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Contract and Fiscal Law Developments of 2002—The Year in Review

Major Thomas C. Modeszto (Editor), Lieutenant Colonel Michael J. Benjamin, Major Karl W. Kuhn, Major Bobbi J.W. Davis, Major Gregg S. Sharp, Major Kevin J. Huyser (USAF), Major James M. Dorn, Colonel Jonathan H. Kosarin, Colonel Steven J. Gillingham, Lieutenant Colonel Louis A. Chiarella, Lieutenant Colonel Steven N. Tomanelli (USAF); Major Timothy M. Tuckey, Ms. Margaret K. Patterson

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FOREWORD

The specter of 11 September 2001 still looms over most practitioners of government procurement and fiscal law. Reasonable minds may disagree, however, over whether the events of that day and their aftermath have altered (either indelibly or even temporarily) our legal practice. While the global War on Terrorism continues, its effects on government acquisition are uncertain. There have been responses. For instance, anecdotal evidence suggests that agencies have robustly exercised the Competition in Contracting Act's statutory exceptions to full and open competition, Congress has raised simplified acquisition thresholds for certain items in the defense against terrorism, and the Department of Defense (DOD) was permitted to hire state and local security guards to protect U.S. installations. These are hardly major changes, however; no major statutes or rules have altered the procurement landscape. On the other hand, on 19 November 2002, the President signed legislation creating a Homeland Security Department, extensively restructuring the federal government.[1]

Perhaps we are simply facing old and continuing challenges with a renewed sense of purpose and focus. We should focus on our ultimate customers—the dedicated soldiers, sailors, airmen, marines, and coast guardsmen who are serving in the defense of our nation—and recognize that our purpose is to provide them with "the best value product or service . . . while maintaining the public's trust and fulfilling public policy objectives."[2]

Everyday buys at the installation have seen something of a revolution, particularly for Army practitioners. First, Congress broke the Federal Prison Industries' (UNICOR) near-monopoly hold on furniture sales, allowing agencies to buy furniture competitively if UNICOR's products are not comparable. This newfound freedom for furniture buyers, however, stands in marked contrast to the limitations recently imposed on office supply purchasing. In September 2002, the recently created Army Contracting Agency (ACA) restricted Army purchases of office supplies to twelve blanket purchase agreements. One final type of everyday purchase remains unsettled; as this article goes to press, the Office of Management and Budget is locked in constitutional combat with Congress over the Government Printing Office's status as the mandatory source for executive agency printing.

We have also seen both decentralization and consolidation of the purchasing function—and the benefits and drawbacks of each. New rules have placed smaller purchases in the hands of hundreds of thousands of purchase cardholders, increasing efficiency and reducing transaction costs. As the General Accounting Office (GAO), the DOD Inspector General, and the popular press (usually little interested in government purchases short of major weapons systems) have observed, however, such a wide dissemination of purchasing power results in some lurid and bizarre abuses. At the same time, the number and value of purchases from consolidated sources such as the Federal Supply Schedules, multiple award contracts, and governmentwide acquisition contracts (GWACs), grew exponentially. The Army also intends to consolidate many larger purchases (over $500,000) at the regional headquarters of the newly created ACA. Meanwhile, the impact of these developments on small businesses, competition, and procurement "values" is hotly debated (as evidenced by the spirited comments, in various media, of the "three Steves"[3]—Professor Steven Kelman, Professor Steven Schooner, and General Services Board of Contract Appeals Chairman Stephen Daniels). All this takes place alongside the private sector background of Enron, Global Crossing, and Arthur Anderson.

The stakes get even higher as we prepare for more "outsourcing." The Bush Administration is considering allowing the private sector to compete for as many as 850,000 jobs currently held by federal employees. Meanwhile, the GAO still sustains a high percentage of A-76-based protests, and the Comptroller General's Commercial Activities Panel tells us that the competitive sourcing process should look more like the FAR. Wow! There is a lot to watch out for in this area.

In addition to these hot-button areas, the courts, boards, and the GAO have issued guidance touching on various aspects of our practice. Interestingly, the number of protests filed at the GAO rose in fiscal year 2002, the first time in over a decade. As usual, numerous statutory and regulatory changes have also impacted a wide variety of areas.

Moving from the profound to the mundane, perennial *Year in Review* readers will note two format changes this year. First, at the end of each section, the section author's name appears. Individual authors can thereby accept kudos or blame, as the case may be, for their explanations, interpretations and pontifications. Second, the footnote numbers renew with each section. While we have taken some pride in reaching (as we did last year) 1835 footnotes (and 171 more in the legislation appendix), the administrative obstacles were formidable, so each section will begin with footnote one.

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1. Pub. L. No. 107-296, 116 Stat. 2135 (2002). It is too early to tell whether the new Department of Homeland Security will bring marked changes to procurement practices. The recently passed bill provides the Homeland Security Department "Other Transaction" authority; the authority to procure temporary personal services contracts; and special streamlined acquisition authority, including increased micro-purchase and simplified acquisition thresholds, and broad "commercial item" treatment. *Id*. §§ 831-833.

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.102(a) (July 2002).

3. Ralph C. Nash & John Cibinic, *Acquisition Reform: A Progress Report*, 16 NASH & CIBINIC REP. 10, ¶ 48 (2002).

The *Year in Review* is the Contract and Fiscal Law Department's[4] effort to capture the most important, relevant, and (sometimes) quirky cases and developments of the past fiscal year. While we cannot possibly cover every decision or rule, we attempt to address those with the most relevance to most practitioners. We hope we have succeeded, and that you find this article both helpful in your practice and intellectually stimulating. Lieutenant Colonel Benjamin.

4. The Contract and Fiscal Law Department is composed of seven active duty judge advocates (six from the Army and one from the Air Force) and our Secretary, Ms. Dottie Gross. Each officer has contributed sections to this work. We owe particular kudos to Major Tom Modeszto, this year's editor, for his extraordinary dedication, constant good cheer, and encouragement (despite his inability to get a New York Yankee hot dog in October), and remarkable attention to detail. The Department would like to thank our outside contributing authors: Colonel Jonathan Kosarin, Colonel Steven Gillingham, Lieutenant Colonel Steven Tomanelli (U.S. Air Force), Lieutenant Colonel Louis Chiarella, Ms. Margaret Patterson, and Major Timothy Tuckey. Their willingness to take time out to help the Department is greatly appreciated. Finally, the article has benefited immensely from the diligent fine-tuning of the Army Lawyer staff: Major Mike Boehman, Captain Erik Christianson, Captain Joshua Stanton, and the footnote guru, Mr. Chuck Strong. Thank you, all!

CONTRACT FORMATION

Authority

No Good Deed Goes Unpunished

A black-letter rule of government contracting provides that only an agent with actual authority may bind the government to a contract.[1] A recent Armed Services Board of Contract Appeals (ASBCA) case demonstrates how strictly the ASBCA apples this rule.[2] In *Portable Water Supply Systems Co.* (PWSS), the ASBCA denied relief to a contractor who entered into an agreement with a senior official from the Agency for International Development (AID) to provide desperately needed drinking water for refugees in the wake of the humanitarian crisis that struck Central Africa in 1994.[3] Although opinions differed significantly concerning the various understandings the parties reached, it was clear that AID procured the services of PWSS with the knowledge and consent of various high-level officials.[4]

In July 1994, the media was focusing the world's attention on the Rwandan refugee crisis and the potential cholera epidemic facing refugees in Goma, Zaire.[5] At this time, PWSS was a recently formed company that specialized in providing water supply equipment and emergency water supply systems. In the wake of developing events, the president of PWSS, Frank T. Blackburn, contacted Senator Dianne Feinstein's Chief of Staff, Hadley Roth. Blackburn informed Roth that PWSS possessed the means and expertise to provide a clean water supply for Goma, and thus prevent a potentially massive cholera epidemic.[6] Following the receipt of this information, Roth talked to Senator Feinstein, who apparently called President Clinton. The Senator's office then contacted Brian Atwood, the Administrator of AID, and eventually Gerard Bradford, the Assistant Director for Operation Support, Office of Foreign Disaster Assistance (OFDA), who initiated negotiations to secure the services of PWSS.[7]

During the negotiations, but before deploying to Zaire, the parties preliminarily agreed the government would reimburse PWSS under a standing emergency equipment rental contract PWSS had with the U.S. Forest Service.[8] The parties never agreed to a new contract before the government mobilized PWSS and airlifted the company's personnel and equipment to Goma.[9] Upon arrival, PWSS encountered an environment where bodies literally lined the streets, and physical security was of paramount concern. The State Department tasked U.S military personnel to provide security for PWSS's operation. Within hours of its arrival, PWSS was providing potable water, and within days it was producing 3000 gallons per hour.[10]

As PWSS proceeded with its performance, Bradford realized that the OFDA needed to formalize a contract for PWSS's services.[11] The authorities gained control of the cholera epidemic during the negotiations, and U.S. military officials informed Blackburn and the OFDA officials that the military would soon pull out of the area.[12] As the military's departure neared, Blackburn received a facsimile copy of the proposed contract from the OFDA; Blackburn signed the contract on 22 August 1994. The contract did not allow for any profit on equipment PWSS sold to the government, or for other expenses

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1. *See* Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); *see also* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 132 [hereinafter *2001 Year in Review*].

2. ASBCA No. 49813, 02-1 BCA ¶ 31,805.

3. *Id.* at 157,121.

4. *Id.* at 157,110-11.

5. Although Zaire is now known as the Democratic Republic of Congo, the ASBCA used the term Zaire since that was the name in use when the events of the case took place. *Id.* at 157,121.

6. *Id.* at 157,110.

7. *Id.* at 157,110-11.

8. *Id.* At the hearing, Bradford testified that during the initial stages of negotiations with PWSS, he thought PWSS was a volunteer entity, and that PWSS was simply seeking transportation support and reimbursement for direct costs. Blackburn testified, however, that he informed Bradford that PWSS was "not a nonprofit organization." *Id.* at 157,112. Blackburn also testified that he had reservations about using the Forest Service contract as a mechanism for payment, since the contract did not cover water purification. Due to the urgency of the situation, however, he felt that he should resolve these issues later. *Id*.

9. *PWSS*, 02-1 BCA ¶ 31,805, at 157,112-13.

10. *Id.* at 157,113

11. On 21 August 1994, the OFDA tasked Georgia Beans with negotiating a contract between the OFDA and PWSS. She contacted Eric Doebert, PWSS's Director of Marketing, and asked PWSS to provide cost figures for various line items. Ms. Beans used this data to draft the contract that Blackburn subsequently signed on 22 August 1994. *Id.* at 155,115.

12. *Id.* at 157,115.

for which Blackburn later sought recovery. Blackburn testified that he felt he had no choice but to sign the contract because he could not acquire physical security or other goods and services from local merchants unless he could demonstrate that he had the money to pay them.[13]

Several months after the completion of contract performance, PWSS invoiced the AID. The invoice, in the amount of $186,979, included costs for the operation of eight water purification units "as required by agreement with Gerald Bradford."[14] On 30 April 1996, the contracting officer denied the claim. On 1 May 1996, PWSS appealed the decision to the ASBCA.[15] At the hearing, PWSS sought recovery for equipment expenses under the Forest Service contract, as opposed to the contract executed on 22 July 1994. PWSS reasoned that during the negotiation phase, Bradford and Blackburn intended to use that contract as the means of payment. In support, PWSS argued that "even [when] not formally warranted, contracting officers have the authority to bind the government and permit [sic] the government to a financial obligation premised on the circumstances and exigencies of the matter at hand."[16]

The ASBCA first examined whether the parties had anything remotely resembling a binding contract before PWSS's departure for Goma. The board held that the parties did not establish mutual assent because they attached materially different meanings to each other's manifestations. As such, even if Bradford had actual authority to bind the government, the parties never achieved the requisite meeting of the minds to form a contract.[17] The board next examined whether Bradford had the authority to bind the government to a contract. Citing *Federal Crop Insurance Co. v. Merrill*,[18] the board applied the age-old rule that only those who have actual authority can bind the government.[19] Although Bradford did have a warrant for small purchases under $25,000, the board concluded that the appellant failed to show that Bradford or any other government employee involved had an express delegation of authority to enter into a contract of the sort contemplated by Blackburn.[20]

The lesson of *PWSS* is that if you want to do good deeds and save the world (albeit for a reasonable profit), get your contractual terms sorted out before you head to the field.

Promises, Promises . . .

If you are in the Witness Security Program (WSP) and the government has promised you the moon and the stars for your cooperation, you may have problems collecting. In *Austin v. United States*,[21] the Court of Federal Claims (COFC) recently ruled that a witness under WSP protection could not collect against the government for alleged promises regarding child visitation rights, move-related expenses, and payment of a monthly stipend, notwithstanding the alleged existence of a written memorandum of understanding (MOU) documenting the promises.[22]

In *Austin*, the plaintiff provided grand jury testimony that resulted in the conviction of several organized crime members. In exchange for Austin's services, the United States Marshall Service (USMS) promised to protect Austin and his family, and entered Austin and his wife into the WSP in November 1994. Austin alleged that when he entered into the WSP, representatives of the USMS made several additional promises. Specifically, Austin alleged that the USMS promised that he would be entitled to child visitation rights at government expense, that the government would reimburse Austin for damage to his personal property resulting from his move to a new location, and that the government would pay Austin's living expenses and a monthly stipend. Austin alleged that these promises were part

13. *Id.* at 157,116.

14. *Id.* at 157,117-18.

15. *Id.* at 157,118.

16. *Id.* The appellant apparently meant to say "commit" instead of "permit." The appellant also argued that he was entitled to recover his expenses because when he signed the 22 July 1994 contract, he was under duress as a result of the pending withdrawal of U.S. military forces. *Id.*

17. *Id.* at 157,119.

18. 332 U.S. 380 (1947).

19. *PWSS*, 02-1 BCA ¶ 31,805, at 157,119.

20. *Id.* at 157,119-20. The final issue the board examined was duress. Applying the standard from *Home Entm't, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550, at 150,862, the board stated that for PWSS to show duress, it would need to establish that it involuntarily accepted the terms of the contract, that circumstances permitted no other reasonable alternative, and that the circumstances were the result of the coercive acts of the government. *PWSS*, 02-1 BCA ¶ 31,805, at 157,120. In this case, PWSS failed to convince the board that the facts met this standard. Specifically, the board noted that much of the delay in finalizing the contract was due to Blackburn's insistence that only he—and not company officials at the PWSS home office—could sign the contract. Further, the decision of the U.S. military to pull out of Goma was not, in the eyes of the board, a coercive act by government officials. *Id.* at 157,120.

21. 51 Fed. Cl. 718 (2002).

22. *Id.*

of the WSP package, and that a government representative put the promises in writing in the form of a memorandum of understanding (MOU). At the motion hearing, however, Austin could not produce a copy of the MOU.[23]

The COFC granted the government's motion to dismiss and observed that the statutory authority for the WSP provided that "[t]he United States and its officers and employees shall not be subject to any civil liability on account of any decision to provide or not provide protection under this chapter."[24] As such, representatives of the USMS possessed no authority to bind the government beyond the scope of the statute. The COFC reasoned that even if Austin could produce the written agreement, he still could not establish that the government had a contractual or statutory obligation under the WSP.[25] Major Dorn.

23. *Id.* at 719.

24. 18 U.S.C. § 3521(a)(3) (2000).

25. *Austin*, 51 Fed. Cl. at 720-21.

Competition

Last year's *Year in Review* introduced its discussion of competition with testimony from then-nominee for Administrator of the Office of Federal Procurement Policy (OFPP), Angela Styles.[1] Last year, Ms. Styles expressed concern about the impact of procurement reform on traditional government procurement objectives: competition, due process, and transparency.[2] The tension between competition and acquisition reform continues to play out in litigation, legislation,[3] and academic discourse. In August 2002, at the invitation of Ms. Styles, General Services Board of Contract Appeals (GSBCA) Chairman Stephen Daniels spoke at the OFPP lecture series.[4] Daniels harshly criticized the acquisition reform movement. According to Mr. Daniels:

> Although some parts of CICA [Competition in Contracting Act of 1984] remain on the statute books, the guts have been ripped out of it. Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of taxpayers were once supreme, now the convenience of agency program managers is most important. Full and open competition has become a slogan, not a standard; agencies have to implement it only "in a manner that is consistent with the need to efficiently fulfill the Government's requirements."[5]

His comments garnered equally stinging replies from reform advocates.[6] The decisions in this section represent some of the many battlegrounds upon which the competition debate is fought.

Unduly Restrictive Specifications: Are You Just Talking Trash?

During the past fiscal year, the Comptroller General considered nine protests[7] alleging unduly restrictive government specifications in violation of the Competition in Contracting Act of 1984 (CICA).[8] The GAO denied six of the protests, generally finding that the government agencies had adequately justified their needs.

In *Vantex Service Corp.*,[9] Vantex challenged the Army's bundling of portable latrine services with waste removal services. Vantex alleged that combining the two types of services unduly restricted competition and was not necessary to meet the government's needs. The GAO agreed with this argument.[10]

The *Vantex* invitation for bids (IFB) contemplated the award of one or more contracts for rental and servicing of portable latrines at Fort Bragg; North Carolina, Fort Drum, New York; and Fort Campbell, Kentucky; and for waste removal services at Fort Campbell.[11] The IFB divided the work into four sched-

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1. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 3-4.

2. *Id*. at 4.

3. *See supra* Part II.C, *Contract Types* (discussing the new regulatory requirements governing competition in Multiple Award Schedules and Government-wide Agency Contracts (GWACS)).

4. *See GSBCA's Daniels Tells OFPP Forum That Reforms Put Efficiency Before Fundamentals*, 78 BNA FED. CONT. REP. 8, at 236 (Aug. 20, 2002); *Recent Procurement Changes Have "Gutted" CICA, GSBCA Chairman Says*, 44 GOV'T CONTRACTOR 31 (Aug. 21, 2002).

5. Stephen M. Daniels, Chairman, General Services Board of Contract Appeals, Address to the Office of Federal Procurement Policy (Aug. 15, 2002), *available at* http://www.pogo.org/m/cp/cp-daniels2002.pdf.

6. Shane Harris, *Procurement Reform Critique Angers Executives*, GovExec.Com (Sept. 6, 2002), *available at* http://www.govexec.com/dailyfed/0902/090602h1.htm. In the article, an anonymous executive called the speech "offensive." *Id*. Steven Kelman, a former OFPP Administrator, was quoted as saying, "Daniels was a key figure in one of the most dysfunctional management systems ever imposed on the federal government." *Id.*

7. C. Lawrence Constr. Co., Comp. Gen. B-290709, Sept. 20, 2002, 2002 CPD ¶ 165; Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; Military Agency Servs. Pty. Ltd., Comp. Gen. B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130; Instrument Control Serv., Inc., Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66; Mark Dunning Indust., Inc., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46; Flowlogic, Comp. Gen. B-289173, Jan. 22, 2002, 2002 CPD ¶ 22; Keystone Ship Berthing, Inc., Comp. Gen. B-289233, Jan. 10, 2002, 2002 CPD ¶ 19; C. Lawrence Constr. Co., Comp. Gen. B-289341, Jan. 8, 2002, 2002 CPD ¶ 17; Apex Support Servs., Inc., Comp. Gen. B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202.

8. 10 U.S.C. § 2305(a)(1)(B)(ii) (2000) ("Specifications will 'include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as authorized by law.'"); 41 U.S.C. § 253a(a)(2)(B) (2000); *see also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 11.002(a)(1) (July 2002) [hereinafter FAR] ("[A]gencies shall . . . [o]nly include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.").

9. Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131.

10. *Vantex*, 2002 CPD ¶ 131, at 1.

11. *Id*. at 1-2.

ules, one for each facility and one that included all three locations. The Fort Campbell schedule covered both the latrine services and the waste removal services,[12] while the Fort Bragg and Fort Drum schedules included latrine services only.[13]

Vantex noted that the two service types fell under different North American Industrial Classification (NAICS) Codes and alleged that providers of latrine services would not compete for waste removal services "and vice versa."[14] The protestor was aware of no other military installation that bundled these requirements and observed that prior solicitations for the combined services at Fort Campbell produced few bidders.[15]

The Army's justification for combining the two requirements boiled down to "administrative convenience."[16] According to the Army, a single solicitation "was cost efficient and reduced our administrative burden. As a result, Fort Campbell could obtain needed similar services utilizing one contracting officer, one contract specialist, and one contracting officer's representative."[17]

The GAO questioned the Army's unsupported assertion that combining the services was more cost efficient, noting that "restricting competition is presumed to raise, not lower, the cost that the government will pay."[18] In light of the historical dearth of competition for the combined solicitation and indications that additional companies would have bid on separate requirements, the GAO expressed concern that bundling in this case caused "unnecessarily high prices."[19]

Ultimately, the GAO clearly placed the burden on the government to justify specifications that limit competition: "the issue is not whether there are any potential offerors who can surmount barriers to competition, but rather whether the barriers themselves—in this case, the bundling—are required to meet the government's needs."[20] In *Vantex*, the Army failed to show that combining the portable latrine services with waste removal services was necessary to meet its needs.[21]

In *C. Lawrence Construction Co.*,[22] the GAO rejected the Department of Labor's use of a brand name specification in a construction solicitation.[23] One specification in this IFB for educational and vocational buildings required signs to be manufactured by "ASI Sign Systems . . . [or a] pre-approved manufacturer with an equal product."[24] At the time of bid opening, no other manufacturer had been "pre-approved."[25]

The IFB contained conflicting provisions concerning whether the solicitation allowed substitutions. The IFB provided, "Where specifications name only a single product or manufacturer, provide the product indicated. No substitutions will be permitted."[26] Another provision, however, stated, "References in the specifications to any article, device . . . by name, make or catalog number, shall be interpreted as establishing a standard of quality, and not as limiting competition. The Contractor may make substitutions equal to the items specified if approved prior to bid opening . . . ."[27] Lawrence interpreted the solicitation as requiring use of ASI signs. Thus, the protestor argued that the sign specification improperly restricted compe-

12. *Id*. at 2. Waste removal services included pumping and cleaning grease pits, septic tanks and concrete pit latrines and removing, and cleaning and reinstalling sump pumps. *Id*.

13. *Id*. at 1-2.

14. *Id*. at 2.

15. *Id*. at 2-3. Even the Army's market research revealed that numerous businesses were capable of competing "for the waste removal services, but chose not to compete" due to the requirement to also provide portable latrine services. *Id*.

16. *Id*. at 4.

17. *Id*.

18. *Id*.

19. *Id*. at 5.

20. *Id*.

21. *Id*. at 6. The GAO recommended that the Army resolicit the services without bundling the requirements. *Id*.

22. Comp. Gen. B-290709, Sept. 20, 2002, 2002 CPD ¶ 165.

23. *Id*. Brand-name specifications were also at issue in *Elementar Americas, Inc*., a simplified acquisition solicitation for commercial items, discussed in the section of this issue entitled *Simplified Acquisitions*. Elementar Americas, Comp. Gen. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20. *See supra* Part II.F (discussing "simplified acquisitions issues).

24. C. Lawrence Constr. Co., Comp. Gen B-290709, Sept. 20, 2002, 2002 CPD ¶ 165, at 2.

25. *Id*. at 4.

26. *Id*. at 2.

tition because it required "the contractor to furnish ASI signs despite the fact that equivalent signs manufactured by other companies will also meet the agency's needs."[28] The GAO found that the provisions were "at best ambiguous and could reasonably have been interpreted" as requiring bidders to furnish only ASI signs. The agency did not argue that only ASI signs would meet its needs.[29] The Comptroller General described the specification as follows:

> [The brand-name specification is] contrary to the statutory requirement that solicitations include specifications that permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency . . . and potentially prejudicial to bidders who reasonably believed themselves precluded from using lower-priced quotations from other sign manufacturers . . . [and] it apparently . . . not what the agency intended.[30]

The GAO sustained the protest.[31]

None of the cases in which the GAO denied allegations of unduly restricted competition broke new ground. In *Military Agency Services Property Ltd.* (*MAS*),[32] the GAO re-affirmed that it will give substantial deference to agency specifications designed to promote human safety. MAS challenged a Request for Quotations (RFQ) for picket boat services.[33] The protestor alleged that the requirements "exceeded the agency's legitimate needs," but included only one specific example.[34] MAS argued that no boat afloat could meet the requirement that the picket boat be "free . . . of exposed wires and connections."[35] Despite this unsupported assertion, the GAO found that MAS had not shown that the Navy's requirement was unreasonable.[36] The nature of the procurement clearly weighed in the government's favor. As the GAO stated, "[W]hen a requirement relates to human safety, the agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness."[37]

In cases challenging unduly restrictive specifications, the GAO examines whether the specification is reasonably necessary to meet the agency's needs.[38] The GAO, however, is reticent to question those needs, even if the needs appear "irrational." In *Mark Dunning Industries, Inc.*,[39] the protestor challenged Fort Campbell's request for proposals (RFP) for an "individual household trash weighing system"[40]—high-technology garbage trucks and containers. The RFP required trash trucks "equipped with an on-board computerized weighing system."[41] Each trash container had to include "indicating elements and radio frequency transponder devices."[42] The system would weigh each household's trash and recycling to support the agency's goal to reduce the amount of waste disposed in landfills.[43] The protestor asserted that weighing the total trash disposed of would be much more efficient and less costly than

27. *Id*. at 3.

28. *Id*. at 4.

29. *Id*. at 8.

30. *Id*. (citations omitted).

31. *Id*. at 6. The final sustained allegation of unduly restricted competition involved the unreasonable imposition of bonding requirements. Apex Support Servs., Inc., Comp. Gen. Dec. B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202. For a discussion of this case, see s*upra*, Part IV.F, *Bonds, Sureties, and Insurance*.

32. Military Agency Servs. Pty. Ltd., B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130.

33. *Id*. at 2. Picket boats protect ships "from all waterborne threats by screening all incoming waterborne craft prior to arrival alongside a ship." *Id*. at 2 n.1.

34. *Id*. at 4.

35. *Id*.

36. *Id*. at 5.

37. *Id*. at 4-5.

38. *See*, *e.g.*, Mark Dunning Indus., Inc., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46, 3-4.

39. *Id*.

40. *Id*. at 1.

41. *Id*. at 2.

42. *Id*.

43. *Id*.

weighing each household's trash. Fort Campbell decided that the best way to accomplish its goal was to weigh individual household trash.[44]

The GAO did not dispute the protestor's belief that the agency's decision was irrational, but the protestor's disagreement with the agency's needs did not provide a basis for protest. Because the agency's requirement was "equally available to all potential competitors," there was no undue restriction on competition.[45] Given the agency's discretion to determine its own needs, the GAO will not sustain a protest solely because the acquisition may be costly, inefficient, and ineffective.[46]

In *C. Lawrence Construction Co.* (*C. Lawrence*),[47] the GAO found that past performance evaluation criteria are not unnecessarily restrictive if the criteria are reasonably related to the agency's minimum needs.[48] The *C. Lawrence* construction RFP[49] provided for a "best value" source selection in which past performance would be evaluated equally to price or other considerations.[50] The Army Corps of Engineers (COE) required each proposal to list five to ten relevant contracts performed within the last five years and to provide a performance survey completed by the project owner of each relevant contract. "Relevant" contracts were those for projects similar in scope and magnitude to the project under solicitation and included, but were not limited to, "aircraft hangars and/or light industrial type facilities which may include pre-engineered metal building frame, paving and utility work; and within the range of $5,000,000 to $10,000,000."[51]

C. Lawrence alleged that requiring at least five contracts of $5 million or more would exclude all small, emerging businesses.[52] The COE responded that it needed five projects to establish "a better 'comfort zone' in which it can determine a contractor's overall performance and performance trends."[53] The project under solicitation was also likely to be closer to the high end of the dollar range.[54] The protestor did not specifically refute the agency's rationale, but argued that these past performance requirements would exclude it and all small emerging businesses from competing. The GAO, unimpressed with this reasoning, denied the protest, holding that "the fact that a particular prospective offeror is unable to compete under a solicitation that reflects the agency's needs does not establish that the solicitation is unduly restrictive."[55]

The GAO denied three other protests alleging unduly restrictive specifications. In *Instrument Control Service*,[56] the protestors contended that a five-work-day turnaround time to calibrate test, measurement, and diagnostic equipment at an Air Force Precision Measurement Equipment Laboratory was unnecessary and unattainable.[57] The Air Force explained, in some detail, how the five-day requirement was necessary to perform programmed maintenance in support of airlift missions.[58] Historical records, including one protestor's average turnaround time under a previous contract, showed that the time period was attainable.[59]

In *Flowlogic*,[60] the COE issued an RFQ on 2 August 2001, using simplified acquisition procedures.[61] The RFQ called for

44. *Id*. at 3.

45. *Id*. at 4.

46. *Id*. The protestor also challenged the requirement that the contractor had to use one particular landfill—the landfill geographically closest to Fort Campbell. Mark Dunning Industries argued that the agency had no basis for this requirement and that the requirement eliminated competitive pressure to keep rates low. *Id*. The GAO found that the need to respond quickly to discoveries of unexploded ordnance justified the mandatory use of the closest landfill. Further, because all offerors had access to the landfill, the agency's requirement did not restrict competition. *Id*. at 4-5.

47. Comp. Gen. B-289341, Jan. 8, 2002, 2002 CPD ¶ 17.

48. *Id*. at 1.

49. *Id.* at 1-2. The RFP contemplated construction of an F-22 squadron maintenance hangar at Tyndall Air Force Base, Florida, costing between $5 and $10 million. *Id*.

50. *Id*.

51. *Id*. at 2.

52. *Id*.

53. *Id*. at 3.

54. *Id*.

55. *Id*. at 4.

56. Instrument Control Serv., Inc., Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66.

57. *Id*. at 1.

58. *Id*. at 5-6.

a commercial software package to administer performance reviews and organizational surveys. The RFQ required software delivery by 5 September and software training no later than 12 September.[62] Installation and training in September were crucial because certain employees had rating periods ending on 30 September.[63]

Flowlogic was one of six offerors. For various reasons, none of the offers was acceptable. Flowlogic's quotation stated that it could not conduct the training until October. Due to time constraints, the agency did not resolicit; instead, using prior market research, it contacted Training Technologies, Inc. (TTI). After receiving an oral quotation and performing a technical and price review of TTI's program, the agency issued TTI a purchase order on 6 September. TTI delivered the software on 7 September. Because of the 11 September terrorist attack, the agency delayed the training, originally scheduled for 13-14 September, until 17-20 September.[64] Flowlogic argued that the changes in the required delivery dates indicated that the RFQ's delivery schedule overstated the agency's needs. Disagreeing, the GAO found that the schedule was delayed not due to changing needs, but rather due to the unsuccessful competition and the 11 September events. Further, because Flowlogic could not deliver until October, it could not have even met the relaxed requirements. The GAO therefore condoned the sole-source order.[65]

In *Keystone Ship Berthing, Inc.*,[66] the Navy Military Sealift Command (MSC) included a "reduction in contract" clause in its RFP for layberth services.[67] The clause allowed MSC to reduce the rate paid to the contractor if the layberth became unfit for safe berthing for any reason "not due to the fault of the government."[68] Keystone Berthing Inc. (KSB) alleged that the provision was contrary to the termination for default clause at FAR section 52.249-8(c)[69] because the clause allowed the MSC to penalize KSB for occurrences beyond the control and without the fault of KSB.[70] Further, KSB asserted, the reduction in contract clause was unduly burdensome on competition because the clause required a contractor to assume risks for which it could not be terminated for default under FAR section 52.249-8(c).[71]

The GAO first determined that the clause was not inconsistent with the FAR.[72] The GAO then found that KSB's competition allegation amounted to no more than disagreement with the government's method for allocating risk. In light of the mis-

59. *Id*. at 7.

60. Comp. Gen. B-289173, Jan. 22, 2002, 2002 CPD ¶ 22.

61. *Id*. at 1.

62. *Id*. at 1-2.

63. *Id*. at 3.

64. *Id*.

65. *Id*. at 3.

66. Comp. Gen. B-289233, Jan. 10, 2002, 2002 CPD ¶ 19.

67. *Id*. at 1.

68. *Id*. at 2.

69. FAR, *supra* note 8, at 52.249-8(c). FAR section 52.249-8(c) provides, in pertinent part:

> [T]he Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include—
>
> (1) acts of God or of the public enemy,
> (2) acts of the Government in either its sovereign or contractual capacity,
> (3) fires,
> (4) floods,
> (5) epidemics,
> (6) quarantine restrictions,
> (7) strikes,
> (8) freight embargoes, and
> (9) unusually severe weather.

Id.

70. *Keystone Berthing*, 2002 CPD ¶ 19, at 2-3.

71. *Id*. at 4.

sion-essential nature of layberth services, the MSC's reduction in contract clause reasonably served "as an incentive to the contractor to anticipate contingencies and to act in a manner that [would] minimize . . . any disruptions" in performance.[73] In addition, the GAO pointed out that the MSC received five to ten initial proposals, suggesting that the clause did not preclude competition.[74]

"Scope" at Two Fora

Whether contract modifications were beyond the scope of their underlying contract vehicles proved a fertile—but ultimately unsuccessful—ground for protestors during the past year at both the Court of Federal Claims (COFC) and the GAO.[75] To determine whether a modification is beyond the original agreement's scope, the GAO looks at "whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different."[76] The GAO compares the modified contract with the original agreement or solicitation, using such factors as the type of work, costs, and performance period.[77]

In *HG Properties A, LP*,[78] the protestor challenged the post-award modification of a lease changing the building site location. The Department of Veterans' Affairs (VA) awarded a lease to Premier Office Complex, Inc. (POC) to provide building space for a VA medical facility in Canton, Ohio.[79] The solicitation for offers (SFO) included detailed architectural requirements and specific requirements for specialized services, "utilities, maintenance, and environmental management."[80] Further, the property had to be "free of hazardous materials."[81] On the other hand, the SFO location requirements were broad and general.[82]

Soon after the award, POC discovered hazardous materials at the proposed building site. Shortly thereafter, POC proposed a new site four blocks from the first location. The new location met the SFO's requirements, and the government accepted this change. POC also agreed to abide by all other previously-proposed terms and conditions, including price and the performance period.[83]

The protestor, HG Properties, argued that because location was an SFO factor, the change in site was a cardinal change outside the lease's scope.[84] Looking at the purpose and nature of

72. *Id*. at 4. The GAO agreed with the agency's argument that the remedies in the reduction in contract clause were "not inconsistent with the FAR termination for default clause, but rather provide[d] under the terms of the contract for additional remedies." *Id.*

73. *Id*. at 3.

74. *Id*. at 5.

75. CESC Plaza LP v. United States, 52 Fed. Cl. 91 (2002); Northrop Grumman Corp. v. United States, 50 Fed. Cl. 443 (2001); HG Props. A, LP, Comp. Gen. B-290416, B-290416.2, July 25, 2002, 2002 CPD ¶ 128; Atlantic Coast Contracting, Inc., Comp. Gen. B-288969.4, June 21, 2002, 2002 CPD ¶ 104; Symetrics Indus., Inc., Comp. Gen. B-289606, Apr. 8, 2002, 2002 CPD ¶ 65; Eng'g & Prof'l Servs., Inc., Comp. Gen. B-289331, Jan. 28, 2002, 2002 CPD ¶ 24.

76. *HG Props*, 2002 CPD ¶ 128, at 3-4.

77. For example, in *HG Properties*, the GAO wrote:

> In assessing whether the modified work is essentially the same as the effort for which the competition was held and for which the parties contracted, we consider, for instance, factors such as the magnitude of the change in relation to the overall effort, including the extent of any changes in the type of work, performance period, and costs between the modification and the underlying contract.

Id. at 4.

78. *Id*.

79. *Id*. at 1.

80. *Id*. at 2. "Particular design requirements were set out for waiting and examination rooms . . . office space for personnel, and space for equipment storage. The SFO also set forth highly specialized specifications for specific medical treatment and laboratory areas." *Id*. Specialized services included security and custodial services. *Id.*

81. *Hg Props.*, 2002 CPD ¶ 128, at 2.

82. *Id*. Referencing the SFO, the GAO wrote:

> No specific property location was identified; rather, offered properties had to be located within a designated area of consideration, defined in the SFO by reference to certain city boundaries. Such properties had to be located in a prime commercial office district with professional surroundings, be reasonably accessible to public transportation and highways, and include a minimum of 125 on-site parking spaces.

Id.

83. *Id*. at 3.

the lease, the GAO disagreed, finding that the location change was not "so material to the overall effort . . . as to be outside" the scope.[85] Contrasting the detailed configuration and services specifications, which POC did not alter, with the broad location requirement, the GAO concluded that the change in site did not "materially change the nature or purpose of the lease."[86] The GAO denied the protest.[87]

The COFC and CAFC apply a similar analysis, using somewhat different "catch phrases," when determining whether a modification is beyond the scope of its initial contract vehicle. In *CESC Plaza LP v. United States*,[88] the COFC wrote that "modifying the contract so that it materially departs from the scope of the original procurement violates CICA."[89] Determining whether the modification "materially departed" from the original contract, the COFC compared the modified contract with the "scope of competition conducted to achieve the original contract."[90] In addition to examining changes in the type of work, performance period and costs, the COFC asked "whether the modification is of a nature which potential offerors would reasonably have anticipated."[91]

CESC involved modifications to a lease which the General Services Administration (GSA) obtained on behalf of the Patent and Trademark Office (PTO), for office space for the consolidated PTO in northern Virginia. Seven months after award to LCOR Alexandria, Inc. (LCOR), LCOR proposed, and the GSA accepted, a list of lease changes. LCOR needed the changes to obtain adequate financing.[92] In addition, LCOR entered into a separate lease directly with the GSA for 3561 parking spaces and adjacent office spaces. The plaintiffs sought injunctive relief, asking the COFC to reopen the procurement.[93] Interestingly, the plaintiffs did not allege that the final building was outside the scope of the initial SFO. Rather, the plaintiffs argued "that the changes allow LCOR to finance the construction of the building in a way which gives it advantages not available to other bidders."[94] The amended lease, the plaintiffs asserted, increased LCOR's cash flow and shifted payment and performance risks to the government in a way that the SFO did not permit.[95]

The COFC first examined six specific changes to the lease that the plaintiffs alleged would, when combined, "add significantly to the cash flow features" and therefore exceed the SFO's mandated rent cap.[96] These changes included "base rent increase,"[97] "square footage increase,"[98] "LCOR's receipt of $6,000,000 per year for parking,"[99] "real estate tax,"[100] "up front cash contribution,"[101] and "design changes."[102] The square

84. *Id*.

85. *Id*. at 4.

86. *Id*.

87. *Id*. at 6. During the past fiscal year, the GAO heard and denied two other protests alleging out-of-scope modifications: *Atlantic Coast Contracting, Inc*., Comp. Gen. B-288969.4, June 21, 2002, 2002 CPD ¶ 104 (determining that a contract modification for garbage collection and disposal services which required the contractor to use its own vehicles, rather than government-furnished vehicles as initially solicited, was not beyond the initial contract's scope because the fundamental nature or purpose of the contract remained unchanged); and *Engineering & Professional Servs., Inc.*, Comp. Gen. B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 (concluding that an engineering change proposal (ECP) providing technologically-advanced handheld computers was not outside scope of the basic contract when the initial RFP included a wide array of hardware and software and envisioned the use of ECPs for technological advancements, and when the modification did not "change the fundamental nature and purpose of the underlying contract").

88. 52 Fed. Cl. 91 (2002). Other COFC cases addressing this issue during the past year include *Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443 (2001) (holding that delivery orders for radar systems did not relax or loosen contract requirements sufficiently to constitute cardinal changes to the contract), and *VMC Behavioral Healthcare Services v. United States*, 50 Fed. Cl. 328 (2001) (holding that a massive increase in the volume of services did not constitute a material change when the addition was specifically contemplated in the solicitation, and when the protestor was an incumbent on the contract and thus in a unique position to anticipate the increase).

89. CESC Plaza LP, 52 Fed. Cl. at 93 (citing AT&T Communications v. Wiltel, Inc., 1 F.3d 1201, 1204 (Fed. Cir. 2002)).

90. *Id*.

91. *Id*.

92. *Id*. at 92. The maximum annual rent was $57,286,560, and the annual per-square-foot rent was twenty-four dollars per rentable square foot. The "project would constitute the largest lease ever executed by GSA." *Id*.

93. *Id*. at 93-94.

94. *Id*. at 93.

95. *Id*.

96. *Id*. at 94-97.

97. *Id*. at 94.

footage increase and the receipt of the $6 million both stemmed from a separate lease between LCOR and the GSA for additional parking and adjacent office space. As such, neither change was material.[103] The base rent increase was explicitly within the escalation allowed by the SFO.[104] The COFC found that the amended real estate tax provisions merely locked in the amount initially projected by LCOR in its final proposal. This was not a material change.[105] Similarly, the up-front cash contribution primarily fixed the time for payment. In exchange for the "added predictability in cash flow to LCOR, the GSA extracted some minor concessions."[106] Finally, the design changes left the "end product basically the same," and therefore were not outside of the SFO.[107] Thus, the court determined that none of these six items constituted "fundamental alterations" to the original SFO.[108]

The COFC then examined the plaintiff's argument that the combined effect of these changes, along with three additional modifications "gave LCOR a critical advantage in terms of the cost of its financing . . . by shifting the payment risk to the government."[109] The court determined that none of the alleged additional modifications—a "fixed rent start date," "unconditional obligation to pay rent," and a "minimum renewal rent rate and option to purchase"—materially altered the SFO.[110] While the fixed rent start date was new, the government bargained for the change, thus "mitigat[ing] any shift in the burden of performance and payment."[111] The final two alterations were not material changes.[112]

Despite the large number of alleged modifications, the COFC held that they were not, individually or collectively, "outside the scope of the SFO."[113] Noting the broad initial competition scope, the court acknowledged that changes between the SFO and the final lease would develop. The modifications, however, did not "improperly change the cash flow" or "improperly shift the payment/performance obligations."[114] The court denied the request for injunctive relief.[115]

Determining whether a task or delivery order is within the scope of its base contract requires analysis nearly identical to the analysis of whether a contract modification is within the scope of its original contract. For instance, in *Symetrics Industries*,[116] the GAO stated, "In determining whether a task order is beyond the scope of the original contract, we look at whether there is a material difference between the task order and that contract . . . . The overall inquiry is whether the task order is of

98. *Id*. at 94-95.

99. *Id*. at 95.

100. *Id*. at 95-96.

101. *Id*. at 96-97.

102. *Id*. at 97.

103. *Id*. at 94-95.

104. *Id*. at 94.

105. *Id*. at 95-96. The initial SFO required the government to pay real estate taxes above a certain minimum amount, determined by a formula. The amended provision prospectively determined what the minimum amount would be based on then-available figures. Thus, the amended provision added certainty, but should not have materially altered the amount of tax the government would pay. *Id*.

106. *Id*. at 96-97.

107. *Id*. at 97.

108. *Id*.

109. *Id*. These other modifications included a "fixed rent start date," an "unconditional obligation to pay rent," and a "minimum renewal rent rate and option to purchase." *Id.*

110. *Id*. at 97-100.

111. *Id.* at 98.

112. *Id*. at 98-100.

113. *Id*. at 100.

114. *Id*.

115. *Id*. at 101.

116. Comp. Gen. B-289606, Apr. 8, 2002, 2002 CPD ¶ 65.

a nature that potential offerors would reasonably have anticipated."[117] In *Symetrics*, the protestor challenged a task order to retrofit modems under a depot maintenance contract.[118] Because retrofitting modems was within the broad definition of depot maintenance, potential offerors would reasonably have anticipated task orders for this work. Thus, the task order did not exceed the scope of the contract.[119]

Navy Says: "They're Our Destroyers, You Can't Use One, but Your Competitor Can;" GAO Says, "Not Unfair"

Competition to design and build the Navy's next generation destroyer reached a pivotal stage on 19 August 2002, when the GAO denied Bath Iron Works Corporation's (BIW) protest of a multi-billion dollar award to Ingalls Shipbuilding to serve as the DD(X) program's design agent for technology development.[120] BIW alleged that the Naval Sea Systems Command failed to conduct the competition on a common basis.[121] Specifically, BIW claimed that the Navy's refusal to allow BIW to use a decommissioned destroyer for at-sea testing, while, for purposes of evaluation, accepting Ingalls' proposed use, competitively disadvantaged BIW.[122]

In earlier phases of the Land Attack Destroyer Program, the Blue Team (with BIW as the prime contractor) and the Gold Team (with Ingalls as the prime contractor) had developed individual destroyer designs.[123] In the solicitation for this phase, the DD(X) design agency required the winning contractor to

> (1) design, develop and build, and conduct factory tests, land-based tests, and (where specified) at-sea tests of engineering development models (EDMs); and (2) engineer the results of the testing into the DD(X) system design based on the contractor's DD 21 Phase II engineering, and that will meet the operational needs and requirements established in the [prior phases'] Operational Requirements Document.[124]

To conduct the at-sea tests, BIW initially requested use of a decommissioned DD 963 Spruance Class destroyer. One BIW study indicated that the DD 963 was the "favored" at-sea platform for evaluating one of the EDMs.[125] The Navy denied the request.[126] The Blue Team final proposal revision (FPR), therefore, contemplated using a "modified commercial heavy lift ship" as its at-sea testing platform.[127] The Gold Team FPR, however, included—and was evaluated based on the use of—a decommissioned DD 963 for at-sea testing.[128] BIW alleged that this apparent differential treatment was improper.

The GAO began by stating one of government contracting's "fundamental principles": "[C]ompetition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis" to prepare their offers.[129] Nonetheless, absent "competitive prejudice," the GAO will not sustain a protest even if an error occurred in the procurement process.[130] For several reasons, the GAO found that denying

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117. *Id*. at 5. Elaborating on the relevant factors, the GAO stated:

> Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued.

Id.

118. *Id*. at 1.

119. *Id*. at 7-8.

120. Bath Iron Works Corp., B-290470, B-290470.2, Aug. 19, 2002, 2002 CPD ¶ 133.

121. *Id*. at 2.

122. *Id*. at 11.

123. *Id*. at 2.

124. *Id*.

125. *Id*. at 8.

126. *Id*. at 9.

127. *Id*. at 10.

128. *Id*. at 10-11. At that time, the Gold Team apparently had not requested permission from any authorized Navy authority to use a decommissioned destroyer. *Id*.

129. *Id*. at 11.

the Blue Team use of a DD 963 did not result in competitive prejudice.[131]

First, after the initial request and rejection by the Navy, the Blue Team did not pursue efforts to use a DD 963.[132] The Blue Team's failure to appeal or otherwise follow up the denial of the request suggested that the team did not view destroyer use as important to its proposal.[133] Second, the Navy reasonably determined that the Blue Team would not have technically benefited from proposing a DD 963 rather than a large commercial ship.[134] Finally, the Blue Team's proposal to use the commercial ship did not materially affect the ultimate evaluation.[135] Therefore, the GAO concluded, "the Blue Team was not competitively prejudiced by the agency's alleged unequal treatment."[136]

BIW also asserted that the Navy improperly used "firewalled" information to the Gold Team's competitive advantage.[137] Raytheon, a member of the Gold Team, developed the radar system that the solicitation required both offerors to use. To prevent Raytheon from entering into an "exclusive arrangement with one of the two DD 21 teams and refus[ing] to share" information with the competing team, the Navy established a firewall.[138] The firewall would ensure that Raytheon equitably provided information to both teams.[139]

The Navy used firewalled information to evaluate both teams' offers. BIW argued that "by taking into account firewalled information in its evaluation of the Gold Team's radar approach, the Navy accorded the Gold Team an unfair competitive advantage."[140] The GAO held that contracting agencies may consider any evidence in evaluating proposals, "even if that evidence is entirely outside the proposal . . . so long as the use of the extrinsic evidence is consistent with established procurement practice."[141] According to the GAO, because the firewall did not prevent government personnel from obtaining information, and because the offerors should have known that the Navy would consider such information, there was "no basis for questioning the agency's handling of firewalled information."[142]

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130. *Id*. at 13. "Where the record does not demonstrate that, but for the agency's actions, the protester would have had a reasonable chance of receiving the award," the GAO will not sustain a protest "even if a deficiency in the procurement is found." *Id.*

131. *Id*.

132. *Id*. at 13-15. The GAO opinion describes how the Navy's rejection was accomplished by an E-mail, and that the office with the ultimate authority to approve or deny the request was not the office that sent the E-mail. *Id.*

133. *Id*. at 15.

134. *Id*. at 15-17.

135. *Id*. at 17-19. The source-selection advisory council specifically found, "[T]he identity of the at-sea platform had no effect on its best value analysis." *Id*. at 19. In addition, the Gold Team's proposal was found to be technically superior and there was "no basis for concluding that [DD 963 use] would have materially altered the evaluation." *Id*.

136. *Id*. at 19.

137. *Id*. at 21-23. The GAO addressed and denied allegations of an incumbent's "competitive advantage" in two other cases this past year: *M & W Construction Corp*., Comp. Gen. B-288649.2, Dec. 17, 2001, 2002 CPD ¶ 30 (holding that no organizational conflict of interest or unfair competitive advantage arises from the "mere existence of a prior or current contractual relationship between a contracting agency and a firm"); and *Snell Enterprises, Inc*., B-290113, 2002 U.S. Comp. Gen. LEXIS 99 (June 10, 2002) (stating that an incumbent's advantage is improper if it is "created by an improper preference or other unfair action by the procuring agency").

138. *Bath Iron Works*, 2002 CPD ¶ 133, at 21.

139. *Id*.

140. *Id*. at 22.

141. *Id*. at 23.

142. *Id.* BIW also asserted that the Navy underestimated the Gold Team's performance costs. According to BIW, the Gold Team's costs, when properly estimated, would have exceeded the $2.865 billion cap; therefore, the Navy should have rejected the Gold Team's proposal. *Id*. at 19. The GAO found that even if the Navy had waived the funding requirements, the waiver did not cause BIW any competitive prejudice. Specifically, the GAO concluded that BIW had not "shown that it would have increased its proposed effort so as to materially improve its competitive position had it known that additional funding . . . would be available." *Id*. at 20.

GAO Condones Two Sole-Source Contract Awards to Incumbents[143]

In *Global Solutions Inc.*,[144] the Department of Labor (DOL) awarded a one-year sole-source contract for Job Corps services to the incumbent contractor.[145] The services consisted of operating a residential educational and training facility.[146]

On 1 February 2002, the DOL issued an RFP as a small business set-aside, for operation of the Potomac Job Corps Center in Washington, D.C.[147] Two weeks later, Global filed a size standard appeal with the Small Business Administration (SBA). On 5 March, the SBA granted Global's appeal.[148] As a result, the agency cancelled the solicitation, citing a need to review its size standard requirements. Soon thereafter, the DOL initiated formal rulemaking with the SBA; a process that was anticipated to take about one year. Since the Potomac Job Corps Center was providing services to approximately 500 students—including residential services to 425 students—and had to continue operations, the DOL awarded a sole-source contract to the incumbent contractor.[149]

Global, which had filed several challenges against prior iterations of this procurement, protested the sole-source award.[150] Global did not question the agency's immediate need for the continued services; nor did Global allege that any firm other than the incumbent could have met the immediate need. Instead, Global contended that the sole-source authorizing official "should have been told of Global's earlier protest contentions."[151] Global did not show how these matters would have had any impact on the decision-maker, nor did Global challenge the basis relied upon in the justification and approval (J & A) for the sole-source award.[152] Therefore, "given the unchallenged, immediate need" for the services and "the extended transition period required for any change of contractor, the record shows that the agency reasonably determined that there was only one available source for the required services" while the agency resolved the size standard issue.[153]

Bannum, Inc.[154] involved another "bridge" contract awarded to an incumbent contractor. As in *Global Solutions*, the sole-source award in *Bannum* resulted, at least in part, from earlier legal efforts by the protestor. On 1 August 2000, the Bureau of Prisons (BOP) solicited for halfway house services. The BOP received and evaluated three proposals, including one from Bannum and one from the incumbent, Keeton Corrections, Inc. (Keeton). After prolonged negotiations caused the agency to extend the incumbent's contract, the BOP awarded to Keeton in November 2000.[155] Bannum protested the award. In response, the BOP canceled the solicitation and terminated the incumbent's contract for convenience on 7 December 2001.[156]

Since the current contract was scheduled to end on 28 February 2002, the BOP prepared a J & A for a competition for a one-year contract, limited to the three prior offerors. The J & A, finalized on 9 January 2002, relied on FAR section 6.302-2, "unusual and compelling urgency."[157] All three offerors submitted proposals. Even though Bannum participated in the competition, it alleged that the 1 March start date made this a "de facto sole-source procurement" because only the incumbent "with its currently operating facility, can meet the RFP's

143. Global Solutions Inc., Comp. Gen. B-290107, June 11, 2002, 2002 CPD ¶ 98; Bannum, Inc., Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD ¶ 61. In a third case, the GAO sustained the protest of a sole-source order from a federal supply schedule. Reep, Inc., B-290665, 2002 U.S. Comp. Gen. LEXIS 137 (Sept. 17, 2002). For further discussion of *Reep*, see *supra* Part II.J, *Multiple Award Schedules.*

144. Comp. Gen. B-290107, June 11, 2002, 2002 CPD ¶ 98.

145. *Id.* at 1, 5-7.

146. *Id.* at 1.

147. *Id.* at 2.

148. *Id.* at 2-3.

149. *Id.* at 3.

150. *Id.* at 5.

151. *Id.* at 6.

152. *Id.*

153. *Id.* at 7.

154. Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD ¶ 61.

155. *Id.* at 1.

156. *Id.* at 1-2.

157. *Id.* at 2.

preparatory start-up schedule and performance start date."[158] Bannum also argued that the short preparation period resulted from a lack of advanced planning.[159]

The Comptroller General found "no evidence" of a lack of advance planning. The lengthy pre-award process and consequent urgency resulted from delays in the evaluation, the filing of two protests, and the termination of the initially-awarded contract.[160] Therefore, "while the agency's planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning."[161]

Agency Reasonably Classifies Feeding Pump CLIN as "Subsistence"

Publicizing is an important component of competition. In *Kendall Healthcare Products Co.*,[162] the protestor alleged that the Department of Veterans Affairs, National Acquisition Center (VANAC) misclassified a contract action in the *Commerce Business Daily* and thereby excluded the protestor from the competition.[163] The commercial item RFP included forty-six line items. Forty-four of the items were dietary supplements "for the management of malnutrition and other medical conditions."[164] Many of these products were provided in "ready-to-hang" (RTH) bags. The remaining two line items were for feeding pump sets, used in conjunction with the RTH products.[165] Required to select one classification code for the entire contract action,[166] the VANAC listed the procurement under code 89, "subsistence."[167] Kendall Healthcare argued that feeding sets were properly classified under code 65, "Medical, dental and veterinary equipment and supplies."[168] According to the Comptroller General, the VANAC's classification of the procurement under code 89 was not unreasonable. The GAO denied the protest.[169]

DOJ Sues to Ensure Nuclear Shipbuilding Competition

On 22 October 2001, the Departments of Defense (DOD) and Justice (DOJ) dashed General Dynamics' hopes of acquiring Newport News Shipbuilding (Newport News). On that date, the DOD announced its decision to recommend to DOJ approval of Northrop Grumman's efforts to acquire Newport News and its decision to recommend disapproving General Dynamics merger plans.[170] The DOJ then brought an antitrust

158. *Id.*

159. *Id.* Referencing the pertinent statutory authority, the GAO stated:

> An agency may use other than competitive procedures where its needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. . . . A contract may not be awarded using other than competitive procedures, however, where the urgent need for the requirement has been brought about by a lack of advance planning by contracting officials.

Id. (citing 41 U.S.C. § 253(c)(2) (2000); FAR, *supra* note 8, at 6.302-2(a)(2)).

160. *Id.* at 3.

161. *Id.* Bannum also complained about the contract period. Bannum asserted that the period should be six months, rather than one year. BOP, however, presented sufficient evidence demonstrating that the agency needed one year to properly conduct a proper procurement for long-term halfway house services. *Id.* at 3-4.

162. Comp. Gen. B-289381, Feb. 19, 2002, 2002 CPD ¶ 42.

163. *Id.* at 1.

164. *Id.* at 2.

165. *Id.*

166. See FAR section 5.207, which states, in pertinent part, that "only one classification code shall be reported." FAR, *supra* note 8, at 5.207(h)(3). It further states:

> Each synopsis shall classify the contemplated contract action under the one classification code which most closely describes the acquisition. If the action is for a multiplicity of goods and/or services, the preparer should select the one category best describing the overall acquisition based upon value. Inclusion of more than one classification code, or failure to include a classification code, will result in rejection of the synopsis by the Commerce Business Daily.

Id. at 5.207(c)(4).

167. *Id.* at 4.

168. *Id.* at 5.

169. *Id.* at 6.

170. *Newport News Shipbuilding Notified of Department of Defense Recommendation*, PR Newswire, Oct. 23, 2001, LEXIS, PR Newswire File.

suit to prevent the merger of Newport News and General Dynamics. A General Dynamics-Newport News combination would leave only one company capable of manufacturing nuclear-powered ships. According to Charles James, the DOJ's antitrust chief, "This merger-to-monopoly would reduce innovation and, ultimately, the quality of products supplied to the military, while raising prices to the U.S. military and to U.S. taxpayers."[171] Clearly, someone believes that competition works. Lieutenant Colonel Benjamin.

171. *Aldridge Favors Northrop in Newport News Deal; DOJ Sues to Block General Dynamics' Bid*, 43 GOVT CONTRACTOR 40, ¶ 415 (Oct. 31, 2001).

