.* para. 3-24.

991. *Id.* para. 3-23.

992. While typical contract law advisors may spend most, if not all, of their careers without seeing a classified contract action, certain situations, such as deployment contracting, carry a significantly increased chance of dealing with classified contracts. We suspect that the events of 11 September 2001 will result in a significant increase in classified contracting actions.

993. Comp. Gen. B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

994. *Id.* at 1.

995. *Id.* at 1, 6.

996. *Id.* at 2.

997. *Id.* at 2-3.

998. *Id.* at 3.

999. *Id.* at 4-5. The proposed project manager was never employed by Triumph and had not even completed an employment application until the day before the awardee was to being performance. *Id.* at 4 n.7.

The RFP specifically stated that "technical merit was more important than cost or price."[1001] The DOS, however, evaluated the proposals on the basis of the lowest price, technically acceptable proposal.[1002] The DOS failed to evaluate the proposals in concert with the stated evaluation criteria. Because its actions converted the procurement from a "best-value" to a lowest cost, technically acceptable award basis, SOGI was entitled to a meaningful opportunity to compete.[1003] The GAO sustained the protest, recommending that the DOS reopen negotiations and reimburse SOGI's costs incurred in pursuing the protest.

Competitive Sourcing

General Accounting Office

This year the GAO decided several cases directly relating to the competitive sourcing process. These cases again highlight the importance of following proper procedures when completing a cost comparison study under *OMB Circular A-76*.

Imaging Systems Technology (IST) protested the Air Force's cancellation of an RFP for logistics support of the Programmable Indicator Date Processor (PIDP) air traffic control and landing system, claiming that the Air Force had failed to conduct a realistic or fair comparison of in-house and contractor performance.[1004] After issuing an RFP in June 1999, the Air Force decided that rather than use a contract to perform the PIDP support function, the work would be assigned to government employees as "other duties as assigned." Before the amendment canceling the RFP was issued, however, the Air Force received two proposals. IST protested the cancellation, citing 10 U.S.C. § 2462, which requires agencies to perform realistic and fair cost comparisons to determine whether the private sector, or government employees, can provide a service at a lower cost. The GAO agreed with IST, finding that the Air Force had failed to determine realistically either the cost of the in-house performance[1005] or the cost of contractor performance.[1006] The GAO sustained the protest, finding that the cancellation of the solicitation lacked a reasonable basis because of the Air Force's failure to comply with 10 U.S.C. § 2462.[1007]

In another case, the GAO held that a protestor did not need to pursue an agency appeal to an *OMB Circular A-76* cost comparison study before protesting to the GAO.[1008] BAE Systems (BAE) was the only private-sector offeror in a cost-comparison study for logistics support. The initial cost comparison determined that BAE's offer was the lower priced, and conditional award was made to BAE. Subsequently, several administrative appeals challenged several aspects of the government's technical performance plan (TPP).[1009] BAE did not participate in any of the appeals. As a result of the appeal decisions, a new cost comparison was performed, which resulted in a decision to keep the functions in-house. BAE protested after a debriefing.[1010]

1000. *Id.* The project manager was the only "key personnel" identified in the RFP. Due to the nature of the project manager's responsibilities, and the essential nature of the position, Triumph's failure to comply with the provision rendered its proposal technically unacceptable. *Id.* at 5.

1001. *Id.* at 5. The RFP also stated that the contracting officer would award on the basis of a "trade-off between technical merit and cost or price." *Id.*

1002. *Id.*

1003. *Id.* at 6-7. Based on the hearing record, the GAO also questioned whether the RFP actually reflected the DOS's true needs. *Id.* at 6.

1004. Imaging Sys. Tech., Comp. Gen. B-283817.3, Dec. 19, 2000, 2001 CPD ¶ 2.

1005. The Air Force changed its position regarding calculating the cost of in-house performance during the course of the protest. Additionally, the one-page cost-comparison form itself included two different calculations of the in-house costs. On the one hand, the Air Force treated the salaries of the government employees as "sunk-costs," because the government would have to pay those salaries regardless of the additional workload, and calculated a cost of zero. On the other hand, the cost-comparison identified the cost of the employees' salaries, suggesting this figure represented the true cost of in-house performance. The GAO noted that in a cost comparison, the fact that current staff may be able to absorb the workload does not justify treating the work as cost-free. *Id.* at 7.

1006. *Id.* The Air Force calculated the cost of contractor performance by averaging the fixed and cost-reimbursement costs paid to the contractor each year over the lifespan of the previous contract, instead of using the two proposals submitted in response to the RFP. The Air Force conceded that the proposed prices were less than previous contract costs, leading the GAO to comment it was "essentially undisputed that the Air Force's estimate of the cost of contractor performance was unrealistically and unfairly high because it failed to take into account IST's proposed prices." *Id.*

1007. *Id*.

1008. BAE Sys., Comp. Gen. B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86.

1009. The initial TPP (the document that lays out how the "most efficient organization" (MEO) will meet the performance standard of the solicitation) did not comply with the performance work statement (PWS), so the source selection evaluation board sent it back for revision. The revised TPP was also deficient and the source selection authority (SSA) directed specific additions to the number of full-time equivalent positions necessary to complete the work to the standard of the PWS. *Id.* at 6. The Administrative Appeals Board found no support for the SSA's decision to add nine FTEs to the in-house offer, because the decision seemed to be based solely on BAE's proposed staffing. *Id.* at 10.

1010. *Id.* at 17.

The threshold issue was whether BAE could protest to the GAO without first exhausting the administrative appeal process.[1011] The Army argued that *OMB Circular A-76, Revised Supplemental Handbook* (*RSH*), as revised by Transmittal Memorandum 22,[1012] required all interested parties to review tentative cost comparison decisions and appeal any potential errors to the agency appeal board.[1013] The GAO declined to dismiss the protest, finding that the *RSH* did not apply to this cost comparison because Transmittal Memorandum 22 specifically applied only to cost comparisons where the in-house offer remained sealed on 8 September 2000.[1014]

The GAO next turned to the merits of BAE's protest, finding that the record did not adequately show that the in-house offer complied with the performance work statement (PWS). Additionally, BAE's offer established a shorter customer service time than required by the PWS. The GAO sustained the protest, finding that the record did not address whether the agency had considered if BAE's performance level established a performance level the in-house offer should have been required to meet.[1015]

In *Jones/Hill Joint Venture–Costs*,[1016] the GAO re-emphasized a 2000 ruling dealing with the comparison of the performance levels offered by the in-house offeror and the private-sector offeror when best value competitions are used to select the private-sector offeror. In September 2000, Jones/Hill Joint Venture (Jones/Hill) challenged the adequacy of the Navy's comparison of the level of performance between Jones/Hill and the in-house offer in a cost-comparison study for base operating services. Additionally, Jones/Hill complained that the agency prejudiced Jones/Hill when it informed only the in-house team of interservice support agreements that affected the overall transportation services and related costs. The Navy requested ADR in an attempt to resolve the protest. The GAO attorney agreed and conducted an ADR conference, at which time he informed the Navy of his view of the Navy's significant litigation risk posed by the protest. The Navy notified the GAO that it intended to take corrective action in response to the protest, which rendered the protest academic. Therefore, the GAO dismissed Jones/Hill's protest in November 2000.[1017]

In response to Jones/Hill's request for costs, the GAO first found that Jones/Hill's initial protest was clearly meritorious. The GAO discussed the requirement for agencies to consider strengths identified by the best-value competition during the comparison with the in-house offer.[1018] The GAO attorney had noted during the ADR conference that the record did not reasonably support the Navy's determination that the revised "most efficient organization" (MEO) offered the same level of performance and performance quality as Jones/Hill's proposal. After discussing the merit of the protest, the GAO found that the agency had unduly delayed taking corrective action, given that the agency waited until after the agency report and supplemental comments by both sides were filed and an ADR conference had taken place to take corrective action.[1019]

The GAO decided issues involving a different kind of delay in *Lackland 21st Century Services Consolidated—Protest and Costs*.[1020] In this case, the protestor claimed the Air Force unreasonably delayed awarding a contract, thereby entitling the protestor to reinstatement of its earlier protest and costs. Lackland 21st Century Services Consolidated (L-21) initially protested the Air Force's selection of the MEO to perform base operations support services at Lackland Air Force Base. The Air Force did not file an agency report on the merits, instead submitting a letter which acknowledged that an internal review had led to selection of L-21 to perform the services. The Air Force's actions rendered the protest academic, and GAO dismissed it in December 2000.[1021]

1011. The GAO had adopted a policy that, when there is a relatively speedy appeal process for the review of a cost-comparison decision, the GAO will not consider a protest on an issue that was not first appealed to the agency. *Id.* (citing Professional Servs. Unified, Inc., Comp. Gen. B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 at 3).

1012. 65 Fed. Reg. 54,568 (Sept. 8, 2000).

1013. *BAE Sys.*, 2001 CPD ¶ 86 at 10.

1014. *Id.* The GAO did not address the apparent deviation from the prior exhaustion of appeals rule, *see supra* note 1011, with regards to the second cost comparison, which, even under the rules applicable to this cost comparison, allowed BAE to appeal items that would reverse the tentative decision.

1015. *BAE Sys.*, 2001 CPD ¶ 86 at 15. The GAO cited this case in another A-76 protest, decided in July 2001. In *DynCorp Technical Services*, Comp. Gen. B-284833.3, B-284833.4, July 17, 2001, 2001 CPD ¶ 112, the GAO sustained a protest on the basis that the in-house offer did not offer a level of performance comparable to that of the selected private-sector proposal. When the private-sector proposal offers performance levels above that required by the PWS, the agency must reasonably determine that the additional performance is of no value to the agency (and so advise offerors) or ensure that the in-house cost estimate is based upon a comparable level of performance. *Id.* at 12.

1016. Comp. Gen. B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62.

1017. *Id.* at 7.

1018. The GAO articulated this requirement in Rice Servs., Ltd., Comp. Gen. B-284997, June 29, 2000, 2000 CPD ¶ 113 at 11.

1019. *Jones/Hill Joint Venture—Costs*, 2001 CPD ¶ 62 at 13.

1020. B-285938.6, 2001 U.S. Comp. Gen. LEXIS 108 (July 13, 2001).

Subsequently, the government employees' union filed a motion with the U. S. District Court for the Western District of Texas for a TRO to enjoin the Air Force from awarding the contract.[1022] The Air Force told the court it would not award the contract during the ongoing litigation without five-business-days notice. While the TRO motion was pending, the Deputy Secretary of the DOD requested that the DOD Inspector General (IG) review this cost-comparison study, followed one day later by a congressional request for an IG review. [1023] Based on the TRO granted by the district court and the IG review, the Air Force decided not to award the contract until the IG completed the review.[1024] The GAO reviewed the Air Force's decision to await the conclusion of the IG review, and found no undue delay.[1025]

A successful protestor was denied costs in *Rice Services Ltd.—Costs*.[1026] Rice Services successfully protested a cost competition for food services at the Naval Academy.[1027] When Rice Services submitted its protest costs, however, the Navy refused to pay the costs of the administrative appeal, bringing the parties back to the GAO for a decision. Rice Services argued that the GAO's policy of exhausting administrative appeals before filing with the GAO[1028] should entitle Rice Services to the costs of pursuing a successful protest through the administrative appeal process. The GAO disagreed, citing the limited authority in the CICA[1029] to recommend payment of costs to only those incurred in filing and pursuing protests filed with the GAO.[1030]

Court of Federal Claims

The COFC tackled the issue of whether a source-selection authority must use best value procedures to determine the winner of an *OMB Circular A-76* cost comparison study.[1031] Rust Constructors (Rust) challenged the Army COE's decision to keep a grounds maintenance and repair contract at Fort Riley, Kansas, in-house after a cost comparison study.[1032]

Rust argued that the COE failed to use "best value" procedures, as contemplated by the RFP, when making the comparison of its proposal and the MEO proposal. The court disagreed with Rust, finding that *OMB Circular A-76* does not contemplate a best value analysis between the private sector offer and the MEO offer. In fact, *OMB Circular A-76* requires a "comparison of the cost of contracting and the cost of in-house performance."[1033]

1021. *Id*. at *2-3.

1022. *Id*. at *4. For a more detailed discussion of the topic of federal government employee standing to challenge cost comparison decisions, see *infra* notes 1040-57 and accompanying text.

1023. *Lackland 21st Century Servs.*, 2001 U.S. Comp. Gen. LEXIS 108, at *4-5. Several members of the Congressional delegation from Texas requested the review. Part of L-21's protest was based on complaints that both the DOD IG and the Air Force were improperly influenced by the Texas congressional delegation. *See id*. at *10. The GAO refused to comment on these allegations, noting that their bid protest jurisdiction is "limited to review of whether agencies' procurement actions complied with procurement statutes and regulations." *Id.*

1024. *Id*. at *5. The Under Secretary of the Air Force urged the DOD IG to complete the study within 30 days because of potential complications related to a reduction in force at Lackland. Nevertheless, the IG did not complete the review until 14 May 2001. *Id.* at *6.

1025. *Id*. at *11-12. In fact, the GAO viewed the decision as reasonable in light of "the complexities of the issues presented by the cost review; the need to consider the varied input received; and our recognition of the disruption that may follow a decision to contract out base operations support at this facility—thus abolishing the positions of federal employees who currently perform these functions." *Id.* at *12. In August 2001, the Air Force decided to cancel the cost comparison study at Lackland and start over. *See* Jason Peckenpaugh, *Air Force Cancels A-76 Competition, Decides to Start Over*, GovExec.com (Aug. 29, 2001). Additionally, the Air Force suspended competitions at Randolph and Sheppard Air Force Bases in Texas and Keesler Air Force Base in Mississippi until the Air Force could convene a panel to review competitions in the Air Education and Training Command (AETC). *See* Jason Peckenpaugh, *Air Force Freezes A-76 Competitions at Three Bases*, GovExec.com (Sept. 5, 2001). Ultimately, the Air Force froze all studies in AETC pending review of the command's cost comparison processes. *See Competitions at Air Force Bases on Hold*, 43 GOV'T CONTRACTOR 33, ¶ 348(b) (Sept. 12, 2001).

1026. Comp. Gen. B-284997.2, May 18, 2001, 2001 CPD ¶ 88.

1027. *See* Rice Servs., Ltd., Comp. Gen. B-284997, June 29, 2000, 2000 CPD ¶ 113.

1028. *See supra* note 1011 (discussing GAO policy).

1029. *See* 31 U.S.C. § 3554(c) (2000).

1030. *Rice Servs.*, 2001 CPD ¶ 88 at 2.

1031. Rust Constructors Inc. v. United States, 49 Fed. Cl. 490 (2001).

1032. *Id*. at 491. Rust was the only offeror to submit a proposal. After receiving Rust's proposal, the government held price negotiations with Rust, accepting Rust's revised cost proposal as the "best value" to the government. *Id.* at 492. Rust's proposal exceeded the MEO's cost by over $21 million. *Id*. Rust first filed an appeal with the U.S. Army Forces Command Administrative Appeals Board, which ultimately found that errors in the cost comparison were not of sufficient magnitude to change the initial cost comparison decision. *Id.* at 493.

Rust attempted to supplement the administrative record with two affidavits that critiqued the COE's solicitation and administrative record.[1034] The court denied the use of the affidavits, finding that it would be unfair to include these affidavits, which had not been provided to the agency level review board during the administrative appeal, without cause, which was absent here.[1035]

Failure to Correct Deficiencies Leads to Request for Congressional Investigation

In an unusual and normally unnecessary move, the GAO requested a congressional investigation into the Army's apparent lack of action in response to a bid protest recommendation.[1036] In February 2000, the GAO sustained a protest arising from an *OMB Circular A-76* cost-comparison study at Aberdeen Proving Grounds in Maryland.[1037] Although the Army told the GAO in July 2000 that it intended to follow the GAO's recommendation, the Army took no further action to remedy the situation. The GAO is required by law to report agencies' failure to fully implement bid protest recommendations.[1038] The GAO General Counsel had not before made such a report to Congress.[1039]

Government Employees Do Not Have Standing to Challenge OMB Circular A-76—the Final Word?

The CAFC ended discussion of whether government employees have standing to challenge *OMB Circular A-76* decisions with a resounding "no!," and more importantly, established the standard for determining standing in bid protest cases before the COFC.[1040] This case began with an American Federation of Government Employees (AFGE) challenge at the COFC to a cost-comparison study at the DLA. The COFC determined that the AFGE did not have standing because its interests do not come within the zone of interest protected by either the Federal Activities Inventory Reform Act (FAIR) or 10 U.S.C. § 2462.[1041] The CAFC affirmed the decision of the COFC, but on a different ground.[1042]

This question of standing to challenge an executive agency cost-comparison decision was a case of first impression for the CAFC, and arises because although 28 U.S.C. § 1491(b) confers standing on "an interested party objecting to a solicitation by a Federal agency," the statute does not define "interested party."[1043] The union argued that the term should be construed using an ordinary dictionary definition, and that federal employees are interested parties because they stand to lose their jobs if their positions are contracted out as a result of the cost-comparison study. Alternatively, the union argued, the court should use the APA standard, and find that the federal employees fall within the "zone of interest" protected by *OMB Circular A-76* and the FAIR Act.[1044] The government, on the other hand, argued that the court should use the CICA jurisdictional standard.[1045] The CAFC sided with the government, and, using the CICA standard, found that because neither the union nor the federal employees were actual or prospective bidders or offerors, they did not have standing to challenge the cost-comparison study or resulting decision to award a contract for the services.[1046]

1033. *Id*. at 494 (citing FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES ¶ 5(a) (Aug. 4, 1983, Revised 1999)) .

1034. *Id*. at 496-97. One affidavit was from a Rust employee, and the other from an "expert in government contracts." *Id.* at 497.

1035. *Id*. at 497.

1036. *See Army Too Slow to Implement Recommendation in Aberdeen A-76 Protest, GAO Tells Lawmakers*, 43 GOV'T CONTRACTOR 24, ¶ 252 (June 27, 2001) [hereinafter *Army Too Slow*].

1037. *See* Aberdeen Tech. Servs., Comp. Gen. B-283727.2, Feb. 22, 2000, 2000 CPD ¶ 46. *See also* Aberdeen Tech. Servs.—Modification of Recommendation, B-283727.3, 2001 U.S. Comp. Gen. LEXIS 132 (Aug. 22, 2001) (modifying initial recommendation to include reimbursement of proposal preparation costs).

1038. *See* 31 U.S.C. § 3554 (e)(1) (2000).

1039. *See Army Too Slow, supra* note 1036 (quoting Daniel I. Gordon, GAO Associate General Counsel for Procurement Law, who was "not aware of any other case in which GAO has concluded that an agency's delay was a reportable failure to follow a bid protest recommendation").

1040. Am. Fed'n Gov't Employees, Local 1482 v. United States, 2001 U.S. App. LEXIS 16595 (Fed. Cir. July 23, 2001).

1041. *See* Am. Fed'n Gov't Employees, v. United States, 46 Fed. Cl. 586 (2000).

1042. *See Am. Fed'n Gov't Employees*, 2001 U.S. App. LEXIS 16595, at *2.

1043. *Id*. at *7 (quoting 28 U.S.C. § 1491(b)).

1044. *Id*. at *7.

1045. *Id*. at *13. The CICA grants bid protest jurisdiction to interested parties, which it defines as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551(2) (2000).

Federal employees and their union did not have any better luck with the standing issue in district court.[1047] The AFGE Local in San Antonio, Texas, challenged the decision to award a contract to L-21 for base operations support services at Lackland Air Force Base, Texas.[1048] The union argued that agency outsourcing regulations created standing for federal employees.[1049] The court disagreed, reminding the union that standing is created by statute, not regulation, and also rejecting the union's contention that because *OMB Circular A-76* cites the Budget and Accounting Act (BAA) of 1921[1050] and the Office of Federal Procurement Policy Act (OFPPA) of 1979[1051] as authority for its policies and procedures, the BAA or OFPPA created standing for federal employees to challenge cost-comparison studies. The court reiterated the well-established holding that the interests of federal employees in maintaining their federal employment is "marginally related to or inconsistent with" the purpose of the statutes.[1052] The court further stated that the "zone of interest" of the Budget and Accounting Act and OFPPA was obtaining the best and most efficient possible value for the government.[1053] Finally, the court rejected the union's argument that the National Defense Authorization Act (NDAA) of 2000[1054] created prudential standing for employees in this case, finding that although the employees may be within the zone of interest of this statute, there was no allegation the government had violated any requirements of the NDAA related to the cost comparison study.[1055]

In spite of the court losses relating to standing to challenge cost-comparison studies, federal employees may have hope in the form of pending legislation, which would give them appeal rights in conjunction with *OMB Circular A-76*. Texas Representative Charlie Gonzalez introduced a bill on 19 June 2001[1056] to remedy what he called an "unjust advantage" that private contractors have over federal employees whose lives are impacted by the cost comparison.[1057]

New Administration—New Approaches to FAIR Act and Outsourcing

Early in the new administration's tenure, the OMB announced changes relating to the FAIR Act lists and their use in competitive sourcing decisions. Sean O'Keefe, Deputy Director of the OMB, gave the first notice of the administration's new focus in a 9 March memo highlighting reform initiatives. For FY 2002, agencies must compete not less than five percent of the full-time equivalent positions listed on the FAIR Act inventories.[1058]

1046. *Am. Fed'n Gov't Employees*, 2001 U.S. App. LEXIS 16595, at *21-23. More important than the actual decision was the holding that the standing requirement of the CICA was consistent with the legislative history of 28 U.S.C. § 1491(b)(1), which indicated that Congress intended to extend the COFC's jurisdiction to include post-award bid protest cases. Furthermore, the court stated that the fact that Congress used the same term in § 1491(b)(1) as it did in the CICA suggested that Congress intended that the same standing requirement for cases brought under the CICA apply to cases brought under § 1491(b)(1). *Id.* at *11.

1047. *See* Am. Fed'n of Gov't Employees, Local 1367 v. United States, 2001 U.S. Dist. LEXIS 4044 (Fed. Cir. Mar. 6, 2001). For a disucssion of the *OMB Circular A-76* decision related to these facts, see *supra* notes 1020-25 and accompanying text.

1048. *Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *2.

1049. *Id*. at *28. Specifically, the union cited U.S. AIR FORCE, INSTR. 38-203, COMMERCIAL ACTIVITIES PROGRAM ch. 18 (1 Aug. 2000).

1050. 31 U.S.C. § 101 (2000).

1051. 41 U.S.C. §§ 401-424 (2000).

1052. *Local 1367*, 2001 U.S. Dist. LEXIS 4044, at *30-31.

1053. *Id.* at *31.

1054. The union cited two statutes, 10 U.S.C. §§ 2467 and 2470. *Id.* at *21. Section 2467(b)(1)(A) requires that the DOD consult with civilian employees at least monthly during the development and preparation of the PWS and the MEO. 10 U.S.C. § 2467(b)(1)(A) (2000).

1055. *Local 1367*, 2001 U.S. Dist. LEXIS 4044, at *40-41.

1056. H.R. 2227, 107th Cong. (2001).

1057. Tanya N. Ballard, *Legislation Would Give A-76 Appeal Rights to Federal Employees*, GovExec.com (June 25, 2001). Although much has been written about the negative impacts of cost-comparison studies on federal employees, the GAO found that it was difficult to draw universal conclusions regarding the effects of A-76 studies. The GAO analyzed three completed A-76 studies and made some interesting observations, including that about half of the civilian government employees remained in federal service following the studies; a small number were subject to involuntary separation; employees who left government service and applied with the successful private offeror were hired; and although pay and benefit amounts differed with the geographical areas, the types of benefits appeared to be similar to those offered to government employees. *See* GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: EFFECTS OF A-76 STUDIES ON FEDERAL EMPLOYEES' EMPLOYMENT, PAY, AND BENEFITS VARY, REPORT NO. GAO-01-388 (Mar. 16, 2001).

1058. *See* Memorandum, Deputy Director, Office of Management and Budget, to Heads and Acting Heads of Departments and Agencies, subject: Performance Goals and Management Initiatives for the FY 2002 Budget (9 Mar. 2001) [hereinafter Performance Goals Memo].

Commercial Activities Panel Forms to Study Future Changes to A-76 Process

Section 832 of the Floyd D. Spence NDAA for FY 2001 directed the Comptroller General to convene a panel of experts to study federal outsourcing policy and report to Congress by 1 May 2002, with recommendations for legislative and policy changes.[1059] The panel, called the Commercial Activities Panel, began meeting in May 2001. Panel membership includes a wide spectrum of organizations affected by outsourcing policy, including representatives from federal employee labor unions, government contractors, the DOD and the OMB, as well as four at-large members.[1060]

OMB Moves to Open ISSAs to A-76

The OMB published a significant change to the *OMB Circular A-76*, *RSH*, expanding public-private competitions for inter-service support agreements (ISSAs).[1061] Since 1 October 1997, new ISSAs have been subject to public-private competition, but renewals of pre-existing ISSAs were exempt from study. The change requires agencies to recompete all existing ISSAs every three to five years. The new provision retains the requirement to subject all new or expanded work to competition under *OMB Circular A-76*. The new competition requirement does not apply to reimbursable agreements within a single agency, but only to those agreements between one department or executive agency and another non-mission agency.[1062] The new provision would not affect ISSAs within the DOD.[1063]

Congressional Reaction to Administration's Attempts to Expand A-76: TRAC

The Truthfulness, Responsibility, and Accountability in Contracting Act (TRAC) has once again surfaced in the 107th Congress, in both the House and the Senate.[1064] Opposition to the TRAC came from several sectors, including a group of twelve retired senior military officers, who claimed the legislation would cause "irreparable harm" to national security.[1065]

Conflict of Interest Rules: Whose Interest Creates a Conflict?

Although the *RSH* Transmittal Memorandum 22[1066] set out guidelines stating that government employees who hold jobs that are the subject of cost-comparison studies should not par-

1059. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 832, 114 Stat. 1654.

1060. *See* Jason Peckenpaugh, *GAO Names Members of Outsourcing Panel*, GovExec.com (Apr. 17, 2001).

1061. Office of Management and Budget, Performance of Commercial Activities, 66 Fed. Reg. 34,962 (July 2, 2001). The change revises part 1, chapter 2 by replacing paragraphs 5 and 5a with a new paragraph 5 as follows:

> 5. Reimbursable support service providers within the Federal Government are providing a large and an increasing amount of commercial work to Federal program activities (customers) under reimbursable service agreements and without the benefits of recurring competitions. These ISSAs are not competing with the private sector or with other public offerors who might be able to provide higher levels of service at less cost. Therefore, not later than October 1, 2001, each customer agency shall establish a recurring schedule for all work performed for it on a reimbursable basis by another agency for competition. ISSAs shall be recompeted every 3-5 years or as otherwise permitted by related procurement regulations for comparable types of commercial work (see Competition-in-Contracting Act (CICA) and the Federal Acquisition Reulgations). These competitions shall permit offers from the private sector, the current reimbursable service provider and other public offerors as appropriate. In addition, all new or expanded work required by a customer agency shall be submitted to competition, as provided in this Chapter.

Id.

1062. *Id*. For example, an ISSA between the Environmental Protection Agency and the Department of Commerce or between the Office of Personnel Management and the Department of Housing and Urban Development for the provision of background investigation services would be subject to the new provision. *Id.*

1063. *Id*.

1064. *See* H.R. 721, 107th Cong. (2001); S. 1152, 107th Cong. (2001). The House version requires a "temporary" suspension of all decisions to privatize, contract out, or conduct a cost-comparison study of any function performed by the agency. The bill does not specify an end date for the temporary suspension of such decisions. Rather, the bill requires agencies to design comprehensive reporting systems to track the costs of service contracting. The bill further requires agencies to submit an approximate number of positions held by contractor personnel to cost-comparison study. *See* H.R. 721. The Senate version imposes a certification requirement before agencies can enter into a service contract. Each agency must certify to the OMB that the agency is making substantial progress toward meeting the requirements of the bill. The requirements are similar to the House version and include the cost-tracking system requirement. *See* S. 1152. Both bills also require consultation or bargaining with the federal employee labor unions during public-private competitions, and a new public-private competition if the actual cost of contracting out or privatization exceeds the anticipated costs or substantially fails to meet quality control standards. Additionally, both bills include a waiver provision to allow OMB to exempt certain contracts from the contracting out prohibition. Unlike the House version, the Senate version exempts contracts with values less than $1 million. *See* H.R. 721; S. 1152.

1065. *See* Jason Peckenpaugh, *Retired Officers Say Outsourcing Bill Threatens National Security*, GovExec.com (July 10, 2001). The group of senior military officers included Navy Admiral William Crowe, Admiral David Jeremiah, Army General John Shalikashvili, Air Force General Michael Carns and Marine Corps General Cal Mundy, Jr. *Id*.

1066. Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568-70 (Sept. 8, 2000).

ticipate as members of a Source Selection Team, there was no such guidance on how far removed an interest may be to still cause an undesirable conflict of interest. In *IT Facility Services—Joint Venture*,[1067] IT Facility Services (IT Facility) challenged award of a public works and logistics services contract to Johnson Controls World Services, Inc. (JCWSI), arguing that the proposal evaluation was tainted by an organizational conflict of interest (OCI) arising from evaluators who were employees of the area under study. IT Facility also objected to an evaluator whose spouse held a position under study.[1068]

IT Facility argued that an employee's relationship with colleagues and subordinates whose positions are under study will impair his objectivity, and therefore no employee working in an area under study should be allowed to serve on a source selection board, even if the individual's position is not under study.[1069] The GAO agreed with the Army that such a concern is "too speculative and remote to establish a significant organizational conflict of interest."[1070] The concern about the individual whose spouse's position was under study was justified, however, according to the GAO. The GAO found there was at least an appearance of a conflict of interest that tainted the employee's evaluation. The GAO did not sustain the protest, however, because the employee's evaluation was consistent with other evaluations, and even with her evaluation removed IT Facility's proposal received the same overall evaluation.[1071]

IT Facility further alleged that a contractor that assisted the Army in the creation of the MEO had an improper OCI that tainted the procurement. Although the contractor participated in both the creation of the MEO and assisted with the proposal evaluation, the GAO found a sufficient "firewall" between the two discreet sets of employees performing these tasks.[1072]

OCI Rules Apply to Subcontractors, Too!

Johnson Control World Services, Inc. (JCWSI), protested the award of an installation support services contract to IT Corp. (IT), alleging that one of IT's subcontractors, Innovative Logistics Techniques, Inc. (INNOLOG), had an improper conflict of interest.[1073] INNOLOG had a contract to provide integrated sustainment maintenance (ISM) services, and established and maintained the database containing detailed work order information relating to maintenance activities provided at the installation where the ISM would be performed.[1074]

The Army argued that there was no impermissable conflict of interest, and that although INNOLOG did possess work-order information, it was no different than information that an incumbent might possess.[1075] The GAO disagreed, finding that INNOLOG's responsibilities were significantly different from an incumbent-support contractor, and included providing analysis of how the work should be performed. The GAO believed that because the INNOLOG analysts were "embedded" in the agency, INNOLOG possessed information that no other offeror had access to, and was involved in the management of support activities for the installation in question.[1076] Because the Army had not taken any steps to minimize this conflict of interest, the GAO recommended that the Army review the IT team's apparent OCI, consider whether it could be minimized or avoided, and take appropriate corrective measures.[1077]

The Army heeded the GAO's recommendation, but not without another protest from JCWSI.[1078] In response to the earlier protest, the Army terminated IT's contract, and required IT to terminate its teaming relationship with INNOLOG. The Army further provided the database information previously available only to IT to both IT and JCWSI and provided agency personnel familiar with the database to assist with using the database and interpreting the contents. Finally, the Army

1067. Comp. Gen. B-285841, Oct. 17, 2000, 2000 CPD ¶ 177.

1068. *Id*. at 10.

1069. *Id*. at 11.

1070. *Id*. at 12.

1071. *Id*. at 13.

1072. *Id*. at 14.

1073. Johnson Controls World Servs., Inc., Comp. Gen. B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20.

1074. *Id*. at 2.

1075. *Id*. at 5.

1076. *Id*. at 6.

1077. *Id*. at 13.

1078. *See* Johnson Controls World Servs. Inc., B-286714.3, 2001 U.S. Comp. Gen. LEXIS 129 (Aug. 20, 2001).

allowed the offerors to submit proposal revisions in those areas dealing with the database information.[1079]

The JCWSI argued that the corrective action was insufficient to overcome the competitive advantage created by IT's OCI.[1080] The GAO found JCWSI's argument unconvincing, especially since IT had terminated its relationship with INNOLOG. The GAO found that JCWSI's final argument, that IT's prior actions reflected a lack of integrity that should make them non-responsible, premature, as the Army has not yet identified the apparent successful offeror.[1081]

Construction Contracting

Contractor Required to Do What the Contract Says!

The COFC had the chance to delve into the world of contract interpretation,[1082] as applied to construction contracts, in *Linda Newman Construction Co. v. United States*.[1083] This case involved changes to a contract for the construction of an addition to a Veteran's Administration (VA) hospital.[1084] During the course of the contract, the parties executed nineteen modifications, each of which extended the delivery date. Each modification also increased the contract price.[1085] Upon contract completion, the plaintiff, Linda Newman Construction Co. (Newman), filed a claim alleging it was due an additional $321,157 for costs incurred as a result of the change orders.[1086] The court characterized these claimed costs as "delay overhead costs."[1087] The contract contained a changes clause that limited overhead and profit recovery on changed work to a maximum of ten percent.[1088] Each of the contract modifications for changed work contained the following reservation clause:

> This change represents full and complete compensation for all direct costs and time required to perform the work set forth herein, plus the overhead and profit as provided for in the Changes clause of this contract. The contractor hereby reserves its right to submit a request for equitable adjustment for all costs resulting from the impact of this change on unchanged contract work.[1089]

Newman argued that the phrase "all costs resulting from the impact of this change on unchanged contract work" modified the changes clause by allowing recovery of overhead and profit related to the impact of changes on unchanged work.[1090] The government countered that the reservation clause entitled Newman to seek only the direct costs associated with such an impact on unchanged work. Siding with the government, the court stated that it could not "discern what 'full and complete compensation for overhead and profit' could mean other than full and complete compensation for profit and overhead."[1091] The court went on to note that Newman's "argument would require the court to find that the reservation clause relied on the Changes clause in one sentence and ignored it in the next."[1092] Finally, the court pointed out that such a result would violate the long-standing rule that "[c]ontract interpretations that make parts of the contract 'useless, inexplicable, inoperative, void, insignificant, meaningless, [or] superfluous' are disfavored."[1093]

1079. *Id*. at *3-4.

1080. *Id*. at *5.

1081. *Id*. at *10.

1082. For a discussion of another CAFC decision concerning contract interpretation, *Program & Constr. Mgmt. Group v. United States*, 246 F.3d 1363 (Fed. Cir. 2001), see *supra* notes 723-29 and accompanying text.

1083. 48 Fed. Cl. 231 (2000).

1084. *Id*. at 231. The court noted that, over the course of the contract, the VA issued 244 change orders. *Id.* at 232.

1085. *Id*. at 232.

1086. *Id*. at 233.

1087. *Id*. at 236.

1088. *Id*. at 233.

1089. *Id*. at 234.

1090. *Id*.

1091. *Id*.

1092. *Id*.

1093. *Id*. (quoting Gould Inc. v. United States, 935 F. 2d 1271, 1274 (Fed. Cir. 1991)).

In addition to this contract interpretation analysis, the court also relied on extrinsic evidence to support its holding. In this case, the record surrounding the negotiation of the reservation clause clearly showed that the government had rejected Newman's attempt to craft the clause so that it would cover delay overhead costs. The government specifically noted at the time that such delay overhead costs were included in the ten percent maximum limitation set forth in the changes clause of the contract.[1094]

Government Cannot Disclaim Responsibility for Design Defects

In *Edsall Constr. Co.*,[1095] the ASBCA considered whether the government may shift the responsibility for defective design specifications to a contractor through the use of a disclaimer in the contract. Answering this question with a resounding "no," the board sustained the appeal.[1096]

The case involved a contract for the construction of two aircraft hangars. Edsall Construction Co. (Edsall) was the general contractor. Uni-Systems, Inc. (USI), was a subcontractor responsible for fabricating and installing the hangar doors at issue in this appeal. The doors were large, steel canopy doors weighing 21,000 pounds each.[1097] The contract contained written specifications that generally described the doors, but also contained fairly detailed drawings depicting the design of the doors. The board found that the written specifications for the door were performance specifications while the drawings were design specifications.[1098]

The drawings for the doors depicted three cables and pick points supporting the doors.[1099] One of the door drawings also contained the following note:

> Canopy door details, arrangements, loads, attachments, supports, brackets, hardware, etc. must be verified by the contractor prior to bidding. Any conditions that require changes from the plans must be communicated to the architect for his approval prior to bidding and all costs of those changes must be included in the bid price.[1100]

Testimony at the hearing established that USI believed that the government's three-cable design would be "very challenging" but that there was nothing obviously wrong with the design.[1101] USI did not conduct a full professional engineering analysis of the design.[1102] After contract award, however, USI determined that the government's design was dangerously defective and proposed a four-cable design that it believed would solve the problem.[1103] Ultimately, the government accepted USI's design change, USI built the doors using the four-cable design, and submitted a claim in the amount of $70,288.26 for the extra costs incurred in building the doors to this design. The contracting officer denied the claim on the basis that USI had not communicated the need for a design change before bidding as required by the drawing note quoted above.[1104]

On appeal, the government argued that the door design features were annotated by disclaimers, and that the drawing note quoted above shifted responsibility for discovering design defects to the contractor. The board categorically rejected this argument, holding that, because the drawings constituted design specifications, the government was responsible for defects in those specifications. Rejecting the government's argument that the disclaimers and notes on the drawing shifted this responsibility to the contractor, the board stated: "[I]t is settled that a contractor is not obligated to inspect the Government's specifications and drawings to ascertain their accuracy and ferret out hidden ambiguities and errors in the documents."[1105] Putting the final nail in the government's coffin for this case, the board went on to state:

1094. *Newman*, 48 Fed. Cl. at 234.

1095. ASBCA No. 51787, 01-2 BCA ¶ 31,425.

1096. *Id.* at 155,176.

1097. *Id.*

1098. *Id.* at 155,177.

1099. *Id.* "Pick points" are support brackets to which the cables used to raise and lower the door are attached. While the door is being raised or lowered, the entire weight of the door is supported by the cables. *Id.*

1100. *Id.*

1101. *Id.*

1102. *Id.*

1103. *Id.* at 155,178.

1104. *Id.* at 155,179.

> "Governmental disclaimers of responsibility for the accuracy of specifications which it authors are viewed with disdain by the courts." . . . In this case, while appellant might be required to verify if the door weighs 21,000 pounds, it had no obligation to ferret out if the Government's three-pick point design would provide the proper load distribution.[1106]

Differing Site Conditions

As usual, contractor claims based on alleged differing site conditions encountered at the construction site continued to constitute a large portion of the construction-related litigation before the courts and boards this year. Contractors continued to develop creative theories to support their claims while the courts and boards continued to apply the relatively clear language of the differing site conditions (DSC) clauses to deny most of those claims. The cases discussed below represent a small sampling of the many decisions involving DSCs issued this year and are intended to provide a refresher for practitioners working in the area.

Wind and Waves Not a DSC

Facing a creative contractor argument, the ASBCA rejected a claim that high seas adversely affected a dike repair project. *Luhr Brothers, Inc.*,[1107] involved a dispute over the repair of a dike on the lower portion of the Mississippi River where the river enters the Gulf of Mexico. Luhr Brothers, Inc. (Luhr), appealed a contracting officer's denial of a claim it sponsored on behalf of its subcontractor, Cross Construction, Inc. (Cross). Cross experienced significant delays caused by unusually high seas and bad weather. Although the government granted time extensions under the Default clause of the contract for most of the delay Cross experienced, Cross contended that a significant portion of the delay was due to a Type II DSC.[1108] Cross argued that a change in channel conditions had resulted in a situation where an incoming saltwater wedge mixed with the outgoing fresh water from the Mississippi in such a way as to create higher-than-usual waves which Cross referred to as "rollers."[1109] According to Cross, these unique circumstances resulted in a condition heretofore unknown to the scientific community and constituted a Type II DSC.[1110] Ultimately, this case came down to a battle between Cross' expert and three government experts.

The board found the government's experts to have the more credible position and, therefore, that Cross had failed to establish the existence of a DSC. Because the government had granted time extensions for the periods of unusually severe weather—all that it was required to do under the terms of the contract—the board denied the appeal.[1111] Those readers interested in hydraulics—estuarine, riverine, and coastal hyrdodynamics—and related fields will find this case a must read.

No DSC Without the Clause in the Contract

Continuing the nautical theme, in *Marine Industries Northwest, Inc.*,[1112] the ASBCA considered a contractor's claim that mill scale[1113] on a Navy vessel was a DSC. The twist in this case is that the fixed-price contract at issue did not contain a DSC clause of any type. Marine Industries Northwest, Inc. (MINI), received a Navy contract to repaint a barge. In preparing its bid, MINI and its painting subcontractor assumed that there would be no mill scale on a Naval vessel currently in service and did not include the costs of removing mill scale in their bids.[1114] Of course, the subcontractor ultimately encountered mill scale during contract performance. MINI filed a claim in the amount of $166,580.32 for the extra costs allegedly incurred in removing the mill scale. MINI's claim was based on a Type II DSC argument and a superior knowledge argument. The cognizant con-

1105. *Id.* at 155,180 (citing Blount Bros. Constr. Co. v. United States, 171 Ct. Cl. 478, 496 (1965); Fed. Contracting, Inc., ASBCA No. 48280, 95-2 BCA ¶ 27,792).

1106. *Edsall*, 01-2 BCA ¶ 31,425 at 155,181 (quoting Bromley Contracting Co., ASBCA Nos. 14884 et al., 72-1 BCA ¶ 9252 at 42,902).

1107. ASBCA No. 52887, 01-2 BCA ¶ 31,443.

1108. *Id.* at 155,284. A Type II DSC involves "unknown conditions at the site, of an unusual nature, which differ materially from those encountered and generally recognized as inhering in work of the character provided for in the contract." FAR, *supra* note 11, § 52.236-2(a)(2). A Type I DSC involves a site condition that differs materially from that depicted in the contract. *Id.* § 52.236-2(a)(1).

1109. *Luhr Bros.*, 01-2 BCA ¶ 31,443 at 155,289.

1110. *Id.*

1111. *Id.* at 155,292.