Contract Types

CAFC Revises the "Delta" That IDIQ Contractor Is Entitled to When Government Fails to Order the Minimum

Last year's *Year in Review*[1] commented on *Delta Construction International, Inc.* (*Delta*),[2] the first board decision to endorse the view that a contractor may receive more than just anticipated profits when the government breaches an Indefinite-Delivery, Indefinite-Quantity (IDIQ) contract.[3] In *Delta*, the Armed Services Board of Contract Appeals (ASBCA) found that the minimum guarantee served as the government's consideration for the contractor's promise to maintain a minimum daily workload capability level. Consequently, the board held that the contractor was entitled to the difference between that guaranteed minimum and the amount the government had ordered.[4]

Over the past year, several decisions have followed the precedent established in *Delta*.[5] The government, recognizing that these decisions could represent the tip of an iceberg, appealed the ASBCA's *Delta* decision to the Court of Appeals for the Federal Circuit (CAFC). The CAFC reversed, noting that "the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation."[6] The CAFC found that the board's decision violated this rule; paying Delta the entire difference would overcompensate it because Delta would have incurred additional costs if it had actually been ordered to perform the additional work.[7]

Before the CAFC, Delta argued that the court's decision in *Maxima Corp. v. United States*[8] had established an exception to the general rule regarding the calculation of damages, at least when the contract required a minimum capability. The CAFC disagreed, noting that

> the result of the court's decision in *Maxima* was that the contractor would retain the amount the government had paid it, representing the difference between the guaranteed minimum and the amount of work the government had ordered. That resulted, however, not because the court approved the basis of payment (it did not address that issue), but because the court found improper the method the government used to recapture the payment (retroactive termination for convenience).[9]

Exactly what amount of damages would put Delta in as good a position as it would have been in, had the United States fully performed its obligation, remains unanswered.[10]

I've Heard of Avoiding Lawn Mowing, But . . .

One case that followed the ASBCA's *Delta* ruling was *Howell v. United States*.[11] *Howell* involved ten separate Farmers Home Administration (FmHA) IDIQ contracts for lawn mowing and grounds maintenance at various FmHA properties in Florida.[12] Each of the contracts incorporated the "Indefinite Quantity" clause found at FAR section 52.216-22,[13] as well as a special clause in Section I, both of which required the government to order "at least the quantity of . . . services designated in the Schedule as the 'minimum.'"[14] Unfortunately, nothing in

1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 19-20 [hereinafter *2001 Year in Review*].

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

3. *Id.* Until *Delta* was decided, the only other decision supporting this contention was *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), on which the ASBCA relied heavily to reach its *Delta* holding. *Delta*, 01-1 BCA ¶ 31,195, at 10.

4. ASBCA No. 52162, 01-1 BCA ¶ 31,195, at 154,028.

5. *See, e.g.*, Howell v. United States, 51 Fed. Cl. 516, 524 (2002); Hermes Consolidated, Inc., ASBCA Nos. 52308, 52309, 02-1 BCA ¶ 31,767, at 156,898; Mid-Eastern Indus., Inc., ASBCA No. 53016, 01-2 BCA ¶ 31,657, at 156,403.

6. White v. Delta Constr. Int'l, Inc., 285 F.3d 1040, 1043 (Fed. Cir. 2002) (citing Mass. Bay Transp. Auth. v. United States, 129 F.3d 1226, 1232 (Fed. Cir. 1997)).

7. *White*, 285 F.3d at 1040.

8. 847 F.2d at 1549.

9. *White*, 285 F.3d at 1044.

10. *Id.* at 1046. The CAFC did note that the contracting officer considered the $11,216 that it had already awarded Delta to be compensation for profit and overhead as well as for labor costs that Delta would have "incurred while remaining available to perform work the government should have given it." *Id.* at 1045. The CAFC ruled that, based upon the record, it could not tell whether this was correct; the CAFC remanded the case to the ASBCA for further review. *Id.*

11. 51 Fed. Cl. 516 (2002).

12. *Id.* at 517.

any of the contracts' schedules expressly established this minimum quantity of services. The statements of work found in Section C of the contracts, however, provided that "[a]dditional mowing of the farm acreage will be decided by the [contracting officer's representative] but shall not be less than twice during the [twelve]-month contract period."[15]

When the government failed to order any services under seven of these ten contracts, Howell, the contractor, submitted an invoice for $93,288 for services which it believed these contracts required the government to order.[16] Howell calculated this amount by concluding that it was entitled to cut each property twice and perform an initial service on each; according to Howell, the statements of work required it to perform additional mowing at least twice after the initial service call.[17] The contracting officer refused payment on these invoices, but acknowledged that the government had committed to ordering a minimum quantity. The contracting officer unilaterally established these required minimums at between $200 and $2000 for each of the seven contracts in which the government had not ordered any services, a total of $5100. The contractor filed suit to recover the difference between its own computations for the minimums and the $5100 it received from the government.[18]

At trial, the government argued that each contract was invalid and unenforceable because each failed to contain a guaranteed minimum.[19] The Court of Federal Claims (COFC) disagreed, observing the common law principle which indicates that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."[20] The court then determined that the parties had intended to form a binding agreement that did include some guaranteed minimum.[21]

The court also distinguished several prior cases that had held IDIQ contracts to be illusory and unenforceable if they lacked a guaranteed minimum. The court reasoned that the prior cases concerned contracts that did not contain FAR section 52.216-22, meaning that the government was not obligated to order any quantity whatsoever. The court pointed out that the *Howell* IDIQ contracts contained this clause, thus requiring the government to order "*some* minimum quantity of plaintiff's services."[22] Lastly, the court had to calculate a quantity to supply for the missing "minimum" in the contract. Here, the court looked at the contracting officer's letter sent in response to Howell's invoice, in which the contracting officer unilaterally established a minimum of $200 on three contracts, $500 on one contract, $1000 on two contracts, and $2000 on another. The court found the $1000 and $2000 amounts to be non-nominal, but found that a mere "few hundred dollars . . . would not have compensated plaintiff for the costs associated with his obligation to stand ready to perform services upon short notice" or for foregoing other employment.[23] It therefore determined that the amounts the contracting officer established for the remaining four contracts were nominal and substituted $1000 in their place.[24] The court indicated that it considered this amount to be non-nominal because Howell would have received at least $500 to cut even the smallest of properties on any of these three contracts, and once the government ordered the initial cutting, it would have been obligated to order a second cutting, again costing the government at least $500.[25]

13. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.216-22 (July 2002) [hereinafter FAR].

14. *Hermes*, 51 Fed. Cl. at 519 (quoting FAR, *supra* note 13, at 52.216-22).

15. 51 Fed. Cl. at 520.

16. *Id*. at 518. The contractor later amended this claim to cover services it believed the government was required to order under the additional three contracts in which the government had ordered some amount of services. *Id*.

17. *Id.* at 519. The contract indicated that the contractor would get $450 for performing an "Initial Service" and twelve dollars per acre for mowing each property. It also indicated that if a property were under forty acres, Howell would get $500 for mowing that property. *Id*.

18. *Id*. at 518-19.

19. *Id*. at 520.

20. *Id*. at 520-21 (citing RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981)).

21. *Id*. at 522. The contracting officer wrote two letters to Howell and a separate memorandum for her file that acknowledge that the government was obligated to purchase a guaranteed minimum. The court found these facts persuasive. *Id*.

22. *Id*. at 523.

23. *Id*. at 524.

24. *Id.* The court also awarded Howell $6,098.16 to compensate it for a second mowing on each property on the other three contracts that the government had mowed a single time. *Id*. at 526-27.

25. *Id*. at 524.

The court's logic seems flawed. There is no apparent relationship between the court-supplied term of $1000 for a guaranteed minimum and the costs of standing ready to perform and foregoing other business opportunities. The logic also implies that the smallest order the government may make under an IDIQ contract is *de facto* a non-nominal quantity. If, for example, the government had a widget contract in which the maximum number of widgets it could order was set at one billion, and the contract contained a clause indicating that each organization placing a first order for widgets had to submit a second order for widgets, would the COFC deem two orders from a single organization for one widget each to be a non-nominal quantity?

The Overlap Between IDIQ Contracts and Options

The CAFC's recent holding in *Varilease Technology Group, Inc. v. United States*[26] sanctions the use of a single minimum quantity in IDIQ contracts containing multiple periods of performance. In *Varilease*, the Defense Information Systems Agency (DISA) awarded a five-year IDIQ contract for the maintenance of its Unisys computers to Varilease in March 1998. The contract expressly stated the following:

> This is an indefinite-delivery, indefinite-quantity (ID/IQ) contract utilizing Firm-Fixed-Price delivery/task Orders in accordance with FAR 16.500. Total orders placed against this contract shall not exceed $50,000,000.00 over a five-year period (6-month base period, four 12-month and one 6-month option periods). The guaranteed minimum is $100,000 for the basic period only. There is no guaranteed minimum for the option periods, if exercised.[27]

The DISA placed approximately $3 million in task orders during the base period of performance and over $10 million in task orders by the end of the third option period. Apparently, the DISA ordered much of the work during the base period or the beginning of the first option period because it began replacing its Unisys computers in September 1998; it either stopped placing new orders or canceled existing orders at this point. Varilease filed a claim alleging that the DISA breached its contract, which the contracting officer denied. Varilease then sued in the COFC. When the COFC granted summary judgment in favor of the government, Varilease appealed to the CAFC.[28] Before the CAFC, Varilease admitted that the initial six-month base period was an enforceable contract because it required the government to order a non-nominal minimum quantity—and the government did. Varilease argued, however, that "each option should be construed as creating a separate contract, and because each . . . separate option contract lacks a stated minimum order quantity (and hence consideration from the government), each option exercise must be found to create a requirements contract."[29]

The government asserted that the contract clearly indicated that each option period of performance was part of a single, unitary contract and that the exercise of each option merely extended the overall duration of that contract. The court looked at the wording in both the contract and the FAR section dealing with IDIQ contracts.[30] Both of these used singular language, such as "this contract" or "the contract," which the court found inconsistent with Varilease's interpretation that each option exercise created a separate contract. The *Varilease* decision clearly demonstrates that the government may award IDIQ contracts containing multiple periods of performance and provide adequate consideration by including a requirement to purchase a non-nominal minimum in the base period.[31]

Government Lacks Consideration

The CAFC also wrestled with the adequacy of consideration in *Ridge Runner Forestry v. Veneman*.[32] That case, however, deals with adequacy within the context of a requirements con-

26. 289 F.3d 795 (Fed. Cir. 2002).

27. *Id*. at 797.

28. *Id*. at 797-98.

29. *Id*. at 798.

30. FAR, *supra* note 13, at 16.504.

31. Varilease had also cited *Dynamics Corp. of America v. United States*, 182 Ct. Cl. 62, 389 F.2d 424 (1968), which held that the issuance of each order above the required minimum under an IDIQ contract was the exercise of an option, and as such, created a separate contract covering that order quantity. The real issue in *Dynamics Corp.* was the timeliness of the task orders. The court had to determine whether the issuance of each task order created a stand-alone contract to determine whether they were valid upon issuance or upon receipt. *See id.* at 430-32. The CAFC never adequately distinguished *Dynamics Corp.* from *Varilease*, concluding only that "the fact that an order pursuant to an option clause in an ID/IQ contract may lead to a separate supply contract for that order does not mean that" the separate supply contract will be a requirements contract because it does not contain a minimum quantity. *Varilease*, 289 F.3d at 800. Realistically, the court should have just held that *Dynamics Corp.* was bad law to the extent that it held that an option exercise necessarily resulted in a new stand-alone contract rather than the extension of the existing contract.

32. 287 F.3d 1058 (Fed. Cir. 2002).

tract. In *Ridge Runner*, the Forest Service entered into several Engine Tender Agreements that permitted, but did not require, the government to place orders with Ridge Runner and other fire companies to provide fire fighting equipment. The agreement further provided that "upon the request of the government, the contractor shall furnish the equipment offered herein to the extent the contractor is willing and able at the time of order."[33] When the government did not order any equipment from it, Ridge Runner filed a claim for $180,000, based on the government's alleged violation of its duty of good faith and fair dealing. The contracting officer denied this claim, and when Ridge Runner appealed to the Department of Agriculture Board of Contract Appeals, it dismissed the case for lack of jurisdiction because the parties did not have an enforceable contract.[34]

On appeal, Ridge Runner attempted to demonstrate that its agreement fit "squarely within [the *Ace-Federal Reporters, Inc. v. Barram*] holding."[35] The court distinguished *Ace-Federal* on the grounds that it involved a series of requirements contracts, which required the government to order all of its court-reporting services from one of the contractors. In contrast, the court determined that the Engine Tender Agreements did not restrict the Forest Service to ordering only from the class composed of Engine Tender Agreement holders. Consequently, the CAFC affirmed the board's decision.[36]

"Shear" Audacity in Contracting for Spare Parts

The COFC also had an opportunity to review a requirements contract in *Hi-Shear Tech. Corp. v. United States*,[37] a case involving the adequacy of government estimates. In *Hi-Shear*, the Army's Communications and Electronics Command (CECOM) entered into two different five-year contracts with Hi-Shear to provide a total of sixteen different spare parts for the T-39 circuit switch. The solicitations and resultant contracts each contained the "Requirements" clause,[38] thus requiring the Army to purchase its entire need for each of these sixteen spare parts from Hi-Shear. They also contained estimates of the government's requirements for each of these parts for each of the annual performance periods.[39]

In calculating these estimates, the CECOM item manager considered data documenting how many broken parts units in the field historically sent back for repair. These repaired spare parts reduced the government's requirements. Unfortunately, this data reflected returns made under an Army policy that did not require field units to pay for spare parts but forced them to pay for the return shipping of any broken parts. Consequently, units in the field had little incentive to return broken parts.

By the time CECOM had issued the solicitation, however, the Army recognized that its policy was causing waste, and had changed its policy to require units to pay for spare parts, but not to pay for return shipping of any broken parts. Unsure of how much of a difference this change of policy would have on the number of returned parts, the item manager sought advice from his branch and division chiefs. These individuals told him to estimate the number of returns at a revised rate of twenty-five percent. At this time, there was also a change in item managers, and the outgoing manager never effectively communicated this twenty-five-percent estimate to the new item manager, who ultimately prepared the government estimates.[40]

By the third year of the contract, CECOM had placed orders against these contracts for less than twelve percent and twenty percent of the estimated annual quantities for the two contracts.[41] Consequently, Hi-Shear filed claims for $310,319 and $53,330, respectively, representing profits and fixed overhead on the difference between the ordered quantities and the estimated quantities provided in the contracts. Hi-Shear alleged that government negligence caused the shortfalls.[42] The government denied these claims, asserting that the "substantial variance" between the estimates and the quantities the government actually ordered resulted from funding cuts.[43]

When Hi-Shear appealed these denials to the COFC, however, the government admitted that funding had nothing to do

33. *Id*. at 1060.

34. *Id*.

35. *Ridge Runner*, 287 F.3d at 1061 (citing Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2002)).

36. *Id*. at 1062.

37. 53 Fed. Cl. 420 (2002).

38. FAR, *supra* note 13, at 52.216-21.

39. 53 Fed. Cl. at 425-26.

40. *Id*. at 423.

41. *Id*. at 426.

42. *Id*. at 426-27.

43. *Id*. at 427.

with the shortfalls. At trial, the government instead indicated that a reduction in the size of the Army and the change in Army policy concerning charging for spares and their return shipping caused the shortfall. The government alleged that the effect of the policy change was indeterminable at the time it issued the solicitation; therefore, it was not negligent in preparing the estimates.[44]

The court, citing precedent, noted that the government "is not free to carelessly guess at its needs" and instead must calculate its estimates based upon "all relevant information that is reasonably available to it."[45] The court recognized that CECOM could not determine the exact effect the policy change would have on its requirements for T-39 spares, but it also emphasized that CECOM knew that there would be a substantial reduction in requirements, for which it did not account when it prepared its estimates. The court ruled in favor of Hi-Shear, determining that CECOM negligently failed to base its estimates on the change in policy.[46]

Hi-Shear was only partially victorious, however, because the court also determined that it could not recover its profit and overhead on the entire difference between the estimated and ordered quantities. The court ultimately substituted the branch and division chiefs' estimate of a twenty-five percent part return rate, apparently believing that the government should have known that the return rate would reach at least this level. The court also accepted the government's contention that a portion of the unordered quantities was associated with a reduction in the size of the military. As a result, the court allowed recovery based upon the difference between the estimates the agency actually used and the "should have used" estimates it had calculated, using the twenty-five-percent return rate.[47]

Around the same time the COFC issued its *Hi-Shear* ruling, the ASBCA tackled a nearly identical issue in *S.P.L. Spare Parts Logistics, Inc.*[48] In *S.P.L.*, the contractor alleged that the Army's Tank and Automotive Command (TACOM) had negligently prepared its estimated quantities of requirements for replacement road wheels for the M-60 tank. The item manager who developed the estimates assumed that the Army would procure new road wheels to satisfy all of its road wheel requirements. This assumption did not consider Department of Defense guidance that required units to repair used road wheels whenever repair was less expensive than replacement.[49] Deciding only the issue of entitlement, the board sustained S.P.L.'s appeal, determining that the TACOM was negligent in not factoring in this policy when it calculated its estimated required quantities.[50]

The significance of these decisions is that the government cannot prepare its estimates carelessly. It must use the best and most current information at its disposal to calculate rationally based estimates.

Doing the Minimum Just Isn't Enough

Last year's *Year in Review*[51] also commented on *Travel Centre v. Barram*,[52] which held 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."[53] More recently, the ASBCA revisited this issue in *Community Consulting, Int'l.*[54] and arrived at a slightly different outcome.

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44. *Id*. at 427-28.

45. *Id*. at 429 (citing Medart, Inc. v. Austin, 967 F.2d 579, 581 (Fed. Cir. 1992); Womack v. United States, 389 F.2d 793, 801 (Ct. Fed. Cl. 1968)).

46. *Id*. at 429-30.

47. *Id*. at 438-43. The court also held that Hi-Shear was only entitled to receive overhead, not profit, on this difference. *Id*. at 444. The court also refused to grant Hi-Shear any overhead associated with the third and fourth option years because the government elected not to exercise those options after Hi-Shear filed its claims in the middle of the second option year. *Id*. at 442-43.

48. ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982.

49. *Id*. at 158,074-75.

50. *Id*. at 158,079. The ASBCA also held that the government was negligent in not revising its estimates for the base year after a congressional inquiry delayed the award of the contract, causing TACOM to procure roughly half of its base year's requirement from another source before the contract was even awarded. The court further held that the government breached its requirement to purchase solely from S.P.L. by purchasing from another vendor during the period of performance. *Id*. at 158,080.

51. *See 2001 Year in Review*, *supra* note 1, at 18-19.

52. 236 F.3d 1316 (Fed. Cir. 2001), *rev'g* Travel Centre v. Gen. Servs. Admin., GSBCA No. 14057, 98-1 BCA ¶ 29,536.

53. *Id*. at 1319.

54. ASBCA No. 53489, 02-2 BCA ¶31,940.

In *Community Consulting*, the U.S. Agency for International Development (USAID) entered into a multiple-award IDIQ contract for "advisory services, technical assistance, and training in the area of sustainable urban management" in April 1999.[55] The contract indicated that the minimum quantity of services that USAID would order from each contractor would be $50,000, and that the ceiling on the three-year basic period of performance was $90 million, with a potential for an additional $20 million if USAID exercised an option for a fourth and fifth year of performance.[56] In the eighteen months after award, USAID placed orders totaling $1,719,503 with Community Consulting, International (CCI).[57] During this same time frame, the other five multiple awardees received orders having a combined ceiling of $37,336,454. CCI filed a claim with USAID during the second year of performance, alleging that USAID breached its contractual requirement to give all awardees a fair opportunity to compete on orders, and that this caused the discrepancy in order volume.[58] The contracting officer's response indicated that he did not view CCI's submission as a valid claim because it did not raise "issues relating to contract administration for which the Contract Disputes Act is applicable."[59]

When CCI appealed the claim's deemed denial to the ASBCA, USAID asserted that the board did not have jurisdiction. USAID argued that CCI's complaint was "nothing more than a collective bid protest on task orders"[60] and contended that CCI's sole recourse was to submit a complaint to USAID's task and delivery order ombudsman. The board rejected this argument, finding that it did have jurisdiction because CCI's allegation was "rooted squarely in the contractual promise" contained in the Section F clause entitled "Fair Opportunity to Be Considered."[61]

USAID next contended that CCI was not entitled to any relief because USAID had already paid it more than the $50,000 minimum guarantee. The board also rejected this argument, noting that "[w]hile the minimum quantity represents the extent of the Government's purchasing obligation, . . . it does not constitute the outer limit of all of the Government's legal obligations under an indefinite quantity contract."[62] The board added that "[w]hile respondent insists that its legal obligations to appellant have been satisfied once appellant had been awarded the $50,000 minimum guaranteed amount in task orders, we cannot harmonize that result with other provisions in the contract."[63] The board specifically noted that the "Fair Opportunity to Be Considered" clause in Section F described certain procedures that "shall be followed in order to insure that the Contractor shall have a fair opportunity to be considered for each task order" and determined that it could only give the phrase "each task order" its intended effect if it construed it to mean that the government had met both task orders, issued before and after the $50,000 minimum guarantee.[64] Major Sharp.

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55. *Id*. at 157,782.

56. *Id*. at 157,782-83.

57. *Id*. at 157,784. The board did not address the amount of money ultimately paid to the contractor, but it apparently exceeded the $50,000 minimum. *Id*.

58. *Id*. at 157,784-85 (citing 41 U.S.C. § 253j(b) (2000); FAR, *supra* note 13, at 16.505). Apparently, CCI was only permitted to compete on twenty-six out of the fifty-one orders that the agency had placed up to that time. *Community Consulting*, 02-2 BCA ¶ 31,940, at 157,787.

59. *Id*. at 157,785.

60. *Id*. at 157,787. USAID also averred that such a protest was prohibited by 41 U.S.C. § 253j(d). *Id*.

61. *Id*.

62. *Id*. at 157,789.

63. *Id*. at 157,790.

64. *Id.* Since the board only considered entitlement, it did not discuss how many, if any, of the twenty-five orders on which CCI had been excluded from competing involved one of the exceptions to fair opportunity set forth in the FAR. *Id*.; *see* FAR, *supra* note 13, at 16.505(b)(2).

Sealed Bidding

I'm Not a Mind Reader

An agency must have a compelling reason to cancel an invitation for bids (IFB) after bid opening.[1] For example, an agency may cancel an IFB that fails to reflect the agency's needs. In *C-Cubed Corp.*,[2] the Government Printing Office[3] (GPO) issued an IFB for the reproduction of documents to computer diskettes and CD-ROMS. The incumbent contractor, C-Cubed, submitted the apparent low bid—$86,000 less than the next-lowest bid. The GPO asked C-Cubed to verify its bid. C-Cubed explained that it submitted a bid based on the current contract requirements. A review of the orders issued under the current contract confirmed that the estimated quantities in the solicitation were inaccurate. The agency realized that if it applied the corrected estimates to the bids, C-Cubed would be displaced as the low bidder.[4] Rather than award to the new low bidder, the GPO cancelled the solicitation because it did not reflect the actual work to be performed; the GPO thus could not determine the "actual cost of the contract to the government."[5]

The GAO held that the GPO had a reasonable basis to cancel the IFB. The GPO failed to provide bidders with accurate estimates to prepare bids, and C-Cubed was "uniquely positioned to recognize and take advantage of the inaccuracies in the initial estimates."[6] The GAO denied the protest, reasoning that the corrected estimates were significantly different from the cancelled IFB, and that the corrected estimates changed the outcome of the competition.[7]

Chenega Management (Chenega)[8] examined whether ambiguous or inadequate specifications are a basis to cancel an IFB after bid opening.[9] In *Chenega*, the agency, the Maritime Administration (MARAD), issued an IFB for fuel and tug boat services. The MARAD rejected Chenega's bid as nonresponsible because it failed to comply with the IFB's refueling and tug boat specifications. The refueling specification required bidders to load a barge with fuel and transport the fuel to a ship "within a four hour notice."[10] A review of the solicitation revealed that the refueling specification was impossible to perform because it takes more than four hours to load a barge with enough fuel to refuel another vessel, without adding the time it takes to transport the fuel to the ship.[11] The tug boat service specification "failed to specify a minimum horsepower or the number of tugs, leaving open the question of what a contractor must be able to provide."[12] The MARAD cancelled the solicitation and Chenega protested. Chenega claimed that it could meet the MARAD's needs under the IFB.[13]

The GAO denied the protest, finding the basis to cancel the solicitation compelling for two reasons. First, it agreed with the

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1. Section 14.404(a)1 provides,

> preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.404-1(a)(1) (July 2002) [hereinafter FAR]; s*ee also* HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298, at 5.

2. Comp. Gen. B-289867, Apr. 26, 2002, 2002 CPD ¶ 72.

3. *Id.* at 3. While the GPO is not subject to the FAR, the Procurement Regulation corresponds to FAR section 14.401-1. *Id*.

4. *Id.* at 2. C-Cubed listed "no charge" for four contract line items, including the production of 125,000 diskettes, 50,000 mailing labels for the diskettes, and 50,000 mailing labels for the CD-ROMs. C-Cubed explained that the agency rarely requested diskettes (eliminating the need for diskette mailing labels), and that the cost for the CD-ROM mailing labels was included in the CD-ROM production cost. *Id*.

5. *Id.* The agency revised the solicitation; it reduced the diskette estimates from 125,000 to 1000, increased the CD-ROM estimate from 7000 to 50,000, and reduced the mailing labels for the diskettes and CD-ROMS from 50,000 to 500 and 50,000 to 40,000, respectively. *Id.*

6. *Id*. at 3. C-Cubed argued the IFB was a requirements-type contract and that GPO was not obligated to order a particular quantity. *Id.*

7. *Id*.

8. B-290598, 2002 U.S. Comp. Gen. LEXIS 112 (Aug. 2, 2002).

9. FAR, *supra* note 1, at 14.404-1(c)(1) ("[I]nvitations may be cancelled and all bids rejected before award but after opening when, consistent with subparagraph (a)(1) of this section, the agency head determines in writing that . . . inadequate or ambiguous specifications were cited in the invitation.").

10. *Chenega*, 2002 U.S. Comp. Gen. LEXIS 112, at *2. The MARAD alleged that Chenega failed to meet two IFB requirements, one to load a barge with fuel and transport it to the requesting ship within four hours, and the other to provide twenty-four hour tug boat services with sufficient tugs and horsepower to meet simultaneous docking and ship movement. The MARAD intended bidders to load a barge with fuel, transport it, and refuel a ship within four hours. *Id*.

11. *Id*. at *4-5. Chenega was a small business concern. The agency and the Small Business Administration concluded that the specifications were ambiguous and impossible. The MARAD, however, alleged that Chenega's solution failed to meet their needs. *Id*.

12. *Id*. at *7. The IFB only called for "an adequate number of tugs of sufficient horsepower." *Id.*

MARAD that the refueling specification was impossible for any bidder to perform as the MARAD intended.[14] The MARAD confirmed that loading a barge with fuel required more than four hours; the solicitation intended for bidders to load a barge with fuel and transport it to the ships within four hours.[15] Second, "the tug boat specification failed to specify the minimum horsepower or number of tugs a contractor must provide."[16] The GAO reasoned that "the lack of specificity in the specification provided a compelling basis for canceling the IFB because even if Chenega proposed a method of performance that could meet MARAD's needs, other prospective bidders were entitled to know the requirements and submit responsive bids based on them."[17]

Follow the Instructions

In *Chenega*,[18] the GAO upheld the agency's cancellation of an ambiguous specification, but in *C. Lawrence Construction Co.* (*Lawrence*),[19] the GAO held that the Department of Labor's (DOL) IFB was ambiguous and sustained the protest.[20] In *Lawrence*, the DOL issued an IFB for construction. The sign specification authorized ASI Sign Systems to provide the signs or a pre-approved manufacturer with an equal product.[21] The IFB's "general material and equipment" specification prohibited substitutions unless accompanied by the term "or equal" or "or approved equal."[22] The "additional instructions" to bidders authorized substitutions for products or manufacturers if the agency approved them before bid opening.[23] Lawrence concluded that the IFB authorized ASI signs only because no other manufacturer's signs were approved before bid opening, and because the sign specification prohibited substitutions.[24] The protester alleged that the specification was unduly restrictive because another manufacturer's signs could also have met the DOL's needs.[25]

The GAO agreed and held that the IFB was reasonably susceptible to Lawrence's interpretation.[26] The DOL argued that the specification authorized an equal product by an alternate manufacturer if approved.[27] The GAO disagreed and held that the "additional instructions" were in conflict with the provisions of the "materials and equipment" specification.[28] The GAO rejected the arguments that the defect in the specifications did not prejudice bidders, or that the cost of the signs was *de minimis* when compared to the overall contract.[29] The GAO found that the $8000 difference between the agency estimate and ASI's quote for the signs could affect the bidders' competitive standing; it recommended that the DOL revise the specifications and re-solicit the IFB.[30]

13. *Id.* at *4.

14. *Id.* at *7.

15. *Id.* at *4-5. Chenega's fuel supplier confirmed that the agency's intent for refueling was impossible. *Id.*

16. *Id.* at *7. Chenega proposed a combination barge and truck refueling service. The MARAD claimed that it intended refueling by barge only. Chenega did not dispute the MARAD's report that fueling by truck was not the industry standard. *Id.*

17. *Id.* at *7.

18. *Id.* at *1.

19. B-290709, 2002 U.S. Comp. Gen. LEXIS 140 (Sept. 20, 2002).

20. *Id.* at *10.

21. *Id.* at *2. The signs were interior modular and interchangeable. The specification also identified an acceptable ASI product. *Id.*

22. *Id.* at *3.

23. *Id.* at *5. The IFB authorized approval prior to bid opening or after award. The IFB, however, indicated that the agency would not approve requests for approval after award and the contractor would bear the risk of denial. *Id.*

24. *Id.* at *5-6. The specification for signs excluded the terms "or equal" or "or approved equal." *Id.*

25. *Id.* at *5.

26. *Id.* at *7.

27. *Id.* at *6.

28. *Id.* at *8. The "additional instructions" authorized substitutions if approved by DOL. The "materials and equipment" specification probibited substitutions when the words "or equal" or "or approved equal" did not accompany the product. *Id.*

29. *Id.* at *9.

It's Like a Sea-Saw

The GAO had three occasions to deal with materially unbalanced bids.[31] In *Ken Leahy Construction, Inc.* (*Leahy*),[32] the base performance of the Department of Transportation's (DOT) IFB required construction of a roadway and included an option to extend it.[33] The contracting officer exercised the option and awarded the contract to Elte.[34] Leahy claimed that Elte improperly front-loaded the cost of mobilization in the base period of the contract. Leahy also alleged that the contracting officer could not exercise the option until he secured all rights-of-way.[35]

The GAO denied the protest. The GAO found Elte's bid balanced because the "factual predicate for unbalanced pricing—that there be actual costs associated with the performance of the option item—was absent."[36] The IFB required the contractor to mobilize only once because the option merely extended the same roadway.[37] The GAO held that the IFB did not impose any conditions precedent, and that no legal impediments precluded the DOT from exercising the option.[38]

In *L.W. Matteson, Inc.* (Matteson),[39] the GAO sustained the Army Corps of Engineers' (COE) rejection of Matteson's materially unbalanced bid. The COE issued an IFB for dredging and the placement of rock fill in a lake in Wisconsin. The IFB required disposing of dredged material, clearing trees and vegetation, grubbing,[40] stripping,[41] placing a geotextile underlay, and rock fill.[42] The contracting officer asked Matteson to verify the contact line item for clearing and grubbing because it was unusually high.[43] Matteson responded that it placed the disposal site development cost in the clearing and grubbing line item.[44] The contracting officer interpreted the contract line item for dredging to include disposal costs and rejected Matteson' bid. The contracting officer reasoned that the contract line item was "excessive, bearing no relation to the actual cost of the clearing and grubbing work, and might constitute an advance payment."[45]

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30. *Id*. at *10. The DOL estimated a cost of $4329 for the signs, while ASI quoted a price of $12,535.14. *Id.*

31. One prominent treatise explains the term "materially unbalanced" by stating,

> There are two aspects to unbalanced bidding—"mathematical unbalancing" and "material" unbalancing. . . . [T]o conclude that a bid is mathematically unbalanced . . . it is necessary to show that a bid contains both understated and overstated prices . . . . [M]aterial unbalancing involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that the acceptance of a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.

JOHN CIBINIC & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 598 (George Washington University, 3d ed. 1998).

32. Comp. Gen. B-290186, June 10, 2002, 2002 CPD ¶ 93.

33. *Id.* at 1-2. "The base period required construction of approximately 8.6 kilometers of roadway. The option required construction of an additional 3.7 kilometers of the same roadway. The DOT divided the requirements because at the time the it issued the IFB, it failed to secure all the option right-of-ways." *Id.*

34. *Id*. at 2. The DOT secured all but one of the ninety-five rights-of-way. The DOT advised the contracting officer that it would issue the remaining right-of-way within thirty days. *Id.*

35. *Id.* Elte listed $1,189,290 for the base mobilization line item and one dollar for the option mobilization line item. Leahy also claimed that seven other line items of Elte's bid were unbalanced. The GAO held that the line items were balanced because the items were only 0.3% of Elte's entire bid, and because Leahy's bid for the same line items was lower than Elte's. *Id*.

36. *Id*. at 2-3. *See* FAR, *supra* note 1, at 14.404-2(g).

37. *Id*. at 3. The IFB precluded payment of more than ten percent of the entire value of mobilization costs prior to completion and acceptance. *Id.*

38. *Id.* The GAO acknowledged that there are instances where it is improper for the agency to include the option to determine the apparent low bidder, but that this was not applicable to this case. *See, e.g.*, Kruger Constr., Comp. Gen. B-286960, Mar. 15, 2001, 2001 CPD ¶ 43. In the third case, *South Atlantic Construction Co.*, Comp. Gen. B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63, the GAO denied a materially unbalanced bid protest. The U.S. Court of Appeals for the Federal Circuit, in an unpublished opinion, affirmed the Court of Federal Claims' denial of a materially unbalanced protest in *Southgulf, Inc. v. United States*, 30 Fed. Appx. 977 (Fed. Cir. 2002).

39. Comp. Gen. B-290224, May 28, 2002, 2002 CPD ¶ 89.

40. *Id*. at 1. Grubbing is the removal of stumps and large roots. *Id.*

41. *Id*. at 2. Stripping is the removal of surface soil and material. *Id.*

42. *Id*. at 1-2.

43. *Id.* at 2. The clearing and grubbing contract line item was $298,500; the government estimate was $1720, but the only other bid for the same CLIN was $1000. *Id.*

44. *Id*. The contractor claimed to be confused about where to put the cost of developing the disposal site. The GAO held that Matteson's disagreement with the solicitation terms, which only authorized recovery of up-front disposal costs over the life of the project, was untimely. *Id.* at 4.

The GAO agreed with the contracting officer and held that the IFB clearly contemplated disposal costs in the dredging contract line item.[46] Although the GAO said that its analysis would exclude the agency's advance payment concern, it held that Mattteson's bid "created the potential for Matteson to recover a disproportionate share of the overall contract price early in the performance period."[47] The GAO also noted that the FAR authorized the COE to reject Matteson's entire bid based on one unbalanced contract line item.[48]

It Wasn't on Time, but It's Not Late

In *J.L. Malone & Associates* (Malone),[49] the GAO held that receipt of a contractor's bid at the direction of the contracting officer qualified as receipt and control by the government.[50] The National Aeronautics and Space Administration (NASA) issued an IFB for construction of an electrical substation at the Marshall Space Flight Center (MSFC) in Huntsville, Alabama.[51] The IFB required bid submission by "1:30 on April 9th."[52] The contracting officer instructed the MSFC construction manager (CM)[53] to go to "Gate 9" to receive bids and to act as a courier for the bids because he was concerned that base security measures might delay bidders. The contracting officer also instructed the CM to remain at the gate until bid opening.[54] The CM received one bid at 1308 hours, from Garnet Electric Co. (Garnet). The CM called the contracting officer and informed him that he had received the Garnet bid. The contracting officer documented the receipt of Garnet's bid in his notebook. The CM remained at the gate until 1328 hours and delivered the Garnet bid to the contracting officer at 1338 hours, in the bid opening room.[55] Garnet was the apparent low bidder, but Malone protested the contracting officer's acceptance of Garnet's bid.[56] Malone claimed that the Garnet bid failed to satisfy the government control exception because a bid received from a contractor at 1308 hours was not receipt and control by the government by 1330 hours. Malone also claimed that the contracting officer considered unacceptable evidence in his analysis of "the propriety of accepting Garnet's bid."[57]

The GAO agreed that the bid was late, but held that the CM filled a purely ministerial task at the direction of the contacting officer, and that the facts failed to cast any doubt on the integrity of the competitive process.[58] The GAO concluded that the

45. *Id.* at 2.

46. *Id.* at 4. The contract line item for dredging provided "payment . . . for dredging . . . shall include all costs for dredging . . . and . . . disposal." *Id.*

47. *Id.* at 3. The GAO stated that "previous versions of the FAR provided for rejection of unbalanced bids where their acceptance would be tantamount to an adverse payment." *Id.* Because the revised FAR part 15, which discusses unbalanced payments, no longer uses the term "advanced payment" (although the FAR clause used in the IFB did), the GAO considered the risk that Matteson's pricing posed to the government. *Id.*

48. FAR, *supra* note 1, at 14.404-2(f) ("[A]ny bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but prices for individual line items as well.").

49. Comp. Gen. B-290282, July 2, 2002, 2002 CPD ¶ 116.

50. The governing FAR section states,

> [A] bid submitted after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late bid would not unduly delay the acquisition; and there is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

FAR, *supra* note 1, at 14.303(b)(1)(ii).

51. *J.L. Malone*, 2002 CPD ¶ 116, at 5.

52. *Id.* The IFB required bid submission by 1330 hours on 9 April 2002, at Room 36, Building 4250. Bid opening actually occurred in Room 38. *Id.*

53. *Id.* at 3. R.W. Beck, Inc., was the MSFC construction management and inspection services contractor. The contracting officer directed the R.W. Beck Project Manager (PM) to send an employee to the main gate, Gate 9, at Redstone Arsenal. The PM designated the CM, and the contracting officer instructed the CM. *Id.*

54. *Id.* at 2. Security measures required visitors to pass through military checkpoints and the Visitor and Badging and Registration Office. Visitors accessing the installation required a military or civilian escort. The contracting officer told the CM that he would contact him at 1330 hours and instruct him to return with any bids he received. The PM called the CM at 1328 hours and told the CM to deliver any bids he received to the bid opening room. *Id.*

55. *Id.* at 3. The Garnet representative signed in the gate at 1259 hours. The CM received the bid from the Garnet representative at 1308 hours. The CM gave the Garnet representative his business card with the date and time of bid receipt on the back. The PM called the CM and instructed the CM to return to the bid opening room. The Garnet representative arrived at the bid opening room at 1340 hours. *Id.*

56. *Id.* at 4.

57. *Id.* at 5. Malone alleged that Garnet failed to "allow sufficient time to ensure delivery of its bid to the designated opening room before bid opening." *Id.* Malone claimed that evidence from the contractor did not satisfy the acceptable evidence requirements of FAR 14.304(c). *Id.* at 4.

CM's receipt at 1308 hours was receipt and control by the government.[59] The GAO also held that the FAR examples of "acceptable evidence" did not exclude other relevant evidence.[60] The evidence from the contractor that the contracting officer considered was thus relevant and reliable.[61]

The Rules Rule, Common Sense Aside

The Court of Federal Claims (COFC) and the GAO had an opportunity to review bid bond responsiveness in *Davis/HRGM Joint Venture v. United States* (*DHJV*).[62] In *DHJV*, a COE contracting officer awarded DHJV a construction contract on 23 May 2001.[63] On 7 June 2001, Hess, the second-lowest bidder, claimed that the Davis bid bond was defective because the principal on the bid bond, James G. Davis Construction Co., was different from DHJV, the entity identified in the bid.[64] The agency dismissed the protest as untimely based on advice from its legal advisor, but on 10 July 2001, the contracting officer terminated the contract and awarded to Hess.[65] DHJV protested the termination.

The COFC reviewed whether the agency's decision to terminate the DHJV contract was arbitrary, capricious, or in violation of law.[66] The court held that the bond was defective, and thus, that the bid was nonresponsive. The COFC found that the information in the bid packet failed to establish that the corporation and the joint venture were the same legal entity.[67] Therefore, the court could not determine that the surety, James G. Davis Construction Co. would be bound to the government if the bidder, DHJV, defaulted. DHJV claimed that the bid bond issue was moot "when the contract was executed and the relevant performance and payment bonds were submitted."[68] The court, however, ignored the DHJV contract and upheld the award to Hess.[69]

In *Paradise Construction Co.* (*Paradise*),[70] the GAO held that the contracting officer properly rejected a bid that failed to comply with the terms of the IFB. In *Paradise*, the Air Force issued an IFB for sealing four maintenance hanger roofs.[71] The IFB incorporated a FAR provision that holds bidders liable for any reprocurement costs that exceed the bid amount if the bidder defaults.[72] Paradise submitted a bond that limited the liability to the difference between its bid amount and the amount of

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58. *Id.* The GAO recognized that "circumstances may exist where a contracting officer might reasonably find that concerns about the integrity of the process meant control by a contractor employee did not meet the regulatory standard." *Id.*

59. *Id*. at 6.

60. FAR section 14.304(c) lists three examples of acceptable evidence: "the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel." FAR, *supra* note 1, at 14.304(c). The GAO held that the "clause does not restrict acceptable evidence to the examples listed" and "that reasonable consideration of other relevant information is permissible." *J.L. Malone*, 2002 CPD ¶ 116, at 6.

61. *J.L. Malone*, 2002 CPD ¶ 116, at 6.

62. 50 Fed. Cl. 539 (2001).

63. *Id*. at 541. The DHJV performance and payment bonds submitted were incomplete; the COE returned them to DHJV. The contracting officer allowed DHJV to correct the deficiencies. On 23 May 2001, Hess protested DHJV's omission of total bid prices, but the agency's attorney opined that the omission was "waiveable because the total bid amount was ascertainable from the face of the bid." *Id.* at 542. The COE denied the protest on 4 June 2001. *Id*.

64. *Id*. "Hess also claimed the bid bond amount was insufficient: that DHJV was not a pre-qualified bidder under step one of the procurement, and therefore could not compete in the second step." *Id.*

65. *Id.* at 543. The legal advisor determined that the bid bond was defective and recommended termination for convenience unless there was a compelling governmental reason not to do so. The contracting officer accepted the Hess bid on 13 July 2001. *Id.*

66. *Id*. at 546.

67. *Id*. at 548. The issue is

> whether the bidder and the bid bond principal are the same legal entity to ensure that the surety will be obligated under the bond to the government in the event that the bidder withdraws its bid within the period specified for acceptance or fails to execute a written contract or furnish required performance and payment bonds.

Id.; *see also* Harris Excavating, Comp. Gen. B-284820, June 12, 2000, 2000 CPD ¶ 103.

68. *DHJV*, 50 Fed. Cl. at 548. The court held that the corporation and the joint venture were separate entities, even though the head of the joint venture signed the bid bond and the SF 1442 listed the same address for the joint venture and the corporation. *Id*.

69. *Id.* at 549. Although the court denied the protest, it concluded that the decision to terminate the contract was "a ridiculous exaltation of bureaucratic punctilio over practicality, contrary to common sense and caused an additional expense of $312,653 because of the technicality of a bid bond." *Id.*

70. Comp. Gen. B-289144, Nov. 26, 2001, 2001 CPD ¶ 192.

the new contract if it defaulted. The Air Force rejected the bid as nonresponsive, and Paradise protested.[73]

The GAO denied the protest, holding that a "bid bond is defective if it is submitted in a form that represents a significant departure from the rights and obligations of the parties as set forth in the IFB."[74] The IFB required the bidder to be liable "for any cost of acquiring the work that exceeds the amount of its bid."[75] The GAO concluded that the Paradise bond was "not available to offset any administrative and other reprocurement costs."[76] The GAO held that the bid was nonresponsive because the bond significantly diminished the surety and bidder's obligation.[77]

It's My Option and I'll Opt if I Want To

The FAR provides agencies with authority to evaluate bids without evaluating the option if the agency determines that evaluation of the option is not in the agency's best interest.[78] In *ACC Construction Co.* (*ACC*),[79] the COE issued an IFB for a construction contract with five options. The contracting officer decided that it was in the government's best interest to evaluate the bids without the options[80] after Army headquarters denied the option funding. The contracting officer awarded to R.C. Construction Co. (R.C.).[81] ACC objected and alleged that the denial of funds required the COE to cancel and resolicit. The GAO held that the COE decision to evaluate prices for award on the base bid only was reasonable and complied with the solicitation.[82]

You Can't Make Me Something I'm Not

In *Great Lakes Dredge & Dock Co.* (*Great Lakes*),[83] the GAO reiterated that "the terms of the solicitation cannot convert a matter of responsibility into one of responsivesness."[84] In *Great Lakes*, the COE issued an IFB to dredge ship channels. The IFB offered a disposal facility but authorized any bidder to propose an alternate disposal facility.[85] The solicitation stated that the COE would reject bids as nonresponsive if they failed to include the required alternate disposal site documents.[86]

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71. *Id.* at 1.

72. *Id.* at 1; *see* FAR, *supra* note 1, at 52.228-1(e) ("[I]n the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference."); *see also* FAR, *supra* note 1, at 52.228-1(a) ("[A] bidder's failure to furnish the required bid guarantee in the proper form and amount may be cause for rejection of the bid.").

73. *Paradise Constr.*, 2001 CPD ¶ 192, at 2.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* FAR, *supra* note 1, at 17.206(b).

79. Comp. Gen. B-289167, Jan. 15, 2002, 2002 CPD ¶ 21.

80. *Id.* at 3. The governing FAR provision states,

> except when it is determined in accordance with FAR 17.206(b) not to be in the Government's best interest, the government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s). . . . The unavailability of funds is an appropriate reason for not evaluating the option prices for award.

FAR, *supra* note 1, at 52.217-5.

81. *ACC Constr.*, 2002 CPD ¶ 21, at 3. The agency originally awarded to R.C. based on the options. R.C. was an eligible HUBZone small business concern and was the low bidder after application of the ten-percent evaluation preference. After the Army denied the COE the option funds, the COE evaluated the bids based on the base requirements. R.C. was the low bidder again, even without the HUBZone preference. *Id.* ACC originally argued that R.C.'s bid was materially unbalanced, that the agency improperly applied the HUBZone preference, that R.C. failed to provide certification of its HUBZone preference, and that R.C. submitted unauthorized facsimile modifications. The GAO held that the HUBZone preference issues and the unbalanced bid arguments were moot after the contracting officer awarded without options. ACC failed to submit a written rebuttal regarding the facsimile bid modifications, but the GAO pointed out that the IFB authorized facsimile bid modifications. *Id.* at 2.

82. *Id.* at 3.

83. Comp. Gen. B-290158, June 17, 2002, 2002 CPD ¶ 100; *see also* Integrated Prot. Sys., Comp. Gen. B-254475.2, B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24; Norfolk Dredging Co., Comp. Gen. B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62.

84. *Great Lakes*, 2002 CPD ¶ 100, at 4.

Bean Stuyvesant's (Bean) bid proposed an alternate facility, but failed to include the required information. The contracting officer determined that Bean was the apparent low bidder and planned to award to Bean. Great Lakes protested, arguing that Bean's bid was nonresponsive. The GAO rejected Great Lakes's argument and held that the permit requirement related to "how the contract requirements will be met," which is a responsibility issue.[87] The GAO found that the "fact that the IFB called for submission of a permit . . . as of bid opening does not convert the permit requirement into a matter of bid responsiveness."[88] Therefore, the GAO saw "no merit in Great Lakes' argument that Beans' bid should have been rejected as nonresponsive." [89] Major Davis.

85. *Id.* at 1.

86. *Id.* at 2. The IFB required bidders proposing an alternate disposal site to submit the site permit with the bid and demonstrate within seventy calendar days from bid opening that the alternate site is operational. *Id.*

87. *Id.* at 3. The contracting officer was determining Bean's responsibility at the time Great Lakes filed its protest. *Id.*

88. *Id.*

89. *Id.*

Negotiated Acquisitions

"Late Is Late" . . . Especially with No Extension

In *Lyons Security Services, Inc.*,[1] the General Accounting Office (GAO) found that the agency properly rejected the protestor's proposal as late, despite the protestor's assertion that the agency had extended the closing date. Under the request for proposals (RFP), the Department of State (DOS) sought to procure security guard services for the U.S. Embassy in Denmark and established 12 February 2002 as the due date for the submission of proposals. Lyons Security Services, Inc. (Lyons Security) submitted a proposal on 20 February, which the DOS rejected as late. Lyons Security challenged the agency's rejection of its proposal, claiming it had received Amendment Number 2 via E-mail, extending the due date for proposals until 22 February.[2]

In response to the protest, the contracting officer testified that he did not issue or authorize anyone else to issue another amendment. Additionally, he stated that he never considered issuing a second amendment or extending the closing date. For its part, the protestor produced no evidence to support its assertion, claiming it had deleted the E-mail notice of the amendment.[3] Unable to retrieve the E-mail, Lyons Security also could not provide the Internet site address of the alleged E-mail or the site from which it downloaded the supposed amendment. Finding no evidence in the record to support the protestor's claim, the GAO denied the protest.[4]

Is It a Technical Evaluation Factor or Not?

In *A.I.A. Construzioni S.P.A*,[5] the GAO ruled that failing to submit an Italian *nulla osta* certification statement with its proposal, as required by the RFP, did not render the awardee's proposal non-compliant because the RFP did not convert the requirement from a responsibility matter into a technical evaluation criteria. The RFP, for construction work at the naval air station in Sigonella, Italy, contemplated the award being made without discussions on a "lowest evaluated price" basis.[6] The RFP also notified offerors that they had to submit a *nulla osta* certification statement with their initial proposals. A *nulla osta* statement, issued by the Italian Chamber of Commerce as part of its certification, indicates the "named contractor has not violated Italian anti-mafia laws, and is eligible to perform on public contracts."[7]

Although Lotos Construzioni S.R.L. (Lotos) submitted the lowest-priced offer, its certification did not include the *nulla osta* statement. The Navy rejected the proposal and awarded to the protestor, A.I.A. Construzioni (AIA). In an agency-level protest, Lotos argued that it should have been allowed to submit the certification at any time before award. "The Navy agreed; deciding the anti-mafia certification was a matter of responsibility, and that it therefore could be submitted up until the time of award."[8] As a result, the Navy terminated the contract with AIA and awarded to Lotos. AIA protested the award decision.[9]

While the GAO noted that agencies may convert traditional responsibility criteria into technical evaluation criteria in negotiated procurements, it found nothing in this case to indicate that the Navy "intended to convert the *nulla osta* certification into a matter of technical acceptibility."[10] Indeed, the RFP specifically listed the certification, of which the *nulla osta* statement was a part, as "other information to be used in the determination of responsibility."[11] Consequently, the GAO concluded that the Navy had properly awarded the second contract to Lotos, notwithstanding the requirement that offerors submit the anti-Mafia certification with their initial proposals, because the RFP treated the *nulla osta* statement as information relating to responsibility.[12]

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1. Comp. Gen. B-289974, May 13, 2002, 2002 CPD ¶ 84.

2. *Id*. at 2.

3. *Id*. at 1. The contracting officer did post agency responses to offerors' questions and an Amendment Number 1, which corrected a clerical error to the Federal Business Opportunities and Statebuy Internet sites. *Id.*

4. *Id*. at 2. Testimony also established that the contracting officer does not actually post solicitations or amendments to the Internet; only persons within the agency's Office of Procurement Executive have the necessary passwords to post them. Individuals from that office similarly testified that no one from that office had been authorized to post an Amendment Number 2, nor did they post one. *Id.*

5. Comp. Gen. B-289870, Apr. 24, 2002, 2002 CPD ¶ 71.

6. *Id*. at 1.

7. *Id*. at 1-2.

8. *Id*. at 2.

9. *Id*.

10. *Id*. (citing McLaughlin Research Corp., Comp. Gen. B-247118, May 5, 1992, 92-1 CPD ¶ 422, at 4).

11. *Id*. (citing section 18 of the RFP, at 201-6(a)).

"Rough Floor Plan" Did Not Satisfy Solicitation's Requirements

In *Marshall-Putnam Soil & Water Conservation District* (*Marshall-Putnam*),[13] the GAO found that an offer that included a "rough floor plan" of the office space it proposed for lease—rather than the architectural elevation and landscape plans specified in the solicitation—was a nonconforming offer. As such, the GAO found that the offer was ineligible for award. In *Marshall-Putnam*, the protestor challenged the award of a U.S. Department of Agriculture (USDA) contract that leased office space from Henry Developers, Inc. (Henry Developers). The protestor claimed that Henry Developers' proposal did not conform to the terms of the USDA's solicitation for offers (SFO),[14] which required an architectural plan drawn to scale and elevation drawings.[15] The GAO agreed, noting that without the required information, the agency simply could not have known what it was getting.[16] Ultimately, the GAO said that the fundamental problem was that "the agency improperly made assumptions about the building that Henry proposed—and concluded that it not only satisfied the government's needs, but warranted a nearly perfect technical score—with no evidence before it of the actual features of the building being proposed."[17]

GAO and COFC Differ on Interpretation of Solicitation Provision

Reviewing the same facts arising out of the same Navy RFP, the GAO and the Court of Federal Claims (COFC) reached completely opposite conclusions. In *Metcalf Construction Co.*,[18] the GAO ruled that the agency properly eliminated Metcalf Construction Company's (Metcalf) proposal from further consideration because its price for one line item exceeded the cost limitation set forth in the RFP. On appeal, however, the COFC found the solicitation provision addressing "cost limitations" ambiguous and determined that the Navy failed to treat all offerors fairly by not notifying all of them of the intended meaning of the provision.[19]

The facts of the case arose out of a Navy RFP for the design and construction of military family housing units at the Marine Corps Base in Kaneohe Bay, Hawaii. The solicitation schedule contained three separate line items——one Base and two Options—relating to three separate projects that spanned three separate fiscal years. Included in the RFP was a provision establishing "cost limitations" or a "budget ceiling" for the separate scheduled line items.[20] Three offerors submitted initial proposals before the RFP closing date—Metcalf, Lend Lease Actus, and an unnamed offeror (Offeror A). Following a round of discussions, the Navy requested final proposal revisions (FPR). A day after receipt of the FPRs, the Navy amended the RFP to include an updated Davis-Bacon Act wage determination, and as a result, a request for a second round of FPRs. In response, Metcalf submitted a final revised price for Option 0002 that exceeded the budget ceiling established in the RFP for that line item. The Navy then eliminated Metcalf's proposal from further consideration and ultimately awarded the contract

12. *Id*. at 2-3.

13. Comp. Gen. B-289949, B-289949.2, May 29, 2002, 2002 CPD ¶ 90.

14. *Id*. at 4-5. The GAO noted that while both the agency and protestor used the terms "bid" and "nonresponsive" in reference to the SFO at issue, the SFO was essentially an RFP and the GAO applied the standards applicable to negotiated procurements. *Id*.

15. *Id*. at 3.

16. *Id*. at 6.

17. *Id*. at 7. The GAO recommended that the agency hold discussions, request revised proposals from Henry Developers and the protestor, revaluate the proposals, and make a new source selection decision based on the reevaluation. *Id.* at 8.

18. Comp. Gen. B-289199, Jan. 14, 2002, 2002 CPD ¶ 31.

19. Metcalf Constr. Co. v. United States, 53 Fed. Cl. 617, 629-30 (2002).

20. *Metcalf Constr.*, 2002 CPD ¶ 31, at 2. Specifically, the provision stated:

> 1A.7 INFORMATION CONCERNING COST LIMITATIONS: The budget ceiling for the award of this contract is as follows:
> Base Item: $7,3000,000 for Project H-570 (30 units)
> Option 0001: $35,780,000 for Project H-571 (158 units)
> Option 0002: $5,400,000 for projects H-571 and H-563 (24 units)
> Proposals in excess of this amount will *not* be considered. Offerors should prepare their proposals so as to permit award at a price within the cost limitation.

Id.

to Lend Lease Actus, whose offer was technically equivalent but lower priced than Offeror A's. [21]

Metcalf first protested to the GAO, arguing that RFP Section 1.7A provided for the elimination of a proposal only when the total evaluated price exceeded the sum of the base item and both options.[22] In support of its interpretation, Metcalf noted the RFP's singular language (i.e., "this amount," instead of "these amounts," and "the cost limitation," instead of "the cost limitations") concerning the budget ceilings.[23] In an attempt to bolster the reasonableness of its interpretation, Metcalf contended that Offeror A interpreted the same language under section 1.7A similarly, and that an agency contract specialist "acknowledged the reasonableness of this interpretation."[24]

While recognizing "that the language of section 1A.7 is somewhat confusing," the GAO nevertheless concluded "that the provision is susceptible of only one reasonable interpretation: it imposes a separate budget ceiling on each line item and excludes from consideration any proposal offering a price in excess of any of the budget ceilings."[25] In reaching its conclusion, the GAO cited the RFP's separate listing of each of the budget ceilings for the three line items. It also noted that because the initial award price covered only the base item work, the instruction to prepare proposals to permit award at a price within the budget ceiling "makes sense only if the solicitation is interpreted as imposing separate line item cost limitations."[26]

The GAO also rejected Metcalf's argument that Offeror A and an agency contract specialist had similarly misinterpreted Section 1A.7. The GAO determined that the issue Offeror A raised actually related to the language in Section 1B.8,[27] which the Navy had recognized as susceptible to misinterpretation. The Navy, however, amended this language before Metcalf submitted the FPR that contained the price in excess of the established budget ceiling for the line item.[28]

The GAO also rejected Metcalf's arguments that the agency should have reopened discussions to allow it to revise its price for Option 0002, and that the Navy conducted "unequal discussions" by informing Offeror A to review its prices to ensure it did not violate the ceilings on the separate line items without doing the same for Metcalf.[29] Recognizing that the decision to reopen discussions falls within the discretion of the contracting officer, the GAO found that the contracting officer did not abuse her discretion, noting that the agency had "already gone through two rounds of FPRs, and we see no basis to require the reopening of discussions here." [30] Further, while the Navy informed Offeror A that two of its prices exceeded the budget ceilings during the initial round of discussions, Metcalf's prices at that time were all under the limitations and therefore there "simply was no reason for the agency to reiterate this requirement or otherwise to discuss budget ceilings during discussions with Metcalf."[31]

Unhappy with the GAO's conclusions and the denial of its protest, Metcalf filed suit at the COFC, advancing very similar arguments, but with very different results. The court noted that while the COFC is not bound by GAO decisions, it generally grants some deference to the GAO's opinions. In this case, however, the court elected not to defer to the GAO because the contract interpretation matter in issue "is a question of law for the court to decide" and "the GAO's finding in favor of the Navy is unsupported on this record." [32]

Applying the "well-established" rules of contract interpretation, the COFC determined that the RFP's language at Section 1A.7 created a patent ambiguity. The court concluded that the

21. *Id*. at 3.

22. *Id*. at 3-4.

23. *Id*. at 4.

24. *Id*.

25. *Id*.

26. *Id*.

27. *Id*. at 2. Section 1B.8, concerning the evaluation of prices, provided in part: "For award purposes, the price for pre-priced Options 0001 and 0002 will be added to the Item 0001 price." *Id*.

28. *Id*. at 4-5. In the contracting specialist's view, the language of Section 1B.8 "could be construed as a 'total' budget ceiling [rather than] an individual line item budget ceiling." *Id*. at 4 (quoting a 4 June 2001 memorandum from the contract specialist to the Source Selection Board). As a result, the contracting specialist recommended the inclusion of Offeror A in the competitive range and the amendment of RFP's Section 1B.8, to substitute the word "evaluation" for "award." *Id*. at 4-5.

29. *Id*. at 5.

30. *Id*. (citing Mine Safety Appliances Co., Comp. Gen. B-242379.5, Aug. 6, 1992, 92-2 CPD ¶ 76, at 6).

31. *Id*.

32. Metcalf Constr Co. v. United States, 53 Fed. Cl. 617, 626 n.17 (2002) (citing E.W. Bliss Co. v. United States, 33 Fed. Cl. 123, 134 (1995), *aff'd*, 77 F.3d 445 (Fed. Cir. 1996)).

Navy, having notice of the defect, failed to inform all offerors of the ambiguity adequately.[33] The court based its finding of an ambiguity on a "probative" comment by the contract specialist in the memo to the SSB, that the language at Section 1B.8 "could be construed as a 'total' budget ceiling vice an individual line item budget ceiling."[34] Referencing the contract interpretation rule that the plain and ordinary meaning of a contract must produce an interpretation "that would be derived 'by a reasonably intelligent person acquainted with the contemporary circumstances,'"[35] and assuming that the contract specialist was such a person, the court stated that "the concept of *res ipsa loquitor*, by analogy, concludes our analysis."[36] In addition to the contract specialist's comments, the court found "an obvious inconsistency" in Section 1A.7 where the agency used singular language (e.g., "budget ceiling," "this amount," and "cost limitation"), but listed the three different line items separately.[37]

Finding the contract language patently ambiguous, the COFC next determined that the Navy had notice of the ambiguity both before the closing date, by way of Offeror A's question about "how the budget items were to be construed," and later, when Offeror A submitted its initial proposal with prices that exceeded two separate budget ceilings.[38] Looking to Federal Acquisition Regulation (FAR) section 14.208(c)[39] for guidance, the court concluded that while the Navy "clearly and distinctly" instructed Offeror A of its interpretation of the ambiguous provision during the first round of discussions, it did not "do the same for the other bidders."[40]

The court also concluded that the Navy treated offerors unfairly when, after the receipt of the initial proposals, it specifically informed Offeror A not to exceed the budget ceilings, but simply eliminated Metcalf from further consideration when its final proposal included a price above the budget ceiling.[41] Dismissing the Navy's claim that the contracting officer reasonably concluded that yet another round of discussions was unnecessary, the court stated that "one more clarifying statement would have only enhanced the quality of the procurement process, and served the interest of (1) fairness, when another bidder had received a prior warning, and (2) competition, when there were only a total of three bidders under consideration."[42] The COFC, concluding that the Navy unreasonably excluded Metcalf's proposal from further consideration, stated that while Offeror A "received only a hospitable warning when it exceeded two of the budget ceilings, . . . Metcalf was held to the strict letter of the [Navy's interpretation of the] solicitation."[43]

While It May Be an E-Mail, It's Still "Informal Advice"

While oral advice that conflicts with an agency solicitation does not bind the government,[44] until this past year, neither the GAO nor the COFC had determined whether government E-

33. *Id*. at 629-30.

34. *Id*. at 629.

35. *Id*. at 628 (quoting Rice Lake Contracting, Inc. v. United States, 33 Fed. Cl. 144, 152 (1995)).

36. *Id*. at 630.

37. *Id.* The court also had some rather harsh words for the GAO's earlier decision: "What is utterly perplexing to this court is the fact the GAO found that: 'While [it] recognize[s] that the language of section 1A.7 is *somewhat confusing*, [it] nonetheless think[s] that the provision is susceptible of only *one reasonable interpretation* . . . .' To so conclude, in this court's view, strains credulity." *Id*.

38. *Id*. at 631.

39. The FAR states:

> [A]ny information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders as an amendment . . . . No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.208(c) (July 2002) [hereinafter FAR].

40. *Metcalf Constr. Co.*, 53 Fed. Cl. at 632.

41. *Id*. at 634-35.

42. *Id*. at 635.

43. *Id*. at 643. While the GAO did not address the issue, the COFC also found that the Navy acted arbitrarily when it ranked Metcalf third technically among the three proposals. Although each of the proposals received the same adjectival rating ("acceptable"), the Navy ranked Metcalf third due to certain advantages in the other proposals. While recognizing that proposals with the same adjectival rating are not necessarily of equal quality, and that an agency may consider specific advantages, the court nevertheless found no "comparative weaknesses" between the proposals in the record as the Navy claimed. *Id.* at 641. Finding that Metcalf met the showings for permanent injunctive relief, the COFC declared the Navy's contract with Land Lease Actus null and void and permanently restrained and enjoined further performance under the contract. The COFC further ordered the reinstatement of Metcalf in the competitive range, the amendment of the solicitation to clarify Section 1A.7, the re-submission of final proposals, and re-evaluation consistent with the court's findings. *Id.* at 646.

mail advice binds an agency. In *Diamond Aircraft Industries, Inc.* (*Diamond Aircraft*),[45] the GAO determined that even if the agency E-mails the informal advice, the result is the same—an offeror relies upon such agency advice at its own risk, and it does not bind the government. In *Diamond Aircraft*, the Air Force issued an RFP for motorized gliders, spare parts, and support equipment. In a commercial item acquisition that provided for the selection of the lowest priced technically acceptable proposal, the solicitation stated that the agency would evaluate the motorized gliders on a pass-fail basis, depending upon their ability to satisfy fourteen minimum requirements.[46] In evaluating Diamond Aircraft's proposal, the Air Force determined that the offered motorized glider, powered by a 100-horsepower (hp) engine, failed to meet five of the minimum requirements; the Air Force thus rejected the proposal.[47]

Diamond Aircraft alleged that the Air Force misled it into submitting a technically unacceptable proposal. At the time the Air Force issued the RFP, Diamond Aircraft manufactured a motorized glider with an 81-hp engine, which met all of the solicitation's minimum technical requirements. Diamond Aircraft, however, was in the process of upgrading the glider to add a 100-hp engine. Because the commercial item solicitation required the glider to meet the specified minimum requirements, and because the 100-hp glider was not certified or in production, Diamond Aircraft E-mailed the Air Force and asked whether it should submit alternative offers. According to Diamond Aircraft, the Air Force's E-mail response "advised that the 100-hp version would be acceptable, and instructed it to submit only one offer, for the 100-hp version."[48]

The GAO noted the general rule that oral advice that conflicts with the solicitation is not binding on the government. Because the solicitation notified offerors that proposals would be evaluated against "specific requirements," the GAO ruled that while the Air Force response to Diamond Aircraft's query was in the form of an E-mail, "[n]o informal advice—oral, or otherwise—could change this basis for evaluation, since the advice would not amend the solicitation."[49] The GAO advised Diamond Aircraft that instead of relying upon the Air Force's E-mail advice, it should have requested an amendment to the solicitation if it believed the RFP required clarification, so that all offerors could compete equally.[50]

CAFC Adds Voice to "Cost" Discussions

The Court of Appeals for the Federal Circuit (CAFC) added its voice to the GAO's[51] and ruled that FAR section 15.306(d)(3)[52] does not automatically require a contracting officer to enter into cost discussions with offerors whose cost proposals the agency deems adequate. In *JWK International Corp. v. United States*,[53] the Navy issued an RFP for supply acquisition logistics management integration services. The RFP listed the evaluation factors as technical, management, past performance, and cost, with cost being the least important evaluation criterion. Following the receipt of initial proposals, the Navy entered into discussions with the only two firms to submit offers—JWK International Corp. (JWK), the incumbent, and LTM Incorporated (LTM), the eventual awardee. While the Navy discussed the weaknesses in their proposals with both bidders, the Navy did not discuss cost with either

44. *See, e.g.*, Input/Output Tech., Inc., B-280585, B-280585.2, Oct. 21, 1998, 98-2 CPD ¶ 131.

45. Comp. Gen. B-289309, Feb. 4, 2002, 2002 CPD ¶ 35.

46. *Id*. at 1.

47. *Id*. at 2.

48. *Id*.

49. *Id*. (citing *Input/Output*, 98-2 CPD ¶ 131, at 5).

50. *Id.* In addition to concluding that the informal E-mail advice provided no basis for reopening the competition, the GAO disagreed with Diamond Aircraft's interpretation of the Air Force's advice. Reviewing the text of the E-mails in question, the GAO could find no references to the technical acceptability of the 100-hp engine—the E-mails referred only to whether the 100-hp version "would be considered to be a commercial item." *Id*. at 3.

51. *See, e.g.*, SOS Interpreting, Ltd., Comp. Gen. B-287477.2, May 16, 2001, 2001 CPD ¶ 84 (holding that the agency was not required to discuss price when it did not consider price to be a significant weakness).

52. At the time of the appeal, FAR section 15.306(d)(3) stated:

> The contracting officer shall . . . discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of contracting officer judgment.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.306(d) (June 2001) [hereinafter 2001 FAR].

53. 279 F.3d 985 (Fed. Cir. 2002).

party because both received an "adequate" rating with respect to cost.[54]

After receiving and evaluating the revised proposals, the Navy awarded the contract to the higher priced offeror, LTM, based on LTM's superior non-cost factor ratings. JWK sued in the COFC, which granted the government's summary judgment motion and rejected JWK's argument that the Navy had failed to engage in "meaningful discussions" when it did not discuss cost.[55]

On appeal, JWK argued that FAR section 15.306(d)(3) required the Navy to hold cost discussions, even though the cost of the proposal was not a significant weakness or deficiency because cost is always a material factor, and adjusting cost will "always materially enhance a proposal's potential for award."[56] The CAFC, however, agreed with the COFC and rejected JWK's argument. The CAFC began by explaining that agencies determine the relative importance of the cost and non-cost evaluation factors in a solicitation. Under the current RFP, the CAFC noted, the Navy decided that the non-cost factors, when combined, were significantly more important than cost. Because agencies must consider both non-cost and cost factors and have the discretion to rank their relative importance, the CAFC continued, "a downward adjustment may not always affect award."[57] The court further observed that under FAR section 15.306(d)(3), the determination of whether to hold discussions falls within the contracting officer's discretion. In fact, "aside from areas of significant weakness or deficiency, the contracting officer need not discuss areas in which a proposal may merely be improved."[58] Here, since the contracting officer determined that JWK's (and LTM's) cost proposal was acceptable (and not an area of weakness) the Navy was not required to include cost in its discussions.[59]

FAR Change "to Clarify" Mandatory Discussions

A final rule, effective 19 February 2002, amended FAR section 15.306(d) to "clarify" that contracting officers are "not required to discuss every area where the proposal could be improved."[60] Under the amended language, contracting officers "must . . . discuss . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had the opportunity to respond."[61] The previous rule also required contracting officers to discuss "other aspects of the offeror's proposal" that could be "altered or explained to materially enhance the proposal's potential for award."[62] By way of contrast, the new rule merely "encourages" contracting officers to discuss such matters, making it "clear that whether these discussions would be worthwhile is within the contracting officer's decision."[63]

Call It What You Want, but It's Still "Discussion"

In determining whether an agency has engaged in "discussions" with an offeror, the GAO continues to focus on whether the offeror had an opportunity to revise its proposal; the characterization an agency attaches to the communication is irrelevant. In *Priority One Services, Inc.*,[64] the protestor challenged the award of a National Institute of Allergy and Infectious Disease (NIAID) contract to SoBran Incorporated (SoBran), under an RFP for the care, treatment, and other technical skills related to the scientific study of animals. The solicitation contemplated a cost-plus-fixed-fee contract and provided that award would be made based on the "best overall value" to the government, with all non-cost-evaluation factors, when combined, being significantly more important than price.[65]

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54. *Id*. at 987.

55. *See* JWK Int'l Corp. v. United States, 49 Fed. Cl. 364, 367 (2001).

56. *JWK*, 279 F.3d at 987-88.

57. *Id*. at 988.

58. *Id*.

59. *Id.* The CAFC added that to prevail in its bid protest, JWK had to show that the Navy's failure to conduct a cost discussion was a significant error that prejudiced award. Despite JWK's argument that had the contracting officer discussed price, it could have adjusted its proposal and offered a lower price, the CAFC again noted that cost was the least important criterion. The CAFC added that JWK's proposed costs were already lower than the awardee's and that the contracting officer had determined that LTM's superior non-cost ratings outweighed the slight cost difference between the two proposals. *Id*.

60. Federal Acquisition Regulation; Discussion Requirements, 66 Fed. Reg. 65,368 (Dec. 18, 2001) (codified at 48 C.F.R. pt. 15 (2002)); *see* Ralph C. Nash & John Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, 16 NASH & CIBINIC REP. 2, ¶ 8 (2002) (providing a brief but "meaningful" discussion of the history of FAR section 15.306(d), GAO decisions concerning the scope of discussions, and the impact of the most recent change).

61. 66 Fed. Reg. at 65,368.

62. 2001 FAR, *supra* note 52, at 15.306(d)(3).

63. 66 Fed. Reg. at 65,368.

64. Comp. Gen. B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79.

Following written discussions and evaluation of the FPRs, the evaluation team decided to award to SoBran. But before the evaluation team completed a formal written recommendation, it requested "further clarification/information from SoBran."[66] In a subsequent telephone call to SoBran that the source selection document characterized as a "[c]larification,"[67] the agency questioned the availability of certain key personnel, as well as the proposed salaries for the quality assurance trainers. SoBran responded by revising its technical and price proposal, which resulted in an increase in its proposed costs.[68] After receiving this information, the NIAID awarded the contract to SoBran.[69]

The protestor claimed that the NIAID's communications with SoBran after tentative selection constituted "discussions," requiring discussions with all offerors remaining in the competitive range.[70] The GAO agreed, declaring that the parties' actions, not the agency's characterization, control the determination of whether they have held discussions. Applying what it termed the "acid test" for determining whether an agency's communications constitute "discussions,"[71] the GAO found that the communications here were in fact "discussions."[72] To the GAO, it was clear that the NIAID had afforded SoBran the opportunity to revise its technical and cost proposals in response to the NIAID's concerns and questions after the receipt of the FPRs; therefore, the communications constituted discussions.[73]

Submission of Omitted Proposal Information Not a Clarification

In *eMind*,[74] the GAO held that the submission of omitted information after the closing date for the receipt of proposals is not an allowable clarification when the omitted information is necessary to determine the technical acceptability of the proposal. The basis for eMind's protest was the rejection of its proposal as technically unacceptable under an Internal Revenue Service (IRS) RFP for off-the-shelf computer-based tax law and accounting courses. The solicitation instructed offerors to submit course descriptions for the courses identified in the schedule, which the agency would use to determine the technical acceptability of proposals. The RFP also advised offerors that the agency intended to award without discussions.[75]

After the closing date for proposals, the contracting officer contacted eMind by telephone to inform it that some of the course names eMind had provided in its schedule did not match the names in the proposal's course catalog section. In an E-mail response, eMind furnished the correct course names. In a subsequent E-mail that same day, eMind provided six course descriptions that it had omitted from its proposal.[76]

During the evaluation phase, the agency evaluation team gave eMind's technical proposal a "fail" rating for the most important technical factor, "Fulfillment of Statement of Work Minimum Requirements."[77] Because eMind's proposal omitted course descriptions for thirteen line items, the evaluators could not determine if eMind's proposed courses satisfied the RFP's minimum requirements. While eMind had provided six additional course descriptions via E-mail, the evaluators determined that consideration of these descriptions would be improper because the agency received them after the RFP's closing date.[78] The team also determined that the majority of descriptions provided failed to meet the RFP's requirements. The agency found eMind's and a third proposal technically unacceptable and awarded to MicroMash.[79]

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65. *Id*. at 2.

66. *Id*. (quoting the Agency Report, Tab XIII, Source Selection Determination, at 2).

67. *Id*. at 5 (quoting the Agency Report, Tab XIII, Source Selection Determination, at 2).

68. *Id*.

69. *Id*. at 2.

70. *Id*. at 5.

71. *Id*. at 5 (citing Raytheon Co., Comp. Gen. B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37, at 11).

72. *Id*. at 6. The NIAID argued that the Health and Human Services Acquisition Regulations, 48 C.F.R. § 315.670 (2002), permitted it to hold "limited negotiations" with the selected offeror. The GAO disagreed, finding that the regulation limited such negotiations "to matters that would have no impact on the award decision and which do not prejudice the competitive interests or the rights of other offerors," unlike the situation here. *Priorities One Servs.*, 2002 CPD ¶ 79, at 6 n.8.

73. *Id*. at 4. The protestor had also challenged the award on the grounds that the NIAID failed to conduct a reasonable cost-realism analysis. The GAO agreed and sustained the protest on this basis as well. *Id*.

74. Comp. Gen. B-289902, May 8, 2002, 2002 CPD ¶ 82.

75. *Id*. at 1-2.

76. *Id*. at 3.

77. *Id*.

In its protest, eMind claimed that the IRS should have considered the course descriptions it had submitted via E-mail, arguing that this information was "an allowable clarification of its proposal since the course descriptions were taken directly from its website and were not developed or modified after the proposal closing date."[80] The GAO disagreed. Referencing the FAR's definition of "clarifications,"[81] the GAO firmly stated that clarifications "may not be used to furnish information required to determine the technical acceptability of a proposal."[82] Because agencies can only evaluate offers based on the information actually provided in a proposal, the GAO rejected eMind's suggestion that the IRS was somehow put on notice of its capabilities because its course descriptions were on its Web site. Furthermore, there was nothing in eMind's proposal suggesting that the Web site course descriptions were incorporated by reference.[83]

GAO Finds Unequal Treatment in Past Performance Trade-Off Decision

In late 2001, the GAO found an award decision unreasonable, based on the agency's unequal treatment in assessing the past performance of the protestor and the awardee. In *Myers Investigative & Security Services, Inc.*,[84] the protestor challenged the award of a General Services Administration (GSA) ten-month interim contract[85] for security guard services to Industrial Loss Prevention, Inc. (ILP). The RFP contemplated the award on a "best value to the Government" basis and included "past performance" as one of two technical factors that, when combined, were more important than price.[86] Concerning past performance, the RFP required offerors to submit references for all current security guard service contracts as well as for any similarly sized contracts performed within the previous five years. The RFP also provided that such information and any other past performance information known to the agency would form the basis for the agency's evaluation.[87]

Assessing the past performance of all offerors, the Source Selection Technical Evaluation Board (SSTEB) gave ILP the highest past performance ranking, while Myers Investigative and Security Services, Inc. (Myers) received the third-highest rating. Although ILP had the third-highest priced proposal and Myers had the lowest overall price, the SSTEB recommended award to ILP based on its superior past performance.[88] Myers protested, arguing that the agency's past performance evaluation was unreasonable and unfair.[89]

The GAO agreed with Myers, sustaining the protest and finding several problems in the past performance evaluation and selection procedures. First, the underlying reference responses failed to support numerous conclusions in the SSTEB Report.[90] Second, the source selection decision varied from the evaluation scheme contemplated in the RFP. Specifically, while the RFP advised offerors that the agency would consider any information on any guard services performed in the past five years, that information "played no discernable role in the selection decision."[91] Instead, the SSTEB's selection recommendation considered only information from Myers's and ILP's prior contracts with the GSA. Finally, and most importantly, the GAO found that the SSTEB's past performance evaluation treated Myers and ILP unequally, given the similarities

78. *Id*.

79. *Id*. at 4.

80. *Id*.

81. FAR, *supra* note 39, at 15.306(a)(1) (defining clarifications as "limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated").

82. *eMind*, 2002 CPD ¶ 82, at 5.

83. *Id*. (referencing Microcosm, Inc., Comp. Gen. B-277326, Sept. 30, 1997, 97-2 CPD ¶ 133, at 6-7).

84. Comp. Gen. B-288468, Nov. 8, 2001, 2001 CPD ¶ 189.

85. The ten-month interim contract at issue was a "stopgap" contract to allow the GSA to take corrective action on the award of a five-year statewide contract for security guard services, which was to replace the previous five-year contract performed by the protestor. *Id*. at 2. A thirty-day "stopgap" contract, performed by the protestor, and a sixty-day interim contract, performed by ILP, preceded the ten-month interim contract that was the subject of this protest. *Id*.

86. *Id*. (referencing RFP sections F-3 and M-2).

87. *Id*.

88. *Id*. at 3.

89. *Id*. at 4.

90. *Id*. at 5.

91. *Id*. at 7.

in the underlying information upon which the agency ultimately based its conclusions.[92] For example, while each firm had a similar number of complaints about tardy guards and guards abandoning their posts, the GSA ranked Myers's past performance significantly lower than ILP's.[93] Given this unequal treatment, and in light of the other problems identified, the GAO found the evaluation unreasonable and sustained the protest.[94]

Contractor with Relevant Past Performance That Is Unavailable Gets "Neutral" Rating

In *Chicataw Construction, Inc.*,[95] the GAO approved the contracting officer's decision to give a "neutral" rating to an offeror that had some past performance information, but not as much as the solicitation requested. The GSA had sought offers for the replacement of a cooling tower in a federal building. The solicitation advised that the award would be on a "best value" basis, considering price and past performance. It stated that the two factors were about equal in weight, but that as proposals became more equal in past performance, the agency would give price greater weight. Concerning past performance, the GSA apparently wanted a minimum of three references for work completed as a prime contractor within the previous five years.[96]

Chicataw Construction, Inc. (Chicataw) submitted five references with its proposal, but the GSA only scored two of the references provided. The contracting officer excluded two of the references because one was too stale and the other was for work as a subcontractor. The contracting officer did not consider the third reference because the contracting officer was unable to make contact with the reference, despite repeated attempts. The agency scored Chicataw's other two references at 4.75 and 3.5 on a five-point scale. Because the solicitation required a minimum of three references and Chicataw did not identify an additional reference, the contracting officer averaged the two ratings with a third score of zero, resulting in an overall past performance score of 2.75.[97] Although Chicataw offered the lowest overall price, the contracting officer determined that it did not offer the "best value" to the government given its significantly lower past performance rating.[98]

In a supplemental report following Chicataw's initial protest, the GSA recognized errors in the evaluation process and recalculated Chicataw's past performance rating, substituting a "neutral" rating of 2.5 for the previous score of zero. This resulted in a new overall average of 3.58 for Chicataw.[99] Nevertheless, the contracting officer determined that the original awardee, Hammond Corporation, represented the "best value" to the government, based on its slightly higher price but significantly higher past performance rating of 4.96.[100]

Challenging the agency's evaluation of its past performance, Chicataw argued that the GSA violated FAR section 15.305(a)(2)(iv)[101] by initially giving it a zero rating for the unavailable project reference. While the GAO stated that it was "not entirely clear" whether FAR section 15.305(a)(2)(iv) applied in a case where the protestor had provided some—but not all—the past performance information requested, the GAO disagreed with Chicataw's contention. The GAO found nothing "unreasonable" in the GSA's use of this principle when it recalculated Chicataw's past performance rating using a "neutral" rating of 2.5 for the unavailable reference.[102]

Chicataw further asserted that the GAO should give "little deference" to the agency's revised evaluation under the *Boeing Sikorsky Aircraft Support*[103] line of cases.[104] Contrasting the agency's reevaluation here with that in *Boeing Sikorsky*, the GAO held that the GSA's reevaluation was "less a matter of judgment, and more a matter of mathematics."[105] Here, the

92. *Id*.

93. *Id*. at 7-8.

94. *Id*. at 9. The GAO recommended that the agency reopen evaluation of proposals, prepare a new evaluation report, and make a new source selection decision, "taking care to explain any benefits associated with the tradeoff decision." *Id.* at 11.

95. Comp. Gen. B-289592, B-289592.2, Mar. 20, 2002, 2002 CPD ¶ 62.

96. *Id*. at 1-2. The solicitation contained conflicting provisions regarding past performance. One section required at least three references, but no more than six; another section required a minimum of six references. *Id*. at 2.

97. *Id*. at 3.

98. *Id*. at 4.

99. *Id*. at 4-5.

100. *Id*. at 5.

101. *Id.* "In the cases of an offeror without a record of relevant past performance or for whom information is not available, the offeror may not be evaluated favorably or unfavorably on past performance." *See* FAR, *supra* note 39, at 15.305(a)(2)(iv).

102. *Chicataw Constr.*, 2002 CPD ¶ 62, at 5.

agency properly determined that the initial zero rating was inappropriate, assigned a "neutral" rating for the unavailable reference, and then recalculated the average past performance score—"a straightforward computation that raises fewer concerns than when we might have when an agency is revisiting matters that are entirely discretionary."[106]

Be Careful How You Evaluate

In *Gemmo Impianti SpA*,[107] the GAO sustained a protest when it found material defects in the agency's evaluation of two of the solicitation's three technical factors, as well as an erroneous assumption concerning the difference in price between proposals during the cost-technical tradeoff analysis.[108] Under the terms of the RFP, the Navy contemplated award of a contract for various installation services in Naples, Italy, based on a "best value determination."[109] The RFP also listed three technical factors—past performance, corporate capability, and quality control—which when combined were of equal importance to price. After evaluating the proposals, the source selection board (SSB) summarized the evaluation team's findings. The SSB noted the extensive experience of Penaullie Italia SpA (Penaullie) and the "superior" ratings it received from references, including two based on major contracts in Paris, France.[110] Additionally, the SSB noted that Penauille's proposal included a "highly detailed" quality control plan and increased staffing, compared to the protestor's plan, which "appear[ed] minimal."[111] The SSB assigned a quantitative value to the benefit of Penaullie's increased staffing and subtracted the cost of the additional staffing from the price difference between the higher priced Penuallie proposal and that of the protestor. Based on this analysis, the SSB determined that the actual price difference between the two proposals was only "marginal," and concluded that Penaullie's "superior" proposal represented the best value to the government.[112]

The GAO agreed with the protestor that the evaluation and source selection decision were unreasonable and unfair. First, under the past performance factor, the GAO found the Navy improperly credited Penauille with performance of the two Paris contracts, when in fact it had been performed by a different corporate entity of a shared corporate parent.[113] In determining whether to attribute such past performance, the GAO stated the "affiliation" is not the only consideration, "but also the nature and extent of the relationship between the two—in particular, whether the proposal demonstrates that the workforce, management, facilities, or other resources of the affiliate may affect contract performance by the offeror."[114] While Penauille claimed that it shared top-level management personnel with its affiliate, its proposal made no mention of the personnel involvement on the contract and thus provided no basis for the Navy to consider the affiliate's past performance.[115]

The GAO also took issue with the agency's evaluation of the quality control factor. While the GAO agreed that Penaullie proposed using twice the number of quality control personnel as the protestor, it found that Penaullie's representatives devoted only fifty percent of their time to quality control, while the protestor's quality control representatives generally worked full-time. Thus, the actual difference in total labor hours was far less significant than the agency's assessment had reflected.[116] Finally, the GAO found the agency's calculation deducting the salaries of the increased number of quality con-

103. Comp. Gen. B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91, at 15 (stating the GAO's skepticism of agency reevaluations prepared in response to protests because they have been "prepared in the heat of an adversarial process" and "may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process").

104. *Chicataw Constr.*, 2002 CPD ¶ 62, at 7.

105. *Id*. at 8; *cf*. *Postscript V: Past Performance Evaluations*, 16 NASH & CIBINIC REP. 7, ¶ 34 (2002) (concluding that the GAO endorsed a technique that represented "abysmally bad mathematics," and arguing that FAR section 15.305(a)(2)(iv) applies to offers as a whole rather than single contracts).

106. *Chicataw Constr.*, 2002 CPD ¶ 62, at 8.

107. Comp. Gen. B-290427, Aug. 9, 2002, 2002 CPD ¶ 146.

108. *Id*. at 5-6.

109. *Id*. at 1.

110. *Id*. at 3 (citing the Agency Report, Tab 9, Final SSB Report, at 14-16).

111. *Id*. (citing the Agency Report, Tab 9, Final SSB Report, at 16-18).

112. *Id*.

113. *Id*. at 4.

114. *Id*. (citing Perini/Jones, Joint Venture, Comp. Gen., B-285906, Nov. 1, 2000, 2002 CPD ¶ 68, at 4-5; ST Aerospace Engines Pte. Ltd., B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161, at 3).

115. *Id*.

trol representatives under Penaullie's proposal to be "defective."[117] Because Penauille did not propose to provide quality control at no cost, there was no basis to deduct such costs to determine that the protestor's price was "only marginally" lower than Penaullie's.[118]

Generalized Conclusions Are Not Enough; Give Some Analysis

In *Johnson Controls World Services, Inc.*,[119] the protestor successfully challenged a "best value" award decision where the agency failed to provide adequate information and analysis in its contemporaneous source selection decision and in a post-protest amendment to the decision. In *Johnson Controls*, the National Aeronautics and Space Administration (NASA) issued an RFP for a variety of support services at the Johnson Space Center. The RFP provided two non-cost factors—mission suitability and past performance—which, when combined, were about equal to cost.[120]

Following discussions and the receipt of final proposals, the source evaluation board's (SEB) final evaluation scored the protestor's proposal "significantly higher" than the eventual awardee, DynCorp Technical Services, Ltd. (DynCorp), but at a "somewhat higher probable cost/price."[121] Focusing primarily on cost, the SEB's final report contained "no comparative analysis of offerors' relative strengths" under the non-cost factors.[122] Similarly, when briefing the source selection authority (SSA), the SEB's charts contained no comparative analysis, nor was there any additional evidence of the contents or discussions of the meeting. The SSA's source selection document merely concluded "without elaboration" that DynCorp's proposal represented the "best value" to the government, as there were no "discernable benefits" in the other proposals that outweighed DynCorp's "significant advantage" in lower cost.[123] The agency awarded the contract to DynCorp; Johnson Controls Worldwide Services (JCWS) protested. In response to this initial protest, NASA recognized that it had not recorded the "contemporaneous inquiries, judgments, tradeoffs and reasons" for the SSA's decision and filed an "addendum" to correct the omissions.[124]

The GAO, in reviewing whether the SSA's decision was reasonable, consistent with the RFP's evaluation criteria, and adequately documented,[125] stated that the SSA's contemporaneous documentation was "devoid of any substantive consideration as to whether JCWS's proposal was a better value to the government than DynCorp's lower-rated, lower-priced proposal."[126] The SSA's "generalized statements" that there were "no discernable benefits" in other proposals that outweighed the "significant advantage" of DynCorp's lower-rated and lower-priced proposal "fall far short of the requirement to justify cost/technical tradeoff decisions."[127]

Even after "giving full consideration" to NASA's post-protest "addendum" to the SSA's decision,[128] the GAO still concluded that there was "insufficient information and analysis in the record for [the GAO] to determine that the award selection was reasonable."[129] Citing the SSA's "reliance on an overly mechanistic methodology" when comparing past performance,

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116. *Id*. at 5-6.

117. *Id*. at 6.

118. *Id*. Finding "a substantial chance for [the protestor] to receive the award under a reasonable evaluation," the GAO concluded that the Navy's errors prejudiced the protestor and recommended that the "Navy reopen discussions if necessary, request and evaluate revised proposals, and make a new source selection decision." *Id*.

119. Comp. Gen. B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88.

120. *Id*. at 1-2.

121. *Id*. at 3.

122. *Id*.

123. *Id*. at 4.

124. *Id*. (citing a NASA legal memorandum).

125. *Id*. at 6 (citing AIU North America, Inc., Comp. Gen. B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39, at 7-8).

126. *Id*. at 6-7.

127. *Id*. at 7 (citing TRW, Inc., Comp. Gen. B-234558, June 21, 1989, 89-1 CPD ¶ 584, at 5).

128. *Id*. The GAO noted the general rule that, although it considers the entire record when reviewing the reasonableness of an agency's award decision, it gives "greater weight to contemporaneous materials rather than judgments made in response to protest contentions." *Id*. (citing Beacon Auto Parts, Comp. Gen. B-287483, June 13, 2001, 2001 CPD ¶ 116, at 6).

129. *Id*. (citing *Beacon Auto Parts*, 2001 CPD ¶ 116, at 7-8; Satellite Servs., Inc., Comp. Gen. B-286508, B-286508.2, Jan. 18, 2001, 2001 CPD ¶ 30, at 9-11; *AIU North America*, 2000 CPD ¶ 39, at 7-11).

the GAO stated that "his failure to consider the qualitative differences" between the proposals and "his failure to explain why he found no risk in awarding to DynCorp" despite the SEB's risk assessment concerning a DynCorp subcontractor, was an unreasonable "conclusion of equivalence."[130]

Don't Be "Mechanical" with Trade-Off Decisions, Either

In *Shumaker Trucking & Excavating Contractors, Inc.*, the GAO sustained another protest, finding that the agency's award decision was unreasonable where the "agency mechanically applied the solicitation's evaluation methodology."[131] The U.S. Department of Agriculture's (USDA) solicitation for the consolidation and capping of mine waste on a Montana reclamation project established four technical factors of varying importance, which, when combined, were equal to price in importance. The RFP further provided that the award would be made to the offeror "'(1) whose proposal is technically acceptable; and (2) whose technical/cost relationship is the most advantageous to the Government.'"[132]

Although URS Group's (URS) proposal was for $400,000 more than the protestor's offer, the technical evaluation panel (TEP) and the contracting officer recommended award to URS, "concluding the difference in technical scores between URS and Shumaker justified the higher price."[133] The SSA adopted the contracting officer's recommendation without additional comment.[134] Shumaker protested the award, challenging the adequacy of the agency's explanation of its cost-technical trade-off decision.[135]

While the RFP correctly stated the standard for the cost-technical trade off decision,[136] the GAO found that the agency's "focal point" in its cost-technical trade-off analysis[137] was "URS's higher technical point score, without discussing what, if anything, the spread between the technical scores . . . actually signified."[138] Moreover, there was no analysis comparing the advantages in URS's proposal to those of Shumaker's proposal, or consideration of "why any advantages of URS's proposal were worth the approximately $400,000 higher price."[139] Stating again that "point scores are but guides to intelligent decision making,"[140] the GAO found the agency's cost-technical trade off decision "inadequate . . . because its mechanical comparison of the offerors' point scores was not a valid substitute for a qualitative assessment of the technical differences . . . so as to determine whether URS's technical superiority justified the price premium involved."[141]

SSAs May Disagree with Evaluator Conclusions . . . Just Be Reasonable About It

While SSAs may disagree with evaluators' conclusions,[142] they must still be reasonable when doing so, and ensure that they adequately support their source selection decisions. In

130. *Id.* at 12. The GAO sustained the protest and recommended that NASA "make a new source selection decision containing a sufficient and documented comparative analysis of the proposals and the rationale for any cost/technical tradeoffs." *Id.*

131. Comp. Gen. B-290732, Sept. 25, 2002, 2002 CPD ¶ 169.

132. *Id.* at 2 (quoting RFP, section M-1).

133. *Id.*

134. *Id.* at 2 n.4.

135. *Id.* at 3. Shumaker also argued that the agency improperly evaluated its technical proposal. *Id.* The GAO disagreed, finding that the record supported the agency's technical evaluation. *Id.* at 6.

136. *Id.* at 6. Describing the "best value" award decision-making process, the RFP stated that "[t] he critical factor in making any cost/technical trade-offs is not the spread between the technical ratings, but rather the significance of that difference." *Id.* (quoting RFP, section M-1).

137. *Id.* at 7. The contracting officer and the TEP concluded that the difference of about $400,000 was "justified;" they highlighted URS's 44% advantage in overall technical rating when compared to Shumaker, including a 100% difference in the "important aspect" of "technical approach," and found that URS's proposed cost was below the government estimate. *Id.* (citing the Agency Report, Tab D, Memorandum of Negotiation, at 2).

138. *Id.* at 7-8.

139. *Id.* at 8.

140. *Id.* (citing Ready Transp., Inc., Comp. Gen. B-285283.3, B-285283.4, May 8, 2001 CPD ¶ 90, at 12).

141. *Id.* (citing Opti-Lite Optical, Comp. Gen. B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61, at 5).

142. While the provisions at FAR section 15.303 suggest that the source selection decision is made by a single person, some noted government contract experts "believe the source selection decision is a *team decision*, and . . . that is as it should be." Ralph C. Nash & John Cibinic, *The Source Selection Decision: Who Makes It?*, 16 NASH & CIBINIC REP. 5 (2002). Compare this to the approach in the Army Federal Acquisition Regulations Supplement (AFARS): "The SSA shall not receive a recommendation from any individual or body as to whom shall receive the award and additionally shall not receive a rank order or order of merit list pertaining to the offers being evaluated." U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 5115.101 (Jan. 2002).

DynCorp International LLC,[143] the U.S. Army Corps of Engineers issued an RFP for base operation support services at Camp As Sayliyah, Qatar. The solicitation informed potential offerors that the agency would award based on the "best value" to the government, considering price and non-price related factors.[144] The technical evaluation team (TET) and the cost evaluation team (CET) reviewed the proposals. Both identified concerns about the proposal of the eventual awardee, ITT Federal Services International Corporation (ITT). The TET was primarily concerned with ITT's proposed staffing levels and identified a performance risk based on ITT's plan to expand its workforce only after contract award.[145] The CET also had concerns about ITT's proposed staffing levels, and found ITT's cost proposal information incomplete.[146] After receiving the TET and CET reports, the SSA disagreed with certain conclusions of the evaluators and determined that ITT's proposal represented the best overall value to the government.[147]

The protestor challenged the SSA's decision as unreasonable; the GAO agreed. Reviewing the SSA's decision for reasonableness, consistency with the evaluation factors, and adequacy of documentation,[148] the GAO found that the record provided no support for "questioning the weaknesses identified by the TET (and CET) relating to the adequacy of ITT's proposed staffing."[149] The GAO also failed to see any reasonable basis for "discounting" the performance risks the TET identified, or the CET's determination that ITT's cost proposal information was incomplete.[150] The GAO also found that the SSA engaged in "disparate treatment" by assigning a "high-performance risk" rating to the protestor's cost proposal based on low proposed hourly labor rates, but did not do the same for ITT, which proposed similarly low labor rates.[151]

Don't Forget About Cost/Price

In *A&D Fire Protection Inc.* (*A&D Fire Protection I*),[152] the GAO reminded all agencies to consider cost or price to the government when they evaluate competitive proposals. In *A&D Fire Protection I*, the Department of Veterans Affairs (VA) issued an RFP for design and construction services at the National Cemetery in San Diego, California. The RFP listed four evaluation factors in descending order of importance: price, construction management experience, past performance, and schedule. Of the six offers the VA received, A&D Fire Protection Inc. (A&D) offered the lowest overall price.[153] The VA, however, eliminated A&D's proposal from the competition without further consideration because the agency determined that it was not "sufficiently technically capable to perform the project."[154] The GAO opinion stated that every RFP must include cost or price to the government, and that agencies must always consider cost or price when evaluating proposals. The GAO added that "the elimination of technically acceptable proposals without meaningful consideration of price is inconsistent with the agency's obligation to evaluate proposals under all of the solicitation's criteria, including price."[155]

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143. Comp. Gen. B-289863, B-289863.2, May 13, 2002, 2002 CPD ¶ 83.

144. *Id*. at 2. The non-cost factors included management capability, technical capability, experience, and past performance. Because the agency also contemplated a cost reimbursement contract, it notified the offerors that proposals "would be evaluated to determine cost reasonableness, cost realism, and completeness of the costs." *Id*. The agency would then assign a risk rating based on the cost and technical evaluations. *Id*.

145. *Id*. at 2-3.

146. *Id*. at 3.

147. *Id*. at 4. The SSA concluded that the protestor's proposal "should have been assigned weaknesses in the area of subcontracting" and a performance risk "based on her conclusion that [the protestor's] low labor rates could result in cost growth over the course of the contract." *Id*. The SSA also discounted several of the weaknesses identified by the TET and CET in ITT's proposal. *Id*. (referencing the agency's source selection documents).

148. *Id*. (citing AIU North America, Inc., Comp. Gen. B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39, at 7-8).

149. *Id*. at 5.

150. *Id*. at 6.

151. *Id*. at 10. The GAO sustained DynCorp's protest and recommended that the agency amend the RPF to clarify its data requirements, obtain revised proposals, and evaluate the proposals consistent with its opinion before making a new source selection decision. *Id*. at 11.

152. Comp. Gen. B-288852, Dec. 12, 2001, 2001 CPD ¶ 201.

153. *Id*. at 1-2.

154. *Id*. at 3 (quoting the Agency Report). Noting that the VA appeared to suggest that A&D's proposal was not "technically acceptable," the GAO stated that the contemporaneous evaluation documentation contradicted any such suggestion, and that its own review of the record indicated otherwise. *Id*. at 3 n.2.

155. *Id*. (referencing Kathpal Tech., Computer & Hi-Tech Mgmt., Inc., Comp. Gen. B-283137.3, Dec. 30, 1999, 2000 CPD ¶ 6, at 9, 12).

If at First You Don't Succeed, Try Again . . . and Then Again

The VA followed the GAO's recommendation in *A&D Fire Protection I*, and conducted a new cost-technical tradeoff analysis in accordance with the terms of the RFP. The VA's results, however, were much the same. In *A&D Fire Protection Inc.* (*A&D Fire Protection II*),[156] the VA determined that the proposal of the original awardee, Stronghold Engineering, Inc. (Stronghold), represented the "best value" to the government because cost savings associated with Stronghold's technical advantages offset A&D's price advantage.[157] More specifically, the VA concluded that Stronghold's proposal intended to shorten the completion schedule for the project by up to sixty-five days, which the VA determined would result in significant cost savings to the agency. A&D once again challenged the VA's decision, asserting that Stronghold offered "no commitment," but only an "attempt" to complete the project in less time than the solicitation required.[158] The GAO again agreed with A&D, finding that the VA erroneously concluded that Stronghold offered a shorter performance schedule. Reviewing the language of Stronghold's proposal, the GAO sustained the protest, determining that "Stronghold's 'intention' and 'belief' that it could complete the contract work sooner than the minimum 420-day completion schedule required by the RFP is not the contractual commitment that the solicitation required to receive additional evaluation credit for an accelerated schedule."[159] Major Huyser.

156. Comp. Gen. B-288852.2, May 2, 2002, 2002 CPD ¶ 74.

157. *Id*. at 4.

158. *Id*. The cemetery's lack of spaces was costing the VA $2500 per day to store remains until it could bury them. Using this figure, the VA calculated that Stronghold's shorter completion time represented savings of $162,500 to the agency. *Id*. The agency also determined that Stronghold's record of "'efficiently performing the project to avoid the least amount of disruption in the project's surrounding environment'" represented additional cost savings. *Id*. (quoting the Agency Report, Tab W, Cost/Technical Tradeoff Reevaluation of Offers (Jan. 7, 2002)).

159. *Id*. at 5. A&D also challenged the propriety of the VA's decision to allow Stronghold to continue contract performance after the initial protest filing. *Id*. at 6. While the VA project manager drafted a justification memorandum for continued performance based on urgent and compelling circumstances, higher headquarters lost the memorandum. Thus, no appropriate authority had signed the memorandum, and no one provided it to the GAO, as required under the Competition in Contracting Act of 1984. *Id*. at 6-7 (citing 31 U.S.C. § 3553(d)(3)(C) (2000)). Accordingly, the GAO recommended that the VA direct Stronghold to discontinue performance until the VA reevaluated the proposals and performed a new cost-technical tradeoff, consistent with the RFP's terms. *Id*. at 7.

Simplified Acquisitions

Threshold Raised in Defense Against Terrorism

On 30 August 2002, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) issued an interim rule increasing the micro-purchase threshold and the simplified acquisition thresholds for anti-terrorist defense procurements.[1] The rule applies to acquisitions for fiscal years 2002 and 2003. The micro-purchase threshold for Department of Defense (DOD) acquisitions of supplies or services to facilitate the defense against terrorism or biological or chemical attack against the United States increased to $15,000.[2] The threshold for simplified acquisitions in support of contingency operations in the United States has increased to $250,000, and the threshold for acquisitions in support of contingency operations outside the United States has increased to $500,000.[3] The new regulations treat DOD-related acquisitions for biotechnology supplies or services for anti-terrorism defense as commercial item procurements.[4] Agencies purchasing supplies or services using this authority must establish a clear and direct relationship between the purchase and the defense against terrorism or biological or chemical attack.[5]

Simple Is as Simple Does

Last year's *Year in Review* discussed the requirement to "play fair when conducting a simplified acquisition that looks like a negotiated procurement."[6] The Comptroller General has since sustained three simplified acquisition procurement protests because agencies failed to evaluate the requests for quotations (RFQ) fairly. In *Kathryn Huddleston and Associates (KHA)*,[7] the Army Corps of Engineers (the Corps) issued an RFQ for an instruction course for teachers. The RFQ indicated that the commercial item procurement would use simplified acquisition procedures under Federal Acquisition Regulation (FAR) part 13.[8] The solicitation required two instructors for each session. The RFQ required two hundred hours of teaching experience during the previous five years for the lead instructor and one hundred hours of teaching experience during the previous three years for the assistant instructor. An amendment listed three evaluation criteria: teaching experience, educational qualifications, and price.[9] The RFQ indicated that teaching experience and educational qualifications were of equal importance and that price was significantly less important than the other two factors.[10] The Corps included only ACT II's quote in the competitive range.[11] Although ACT II's quote failed to meet the minimum solicitation requirements, the Corps allowed ACT II to correct this deficiency during discussions.[12] KHA challenged the evaluation of its quote, and the General Accounting Office (GAO) sustained the protest.

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1. Temporary Emergency Procurement Authority, 67 Fed. Reg. 56,120 (Aug. 30, 2002) (to be codified at 48 C.F.R. pts. 2, 12, 13, 19, 25, and 48).

2. 67 Fed Reg. at 56,121 (amending 48 C.F.R. pt. 2). This change does not apply to construction subject to the Davis-Bacon Act. The previous micro-purchase threshold was $2500. 48 C.F.R. pt. 2 (2002).

3. *Id.* The simplified acquisition threshold was $100,000. For purchases in support of a contingency operation outside the United States, however, the simplified acquisition threshold was $200,000. 48 C.F.R. pt. 2.

4. *Id.* (amending 48 C.F.R. pt. 12).

5. *Id.* (amending 48 C.F.R. pt. 48).

6. Major John Siemietkowski, et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002, at 29-30.

7. Comp. Gen. B-289453, Mar. 11, 2002, 2002 CPD ¶ 57.

8. *Id.* at 2. GENERAL SERVS. ADMIN. ET AL., FED. ACQUISITION REG. pt. 13 (July 2002) [hereinafter FAR].

9. *Kathryn Huddleston*, 2002 CPD ¶ 57, at 3. KHA alleged that it did not receive the amendment prior to submitting its quote. A Corps of Engineers contract specialist claimed that, "to the best of his recollection," the Corps informed KHA that it would post solicitation changes on the Corps electronic bulletin board. The GAO sustained the protest without reaching this issue. *Id*. at 7.

10. *Id.* An informal technical evaluation board evaluated the quotes. *Id*.

11. *Id.* at 5.

12. *Id.* at 4. "[The ACT II quote] contained inconsistencies in the amount of experience claimed, did not show the proposed instructors had the required amount of experience, and did not identify for each course section which instructors would be lead and assistant instructors." *Id.* The Corps alleged that KHA's quote could not be cured with clarifications or discussions. *Id.* at 5.

The GAO found that the Corps acted unreasonably when it excluded KHA's quote from the competitive range, and that the Corps "failed to treat the two firms fairly and equally with respect to conducting discussions."[13] The exclusion of KHA's quote from the competitive range was also unreasonable because KHA's quote and ACT II's quote contained similar deficiencies.[14] The Corps was unable to convince the GAO that KHA's quote could not be cured with discussions.[15] In addition, because KHA's quote was lower than ACT II's quote and received a higher adjectival rating on an equally important evaluation criterion—educational qualifications—the GAO found no basis for the government's argument that "KHA's quote had no realistic prospect of receiving the award."[16] The GAO, therefore, "recommended the Corps conduct a new source selection decision."[17]

In Elemantar Americas, Inc. (Elementar),[18] the U.S. Forest Service, using simplified procedures, issued an RFQ for a combustion nitrogen-carbon analyzer. The RFQ requested a brand-name or equal product.[19] The solicitation failed to list any salient characteristics or minimum requirements, but indicated that quotes should contain technical descriptions sufficiently detailed to evaluate compliance.[20] The RFQ allowed bidders to provide this information through a variety of sources, including product literature. The Forest Service received a quote from Elantech for a brand-name product and a quote from Elementar for a lower-priced "equal" product.[21] The Forest Service determined that Elementar's product failed to analyze samples in sufficient time to meet the Forest Service's requirement.[22] The Forest Service decided that Elementar's product was not equal and awarded the contract to Elantech.[23] Elementar protested the Forest Service's evaluation.[24]

The GAO held that "the Forest Service is precluded from rejecting a quote offering an equal product for noncompliance with some performance or design feature, unless the offered item is significantly different from the brand-name product."[25] While the Forest Service argued that Elementar's product failed to analyze samples in the required two and a half minutes, it could not establish that Elantech's product could meet this requirement, either.[26] The descriptive literature for both products suggested that their analysis times were comparable.[27] Elementar's descriptive literature addressed the deficiencies alleged by the Forest Service; the record did not establish that Elementar's product deviated significantly from the brand-name product. Therefore, even though this was a simplified acquisition, GAO held that the Forest Service "did not reasonably consider the descriptive literature or reasonably evaluate Elementar's quote."[28]

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13. *Id*. at 7. The GAO acknowledged that "although an agency is not required to establish a competitive range or conduct discussions under simplified acquisition procedures, . . . where an agency avails itself of these negotiated procurement procedures, the agency should fairly and reasonably treat quoters in establishing the competitive range and conducting discussions." *Id.* at 6.

14. *Id.* at 6. KHA's quote failed to demonstrate the relevant required experience; the assistant instructor did not meet the three-year experience requirement. *Id*. at 4.

15. *Id*. at 7. The Corps was also unable to rebut "KHA's statements that it could provide further information or revise its quote such that it would become acceptable." *Id*.

16. *Id*. ACT II received a higher adjectival rating than KHA under teaching experience; however, "KHA received a higher adjectival rating under the equally important educational qualifications factor and quoted a lower price than ACT II." *Id*.

17. The GAO recommended that the Corps "include KHA in the competitive range, conduct discussions with KHA and ACT II, and request revised quotes." *Id.* at 7.

18. Comp. Gen. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20.

19. *Id.* at 1. The RFQ stated that the product was a commercial item. *Id.*

20. *Id.* at 2.

21. *Id.* Elantech's quoted price was $32,675; Elementar's quoted price was $28,200. *Id*.

22. *Id.* at 3. The Forest Service claimed that Elementar's product failed to analyze samples in sufficient time to meet the agency's yearly analysis requirements. The Forest Service argued that Elantech's product could analyze samples in two and a half minutes, but the literature indicted that the analysis time was less than five minutes. The Forest Service claimed that a discussion with an Elementar representative seven months before the solicitation notice revealed that the Elementar product analyzed samples in ten minutes. Elementar alleged that its product could analyze samples in four to six minutes. *Id*.

23. *Id.* at 2.

24. *Id.*

25. *Id.* (citing Access Logic, Inc., Comp. Gen. B-274748, B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36, at 3-6). *Id.*

26. *Elementar Americas,* 2002 CPD ¶ 20, at 3. The Forest Service argued that the analysis time associated with processing samples was the primary reason Elementar's product was not equal. *Id.*

27. *Id.* The GAO determined that Elantech's "less than five minutes" was comparable to Elementar's "four to six minutes." *Id*.

In *Sonetronics, Inc.*,[29] UNICOR,[30] issued an RFQ for 30,000 military radio handsets. The RFQ indicated that the award would be based on "best value," considering past performance, technical factors, and price.[31] Price and technical factors were worth a combined fifty points, and past performance was worth fifty points. Offerors were required to identify at least three previous completed contracts.[32] Maranatha and Sonetronics each earned fifty points for past performance, but the agency used two uncompleted contracts to evaluate Maranatha's past performance.[33] Sonetronics alleged that the agency unreasonably evaluated Maranatha's past experience. The GAO sustained the protest because the RFQ stated that the evaluation of past performance would be based on "completed" contracts.[34] The Sonetronics quote only included one completed contract; therefore, Sonetronics's perfect score for past performance was unreasonable and failed to comply with the stated evaluation scheme.[35] Major Davis.

Government Purchase Card and Travel Card

During the past year, the General Accounting Office (GAO) issued a series of stinging audit reports concerning the Government Purchase Card and Travel Card Programs.[36] Daily newspapers picked up on the most lurid details of these reports.[37] Rather than dwell on individual abuses, however, the GAO audits focus on "control weaknesses" that leave government agencies "vulnerable to fraud, waste and abuse."[38]

28. *Id.* at 5.

29. Comp. Gen. B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48.

30. *See generally* UNICOR Web Site, *at* www.unicor.gov (last visited Jan. 6, 2003).

31. *Id.* at 1.

32. *Id.* Offers could identify similar federal, state, local, or private contracts. *Id.*

33. *Id.* at 3. The Maranatha and Sonetronics bids each received twenty-five technical points. Maranatha's quote of $925,000 received 25 points for price and Sonetronics's quote of $1,102,500 received 20.96 points for price. *Id.*

34. *Id.*

35. *Id.* Under Sonetronics's two uncompleted contracts, it had made no deliveries and had not passed first-article testing. *Id.*

36. *See* GEN. ACCT. OFF., REP. NO. GAO-03-169, *Travel Cards: Control Weaknesses Leave Army Vulnerable to Potential Fraud and Abuse* (Oct. 11, 2002); GEN. ACCT. OFF., REP. NO. GAO-03-148T, *Travel Cards: Control Weaknesses Leave Navy Vulnerable to Fraud and Abuse* (Oct. 8, 2002); GEN. ACCT. OFF., REP. NO. GAO-03-154T, *Purchase Cards: Navy Vulnerable to Fraud and Abuse but Is Taking Action to Resolve Control Weaknesses* (Oct. 8, 2002) [hereinafter GAO-03-154T]; GEN. ACCT. OFF., REP. NO. GAO-02-1041, *Purchase Cards: Navy Is Vulnerable to Fraud and Abuse but Is Taking Action to Resolve Control Weaknesses* (Sept. 27, 2002) [hereinafter GAO-02-1041]; GEN. ACCT. OFF., REP. NO. GAO-02-844T, *Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse* (July 17, 2002) [hereinafter GAO-02-844T]; GEN. ACCT. OFF., REP. NO. GAO-02-863T, *Travel Cards: Control Weaknesses Leave Army Vulnerable to Potential Fraud and Abuse* (July 17, 2002) [hereinafter GAO-02-863T]; GEN. ACCT. OFF., REP. NO. GAO-02-732, *Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse* (June 27, 2002) [hereinafter GAO-02-732]; GEN. ACCT. OFF., REP. NO. GAO-02-676T, *Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse* (May 1, 2002) [hereinafter GAO-02-676T]; GEN. ACCT. OFF., REP. NO. GAO-02-506T, *Purchase Cards: Continued Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Mar. 13, 2002) [hereinafter GAO-02-506T]; GEN. ACCT. OFF., REP. NO. GAO-02-32, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Nov. 30, 2001). In addition to the GAO's findings and criticisms, a Department of Defense (DOD) Inspector General's Report indicated that between "FY 1996 and FY 2001, over 300 audit reports identified a wide range of implementation problems in the DOD Purchase Card Program." U.S. DEP'T OF DEFENSE INSPECTOR GENERAL, CONTROLS OVER THE DOD PURCHASE CARD PROGRAM, AUDIT REP. NO. D-2002-075 (Mar. 29, 2002).