1112. ASBCA No. 51942, 01-1 BCA ¶ 31,201.

1113. "Mill scale" is "[a] black scale of magnetic oxide of iron formed on iron and steel when heated for rolling, forging, or other processing." *Id.* at 154,042 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

1114. *Marine Indus. Northwest, Inc.*, 01-1 BCA ¶ 31,201 at 154,042.

tracting officer denied the claim, and MINI appealed to the ASBCA.[1115]

The board rejected the Type II DSC argument solely on the basis that there was no DSC clause in the contract. The board reasoned that, in a fixed-price contract, in the absence of a DSC clause or some other clause shifting risk to the government, MINI bore the cost risk of encountering mill scale. Finding that MINI had not met its burden of proving that the government was aware of the presence of mill scale on the vessel, the board also rejected MINI's superior knowledge argument and denied the appeal.[1116]

You Really Need to Do That Site Inspection!

The authors have included the final two cases in this area simply to reemphasize the importance of a contractor's failure to conduct a reasonable site inspection in the analysis of a DSC claim. In *Sagebrush Consultants, L.L.C.*,[1117] and *American Construction & Energy, Inc.*,[1118] the IBCA and the ASBCA, respectively, each considered DSC claims from contractors that had failed to take advantage of offered site inspections before bidding on their respective contracts. *Sagebrush* involved an Interior Department contract to inventory archeological sites, while *American* involved an Air Force contract to replace plumbing fixtures. In *Sagebrush*, the contractor argued that the density of archeological sites was much higher than expected and that this condition constituted a Type II DSC.[1119] In *American*, the contractor claimed that replacement of the fixtures unexpectedly required it to demolish and replace large portions of the walls covering the pipes leading to the fixtures.[1120] In both cases, the boards denied the claims, holding that a reasonable site inspection (which the government made available to both contractors before submittal of bids) would have put the contractors on notice of the potential existence of these conditions.[1121]

Bonds, Sureties, and Insurance

Hunting Blue Foxes: Insurance Co. of the West v. United States[1122]

The CAFC was called upon to determine whether the Supreme Court's decision in *Blue Fox*[1123] barred a subrogee from bringing suit against the United States under the Tucker Act[1124] after the subrogee stepped in and completed the contract work.[1125]

Insurance Company of the West (ICW) provided performance and payment bonds for P.C.E., Ltd. (PCE), on a contract awarded by the Air Force.[1126] After beginning performance, PCE notified the Air Force that it was financially unable to meet its obligations under the contract and that ICW would be responsible for assuming control and assuring completion of the contract. PCE "voluntarily and irrevocably" directed that all contract funds remaining due be paid to ICW.[1127] Shortly thereafter, ICW confirmed this in writing to the contracting officer.[1128]

1115. *Id.* at 154,043.

1116. *Id.*

1117. IBCA No. 4182E-2000, 01-1 BCA ¶ 31,159.

1118. ASBCA Nos. 52031, 52032, 01-1 BCA ¶ 31,202.

1119. *Sagebrush Consultants*, 01-1 BCA ¶ 31,159 at 153,913.

1120. *American Constr.*, 01-1 BCA ¶ 31,202 at 154,048.

1121. In *Sagebrush*, the IBCA found that the site inspection would have put the contractor on notice of geological features that should have put the contractor's archeologists on notice of the potential for a higher-than-expected density of sites. *Sagebrush Consultants*, 01-1 BCA ¶ 31,159 at 153,914. In *American*, the ASBCA noted that the site visit included areas where the government actually had removed portions of the walls so that the potential bidders could see the pipes leading to the fixtures and determine what work would be required. *American Constr.*, 01-1 BCA ¶ 31,202 at 154,048.

1122. 243 F.3d 1367 (2001).

1123. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999). In *Blue Fox*, the Supreme Court held that a subcontractor could not pursue its equitable lien because of sovereign immunity. *Id.* at 265. *See 1999 Year in Review, supra* note 505, at 72. *See also* Major Jody Hehr & Major David Wallace, *The Supreme Court "Outfoxes" the Ninth Circuit*, ARMY LAW., Aug. 1999, at 47. For an analysis of the prior history of *Blue Fox*, see Major Stuart Risch, *Recent Decision: Blue Fox, Inc. v. The United States Small Business Administration and the Department of the Army*, ARMY LAW., Nov. 1997, at 53.

1124. 28 U.S.C. § 1491 (2000).

1125. *Insur. Co. of the West*, 243 F.3d at 1369.

1126. *Id.* The contract required the replacement of automatic doors in the commissary at Hickham AFB. *Id.*

1127. *Id.*

About seven weeks later, the Air Force issued a unilateral modification changing the remittance address for payments to PCE at ICW's address.[1129] ICW financed the completion of the contract to the tune of $354,744.34. Instead of sending the payments on the contract to ICW, the Air Force continued to make payments directly to PCE. When ICW inquired about the payments, the government informed ICW that payments had been made to PCE and that they should settle the issue between themselves. ICW then filed suit, claiming entitlement to $174,000 in wrongfully disbursed funds. The government moved for summary judgment on the grounds of sovereign immunity.[1130]

Although the law was well settled[1131] that a surety can recover from the United States payments made to a contractor after a surety had notified the government of the contractor's default, the government argued that *Blue Fox* had effectively overruled the existing case law.[1132] At a pretrial hearing, the COFC ruled that it was bound by *Balboa Insurance Co. v. United States*,[1133] because *Blue Fox* had not directly overruled the *Balboa* case law. The case reached the CAFC on interlocutory appeal.[1134]

The Miller Act requires prime contractors to post performance bonds on all federal construction contracts.[1135] When those contractors run into trouble, sureties have traditionally relied on the doctrine of equitable subrogation, rather than privity of contract, to assert their claims against the government.[1136] ICW asserted that the Tucker Act's waiver of sovereign immunity gives the COFC jurisdiction over claims against the United States "founded . . . on express or implied contract."[1137] The CAFC framed the issue in this case as "whether the government's consent to suit based on a contract includes consent to suit on a contract brought by a subrogee."[1138]

The CAFC noted there is case law construing a similar waiver provision under the Federal Tort Claims Act (FTCA).[1139] Neither party cited that case, *United States v. Aetna Casualty & Surety, Co.*,[1140] in their arguments. Relying on the rationale in *Aetna*, the CAFC found that the decision stood for a broader principle, that "waivers of sovereign immunity applicable to the original claimant are to be construed as extending to those who receive assignments, . . . where the statutory waiver of sovereign immunity is not expressly limited to claims asserted by the original claimant."[1141] The CAFC concluded "that the Tucker Act must be read to waive sovereign immunity for assignees as well as those holding the original claim."[1142]

"I Think That I Would Rather Be a Tree;" Forests Are Not "Government Installations" Under FAR Part 28

At issue in *SHABA Contracting*[1143] was a Forest Service (FS) IFB for forestry work in the national forest lands in the Buffalo Ranger District, Arkansas. The IFB did not include clauses requiring the contractor to obtain coverage for workers' compensation and other specified insurance.[1144] The protestor,

1128. *Id.*

1129. *Id.* ICW did not execute a takeover agreement, nor was the contract with PCE terminated. *Id.*

1130. *Id*.

1131. *See* Perlman v. Reliance Ins. Co., 371 U.S. 132 (1962); Balboa Ins. Co. v. United States, 775 F.2d 1158, 1161-63 (Fed. Cir. 1985) (both cases holding that the government waived its sovereign immunity from equitable subrogation claims by sureties).

1132. *Insur. Co. of the West*, 243 F.3d at 1369-70.

1133. 775 F.2d 1158.

1134. *Insur. Co. of the West*, 243 F.3d at 1370.

1135. 40 U.S.C. § 270a(a)-(d) (2000). Performance bonds generally give the surety the option of taking over and completing performance or of assuming liability for the government's costs in completing the contract in excess of the contract price. A third alternative, where the surety provides funds to the contractor to complete the contract, is the option ICW chose in this case. *See Insur. Co. of the West*, 243 F.3d at 1369-70.

1136. *Insur. Co. of the West*, 243 F.3d at 1370.

1137. *Id.* at 1372 (citing 28 U.S.C. § 1491(a)(1) (2000)).

1138. *Id*. at 1372.

1139. 28 U.S.C. § 2671 (2000).

1140. United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949). The CAFC found that in *Aetna*, the Supreme Court had directly held that the FTCA's waiver of sovereign immunity included suits by subrogees. *Insur. Co. of the West*, 243 F.3d at 1373.

1141. *Insur. Co. of the West*, 243 F.3d at 1373.

1142. *Id.* at 1375.

SHABA Contracting (SHABA), protested the solicitation, arguing that the FS was required by regulation to include the clauses requiring insurance and that the FS routinely included these clauses in similar solicitations in the past.[1145]

The GAO reviewed the regulatory provisions in question, both of which require offerors to provide insurance "for work on a Government installation."[1146] The GAO determined that the subject acquisition regulations do not define "Government installation."[1147] The FS argued that a national forest should not be considered a "Government installation." The GAO agreed. Because the term was not defined in the regulation, the GAO determined that if the FAR intended to apply to forestlands and similar lands, the term "Government-owned property" should have been used.[1148]

Can the Contracting Officer Require Bid Guarantees for Bids Under $100,000? Yes He Can!

The FWS issued an IFB for the award of a fixed-price contract to repair a residence in the E.B. Forsythe National Wildlife Refuge in New Jersey. The IFB required the contractor to furnish all labor, materials, and equipment, including the furnishing and installation of framing, windows, doors, cabinets, a bathroom, and a heating, ventilating, and air conditioning system.[1149] In the IFB, the FWS included a Standard Form (SF) 1442[1150] that noted a "bid bond, 20%" was required, and block 13.B of the SF 1442 specified that "an offer guarantee . . . is . . . required."[1151] The bid guarantee clause[1152] was also incorporated by reference in the IFB, specifying that the failure to provide a proper bid guarantee could result in rejection of the bid.[1153]

Lawson's Enterprises, Inc. (Lawson), submitted a bid of $96,740.[1154] Recognizing its bid was under the Miller Act[1155] threshold, Lawson did not submit a bid guarantee. Because Lawson did not submit a bid guarantee, the FWS awarded the contract to the next lowest bidder at a cost of $130,500, after determining that Lawson's bid was non-responsive.[1156]

Lawson protested the award, arguing that the solicitation did not require a bid guarantee for bids under $100,000.[1157] Lawson's argument was based on three prongs. First, the Miller Act only requires payment and performance bonds for construction contracts greater than $100,000.[1158] Second, the IFB incorporated by reference FAR 52.228-15, which requires performance

1143. Comp. Gen. B-287474, July 2, 2001, 2001 CPD ¶ 109.

1144. *Id*. at 1-2. The clauses in contention were FAR, *supra* note 11, § 52.228-5, Insurance—Work on a Government Installation, and Agriculture Acquisition Regulation § 452.228-71, Insurance Coverage. *SHABA*, 2001 CPD ¶ 109 at 2. The Forest Service is an agency within the Department of Agriculture.

1145. *SHABA*, 2001 CPD ¶ 109 at 1-3. SHABA also protested on two other grounds: first, that the FS's provisions for site viewing were inadequate and, second, that the failure to include the insurance provisions would result in the FS awarding to a vendor who uses "nonimmigrant aliens." *Id*. at 3-4. The GAO saw no merit in either assertion. *Id.*

1146. FAR *supra* note 11, § 28.310. The FAR makes the inclusion of the clause mandatory unless only a small amount of work is required, or all of the work will be performed outside the United States, its possessions, or Puerto Rico. *Id.*

1147. *SHABA*, 2001 CPD ¶ 109 at 2.

1148. *Id*. The GAO noted that the DOD has a regulatory definition for "Government installation," as a "facility having fixed boundaries and owned or controlled by the government." *Id*. (citing 32 C.F.R. § 842.74 (2001)). The cited C.F.R. section pertains to Air Force "non-scope" claims authority. *See* 32 C.F.R. § 842.74 (2001). The Army version is found at 32 C.F.R. section 536.90: "a Government installation is a facility having fixed boundaries owned or controlled by the Government." *Id*. § 536.90 (2001). The Navy has a similar, though slightly more expansive, provision: "Government installation. Any federal facility having fixed boundaries and owned or controlled by the U.S. Government. It includes both military bases and nonmilitary installations." *Id*. § 750.63(c). Because only in rare instances would a military facility not have a fixed boundary, contracting officers would be cautioned to read FAR section 28.310 expansively. The DFARS does not specifically address this issue.

1149. Lawson's Enters., Inc., Comp. Gen., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36 at 1.

1150. Standard Form 1442: Solicitation, Offer, and Award (Construction, Alteration, or Repair) (Rev. Apr. 1995). See FAR, *supra* note 11, §§ 53.301-1442.

1151. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 2.

1152. FAR, *supra* note 11, § 52.228-1.

1153. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 2.

1154. *Id.* at 1.

1155. 40 U.S.C. §§ 270a to d-1 (2000).

1156. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 1.

1157. *Id.* at 2.

and payment bonds, unless the resulting contract is less than $100,000,[1159] and third, that FAR 52.228-15 prohibits contracting officers from requiring bid guarantees unless a performance or payment bond is also required.[1160]

The GAO rejected all three arguments advanced by Lawson.[1161] The GAO determined that bid guarantees are promulgated under procurement regulations, and not mandated by statute. In cases where the bid is less than the Miller Act threshold of $100,000, an agency may still condition acceptance on the requirement that bid guarantees be furnished at the time of bid opening. Where the IFB requires all bids to include a bid guarantee, any bid failing to include the required guarantee must be rejected as non-responsive.[1162]

No Way to Inoculate Yourself from the Epidemics in the Insurance Marketplace

In *Novavax, Inc.*,[1163] the intricacies of the medical research and developmnent (R&D) insurance marketplace created an illness the offeror could not survive. The Centers for Disease Control and Prevention (CDC) issued an RFP for the development and stockpiling of smallpox vaccine as part of the nation's biological weapons defense preparations.[1164] The RFP required the successful offeror to develop a vaccine, conduct clinical trials, obtain licensure of the vaccine, and produce and stockpile at least 40 million units of the vaccine.[1165]

The RFP stated that the award would be made to the best-integrated proposal; that is, based on technical, business, and past performance, the proposal that offered the highest technical merit at the best overall value to the government. The RFP also included a pass/fail requirement that each proposal demonstrate the offeror "has the capability to provide indemnification/liability" coverage as required in the RFP.[1166]

Four proposals were received, and Novavax, Inc.'s (Novavax), proposal was the highest rated of the two proposals found technically acceptable.[1167] After reviewing the proposals, the CDC determined that the language in the RFP was not specific enough to put offerors on notice of the CDC's requirements, and an amendment was issued.[1168]

The contracting officer established the competitive range, consisting of the Novavax and OraVax offers. The CDC conducted discussion with both offerors and requested final proposal revision (FPR).[1169] During the discussions, Novavax

1158. *Id*. *See* 40 U.S.C. §§ 270a to d-1.

1159. *See* FAR, *supra* note 11, § 52.228-1.

1160. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 1-2. *See* FAR, *supra* note 11, § 28.101.

1161. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 1-2.

1162. *Id.* at 2.

1163. Comp. Gen. B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202.

1164. *Id.* at 2. "[S]mallpox was officially declared eradicated in 1980. In recent years, however, concern has grown that large-scale biological weapons research and production involving smallpox might still exist in many countries." *Id.* The civilian population is extremely vulnerable to smallpox and could expect thirty-percent fatalities in any exposure. *Id.*

1165. *Id.*

1166. *Id.* at 3. The RFP required that "the contractor shall indemnify or shall obtain insurance to indemnify, defend and hold harmless the government from any claims and cost resulting from acts, omissions, and mishandling of the vaccine." *Id.* (quoting RFP section H. 14).

1167. *Id.* Novavax received a score of 83.50 and OraVax, Inc., received a score of 76.50, out of a possible 100. The two other proposals did not meet the technical requirements. *Id.*

1168. *Id.* Amendment 5 revised section H. 14, adding the following specific requirements to the existing language:

> The indemnification/insurance coverage obtained shall include 1) clinical trials—adults; 2) clinical trials—pediatrics; 3) use in at risk laboratorians; 4) use in [immuno]-compromised individuals and [pregnant] women; and 5) use in emergency [situations]. A non-cancelable policy for the 20-year life of the contract shall be obtained by the Contractor prior to initiation of the clinical trials.

Id. at 3-4. Amendment 5 also added section B. 5 to the solicitation. This section added a required line item that was to "[reflect] the non-cancelable policy payment terms reached with the insurance providers for insurance which meets the requirements of [section] H. 14." *Id*. (quoting RFP section B. 5(1)). Section B. 5 also stated:

> (2) Backup documentation shall include a written justification as to how the amount of coverage was determined.
>
> (3) Proof of a guaranteed 20-year non-cancelable insurance policy from the insurance provider(s) shall be provided. This documentation shall clearly state the estimated cost of the coverage, the amount of the coverage, exactly what the coverage includes, and payment terms.

Id. (quoting RFP section B. 5(2)-(3)).

informed the CDC that insurance coverage was unavailable because a competitor had "locked up" the available insurance for this type of high-risk pharmaceutical project.[1170]

Upon receiving the FPRs, the CDC excluded Novavax from the competitive range for failing to submit either the required insurance or a risk assessment showing that the company had a basic understanding of the amounts and cost of coverage that would be required.[1171] Novavax protested the exclusion from the competitive range.[1172]

The GAO denied Novavax's protest. First, Novavax knew that the insurance carriers would refuse to provide more than one quote well before the time for FPRs. Novavax was required to raise that issue before submitting its proposal and failure to do so rendered that ground untimely.[1173]

Second, the RFP required offerors to demonstrate their capability to indemnify the government, or alternatively, to obtain insurance to indemnify the government.[1174] The GAO reasoned that before an offeror could demonstrate they had the capability to provide the required insurance, they must first determine how much insurance is necessary.[1175] Thus, the GAO determined that a risk assessment was reasonably implied from the terms of the RFP and the contracting officer was correct to exclude the Novavax proposal from the competitive range for failing to provide a risk assessment.[1176]

Cost and Cost Accounting Standards

Proposed Rule on Signing/Retention Bonuses

This past year, the FAR Council proposed[1177] and then withdrew[1178] a rule that would have explicitly made bonuses paid to recruit or retain employees with critical skills an allowable cost. The proposed rule would have amended FAR section 31.205-34, Recruitment Costs, by adding two subparagraphs which address signing bonuses and periodic retention bonuses, respectively. In the notice, the FAR Council specifically pointed out that it viewed the amendment to be a "clarification since the FAR currently does not disallow these type of expenses."[1179] In withdrawing the proposed rule, the Council stated that it was unnecessary because bonuses are already implicitly allowable so long as they are reasonable and allocable.[1180] This rationale seems to be at odds with FAR section 31.204(c), which states that "[s]ection 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable."[1181]

1169. *Id.* at 4.

1170. *Id.* Novavax contended it was unable to secure proof of insurance because:

> [I]nsurers generally form a consortium to provide the coverage capacity required for such projects and the consortium insurers will provide only one quotation on the project. That quotation is specific to the project and not dependent upon the pharmaceutical company that will perform the work, assuming that each relevant company is an established entity of sufficient reputation. Once one of the insurers issues a quotation to one company, none of the insurers will provide any information to any other company--the market "locks up." When the contract for the project is awarded, the insurers open the market to the firm that wins the competition and make the quotation available to that firm.

Id. (quoting the affidavit of Novavax's Vice President for Product Development).

1171. *Id.* at 5. The contracting officer accepted Novavax's statements concerning the "lock-up" at face value. The proposal was still excluded from the competitive range, however, because it did not address the risk assessment needed to quantify the amounts of coverage and associated costs. *Id.*

1172. *Id.* The CDC, citing urgent and compelling circumstances, overrode the statutory stay and awarded the contract to OraVax for $343.3 million. *Id.*

1173. *Id.* at 9-10. The CDC was able to develop the government estimate from publicly available information. The GAO concluded that Novavax could have estimated the necessary insurance using the same publicly available information. *Id.*

1174. *Id.* at 3-6.

1175. *Id.* at 7-8.

1176. *Id.* at 8. The RFP specifically required "written justification as to how the amount of coverage was determined." *Id.*

1177. Federal Acquisition Regulation; Signing and Retention of High-Technology Workers, 65 Fed. Reg. 82,876 (Dec. 28, 2000) (to be codified at 48 C.F.R. pt. 31).

1178. Federal Acquisition Regulation; Signing and Retention of High-Technology Workers, 66 Fed. Reg. 40,838 (Aug. 3, 2001).

1179. 65 Fed. Reg. 82,876.

1180. 66 Fed. Reg. 40,838.

1181. FAR, *supra* note 11, 31.204(c). Similarly, if all costs that were not expressly made unallowable by the FAR were deemed to be implicitly allowable, then there would be no need for any of the other current FAR provisions expressly making certain costs allowable. *See, e.g., id.* §§ 31.205-12 (Economic Planning Costs); 31.205-28 (Other Business Expenses); 31.205-29 (Plant Protection Costs); 31.205-32 (Precontract Costs).

DynCorp 2, Army 0

In last year's *Year in Review*,[1182] we covered the ASBCA's decision in *DynCorp*,[1183] which held that legal expenses incurred in connection with a criminal investigation for alleged contractor wrongdoing were allowable expenses where the evidence only demonstrates wrongdoing on the part of an employee of the contractor rather than the contractor itself.[1184] This past year, the Army twice tried unsuccessfully to make an end-run around this decision.[1185]

First, the Army argued that the statute allowing recovery of legal proceeding costs[1186] required the costs to be indirect rather than direct as DynCorp claimed them.[1187] The board summarily rejected this contentention.[1188]

Subsequently, the Army argued that it had received no benefit from DynCorp's legal representation during the criminal investigation. The legal costs were, therefore, not allocable to the contract.[1189] The basis for this argument was that the FAR test for allocability states that a "cost is allocable if it" can be assigned or charged "on the basis of relative benefits received or other equitable relationship." [1190] That section goes on to list the following situations in which a cost would be allocable: (a) if the cost were "incurred specifically for the contract," (b) if the cost "benefits both the contract and other work and can be distributed to them in reasonable proportion to the benefits received," or (c) the cost "is necessary to the overall operation of the business."[1191] Without discussing which of the three situations was applicable to DynCorp's legal proceeding costs, the board stated the concept of benefit should be read very broadly and could be implied because Congress would not have enacted the Major Fraud Act[1192]—making these costs allowable where there was no conviction—unless it saw a benefit to the government.[1193]

Get Your PAWS Off Our Money!

In *Johnson Controls World Services, Inc*.,[1194] the COFC held that the government's share of a pension fund surplus should include amounts attributable to employee contributions in addition to the contractor contributions.[1195] Between 1953 and 30 September 1988, Pan American World Services (PAWS) and its predecessors performed operation and maintenance services for the Air Force at the Eastern Test Range (ETR) in Cape Canaveral, Florida, under several successive contracts.[1196] The contractor had established a defined-benefit pension plan for its employees to which both it and its employees made contributions. The contractor charged the allocable portion of its contributions to the ETR contracts.[1197] In 1991-92, PAWS closed out the pension plan attributable to the ETR contracts as a result of a corporate takeover. Because the pension was over-funded, the government claimed it was entitled to an adjustment based upon the entire excess contributions, including those attributable to PAWS employees.[1198]

1182. *See 2000 Year in Revie*w, *supra* note 2, at 66.

1183. ASBCA No. 49714, 00-2 BCA ¶ 30,986, *motion for reconsideration denied*, 00-2 BCA ¶ 31,087.

1184. *Id*. at 152,932.

1185. *See* DynCorp, ASBCA No. 49714, 01-2 BCA ¶ 31,433; DynCorp, ASBCA No. 53098, 01-2 BCA ¶ 31,476.

1186. 10 U.S.C. § 2324 (2000).

1187. *DynCorp*, 01-2 BCA ¶ 31,433 at 155,228.

1188. *Id.* The board did not discuss why the government felt such costs had to be indirect. The board did not merely hold that legal proceeding costs could be direct. In fact, it held that its reading of congressional intent was for *all* such costs to be treated as direct costs. *Id.* at 155,229 (emphasis added). This could pose a problem for any contractors who treat proceeding costs as indirect costs.

1189. *DynCorp*, 01-2 BCA ¶ 31,476 at 155,400.

1190. FAR, *supra* note 11, § 31.201-4.

1191. *Id.*

1192. Pub. L. No. 100-70, 102 Stat. 4636 (codified at 18 U.S.C. § 1031 (2001); 10 U.S.C. § 2324(e)(1)(O), (k) (2000)).

1193. *DynCorp*, 01-2 BCA ¶ 31,476 at 155,404-05.

1194. 48 Fed. Cl. 182 (2000).

1195. *Id.* at 187.

1196. *Id.* at 183. A corporate acquisition in 1989 resulted in JCWSI being the successor in interest to PAWS. *Id.*

1197. *Id.*

Two different contracts were at issue in this dispute. The first of these—a 1978 contract—contained a provision stating: "The difference between the market value of the assets and the actuarial liability for the segment will be considered as an adjustment to previously determined pension costs . . . . That portion of any excess applicable to this contract shall be . . . paid . . . as the Contracting Officer may direct."[1199] The court concluded that government refunds are not limited to amounts charged to it unless the contract so specified and further determined that the language quoted above indicated the government was entitled to a broadly calculated refund in this case.[1200] Interestingly, the court did not discuss FAR 52.216-7, Allowable Cost and Payment, which limits the credits and refunds to the amount the government has reimbursed the contractor.[1201]

Government Entitled to Share of Contractor Employee Pension Contributions

The COFC has given Teledyne, Inc. (Teledyne), a mixed victory in its challenge of the validity of the 1995 amendment to Cost Accounting Standard (CAS) 413 governing pension costs.[1202] In 1995 and 1996, Teledyne sold the assets of two of its subsidiary divisions to other companies.[1203] The first of these asset sales preceded the 1995 amendment to CAS 413 and involved a division that had both cost-reimbursement and fixed-price contracts with the government at the time of the sale.[1204] The second sale occurred post-amendment to CAS 413 and involved a division that had only fixed-price contracts with the government.[1205] The defined benefit pension plans associated with these divisions ended as a result of these sales. At that time, the plans were over-funded, and the contracting officer asserted a claim for the government's share of the excess funding which took into consideration the fixed-price contracts as well as the cost-reimbursement contracts with Teledyne.[1206] Directly at issue was over $130 million.[1207]

In 1995, CAS 413 was amended to address several issues the government repeatedly faced.[1208] One of the amendments expressly provided for recovery of excess pension assets under fixed-price contracts.[1209] Subsequently, there was considerable disagreement within the government concerning whether segment closings that occurred before the 1995 amendment should take into account fixed-price contracts when determining the government's share of any excess pension assets. By the time *Teledyne* went to trial, the government had switched from its initial contention that the adjustments related to Teledyne's pension plans should account for fixed-price contracts. This apparently was sparked by a claim filed by General Motors seeking an adjustment that used the government's rationale against it. In the General Motors case, there had been a pre-amendment segment closing involving only fixed-price contracts and a pension deficit.[1210]

The government still maintained that it was entitled to an adjustment that included fixed-price contracts for post-amend-

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1198. *Id.* at 185. Johnson Controls argued that any adjustment should not include amounts attributable to employee contributions because they were not a cost paid by the government. *Id.* at 186.

1199. *Id.* at 184. This provision was not found in the second, 1984 contract. The court, however, did not see this omission to be significant and felt the second contract somehow incorporated the terms of the prior contract. *Id.*

1200. *Id*. at 186-87.

1201. *See* FAR, *supra* note 11, § 52.216-7.

1202. Teledyne, Inc. v. United States, 50 Fed. Cl. 155 (2001).

1203. *Id.* at 157.

1204. *Id*. at 158.

1205. *Id*. at 159-60.

1206. *Id*. at 157-60.

1207. *Id*. at 159-60. There also are several other contractors facing this same issue. *See, e.g.*, Martha A. Matthews, *GM Goes to Court of Federal Claims Seeking $ 311M in Pension Plan Underpayments*, 73 BNA FED. CONT. REP. 137 (2000) [hereinafter *GM Goes to Court*]; Martha A. Matthews, *GE Sues in Court of Federal Claims for $ 539M Pension Cost Adjustment Following $ 950M Government Claim Under CAS 413 Segment-Closure Provisions*, 71 BNA FED. CONT. REP. 624 (1999). Both General Motors and General Electric participated as *amicus curiae* in *Teledyne*. 50 Fed. Cl. at 157.

1208. *Teledyne*, 48 Fed. Cl. at 166. The primary reason for the amendment was that CAS 413 was initially drafted at a time when the vast majority of pension plans were underfunded. By 1995, the vast majority of pension funds were overfunded, largely as a result in a change to the tax laws and better than historical results in the stock market. *Id.*

1209. See CAS 413.50(c)(12)(vii), found at 48 C.F.R. section 9904.413, which as amended reads as follows: "The full amount of the Government's share of an adjustment is allocable, without limit, as a credit or charge during the cost accounting period in which the event occurred and contract prices/costs will be adjusted accordingly." 48 C.F.R. § 9904.413 (2000). Prior versions of this standard contained no reference to price.

1210. *Teledyne*, 50 Fed. Cl. at 178-81. See *GM Goes to Court*, *supra* note 1207, for greater details on this claim.

ment pension adjustments. The COFC agreed, holding that although Teledyne had entered into its contract before the amendment, Teledyne was required to comply with not just the CAS in effect at the time of award, but also any modifications or amendments to the CAS by virtue of the CAS clause[1211] that had been incorporated into the contract.[1212] The court also held, however, that this very same clause entitled Teledyne to an equitable adjustment, because the 1995 amendment to CAS 413 required it to make a change to its cost accounting practices, increasing its costs.[1213]

COFC Imposes Herculean Burden on Contractors

The COFC's holding in *Hercules, Inc. v. United States*[1214] highlights the incongruities between the cost principles found in the FAR and the CAS. In this case, the contractor operated the Radford Army Ammunition Plant (Radford) in Virginia. Between 1941 and the end of 1994, Hercules, Inc. (Hercules) operated the plant under a cost-reimbursement contract, but commencing in 1995 it began operating under a fixed-price contract. In 1987, Hercules sold its stock in another company and the income taxes assessed by Virginia for the year included $6.9 million in capital gains from the stock sale. Hercules paid its tax assessment and allocated this cost to the Radford operating contract in proportion to the mix of fixed-price and cost-reimbursement contracts it had in 1987.[1215] At the same time, it instituted litigation against Virginia seeking a refund of the taxes attributable to the stock sale. In 1995, Virginia entered into a settlement agreement in which it paid Hercules $10.5 million.[1216]

The government gave Hercules a demand letter for a refund of $5,775,000 of that amount based upon the 1987 allocation factor used by Hercules to seek reimbursement of the taxes from the government. Hercules refused to pay because it contended CAS that 406 mandated that the refund to the government be calculated based upon the mix of fixed-price and cost-reimbursement contracts Hercules had in 1995 when it received the Virginia tax refund. Because Hercules had only fixed-price contracts by that time, Hercules concluded that the government was entitled to nothing.[1217] The court disagreed with this contention, and, citing two FAR provisions dealing with refunds,[1218] held that a tax refund is not a cost but rather a cost reduction. Consequently, Hercules had to reduce its 1987 costs and had to calculate this reduction using the proportion of cost-reimbursement contracts in effect in 1987. According to commentators, this case is fairly significant because many contractors treat tax refunds and credits in a manner similar to Hercules.[1219]

"You're Talking Turkey," CAFC Tells ASBCA

In *General Electric Co. v. Delaney*,[1220] the CAFC reversed a somewhat controversial February 2000 ASBCA decision regarding depreciation of assets purchased in foreign countries.[1221] This case involved a foreign affiliate of General Elec-

1211. FAR, *supra* note 11, § 52.230-2.

1212. *Teledyne*, 50 Fed. Cl. at 163, 185-87.

1213. *Id*. *See also* FAR, *supra* note 11, § 52.230-2(a)(4). The *Teledyne* court also rejected the government's contention that its recovery should take into consideration amounts contributed by Teledyne's employees. 50 Fed. Cl. at 184-85. This result is completely opposite the holding in *Johnson Controls World Services, Inc.* (*JCWSI*), 48 Fed. Cl. 182 (2000), discussed *supra* notes 1194-1201. The *Teledyne* court based its holding on language found in FAR, *supra* note 11, § 52.216-7, Allowable Cost and Payment, limiting government refunds and credits to amounts it has reimbursed the contractor. *See* 50 Fed. Cl. at 191. This clause was not addressed by the prior *JCWSI* court, *see* 48 Fed. Cl. 182, and the latter *Teledyne* decision did not address the earlier *JCWSI* decision, *see* 50 Fed. Cl. 155.

1214. 49 Fed. Cl. 80 (2001). For further discussion of this decision, see *infra* notes 1605-11 and accompanying text.

1215. *Hercules*, 49 Fed. Cl. at 82-84. Initially, the contracting officer disallowed that part of the income taxes due to the stock sale. In a prior decision, the Federal Claims Court held in favor of Hercules on the allowability of these taxes and granted it nearly $4.9 million. *Id.* (citing Hercules, Inc. v. United States, 26 Cl. Ct. 662 (1992)).

1216. *Id*. at 85. Hercules accounted for this settlement as follows: $5.25 million tax refund and $5.25 million in interest. The agreement was silent concerning any break-down in amounts. *Id*. at 86.

1217. *Id*. at 86, 91-92. Cost Accounting Standard 406 specifically provides: "The same cost accounting period shall be used for accumulating costs in an indirect pool as for establishing its allocation base." *Id.* (quoting CAS 406). Thus, Hercules argued that because it treated the tax refund payment as a cost (a negative one) that it accumulated in its 1995 indirect cost pool. Because the payment was made in 1995, it was required to allocate that cost over its 1995 allocation base. It is also worth mentioning that Hercules had consistently treated tax refunds in a similar fashion in the past and had not adopted this method of accounting solely to cheat the government out of any refund. *Id*. at 90. Had Hercules had only cost-reimbursement contracts in 1995, the resultant allocation would have been greater than the 1987 allocation factor; it is unclear whether the government would have used a different line of reasoning in that case.

1218. *Id*. at 90-91 (noting that FAR section 31.205-41, Taxes, requires tax credits to be treated as a "cost reduction" and that FAR section 52.216-7, Allowable Cost and Payment, states: "The contractor shall pay to the Government any refunds . . . (including interest, if any) accruing to or received by the Contractor . . . to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed to [sic] the Government.").

1219. *See* Johnson & Robert S. Nichols, *Hercules II: A Controversial Decision in the Court of Federal Claims*, 75 BNA FED. CONT. REP. 513 (2001).

1220. 251 F.3d 976 (Fed. Cir. 2001).

tric (GE), Tusas Engine Industries, Inc. (Tusas), that GE had formed in Turkey to locally manufacture F-16 engines as part of a Foreign Military Sales agreement between the United States and Turkey. Thereafter, the Air Force awarded GE six different contracts for aircraft engine repair parts; GE subcontracted the work to Tusas. To calculate allowable depreciation on these contracts, Tusas began by recording the company assets, which had been purchased using U.S. dollars, in Turkish lira. In doing so, Tusas used the exchange rate in effect at the time it acquired the assets. It then took depreciation based upon this same exchange rate for the life of the asset. The contracting officer recalculated the depreciation by basing it on the current exchange rate in effect for each accounting period. Because Turkey was experiencing a period of tremendous inflation, the net result was that the contractor recovered significantly less depreciation using this current exchange rate rather than the historic exchange rate.[1222]

GE argued that because neither the CAS nor the FAR cost principles expressly addressed the scenario of depreciation in foreign countries, it was free to calculate depreciation in accordance with generally accepted accounting principles.[1223] In contrast, the government argued that usage of historic exchange rates would violate FAR 31.205-11(e).[1224] The ASBCA agreed that neither the FAR nor the CAS expressly address this scenario[1225] and also noted that the burden of proof was on the government since this was a cost disallowance.[1226] The board ruled in favor of the government, however, because it saw depreciation of greater than the book value, when measured in Turkish Lira, to violate the FAR.[1227] The CAFC's reversal this past year was based upon its belief that the ASBCA has misinterpreted the FAR by looking at the amount of depreciation versus the original book value solely in terms of Turkish Lira. This resulted in a "mischaracterization of the transaction" which controverted the purpose of depreciation—to allocate the entire cost of an asset over its useful life.[1228]

More FAR/CAS Conflicts and Allegations of Retroactivity

This past year, on the same day, the ASBCA handed down two important decisions dealing with asset valuations following a business combination.[1229] Both cases held, by a two-to- one margin, that a contractor using the purchase method of accounting was limited to amortization, depreciation, and cost of money based upon the pre-business combination value of assets, even for combinations that occurred before the 1990 FAR revision that created this limitation.[1230] Both of these cases involved a merger of corporations or, in government contract parlance, a business combination, and in both cases the merger occurred before 1990.

In accordance with Accounting Principles Board[1231] Opinion Number 16, which required an acquiring entity to record assets at their fair market value, the contractors hired independent appraisal firms to determine the respective fair market values and then recorded the assets at that value.[1232] Thereafter, in 1990 the government published a new cost principle[1233] which

1221. Gen. Elec. Co., ASBCA No. 44646, 00-1 BCA ¶ 30,765.

1222. 251 F.3d 976, 977-78.

1223. *Gen. Elec. Co*., 00-1 BCA ¶ 30,765 at 151,943. In this regard, GE calculated its depreciation in accordance with Financial Accounting Standard 52. *Id*. at 151,933-34.

1224. *Id*. at 151,939. This provision prohibits allowable depreciation from exceeding book value of the asset. To illustrate the government's argument, Tusas obtained a power supply in 1987 at a cost of $331,820, which converted to 201,588,654 Turkish Lira (TL). This asset had a life of ten years and was depreciated using a straight-line method of depreciation, meaning it could depreciate ten percent of the asset value, or 20,158,865 TL, each year. This would have been equivalent to $33,182 per year based upon the exchange rate in effect when the asset was obtained. Throughout the life of this asset, the inflation rate in Turkey was very large, and by the tenth year the exchange rate was 86,457 TL to the dollar as opposed to 866 TL to the dollar when the asset was purchased. Under GE's method of calculation, in year ten it claimed depreciation of over 2 billion TL, ten times the original book value in TL. In terms of dollar values, the depreciation in year ten was only $33,182 , or ten percent, of the original book value. *Id.* at 151,936.

1225. *Id*. at 151,943.

1226. *Id*. at 151,941.

1227. *Id*. at 151,942.

1228. Gen. Elec. Co. v. Delaney, 251 F.3d 976, 980 (Fed. Cir. 2001).

1229. *See* BAE Sys. Info. & Elec. Sys. Integration, Inc., ASBCA No. 44832, 01-2 BCA ¶ 31,495; Kearfott Guidance & Navigation Corp., ASBCA No. 45536, 01-2 BCA ¶ 31,496 [hereinafter *Kearfott*].

1230. *BAE*, 01-2 BCA ¶ 31,495 at 155,522.

1231. The Accounting Principles Board is a predecessor to the Financial Accounting Standards Board.

1232. *BAE*, 01-2 BCA ¶ 31,495 at 155,512; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,553.

1233. *See* FAR, *supra* note 11, § 31.205-52, Asset Valuations Resulting From Business Combinations.

at that point stated "When the purchase method of accounting for a business combination is used, allowable amortization, cost of money and depreciation shall be limited to the total of the amounts that would have been allowed had the combination not taken place."[1234] Subsequently, each of the parties in the two cases entered into new cost-reimbursement contracts. In both cases, when the contractor submitted its vouchers for payment, the government disallowed that part of the voucher related to the stepped-up asset values.[1235]

One of the more noteworthy arguments raised in both of these appeals is that the new cost principle was an illegal retroactive regulation insofar as it was being applied to combinations that occurred before the effective date of the new cost principle.[1236] The board rejected this argument because it felt "it was not the date of the . . . business combination . . . that caused the regulation to apply to the disallowed costs here. Rather, it was [the contractor's] use of the purchase method of accounting to account for income and expenses after its contract was awarded."[1237]

The board reasoned that even though the contractor had been using the purchase method of accounting since the date of the merger, when it entered the contract with the government and submitted its vouchers for payment, it could have elected a different method of accounting and the election to continue to use the purchase method of accounting at that time triggered the application of the cost principle. Another argument that was raised, but rejected, is that the new cost principle was invalid because it conflicted with CAS 404.[1238] In her dissenting opinion, Judge Thomas acknowledged the existence of a conflict because she believed the new cost principle "did not allow the use of the purchase method of accounting in the case of the sale of a business at a profit and CAS 404 did."[1239]

Deployment and Contingency Contracting

Special Authorities Invoked in the Wake of the 11 September Attacks

In response to the terrorist attacks on 11 September 11 2001, the U.S. government invoked a number of special authorities in the contracting arena to respond to the attacks and to facilitate the transition to a wartime posture. On 14 September, the President issued EO 13,223,[1240] declaring a national emergency.[1241] The EO invoked or suspended a variety of authorities (about twenty-one separate authorities) under titles 10 and 14 of the U.S. Code, authorized the increase of the active-duty strength of the armed forces, and invoked the Feed and Forage Act.[1242]

In addition to the actions taken by the President, a number of other officials issued guidance to the field in the aftermath of the 11 September attacks. Based on the President's actions in invoking 10 U.S.C. § 12,302,[1243] and the exercise of that authority by the Secretaries of the military departments, the DOD determined that a "contingency operation"[1244] was underway. As a contingency operation, the DOD is authorized to use all contingency operation contracting provisions and procedures in the FAR and the DFARS. One of the most useful of these authorities is the increase in the simplified acquisition threshold[1245] from the normal $100,000 level to $200,000.[1246]

The DOD procurement workforce is leaning forward in the foxhole to support the recovery efforts in New York, Virginia, and Pennsylvania, and in carrying forward the war against terrorism. While creativity is a necessary component of our warfighting effort, it is important to remember that authorities,[1247] procedures, and processes exist within the established frame-

1234. *BAE*, 01-2 BCA ¶ 31,495 at 155,522. This FAR provision was modified slightly in 1998, but the change would not have affected the outcome in this case.

1235. *Id*. at 155,512-13; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,554.

1236. *BAE*, 01-2 BCA ¶ 31,495 at 155,533-35; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,555. The plaintiffs also argued this amounted to a taking of property without just compensation in violation of the Fifth Amendment's Due Process Clause, but the board ruled that it did not have jurisdiction over such a claim. *BAE*, 01-2 BCA ¶ 31,495 at 155,526-27; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,556.

1237. *BAE*, 01-2 BCA ¶ 31,495 at 155,534-35.

1238. *Id*. at 155,535-42.

1239. *Id*. at 155,548. This is not entirely correct: the cost principle did actually permit the purchase method of accounting, but it limited the amount of allowed depreciation, cost of money, and amortization when the method was used.

1240. Exec. Order No. 13,223, Ordering the Ready Reserve of the Armed Forces To Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation, 66 Fed. Reg. 48,201 (Sept. 18, 2001).