37. *See, e.g.*, David Pace, *GAO: Army Credit Cards Go Beyond Call of Duty; Report Claims Rampant Abuses, Cites Lap Dances*, CHI. TRIB., July 18, 2002, at 11. The article reported:

> Nearly 200 Army personnel used government charge cards to get $38,000 in cash to spend on "lap dancing and other forms of entertainment" at strip clubs near military bases . . . . [T]he soldiers used their military identification and government travel cards to obtain the cash from adult entertainment clubs, which added a ten percent fee. The clubs billed the travel cards for the full amount as a restaurant charge, the GAO found. An Army spokesman said he did not know what, if any, disciplinary action had been taken against the 200 individuals. But the GAO said it found "little evidence of documented disciplinary action against Army personnel who misused the card, or that Army travel program managers or supervisors were even aware that Army personnel were using their travel cards for personal use." The GAO report found that government cards had been used for personal purchases of more than $100,000 for computers and other electronic equipment, $45,000 for cruises, and $7,373 for closing costs on a home. In addition, it questioned purchases of fine china, cigars, wine, a trip to Las Vegas, Internet and casino gambling, and two pictures of Elvis Presley bought at his Graceland mansion in Memphis.

Id.

38. GAO-02-506T, *supra* note 36; GAO-02-732, *supra* note 36; GAO-02-863T, *supra* note 36.

The GAO audit of the Army's purchase card program revealed problems encountered throughout the executive agencies, including lack of formal agency-wide regulation or guidance,[39] ineffective oversight at various levels,[40] lack of controls over issuing and renewing cards,[41] assigning too many cardholders per billing official, lack of control over cardholder spending limits,[42] inadequate monitoring of potentially abusive and questionable transactions,[43] failure to cancel accounts for departed cardholders,[44] and inadequate training.[45] In addition, GAO identified four particular "internal control techniques" the Army had not effectively implemented: advance approval of purchases;[46] independent receiving and acceptance of goods and services by someone other than the cardholder,[47] independent approving official review of the cardholder's statements,[48] and obtaining and providing invoices.[49]

On 31 July 2002, the Army issued its Government Purchase Card Standard Operating Procedure (Purchase Card SOP).[50] The Purchase Card SOP sets forth the organizational structure of the purchase card program.[51] It also mandates specific "span of control" guidelines limiting the number of accounts per installation program coordinator to three hundred and the number of cardholders per billing official to seven.[52] The Purchase Card SOP requires use of the electronic "Customer Automated Reports Environment" and sets specific timelines for cardholders to review—and billing officials to certify—monthly statements.[53] Certifying officials, usually cardholders' first line supervisors, are also pecuniarily liable for illegal, improper, or incorrect payments due to inaccurate or misleading certifications.[54] The Purchase Card SOP also discusses training for newcardholders and billing officials, refresher training, and special training for cardholders with authority to make purchases above $2500.[55] Other topics in the Purchase Card SOP include property accountability,[56] surveillance,[57] suspected fraud or abuse,[58] roles and responsibilities of the key players,[59] establishing accounts,[60] spending thresholds for the different types of card purchases,[61] the "pay and confirm" policy,[62] pro-

39. GAO-02-732, *supra* note 36, at 4.

40. *Id*. at 16-18.

41. *Id*. at 13.

42. *Id*. at 14, 25.

43. *Id*. at 19-20.

44. *Id*. at 20-21.

45. *Id*. at 18. The Army audit revealed adequate initial training, but inadequate refresher training. *Id.*

46. *Id*. at 29-31.

47. *Id*. at 31-32.

48. *Id*. at 33-38.

49. *Id*. at 38.

50. U.S. DEP'T OF ARMY, GOVERNMENT PURCHASE CARD STANDARD OPERATING PROCEDURE (31 July 2002).

51. *Id*. at 3-4.

52. *Id*. at 5.

53. *Id*. at 6-7.

54. *Id*. at 10.

55. *Id*. at 16-17.

56. *Id*. at 8.

57. *Id*.

58. *Id*. at 9.

59. *Id*. at 11.

60. *Id*. at 17.

61. *Id*. at 18.

hibited items,[63] purchase card use during contingencies,[64] and convenience checks.[65] Lieutenant Colonel Benjamin.

62. *Id*. at 19. The Army's policy is to certify an invoice even if the cardholder has not yet received all of the items on the invoice. If the cardholder has not received the item within forty-five days, the cardholder will dispute the transaction. *Id*.

63. *Id*. at 19.

64. *Id*. at 21.

65. *Id*. at 22.

Contractor Qualifications: Responsibility

A Couple of Follow-Ups

As reported in last year's *Year in Review*,[1] in *Impresa Construzioni Geom. Domenico Garufi v. United States (Impresa)*,[2] the United States Court of Appeals for the Federal Circuit (CAFC) applied a rational basis standard to judicial review of contracting officer responsibility determinations.[3] When the CAFC applied this standard to the facts of *Impresa*, however, it could not assess the reasonableness of the contracting officer's determination "because the contracting officer's reasoning supporting that determination is not apparent from the record."[4] The CAFC remanded the case to the Court of Federal Claims (COFC) for a deposition of the contracting officer to determine specifically "(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."[5]

On remand, the COFC determined that the "contracting officer, based on his deposition testimony, . . . failed to conduct an independent and informed responsibility determination."[6] More specifically, the COFC found that the contracting officer unreasonably relied on the technical evaluation board's review, which was "limited to checking the master list of debarred firms and curiously confirming the offeror's satisfactory performance on past contracts."[7] Additionally, the contracting officer failed to inquire independently about JVC's responsibility or investigate the terms of the receivership agreement, despite knowing of an ongoing investigation of bid-rigging at Sigonella and the Italian court actions against JVC, the apparent awardee.[8] The court found that the contracting officer instead "made assumptions about the terms of the receivership agreement, but he did not himself read it nor did he obtain assistance in reading it."[9] Because the contracting officer "lacked sufficient information to be in a position to make the assumptions he did and because he failed to make an affirmative assessment of JVC's responsibility," the COFC held that the contracting officer failed to conduct a reasonable responsibility determination and sustained the protest.[10]

The Times, They Are A-Changing

Last year's *Year in Review* reported that the standard set forth by the CAFC in *Impresa* conflicted with the General Accounting Office (GAO) bid protest rule addressing affirmative responsibility determinations.[11] In light of the CAFC's decision, the GAO announced in February 2002 that it was considering a revision of its bid protest rules and welcomed comments.[12] After considering the comments, the GAO proposed revising its affirmative responsibility rule at section 21.5(c) to expand its consideration of such determinations "where there is evidence raising serious concerns as to whether the contracting officer unreasonably failed to consider available relevant information, or otherwise violated a statute or regulation."[13] Such protests must be based on more than "mere information and belief or speculation" and must be "substantial enough to bring into question whether the affirmative determination could have a rational underpinning."[14] Under the proposed language, the "GAO anticipates that allegations most commonly will be

1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 55-56 [hereinafter *2001 Year in Review*].

2. 238 F.3d 1324, 1327-28 (Fed. Cir. 2001).

3. *Id*. at 1327-28.

4. *Id.* at 1337. In *Impresa*, the appellant, Impresa Construzioni Geom. Domenico Garufi (Garufi), protested the Navy's decision to award a consolidated services contract at the naval air station in Sigonella, Italy, to Joint Venture Conserv (JVC). Garufi alleged that JVC was not responsible under Federal Acquisition Regulation (FAR) 9.104-1 because an Italian court, prior to the contracting officer's responsibility determination and award decision, found that an owner of the joint venture partners was involved in a Mafia organization and had engaged in a bid-rigging scheme at the station. This finding resulted in the Italian court placing the three companies under a receivership administered by the court. *Id*.

5. *Id*. at 1339.

6. Impresa Construzioni Geom. Domenico Garufi v. United States, 52 Fed. Cl. 421, 427 (2002).

7. *Id*.

8. *Id*.

9. *Id*. at 428.

10. *Id.* In sustaining the protest, the COFC awarded bid preparation and proposal costs to Garufi. It also ordered the parties to confer about non-monetary relief and address the propriety of non-monetary relief in subsequent filings to the court. *Id.* After consideration of the parties' separate filings on the matter, the COFC ordered injunctive relief. Impresa Construzioni Geom. Domenico Garufi v. United States, 52 Fed. Cl. 826 (2002). Concluding that Garufi had been prejudiced by the contracting officer's unreasonable responsibility determination, the COFC further found that Garufi satisfied the additional requirements for obtaining injunctive relief and enjoined the Navy from exercising the option on the contract. The court ordered the Navy to re-solicit and award the contract as soon as practicable to ensure continued performance. *Id*. at 829.

based on the alleged failure of the contracting officer to consider publicly-available relevant information," as occurred in the CAFC's *Impresa* decision.[15] To date, however, the GAO has not changed its bid protest regulations, meaning that the "GAO's long held view that such determinations are so subjective that they do not lend themselves to reasoned review" remains.[16]

Bankruptcy and Responsibility

Both the CAFC and the GAO had the opportunity to address the impact of a prospective contractor's bankruptcy filing upon the contracting officer's responsibility determination. While bankruptcy is obviously a factor that the contracting officer must consider, both the CAFC and the GAO have recently held that a prospective contractor is not necessarily nonresponsible just because it has filed for bankruptcy. These decisions further illustrate the discretion that contracting officers exercise in making their responsibility determinations, and the emerging importance of documenting the determination process.

In *Bender Shipbuilding & Repair Co. v. United States*,[17] the CAFC affirmed a COFC decision upholding the contracting officer's affirmative determination that Halter Marine, Inc. (Halter Marine), the awardee of an Army contract for the construction of specialized ships, was a responsible prospective contractor, even though Halter Marine and its parent company had filed for Chapter 11 Bankruptcy reorganization shortly before the award. In light of this bankruptcy filing and given that a "responsible" contractor under FAR 9.104-1(a) must "have adequate financial resources to perform the contract, or the ability to obtain them,"[18] Bender Shipbuilding and Repair Company alleged that the contracting officer's responsibility determination was "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."[19] The CAFC disagreed and denied the appeal, concurring instead with the COFC's finding that "the contacting officer made an informed, complicated business judgment based on ample factual support in the record, and the agency provided a coherent, reasonable explanation for the exercise of the contracting officer's decision."[20] The CAFC considered information from two pre-award surveys by the Defense Contract Management Agency (DCMA), as well as other financial reports and expert advice the contracting officer relied on to make his responsibility determination.[21] The CAFC agreed that "[a]lthough Halter Marine and its parent had financial problems, we cannot say the contracting officer's determination that Halter Marine was financially responsible was arbitrary and capricious or without adequate factual basis."[22]

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11. *2001 Year in Review, supra* note 1, at 55. The relevant provision in the GAO's bid protest regulations states:

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

4 C.F.R. § 21.5(c) (2002).

12. General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 67 Fed. Reg. 8485 (draft published Feb. 25, 2002).

13. Proposed Rules; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contract, 67 Fed. Reg. 61,542, at 61,543 (proposed Oct. 1, 2002) (to be codified at 4 C.F.R. pt. 21).

14. *Id*.

15. *Id*.

16. 67 Fed. Reg. at 8485. *See, e.g.*, Hot Shot Express, Inc., Comp. Gen. B-290482, Aug. 2, 2002, 2002 CPD ¶ 139, at 2 (citing and applying 4 C.F.R. § 21.5(c) in denying review of an affirmative responsibility determination).

17. 297 F.3d 1358 (Fed. Cir. 2002).

18. *Id*. at 1361.

19. *Id*.

20. *Id*. at 1362 (quoting the COFC's opinion below).

21. The contracting officer requested a second pre-award survey in response to Halter Marine and its parent company filing for Chapter 11 Bankruptcy reorganization. *Id*. at 1360. Additionally, the contracting officer sent a number of financial experts to the parent company's headquarters "to assess [the company's] 'long-term survival prospects . . . and its capability to assure the availability of working capital to perform [the] prospective contract.'" *Id.* Thus, at the time of his responsibility determination, the contracting officer had information: (1) that the parent company "guaranteed Halter Marine's performance;" (2) on "details of the governments progress payments during the performance of the contract;" and (3) that "Halter Marine would have available as working capital the proceeds of its parent company's sale of a foreign subsidiary." *Id.* at 1362.

22. *Id*.

The GAO similarly recognized a contracting officer's discretion in making responsibility determinations when it upheld a contracting officer's determination that a prospective contractor was nonresponsible in *Global Crossing Telecommunications, Inc.*[23] The protestor, Global Crossing Telecommunications, Inc. (Global Crossing) challenged the award of a Defense Research Engineering Network contract to MCI WorldCom Communications, Inc. (WorldCom). Under the initial "best value" solicitation, issued on 5 January 2001, the agency evaluated Global Crossing's proposal as the highest-rated and lowest-priced and made an award to Global Crossing on 9 July 2001. After the non-selected bidders protested, however, the agency took corrective action that included canceling the award to Global Crossing, amending the solicitation, and recompeting the requirement.

Following the recompetition, the agency again evaluated Global Crossing's proposal as the highest-rated, lowest-priced proposal.[24] Before re-awarding the contract to Global Crossing, however, the contracting officer saw news reports about financial difficulties at Global Crossing. Based on this information, the contracting officer requested that the DCMA conduct a pre-award survey. While the DCMA determined that Global Crossing had financial problems, it rated Global Crossing's financial status "satisfactory" and concluded it still had "the financial resources to perform this solicitation based on having sufficient working capital on hand and the signed Corporate Guarantee from the parent company."[25] Relying on this pre-award survey, the contracting officer determined that Global Crossing was responsible.[26]

Shortly before the planned award, Global Crossing announced that it was filing for reorganization under Chapter 11 of the Bankruptcy Code.[27] At this point, the contracting officer requested that the DCMA conduct a second pre-award survey. Based on the findings and recommendations in the DCMA's second pre-award survey, the contracting officer determined that Global Crossing was nonresponsible.[28]

Global Crossing protested its non-selection; while it did not challenge the factual accuracy of the second pre-award survey, Global Crossing alleged that the nonresponsibility determination was unreasonable because it was based on the same information that the DCMA uncovered during the initial pre-award survey—information which the contracting officer initially relied upon to determine that Global Crossing was responsible.

In its decision, the GAO conceded that both surveys included much of the same financial information, and that little time had passed between the two pre-award surveys, but it also noted that Global Crossing "had commenced bankruptcy proceedings" in the interim.[29] Although the bankruptcy filing did not necessarily render Global Crossing nonresponsible, the GAO stated that "bankruptcy may nevertheless be considered as a factor in determining that a particular bidder is nonresponsible."[30] The GAO further stated that "a contracting officer may reasonably view bankruptcy as something other than a favorable development."[31] Here, the risks of non-performance that the protestor's bankruptcy filing created played a "significant part" in the contracting officer's nonresponsibility determination. Global Crossing provided no evidence "that these risks were not significant or that the agency's consideration of the risks associated with the protester's bankruptcy proceedings was unreasonable."[32]

The GAO also found that the second requested pre-award survey "was more extensive, considered additional information not previously available, and examined risks more critically."[33] In its second survey, the DCMA considered Global Crossing's estimated fourth quarter revenues and information about the bankruptcy proceedings that was previously unavailable.[34] The DCMA's second survey also identified increased risks to the

23. Comp. Gen. B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102.

24. *Id*.

25. *Id*. at 3 (quoting the DCMA's first survey).

26. *Id*. at 5.

27. *Id*.

28. *Id*. at 5.

29. *Id*. at 7.

30. *Id*. (citing Wallace & Wallace, Inc., Wallace & Wallace Fuel, Inc.—Recon., Comp. Gen. B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142, at 5).

31. *Id*. (referencing Wallace & Wallace, Inc., Wallace & Wallace Fuel, Inc.—Recon., Comp. Gen. B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142, at 5 n.1; Harvard Mfg. Co., Comp. Gen. B-247400, May 1, 1992, 92-1 CPD ¶ 413, at 6).

32. *Id*. at 7-8.

33. *Id*. at 8.

34. *Id*.

agency associated with the bankruptcy filing, such as limitations on the agency's ability to terminate the contract in the future, and other adverse considerations, such as an ongoing investigation by the SEC and reports of a potential investigation by the FBI.[35] The GAO noted that the second pre-award survey provided a rational basis for the contracting officer to change her initial responsibility determination, and found that "her prior determinations that Global Crossing was responsible cannot be viewed as precluding the subsequent nonresponsibility determination."[36] Major Huyser.

35. *Id*. at 4-5. Global Crossing also alleged that the agency had treated it and WorldCom unequally by considering the SEC and FBI investigations into Global Crossing's business practices without considering similar reports about WorldCom. The GAO dismissed this complaint, noting that there was no evidence of similar adverse information against WorldCom or that the agency "knew or should have known of such information." *Id.* at 9. Moreover, the record demonstrated that the pre-award surveys for both businesses analyzed similar types of information and showed that "[WorldCom] maintains a significantly stronger financial position without the same risks arising from bankruptcy that exist for Global Crossing." *Id*. Interestingly, shortly after the issuance of the *Global Crossing* opinion, WorldCom publicly announced that it had committed significant accounting improprieties and later filed for Chapter 11 reorganization protection. *See* Simon Romero & Riva D. Atlas, *WorldCom's Collapse: The Overview*, N.Y. TIMES, July 22, 2002, at A1. In light of WorldCom's public announcements, Sprint Communications and Global Crossing contended in subsequent bid protests that the agency had relied upon a "material representation" by WorldCom in making its award. Sprint Communications Co. LP, Global Crossing, B-288413.11, B-288413.12, 2002 U.S. Comp. Gen. LEXIS 154, at *2 (Oct. 8, 2002). While the GAO recognized that WorldCom's announcements demonstrated that the "agency relied on grossly inaccurate financial information in making a determination that WorldCom was a responsible contractor," the GAO dismissed the protests. *Id*. at *8. The GAO determined that the misrepresentation related to information submitted during the pre-award survey, not representations in WorldCom's proposal; therefore, the protest amounted to a challenge of the agency's affirmative determination, which the GAO will not consider under its current bid protest regulations, absent bad faith. *Id*. at *9 (citing 4 C.F.R. § 21.5(c) (2002)).

36. *Global Crossing*, 2002 CPD ¶ 102, at 8 (referencing Microdyne Corp., B-171108, 1971 Comp. Gen. LEXIS 2836 (Apr. 6, 1971); Harvard Interiors Mfg. Co., Comp. Gen. B-247400, May 1, 1992, 92-1 CPD ¶ 413, at 9; Firm Enrich Bernion GmbH, Comp. Gen. B-234680, B-234681, July 3, 1989, 89-2 CPD ¶ 1, at 6)).

Commercial Items

There's Just No Comparison

In December 2001, Congress qualified the status of Federal Prison Industries, also known as UNICOR,[1] as a mandatory source by requiring the Department of Defense (DOD) to determine whether UNICOR products are comparable to products available in the commercial market.[2] On 26 April 2002, the DOD issued an interim rule implementing Congress's intent.[3] The rule requires contracting officers to conduct market research to determine whether UNICOR products are comparable to products available on the commercial market in terms of price, quality, and time of delivery.[4] The interim rule requires the contracting officer to purchase from UNICOR if the UNICOR product is comparable to private industry products that best meet the government's needs in terms of price, quality, and time of delivery.[5] Otherwise, the contracting officer is required to use competitive procedures to acquire the product. UNICOR is authorized to compete, and the contracting officer must consider a timely UNICOR offer. The comparability determination is solely within the agency's discretion.[6]

The Defense Acquisition Regulations Council (DARC) received more than forty comments on the interim rule from trade associations, federal agencies, and members of Congress.[7] "Most of the comments focused on the interpretation of [UNICOR's] waiver powers, the rule's effect on set-aside contracts, and the need for more clearly defined terms."[8] Due to the number of comments, the council did not estimate when it expects to issue a final rule.[9]

Try Door Number Two

The General Accounting Office (GAO) reviewed a comparability issue less than three months after the DOD issued the interim rule. In *Federal Prison Industries*,[10] the U.S. Marine Corps conducted market research to determine whether UNICOR furniture products were comparable in price, quality, and time of delivery.[11] The agency required installation of the furniture by 12 July 2002. UNICOR required ninety days lead time for delivery and three weeks for installation. The market research revealed that vendors on the General Services Administration's (GSA) Federal Supply Schedule (FSS) could meet the agency's delivery schedule at a lower price. The agency determined that UNICOR's products were not comparable, and the contracting officer conducted an FSS competition.[12]

"Competitive procedures" entailed vendors submitting e-mails verifying price and delivery time. The contracting officer did not issue a formal solicitation. UNICOR submitted a price higher than one FSS vendor and indicated that it could deliver and install the furniture by 8 July 2002 if the agency submitted a purchase order by 1 April 2002. Because funding for the project would not be obligated until late April 2002, the contracting officer determined that UNICOR's delivery terms failed to meet the agency's requirement. The contracting

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1. Federal Prison Industries (FPI) or UNICOR is part of the Bureau of Prisons. The mission of the FPI is to employ and provide skills to inmates confined within the Federal Bureau of Prisons. The inmates of the self-sustaining program produce items for sale to other federal agencies. *See* U.S. Bureau of Prisons, *UNICOR Web Site*, *at* www.unicor.gov/about/inex.htm (last visited Jan. 6, 2003).

2. 10 U.S.C. § 2410n (2000). Previously, contracting officers were required to purchase from UNICOR and were not authorized to compare UNICOR products to private industry products. *Id*.

3. Competition Requirements for Purchases From a Required Source, 67 Fed. Reg. 20,687 (Apr. 26, 2002) (to be codified at C.F.R. pts. 208, 210).

4. 67 Fed. Reg. at 20,688.

5. *Id.* The requirements of Part 8 of the Federal Acquisition Regulation (FAR) must be followed if the UNICOR product is comparable. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 8 (July 2002) [hereinafter FAR].

6. 67 Fed. Reg. at 20,688.

7. *DOD Posts Comments to FPI Purchase Rules*, 44 GOV'T CONTRACTOR 25, ¶ 254 (July 10, 2002).

8. *Id.* Members of the House Committee on Small Businesses requested a definition of "competition" and "comparable price, quality, and time of delivery." The U.S. Chamber of Commerce requested that the council clarify that all three criteria must be met by FPI to satisfy the requirement of a comparable product. The Federal Bureau of Prisons maintained that DOD is required to obtain a waiver from FPI if the agency determines that the product is not comparable. The Defense Logistics Agency requested that micropurchases be excluded. *Id.*

9. Raya Wideonoja, *Defense Department Gets Earful on Prison Contract Rule*, GovExec.com (June 25, 2002), *at* http://www.govexec.com/dailyfed/0602/062502r2.htm.

10. Comp. Gen. B-290546, July 15, 2002, 2002 CPD ¶ 112.

11. *Id.* at 2. The Corps began working with UNICOR to provide furniture for the Amphibious Warfare School at the Quantico Marine base in Virginia. *Id.* The requirement to conduct market research was enacted before the purchase of the UNICOR products.

12. *Id*.

officer concluded that UNICOR's price and delivery terms were not comparable and issued a purchase order to a FSS vendor.[13] UNICOR challenged the contracting officer's finding and the competitive procedures the agency used to award the contract. The agency alleged that UNICOR's enabling statute required the arbitration board to resolve the dispute and moved to dismiss.[14]

The GAO agreed with the agency. UNICOR's enabling statute specifically vested the arbitration board with authority to resolve disputes involving price, quality, character, or suitability of UNICOR products. The GAO held that the board retained authority to resolve the dispute because the statute requiring the comparability determination did not specifically alter the board's arbitration authority. The new requirement applicable to UNICOR purchases did not exclude DOD purchases from the board's authority.[15] The GAO refused to decide whether the FSS competition complied with the statute's competitive procedures requirement until the arbitration board decides the comparability issue.[16]

Compare Past Performance, Too

The Civilian Agency Acquisition Council (CAAC) and the DARC proposed an amendment aimed at improving FPI's customer satisfaction, specifically its performance in delivery, price, and quality.[17] Federal customers would rate FPI's performance and compare its performance to private industry performance. The information will provide FPI with feedback and agencies with information for future source-selection determinations.[18]

Treat It like a Commercial Item

The DOD issued an interim rule on 6 December 2001 authorizing commercial item treatment for certain performance-based service contracts and task orders.[19] The interim rule requires the contract or task order to be a firm-fixed priced acquisition, have a value not exceeding five million dollars, specify each task the contractor must perform, define each task in measurable mission-related terms, and identify the specific end products or output the contractor must achieve for each task. The rule also requires the contractor to provide similar services to the general public at the same time and under similar terms and conditions as the contract or task order.[20]

Coordinated Effort

On 20 March 2002, the CAAC and the DARC issued a proposed rule amending the Federal Acquisition Regulation to update the clause regarding contract terms and conditions required to implement statutes or Executive Orders for commercial items.[21] The new clause ensures statutes enacted after the Federal Acquisition Streamlining Act of 1994 (FASA)[22] contain the applicable civil or criminal penalties and specifically cite their applicability to commercial items included in the list. The clause now includes pre-FASA clauses and alternatives, and excludes any post-FASA items that no longer apply.[23] "The date of each clause is added to the list to identify what revision of the listed clause applies when the clause is added to a contract."[24]

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13. *Id.*

14. *Id.* at 3; *see* 18 U.S.C. § 4124(b) (2000). The statute provides that "[d]isputes as to the price, quality, character, or suitability of such products shall be arbitrated by a board consisting of the Attorney General, the Administrator of General Services, and the President, or their representatives. Their decision shall be final and binding upon all parties." *Id.*

15. *Fed. Prison Indus.*, 2002 CPD ¶ 112, at 3.

16. *Id.* at 4.

17. Past Performance Evaluation of Federal Prison Industries Contracts, 67 Fed. Reg. 55,680 (Aug. 29, 2002) (to be codified at 48 C.F.R. pts. 8, 42).

18. *Id.*

19. Performance-Based Contracting Using Federal Acquisition Regulation Part 12 Procedures, 66 Fed. Reg. 63,335 (Dec. 6, 2001) (codified at 48 C.F.R. pts. 212, 237).

20. 66 Fed. Reg. at 55,680.

21. Contract Terms and Conditions Required to Implement Statute or Executive Orders—Commercial Items, 67 Fed. Reg. 13,076 (Mar. 20, 2002) (codified at 48 C.F.R. pt. 52).

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

23. In addition, the new language adds pre-FASA clauses and alternates that were inadvertently left off the former list. 67 Fed. Reg. at 13,076.

24. *Id*.

Whose Responsibility Is It?

On 31 May 2002, the DOD issued a final rule amending the Defense Federal Acquisition Regulation Supplement[25] to clarify responsibilities regarding commercial item determinations for subcontractors.[26] The rule requires contractors to determine "whether a particular subcontract item meets the definition of a commercial item."[27] When the administrative contracting officer (ACO) conducts a contractor purchasing system review (CPSR), the ACO will review the adequacy of the contractor's documented rationale for the commercial item determination.[28] The ACO should use reasonable business judgment to determine if a subcontract item complies with the commercial item definition.[29] The requirement does not affect the contracting officer's responsibilities or determinations regarding obtaining cost or pricing data.[30]

Just Minor Updates

The CAAC and the DARC issued a final rule on 20 March 2002, revising the commercial item Standard Form 1449. The final rule makes minor revisions: adding a block to indicate HUBZone set-asides, substituting the NAICS code for the SIC code, inserting a notation that award is made only on items specifically listed, and adding a block in the government's receiving report area.[31] Major Davis.

25. U.S. Dep't of Army, Defense Federal Acquisition Reg. Supp. (July 2002).

26. Subcontract Commerciality Determinations, 67 Fed. Reg. 38,023 (May 31, 2002) (to be codified at 48 C.F.R. pt. 244).

27. *Id.*; *see* FAR, *supra* note 5, at 2.101 (defining the term "commercial item").

28. 67 Fed. Reg. at 38,023. Section 44.302 of the FAR requires the administrative contracting officers to conduct a review to determine if a CPSR review is needed when a contractor's sales to the government are expected to exceed $25 million during the next twelve months. FAR, *supra* note 5, at 44.302.

29. *Id.*

30. *See* FAR, *supra* note 5, at 15.403.1.

31. U.S. Gen. Servs. Admin., SF 1449, Solicitation/Contract/Order for Commercial Items, 67 Fed. Reg. 13,049 (Mar. 20, 2002) (amending 28 C.F.R. pts. 1, 53).

Multiple Award Schedules

Electronic Listing of Multiple Agency Use Contracts

In February 2002, the Federal Acquisition Regulatory Council (FARC) issued a proposed amendment to the Federal Acquisition Regulation (FAR)[1] that would require electronic listings of multiple agency use contracts.[2] The proposed rule requires contracting activities to provide the information on-line within ten days of the award of a procurement instrument intended for use by multiple agencies.[3] The Web site would include information about the procurement instrument, placing orders, and other general information. The FARC proposes placing the new subpart in Federal Acquisition Regulation part 5, Publicizing Contract Actions, but is also considering inserting this database in FAR part 4, Administrative Matters, and FAR part 7, Acquisition Planning.[4]

We're Not In Kansas Anymore

The Department of Defense Acquisition Council (DDAC) and the Civilian Agency Acquisition Council (CAAC) issued a final rule that requires the development of acquisition plans and an information technology acquisition strategy for orders placed under a Federal Supply Schedule (FSS) contract.[5] All "information technology acquisitions shall comply with capital planning and investment control requirements"[6] and *Office of Management and Budget* (OMB) *Circular A-130*.[7] The rule excludes FSS orders using simplified acquisitions procedures under FAR part 13 and small business programs under FAR part 19.[8] Although orders placed under Multiple Award Schedule[9] (MAS) procedures are still considered full and open competition,[10] FFS orders are not exempt from the fair opportunity competition requirement. Contracting officers must ensure that all awardees have a fair opportunity[11] to compete for a delivery-order or task-order exceeding $2500 unless an exception applies.[12] Contracting officers must also document the rationale for the order, the price, any tradeoffs, and the basis for the award. The contracting officer must also have a documented rationale for authorizing fair opportunity or logical follow-on

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1. General Servs. Admin. et al., Federal Acquisition Reg. pt. 5 (July 2002) [hereinafter FAR].

2. Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency, 67 Fed. Reg. 7256 (proposed Feb. 15, 2002) (to be codified at 48 C.F.R. pt. 5) (amending FAR pt. 5).

3. 67 Fed. Reg. at 7257. The contracting agency must make the information available on the GovWide Contracts Web Site, http://www.arnet.gov/gwac/govwide.html. *Id.*

4. *Id.*

5. The final rule is designed to:

> (1) increase attention to modular contracting principles to help agencies avoid unnecessarily large and inadequately defined orders;
>
> (2) facilitate information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the government to award performance-based orders; and
>
> (3) revise existing documentation requirements to address tradeoff decisions as well as the issuance of sole-source orders as logical follow-ons to orders already issued under the contract.

Final Rule Amending Various Provisions of the Federal Acquisition Regulation (FAR) to Further Implement Subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000, 67 Fed. Reg. 56,117 (Aug. 30, 2002) (to be codified at scattered sections of 48 C.F.R.).

6. *See* 40 U.S.C. § 1422 (2000). The capital planning requirements establish a comprehensive approach for executive agencies to improve the acquisition and management of information resources. *Id.*

7. Office of Management and Budget, OMB Circular A-130, Management of Federal Information Resources, Established Policy for the Management of Federal Information Resources, 67 Fed. Reg. 56,119 (amendment of July 17, 1996), *available at* http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html.

8. Except for the provisions at FAR section 13.303-2(c)(3), which define with whom contracting officers may establish blanket purchase agreements. 67 Fed. Reg. at 56,119.

9. The Multiple Award Schedules are also called the Federal Supply Schedule.

10. 67 Fed. Reg. at 56,117.

11. *Id.* at 56,118.

exceptions.[13] The new rules will increase contracting officers' procedural responsibilities.

Competition Required Among FSS Vendors

The Defense Acquisition Regulations Council (DARC) recently proposed an amendment the Defense Federal Acquisition Regulation Supplement[14] (DFARS) to require competition for FSS service contracts exceeding $100,000.[15] The amendment implements section 803 of the National Defense Authorization Act for Fiscal Year 2002.[16] The rule requires award on a competitive basis unless an exception[17] applies or a statute expressly authorizes or requires the purchase from another source.

A competitive basis requires agencies to give contractors fair notice of the intent to purchase, a description of the work the contractor must perform, and the basis for selection. All responding contractors must have a fair opportunity to submit an offer and have that offer fairly considered. Alternatively, a competitive basis requires the contracting officer to notify as many contractors on the schedule as practicable and receive offers from at least three qualified contractors.[18] If fewer than three qualified contractors submit offers, the contracting officer must determine whether he could identify additional qualified contractors through reasonable efforts. The contracting officer must provide written documentation when he determines that reasonable efforts would not reveal additional qualified contractors.[19]

Contracting officers are authorized to establish single and multiple blanket purchase agreements (BPAs) against the FSS if they meet the competitive basis and fair notice requirements. In addition, for single BPAs, the statement of work must define the task and establish a firm-fixed price for identified tasks or services. For multiple BPAs, all awardees must receive the statement of work and selection criteria on the FSS before the contracting officer places an order.[20]

It's Not Incidental

The CAAC and the DARC recently issued a final rule governing incidental purchases from FSS vendors and disputes with FSS vendors.[21] The final rule authorizes incidental orders from a FSS BPA or a task or delivery order if the agency follows the non-FSS acquisition rules. The contracting officer

12. *Id*. The statutory exceptions are:

> (i) the agency need for supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays;
>
> (ii) only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized;
>
> (iii) the order must be issued on a sole source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order; or
>
> (iv) it is necessary to place an order to satisfy a minimum guarantee.

FAR, *supra* note 1, at 16.5505(2).

13. 67 Fed. Reg. at 56,120. The contracting officer must identify the basis for the fair opportunity process exception. The follow-on exception requires the contracting officer to describe why the relationship between the initial order and the follow-on order is logical to the follow-on. *Id*.

14. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (July 2002) [hereinafter DFARS].

15. Competition Requirements for Purchase of Services Under Multiple Award Contracts, 67 Fed. Reg. 15,351 (Apr. 1, 2002) (to be codified at 48 C.F.R. pts. 208, 216) (amending DFARS, *supra* note 14, at 208, 216). The rule eliminated the requirements of FAR section 8.404(b)(2), Ordering Procedures for Optional Use Schedules, for Service Contracts Exceeding $100,000. *See* 67 Fed. Reg. at 15,351. The rule also implements the procedures of FAR section 8.404(b)(3)(i), Orders exceeding the maximum order threshold; and FAR section 8.404(b)(7), Documentation. 67 Fed. Reg. at 15,352.

16. National Defense Authorizations Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

17. The contracting officer may waive the competitive basis requirement if one of the exceptions at FAR section 16.505(b)(2)(i)-(iii) applies. 67 Fed. Reg. at 15,352.

18. *Id*. The rule requires the contracting officer to make a written determination. *Id*.

19. *Id*.

20. *Id*.

21. Federal Supply Order Disputes and Incidental Items, 67 Fed. Reg. 43,514 (June 27, 2002) (to be codified at 48 C.F.R. pts. 8, 51) (amending FAR, *supra* note 1, at 8.401, 8.405-7).

must also determine that the price of the incidental items is fair and reasonable, clearly identify the non-FSS items on the order, and include all applicable FSS clauses.[22]

The final rule also adds a section regarding the disposition of disputes under the FSS. The ordering contracting officer may issue a final decision or refer the dispute to the schedule contracting officer. The rule refers disputes relating to contract terms and conditions to the schedule contracting officer. The rule also encourages parties to use alternative dispute resolution to the maximum extent practicable. Contracting officers are authorized to appeal final decisions to the agency's Board of Contract of Appeals or the U.S. Court of Federal Claims.[23]

This Is Why We Have the Rules

In *Reep, Inc.*,[24] the General Accounting Office (GAO) recently held that agencies need not conduct competitive acquisitions when making FSS purchases if the awardee is the vendor providing the best value to the government at the lowest overall cost. The GAO sustained the FSS protest in *Reep* because the agency awarded a sole-source delivery order to the incumbent vendor, even though a vendor on another schedule provided the same service at a lower price.[25]

In March 2001, the 5th Special Forces Group (SFG) awarded Worldwide a one-year delivery order contract under the FSS for language training services. On 4 March 2002, the SFG issued a request for quotes, but a protest caused the SFG to take corrective action and issue a new solicitation.[26] The SFG issued two FSS delivery orders to Worldwide on 15 March 2002 and 3 June 2002 to meet the ongoing need for language training services. Worldwide was the only vendor on that FSS schedule. Other vendors on another FSS schedule, including Reep, provided language training services at a lower price. Reep protested the SFG's failure to consider vendors on the alternate FSS.[27]

The GAO held that the SFG must consider reasonably available information to ensure that it meets the statutory obligation to obtain the best value at the lowest overall cost when placing orders under the FSS.[28] Reviewing the prices of the vendors on the other FSS would have satisfied the statutory requirement.[29] The GAO found that the agency failed to comply because it had actual knowledge of vendors on the other FSS and failed to provide a unique basis for Worldwide's language training services.[30] Under the new DFARS rule regarding the acquisition of services exceeding $100,000, contracting officers are required to provide FSS vendors notice of the RFQ and award on a competitive basis.[31]

Army Mandates Use of Blanket Purchase Agreement (BPA)

Effective 1 October 2002, the Army Contracting Agency (ACA) mandated the use of a Department of the Army BPA for office supply purchases using the government purchase card. Installations in the continental United States must use one of twelve vendors to purchase office supplies if their self-service supply center is unable to fill their requirements. Installations outside the continental United States must use the BPA if a listed vendor can meet their delivery requirements. The vendors were selected from existing General Service Administration (GSA) FSSs to promote the statutory preference to use GSA FSSs and to promote small or disadvantaged businesses.[32] The vendors will automatically substitute statutorily mandated products under the Javits-Wagner-O'Day (JWOD) program when an agency places an order. The goal is to "standardize the Army's method of procuring office products, offer better prices

22. Contracting officers must follow the applicable regulations of FAR part 5, Publicizing; FAR part 6, Competition Requirements; FAR part 12, Acquisition of Commercial Items, Contracting Methods; FAR parts 13, 14, and 15; and FAR part 19, Small Business Programs. 67 Fed. Reg. at 43,515.

23. *Id.* The schedule contracting officer must receive notice of the ordering contracting officer's final decision. The contracting officer must notify the schedule contracting officer of the referral. *Id.*

24. B-290665, 2002 U.S. Comp Gen. LEXIS 137 (Sept. 17, 2002).

25. *Id*. at *5.

26. *Id*. at *2.

27. *Id*. at *3. The SFG did not issue a solicitation or request quotes from FSS vendors. *Id.*

28. *Id*. at *3-4.

29. *Id*. at *4.

30. *Id*. at *5.

31. Competition Requirements for Purchases of Services Under Multiple Award Contracts, 67 Fed. Reg. 15,351 (Apr. 1, 2002) (to be codified at 48 C.F.R. pts. 208, 216).

32. Memorandum, Acting Director of the Army Contracting Agency, to Heads of Contracting Activities, subject: Mandatory Use of Blanket Purchase Agrements (BPAs) for Office Products for the Army (26 Sept. 2002). "Historically, the Army has purchased approximately $100 million in office supplies annually." *Id.*

(by maximizing quantity discounts) and enhance the Army's commitment to support small businesses and the JWOD program."[33] The DOD's Electronic Mall hosts the BPAs.[34] Major Davis.

33. 41 U.S.C. §§ 46-48(c) (2000). One of the goals of the BPA is to "enhance the Army's commitment to the JWOD Program." *Id.*

34. *Id*. The DOD Electronic Mall is available at https://emall.prod.dodonline.net/scripts/EMStoresRelatedSites.asp.

Electronic Commerce

E-Government

Federal agencies introduced numerous electronic government (E-Government) initiatives this year. President Bush issued a memo reiterating that E-Government is a core feature of government reform and encouraged coordinated E-Government initiatives.[1] The Senate passed legislation creating an E-Government position in the Office of Management and Budget (OMB).[2] The E-Government Task Force implemented E-Government initiatives to address redundant and overlapping agency actions.[3] The General Services Administration (GSA) redesigned a key component of E-Government, FirstGov, to allow direct transactions between the government and the public.[4] The OMB plans to centralize the rule-making services of several agencies on-line with FirstGov.com. The integration should save the federal government $70 million in an eighteen-month period.[5] The OMB and the Department of Labor launched a Web Site, GovBenefits, to give easy access to information about government programs.[6] The GSA released the Certificate Arbitrator Module software on an open-source basis. The software is "designed to make it easier for the public and the commercial sector to securely conduct business with the government electronically."[7] The General Accounting Office (GAO) announced plans to implement electronically filed bid protests as part of the GAO's E-Gov initiatives.[8] The Department of Energy (DOE) used digital verification to send a 9500-page proposal.[9] "It is estimated the DOE saved nearly one million dollars in reproduction and storage costs by e-mailing and electronically signing the proposal."[10] Finally, the Administrator for Federal Procurement Policy launched the government-wide past performance retrieval database.[11] The Web site is an E-Government initiative to eliminate "collection redundancies."[12]

Electronic Request for Payment

The Department of Defense (DOD) proposed amending the Defense Federal Acquisition Regulation Supplement[13] to require contractors to submit payments electronically and the DOD to process those payments electronically.[14] The rule would authorize the Secretary of Defense to exempt cases if the electronic requirement would be unduly burdensome.[15] The DOD delayed implementation of the rule until 1 October 2002.[16]

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1. Memorandum from The President of the United States to the heads of Executive Departments and Agencies, subject: Electronic Government's Role in Implementing the President's Management Agenda (July 7, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/07/20020710-6.html.

2. Maureen Sirhal, *Senate Passes Bill to Create E-Government Office*, GovExec.com (June 28, 2002), *at* http://www.govexec.com/dailyfed/0602/062802tdl.htm; *see* S. 803, 107th Cong. (2002).

3. U.S. Office of Mgmt. and Budget, *E-Gov Initiatives* (Sept. 22, 2002), *at* http://www.arnet.gov/ego/index.html.

4. *Cheney Announces FirstGov Overhaul*, 44 Gov't Contractor 9, ¶ 92 (Mar. 2, 2002).

5. *Administration's E-Gov Initiative Takes Another Step Forward*, 44 Gov't Contractor 19, ¶ 188 (May 15, 2002).

6. Press Release, U.S. Dept. of Labor, GovBenefits Web Site Officially Launched, WWW.GovBenefits.gov Provides Easy Access to Benefit Information; Streamlines Bureaucracy (Sept. 19, 2002), *at* http://www.dol.gov/opa/media/press/opa/OPA2002256.html.

7. *GSA Announces "Open Source" Release of PKI-related Software*, 43 Gov't Contractor 37, ¶ 383 (Oct. 10, 2002).

8. *E-Filing of Bid Protests, Rule Revamp on Tap at GAO*, 44 Gov't Contractor 5, ¶ 50 (Feb. 6, 2002).

9. *Id.* The authentication services used enclosed the "document in a security barrier that prevents undetected alterations." *Id.*

10. *Id.*

11. *Government-Wide Past Performance Retrieval Database Launched*, 44 Gov't Contractor ¶ 281 (July 24, 2002).

12. *Id.*

13. U.S. Dep't of Defense Federal Acquisition Reg. Supp. (June 2001) [hereinafter DFARS].

14. Electronic Submission and Processing of Payment Requests, 67 Fed. Reg. 38,057 (proposed May 31, 2002) (to be codified at 48 C.F.R. pts. 232, 252). Specifically, the rule requires contractors to submit requests for contract financing and invoice payment in electronic form. The rule requires the DOD to receive payment requests electronically and to process payment requests and supporting documentation electronically. *Id.*

15. *Id.*

16. Delay in the Implementation of 10 U.S.C. § 227; Electronic Submission and Processing of Claims for Contract Payments, 66 Fed. Reg. 43,841 (Aug. 21, 2001). The original implementation date was 30 June 2002. *Id.*

Reverse Auctions

Agencies continued to use on-line reverse auctions to procure goods and services. The Air Force Center for Environmental Excellence (AFCEE) used a reverse auction to procure the construction of a motorized security gate.[17] The AFCEE notified contractors in advance and issued log-in identification and passwords to access the auction Web site.[18] Contractors submitted proposals in advance, and contractors with unacceptable proposals were excluded from the Web site.[19] The bidding process continued until there were no bids within a five-minute period, and ended in forty-eight minutes.[20]

When Will It End?

Last year's *Year in Review* emphasized the importance of thoroughly reviewing electronic commerce reverse auction requests for proposals (RFP) to avoid clauses that could indefinitely extend auctions.[21] In *Royal Hawaiian Movers, Inc.*,[22] the GAO denied a protest challenging corrective action taken as a result of an ambiguous electronic commerce RFP. The Department of the Navy issued an RFP for the movement of containers between points in Oahu, Hawaii. The RFP included a reverse auction after the receipt of initial price proposals.[23] The auction was to begin at 0900 hours and last for sixty minutes, but receipt of revised offers within the last five minutes of the auction extended the acution for an additional five minutes.[24] The RFP authorized fifty extensions and indicated the auction would end at 1400 hours. The Navy failed to recognize that the auction would end at 1410 hours if the bidders used all fifty extensions;[25] they did, and the auction ended at 1410 hours. Royal Hawaiian submitted the lowest-priced offer after 1400 hours. Pacific Express objected, because it submitted the lowest-priced offer before 1400 hours. The Navy acknowledged that the RFP was ambiguous and amended it to request revised proposals from the offerors.[26]

Royal Hawaiian protested the amendment. Specifically, Royal Hawaiian complained that "reopening the competition after the reverse auction was not required to ensure fair competition."[27] Royal Hawaiian argued that there was no evidence that the RFP misled the offerors. Pacific Express knew that the auction would continue past 1400 hours because it submitted a revised offer after 1400 hours. Royal Hawaiian also complained that receipt of final proposals required it to bid against itself, resulting in fundamental unfairness to Royal Hawaiian.[28]

The GAO stated 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."[29] The Comptroller General found that reopening the competition was a reasonable corrective action because the offerors may have formulated different strategies based on a different understanding of when the auction would end.[30] Pacific Express did submit a revised offer after 1400 hours, but the GAO would not conclude that this meant that Pacific Express knew before 1400 hours that the auction would continue past 1400 hours.[31] The GAO held that the RFP was patently ambiguous and that the Navy's request for revised

17. *AFCEE's Internet "Reverse Auction" Receives High Marks*, 44 GOV'T CONTRACTOR ¶ 301 (Aug. 7, 2002).

18. *Id.*

19. *Id.* The web site used administrative controls to lock out companies with unacceptable proposals. *Id.*

20. *Id.* The apparent low bidder, at $39,000, was required to submit an acceptable cost proposal. If AFCEE rejected the proposal, it was authorized to accept a cost proposal from the next lowest bidder. *Id.*

21. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 31 [hereinafter *2001 Year in Review*].

22. Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182.

23. *Id.* at 1.

24. *Id.* at 2. The RFP authorized price revisions during the reverse auction only. *Id.*

25. *Id.*

26. *Id.* at 3.

27. *Id.*

28. *Id.*

29. *Id.* at 4.

30. *Id.* at 5; *see* Main Bldg. Maint., Inc., Comp. Gen. B-279191.3, Aug. 5. 1998, 98-2 CPD ¶ 47.

31. *Royal Hawaiian Movers*, 2001 CPD ¶ 182, at 5. "Another competing offeror did not submit a revised offer after 2:00 p.m." *Id.*

proposals was an appropriate corrective action.[32] Although the Navy included clauses that avoided extending the auction indefinitely,[33] this experience still provides a valuable lesson—agencies should conduct dry runs and implement all the provisions of the RFP to alleviate conflicts and ambiguities. Major Davis.

32. *Id.*

33. *2001 Year in Review*, *supra* note 21, at 28.

Socio-Economic Policies

Affirmative Action in Government Contracting

Adarand: Supreme Court Dismisses Long-Standing Case

For several years, this publication has analyzed the *Adarand* affirmative action cases.[1] These cases began when the United States District Court for the District of Colorado held that the "DBE [Disadvantaged Business Enterprise] Program as administered by the [Central Federal Lands Highway Division] within Colorado" was constitutional.[2] The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) affirmed the district court's holding,[3] and the United States Supreme Court remanded the case to the Court of Appeals and directed it to apply "strict scrutiny" analysis instead of the intermediate standard of review applied earlier.[4] On remand, the Tenth Circuit reversed the district court's decision[5] and held that the pertinent provisions of the program were unconstitutional under a strict scrutiny analysis.[6]

The Supreme Court's second review of the *Adarand* cases could have ended with a landmark decision for race-based initiatives in federal contracting. Instead, the Supreme Court dismissed the writ of certiorari as improvidently granted.[7] The Court reasoned that the Tenth Circuit had shifted its focus from statutes and regulations pertaining to federally funded state and local highway contracts,[8] to statutes and regulations pertaining to direct procurement of Department of Transportation (DOT) funds for highway construction on federal lands.[9] The Court refused to address this latter issue because the Tenth Circuit had specifically held that the plaintiff lacked standing to challenge agency decisions in this area.[10] The Court dismissed the writ, "effectively stalling Adarand's litigation—at least for now."[11]

The *Adarand* Legacy Lingers

Race-based preferences in federal contracting continue to be an issue in spite of the dismissal of A*darand*. In *Rothe Development Corp. v. U.S. Department of Defense*,[12] the Court of Appeals for the Federal Circuit (CAFC) vacated a district court decision that upheld the constitutionality of Section 1207 (the 1207 Program) of the National Defense Authorization Act of 1987. The 1207 Program provision at issue authorizes the Department of Defense (DOD) to raise the bids of non-Small Disadvantaged Businesses (SDBs) by ten percent to attain the five percent SDB contracting goal.[13] The DOD's ability to meet

1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 38-41.

2. Adarand Constructors, Inc. v. Skinner, 790 F.Supp. 240, 244-5 (D. Colo. 1992) [hereinafter *Adarand I*]. Adarand Constructors, a non-Disadvantaged Business Enterprise (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 federal government's Fifth Amendment obligation not to deny anyone equal protection of the laws. *See* 15 U.S.C. § 637(a)(5) (2000) (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) (2000) (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").

3. Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1539 (10th Cir. 1994) [hereinafter *Adarand II*] (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"). *Id.*

4. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) [hereinafter *Adarand III*]; *see* Major Timothy J. Pendolino et al., *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 36 (discussing the Supreme Court's decision to overrule its earlier decision in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), applying an intermediate standard of scrutiny to two race-based policies of the Federal Communications Commission).

5. Adarand Constructors, Inc. v. Pena, 965 F.Supp. 1556 (D. Colo. 1997) [hereinafter *Adarand IV*]; *see* 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 and its holding that the subcontractor compensation clause (SCC) was not narrowly tailored to the goal of overcoming discriminatory barriers in federal highway contracts). The SCC provided a financial advantage to prime contractors that hired subcontractors who qualified as DBEs. At the time of award, contractors were obligated to presume individuals of certain races or ethnic backgrounds were socially and economically disadvantaged and therefore qualified as DBEs. *Adarand I*, 790 F.Supp. at 241-42.

6. Adarand Constructors, Inc., v. Slater, 228 F.3d 1147 (10th Cir. 2000) [hereinafter *Adarand V*] (noting that several changes made to the SCC and DBE since the suit was first filed made those provisions sufficiently narrowly tailored); s*ee also* Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 41-42 (discussing the Tenth Circuit's decision in *Adarand V*).

7. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 111 (2001) [hereinafter *Adarand VI*].

8. *See* Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1999) (codified at 49 C.F.R. pt. 26).

9. *See* 15 U.S.C. § 637(d)(4)(E) (2000) (providing federal agencies the authority to encourage subcontracting opportunities for DBEs).

10. *Adarand V*, 228 F.3d at 1160. The Supreme Court noted that Adarand's original petition for certiorari did not contest the Tenth Circuit's holding that Adarand's standing was limited to a challenge of TEA-21. *Adarand VI*, 534 U.S. at 107-08.

11. *See* Adarand*: High Court Decides Not To Decide*, 43 GOV'T CONTRACTOR 45, ¶ 461 (Dec. 5, 2001) (discussing the Supreme Court's dismissal).

12. 262 F.3d 1306 (2001). *See also 2001 Year in Review*, *supra* note 1, at 41-43.

the five percent SDB contracting goal may explain the reason the issue is moot, at least to some.[14]

In *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*,[15] the United States District Court for the District of Minnesota held that the latest version of the affirmative action program for federally funded highway contractors survives the strict scrutiny analysis prescribed in *Adarand III*.[16] Sherbrooke Turf, Inc. (Sherbrooke), a firm owned and operated by caucasian males, provides landscaping services for land adjacent to highways. Sherbrooke submitted subcontracting bids on two federally assisted, state-administered highway projects. In both instances, the prime contractor awarded the contract to a DBE subcontractor who submitted a higher bid in the case of one project, and omitted services that were often necessary in the case of another.[17] Sherbrooke sued, claiming that the Minnesota Department of Transportation's (MnDOT) DBE program violated the Equal Protection Clause of the U.S. Constitution.[18]

Referring to a congressional "Benchmark Study," the *Sherbrooke* court held that Minnesota's implementation of the federal program met the "compelling interest" requirement because "[t]he record makes clear that Congress had a sufficient evidentiary basis on which to conclude that the persistence of racism and discrimination in highway subcontracting warranted a race-conscious procurement program."[19] The court also noted several features of the program that demonstrate its narrow tailoring to serve the compelling government interest of addressing the persistence of racism and discrimination in highway subcontracting. First, the program emphasized the use of race-neutral measures to meet the MnDOT goals.[20] Second, the program was limited in duration.[21] Third, the program barred any "rigid quotas," permitted states to deviate from the aspirational national ten percent goal, and permitted states to apply for exemptions.[22] Last, the plaintiff failed to show that its inability to secure an award on either project was related to the MnDOT program.[23]

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13. The 1207 Program sets a statutory goal for the DOD of five percent participation by socially and economically disadvantaged businesses. *See* 10 U.S.C. § 2323 (2000). The 1207 Program points to section 8(d) of the Small Business Act in order to define socially and economically disadvantaged businesses. *See also* 10 U.S.C. § 2323 (a)(1)(A); 15 U.S.C. § 637(d). The ten percent price evaluation program is implemented by the Federal Acquisition Regulation (FAR). GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 19.11 (July 2002) [hereinafter FAR]; *see also* Inter-Con Sec. Sys., Inc., B-290493, B-290493.2, 2002 U.S. Comp. Gen. LEXIS 121 (Aug. 15, 2002) (interpreting the Foreign Relations Authorization Act, 22 U.S.C. § 4864 (2000), as allowing a ten-percent evaluation price preference for U.S. security firms bidding on contracts for U.S. Foreign Missions abroad, even if they are subsequently acquired by foreign corporations).

14. For the third consecutive year, the price evaluation adjustment for SDBs is 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). The suspension applies to all solicitations from 24 February 2002 to 23 February 2003. *See Small Disadvantaged Business*: *DOD Met 5% SDB Goal in FY 2001, Must Suspend Price Adjustment for 1 Year*, 77 BNA FED. CONT. REP. 7, at 185 (Feb. 19, 2002). *But see Small Disadvantaged Business*: *Kerry, Bond Urge Administration To Consider Reinstituting SDB Set-Asides*, 77 BNA FED. CONT. REP. 16, at 464 (Apr. 23, 2002) (discussing two U.S. senators' concern for the decrease in the percentage of federal contract dollars awarded to SDBs, and their request to the Small Business Administration (SBA) to revisit the SDB programs, which the Clinton administration scaled back considerably in response to the 1995 *Adarand III* decision requiring strict scrutiny of race-preference statutes). The decrease in the percentage of federal contract dollars is consistent with a report by the SBA's Office of Advocacy, which concluded that although minorities have made significant gains in the small business sector, significant obstacles continue to impede the growth of SDBs. *See* U.S. SMALL BUSINESS ADMIN., MINORITIES IN BUSINESS (2001), *available at* http://www.sba.gov/advo/stats/min01.pdf.

15. No. 00-CV-1026 (JMR/RE), 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001 Nov. 14, 2001).

16. *Id*. at *34.

17. *Id*. at *9.

18. *Id*. at *10. The court described MnDOT's DBE program as follows:

> MnDOT has set an 11.6% overall goal for DBE participation. Under Part 26 of the federal regulations, it determined it could meet 2.6% of its participation goal using race and gender neutral means, including selecting DBEs based on the lowest bid; the remaining 9% of its goal was to be met through contract goals. To implement these highway contracting goals, Minnesota required each prime contract-bidder to provide evidence showing it either subcontracted to DBEs in order to meet the contract goal, or engaged in a good faith effort to meet it.

Sherbrooke Turf, 2001 U.S. Dist. LEXIS 19,565, at *8 (citing 49 C.F.R. pt. 53 (2002)).

19. *Id*. at *18.

20. *Id*. at *22.

21. *Id*. at *23-24. Specifically, the DBE provision of the program expires in 2004. Furthermore, the program is automatically discontinued when a participating state meets its annual overall goals through race-neutral means in two consecutive years. *See* 49 C.F.R. § 26.51(f)(3).

22. *Id*. at *26-27. The court characterized Sherbrooke's argument that Minnesota's decision to opt into the program was proof of the state's "inflexibility" as "specious." The court reasoned that such logic would lead to the conclusion that opting out of the program is the "only ultimate proof a state could offer to show flexibility." *Id*. at *27.

23. *Id*. at *31.

Thus far, *Sherbrooke* has not percolated up to the Supreme Court. The *Adarand VI* dismissal assures that the plaintiff in *Sherbrooke* will remain focused on federally funded projects that are delegated to state and local governments. While some state and local governments wrestle with harmonizing race-conscious measures with *Adarand's* strict scrutiny analysis, others may simply avoid the issue altogether by eliminating the programs that include race-conscious provisions.[24]

It's All in the Classification

Unlike the strict scrutiny analysis required for race-based classifications, statutory preferences based on "political" classifications are subject to a rational-basis analysis.[25] This distinction was helpful in *American Federation of Government Employees* (*AFL-CIO*) *v. United States* (*AFGE*),[26] where a Native American firm received an award of a civil engineering contract pursuant to an exemption under section 8014 of the 2000 Defense Appropriations Act.[27] *AFGE* involved two civilian employees at Kirtland Air Force Base whose positions were eliminated when the Air Force awarded a contract to a qualified firm under Native American ownership. The employees-plaintiffs alleged that the Section 8014(3) exemption was unconstitutional because it denied them the opportunity to compete for the award in a public-private cost evaluation.[28] The plaintiffs also alleged that the exemption was not narrowly tailored to serve a compelling government interest because non-Native Americans who owned forty-nine percent of a Native American-owned firm would also benefit from the preference.[29]

The court disagreed with the plaintiffs' premise that the preference was a racial classification subject to strict scrutiny analysis. The court characterized the preference for Native Americans as one involving the treatment of a "political" rather than a "racial" group.[30] The "political" characterization was based on Congress's constitutional powers to regulate commerce with Indian Tribes[31] and the "legislative arm's unique authority to legislate on behalf of tribally affiliated Indians as a politically-defined group."[32] The court reasoned that "political" classifications were subject to rational basis analysis and concluded that "[n]o reasonable trier of fact could find, looking at all the evidence, including the history, with all references in favor of the plaintiffs, that the United States' trust obligation and self-determination of Native Americans are not reasonably accomplished by enacting the section 8014(3) preference."[33]

Small Business

Dealing Direct

On 14 March 2002, the DOD issued an interim rule[34] amending the Defense Federal Acquisition Regulation Supplement that permits the DOD to bypass the SBA and contract directly with SDBs on behalf of the Small Business Administration (SBA).[35] The interim rule implements a partnership agreement

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24. *See, e.g.*, *Affirmative Action*: *City of Charlotte Scraps Set-Aside Program in Face of Lawsuit Challenging Constitutionality*, 77 BNA FED. CONT. REP. 3, at 65 (Jan. 22, 2002) (discussing the Charlotte, North Carolina, City Council's decision to drop its program designed to boost participation by women and minorities in local building construction contracts). "According to City Attorney DeWitt McCarley, the city council voted Jan. 14 [2002] to scrap its program after a local construction company, backed by the Southeastern Legal Foundation (SLF), challenged its constitutionality in federal court ." *Id*.

25. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

26. 195 F. Supp. 2d 4 (D.D.C. 2002).

27. Section 8014 of the Defense Appropriations Act for Fiscal Year 2000 provides in part that "no funds shall be available to convert to contractor performance an activity or function of the DOD that is performed by more than ten DOD civilian employees until a most efficient and cost effective organization analysis (MEO) is completed on the activity or function." Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, § 8014(3), 113 Stat. 1212, 1234 (1999). The statute creates an exemption for firms under fifty-one percent Native American ownership. *See id*.

28. *AFGE*, 195 F. Supp. 2d at 14-15.

29. *Id*. at 17-18.

30. *Id*. at 18. The *AFGE* court easily extended the "Native American" preference to a "Native Alaskan" preference, and then to the awardee, Chugach, which was owned by two Native Alaskan-owned corporations. *Id*. at 21-23. Failure to prove its status as a Native Alaskan firm could have resulted in a different conclusion. *See, e.g.*, Colorado Constr. Corp., B-290960, 2002 Comp. Gen. LEXIS 133 (Sept. 6, 2002) (holding that an agency reasonably rejected a bid submitted in response to a Native American set-aside solicitation, when the documentation raised questions about the bidder's eligibility as a Native American enterprise). The government, of course, could sue any firm that falsely certifies itself to be an enterprise entitled to any preference. *See generally Small Disadvantaged Businesses*: *DOJ Files Lawsuit Against California Firms For Masquerading as Minority-Owned*, 76 BNA FED. CONT. REP. 21, at 617 (Dec. 11, 2001) (discussing a Department of Justice lawsuit against three California construction companies their owners, whom it accused of falsely certifying the companies as SDBs).

31. *See* U.S. CONST. art. I, § 8, cl. 3.

32. *AFGE*, 195 F. Supp. 2d at 18.

33. *Id*. at 24. The preference for Native American-owned firms is discretionary, not mandatory. In Deponte Invs., Inc., Comp. Gen. B-288871; B-288871.2, Nov. 26, 2001, 2002 CPD ¶ 9, the GAO held that a protestor's offer was not entitled to a preference for Native American-owned firms where the solicitation did not provide for a preference. *Id*.

between the DOD and the SBA that replaces a memorandum of understanding in effect since 6 May 1998. The authority to bypass the SBA expires on 30 September 2004. The SBA will continue to determine eligibility under the SDB program[36] and to resolve appeals.[37]

To Set Aside Or Not To Set Aside

The Federal Acquisition Regulation (FAR) requires set-aside procurements for small businesses when there is a reasonable expectation that the agency will obtain offers from at least two responsible small businesses. The FAR does not require agencies to use any particular technique when assessing small business availability; however, agencies must base their assessments on sufficient facts to establish their reasonableness.[38] Such were the circumstances in *Quality Hotel Westshore; Quality Inn Busch Gardens*.[39] In *Quality Hotel*, the agency took several steps before deciding to issue a Request for Proposals (RFP) on an unrestricted basis.[40] The contracting officer conducted a market survey, including an Internet search on a SBA-maintained Web Site.[41] The contracting officer also coordinated with the local SBA office, which could not identify any small business sources.[42] The Army's small business specialist, the local SBA representative, and eventually the General Accounting Office (GAO), found that the contracting officer's decision to keep the requirement "full and open" was reasonable.[43]

Although an agency "may" review a large business proposal submitted under a cascading set-aside preference, it is not "required" to view the proposal if the agency achieves sufficient small business competition under the solicitation.[44] In *Carriage Abstract*, the Department of Housing and Urban Development (HUD) awarded contracts to three small businesses for real estate closing services in different geographic areas. The incumbent-protestor, a large business, argued that HUD was required to evaluate its proposal because it offered a historically lower price than two of the awardees.[45] The GAO disagreed, noting that the protestor provided no legal support for its contention. The GAO accepted HUD's explanation "that such [a cascading set-aside] approach promotes the interests of small business concerns and also provides the agency with an efficient means to continue the procurement in the event that sufficient small business participation is not realized."[46]

No Monkey Business With Small Business—Got It?

Carriage Abstract will do little to assuage those who believe federal agencies are not doing enough to include small businesses. On 15 May 2002, the House of Representatives Small Business Committee Democrats released a 327-page report, grading the performance of federal agencies on small business contracting.[47] The report gave "scorecards" charting the records of agencies over the past three years. The DOD was one of two agencies that received a failing grade.[48] On the same

34. Defense Federal Acquisition Regulation Supplement; DoD Pilot Mentor-Protege Program, 67 Fed. Reg. 11,435 (proposed Mar. 14, 2002) (to be codified at 48 CFR Parts 219 and 252).

35. *See* U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 219.8 (July 1, 2002) [hereinafter DFARS].

36. The SDB Program is commonly referred to as the "Section 8 Program." The program gets its name from its location in the Small Business Act. *See* 15 U.S.C. § 637(a)(8)(1)(A) (2000).

37. *See* FAR, *supra* note 13, at 19.810.

38. *Id*. at 19.502-2(b); *see, e.g.*, LBM, Inc., B-290682, 2002 U.S. Comp. Gen. LEXIS 138 (Sept. 18, 2002) (sustaining a protest that the agency did not consider the application of FAR 19.502-2(b) when it transferred services previously provided by small businesses to a task order under an indefinite-delivery/indefinite quantity contract).

39. Comp. Gen. B-290046, May 31, 2002, 2002 CPD ¶ 91.

40. The solicitation was for "meals, lodging and transportation for applicants processing at the military entrance processing station (MEPS) in Tampa, Florida." *Id.* at 1.

41. *Id*. at 2.

42. *Id*.

43. *Id*. at 2, 4. Only two businesses applied as small businesses—the protestors. The contracting officer found the protestors' documentation of their alleged small business status insufficient. *Id*. at 2-3.

44. Carriage Abstract, Inc., B-290676, B-290676.2, 2002 U.S. Comp. Gen. LEXIS 119 (Aug. 15, 2002). "Cascading" set-aside preference refers to a solicitation that prioritizes proposals by categories. In this instance, the priorities were SDBs, small businesses, and last, all businesses regardless of status. *Id*. at *8.

45. *Id.* at *4-5. The price offered by the incumbent was $220 per closing compared to the $250 per closing offered by two of the awardees. *Id.*

46. *Id*. at *8.

47. *See Federal Agencies Receive Poor Grades For Small Business Contracting*, 44 GOV'T CONTRACTOR 20, ¶ 195 (May 22, 2002).

day as the release of the report, Representative (Rep.) Nydia Velazquez (D-N.Y.) "led the charge against Under Secretary of Defense for Acquisition, Technology, and Logistics Edward 'Pete' Aldridge at a House Small Business Committee hearing on Defense Department procurement practices affecting small businesses."[49] Responding to Rep. Velazquez's accusations that "no one department is 'more responsible for the exclusion of small business' than DOD," Secretary Aldridge defended the DOD's practices, stating that "approximately 88 percent of DOD's prime contractors are small businesses."[50] Whether the debate reflects real problems or is politically motivated,[51] Congress will continue to pass legislation protecting small business interests.[52] This is especially true today; President Bush recently issued an executive order directing federal agencies to consider the impact on small businesses whenever the agencies write new rules and regulations.[53]

Sizing Up the Competitors

Contractors may appeal to the SBA's Office of Hearings and Appeals (OHA) when a contracting officer denies them small business status. On 18 July 2002, the SBA issued a final rule amending its regulations governing proceedings before the OHA for size protests and challenges to North American Industry Classification System (NAICS) code designations.[54] The final rule explains the purpose of the amendments as follows:

> This rule improves the appeals process by revising and clarifying procedures, particularly those on filing, service, and calculating deadlines that have proven to be "stumbling blocks," causing additional litigation and delays; expedites certain procedures; conforms the regulations and procedures developed by case law and prevailing practice; and makes plain language revisions.[55]

The changes to the regulations, which became effective on 16 September 2002, include clarifications of how to determine filing dates[56] and rules for the exhaustion of administrative remedies.[57] In addition to the amendments regarding OHA appeals, the SBA issued an interim final rule on 23 January 2002,[58] that adjusted its monetary-based small business size standards to account for a 15.8 percent inflation rate between 1994 and the third quarter of 2000.[59] The SBA estimates that this amendment, which took effect on 22 February 2002, is expected to result in "8,600 newly designated businesses" and an additional $46.2 million worth of federal contracts to firms that will now be designated as small businesses.[60]

A contractor may appeal an OHA ruling, but as one contractor discovered, a favorable ruling does not necessarily prevent the agency from awarding the contract to another firm. In *Ceres Environmental Services, Inc. v. United States*,[61] the Court

48. *Id*. at 5.

49. *See Small Business*: *House Panel Scrutinizes DOD's Small Business Contracting Record*, 77 BNA FED. CONT. REP. 20, at 592 (May 21, 2002).

50. *Id*.

51. A DOD spokeswoman remarked that "[i]t is unfortunate that the report is not a bipartisan effort but that of one Democrat on the committee." *Id*.

52. *See, e.g., Small Business: House Agrees to Set 23% Prime Small Business Contracting Goal for DHS*, 78 BNA FED. CONT. REP. 5, at 135 (July 30, 2002) (discussing a bipartisan amendment to the Homeland Security Bill that would establish a twenty-three percent small business prime contracting goal for the new Department of Homeland Security). There are advocates who support increasing the twenty-three percent goal for small business prime contracting. On 18 July 2002, Senator John Kerry (D-Mass.) introduced legislation that increases the goal to thirty percent. *See* Small and Disadvantaged Business Ombudsman Act, S. 2753, 107th Cong. (2002). The bill would also expand the responsibilities of the SDB Ombudsman, requiring an annual report to Congress on small business and SDB issues. *See Small Business: Sen. Kerry to Introduce Legislation to Raise Government-Wide Small Business Goal to 30%*, 77 BNA FED. CONT. REP. 24, at 725 (June 18, 2002). On 3 September 2002, the Senate placed the bill on its legislative calendar. The bill's status is available at http://www.thomas.loc.gov.

53. Exec. Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

54. *See* Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases before the Office of Hearings and Appeals, 67 Fed. Reg. 47,244 (July 18, 2002) (amending 13 C.F.R. pts. 121, 124, 134).

55. *Id*.

56. *Id*. at 47,247 (amending 13 C.F.R. § 134.204(b)(2)).

57. *Id*. at 47,245 (amending 13 C.F.R. §§ 121.1101, 121.1102). Business may now appeal formal size determinations and NAICS code designations as a matter of right to OHA. The appellant must exhaust the OHA appeal procedure before seeking judicial review in court. *Id.*

58. Small Business Size Standards; Inflation Adjustment to Size Standards, 67 Fed. Reg. 3041 (Jan. 23, 2002) (amending 13 C.F.R. pt. 121).

59. The last inflation adjustment occurred on 7 April 1994. *See* Small Business Size Standards; Inflation Adjusted Size Standards, 59 Fed. Reg. 16,513 (Apr. 7, 1994) (amending 13 C.F.R. pt. 121).

60. *See Inflation Adjustment to Size Standards Will Benefit 8,600 Newly-Designated Small Businesses*, 44 GOV'T CONTRACTOR 4, ¶ 42, at 12 (Jan. 30, 2002).

of Federal Claims (COFC) vacated an OHA ruling on an NAICS classification. The protestor contended that the Department of Agriculture incorrectly classified a small business set-aside solicitation for ice storm debris removal as "Other Waste Collection" instead of "All Other Heavy Construction."[62] After the OHA rejected the protestor's appeal, it filed suit in the COFC, requesting that the court enjoin the award and grant a judgment declaring that the "All Other Heavy Construction" classification was appropriate. In vacating the OHA's ruling, the COFC noted that the predecessor Standard Industrial Classification Code (SIC)[63] for "Other Waste Removal" applied solely to refuse removal and not some of the other requirements of the solicitation.[64] The COFC remanded the case to the OHA for a new decision, but did not enjoin the award because the previous SIC codes used for similar work were not the predecessors to the NAICS "All Other Heavy Construction" classification.[65] The COFC also determined that it was unlikely that Ceres would have fallen under the average annual receipts threshold for any of the counterpart NAICS classifications the OHA could ultimately choose.[66]

A dispute over a firm's "small business" status may occur even when the parties agree on the applicable NAICS code.[67] In *CMS Information Services, Inc.*,[68] a Request for Quotations (RFQ) issued to small business Federal Supply Schedule (FSS) contractors required each vendor to "self-certify as small businesses as of the date of quotation submission."[69] The protestor, CMS, was a small business at the time of its award on the FSS contract in 1997, but lost its small business status before submission of the RFQ in 2002. In its protest, CMS argued that the SBA's regulations require that vendors certify as small businesses on the date of "initial offer submission" on the FSS RFQ.[70] The GAO rejected CMS's contention, noting that the purpose of the RFQ requirement to self-certify was consistent with the Small Business Act's goal "to ensure a fair proportion of all government contracts be placed with small business concerns."[71] The GAO disagreed with CMS's narrow reading of the regulation, commenting that although the regulation provides for size status determination on the date the initial offer is submitted, "it does not go the next step and provide that small business status can be established *only* in connection with the submission of an offer (as opposed to quotation) or, conversely, that agencies are not permitted to consider small business status, as here, at the time of the submission of a quotation in response to an FSS."[72] The GAO also noted that this FSS contract had a "potential duration of twenty-one years," a period of time during which several of the FSS vendors may lose small business status.[73]

Successful, but "Nonresponsible" Awardee

In addition to reviewing NAICS and other small business size status contracting officer determinations, the SBA reviews a contracting officer's determination that "an apparent successful small business offeror lacks certain elements of responsibility."[74] If the SBA finds the contractor "responsible," it issues a Certificate of Competency (COC), which states that the con-

61. 52 Fed. Cl. 23 (2002).

62. *Id*. at 26. The protestor met the "annual average receipts" small business threshold for "All Other Heavy Construction," but not for "Other Waste Collection." *Id*. at 37.

63. On 1 October 2000, the NAICS replaced the SIC as the basis for the SBA's small business standards. *See* 65 Fed. Reg. 53,533 (Sept. 5, 2000) (amending 13 C.F.R. § 121.101).

64. *Ceres*, 52 Fed. Cl. at 35-37. The solicitation also required "the use of heavy equipment to cut debris, remove embedded material, place earth fill, shape embankments, and perform other construction-type related work." *Id*. at 37.

65. *Id*. at 38-39.

66. *Id*. at 39.

67. Ironically, the applicability of a firm's "undisputed" small business status is also subject to dispute. *See, e.g.*, Summit Research Corp., Comp. Gen. B-287523, July 12, 2001, 2001 CPD ¶ 176 (holding that an agency incorrectly limited a proposal's "small business participation" clause to only the offeror's proposed subcontractors, but not to the offeror itself, a small business).

68. B-290541, 2002 U.S. Comp. Gen. LEXIS 111 (Aug. 7, 2002).

69. *Id*. at *2.

70. *Id*. at *3 (citing 13 C.F.R. § 121.404 (2002)).

71. *Id*. (citing 15 U.S.C. § 644 (2000)).

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

73. *Id*. at *5 n.2. The GAO will, "as a general rule, . . . defer to [the] SBA's judgment in matters such as this, which fall squarely within its responsibility for administering the Small Business Act." *Id*. at *3. In *Size Appeals of: SETA Corp., Fed. Emergency Mgmt. Admin.*, No. SIZ-4477, 2002 SBA LEXIS 10 (Mar. 1, 2002), the OHA ruled that an agency may properly determine size status under an FSS Multiple Award Schedule Contract (MAS) when it issues the solicitation for a blanket purchase agreement, not the MAS. The GAO found the concepts in *CMS* analogous to that in *SETA*. *See CMS*, 2002 U.S. Comp. Gen. LEXIS 111, at *7.

tractor is responsible "for the purpose of receiving and performing a specific Government contract."[75] When the COC process extends past a contractor's bid acceptance period, the contractor is wise to submit an extension or risk losing its chance to receive an award.

In *Brickwood Contractors, Inc.*,[76] a bidder's noticeably low bid prompted the contracting officer to request that the bidder confirm its bid. The contracting officer also determined during a preliminary investigation that the bidder did not have the required "marine construction experience."[77] After a few exchanges of correspondence, the contracting officer found the bidder "nonresponsible" and referred the matter to the SBA for consideration under the COC procedures. The contracting officer requested the bidder to extend its bid acceptance date, knowing that the SBA would not conduct a COC review if the review would not be completed past the current bid acceptance date.[78] The bidder failed to do so, and after the initial bid acceptance period passed, the contracting officer advised the bidder that its bid was no longer valid.[79] Rejecting the bidder's contention that the contracting officer's referral to the SBA was "untimely," the GAO explained that no regulation requires a contracting officer to submit a referral to the SBA that guarantees a COC determination before the end of the bid acceptance period.[80]

Contract Bundling

Bundling Brouhaha

Last year's *Year in Review* reported on the concern over the effects of contract bundling on small businesses.[81] Throughout the past year, Congress continued to propose legislation designed to limit the use of contract bundling. The fact that so many federal agencies have reviewed their actions in light of these concerns illustrates the breadth of those concerns.

On 17 January 2002, the Office of Small and Disadvantaged Business Utilization released a benefit analysis guidebook[82] to assist DOD acquisition teams considering contract bundling. The guidebook directs the teams to perform the regulatory requirement of ascertaining "measurably substantial benefits,"[83] and offers "practical advice on avoiding bundling and on mitigating the adverse impact upon small business when the bundled action has been determined to be necessary and justified."[84] The guidebook was released on the same day that DOD issued a memorandum reminding acquisition officials to "avoid unnecessary and unjustified bundling of requirements and take efforts to mitigate the negative impact that contract bundling has on small business concerns."[85]

74. *See* FAR, *supra* note 13, at 19.602-1. The elements of responsibility include, but are not limited to, "capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting." *Id*.

75. *Id*. at 19.601(a).

76. Comp. Gen. B-290444, Jul. 3, 2002, 2002 CPD ¶ 121.

77. *Id*. at 2.

78. *Id*. at 3.

79. *Id*.

80. *Id.* at 6. The GAO was also unconvinced by the bidder's assertion that it had actually faxed a request to extend the bid acceptance period in time, accepting the contracting officer's explanation that the request was never received. *Id*. at 7-8. This case illustrates GAO's deference to a contracting officer's discretion in handling small business procurements. *See also* Quality Trust, Inc., Comp. Gen. B-289445, Feb. 14, 2002, 2002 CPD ¶ 41 (denying a protest where the contracting officer refuses to review the protestor's responsibility after the SBA declines to issue a COC and the protestor offers no new evidence). As mentioned earlier, deference extends to the SBA in "size" disputes with contractors. *See* FAR, *supra* note 13, at 19.602-1; *accord* E.F. Felt Co., Inc., Comp. Gen. B-289295, Feb. 6, 2002, 2002 CPD ¶ 37 (dismissing a protest alleging bad faith on the part of the SBA for refusing to issue a COC).

81. *See generally 2001 Year in Review*, *supra* note 1, at 43.

82. This guidebook is available at http://www.acq.osd.mil/sadbu.

83. *See* FAR, *supra* note 13, at 7.107.

84. See *Contract Bundling: DOD Takes Aggressive Actions to Prevent Unnecessary Bundling, Mitigate Impact*, 77 BNA FED. CONT. REP. 9, at 241 (Mar. 5, 2002).

85. *Id*.

One senator praised the Air Force for its decision to set aside a multimillion-dollar C-20 aircraft maintenance and support contract for small business.[86] Last year's most notable contract bundling case, however, remains a thorny issue for more skeptical members of Congress.[87] Congress continues to scrutinize agencies' bundling practices as complaints from small businesses mount.[88] Dissatisfaction with federal agencies' approach to contract bundling has led to bills designed to close "loopholes that have allowed agencies to circumvent statutory safeguards intended to ensure that separate contracts are consolidated for sound economic reasons, and not merely for convenience."[89]

Notwithstanding last year's *Phoenix* decision, the GAO continues to closely scrutinize single contracts previously divided among several vendors. In *TRS Research*,[90] the GAO held that a single-source procurement for leased intermodal container equipment and the management of an intermodal container leasing program was improperly bundled. Nine vendors, including the protestor, previously supplied the majority of containers through indefinite-delivery/indefinite-quantity contracts under a Master Lease Agreement (MLA).[91] The agency contended that the contract did not meet the definition of bundling because it was not "consolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts."[92] Instead, the agency stated that the current requirement was a "single" requirement, and therefore not subject to statutory bundling restrictions.[93] The GAO disagreed, noting that the MLA functioned as a "list of a range of multiple procurement requirements" and that the "nine contracts awarded under the MLA were of varied scope and covered varying lists of equipment."[94] Consequently, the GAO sustained the protest and recommended that the SBA have an opportunity to propose alternative actions or to appeal the agency's consolidation of requirements.[95]

HUBZone and SDBs: Can't We Just All Get Along?

Last year's *Year in Review* reported on changes in the HUBZone Program[96] which were designed to ease eligibility rules and clarify the program's scope.[97] The quest to end the confusion over any perceived priority between HUBZone businesses

86. *See Small Business: Air Force Reserves C-20 Aircraft Support Contract for Small Business*, 76 BNA FED. CONT. REP. 21, at 606 (Dec. 11, 2001). Senator Christopher "Kit" Bond (R-Mo.), ranking member of the Small Business and Entrepreneurship Committee, voiced a hope that the set aside "will serve as a practical example for other branches of the Armed Services." *Id*. The article also refers to a GAO report that outlines the impressive gains made by small business using the Internet. *See* GENERAL ACCOUNTING OFFICE, REPORT NO. 02-1, *Electronic Commerce: Small Business Participation in Selected On-Line Procurement Programs* (Oct. 29, 2001). Gains made by small businesses using the Internet are most likely to increase due to other projects that benefit small businesses. *See* Press Release, U.S. Small Business Administration, *businesslaw.gov* wins E-Gov Award, Announces Partnership With Cornell University (July 25, 2002) (on file with author) (discussing a website launched on 5 December 2001 that is designed to help small businesses comply with laws and regulations).

87. *See* Phoenix Scientific Corp., Comp. Gen. B-286817, Feb. 24, 2001, 2001 CPD ¶ 24; *see also 2001 Year in Review*, *supra* note 1, at 44-45 (discussing the reverberative effects of *Phoenix*).

88. *See Federal Contract "Watch List" Highlights Bundled Contracts That Freeze Out Small Businesses*, 44 GOV'T CONTRACTOR 17, ¶ 169 (May 1, 2002) (referring to a congressional report that targets ten huge contract bundling contracts because of the effect on small business); *see also Small Business: Small Businesses Criticize Impact of Contract Bundling, Streamlining on Bottom Lines*, 77 BNA FED. CONT. REP. 24 (June 18, 2002) (discussing a public meeting hosted by the Office of Federal Procurement Policy Administrator, Ms. Angela Styles, where the "consensus among most of the speakers was that obtaining contracts from the federal government in today's environment is extremely difficult and in many cases just plain 'unfair'"). *Id*.

89. See *Contract Bundling*: *Two Senate Bills Introduced to Tighten Contract Bundling Rules*, 77 BNA FED. CONT. REP. 19 (May 14, 2002) (referring to S. 2463, 107th Cong. (2002) and S. 2466, 107th Cong. (2002)). On 7 May 2002, S. 2463 was forwarded to the Senate Armed Services Committee, and on 8 October 2002, the Senate placed S. 2466 on its legislative calendar. The bills' statuses are available at http://www.thomas.loc.gov. The Senate has not been the only legislative body introducing bills that would limit contract bundling. *See, e.g.*, H.R. 2867, 107th Cong. (2002). The bill, introduced by Representative Nydia Velazquez (D-NY), would require the SBA to appeal to the Office of Management and Budget when a federal agency rejects an SBA recommendation to alter the procurement strategy on a bundled contract. Furthermore, the bill would extend the amount of time for small businesses to respond to a solicitation for a bundled contract. *Id.*

90. Comp. Gen. B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.

91. *Id*. at 2. In addition, three small businesses provided other items inadvertently omitted from the MLA. *Id.* at 3.

92. *Id*. at 3 (citing 15 U.S.C. § 632(o)(2)(3) (2000)). This contention seems contradictory to the agency's admission that "awarding a single contract . . . will cure performance problems experienced under the previous fragmented and inefficient approach." *Id*.

93. *Id*. at 4; *see* 13 C.F.R. § 125.2(d)(3)(iii)(A)(2) (2002) (requiring the greater of a cost savings of $7.5 million or five percent of the total value of a contract equal to or greater than $75 million).

94. *TRS*, 2002 CPD ¶ 159, at 5-6; *see also* Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 8, 2002, 2002 CPD ¶ 131 (holding that a contract bundling portable latrine services with fixed site waste removal unfairly restricted competition when the Army could not show significant cost savings).

95. *TRS*, 2002 CPD ¶ 159, at 9.

96. *See* 15 U.S.C. §657(a) (2000); *see also* FAR, *supra* note 13, at 19.13. The HUBZone program was designed to increase employment opportunities by providing federal contracting assistance for qualified small business concerns located in historically under utilized business zones.

and SDBs continues. On 28 January 2002, the SBA issued a proposed rule to "clarify parity" between the two categories of businesses.[98] Specifically, a contracting officer should consider "where the contracting activity is in fulfilling its HUBZone and [section] 8(a) programs in determining how to fulfill a particular procurement requirement."[99] The proposed rule also directs contracting officers to exercise their "discretion" when choosing between the two programs.[100] The proposed rule has both strong proponents and opponents. Some believe "that Congress intended that the two programs be on equal footing."[101] Others see the move to parity as a "naked attempt to destroy the [section] 8(a) program."[102] Despite the need for clarity,[103] the proposed rule is not final. Major Modeszto.

97. *See 2001 Year in Review*, *supra* note 1, at 45.

98. *See* 67 Fed. Reg. 3826 (Jan. 28, 2002) (amending 13 C.F.R. § 126.103 (2002)).

99. 67 Fed. Reg. at 3832.

100. *Id*.

101. See *HUBZone*: *SBA Proposed Rule Would Clarify Parity Between 8(a), HUBZone Programs*, 77 BNA FED. CONT. REP. 5 (Feb. 5, 2002) (sharing a sentiment held by the HUBZone Program's author, Senator Christopher "Kit" Bond (R-Mo.) and others favorable to the HUBZone Program). In the article, Senator Bond explained his enthusiasm for the proposed change as follows: "Ensuring parity between HUBZones and [section] 8(a) will allow both programs to move forward from the controversy that has dogged them for the past two years." *Id*.

102. *Id*. (quoting Rep. Nydia Velazquez (D-NY)). Hank Wilfong, the President of the National Association of Small Disadvantaged Businesses, shares Rep. Velazquez's concern. Mr. Wilfong pointed out that an agency's determination of whether it has met its HUBZone and section 8(a) goals is impossible to make because "while there is a statutory [three] percent goal for the HUBZone Program, there is no similar goal for the [section] 8(a) program." *Id*.; *see also* 77 BNA FED. CONT. REP. 10, at 276 (Mar. 12, 2002) (discussing Senator John Kerry's (D-Ma) concern that the proposed rule "will strike the wrong balance" between the two programs). *Id.*

103. *See* GENERAL ACCOUNTING OFFICE, REPORT NO. 02-57, *Small Business: HUBZone Program Suffers from Reporting and Implementation Difficulties* (2001) (reporting that HUBZone program achievements for fiscal year 2000 were significantly inaccurate). *Id*. at 1. One of the primary excuses federal contracting personnel offered for not achieving HUBZone participation goal—1.5 percent of the value of all prime contract awards—was the SBA's guidance that emphasizes the section 8(a) program over the HUBZone program. *Id.* at 7-8. One point, however, is clear. If confusion exists about whether the solicitation calls for a HUBZone or another type of preference, a protestor needs to file its protest prior to bid opening because the source of the confusion will probably be considered a patent ambiguity. *See, e.g.*, J&H Reinforcing & Structural Steel Erectors, Inc. v. United States, 50 Fed. Cl. 570 (2001).

Foreign Purchases

Black Beret Update

Last year's *Year in Review* issue reported on the congressional scrutiny of the Chief of Staff's decision to make the new black berets the Army's standard headgear by 14 June 2001, the Army's first birthday of the new millennium.[1] A General Accounting Office (GAO) report detailed the facts and circumstances leading to the decision to purchase the berets from several foreign suppliers.[2] Three of the contract actions were noncompetitive procurements, justified based on the "unusual and compelling urgency" to meet the Chief of Staff's deadline.[3] In addition, the Defense Logistics Agency (DLA) neglected to seek a Small and Disadvantaged Business Utilization Office review to determine the feasibility of small business participation.[4]

The DLA's use of a Berry Amendment waiver, which usually requires the Department of Defense (DOD) to purchase military clothing from domestic firms, also dismayed Congress.[5] At the time the DLA invoked the Berry Amendment waiver provision, such waivers were possible if the "Secretary concerned or [his] *designee* determine[d] that [the items] cannot be acquired when needed in a satisfactory quality and sufficient quantity grown or produced in the United States."[6] The DLA approved waivers[7] for all of the foreign companies, citing the 14 June 2001 deadline as the "emergency" justifying the waivers.[8] On 2 May 2001, the Army announced at a hearing that it would not outfit any of its three million troops with berets from foreign sources, particularly from Chinese manufacturers contracting with the British Company Kangol, Ltd.[9]

On 11 December 2001, GAO filed a follow-up report "to assess the current status of the black beret procurement as well as the status of DOD's efforts to ensure proper waivers of the Berry Amendment."[10] As of mid-October 2001, "2.1 million berets had been delivered to DLA, but less than 1 million [had] been distributed to Army, National Guard and Reserve personnel."[11] The reasons for the distribution delay were the cancellation of three contracts for failure to deliver the berets on time and the decision to not outfit any troops with Chinese-manufactured berets.[12] The report added, "DLA is in the process of contracting for additional berets so that it can distribute two berets to all personnel and have an adequate stock."[13] The Army has come closer to this goal, having recently announced the award of a contract for the manufacture of berets.[14] Even this decision, however, may cause certain members of Congress some angst.[15]

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1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002, at 76-77.

2. *See* GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-695T, *Contract Management: Purchase of Army Black Berets* (May 2, 2001) [hereinafter GAO-01-695T]. After amending a contract with the current domestic supplier of berets, the Defense Logistics Agency (DLA) awarded contracts to two foreign suppliers and later made competitive awards to four additional foreign suppliers. 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*. app. I.

3. *Id*. (quoting David E. Cooper, Director, Acquisition and Sourcing Management).

4. *Id*. at 2 and app. I. One of the non-competitive awards was at a price fourteen percent higher than the domestic price. The price on the single largest noncompetitive contract was twenty-seven percent higher than the average competitive price. *Id.*

5. *See* 10 U.S.C. § 2533a (2000); *see also* U.S. DEP'T OF DEFENSE, DEFENSE FED. ACQUISITION REG. SUPP. 225.7002-1(a) (1 July 2002) [hereinafter DFARS].

6. *See* DFARS, *supra* note 5, at 225.7002-1(a) (emphasis added). On 1 May 2001, the Deputy Secretary of Defense cancelled the delegation of authority previously granted to the DLA Director and Senior Procurement Executive. 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 (1 May 2001) (on file with author). Consequently, the most recent version of the DFARS no longer includes the term "or designee." *See* DFARS, *supra* note 5, at 225.7002-1(b).

7. The Deputy Commander of the DLA's Defense Supply Center at Philadelphia, Pennsylvania, 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. *See* GAO-01-695T, *supra* note 2, at 3.

8. *Id.*; *see generally Buying the "Black Beret": Balancing Customer "Needs" and Socio-Economic Policies,* 43 GOV'T CONTRACTOR 15, ¶ 158 (Apr. 18, 2001) (opining that the emergency was more a by-product of an "arbitrarily selected" deadline rather than a true emergency).

9. *See Chinese Berets to Be Surplused as Army Bows to Political Pressure*, 43 GOV'T CONTRACTOR 18, ¶ 191 (May 9, 2001). The Chinese-made berets will be characterized as surplus property, a result described by one commentator as "replacing one symbolic gesture with another." *Id.*

10. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-02-165, *Contract Management: Update on DOD's Purchase of Black Berets* 1 (2001) [hereinafter GAO-02-165] (quoting David E. Cooper, Director, Acquisition and Sourcing Management).

11. *Id*. at 3.

12. *Id*. The decision to stock the Chinese-manufactured berets as surplus affected "about 925,000 of the berets, valued at $6.5 million." *Id*.

13. *Id*.

Because of the beret controversy, the DOD is exercising tighter controls on Berry Amendment waivers.[16]

DOD IG Has Its Say on Buy American Act & Berry Amendment Violations

After last year's beret saga, the GAO's recent report was a welcome sign that the DOD was making progress on monitoring its procurement practices relating to foreign purchases.[17] Unfortunately, not all of the news during the past year was positive. On 20 March 2002, the DOD Inspector General (IG) issued a report evaluating the DOD's compliance with the Buy American Act (BAA)[18] and the Berry Amendment[19] during fiscal years 1998 and 1999.[20] The report discussed "698 of the procurements [of military clothing and related items], valued at $136.7 million, by 65 installations."[21] The report summarized violations as follows:

> [DOD] contracting officers continued to violate the Buy American Act on FY 1998 and 1999 procurements of military clothing and related items. Of 698 contracts reviewed, 416 (60 percent) did not include the appropriate contract clause to implement the Buy American Act or the Berry Amendment. Contracting Officers at 13 military installations procured military clothing and related items that were manufactured or produced abroad without determining whether items manufactured in the United States or a qualifying country were available, as required by the Buy American Act, or items manufactured in the United States were available, as required by the Berry Amendment. As a result, contracting officers awarded 28 contracts to contractors that supplied $593,004 worth of items manufactured abroad that may have been available from contractors supplying items manufactured in the United States. The noncompliance with the Berry Amendment resulted in three potential violations of the Anti-Deficiency Act because the contracts were either funded directly with appropriated funds or working capital funds that were reimbursed with appropriated funds, which are not available for the procurement of foreign-made items.[22]

DOD Proposes Rule to Negate Unfair Treatment of Certain U.S. Products

On 30 July 2002, the DOD issued a proposed rule[23] that would amend the Defense Federal Acquisition Regulation Supplement (DFARS) to avoid "treating products substantially transformed in the United States less favorably than products substantially transformed in a designated, Caribbean Basin, or

14. *See Cabot Company Wins Beret Contract from Army*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 25, 2002 (announcing the Army's award of a $3.6 million contract to Bancroft Cap Company, a Cabot, Arkansas manufacturer).

15. *See* Duncan Adams, *Military Contract Up in the Air; Sen. George Allen Made Announcement Sept. 12 About Future Jobs in S.W. VA.*, ROANOKE TIMES & WORLD NEWS, Sept. 25, 2002, at A9. The article discusses the DLA's response to Virginia Senator George Allen's announcement that the contract award for military berets would go to a manufacturer in Southwest Virginia. A DLA spokesman characterized Senator Allen's announcement as "not correct." *Id*.

16. The GAO commented that "[b]ecause DOD is taking actions to ensure proper waivers of the Berry Amendment, we are not making any recommendations." *See* GAO-01-165, *supra* note 10, at 1. In addition to the limitations on Berry Amendment waivers, the DLA sent additional guidance to its buying activities to "heighten supplier awareness of the requirements of the Berry Amendment and thus facilitate compliance with the Amendment." *Id.* at 7.

17. *See generally id.*

18. *See* 41 U.S.C. § 10a (2000).

19. *See* 10 U.S.C. § 2533a (2000).

20. U.S. DEP'T OF DEFENSE, INSPECTOR GEN., REP. NO. D-2002-066, *Buy American Act Issues on Procurements of Military Clothing* (Mar. 20, 2002) [hereinafter DOD IG REPORT 02-066], *available at* http://www.dodig.osd.mil/audit/reports/fy02/02-066.pdf.

21. *Id*. at i.

22. *Id*. The DOD General Counsel declined to treat twenty-five BAA violations relating to procurements of commercial items as potential ADA violations because of ambiguities in the DFARs. Accordingly, the DOD General Counsel issued a prospective opinion that states that the BAA applies to procurements of commercial items. Memorandum, Office of the General Counsel, Dep't of Defense, to Deputy Assistant Inspector General for Auditing, Office of the Inspector General, subject: Request for Opinion Whether Certain Expenditures in Violation of the Buy American Act (41 U.S.C. § 10a-d) Also Violate the Antideficiency Act (31 U.S.C. § 1341) (18 Jan. 2002) (on file with author). One month before, the Army, perhaps anticipating the report's conclusions, had distributed a memorandum directing procurement officials to increase emphasis on BAA and Berry Amendment compliance. *See* Memorandum, Office of the Assistant Secretary of the Army, Acquisition, Technology, and Logistics, to Principal Assistants Responsible for Contracting, subject: Buy American Act and Berry Amendment Restrictions on the Procurement of Military Clothing and Related Items (14 Feb. 2002) (on file with author).

23. Defense Federal Acquisition Regulation Supplement; Trade Agreements Act—Exception for U.S. Made End Products, 67 Fed. Reg. 49,278 (proposed July 30, 2002) (to be codified at 48 C.F.R. pts. 225, 252).

North American Free Trade Agreement country."[24] Existing DFARS policy places a fifty percent price evaluation preference for domestic end products over U.S.-made end products that do not qualify as domestic end products.[25] For acquisitions subject to the Trade Agreements Act (TAA),[26] however, an end product of a designated Caribbean Basin country[27] or North American Free Trade Act (NAFTA) country[28] is exempt from application of the fifty percent evaluation factor, regardless of the source of the product's components. The proposed change would eliminate the fifty percent price evaluation that the DOD gives to domestic end products subject to the TAA over U.S.-made end products with a foreign component content of fifty percent or greater. The goal is to provide a disincentive for companies that provide domestic end products containing foreign components to move their facilities to designated Caribbean Basin or NAFTA countries. Comments on the proposed rule were due on 30 September 2002. Major Modeszto.

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24. *Id*. at 49,279; *see also Buy American Act: DOD Violates BAA, Berry Amendment On Clothing Procurements, IG Finds*, 78 BNA FED. CONT. REP. 6, at 403 (Aug. 6, 2002).

25. *See* DFARS, *supra* note 5, at 225.5. The DFARS defines a domestic end product as:

> i. An unmanufactured end product that has been mined or produced in the United States; or
> ii. An end product manufactured in the United States if the cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all of its components.

Id. at 252.225-7001(a)(2)(i) and (ii).

26. 19 U.S.C. §§ 2501-2582 (2000).

27. *See* DFARS, *supra* note 5, at 252.225-7007(a)(1).

28. *Id*. at 252.225-7007(a)(4).

Randolph-Sheppard Act

RSA[1] Continues to Score Knockouts in Food Fights

Last year's *Contract Law Year in Review*[2] reported on *NISH v. Cohen*,[3] a case from the U.S. Court of Appeals for the Fourth Circuit that affirmed a district court holding that the preference for blind vendors in the Randolph-Sheppard Act (RSA) applies to the procurement of dining facility services.[4] On 15 February 2002, "in a case with virtually identical facts to [*NISH v. Cohen*]," the United States District Court for the District of New Mexico held that the Air Force properly applied the blind vendor priority of the RSA to a contract for operation of a mess hall.[5]

In *NISH v. Rumsfeld*, RCI, Inc. was the Javits-Wagner-O'Day Act (JWOD)[6] mandatory source contractor for ten years before the award to the New Mexico Commission for the Blind (NMCB). RCI argued that the RSA did not apply to military mess halls "because vending as envisioned by the RSA is limited to an entirely private transaction and, in obtaining full food services for mess halls, the DOD is expending appropriated funds."[7] The court disagreed with RCI's view that the expenditure of appropriated funds was dispositive. Instead, it took a broader view, reasoning that the federal government engages in a "procurement" as defined in the Competition in Contracting Act (CICA)[8] "[w]hen the federal government determines that there is a need for services for its employees or the public and thus contracts with a vendor to come onto federal property."[9] The court also deferred to the Department of Education's interpretation that the RSA applies to contracts for military mess halls because the RSA itself is silent on the issue.[10] Finally, the court found the Fourth Circuit's reasoning "persuasive" on the issue of the conflict between JWOD and the RSA.[11] Given that the facts, rationale, and holdings of *NISH v. Cohen* and *NISH v. Rumsfeld* were strikingly similar, RSA and JWOD proponents may have fought the last round of their food fights.[12]

Only "Competitive" State Licensing Agencies Need Apply

In *North Carolina Division of Services for the Blind (NCDSB) v. United States*,[13] the government issued a solicitation to provide full food and dining facility attendant services at Fort Bragg, North Carolina. The solicitation, which included a "detailed description of the evaluation factors to contract award," stated that the "Army will award the contract to the offeror who represents the best value."[14] The solicitation was

1. The Randolph-Sheppard Act, 20 U.S.C. § 107(a)-(f) (2000), is designed to maximize the number of vending facilities on federal property that are operated by the blind. The original Act was limited in scope and extended a priority to contracts in federal buildings for newsstands, snack bars, and similar establishments. In 1974, Congress extended the definition of vending facilities subject to the Act to include cafeterias. Act of Dec. 7, 1974, Pub. L. No. 93-516, 88 Stat. 1617.

2. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 123 [hereinafter *2001 Year in Review*].

3. 247 F.3d 197 (4th Cir. 2001). Although NISH appears to be an acronym, the full name of this organization is The Committee for Purchase from People Who Are Blind or Severely Disabled. NISH Web Site, *NISH Contacts* (Nov. 21, 2002), *at* http://www.jwod.gov/jwod/contacts/nish_contacts.htm.

4. *Cohen*, 247 F.3d at 204; *see also 2001 Year in Review*, *supra* note 2, at 123.

5. NISH v. Rumsfeld, 188 F. Supp. 2d 1321, 1326 n.7 (D.N.M. 2002).

6. The Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. §§ 46-48c (2000), authorizes an independent federal agency, the Committee for Purchase From People Who Are Blind and Severely Disabled, to identify products and services for federal procurement that persons with disabilities can provide. This committee had designated the NISH as the central nonprofit agency facilitating procurement from qualified agencies. *Cohen*, 247 F.3d at 200.

7. *Rumsfeld*, 188 F. Supp. 2d at 1326. All the parties "appear to concede that if the RSA does not apply to contracts for military mess hall services, the JWOD would require the Kirtland [Air Force Base] to contract with RCI for full food services at the mess hall." *Id*. at 1324.

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

9. *Rumsfeld*, 188 F. Supp. 2d at 1324.

10. *Id*. at 1328.

11. *Id*. at 1329 (referring to the Fourth Circuit's remark that the "basic tenant of statutory construction [is] that when two statutes ostensibly apply, the more specific of the two control[s]").

12. During the writing of this article, the Comptroller General decided a case that underscored the general view that the RSA preference does not conflict with other required sources procurements. In *Intermark, Inc.*, B-290925, 2002 U.S. Comp. Gen. LEXIS 167 (Oct. 23, 2002), the General Accounting Office (GAO) held that an agency improperly withdrew a small business set-aside procurement on the basis that the RSA State Licensing Agency (SLA) for the State of Alabama was not a small business. Therefore, the agency believed that it needed to open the solicitation competition to all businesses. The GAO disagreed, stating that the solicitation could offer a "cascading" set of priorities. That is, the SLA will receive the award if it falls within the competitive range and consultation with the Secretary of Education agrees the award should be made to the SLA. If both of these conditions are unmet, then the competition is limited to the eligible small businesses. *Id*. at *6-7.

13. 53 Fed. Cl. 147 (2002).

issued as a small business set-aside, rather than pursuant to the RSA.[15] After evaluating the bids, the contracting officer informed the state licensing agency, NCDSB, that it was outside of the competitive range and that its proposal "did not have a reasonable chance of being selected for award."[16]

The Court of Federal Claims (COFC) first settled the issue of the standing of Mr. Timothy M. Jones, one of the plaintiffs who would take over the contract and receive its benefits. The COFC determined that Mr. Jones, as the blind licensee, "would be the contract manager, one of the people identified by NCDSB 'in positions of importance in the contract,' but certainly *not a bidder or offeror.*"[17] Therefore, Mr. Jones did not fit the CICA's definition of the term "interested party."[18]

The court came to a similar conclusion in response to the contention that NDCSB would have a reasonable chance to receive the award if Fort Bragg had properly applied the RSA at the beginning of the solicitation. Specifically, the COFC held that the NCDSB lacked standing because it "cannot show that it would have been in a position to receive the challenged award since it was not in the competitive range as required to apply the RSA priority."[19] In addition to the standing issues, the COFC concluded that the challenge to the solicitation itself was untimely.[20] Finally, the COFC rejected the argument that "RSA regulations require the application of a competitive range definition that is different from that typically used in federal procurement."[21] Major Modeszto.

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14. *Id*. at 152.

15. *Id*. at 154. To support its conclusion that the solicitation did not qualify under the RSA, the court mentions a memorandum by the Fort Bragg Contracting Office, which was submitted to the Army through its higher headquarters at Forces Command. The memorandum reported that the solicitation did not qualify under the RSA. *Id*. The COFC, however, did not mention the specific contents of the memorandum because the "court's ruling . . . does not rely upon such opinions in any manner." *Id*. at 154 n.8.

16. *Id*. at 153.

17. *Id*. at 162 (emphasis added).

18. *See* Competition in Contracting Act, Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199 (codified as amended at 31 U.S.C. 3551) (defining the term "interested party" 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").

19. *NCDSB*, 53 Fed. Cl. at 162. The RSA authorizes the Department of Education to "[prescribe] regulations designed to accomplish the purposes of the statute." 20 U.S.C. § 107(b)(2) (2000). The regulations are promulgated at 34 C.F.R. § 395.1-.38 and state, in pertinent part,

> If the proposal received from the State licensing agency is judged to be within the competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section.

34 C.F.R. § 395.33 (2002).

20. *NCDSB*, 53 Fed. Cl. at 165 ("adopt[ing] the General Accounting Office rule that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time of receipt of proposals" are untimely).

21. *Id*. at 167.

Labor Standards

The President's Proprietary Authority

In *Building Construction Trades Department, AFL-CIO v. Allbaugh*,[1] the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) reversed the United States District Court for the District of Columbia (District Court) and held that President Bush acted within his constitutional authority when he issued an Executive Order[2] (EO) that prohibited the required use of project labor agreements[3] (PLA) on any federal or federally funded construction projects.[4]

On 17 February 2001, President Bush signed EO 13,202. The EO prevents contracting authorities from requiring or forbidding the use of PLAs.[5] The plaintiffs[6] challenged the validity of the EO after the Federal Highway Administration rejected a bid specification that incorporated a PLA for a federally funded construction project.[7] The District Court held that the President exceeded his authority by issuing the EO.[8] The court also found that the National Labor Relations Act[9] (NLRA) preempted the President's authority because the EO "abridged the rights granted in the Act and would alter the delicate balance of bargaining and economic power that the NLRA establishes."[10] The District Court issued a permanent injunction against enforcement of the Executive Order; the agency appealed this injunction.[11]

On appeal, the Court of Appeals reversed and vacated the District Court's injunction. The Court of Appeals held that "the President's power necessarily encompasses general administrative control of those executing the laws," which "frequently requires the President to provide guidance and supervision to his subordinates."[12] The court determined that the EO was "such an exercise of the President's supervisory authority over the Executive Branch."[13]

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1. 295 F.3d 28 (2002).

2. Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 22, 2001).

3. A PLA is

> [a] multi-employer, multi-union prehire agreement designed to systemize labor relations at a construction site. It typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project, and that wages, hours, and other terms of employment be coordinated or standardized pursuant to the PLA across the many different unions and companies working on the project.

Bldg. Constr., 295 F.3d at 30.

4. *Id*. at 36. The EO applies to "any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects." *Id*.

5. *Id*. at 30.

6. The plantiffs were the Building and Construction Trades Department of the AFL-CIO (BCTD), the Building Construction Trades Council (BCTC), and the City of Richmond, California. The BCTD consists of fourteen national labor organizations. The BCTC consists of twenty-seven local labor unions representing construction workers in Contra Costa County, California. The BCTD alleged that the EO inhibited the enforcement of the PLA in the Woodrow Wilson Bridge Construction Project and future contracts. The BCTC claimed that the EO inhibited its ability to negotiate PLAs on future federally funded City of Richmond projects. The City of Richmond alleged that the EO inhibited its ability to require PLAs on federally funded construction projects without losing access to federal funds. *Id*. at 30-31.

7. *Id.* ("The plaintiffs negotiated a PLA for the Woodrow Wilson Bridge Construction Project. Congress appropriated $1.5 billion for the project and transferred ownership of the bridge to the District of Columbia, the State of Maryland, and the Commonwealth of Virginia."). Although this arrangement transferred ownership and control of the project to state agencies, it required them to submit bid specifications to the Federal Highway Administration for approval. *Id*.; 23 C.F.R. §§ 630.205(e), 635.104(a), 635.112(a) (2002).

8. *Bldg. Constr.*, 295 F.3d at 31. The district court held that the "President could not impose the conditions of the EO upon the administration of federal funds without the express authorization of the Congress and that no other statutes authorized the President's action." *Id.*

9. 29 U.S.C. §§ 151-159 (2000).

10. *Id*. In its opinion below, the District Court explained as follows:

> The PLA is a form of a prehire collective bargaining agreement [which is] usually negotiated before the start of a construction project. Section 8(f) of the NLRA, 29 U.S.C. § 158(f), authorizes the use of prehire agreements in the construction industry. Section 8(e) of the NLRA, 29 U.S.C. § 158(e), authorizes prehire agreements to require all contractors and subcontractors performing work on a particular construction project to be bound by the terms of a prehire agreement covering the project. Taken together, [Sections] 8(e) and (f) of the NLRA authorize the use of a PLA on a construction project, pursuant to which all contractors and subcontractors operating on the project must agree to adhere to the PLA's terms.

Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 172 F. Supp. 2d 67, 77 (D.D.C. 2001).

The district court held that because "private entities were being prohibited . . . from requiring PLAs that are expressly allowed by the [NLRA], the NLRA preempted the EO insofar as it applies to private recipients of federal funding who act as employers in construction projects."[14] The appeals court held, however, that the NLRA was not applicable unless the "[g]overnment is regulating within a protected zone, not when it is acting as a proprietor."[15] If the government imposes a condition to awarding or funding a contract unrelated to the employer's performance of contractual obligations to the government, the condition is regulatory. Because "the impact of [the] procurement policy [expressed in EO 13,202] extends only to work on projects funded by the government," the EO expresses a proprietary policy that is not subject to preemption by the NLRA.[16]

Labor Clauses Below the Simplified Acquisition Threshold

On 20 March 2002, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) issued a final rule, amending the Federal Acquisition Regulation (FAR) and clarifying the application of labor clauses to contracts below the simplified acquisition threshold.[17] The final rule incorporates the prohibition of segregated facilities clause and the equal opportunity clause by reference.[18] The rule also requires the application of the prohibition of segregated facilities clause whenever the equal opportunity clause is used.[19] The rule clarifies the geographic application of the Walsh-Healey Public Contracts Act,[20] the Affirmative Action for Workers with Disabilities Act,[21] and the Service Contract Act.[22] Finally, the rule defines "United States" in the equal opportunity clause.[23]

Davis-Bacon Act

What Do You Mean I'm Responsible?

In *Westchester Fire Insurance Co. v. United States*,[24] the U.S. Court of Federal Claims (COFC) held that the rights of a subcontractor's employees to withheld Davis-Bacon Act[25] (DBA)

11. Specifically, the District Court held:

> [T]he President could not impose the conditions of the Executive Order upon the administration of federal funds without the express authorization of the Congress. . . . [N]either the Federal Property and Administrative Services Act nor any other statute authorized the President to issue the EO. . . . The EO was preempted in its entirety by the National Labor Relations Act because the EO would abridge rights granted in [Section] 8 of the Act.

Id.

12. *Bldg. Constr*, 295 F.3d at 32.

13. *Id*. at 33.

14. *Id*. at 34.

15. *Id*. The appeals court determined that the government is the proprietor of its own funds, and that it is acting in a proprietary capacity when it acts to ensure the most effective use of those funds. The court also held that the distinction between federally owned and federally funded was not relevant here because the government, like a private entity, is concerned with the efficient use of its financial backing whether it is a lender to, a benefactor of, or the owner of a project. *Id.* at 35.

16. *Id*. at 36.

17. Application of Labor Clauses, 67 Fed. Reg. 13,066 (Mar. 20, 2002) (to be codified at 48 C.F.R. pt. 52); *see* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (July 2002) [hereinafter FAR].

18. FAR, *supra* note 17, at 52.222-.221. This section prohibits segregated facilities, defines the term "segregated facilities," and requires contractors to agree that "it does and will not maintain or provide for its employees any segregated facilities at any of its establishments and that the contractor does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained." *Id.*

19. 67 Fed. Reg. at 13,066.

20. 41 U.S.C. §§ 35-45 (2000). The Walsh-Healey Public Contracts Act applies to supply contracts over $10,000 in the United States, Puerto Rico, or the U.S. Virgin Islands. 67 Fed. Reg. at 13,067.

21. 29 U.S.C. § 793 (2000). The Affirmative Action for Workers with Disabilities Act applies to contracts over $10,000, unless the work will be performed outside the United States by employees recruited outside the United States. "United States" means the fifty states, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island. 67 Fed. Reg. at 13,067.

22. 41 U.S.C. § 351. The Service Contract Act applies to service contracts over $2500 performed in the United States, District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, or the outer continental shelf lands. 67 Fed. Reg. at 13,067.

23. FAR, *supra* note 17, at 52.222-.226. The Equal Opportunity clause defines "United States" as the fifty states and the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island. 67 Fed. Reg. at 13,067.

and Contract Work Hours and Safety Standards Act[26] (CWHSSA) wages were superior to the rights of the Coast Guard, the contractor, and the contractor's subrogee, Westchester.[27] Zanis Contracting Corporation (Zanis) was the prime contractor for a $440,000 U.S. Coast Guard contract for waterfront rehabilitation at a Coast Guard facility in Eaton Neck, New York. The contracting officer terminated the Eaton Neck contract for default and re-procured the remaining work after the contracting officer and the surety failed to enter into a takeover agreement.[28] Five months after the contracting officer terminated the contract, the Department of Labor (DOL) requested that the contracting officer withhold $69,105.12 for alleged DBA and CWHSSA wage infractions by a Zanis subcontractor, Harbor Clean Corporation (Harbor Clean). Westchester claimed that the contracting officer voluntarily paid the GAO $60,216.58 of the unpaid balance of the defaulted Zanis contract for DBA and CWHSSA violations. Therefore, Westchester argued that their liability excluded the amount the contracting officer paid to the GAO.[29]

The COFC held that the contracting officer was required to withhold funds from the prime contractor by law and by contract, and therefore, that the release of the funds to the GAO was not voluntary.[30] Once withheld, the funds were no longer available to the Coast Guard, Zanis, or Westchester because "a surety is not entitled to the use of contract funds that are set aside to pay."[31] Westchester claimed subrogation to the rights of the Coast Guard. The COFC responded that "it was immaterial whether Westchester was subrogated to the rights of the Coast Guard or Zanis in the remaining balance of the contract because the rights of the harbor workers were superior to both."[32] The court also held that Harbor Clean violated the labor standards during the performance of the contract.[33] After Zanis defaulted, Westchester was responsible for fulfilling the terms of the contract under the performance bond or the payment bond.[34] The GAO recommended that Westchester pay $151,449.58, plus interest.[35]

Service Contract Act

Agency Responsible for Wages Paid Pursuant to Law

In *Instrument Control Service Inc.*,[36] the incumbent contractor, Instrument Control Service (ICS), alleged that the request for proposals (RFP) was defective because the solicitation excluded any wage conformance for employees who were omitted from the wage determination under the previous con-

24. 52 Fed. Cl. 567, 582 (2002).