1241. *Id*. The order furthers the President's emergency proclamation. *See Proclamation No. 7463 of September 14, 2001, Declaration of* National Emergency *by Reason of Certain Terrorist Attacks*, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

1242. Exec. Order No. 13,223, 66 Fed. Reg. 48,202. The Deputy Secretary of Defense invoked 41 U.S.C. § 11(a) (2000), commonly referred to as the Feed and Forage Act, on 16 September 2001. *See* Memorandum, Deputy Secretary of Defense, subject: Obligations in Excess of Appropriation Subsequent to Terrorist Attacks and Aircraft Crashes at the World Trade Center, the Pentagon, and in Pennsylvania (16 Sept. 2001).

1243. 10 U.S.C. § 12,302 (2000). Section 12,302 authorizes the President to recall involuntarily members of the Ready Reserve in times of national emergency. *Id.*

work that will allow us to execute any mission necessary to ensure the victory of a free people.[1248]

Mo' Better Doctrine

Within military organizations, doctrine is the operational framework to accomplish the mission. Contracting officers, and their supporting legal counsel, must understand the doctrinal underpinnings of their clients to support better better the operational objectives of the commanders they serve. This year, like last year, there has been seen a flurry of doctrinal publications that impact the contingency contracting process.

Many of the key doctrinal references were reissued this year, changing the doctrinal focus from pre-Desert Storm cold-war operations to something more contemporary. The "capstone" doctrinal publications, *Unified Action Armed Forces*,[1249] and *Operations*,[1250] were both reissued this year, updating the basic doctrine for all military operations and units. In addition to the capstone operational publications, a number of new operational publications, including manuals on amphibious[1251] and forced entry operations,[1252] foreign humanitarian assistance,[1253] and civil-military operations,[1254] all contain guidance on the use of contingency contracting support in their respective areas. Specific logistical doctrine was also issued this year in the areas of health service support,[1255] civil engineering,[1256] common-user logistics,[1257] and support to multinational operations.[1258]

1244. *Id.* § 101(a)(13).

> The term "contingency operation" means a military operation that—
>
> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
>
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title [10 U.S.C. §§ 331 et seq.], or any other provision of law during a war or during a national emergency declared by the President or Congress.

Id.

1245. *Id.* § 2302(7). This section states:

> (7) The term "simplified acquisition threshold" has the meaning provided that term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403), except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means an amount equal to two times the amount specified for that term in section 4 of such Act [41 U.S.C. § 403].
>
> (8) The term "humanitarian or peacekeeping operation" means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

Id. See also 41 U.S.C. § 403 (2000), and FAR, *supra* note 11, § 2.101.

1246. *See* Memorandum, Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology), Acting Deputy Assistant Secretary of the Army (Procurement), subject: Simplified Acquisition Threshold Increase in Support of Operation Enduring Freedom (10 Oct. 2001).

1247. Other authorities that may be useful in the current situation are the Defense Production Act, 50 U.S.C. app. 2061 (2000), and Public Law 85-804 (codified at 50 U.S.C. §§ 1431-1435, implemented by EO 10,789 and FAR pt. 50). Public Law 85-804 authorizes the President to take extraordinary contract actions to facilitate national defense. FAR, *supra* note 11, § 50.101.

1248. For an example of the types of procedures that will likely be employed to support the recovery and combat efforts, see Memorandum, Office of the Assistant Secretary of the Air Force, Principle Deputy Assistant Secretary (Acquisition & Management), subject: Transition to a Wartime Footing (5 Oct. 2001) (listing undefinitized contract actions, urgent and compelling Justification and Authorizations, options for increased quantities, and accelerated delivery options as methods to be explored and utilized to support the war on terrorism), *available at* http://web2.deskbook.osd.mil/New_Pubs/Transitiontowar.doc.

1249. Joint Chiefs of Staff, Joint Pub. 0-2, Unified Action Armed Forces (10 July 2001).

1250. Joint Chiefs of Staff, Joint Pub. 3-0, Operations (10 Sept. 2001).

1251. Joint Chiefs of Staff, Joint Pub. 3-02, Joint Doctrine for Amphibious Operations (19 Sept. 2001).

1252. Joint Chiefs of Staff, Joint Pub. 3-18, Joint Doctrine for Forcible Entry Operations IV-4 (16 July 2001) (discussing contractor support to the logistics requirements for a forcible entry operation).

1253. Joint Chiefs of Staff, Joint Pub. 3-07.6, Joint Tactics, Techniques, and Procedures for Foreign Humanitarian Assistance IV-8 (15 Aug. 2001) (requirement to consider "critical support contracting").

1254. Joint Chiefs of Staff, Joint Pub. 3-02, Joint Doctrine for Civil-Military Operations (8 Feb. 2001).

The Army also issued newly revised doctrine for the operational force. Newly issued *Field Manual 1*[1259] and *Field Manual 3-0*[1260] provide the basic operational guidance for Army units. *Field Manual 3-0* devotes one of twelve chapters to combat service support including contracting.[1261]

Perhaps the most directly useful publication issued this year is the new *Contractor Support in the Theater of Operations, Deskbook Supplement*.[1262] This supplement provides sample clause language for inclusion in contracts for contractor support in an operational theater.[1263] In addition to the sample contract language, the guide provides a short bibliography of contractor on the battlefield references, a checklist for contractor support considerations, and instructions for incorporating contractor deployment requirements into the Time-Phased Force Deployment Data (TPFDD).[1264]

Contracting Officers Still Have to Go to School, but Only the New Ones![1265]

After much wailing and gnashing of teeth by the procurement community workforce, the Acting Under Secretary of Defense for Personnel and Readiness issued guidance on 21 March 2001 (Cragin memo) that soothes some of the concerns about contracting officer education requirements and career progression, at least for contracting officers who were on-duty before 1 October 2000.[1266] Section 808 of the FY 2001 NDAA[1267] requires all contracting personnel in the GS-1102 series or compatible military positions to have a bachelor's degree and at least twenty-four hours of business-related courses[1268] from an accredited institution of higher learning. After enactment, confusion reigned regarding who was actually covered by the provision. The Cragin memo states that the DOD views Section 808 as applying only to new entrants in the contracting field after 1 October 2000.[1269] While the interpretation minimizes the impact upon the existing contracting workforce, the interpretation jeopardizes recruitment and retention of enlisted contracting officers in both the Army and the Air Force.[1270] Both services rely heavily on enlisted contracting

1255. Joint Chiefs of Staff, Joint Pub. 4-02, Doctrine for Health Service Support in Joint Operations (30 July 2001).

1256. Joint Chiefs of Staff, Joint Pub. 4-04, Joint Doctrine for Civil Engineer Support (27 Sept. 2001).

1257. Joint Chiefs of Staff, Joint Pub. 4-07, JTTP (Joint Tactics, Techniques, and Procedures) for Common-User Logistics During Joint Operations (11 June 2001).

1258. Joint Chiefs of Staff, Joint Test Pub. 4-08, Joint Doctrine for Logistic Support to Multinational Operations (15 May 2001).

1259. U.S. Dep't of Army, Field Manual 1, The Army (14 June 2001). *Field Manual 1* "establishes doctrine for employing land power in support of the national security strategy and the national military strategy." *Id.* preface.

1260. U.S. Dep't of Army, Field Manual 3-0, Operations (14 June 2001) [hereinafter FM 3-0]. *Field Manual* 3-0 replaced *Field Manual 100-5, Operations* (14 June 1993). The Army has adopted the joint number system, aligning the corresponding Army field manuals with their respective joint publications.

1261. FM 3-0, *supra* note 1260, ch. 12.

1262. Defense Acquisition Deskbook, Contractor Support in the Theater of Operations, Deskbook Supplement (28 Mar. 2001), *available at* http://web1.deskbook.osd.mil/data/001QZDOC.DOC.

1263. The deskbok supplement provides model clause language in twenty-three separate areas related to the activities of contractors in an operational deployment. *Id.*

1264. The TPFDD is the product of the formal planning process for the deployment of U.S. forces. Joint Chiefs of Staff, Joint Pub. 1-02, Department of Defense Dictionary of Military and Associated Terms 439-40 (15 Oct. 2001).

1265. See *infra* Legislation Appendix A, notes 107-08 and accompanying text, for legislative exceptions to this requirement contained in this year's NDAA.

1266. Memorandum, Acting Under Secretary of Defense, Personnel and Readiness, Department of Defense, to Secretaries of the Military Departments et al., subject: Changes in Education Requirements for the Acquisition Workforce (21 Mar. 2001) [hereinafter Cragin Memo], *available at* http://www.acq.osd.mil/ar/doc/section808-1102-032101.pdf.

1267. The National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 808, 114 Stat. 1654, *amending* 10 U.S.C. § 1724. *See also 2000 Year in Review*, *supra* note 2, at 116.

1268. Pub. L. No. 106-398, § 808. Such courses include: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management. Cragin Memo, *supra* note 1266, at 1.

1269. Cragin Memo, *supra* note 1266, at 2. The "grandfather" provision only applies to contracting officers who were authorized to award or administer contracts above the simplified acquisition threshold on or before 30 September 2000. *Id.*

1270. At least for the Army, many of the enlisted contracting officers are limited to awarding contracts at or below the simplified acquisition threshold. *See id.*

officers to provide a significant portion of the contingency contracting capability.

When There Are Terrorists in Your Neighborhood, How Ya Gonna Call Bin Laden Busters?

Sometimes when U.S. forces are deployed to remote spots around the world, the most important question is not "who ya gonna call," but how you are going to call them. The DOD took a step this year to solve the difficult questions of how to communicate securely from remote corners of the world and how to do so without lugging an entire signal platoon along for the ride. In December 2000, the Defense Information Systems Agency (DISA) awarded a twenty-four month, $72 million contract to Iridium Satellite, L.L.C., to provide unlimited airtime for up to 20,000 government users.[1271] The DISA used the national security exception to the CICA to make the award.[1272]

Iridium Satellite, L.L.C. (Iridium Satellite), is the successor to Iridium, L.L.C., a once high-flying telecommunications company that went bankrupt and nearly ceased to function as a commercial entity.[1273] The DOD had invested over $140 million in Iridium before its bankruptcy.[1274] The DOD contract provides a transfusion that kept the Iridium satellite system functioning, and provides the DOD with commercial mobile, cryptographically secure telephone services available anywhere in the world.[1275] The capability provided by the Iridium satellite network should prove invaluable in assisting the efforts of U.S. forces engaged in Operation Enduring Freedom.

T&G Aviation, Inc.

T&G Aviation, Inc. (T&G), held two contracts with the U.S. Agency for International Development (USAID) for aerial spraying in Morocco and Senegal in the mid-1980s.[1276] At that time, sub-Saharan Africa suffered from a locust infestation of near biblical proportions.[1277] The two contracts were separately awarded, separately administered, and generated from two separate organizations within USAID.[1278] At the completion of the Senegal contract, T&G decided to reposition its two DC-7 aircraft from Senegal to Morocco, rather than return them to the United States,[1279] in anticipation of additional spraying contracts that would be awarded by the USAID office in Morocco the following spring. After advising T&G officials that the repositions of aircraft to Morocco would be a good business decision, USAID officials asked T&G to carry some pumping equipment and some fifteen tons of insecticide from Senegal to Morocco.[1280]

During the repositioning flight, the two T&G aircraft were attacked by surface to air missiles (SAMs) from the Polisario, a Western Sahara independence movement.[1281] As a result of the attack, one aircraft crashed and the other was severely damaged. Five T&G employees were killed.[1282]

T&G filed a claim for $1,499,709 with the contracting officer of the Senegal contract, which was denied in a final decision issued on 17 November 1989.[1283] The claim was predicated on the theory that the USAID had breached: "(a) the implied warranty of design specification, (b) the duty to disclose superior knowledge, and (c) the implied duty of coopera-

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1271. Press Release, Office of the Assistant Secretary of Defense (Public Affairs) Defense Department Announces Contract for Iridium Communications Services (Dec. 6, 2000) [hereinafter Iridium Press Release], *available at* http://www.defenselink.mil/news/Dec2000/b12062000_bt729-00.html. *See also* Gerry J. Gilmore, *DoD Gets 'Global' With Satellite-Phone System*, American Forces Press Service (Dec. 7, 2000), *available at* http://www.defenselink.mil/news/Dec2000/n12072000_200012072.html.

1272. 10 U.S.C. § 2304(c)(6) (2000). The DISA drew a protest in this acquisition because of their reliance on the national security exception. *See* Globalstar LP & Gov't Sys., L.L.C., Comp. Gen. B-286980 (protest withdrawn Jan. 30, 2001). After the protestor's outside counsel gained limited access to the classified documentation supporting the National Security exemption, the protest was withdrawn. *See* Letter from Mr. James J. McCullough, Fried, Frank, Harris, Shriver & Jacobson, to Lieutenant General Harry D. Raduege, Jr., Director, Defense Information Systems Agency1 (Jan. 26, 2001) (on file with author).

1273. Paula Shaki Trimble, *DOD Takes Loss in Stride*, FED. COMPUTER WEEK, Mar. 27, 2000, *available at* http://www.fcw.com/fcw/articles/2000/0327/news-dod-03-27-00.asp.

1274. In April of 1999, the DISA issued a modification to an existing contract valued at up to $219 million for Motorola for support, equipment, and airtime on the Iridium system. Press Release, Office of the Assistant Secretary of Defense (Public Affairs), Contracts (Apr. 1, 1999), *available at* http://www.defenselink.mil/news/Apr1999/c04011999_ct138-99.html.

1275. Iridium Press Release, *supra* note 1271. The primary users of the Iridium services are special operations forces (SOF) and combat search and rescue (CSAR). *Id.*

1276. T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147. The ASBCA hears cases arising under USAID contracts pursuant to the agency's designation. 48 C.F.R. § 733.270-1 (2001).

1277. *Id.* at 153,839 (quoting USAID documents forecasting a "massive locust invasion of Morocco is imminent").

1278. *T&G Aviation, Inc.*, 01-1 BCA ¶ 31,147 at 153,834-35.

1279. Both contracts provided for a demobilization flight to return the aircraft to the United States *Id.* at 153,834.

1280. *Id.* at 153,838.

tion."[1284] The board, while mindful of the loss of life and failure of the USAID leadership to inform T&G's personnel of the very real danger to their aircraft, nevertheless held for the government.[1285]

T&G argued that the provisions in both contracts "calling for the government representatives to designate specific areas to be sprayed constituted design specifications."[1286] T&G argued that the government's designation of specific spraying locations amounted to an implied warranty guaranteeing that those areas were safe and that the government was liable on that guarantee.[1287] The board found that while the government designated areas to be sprayed, T&G had complete authority to decide its manner of mobilization and demobilization, all matters of flight operations, and even whether a flight should take place at a particular location and the determination of cargoes and weather conditions.[1288] The board rejected T&G's argument, finding that the fact that a USAID representative specified areas to be sprayed "is insufficient to render the specifications design type and to trigger its implied warranty."[1289]

The second theory T&G advanced, a duty to disclose superior knowledge, also met with failure at the board. While the board deplored the failure of USAID representatives to pass critical information to T&G during the performance of the Moroccan contract,[1290] the board nevertheless found for the government on this issue as well. The board reasoned that while the government may have been morally obligated to provide such information, the failure to provide such information did not impact the performance on *this contract*, and could not form the basis for recovery.[1291]

The third basis, the government's alleged failure to cooperate with T&G in the performance of the contract, also figuratively went down in flames. The board recounted the law as it relates to the duty to cooperate. Again, because the loss occurred during the transfer flight, and outside the performance of either contract, the board found that T&G failed to show that it sustained its damage as a result of the government's failure to cooperate by providing information on the insurgent's anti-aircraft capability and propensity.[1292]

Environmental Contracting

Energy Policy on Front Burner for New Administration

President Bush issued three EOs signaling his administration's energy policy. The first, EO 13,211,[1293] requires agencies to prepare a "Statement of Energy Effects" when undertaking agency actions that promulgate or lead to the promulgation of final rules or regulations that are likely to have a "significant

1281. *Id.* at 153,840. The conflict is still not settled. Since 1991, the United Nations Mission for the Referendum in Western Sahara (MINURSO) has been attempting to execute a referendum to determine the future of Western Sahara. MINURSO was established by Security Council Resolution 690 (1991) of 29 April 1991. The most current action by the U.N. is Resolution 1359 of 29 June 2001. Former Secretary of State James A. Baker, III, is the Personal Envoy of the Secretary General. *See* United Nations, *Western Sahara—MINURSO—Background*, Current Peacekeeping Operations (2001), *at* http://www.un.org/Depts/DPKO/Missions/minurso/minursoB.htm.

1282. *T&G Aviation, Inc.*, 01-1 BCA ¶ 31,147 at 153,840..

1283. *Id.* at 153,842. The claim was for loss and damage to the two aircraft, lost profits, legal fees and consultant costs, and General and Administrative (G&A) costs, and profit. *Id.* The costs associated with the death and injury to T&G's personnel were covered under the FAR, *supra* note 11, § 52.228-4 (Workers' Compensation and War-Hazard Insurance Overseas), and AIDAR 752.228-70, Alternate 71 (Insurance-Workers' Compensation, Private Automobiles, Marine, and Air Cargo) clauses. *Id.* at 153,841. Unfortunately, T&G's insurance did not include "war-risk" coverage and its property losses were uncompensated. *Id.* at 153,842.

1284. *Id.* at 153,845.

1285. *Id.* at 153,842.

1286. *Id.* at 153,845.

1287. *Id.*

1288. *Id.* at 153,845-46.

1289. *Id.* at 153,846.

1290. *Id.* at 153,842 ("[W]e find that AID's Mr. Johnson unreasonably failed to communicate, or to have other AID officials communicate, to appellant information he had received regarding the berm, the Polisario, and its SAM capability during the performance of the Morocco Contract."). The USAID representatives attended daily "country team meetings" at the U.S. embassy in Morocco. *Id.* at 153,837. During these meetings, officials from the U.S. Defense Attaché office in Morocco provided detailed intelligence on the capabilities, locations, and propensities of the Polisario, and the increased possibility of Polisario launched SAM attacks against aircraft in proximity to the disputed region. *Id.*

1291. *Id.* at 153,846-47 (emphasis added).

1292. *Id.* at 153,847.

1293. Exec. Order No. 13,211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 Fed. Reg. 28,355 (May 22, 2001).

adverse effect on the supply, distribution or use of energy."[1294] This EO highlights the administration's policy that, although the federal government can significantly affect energy supply and use, there is "too little information regarding the effects that governmental regulatory actions can have on energy."[1295] The Statement of Energy Effects should provide more information and "hence improve the quality of agency decision-making."[1296]

The second executive order[1297] requires executive departments and agencies to take appropriate actions to expedite projects that will increase energy production, transmission, or conservation.[1298] Agencies are reminded that expediting actions must be "consistent with applicable law" and "maintain[ ] safety, public health, and environmental protections."[1299] Finally, the order establishes an interagency task force to assist agencies with implementation of the executive order. The task force shall be chaired by the Chairman of the Council on Environmental Quality, and housed at the DOE.[1300]

The final executive order[1301] expects agencies to rid themselves of "the vampires"[1302] and purchase commercially available, off-the-shelf products that use external standby power devices that use no more than one watt in the standby power-consuming mode. The order contemplates an exception when the life-cycle costs are not "cost-effective" or when the product's utility and performance are compromised as a result of the one-watt standby requirement.[1303] The order also requires the DOE, in consultation with the DOD and the GSA, to compile a list of products subject to the power efficiency standards.[1304]

Authority to Suspend Logging Contract Not Answered by Sovereign Acts Doctrine

In *Croman Corp. v. United States*,[1305] the COFC reversed a 1999 finding that the sovereign acts doctrine authorized the suspension of contract timber sales in a portion of the Klamath National Forest in California, holding instead that the contract addressed the issue of delays caused by government action.

In 1992, the FWS listed the marbled murrelet, a small bird found in Pacific coastal regions, as an endangered species under the ESA. The FWS prohibited felling under any timber sale contract in marbled murrelet habitat and also directed that any project that "may affect" the marbled murrelet "should be suspended and no irreversible or irretrievable commitment of resources" made without consultation with the FWS.[1306] The FS suspended Croman Corp. (Croman) timber operations in the area in question, the Clearview sale area, and requested FWS consultation. In 1995, the FS informed Croman that timber operations could resume, as no marbled murrelets had been detected on the site. In 1997, Croman filed a claim seeking damages of over $4 million allegedly resulting from the FS's "wrongful suspension" of the timber operations from September 1992 until August 1995.[1307] When the contracting officer denied the claim, Croman filed suit at the COFC.[1308]

In the initial proceedings, the COFC held that the FS's suspension of timber operations in response to the listing of the marbled murrelets under the ESA was a sovereign act, for which the government could not be held liable for breach of contract.[1309] The court later reopened the sovereign acts issue,

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1294. *Id.* § 4(b), 66 Fed. Reg. 28,355-56.

1295. *Id.* § 1, 66 Fed. Reg. 28,355.

1296. *Id.*

1297. Exec. Order No. 13,212, Actions to Expedite Energy-Related Projects, 66 Fed. Reg. 28,357 (May 22, 2001).

1298. *Id.* § 1, 66 Fed. Reg. 28,355.

1299. *Id.* § 2, 66 Fed. Reg. 28,355.

1300. *Id.* § 3, 66 Fed. Reg. 28,355.

1301. Exec. Order No. 13,221, Energy Efficient Standby Power Devices, 66 Fed. Reg. 40,571 (Aug. 2, 2001).

1302. George W. Bush, Remarks by the President on Energy Efficiency (July 31, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/07/20010731-9.html.

1303. Exec. Order No. 13,221, § 1, 66 Fed. Reg. 40,571.

1304. *Id.* The first list is due by 31 December 2001, and annually thereafter. *Id.*

1305. 49 Fed. Cl. 776 (2001)

1306. *Id.* at 780.

1307. *Id.* at 781.

1308. *Id.*

and withdrew that portion of the decision that held that the sovereign acts doctrine authorized the suspension of the timber operations in response to the marbled murrelets endangered-species listing.[1310] The court did not, however, disturb the ruling that the suspension of timber operations was authorized. Instead of the sovereign acts doctrine, the court said that the contract specifically addressed the issue of delays caused by government action.[1311] After finding that the initial suspension of timber operations was not a breach of contract, the court looked at whether there was an unreasonable delay following the initial suspension. Because the contract contemplated delay, and fashioned a remedy for a delay, the court held that to obtain relief other than that provided for in the contract, Croman needed to show that the FS's actions violated the implied duty of cooperation[1312] or were otherwise unreasonable. The court found a genuine issue of material fact, however, regarding whether the FS's actions were unreasonable, and therefore denied the motion for summary judgment.[1313]

Success of Affirmative Procurement Programs "Largely Uncertain," Says GAO

Twenty-five years after the implementation of affirmative procurement programs under the Resource Conservation and Recovery Act of 1976, federal agencies are unable to track the programs' success, a recent GAO report found.[1314] The GAO noted three areas that seem to be affecting fuller implementation. First, the GAO noted that the Environmental Protection Agency (EPA) and U.S. Department of Agriculture (USDA), the agencies responsible for managing programs to purchase environmentally preferable and biobased products, have been slow to develop and implement the programs.[1315] Second, the GAO found that agency reporting systems are generally not designed to track purchases of "green" products, especially those made through contracts (which account for at least ninety percent of procurement dollars).[1316] The GAO reported on a White House task force that is currently working to streamline and improve data collection from federal purchase card users and contractors, beginning with a pilot project that will identify recycled-content product purchases made with federal purchase cards.[1317] Finally, the GAO reported that agencies are not effectively educating procurement officials about the affirmative procurement program requirements.[1318] The report recommends that the OMB and OFPP develop more specific guidance on fulfilling the affirmative procurement program review and monitoring requirements and that the EPA develop a process to provide procuring agencies with current information about the availability of recycled-content products, and how to more effectively promote such products.[1319]

Foreign Military Sales

Rocket Motors: I Think It's Gonna Be a Long, Long Time[1320] *Before You Get Your Money!*

Last year's *Year in Review*[1321] discussed *Defense Systems Co.*,[1322] where the ASBCA held that the government must inform prospective offerors of Foreign Military Sales (FMS) and Special Defense Acquisition Funds (SDAF)[1323] quantities included in an acquisition. Defense Systems Co. (DSC) was back again this year, in the hunt for further relief.[1324]

1309. Croman Corp. v. United States, 44 Fed. Cl. 796, 807 (1999).

1310. *Croman Corp.*, 49 Fed. Cl. at 779.

1311. *Id.* at 782. The contract included a provision allowing for a contract term adjustment if timber operations were curtailed due to "acts of Government." *Id.* at 780. The clause allowed for a contract term adjustment to include additional days equal to the days lost. *Id.*

1312. The court cited two circumstances that violated the implied duty to cooperate when a party unreasonably causes delay or hindrance to contract performance, citing C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1542 (Fed. Cir. 1993), and when the original cause of a delay is not under a party's control, but the party's conduct exacerbates the delay, citing Lewis-Nicholson, 550 F.2d 26, 31 (Ct. Cl. 1973). *Croman Corp.*, 49 Fed. Cl. at 785.

1313. *Croman Corp.*, 49 Fed. Cl. at 789.

1314. General Accounting Office, Federal Procurement: Better Guidance and Monitoring Needed to Assess Purchases of Environmentally Friendly Products, Report No. GAO-01-430 (June 2001).

1315. *Id.* at 3. The GAO noted that the EPA's guidance on purchasing environmentally preferable products was issued five years later than the executive order required. Each agency studied indicated that purchasing environmentally preferable products would be easier if the EPA identified a list of such products, as it did for the recycled content products. Likewise, the USDA has not yet published a list of biobased products. *Id.*

1316. *Id.*

1317. *Id.* at 14.

1318. *Id.* at 15.

1319. *Id.* at 24.

1320. Music by Elton John, Lyrics by Bernie Taupin, *Rocket Man, on* Honkey Chateau (Dick James Music, Ltd. 1972).

The case involved a production contract for HYDRA-70 Rockets.[1325] In the original decision,[1326] DSC successfully argued that it was entitled to an equitable adjustment for the rockets and components not properly attributed to FMS and SDAF requirements.[1327] On a motion for reconsideration, [1328] DSC now argued that the original decision failed to account for an additional 10,680 rocket motors that the government had failed to identify as FMS requirements.[1329] DSC also argued that it was entitled to "reformation of the systems contract," and that the case should be remanded to the parties to establish the prices that would have been agreed to by the parties if the FMS/SDAF quantities were properly identified.[1330]

While the board did not hesitate to modify the original decision to add the additional FMS requirements,[1331] the board was less favorably disposed to reform the contract.[1332] DSC contended that it was entitled to reformation because the government materially misrepresented the facts regarding FMS and SDAF quantities in the solicitation.[1333] The board reviewed the standard for reformation, concluding that reformation is more broadly available for fraudulent misrepresentation than in cases of mistake. Reformation for mistake is only available when the parties, having reached an agreement, fail to express it correctly in writing.[1334]

The board reviewed the factual basis for the failure to separately identify the FMS and SDAF requirements in the solicitation and subsequent modifications.[1335] Reformation is a powerful tool, but not one intended to revise the agreement to one that was not struck by the parties, or would not have been struck.[1336] The board had previously found that DSC intentionally underbid the contract by $32 million below its estimated cost of performance to secure award. DSC then planned a very aggressive FMS and direct international sales campaign to make up contract losses.[1337] The board determined that "the Government was not privy to DSC's complicated and risky bidding strategy."[1338] The board refused to accept DSC's reformation argument and rejected its attempt to reprice the entire

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1321. *2000 Year in Review, supra* note 2, at 43-44 (defective specifications), 46-47 (speculative damages) and 81-82 (Foreign Military Sales). For the discussion relevant to this issue, *see id.* at 82 nn.915-21.

1322. ASBCA No. 50918, 00-2 BCA ¶ 30,991.

1323. The SDAF provides funds for the procurement of defense articles in anticipation of the sale or transfer to foreign governments. The SDAF provides a readily available source of selected material to meet urgent military requirements of FMS customers without diverting material earmarked or stockpiled for U.S. forces. *See* 22 U.S.C. § 2795(a) (2000).

1324. *See* Appeal of Def. Sys. Co., Inc., ASBCA No. 50918, 01-1 BCA ¶ 31,152.

1325. The HYDRA-70 rocket is the standard air-to-ground rocket for the U.S. military and much of the world. The rocket can carry a variety of anti-material and anti-personnel munitions, as well as suppression munitions, screening, illumination, and training warheads. DEP'T OF ARMY, WEAPON SYSTEMS 2000, at 181 (2000).

1326. Def. Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991.

1327. *Id.*

1328. *Appeal of Def. Sys. Co.*, 01-1 BCA ¶ 31,152.

1329. *Id.* at 153,878. The government did not object to repricing an additional 5004 rocket motors for Bahrain and an additional 5676 motors for the Philippines that were not previously identified as FMS requirements. *Id.*

1330. *Id.*

1331. *Id.* The board would have included these quantities in the original decision had they been properly identified during the initial litigation.

1332. *Id.* at 153,881.

1333. *Id.* at 153,878. DSC contended that reformation should put DSC "in the same position he would have been in had the misrepresentation not been made." *Id.* at 153,879. Thus, DSC wants the board to remand the case to the parties to establish "the contract price(s) which would have been agreed to by the parties if the Government had properly represented in the solicitation the FMS/SDAF quantities which the Government intended to be included in the contract." *Id.*

1334. *Id.* The board also foreshadowed the outcome. "Since the remedy of reformation is equitable, a court has the discretion to withhold it, even if it would otherwise be appropriate." *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 166, cmt. A (1979)).

1335. The board had previously found that the procuring contracting officer failed to identify the FMS and SDAF requirements because: the requesting activity had not separately identified the requirements, no "ship to" addresses were provided, the procuring contracting officer had no experience buying this type of product, and the government believed the SDAF rockets were U.S. government purchases, not FMS purchases. Defense. Sys. Co., ASBCA No. 50918, 00-2 BCA ¶ 30,991, at 152,958-62.

1336. *Appeal of Def. Sys. Co.*, 01-1 BCA ¶ 31,152 at 153,880.

1337. *Def. Sys. Co.*, 00-2 BCA ¶ 30,991 at 152, 960.

systems contract.[1339] To do otherwise would have allowed DSC to recover, through reformation, remote and speculative damages, which, even if provable, are not recoverable as a matter of law.[1340]

President Extends Certain Export Authorities and National Emergencies,[1341] *and Declares New Emergencies*

Again this year,[1342] the President moved to continue certain export control regulations[1343] and certain authorities under the Trading With the Enemy Act.[1344] The President terminated the emergency authority under EO 12,924, which had been continued since 1994.[1345]

In other action, the President also continued emergencies with respect to Libya,[1346] Iraq,[1347] Iran,[1348] the National Union for the Total Independence of Angola (UNITA),[1349] Sudan,[1350] the Former Republic of Yugoslavia,[1351] Weapons of Mass Destruction,[1352] Cuba,[1353] Terrorists Who Threaten the Middle East Peace Process,[1354] and the Taliban.[1355]

In response to the 11 September 2001 attacks on the United States, the President issued a general declaration of a national emergency.[1356] In addition, the President froze the assets of terrorists and those who support them,[1357] and lifted sanctions on India and Pakistan.[1358]

1338. *Appeal of Def. Sys. Co.*, 01-1 BCA ¶ 31,152 at 153,880 (citing Finding 30, *Defense Sys. Co.*, 00-2 BCA ¶ 30,991 at 152,958).

1339. *Id.* at 153,880. "[T]he parties could not have reached a meeting of the minds with respect to a higher systems contract price based on the business risk that DSC undertook. Consequently, we conclude that DSC has failed to establish that the Government's regulatory violations affected its overall systems contract price." *Id.*

1340. *Id.*

1341. The declaration of a national emergency makes available a number of extraordinary authorities under a variety of statutes. 50 U.S.C. § 1621 (2000). Emergencies are terminated either by presidential proclamation or by congressional actions. *Id.* § 1622.

1342. The invocation or extension of a number of emergency authorities has become a yearly event. *See generally 2000 Year in Review, supra* note 2, at 79.

1343. Exec. Order No. 13,222, Continuation of Export Control Regulations, 66 Fed. Reg. 44,025 (Aug. 22, 2001).

1344. Continuation of the Exercise of Certain Authorities under the Trading with the Enemy Act, 66 Fed. Reg. 47,943 (Sept. 14, 2001).

1345. Exec. Order No. 13,206, Termination of Emergency Authority for Certain Export Controls, 66 Fed. Reg. 18,397 (Apr. 8, 2001). The President terminated the emergency due to the reauthorization and extension of the Export Administration Act of 1979 as amended by Public Law 106-508. *See also* Exec. Order No. 12,924, Continuation of Export Control Regulations, *59* Fed. Reg. 43,437 (Aug. 19, 1994); *2000 Year in Review, supra* note 2, at 79 (citing last year's continuation action under EO 12,924).

1346. Continuation of the Libya Emergency, 66 Fed. Reg. 1251 (Jan. 4, 2001).

1347. Continuation of the Iraqi Emergency, 66 Fed. Reg. 40,105 (July 31, 2001).

1348. Continuation of the Iran Emergency, 66 Fed. Reg. 15,013 (Mar. 14, 2001).

1349. Continuation of Emergency With Respect to UNITA, 66 Fed. Reg. 1251 (Sept. 25, 2001).

1350. Continuation of Sudan Emergency, 65 Fed. Reg. 66,163 (Nov. 2, 2000).

1351. Continuation of Emergency with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro) the Bosnian Serbs, and Kosovo, 66 Fed. Reg. 29,007 (May 25, 2001).

1352. Continuation of Emergency Regarding Weapons of Mass Destruction, 66 Fed. Reg. 68,063 (Nov. 13, 2000).

1353. Continuation of the National Emergency Relating to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels, 66 Fed. Reg. 12,841 (Feb. 28, 2001).

1354. Continuation of Emergency Regarding Terrorists Who Threaten to Disrupt the Middle East Peace Process, 66 Fed. Reg. 7731 (Jan. 22, 2001).

1355. Continuation of Emergency with Respect to the Taliban, 66 Fed. Reg. 35,363 (July 3, 2001).

1356. Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

1357. Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

1358. India and Pakistan: Lifting of Sanctions, Removal of Indian and Pakistani Entities, and Revision in License Review Policy, 66 Fed. Reg. 50,090 (Oct. 1, 2001).

Defense Trade Offsets:[1359] *Lots of Smoke, Little Progress*

On 4 December 2000, President Clinton issued EO 13,177,[1360] establishing the National Commission on the Use of Offsets in Defense Trade and President's Council on the Use of Offsets in Commercial Trade. The Commission, composed of eleven members appointed by the President,[1361] is responsible for reviewing and reporting on the current status of the use of offsets by foreign governments, the impact of these offsets on defense and non-defense industry in the United States, and the role of offsets on domestic industry stability, United States trade competitiveness, and national security.[1362]

The Commission issued a preliminary report in February 2001. The preliminary report found that offsets account for $3 billion per year in transactions with other nations, and that offsets are a significant factor in defense trade, thus impacting jobs, technology, and the ability to export defense goods to other countries.[1363] The final report, with recommendations, was due in October 2001.[1364]

Freedom of Information Act

Evaluating the Competition for Competitor's Performance Evaluations

The Freedom of Information Act (FOIA)[1365] provides for the release upon request of government records[1366] to nearly any person,[1367] unless the record is exempt from release by one of the Act's enumerated exemptions.[1368] The third of these, FOIA Exemption 3 (Exemption 3),[1369] permits the withholding of

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1359. The DOD *Security Assistance Management Manual (SAMM)* defines "offset" as:

> An agreement, arrangement, or understanding between a US supplier and a non-US Purchaser under which the supplier agrees to purchase or acquire, or to promote the purchase or acquisition by other US persons of, goods or services produced, manufactured, grown, or extracted, in whole or in part, outside the US in consideration for purchases of defense articles or services from the supplier. A US person means an individual who is a national or permanent resident alien of the US and any corporation, business association, partnership, trust, or other judicial entity incorporated, or permanently residing, in the US.

U.S. Dep't of Defense, Manual 5105.38-M, Security Assistance Management Manual (SAMM) app. B (28 June 2001) (Glossary).

1360. Exec. Order No. 13,177, *National Commission on the Use of Offsets in Defense Trade and President's Council on the Use of Offsets in Commercial Trade***,** 65 Fed. Reg. 76,558 (Dec. 6, 2000). The EO implements the requirements of the Defense Offsets Disclosure Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A (1999).

1361. Exec. Order No. 13,177, § 1, 65 Fed. Reg. 76,558.

> The Commission membership includes: (a) representatives from the private sector, including one each from (i) a labor organization, (ii) a United States defense manufacturing company dependent on foreign sales, (iii) a United States company dependent on foreign sales that is not a defense manufacturer, and (iv) a United States company that specializes in international investment; (b) two members from academia with widely recognized expertise in international economics; and (c) five members from the executive branch, including a member from the: (i) Office of Management and Budget, (ii) Department of Commerce, (iii) Department of Defense, (iv) Department of State, and (v) Department of Labor. The member from the Office of Management and Budget will serve as Chairperson of the Commission and will appoint . . . the Executive Director of the Commission.

Id.

1362. *Id.* § 2, 65 Fed. Reg. 76,558. The Commission's report will include:

> (a) an analysis of (i) the collateral impact of offsets on industry sectors that may be different than those of the contractor paying offsets, including estimates of contracts and jobs lost as well as an assessment of damage to industrial sectors; (ii) the role of offsets with respect to competitiveness of the United States defense industry in international trade and the potential damage to the ability of United States contractors to compete if offsets were prohibited or limited; and (iii) the impact on United States national security, and upon United States nonproliferation objectives, of the use of co-production, subcontracting, and technology transfer with foreign governments or companies, that results from fulfilling offset requirements, with particular emphasis on the question of dependency upon foreign nations for the supply of critical components or technology; (b) proposals for unilateral, bilateral, or multilateral measures aimed at reducing any detrimental effects of offsets; and (c) an identification of the appropriate executive branch agencies to be responsible for monitoring the use of offsets in international defense trade.

Id. § 3, 65 Fed. Reg. 76,558.

1363. Presidential Offsets Commission, Status Report of the Presidential Commission On Offsets In International Trade (Jan. 18, 2001), *available at* http://www.offsets.brtrc.net/statusreport/statusreport.pdf. The GAO shared its observations on defense offsets with the commission in mid-December, 2000. *See* General Accounting Office, Defense Trade: Observations on Issues Concerning Offsets, Report No. GAO-01-278T (Dec. 15, 2000).

1364. Press Release, Executive Office of the President, Presidential Commission on Offsets, Presidential Commission on "Offsets" in International Trade Issues Report (Feb. 15, 2001) (on file with author). The final report had not been issued as of the writing of this article.

1365. 5 U.S.C. § 552 (2000).

1366. The FOIA "mandates a policy of broad disclosure of government documents." Church of Scientology v. Dep't of Army, 611 F.2d 738, 741 (9th Cir. 1980).

information prohibited from disclosure under the provisions of other statutes. Which statutes' withholding provisions qualified for Exemption 3 protection has not been very clear. To assist practitioners, the DOD compiled a "list" of recognized Exemption 3 statutes, which has been through several iterations.[1370] For years, contracting officers safely believed that the Procurement Integrity Act (PIA)[1371] was an Exemption 3 statute because it provided justification to withhold source selection information.[1372]

The PIA's status as an Exemption 3 statute, however, was placed squarely in question in recent litigation involving the FAR's mandated post-performance contractor evaluations[1373] and the requirement to withhold these evaluations as source selection information.[1374] Entities vying for government contracts have long used the FOIA to obtain information related to a competitor's submissions.[1375] In a recently decided suit against the Army filed by Legal and Safety Employer Research, Inc. (LASER),[1376] the plaintiff was not a competitor, but a public-interest research firm that sought copies of a specific government contractor's construction performance evaluations. After reviewing LASER's request, the Army determined that disclosure of the evaluations would "jeopardize the integrity" of the agency's procurements and ordered the retroactive labeling of the documents as "source selection information."[1377] In litigation, the Army's position was that it could not release the documents pursuant to a FOIA request because the PIA required the Army to withhold the data designated as source selection information. In essence, the Army asserted that the PIA was an Exemption 3 statute.[1378] Alternatively, the Army argued that FOIA Exemption 5 (Exemption 5) protected the post-performance evaluations from disclosure[1379] as interagency memoranda that would not be available by law to a party in litigation. The court did not agree on either count.[1380]

The court held that memoranda or internal agency communications only qualify as Exemption 5 privileged "deliberative process" documents if they are both predecisional and deliberative.[1381] Moreover, the document must be related to the government's policy- or decision-making process.[1382] The *LASER* court added that these "evaluations are created at the completion" of the government construction project and "even if these evaluations are characterized as predecisional, the decision

1367. As a general rule, in responding to a request for records under the FOIA, agencies do not consider the status and purpose of a requestor except in deciding procedural matters such as fee issues. Reporters Comm. for Freedom of the Press v. Dep't of Justice, 489 U.S. 749 (1989).

1368. "When a request is made, an agency may withhold a document, or portion thereof, only if the material at issue falls within one of the nine statutory exemptions found in § 552(b)." Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1085 (9th Cir. 1997). The nine exemptions permit, but do not require, an agency to withhold a requested record. 5 U.S.C. § 552(b) (2000).

1369. 5 U.S.C. § 552(b)(3).

1370. Memorandum, Department of Defense, Directorate of Freedom of Information and Security Review, subject: FOIA Exemption Three Statutes (13 Mar. 2001) (containing the DOD's most recent list, superceding the agency's earlier memorandum dated 16 February 2000, same subject), *available at* http://www.defenselink.mil/pubs/foi/b3.pdf.

1371. 41 U.S.C. § 423 (2000).

1372. The PIA still is listed on the DOD, Directorate of Freedom of Information and Security Review's list of Exemption 3 statutes. *See id.*

1373. Agencies are required to complete a written evaluation of the contractor's performance at the completion of all government contracts in excess of $100,000 entered after 1 January 1998. FAR, *supra* note 11, § 42.1502(a). Agencies are required to consider a contractor's past performance in making an award determination; therefore, the post-performance evaluations required by the FAR are designed for agencies' use as source selection materials in the agencies' future procurements. *Id.* § 42.1501.

1374. The FAR requires agencies to maintain post-performance evaluations for three years and proscribes release outside the government to anyone besides the evaluated contractor. *Id.* § 42.1503(e). Like all other non-exempt documents compiled or created by the federal government, the FAR-mandated evaluations are subject to the disclosure provisions of the FOIA. *Id.* § 9.105-3(a) ("Except as provided in subpart 24.2, Freedom of Information Act, information . . . accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.").

1375. In addition, "[t]ypically, the submitter contends that the requested information falls within Exemption 4 of the FOIA." U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 640-41 (2000) [hereinafter FOIA GUIDE].

1376. Legal and Safety Employer Research, Inc. v. Dep't of Army, No. 00-1748 slip op. (E.D. Cal. May 7, 2001) (unpublished).

1377. *Id*. at 5.

1378. The Army relied upon the Procurement Integrity Act provision that states government personnel "shall not, other than provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 423(a)(1) (2000).

1379. 5 U.S.C. § 552(b)(5) (2000).

1380. *Legal and Safety Employer Research*, No. 00-1748.

they precede is not a 'policy decision,' as required by Exemption 5."[1383]

To qualify as an Exemption 3 statute, a withholding statute must satisfy either prong of Exemption 3's disjunctive test.[1384] The first prong permits no agency discretion in the decision to withhold. The Army could not meet this test, conceding that it had "discretion to determine what materials constitute 'source selection information.'"[1385] Under the other prong, the statute "must limit agency discretion by prescribing guidelines for the exercise of discretion."[1386] The court next examined the source selection "guidelines" within the PIA, noted that "Congress limited agency discretion to withhold" source selection information, and "then carefully identified documents that make up source selection information."[1387] Consequently, the court held that it was "satisfied that section 423 [of the PIA] is a non-disclosure statute under Exemption 3."[1388]

In deciding against the Army, the court determined that the Army's post-performance evaluations were not source selection information. Specifically, the court found that the post-performance evaluations neither fit into any of the congressionally-identified categories of source selection information,[1389] nor into the "case-by-case" catch-all category[1390] advocated by the Army. Instead, the court stated that because the FOIA's overarching purpose is to disclose, the Act's exemptions "must be narrowly construed."[1391] Accordingly, the court could not extend the reach of Exemption 3 to include documents that were retroactively deemed to be source selection information through the exercise of the agency's discretion.[1392]

While it is questionable whether this case will have any lasting impact upon Army contracting, a few observations may be drawn. First, *LASER* was the first FOIA case to determine whether or not the PIA's provisions served as a FOIA Exemption 3 statute. The *LASER* court was also the first court to consider post-contract evaluations under the FOIA. If for no other reasons than these, the *LASER* decision is noteworthy.

Second, the *LASER* decision is also remarkable because of the court's arguably erroneous conclusions on both of the Army's alternative positions.[1393] In deciding that the PIA qualified as a FOIA Exemption 3 statute, the court overlooked the PIA's clear language that prohibits only those disclosures "other than as provided by law."[1394] Because the FOIA provides an alternative basis for disclosure, reliance upon the PIA as a nondisclosure statute is improper. In deciding that the government's post-contract evaluations failed to qualify for Exemption 5 protection, the court characterized the evaluations as post-decisional and the future procurement decisions as outside the scope of Exemption 5's "policy decision" protection. The court's very narrow perspective discounts the post-performance evaluations' role as deliberative information in future high-value government contracts.[1395]

1381. *Id*. at 10. Exemption 5's "deliberative process" privilege may be used to withhold documents that are "both 'antecedent to the adoption of agency policy' and 'deliberative,' meaning 'it must actually be related to the *process* by which policies are formulated.'" *Id*. (citing Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988).

1382. Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1 (D.D.C. 1995) (citing Jordan v. Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978)). "These twin requirements recognize that the underlying purpose of this privilege is to 'protect[ ] the consultative recommendations, and deliberations, comprising part of a process by which governmental decisions and policies are formulated.'" *Id.* (quoting *Jordan*, 591 F.2d at 774).

1383. *Legal and Safety Employer Research*, No. 00-1748 at 12.

1384. Agencies may withhold records under Exemption 3 when

> specifically exempted from disclosure by statute (other than section 552b of this title) provided that such 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.

5 U.S.C. § 552(b)(3). Section 552b of title 5, cited within the text of Exemption 3, is better known as the Government in the Sunshine Act of 1976.

1385. *Legal and Safety Employer Research*, No. 00-1748 at 7.

1386. *Id.* at 8 (citing Long v. IRS, 742 F.2d 1173, 1178 (9th Cir. 1984)).

1387. *Id*.

1388. *Id.* at 9.

1389. 48 U.S.C. § 423(f)(1)(A)-(J) (2000).

1390. *Id.* § 423(f)(2)(J).

1391. *Legal and Safety Employer Research*, No. 00-1748 at 6 (citing Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1086 (9th Cir. 1997)).

1392. *See id*.

1393. *See supra* text accompanying notes 1378-80.

Finally, because the *LASER* decision is unpublished, the case is unlikely to merit attention outside of the DOJ and the procurement community. Nonetheless, the court clearly identified potential problems that may be the focus of future contract litigation. Consequently, contracting officials and FOIA practitioners can learn several valuable lessons from the decision. Despite the court's dicta suggestion that the PIA qualifies as a withholding statute under Exemption 3, contracting officers should not rely *solely* upon the PIA and Exemption 3 to withhold documents under the FOIA.[1396] Instead, the government should attempt to provide courts with multiple bases for withholding. Likewise, to withhold sensitive post-performance evaluations under Exemption 5, practitioners must be able to articulate a strong policy or decision-related basis for the exemption. Because the PIA authorizes the use of post-performance evaluations in the source selection process, it would behoove contracting officials to view and characterize these evaluations as both deliberative and, in light of the document's value in later acquisitions, predecisional.

Unless "Traded," Trade Secrets May Have a Long, Long Life

As a practical matter, secrets generally remain secrets until they are discovered or disclosed. This is also true under the FOIA. Despite the strong presumption that government-controlled records will be available to the public,[1397] Congress exempted trade secrets as a category of information that lawfully can be withheld from a requestor.[1398] This protection is separate and distinct from the cover afforded by the Trade Secrets Act,[1399] another congressionally established safeguard.[1400] Once data is determined to be a trade secret, the protection afforded by either the FOIA or the Trade Secrets Act is strong.

The most recent trade secret case combines the issue's infrequent judicial analysis with some extraordinary facts. In *Herrick v. Garvey*,[1401] the court seized upon a rare opportunity to consider how long the FOIA will protect a trade secret. At issue were the technical drawings of a commercially obsolete aircraft, the Fairchild F-45. The Fairchild Aircraft Corp. (Fairchild) originally submitted F-45 drawings to the Civil Aeronautics Agency in 1935.[1402]

1394. 41 U.S.C. § 423(a)(1) (2000). Moreover, the PIA's "savings provision" provides that the statute does not "limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation." *Id.* § 423(h)(7). In *Pikes Peak Family Housing v. United States*, 40 Fed. Cl. 673 (1998), a case not cited by the *LASER* court, the government also argued that the PIA prohibited the release of source selection information. The court highlighted the government's failure "to mention that the Act prohibits not *all* disclosure of procurement-related information, but rather, disclosure '*other than as provided by law.*'" *Id.* at 680 (citing 41 U.S.C. § 423).

1395. The decisions involved in the letting of multi-million dollar contracts are the very "policy decisions" that should be afforded protection under Exemption 5. The focus of analysis should be "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." Petroleum Info. Corp. v. Dep't of Interior, 976 F. 2d 1429, 1436 (D.C. Cir. 1992). For an analysis of the "emerging" policy focus of Exemption 5 cases, *see* FOIA GUIDE, *supra* note 1375, at 255-56.

1396. The government has yet to establish through litigation the PIA's status as a FOIA Exemption 3 statute. See discussion on *Pikes Peak*, *supra* note 1378. The *LASER* court's conclusion that the PIA is an Exemption 3 statute is merely dicta. Moreover, the DOJ did not file an appeal in the case. Consequently, the issue of the PIA's status will await litigation in a future case.

1397. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

1398. 5 U.S.C. § 552(b)(4) (2000). Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.*

1399. 18 U.S.C. § 1905 (2000). As discussed above, the Trade Secrets Act was once considered to be a FOIA Exemption 3 withholding statute. The D.C. Circuit, the court of universal jurisdiction for FOIA litigation, closed the debate on the Trade Secrets Act's status in *CNA Finance Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987).

1400. Most courts view the Trade Secrets Act and FOIA Exemption 4 as "coextensive." *See, e.g.*, Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1402 (7th Cir. 1984).

1401. No. 98-0234, 2000 U.S. Dist. LEXIS 20342 (D. Wyo. Dec. 12, 2000) (appeal pending).

1402. *Id*. at *2. From 1935 to 1939, the Fairchild Aircraft Corporation produced only sixteen F-45s, of which only three survive. *Id.*

The plaintiff, a collector of rare airplanes, submitted a FOIA request to the FAA for a copy Fairchild's 1935 drawings. The FAA recognized that the design drawings still had some commercial value to Fairchild.[1403] Consequently, the FAA provided Fairchild with the required "submitter notice,"[1404] positioning itself for a potential "reverse" FOIA action.[1405] After considering Fairchild Corporation's response, the FAA informed the plaintiff that the agency would deny his request. Thereafter, the plaintiff filed suit under the FOIA challenging the FAA's decision.[1406]

The court observed that, in determining whether the FOIA protects commercial information, the "'first step is to determine whether any of the information is a trade secret; if so, it is categorically protected by Exemption 4.'"[1407] Next, the court reviewed affidavits submitted by the FAA that highlighted the commercial value of the requested information within the "antique airplane market"[1408] and found that the "F-45 certification materials do come within the scope of Exemption 4 as they are trade secrets customarily not available to the public."[1409] Accordingly, the court did not address the plaintiff's claim that the FAA failed to demonstrate that disclosure would commercially harm Fairchild.[1410]

The court, however, did address the plaintiff's "estoppel" argument that Fairchild had previously released other F-45 certification materials. Fairchild initially authorized the release of limited information in 1955. The FAA also admitted that it previously released F-45 drawings pursuant to requests from the plaintiff, but asserted that "those drawing lists are not protected trade secrets."[1411] The court quickly dispatched the issue by opining that only the materials released under the 1955 authorization "are in the public domain" and that "the corporation has reversed its earlier authorization to disclose materials."[1412]

While contracting officials may only rarely encounter similar fact patterns, the case offers a few lessons. First, the judiciary will likely recognize submitters' rights to withdraw release authorizations for information that has not yet been disclosed. Second, so long as there is privity between different entities, the courts may recognize a successor-organization's right to restrict the release of even antiquated information. And finally, trade secrets may have a very long life. Thus, in determining whether or not to release documents, agency officials must understand that the "age or antiquity of materials in the custody and possession of the agency is irrelevant and is not a pertinent factor."[1413]

1403. *Id*. at *3-4. The Fairchild Engine and Airplane Corporation acquired the Fairchild Aircraft Corporation in 1939. In turn, the Fairchild Engine and Airplane Corporation was subsumed by the Fairchild Corporation. Although the Fairchild Aircraft Corporation is no longer extant and was unable to assert its rights, the court found that the successor of the original submitter, the Fairchild Corporation, still had a proprietary interest in the protection of the trade secrets. The plaintiff's contention that the Fairchild's corporate evolution "should play a significant role" in the case was deemed by the court to be "a red herring." *Id.* at *14-15.

1404. Agencies frequently receive FOIA requests for previously submitted commercial information that may be considered "confidential" by the submitter. Executive Order 12,600 requires all executive branch departments and agencies to establish and publish "predisclosure notification procedures which will assist agencies in developing adequate administrative records." FOIA GUIDE, *supra* note 1375, at 652 (citing 3 C.F.R. § 235 (2001)). Under these procedures, agencies are generally required to notify submitters of the potential disclosure of "confidential" information. The agency must consider the submitter's response before the agency determines whether release is appropriate. This process is commonly referred to as "submitter notice." Exec. Order No. 12,600, 3 C.F.R. (1987 Comp.) at 235, *reprinted in* 5 U.S.C. § 552 note (2000). FOIA procedures for individual agencies are generally published in the Code of Federal Regulations.

1405. *Herrick v. Garvey*, 2000 U.S. Dist. LEXIS 20342, at *3-4. "Reverse" FOIA cases pit the submitter of information against the agency contemplating disclosure of that information. The FOIA does not provide submitters "any right to enjoin agency disclosure." Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979), therefore, submitters seeking to prevent the disclosure must bring suit under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (2000), where the administrative record is reviewed to determine whether the agency's actions were arbitrary or capricious. *Chrysler Corp*., 441 U.S. at 318.

1406. *Herrick v. Garvey*, 2000 U.S. Dist. LEXIS 20342, at *3-4. The plaintiff alleged that the materials in issue did not fall under Exemption 4, that the FAA failed to establish that the Fairchild Corporation would suffer competitive harm, and that Fairchild Corporation had previously waived Exemption 4 protections. The court rejected the plaintiff's assertion that Fairchild Corporation lacked standing. *Id*. at *20.

1407. *Id*. at *7 (quoting Center for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 13 (D.D.C. 2000)).

1408. *Id*.*at 12. The requested documents would have had commercial value to the requestor.

> For example, if a person restored an F45, and wanted to fly the aircraft, each repair to the aircraft must be certified as an airworthy repair. This procedure is significantly easier if the certification materials are available. . . . Without the materials the mechanic would have to establish some other means of demonstrating, to the FAA, the airworthiness of each repair made to restore the aircraft . . . . An antique aircraft which can be flown is more valuable than the same airplane which cannot.

Id. at *12-13.

1409. *Id*. at *16.

1410. *See id.*

1411. *Id*. at *19.

1412. *Id*. at *20.

Government-Furnished Property (GFP)

Government Liable for Defective GFP Notwithstanding Inclusion of "As Is" Clause in Contract

In *Primex Technologies*,[1414] the contractor was required to disassemble government-furnished ammunition for reuse and resource recovery. The explosive material in the ammunition contained unusually low levels of wax that increased the hardness of the material and caused the contractor to incur additional costs. The contractor submitted a claim for its additional costs, alleging that the government-furnished ammunition was defective. In its motion for summary judgment, the government contended that even if the ammunition was defective, the claim should be dismissed because the contract contained FAR section 52.245-19, Government Property Furnished "As Is."[1415] This clause states in pertinent part:

> (a) The Government makes no warranty whatsoever with respect to Government property furnished 'as is,' except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.[1416]

Although the board found that the contract did incorporate this clause, it concluded that the clause did not shield the government from liability because the contract "contained no clause specifying that the ammunition to be delivered by the Government was to be delivered 'as is.'"[1417] Because the contract in *Primex* did not specifically state that the government-furnished ammunition was subject to the "as is" clause, the issue of liability had to be determined and the board denied the government's summary judgment motion.[1418]

"Government-Furnished Computers" Includes Printers, but Not Internet Service

A contract to provide dining services required the government to provide "government-furnished computers" and required the contractor to supply the software to be used with the computers.[1419] When the government refused to provide the computers, the contractor purchased a computer and a printer and submitted a claim for the cost of both, as well as for Internet service (all of which were used to perform the contract). The board found that the printer was included within the term "government-furnished computers," and held that the contractor was entitled to an equitable adjustment for the cost of the computer and the printer. The board, however, did not find that the contractor was entitled to reimbursement for the cost of Internet service, reasoning that "[w]e consider internet service to be within the definition of software that was [the contractor's] responsibility under the contract."[1420]

Waiver Defense Denies Equitable Adjustment to "De-Fenced" Contractor

In *E.L. Hamm & Associates*,[1421] a housing maintenance contract required the Navy to furnish storage and shop facilities to the contractor. At the site visit before submitting its bid, representatives of E.L. Hamm & Associates (E.L. Hamm) noticed that the government-furnished facilities were surrounded on three sides by a chain-link fence and that posts were embedded in concrete. Although the fence appeared to be an integral part of the Navy's facilities, it was installed and owned by the incumbent contractor. E.L. Hamm's representatives assumed that the fence would be provided by the Navy and did not include costs for a fence in its bid. After the incumbent contractor learned that it was not selected for award, it removed the fence. After the Navy denied E.L. Hamm's request that the Navy replace the fence, an E.L. Hamm employee informed the Navy that it would install the fence itself "at no cost to the government."[1422] E.L. Hamm management had second thoughts, however, and later submitted a claim for the cost of the fence, which the Navy denied.[1423]

1413. *Id*. at *18. "Information does not become stale merely because it is old." *Id*. (citing Center for Auto Safety v. Nat'l Highway Traffic Safety Admin., 93 F. Supp. 2d 1, 16 (D.D.C. 2000)).

1414. ASBCA No. 52000, 01-1 BCA ¶ 31,231.

1415. *Id*. at 154,146-47.

1416. FAR, *supra* note 11, § 52.245-19.

1417. *Primex Techs.*, 01-1 BCA ¶ 31,231 at 154,148.

1418. *Id*.

1419. LA Ltd., ASBCA No. 52179, 00-1 BCA ¶ 30,319.

1420. *Id*. at 154,701.

1421. ASBCA No. 48600, 01-1 BCA ¶ 31,247.

On appeal, the board determined that the contractor reasonably concluded that the fence was included as part of the government-furnished facilities that the government was required to provide. The board, however, denied the appeal, finding that a waiver by "estoppel" applied against the contractor, because it had stated that it would install the fence at "no cost to the government," and the Navy relied on that statement to its detriment by forgoing alternative means of resolution.[1424]

Poor Design Decision, Not Late GFP, Responsible for Contractor's Additional Costs

When a contractor receives late or defective GFP, its recovery is generally based on the additional costs attributable to delays or performance inefficiencies. In *NavCom Defense Electronics, Inc.*,[1425] the contractor advanced a more innovative basis for recovery. Under its contract with the Navy, the contractor was to design and build one or more types of interface boards that would be compatible with twelve government-furnished testers. The Navy delivered the GFP late and the contractor alleged that, because it could not simply wait until all of the GFP was received, it started to build what it hoped would be a "universal" interface board. When the late GFP arrived and the contractor realized that its universal interface was not as universal as hoped, the contractor changed its approach and had to design several interface boards. The contractor appealed the contracting officer's denial of its claim for additional costs to design and build additional types of interface boards.[1426]

Although the board agreed with the contractor that the Navy failed to meet its obligation to provide GFP in a timely manner, it denied recovery because the contractor failed to prove that the late GFP caused it to incur additional costs. Instead, the board determined that the contractor had sufficient information at the time its initial design decision was made to know that its universal interface strategy could not work. The board concluded, "[B]ecause NavCom was forced to redesign the [interface board] as a result of its own flawed design, and not as a result of the late delivery of GFE, we conclude that the Government is not liable for the costs incurred in redesigning the [interface board]."[1427]

Information Technology (IT)

If You Don't Get IT, You'll Never Get It!

The importance of IT continued to grow during the past year. More Army installations are issuing the DOD "smart card to their soldiers."[1428] Along with serving the same functions as the current military ID card, the smart card also will allow users to log onto DOD computer networks, digitally sign and encrypt e-mail messages, and allow keyless entry to certain buildings and controlled spaces.[1429] Soldiers also are benefiting from free online technology courses sponsored by the Army.[1430] Although the courses do not offer actual certifications, soldiers can nonetheless use the Internet to train on more than 1100 technical subjects.[1431] In the near future, soldiers also will benefit from a new distance learning program that will enable them to obtain college degrees and professional certifications.[1432] Awarding a $453 million contract to PricewaterhouseCoopers to develop and deliver the technology, the Army plans to offer the program to 80,000 soldiers over the next five years.[1433] Soldiers who sign up for the program will receive a free laptop, printer, Internet service provider, and access to a help desk.[1434] The equipment becomes the property of the soldier upon completion of twelve credit hours within two years.[1435]

1422. *Id*. at 154,214.

1423. *Id*. at 154,216.

1424. *Id*.

1425. ASBCA No. 50767, 01-2 BCA ¶ 31,546.

1426. *Id*. at 155,763.

1427. *Id*.

1428. Lisa Beth Snyder, *More Installations to Issue New ID Card*, SOLDIERS, July 2001, at 16. Those installations are Fort Monmouth, Fort Meade, Somerset National Guard (New Jersey), Tobyhanna Army Depot (Pennsylvania), Fort Hamilton, Fort Detrick, and Fort Myer. *Id*.

1429. *Id*. *See also 2000 Year in Review*, *supra* note 2, at 86.

1430. *Army Offers Free Online Tech Courses*, SOLDIERS, Feb. 2001, at 14.

1431. *Id*. This program is a result of a contract between the Army and SmartForce, a commercial computer-based training company. About 70,000 soldiers have registered to use the SmartForce instruction. *Id*.

1432. *See Distance Education Contract Awarded*, SOLDIERS, Feb. 2001, at 13; *Soldiers Can Use Laptops to Get College Degrees*, FEDTECHNOLOGY.COM EMAIL NEWSLETTER (Jan. 16, 2001) (on file with author).

1433. *Distance Education Contract Awarded*, SOLDIERS, Feb. 2001, at 13. The Army will test the new initiative during the next year at Fort Benning, Fort Campbell, and Fort Hood. *Id*.

Semper Intranet!

Last year, we wrote about the Navy and Marine Corps' new Intranet project, called the NMCI (Navy-Marine Corps Intranet).[1436] The NMCI is the Navy and Marine Corps' "5-year, $4.1 billion-effort to outsource the technology, maintenance and help desk support for over 350,000 desktops and 200 networks."[1437] The Navy and Marine Corps opened the NMCI's Norfolk operations center and help desk on 9 July 2001.[1438] The Navy and Marine Corps hope that the NMCI will make them the government leader in electronic records management.[1439]

Section 508 Disabilities Initiative Takes Effect

Perhaps the most important IT development this past year was the implementation of the Section 508 disabilities initiative (Section 508).[1440] Effective 25 June 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public.[1441] The new requirement applies to contracts *awarded*, not *solicited*, on or after 25 June. For indefinite-quantity contracts, the requirement applies to delivery orders or task orders issued on or after 25 June.[1442]

The rule contains several exceptions. First, the rule does not apply to "national security systems," as the Clinger-Cohen Act defines that term.[1443] Second, there is the "back room" or "service personnel" exception. The rule does not apply "in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment."[1444] Third, micro-purchases[1445] are exempt until 1 January 2003. Fourth, Section 508 does not apply to EIT "acquired by a contractor incidental to a contract."[1446] Finally, agencies need not comply with Section 508 if doing so would "impose an undue burden on the agency."[1447]

Although its requirements are significant and complex, agencies are not without help in implementing Section 508. Participants in all aspects of public procurements should access the GSA's "Frequently Asked Questions" Web site.[1448] All players in public procurement must understand these Section 508 requirements, how to implement them, and their exceptions.

The Future of IT—a Revolving Door?

On 31 July 2001, Congressman Tom Davis of Virginia introduced a bill that would establish an exchange program between

1434. *Id*.

1435. *Id*. Talk about incentive to study hard!

1436. *2000 Year in Review*, *supra* note 2, at 85-86.

1437. Joshua Dean, *Navy Intranet Backers Push for Continued Funding*, GovExec.com (May 31, 2001), *at* http://www.govexec.c…/index.cfm?mode=report&articleid=20281&printerfriendlyVers=1.

1438. *Navy Intranet Project Takes Off with Opening of First Network Operations Center but Questions About Testing Remain*, 43 GOV'T CONTRACTOR 26, ¶ 277 (July 18, 2001). The Norfolk center is the first of six planned operations centers. *Id*.

1439. Joshua Dean, *Navy Says Intranet Will Solve Records Management Problem*, GovExec.com (July 17, 2001), *at* http://www.govexec.com/dailyfed/0701/071701j1.htm.

1440. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508 (codified as amended by the Workforce Investment Act of 1998 at 29 U.S.C. § 794d (2000)) (usually referred to as "Section 508").

1441. Elec. & Info. Tech. Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 10-12, 39); *see* Major John Siemietkowski, *Procurement Disabilities Initiative Takes Effect*, ARMY LAW., Sept./Oct. 2001, at 27.

1442. Elec. & Info. Tech. Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001).

1443. *Id*. at 20,897; Elec. & Info. Tech. Accessibility Standards, 65 Fed. Reg. 80,500 n.1 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194) (citing the Clinger-Cohen Act of 1996, 40 U.S.C. § 1452(a) (2000)).

1444. 66 Fed. Reg. 20,897.

1445. Micro-purchases are acquisitions of "supplies or services (except construction), the aggregate amount of which does not exceed $2500, except that in the case of construction, the limit is $2,000." FAR, *supra* note 11, § 2.101.

1446. 66 Fed. Reg. 20,897.

1447. *Id*. "Undue burden" means "a significant difficulty or expense." *Id.* The lack of significant guidance in defining this term will likely lead to much litigation.

1448. U.S. Gen'l Servs. Admin., *Section 508 Acquisition FAQ's*, Section 508, *at* http://www.section508.gov/index.cfm?FuseAction=Content&ID=75 (last visited Jan. 22, 2002).

the government and industry to develop expertise in IT management.[1449] Generally speaking, transferred employees would "switch sides" for one year, and would retain all pay and benefits of their permanent employer.[1450] The bill has been referred to the appropriate House committees.[1451]

GAO Speaks Out!

The GAO addressed IT issues in six separate reports to Congress during the past year. In February 2001, the GAO issued a report to Congress assessing the government's public key infrastructure strategy in terms of secure transactions and communications.[1452] In March, the GAO criticized cost-overruns related to the DOD's computer systems.[1453] The GAO also issued two other reports in March, one assessing the DOD's ability to resist a computer attack, and the other challenging the DOD to improve its ability to safeguard computer-based information.[1454] The GAO addressed the dangers of IT interference with operational electronic systems for deployed units in May.[1455] To cap off a plethora of writing, the GAO analyzed the DLA's IT management practices in June.[1456]

Non-FAR Transactions

DOD OT Guidance

This past year, the DOD issued its first guidance on use of its authority to enter into "other transactions" (OTs) to acquire prototypes of weapon systems.[1457] Congress enacted 10 U.S.C. § 2371 in 1989 to allow the DOD to enter into a contract that did not have to comply with the FAR. The term OT is derived from the title of the statute: "Research projects: transactions other than contracts and grants," which, as the title also implies, were initially limited to the scenario in which the government was acquiring basic, applied, and advanced research. Section 845 of the NDAA for FY 1994[1458] broadened this authority and temporarily permitted the DOD to use OTs to acquire prototypes of weapon systems. Section 803 of the NDAA for FY 2001[1459] extended this expanded authority through 30 September 2004, but also placed some restrictions on the DOD's use of this authority.[1460] The *"Other Transactions" (OT) Guide For Prototype Projects*,[1461] published by the DOD in December 2000, addresses these restrictions and provides fairly comprehensive guidance on a whole host of issues, including intellectual property, price reasonableness determinations, allowable costs, accounting systems, audits, and annual reporting requirements.[1462]

1449. H.R. 2678, 107th Cong. (2001).

1450. *Id*. §§ 3702-3704.

1451. U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.02678 (last visited Oct. 12, 2001).

1452. General Accounting Office, Information Security: Advances and Remaining Challenges to Adoption of Public Key Infrastructure Technology, Report No. GAO-01-277 (Feb. 26, 2001).

1453. General Accounting Office, DOD Information Technology: Software and Systems Process Improvement Programs Vary in Use of Best Practices, Report No. GAO-01-116 (Mar. 1, 2001).

1454. General Accounting Office, Information Security: Challenges to Improving DOD's Incident Response Capabilities, Report No. GAO-01-341 (Mar. 29, 2001); General Accounting Office, Information Security: Progress and Challenges to an Effective Defense-Wide Information Assurance Program, Report No. GAO-01-307 (Mar. 30, 2001).

1455. General Accounting Office, Defense Spectrum Management: New Procedures Could Help Reduce Interference Problems, Report No. GAO-01-604 (May 17, 2001).

1456. General Accounting Office, Information Technology: DLA Should Strengthen Business Systems Modernization Architecture and Investment Activities, Report No. GAO-01-631 (June 29, 2001).

1457. *See* Memorandum, Under Secretary of Defense (Acquisition, Technology and Logistics), to Secretaries of the Military Departments and Directors of Defense Agencies, subject: "Other Transaction" Authority (OTA) for Prototype Projects (21 Dec. 2000), *available at* http://www.acq.osd.mil/dp/dsps/ot/atl21dec00memowithguide.doc. Attached to this memorandum is a sixty-page guide covering usage of such OTs.

1458. Pub. L. No. 103-160, 107 Stat. 1721 (1993).

1459. Pub. L. No. 106-398, 114 Stat. 1654 (2000).

1460. *Id*. § 8. For example, at least one nontraditional defense contractor has to participate in the OT to a significant extent.

1461. Under Secretary of Defense, Acquisition, Technology, and Logistics, "Other Transactions" (OT) Guide For Prototype Projects (Dec. 21, 2000), *available at* http://www.acq.osd.mil/dp/dsps/ot/atl21dec00memowithguide.doc.

1462. *Id*.

Payment and Collection

Performance-Based Payment Preferred Method of Contract Financing

On 13 November 2000, Dr. J. S. Gansler directed that the DOD take "maximum advantage of the benefits of performance-based payments [PBP]," making PBP the "primary and most commonly used form of contract financing."[1463] For FY 2002, agencies should use PBP in "at least 25% of contracts valued at $2 million or more."[1464] By FY 2005 PBP should be used in "most" contracts that provide financing.[1465]

"Commercial-Friendly" Policies Include Increased Progress Payment Rates

Under Secretary of Defense (Acquisition, Technology, and Logistics) E.C. Aldridge, took steps to encourage more companies to do business with the DOD by increasing the customary uniform progress payment rate for large business concerns from seventy-five to eighty percent.[1466] The progress payment rate change only applies to contracts awarded on or after 1 October 2001.[1467]

Speak Now or Forever Hold Your Peace!—Boards Find Government Silence Waives Claim

In *Ver-Val Enterprises, Inc.*,[1468] the ASBCA found that the government's claim for over $2 million in unliquidated progress payments had been discharged in bankruptcy proceedings. Even though the government had filed a claim against the contractor for the unliquidated progress payments and received a copy of the reorganization plan, the amount listed on the reorganization plan was $0. The government took no action to notify the bankruptcy court otherwise. The board found that the "fatal difficulty" with the government's argument that the parties intended to settle the unliquidated damages claim outside of the bankruptcy court was a lack of "evidence as to what the government intended."[1469] The government missed several opportunities to voice an objection to the plan.[1470] Because the government was a party to the bankruptcy proceeding, and did not appeal the court's order, the final bankruptcy judgment binds the government with respect to this claim.[1471]

The Veterans Affairs Board of Contract Appeals decided a similar issue in *Bradford F. Englander*.[1472] In this case, the government sought to set off funds mistakenly paid to a contractor against payment due on a different contract. The board barred such a set-off, finding that the government had failed to assert the claim during the contractor's bankruptcy case. The government failed to participate in the bankruptcy proceedings except to object to the reorganization plan, and failed to appeal the bankruptcy court's order approving the plan.[1473] By not partic-

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1463. Memorandum, J.S. Gansler, Under Secretary of Defense (Acquisition ,Technology and Logistics), to Secretaries of Military Departments, Component Acquisition Executives, and Directors, Defense Agencies, subject: Use of Performance-Based Payments (13 Nov. 2000) [hereinafter Gansler PBP Memo]. When using a PBP, the agency and contractor agree on performance events that will trigger a pre-negotiated financing payment. Statutory authority for PBPs is found in 10 U.S.C. § 2307(b) (2000) and implemented in FAR, *supra* note 11, pt. 32.10.

1464. Gansler PBP Memo, *supra* note 1463.

1465. *Id.* On 20 July 2001, the Defense Contract Audit Agency (DCAA) released audit guidance on PBPs. This guidance stresses the importance of establishing and valuing the PBP triggering events. Pre-payment auditor assistance may be sought in negotiating and structuring the contract financing template. The DCAA cautions that PBP event values should not be disproportionate to the "value" of the progress the events represent. *See* Memorandum, Lawrence P. Uhlfelder, Assistant Director, Policy and Plans, Defense Contract Audit Agency, to Regional Directors, DCAA and Director Field Detachment, subject: Audit Guidance on Performance-Based Payments (PBPs) (July 20, 2001).

1466. Defense Federal Acquisition Regulation Supplement; Customary Progress Payment Rate for Large Business Concerns, 66 Fed. Reg. 44,588 (Aug. 24, 2001).

1467. *Id.* The new rule specifically prohibits modification of existing contracts to incorporate the eighty percent rate. *Id.*

1468. ASBCA No. 49892, 01-2 BCA ¶ 31,518.

1469. *Id*. at 155,600.

1470. *Id*. at 155,595-99. The government did not vote on the reorganization plan, and filed a formal objection that only discussed debts related to taxes and certain secured obligations, but did not object to or mention the disposition of debts owed to the DOD. Finally, the government did not demand a hearing to address the plan's payment treatment of the debt claimed. *Id.*

1471. *See id*. at 155,600.

1472. VABCA No. 6475-6477, 6479, 2001 VA BCA LEXIS 4 (Apr. 24, 2001).

1473. *Id.* at *2-11. The government argued the claim was not covered by the bankruptcy order, because it was asserted as a defense to the contractor's claim for increased costs and therefore covered by the Contract Disputes Act. The board disagreed, finding the set-off claims should have been pursued in the bankruptcy proceedings. *Id.* at *11-15.

ipating, the board said, the government had waived its rights and was bound by the bankruptcy court's order, as the reorganization plan constituted a final judgment and had to be given res judicata effect as to those claims.[1474]

Time Is on My Side—Wait, No It's Not!—Government Claim Too Old, Says Appeals Court

The Court of Appeals for the Eleventh Circuit found that the statute of limitations of 28 U.S.C § 2415[1475] barred a government claim for over $900,000 in reprocurement costs. In *United States v. American States Insurance. Co*.,[1476] the government terminated a contract for failure to perform in 1985 and asserted a claim against the contractor and the surety for the excess reprocurement costs in 1992. The contractor and surety refused to pay and challenged the government's demand. In 1995, the contracting officer issued a final decision demanding the amount originally claimed in 1992. Then, in 1999, the government sued the surety to recover under the terms of the bond.[1477]

The district court granted the government's motion for summary judgment, holding that the surety was bound by the contracting officer's 1995 final decision. The surety appealed, arguing that the case was barred by the statute of limitations. The government argued that the statute of limitations did not begin until the issuance of the contracting officer's final decision, which in this case occurred in 1995. The Eleventh Circuit disagreed, finding that the latest date the cause of action had accrued was July 1992, when the government first demanded the excess costs. Because the government had waited until 1999 to file suit, the six-year statute of limitations had passed, precluding the government from pursuing the claim.[1478]

My Word Is My Bond—or at Least My Financial Condition Is (Adequate Security)

In an interesting and ironic change of positions, the government argued that the FAR improperly implemented the FASA by allowing a contractor's financial condition to serve as "adequate security" for a commercial item financing payment.[1479] A contract for integrated drive generators, which the procuring contracting officer (PCO) determined were commercial items, included the installment payment clause at FAR section 52.232-30.[1480] The contract did not include a definition of "adequate security," which led to the issues at the heart of the dispute. The contractor understood that its financial condition was adequate security, a position the PCO apparently shared. The administrative contracting officer, however, disapproved the contractor's request for an installment payment unless it provided some form of security the government could liquidate if it became necessary.[1481]

At the board, the dispute centered around the definition of "security." The government argued that "security" meant "collateral," and without some form of collateral of at least equal value to the installment payment, the installment payment provision ran afoul of a statutory prohibition on advance payments. The board used a broader definition of "security" and found it reasonable to use the contractor's good financial condition as "security." Because the appellant's financial condition was adequate security, and there was no evidence of any "impairment or diminution of the security under the contract," the contractor was entitled to the installment payments claimed, as well as interest from the date of receipt of the certified claim.[1482]

I Can't Hear You—No Jurisdiction to Hear PPA Claim Without CDA Claim

In *Sprint Communications Co. v. General Services Administration*,[1483] the GSBCA held it had no jurisdiction to hear a

1474. *Id*. at *14-15.

1475. Every action for money damages founded upon any express or implied in law or fact contract shall be barred "unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later." 28 U.S.C. § 2415(a) (2000).

1476. United States v. Am. States Ins. Co., 252 F.3d 1268 (11th Cir. 2001).

1477. *Id*. at 1272.

1478. *Id*.

1479. Sundstrand Corp., ASBCA No. 51572, 01-1 BCA ¶ 31,167.

1480. *Id*. at 153,949. This clause provided that the contractor was entitled to contract financing installment payments when the supplies deliverable under the contract were delivered, providing there was no impairment or diminution of the government's security under the contract. FAR, *supra* note 11, § 52.232-30 (a). The clause further gave the contracting officer the right to suspend financing payments in the event the contractor failed to provide adequate security. *Id*. § 52.232-30 (f).

1481. *Sundstrand Corp.*, 01-1 BCA ¶ 31,167 at 153,949-50.

1482. *Id*. at 153,957. Impairment or diminution of the security would give cause to the contracting officer to deny the installment payment under the clause. *See* FAR, *supra* note 11, § 52.232-30(a).

Prompt Payment Act (PPA) interest claim because the claim was never submitted to the contracting officer for final decision under the CDA.[1484] This case arose from a previous decision in which the GSBCA found the GSA responsible to pay Universal Service Fund (USF) contributions as part of a Federal Communications Commission tariff imposed on the telecommunications contract in dispute.[1485] The first decision was limited to entitlement, and the board directed the parties to develop a record to use to decide the quantum of the claim. Sprint claimed CDA interest as well as PPA interest on the over $4 million in USF funds due. The government argued, and the board agreed, that because no CDA claim had ever been submitted to the contracting officer for PPA interest on any of the unpaid USF line items, the board had no jurisdiction to hear the PPA interest claim.[1486] The board found that Sprint was entitled to only CDA interest for the USF line-item charges that were unpaid.[1487]

When Is a Payment "Past Due" Under the PPA?

In *Active Fire Sprinkler Corp. v General Services Administration*,[1488] the GSBCA focused on the question of when interest begins to accrue under the PPA, reiterating the rule that the government will not pay interest on a payment that is not made because of a dispute over the amount of the payment or compliance with the contract.[1489] In this case, the DOL directed the contracting officer to withhold payment on a contract, pending the outcome of an investigation into alleged labor standard violations.[1490] The contractor claimed PPA interest on the withheld amounts, claiming that the withholdings were "unnecessary and unreasonable."[1491]

The board found that the contractor was not entitled to PPA interest for two reasons. First, the PPA does not require an interest penalty on a payment that is not made because of a dispute over the amount of payment or compliance with the contract.[1492] The board reasoned that as a result of the DOL investigation into possible labor standards violations, the contracting officer reasonably questioned whether the contractor was in compliance with the contract. The funds did not become "due" under the PPA until the DOL determined the scope and extent of the labor violations and notified the contracting officer to release the withheld funds.[1493]

Second, the contract contained an "Interest on Overdue Payments" clause, which provided that "the contractor shall not be entitled to interest penalties on progress payments . . . on amounts temporarily withheld in accordance with the contract."[1494] The board noted that the contract contained a withholding clause giving the contracting officer the ability to withhold amounts "necessary to pay laborers . . . the full amount of wages required by the contract" and that withholdings would continue "until such violations ceased."[1495] Further, the board found that the contracting officer did not act unilaterally, that the DOL approved all her actions in conjunction with the labor standards investigation, and that she had released the withheld amounts when instructed by the DOL. The board declined to make any findings about the reasonableness of the DOL investigation that led to the withholdings, citing a lack of jurisdiction in such a matter.[1496]

In *Johnson Controls World Services, Inc.*,[1497] the ASBCA found that payments providing reimbursement of costs on a provisional basis were not subject to the PPA. In this case, the

1483. GSBCA No. 15139, 01-2 BCA ¶ 31,464.

1484. *Id*. at 155,344.

1485. *See* Sprint Comm'n Co. v. GSA, GSBCA No. 15139, 00-1 BCA ¶ 30,909.

1486. *Sprint Comm'n Co.*, 01-2 BCA ¶ 31,464 at 155,345.

1487. *Id*. at 155,344-45.

1488. GSBCA No. 15318, 01-2 BCA ¶ 31,521.

1489. *Id*. at 155,619.

1490. *Id*. at 155,612. Specifically, the DOL was investigating violations of the Davis-Bacon Act, 40 U.S.C. § 276a (2000), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 (2000). *Active Fire Sprinkler Corp.*, 01-2 BCA ¶ 31,521 at 155,612.

1491. *Active Fire Sprinkler Corp*., 01-2 BCA ¶ 31,521 at 155,618.

1492. *Id*. at 155,619. *See* 31 U.S.C. § 3907(c) (2000) ("This chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract.").

1493. *Active Fire Sprinkler Corp*., 01-2 BCA ¶ 31,521 at 155,619.

1494. *Id.*

1495. *Id*. at 155,613.

1496. *Id*.

cost-reimbursement contract provided for reimbursement of costs and payment of fee every two weeks, based on an invoice from the contractor supporting the claimed costs.[1498] The vouchers from JCWSI were subject to audit before final payment.[1499] JCWSI claimed PPA interest for late payment of ninety-four cost reimbursement vouchers. JCWSI contended the vouchers were requests for payment for partial performance of the services, and therefore subject to the PPA. The board, however, found that the vouchers submitted were not requests for specific services performed, but rather were requests for reimbursements of costs incurred as work progressed. Further, because the vouchers were subject to audit and adjustment for under/overpayment, the payments were not final payments, further evidencing their financing nature.[1500]

Am I Repeating Myself?—GAO Issues More Reports Critical of Payment Systems, and Congress Again Considers Recovery Audit Legislation

The GAO issued several reports this year, echoing prior criticism of government payment and collection systems.[1501] Although no new legislation aimed at correcting these identified deficiencies emerged from the 106th Congress, congressional attention has not died. In July 2001, Representative Burton introduced the 107th Congress' version of legislation designed to address government overpayments.[1502] Mr. Burton's Erroneous Payments Recovery Act of 2001 would require all agencies that enter into contracts totaling over $500 million to develop a "cost-effective program for identifying errors made in paying contractors and for recovering any amounts erroneously paid to the contractors."[1503] Although the bill requires "recovery audits," it leaves the definition of such audits to the Director of the OMB.[1504]

Performance-Based Service Contracting (PBSC)

OMB Chief Boosts PBSC Usage

During the past year, both the OMB and the FAR Council emphasized the use of PBSC as the preferred method for government procurement of services.[1505] Unlike the FAR, which only requires the use of PBSC to "the maximum extent practicable," the OMB has set a specific goal to use PBSC techniques when awarding contracts over $25,000 for "not less than 20 percent of the total eligible service contracting dollars."[1506]

Privatization

District Court Answers Privatization Questions

In last year's issue, the authors reported on a GAO decision addressing whether the Army must convey on-base utility distribution systems in accordance with state law.[1507] After the

1497. ASBCA 51640, 51766, 52127, 52262, 01-2 BCA ¶ 31,531.

1498. *Id*. at 155,664.

1499. *Id*. at 155,665.

1500. *Id*. at 155,668-70.