25. 40 U.S.C. §§ 276a(a)(7) (2000).

26. *Id*. §§ 327-333.

27. *Westchester*, 52 Fed. Cl. at 581.

28. *Id*. Westchester claimed that the government owed it the entire remaining balance ($203,651) under the Zanis contract. The contracting officer agreed, except for $69,105.12 that the Department of Labor requested withheld pending completion of an investigation of Harbor Clean, a Zanis subcontractor, for alleged violations of the DBA and the CWHSSA. *Id.* at 581.

29. *Id*. at 580. Harbor Clean employees received restitution in the amount of $60,216.58 in back wages and fringe benefits, pursuant to an agreement between the DOL and Harbor Clean—$8888.54 less than the contracting officer was originally requested to withhold. "[T]he Comptroller General (GAO) is authorized and directed to pay directly to [workers] from any accrued payments withheld under the terms of the contract any wages found to be due . . . 40 U.S.C. § 276a-2(a)." *Id*.; *see also* 40 U.S.C. § 276a-2(a).

30. *Westchester*, 52 Fed. Cl. at 581. The Eaton Neck contract incorporated the Davis-Bacon Act and the FAR section 52.222-7 Withholding of Funds clause, requiring the contracting officer to withhold funds under the contract if violations under the DBA were suspected or if a representative of the DOL requested the contracting officer to withhold funds. *Id*. at 580.

31. *Id*. at 583 (citing Reliance Insur. Co. v. United States, 27 Fed. Cl. 815, 828 (1993)).

32. *Id*. at 582.

33. *Id*. Westchester tried "to make an issue of the fact that DOL ordered the contracting officer to withhold the funds five months after the contract had been terminated for default rather than during Zanis's performance of the contract." *Id.* The court held that this was a "distinction without legal significance" because "the violations were committed by a Zanis subcontractor during the performance of the contract . . . so the funds were owed to the subcontractor's workers prior to the contractor's default." *Id.*

34. *Id.* Even if Westchester entered into a takeover agreement with the Coast Guard, the withheld funds would not have been available under the contract. When Zanis defaulted and Westchester did not enter into a takeover agreement, Westchester was responsible under the payment bond. *Id.*

35. *Id.* at 568-69. The total included $90,229.00 to re-procure the contract, plus $60,216.58 paid to the DOL under the agreement between the DOL and Harbor Clean. *Id*.

36. Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66. The Air Force issued an RFP "for calibration and repair services of test, measurement and diagnostic equipment at the Precision Measurement Equipment Laboratory, Warner Robbins Air Logistics Center, Robins Air Force Base, Georgia." *Id*. at 1.

tract.[37] The RFP incorporated the requirements regarding "wages for any class of employees subject to the Service Contract Act,[38] but omitted from the wage determination."[39] ICS knew about the prior contract's wage conformances but argued that it was under a competitive disadvantage because "prospective offerors may underestimate the cost of the excluded employees and underbid [ICS] because of their lack of knowledge."[40]

The GAO denied ICS's protest. First, the GAO held that the FAR does not require agencies to include wage conformances in the solicitation; a successor contractor is not bound by the previous contract's wage conformance.[41] Second, the GAO reviewed the solicitation to determine whether it provided the offerors sufficient detail to compete intelligently and on an equal basis.[42] The GAO reasoned that the Air Force treated the offerors equally because they could obtain the wage conformance information pursuant to a Freedom of Information Act (FOIA) request.[43] The Comptroller General noted that including the wage conformance in the solicitation could increase competition but acknowledged "the absence of a statutory or regulatory obligation to do so."[44]

In *Phoenix Management, Inc.*,[45] the Armed Services Board of Contract Appeals (ASBCA) sustained a contractor's claim for increased labor costs pursuant to a DOL wage determination.[46] The Air Force awarded Phoenix a contract for airfield management services at Randolph Air Force Base, Texas, in February 1997. The contract included a seven-month base period and four one-year option periods. At the time of the award, the contract excluded a wage determination for the airfield manager (AM) and assistant airfield manager (AAM).[47]

Phoenix entered into a collective bargaining agreement (CBA) with the union in January 1999. The CBA included the AM and the AAM. Phoenix notified the contracting officer, but did not seek a conformance.[48] The contracting officer forwarded the CBA to the DOL and objected to the inclusion of the AM and the AAM.[49] The DOL issued a wage determination incorporating the CBA, and the contracting officer did not request further review. The contracting officer exercised the option for fiscal years (FY) 2000 and 2001, and the extended performance incorporated the DOL wage determination. Phoenix protested the contracting officer's denial of the FY 2000 and FY 2001 wage increases for the AM and AAM.[50]

The board concluded that Phoenix was entitled to recover the cost increases for FY 2000 and 2001.[51] The board found that the Fair Labor Standards Act[52] and Service Contract Act[53] required a price adjustment for increased wages for the option

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37. *Id*. at 1. ICS protested before the RFP's closing date. ICS also alleged that a five working day turnaround requirement was unnecessary and unattainable. The GAO held that ICS failed to establish that the requirement did not represent the Air Force's minimum needs. *Id.*

38. 41 U.S.C. §§ 351-388 (2000).

39. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 3; *see* FAR, *supra* note 17, at 52.222-42(c)(2)(i) (requiring contractors to classify employees, employed under the contract but not listed in the wage determination, with employees who have a reasonable relationship to employees classified in the wage determination).

40. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 3; *see* FAR, *supra* note 17, at 52.222-42(c)(2)(ii). This section requires the contractor to initiate the conformance procedure by submitting the SF 1444, *Request for Authorization of Additional Classification and Rate*, to the contracting officer within thirty days from the date the unlisted employees perform any work on the contract. The contracting officer reviews the form, makes recommendations, and submits it to the DOL's Wage and Hour Division (WHD). The WHD will respond or notify the contracting officer that additional time is required within thirty days of receipt of the request. *Id.*

41. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 4. ICS could "elect without DOL approval, to adopt . . . a previous wage conformance instead of initiating a new wage conformance action[, but] is not entitled to a price adjustment as part of a wage conformance action if the conformed wage is higher than the wage estimated when submitting its proposal." *Id*. at 3.

42. *Id.* at 4; *accord* Braswell Servs. Group, Inc., Comp. Gen. B-276694, July 15, 1997, 97-2 CPD ¶ 18, at 2 (holding that the agency solicitation must provide sufficient detail to enable offerors to compete intelligently and on an equal basis).

43. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 4. The solicitation informed offerors the wage conformance "information could be obtained pursuant to the Freedom of Information Act (FOIA)." *Id*.; *see* 5 U.S.C. § 552 (2000).

44. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 5. The GAO failed to understand why the Air Force did not make the previous wage conformance "more freely available" when the offerors could obtain the information under FOIA. *Id*.

45. ASBCA No. 53409, 02-1 BCA ¶ 31,704.

46. *Id*. at 156,591.

47. *Id*. at 156,587.

48. *Id*. at 156,588. Phoenix did not submit the SF-1444, *Request for Authorization of Additional Classification and Rate*, to the contracting officer. *Id.*

49. *Id*. at 156,587. The CO did not submit the SF 1444 to seek a conformance. *Id.*

50. *Id*. at 156,588.

renewal pursuant to the DOL wage determination.[54] The ASBCA rejected the Air Force's argument that the FY 2000 option year "resulted in an initial conformance for the AM and AAM positions."[55] The board refused to treat the wage determination as a conformance because Phoenix and the Air Force failed to comply with the conformance process and because the DOL wage determination failed to convey that the DOL "intended it to be a conformance."[56] Phoenix was therefore entitled to recover wages associated with the cost of complying with the wage determination.[57] Major Davis.

51. *Id*. at 156,590–91.

52. 29 U.S.C. §§ 201-219 (2000).

53. 41 U.S.C. §§ 351-358 (2000).

54. *Phoenix Mgmt.*, 02-1 BCA ¶ 31,704, at 156,589.

55. *Id*. at 156,590.

56. *Id*.

57. *Id*. at 156,591; *accord* Glazer Constr. v. United States, 52 Fed. Cl. 513 (2002) (holding that a DBA violation discovered after contract termination was a justifiable basis for termination of the contract, even though the DBA violations were not known at the time of the termination).

Bid Protests

Jurisdiction

No Implied Contract Jurisdiction at COFC

Last year's *Year in Review* discussed how the Administrative Dispute Resolution Act of 1996[1] (ADRA) ended district courts' bid protest jurisdiction on 1 January 2001.[2] The Court of Appeals for the Federal Circuit (CAFC) has since held that the ADRA requires courts to review an agency award decision under the standards set forth in the Administrative Procedure Act (APA).[3] From the perspective of protestors, the result was a more favorable standard of review on the issue of contractor "responsibility." The standard, which previously required a showing of fraud or bad faith, now requires a mere showing of a lack of rational basis or a violation of a regulation or procedure.[4]

In *Lion Raisins, Inc. v. United States*,[5] the Court of Federal Claims (COFC) applied this new reasoning when a protestor sought lost profits under an implied contract theory. The COFC had previously granted the protestor's summary judgment motion, holding that the United States Department of Agriculture's (USDA) decision to suspend the plaintiff, and thereby preclude it from bidding, was arbitrary, capricious, an abuse of discretion, and not in accordance with the law.[6] The protestor sued for lost profits, arguing that the ADRA did not relinquish the court's bid protest jurisdiction under the implied-contract theory.[7] The COFC disagreed, noting that the ADRA repealed the provision in the Tucker Act that previously granted bid protest jurisdiction under the implied-contract theory.[8] The provision was also replaced by another provision that limited monetary relief to "bid preparation and proposal costs."[9] The limit is identical to that imposed on district courts' bid protest jurisdiction exercised before the ADRA. The court's decision "establishe[s] that Congress expressly intended the ADRA to confer the Court of Federal Claims with the same power in bid protest actions that the district courts exercised under the APA."[10]

Not All Reviews Are the Same

The ADRA grants the COFC authority under the Tucker Act to review "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."[11] As *Advance Construction Services, Inc. v. United States* (*Advance Construction*)[12] illustrates, that authority is limited to a review of the agency's actions, not the GAO's decision. The plaintiff in *Advance Construction*, the awardee on a road upgrade contract, requested declaratory and injunctive relief on the eve of a GAO bid protest hearing initiated by the losing bidder. The plaintiff contended that the GAO violated several statutes and regulations governing GAO bid protests.[13] The COFC rejected the plaintiff's argument that the Tucker Act contemplated a review of GAO violations.[14] Citing the pertinent legislative his-

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1. Pub. L. No. 104-320, 110 Stat. 3870 (1996) (amending 28 U.S.C. § 1491 (2000)).

2. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 49 [hereinafter *2001 Year in Review*]. The ADRA had granted the COFC and district courts concurrent jurisdiction over bid protests. *See id*.

3. Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Fed. Cir. 2001); *see* 5 U.S.C. § 706 (2000).

4. *See Impresa*, 238 F.3d at 1331-32. 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 id.* The COFC (and its predecessor court) used the former standard of review under its grant of jurisdiction pursuant to the Tucker Act. *See* 28 U.S.C. § 1491(b)(1), (b)(4). Consistent with the APA standard of review, the CAFC ordered a deposition of the contracting officer in order to place "the basis for the contracting officer's responsibility determination" on the record. *Impresa*, 238 F.3d at 1339; *see also supra* Part II(G) (discussing the effect of the CAFC's holding on a contracting officer's responsibility determination).

5. 52 Fed. Cl. 115 (2002).

6. Lion Raisins, Inc. v. United States, 51 Fed. Cl. 238 (2001); *see supra* Part IV.Q (discussing the facts and circumstances of the suspension).

7. *Lion Raisins*, 52 Fed. Cl. at 118.

8. *Id*. (referring to 28 U.S.C. § 1491(a)(1)).

9. *See* 28 U.S.C. § 1491(b).

10. *Lion Raisins*, 52 Fed. Cl. at 119. The COFC later denied the plaintiff's bid preparation and protest costs. *See* Lion Raisins, Inc. v. United States, 52 Fed. Cl. 629 (2002). The court found that the plaintiff's costs related to the size protest with the SBA and the investigation for a certificate of competency "cannot be characterized as bid protest costs." *Id*. at 632.

11. *See* 28 U.S.C. § 1491(b).

12. 51 Fed. Cl. 362 (2002).

13. *Id*. at 363.

tory, the COFC held that its Tucker Act jurisdiction was limited to "agency" decisions and that it could not intrude upon the GAO's bid protest jurisdiction.[15] The COFC refused to extend its jurisdiction any further than the plain language of the statute allowed and dismissed the lawsuit.[16]

GAO's Jurisdictional Wings Grow Shorter

The GAO, like the COFC, also clipped its own jurisdictional wings in a number of cases. In *Shinwha Electronics*,[17] the GAO announced that it would "no longer review, even under a limited standard, protests that an agency improperly suspended or debarred a contractor from receiving government contracts."[18] In the past, the GAO "generally declined to review protests of suspension or debarment decisions," but retained jurisdiction over protests alleging an improper suspension or debarment imposed "during the pendency of a procurement in which it was competing."[19] The Army notified Shinwha of its suspension from government contracting pending completion of a criminal fraud investigation.[20] Although the GAO denied the protest under the standard of review imposed in prior suspension-debarment cases,[21] it stated that it would no longer review such cases "[b]ecause the FAR sets forth specific procedures for both imposing and challenging a suspension or debarment action . . . the appropriate forum for resolving such disputes is with the contracting agency."[22]

The jurisdiction noose grew even tighter in *Champion Business Services, Inc.*,[23] when the GAO dismissed a protest alleging that the Defense Information Systems Agency, Defense Information Technology Contracting Organization (DISA/DITCO) acted improperly by retaining Champion's proposal in the competitive range and inviting it to make an oral presentation. Champion alleged that the evaluation results prove that it had no chance for award.[24] The GAO held that the claim of an improper invitation to make an oral presentation did not come within the scope of its bid protest jurisdiction under the Competition in Contracting Act (CICA).[25]

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14. *Id*. The COFC has jurisdiction to render judgment in an action involving "*any* alleged violation of statute or regulation." 28 U.S.C. § 1491(b)(1) (emphasis added).

15. *Advance Constr.*, 51 Fed. Cl. at 365-66 (quoting Sen. Carl Levin (D-Mich.) as stating that "these provisions addressing federal court jurisdiction over procurement protests would not affect the authority of the Comptroller General to review procurement protests").

16. *Id*. at 366; *see also* Davis/HRGM Joint Venture v. United States, 50 Fed. Cl. 539 (2001) (holding that the COFC did not have the jurisdiction to review a termination for convenience claim when the agency terminated a contract with an awardee after it discovered a defect in the bid bond submitted with the bid).

17. Comp. Gen. B-290603, B-290603.2, Sept. 3, 2002, 2002 CPD ¶ 154.

18. *Id*. at 5.

19. *Id*. at 4.

20. *See supra* Part IV.Q (discussing the fraud issues in *Shinwha*).

21. *Shinwha*, 2002 CPD ¶ 154, at 4. Under the previous standard of review, the GAO would review the matter "to ensure that the agency has not acted arbitrarily to avoid making an award to an offeror otherwise entitled to an award, and also to ensure that minimum standards of due process have been met." *Id*.

22. *Id*. at 5 (referring to FAR sections 9.406-3(b) and 9.407-3(b), which make the contract agency the appropriate forum for resolving such dispute).

23. Comp. Gen. B-290556, June 25, 2002, 2002 CPD ¶ 130.

24. *Id*. at 2. The agency made four awards out of the thirty-five offerors who made oral presentations. Champion's proposal was rated thirty-fifth out of thirty-five. *Id*.

25. *See* 31 U.S.C. §§ 3551-3556 (2000); 4 C.F.R. pt. 21 (2002). Specifically, the CICA grants the GAO bid protest jurisdiction over the following types of protests:

> challenges to a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; or a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of a contract.

31 U.S.C. §§ 3551(1), 3552; *see* 4 C.F.R. § 21.1(a).

The GAO will occasionally direct a protestor to the proper forum when it does not have jurisdiction. In *Military Agency Services Pty., Ltd.*,[26] a protestor alleged that four separate orders for picket boat services in Singapore Harbor under a blanket purchase agreement breached the protestor's requirements contract for "ship husbanding services," which included a provision for picket boat services.[27] The GAO dismissed this part of the protest, reasoning that the allegation was a matter of contract administration for review "by a cognizant board of contract appeals or the Court of Federal Claims" under the Contract Disputes Act of 1978.[28]

But Then, Sometimes We'll Review Them by Default

The GAO will sometimes review a protest, even if it suspects that Congress may have intended that it be reviewed elsewhere. In *Resource Consultants, Inc.*,[29] the GAO held that the authorizing legislation in the Aviation and Transportation Act (ATSA)[30] specifically exempted the Transportation Security Administration's (TSA) acquisitions of "equipment, supplies and materials" but not services.[31] The GAO did recognize, however, that the legislative history of the ATSA implies that Congress may have intended to include services in the exemption.[32] The implication did not deter the GAO, which concluded that it would hear protests of TSA's acquisitions of services "[u]nless the Congress changes the statutory language."[33]

And Sometimes We Just Don't Feel Like Making Any "Concessions"

One of the GAO's more interesting decisions was *Starfleet Marine Transportation, Inc.*[34] This protest involved the National Park Service's (NPS) decision to cancel a prospectus seeking proposals for ferry services to tourists visiting Fort Sumter National Monument. The NPS cancelled the prospectus and awarded to the incumbent contractor when it decided to offer more than one departure point, a service the incumbent had performed for the past forty years.[35] The protestor claimed that the decision to cancel the prospectus lacked a rational basis and was the result of congressional interference. The NPS claimed that the GAO did not have jurisdiction over the concession contracts because "they are not procurement of goods and services, but instead essentially involve the 'sale' of a license or permit to operate a business on federally-owned property."[36]

The GAO disagreed, observing "that certain contracts, including concession contracts, can involve both a sale and a procurement."[37] The GAO also rejected any limitations cited in the Senate and House reports[38] accompanying the National Park Service Concessions Management Improvement Act of 1998.[39]

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26. Comp. Gen. B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130.

27. *Id*. at 1. Picket boats protect ships from waterborne threats by screening incoming watercraft, directing unauthorized watercraft away from the protected vessels, and warning protected vessels of unauthorized watercraft headed in its direction. *Id.* at 1 n.1.

28. *Id*. at 3-4; *see also* 41 U.S.C. §§ 601-613 (2000); *supra* pt. III.I (discussing jurisdiction issues under the Contract Disputes Act).

29. Comp. Gen. B-290163, B-290163.2, June 7, 2002, 2002 CPD ¶ 94.

30. Pub. L. No. 107-71, 115 Stat. 597 (2001).

31. *Res. Consultants*, 2002 CPD ¶ 94, at 5-6. The Federal Aviation Administration's Acquisition Management System (AMS) specifically granted an exemption for the TSA's procurements of equipment, supplies, and materials. 49 U.S.C. § 40110(d) (2000).

32. *Res. Consultants*, 2002 CPD ¶ 94, at 6. The GAO noted that the AMS's statutory authority was "couched in inclusive terms, directing the FAA Administrator to develop and implement an acquisition management system that addresses the unique needs of the agency." *Id*. In contrast, the ATSA's language specifically limited the applicability of the AMS to TSA's acquisitions of "equipment, supplies, and materials." *Id*.

33. *Id*. The GAO found no such incongruity in *LBM, Inc*., Comp. Gen. B-290682, Sept. 15, 2002, 2002 CPD ¶ 157. In *LBM*, the GAO rejected the Army's challenge to a protest concerning the proposed issuance of a task order that was previously set aside for small businesses. The Army contended that protests were "not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." *Id*. at 4 (citing 10 U.S.C. § 2304c(d) (2000)). The GAO disagreed, citing the legislative history of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, 3253, and concluding that "nothing in the statute authorizes the transfer of acquisitions to ID/IQ contracts in violation of those laws and regulations." *LBM, Inc*., 2002 CPD ¶ 157, at 5.

34. Comp. Gen. B-290181, July 5, 2002, 2002 CPD ¶ 113.

35. *Id*. at 2.

36. *Id*. at 5. The protestor also alleged that extending the incumbent's contract violated the CICA. *Id*.

37. *Id*. at 6.

38. *Id*. at 3. The Senate and House reports "expressed the view that concession 'contracts do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise.'" *Id*. at 5 (quoting S. 202, 105th Cong. (1998); H.R. 767, 105th Cong. (1998)).

Finally, the GAO declined to extend the holding in a D.C. Circuit case that characterized the government's receipt of "incidental benefits from a concessioner's performance" as insufficient to give rise to a procurement contract.[40] Instead, the GAO took a broader approach to mixed transactions that include "concession" and "services" elements in order to determine if the services were "de minimis" when compared to the concessions provided.[41] The GAO ultimately held that the cancellation was reasonable and denied the protest.[42] The decision may offer only temporary solace for those annoyed with the GAO's intrusion into the concession world, especially when the "service" elements of the prospectus were largely for the benefit of the visitors, not for the government.[43]

COFC Not "Interested" That Boot Manufacturer Had "Standing" at GAO

Last year's *Year in Review* discussed a case where a protestor claimed that it was an "interested party," even though it did not actually submit a proposal.[44] In *McRae Industries, Inc.*,[45] the protestor alleged that it would have submitted a proposal but for tests included in the solicitation that the contracting officer later waived.[46] Although the GAO denied the protest, it did hold that the protestor was an interested party based on its assertion that it would have submitted a proposal under the relaxed requirements.[47] McRae then filed suit in the COFC to enjoin award of the contracts.[48] The COFC, however, was not as generous in granting the protestor interested party status. Instead, it held that McRae was a "prospective" rather than "actual" bidder, citing an earlier case

> that reasoned that the use of the word "prospective" indicated that, "in order to be eligible to protest, one who has not actually submitted an offer must be *expecting* to submit an offer prior to the closing date of the solicitation . . . the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends."[49]

McRae did not submit a bid or protest the request for proposal before the close of bidding. Therefore, McRae was neither a prospective bidder nor had standing and COFC affirmed the earlier dismissal.[50]

Is the Contractor Standing also Responsible?

In *Myers Investigative & Security Services v. United States*,[51] the COFC held that a protestor had standing as an interested party when an agency refused its bid submission on a sole-source solicitation. The COFC concluded, however, that the protestor failed to prove prejudice by the agency's sole-source decision because the protestor "made no effort to show that it was responsible and could have performed the contracts."[52] On appeal, the CAFC affirmed the COFC's dismissal, holding that Myers needed to prove that it would have a "substantial

39. 16 U.S.C. § 5951 (2000).

40. *Starfleet Marine Transp., Inc*., 2002 CPD ¶ 113, at 7 (citing Amfac Resorts, L.L.C. v. Dep't of Interior, 282 F.3d 818, 835 (D.C. Cir. 2002)).

41. *Id*. at 8. The GAO decided that in this case, the services were more than de minimis because they included a long list of other service-related tasks that the contractor was required to perform in addition to the ferry service. *Id*.

42. *Id*. at 9.

43. *Id*. at 8. The services included cleaning the visitor center, providing janitorial services for the assigned docks and pier, and providing visitors with an interpretive program that would be heard on a loudspeaker system on each ferry. *Id*.

44. *See 2001 Year in Review, supra* note 2, at 52. 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." 31 U.S.C. § 3551(2) (2000); 4 C.F.R. § 21.0(a) (2002).

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

46. *Id*. at 1-2. The contracts were for military boots, and the tests were for leakage and toe adhesion requirements of cold, wet boots with removable insulated booties. The GAO agreed with McRae's contention that an opportunity to compete under a revised request for proposal gave McRae a sufficient direct economic interest. *Id*.

47. *Id*. at 5-6. The GAO ultimately denied the protest because although the tests were no longer required, the standard requirements remained a part of the solicitation. Since McRae admittedly could not meet the standard requirements, it did not show the required "prejudice" to have the protest sustained. *Id*.

48. McRae Indus., Inc. v. United States, 53 Fed. Cl. 177 (2002). The Defense Logistics Agency awarded two contracts—one to Belleville Shoe Manufacturing Co., and the other to Wolverine World Wide, Inc. Both awardees filed as intervenors in the protest. *Id*. at 178.

49. *Id*. at 180 (quoting MCI Telecomm. Corp. v. United States, 878 F.2d 362, 365 (Fed. Cir. 1989)).

50. *Id*. at 180-81.

51. 47 Fed. Cl. 605 (2000).

52. *Id*. at 620.

chance" of receiving the award.[53] The CAFC concluded that the facts showed no prejudice in this instance because "Myers, by its own admission, presented no evidence that it was qualified to secure the awards if they had been made the subject of competitive bids."[54]

Equal Access to Justice Act

Catalyst Theory Lays a Brick

Last year's *Year in Review* discussed *Brickwood Contractors, Inc. v. United States*,[55] a COFC case that involved a protestor's Equal Access to Justice Act (EAJA)[56] claim. The protestor filed its claim after the Navy took corrective action in response to the protest by canceling its original Invitation for Bids (IFB) and resoliciting under a Request for Proposals (RFP). The trial court's remarks at a temporary restraining order (TRO) hearing raised questions about the Navy's resolicitation and prompted the Navy to take corrective action. Brickwood's EAJA application sought attorney fees and expenses for work it performed on the protest. At that time, the COFC held that Brickwood was a "prevailing party" under the EAJA, and therefore, entitled to protest costs.[57] The court discussed the term "prevailing party" under the "catalyst theory," and concluded that a party may be entitled to costs under the EAJA even without findings on the merits.[58] Instead, it was enough that the suit is a "causal, necessary, or substantial factor in obtaining the result plaintiff sought."[59] The court did recognize, however, that "[t]he Supreme Court [had] granted certiorari in a case in which the viability of the catalyst theory is directly at issue."[60]

The *Brickwood I* court was referring to *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*,[61] a U.S. Supreme Court case that rejected the "catalyst theory"[62] of prevailing party claims as it applied to two specific statutes— the Fair Housing Amendments Act (FHAA) of 1988[63] and the Americans with Disabilities Act (ADA) of 1990.[64] In *Buckhannon*, the plaintiff, who operated assisted-living care homes, sued in the U.S. District Court for the Northern District of West Virginia, alleging that West Virginia's "self-preservation" requirements, which forbade the boarding of residents who could not remove themselves from dangerous situations such as fires, violated both the FHAA and the ADA. The district court dismissed the case after legislation deleted the "self-preservation" requirements. The plaintiffs then requested attorney's fees as the "prevailing party" under the FHAA and the ADA.[65] The Supreme Court rejected the theory that a party can be "prevailing" because of a defendant's voluntary change in conduct, instead requiring entitlement based on the merits, either in the trial court or on appeal.[66]

The Navy filed a motion seeking relief from the *Brickwood I* judgment, contending that the Supreme Court's *Buckhannon* decision invalidated the finding that the plaintiff was a "prevailing party."[67] The COFC disagreed, noting that the *Buckhannon* court specifically excluded the EAJA from the breadth of its holding. The COFC also compared the impetus behind the change in circumstances. In *Buckhannon*, the West Virginia legislature resolved the underlying issue independently.[68] In this case, the Navy took corrective action after hearing the trial court's serious reservations about the its handling of the solicitation.[69] The COFC compared the "prevailing party" language in the EAJA with that in the FHAA and the ADA and concluded that the FHAA and the ADA allowed the court broad discretion to determine if a plaintiff was a "prevailing party."[70] Contrarily,

53. Myers Investigative & Sec. Servs. v. United States, 275 F.3d 1366, 1370 (Fed. Cir. 2002).

54. *Id*. at 1371.

55. 49 Fed. Cl. 738 (2001) [hereinafter *Brickwood II*]; *see also 2001 Year in Review, supra* note 2, at 52-54 (discussing *Brickwood II* and the COFC's earlier decision in Brickwood Contractors, Inc. v. United States, 49 Fed. Cl. 148 (2001) [hereinafter *Brickwood I*]).

56. 28 U.S.C. § 2412 (2000).

57. *Brickwood I*, 49 Fed. Cl. at 148.

58. *Id*. at 154.

59. *Id*.

60. *Id*. at 154 n.4.

61. 532 U.S. 598 (2001).

62. 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 603.

63. 42 U.S.C. § 3613(c)(2) (2000).

64. 42 U.S.C. § 12205.

65. *Buckhannon*, 532 U.S. at 604.

the EAJA clearly stated 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."[71] Last, the COFC held that the trial court's comments at the temporary restraining order hearing, which questioned the agency's handling of the solicitation, "represent[ed] the necessary 'judicial imprimatur' that caused the legal relationship of the parties."[72]

On appeal, the CAFC offered several reasons for its reversal of the *Brickwood II* court's holding. First, the CAFC noted that although the *Buckhannon* court considered only the fee-shifting provisions in the FHAA and ADA, the "analysis applied . . . to numerous statutes in addition to those at issue here."[73] The CAFC agreed that "there are certain differences between the EAJA and other fee-shifting statutes."[74] The court added that Congress chose the same term, "prevailing party," in the EAJA as it did in other fee-shifting statutes, stating that "[t]here is no reason to assume this term has a different meaning under the EAJA."[75] The court noted that under the EAJA, courts "shall" award reasonable attorney's fees absent substantial justification for the government's position, "whereas under the FHAA and ADA the court 'may' award fees."[76] The CAFC examined the text and history of the EAJA, which it concluded illustrated Congress's intent to use the term "prevailing party" consistently among all the fee-shifting statutes.[77] Last, the CAFC described the trial court's "very preliminary" remarks at the TRO as "not constitut[ing] a 'court-ordered change in the legal relationships of the parties as *Buckhannon* requires.'"[78]

GAO Not Jumping on the Buckhannon *Bandwagon*

Successful protestors at the GAO may enjoy a higher reimbursement success rate than elsewhere. In *Georgia Power Co.*,[79] the agency took corrective action twelve days after the protestors filed their comments and two days after a teleconference between the GAO and the parties.[80] At the protestors' request, the GAO recommended the reimbursement of protest costs. The agency argued that *Buckhannon* precludes the GAO from awarding protest costs where agency action results in the dismissal of the protest.[81] The GAO disagreed, seizing on the Supreme Court's characterization of "prevailing party" as a "term of art" not present in CICA.[82] The GAO concluded that the CICA limits its authority to recommend reimbursement of an "appropriate interested party" and that "there is nothing in the express language of CICA that compels the conclusion that to be an 'appropriate interested party' requires a 'judicially-mandated change in the relationship of the parties.'"[83]

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66. *Id*. at 615.

67. *Brickwood II*, 49 Fed. Cl. 738, 740 (2001).

68. *Id*. at 744.

69. *Id*. at 748-49.

70. *Id*. at 745.

71. *Id*. at 746.

72. *Id*. at 749.

73. Brickwood Contractors, Inc., v. United States, 288 F.3d 1371, 1377 (Fed. Cir. 2002) [hereinafter *Brickwood III*] (citing Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res., 532 U.S. 598, 602 (2001)).

74. *Id*. at 1378.

75. *Id*. at 1378-79 (citing Perez-Arellano v. Smith, 279 F.3d 791, 795 n.20 (9th Cir. 2002)).

76. *Id*. at 1378 (citing *Perez-Arellano*, 279 F.3d at 795).

77. *Id*. at 1379 (quoting H.R. 1418, 96th Cong. (1980) ("It is the committee's intention that the interpretation of the term [prevailing party] be consistent with the law that has developed under existing statutes.").

78. *Id*. at 1380 (quoting *Buckhannon*, 532 U.S. at 608).

79. Comp. Gen. B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81.

80. *Id*. at 4. At the teleconference, the GAO advised the agency that it did not find any past performance documentation that was required under the RFP. *Id*.

81. *Id*. at 10-11.

82. *Id*. at 11 (citing *Buckhannon*, 532 U.S. at 603).

Get Serious, Already!

The GAO's regulations allow a successful offeror reimbursement of the costs of filing and pursuing a protest, in addition to the costs of preparing a proposal.[84] Of course, the GAO may deny protest costs if an agency takes prompt corrective action.[85] The GAO may also decide to award protest costs "where the contracting agency unduly delayed taking corrective action in response to a clearly meritorious protest," and "corrective action was taken only after the protestor filed comments on the agency report and after GAO expressed concerns regarding the lack of adequate documentation."[86] In any case, the successful protestor should request an amount that has some basis in reality. In *Galen Medical Associates, Inc.*,[87] the GAO found that basis lacking, quantifying the protestor's claim as equaling $7154 per page of its twenty-two pages of submissions to GAO.[88] The GAO recommended that the agency reimburse the protestor a whopping $110.65 out of the $159,195.32 claim.[89]

GAO Proposes to Amend Bid Protest Regulations

The GAO recently issued a proposed rule designed to revise and update several of its bid protest regulations. One proposed change is to clarify "that protests and other documents may be filed by facsimile" and that subject to protective orders, "all filings, including protests, may be filed by other electronic means, such as electronic mail (E-mail)."[90] Another revision clarifies that the GAO's Alternate Dispute Resolution (ADR) program includes both "outcome prediction and negotiation assistance," and states that "ADR is among the flexible alternative procedures GAO may use to promptly and fairly resolve a dispute."[91] The GAO also proposes to delete language in the regulations that suggests that it may decide protests on the record without protestors' comments, and also clarify that only the GAO may grant an extension of the ten days to file the protestor's comments.[92]

In an effort to make the Small Business Certificate of Competency (COC) Program consistent with affirmative determinations of responsibility under the Section 8(a) program, the GAO proposes creating an "SBA's failure to follow its own regulations" exception to the general rule that the GAO will not review protests in this area.[93] The GAO also proposes deleting language that specifically prohibits separate comments on the agency report if it will also hold a hearing. The timeliness rules regarding claims for protest costs would change from "[fifteen] days after the protestor is advised that the contracting agency has decided to take corrective action" to "[fifteen] days from the time the protestor learned or (should have learned) that GAO has closed the protest in response to a corrective action."[94] Another proposed revision clarifies that "any case—not only bid protests—will be dismissed where the matter involved is the subject of litigation, or has been decided on the merits."[95]

Two of the proposed changes involve cases reported earlier in this section. One of the changes reflects the GAO's holding in *Shinwha Electronic, Inc.*,[96] that it would no longer review suspension and debarment actions.[97] The other change expands

83. *Georgia Power Co.*, 2002 CPD ¶ 81, at 11-12. In addition to rejecting *Buckhannon*'s applicability to its authority to recommend protest costs, the GAO also rejected the agency's contention that it had no authority to recommend reimbursement of protest costs. Although the CICA required a violation of a statute or regulation to entitle a plaintiff to compensation for its costs, GAO regulations did not. *Id*. at 7-8. The GAO disagreed, stating that its rules implemented the authority provided in the CICA "[i]f the contracting agency decides to take corrective action in response to a protest." *Id*. at 8 (citing 4 C.F.R. § 21.8(e) (2002)).

84. *See* 4 C.F.R. § 21.8(d).

85. *See, e.g.*, Mapp Bldg. Servs.—Costs, Comp. Gen. B-289160, Mar. 13, 2002, 2002 CPD ¶ 60 (denying protest costs where the agency agreed to take corrective action before the protest report was due and no basis exists to find that the agency did not promptly implement the promised corrective action).

86. Alaska Mech., Inc.—Costs, Comp. Gen. B-289139.2, Mar. 6, 2002, 2002 CPD ¶ 56, at 1.

87. Comp. Gen. B-288661.6, July 22, 2002, 2002 CPD ¶ 114.

88. *Id*. at 3.

89. *Id*. at 8.

90. 67 Fed. Reg. 190 at 61,542 (proposed Oct. 1, 2002) (to be codified at 4 C.F.R. pt. 21).

91. *Id*.

92. *Id*. at 61,543.

93. *Id*. The present rule allows a GAO COC determination review only if there is a showing of bad faith by government officials. 4 C.F.R. § 21.5(b)(2).

94. *Id*.

95. *Id*. at 61,543-44.

96. Comp. Gen. B-290603, B-290603.2, Sept. 3, 2002, 2002 CPD ¶ 154.

the GAO's review of affirmative determinations of responsibility, consistent with the holding in *Impresa Construzioni Geom. Domenico Garufi v. United States*.[98] Under the rule change, the review could include protests where the evidence raises serious concerns as to whether the contracting officer unreasonably failed to consider available relevant information, or otherwise violated statute or regulation.[99]

GAO Bid Protest Docket Up; Decision on Merits and Sustain Rate Down

The number of bid protests filed at the GAO during fiscal year (FY) 2002 increased for the first time in over a decade. The GAO's statistics, however, show that it heard and sustained fewer protests. The total number of bid protests filed at the GAO rose from 1146 in FY 2001 to 1204 in FY 2002.[100] The increase in filings did not translate into more favorable results for protestors. The GAO issued fewer decisions on the merits, from 311 in FY 2001 to 256 in FY 2002. The GAO protest-sustain rate decreased five percent, from twenty-one percent in FY 2001 (sixty-six sustains), to sixteen percent in FY 2002 (forty-one sustains). The number of ADR proceedings also decreased. Although the number of ADR hearings significantly decreased, the ADR success rate held constant at eighty-four percent.[101] The COFC's FY 2002 bid protest statistics were unavailable as of January 2003.[102] Major Modeszto.

97. 67 Fed. Reg. at 61,543.

98. 238 F.3d 1324 (Fed. Cir. 2001).

99. 67 Fed. Reg. at 61,543.

100. *See Bid Protests: GAO Protest Docket Up 5% in FY 2002; Sustain Rate Down 5% to 16%*, 78 BNA FED. CONT. REP. 16, at 485 (Oct. 29, 2002).

101. *Id*. For those protests that the GAO heard on the merits, it issued decisions in an average of seventy-nine days. *Id.*

102. United States Court of Federal Claims, *Announcements* (Jan. 10, 2003), *at* http://www.uscfc.uscourts.gov/announce.htm.

CONTRACT PERFORMANCE

Contract Interpretation

Last year, two new cases further defined the issue of who should bear the risk when the government drafts its contracts carelessly. When defective drafting results in ambiguities in a contract, both parties may claim that the other side should bear the responsibility for these ambiguities. The ultimate question is whether the ambiguity was patent or latent, because a patent ambiguity creates a duty to inquire.

COFC Reinforces Bad Habits

In *J&H Reinforcing & Structural Erectors, Inc. v. United States* (*J&H Reinforcing*),[1] the ambiguity involved whether a Historically Underutilized Business Zone (HUBZone) preference would apply to a contract to rehabilitate a dam in the Wayne National Forest. As this was a commercial item acquisition, section I of the solicitation contained the clause found at Federal Acquisition Regulation (FAR) section 52.212-5.[2] This clause incorporates several other clauses into the contract by reference.[3] The FAR also cross-references two clauses that apply to all commercial item acquisitions.[4]

Another paragraph, however, cross-references twenty-eight clauses that may or may not apply, depending upon the nature of the particular commercial item acquisition. There should be a blank line before each of these twenty-eight clauses, where the contracting officer checks whether the nature of that particular acquisition requires incorporation of that clause. There should also be a note at the beginning of this listing of potentially incorporated clauses, indicating that the "Contracting Officer shall check as appropriate" those clauses that are applicable.[5] Unfortunately, the solicitation in *J&H Reinforcing* did not contain either this note or the blank lines before each of the listed twenty-eight clauses.[6]

One of the twenty-eight clauses listed in FAR section 52.212-5(b) is FAR section 52.219-3, which sets aside procurements for HUBZone Small Business Concerns. At a pre-bid meeting, in which J&H Reinforcing did not take part, a potential bidder asked whether the rehabilitation project was being set aside for HUBZone businesses. The contracting officer said that it was not being set aside. The contracting officer later amended the solicitation to reflect corrections in the drawings and specifications. In this amendment, the government also included a list of questions and answers raised during the pre-bid meeting. Unfortunately, this listing did not address whether the government was setting aside the acquisition for HUBZone businesses.[7]

Four businesses bid on the dam project. The low bidder was disqualified, and the second-lowest bidder was T-C, Inc., a non-HUBZone business. J&H Reinforcing was the third-lowest bidder. When the government awarded to T-C, Inc., J&H Reinforcing sued in the Court of Federal Claims (COFC), alleging that the government violated statutory and regulatory provisions regarding the HUBZone program by awarding to a non-HUBZone business.[8] The court held in favor of the government, finding an ambiguity in the solicitation but also finding that the ambiguity was patent, which gave J&H Reinforcing a duty to inquire further. The court noted that one of the other clauses listed in FAR section 52.212-5(b) is FAR section 52.219-4, which gives HUBZone businesses an evaluation preference by adding ten percent to the price bid by any non-HUBZone businesses. The court found that FAR sections 52.219-3 and 52.219-4 were mutually inconsistent, resulting in a patent ambiguity.[9]

Had this been the end of the story, it may not have been too difficult to accept the court's holding that the patent ambiguity created a duty for J&H Reinforcing to inquire further. In this case, however, J&H Reinforcing also alleged that it called the contracting officer to clarify whether the solicitation was, in fact, set aside. J&H also alleged that the contracting officer was unavailable to answer its questions, but that her representative assisted J&H Reinforcing to "bid as a HUBZone contractor."[10] In response to this argument, the court noted that FAR section 52.214-6 requires prospective bidders who need explanations to submit their inquiries in writing. It then noted that this pro-

1. 50 Fed. Cl. 570 (2001).

2. General Servs. Admin. et al., Federal Acquisition Reg. 52.212-5 (July 2002) [hereinafter FAR]

3. *Id*.

4. *Id*. at 52.212-5(a).

5. *Id*. at 52.212-5(b).

6. *J&H Reinforcing*, 50 Fed. Cl. at 572-73.

7. *Id*. at 573.

8. *Id*. at 573-74.

9. *Id*. at 575 (reasoning that setting aside the award to only HUBZone businesses would mean that there would never be a non-HUBZone business that would get ten percent added to their price for evaluation purposes).

vision was designed to prevent the exact scenario in which J&H Reinforcing found itself—"reading the tea leaves of recalled utterances to ascertain if the contracting officer or her representatives made a statement that would bind the government."[11] Because the alleged conversation between J&H Reinforcing and the contracting officer's representative was verbal, the court ruled against J&H Reinforcing and granted the government's motion for summary judgment.[12]

This case is also somewhat troubling because it appears that the court could have decided it on other grounds. The court hinted at various times that the contracting officer's representative had no authority regarding this procurement.[13] At other times, the court implied that this case really involved a failure of proof by the plaintiff.[14] Yet, instead of basing its holding on either of these grounds, the court chose to reach its outcome on the basis that J&H Reinforcing failed to inquire in writing. This was a commercial item acquisition—a procurement in which one should expect less savvy contractors. The actions of government personnel contributed more to J&H Reinforcing's situation than its telephone inquiry. Hopefully, holdings similar to *J&H Reinforcing* will not reinforce inattentive behavior by government personnel or discourage smaller contractors from participating in government procurement.

Government Stays with an "Edsall" of an Argument

Last year's *Year in Review* reported on *Edsall Construction Co.*,[15] a case in which the Armed Services Board of Contract Appeals (ASBCA) had held against the Army in its attempt to use a disclaimer to shift the responsibility for defective design specifications to a contractor.[16] *Edsall* involved a Montana National Guard contract for the construction of two aircraft hangars, including steel canopy hangar doors weighing 21,000 pounds each.[17] The solicitation contained detailed drawings depicting the design of the doors, which the board determined to be design specifications.[18] Included in these drawings were three cables with "pick points" on the door, indicating where the cables would attach to support the doors. After the award, a subcontractor determined that the load on the doors would be too heavy for just three cables, so it proposed to use four instead. When Edsall notified the government of this proposed change, the government agreed, believing that the design change would be cost-free for the government. When Edsall later submitted a claim for the additional $70,288.26 in costs, the government denied the claim because a door drawing contained a note that stated:

> [c]anopy 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.[19]

The board found that this single note buried in fine print on one of the detailed drawings may have been sufficient to require contractors to verify the weight of the door, but it did not adequately put the contractor on notice that the risk of any design deficiencies was being shifted to it.[20] The government appealed this ruling to the Court of Appeals for the Federal Circuit (CAFC).[21] The CAFC was no more sympathetic to the government, specifically pointing out that when the government provides the contractor with design specifications and forces the contractor to build according to those specifications, it is warranting that those specifications are free of any defects.[22] The court then examined the government's disclaimer and deter-

10. *Id*. The court did not discuss what authority, if any, this individual had. *Id.* at 576-77.

11. *Id*. at 577.

12. *Id.*

13. *Id*. at 576. At times, the court refers to her as a clerk. *Id.*

14. *Id*. at 577.

15. ASBCA No. 51787, 01-2 BCA ¶ 31,425.

16. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 138.

17. ASBCA No. 51787, 01-2 BCA ¶ 31,425, at 155,176.

18. *Id.* at 155,177.

19. *Id.* at 155,177-79.

20. *Id.* at 155,181.

21. White v. Edsall Constr. Co., 296 F.3d 1081 (2002).

22. *Id*. at 1084 (citing United States v. Spearin, 248 U.S. 132 (1918)).

mined that although "the disclaimer at issue requires the contractor to verify supports, attachments, and loads, it does not clearly alert the contractor that the design may contain substantive flaws requiring correction and approval before bidding."[23]

The government next argued that if the disclaimer was not clear, it still resulted in an ambiguity that was patent, giving Edsall a duty to inquire. The court responded without much elaboration, concluding that this case did not involve a patent ambiguity because "the design flaw was hidden."[24] The court specifically held open the possibility that the government could shift the risk of defects in design specifications to a contractor; it also stated, however, that the disclaimer must be obvious and unequivocal to shift that risk.[25] In both of the cases discussed here, the government's attempts to shift the risk for its inartfully drafted solicitations appear somewhat harsh. In assigning responsibility for the risks created by contract ambiguities, it may be appropriate to modify the rule of law to consider the parties' respective equities. Major Sharp.

23. *White*, 296 F.3d at 1084.

24. *Id*. at 1087.

25. *Id*. at 1085-87 (holding that the disclaimer must be "express and specific" rather than "general" in nature to shift liability).

Contract Changes

During the last year, the courts and boards only issued a few decisions that had any major impact on the field of contract changes; only two merit discussion. Both cases involve issues with little precedent, and which are interesting to practitioners because, if for no other reason, they may help to fill the gaps in these areas.

Impracticable Standards

Last year's *Year in Review*[1] commented on *Raytheon Co.*,[2] a case in which the Army's rush to get a contract into place before funds expired ultimately cost the Army millions of dollars. In *Raytheon*, the Armed Services Board of Contract Appeals (ASBCA) held that the Army knew that 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. This non-disclosure of superior knowledge was a constructive change to the contract, entitling the contractor to an additional $7.4 million in compensation.[3] Raytheon also argued that its contract was commercially impracticable.[4] When the board rejected the commercial impracticability claim,[5] Raytheon appealed to the CAFC.[6]

The CAFC began its analysis by noting that a contract is impracticable if, due to unforeseen events, "it can be performed only at an excessive and unreasonable cost."[7] Raytheon argued that the board erred in determining whether this standard was met by comparing the estimated cost of completion to the contract price at the time of termination. Raytheon contended that the board should have instead compared the estimated cost of completion with the original contract price.[8]

Rejecting this contention, the court specifically pointed out that Raytheon had offered no legal authority to support its contention that the original contract price was the correct yardstick for determining Raytheon's damages. The court went on to hold that the board's use of the contract price at the time of termination was reasonable since the "adjusted contract price would accurately reflect the cost of performing the entire contract as adjusted, rather than as awarded."[9] The court never explained this circular reasoning. Apparently, the government gets the benefit of any adjustments to the contract price determined under the changes clause before calculating whether the contract is commercially impracticable.

California Abandons Cardinal Changes

This past year, the California Supreme Court decided *Amelco Elec. v. City of Thousand Oaks*,[10] a case involving a California state government contract that may, by analogy, impact the "cardinal change" doctrine in federal government contracts. In *Amelco*, the City of Thousand Oaks, California solicited for electrical work as part of a construction effort involving several major civic projects, including a civic center and office building, a 400-seat theater, an 1800-seat performing arts theater, and an outdoor arena. Amelco's bid of $6,158,378 was the lowest, and the city awarded the contract to Amelco. The city subsequently issued over a thousand drawings to the various contractors working on these projects, to either clarify or change the original contract drawings. To compensate Amelco for its changed work, the city paid it $1,009,728 over the initial contract price.[11]

Amelco was not satisfied with this amount because it was only compensation for the additional work not contained in the initial contract. Amelco claimed that it was also entitled to an additional $1.7 million for "the noncaptured costs of the change orders."[12] Amelco alleged that the vast number of changes made it difficult to keep track of its responsibilities and that the changes required Amelco to delay or accelerate certain tasks, or

1. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 92-93.

2. ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245.

3. *Id.* The contracting officer had already issued a final decision granting Raytheon slightly more than $12 million. *Id.*

4. *Id.* at 154,201-02.

5. *Id.* at 154,201. The board summarily rejected the commercial impracticability argument, noting that a fifty-seven percent cost overrun did not "by itself constitute commercial impracticability." *Id.*

6. Raytheon Co. v. White, 305 F.3d 1354 (Fed. Cir. 2002).

7. *Id.* at 1367 (citing Int'l Elecs. Corp. v. United States, 227 Ct. Cl. 208 (1981)).

8. *Id.* The original contract price was $51,758,509, the contract price at termination was $60,374,361, and the estimated cost of completion at the time of termination was $82,983,697. *Id.* at 1365.

9. *Id.* at 1367.

10. 38 P.3d 1120 (Cal. 2002), *reh'g denied*, 2002 Cal. LEXIS 1689 (Mar. 13, 2002).

11. *Id.* at 1122.

to shift workers between tasks to accommodate other contractors. Essentially, Amelco claimed it had to perform much more extensive managerial oversight in the contract as changed than it anticipated when it bid on the initial contract. When the city denied Amelco's claim, Amelco filed suit alleging alternatively that the city had abandoned and breached the contract.[13]

Under California's abandonment doctrine, when a construction project "become[s] materially different from the project contracted for, the entire contract . . . is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all of its work."[14] The trial court ruled that Amelco had satisfactorily demonstrated that the city's project had become sufficiently different so as to be deemed abandoned. The appellate court affirmed. The California Supreme Court, however, overturned the lower courts' rulings dealing with abandonment in a five-to-one ruling, determining that the doctrine did not apply to public contracts "since such a theory is fundamentally inconsistent with the purpose of the competitive bidding statutes."[15] Crucial to the court's holding was a state law that required agencies to award all contracts in excess of $5000 to the lowest responsible bid on the basis of competitive bidding. The court concluded that deeming a public contract to be abandoned would violate this statute because it would result in the creation of an implied contract for *quantum meruit* payment that did not result from a competitive bidding process.[16]

It is not clear what effect, if any, the *Amelco* ruling will have on the cardinal change doctrine in federal government contracts. Before the California Supreme Court, Amelco actually argued that the "abandonment doctrine is coextensive with the cardinal change doctrine."[17] It also asked the court to consider the fact that the federal courts had never held that the cardinal change doctrine violated federal statutes and regulations governing the making of awards on a competitive basis. The court distinguished the abandonment doctrine, which would result in setting aside the entire original contract, and which would entitle the contractor to a *quantum meruit* recovery for the entire effort performed. The cardinal change doctrine, however, sets aside only that portion of the contract that one of the parties materially changes, and replaces it with an implied contract.[18] Regardless of the merits of this distinction, the federal government may soon raise this sort of argument when defending against cardinal changes.[19] Major Sharp.

12. *Id*. at 1123.

13. *Id*.

14. *Id*. at 1127.

15. *Id*. The court also remanded to the trial court on the issue of damages for breach of contract. *Id*. at 1133.

16. *Id*. at 1127 (citing CAL. PUB. CONTRACT CODE § 20162 (West 2001)).

17. *Id*. at 1126.

18. *Id*.

19. One factor that may affect the viability of such an argument in a federal contract dispute is the availability of an alternate remedy. In federal government contracts, courts and boards are reluctant to find the existence of a breach. In *Amelco*, the California state courts appeared to be less averse to finding a breach. *See id.*

Inspection, Acceptance, and Warranties

There She Blows: Government Over-Testing of Pipeline Irrelevant in the Face of Bilateral Modification

As a general rule, courts and boards usually presume that contractually-specified inspections or tests are reasonable unless they conflict with other contract requirements.[1]

In *Blake Construction Co.*,[2] the Armed Services Board of Contract Appeals (ASBCA) recently held that when the government writes contract specifications requiring stringent testing, it has a right to enforce these provisions, even when the testing standards significantly exceed the intended use of the product. The Navy awarded Blake Construction (Blake) a $14 million contract to construct a Landing Craft Air Cushion Complex at Camp Pendleton, California. The contract required Blake to construct an underground, double-wall fuel pipeline.[3] The contract also required Blake to certify that the system conformed to testing requirements before testing, and required Blake to repair any leaks or other deficiencies that resulted from faulty workmanship or materials.[4]

After the contract award, Blake subcontracted with T.F. Austin Plumbing Co. (Austin) to install the pipeline.[5] Before it buried the pipeline, Blake was aware that the contracting officer contemplated some additional changes and testing. Nevertheless, Blake buried the pipeline.[6] Shortly thereafter, Blake held discussions with the government, and the parties agreed to a bilateral modification that increased the contract performance price by $716,792 and required Blake to conduct hydrostatic testing of the pipeline at 225 pounds per square inch (psi). The modification indicated that it was a "complete and equitable adjustment" and an "accord and satisfaction," releasing the government from further liability for any and all costs arising out of or incidental to the work.[7]

Needless to say, the pipeline failed to meet the new standards. At the hearing, one witness observed that water was shooting out of the ground sending "a heck of a shock both ways."[8] After Blake made additional repairs, the government permitted Blake to test the carrier piping at only 100 psi. The carrier piping passed the new, less stringent test; however, Blake discovered that the hydrostatic tests significantly damaged the containment pipe. Since locating the leaks was difficult, Blake had to dig up approximately eighty percent of the underground pipe system, much of which had been paved over.[9] After spending a considerable amount of time and money, Blake was able to repair the pipeline. Several months latter, Blake submitted a claim to the government seeking an equitable adjustment of $250,656. The contracting officer denied the claim, and Blake appealed the claim to the ASBCA.[10]

At the hearing, Blake's expert witness testified that the new hydrostatic test requirements were unreasonable for the pipeline's intended use. The witness also testified that construction activity by other contractors in the area resulted in underground vibrations, and these vibrations may have damaged the pipe and joints sufficiently to cause the leaks. In response, the government's expert witness testified that the test failures likely resulted from poor workmanship by Blake's subcontractor, Austin, and that the vast majority of construction activity in the vicinity of the pipeline involved Blake's personnel.[11]

The board held Blake to the terms of the bilateral modification. Specifically, the board observed that the modification required Blake to provide a pipeline that could withstand pressures up to 225 psi, regardless of the pipeline's intended use. Because Blake agreed to this requirement, and because the requirement was unambiguous, Blake was foreclosed from recovery under the doctrine of accord and satisfaction.[12]

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1. *See* Gen. Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.

2. ASBCA Nos. 52305, 52475, 02-1 BCA ¶ 31,765.

3. *Id.* at 156,882.

4. *Id.* at 156,882-83. Although the pipeline system was initially to have operated at a pressure of fifty pounds per square inch (psi), the original solicitation required that the components of the pipeline be able to withstand 275 psi, and required hydrostatic testing of the pipeline at 225 psi before acceptance. For reasons not stated in the opinion, the government issued an amendment to the solicitation before the award. The amendment deleted the requirement for hydrostatic tests from one portion of the contract, and reduced the test in another section of the contract from 225 psi to sixty-five psi. *Id.*

5. *Id.* at 156,883.

6. *Id.* at 156,884-85.

7. *Id.* at 156,885.

8. *Id.*

9. *Id.*

10. *Id.* at 156,886.

11. *Id.*

Leave Me Out of This: Manufacturer's Warranty Does Not Bind the Prime

The Court of Federal Claims (COFC) recently ruled that a manufacturer's warranty is just that—a manufacturer's warranty, and not a construction contractor's warranty. In *Lee Lewis Construction*,[13] the U.S. Postal Service (USPS) awarded Lee Lewis Construction (Lewis) a contract to roof a mail facility in Midland, Texas. The contract contained a provision requiring the contractor to furnish the USPS a ten-year manufacturer's materials warranty for the roof. Lewis complied, and before the warranty expired, the roof began to leak. The manufacturer's successor, HPG International (HPG), agreed to repair the roof, but before HPG completed the work, a hailstorm destroyed most of the unrepaired roof. Since the roof was not warranted against hail damage, HPG refused to repair the hail-damaged portions of the roof. The USPS's contracting officer then dragged Lewis into the dispute and ordered Lewis to pay repair costs.[14] Lewis then sued at the COFC, seeking relief from the contracting officer's decision.[15]

The issue before the COFC was whether a manufacturer's warranty bound the prime contractor after the government accepted the work.[16] The COFC's conclusion was a resounding "no." The COFC looked to the plain and ordinary wording of the warranty clause and concluded that the contractor did exactly what the contract called for—secure a manufacturer's warranty for the USPS. The COFC concluded that the warranty did not legally bind the prime contractor.[17] As such, the COFC denied the USPS's counterclaim against Lewis.[18] Major Dorn.