1501. *See* General Accounting Office, Contract Management: Excess Payments and Underpayments Continue to Be a Problem at DOD, Report No. GAO-01-309 (Feb. 2001) (concluding most excess payments are due to contract administration problems, particularly adjustments in progress payments); General Accounting Office, Debt Collection: Defense Finance and Accounting Service Needs to Improve Collection Efforts, Report No. GAO-01-686 (June 2001) (citing DFAS management commitment and targeted efforts as critical aspects to collecting and resolving delinquent debts, totaling almost $750 million); General Accounting Office, Strategies to Manage Improper Payments, Learning for Public and Private Sector Organizations, Report No. GAO-02-69G (Oct. 2001) (identifying effective practices and providing case illustrations for use in developing strategies to manage improper payment in federal agency programs).

1502. H.R. 2547, 107th Cong. (2001).

1503. *Id*. § 2(a).

1504. *Id*. § 2(c). On 18 July 2001, the bill was referred to the House Committee on Government Reform. *See* U.S. Library of Congress, *Bill Summary & Status for the 107th Congress, at* http://thomas.loc.gov/bss/d107query.html (last visited Oct. 15, 2001).

1505. Sean O'Keefe, Deputy Director of the Office of Management and Budget, set a specific goal of using PBSC in a 9 March 2001 memo to federal agencies. *See* Performance Goals Memo, *supra* note 1058. Federal Acquisition Circular (FAC) 97-25 amended FAR sections 2.101 and 37.102 . FAR section 37.102 notes the policy that agencies must use performance-based contracting methods to acquire services "to the maximum extent practicable." Federal Acquisition Circular (FAC) 97-25, 66 Fed. Reg. 22,082 (May 2, 2001) (to be codified at 48 C.F.R. pt. 1). The AFARS goes one step further, requiring all service contracts be performance based. *See* AFARS, *supra* note 112, pt. 5137.

1506. Performance Goals Memo, *supra* note 1058. The memo does not define service contracts that might be exempt from the requirement, although the language "eligible service contracting dollars" suggests that some service contracts might be exempt. Members of the Procurement Executive Council subsequently asked OMB to raise the threshold to $100,000 to exempt service contracts awarded using simplified acquisition methods. *See* Jason Peckenpaugh, *Procurement Chiefs Want New Guidance on Performance-Based Contracts*, GovExec.com (Apr. 26, 2001).

1507. *See 2000 Year in Review*, *supra* note 2, at 61.

GAO denied their protest, Baltimore Gas & Electric (BG&E) and the Maryland Public Service Commission (PSC) turned to the U.S. District Court of Maryland, challenging the solicitation to privatize the utility distribution system at Fort Meade, Maryland.[1508] The plaintiffs contended that the solicitation improperly failed to include a provision specifying that the private entity providing electricity and natural gas distribution services to Fort Meade would be subject to PSC's regulatory jurisdiction, as mandated by section 8093 of the DOD Appropriations Act of 1988.[1509] In effect, BG&E and PSC wanted the Army to create a sole-source acquisition for BG&E, because it is the only franchisee for gas and electric distribution services in the Fort Meade area.

The district court agreed with the Army's position that, although section 8093 requires the Army to purchase electricity in accordance with state law and regulation, 10 U.S.C. § 2688 requires that conveyance of utility systems be subject to competition.[1510] Therefore, the court found, the Army had appropriately issued a solicitation that allowed private entities other than those with state franchise rights to compete. Further, the court found that PSC had no regulatory jurisdiction over the successful bidder because the federal government had not ceded such jurisdiction over Fort Meade.[1511]

Procurement Fraud

Beware of "Take Care"

Last year,[1512] we analyzed a Court of Appeals for the Fifth Circuit decision[1513] wherein a divided panel ruled that the *qui tam* provisions of the False Claims Act (FCA)[1514] violate the "take care" clause[1515] of the Constitution. Not surprisingly,[1516] the Fifth Circuit, sitting en banc, reversed its earlier decision and held that *qui tam* does not violate the take care clause.[1517] In its decision, the court emphasized that the executive branch retains some control over *qui tam* litigation regardless of whether it joins the relator's lawsuit:

> [T]he Executive retains significant control over litigation pursued under the FCA by a *qui tam* relator. First, there is little doubt that the Executive retains such control when it intervenes in an action initiated by a relator. Second, even in cases where the government does not intervene, there are a number of control mechanisms present in the *qui tam* provisions of the FCA so that the Executive nonetheless retains a significant amount of control over the litigation. The record before us is devoid of any showing that the government's ability to exercise its authority has been thwarted in cases where it was not an intervenor.[1518]

1508. Baltimore Gas & Elec. Co. v. United States, 133 F. Supp. 2d 721 (D. Md. 2001).

1509. Pub. L. 100-202, § 8093, 101 Stat. 1329 (1987). Section 8093 provides in pertinent part:

> None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

Id.

1510. *Baltimore Gas & Elec.*, 133 F. Supp. 2d at 740-41. Section 2688 requires that "if more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures." 10 U.S.C. § 2688(b) (2000).

1511. *Baltimore Gas & Elec.*, 133 F. Supp. 2d at 741.

1512. *2000 Year in Review*, *supra* note 2, at 90.

1513. United States *ex rel.* Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999).

1514. 31 U.S.C. § 3730(b) (2000).

1515. U.S. CONST. art. II, § 3 (requiring the executive branch to "take care that the laws be faithfully executed").

1516. As a practical matter, if the full court had not reversed the first decision, the right to pursue a *qui tam* action would disappear in all cases where the government declined to join the relator's lawsuit.

1517. United States *ex rel.* Riley v. St. Luke's Episcopal Hospital, 252 F.3d 749 (5th Cir. 2001) (en banc).

1518. *Id*. at 753.

This decision should put to rest the theory that *qui tam* somehow infringes upon the executive branch's ability to "take care" that the nation's laws are faithfully executed.

Make It Hurt So Good

Under the FCA, a court may assess civil penalties of $5000 to $10,000 per false claim and treble damages against a defendant.[1519] Finding such treble damages inherently punitive in nature, the Court of Appeals for the Ninth Circuit held last March that such penalties are subject to the Eighth Amendment's "excessive fines" prohibition.[1520] In this case, *United States v. Mackby*,[1521] the court noted that treble damages indicate an intent to punish.[1522] The court further noted that trial courts may impose treble damages without regard to the government's actual damages.[1523] The court therefore held that trial courts must determine whether the penalties imposed are "grossly disproportionate to the gravity" of the FCA violation before imposing treble damages.[1524] One way to make this determination is to decide whether the penalties are necessary to achieve the desired deterrence.[1525]

But Does It Have to Hurt at All?

A more basic issue in determining FCA liability is whether the government must suffer any damages at all for a *qui tam* relator to succeed in an FCA action. The Courts of Appeal for the Sixth and Third Circuit recently reached different conclusions on this issue. In *Varljen v. Cleveland Gear Co.*,[1526] the Sixth Circuit ruled that an FCA plaintiff need not prove a "quantifiable effect or detriment that the submission of a false claim had on the government."[1527] In the court's view, the mere submission of a false claim is sufficient for FCA liability to attach.[1528] Taking a different view, the Third Circuit decided in *Hutchins v. Wilentz, Golman & Spitzer* that FCA liability requires a finding of financial loss to the government.[1529] The court held that the mere submission of false invoices,[1530] without payment by the government of those invoices, was insufficient for FCA liability.[1531]

Who Is a "Person" Subject to FCA Liability?

The FCA subjects "any person" to civil liability for defrauding the government.[1532] In May 2000, the Supreme Court ruled that state entities are not "persons" subject to FCA *qui tam* liability.[1533] The Fifth Circuit extended this ruling to local government entities in *United States ex rel. Garibaldi v. Orleans Parish School Board*.[1534] Noting that imposing penalties on local governments usually results in higher taxes or reduced services for blameless citizens, the court held that FCA liability could not attach to a school board.[1535] State employees, however, may not be as fortunate as their employers. In *Bly-Magee v. California*,[1536] the Ninth Circuit ruled that state employees *may* be subject to FCA liability in their individual capacities.[1537] The court held, however, that such individual liability could

1519. 31 U.S.C. § 3729(a) (2000).

1520. U.S. CONST. amend. VIII.

1521. 243 F.3d 1159, *remanded on other grounds*, 2001 U.S. App. LEXIS 18478 (9th Cir. Aug. 16, 2001).

1522. *Id*. at 1167.

1523. *Id*. *See also* Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965) (no requirement for government to show that it suffered any damages). *But see* discussion on "Does It Have to Hurt at All?," *infra* notes 1526-31 and accompanying text.

1524. 243 F.3d at 1167.

1525. *Id*.

1526. 250 F.3d 426 (6th Cir. 2001).

1527. *Id*. at 431.

1528. *Id*. at 429-30.

1529. 253 F.3d 176, 179, 182 (3rd. Cir. 2001).

1530. The false invoices were for inflated legal bills submitted for payment by a law firm to a bankruptcy trustee. Apparently, the firm's policy was to multiply actual Westlaw and LEXIS expenses by 1.5. *Id*. at 179-80.

1531. *Id*. at 182-84.

1532. 31 U.S.C. § 3729(a) (2000).

1533. Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 780-87 (2000); *see also 2000 Year in Review*, *supra* note 2, at 89-90.

1534. 244 F.3d 486 (5th Cir. 2001).

only attach for wrongful conduct outside of the employees' official duties.[1538]

No Parasites Allowed!

The FCA permits *qui tam* lawsuits only if the plaintiff is the "original source" who uncovers the fraud committed against the government.[1539] The law is designed to prevent parasitic plaintiffs from benefiting when others uncover fraud. The Ninth Circuit clarified this rule in *Seal 1 v. Seal A*.[1540] In *Seal*, the plaintiff filed a *qui tam* lawsuit against his former employer, a government contractor.[1541] This prompted the government to launch an investigation into the former employer, which expanded to include another contractor as well. Based on the government's investigation into this second contractor, the plaintiff filed a separate *qui tam* lawsuit against the second contractor.[1542] Because the plaintiff had access to the government's investigative work, the court ruled that the material was "publicly disclosed" even though the government disclosed the information to *only* the plaintiff as part of his original lawsuit.[1543] The court reasoned that "disclosure of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure."[1544] The court therefore dismissed the plaintiff's *qui tam* suit against the second contractor.[1545]

Arbitrate, Don't Litigate!

Can arbitration in FCA litigation be mandatory without being binding? According to the Court of Appeals for the Fourth Circuit, the answer is "yes!" In *United States v. Bankers Insurance Co.*,[1546] the court held that the non-binding nature of an arbitration clause in a contract with an FCA defendant did not render such a clause optional for the government.[1547] Although the government's contract with the defendant stated that factual issues "*may* be submitted to arbitration for a determination that *shall be binding*,"[1548] the court nonetheless found that arbitration was *mandatory*, though *not binding*.[1549] The court further reasoned that the government could not seek to enforce the arbitration clause only when it is convenient to do so.[1550] Although the court's reasoning in *Bankers* is a bit circuitous, the government will always look good when it arbitrates claims under an arbitration clause even though the clause may not seem to require such arbitration.

One Bad Apple Don't Spoil the Whole Bunch

May a contractor who successfully defends against fraud allegations charge the government for the cost of its legal defense? According to *DynCorp*,[1551] the answer is "yes." In *DynCorp*, the government had successfully prosecuted one

1535. *Id*. at 491-93; *accord*, United States *ex rel*. Dunleavy v. County of Delaware, No. 94-7000, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000) (county is not an entity subject to FCA liability). *But see* Giles v. Sardie, No. CV-96-2002, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. Aug. 1, 2000) (city of Los Angeles is a "person" subject to FCA liability).

1536. 236 F.3d 1014 (9th Cir. 2001).

1537. *Id*. at 1018.

1538. *Id*. It seems that the plaintiff bringing the suit, as well as the state entity defending the suit, would likely argue that any wrongful conduct by employees is per se outside the scope of their official duties.

1539. 31 U.S.C. § 3730(e)(4)(A) (2000).

1540. 255 F.3d 1154 (9th Cir. 2001).

1541. *Id*. at 1156.

1542. *Id*. at 1157.

1543. *Id*. at 1161-62.

1544. *Id*. at 1162.

1545. *Id*. at 1163.

1546. 245 F.3d 315 (4th Cir. 2001).

1547. *Id*. at 325.

1548. *Id*. at 318 (emphasis added).

1549. *Id*. at 320-21. The court reasoned that clauses stating that parties "may" arbitrate give the parties the choice of arbitrating the dispute or dropping the claim, not the choice of avoiding arbitration in order to litigate. Furthermore, the court found that "shall be binding" did not mean "binding" because of a statutory requirement that this particular agency head approve any arbitration award. *Id*. at 321-22.

1550. *Id*. at 320.

employee of the corporation for a violation of the Major Fraud Act,[1552] but could not obtain a conviction against the corporation itself.[1553] When the contractor subsequently claimed its legal defense costs as allocable to the contract, the government denied the claim, reasoning that the government obtained no benefit from the successful defense of the corporation against the fraud allegations.[1554] The board disagreed, finding that legal defense costs are properly allocable to a contract in the absence of a conviction.[1555] The corporation's legal defense costs (but not the employee's defense costs) were properly allocable to the contract because the government obtained a fraud conviction against one employee and not against the entire corporation.[1556]

Randolph-Sheppard

Food Fight!: Fourth Circuit Decides NISH v. Cohen

Last year, we reported on the Eastern District of Virginia's decision that the Randolph-Sheppard Act preference for blind vendors applies to the procurement of dining facility services.[1557] NISH and Goodwill Industries, Inc. (NISH, collectively), appealed to the Court of Appeals for the Fourth Circuit, arguing that because the Randolph-Sheppard Act (RSA) was not a statutory procurement procedure it failed to meet the CICA's exemption for procurement procedures otherwise expressly authorized by statute. The Fourth Circuit, however, affirmed the district court's decision, finding that the CICA broadly defines "procurement" as "including all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout,"[1558] and that the provisions of the RSA "clearly fit this sweeping definition of procurement."[1559] Like the district court, the circuit court deferred to the Department of Education's interpretation that the Act "clearly covers all types of food service operations on military bases, including military troop mess halls,"[1560] and the DOD General Counsel's opinion that "the assertion that the Act does not apply to military dining facilities cannot withstand analysis."[1561] The court further cited Comptroller General opinions that military dining facilities are cafeterias subject to the Act's priorities.[1562]

Food Fight 2: Randolph-Sheppard Versus HUBZones

Automated Communication Systems, Inc. (ACSI), tried another approach at the CAFC to challenge the Air Force's application of the RSA mandatory award preference for blind vendors to dining facility contracts at Lackland Air Force Base, Medina Annex, Kelly Annex, and Camp Bullis, Texas.[1563] ACSI first challenged the continued validity of the RSA preference for the blind implemented by DOD Directive 1125.3. The court dismissed this challenge, finding that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities.[1564] ACSI also argued that the Air Force had failed to apply properly preferences provided by other procurement-oriented statutes such as those favoring businesses in HUBZones.[1565] The court agreed with the govern-

1551. ASBCA No. 53098, 01-2 BCA ¶ 31,476. For further discussion of this case, see *supra* notes 1182-93 and accompanying text.

1552. 18 U.S.C. § 1031 (2000).

1553. *DynCorp*, 01-2 BCA ¶ 31,476 at 155,399.

1554. *Id*. at 155,403.

1555. *Id*. at 155,404.

1556. *Id*. at 155,406.

1557. *See 2000 Year in Review, supra* note 2, at 92.

1558. NISH v. Cohen, 247 F. 3d 197, 204 (4th Cir. 2001) (citing 10 U.S.C. § 2302(3)(A) (2000)).

1559. *Id*.

1560. *Id*. at 205 (citing 1997 memorandum of Frederick K. Schroeder, Commissioner of Rehabilitative Services Administration).

1561. *Id*. (citing 1998 memorandum of Judith A. Miller, General Counsel of the DOD).

1562. *Id*. (citing Matter of Dep't of the Air Force—Reconsideration, Comp. Gen. B-250465.6, B-250465.7, B-250783.2, June 4, 1993, 93-1 CPD ¶ 431; Comptroller General of the United States, Opinion Letter to Senator Jennings Randolph, Comp. Gen. B-176886 (June 29, 1976)). The Randolph-Sheppard Act (RSA) gives contracting priority to blind persons operating vending facilities on federal property, and defines "vending facility" as "automatic vending machines, cafeterias, snack bars, cart services, shelters, and counters." *See* 20 U.S.C. § 107e(7) (2000). At the lower court, NISH had contended that the Javits-Wagner-O'Day (JWOD) Act, which provides a more general priority for all disabled persons, governed the solicitation. *See 2000 Year in Review, supra* note 2, at 92. The Fourth Circuit found that both the RSA and JWOD Act applied to the solicitation, but that the RSA more specifically addressed the issue. The court stated it was following the "basic tenant of statutory construction that when two statutes ostensibly apply, the more specific of the two control[s]." *NISH*, 247 F.3d at 205.

1563. Automated Comm'n Sys., Inc. v. United States, 49 Fed. Cl. 570 (2001).

ment's argument that the RSA and HUBZone preferences were not in conflict; rather, the RSA preference carries greater weight in the military vending procurement process.[1566] Further, the court cited the Fourth Circuit rationale in *NISH v. Cohen*,[1567] that even if there were a conflict between the RSA and HUBZone statutes, the more-specific RSA preference would take precedence over the less-specific HUBZone statute.[1568]

But State Licensing Agencies Don't Win All the Arguments . . .

Maryland's State Department of Education, Division of Rehabilitative Services challenged food service solicitations for Andrews Air Force Base and Fort Meade, claiming that the solicitations violated DOD regulations implementing the RSA and inappropriately contemplated a HUBZone preference in addition to the RSA preference. The GAO, however, dismissed the protest, finding that the Secretary of Education has exclusive authority for resolving disputes between State Licensing Agencies (SLAs) and contracting agencies.[1569] Although the SLA argued that the protest alleged a violation of DOD regulations, the GAO found that, in fact, the issue was one of compliance with the RSA and that the Secretary of Education must resolve such an issue "under the statutory and regulatory scheme established for Randolph-Sheppard procurements."[1570] The GAO noted that this protest differed from other RSA protests it had decided because the other protests had been filed by businesses competing with the SLA, not the SLA itself.[1571]

Taxation

Mistaken Tax Calculations

In *B&M Cillessen Construction Co.*,[1572] the GAO upheld the agency's decision to allow the low bidder to adjust its bid upward by recalculating applicable taxes, while at the same time it avoided comment on the correctness of the recalculation. The IFB contained the standard tax clause for fixed-price contracts.[1573] In this case, the applicable taxes included a 5.75% New Mexico Gross Receipts Tax (NMGRT) and a three percent Navajo Business Activities Tax (BAT).[1574]

After bid opening, HB Construction of Albuquerque, Inc. (HB), notified the contracting officer that it mistakenly calculated the amount for the NMGRT at three percent, instead of adding the three percent BAT to the cost of the contract and then calculating the 5.75% NMGRT. HB was permitted to recalculate its bid and revised its bid from $4,579,000 to $4,842,293.[1575]

The GAO concluded that the agency action to allow HB to adjust its bid upward was reasonable based on clear and convincing evidence of the claimed mistake and the intended bid price.[1576] The GAO also rejected B&M Cillessen Construction Co.'s argument that HB underestimated various costs that if accurately calculated, would displace HB as the low bidder.[1577]

1564. *Id*. at 575 ("The ADRA vests exclusive jurisdiction in the Court of Federal Claims over actions challenging the government's compliance with its procurement regulations, *not* over actions regarding the validity of those regulations.").

1565. *Id*. at 576.

1566. *Id*. at 577.

1567. *See supra* note 1562 and accompanying text.

1568. *Automated Comm'n Sys., Inc*., 49 Fed. Cl. at 578. *See also* NISH v. Cohen, 247 F. 3d 204, 205 (2000).

1569. Maryland State Dep't of Educ., B-288501, B-288502, 2001 U.S. Comp. Gen. LEXIS 123 (Aug. 14, 2001).

1570. *Id*. (citing 34 C.F.R. § 395.37(a) (2000)).

1571. *Id*. at *9 n.1.

1572. B-287449.2, 2001 U.S. Comp. Gen. LEXIS 84 (June 5, 2001).

1573. *See* FAR, *supra* note 11, § 52.229-3(b) (providing that "the contract price includes all applicable Federal, State, and local taxes and duties").

1574. *B&M Cillessen*, 2001 U.S. Comp. Gen. LEXIS 84, at *2. The GAO noted that the BAT applies to the entire contract amount, including the amount of the NGMRT. *Id.*

1575. *Id*. at *4-5. The GAO noted that HB remained the low bidder regardless of the order in which the percentages for the NMGRT and the BAT were calculated. *Id*. at *5 and n.4.

1576. *Id*. at *8-9.

1577. *Id*. at *9. The GAO noted that "submission of a below-cost bid is not illegal" and that an agency is allowed to exercise its subjective judgment regarding a bidder's responsibility. *Id*. at 10.

Avoid Special Tax Notices on Green Paper

In *Hunt Construction Group, Inc. v. United States*,[1578] the COFC relied on basic rules of contract interpretation to reject a contractor's claim for sales and use tax reimbursement. The dispute involved a Department of Veterans Affairs (DVA) solicitation for construction of an ambulatory care clinic in Phoenix, Arizona.[1579] Most of the solicitation was printed on white paper and contained the standard fixed-price tax clause.[1580] The solicitation also included a "Special Notice," printed on green paper, with instructions that the contractor seek applicable sales and use tax exemptions.[1581] Plaintiff Hunt Construction Group, Inc. (Hunt), the low bidder and eventual awardee, submitted its bid on the assumption that it would not have to pay state and local sales and use taxes on permanent materials.[1582]

Several months after beginning work, Hunt asked the DVA to sign an agreement so Hunt could obtain the tax exemption. The DVA refused, citing FAR 29.303(a), which generally prohibits prime and subcontractors from being "designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes."[1583] The DVA subsequently denied Hunt's claim for reimbursement of the state sales taxes that it was required to pay because of the inability to claim exemptions.[1584]

The COFC rejected Hunt's contention that the Special Notice created an ambiguity that should be construed against the government as its drafter. It concluded that the "plain meaning of the provisions, taken together, is clear."[1585] Specifically, the COFC found that the only reasonable interpretation of FAR section 52.229-3 and the Special Notice was that the responsibility for determining tax exemptions fell on the contractor, and that the Special Notice merely put offerors on notice that exemptions might be available. The Special Notice did not relieve bidders of the duty to include all applicable taxes in their bids.[1586] Nevertheless, the court shared Hunt's "frustration" with the Special Notice, stating that "[i]f a continuum exists by which plain meaning can evolve into ambiguity, this case can be positioned right before the line of demarcation."[1587] The court added that it is reasonable for a contractor to expect the same subject matter to be addressed under one section.[1588]

For That Matter, Avoid Special Tax Notices on White Paper

In *Costello Indus., Inc.*,[1589] the ASBCA denied a contractor's request for reimbursement of Mississippi state taxes. In addition to the standard FAR tax clauses,[1590] this solicitation included a notice to bidders advising them of a 3.5% Mississippi state tax, along with an admonition to direct "[q]uestions on these taxes" to the Mississippi State Tax Commission.[1591] Costello Industries, Inc. (Costello), incorrectly concluded that the Mississippi tax did not apply to this contract, and did not include the tax in its bid. Mississippi levied the tax on the total value of Costello's work under the contract. Costello contested

1578. 48 Fed. Cl. 456 (2001).

1579. *Id*. at 457.

1580. *See* FAR, *supra* note 11, § 52.229-3(b), (h) (providing, in relevant part, that "the contract price includes all applicable Federal, State, and local taxes and duties," and that "the Government shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption").

1581. *Hunt Constr.*, 48 Fed. Cl. at 459. On the page immediately following the table of contents, a piece of green paper contained the title "SPECIAL NOTICE" and text that read: "I. Sales and Use Taxes: (a) Sales and use tax exemptions should be sought where applicable." *Id.*

1582. *Id*. at 458. Arizona law provided for exemption to sales and use tax on the purchase of permanent building materials, but only when a "qualifying" hospital designates the general contractor as agent. *Id*. at 458 n.3.

1583. *Id*. at 458-59.

1584. *Id*. at 459.

1585. *Id*. at 460.

1586. *Id*. The court made this finding notwithstanding the fact that another offeror submitted a qualified offer that proffered an agency agreement for the DVA to sign. After the contracting officer rejected that offer, the offer was revised to give the DVA the option, which it took, of adding a specified amount of sales tax to the original price, in lieu of signing the agency agreement. The COFC noted, however, that neither Hunt nor any other offeror asked any questions about the Special Notice at the pre-bid conference. *Id*. at 461 n.5.

1587. *Id*. at 463.

1588. *Id*.

1589. ASBCA No. 49125, 00-2 BCA ¶ 31,098.

1590. *See* FAR, *supra* note 11, § 52.229-3.

1591. *Costello Indus*., 00-2 BCA ¶ 31,098 at 153,577.

the tax, but ultimately paid the assessment and unsuccessfully sought reimbursement from the Navy.[1592]

Costello argued that it reasonably interpreted the language of the tax notice as inapplicable to the contract and that the government should not receive "a windfall for having the work done without absorbing the tax."[1593] The board disagreed, finding that the tax notice was a fair summary of the law and not misleading. The board concluded that Costello's reading of the tax notice was a "judgmental mistake" which was "not compensable."[1594] Although the government prevailed in this case, *Costello* nevertheless illustrates the potential pitfalls of including special tax provisions in a solicitation, even when they are intended to help offerors.

And Sometimes, Special Tax Notices Aren't Worth the Paper Written on

In *Encorp*[1595] the ASBCA denied a contractor's claim for reimbursement of certain foreign taxes the contractor paid during performance of a construction contract in Pakistan. This solicitation by the USAID included a tax clause for foreign fixed-price contracts.[1596] Several statements modified the tax clause. One statement indicated that the USAID was not allowed to finance any identifiable host-country taxes or duties. Another statement cited to an agreement between the United States and Pakistan, which exempted U.S. technical and developmental projects from Pakistani taxes.[1597] These statements were further mentioned in amendments to the solicitation.[1598]

Encorp's subcontractor, Murshid, was unsuccessful in obtaining an exemption for duties and taxes imposed on steel reinforcing bars and billets, and eventually paid the duties and taxes to avoid project delays. Murshid sought reimbursement through Encorp. The USAID denied Encorp's request for reimbursement, citing the Foreign Taxes clause.[1599]

The contractor argued that the government breached its contractual obligation to enforce international agreements between the United States and Pakistan that established exemption from these taxes.[1600] The board concluded that Encorp, not the USAID, was negligent in its pursuit of the exemptions.[1601] The board also discarded the notion that the government was at fault by characterizing the failure to grant the tax exemptions as actions of local Pakistani authorities, and not an "official" position of the Pakistani government.[1602] While the board's rejection of the claim hinged in part on its finding that Encorp was negligent in pursuing the exemptions,[1603] the case raises some issues with its distinction between an "official" government position and actions of local authorities.[1604]

1592. *Id*. at 153,584.

1593. *Id*. at 153,585.

1594. *Id*.

1595. ASBCA No. 51293, 01-1 BCA ¶ 31,165.

1596. See FAR section 52.229-6, which states, in pertinent part, that the contract price includes "all applicable taxes and duties, except taxes and duties that the Government of the United States and the government of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States." FAR, *supra* note 11, § 52.229-6(c). It further states that the contractor "shall take all reasonable action to obtain the exemption from or refund of any taxes . . . which the governments of the United States and the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States." *Id*. § 52.229-6(i).

1597. *Encorp*, 01-1 BCA ¶ 31,165 at 153,933. The Bilateral Agreement for Technical Cooperation Between the United States of America and Pakistan (1951) exempts from Pakistani taxes "[a]ny funds, materials and equipment introduced into Pakistan by the Government of the United States of America pursuant to such program and project agreements." *Id*.

1598. *Id*.

1599. *Id*.

1600. *Id*. at 153,937.

1601. *Id*. at 153,937-38.

1602. *Id*. at 153,938.

1603. The board notes that "[the] sole legal action instituted by appellant [Encorp] was submission of the [subcontractor's] claim to the contracting officer, without exhausting its remedies in Pakistan." *Id*.

1604. What if the contractor was found to have taken all reasonable steps to obtain the exemption or refund, but to no avail? What recourse is left to the contractor if this is not considered a breach of the international agreement (the sole basis for the exemption)?

Apportionment of Tax Refund Under Cost-Reimbursement Contract

In *Hercules, Inc. v. United States*,[1605] the COFC determined the proper methodology for computing the government's proportionate share of a $10.5 million, 1995 tax refund received by Hercules. The refund was based on Hercules's 1987 Virginia state income tax liability, which was previously reimbursed by the government under Hercules' contract.[1606] The principal issue was whether to base the government's share of the refund on the mix of government and commercial work at Hercules in the year the tax was paid (1987) or the year the refund was received (1995).[1607] The government argued that its share of the refund must be calculated in the same proportion as was used to calculate the amount of taxes it reimbursed Hercules.[1608] Hercules argued that cost accounting standards CAS required that the refund be allocated over the 1995 contract mix.[1609] The COFC disagreed with Hercules, stressing that a tax refund is not itself an indirect cost subject to CAS, but a "*credit* for a *previously recognized and allocated* indirect tax cost."[1610] Thus, the credits clause,[1611] incorporated into the contract, prevailed over the CAS.

Intellectual Property

ASBCA Sinks Navy's Ship

Only rarely does a court or board decision involve sorting through intellectual property (IP) issues arising in a government contract. This past year, in *Ship Analytics, Inc.*,[1612] the ASBCA heard such an appeal and found the Navy had breached its contract by allowing a third party to have access to source code to upgrade ship-handling simulators that Ship Analytics, Inc. (SAI), had developed at private expense and furnished to the Navy under the contract. In 1986, the Naval Training Systems Center issued a request for proposals (RFP) for a "computer-based simulator system for teaching ship-handling skills to naval students."[1613] The trainer had two frigate class and two destroyer class simulated bridges that could operate independently or in a combined exercise. The trainer simulated ship control cues, internal and external communication, and radar/sonar displays, but it specifically did not provide any "out-the-window or real world visual setting" for the students.[1614]

SAI responded to the RFP and proposed using Pilotship 2000 software, which it had developed at private expense, for the trainer. Its proposal indicated that it was conditioned "upon execution of a software license agreement granting the Government restricted rights to the software."[1615] The government asked SAI for clarification concerning whether it would be disclosing its source code, because the code was a contract deliverable. During this dialogue, the government indicated that it needed the code to maintain and support the software over the life of the trainer, and SAI noted that it did not want the source code to get turned over to a competitor or to anyone for other than maintenance and support. SAI later submitted a revised proposal that stated its restricted rights software license "will fully support the Government's requirements for operation and maintenance of the [trainer]."[1616]

In 1995, the government awarded an 8(a) contract to Enzian Technology, Inc. (ETI), under which the government would give SAI's source code to ETI and ETI would upgrade the trainer to provide an "out-the-window simulation experience."[1617] Before award of this latter contract, SAI notified the government that it had heard about the contemplated procurement and indicated that it viewed the action as a breach of its contract and license agreement.[1618] Before the board, the government contended it had unlimited rights in the source code.

1605. 49 Fed. Cl. 80 (2001). For further discussion of this decision, see *supra* notes 1214-19 and accompanying text.

1606. *See* FAR, *supra* note 11, § 31.205-41 (reimbursement for taxes under cost-reimbursement contracts).

1607. *Hercules*, 49 Fed. Cl. at 85-86. The 1987 share was much more favorable to the government than the 1995 share. *See id.*

1608. *Id*. at 89.

1609. *Id*. at 91-92.

1610. *Id*.

1611. *See* FAR, *supra* note 11, § 31.201-41.

1612. ASBCA No. 50914, 01-1 BCA ¶ 31,253, *motion for reconsideration denied*, 01-1 BCA ¶ 31,394.

1613. *Id*. at 154,346.

1614. *Id*.

1615. *Id.* at 154,347.

1616. *Id.* at 154,347-48.

1617. *Id.* at 154,349.

The board rejected this contention, however, noting that SAI's interpretation of the government's rights in the code had been clearly conveyed to the government, and the government did nothing to object to or change this interpretation.[1619]

Guiding the IP Challenged

Shortly before leaving office last year, Dr. Gansler, then Under Secretary of Defense (Acquisition, Technology, and Logistics), ordered the creation of a DOD Intellectual Property (IP) Guide.[1620] A later DOD memorandum called for release of this guide "by March, 2001."[1621] The first version of the guide was published on 15 October 2001.[1622] Both memoranda stated the guide was supposed to make the complex field of IP more understandable for the acquisition workforce.[1623] It appears, however, that the guide is mainly concerned with showing the acquisition workforce that there is sufficient flexibility in the IP laws and regulations to accommodate non-traditional defense contractors.[1624] As the *Ship Analytics* case demonstrates, however, the DOD acquisition workforce needs a better understanding of all aspects of IP law, not just those aspects that will enable it to attract new contractors to do business with the government.

Proposed Rule on Government Trademarks

The FAR Council has published a proposed rule that would amend FAR part 27 to include a new subpart and a new clause in FAR part 52 dealing with contractor rights in government-unique trademarks and servicemarks.[1625] Under the proposed rule, contractors would be required to submit written notification before attempting to register or assert rights in any mark that identifies and distinguishes its goods or services from the goods or services of other firms if those goods or services were first developed, manufactured, or rendered in performance of a government contract.[1626] Interestingly, under the proposed rule, use of the new clause would be prescribed whenever a rights in data or a patent rights clause also is included in the contract.[1627] This further demonstrates that there is a great deal of confusion within the government workforce concerning IP because trademarks/servicemarks often arise under circumstances where there would be no patentable invention and no technical data that would need protection.

Contract Pricing

The Beginning of the End: Motorola, Inc.,[1628] *What Did Congress Really Mean by "Contracts Entered into on or After"?*

In a case of first impression, the ASBCA had the opportunity to determine when contracts were governed by the 1985 and 1986 amendments to the Truth in Negotiations Act (TINA).[1629] Effective 8 November 1985, section 934 of Public Law Number 99-145 prescribed interest on any overpayment made to a contractor due to defective pricing under TINA-covered contracts with the DOD. The provision applied to contracts entered into on or after 8 November 1985.[1630] Congress repealed section 934 a year later, replacing it with a prescription for TINA inter-

1618. *Id*.

1619. *Id*. at 154,352-53. The board also took the time to expressly point out that the contract administrator had very little "understanding of the contract and [software license agreement] provisions." *Id.* at 154,350.

1620. Memorandum, The Under Secretary of Defense (Acquisition, Technology and Logistics), to Secretaries of the Military Departments and Directors of the Defense Agencies, subject: Training on Intellectual Property (5 Sept. 2000) [hereinafter Training on Intellectual Property Memo].

1621. *See* Memorandum, The Acting Under Secretary of Defense (Acquisition, Technology and Logistics), to Service Acquisition Executives, subject: Reform of Intellectual Property Rights of Contractors (4 Jan. 2001) [hereinafter Reform of Intellectual Property Rights Memo], *available at* http://www.acq.osd.mil/ar/doc/intellprop010501.pdf.

1622. *See* UNDER SECRETAR OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS (Oct. 15, 2001) [hereinafter IP NAVIGATING GUIDE], *available at* http://www.acq.osd.mil/ar/doc/intelprop.pdf.

1623. *See* Training on Intellectual Property Memo, *supra* note 1620; Reform of Intellectual Property Rights Memo, *supra* note 1621.

1624. *See* IP NAVIGATING GUIDE, *supra* note 1622.

1625. Federal Acquisition Regulation; Trademarks for Government Products, 66 Fed. Reg. 42,102 (Aug. 9, 2001) (to be codified at 48 C.F.R. pts. 27 and 52).

1626. *Id*. at 42,102-03.

1627. *See id*.

1628. ASBCA No. 51789, 01-1 BCA ¶ 31,233.

1629. 10 U.S.C. § 2306a (2000); 41 U.S.C. § 254b (2000).

1630. *Motorola, Inc*., 01-1 BCA ¶ 31,233 at 154,150.

est on contracts with DOD and stated that the interest provision would apply "to contracts or modifications on contracts entered into after November 7, 1985."[1631]

The contract in question was awarded by the CECOM[1632] on 10 August 1984, with an effective date of 1 May 1984.[1633] The defective pricing occurred in a modification issued 30 September 1986, using cost or pricing data that was certified as of 24 September 1986.[1634] The primary issue was whether the interest to be recovered should use the TINA standard, interest due for the date of overpayment, or the Defense Acquisition Regulation (DAR) Interest clause,[1635] that provides for interest from the date of the first written demand for payment by the government.[1636]

The board looked to the rules of statutory construction to resolve the differing interpretations by the parties.[1637] The board determined that both the 1985 and 1986 amendments to TINA included the phrase "under a contract with the Department of Defense" and that the contract in question was entered into before the TINA amendments; thus, interest was recoverable under the prior, more lenient, DAR interest provisions.[1638]

DFARS Catches Up, TINA Threshold Increased to $550,000

On 1 October 2001, the DOD issued a final rule[1639] amending the DFARS to reflect the increase in the cost or pricing data threshold specified in the FAR.[1640] The new rule now tracks FAR 15.403-4, raising the threshold at which a contracting officer must obtain cost and pricing data before award of a negotiated contract or the modification of certain existing contracts from $500,000 to $550,000.[1641]

The Curse of the $900 Toilet Seat:
Cost Reasonableness in Commercial Item Buys Still Lacking

The DOD continues to experience difficulties determining price reasonableness when cost or pricing data is not obtained, at least in the opinion of the DOD IG.[1642] The IG reviewed 145 contract actions awarded in FY 1998 and FY 1999 valued at $652 million on contracts totaling $3.1 billion. Of the 145 contract actions reviewed, the IG determined that in thirty-two percent (forty-six actions), contracting officers failed to obtain required data. In addition, the price analysis documentation did not support price reasonableness in eighty-six percent (124) of the actions reviewed.[1643] The IG believes that the DOD has an ongoing problem with price reasonableness and an unwarranted propensity to waive cost and pricing data.[1644]

1631. Pub. L. No. 99-500, 100 Stat. 1783 (1986).

1632. U.S. Army Communications and Electronic Command, located at Fort Monmouth, New Jersey.

1633. *Motorola, Inc*., 01-1 BCA ¶ 31,233 at 154,149.

1634. *Id*. at 154,149-50.

1635. *Id*. at 154,149. The DAR was the predecessor to the current DFARS. The difference between DAR interest and the interest due under the TINA provision is significant.

1636. *Id*.

1637. *Id*. at 154,153 (citations omitted).

1638. *Id.* The board declined to follow a district court opinion that had previously addressed the issue raised in this appeal. *See* United States v. United Techs. Corp., Sikorski Aircraft Division, 51 F. Supp. 2d 167, 194-95 (D. Conn. 1999).

> We are not persuaded to follow *Sikorski*, because it did not analyze whether, but apparently assumed that, the phrase, 'entered into after November 7, 1985' in § 952(d)(2), qualified 'modifications on contracts'; did not address or analyze the legal effect of the absence of a contract clause implementing TINA interest; did not analyze the potential application of the rule in *Yankee Atomic Electric Co.*, [112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998)], and is not a precedent binding on the ASBCA.

Motorola, Inc., 01-1 BCA ¶ 31,233 at 154,154.

1639. Defense Federal Acquisition Regulation Supplement; Cost or Pricing Data Threshold, 66 Fed. Reg. 49,862 (Oct. 1, 2001) (to be codified at 48 C.F.R. pts. 215, 253).

1640. *2000 Year in Review*, *supra* note 2, at 67.

1641. DFARS, *supra* note 361, §§ 215.404, 253.215-70.

1642. U.S. Dep't of Defense Inspector General Audit Report, Contracting Officer Determinations of Price Reasonableness When Cost or Pricing Data Were Not Obtained, Report No. D-2001-129 (May 30, 2001) [hereinafter Price Reasonableness].

1643. *Id*. at i.

Several causes contribute to the inadequate price reasonableness determinations. First, contracting officers use questionable competion as a basis for accepting contractor prices.[1645] Second, contracting officers relied on unverified prices from contractors.[1646] Third, the lack of procurement planning leads to an excessive number of urgent requirements.[1647] Finally, staffing problems,[1648] lack of senior leadership oversight,[1649] and a lack of emphasis on obtaining cost or pricing data contributed to the problem.[1650]

The DOD procurement community disputed the IG's interpretation of the data sampled. Ms. Lee, the Director of Defense Procurement, denied that the DOD had "systemic problems" determining price reasonableness.[1651] She stated that the IG failed to consider acquisition reforms that were implemented since the IG's review, and the discretion exercised by contracting officers in determining price reasonableness.[1652] Further, according to Ms. Lee, the IG's methodology did not result in statistically valid sampling, producing results that could not be extrapolated across DOD contracting actions.[1653]

The Army's view was less argumentative, asserting that less overpricing occurred than the IG reported,[1654] but that the overpricing that did occur was a result of an overburdened workforce that has been reduced by more that fifty percent over the past ten years.[1655] The Navy also cited manpower problems as contributing to the difficulty in obtaining the required data.[1656] The Air Force argued that the sample was not sufficient to make generalized comments about the status of pricing problems DOD-wide.[1657]

FISCAL LAW

Release of GAO's "Red Book" Volume IV

One of the most important fiscal law developments of the past year was the long-awaited release of Volume IV of GAO's "*Red Book*."[1658] With this release, this "bible" for fiscal law acolytes is nearly complete.

Purpose

Comptroller General Refines Definition of Training

Before this past year's decision in *Payment of Fees for Actuarial Accreditation Examination Review*,[1659] there had been several Comptroller General decisions that limited the ability of an agency to use appropriated funds to pay for review courses for accreditation exams. These prior decisions viewed the review courses as personal expenses since the expenses were necessary to qualify the individual for the particular government employment. Thus, in these prior decisions the dividing line between whether training expenses were payable hinged on whether those expenses qualified the individual for a certain position.[1660]

1644. *Id.* at 1. The IG has issued eleven reports regarding price reasonableness determinations and commercial item classification since FY 1998. *Id.* The most recent prior report is: U.S. Dep't of Defense Inspector General Audit Report, Waivers of Requirements for Contractor to Provide Cost or Pricing Data, Report No. D-2001-061 (Feb. 28, 2001).

1645. Price Reasonableness, *supra* note 1642, at 13.

1646. *Id*. at 9-14.

1647. *Id*. at 14.

1648. *Id*. at 15, 18.

1649. *Id*. at 18.

1650. *Id*. at 15.

1651. *Id*. at 112.

1652. *Id*.

1653. *Id*. at 113.

1654. *Id*. at 129.

1655. *Id*. at 130.

1656. *Id*. at 159.

1657. *Id*. at 168.