12. *Id.* at 156,887. The board discounted Blake's argument that other contractors caused the damage because Blake and his subcontractors were responsible for most of the construction activity in the area. Absent contemporaneous evidence to the contrary, the board was unwilling to entertain an argument that the pipeline failure was the result of anything but poor workmanship. *Id* at 156,887-88.

13. 54 Fed. Cl. 88 (2002).

14. *Id*. at 89.

15. *Id*. at 89-90. Lewis filed suit before the COFC seeking relief from the decision of the contracting officer and a declaration that Lewis owed no money to the USPS. The USPS then filed a counterclaim for $697,450, the amount specified in the contracting officer's final decision, claiming breach of warranty, and in the alternative, a decision that latent defects caused the material failure of the roof. *Id.* at 89.

16. *Id.* at 90. The parties originally agreed to limit their summary judgment motions to the issue of breach of warranty; however, both parties addressed the latent defects issue in their respective motions for summary judgment. Specifically, the USPS alleged that the roofing material used on the facility contained a latent defect and that Lewis was liable for the replacement cost of the roof. Lewis argued that the defects were not latent because the USPS had knowledge of the risks associated with the roofing material. *Id*. Given that the parties' proposed findings of uncontroverted facts failed to provide a detailed treatment of the facts relevant to a determination of the existence of latent defects, the court deferred a decision on the issue until after further proceedings. *Id.* at 93.

17. *Id*. at 91.

18. *Id*. at 93.

Government-Furnished Property

Fair Treatment Does Not Mean the Same Treatment

In *Bath Iron Works Corp.*,[1] two industry teams, the Blue Team and the Gold Team, were competing in the final phase of the Navy's DD(X) surface combatant program. The request for proposals (RFP) required each team to conduct at-sea tests of their design models.[2] The RFP stated that it was the responsibility of each offeror to acquire appropriate test platforms and, in response to a pre-solicitation question, the Navy advised the offerors that "[t]he government does not intend to provide the platform for at-sea testing."[3] At the protest hearing, the contracting officer testified that he did not intend to preclude the use of a government-owned platform, but wanted to advise the offerors that the program office would not provide test resources as government-furnished property (GFP).[4] The Blue Team asked the Navy to provide a decommissioned DD-963-Class destroyer that it could use as its test platform due to its similarity to the proposed hull, but the Navy advised the Blue Team that no DD 963 was available.[5] The Gold Team, however, was able to obtain a DD 963, which it used to conduct its at-sea tests.[6]

After award to the Gold Team, the Blue Team filed a General Accounting Office (GAO) protest alleging that "the Navy failed to conduct the competition on a common basis when it denied the Blue Team the use of a decommissioned DD 963 . . . for at-sea testing while at the same time accepting for purposes of the evaluation the Gold Team's proposed use of a decommissioned DD-963-Class destroyer."[7] The GAO denied the protest for lack of prejudice.[8] Specifically, the GAO found that the use of a decommissioned DD-963 did not result in a strength for the Gold Team and would not have changed the evaluation of the Blue Team.[9] The GAO also concluded that the "Blue Team's failure to pursue [the] denial of the use of a decommissioned DD 963" as evidence that the Blue Team did not view its use as a "significant consideration."[10]

Recovery Denied for Contractor's Failure to Notify Agency of GFP Shortage

Government-furnished property claims are rarely denied because a contractor failed to notify the government of defects or shortages in the GFP. This is because of the difficulty of proving that the government suffered prejudice. In *Franklin Pavkov Construction Co.*,[11] however, the Court of Appeals for the Federal Circuit (CAFC) affirmed the decision of the Armed Services Board of Contract Appeals,[12] denying Pavkov's appeal on this basis. In *Pavkov*, the Air Force agreed to provide various items of GFP, including eighty-seven stair nosings that the contractor would use to install several staircases. The Air Force kept the GFP in a fenced location that it maintained. Although representatives of the Air Force and the contractor met to inventory the GFP, the contractor's representative had to depart before inventorying the stair nosings. Six months later, the contractor notified the Air Force that only ten stair nosings were in the fenced area. To avoid delaying the project, Pavkov purchased substitute materials and later submitted a claim for the additional costs.[13]

The CAFC applied the delivery standard of the Uniform Commercial Code and held that the Air Force met its obligation by tendering delivery to Pavkov. This tender imposed a duty on Pavkov to inspect the property and either promptly reject or accept it. Since Pavkov did not promptly reject the GFP, it was deemed to have accepted it at the time of the inventory.[14] Not-

1. Comp. Gen. B-290470, B-290470.2, Aug. 19, 2002, 2002 CPD ¶ 133.
2. *Id*. at 2.
3. *Id*. at 7.
4. *Id*.
5. *Id*. at 8-9.
6. *Id*. at 10.
7. *Id*. at 11.
8. *Id*.
9. *Id*. at 11-12.
10. *Id.* at 19.
11. 279 F.3d 989 (2002).
12. *See* Franklin Pavkov Constr. Co., ASBCA No. 50828, 00-2 BCA ¶ 31,000, at 153,597.
13. *Franklin Pavkov Constr.*, 279 F.3d at 992.
14. *Id.* at 998.

ing that the applicable GFP clause required the contractor to provide notice "within a reasonable time,"[15] the court found that the six-month delay was not reasonable and denied the appeal.[16] Lieutenant Colonel Tomanelli.

15. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.245-4(a)(1) (July 2002).

16. *Franklin Pavkov Constr.*, 279 F.3d at 998.

Pricing of Adjustments

"Don't Ask Me Why! That's Just the Way It Is!" The CAFC Remands an Eichleay Claim to the ASBCA for Originally Failing to Explain Its Rationale in Denying Any Eichleay Damages

In 1992, Charles G. Williams Construction, Inc. (CGW) contracted with the U.S. Army to improve and repair the Fitzsimmons Army Medical Center in two phases.[1] As a result of differing site conditions, drawing defects, and continued government occupancy of the work area during Phase I, the parties negotiated various price adjustments and contract extensions through numerous bilateral modifications. CGW reserved its right, however, to seek impact damages later and to include delay costs under the Eichleay formula.[2] The government subsequently terminated the second phase of the work for convenience. After settlement negotiations stalled, CGW appealed the deemed denial of additional price adjustment claims and its termination settlement proposal to the Armed Services Board of Contract Appeals (ASBCA).[3]

Concerning CGW's claim for extended and unabsorbed overhead, the board found:

> CGW claims $98,642 for 330 days of "extended overhead/unabsorbed overhead" allegedly incurred as a result of the drawing defects, differing site conditions and Government occupancy of the work area. The claimed amount is an "Eichleay" calculation. The [Defense Contract Audit Agency] auditor found that the overhead for the entire period of extended contract performance was "fully absorbed by the basic contract, contract modifications, and other projects." He further found that [the appellant] used both variable and fixed overhead expenses in computing the average daily overhead rate. On this evidence, CGW's Eichleay claim is not proven.[4]

The board stated this conclusion as a finding of fact, but did not provide any further analysis in the decision portion of its opinion.[5]

In the subsequent appeal, the Court of Appeals for the Federal Circuit (CAFC) vacated and remanded that portion of the ASBCA decision concerning the Eichleay claim because the board failed to explain its reasoning adequately.[6] The court noted that Eichleay damages concern the recovery of home office overhead costs during government-caused delays of construction work.[7] The court also cited the two prerequisites for recovery of Eichleay damages as "(1) that the contractor be on standby; and (2) that the contractor be unable to take on other work."[8] Specifically, the board noted:

> The proper standby test focuses on the delay or suspension of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform. . . . The second prong—the contractor's inability to take on outside work—requires "the government to demonstrate that it was not impractical for the contractor to take on replacement work and thus avoid the loss. . . ." If both of these requirements are satisfied, the contractor has shown that it had unabsorbed general overhead for which it is entitled to Eichleay damages.[9]

The court found that "the Board did not mention, let alone discuss, either of these [prerequisites]."[10] The court also criticized the board for merely noting the Defense Contract Audit Agency (DCAA) auditor's finding without applying its own analysis:

1. Charles G. Williams Constr., Inc., ASBCA No. 49,775, 00-2 BCA ¶ 31,047.

2. *Id.* at 153,321. The *Eichleay* formula is used for calculating a contractor's overhead that was not allocated as a contract cost because of alleged government caused delay and usually referred to as "unabsorbed overhead." Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688.

3. *See* Charles G. Williams, Inc., ASBCA No. 49,775, 00-2 BCA ¶ 31,047.

4. *Id.* at 153,321.

5. *See id.*

6. *See* Charles G. Williams Construction, Inc. v. White, 271 F.3d 1055 (Fed. Cir. 2001).

7. *Id.* at 1056.

8. *Id.* at 1058 (quoting Interstate Gen. Gov't. Contractors, Inc. v. West, 12 F.3d 1053, 1056 (Fed. Cir. 1993)).

9. *Charles G. Williams Constr.*, 271 F.3d at 1058 (quoting West v. All State Boiler, Inc., 146 F.3d 1368, 1381 (Fed. Cir. 1998); *Interstate Gen. Gov't Contractors*, 12 F.3d at 1056).

10. *Charles G. Williams Constr.*, 271 F.3d at 1058.

> The Board's function in this case was itself to determine whether Williams had established its case for Eichleay damages, not to determine whether the auditor's "finding" that Williams had not done so was supported by the record. The Board was entitled to give the auditor's evidence and testimony, like that of any other evidence, whatever weight it concluded it should have. Under the Contract Disputes Act, however, it is the function and responsibility of the Board, and not of the auditor, to decide the question of entitlement.[11]

On remand, the board provided additional findings specifically on the standby prerequisites for an Eichleay claim.[12] The board ultimately decided that CGW failed to prove the standby prerequisite, and because of this initial failure of proof, did not need to address the second prerequisite of whether CGW was unable to take on other work.[13]

Another Example of the Difficulty in Proving Damages Without Using an Actual Damages Approach

Last year's Year in Review[14] discussed the 2001 ASBCA decision in NavCom Defense Electronics, Inc.,[15] a case which "serves as a reminder of just how difficult it is for contractors to demonstrate that they are entitled to a jury verdict method of proof."[16] This year, in Propellex Corp.,[17] the ASBCA reminded a contractor of just how difficult it is to prove damages using the modified total cost method.[18] Propellex had two contracts for the production of MK 45 primers "used for the propelling charge of the 5-inch 54 caliber gun."[19] The government rejected four lots of Propellex primers for exceeding the maximum moisture content. Eventually, the government accepted the rejected lots with price reductions.[20] Propellex claimed, however, that the government moisture content testing was flawed, and it incurred $1,790,065 in additional costs due to production delays and investigation costs for a non-existent moisture contamination problem.[21] Propellex used the total cost method in calculating its claim for increased costs.[22] It later adjusted its $1,790,065 claim to "$1,356,580 on a modified total cost basis."[23]

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11. *Id*. at 1059 (citing the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000)).

12. *See* Charles G. Williams Construction, Inc., ASBCA No. 49,775, 02-1 BCA ¶ 31,833.

13. *Id*. at 157,278.

14. Major John J. Siemietkowski, et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002 [hereinafter *2001 Year in Review*].

15. ASBCA Nos. 50,767, 52,292-98, 01-2 BCA ¶ 31,546.

16. *2001 Year in Review, supra* note 14, at 62.

17. ASBCA No. 50,203, 02-1 BCA ¶ 31,721.

18. Last year's *Year in Review* also reported on a contractor's successful use of a modified total cost method approach. *See 2001 Year in Review, supra* note 14, at 62; Baldi Brothers Contractors v. United States, 50 Fed. Cl. 74 (2001).

19. *Propellex*, 02-1 BCA ¶ 31,721, at 156,717.

20. *Id*. at 156,722.

21. *Id*. at 156,726.

22. As last year's *Year in Review* stated:

> 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.

2001 Year in Review, supra note 14, at 62 n.788 (citing Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302, 321-24 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990)).

23. *Propellex*, 02-1 BCA ¶ 31,721, at 156,727.

Propellex prevailed on the entitlement portion of its claim because the board determined that the government had not established "that it conducted the [moisture testing] in accordance with the contract testing requirements."[24] The board also found, however, that Propellex was only entitled to $6921 for consultant fees and costs related to its moisture contamination investigation and $25,497 for attorney fees in preparing its claim.[25] In using the modified total cost method to deny the remainder of the claim, the board noted that claimants must prove four elements, established in Servidone Construction Corp. v. United States,[26] to recover under the total cost method:

> To recover under the total cost method of quantifying an equitable adjustment, the contractor has the burden of establishing the following elements: (1) the impracticability of proving actual losses directly; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) lack of responsibility for the added costs.[27]

The board held that "Propellex failed to establish two of the four required elements of proof of a modified total cost recovery."[28] Specifically, Propellex failed to establish the first element, the impracticability of proving actual costs directly, because it failed to prove that it could not segregate and estimate its costs for the black powder moisture investigation.[29] Interestingly, the Board used Propellex's ability to approximate excess costs that were not due to the government's flawed moisture testing as evidence that Propellex presumably could have proved its actual losses directly.[30] The board also found that Propellex failed to establish the fourth required element in proving its lack of responsibility for the added costs. The board stated that "[t]he most serious failure of Propellex's modified total cost proof is that it did not exclude from the claim amounts, costs . . . not attributable to black powder moisture investigation, including the costs" that were associated with specific non-moisture related corrections and testing.[31] Major Kuhn.

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24. *Id.* at 156,729.

25. *Id.* at 156,731.

26. 931 F.2d 860 (Fed. Cir. 1991).

27. *Propellex*, 02-1 BCA ¶ 31,721, at 156,729.

28. *Id.* at 156,730.

29. *Id.*

30. These unrelated excess costs formed part of Propellex's modifications to its initial total cost method calculation that resulted in a modified total cost method calculation. *Id.*

31. *Id.*

Value Engineering Change Proposals

Last year, the courts announced two noteworthy decisions in the rarely reported area of Value Engineering Change Proposals (VECPs). Both cases dealt with the government's attempts to avoid paying contractors for incurred savings. Although the government prevailed in one decision, the long-term effect of these cases may be to produce an environment in which contractors will distrust the government's "assurance" that it will share any savings resulting from contractor-suggested changes.

What's Our Advantage in Acting Like This?

In *Vantage Assocs., Inc. v. England*,[1] the Court of Appeals for the Federal Circuit (CAFC) overturned an Armed Services Board of Contract Appeals (ASBCA) decision[2] that held that the government correctly rejected a VECP because the contract at issue was already closed by the time the contractor submitted it. The Navy awarded Vantage a contract on 30 September 1991 to produce several different "underwater marking devices used by dolphins in the government's Marine Mammal System."[3] One of these devices contained a glass-filled polyethylene substance manufactured by a different company. The contract contained the FAR Value Engineering Clause.[4] Vantage completed delivery of all but one of the items required under this contract on or before 22 September 1993. The one missing item was a five-dollar spare part that the government never noticed was missing and for which Vantage never submitted an invoice.[5]

Without notifying Vantage, the government closed out the contract on 31 August 1995. On 18 January 1996, Vantage notified the government that it had found a substitute material that could be used in lieu of the glass-filled polyethylene material and which it felt would achieve a 90% cost reduction for the government.[6] On 28 January 1997, the government advertised a follow-on contract for the underwater marking devices that identified Vantage's substitute material. On 4 March 1997, Vantage told the government that it wished to submit a VECP; the government responded that Vantage would need to submit the information required by FAR section 52.248-1(c). Vantage submitted a VECP on 1 May 1997. The government awarded Vantage the follow-on contract for the marking devices on 20 August 1997.[7]

Thereafter, the contracting officer determined that there was no open contract when Vantage submitted the VECP and rejected it. The opinion does not explain the logic behind this decision; the contracting officer may have reasoned that the contractor's entitlement to compensation for the proposed change was governed by the Value Engineering Clause, and that this clause ceased to apply upon contract termination or close-out. Vantage appealed this determination to the ASBCA. The board ruled in favor of the government, finding that the government's closure of the contract on its books on 31 August 1995 was conclusive. The board reasoned that the outstanding part of the contract was *de minimis* in value, and that nearly four years had elapsed "between what amounted to contract completion on 22 September 1993 and the submission of the VECP on 1 May 1997."[8] In its ruling, the board distinguished an earlier board decision in which there were significant quantities of undelivered items.[9]

On appeal, the CAFC first analyzed the FAR provision governing contract completion.[10] This provision requires: (1) that the contractor deliver and the government inspect and accept all supplies; or (2) that the government notify the contractor that it considers the contract to have been completed. The CAFC noted that neither of these conditions had been met; therefore, it held that Vantage's initial contract with the government was still open when Vantage submitted its VECP.[11] Perhaps the Navy took a "penny-wise, pound foolish" approach to the value engineering process in this case. One policy behind making payments under the Value Engineering Clause is to encourage other contractors to make VECPs, thus saving the government money in the long run. Given that policy, it is unclear why the government would not want to make every effort to pay con-

1. No. 01-1073, 2001 U.S. App. LEXIS 23566 (Fed. Cir. Oct. 9, 2001).

2. *See* Vantage Assocs., Inc., ASBCA No. 51418, 00-2 BCA ¶ 31,141.

3. *Vantage Assocs*., 2001 U.S. App. LEXIS 23566, at *1.

4. *See* General Servs. Admin. et al., Federal Acquisition Reg. 52.248-1 (July 2002).

5. *Id*.

6. *Id*.

7. *Vantage Assocs*., 00-2 BCA ¶ 31,141, at 153,793.

8. *Id*. at 153,794.

9. *Id.*

10. *See* FAR, *supra* note 4, at 4.804-4.

11. *Vantage Assocs*., 2001 U.S. App. LEXIS 23566, at *10-11. The court remanded the case to the board for further consideration of Vantage's VECP. *Id.*

tractors like Vantage, particularly when no clear legal authority indicated that the contract was closed.

Contractor Is Up-the-Creek for Failing to Comply With the Value Engineering Clause Requirements

Another noteworthy case dealing with a VECP is *C.A. Rasmussen, Inc. v. United States*.[12] On 11 June 1997, the Corps of Engineers awarded Rasmussen a contract for the improvement of a creek channel to provide better flood protection. The Statement of Work included a requirement to construct a stone protection channel using stone excavated from the channel bed.[13] By October 1997, Rasmussen had excavated 60,000 cubic meters of material from the channel bed. This yielded a total of less than 3000 cubic meters of stone suitable for use in building the protection channel. Although the parties estimated that Rasmussen would need a total of 9100 cubic meters of stone to build the protection channel, it would have to excavate and sort through an additional 183,000 cubic meters of material to yield the amount of stone needed.[14]

Continuing to excavate and sort through the remaining channel bed material would have cost the government sixteen dollars per cubic meter. Realizing that it would be less expensive to import the stone, Rasmussen met with the contracting officer on 27 October 1997 and proposed to import the stone from a local river. The government accepted Rasmussen's proposal and paid Rasmussen an additional $467,760 to compensate it for the cost of importing the stone. Subsequently, Rasmussen submitted a claim for an additional $1,632,184, which representing its share of the savings that the government incurred as a result of "value engineering services" associated with recommending the stone importation.[15] The parties engaged in settlement discussions, without success. Ultimately, the court determined that there was a deemed denial of Rasmussen's claim.[16]

At trial, the government asserted that VECPs had to be submitted in writing, and that Rasmussen's oral proposal was insufficient. The government alternatively argued that Rasmussen failed to comply with the requirements of the Value Engineering Clause in the contract.[17] The clause required Rasmussen's VECP to include such things as a description of the difference between the existing contract requirements and proposed contract requirements, an estimate of the costs the government would incur in implementing the VECP, an estimate of the cost savings, and an indication of when the VECP must be accepted by the government to maximize the cost savings.[18] The court found that Rasmussen had complied with none of these requirements.[19]

Rasmussen argued that the court should not strictly construe the regulatory requirements, and that its failure to include this information should not be fatal to its claim.[20] Rasmussen cited two prior board decisions that held that the failure to comply with the value engineering regulations was not fatal to recovery. The court distinguished these prior decisions on the basis that their only deficiency was the failure to label the VECP as a VECP, and granted the government's motion for summary judgment.[21]

The *Rasmussen* result, by giving the contractor only the additional costs it incurred to import the stone, actually gave the government a windfall because the government obtained the full benefit of Rasmussen's cost reduction suggestions. In *Rasmussen*, the government, and later the court, chose to interpret the FAR strictly to the immediate detriment of the contractor. None of the technical deficiencies, however, appears to have prejudiced the government. Absent prejudice, a broader interpretation of the FAR provisions would encourage future contractors to submit VECPs and would not unfairly harm the government.

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12. 52 Fed. Cl. 345 (2002).

13. *Id*. at 346-47.

14. *Id*. at 348-49.

15. *Id*. at 348-50. Rasmussen apparently calculated the savings by multiplying the remaining volume of channel bed material by the unit cost of sixteen dollars, and then subtracting the $467,760 added cost to import the material instead. The court, however, did not discuss this calculation. *Id.*

16. *Id*. at 348.

17. *Id.*; *see* FAR, *supra* note 4, at 52.248-3.

18. *Rasmussen*, 52 Fed. Cl. at 347 (discussing the requirements of the FAR Value Engineering Clause); *see* FAR, *supra* note 4, at 52.248-3(c).

19. *Rasmussen*, at Fed. Cl. at 351.

20. *Id*. at 350.

21. *Id*. (citing McDonnell Douglas Astronautics Co., ASBCA No. 19971, 76-2 BCA ¶ 12,117; Syro Steel Co., ASBCA No. 12530, 69-2 BCA ¶ 8046).

Removal of DFARS Clauses

Before 1 October 2001, the Department of Defense (DOD) had a specific supplemental clause that required contractors to submit VECPs in the format prescribed by *MIL-STD-973*.[22] That standard was cancelled in 2000, and on 1 October 2001, the DOD updated the Defense Federal Acquisition Regulations (DFARS) by deleting the supplemental VECP clause as well as the provision in the DFARS prescribing its use.[23] Major Sharp.

22. *See* U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 252.248-7000 (May 1994) [hereinafter DFARS].

23. *See* 66 Fed. Reg. 49,865 (Oct. 1, 2001) (deleting DFARS, *supra* note 22, at 252.248-7000).

Terminations for Default

The Latest A-12 Wranglings: Honey, This Letter from the Collection Agency Says We Owe $2.3 Billion

Last year's *Year in Review*[1] reported that the Court of Federal Claims (COFC), on remand from the Court of Appeals for the Federal Circuit (CAFC), dismissed the plaintiffs' complaint in the longstanding, multi-billion dollar A-12 litigation, *McDonnell Douglas Corp. v. United States*.[2] That decision, rendered on 31 August 2001, apparently left the Boeing Corp. (the successor to McDonnell Douglas) and General Dynamics Corp. billions of dollars in debt to the Navy.[3] Although the plaintiffs appealed that decision to the CAFC,[4] the parties spent most of the year in settlement talks.[5]

On 30 August 2002, the Navy Comptroller, Dionel M. Aviles, demanded that General Dynamics and Boeing pay the Navy $2.3 billion dollars, or the Navy would "refer the matter to the Defense Finance and Accounting Service for collection."[6] In response, General Dynamics called the letter "an unseemly negotiating tactic, and an apparent effort to gain advantage during settlement talks."[7] According to the Navy, the contractors owe a little over $1.3 billion in principal and $1 billion in interest. As of 30 September 2002, $191,804 in interest accrued each day. The letter concluded on a somewhat conciliatory note, stating that the Navy "fully support[s]" settlement discussions.[8]

Re-establishing a Delivery Schedule After Government Waiver: There's a Right Way and A Wrong Way

Generally, the government has the right to terminate a contract immediately upon a contractor's failure to deliver or perform on time.[9] When the government disregards the delivery schedule and encourages or condones continued performance, however, it waives the right to terminate, unless it re-establishes a delivery or performance schedule.[10] The government can reimpose the schedule either bilaterally or unilaterally.[11] Three boards of contract appeals recently considered variations on this scenario of failure to perform, waiver, and attempted reestablishment.[12]

In *Beta Engineering, Inc.*,[13] the Defense Supply Center Philadelphia (DSCP) contracted with Beta Engineering, Inc. (Beta Engineering) to supply lock-release levers[14] for aircraft

1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2001, at 64-65 [hereinafter *2001 Year in Review*].

2. 50 Fed. Cl. 311, 314 (2001).

3. Interestingly, an "industry official, who asked not to be named" told *Aerospace Daily* that "the judge never set an amount, nor did he make a ruling that anybody owed anyone any money." Nick Jonson, *Navy A-12 Compensation Demands Still Under Appeal*, AEROSPACE DAILY, Sept. 9, 2002, at 4, LEXIS, Aerospace Daily File.

4. *Outlook for Issues Affecting Federal Procurement in 2002*, 77 BNA FED. CONT. REP. 5 (Feb. 5, 2002) at 146 (stating that the plaintiffs filed an appeal notice on 30 November 2001 and that the government filed a notice of cross appeal on 14 December 2001).

5. *See Navy Rejects Settlement in A-12 Case, Demands $2.3B Payment by Sept. 30*, 78 BNA FED. CONT. REP. 9, Sept. 10, 2002, at 298; *Navy Demands $2.3 Billion from Boeing and General Dynamics in A-12 Dispute*, 44 GOV'T CONTRACTOR 33, ¶ 344 (Sept. 11, 2002).

6. Letter from The Comptroller of the Navy, Office of the Assistant Secretary of the Navy (Financial Management and Comptroller), to Michael J. Mancuso, Senior Vice President and Chief Financial Officer, General Dynamics (30 Aug. 2002), *available at* http://www.generaldynamics.com/news/press_releases/2002/Navy_A-12_Letter.pdf [hereinafter Aviles Letter].

7. Press Release, General Dynamics, General Dynamics Receives Payment Demand in A-12 Case: Demand Jumps the Gun on Settlement Talks and Appellate Litigation (Sept. 3, 2002), *available at* http://www.generaldynamics.com/news/press_releases/2002/News%20Release%20-%20Tuesday,%20September%203,%202002.htm.

8. Aviles Letter, *supra* note 6.

9. *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.249-8(a)(1)(i) (July 2002) [hereinafter FAR].

10. Waiver occurs if: (1) the government fails to terminate a contract within a reasonable period of time after the default; and (2) the contractor relies on the failure to terminate by continued performance, with the government's knowledge or consent. Devito v. United States, 413 F.2d 1147, 1153-54 (Ct. Cl. 1969).

11. *See, e.g.*, Beta Engineering, Inc., ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879, at 157,505 ("To reestablish a delivery schedule, the government could either (a) reach an agreement with the contractor on a new delivery schedule, or (b) unilaterally establish a reasonable new delivery schedule."); Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302, at 130,828.

12. Beta Engineering, Inc., 02-2 BCA ¶ 31,879; Rowe, Inc., GSBCA No. 14211, 01-2 BCA ¶ 31,630; Kadri Int'l Co., AGBCA No. 2000-170-1, 02-1 BCA ¶ 31,791.

13. ASBCA Nos. 53570, 53571, 02-2 BCA ¶ 31,879.

14. The "lock-release lever is also known as a belt-feed lever. It is the part of the ammunition feeding mechanism that fits into the cartridge of the M-2 .50-caliber aircraft machine gun." *Id.* at 157,495.

machine guns.[15] The contract required Beta Engineering to deliver first-article test samples (FATS) on a specified date.[16] A clause in the contract provided that if the contractor failed to deliver any FATS on time, "the Contractor shall be deemed to have failed to make delivery within the meaning of the Default clause."[17] The levers had to pass a detailed preliminary inspection before first article testing.[18]

Although Beta Engineering failed to meet the FATS submission deadline, 30 April 2001, the government procurement contracting officer (PCO) did not terminate the contract or notify Beta Engineering that it was delinquent.[19] After 30 April 2001, the PCO even authorized the contractor to use a different grade of steel and allowed the contractor to conduct a preliminary inspection. The Armed Services Board of Contract Appeals (ASBCA) found that these government acts and failures to act "disestablished 30 April 2001 as the deadline for submission of FATS."[20] On 17 May 2001, the contractor, with a government representative present, conducted a preliminary inspection. The inspection was not completed successfully. After the failed inspection, the contractor proposed a new date for a second FATS preliminary inspection. The PCO, however, took no action to reestablish a new FATS due date and failed to respond to the contractor's offer to submit new FATS, leaving Beta Engineering "in limbo."[21] The PCO terminated the contract on 15 August 2001.[22]

Citing an earlier decision, the board stated, "[w]e have held that a termination for default for failure to deliver a first article was improper where 'there was no enforceable first article delivery schedule in place at the time the government terminated the contract for default.'"[23] The board found that after Beta Engineering missed the FATS deadline, not only did the government fail to terminate the contract, but the government encouraged further performance by approving the lower-grade steel and by proceeding with preliminary inspections. The government thereby waived the FATS delivery due date. By leaving Beta Engineering in limbo about whether and when it could submit a second set of FATS, the government left itself "without an enforceable FATS delivery schedule."[24] The government, therefore, improperly terminated the contract for default.[25]

In *Rowe, Inc.*,[26] the General Services Administration (GSA) also faced missed delivery dates. After allowing the contractor, Rowe, to miss two delivery dates, however, the GSA contracting officer (CO) properly set a new deadline. When Rowe missed the new delivery date, the government was in a position to properly terminate the contract for default.[27]

The GSA awarded Rowe a contract for, among other items, "modified type IX vans with cut-off cabs."[28] The order required shipment by 27 August 1996.[29] A government inspection of Rowe's facility on 20 August 1996 revealed that Rowe had not received the chassis for the vans and would not meet the 27 August deadline. On 17 September 1996, the CO sent a "cure letter," demanding an explanation for the delay, a new shipment date, and consideration for the delay.[30] In two letters dated 4 October and 8 November 1996, Rowe indicated it could have the vehicles ready within fourteen days of receipt of the chassis

15. *Id.* at 157,495.

16. *Id.* There was some confusion over what that date was, but the board found that "both parties considered 30 April 2001 to be the deadline." *Id.* at 157,499.

17. *Id.* at 157,496 (referencing FAR, *supra* note 9, at 52.209-4(d)).

18. *Id.* at 157,500.

19. *Id.* at 157,499.

20. *Id.* at 157,500.

21. *Id.* at 157,502.

22. *Id.* at 157,503.

23. *Id.* at 157,504 (quoting Aviation Technology, Inc., ASBCA No. 48063, 00-2 BAC ¶31,046, at 153,315).

24. *Id.* at 157,505.

25. *Id.*

26. GSBCA No. 14211, 01-2 BCA ¶ 31,630.

27. *Id.* at 156,263.

28. *Id.*

29. *Id.*

30. *Id.* at 156,265.

and that it expected to receive the chassis on 7 December 1996. The CO then issued a unilateral modification "establishing a new shipment date of December 26, 1996." [31] When Rowe missed this new deadline, the parties exchanged letters, the government changed COs, and on 6 February 1997, the new CO issued a show cause letter.[32] Although the letter stated that the GSA was considering a default termination, it did not set a new delivery date.[33] In response, Rowe stated that it had received the chassis, but for the first time, Rowe alleged confusion over the specifications.[34] In a 4 April 1997 letter, after several exchanges concerning the technical specifications, the CO demanded a new production schedule from Rowe.[35] On 17 April 1997, although Rowe had requested approximately seventy additional days, the CO "unilaterally established a new completion date of May 14, 1997."[36] When Rowe failed to deliver the vehicles by 14 May 1997, the CO terminated the order.[37]

The General Services Board of Contract Appeals (GSBCA), determined that although the GSA had "overlooked Rowe's failure to meet two previously established delivery dates," it "established a new delivery date of May 14, 1997, and terminated [the order] immediately when Rowe failed to" deliver.[38] The critical issue, therefore, was whether the new, unilaterally-imposed, delivery date was reasonable.[39] The board made an "objective determination [from] the standpoint of the performance capabilities of the contractor at the time the notice [was] given."[40] The board found that the new date was "reasonable" for various reasons. First, Rowe had stated on two occasions that it could provide the vehicles fifteen days after receiving the chassis; the CO had given Rowe twenty-seven days from the date of the final (17 April) letter. Second, Rowe did not object to the new date. Finally, the record indicated that other contractors could have met the new delivery schedule. Thus, the GSBCA found the CO had established a reasonable schedule.[41] Rejecting Rowe's defenses to the termination,[42] the board denied the appeal.[43]

COFC OKs Monday-Morning Justification for Default Termination

In *Glazer Construction Co. v. United States*,[44] (*Glazer*) the COFC upheld a termination for default based on Davis-Bacon Act[45] (DBA) violations committed before, but discovered after, the government issued a default termination notice. In *Glazer*, in January 1998, the Department of Veterans Affairs (VA) terminated Glazer Construction's contract to renovate and alter a portion of a Veterans Hospital for "failure to complete the contract on time."[46] Glazer timely challenged the default termination decision, alleging that the VA abused its discretion.[47] In January 2002, the Department of Labor (DOL) notified Glazer Construction that it had committed DBA violations while working on the VA contract.[48] Glazer never challenged the DOL's allegations.[49] The government filed a motion for sum-

31. *Id*. at 156,266.

32. *Id*. at 156,266-67.

33. *Id*. at 156,267.

34. *Id*. at 156,268.

35. *Id*. at 156,270.

36. *Id*. at 156,271.

37. *Id*. at 156,272.

38. *Id*. at 156,273.

39. *Id*. Last year's *Year in Review* discussed this issue in the context of the A-12 litigation. *See 2001 Year in Review, supra* note 1, at 64-65.

40. *Rowe, Inc*., 01-2 BCA ¶31,630, at 156,273.

41. *Id*. at 156,274.

42. The board rejected Rowe's claims that contract ambiguities, defective specifications, and government-caused delay resulted in excusable delay on the part of Rowe. *Id*. at 156,274-76. The board also rejected Rowe's arguments that the "termination was improper due to various procedural defects." *Id.* at 156,276-77.

43. *Id*. at 156,277.

44. 52 Fed. Cl. 513 (2002).

45. 40 U.S.C. § 276(a)-(a)(7) (2000).

46. *Glazer Constr.*, 52 Fed. Cl. at 516.

47. *Id*. at 523.

mary judgment to dismiss Glazer's challenge of the termination.[50]

The VA asserted that Glazer Construction's DBA violations "committed during contract performance, although . . . discovered after the termination for default was issued," justified the termination decision.[51] In response, Glazer argued that because the CO's final decision did not rely on the DBA violations, the court did not have jurisdiction "to determine whether the Davis-Bacon Act . . . violations warranted a termination of the contract."[52] Glazer argued that, in the absence of a cure notice covering the DBA violations, the government could not rely on "newly discovered evidence" to justify the termination.[53]

The COFC rejected both arguments. Generally, the court cited the CAFC for the proposition that it would sustain "'a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason.'"[54] The court found that Glazer's jurisdiction argument overlooked numerous decisions allowing the government to justify a default termination on facts "not known to the government at the time of default, without mention of a contracting officer's final decision on the newly discovered evidence."[55]

Nor did the absence of a cure notice prevent the government from relying on the DBA violations as a basis for the termination. Because the "post-hoc justification" was incurable, Glazer Construction could not have been prejudiced by the lack of a cure notice.[56] A cure notice, issued after termination, would be "futile" because the contractor, "barred from the contract site," would have "no means to cure the defect."[57] Thus, having determined that Glazer Construction committed DBA violations, and concluding that clauses in the contract allowed the government to terminate the contractor for default for DBA violations,[58] the COFC granted the government's motion for summary judgment.[59]

ASBCA Overturns Default Termination Based on Contractor's Reasonable Response to Cure Notice & CO's Failure to Communicate

Although *Ryste & Ricas, Inc*.[60] did not break new legal ground, administrative contracting officers (ACOs) (and attorneys advising ACOs) should heed the decision's lessons. *Ryste & Ricas* involved the default termination of a $1.7 million repair and renovation contract. The contractor had to complete work "not later than 300 days after"[61] the date of the notice to proceed, 29 October 1997. The original completion date was 18 August 1998.[62]

In the course of the contract's performance, the parties signed four bilateral modifications. Although each modification increased the total cost of the contract, none included time extensions. The contractor requested time extensions for two of the modifications.[63] Rather than flatly deny the requests for more time, the CO stated on one occasion that the request "'will

48. *Id.* at 518. The government also alleged that Glazer committed Buy America Act violations. In a separate proceeding, discussed in the case, the contractor was disbarred on this ground. *Id.* at 520-23. Because the court found the DBA violations adequate to justify the termination, it did not determine whether the Buy America Act would also have been sufficient grounds. *Id.* at 531.

49. *Id.* at 520.

50. *Id.* at 523-24.

51. *Id.* at 525.

52. *Id.* at 526.

53. *Id.*

54. *Id.* at 526 (quoting Kelso v. Kirk Bros. Mech. Contractors, Inc., 16 F.3d 1173, 1175 (Fed. Cir. 1994) (quoting Joseph Morton Co. v. United States, 757 F.2d 1273, 1277 (Fed. Cir. 1985))).

55. *Id.* at 527-28 (citing *Kelso*, 16 F.3d at 1175; *Joseph Morton*, 757 F.2d at 1275; Daff v. United States, 31 Fed. Cl. 682 (1994), *aff'd on other grounds*, 78 F.3d 1566 (Fed. Cir. 1996); Balimoy Mfg. Co. of Venice, ASBCA No. 47,006, 95-2 BCA ¶ 27,854; Quality Granite Constr. Co., ASBCA No. 43,846, 93-3 BCA ¶ 26,073.)

56. *Id.* at 530.

57. *Id.*

58. *Id.* at 526.

59. *Id.* at 531.

60. ASBCA No. 51841, 02-2 BCA ¶ 31,883.

61. *Id.* at 157,512-13.

62. *Id.* at 157,514.

not be granted at this time, but in the event that additional time is needed to complete the contract it will be considered and a modification prepared at that time.'"[64] The CO's own analysis indicated that the modifications merited time increases, but fewer days than the contractor requested.[65]

In June, the CO provided a cure notice to the contractor for "failure to adhere to the progress schedule." In response, the contractor requested sixty days for the change orders that it had already issued, and forty-five days for rain delays.[66] The CO again equivocated, stating that "we would visit time extensions when we got closer to the end of the project."[67] The CO did not tell the contractor that he considered 105 days unreasonable. Meanwhile, the contractor believed that the schedule adding 105 days was in effect because "[n]o one said anything otherwise."[68] The board noted that there were no indications that the CO told the contractor "that they differed so greatly in the proper length of the time extension[s]."[69] In addition, the government failed to produce evidence showing that the CO "analyzed progress problems against a specified completion date."[70]

On 4 August 1998, the CO issued a second cure notice, predominantly focusing on the failures of two subcontractors. On 12 August 1998, the contractor replied, indicating that it had fixed the problems with both subcontractors.[71] Nonetheless, on 14 August 1998, the CO terminated the contract for default.[72]

The board provided several reasons for finding that the CO abused his discretion. First, the CO did not provide any time extensions for any of the four modifications and did not "even adequately consider whether time extensions were appropriate."[73] Second, the contractor reasonably replied to the government's August cure notice, addressing each area of concern. Third, the CO did not analyze progress problems "against a specified completion date."[74] Finally, the CO failed to set a final completion date or tell the appellant that their views about time extensions varied so greatly.[75]

Similar considerations convinced the ASBCA to overturn a default termination in *Bison Trucking & Equipment Co.*[76] In *Bison Trucking*, the CO terminated a contract for erosion repair for default before the contract's completion date.[77] As in *Ryste & Ricas, Inc.*,[78] the board found "no evidence that the contracting officer did the required analysis of the time and work necessary to complete the contract."[79] These cases should remind ACOs to analyze and document work and time remaining until completion carefully, before they terminate a contract on the

63. *Id*. at 157,514-15.

64. *Id*. at 157,514.

65. *Id*. For Modification P00002, the contractor requested thirty-three extra days. Before termination, the CO believed the contractor should have received four to five days. After termination, the CO raised the figure to five to ten days. *Id.*

66. *Id*. at 157,515.

67. *Id*. at 157,515-16.

68. *Id*.

69. *Id*. at 157,514.

70. *Id*. at 157,517.

71. *Id*. at 157,516-17.

72. *Id*. at 157,517.

73. *Id*. at 157,518.

74. *Id*.

75. *Id*.

76. ASBCA No. 53390, 01-2 BCA ¶31,654.

77. *Id*. at 156,385.

78. ASBCA No. 51841, 02-2 BCA ¶31,883.

79. *Bison Trucking*, 01-2 BCA ¶ 31,654, at 156,385. In *Bison Trucking*, the government also never responded to the contractor's reasonable request "for the location the Government would accept for a test boring." *Id*.

grounds that the contractor will be unable to complete the work before the scheduled completion date.

Withholding Payment Under Contract Specifications Cannot Exceed the Amount Allowed Under the FAR

In *All-State Construction, Inc.*,[80] the government awarded All-State Construction, Inc. (All-State), a contract to construct a hazardous waste facility.[81] The government made periodic progress payments under the FAR payments clause in the contract. During performance, All-State fell behind schedule. As a result, the CO informed All-State that he was recommending a default termination. Soon thereafter, the CO refused payment of an invoice. The amount retained on that invoice, coupled with amounts previously retained by the government, constituted thirty-eight percent of All-State's "otherwise undisputed earned amount for completed work."[82] The CO withheld that amount to cover liquidated damages and reprocurement costs if the contract was later terminated for default. Not long after the CO refused payment of the invoice, the government terminated the contract for default.[83]

All-State moved for a summary judgment, seeking to convert the default termination into one for convenience. All-State alleged that retaining thirty-eight percent of its earned progress payments was a material breach of the contract.[84] The All-State contract incorporated the FAR Payments Clause for Fixed Price Construction Contracts, which provides that "if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved."[85] The government, however, relied on a clause in the contract that provided:

> The obligation of the Government to make any of the payments required under any of the provisions of this contract shall in the discretion of the Officer in Charge of Construction, be subject to . . . [a]ny claims which the Government may have against the Contractor under or in connection with this contract.[86]

The ASBCA held that the government could not interpret this contract provision as allowing retention "in excess of the express limit in the FAR Payments clause."[87] Nor could the government rely on the right to common law set-off. By placing the FAR payments clause in the contract, the government limited its common law rights to those specified in the FAR clause. Therefore, the government had breached the contract, relieving All-State of its obligation to perform. All-State was not in default and the board converted the termination to one for the convenience of the government.[88]

When Congress Changes the Rules, Is That Repudiation or an Immediate Breach?

In the context of federal housing loans, the Supreme Court answered that question in *Franconia Associates v. United States*.[89] The answer—repudiation—determined the timeliness of Tucker Act claims.[90]

Pursuant to a federal program, the Farmers Home Administration (FmHA) gave the petitioners low-interest mortgage loans in exchange for their agreement to use the mortgaged properties for low and middle-income housing, and to adhere to other restrictions "during the life of the loan."[91] The loans' promissory notes allowed the borrowers to prepay the loans at any time, relieving them of the program's restrictions on the use of the mortgaged properties.[92] After the petitioners entered into these loans, Congress passed the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA).[93] The ELIHPA

80. ASBCA No. 50586, 02-1 BCA ¶ 31,794.

81. *Id*. at 157,019.

82. *Id*. at 157,020.

83. *Id.* The CO stated that "'it is not prudent at this time to make further payments to you until we are sure that sufficient funds are available in the contract to cover the costs of reprocurement and the assessment of liquidated damages if the contract is terminated for default.'" *Id*.

84. *Id*. at 157,019.

85. FAR, *supra* note 9, at 52.232-5.

86. *All-State Constr.*, 02-1 BCA ¶ 31,794 at 157,020.

87. *Id*. at 157,021.

88. *Id.*

89. 536 U.S. 129 (2002).

90. 28 U.S.C. § 1491 (2000).

91. *Franconia*, 536 U.S. at 140.

imposed permanent restraints on prepayment of FmHA loans. Over nine years later, in 1997, the petitioners filed suit, alleging that the ELIHPA "effected . . . a repudiation of their contracts."[94] The CAFC affirmed the COFC's dismissal on timeliness grounds. The lower courts reasoned that 28 U.S.C. § 2501 requires plaintiffs to file all Tucker Act claims within six years of the date the claims "first accrued," and that the petitioners' claims first accrued upon enactment of the ELIHPA.[95] According to the CAFC, "passage of the ELIHPA constituted an immediate breach" of the loan agreements and "therefore triggered the running of the limitations period."[96] Because the plaintiffs filed their suit over nine years after the ELIHPA's enactment, the claims were untimely. The Supreme Court disagreed, finding that the passage of the ELIHPA served as "a repudiation of the parties' bargain, not a present breach of the loan agreements."[97]

The lower courts determined that the only government performance required was "'to keep its promise to allow borrowers an unfettered prepayment right.'"[98] Viewed in that manner, the government's "'continuing duty was breached . . . immediately upon enactment of the ELIHPA because, by its terms, the ELIHPA took away the borrowers' unfettered right of prepayment.'"[99]

The Supreme Court saw things differently, concluding that the government's promised performance was "an obligation to accept prepayment."[100] Thus, the time for government performance arose only when a borrower attempted to prepay a mortgage loan. The ELIHPA renounced the government's contractual duty to accept prepayment "*before* the time fixed . . . for performance."[101] The ELIHPA, therefore, effected a repudiation, not an immediate breach. A present breach would occur if a petitioner treated ELIHPA as a breach by filing suit before the performance period or when the government refused a prepayment.[102]

Two "practical considerations" buttressed the Court's conclusion. First, adopting the government's view of section 2501 would "seriously distort the repudiation doctrine" in Tucker Act suits.[103] The government's approach would take away the very flexibility that the repudiation doctrine intends to bestow on aggrieved plaintiffs—the flexibility to sue immediately or wait until the performance date.[104] Second, the government's interpretation "would surely proliferate litigation" by forcing plaintiffs to choose between suing soon after repudiation or "forever relinquishing their claims."[105]

Finally, the government argued that the repudiation doctrine could not apply to congressional acts because Congress was not free to change its mind later and perform its contractual duties. The Court rejected this argument as well. Just as Congress passed a law renouncing its contractual duties, it could also pass a subsequent statute before the time for performance, retracting the earlier renouncement.[106]

Reversing the lower court judgment, the Court concluded that "each petitioner's claim is timely if filed within six years of a wrongly rejected tender of payment."[107]

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92. *Id*.

93. Pub. L. No. 100-242, 101 Stat. 1877 (codified as amended at 42 U.S.C. § 1472(c) (2000)).

94. *Franconia*, 536 U.S. at 140.

95. *Id*.

96. *Id*.

97. *Id*.

98. *Id*. at 143 (quoting Franconia Assocs. v. United States, 240 F.3d 1358, 1363 (Fed. Cir. 2001)).

99. *Id*. (quoting *Franconia*, 240 F.3d at 1364).

100. *Id.* at 146.

101. *Id*. at 147.

102. *Id*.

103. *Id.* at 148.

104. *Id.* at 149.

105. *Id*.

106. *Id*. at 149-50.

107. *Id.* at 150.

The Fulford *Doctrine Lives*

The "*Fulford* Doctrine" allows a contractor to challenge a default termination as part of a timely appeal from the assessment of excess reprocurement costs, even if the appeal is filed more than a year after termination.[108] The doctrine originated in a 1955, pre-Contract Disputes Act (CDA) ASBCA decision.[109] Applying the *Fulford* Doctrine often contradicts the literal time limitations set by the CDA,[110] which requires contractors to file an appeal of a default termination to an agency board of contract appeals within ninety days,[111] or to the COFC within twelve months.[112]

The GSBCA recently re-validated the *Fulford* Doctrine in *Deep Joint Venture.*[113] The GSA signed a lease with Deep Joint Venture on 31 August 1993.[114] Because the contractor failed to make satisfactory progress in the contracted building construction, the CO terminated the contract for default on 12 December 1994.[115] Between 27 July 1997 and 7 January 1998, the government sent Deep Joint Venture three demand letters for excess reprocurement costs. Deep Joint Venture then timely appealed the CO's assessment of excess reprocurement costs, and concurrently challenged the underlying default termination.[116]

The GSA urged the board to "revisit and overrule past decisions adopting and adhering to" the *Fulford* Doctrine.[117] The board declined to break from its precedent, observing that the COFC and most of the other boards of contract appeals that have considered the issue after CDA passage have adopted this doctrine.[118] The court also reasoned that the rationale underlying the doctrine—"preservation of principles of judicial economy"—remained sound under the CDA.[119] Finally, the doctrine does not actually violate "jurisdictional time limitations," but instead recognizes that the default clause allows a contractor to raise an excusability defense when the CO assesses excess costs.[120] Therefore, the board concluded,

> While we would not permit a contractor solely to seek, more than ninety days after receiving a default termination decision, a conversion of the default termination to one for the convenience of the Government, or to seek to recover convenience termination costs once the decision is final, we do permit the contractor to challenge the propriety of the termination action in defending against an assessment of excess costs of reprocurement.[121]

Lieutenant Colonel Benjamin.

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108. *See* Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914. The doctrine does not allow two bites at the apple, however; the parties need not litigate the merits of a default termination twice. *See* Phoenix Petroleum Comp., ASBCA No. 45414, 02-1 BCA ¶ 31,835 (holding that the appellant had a full hearing on the merits of a default termination appeal; therefore, the *Fulford* Doctrine did not require reinstatement of an appeal that had been dismissed with prejudice).

109. Fulford Mfg., Inc., ASBCA Nos. 2143, 2144, 1955 ASBCA LEXIS 970 (May 20, 1955).

110. 41 U.S.C. §§ 601-613 (2000).

111. *Id.* § 606.

112. *Id.* § 609(a)(3).

113. GSBCA No. 14511, 02-2 BCA ¶ 31,914.

114. *Id.* at 157,669.

115. *Id.* at 157,673.

116. *Id.* at 157,674.

117. *Id.*

118. *Id.* at 157,675.

119. *Id.* More specifically, the board stated:

> It makes little sense to require a contractor who does not want to contest the validity of a termination action in the absence of the assessment of excess reprocurement costs to challenge the default action immediately in order to preserve its ability to defend against a later contracting officer decision to seek reimbursement of costs.

Id.

120. *Id.*

121. *Id.* The board then proceeded to consider and reject Deep Joint Ventures' seven grounds for summary relief. *Id.* at 157,676-82.

Terminations for Convenience

Definitional Housekeeping—Finalized

Effective 29 July 2002, the Federal Acquisition Regulation (FAR) Councils finalized a rule discussed in last year's *Year In Review*,[1] 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.[2] The rule also replaces the abbreviated definition of "termination for convenience" in FAR section 17.103[3] with a fuller definition 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."[4] As proposed, the final 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). As proposed, the final 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."[5] As the FAR Councils intended, these amendments do not appear to "change the meaning of any FAR text or clause."[6]

The T4C Clause: A Clause with "Ancient Lineage," A Clause Not Easily Ignored

In *Dart Advantage Warehousing, Inc. v. United States*,[7] The Court of Federal Claims (COFC) vigilantly protected the government's ability to rely on a termination for convenience clause in the face of a termination on notice clause. On 6 September 1996, the U.S. Postal Service (USPS) awarded Dart Advantage Warehousing, Inc. (Dart) a two-year contract for warehousing services, with four two-year renewal options. On 25 September 1998, the USPS exercised the first two-year renewal in a modification. The modification also included a termination on notice clause, which provided:

> This contract may be terminated in whole or in part by either the Postal Service contracting officer or the contractor upon 180 days written notice. In the event of such termination, neither party will be liable for any costs, except for payment in accordance with the payment provisions of the contract for the actual services rendered prior to the effective date of the termination.[8]

On 26 August 1999, the USPS terminated the contract for default.[9] The COFC determined that the default termination was improper.[10]

The contract's default termination clause provided that an improper default termination would be converted to one for convenience. The convenience termination clause in the contract authorized the USPS to terminate the contract whenever the contracting officer (CO) "determines that termination is in the interest of the Postal Service."[11] Dart argued, however, that the termination on notice clause modified the convenience termination clause[12] and that the government was obligated to give Dart 180 days written notice before terminating the contract or pay damages.[13]

1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2001, at 71 [hereinafter *2001 Year in Review*].

2. Federal Acquisition Regulation; Definition of "Claim" and Terms Relating to Termination, 67 Fed. Reg. 43,513 (June 27, 2002) (to be codified at 48 C.F.R. pts. 2, 17, 31, 33, 49, and 52).

3. Termination for convenience refers to the "procedure which may apply to any Government contract, including multi-year contracts." GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 17.103 (July 2002) [hereinafter FAR].

4. 67 Fed. Reg. at 43,514.

5. *Id.*

6. *Id.* at 43,513.

7. 52 Fed. Cl. 694 (2002).

8. *Id.* at 696.

9. *Id.* at 697.

10. *Id.* at 702-03.

11. *Id.* at 703.

12. *Id.*

13. *Id.* at 706.

The court sought to reconcile the termination for convenience clause and the termination on notice clause by finding an "interpretation which harmonize[d] and [gave] meaning to all parts" of the contract.[14] The court determined that the two clauses were "different and independent ways to terminate a contract, [and] the two clauses [had] different purposes and provide[d] different rights and obligations."[15] Thus, the court would not render either clause meaningless.

The COFC also reviewed the long history of the government's right to immediately terminate a contractor for convenience.[16] In particular, the COFC noted the "Christian Doctrine," whereby the convenience termination clause is "read into" a contract as a matter of law, even when omitted. The COFC determined that a "clause with such ancient lineage, reflecting deeply ingrained public procurement policy . . . , applied to contracts with the force and effect of law even when omitted, [and] should not be materially modified or summarily rendered meaningless without good cause, which plaintiff has not supplied."[17] The court concluded that the termination on notice clause did not modify the termination for convenience clause, and that the latter clause would govern the measure of damages.[18]

DOTBCA Treats Government's Breach as Constructive T4C, Despite Contractor's Bankruptcy

In *Carter Industries*,[19] the Department of Transportation Board of Contract Appeals (DOTBCA) determined the measure of damages when the Department of Justice, Bureau of Prisons (FBOP) breached a contract while the contractor was in bankruptcy proceedings. In a prior proceeding, the board had determined that the FBOP had breached the contract by improperly refusing tender of goods. At the time the government breached the contract, Carter Industries (Carter) was undergoing bankruptcy proceedings. In the earlier proceeding, the board remanded the case to the parties to determine the amount of damages for the government's anticipatory breach.[20]

Carter claimed breach damages, including anticipatory profits. In response, the government argued that the anticipatory breach should be treated as a constructive termination for convenience. It reasoned that anticipatory profits are not available under the termination for convenience clause. Carter contended that the Bankruptcy Act[21] stay would have prevented any termination at the time the breach occurred; therefore, the "constructive termination for convenience defense is unavailable."[22]

After reviewing the most typical circumstances in which courts and boards have treated government breaches as convenience terminations, the board summarized the applicable law as follows: "[W]here at the time of breach the Government could have exercised its right to terminate the contract for the convenience of the Government, a contractor's damages will be limited to those that it would have received under the provisions of the Termination for Convenience clause."[23] The Bankruptcy Act stay prohibits the government from terminating the contract of a "debtor in possession" for default, absent permission from a bankruptcy court. Extending this reasoning, Carter asserted, the "FBOP could not have terminated the contract for convenience" without the permission of the bankruptcy court.[24] Therefore, the right to a convenience termination "was technically not available to the FBOP."[25]

The board found it unnecessary to decide whether the bankruptcy court would have had to approve a convenience termination. Regardless of the need for bankruptcy court approval, the board found that "if the contract contains the Termination for Convenience clause, the damages recoverable by a contractor in a breach of contract case are limited by the terms of that

14. *Id*.

15. *Id*.

16. *Id*. at 708.

17. *Id.* at 709 (discussing G.L. Christian & Assoc. v. United States, 312 F.2d 418 (1963), *cert. denied*, 375 U.S. 954 (1963), *reh'g denied*, 376 U.S. 929, 377 U.S. 1010 (1964)).

18. *Id*. at 710.

19. DOTBCA No. 4108, 02-1 BCA ¶ 31,738.

20. *Id*. at 156,784.

21. *See* 11 U.S.C. §§ 101, 106, 362, 1101-1114 (2000).

22. *Carter Industries*, 02-1 BCA ¶ 31,738, at 156,784.

23. *Id*. at 156,786.

24. *Id*.