1658. General Accounting Office, Principles of Federal Appropriations Law, Second Edition, Volume IV, Publication No. GAO-01-179SP (Mar. 2001). The preface to volume IV indicates that it will be followed by a volume V.

1659. Comp. Gen. B-286026, June 12, 2001, *available at* http://www.gao.gov/decisions/appro/286026.pdf.

In *Accreditation Examination Review*, the Pension Benefit Guaranty Corp. (PBGC) asked whether it could "use appropriated funds to pay, as training costs, fees for actuary accreditation examination review courses, on-the-job study time, and examination fees."[1661] The Comptroller General expressly overruled its prior decisions and indicated that the agency could use appropriated funds for the first two of these three types of expenses. It specifically noted that its prior focus on whether the employee benefited by qualifying for a new position was inappropriate. Instead, the focus should be on whether the proposed training would "improve individual and organizational performance and assist in achieving the agency's mission and performance goals."[1662] Because taking part in the accreditation review course and study of the materials tested on the exam would improve the employee's knowledge, skills, and/or abilities (KSAs) that are important to his performance of official duties, PBGC could pay for the course and allow the employee to study on-the-job. The expense of actually taking the accreditation exam, however, was determined to be a personal expense because it would not enhance an examinant's KSAs; it would merely test her existing KSAs.[1663]

Grant Funds Retain Federal Character

The federal government gives a great deal of grant money each year to state, local, and Indian tribal governments.[1664] This past year, a district court held that these funds retain their federal character even post-transfer from the federal government.[1665] Consequently, a state's subsequent transfer of a portion of these funds for an unauthorized purpose violated the "Purpose Statute," permitting the federal government to disallow these costs and obtain a refund.[1666]

Before 1980, the Department of Health and Human Services (HHS) and the Alabama negotiated a cost allocation plan (CAP) which identified those state support services for which the federal government would be granting federal funds to Alabama.[1667] One of these identified support services for which Alabama received federal funding was a self-insurance fund (SIF). The SIF insured state and local government buildings against arson, vandalism, burglary, and other man-made or natural disasters.[1668] Between 1980 and 1986, Alabama transferred $43.26 million from the SIF to several state health agencies and the state general fund, with a requirement that the SIF be reimbursed when there were sufficient funds in the state general fund.[1669]

In 1990, the HHS conducted an audit of the SIF. Upon discovering these transfers, the HHS determined in accordance with *OMB Circular A-87* that the transfers "were not allowable uses of Federal funds" and demanded the return of the federal share.[1670] The state appealed this determination, arguing that as soon as the granted funds entered the SIF, they ceased to retain federal character and *OMB Circular A-87* was no longer applicable.[1671] The court accepted the HHS's contention that Alabama had an on-going requirement to account for federal funds and ensure those funds transferred to the SIF were not transferred to another state-function not approved by the CAP.[1672] Consequently, the amount transferred from the SIF had to be returned to the HHS.[1673]

1660. *Id*.

1661. *Id.*

1662. *Id.* (citing 5 U.S.C. § 4101(4) (2000)).

1663. *Id.*

1664. In FY 2002, it is estimated the federal government will grant state and local governments over $350 billion, representing about 17.9% of all federal outlays. *See* Office of Management and Budget, Historical Tables, Budget of the United States Government, Fiscal Year 2002, 217 tbl. 12.1 (2001) (Table 12.1—Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940-2006).

1665. Alabama v. Shalala, 124 F. Supp. 2d 1250, 1257-60 (M.D. Ala. 2000).

1666. *Id.* at 1269.

1667. *Id.* at 1253. Subsection J of *OMB Circular A-87* requires the use of a CAP. Federal Office of Management and Budget, Circular No. A-87, Cost Principles for State and Local Governments (Jan. 28, 1981).

1668. *Shalala*, 124 F. Supp. 2d at 1253.

1669. *Id.* at 1254. The actual transfers were $18 million to the state general fund, $12 million to the Alabama Department of Mental Health and Mental Retardation, $11 million to the Alabama Medicaid Agency, and $2 million to the Alabama Department of Public Health. None of the transferees' support services were embodied in the CAP. *Id.*

1670. *Id.* at 1254-55. The HHS also demanded lost interest on the transfers, but an HHS appeals board determined that the HHS had no authority to recover such interest. *Id.* at 1255.

1671. *Id.* at 1257.

1672. *Id.* at 1258-59.

Time

DOD Admonished for Creative Bookkeeping Practices

In 1990, Congress thought that it addressed the inadequate controls over appropriation accounts, especially those within the DOD.[1674] As a July 2001 GAO report revealed, the DOD, more than any other federal agency, has difficulty abiding by these rules. Specifically, the GAO report revealed that the DOD made $615 million of improper or illegal adjustments to closed appropriations accounts during FY 2000.[1675]

The total amount of $615 million was the result of four major categories. The first, disbursements worth $107.7 million, had been charged to closed accounts.[1676] The largest chunk of this figure comes from disbursements made by the Defense Finance and Accounting Service-Columbus (DFAS-Col).[1677] In December 1999, DFAS-Col changed $79 million of disbursements from charges against FYs 1993-1995 R&D appropriations to charges against an FY 1992 R&D appropriation. The adjustments were made to redistribute payment in accordance with the contract, that is, using oldest funds first.[1678]

The second category is disbursements made before enactment of the appropriation. The total under this category is $38.2 million, and includes $21 million of disbursements that were charged to FY 1989 and FY 1990 and then changed to charges against FY 1998 and FY 1999 accounts.[1679] In addition, $9.9 million of this amount was overpayments redistributed to expired and closed accounts, instead of returning it to the Department of the Treasury.[1680]

The third, and largest category cited in the GAO report included $364 million worth of unnecessary adjustments. The DOD made these adjustments during contract reconciliations to try to correct errors in recording disbursements made under the contracts.[1681] In one case, DFAS-Col made $210 million in adjustments to closed accounts that resulted in accounting errors in those accounts that did not exist before the reconciliation.[1682]

The last category included insufficient documentation to support $104.9 million worth of adjustments. In one instance, DFAS-Col changed over $2.4 million of disbursements against an FY 1993 appropriation that had not yet been closed to an FY 1992 appropriation that had been closed.[1683] Unfortunately, no supporting documentation exists to prove the adjustment was needed to correct an earlier disbursing error.[1684]

The GAO made clear its displeasure with the DOD's seemingly aloof attitude, concluding:

> The DOD was aware of the limitations the account closing law placed on the availability of cancelled appropriations and that the law was enacted because of previous abuses by DOD's use of old appropriations. The department also knew that a major system

1673. *Id.* at 1254-55. The court did not discuss whether those funds would be subject to the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (2000).

1674. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405 (1990), 104 Stat. 1678 (codified as amended at 31 U.S.C. §§ 1551-1558) (2000). The law provided that appropriation accounts would be closed five years after the period of availability of a fixed-term appropriation. After closing, funds from the account could not be used for obligations or expenditures for any purpose. *Id.*

1675. *See* General Accounting Office, Canceled DOD Appropriations: $615 Million of Illegal or Otherwise Improper Adjustments, Report No. GAO-01-697 (July 26, 2001) [hereinafter GAO Report No. 01-697].

1676. *Id*. at 9-10 and tbl. 1.

1677. *Id.* at 7. The focus of the report is on the disbursement practices of DFAS-Col, because according to DFAS headquarters officials, DFAS-Col makes about ninety-nine percent of DOD's annual closed appropriation account adjustments. *Id.*

1678. Unfortunately, according to the GAO, this adjustment was improper because it had occurred four months after the FY 1992 R&D account had closed on 30 Septemer 1998. *Id*. at 3.

1679. *Id*. at 11-12. Although the report does not specifically offer any reasons for these particular improper adjustments, they seem to be the result of deficiencies in the DOD's Contract Reconciliation System (CRS). *Id*. at 3. These adjustments were improper because they charged disbursements to appropriation accounts "that had not yet been enacted at the time the disbursements were actually made." *Id.* at 11. *See also* 31 U.S.C. § 1502(a) (2000) (stating that an appropriation "is available only for payment of expenses properly incurred during the period of availability").

1680. *See* GAO Report No. 01-697, *supra* note 1675, at 12. Collections normally creditable to an appropriation account received after the account is closed, "shall be deposited in the Treasury as miscellaneous receipts." *See* 31 U.S.C. § 1552(b).

1681. *See* GAO Report No. 01-697, *supra* note 1675, at 12.

1682. *Id*. The GAO observed that the actual disbursements on these closed accounts, some of which were made ten years earlier, were recorded correctly at the time they were made. *Id.*

1683. *Id*. at 13.

1684. *See id*.

> used to control its use of appropriations allowed for disbursements to be charged in a way that was inconsistent with the law. However, it did nothing to fix the system, although it estimated the cost to do so would be minimal.[1685]

The GAO recommended both short-term and long-term solutions. The short-term recommendations include "immediately reversing the erroneous adjustments" and "determining the correct accounting for the reversed adjustments."[1686] The long-term solutions include "ensur[ing] that the requisite controls are properly included and operating effectively in [the DOD's Contract Reconciliation System]" to prevent disbursements to closed or unopened accounts; "revise current policies and procedures pertaining to closed account adjustments to include specific detailed guidance" to ensure future adjustments to closed accounts are proper; and "establish a monitoring program for future adjustments to closed appropriation accounts and make clear to managers that they will be held accountable if abuses are identified."[1687]

Time will tell how the DOD reacts to the GAO's recommendations. Although there may be some that claim the problem was inherited,[1688] the problem is similar to many that the DOD faces in these turbulent times. It must resolve a long-running problem that needs immediate attention and quickly implement effective, long-term, preventive measures.

Sorry, Phases Two and Three Are Off the Clock

When dealing with agreements that allow funds to be expended in subsequent fiscal years, agencies should have clear plans on how these funds will be spent or risk losing them. That's just what the U.S. Total Army Personnel Command (PERSCOM) discovered when it requested a decision regarding funds that it had provided to the GSA's Federal Systems Integration and Management Center (FEDSIM).[1689]

PERSCOM was tasked with the implementation of an EO[1690] that prescribed a uniform system for classifying, safeguarding, and declassifying national security information. It entered into an agreement with FEDSIM under which FEDSIM would contract for the development and implementation of a declassification management system on behalf of PERSCOM.[1691] The agreement articulated a three-phase project, but provided details only for phase one. The agreement mentioned that the plan "might be expanded to include Phases II and III," but "did not provide specific work requirements, time frames, or cost estimates for additional phases."[1692]

PERSOM obligated $17.5 million of FY 1997 funds under the agreement with FEDSIM. By May 1998, only phase one was completed, at a cost of $8.5 million. The GAO advised PERSCOM that it could not use the remainder of the funds ($9 million) because it had not incurred any obligations on phase two or phase three. In this instance, banking all of the funds in FEDSIM without an articulated plan for subsequent phases resulted in the expiration of $9 million. To continue the project, additional funds must be obligated from current FY funds.[1693] Agencies that acquire information techonlogy through the GSA must clearly articulate a bona fide need for future projects in the fiscal year that funds are obligated.[1694]

1685. *Id*. at 19.

1686. *Id*.

1687. *Id*. at 19-20.

1688. *See generally DOD Illegally Paid Bills from Closed Appropriations Accounts, GAO Says*, BNA FED. CONT. REP. (July 31 2001) (noting that DFAS Director Thomas Bloom and Deputy Under Secretary of Defense for Financial Management Tina Jones "agreed with the [GAO] recommendations, but said the administration inherited the financial management problems"). *See also* Tanya N. Ballard, *Audit Uncovers $615 million in Illegal Defense Payments*, GOV'T EXECUTIVE MAG., July 27, 2001 (citing Congressman Steve Horn's (R-CA) remark that "[t]his is not a new issue. . . . Long ago, Congress suspected that [the DOD] was abusing old appropriations.").

1689. Continued Availability of Expired Appropriation for Additional Project Phases; Comp. Gen. B-286929, Apr. 25, 2001, *available at* http://www.access.gpo.gov/su_docs/aces170.shtml. For further discussion of this decision, see *infra* notes 1775-89 and accompanying text.

1690. Exec. Order No. 12,598, 60 Fed. Reg. 19,825 (Apr. 17, 1995).

1691. *Continued Availability*, Comp. Gen. B-286929, at 1-2. FEDSIM derives its financing through a revolving fund (Information Technology Fund). The advantage of using FEDSIM for IT services and supplies is that the Brooks Act, not the Economy Act, governs FEDSIMS agreements. The practical effect is that funds obligated under a FEDSIM agreement can be used in subsequent fiscal years, as long as the funds were properly obligated prior to expiration, the requirement still exists, and the inter-agency agreement has not expired. Under inter-agency agreements governed by the Economy Act, a fixed-year appropriation must be deobligated at the end of the fiscal year charged to the extent that the performing agency has not performed or incurred valid obligations. *See* 31 U.S.C. § 1535(d) (2000).

1692. *Continued Availability*, Comp. Gen. B-286929, at 3.

1693. *Id*. at 4. As the last sentence of the opinion suggests, however, money can be obligated for both phases two and three using current fiscal year funds, so long as they are for valid obligations. *See id*. at 5.

The Antideficiency Act

Not Unless Authorized by Law . . .

In a letter to the Chairman, Subcommittee on Defense, House Appropriations Committee,[1695] the GAO provided a good review of the basic rules on obligating appropriated funds as well as the application of the "unless otherwise authorized by law" exception to the Antideficiency Act.[1696] Basically, this decision answers the question: What does an agency do when it is required by law to make a payment, but does not have sufficient funds available to cover that payment? Reviewing the operation of the DOD's TRICARE Program, the GAO determined that eligible beneficiaries are entitled to treatment under authorizing statutes.[1697] Therefore, when an eligible beneficiary receives treatment, the DOD must pay for such treatment.[1698] Based on this analysis, the GAO concluded that expenditures to pay for such treatment are lawful, even if those expenditures exceed the amounts available in the applicable appropriation.[1699] Practitioners faced with issues regarding funding of mandatory requirements will find this decision a useful primer.

Construction Funding[1700]

"Youse Want a Piece of My Tower?" Pay for It!

The FAA is constructing a new Air Traffic Control Tower (ATCT) at LaGuardia Airport in Flushing, New York.[1701] The construction is being funded with $23 million in FY 2001 Facilities and Equipment funds from the Department of Transportation and Related Agencies Appropriation Act for 2001.[1702] The new ATCT will replace an existing ATCT owned by the Port Authority of New York and New Jersey. When the new ATCT is completed, the existing ATCT will obstruct the new tower's view of air traffic. Consequently, the existing tower must be demolished. The FAA agreed to demolish the tower to the point where the existing tower would no longer obstruct the view from the new ATCT. The Port Authority objected to the demolition plan, believing the remaining structure would present an eyesore.[1703] The FAA requested an advance decision on whether it may use appropriated funds for the complete demolition of the existing ATCT.[1704]

The question raised by the FAA's request for an advance decision is twofold. First, is the expenditure for the complete demolition of the existing ATCT necessary to accomplish the purpose of the appropriation? Second, may an agency use appropriated funds to pay for permanent alteration to property not owned by the government? The GAO answered both questions in the affirmative.[1705] The GAO analyzed this issue in light of the purpose statute[1706] and the necessary expense doctrine[1707] as they related to the proposed ATCT demolition.[1708]

The GAO reviewed the language in the DOT appropriations act, noting that the term "replacement" is generally thought to include the authority to remove an existing facility, then construct a replacement facility in its place. The GAO opined that

1694. *See* Memorandum, Deputy Assistant Secretary of the Army, subject: Information Technology Management Reform Act of 1996—Army Reimbursement Guidance (23 July 2001) (answering "generally no" to the following question: "[M]ay the unexpended balance of appropriated funds obligated to the GSA to meet certain bona fide requirements of the Army for information technology for one fiscal year be redirected after the end of the fiscal year to meet other requirements of the Army that were not previously addressed or were not applicable until a later fiscal year?") (on file with author).

1695. Honorable Jerry Lewis, Comp. Gen. B-287619, July 5, 2001, *available at* http://www.gao.gov/decisions/appro/287619.htm.

1696. *See* 31 U.S.C. § 1341(a) (2001).

1697. *See, e.g.*, 10 U.S.C. §§ 1079, 1086 (2001).

1698. *Honorable Jerry Lewis*, Comp. Gen. B-287619, at 7.

1699. *Id*. The GAO did note, however, that if the DOD were forced to incur obligations in excess of the available appropriation, the DOD would need to obtain additional appropriations to cover the payment for these obligations. *Id.*

1700. One significant issue regarding construction funding is the increased restrictions on the migration of training funds to real property maintenance activities. For a full discussion of this issue, see this article's section on Operational and Contingency Funding section, *infra* notes 1790-1821 and accompanying text.

1701. Demolition of the Existing LaGuardia Air Traffic Control Tower, B-286457, 2001 U.S. Comp. Gen. LEXIS 37 (Jan. 29, 2001).

1702. Department of Transportation and Related Agencies Appropriation Act for 2001, Pub. L. No. 106-346, 114 Stat. 1356 (2000). The Act appropriated $145 million for "replacement of air Traffic Control towers and other terminal facilities" at about fifty airports. *Id*. Congress specifically identified $23 million for the replacement of the control tower at LaGuardia. *LaGuardia Air Traffic Control Tower*, 2001 U.S. Comp. Gen. LEXIS 37, at *1-3.

1703. *LaGuardia Air Traffic Control Tower*, 2001 U.S. Comp. Gen. LEXIS 37, at *2.

1704. *Id*. The Port Authority had refused to fund the remaining demolition cost itself. *Id.* In addition to the aesthetic issues, the FAA expressed concern that the hub for electrical wiring for the existing ATCT is under the base of the tower and may not be accessible without completing the demolition. *Id.* at * 2-3.

1705. *Id*. at *3.

1706. 31 U.S.C. § 1301(a) (2000).

while the complete demolition of the existing facility may not be necessary in the strict sense of the word, that is not the test to be applied under the necessary expense doctrine. Rather, the test is whether completely demolishing the existing tower contributes to accomplishing the appropriation's purpose. The GAO found that it did.[1709]

The second question was more problematic. In general, agencies are not permitted to improve property not owned by the government. Permitting such improvements confers a gratuity upon the owner which government officials are not authorized to make absent statutory authority. The GAO recognized that there may be instances when the government receives a benefit as a result of making permanent improvements to property it does not own.[1710] The GAO enunciated four factors that should be present before the government expends appropriated funds for permanent alterations to property not owned by the government:

> (1) the improvements are incidental to and essential for the accomplishment of the purposes of the appropriation,
> (2) the cost of the improvement is in reasonable proportion to the overall cost of the contract price,
> (3) the improvements are used for the principal benefit of the government, and
> (4) the interests of the government in the improvements are protected.[1711]

After reviewing the policy, the GAO stated that it did not have to apply the policy in this case. Because Congress had specifically identified replacement of ATCTs at specified airports,[1712] including LaGuardia, the FAA's use of the Facilities and Equipment Appropriation is proper in this instance.[1713] Because Congress specifically appropriated funds to replace the tower at LaGuardia, and because the GAO believed that the FAA may reasonably conclude that demolishing the existing tower is necessary to construct the replacement tower, the GAO would not object to the expenditure.[1714]

Maintenance and Renovation of DOD Historic Properties Continues to Present Challenges[1715]

The DOD has a large and ever growing supply of historic properties.[1716] The DOD currently has over 17,300 historic properties.[1717] As DOD facilities age, more facilities will be defined as historic.[1718] A number of studies have reviewed the cost associated with maintaining these historic properties.[1719] The GAO determined that existing data on historic properties are not reliable[1720] and that historic properties appear to cost about the same per square foot for maintenance compared with newer properties.[1721] While there was much activity investigating the state of historic properties within the DOD during FY

1707. The "necessary expense doctrine" allows an agency to expend funds if the expenditure is reasonably necessary to carry out an authorized function or contributes materially to the accomplishment of the purposes of the appropriation to be charged, as long as such expense is not otherwise prohibited by law. *Id.*

1708. *LaGuardia Air Traffic Control Tower*, 2001 U.S. Comp. Gen. LEXIS 37, at * 3-4.

1709. *Id.* at *5.

1710. *Id.* at *6.

1711. *Id.* at *7 (citations omitted).

1712. *Id.* at *8 (citing H.R. CONF. REP. NO. 106-940, at 6 (2000)).

1713. *Id.*

1714. *Id.* at *9.

1715. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 393, 113 Stat. 512 (1999) (requiring the Comptroller General to review historic properties within the DOD, identify all properties that must be maintained as historic, the cost for FY 2000 and the projected cost for the next ten fiscal years, and the accounts used by the DOD and the services to pay for the maintenance of historic properties).

1716. GENERAL ACCOUNTING OFFICE, MILITARY SERVICES LACK RELIABLE DATA ON HISTORIC PROPERTIES, REPORT NO. GAO-01-437, at 1 (Apr. 2001).

1717. *Id.* This figure only includes those properties currently listed as historic properties. It does not include those properties eligible for listing. *Id.* at 3.

1718. Historic properties are those properties that meet criteria established by the National Historic Preservation Act of 1966, Pub. L. No. 89-665, as amended, codified at 16 U.S.C. § 470 (2000).

1719. U.S. DEP'T OF DEFENSE, THE COST OF MAINTAINING HISTORIC MILITARY FAMILY HOUSING (Feb. 2001), *available at* https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Legacy/Housing_Costs/DODhousingfinal.pdf. *See also* DEP'T OF NAVY, MODERNIZATION OF HISTORIC MILITARY HOUSING, FINAL REPORT: HISTORIC MILITARY HOUSING: THREAT OR OPPORTUNITY? (undated), *available at* https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/Housing/modernhous.html.

1720. GENERAL ACCOUNTING OFFICE, MILITARY SERVICES LACK RELIABLE DATA ON HISTORIC PROPERTIES, REPORT NO. GAO-01-437, at 3-6 (Apr. 2001).

2001, very little in the way of concrete policy decision resulted. Expect the funding of historic property maintenance to continue to be an issue of concern and investigation during FY 2002.[1722]

Build It and They Will Come: CJCS Issues a New Instruction on Exercise-Related Construction

Exercise Related Construction, or ERC, is a hot-button issue for congressional oversight.[1723] Congress has taken a dim view of any instance where DOD organizations have failed to play by the established rules,[1724] and the services continue to experience difficulties executing ERC projects within the established constraints.[1725] In an effort to assist commands in preparing for and executing ERC, the Chairman of the Joint Chiefs of Staff (CJCS) has issued a new instruction.[1726] The instruction establishes the responsibilities under the ERC program,[1727] procedures for the management of ERC programs,[1728] and congressional interaction and notification.[1729] The new instruction should not have a significant impact on existing Army ERC guidance.[1730]

DOD Establishes Unified Facility Criteria

On 6 October 2000, the DOD announced the establishment of a program to unify all design and construction technical criteria.[1731] The program will simplify the way architectural and engineering firms do business with the DOD and will make use of commercial construction standards to the maximum extent possible. The new standards should provide for more cost effective and faster generation of facility designs. The unified design criteria should help delineate what components are required to make a facility "complete and useable" for its intended purpose. The unified criteria will be published only in electronic format and will be instantaneously updated as standards are refined and updated.[1732]

Intragovernmental Acquisitions

Do the Fees Match the Effort?

In April 2001, the Senate Governmental Affairs Committee directed the GAO to study the government's use of multiagency contracts.[1733] The request asks that the focus of the study be on fees charged by agencies, because "there may be

1721. *Id.* at 9-12. The GAO determined that while the cost per square foot was about the same, the larger size of historic properties resulted in increased costs for maintenance and repair compared with newer properties utilized for the same functional purpose. *Id.* at 9.

1722. *Id.* at 12. The GAO recommended that Secretary of Defense require the services to update their inventories of historic property, including those properties listed or eligible for listing on the National Register of Historic Places. *Id.*

1723. 10 U.S.C. § 2805(a)(2) (2000). Section 2805(a)(2) prohibits a secretary of a military department from using more than $5 million for exercise-related unspecified minor military construction during an exercise outside the United States directed or coordinated by the Joint Chiefs of Staff in any fiscal year. *Id.*

1724. *See generally* Honorable Bill Alexander, 63 Comp. Gen. 422 (1984); and Honorable Bill Alexander, Comp. Gen. B-213137, Jan. 30, 1986 (unpublished) (concluding that the Purpose Statute applies to OCONUS military exercises) (discussing the DOD's failure to apply existing construction funding restrictions to construction projects undertaken during a series of joint and combined exercise in Honduras in the 1980s).

1725. *See, e.g.*, AIR FORCE AUDIT AGENCY, EGLIN AREA AUDIT OFFICE, INSTALLATION REPORT OF AUDIT #DE001007, FUNDS AND PURCHASING MANAGEMENT DURING DEPLOYMENT 823 RED HORSE SQUADRON, HURLBURT FIELD, FLORIDA (Oct. 24, 2000). The audit report details the adventures of the Squadron commander while executing an ERC project in Jordan in 1997. *Id.* According to the audit report, the squadron commander is awaiting disciplinary action for his misdeeds in executing the ERC project. *Id.* at 12.

1726. JOINT CHIEFS OF STAFF, INSTR. 4600.01, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (20 June 2001).

1727. *Id.* encl. A.

1728. *Id.* encl. B. Procedural guidance is provided for the determination of ERC cost, project ranking, training value, coordination, congressional notification, execution messages, and funding policies, among others. *Id.*

1729. *Id.* encls. C, E. The instruction also provides guidance on the use of the ERC database. *Id.* encl. F.

1730. *See* U.S. DEP'T OF ARMY, REG. 415-32, ENGINEER TROOP UNIT CONSTRUCTION IN CONNECTION WITH TRAINING ACTIVITIES (15 Apr. 1998). Chapter 3, Troop Construction in Conjunction with Training Exercises Conducted Outside the United States, provides Army-specific guidance for ERC. *Id.* ch. 3.

1731. Press Release, Office of the Assistant Secretary of Defense (Public Affairs), DOD Establishes Unified Facility Criteria (Oct. 6, 2000) (on file with author).

1732. *Id.* Additional information is available at the following Web sites: Unified Master Reference List (UMRL) (Sept. 2001), at http://www.hnd.usace.army.mil/techinfo/nibs/umrlall.pdf; U.S. Army Corps of Engineers at http://www.hnd.usace.army.mil/techinfo/ufc.htm; Naval Facilities Engineering Command at http://criteria.navfac.navy.mil/criteria; Air Force Civil Engineering Support Agency at http://www.afcesa.af.mil; National Institute of Building Sciences(NIBS)/Construction Criteria Base at http://www.ccb.org; and NIBS/Whole Building Design Guide at http://www.wbdg.org.

1733. *See* 43 THE GOV'T CONTRACTOR 18, ¶ 178 (May 2, 2001).

substantial variation in the fees being charged for similar services."[1734] The concern is that user fees charged to other agencies "may substantially exceed the actual costs and circumvent congressional control and oversight."[1735]

The Committee wants to determine if "user fees associated with multi-agency contracts are equitable and tailored to recapture the actual costs of managing and administering these types of contracts."[1736] To date, the GAO has not released a report on the matter. If their conclusion is that agencies have been overcharging user fees, however, the next question is: What have they been doing with the "profit?" Both this report and subsequent congressional reaction to its conclusions merit close scrutiny because they may have a major impact on the current practice of agencies providing services to other agencies.

GAO Agrees that GSA Exceeded the Scope of IT Contract

The Federal Property and Administrative Services Act[1737] authorizes the GSA to "procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities."[1738] Under the Clinger-Cohen Act of 1996,[1739] agencies can acquire information technology (IT) through the GSA. Both authorities specifically remove such interagency acquisitions (IGA) from the Economy Act,[1740] which applies only "when more specific statutory authority does not exist."[1741] These authorities, however, do not allow agencies acquiring IT through the GSA to issue task orders that increase the scope, period, or maximum value of the underlying contracts.

In *Floro & Associates*,[1742] the GSA issued a task order against a multiple award, indefinite delivery/indefinite quantity (MAIDIQ) contract. The GAO concluded that the task order, which was for management services to assist an agency with their "Collaboration and Distance Learning Mentorship product lines,"[1743] was materially different from the MAIDIQ contract, which required "commercially off-the-shelf hardware and software resulting in turnkey systems for GSA's client agencies."[1744] The GAO acknowledged that the projects under the task order could require the use and application of IT acquired under the MAIDIQ contract. The GAO, however, could find "no tasks or subtasks included in the [scheduled of work] for this [task] order that are susceptible of being classified as noncomplex integration services [under the MAIDIQ contract]."[1745] The practice point is that task orders should be reasonably anticipated by potential offerors of the underlying contract—even when the order is placed through an IGA.

Nonappropriated Funds

DOD Allows One-Time Exception for TDY to Army Ten-Miler

On 27 September 2001, the Assistant Secretary of Defense (Force Management Policy) issued a memorandum permitting a one-time exception to the general rule[1746] that commands may not use appropriated funds (AFs) to send soldiers to Washington, DC for the "Army Ten-Miler."[1747] Before the race was canceled this year, commands were permitted to spend AFs for travel and per diem of "team participants" traveling to the Ten-Miler.[1748] Commanders who are general officers were allowed to authorize such use of AFs for "not more than one team from each sponsoring command in each event category."[1749] Moreover, "[t]eam membership is limited to soldiers and cadets and should be based on participation in an installation, activity, or command intramural program."[1750] Finally, the memo also per-

1734. *Id*. (citing a letter from Senators Fred Thompson (R-TN) and Joseph Lieberman (D-CT) to the Comptroller General).

1735. *Id*.

1736. *Id*.

1737. Codified in scattered sections of 40, 41 U.S.C. (2000).

1738. *See* 40 U.S.C. § 481(a)(3).

1739. 40 U.S.C. § 1401; 41 U.S.C. § 251.

1740. 31 U.S.C. § 1535 (2000).

1741. *See* FAR, *supra* note 11, § 17.500(b).

1742. Comp. Gen. B-285.451.3, B-285481.4, Oct. 25, 2000, 2000 CPD ¶ 172.

1743. *Id*. at 7.

1744. *Id*.

1745. *Id*.

1746. *See* Memorandum, Dep't of the Army, Deputy General Counsel (Ethics and Fiscal), to Command Judge Advocate, U.S. Army Community & Family Support Center, subject: Use of Appropriated Funds for Travel to Army 10-Miler (20 Mar. 2000).

mitted commands to obtain travel funding through commercial sponsorship.[1751]

Alas Poor UREP, We Hardly Knew Thee

Last year, we wrote about the Uniform Resource Expanded Program (UREP).[1752] The UREP was a proposed extension of the Uniform Resources Demonstration (URD).[1753] The URD permitted the merging of NAFs and AFs to support Morale, Welfare and Recreation (MWR) programs authorized AF support.[1754] Unfortunately for fans of the UREP, it appears that the program will not be enacted during the current session of Congress.[1755]

Army Issues New Civilian MWR Regulation

On 26 January 2001, the Army issued a new civilian MWR regulation.[1756] This new regulation "[r]eplaces the joint Army Regulation 215-7/AFR 176-14 due to the dissolution of the Army and Air Force Civilian Welfare Fund."[1757] The new regulation makes only minor changes to its predecessor regulations.[1758]

CAFC Affirms Furash *Decision*

Last year's Year in Review discussed *Furash & Co. v. United States*,[1759] in which the COFC ruled that it does not have jurisdiction over a self-funding government agency.[1760] On 13 July 2001, the CAFC affirmed the COFC's decision.[1761] Agreeing with the COFC that jurisdiction lies only over agencies that operate with appropriated funds, the court held that, because "the Finance Board's operations are to be funded through assessments against federal home loan banks, not from general fund revenues, . . . the Court of Federal Claims therefore lacks . . . jurisdiction over this case."[1762] This case is useful for government practitioners defending NAF entities because it provides a ready defense against any suit brought in the COFC.[1763]

1747. Memorandum, Assistant Secretary of Defense (Force Management Policy), to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: Funding of the Military Team Members Participating in the October 2001 Army 10-Miler Morale and Fitness Event (27 Sept. 2001). Secretary of the Army Thomas White issued a similar memo on 1 October 2001. *See* Memorandum, Secretary of the Army, to Assistant Secretary of the Army (Manpower & Reserve Affairs) et al., subject: Endorsement of the October 2001 Army Ten-Miler as an Army-Wide Morale and Fitness Event (1 Oct. 2001) [collectively, hereinafter 10-Miler Memos]. For information on the Army Ten-Miler, see their Web site. Military District of Washington, *Army Ten-Miler*, *at* http://www.armytenmiler.com/home.html (last visited Oct. 12, 2001).

1748. 10-Miler Memos, *supra* note 1747.

1749. *Id*.

1750. *Id*.

1751. *Id*. *See generally* U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES para. 7-47 (25 Oct. 1998).

1752. *2000 Year in Review*, *supra* note 2, at 100.

1753. *Id*.

1754. *Id*.

1755. *See* U.S. Army Community and Family Support Center, *DOD Legislation (107th Congress)* (5 July 2001) (on file with author). We do not know exactly why Congress does not favor this legislation.

1756. U.S. DEP'T OF ARMY, REG. 215-7, CIVILIAN NONAPPROPRIATED FUNDS AND MORALE, WELFARE, AND RECREATION ACTIVITIES (26 Jan. 2001).

1757. *Id*. at Summary of Change.

1758. *Id*.

1759. 46 Fed. Cl. 518 (2000).

1760. *2000 Year in Review*, *supra* note 2, at 100. *Furash* involved the U.S. Finance Board, an independent government agency supported by assessments on member banks rather than by appropriated funds. *See* 46 Fed. Cl. at 522-23.

1761. Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001).

1762. *Id*. at 1339-40.

1763. Attorneys should realize, however, that 28 U.S.C. § 1491(a)(1) (2000) establishes a separate basis for COFC jurisdiction over claims against service exchanges.

Paper or Plastic?

In another jurisdiction case, the ASBCA decided that it had jurisdiction over a dispute between a commissary bagger and the Defense Commissary Agency (DECA). In *Enrique (Hank) Hernandez*,[1764] the claimant worked as a commissary bagger at Goodfellow Air Force Base in Texas. Mr. Hernandez had signed an agreement with Goodfellow's commissary officer acknowledging his status as an independent contractor, acknowledging he was not a DECA employee, and agreeing that he would work for customer tips only.[1765] After the commissary officer fired Mr. Hernandez for alleged discourteous customer service, Mr. Hernandez complained to the DECA's regional director that his firing violated the signed agreement. The regional director never responded to Mr. Hernandez's claim.[1766] Mr. Hernandez next complained to the DECA, whose deputy general counsel denied relief, telling Mr. Hernandez that he did not have a contract with the DECA. Mr. Hernandez then filed an appeal with the ASBCA.[1767]

Moving to dismiss, the government argued that the ASBCA lacked jurisdiction over Mr. Hernandez's claim because there was never a contract between the claimant and the government within the meaning of the CDA.[1768] Mr. Hernandez countered that he had an implied-in-fact contract with the government, which granted the board jurisdiction.[1769]

The board sided with Mr. Hernandez, finding that the

> [a]ppellant offered to be a bagger at the commissary, and the services of appellant were accepted by the Government in signing the Agreement. The mutuality of consideration was the Government's obligation in consenting to appellant's performance of bagging services to furnish space for appellant's operations and encourage patrons to tip or, at a minimum, notify patrons that baggers work only for tips. Appellant was obligated to perform the bagging services according to the terms of the Agreement and received the benefit of tips. The Government received the benefit of customer service.[1770] The parties' mutual intent that appellant provide bagging services as an independent contractor and not an employee of the Government is evident in the terms of the Agreement. The parties' Agreement meets all of the requirements for the formation of a contract.[1771]

This case may potentially open up claims by independent contractors and concessionaires to CDA litigation. Though many such contractors and concessionaires will not seek CDA litigation, NAF contract advisors and attorneys should keep this case in mind when drafting agreements and especially in settling disputes.

Obligations

Deputy Secretary of Defense Invokes Feed and Forage Act

On 16 September 2001, pursuant to 41 U.S.C. § 11,[1772] the Deputy Secretary of Defense authorized the military departments to incur obligations in excess of available appropriations to support units conducting military operations in response to the 11 September 2001 terrorist attacks and aircraft crashes.[1773] The Deputy Secretary of Defense also authorized the military departments to incur deficiencies for the costs associated with the increased number of armed forces personnel called to active duty.[1774]

1764. ASBCA No. 53011, 00-2 BCA ¶ 31,220.

1765. *Id*. at 154,100.

1766. *Id*. at 154,101.

1767. *Id*. at 154,102.

1768. *Id*. The Contract Disputes Act, 41 U.S.C. §§ 607(d) 602 (2000), grants jurisdiction to the Board over disputes arising out of contracts with the government.

1769. *Enrique (Hank) Hernandez*, 00-2 BCA ¶ 31,220 at 154,103.

1770. Though there was not much "customer service," according to the commissary officer. *Id*. at 154,101.

1771. *Id*. at 154,103.

1772. 41 U.S.C. § 11 (2000).

1773. Memorandum, Deputy Secretary of Defense, subject: Obligations in Excess of Appropriations Subsequent to Terrorist Attacks and Aircraft Crashes at the World Trade Center, the Pentagon and in Pennsylvania (16 Sept. 2001).

1774. *Id.* (citing 10 U.S.C. § 2201(c) (2000)).

Continued Availability of Expired Appropriation for Additional Project Phases[1775]

In May 1997, PERSCOM entered into a "Basic Agreement" with the GSA's Federal FEDSIM for developing and implementing a declassification management system.[1776] The agreement was authorized pursuant to the Brooks Act,[1777] which allowed the GSA to enter into multiyear contracts.[1778] Under the terms of the Basic Agreement,

> [T]he existence of a defined requirement at the time this Basic Agreement is executed forms the basis for the incurring and recording of a financial obligation on the part of the client. This obligation remains in force across fiscal year boundaries until the specified services are delivered or the Agreement is rescinded by the signatories.[1779]

The Basic Agreement addressed only phase one of a proposed three-phase project.[1780] PERSCOM obligated $17.5 million of FY 1997 funds towards phase one work.[1781] The agreement did not require FEDSIM to do any work on phases two or three. The first phase was completed in May 1998 and cost only $8.5 million. After FY 1997 ended, PERSCOM wanted to "use the unexpended, but expired, balance of $9 million to complete work."[1782]

The Comptroller General opinion first sets forth the "black-letter" law concerning availability of obligations: "Obligated budget authority is available only to liquidate liabilities (i.e., obligations) legally incurred during the period for which the appropriation is available. Generally, if an agency has obligated more funds than needed for a project, it should deobligate the excess amount."[1783] Further, once an agency liquidates an obligation, "any remaining balances are not available to enter into a new obligation after the account has expired (i.e. if fiscal year funds, after the end of the fiscal year)."[1784] Because PERSCOM's agreement covered only phase one, the obligated FY 1997 funds were available only to liquidate obligations incurred for phase one.[1785]

PERSCOM argued that phases two and three were bona fide needs of FY 1997, and that "the expired budget authority should remain available to fund these additional phases."[1786] As GAO pointed out, however, "[n]othing in the bona fide needs rule suggests that expired appropriations may be used for a project for which a valid obligation was not incurred prior to expiration merely because there was a need for that project during that period."[1787] Therefore, "[b]ecause PERSCOM entered into an agreement incurring an obligation for only one phase of the project, it cannot now obligate and charge payments for additional phases to the expired fiscal year 1997 appropriation."[1788] Even if PERSCOM could show that the later phases were bona fide needs of FY 1997, "PERSCOM did not take appropriate action to satisfy that need during the fiscal year by contracting (i.e. incurring valid obligations) for additional phases during the period of availability of the appropriation."[1789] Therefore, PERSCOM could not obligate FY 1997

1775. Comp. Gen. B-286929, April 25, 2001, *available at* http://www.access.gpo.gov/su_docs/aces/aces170.shtml. For additional discussion of this decision, see *supra* notes 1689-94 and accompanying text, and *infra* notes 1829-31 and accompanying text.

1776. *Continued Availability*, Comp. Gen. B-286929, at 2.

1777. 40 U.S.C. § 757 (2000).

1778. *Continued Availability*, Comp. Gen. B-286929, at 2 (citing 40 U.S.C. § 757).

1779. *Id.*

1780. *Id*. "Phase I . . . consisted of designing and testing. Phase II will consist of establishing the declassification program. . . . Phase III will consist of developing a long-term program to sustain the declassification effort." *Id*.

1781. *Id*. at 3 (citations omitted).

1782. *Id.*

1783. *Id*. (citing 31 U.S.C. § 1553(a) (2000)).

1784. *Id*. at 4 (citation omitted).

1785. *Id.*

1786. *Id.*

1787. *Id*. (citation omitted).

1788. *Id*. at 1.

1789. *Id*. at 4.

funds after those funds had expired even if the need arose during FY 1997.

Operational and Contingency Funding

New FMR Chapter Provides Guidance on "CONOPS" Funding

In February 2001, the DOD issued a revised *Financial Management Regulation* chapter on contingency operations.[1790] Generally speaking, the services must execute contingency operations with current funding, and then provide the DOD with financial data to support the transfer of designated contingency funds to the departments,[1791] justification for supplemental appropriations,[1792] and justification for the billing of non-DOD organizations for reimbursable support.[1793] The revised chapter updates the guidance for funding DOD contingency operations,[1794] including peace and humanitarian operations, noncombatant evacuation operations (NEOs), and foreign disaster relief operations.[1795] Funding guidance for peacetime civil emergencies in CONUS is specifically excluded from the revised chapter.[1796]

The chapter provides guidance on the estimating process,[1797] the costs that may be reimbursed in a contingency operation,[1798] cost collection, determination, and reporting.[1799] The chapter also addresses special funding mechanisms,[1800] support to the United Nations,[1801] and funding issues in NEOs.[1802]

Sand Dollars: Southwest Asia Is No Longer a "Contingency" for Funding Purposes

Contingency operations funding has been, and will continue to be, an important topic of discussions between the DOD and Congress. Since the end of the Gulf War, the DOD has reported over $25 billion[1803] in incremental costs[1804] for overseas contingency operations. Since the Iraqi invasion of Kuwait in August 1990, the United States has maintained an ongoing robust pres-

1790. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 12 (Special Accounts and Programs), ch. 23 (Contingency Operations) (Feb. 2001) [hereinafter DOD FMR Contingency Operations].

1791. *See* Overseas Contingency Operations Transfer Fund (OCOTF), DOD Appropriations Act for FY 2001, Pub. L. No. 106-259, § 8131, 114 Stat. 661 (2000). The Act appropriates $3.94 billon of "no-year" funds "for expenditures directly relating to Overseas Contingency Operations by U.S. Military Forces." *Id.* These funds may be transferred to Operations and Maintenance (O&M) accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, Research, Development, Test, and Evaluation (RDT&E) accounts, and working capital funds. *See also* U.S. DEP'T OF DEFENSE, REG. 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 2B (Budget Formulation and Presentation), ch. 17, (Contingency Operations) (June 2000) [hereinafter DOD FMR Contingency Operations Budget Formulation].

1792. Supplemental appropriations have become routine over the last decade. For an example of a typical supplemental appropriation, see Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 106-31 (1999).

1793. The DOD may provide reimbursable support to other U.S. government agencies, and selected international organizations and foreign countries. Authorities to provide such support include: Economy Act, 31 U.S.C. § 1535 (2000); Foreign Assistance Act § 607, codified at 22 U.S.C. § 2357 (2000); UN Participation Act, codified at 22 U.S.C. § 287d-1; and Foreign Assistance Act § 632, codified at 22 U.S.C. § 2392.

1794. 10 U.S.C. § 101(13) (2000).

1795. DOD FMR Contingency Operations, *supra* note 1790, para. 230101.

1796. *Id.*

1797. *Id.* para. 2304.

1798. *Id.* para. 2306. Costs associated with a contingency operation are limited to the incremental costs of the operation, that is, costs that are above baseline training, operations, and personnel costs. *Id.* In other words, the costs that the unit would not otherwise have incurred, but for the contingency.

1799. *Id.* paras. 2307, 2309, and 2308 (respectively).

1800. *Id.* para. 2306. Chapter 23 uses the term "special funding mechanisms" in reference to the authority granted under 10 U.S.C. § 127a. Under section 127a, the Secretary of Defense has the authority to, under certain conditions, waive reimbursement of Working Capital Funds , and to transfer up to $200 million in any fiscal year to reimburse accounts used to fund operations for incremental expenses incurred. 10 U.S.C. § 127a (2000).

1801. DOD FMR Contingency Operations, *supra* note 1790, para. 231003.

1802. *Id.* para. 231102.

1803. GENERAL ACCOUNTING OFFICE, NEED FOR CONTINUED VISIBILITY OVER USE OF CONTINGENCY FUNDS, REPORT NO. GAO-01-829, at 1 (July 6, 2001) [hereinafter CONTINUED VISIBILITY]. Over $22 billion of those costs have been incurred in Southwest Asia (SWA) and the Balkans. *Id.* Through September 2000, $15.1 billion had been expended in the Balkans. *Id.* at 3. A further $7.1 billion had been expended in SWA. *Id.* at 4.

1804. Incremental costs are those costs directly attributable to the operation that would not have been incurred but for the operation. *Id.* at 1 n.1.

ence in the Southwest Asia (SWA) theater.[1805] The cost of maintaining this presence has been more than $7.1 billion.[1806] For a number of years, Congress has pushed the DOD to "budget" more funds for contingency operations, rather than continue to rely on supplemental appropriations requests. Congress authorized the Overseas Contingency Operations Fund (OCOTF),[1807] providing a mechanism that allows limited budgeting for contingencies. After ten years, the operations tempo in SWA is now thought to be relatively predictable and the ability of the DOD and the services to budget[1808] at the level to sustain current operations is well defined.

Budgeting for operations in SWA as part of the routine budgeting process has advantages, as well as several disadvantages. For example, under the current system, the audit trail for expenditures related to these contingencies is robust and easily discernible.[1809] Congress is hoping to achieve better cost control by shifting the cost of the SWA operations to the services.[1810]

Due to the tragic events of 11 September 2001, SWA will likely be eligible for contingency funding again soon to cover the costs of new operations. It remains to be seen how the operations against terrorism will be funded and what mechanisms will be used to control that funding.

Migration of Training Dollars—Congress to the Army: Stop Robbing Peter to Pay Paul

As every teenager knows, it's hard to live within the budget that mom and dad give you. In the real world, it's even harder to live within that budget. The Army is no different; trying to live within the budget that Congress approves each year is a daunting task. There will never be enough resources available to execute all the missions the Army believes it must execute to maintain readiness.

In each year's budget submission documents, the Army indicates to Congress how it will execute the funds provided in each appropriation. Among the many items included under the Army's Operation and Maintenance (O&M) appropriation is a sub-account for training armored units. Over the last few years, the Army has used over $1 billion of the $4.8 billion identified for heavy division training for other, non-training purposes.[1811] The Army primarily used the transferred funds to support base operations and real property maintenance at Army installations.[1812] Congress has been aware of the issue for the past several years,[1813] and has become increasingly unhappy with the Army's failure to use training funds for their designated purpose.[1814] The division training sub-activity has been the source for the majority of these transfers.[1815]

1805. The Army has maintained units in Kuwait, and has conducted a number of joint/combined exercises in Kuwait and neighboring countries. Operations Northern & Southern Watch, the enforcement of no-fly zones over much of Iraq, continues on a daily basis. *See generally* CONTINUED VISIBILITY, *supra* note 1803; GENERAL ACCOUNTING OFFICE, FISCAL YEAR 2000 CONTINGENCY OPERATIONS COSTS AND FUNDING, REPORT NO. GAO/NSIAD-00-168 (June 6, 2000); *2000 Year in Review*, *supra* note 2, at 101.

1806. As of September 2000, the DOD had expended $7.1 billion in SWA since the end of the Gulf War. CONTINUED VISIBILITY, *supra* note 1803, at 4.

1807. *2000 Year in Review*, *supra* note 2, at 101. Funds from the OCOTF are commonly referred to as "CONOPS" funds. *See* DOD FMR Contingency Operations Budget Formulation, *supra* note 1791.

1808. The Army's budget submission document for FY 2002 states that the Army received $210.3 million from the OCOTF in FY 01 for operations in SWA. This level of funding supports 2850 active duty soldiers and 496 reserve component soldiers. U.S. DEP'T OF ARMY, FY 2002 BUDGET SUBMISSION, OPERATIONS AND MAINTENANCE ARMY (OMA) Volume 1: Justification of OMA Estimates for FY 2002 at 135-5 (June 27, 2001), *available at* http://www.asafm.army.mil/budget/fybm/fybm.asp. *See also* CONTINUED VISIBILITY, *supra* note 1803, at 2.

1809. Under current rules, the DOD is required to submit monthly contingency operations cost reports. CONTINUED VISIBILITY, *supra* note 1803, at 2-3, 11. By requiring the services to fund SWA operations directly from service O&M accounts, visibility over these costs will be significantly reduced, if not lost all together. *Id.*

1810. *Id.* at 10.

1811. GENERAL ACCOUNTING OFFICE, NEED TO BETTER INFORM CONGRESS ON FUNDING FOR ARMY DIVISION TRAINING, REPORT NO. GAO-01-902, at 2 (July 5, 2001) [hereinafter ARMY DIVISION TRAINING]. The Army uses a planning figure of 800 tank miles for home station training as a baseline for funding tank training. *Id.* at 10. The Army uses the 800 tank mile goal to develop divisions' home station training budgets. *Id.* at 6. The Army consistently missed that 800 tank mile average by twenty-six percent during FY 1997 to FY 2000. *Id.* at 10. The Army continues to use the 800 tank mile figure for budgeting purposes. ASSITANT SECRETARY OF THE ARMY FOR FINANCIAL MANAGEMENT AND COMPTROLLER, FY 2002 ARMY GREEN TOP 2 (June 25, 2001), *available at* http://www.asafm.army.mil/budget/fybm/fybm.asp.

1812. ARMY DIVISION TRAINING, *supra* note 1811, at 2.

1813. *See* GENERAL ACCOUNTING OFFICE, ANALYSIS OF REAL PROPERTY MAINTENANCE AND BASE OPERATIONS FUND MOVEMENTS, REPORT NO. GAO/NSIAD-00-87 (Feb. 29, 2000); GENERAL ACCOUNTING OFFICE, ARMY TRAINING: ONE-THIRD OF 1993 AND 1994 BUDGETED FUNDS WERE USED FOR OTHER PURPOSES, REPORT NO. GAO/NSIAD-95-71 (Apr. 7, 1995).

1814. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 365, 113 Stat. 512 (1999) (requiring the Comptroller General to review real property maintenance (RPM) funding, including diversion of training funds to RPM, and the impact of those diversions on readiness).

1815. ARMY DIVISION TRAINING, *supra* note 1811, at 8.

In response to Congress' displeasure, the Army issued guidance for FY 2001, restricting the authority and ability of Army commands to transfer training funds to other purposes.[1816] As a result of the revised guidance, Army commands are now severely limited in their ability to migrate funds to non-training activities.[1817] This policy will result in a significant decrease in effective real property maintenance funding over the near term.[1818]

The Great DOD Giveaway:
DSCA Issues a Drawdown Handbook

In December, the Defense Security Cooperation Agency (DSCA) issued a *Handbook for Drawdowns of Defense Articles and Services*.[1819] Drawdown authority[1820] allows the President to provide specified amounts of U.S. government goods and services to authorized recipients. Drawdowns have become ever more important in the execution of U.S. foreign policy over the last decade.[1821] DSCA's *Handbook* is a good "nuts and bolts" guide to drawdowns.

Revolving Funds

If You Don't Use It, You Might Just Lose It!

As a general rule, revolving funds are "no-year" funds that do not depend on annual appropriations.[1822] Because of this, agencies with leftover money at the end of a fiscal year may obligate those funds on a project that crosses fiscal years rather than let them expire. In effect, an agency may be using current year funds several years later if it "banked" those funds with a revolving fund. The GAO, however, issued two opinions and a report to Congress this past year that may limit agencies' ability to bank funds in the future.

In *Implementation of the Library of Congress FEDLINK Revolving Fund*,[1823] the Library of Congress (Library) asked the GAO whether the Federal Library and Information Network (FEDLINK) revolving fund could keep, without fiscal year limitation, deobligated, unexpended balances of customer funds advanced to it for future customer orders. Like a typical revolving fund, FEDLINK is self-sufficient and uses customer deposits to cover the costs of providing goods and services to its customers. The Library cited its organic legislation to the GAO in arguing that it could bank unspent, deobligated customer funds to cover future customer orders: "Amounts in the accounts of the revolving fund under this section shall be available to the Librarian, in amounts specified in appropriations Acts and *without fiscal year limitation*, to carry out the program covered by each such account."[1824]

The GAO agreed with the Library, but only in part. The GAO viewed the FEDLINK revolving fund as having two components: (1) customer advances to cover customer orders, and (2) reimbursements to the Library to cover administrative costs. GAO agreed with the Library that funds used to cover administrative costs retain their no-year identity because they relate to on-going, day-to-day costs. Tthe GAO disagreed with the Library, however, on the issue of funds used for advance orders.

1816. Memorandum, Deputy Chief of Staff for Operations and Plans, Department of the Army, subject: FY01 Operating Tempo (OPTEMPO)/Flying Hour Program (FHP) Management Implementation Instructions (17 Oct. 2000) [hereinafter DCSOPS memo]; Memorandum, Assistant Secretary of the Army (Financial Management and Comptroller), Department of the Army, subject: FY 2001 Operations and Maintenance, Army (OMA) Funding Letter (25 Sept. 2000) [hereinafter ASA(FM&C) Memo].

1817. ASA(FM&C) Memo, *supra* note 1816, at Narrative Guidance, para. 1a (directing major commands to execute ground OPTEMPO and Flying Hour Program as specified in the Combined Arms Training Strategy and prohibiting the migration of training funds to other purposes without prior approval of headquarters, Department of the Army).

1818. *Id*. at 1.

1819. U.S. Dep't of Defense, Security Cooperation Agency, DSCA Action Officer (AO) Handbook for Foreign Assistance Act (FAA): Drawdown of Defense Articles and Services (Dec. 15, 2000) [hereinafter Drawdown Handbook], *available at*: http://129.48.104.198/programs/erasa/Drawdown%20handbookr1.pdf.

1820. The Foreign Assistance Act of 1961, Pub. L. 87-195, as amended, provides three drawdown authorities. The relevant sections of the Act are: FAA section 506(a)(1), 22 U.S.C. § 2318 (2000), providing up to $100 million worth of DOD stocks, services and training per fiscal year for unforeseen emergencies; FAA secion 506(a)(2), 22 U.S.C. § 2318, providing up to $200 million worth of U.S. government stocks, services, and training per fiscal year for counternarcotics, disaster relief, migration and refugee assistance, antiterrorism, and non-proliferation assistance, up to $75 million of which may come from the DOD; and FAA section 552(c)(2), 22 U.S.C. §2348a, providing up to $25 million worth of U.S. government stocks, services and training per fiscal year for peacekeeeping. The total drawdown authority per fiscal year is $325 million, of which $200 million may be furnished directly by the DOD. For a chart depicting the authorities and authorized uses, see The Judge Advocate General's School Web site at http://www.jagcnet.army.mil/TJAGSA. Once you reach the school's home page, toggle on "Publications." Then look under the Contract and Fiscal portion for "Chart: Drawdown Authorities." No password or registration is required.

1821. From 1980 to 1992, the United States executed twenty-five drawdowns for a total value of $652.02 million. Between 1993 and October 2000, the United States executed forty-nine drawdowns with a total value of $1,817.8 billion. Drawdown Handbook, *supra* note 1820, para. C2.2.4

1822. 10 U.S.C. § 2210(b) (2000).

1823. Comp. Gen. B-288142, Sept. 6, 2001, *available at* http://www.gao.gov/decisions/appro/288142.htm.

1824. Pub. L. No. 106-481, § 103(e), 114 Stat. 2187 (2000) (emphasis added).

Analyzing the issue in light of the bona fide needs rule,[1825] the GAO reasoned, "When, as here, an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, that amount is available for obligation only for the same period as the appropriation from which the funds were withdrawn."[1826] Disagreeing with the general rule that revolving funds contain no-year money, the GAO further held, "Because they are subject to the same time limitations as the appropriation from which they were withdrawn, the withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited."[1827] Making its position even clearer, the GAO went on to state that "amounts withdrawn from a fiscal year appropriation and credited to a no-year revolving fund, such as the FEDLINK revolving fund, are available for obligation only during the fiscal year of availability of the appropriation from which the amount was withdrawn."[1828]

The GAO reached a similar conclusion in *Continued Availability of Expired Appropriation for Additional Project Phases*.[1829] In that case, PERSCOM had contracted with the GSA's FEDSIM to implement a declassification information management system. The FEDSIM is a revolving fund. Although the contract envisioned a three-phase project, PERSCOM contracted in FY 1997 only for the first phase. It nonetheless obligated enough FY 1997 funds to cover all three phases. After completion of the first phase, PERSCOM wanted to use the remaining funds ($9 million) to cover the second and third phases of the project. PERSCOM reasoned that, since the remaining funds were in the revolving fund, those funds had not expired and could be used for the remaining phases.[1830]

The GAO disagreed, reasoning that even if the second and third phases were bona fide needs of FY 1997, PERSCOM did not incur an obligation to pay for those needs when it originally obligated the FY 1997 funds. In other words, if the original contract had specified that the FY 1997 funds were to cover all three phases, rather than just the first phase, then PERSCOM could have used the remaining $9 million to pay for the remaining two requirements. Despite the no-year nature of the FEDSIM fund, the GAO found, "Once the obligational period has expired, new obligations must be charged to current funds even if a continuing need arose during the prior period."[1831] The lesson learned for practitioners is to clearly identify all future needs envisioned in the obligation, even if the obligated funds enter a revolving fund.

The GAO also expressed concern with DOD's practice of "banking" money in revolving funds in a report released to Congress on 30 May 2001.[1832] Citing DOD's FY 2001 budget estimates, the GAO stated that "working capital fund industrial activities will have about $7 billion of funded work that will be carried over from fiscal year 2001 into fiscal year 2002."[1833] Though recognizing the necessity of "some carryover to ensure a smooth flow of work during the transition from one fiscal year to the next," the GAO noted that Congress is concerned "that the level of carryover may be more than is needed for this purpose."[1834] After analyzing how the DOD runs its working capital funds, the GAO concluded by recommending that the DOD implement four initiatives to bring consistency to the DOD's carryover policies.[1835] The DOD has accepted these recommendations.[1836]

1825. 31 U.S.C. § 1502 (2000). The GAO actually cited 31 U.S.C. § 1532 (2000) in its analysis.

1826. *FEDLINK Revolving Fund*, Comp. Gen. B-288142, at 2.

1827. *Id*.

1828. *Id*.

1829. Comp. Gen. B-286929, Apr. 25, 2001, *available at* http://www.access.gpo.gov/su_docs/aces/aces170.shtml. For further discussion of this decision, see *supra* notes 1689-94 and 1772-89.

1830. *Continued Availability*, Comp. Gen. B-286929, at 5.

1831. *Id*.

1832. General Accounting Office, Defense Working Capital Fund: Improvements Needed for Managing the Backlog of Funded Work, Report No. GAO-01-559 (May 30, 2001).

1833. *Id*. at 1.

1834. *Id*.

1835. Those recommendations involve:

> (1) determining the appropriate carryover standard for the depot maintenance, ordnance, and research and development activity groups based on the type of work performed by the activity group and its business practices, (2) clarifying DOD's policy on calculating months of carryover, (3) ensuring that the services calculate carryover in a consistent manner so that the carryover figures are comparable, and (4) providing better information on budgeted carryover.

Id. at 4.

These GAO opinions and report to Congress send a message to the DOD to carefully manage all monies placed in revolving funds. Although such funds may technically become no-year funds, the GAO and Congress likely will carefully evaluate whether an agency is using the revolving funds to simply bank funds otherwise set to expire.

1836. *Id*. at 28.

Appendix A

Department of Defense Legislation for Fiscal Year 2002

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2002

President Bush signed the Department of Defense Appropriations Act, 2002, on 10 January 2002.[1] The Act appropriated about $317.6 billion to the Department of Defense (DOD) for fiscal year (FY) 2002.[2] This amount is about $19.1 billion more than Congress appropriated for FY 2001, but about $1.9 billion less than President Bush requested for FY 2002.[3]

Military Personnel

Department of the Army

Congress appropriated about $23.4 billion for "Military Personnel, Army."[4] This amount is sufficient to support an active force composed of 480,000 soldiers.[5]

Department of the Navy

Congress appropriated about $19.6 billion for "Military Personnel, Navy" and about $7.3 billion for "Military Personnel, Marine Corps."[6] This amount is sufficient to support an active force composed of 376,000 sailors and 172,600 marines.[7]

Department of the Air Force

Congress appropriated about $19.8 billion for "Military Personnel, Air Force."[8] This amount is sufficient to support an active force composed of 358,800 airmen.[9]

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1. Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, 115 Stat. 2230 (2002). The Department of Defense Appropriations Act is Division A of Public Law Number 107-117. *Id*. The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 107-350, at 129 (2001); *see also* H.R. REP. NO. 107-298 (2001); S. REP. NO. 107-109 (2001).

2. H.R. CONF. REP. NO. 107-350, at 462 (2001). The conference report breaks down the appropriations as follows:

Military Personnel	$82,056,651,000;
Operations and Maintenance	$105,047,644,000;
Procurement	$60,864,948,000;
Research, Development, Test, and Evaluation	$48,921,641,000;
Revolving and Management Tools	$1,745, 394,,000;
Other DOD Programs	$20,491,353,000.

Id. at 130, 162, 211, 305, 389-90.

3. *Id.* at 462.

4. Department of Defense Appropriations Act, 2002, div. A, tit. I. Congress also appropriated about $2.6 billion for "Reserve Personnel, Army," and about $4 billion for "National Guard Personnel, Army." *Id.*

5. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 401, 115 Stat. 1012, ___ (2001).

6. Department of Defense Appropriations Act, 2002, div. A, tit. I. Congress also appropriated about $1.7 billion for "Reserve Personnel, Navy," and about $466 million for "Reserve Personnel, Marine Corps." *Id*.

7. *See* National Defense Authorization Act for Fiscal Year 2002, § 401.

8. Department of Defense Appropriations Act, 2002, div. A, tit. I. Congress also appropriated about $1.1 billion for "Reserve Personnel, Air Force," and $1.8 billion for "National Guard Personnel, Air Force." *Id*.

9. *See* National Defense Authorization Act for Fiscal Year 2002, § 401.

Emergency and Extraordinary Expenses and CINC Initiative Funds

Congress authorized the Secretary of Defense (SECDEF) and the service secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses."[10] In addition, Congress gave the SECDEF the authority to make $25 million of the Defense-wide O&M appropriation available for the Commander-in-Chief (CINC) initiative fund account.[11]

Overseas Contingency Operations Transfer Fund (OCOTF)

This year, Congress made significant changes to the OCOTF. Congress appropriated $50 million for "expenses directly relating to Overseas Contingency Operations by U.S. military forces."[12] The joint conference report accompanying the Act explains that "[t]his amount provides a central response fund from which the Secretary of Defense can address unknown and unexpected overseas contingency costs."[13]

The report goes on to explain that funds for operations in the Balkans and in Southwest Asia, previously provided through the OCOTF, had been provided through the Services' operations and maintenance and military personnel appropriations.[14] As in past years, funds appropriated to the OCOTF remain available until expended; however, the SECDEF may transfer them to the military personnel accounts, O&M accounts, the Defense Health Program appropriation, procurement accounts, RDT&E accounts, and to working capital funds.[15] Transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is prohibited, and the SECDEF must submit a report each fiscal quarter detailing certain transfers to the congressional appropriations committees.[16]

Overseas Humanitarian, Disaster, and Civic Aid

Congress appropriated $49.7 million for the DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.[17] These funds are available until 30 September 2003.[18]

Drug Interdiction and Counter-Drug Activities

The Department of Defense received about $843 million for drug interdiction and counter-drug activities.[19]

End-of-Year Spending Limited

Congress continued to limit the ability of the SECDEF and the service secretaries to obligate funds during the last two months of the fiscal year to twenty percent of the applicable appropriation.[20]

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10. Department of Defense Appropriations Act, 2002, div. A, tit. II. Congress capped this authority at $10,794,000 for the Army, $4,569,000 for the Navy, $7,998,000 for the Air Force, and $33,500,000 for the DOD. *Id*; *see also* 10 U.S.C. § 127 (2000) (authorizing the Secretary of Defense, the DOD Inspector General, and the Secretaries of the military departments to provide for "any emergency or extraordinary expense which cannot be anticipated or classified").

11. Department of Defense Appropriations Act, 2002, div. A, tit. II (Operation and Maintenance, Defense-Wide); *see also* 10 U.S.C. § 166a (2000) (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the CINC Initiative Fund to combatant commanders for specified purposes).

12. Department of Defense Appropriations Act, 2002, div. A, tit. II (Overseas Contingency Operations Transfer Fund). This is a significant decrease from the nearly $4 billion that Congress appropriated to DOD last year. *See* Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, 114 Stat. 656, 661 (2001).

13. H.R. CONF. REP. NO. 107-350, at 209 (2001).

14. *Id*.

15. Department of Defense Appropriations Act, 2002, div. A., tit. II (Overseas Contingency Operations Transfer Fund).

16. *Id.* § 8115.

17. *Id.* The DOD provides humanitarian, disaster, and civic aid to foreign governments pursuant to several statutes. *See, e.g.*, 10 U.S.C. §§ 401-402, 404, 2557, 2561 (2000).

18. Department of Defense Appropriations Act, 2002, div. A, tit. II (Overseas Humanitarian, Disaster, and Civic Aid).

19. *Id*. div. A, tit. VI (Drug Interdiction and Counter-Drug Activities, Defense).

Multi-Year Procurement Authority

Congress again prohibited the service secretaries from awarding a multi-year contract that: (1) exceeds $20 million for any one year of the contract, (2) provides for an unfunded contingent liability that exceeds $20 million, or (3) is an advance procurement which will lead to a multi-year contract in which procurement will exceed $20 million in any one year of the contract unless the service secretary notifies Congress at least thirty days in advance of award.[21] In addition, Congress prohibited the service secretaries from awarding multi-year contracts in excess of $500 million unless Congress specifically provided for the procurement in the Appropriations Act.[22] The only two multi-year procurements that Congress specifically authorized in this year's Appropriations Act are the Air Force's procurement of C-17 cargo aircraft and Navy/Marine Corps' procurement of engines for the F/A-18E.[23]

Military Installation Transfer Fund

Congress continued to authorize the SECDEF to enter into executive agreements that permit the DOD to deposit into a separate account the funds it receives from North Atlantic Treaty Organization (NATO) member nations for the return of overseas military installations to those nations.[24] The DOD may use this money to build facilities which have been approved by an Act of Congress to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.[25]

Commercial Activities Studies

If an agency desires to convert a function it currently performs in-house to contractor performance, 10 U.S.C. § 2461 requires the agency to notify Congress of its intent and then conduct a cost analysis to determine whether it will be cheaper to perform via contractor. In this year's Act, Congress has once again granted a waiver to that study requirement, thereby permitting agencies to make direct conversion of their functions if performance of that function will go to: (1) a firm that is listed on the Procurement List established by the Javits Wagner O'Day (JWOD) Act, which employs severely handicapped or blind employees, or (2) a firm that is at least fifty-one percent under the control of an American Indian tribe or Native Hawaiian organization.[26] Congress also continued the prohibition on the use of funds to perform A-76 studies if the government exceeds twenty-four months to perform a study of a single function activity or forty-eight months to perform a study of a multi-function activity.[27]

Limit on Transfer of Defense Articles and Services

The Act also prohibits the transfer of defense articles or services (other than intelligence services) to another nation or international organization during peacekeeping, peace-enforcement, or humanitarian assistance operations, without advance congressional notification.[28]

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20. *Id.* § 8004. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officer Training Corps (ROTC) cadets. *Id*.

21. *Id*. Congress also continued to require a present-value analysis to determine whether a multi-year contract will provide the government with the lowest total cost as well as an advance notice at least ten days before terminating a multi-year procurement contract. *Id*.

22. *Id*.

23. *Id.* § 8008; *see also infra* notes 69-70 and accompanying text.

24. Department of Defense Appropriations Act, 2002, § 8019.

25. *Id.*

26. *Id.* § 8014.

27. *Id.* § 8024.

28. *Id.* § 8072. This provision originally appeared in the FY 1996 Appropriations Act. *See* Department of Defense Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995).

Limitation on Training of Foreign Security Forces

Unless the SECDEF determines that a waiver is required, no funds may be used to support training of a unit of the security forces of a foreign country where "credible information" exists that the unit has committed a gross violation of human rights.[29]

Required Actions of DOD Chief Information Officer

No funds appropriated in the Department of Defense Appropriations Act for FY 2002 are available for a mission critical or mission-essential information technology system until it is registered with the DOD Chief Information Officer (CIO).[30] In addition, for major automated information systems, the CIO must certify that the system is compliant with the Clinger-Cohen Act of 1996 before Milestone I, II, or III approval.[31]

Repeal of F-22 Restrictions

The Act repeals restrictions placed upon the Air Force's F-22 program in last year's Appropriations Act,[32] including a prohibition on expending more than $58 billion on engineering and manufacturing development and production.[33]

Matching Disbursements With Obligations

Section 8106 of the Department of Defense Appropriations Act for 1997[34] required DOD, before making a disbursement in excess of $500,000, to match that intended disbursement with an obligation. In this year's Appropriation Act, Congress extends that requirement to cover disbursements made in FY 2002.[35]

Regional Defense Counter-Terrorism Fellowship Program

The Act also appropriated separate funds in the amount of $17.9 million to enable the SECDEF to establish a Regional Defense Counter-Terrorism Fellowship Program.[36] The program will fund the training of foreign military officers on counter-terrorism subjects at U.S. military schools.[37]

U.S.S. Greeneville Claims

The Secretary of the Navy has been granted the authority to settle any admiralty claims arising out of the collision between the U.S.S. Greenville and the Ehime Maru, regardless of their dollar amount.[38]

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29. Department of Defense Appropriations Act, 2002, § 8093. This same provision has been included in appropriations acts since FY 1999. *See* Department of Defense Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998).

30. Department of Defense Appropriations Act, 2002, § 8104(a). Registration with the Chief Information Officer was required under section 8102(a) in last year's appropriation act and under section 8121(a) in the Department of Defense Appropriations Act for Fiscal Year 2000.

31. *Id*. § 8104(b).

32. *See* Department of Defense Appropriations Act for Fiscal Year 2001, § 8125, Pub. L. No. 106-259, 114 Stat. 656, 702 (2000).

33. Department of Defense Appropriations Act, 2002, § 8091.

34. Pub. L. No. 104-208, § 8106, 110 Stat. 3009, 3111 (1996).

35. Department of Defense Appropriations Act, 2002, § 8118.

36. *Id*. § 8125. The funds are no-year funds. *Id*.

37. *Id*.

38. *Id*. § 8133 (indicating the source of payment will be Operations and Maintenance, Navy appropriations).

Congress Giveth and Congress Taketh Away

From the $22.3 billion that Congress appropriated for Operations and Maintenance, Army for FY 2002, Congress has already taken back $5 million to reflect savings the Army has achieved (or is expected to achieve) in "Army acquisition management practices."[39]

Boeing Lease Program

Congress has granted the Air Force authority to establish a multi-year pilot program to lease up to one hundred Boeing 767 and four Boeing 737 aircraft.[40] One of the more interesting aspects of this grant of authority is that Congress has exempted the pilot program from the normal lease versus purchase analysis that is required in government contracting.[41]

Aircraft Industrial Base

The Act also notes congressional concern regarding the shrinking defense industrial base, particularly that related to the aircraft industry.[42] Congress has, therefore, tasked the SECDEF to study the impact that this shrinking industrial base has had on the ability to control costs and to obtain innovation. The SECDEF must submit a report containing the results of this study within six months of passage of the Act.[43]

Counter-Terrorism and Operational Response Transfer Fund

Congress appropriated $478 million to establish the Counter-Terrorism and Operational Response Transfer Fund. These funds are to be used to protect against terrorist attacks, to prepare for the consequences of such attacks, and to deny unauthorized users access to sensitive military data or networks.[44]

Of the amount provided, $333 million is available only for improving force protection and defenses against chemical or biological attack and for response to attacks using weapons of mass destruction; $70 million is available only for improving DOD capabilities relating to information assurance, critical infrastructure protection, and information operations; and $75 million is available only for development and demonstration of systems to protect against unconventional nuclear threats. The Secretary may transfer these funds to any appropriation account of the DOD but, within ninety days of enactment of the Act, must submit a report to Congress identifying the projects and accounts to which he will transfer these funds.[45]

Former Soviet Union Threat Reduction

Congress appropriated $403 million for assistance to the republics of the former Soviet Union. This assistance is limited to activities related to the elimination, safe and secure transportation, and storage of nuclear, chemical, and other weapons in those countries, including efforts aimed at non-proliferation of these weapons. Significantly, however, Congress also included authority to use these funds for "defense and military contacts."[46]

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39. *Id*. § 8149.

40. *Id*. § 8159.

41. *Id*. § 8159 (exempting the program from 10 U.S.C. §2401a (2000)).

42. *Id*. § 8162.

43. *Id*. (noting that funding for the study and report will come from the Defense-wide procurement appropriations).

44. *Id*. div. A, tit. IX (Counter-Terrorism and Operational Response Transfer Fund).

45. *Id.*

46. *Id*. (Former Soviet Union Threat Reduction). Inclusion of this language appears to expand the purpose of the appropriation to include basic military-to-military contacts. Such contacts have been included in the National Defense Authorization Acts for years. *See, e.g.*, National Defense Authorization Act for 2002, Pub. L. No. 107-107, § 1302(a)(8), 115 Stat. 1012, ___ (2001). This expanded authority will greatly enhance the ability of DOD to interact with these countries.

TRANSFERS FROM THE EMERGENCY RESPONSE FUND PURSUANT TO PUBLIC LAW 107-38[47]

On 18 September 2001, President Bush signed into law the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States.[48] This Act was passed in response to the terrorist attacks in New York City and the Pentagon and the aircraft crash in Pennsylvania on 11 September 2001. The Act appropriated $40 billion dollars for activities related to disaster relief, counter-terrorism, increased transportation security, and national security.[49]

The Act was unusual both for the breadth of authority it provided with respect to the expenditure of these funds and for the fact that, of the $40 billion, only $20 billion actually was appropriated. The remaining $20 billion was available for obligation "only when enacted in a subsequent emergency appropriations bill, in response to terrorist acts on September 11, 2001."[50] The Emergency Supplemental Act, 2002, enacted as division B of Public Law 107-117, appropriates the remainder of these funds.[51] Those provisions applicable to DOD are discussed below.

DOD Military Operation and Maintenance

The Act appropriates about $4 billion for the Defense Emergency Response Fund (DERF), for expenses related to the 11 September attacks, to remain available until expended. This appropriation is broken out as follows:

(1) For increased situational awareness, $850,000,000;

(2) For increased worldwide posture, $1,495,000;

(3) For offensive counterterrorism, $372,000,000;

(4) For initial crisis response, $39,100,000;

(5) For the Pentagon Reservation Maintenance Revolving Fund, $475,000,000;

(6) For relocation costs and other purposes, $164,500,000.[52]

Defense Emergency Response Fund

The Act clarifies that funds in the DERF may be used to reimburse other DOD accounts, but only for costs incurred on or after 11 September 2001.[53] The Act also provides that these funds may be used to liquidate obligations incurred under the authority of the Food and Forage Act.[54]

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47. Emergency Supplemental Act, 2002, Pub. L. No. 107-117, div. B, 115 Stat. 2230 (2002).

48. Pub. L. No. 107-38, 115 Stat. 220 (2001).

49. *Id.*

50. *Id.*

51. Emergency Supplemental Act, 2002.

52. *Id.* ch. 3. Of the funds appropriated for "relocation costs and other purposes," $500,000 is available only for the White House Commission on the National Monument of Remembrance. *Id.*

53. *Id.* § 301.

54. *Id.* The Food and Forage Act, 41 U.S.C. § 11 (2000), provides authority for the DOD to incur obligations in advance and in excess of available appropriations for certain purposes. The Deputy Secretary of Defense invoked the Food and Forage Act to authorize the incurrence of "deficiencies for clothing, subsistence, forage, fuel, quarters, transportation, and medical and hospital supplies" in response to the 11 September attacks. *See* Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments; Chairman of the Joints Chiefs of Staff; and Commander and Chief, U.S. Special Operations Command, subject: Obligations in Excess of Appropriations Subsequent to Terrorist Attacks and Aircraft Crashes at the World Trade Center, the Pentagon, and in Pennsylvania (16 Sept. 2001).

Support to the Salt Lake City Winter Olympics

The Act provides that DOD may use funds available in the Support for International Sporting Competitions, Defense (SISC) account[55] to support "essential security and safety" for the 2002 Winter Olympics.[56] The Act waives the statutory requirement that the Attorney General certify that "such assistance is necessary to meet essential security needs."[57] The Act also expands DOD's ability to use SISC funds to include payment of expenses incurred by Army National Guard and Air National Guard personnel in state active duty status and in full-time National Guard duty status in connection with providing essential security and safety support to the Olympic Games.[58]

Support to Pakistan and Jordan

The Act makes $100 million available for payments to Pakistan and Jordan for support provided, or to be provided, in connection with U.S. operations in Operation Enduring Freedom. Interestingly, the Act provides that the SECDEF may make these payments "in amounts as [he] may determine in his discretion, and [his] determination is final and conclusive upon the accounting officers of the United States."[59]

Transfer Authority

The Act contains an unusual transfer provision that authorizes the SECDEF to transfer up to one and one-half percent of the unobligated balances of Procurement and Research, Development, Test, and Evaluation (RDT&E) funds appropriated by the Defense Appropriations Act, 2002, to DOD's O&M accounts for costs incurred in support of Operations Enduring Freedom and Noble Anvil. This authority may not be used until all of the emergency supplemental funds provided through Public Law 107-38 have been obligated. This transfer authority expires on 30 April 2002.[60]

Assistance to U.S. Capitol Police

The Act provides authority to DOD (and other federal agencies) to provide assistance to the U.S. Capitol Police in the form of services (including personnel), equipment, and facilities. Such support may be on a temporary, reimbursable basis (when requested by the Capitol Police Board) or on a permanent, reimbursable basis (when requested through an advance written request from the Capitol Police Board). The DOD and the Coast Guard may provide temporary support on a non-reimbursable basis when assisting the capital police in carrying out its statutory duties related to the protection of members of Congress and their families.[61]

Military Construction

The Act authorizes the SECDEF to use up to $74.4 million in funds that were appropriated to DOD in the 2001 Emergency Supplemental Appropriations Act[62] to carry out emergency construction in response to the 11 September attacks.[63] Such construction

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55. *See* Pub. L. No. 104-208, div. A., § 5802, 110 Stat. 3009 (1996) (10 U.S.C. § 2564 note).

56. Emergency Supplemental Act, 2002, § 302.

57. *See* 10 U.S.C. § 2564(a) (2000).

58. Emergency Supplemental Act, 2002, § 302. The Act also authorizes provision of "logistical and security support" to the 2002 Paralympic Games. *Id.*

59. *Id.* § 304.

60. *Id.* § 306.

61. *Id.* § 911; *see* 40 U.S.C. § 212a-2 (2000).

62. Pub. L. No. 107-38, 115 Stat. 220 (2001).

63. Emergency Supplemental Act, 2002, ch. 10. The Act breaks this authority down by service, as follows:

Military Construction, Army	$20,700,000;
Military Construction, Navy	$2,000,000;
Military Construction, Air Force	$47,700,000;
Military Construction, Defense-wide	$35,000,000.

Id.

projects do not have to be authorized via the normal military construction (MILCON) project procedures,[64] so long as the SECDEF determines the project is designed to "respond to or protect against acts or threatened acts of terrorism."[65] Before carrying out such project, the SECDEF must notify Congress of his intent and wait fifteen days.[66]

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2002[67]

The President signed the National Defense Authorization Act for FY 2002 into law on 28 December 2001.

Procurement

Sale of Articles and Services from Army Industrial Facilities

The pilot program authorizing the Army to sell manufactured articles and services from its industrial facilities without regard to whether a commercial source of the article or service exists in the United States has been extended through 30 September 2002.[68]

Multi-Year Procurement Authority

Congress authorized the Navy to enter into a multi-year contract for engines for the F/A-18 E and F aircraft.[69] It also authorized the Air Force to enter into a multi-year contract for the procurement of up to 60 C-17 aircraft.[70]

Osprey Aircraft Program

Congress has prohibited the Navy from increasing the production rate for its V-22 Osprey Aircraft above the minimum sustaining production rate until the SECDEF certifies to Congress that: (1) operational testing of the V-22 has demonstrated the changes to the flight control software and hydraulic system are adequate to achieve low risk to passengers and crew, (2) the V-22 can achieve sufficient reliability and maintainability levels to ensure operational availability, and (3) the V-22 will be operationally effective both in terms of functioning in various operational settings and when employed with other types of aircraft.[71] The SECDEF is also directed to submit a report to Congress not later than thirty days before the resumption of flight testing of the V-22, which discusses the deficiencies in the hydraulics system and flight control software and any proposed remedies to these deficiencies.[72]

Research, Development, Test, and Evaluation

Ballistic Missile Defense

The Act amends section 224 of Title 10 to permit the SECDEF to transfer a program from the Ballistic Missile Defense Organization to one of the services. Before transferring program management responsibility, however, the SECDEF must submit notice of such intent to Congress and wait a minimum of sixty days.[73] The Act also gives the SECDEF authority to use up to $500 million in available RDT&E funds appropriated to DOD after FY 2001 to carry out construction projects necessary to establish and operate a Missile Defense System Test Bed.[74]

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64. *See* 10 U.S.C. § 2802 (2000).

65. Emergency Supplemental Act, 2002, § 1001.

66. *Id.* Compare with section 1504 of the National Defense Authorization Act for Fiscal Year 2002, discussed *infra* at notes 130-32, which contains similar authorization but without a notice-and-wait requirement.

67. Pub. L. No. 107-107, 115 Stat. 1012 (2001).

68. *Id*. § 112.

69. *Id.* § 122; *see also supra* note 23 and accompanying text.

70. National Defense Authorization Act for Fiscal Year 2002, § 131.

71. *Id.* § 123.

72. *Id.* § 124.

73. *Id*. § 231.

Science and Technology Demonstration Project

The Act directs the Navy to carry out a demonstration project that provides access to and use of the Major Range and Test Facility Bases (MRTFB) operated by the Navy. Small businesses and universities are eligible if performing research work under a contract awarded by the Office of Naval Research pursuant to either the Small Business Innovative Research Program or the Small Business Technology Transfer Program.[75]

Operation & Maintenance

Reimbursement for Usage of Commissary Facilities

The Act amends Title 10 to add a new section requiring military departments to reimburse the Defense Commissary Agency if they use a commissary facility for purposes other than commissary sales. Reimbursement is based on the depreciated value of the portion of the facility used for other than commissary purposes.[76]

NAFI Recovery of Costs Related to Shoplifting

The Act amends 31 U.S.C. § 3701(b)(1)(B) to revise the definition provided for civil recovery claims by the U.S. Government so that the government may now also recover the "actual and administrative costs related to shoplifting, theft detection, and theft prevention" at its Nonappropriated Fund Instrumentalities.[77]

Limitations on Performance of Depot-Level Maintenance

Since 1988, Congress has restricted DOD from performing more than fifty percent of its depot-level maintenance via contract unless a service secretary determined that national security required a waiver of the limitation.[78] The Act revises the waiver portion of this limitation by requiring the SECDEF—rather than the service secretary—to make this determination.[79] At the same time, the Act also revises 10 U.S.C. § 2474 to exclude maintenance work performed by contractors "pursuant to a public-private partnership" from the fifty-percent limitation.[80]

Army Manpower Reporting

Congress has directed the Army to submit annual reports for FY 02-04 indicating the number of work-year equivalents that contractors performed working on service contracts with the Army.[81]

DOD Dependents Schools Auxiliary Services

The Act amends the code section that requires DOD to operate a school system overseas for its dependents to permit dependents that are home-schooled to use the school system's resources, including the library and after-school programs such as music and sports.[82]

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74. *Id.* § 235.

75. *Id.* § 262; *see also* 10 U.S.C. § 2681 (2000) (permitting commercial entities to utilize a DOD MRTFB, but also permitting DOD to charge the commercial entity for both the direct and indirect costs of such usage). The demonstration project requires the Navy to charge the participant at the same rate it charges DOD users, which essentially covers only the direct costs. National Defense Authorization Act for Fiscal Year 2002, § 262.

76. National Defense Authorization Act for Fiscal Year 2002, § 332.

77. *Id.* § 335.

78. *See* 10 U.S.C. § 2466 (2000).

79. National Defense Authorization Act for Fiscal Year 2002, § 341.

80. *Id.* § 342. Congress authorized DOD to enter into public-private partnerships beginning in 2001 to encourage greater usage of defense depots. *See* National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 341, 114 Stat. 1654 (2000).

81. National Defense Authorization Act for Fiscal Year 2002, § 345. The report must also be categorized by federal service code and indicate the appropriation as well as the major organizational element that funded the contract. *Id.*

82. *Id.* § 353 (amending 20 U.S.C. § 926 (2000)).

Navy-Marine Corps Intranet

Last year, Congress imposed several restrictions on the Navy's ability to implement its purchase of intranet work stations. One of those restrictions was the requirement to purchase the work stations in increments, with a restriction on buying no more than fifteen percent of the total required work stations in the first increment.[83]

This year's Act permits the Secretary of the Navy to contract for a second increment of up to an additional 100,000 work stations conditioned upon the approval of both the Under Secretary of Defense for Acquisition, Technology, and Logistics and the DOD Chief Information Officer. It also permits the Secretary to contract for a third increment of up to an additional 150,000 work stations once the Navy demonstrates that it has 20,000 work stations successfully operating on the intranet. The Act also requires the Navy to submit a report to Congress on the status of testing and implementation of the intranet.[84]

Military Personnel Authorizations

Limitations on Personnel End Strengths

During times of war or national emergency, the President can suspend statutory end strength limits.[85] The Act has amended this authority to permit the suspension of end strengths to remain in effect for up to nearly seven months after the termination of war or national emergency.[86]

Acquisition Policy, Acquisition Management, and Related Matters

Management of the Procurement of Services

The Act adds sections 2330 and 2330a to Title 10, requiring DOD to establish a management structure for the procurement of services similar to the structure already in place for products. The Act specifically requires the services to appoint designated officials who will be responsible for managing services' procurement. It also requires the establishment of dollar thresholds applicable to certain acquisitions.[87]

The Act further requires that the designated official responsible for managing the acquisition of services to approve any procurement of services above these dollar thresholds when it is made through the use of a contract or task order that is not performance-based. This requirement also applies to any acquisition of services through a contract or task order awarded by an agency outside the DOD.[88]

Additionally, the management structure must collect and maintain data concerning purchases of services in excess of the simplified acquisition threshold. Data that must be accumulated includes the type of service purchased, the form of contract action used to acquire the service, and whether the purchase was performance-based and if so, whether it was done on a firm-fixed-price basis.[89]

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83. *See* National Defense Authorization Act for Fiscal Year 2001, § 814.

84. National Defense Authorization Act for Fiscal Year 2002, § 362.

85. *See* 10 U.S.C. § 123a (2000).

86. National Defense Authorization Act for Fiscal Year 2002, § 421. Previously, the suspension could last no longer than 30 November of the year following the termination of war or national emergency. *See* 10 U.S.C. § 123a (2000). Thus, for terminations occurring in the latter part of the fiscal year, this amendment provides expanded authority to suspend strength limitations for greater periods of time (for example, if a national emergency ended on 1 June, the President may now defer end strength limitations until 31 December, versus 30 November under prior law). For terminations that arise early in the fiscal year, however, the amendment actually reduces the President's ability to suspend end strengths (for example, if a national emergency ended on 1 April, the President may now defer end strength limitations only until 31 October, versus 30 November under prior law).

87. National Defense Authorization Act for Fiscal Year 2002, § 801.

88. *Id.*

89. *Id.*

Services Procurement Savings Goals

To give the management system added teeth, Congress has given DOD the goal of achieving specified reductions in the amount expended on services over the next ten fiscal years. By FY 2011, Congress expects DOD to achieve a ten-percent reduction in expenditures measured against the amount spent in FY 2000. More imminently, Congress believes DOD should achieve a three-percent reduction during the current fiscal year. Congress anticipates DOD will achieve these reductions through greater use of competition on task orders, increased use of performance-based services contracting, and improved management practices.[90]

Enhanced Competition Under Multiple Award Contracts for Services

The Act also requires the promulgation of new DFARS regulations requiring DOD to purchase on a "competitive basis" all services in excess of $100,000 made under a multiple award contract.[91] The Act permits exceptions to this requirement that parallel the current exceptions to the general rule, requiring that awardees be given a "fair opportunity to compete" for task orders issued under a multiple award contract.[92] The Act also defines "competitive basis" to generally require fair notice to all multiple award contractors as well as an opportunity to make an offer.[93] Finally, the Act prohibits the award of a task order not made on a "competitive basis" unless: (1) offers are received from at least three qualified contractors; or (2) the contracting officer determines, in writing, that no additional qualified contractors could be identified, despite reasonable efforts to do so.[94]

Preference for Federal Prison Industries Clarified

Federal agencies are required to purchase products made by the Federal Prison Industries (FPI) if those products meet the agency's requirements, are timely available, and are not more expensive than current market prices.[95] The FAR provisions that implement this statutory preference do not track the statute, however.[96] Specifically, the FAR requires agencies to obtain a "clearance" or waiver from the FPI before making an outside purchase, and it indicates that clearances would not normally be issued merely because other sources could provide the supply at a lower price.[97]

The Act adds a new section 2410n to Title 10 that emphasizes the prerequisites that must be met for the FPI preference to come into play. Under this new section, DOD must conduct market research to determine whether the FPI product is comparable in price, quality, and timeliness to other products. If the FPI product is not comparable, the item must be purchased using competitive procedures. Any timely offer from FPI should be considered and evaluated, along with all other offers, in accordance with the evaluation criteria set forth in the solicitation.[98]

Extension of Mentor-Protégé Program

The Mentor-Protégé Program established by section 831 of the National Defense Authorization Act for Fiscal Year 1991[99] has been extended for an additional three years.[100] Businesses now have until the end of FY 2005 to become protégés and enter into mentor-protégé agreements, and mentors are eligible for reimbursement of mentoring costs incurred through the end of FY 2008.[101]

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90. *Id.* § 802.

91. *Id.* § 803.

92. *Id.* § 803(b)(1); *see* 10 U.S.C. § 2304c(b) (2001); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. § 16.505(b)(2) (June 1997) [hereinafter FAR].

93. National Defense Authorization Act for Fiscal Year 2002, § 803(b)(2).

94. *Id.* § 803(b)(4).

95. *See* 18 U.S.C. § 4124 (2000).

96. *See* FAR, *supra* note 92, subpt. 8.6.

97. *Id.* § 8.605.

98. National Defense Authorization Act for Fiscal Year 2002, § 811.

99. Pub. L. No. 101-510, 104 Stat. 1498 (1990).

100. National Defense Authorization Act for Fiscal Year 2002, § 812. The program establishes incentives for defense contractors to serve as mentors for small disadvantaged businesses. *See* U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. app. I (Aug. 2000).

Conformity of Acquisition Phase and Milestone Terminology

When DOD Directive 5000.1, The Defense Acquisition System, and DOD Instruction 5000.2, Operation of the Defense Acquisition System, were revised on 23 October 2000, the terminology used to describe some of the phases and milestones for major systems was revised, causing a lack of conformity between the regulations and several pieces of legislation. This year's Authorization Act revised the terminology used in these pieces of legislation to make it conform with that used in the regulations.[102]

Follow-on Production Contracts Authorized for Prototype-Developed Products

In 1989, Congress authorized the Defense Advance Research Projects Agency (DARPA) to enter into Other Transactions (OTs)—a contract action not subject to the FAR— to acquire research from firms unwilling to conduct business with the government under the terms of the FAR.[103] In 1993, that authority was expanded to permit DOD to enter into OTs to acquire prototypes of products—in addition to research—so long as the product was relevant to an actual or proposed weapon system.[104]

The National Defense Authorization Act for Fiscal Year 2002 now permits DOD to award a follow-on contract for production quantities on a sole-source basis if competitive procedures were used to select the party(ies) the government contracted with in the initial OT. To take advantage of this provision, the parties will have to address the follow-on production contract in the initial OT, with the production quantity determined by balancing the investment made by the other party(ies) in the project against the interest of the government in having the project's end-product acquired through competition.[105]

Extension of Test Program for Commercial Items

The test program authorizing the use of simplified acquisition procedures to acquire certain commercial items has again been extended and is now set to expire on 1 January 2003.[106]

Exceptions to Educational Qualifications for Acquisition Workforce

To receive an appointment or assignment in the GS-1102 occupational specialty or a similar occupational specialty filled by a military member, a person must meet certain educational qualifications, including receipt of a baccalaureate degree and completion of at least twenty-four semester credit hours in business disciplines.[107]

The Act eases these qualification requirements for certain types of individuals. First, the Act makes these requirements inapplicable to: (1) individuals who served in a GS-1102 or similar position on or before 30 September 2000, and (2) individuals currently serving in the contingency contracting workforce. Second, the Act permits appointment of individuals not meeting these requirements and grants a three-year reprieve from the requirements from the time of appointment for that individual to attain the necessary qualifications.[108]

Identification and Recovery of Erroneous Payments

The Act adds a new section 3561 to Title 31, which requires any executive agency that annually awards total contracts in excess of $500 million to develop a program that will identify erroneous payments made to contractors. The Act also adds a new section 3562 to Title 31 which permits agencies to use any recovery of erroneous payments to: (1) reimburse the actual administrative expenses incurred by the agency in executing the program, and (2) to pay a contractor a contingency amount for its services rendered in recovering the erroneous payment from another contractor.[109]

101. National Defense Authorization Act for Fiscal Year 2002, § 812.

102. *Id.* § 821.

103. *See* Department of Defense Authorization Act for Fiscal Years 1990/1991, Pub. L. No. 101-189, § 251, 103 Stat. 1403 (1989) (codified at 10 U.S.C. § 2371).

104. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1721 (1993).

105. National Defense Authorization Act for Fiscal Year 2002, § 822.

106. *Id.* § 823; *see also* FAR, *supra* note 92, subpt. 13.5 (describing the implementation of this program).

107. *See* 10 U.S.C. § 1724(a) (2000).

108. National Defense Authorization Act for Fiscal Year 2002, § 824.

Codification of Berry Amendment

Section 9005 of the Department of Defense Appropriations Act for Fiscal Year 1993,[110] better known as the Berry Amendment, prohibits DOD from spending appropriated funds on a number of foreign items including food, clothing, textile products, specialty metals, hand tools and measuring tools. This year's Authorization Act codifies that prohibition by adding a new provision, 10 U.S.C. § 2533a.[111]

Overseas Personal Services Contracts

The State Department has had broad authority to enter into personal services contracts in overseas locations for several years.[112] This year's Authorization Act gives the State Department the authority to enter personal service contracts on behalf of DOD and other agencies.[113]

Defense Against Terrorism or Chemical/Biological Attack

For any procurement to "facilitate the defense against terrorism or biological or chemical attack against the United States" using funds appropriated to DOD in FY 2002 or FY 2003, Congress has raised the micro-purchase threshold to $15,000 and the simplified acquisition threshold to $250,000 if operating inside the United States, and $500,000 if operating outside the United States in support of a contingency operation. The Act also provides authority to treat any such purchase of biotechnology property or services as a commercial item acquisition.[114]

Counter-Drug Activities

Section 1004 of the National Defense Authorization Act for Fiscal Year 1991[115] provided DOD with broad authority to participate in counter-drug activities. This year's Act restates that authority and extends it through 2006.[116]

Combating Terrorism Readiness Initiative Funds

Section 1512 of the Act amends Title 10 to add a new section 166b.[117] This section codifies the longstanding practice of making funds available for high-priority, unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.[118]

109. *Id.* § 831.

110. Pub. L. No. 102-396, 106 Stat. 1900 (1992).

111. National Defense Authorization Act for Fiscal Year 2002, § 832.

112. *See* 22 U.S.C. § 2669(c) (2000).

113. National Defense Authorization Act for Fiscal Year 2002, § 833.

114. *Id.* § 836.

115. Pub. L. No. 101-510, § 1004, 104 Stat. 1684 (1990).

116. National Defense Authorization Act for Fiscal Year 2002, § 1021.

117. *Id.* § 1512.

118. Detailed procedures regarding the fund may be found in CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5261.01B (1 July 2001).

General Provisions

Bosnia/Kosovo Funding Limitations

The DOD is prohibited from obligating more than $1,315,600,000 for the Bosnia peacekeeping operation or more than $1,528,600,000 for the Kosovo peacekeeping operation from the Overseas Contingency Operations Transfer Fund.[119]

Clarification on Interest Penalties for Late Service Contract Payments

In the National Defense Authorization Act for FY 2001, Congress directed federal agencies to pay an interest penalty under a cost-reimbursement services contract that required the agency to make interim payments if the agency failed to do so within thirty days after receiving a proper invoice. The FY 2001 Act indicated the penalty provision would go into effect on 15 December 2000.[120] This year's Act clarifies that the penalty will apply to payments that are due after 15 December 2000 even if the contract was entered into before 15 December 2000.[121]

Civilian Personnel Matters

Reimbursement for Professional Credentials

Congress has added 5 U.S.C. § 5757, which permits an agency to use appropriated funds to pay for its competitive service employees' expenses associated with obtaining professional credentials.[122] Included within these expenses are the following: professional accreditation, state-imposed and professional licenses, professional certification, and examinations to obtain such credentials.[123]

Retention of Travel Perquisites

In section 6008 of the Federal Acquisition Streamlining Act of 1994,[124] Congress required the GSA to implement regulations that required federal employees to use travel perquisites they accrued performing official travel only for other future official travel purposes. This year's Authorization Act repealed that provision and specifically permits federal employees, military service members, and their family members and dependents to use these perquisites for personal use so long as the perquisite is obtained under the same terms as those offered to the general public and causes the government to incur no additional cost.[125]

Matters Relating to Other Nations

Logistical Support for Security Forces

The Act amends 22 U.S.C. § 3424 to permit DOD to use contractors, in addition to in-house resources, to provide logistical support to the Multinational Force and Observers.[126] The amendment also permits the President to waive reimbursement whenever he determines that "such action enhances or supports the national security interests of the United States."[127]

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119. National Defense Authorization Act for Fiscal Year 2002, § 1005. The changes to the OCOTF, see *supra* note 12 and accompanying text, make these ceilings largely irrelevant.

120. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 1010, 114 Stat. 1654A-251 (2000).

121. National Defense Authorization Act for Fiscal Year 2002, § 1007.

122. *Id.* § 1112. There is no corresponding provision for payment of a military member's professional credentials expenses.

123. *Id.*

124. Pub. L. No. 103-355, § 6008, 108 Stat. 3243, 3367 (1994).

125. National Defense Authorization Act for Fiscal Year 2002, § 1116.

126. *Id.* § 1211. This authority extends only to support provided to the Multinational Force and Observers operating in the Sinai as part of the peace accords reached between Egypt and Israel. *See generally* 22 U.S.C. §§ 3421-3427 (2000).

127. National Defense Authorization Act for Fiscal Year 2002, § 1211.

Allied Defense Burden Sharing

Congress indicates it believes the President should seek greater defense burden sharing by our allies. In particular, the Act suggests the United States should negotiate host nation support agreements with any allied country in which it has military personnel assigned, whereby it obtains financial contributions from that ally in an amount equal to seventy-five percent of the non-personnel costs incurred by the United States.[128]

Activities Relating To Combating Terrorism

Military Construction Project Funding

The Act authorizes the SECDEF to use certain emergency defense appropriations to carry out military construction projects that were not authorized via the normal specified MILCON project procedures,[129] so long as he determines the project is "necessary to respond to or protect against the terrorist attacks on the United States that occurred on September 11, 2001."[130] In carrying out these projects, the SECDEF may only use funds that were appropriated to DOD in the 2001 Emergency Supplemental Appropriations Act[131] and that are authorized for use in sections 1502 and 1503 of the National Defense Authorization Act for Fiscal Year 2002.[132]

Military Construction General Provisions

Congress has increased the thresholds for military construction projects that may be funded with operations and maintenance appropriations to $1,500,000 for projects intended to correct a deficiency that threatens life, health, or safety, and $750,000 for all other projects.[133] It has also increased the threshold for military construction projects that do not require the advance approval of the service secretary to $750,000.[134]

Extension of Alternative Authority to Acquire Military Housing

In 1996, Congress granted DOD additional authority to acquire military housing via non-traditional means, including use of loan and rental guarantees, conveyance of existing housing and facilities, and differential lease payments.[135] In this year's Appropriations Act, Congress extended the ability to make use of this alternative authority through 31 December 2012.[136]

Pentagon Memorial

Congress has authorized the SECDEF to establish a memorial at the Pentagon to remember the victims of the 11 September 2001 terrorist attack, and has authorized use of the Pentagon Reservation Maintenance Revolving Fund (PRMRF) as a source of the funds to construct and maintain the memorial. Congress has also authorized DOD to accept monetary gifts into the PRMRF and to use such gifted funds towards the establishment of the memorial as well as the repair of the portion of the Pentagon that was damaged in the attack.[137]

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128. *Id.* § 1214.

129. *See* 10 U.S.C. § 2802 (2000).

130. National Defense Authorization Act for Fiscal Year 2002, § 1504(a).

131. Pub. L. No. 107-38, 115 Stat. 220 (2001)

132. National Defense Authorization Act for Fiscal Year 2002, § 1504(c). See section 901 of Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, 115 Stat. 2230 (2002), discussed *supra* notes 64-66, which contains the additional requirement to notify Congress and wait fifteen days before carrying out the construction project.

133. National Defense Authorization Act for Fiscal Year 2002, § 2801(b) (to be codified at 10 U.S.C. § 2805(c)(1)).

134. *Id.* § 2801(a) (to be codified at 10 U.S.C. § 2805(b)(1)).

135. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186, 547 (1996) (amending Title 10 to add subchapter IV to chapter 169).

136. National Defense Authorization Act for Fiscal Year 2002, § 2805.

137. *Id.* § 2864.

MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2002

President Bush signed the Military Construction Appropriations Act, 2002, on 5 November 2001.[138] This Act appropriated $10.5 billion for military construction, family housing, and base closure activities.[139] This amount exceeds the FY 2001 total by more than $1.5 billion, or nearly a fifteen percent increase in funding. It is also nearly $530 million more than the administration requested.[140] Included in these appropriations are nearly $100 million for unspecified minor military construction and $10 million for contingency construction.[141] The Act also raised the amount of money that may be spent annually on each general or flag officer's quarters without notifying Congress; the new amount is $35,000.[142]

DEFENSE PRODUCTION ACT AMENDMENTS OF 2001[143]

The President signed the Defense Production Act Amendments of 2001 into law on 5 October 2001, extending the Defense Production Act of 1950[144] through 30 September 2003.[145] The House initially sought to extend the term by three years,[146] while the Senate

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138. Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (2001).

139. H.R. REP. NO. 107-246, at 56. The Military Construction Appropriations Act breaks the appropriations down as follows:

Military Construction, Army	$1,778,256,000;
Military Construction, Navy	$1,144,221,000;
Military Construction, Air Force	$1,194,880,000;
Military Construction, Defense-wide	$840,558,000;
Military Construction, Army National Guard	$405,565,000;
Military Construction, Air National Guard	$253,386,000
Military Construction, Army Reserve	$167,019,000;
Military Construction, Naval Reserve	$53,201,000;
Military Construction, Air Force Reserve	$74,857,000;
NATO Security Investment Program	$162,600,000;
Family Housing Construction, Army	$312,742,000;
Family Housing Operation & Maintenance, Army	$1,089,573,000;
Family Housing, Navy and Marine Corps	$331,780,000;
Family Housing Operation & Maintenance, Navy and Marine Corps	$910,095,000;
Family Housing Construction, Air Force	$550,703,000;
Family Housing Operational & Maintenance, Air Force	$844,715,000;
Family Housing, Defense-wide	$44,012,000;
(earmarked for construction)	$250,000;
DOD Family Housing Improvement Fund	$2,000,000;
Defense Homeowners Assistance Fund	$10,119,000;
Defense Homeowners Assistance Fund	$632,713,000.

Military Construction Appropriations Act, 2002, 115 Stat. at 474-78. The sum total of these appropriations amount to $10,802,995,000, but Congress also rescinded a total of $302,995,000, leaving a net amount of $10,500,000,000 in new obligational authority.

140. H.R. REP. NO. 107-246, at 56.

141. The conference report accompanying the Act provides the following amounts for unspecified minor military construction:

Unspecified Minor Construction, Army	$19,565,000;
Unspecified Minor Construction, Navy	$12,679,000;
Unspecified Minor Construction, Air Force	$11,750,000;
Unspecified Minor Construction, Defense-wide	$24,492,000;
Unspecified Minor Construction, Army National Guard	$16,526,000;
Unspecified Minor Construction, Air National Guard	$6,713,000;
Unspecified Minor Construction, Army Reserve	$2,625,000;
Unspecified Minor Construction, Air Force Reserve	$4,996,000.

Id. at 50-51.

142. Military Construction Appropriations Act, 2002, § 127, 115 Stat. at 482. Previously, this limit had been set at $25,000 per quarter. *See, e.g.*, Military Construction Appropriations Act, 2001, Pub. L. No. 106-246, § 127, 114 Stat. 511, 518 (2000).

143. Pub. L. No. 107-47, 115 Stat. 260 (2001).

144. 50 U.S.C. app. § 2061 (2000). This authority permits the President to compel contractors to fulfill government contractual requirements before commercial contract requirements even if the government contract was subsequent to the commercial contract. *Id*. app. § 2071.

thought the Act should only be extended for one year.[147] A compromise of a two-year extension was reached just days before the Act was set to expire.[148]

UNITED NATIONS PEACEKEEPING OPERATIONS

In 1999, Congress enacted legislation that restricted the Secretary of State's ability to pay the United States' share of United Nations (UN) assessments.[149] This Act specifically required the Secretary of State to certify that no UN member was assessed more than twenty-five percent for any peacekeeping operation before making payment to the UN.[150] Congress enacted an amendment to that legislation on 24 September 2001, which the President signed into law on 5 October 2001, raising the percentage limit to 28.15%.[151]

USA PATRIOT ACT OF 2001

Section 2465 of Title 10 of the U.S. Code generally prohibits DOD from entering into contracts for security and firefighting services on installations within the United States unless such services were already performed by a contractor on 24 September 1983.[152] Following the September 11th attacks on the World Trade Center and Pentagon, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, which the President signed into law on 26 October 2001.[153] One of the provisions of this Act grants DOD a temporary exception to the prohibition on procuring security services for the duration of Operation Enduring Freedom and for 180 days thereafter. The exception requires DOD to contract with state or local governments to procure security services.[154]

FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED APPROPRIATIONS ACT, 2002[155]

The Foreign Operations, Export Financing, and Related Appropriations Act provides funding for U.S. foreign and security assistance programs which are administered primarily by the State Department and its subordinate agencies. Because some of these programs impact DOD operations, a brief overview of the highlights of the Act follows.

Economic Support Fund

The Act appropriates $2.24 billion for the Economic Support Fund (ESF).[156] Of this amount, $720 million is available only for support to Israel and $655 million is available only for support to Egypt.[157]

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145. Defense Production Act Amendments of 2001, 115 Stat. at 260.

146. H.R. CONF. REP. NO. 107-173, at 1 (2001).

147. *See* 147 CONG. REC. S9673 (daily ed. Sept. 21, 2001).

148. *See* 147 CONG. REC. S9856-57 (daily ed. Sept. 26, 2001).

149. *See* Pub. L. No. 106-113, tit. IX, 113 Stat. 1501 (1999).

150. *Id.* § 931(b)(2), 113 Stat. at 1501A-480.

151. Pub. L. No. 107-46, 115 Stat. 259 (2001); *see* S. 248 (2001); 147 CONG. REC. H5941 (daily ed. Sept. 24, 2001) (for insight into the rationale for the passage of the Act).

152. 10 U.S.C. § 2465 (2000).

153. Pub. L. No. 107-56, 115 Stat. 272 (2001).

154. *Id.* § 1010, 115 Stat. at 395-96. It also does not provide an exception to the prohibition on procuring firefighting services. *Id.*

155. Pub. L. No. 107-115, 115 Stat. 2118 (2002).

156. Foreign Operations Appropriations Act, 2002, tit. II, 115 Stat. at ___ (2002). The ESF provides funding for foreign economic development through programs involving such things as balance of payment support, infrastructure and technical assistance development projects, and health, education, agriculture, and family planning. *See* 22 U.S.C. §§ 2346-2346d (2000).

157. Foreign Operations Appropriations Act, 2002, tit. II.

International Military Education and Training

Congress appropriated $75 million for the International Military Education and Training (IMET) Program.[158] Of this amount, not less than $600,000 is available for assistance to Armenia.[159]

Foreign Military Financing Program

The Act provides $3.674 billion for the Foreign Military Financing Program (FMFP).[160] Of this amount $2.04 billion is earmarked for grants to Israel and $1.3 billion is earmarked for grants to Egypt.[161]

Former Yugoslavia War Crimes Tribunal Drawdown

Congress authorized the President to drawdown up to $30 million of commodities and services under section 552(c) of the Foreign Assistance Act[162] for the United Nations War Crimes Tribunal for the former Yugoslavia. Before exercising this authority, the President must determine that providing goods or services through the drawdown "will contribute to a just resolution of charges regarding genocide or other violations of humanitarian law."[163]

Governments Destabilizing Sierra Leone

None of the funds appropriated by the Act may be made available to any government that the Secretary of State determines has directly or indirectly provided assistance to any group "intent on destabilizing the democratically elected government of Sierra Leone."[164] This provision specifically identifies the Sierra Leone Revolutionary United Front and the Liberian Armed Forces as such groups.[165] The Act also prohibits assistance to any government that the Secretary of State determines "has aided or abetted . . . in the illicit distribution, transportation, or sale of diamonds mined in Sierra Leone."[166]

Democracy and Human Rights in Muslim Countries

The Act provides that not less than $10 million of the funds appropriated for the Economic Support Fund[167] "shall be made available for programs and activities to foster democracy, human rights, press freedoms, and the rule of law in countries with a significant Muslim population . . . where such programs and activities would be important to the United States efforts to respond to, deter, or prevent acts of international terrorism."[168]

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158. *Id.* DOD administers the IMET program through which DOD personnel provide training to foreign military and defense personnel in the United States, and in participating foreign countries, on a grant basis. *See* 22 U.S.C. §§ 2347-2347d (2001).

159. Foreign Operations Appropriations Act, 2002, tit. II.

160. *Id.* Through the FMFP, eligible countries receive grants of U.S. funds to help them purchase U.S. defense articles, services, or training through one of the Foreign Military Sales (FMS) programs. *See* 22 U.S.C. §§ 2763-2754 (2001).

161. Foreign Operations Appropriations Act, 2002, tit. II.

162. 22 U.S.C. § 2348a(c) (2000). Under this authority, the President may direct any federal agency to provide goods or services to another country or international organization (in this case, the United Nations War Crimes Tribunal). Goods or services to be drawn down must come from an agency's stock, and, generally, an agency is not reimbursed for the costs of goods or services it provides. *See id.*

163. Foreign Operations Appropriations Act, 2002, tit. V, § 547.

164. *Id.* § 574(a).

165. *Id.*

166. *Id.* § 574(b).

167. *See supra* note 156 and accompanying text.

168. Foreign Operations Appropriations Act, 2002, tit. V, § 526(b).

Afghan Women and Children Relief Act of 2001

The Act provides the President the authority to "provide educational and health care assistance for women and children living in Afghanistan and as refugees in neighboring countries."[169] The President must provide the assistance in a manner that promotes and protects the human rights of all people in Afghanistan, "utilizing indigenous institutions and nongovernmental organizations, especially women's organizations"[170] to the maximum extent possible. The Act authorizes the use of funds appropriated under the 2001 Emergency Supplemental Appropriations Act[171] to carry out the purpose of the Act.

169. Afghan Women and Children Relief Act of 2001, § 3(a), Pub. L. No. 107-81, 115 Stat. 811.

170. *Id.* at § 3(b)(1).

171. Pub. L. No. 107-38, 115 Stat. 220 (2001). The Act also mandates periodic reporting requirements to inform Congress of the activities carried out under the Act and the condition of women and children in Afghanistan and in refugee camps. Afghan Women and Children Relief Act of 2001, § 3(b)(2).

Appendix B

Contract & Fiscal Law Web Sites

[S] indicates search engine

Content	Address

Meta-sites (indicated by [S])

Professor Steve Schooner's site	http://www.law.gwu.edu/facweb/sschooner
Where in Federal Contracting?	http://www.wifcon.com/
FedBizOps [S]	http://www.fedbizops.gov/
About	http://government.about.com/es/ecommerce
Army Single Face to Industry (ASFI)	http://acquisition.army.mil/default.htm
Defense Acquisition Deskbook [S]	http://www.deskbook.osd.mil
DoD Busops [S]	http://www.dodbusopps.com/
DoD E-Mall [S]	https://www.emall.dla.mil/
FindLaw [S]	http://www.findlaw.com
Fir[S]	http://www.firstgov.gov/
MEGALAW [S]	http://www.megalaw.com
SearchMil (search engine for .mil websites) [S]	http://www.searchmil.com/

A

ABA LawLink Legal Research Jumpstation [S]	http://www.lawtechnology.org/lawlink/home.html
ABA Network [S]	http://www.abanet.org/
ABA/GWU Public Contract Law Journal	http://www.abanet.org/contract/operations/lawjournal/journal.html
ABA Public Contract Law Section (Agency Level Bid Protests)	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network [S]	http://www.arnet.gov
ACQWeb - Office of Undersecretary of Defense for Acquisition & Technology [S]	http://www.acq.osd.mil
Agency for International Development [S]	http://www.info.usaid.gov
Air Force Acquisition Reform [S]	http://www.safaq.hq.af.mil/

Air Force ADR (includes guide to Federal procurement ADR) [S]	http://www.adr.af.mil
Air Force Contract Augmentation Program [S]	http://www.afcesa.af.mil/Directorate/CEX/AFCAP/afcap.html
Air Force FAR Supplement [S]	http://farsite.hill.af.mil
Air Force Home Page	http://www.af.mil/
Air Force Legal Services and Research Division	http://aflsa.jag.af.mil
Air Force Materiel Command Web Page [S]	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command SJA Web Page	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://afpubs.hq.af.mil/orgs.asp?type=pubs
Air Force Site, FAR, DFARS, Fed. Reg. [S]	http://farsite.hill.af.mil/
Army Acquisition Corps Website	http://dacm.rdaisa.army.mil
Army Corps of Engineers Home Page [S]	http://www.usace.army.mil/
Army Electronic Commerce Home Page [S]	http://www.armyec.army.mil/
Army Home Page [S]	http://www.army.mil/
Army Financial Management Home Page [S]	http://www.asafm.army.mil/
Army Materiel Command Web Page [S]	http://www.amc.army.mil/
Army Portal [S]	http://www.us.army.mil/
Army Publications [S]	http://www.usapa.army.mil
Army Single Face to Industry (ASFI) Acquisition Web Site	http://acquisition.army.mil/
Army STRICOM (Simulation, Training, and Instrumentation Command) Home Page [S]	http://www.stricom.army.mil/
ASBCA [S]	http://www.law.gwu.edu/asbca
ASSIST (Acquisition Streamlining and Standardization Information System)	http://astimage.daps.dla.mil/online/new

C

CASCOM Home Page [S]	http://www.cascom.army.mil/
CECOM	http://www.monmouth.army.mil/cecom/cecom.html
Code of Federal Regulation [S]	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
eCFR [S]	http://www.access.gpo.gov/ecfr
Coast Guard Home Page [S]	http://www.uscg.mil
Central Contractor Registration (DOD) [S]	http://www.ccr2000.com
Commerce Business Daily (CBD) [S]	http://cbdnet.access.gpo.gov
Commerce Clearing House [S]	http://business.cch.com/government_contracts
Comptroller General Decisions [S]	http://www.gao.gov/decisions/decison.htm

Congress on the Net-Legislative Info [S]	http://thomas.loc.gov/
Contract Pricing Reference Guides	http://www.hydra.gsa.gov/staff/v/guides/volumes.htm
Cornell University Law School – Extensive list of links to legal research sites (USC, CFR, etc.) [S]	www.law.cornell.edu
Cost Accounting Standards (see 48 CFR, Ch 99)	http://www.fedmarket.com/vtools/links/cas.html

D

DCAA Web Page	http://www.dcaa.mil
Debarred List	http://epls.arnet.gov
Defense Acquisition Deskbook [S]	http://www.deskbook.osd.mil
Defense Acquisition University [S]	http://www.dau.mil/
Defense Electronic Business Program Office (formerly JECPO) [S]	http://www.defenselink.mil/acq/ebusiness/
DOD Busops [S]	http://www.dodbusopps.com/
DOD Contract Pricing Reference Guide [S]	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DOD E-Mall [S]	https://www.emallmom01.dla.mil/scripts/default.asp
DOD Inspector General (Audit Reports) [S]	http://www.dodig.osd.mil
Defense Logistics Agency Electronic Commerce Home Page [S]	http://www.supply.dla.mil/
Defense Tech. Info. Ctr. Home Page (use jumper Defenselink and other sites) [S]	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.contracts.ogc.doc.gov/cld/cld.html
Department of Justice (jumpers to other Federal Agencies and Criminal Justice) [S]	http://www.usdoj.gov
Department of Veterans Affairs Web Page [S]	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals [S]	http://www.va.gov/bca/index.htm
Defense Acquisition Regulations Directorate (DARD) – FAR, DFARS, Deskbook, etc. [S]	http://www.acq.osd.mil/dp/dars/dfars.html
DFAS [S]	http://www.dfas.mil/
DFAS Electronic Commerce Home Page [S]	http://www.dfas.mil/ecedi/
DIOR Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Claiment Program Number (Procurement Coding Manual)	http://web1.whs.osd.mil/peidhome/guide/mn02/mn02.htm
DOD Home Page [S]	http://www.defenselink.mil
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD SOCO Web Page [S]	http://www.defenselink.mil/dodgc/defense_ethics

DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc.html

F

FAR (GSA) [S]	http://www.arnet.gov/far/
Federal Acquisition Virtual Library (FAR/DFARS, CBD, Debarred list, SIC)[S]	http://www.arnet.gov/Library/
FedBizOps [S]	http://www.fedbizops.gov/
Federal Marketplace [S]	http://www.fedmarket.com/
Federal Register [S]	http://www.access.gpo.gov/nara
FFRDC - Federally Funded R&D Centers [S]	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations [S]	http://www.dtic.mil/comptroller/fmr/
FORSCOM: Army Atlanta Contracting Command	http://www.forscom.army.mil/aacc/

G

GAO Home Page [S]	http://www.gao.gov
GAO Comptroller General Decisions (Allows Westlaw/Lexis like searches) [S]	http:/www.access.gpo.gov/su_docs/aces/aces170.shtml
GP [S]	http://www.gpo.gov
Decisions of GPO Board of Contract Appeals [S]	http://www.contracts.ogc.doc.gov/gpobca
GovCon (Government Contracting Industry Website) [S]	http://www.govcon.com/content/homepage
GSA Advantage (MyGSA) [S]	www.fss.gsa.gov
GSA Legal Web Page (FedLaw)	http://www.legal.gsa.gov

J

JAGCNET (Army JAG Corps homepage) [S]	http://www.jagcnet.army.mil/
JAGCNET (Contract & Fiscal Law publications [S]	http://www.jagcnet.army.mil/ContractLaw
JAGCNET (The Army JAG School Homepage)	http://www.jagcnet.army.mil/TJAGSA
Joint Publications	http://www.dtic.mil/doctrine/jel/jointpub.htm
Joint Travel Regulations (JFTR/JTR) [S]	http://www.dtic.mil/perdiem/trvlregs.html
JWOD (Javits-Wagner-O'Day Act)	www.jwod.gov

L

Library of Congress Web Page [S]	http://lcweb.loc.gov
LOGJAMMS: Logistics Joint Administrative Management Support Services	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm
LOGCAP Homepage (Army AMC) [S]	http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html

M

Marine Corps Home Page	http://www.usmc.mil
Mil Standards (DoD Single Stock Point for Military Specifications, Standards and Related Publications	http://www.dodssp.daps.mil/
MWR (Army) Home Page	http://www.ArmyMWR.com

N

NAF Financial (MWR) [S]	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Partnership for Reinventing Government (aka National Performance Review or NPR) Library – now closed, maintained in archive [S]	http://www.govinfo.library.unit.edu/npr/default.html
National Industries for the Blind	www.nib.org
NISH	www.nish.org
NARDIC (Navy Acquisition, Research and Development Information Center)	http://nardic.nrl.navy.mil
NAVSUP Home Page [S]	http://www.navsup.navy.mil/
Navy Acquisition Reform [S]	http://www.acq-ref.navy.mil/
Navy Electronic Commerce On-line	http://www.neco.navy.mil/
Navy Home Page [S]	http://www.navy.mil

O

OGE Web Page (Ethics Advisory Opinions, Publications, and Training Materials) [S]	http://www.usoge.gov
Office of Acquisition Policy	http://www.gsa.gov/staff/ap.htm
Office of Deputy ASA (Financial Ops) Information on ADA violations/NAF Links/Army Pubs/and Various other sites [S]	http://www.asafm.army.mil/fo/fo.asp
Office of Management and Budget (OMB) [S]	http://www.whitehouse.gov/omb
OFPP (Best Practices Guides)	http://www.arnet.gov/BestP/BestP.html

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/per-diem/perd97.htm
Producer Price Index	http://stats.bls.gov/ppihome.htm

S

SBA Government Contracting Home Page	http://www.sba.gov/GC/
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner
Service Contract Act Directory of Occupations	http://www.dol.gov//dol/esa/public/regs/compliance/whd/wage/main.htm
SI [S]	http://www.osha.gov/oshstats/sicser.html

T

Training and Doctrine Command (TRADOC) Acquisition Center	http//www.tac.eustis.army.mil

U

U.S. Business Advisor (sponsored by SBA) [S]	http://www.business.gov
U.S. Congress on the Net-Legislative Info [S]	http://thomas.loc.gov
U.S. Code [S]	http://uscode.house.gov
U.S. Court of Federal Claims	http://www.contracts.ogc.doc.gov/fedcl
UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
6-18 January	2002 JAOAC (Phase II) (5F-F55).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
8 January-1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
14-18 January	2002 USAREUR Tax CLE (5F-F28E).
23-25 January	8th RC General Officers Legal Orientation Course (5F-F3).
28 January-1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February-12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
3-8 February	2002 USAREUR Operational Law CLE (5F-F47E).
4-8 February	2nd Closed Mask Training (512-27DC3).
4-8 February	77th Law of War Workshop (5F-F42).
11-14 February	2002 Maxwell AFB Fiscal Law Course (5F-F13A).
25 February-1 March	62d Fiscal Law Course (5F-F12).
25 February-8 March	37th Operational Law Seminar (5F-F47).
25 February-26 April	7th Court Reporter Course (512-27DC5).
28 January 8 February	4th Voice Recognition Training (512-27DC4).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-13 March	7th Comptroller Accreditation Program (5F-F14).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).

18-22 March	4th Contract Litigation Course (5F-F102).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	Domestic Operational Law Workshop (5F-F45).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

2-5 April	6th Comptroller Accreditation Program (5F-F14)
15-19 April	4th Basics for Ethics Counselors Workshop (5F-F202).
15-19 April	13th Law for Paralegal NCO Course (512-27D/20/30).
22-26 April	2002 Combined WWCLE (5F-2002).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-27DC3).
13-17 May	5th Intelligence Law Workshop (5F-F41).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	5th Voice Recognition Training (512-27DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Paralegal NCO Management Course (512-27D/40/50).
17-21 June	6th Chief Paralegal NCO Course 512-27D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
8-26 July	3d JA Warrant Officer Advanced Course (7A-550A0).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-27DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers

Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-27DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

1 February ICLE	Jury Selection & Persuasion Atlanta, Georgia
28 February ICLE	Advanced Criminal Practice Kennesaw State University Atlanta, Georgia
28 February- 1 March ICLE	Trial Evidence Atlanta, Georgia
15 March ICLE	Effective Closing Arguments Atlanta, Georgia
22 March ICLE	Advocacy & Evidence Atlanta, Georgia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	31 December, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually

Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September/ October 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline.

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2002***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2003 ("2003 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2003 JAOAC will be held in January 2003, and is a prerequisite for most JA captains to be promoted to major.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2002). If the student receives notice of the need to re-do any examination or exercise after 1 Ocotber 2002, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2003 JAOAC. Put simply, if you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2000-2001 Academic Year)

DATE	TRNG SITE/HOST UNIT	COURSE NUMBER*	CLASS NUMBER	SUBJECT	ACTION OFFICER
2-3 Feb 02	Seattle, WA 70th RSC/WAARNG	JA0-21 JA0-31	931 924	Administrative Law (Legal Assistance); Criminal Law	LTC Greg Fehlings (206) 553-2315 Gregory.e.fehlings@usdoj.gov
8-10 Feb 02	Columbus, OH 9th LSO	JA0-41 JA0-21	926 932	Operational Law; Law of War; Administrative Law	SSG Lamont Gilliam (614) 693-9500
16-17 Feb 02	Indianapolis, IN INARNG	JA0-31 JA0-21	926 933	Criminal Law; Administrative Law	LTC George Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
2-3 Mar 02	Denver, CO 96th RSC/87th LSO	JA0-21 JA0-31	934 927	Administrative Law (Legal Assistance/Claims)); Criminal Law	LTC Vince Felletter (970) 244-1677 vfellett@co.mesa.co.us
9-10 Mar 02	Washington, DC 10th LSO	JA0-41 JA0-11	927 920	Operational Law; Contract Law	CPT James Szymalak (703) 588-6750 James.Szymalak@hqda.army.mil
9-10 Mar 02	San Mateo, CA 63rd RSC/75th LSO	JA0-41 JA0-11	928 921	International Law (Information Law); Contract Law; Ethics Tape	MAJ Adrian Driscoll (415) 274-6329 adriscoll@ropers.com
16-17 Mar 02	Chicago, IL 91st LSO	JA0-21 JA0-11	935 924	Administrative Law (Claims); Contract Law	MAJ Richard Murphy (309) 782-8422 DSN 793-8422 murphysr@osc.army.mil
12-14 Apr 02	Kansas City, MO 8th LSO/89th RSC	JA0-21 JA0-11	936 922	Administrative/Civil Law; Contract Law	MAJ Joseph DeWoskin (816) 363-5466 jdewoskin@cwbbh.com SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
22-26 Apr 02	Charlottesville, VA OTJAG	5F-2002	002	Spring Worldwide CLE	
19-21 Apr 02	Austin, TX 1st LSO	JA0-31 JA0-21	929 937	Criminal Law; Administrative Law	MAJ Randall Fluke (903) 868-9454 Randall.Fluke@usdoj.gov
27-28 Apr 02	Newport, RI 94th RSC	JA0-31 JA0-11	930 923	Military Justice; Contract/Fiscal Law	MAJ Jerry Hunter (978) 796-2140 Jerry.Hunter@usarc-emh2.army.mil

***** Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available through the DTIC, see the September/October 2001 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September/October 2001 issue of *The Army Lawyer.*

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information ser-

vice called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users, who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the September/October 2001 issue of *The Army Lawyer*.

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

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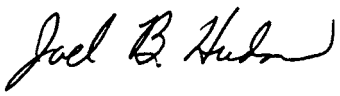

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Administrative Assistant to the
Secretary of the Army
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