25. *Id*.

clause."[26] The board limited recovery to the amount Carter "would have otherwise received had the contract been terminated for convenience on the day the contract ended."[27]

New Venture Not Precluded from Recovering Lost Profits upon Government Breach

In *Energy Capital Corp. v. United States*,[28] the Court of Appeals for the Federal Circuit (CAFC) rejected the government's invitation to establish a per se bar to lost profits for new ventures. Energy Capital Corp. negotiated an agreement with the Department of Housing and Urban Development (HUD) to finance energy improvements in HUD properties. Under the Affordable Housing Energy Loan Program (AHELP), Energy Capital "could originate loans to owners of HUD properties for three years, or until a cap of $200 million in loan originations was reached."[29]

The agreement allowed Energy Capital's loans to take the senior mortgage position, ahead of loans secured by first mortgages, so long as the first mortgagee consented. Energy Capital would obtain its capital from the Federal National Mortgage Association (Fannie Mae). Energy Capital would loan money at the Treasury rate plus 3.87% and repay Fannie Mae at the Treasury rate plus 1.87%. The remaining two percent would be Energy Capital's profit.[30] As a result of an article in the Wall Street Journal, the government terminated the agreement. The AHELP agreement did not contain a termination for convenience clause.[31]

At the COFC, the government conceded liability for breach of contract; the parties proceeded to trial to contest the amount of the damages. Energy Capital sought lost profits.[32] At trial, the COFC found that Energy Capital established the three elements needed to demonstrate entitlement to lost profits—causation, foreseeability, and reasonable certainty. On appeal, the government did not challenge any of the COFC's findings of fact.[33] Instead, the government urged the court to "adopt a per se rule that lost profits may never be recovered for a new business venture that was not performed."[34] The government argued that because neither Energy Capital nor any other party had ever performed this venture, the award of lost profits "was speculative and erroneous as a matter of law."[35]

The circuit court disagreed and restated the traditional elements a plaintiff must prove to recover lost profits:

> (1) the loss was the proximate result of the breach; (2) the loss of profits caused by the breach was within the contemplation of the parties because the loss was foreseeable or because the defaulting party had knowledge of special circumstances at the time of contracting; and (3) a sufficient basis exists for estimating the amount of lost profits with reasonable certainty.[36]

The CAFC recognized that determining the amount of a new venture's lost profits is difficult, but not legally impermissible.[37] The court also rejected, in turn, the government's subordinate arguments that it should bar the award of lost profits as a matter of law: that no other contractor performed the contract after HUD terminated Energy Capital (so as to establish infor-

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26. *Id.* Although this statement, standing alone, appears quite broad, earlier portions of the board's decision appear to limit this holding. For instance, the board seemed to recognize that had the government acted in bad faith, the constructive convenience termination device would be unavailable, even if the termination for convenience clause was in the contract. Earlier in the opinion, the board recognized that the "constructive convenience termination principle was unavailable where the Government had acted in bad faith." *Id.* at 156,786 (discussing Torncello v. United States, 231 Ct. Cl. 20 (1982)).

27. *Id.* Interestingly, the board stated, "Since the FBOP could have invoked the provisions of the Termination for Convenience clause, appellant's recovery is limited." *Id*. The preceding paragraph of the decision, however, explicitly leaves open whether FBOP could have properly terminated the contract. *Id*. at 156,785.

28. 302 F. 3d 1314 (Fed. Cir. 2002).

29. *Id*. at 1317.

30. *Id*. at 1318.

31. The article alleged that Energy Capital received the contract in return for significant fundraising for President Clinton. Three days later, the *Wall Street Journal* admitted that "no one has said that HUD officials knew" about the fundraising efforts. *Id*. at 1319.

32. *Id*.

33. *Id*. at 1320.

34. *Id*. at 1324.

35. *Id*. at 1325.

36. *Id*. 1324-25 (referencing Chain Belt Co. v. United States, 115 F. Supp. 701, 714 (Ct. Cl. 1953); RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981)).

37. *Id*. at 1326-27.

mation to determine damages); that no third party had ever performed this type of contract;[38] and that the lower court "erred as a matter of law by engaging in 'rampant' and 'unsupported' speculation" in determining that Energy Capital "would have realized profits."[39] The CAFC affirmed the lower court's award of lost profits.[40]

ASBCA Resolves a Potpourri of Pecuniary Problems Resulting from Partial T4C

In *Information Systems & Networks Corp.*,[41] the Air Force issued a $3 million delivery order (DO) to Information Systems & Networks Corporation (ISN) to "provide services, labor, tools, materials, personnel, and equipment to successfully implement . . . network and video teleconferencing hardware components."[42] A key factual issue was whether the DO was an incrementally funded order covering thirteen locations, as ISN asserted, or a fixed-price order for services at four locations, as the Air Force contended. The board definitively sided with ISN on this issue.[43] The Air Force partially terminated the DO for convenience, essentially leaving work on only four sites. ISN and the government disagreed about several elements of recovery for the partially terminated order.[44]

As a threshold matter, the Air Force contended that the FAR limited ISN's recovery to "the dollar amount remaining on [the] delivery order."[45] ISN asserted that its claims for "lost volume discounts, restocking charges, and early termination" of a lease "all represent constructive changes," and therefore "the general rule" limiting recovery to the contract price does not control.[46] The board agreed with ISN, finding it inappropriate to adhere strictly to the contract price in light of "unpriced changes" and "other modifications."[47] The board used ISN's proposal price for the DO, over $6 million, as the payment limit. Because ISN sought significantly less than $6 million, the "contract price" was not a factor in limiting recovery.[48]

ISN sought to recover lost volume discounts.[49] When the Air Force reduced the DO from thirteen sites to four, ISN reduced its orders from suppliers. The suppliers then charged ISN to recoup their volume discounts and for restocking.[50] The Air Force, asserting that the initial DO only covered four sites, argued that the decision to buy supplies for thirteen sites was a voluntary act by ISN. Because the board decided that the DO included all thirteen sites, it also determined that ordering supplies for all thirteen was not a voluntary act.[51] The board then recognized that FAR section 49.104[52] required the contractor to "perform the continued portion of the contract and [to] submit promptly any request for an equitable adjustment . . . supported by evidence of any increase in the cost, if the termination is partial."[53] ISN, therefore, could recover its "increased cost of performing nonterminated work which arose from the convenience

38. *Id.* at 1326.

39. *Id.* at 1328.

40. *Id.* at 1334. The circuit court rejected the COFC's use of a risk-free discount rate to calculate the value of the AHELP project and remanded the case to the COFC to determine final damages based upon a risk-adjusted discount rate. *Id.*

41. ASBCA No. 46119, 02-2 BCA ¶ 31,952.

42. *Id.* at 157,858. The delivery order was part of a larger contract for "Internetted Warfighting Analysis Capability" (IWAC). *Id.* at 157,852. The Air Force District of Washington (AFDW) contracted with the Small Business Administration (SBA) to provide "all labor, tools, supervision, and other services necessary to design, install, certify, and manage the integration of 7CG computers, computer system, and networks." *Id.* at 157,851. The SBA simultaneously contracted with ISN to perform the work. *Id*.

43. *Id.* at 157,875-76.

44. *Id.* at 157,867-68.

45. *Id.* at 157,873.

46. *Id*.

47. *Id.*

48. *Id.* at 157,875-76.

49. *Id.* at 157,876.

50. *Id.* at 157,868.

51. *Id.* at 157,876.

52. FAR, *supra* note 3, at 49.104.

53. *Info. Sys. & Networks*, 2002-2 BCA ¶ 31,952, at 157,876.

termination, i.e., lost volume discounts and vendor restocking charges."[54]

The Air Force also contested ISN's recovery of lease costs for a one-year lease that ISN entered into with U.S. Sprint for communication circuits.[55] According to the board, rental costs for unexpired leases are allowable convenience termination costs if the lease was reasonably necessary to perform the terminated contract, and upon termination, the contractor takes reasonable efforts to mitigate the costs of such leases. Because ISN's lease costs did not result from negligent or willful failure to prevent such costs, they were recoverable expenses.[56]

At termination, ISN was storing certain equipment that ISN had attempted to deliver to the government. The government failed to tell ISN what to do with the equipment.[57] Referencing FAR section 52.249-2, the court noted, the convenience termination clause excludes "destroyed, lost, stolen, or damaged" property from the amount payable to a terminated contractor.[58] Because the stored equipment did not fall into any of these categories, ISN was able to recover the value of the stored equipment from the Air Force "pending further delivery instruction."[59]

Finally, because the ISN had charged the Air Force a twelve-percent "handling fee" on major equipment under the thirteen-site DO, the profit rate for only four locations would have to be higher. The Air Force challenged this additional mark-up.[60] Again, the board sided with ISN. Because ISN could spread its overhead costs for equipment to only four sites instead of thirteen, the board determined that the proper rate would be the "overhead rate the contractor would have quoted upon the 'quantity as terminated,'" rather than the "original quantity."[61] The board allowed ISN to seek recovery for the increased mark up.[62]

Well-Nigh Irrefragable Standard Is Well-Nigh History

In the humdrum world of evidentiary standards, every law student learns about three traditional standards of proof: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. But in the world of government contracting, practitioners have been treated to (some would say, subjected to) the "well-nigh irrefragable" standard. Specifically, a contractor can overcome the strong presumption that government officials act in good faith only with "well-nigh irrefragable proof of the contrary."[63]

Most often, courts apply the standard to contractors that allege bad faith as a defense to a termination.[64] In *Am-Pro Protective Services, Inc. v. United States*,[65] the CAFC may have sounded the standard's death-knell in the context of a contractor's allegation of duress. In *Am-Pro Protective Services*, the Department of State (DOS) awarded the appellant a contract for security guard services in June 1989. Two years into performance, Am-Pro Protective Services Inc. (Am-Pro) filed a claim for additional compensation for "breaker hours."[66] The CO denied the claim in May 1991. In November 1991, Am-Pro sent the DOS a letter withdrawing the claim and agreed not to appeal the CO's final decision.[67] In May 1998, Am-Pro filed another claim for the same "breaker hours," and attached a letter alleging that it had submitted the November 1991 withdrawal under duress.[68] Am-Pro later submitted an affidavit

54. *Id*.

55. *Id*.

56. *Id*. at 157,876-77.

57. *Id*. at 157,877.

58. *Id*. (citing FAR, *supra* note 3, at 52.249-2(g)).

59. *Id*.

60. *Id*. at 157,877-78.

61. *Id*. at 157,878 (citing Fairchild Stratos Corp., ASBCA No. 9169, 67-1 BCA ¶ 6225).

62. *Id*.

63. *See, e.g*., Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (citing T & M Distribs., Inc. v. United States, 185 F.3d 1279, 1285 (Fed. Cir. 1999); Torncello v. United States, 681 F.2d 756, 770 (Ct. Cl. 1982); Schaefer v. United States, 633 F.2d 945, 948-49 (Ct. Cl. 1980); Kalvar Corp. v. United States, 543 F.2d 1298, 1302 (Ct. Cl. 1976); Grover v. United States, 200 Ct. Cl. 337, 344 (1973)).

64. *See, e.g*., *Kalvar*, 543 F.2d at 1302; *Torncello*, 681 F.2d at 770.

65. 281 F.3d 1234 (Fed. Cir. 2002).

66. *Id.* at 1236-37. Breaker hours were the "hours for lunch breaks and the two fifteen-minute breaks that Am-Pro was required to provide each guard." *Id.* at 1236.

67. *Id*. at 1237.

alleging that in November 1991, "the CO threatened to adversely impact its ability to contract with other agencies of government" if Am-Pro appealed the CO's final decision.[69]

A new CO refused to consider the second claim. Am-Pro then filed suit in the COFC. The COFC dismissed the suit because "Am-Pro had failed to contest the CO's 1992 final decision within the one-year limitations period set forth in the Contract Disputes Act."[70] In the U.S. Court of Appeals for the Federal Circuit (CAFC), Am-Pro argued that because its failure to file on time resulted from duress, the court should equitably toll the limitations period and find Am-Pro's release invalid.[71] The CAFC affirmed the COFC's decision that Am-Pro's argument could not survive the government's motion for summary judgment.[72]

The CAFC judged Am-Pro's allegation against the "high burden of proof necessary to overcome the presumption of good faith"[73] and used the case as an opportunity to clarify the "confusion" surrounding the standard necessary to prove government bad faith.[74] The CAFC found that of the three standards of proof recognized by courts, "preponderance of the evidence," "clear and convincing," and "beyond a reasonable doubt," "'clear and convincing' most appropriately describes the burden of proof applicable to the presumption of the government's good faith."[75] The court later stated that the clear and convincing standard "most closely approximates . . . 'well-nigh irrefragable.'"[76] After providing various courts' formulas and a dictionary definition of "irrefragable,"[77] the CAFC concluded that "showing a government official acted in bad faith is intended to be very difficult, and that something stronger than a preponderance of evidence is necessary."[78]

Regardless of the court's phrasing, it held that Am-Pro failed to create a "genuine issue of material fact about whether its inaction and its release resulted from duress by the government."[79] That is, the CAFC determined that "a reasonable fact finder could not find, by clear and convincing evidence, that the CO did not act in good faith."[80] The court reasoned that Am-Pro's only evidence was an "utterly uncorroborated" affidavit, lacking any suggestion that the government had a "specific intent to injure."[81] Moreover, Am-Pro prepared the affidavit six years after the government made the alleged threats, and there was ample evidence that Am-Pro's attorneys participated in preparing it.[82]

Is "well-nigh irrefragable" a relic of history? The CAFC seems to think so. Summing up the issue of good faith, the court wrote that "Am-Pro's belated assertions, with no corroborating evidence, therefore fall short of the clear and convincing or highly probable (*formerly* described as well-nigh irrefragable) threshold."[83]

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68. *Id*. at 1238.

69. *Id*. at 1237.

70. *Id*. at 1238.

71. *Id*.

72. *Id*. at 1243.

73. *Id*. at 1238.

74. *Id*. at 1239-40.

75. *Id*. at 1239.

76. *Id*. at 1239-40.

77. The word "irrefragable" means "[i]ncapable of being refuted or controverted." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 692 (New College ed. 1976).

78. *Am-Pro*, 281 F.3d at 1240.

79. *Id*. at 1240-41.

80. *Id*. at 1241.

81. *Id*. at 1241-42.

82. *Id*.

83. *Id*. at 1243 (emphasis added).

Moving Office Violated Implied Covenant of Good Faith and Fair Dealing

The COFC, without referring to "well-nigh irrefragable" or "clear and convincing," found that the government acted in bad faith in *Hubbard v. United States*.[84] In 1984, Hubbard contracted with the U.S. Navy Exchange (Exchange) to build a mini storage facility at Lemoore Naval Air Station (NAS) in California.[85] Hubbard agreed to return 17.5% of the gross revenue to the Navy Exchange. As part of the consideration from the Navy, the Navy "provided a rental office and check in/check out area near the site of the storage units, known as the Rent All Center.[86] Nine years later, in 1993, over Hubbard's vigorous objections, the Commander of NAS Lemoore moved the Rent All Center from its initial location near the storage facility to a more distant off-site location.[87]

Hubbard alleged that the move violated a requirement of the contract or breached the implied covenant of good faith and fair dealing. Although the COFC found that the office's location was not a contract term, the Navy had to "act reasonably . . . not to impair the ability of Mr. Hubbard to earn a fair return on his investment."[88] The commander provided two reasons for moving the Rent All Center. First, it was an eyesore. Second, he was concerned about the welfare of the Exchange workers. Finding the commander's testimony "simply not credible," the COFC rejected the commander's two stated reasons as "at best, pretexts."[89] The commander even admitted that he would have kept the Rent All Center in the same place had Mr. Hubbard increased the Exchange's share of the revenue. The court concluded with these harsh comments:

> This suggests that employee welfare and base aesthetics were important only so far as they would permit Captain Gorthy to extract more revenue from Mr. Hubbard. While the court can in some respects only hazard a guess as to Captain Gorthy's motives for the move, it is clear to the court that the stated reasons for the move were pretextual, and that the move was engineered in bad faith, without regard, indeed, with deliberate and bad faith disregard, for the legitimate business interests of Mr. Hubbard.[90]

Lieutenant Colonel Benjamin.

84. 52 Fed. Cl. 192 (2002).

85. *Id*. at 193.

86. *Id*. at 193-94.

87. *Id*. at 194.

88. *Id*. at 195.

89. *Id*. at 196.

90. *Id*.

Contract Disputes Act (CDA) Litigation

Jurisdiction

The Appeal of Uranium

Last year's Year in Review reported that in Florida Power & Light Co. v. United States,[1] the Court of Federal Claims (COFC) found that the transfer of enriched uranium from the Department of Energy (DOE) to private utility companies was not subject to the Contract Disputes Act (CDA)[2] as a purchase or sale of property, but was subject to the Tucker Act[3] as a provision of services by the DOE.[4] This distinction is important because, as the last Year in Review reported, the CDA, "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."[5] On appeal, the U.S. Court of Appeals for the Federal Circuit (CAFC) upheld the COFC's determination that the CDA did not apply to the uranium transfer.[6] Specifically, the CAFC held:

> In light of the pricing mechanism, the transaction is best characterized as a service provided by the government (the provision of a set amount of enrichment service for a particular price) rather than as a purchase or sale of personal property (the provision of a set amount of enriched uranium for a particular price).[7]

CAFC Reversal—District Court Stay Tolled the Statutory Time Period for Filing COFC Appeal

A contractor must file its appeal of a contracting officer's final decision with the COFC or the ASBCA before the statutory deadline expires or risk dismissal for lack of jurisdiction.[8] One recent case, however, demonstrates that there are exceptions to the rule. As last year's Year in Review reported, in International Air Response v. United States,[9] the COFC granted a government motion to dismiss because the contractor did not file its appeal until nineteen months after the final decision.[10] The contractor argued that an Arizona district court stay tolled the deadline.[11] The COFC held that "nothing in the All Writs Act gave the district court power to derogate from the jurisdiction of the Court of Federal Claims, or otherwise to affect the CDA's limitations provisions."[12]

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1. 49 Fed. Cl. 656 (2001).

2. 41 U.S.C. §§ 601-613 (2000). 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.

Id. § 602(a).

3. 28 U.S.C. § 1491 (2000).

4. Major John J. Siemietkowski, et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 71 [hereinafter *2001 Year in Review*].

5. *Id.* (citing 41 U.S.C. § 611).

6. Florida Power & Light Co. v. United States, 2002 U.S. App. LEXIS 20858 (Fed. Cir. Oct. 4, 2002).

7. *Id.* at *23.

8. The deadline for an appeal to the COFC is twelve months. 41 U.S.C. § 609(a) (2000). The deadline for an appeal to the ASBCA (or any Board of Contract Appeals) is ninety days. 41 U.S.C. § 606.

9. 49 Fed. Cl. 509 (2001).

10. *2001 Year in Review*, *supra* note 4, at 73.

11. *Int'l Air Response*, 49 Fed. Cl. at 511.

12. *Id*. at 512. The All Writs Act is codified at 28 U.S.C. § 1651 (2000).

The CAFC held, however, that tolling the one-year appeal period was appropriate because the government contracting activity did not appeal the district court's stay order.[13] Specifically, the CAFC determined that the "government was barred by the doctrine of res judicata from relitigating the issue of the Arizona district court's authority under the All Writs Act to issue the stay order."[14] Accordingly, the CAFC determined that the government was foreclosed from its collateral attack on the stay order, but ultimately did not decide whether the district court originally had authority to issue the stay order.[15]

Well-Nigh Irrefragable Proof Equals Clear and Convincing Proof

In Am-Pro Protective Agency, Inc. v. United States,[16] the CAFC affirmed a COFC dismissal for untimeliness where the contractor, Am-Pro, waited six years to file its appeal. Am-Pro alleged that the contracting officer had threatened to cancel the contract, refuse to exercise subsequent options, and prevent other contract awards if Am-Pro appealed her final decision.[17] The CAFC held that Am-Pro failed to overcome the strong presumption that the contracting officer acted in good faith in denying the claim.[18] While noting that the CAFC and its predecessors had "used the 'well-nigh irrefragable' language to describe the quality of evidence required to overcome the good faith presumption," the court also noted that prior decisions had also used the phrase "clear evidence."[19] From the three generally recognizable standards of proof courts most commonly used,[20] the CAFC held that the "clear and convincing" standard most closely approximated the somewhat archaic "well-nigh irrefragable" standard of proof language. Using the clear and convincing proof standard, the CAFC found that Am-Pro failed to rebut the presumption of good faith, primarily because Am-Pro waited six years after the alleged threats to make any complaint of wrongdoing.[21]

Late Is Late, Especially with Return Receipt Evidence

In Policy Analysis Co. v. United States,[22] the contracting officer mailed a certified letter dated 27 April 1999, terminating a purchase order for default, and received a return receipt dated 30 April 1999. The contractor, Policy Analysis Co. (PAC), used the services of a commercial mail drop named Press Building Mailbox Company to receive the termination notice. More than one year later, on 2 May 2000, PAC appealed its termination to the COFC.[23] PAC alleged that it had never received the termination notice sent by certified mail, but rather learned of the termination through an employee of the contracting activity, and subsequently received a facsimile copy of the 27 April termination notice on 10 May 1999.[24] The COFC, however, held that the commercial mail drop acted as PAC's agent to receive mail, and that the return receipt evidenced receipt of the termination notification on 30 April 1999. Accordingly, PAC was late in filing its appeal.[25]

The GSBCA Examines a Postmark

After failing to get an adequate declaration from the pro se appellant in Betty Hamlin v. General Services Administration,[26] the General Services Board of Contract Appeals (GSBCA) examined the postmark on the notice of appeal to determine when it was mailed. The GSBCA received the appeal notice on 29 April 2002, which was beyond the ninety-day time period to

13. Int'l Air Response v. United States, 302 F.3d 1363 (Fed. Cir. 2002).

14. *Id.* at 1368.

15. *Id.*

16. 281 F.3d 1234 (Fed. Cir. 2002).

17. *Id.* at 1237.

18. *Id.* at 1238-39.

19. *Id.* at 1239 (citing Librach v. United States, 147 Ct. Cl. 605 (1959); George v. United States, 166 Ct. Cl. 527, 531 (1964)).

20. "Courts generally recognize three standards of proof: 'preponderance of the evidence,' 'clear and convincing,' and 'beyond a reasonable doubt.'" *Id.* (citing Price v. Symsek, 988 F.2d 1187, 1191 (Fed. Cir. 1993)).

21. *Id.* at 1242.

22. 50 Fed. Cl. 626 (2001).

23. *Id.* at 627.

24. *Id.* at 628.

25. *Id.* at 631.

26. GSBCA No. 15,856, 02-2 BCA ¶ 31,934.

file an appeal after receipt of the contracting officer's final decision 18 January 2002.[27] Because the postmark's date was not clear, the GSBCA enlarged the postmark and modified the shading to conclude that the appellant had mailed its notice on 17 April 2002. Accordingly, the GSBCA determined that the appellant had filed the notice within ninety days.[28]

It Still Takes Two to Reconsider

Last year's Year in Review discussed Propulsion Controls Engineering,[29] where the ASBCA refused to extend the ninety-day deadline for filing an appeal when the contractor alleged that the contracting officer's reconsideration extended the deadline.[30] The ASBCA found no evidence of reconsideration by the contracting officer. The contracting officer merely declined to rescind her original decision after the contractor's attorney presented additional issues and requested rescission of the contracting officer's decision.[31] In Damson Builders Inc.,[32] the ASBCA continued to apply a strict standard to allegations of contracting officer reconsideration. Damson Builders submitted a letter on 25 March 1999, stating that it did not accept the contracting officer's 9 March 1999 final decision and asked that the letter serve as "our notice of claim dispute."[33] Damson Builders did not send the letter to the contracting officer, however, but to another government employee.

Over a year later, on 5 October 2000, Damson Builders notified the contracting officer that it had not sent its 25 March 1999 letter to the ASBCA, in the belief that its earlier submission would suffice. Damson Builders also requested that the contracting officer review the 9 March 1999 final decision. On 16 November 2000, the contracting officer notified Damson Builders that he would not review the final decision because Damson Builders had not presented any additional information for reconsideration.[34] On appeal, the ASBCA granted the government's motion to dismiss because the contracting officer's "actions could not have been reasonably construed to mean that the contracting officer had reconsidered his final decision."[35]

Last year's Year in Review warned that "a contracting officer may take actions that can be construed as reconsidering a claim which could inadvertently extend the filing deadline."[36] In DK & R Co.,[37] a contracting officer fell into this trap when she concluded her final decision with the following: "If you wish to further discuss this issue, I can be reached at [her telephone number]."[38] She also subsequently arranged a meeting between the appellant and the acquisition executive.[39] Based on this activity and her concluding remarks in the final decision, the ASBCA concluded that the "appellant reasonably and objectively could have concluded that the [contracting officer] was reconsidering her decision and thus it was not final."[40]

Is the Contractor Premature with Its Appeal or Has There Been a Deemed Denial?

As some contractors discover that they may be at risk for dismissal of their appeals for filing late, other contractors risk dismissal for appealing prematurely, before the contracting officer issues a final decision. In Fru-Con Construction Corp.,[41] the ASBCA allowed a protestor to continue with its appeal after the

27. *Id.* at 157,761.

28. *Id.* at 157,762. The GSBCA rules allow the date for filing a notice of appeal to occur on the earlier of its receipt at the board or on the date that is mailed. 48 C.F.R. § 6101.1(b)(5)(i) (2002).

29. ASBCA No. 53,307, 01-2 BCA ¶ 31,494.

30. *See 2001 Year in Review*, *supra* note 4, at 73.

31. *Propulsion Controls Eng'g*, 01-2 BCA ¶ 31,494, at 155,508.

32. ASBCA No. 53,172, 01-2 BCA ¶ 31,618.

33. *Id.* at 156,214.

34. *Id.*

35. *Id.* at 156,215.

36. *See 2001 Year in Review*, *supra* note 4, at 73-74.

37. ASBCA No. 53,451, 02-1 BCA ¶ 31,769.

38. *Id.* at 156,902.

39. *Id.*

40. *Id.* at 156,903.

41. ASBCA No. 53,544, 02-1 BCA ¶ 31,729.

contracting officer notified the parties that she would issue her final decision within thirteen months.[42] The board held that the appeal was not premature because such an unreasonably long period of time was a constructive denial of the protestor's claim.[43]

"Do You Choose Curtain Number One or Two? The Government Wins Either Way!" The ASBCA Treats a Motion to Dismiss for Lack of Subject Matter Jurisdiction as a Motion for Summary Judgment and Dismisses a Vietnam-Era Appeal.

On 23 August 2002, the ASBCA issued a summary judgment, dismissing the appeal in Thai Hai,[44] ending a thirty-five-year contract dispute saga. On 22 February 2001, Mr. Thai Hai submitted a claim for over $2 million for "back rent, rent due under the lease, the value of the warehouse property, allegedly destroyed due to the Army's negligence; and accrued interest" for warehouse property in Vietnam that the appellant had allegedly leased to the Army during the Vietnam War.[45] Before the ASBCA, the government filed a motion to dismiss Mr. Hai's appeal for lack of subject-matter jurisdiction because no contracting officer had ever signed the alleged lease document.[46] Because the parties presented and disputed facts that were outside the scope of the initial pleadings, the board determined that a summary judgment would be more appropriate. Accordingly, the ASBCA found that there was never any mutuality of intent to lease the property from the appellant in his individual capacity because the dealings with Mr. Hai had been in his capacity as an agent for the alleged owner. The board also found no evidence of an unambiguous offer and acceptance because the Army believed that the South Vietnamese government had control over the property and allowed the Army to occupy it rent-free.[47]

Remedies and Defenses

Don't Save Affirmative Defenses for a Rainy Day!

The ASBCA dealt the Air Force a hard blow in Phoenix Management, Inc.[48] when it barred the Air Force from asserting an affirmative defense in its brief without having first raised that defense in its answer. Phoenix Management, Inc. (PMI) provided airfield management services at Randolph Air Force Base, Texas, under a firm fixed-price contract awarded on 25 February 1997. During the option period for fiscal years (FY) 2000 and 2001, PMI was subject to a revised wage determination through the incorporation of a collective bargaining agreement (CBA).[49] The contracting officer had originally non-concurred with the inclusion of two management positions within the CBA, but the revised wage determination had not addressed this concern.[50] In a letter dated 20 October 1999, PMI submitted a request for equitable adjustment for the increased costs associated with the revised wage determination. The contracting officer denied the request as it related to the two management positions, however, because he "considered these positions as exempt salaried personnel."[51]

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42. *Id.* at 156,757. Under the CDA, there is a three-step analysis before a contractor may pursue an appeal of a deemed denial of its claim:

> A contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000 . . . issue a decision; or . . . notify the contractor of the time within which a decision will be issued. . . . The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor. . . . Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim.

41 U.S.C. §§ 605(c) (2000).

43. *Fru-Con Constr.*, 02-1 BCA ¶ 31,729, at 156,757; *see also* Midwest Props., LLC, Nos. 15,822, 15,844, 2002 GSBCA LEXIS 160 (Aug. 1, 2002). The GSBCA held that Midwest Properties, LLC was immediately entitled to appeal the contracting officer's letter even though it did not meet the final decision requirements. The board found that the letter was "in essence" a final decision because the letter unequivocally provided the contracting officer's position without any suggestion that he was not open to negotiations. *Id.*

44. ASBCA No. 53,375, 02-2 BCA ¶ 31,971.

45. *Id.* at 157,919.

46. *Id.* at 157,920.

47. *Id.* "Although the Federal Rules of Civil Procedure do not apply to the Board as an administrative tribunal, [the Board] can look to them for guidance, particularly in areas our rules do not specifically address." *Id.* at 157,920 (citing Dennis Anderson Constr. Corp., ASBCA Nos. 48,780, 49,261, 96-1 BCA ¶ 28,076, at 140,188). The board looked to Federal Rule of Civil Procedure 12(b) to determine that it should treat the government's motion as a motion for summary judgment when "matters outside the pleadings are presented and not excluded by the tribunal." *Id.*

48. ASBCA No. 53,409, 02-1 BCA ¶ 31,704.

49. *Id.* at 156,587.

50. *Id.* at 156,587-88.

On 7 June 2001, the parties executed a bilateral modification that provided for the wage adjustment and a release for the revised wage determination for FY 2001, but not for FY 2000.[52] After a final agency decision denying the remainder of PMI's claim and subsequent appeal to ASBCA, the Air Force's brief eventually argued that PMI released any remaining FY 2001 claims for the wage determination through the modification. Unfortunately for the Air Force, the board granted PMI's motion to strike the defense because "'any affirmative defenses available' must be pled in the answer."[53] Accordingly, the ASBCA "disregard[ed] the release in modification P00015 in evaluating entitlement for FY 2001"[54] and found that PMI was entitled to full recovery of the FY 2001 costs for complying with the wage determination.[55]

There Is Some Rotten Lumber in Panama—or Maybe Not

In 1997, the U.S. Army awarded Delta Construction International, Inc. (Delta) an indefinite-delivery, indefinite-quantity contract for replacing rotten lumber at various U.S. facilities in Panama, with a guaranteed minimum of $200,000 for the nine-month base and the two option years.[56] The contract also required Delta "to possess sufficient capability to accomplish a daily rate of work in monetary value of a minimum of $3000 when single or multiple delivery orders have been issued and accepted."[57] In January 1999, Delta submitted a claim for $125,965.46, which represented the difference between the amount of work ordered during the base and first option periods and the guaranteed $200,000 minimum. The contracting officer denied the claim but acknowledged that the government had failed to order the guaranteed minimum and provided an $11,216 adjustment.[58] The contracting officer explained his reasoning in his final decision:

> [T]he Government did not order the guarantee minimum, nevertheless, the contractor is not entitled to be put in a better position than it would have been if it had performed and had to bear the expense of full performance. It is my decision that the contractor is entitled to recover a reasonable profit which it would have earned had he performed, based on the guarantee minimum, the overhead costs incurred on the guarantee minimum, and any reasonable, allocable, and allowable cost incurred based on the guarantee minimum.[59]

Upon appeal to the ASBCA, the board held that "Delta is entitled to recover the difference between $200,000 and the $86,323.07 in orders performed, or $113,676.93."[60] Relying on Maxima Corp. v. United States,[61] the board found that Delta's contract required it to maintain a minimum capability in return for the minimum guaranteed amount.[62] The CAFC, however, vacated and remanded the case to the ASBCA because the board used "an impermissible basis for calculating damages."[63] The CAFC specifically held that the board's impermissible damages calculation would have

> put the contractor in a more favorable position than it would have been in if the government had performed rather than breached its contractual commitment. The proper basis for damages in this case is the loss the contractor suffered as a result of the government's breach, not the total amount it would have received without the breach.[64]

51. *Id.* at 157,588.

52. *Id*.

53. *Id.* at 156,589.

54. *Id.*

55. *Id.* at 156,591.

56. White v. Delta Constr. Int'l, Inc., 285 F.3d 1040 (Fed. Cir. 2002).

57. *Id.* at 1042 (citing to the contract requirements).

58. *Id*.

59. *Id*.

60. Delta Constr. Int'l, Inc., ASBCA No. 52,162, 01-1 BCA ¶ 31,195. The ASBCA similarly held that the contractor was entitled to the difference between the guaranteed minimum and the amount actually ordered in a Navy IDIQ contract. Mid-Eastern Indus. Inc., ASBCA No. 53,016, 02-1 BCA ¶ 31,657.

61. 847 F.2d 1549 (Fed. Cir. 1988).

62. *See Delta Constr. Int'l*, 01-1 BCA ¶ 31,195, at 154,028.

63. *Delta Constr. Int'l*, 285 F.3d at 1040.

The CAFC also distinguished its Maxima[65] decision by noting that the issue on appeal only involved whether the government could retroactively terminate a contract for convenience. The CAFC acknowledged that the contractor in Maxima would retain the difference between the guaranteed minimum and the amount the government actually ordered because the court did not address this basis of payment issue, but addressed the improper retroactive termination for convenience method of recapturing the erroneous payment.[66] Major Kuhn.

64. *Id.*

65. *Maxima Corp.*, 847 F.2d at 1549.

66. *Delta Constr. Int'l*, 285 F.3d at 1044.

SPECIAL TOPICS

Alternative Dispute Resolution

ADR or Else?

In last year's *Year in Review*,[1] the authors commented on an Air Force alternative dispute resolution (ADR) initiative that included the timely identification and resolution of issues in controversy as a consideration in contractor past performance evaluations.[2] Despite resistance from private contractors and attorneys, the Air Force officially revised its Contractor Performance Assessment Reporting System (CPARS) and incorporated this initiative into its December 2001 CPARS guide.[3] In May 2002, the Air Force revised the CPARS's coverage of ADR again, "to clarify [that the Air Force] encourage[s] timely resolution of issues, but [does] not mandate how an issue is resolved."[4]

The Air Force's most recent revision came on the heels of a directive from Angela Styles, Administrator of the Office of Federal Procurement Policy (OFPP). On 1 April 2002, Ms. Styles instructed all federal agencies that the "filing of protests, the filing of claims, or the use of Alternative Dispute Resolution, must not be considered by an agency in either past performance or source selection decisions."[5] While encouraging federal agencies to use ADR where appropriate, the OFPP directive states that "contractors should feel free to avail themselves of the rights provided them by law."[6] The OFFP directive also instructs procurement executives to emphasize to all agency acquisition personnel, but especially source selection officials, that: (1) "[c]ontractors may not be given 'downgraded' past performance evaluations . . . for filing protests and claims or deciding not to use ADR;" and (2) "[c]ontractors may not be given 'positive' past performance evaluations for refraining from filing claims or protests or for agreeing to use ADR."[7]

In February 2002, David Drabkin, Deputy Associate Administrator for the General Services Administration (GSA), had issued similar guidance in a policy letter applicable to all GSA-issued or administered contracts, including those of agencies that make use of GSA multiple award schedules and government-wide contracts.[8] Mr. Drabkin stated that a "contractor's judicious exercise of a process protection is not evidence of unreasonable or uncooperative behavior" and therefore, "absent a clear pattern of frivolous or bad faith exercise of such protections, you cannot downgrade a contractor's performance for filing a protest or claim, or declin[e] to participate in an ADR process."[9]

ADR and Schedule Disputes . . . It's Final

While the OFPP and the GSA frown upon contracting agencies evaluating contractors' past performance based on their (un)willingness to participate in ADR procedures, it is clear that agencies encourage the use of ADR in resolving disputes. In June 2002, a final rule announcement amended the Federal Acquisition Regulation (FAR) to incorporate policies for dispute resolution in federal schedule contracts.[10] The proposed rule stated that contracting officers should, when resolving disputes arising out of federal schedule contracts, "use the alternative dispute resolution (ADR) procedures, when appropriate."[11]

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1. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002, at 75 [hereinafter *2001 Year in Review*].

2. *See* Martha A. Matthews, *Air Force Revising CPARS to Urge Contractors to Resolve Disputes, Avoid Litigation*, 76 BNA FED. CONT. REP. 12 (Oct. 2, 2001).

3. *See Air Force Adds ADR Initiative to CPARS*, 44 GOV'T CONTRACTOR 2, ¶ 19(c) (Jan. 16, 2002).

4. U.S. DEP'T OF AIR FORCE, CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (May 2002). More specifically, the newest CPARS guidance states that "ratings of how well the contractor worked with the government to identify and resolve issues should focus on the contractor's cooperation in identifying and resolving issues without regard to the means of resolution of the issue." *Id*. para. 7.2.4. It further states that "[c]ontracting agencies should not lower an offeror's past performance evaluation based solely on its having filed claims . . . or bid protests." *Id*.

5. Memorandum, Angela B. Styles, Administrator, Office of Federal Procurement Policy, to Senior Procurement Executives, subject: Protests, Claims, and Alternative Dispute Resolution (ADR) as Factors in Past Performance and Source Selection Decisions (Apr. 1, 2002) [hereinafter Past Performance Memo], *available at* http://www.acqnet.gov/notes; *see also* Martha A. Matthews, *OFPP: Protests, Claims, Use of ADR Can't Be Factors in Evaluation Source Selection*, 77 BNA FED. CONT. REP. 14 (Apr. 9, 2002); *Protests and Claims History Cannot Be Used to Downgrade Past Performance, OFPP Says*, 44 GOV'T CONTRACTOR 14, ¶ 138 (Apr. 10, 2002).

6. Past Performance Memo, *supra* note 5, para. 2.

7. *Id*.

8. *See* Martha A. Matthews, *GSA Policy Forbids Downgrading Contractor for Filing Claims, Refusing to Use ADR*, 77 BNA FED. CONT. REP. 10 (Mar. 12, 2002); *Exercise of Legal Rights May Not Affect Past Performance Evaluations, GSA Says*, 44 GOV'T CONTRACTOR 8, ¶ 83 (Feb. 27, 2002).

9. Matthews, *supra* note 8, at ¶ 83.

10. Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items, 67 Fed. Reg. 43,514 (June 27, 2002) (codified at 48 C.F.R. § 8.405-7). The final rule became effective 29 July 2002. *Id.*

Based on public comments that the language used should be consistent with ADR policy statements found elsewhere in the FAR, the final rule revised the proposed language to reflect that parties should use ADR "to the maximum extent possible" and incorporated references to both FAR section 33.204 and FAR section 33.214.[12]

ADR Doesn't Get Agency Off the Hook for Costs

In *National Opinion Research Center—Costs*,[13] the General Accounting Office (GAO) held that when an agency takes corrective action pursuant to the GAO outcome-prediction ADR[14] and after filing its agency report, the agency will presumably be "on the hook" for the protestor's costs. The National Opinion Research Center (NORC) sought reimbursement of costs for filing and pursuing a protest challenging the award of a contract by the Department of Health and Human Services (HHS) to operate a patient safety research coordinating center. In its protest filing, the NORC argued that the agency's evaluation and source selection determination were improper.[15] After an outcome-prediction conference, the GAO attorney advised the parties that the protest was likely to be sustained based on a "clearly flawed" source selection decision.[16] In response, the HHS advised that it would take corrective action by arranging for a new source selection authority from outside the HHS to conduct a new source selection. Based on the proposed corrective action, the GAO dismissed the protest as academic.[17]

While the outcome prediction ADR successfully resolved the case, the NORC still sought reimbursement of its costs for filing and pursuing its protest. The HHS did not oppose reimbursement, but requested a formal recommendation from the GAO. The GAO started with the general rule that it will recommend agency reimbursement of costs when "we determine that the agency delayed taking corrective action in the face of a clearly meritorious protest, thereby causing protestors to expend unnecessary time and resources to make further use of the protest process in order to obtain relief."[18] In an outcome prediction ADR, the GAO noted, the assigned attorney informs the parties that the GAO is likely to sustain a protest "only if she or he has a high degree of confidence regarding the outcome."[19] The GAO attorney's "willingness to do so," concluded GAO, is an "indication that the protest is viewed as clearly meritorious, and satisfies the 'clearly meritorious' requirement for purposes of recommending reimbursement for protest costs."[20] The GAO concluded by stating that agency corrective action following outcome-prediction ADR and the filing of the agency report[21] presumptively satisfies the cost-reimbursement standard, absent contrary persuasive evidence.[22]

We're Unoffically on the ADR Bandwagon . . . but We'd Like to Make It Official

While the GAO regularly uses ADR to resolve bid protests efficiently and expeditiously, its Bid Protest Regulations[23] currently make no mention of these procedures. The GAO may

11. Federal Acquisition Regulation; Federal Supply Schedule Order Disputes and Incidental Items, 65 Fed. Reg. 79,702 (Dec. 19, 2000) (amending GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 8.405-7(d) (Sept. 2001)).

12. 67 Fed. Reg. at 43,515. The language in FAR section 33.204 addresses the "government's policy to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level." GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 33.204 (July 2002). In section 33.214, the FAR provides additional and more specific guidance about ADR. *See id*. at 33.214.

13. Comp. Gen. B-289044.3, Mar. 6, 2002, 2002 CPD ¶ 55; *see also Corrective Action: Protestor Entitled to Costs Although Agency Action Followed GAO Outcome Prediction ADR*, FED. CONTRACTS DAILY, Mar. 25, 2002.

14. Under the GAO's outcome-prediction ADR procedures, the GAO attorney assigned to the protest convenes the parties and provides them with the attorney's belief of the likely outcome of the case, and the reasons for that belief. *National Opinion Research Center—Costs*, 2002 CPD ¶ 55, at 2 n.1. The GAO only uses outcome prediction when the assigned GAO attorney has a "high degree of confidence" in the outcome. *Id*. If the predicted losing party takes corrective action in response, the GAO closes the case without issuing a written decision. While the prediction reflects the belief of the assigned attorney, the opinion does not bind the GAO if it needs to issue a written decision later. *Id*.

15. *Id*. at 1.

16. *Id*. at 2. More specifically, while the agency evaluation committee recommended that the source selection authority (SSA) award to the NORC and supported that recommendation with a detailed rationale, the SSA made an award to Westat, Inc., based on an executive committee group recommendation that was not supported by contemporaneous documentation. *Id*.

17. *Id*.

18. *Id*. at 3.

19. *Id*.

20. *Id*.

21. The GAO noted that it generally considers agency corrective action unduly delayed when the action is taken after the due date for the agency report. *Id*. at 3 n.2.

22. *Id*. at 3.

soon fill this void by adding proposed language to its regulations reflecting the current practice of using ADR to resolve protest cases.[24] In response to the comments it received, the GAO has proposed incorporating a definition of ADR in a new paragraph (h), in section 21.0 of its Bid Protest Regulations.[25] The proposal also revises paragraph (e) of section 21.10 "to specifically provide that ADR is among the flexible alternative procedures GAO may use to promptly and fairly resolve a protest."[26] Major Huyser.

23. 5 C.F.R. pt. 21 (1996).

24. Advance Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contract, 67 Fed. Reg. 8485 (proposed Feb. 25, 2002) (to be codified at 4 C.F.R. pt. 21).

25. Proposed Rules; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 67 Fed. Reg. 61,542 (proposed Oct. 1, 2002) (to be codified at 4 C.F.R. pt. 21). The broad definition states, "Alternative dispute resolution encompasses various means of resolving cases expeditiously, without a written decision, including techniques such as outcome prediction and negotiation assistance." *Id*. at 61,544.

26. *Id*. at 61,542.

Classified Contracting

Who Pays the Tab?

Department of Defense (DOD) readers who support classified programs face more complicated contracting issues because of security concerns. Contractors working in the secure contracting environment subject their employees to an extensive Defense Security Service (DSS) background investigation before they can receive the appropriate clearance to work on classified contracts. The DSS investigative process is lengthy and expensive, and the DOD has historically paid the cost of vetting contractor employees. The DOD Comptroller examined these costs and proposed that such costs were a potential fee-for-service candidate in Program Budget Decision (PBD) 434. Under PBD 434, the DSS would directly charge contractors for their personnel security clearance investigations.[1]

The Under Secretary of Defense for Acquisition, Technology and Logistics conducted a study analyzing PBD 434 and non-concurred in the proposed fee-for-service proposal.[2] In surveying its five largest defense contractors, the Under Secretary determined that the proposal would "simply shift the current costs of performing contractor security clearances, including overhead, general and administrative . . . , and profit/fee to DOD weapons systems, thereby increasing the costs of those weapons systems and increasing the Department's costs in total."[3] The projected costs of implementing PBD 434 would result in the DOD paying an additional thirty-four percent over the current costs for such clearances. Contractors would be able to charge the clearance costs directly to DOD customers as a cost of doing business. The DOD would draw such additional costs from program funds, thus eating into program budgets which may already be tight.[4]

The study also determined that charging contractors for security clearances would not reduce the number of contractor clearance requests. The study noted that competitive market pressures already provide an incentive to limit personnel costs, including clearance costs, to only those employees necessary to perform the contract. Moreover, because the DSS is the mandatory source for DOD contractor security clearances, contractors questioned the remedies available to them against the DSS "in the event of quality or timeliness problems under the proposed fee-for-service arrangement."[5]

As an alternative to PBD 434, the Comptroller proposed that the DSS "direct charge" the military departments for costs of security clearances for contractor personnel working on their contracts.[6] The military departments rejected this proposal for several reasons. First, the proposal would result in increased personnel costs "required to manage the submission and adjudication of contractor security clearances, with no accompanying expectation that it would lead to future reductions in the number of contractor security clearance requests."[7] Second, it would be "impossible for Government contract managers to determine which Military Department should bear fiscal responsibility for processing a particular security clearance in a situation where multiple DOD contracts are being performed simultaneously by the same contractor."[8]

FAR Changes

A new amendment to the Federal Acquisition Regulation (FAR) consolidates and clarifies definitions concerning classified contracting and provides guidance on disclosure of classified sealed bids.[9] The first change moved the definitions of "classified acquisition," "classified contract," and "classified information" from FAR section 4.401, dealing with safeguarding classified information within industry, to FAR section 2.101, the general definitions section. This change clarifies that the definitions applied to more than one FAR part. The second change involved rewriting FAR section 14.402-2. The new amendment revised the language stating that only properly

1. Memorandum, Under Secretary of Defense (Acquisition, Technology and Logistics), to Deputy Secretary of Defense, subject: Study for Program Budget Decision (PBD) 434, Defense Security Service (30 May 2002). The costs for contractor personnel security clearances are currently charged against a DOD-wide Operation and Maintenance (O&M) appropriation. *Id.*

2. Under Secretary of Defense (Acquisition, Technology & Logistics) Study for PBD 434, Defense Security Service (undated) (on file with author).

3. *Id.* at 1.

4. *Id.* In fiscal year 2002, the DOD projected costs of $91.2 million in Operation and Maintenance funds if the DOD paid directly for the clearances, and $122.2 million if the DOD used the proposed fee-for-service system. *Id.*

5. *Id.* Among the questions contractors asked were whether contractors could legitimately refuse to pay the DSS or take any legal action against it in such situations. *Id.*

6. *Id.* at 2.

7. *Id.*

8. *Id.*

9. FAC 01-04, FAR Case 2000-404, Definitions for Classified Acquisitions, 67 Fed. Reg. 6,113 (proposed Feb. 8, 2002). The final rule became effective 20 February 2002.

cleared bidders or their representatives may attend classified bid openings, and added language allowing the contracting officer to make classified bids available to such properly cleared bidders or representatives at a time after bid opening.[10] Colonel Kosarin.

10. *Id*.

Competitive Sourcing

Does competitive sourcing ever have an "off" year? The rules of competitive sourcing remain in constant flux because of the high stakes in jobs and dollars, and the broad initiative for practitioners in this field. The process of conducting public-private cost-comparison studies under *Office of Management and Budget* (*OMB*) *Circular A-76*[1] and the *Revised Supplemental Handbook* (*RSH*)[2] is certainly as much a political issue as a legal issue. Competitive sourcing continues to be a topic of important concern to many contract attorneys.

The Never-Ending Tale of Jones-Hill Joint Venture

Some cost-comparison studies never seem to end; instead, they go on like bad daytime soaps, providing an unending stream of drama and suspense, but no finality. One such example is *Jones/Hill Joint Venture*. At the time of writing of last year's *Year in Review*,[3] the GAO had decided the issue of Jones/Hill's entitlement to protest costs, including attorneys' fees, for an earlier protest in which the agency took corrective action.[4] The Navy then reviewed its original determination that it would be more economical to perform its own base operations, real property maintenance, and operations services for the Naval Air Station, Lemoore (NASL), California, using government employees rather than contracting with Jones/Hill for these services.[5] When the agency's review ended with the same cost-comparison determination, the *Jones/Hill Joint Venture* protest returned with a vengeance.[6]

Jones/Hill's protest raised several allegations, including some that it had raised in its original protest action.[7] The critical and novel issue, however, was Jones/Hill's contention that the agency's use of both a private-sector consultant and a Navy employee to prepare the solicitation's performance work statement (PWS) and to draft the in-house proposal constituted an impermissible conflict of interest. This occupied the bulk of the GAO's decision.

As one of the first steps in the NASL cost-comparison study process, the Navy organized a commercial activities (CA) team to plan the study.[8] Included among the CA team's functions was the development of the PWS, which represented the agency performance requirements that it required both the private sector and in-house proposals to meet. Several CA team members—including the CA team leader and employees of the consultant contractor—subsequently became members of the most efficient organization (MEO) team responsible for developing the in-house management plan. In its protest, Jones/Hill argued that the Navy employee and private-sector consultants who served in these multiple roles had a conflict of interest which violated applicable standards of conduct and gave the MEO team an unfair competitive advantage.[9] The GAO agreed.[10]

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

2. U.S. Office of Mgmt. & Budget, Circular A-76, Revised Supplemental Handbook, Performance of Commercial Activities (1996) [hereinafter RSH].

3. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, Army Law., Jan./Feb. 2002, at 80 [hereinafter *2001 Year in Review*].

4. Jones/Hill Joint Venture—Costs, Comp. Gen. B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62. As part of its conclusion that Jones/Hill's initial protest was clearly meritorious, the GAO explained how agencies should conduct a competitive sourcing studies properly, at great length. *Id*. at 9-13.

5. *Id.* at 7. The agency had agreed that its corrective action would examine various strengths in Jones/Hill's proposal that had been identified but not considered, and that it would adjust its in-house plan as necessary to account for those strengths "that predict a higher quality performance (as opposed to 'strengths' such as a well-written proposal)." *Id.* at 7 (quoting the Agency's Post-ADR Comments, at 10). The agency also stated that it would adjust the in-house management plan as necessary and prepare a detailed written justification of its conclusion. *Id.*

6. Comp. Gen. B-286194.4, B-286194.5, B-286194.6, Dec. 5, 2001, 2001 CPD ¶ 194.

7. *Id*. at 6. Jones/Hill argued that: (1) the agency had unreasonably determined that the MEO could perform the work required with the number of personnel proposed in the in-house plan; (2) that the in-house management plan provided for the performance of certain tasks by individuals who were not part of the MEO; and (3) that the agency's determination that the MEO and Jones/Hill's proposal offered the same level of performance and performance quality was unreasonable. *Id*. The GAO decision sustained Jones/Hill's protest on these grounds. *Id*. at 18-19, 21.

8. *Id*. at 7. The CA team was comprised of Navy personnel assisted by a private consultant, E.L. Hamm, Inc. *Id.*

9. *Id.* at 8. The CA team leader, who participated in drafting and developing the PWS, became the MEO team leader. E.L. Hamm, considered a "co-producer" and "active coparticipant in the preparation of the PWS," became a "full participant" in the MEO team's development of the in-house proposal. *Id*.

10. *Id*. at 18-19.

In setting out the standards of conduct that apply to government business, the GAO noted that the Federal Acquisition Regulation (FAR) requires agencies to conduct such business in a manner above reproach.[11] While the FAR does not provide specific guidance regarding situations where job positions or relationships with particular government organizations create conflicts of interest for government employees, the GAO noted that FAR subpart 9.5 addressed analogous situations involving contractor organizations.[12] Here, the FAR broadly categorizes organizational conflicts of interest into three groups: "unequal access to information" cases,[13] "biased ground rules" cases,[14] and "impaired objectivity" cases.[15] The GAO found that, "given the use of the competitive system in *Circular A-76* studies and the MEO team's status as essentially a competitor in the study," the FAR provisions at subpart 9.5 served as useful guidance in determining the presence of conflicts of interest.[16]

Because the facts were not in dispute, the GAO also determined that the record was "consistent with the circumstances attendant to both 'unequal access to information' and 'biased ground rules' conflicts of interest."[17] Finding no reason to treat government employee conflicts of interest differently than contractor-employee conflicts of interest, the GAO concluded that "the appearance of impropriety resulting from the conflicts of interest here has tainted the integrity of the process,"[18] and sustained this part of Jones/Hill's protest. Regarding the resulting remedy, the GAO recommended that the agency essentially start over—that it should issue a new PWS, drafted by individuals who would not subsequently draft the in-house management plan; prepare a new in-house management plan; solicit new proposals for private-sector offerors; and conduct a new cost comparison.[19]

Jones/Hill Joint Venture—*One More Time?*

The impact of the *Jones/Hill* decision, including the GAO's recommendation for an appropriate remedy, stood to affect not only the Navy's cost-comparison study at NASL, but as many as 160 ongoing agency competitive sourcing studies. The Navy, therefore, requested reconsideration of the GAO's decision to the extent that it concluded that a conflict of interest existed.[20] The GAO affirmed its decision, but it modified the recommended corrective action to apply the conflict of interest portion of the decision prospectively only.[21]

Without disputing the underlying facts—that a government employee and consultant-contractor employees developed both the PWS and the in-house management plan—the agency set forth several arguments challenging the GAO's conclusion. The Navy first challenged the GAO's characterization of the MEO team as "essentially a competitor."[22] The GAO found

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11. More specifically, the FAR provides:

> Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITIONS REG. 3.101-1 (July 2002) [hereinafter FAR].

12. Jones/Hill Joint Venture—Costs, Comp. Gen. B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62, at 9 (citing DZS/Baker LLC; Morrison Knudsen Corp., Comp. Gen. B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19, at 4; Battelle Memorial Inst., Comp. Gen. B-278673, Feb. 27, 1998, 98-1 CPD ¶ 107, at 6-7).

13. *Id*. at 10. Such cases include situations in which a firm has access to non-public information as part of its performance of a government contract, and where that information may provide the firm an unfair competitive advantage in a later competition for a government contract. *Id*. (citing FAR, *supra* note 11, at 9.505-4; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., Comp. Gen. B-254397.15, July 27, 1995, 95-2 CPD ¶ 129, at 12).

14. *Id*. Such cases include situations in which a firm, as part of its performance of a government contract, has somehow set the ground rules for the competition for another government contract, for example, by writing the statement of work or the specifications. *Id*. (citing FAR, *supra* note 11, at 9.505-1, 2; *Aetna Gov't Health Plans*, 95-2 CPD ¶ 129, at 13).

15. *Id*. Such cases include situations where a firm's work under one government contract could require it to evaluate itself or a related entity, either through an assessment of performance under another contract or an evaluation of proposals. *Id*. (citing FAR, *supra* note 11, at 9.505-3; *Aetna Gov't Health Plans*, 95-2 CPD ¶ 129, at 13).

16. *Id*. at 11.

17. *Id*. at 10.

18. *Id*. at 14.

19. *Id*. at 21-22.

20. Department of the Navy—Reconsideration, Comp. Gen. B-286194.7, May 29, 2002, 2002 CPD ¶ 76. The Navy did not challenge the other bases upon which the GAO had sustained the protest. *Id*. at 4-5.

21. *Id*. at 12.

that, notwithstanding the fact that the MEO team was not legally an offeror, the MEO team members functioned, and viewed themselves, as competitors.[23] The Navy also argued that in-house teams were still factually distinguishable from private-sector competitors, leaving an adequate basis "to exempt MEO teams from application of the conflict of interest rules generally applicable to private-sector competitors."[24] The GAO did not dispute the Navy's factual observations, but it rejected the agency's conclusion that the nature and status of the MEO team justified exempting that team from the conflict of interest limitations generally applied to private-sector competitors.[25]

The Navy also challenged the GAO's application of FAR subpart 9.5 to the *OMB Circular A-76* process. In response, the GAO stated that in complying with the obligatory conflict of interest requirements of FAR subpart 3.1, "it is not reasonable for an agency to ignore the instruction and guidance provided by FAR subpart 9.5."[26] The GAO also rejected the Navy's argument that Jones/Hill had failed to demonstrate any prejudice, holding that "where a protest establishes facts that constitute a conflict of interest or apparent conflict of interest, [the GAO] will presume prejudice unless the record affirmatively demonstrates its absence."[27]

Lastly, the GAO examined the agency's request that the GAO modify the recommended corrective action. The GAO analyzed which parties its original corrective action would help or harm, and concluded,

> [W]e believe that the integrity of the decision-making process in A-76 cost studies should be above reproach. Nonetheless, just as our decision reflected the reality that A-76 studies are essentially public/private competitions, we believe it important to recognize the practical realities supporting the agencies' request for prospective application of the conflict of interest portion of our decision. The fact is that disruption or cancellation of large numbers of studies will not serve the private-sector firms who would presumably be disadvantaged by the conflicts, nor the agencies endeavoring to conduct the studies, nor the viability of the A-76 process overall.[28]

Accordingly, the GAO modified its recommended corrective action so that it applied prospectively only.[29] It will not be necessary, therefore, for the Navy or any other federal agency to unravel all ongoing cost-comparison studies when the same employees prepared both the PWS and the in-house proposal.[30]

A New Twist in A-76 Cost Comparisons

In *Sodexho Management Inc.*,[31] the GAO confronted another novel issue for the competitive sourcing process—the reliance on nonappropriated fund instrumentality (NAFI) employees as part of an MEO's proposed staffing solution.[32]

The Navy began a commercial activity study for the performance of various community support services at the Pensacola Naval Regional Complex in Pensacola, Florida.[33] The agency received proposals from two private sector offerors, and determined that Sodexho's proposal represented the best value to the government. As part of the commercial activity study, a cost-analysis team (MEO team) of Navy personnel and contractor

22. *Id*. at 4.

23. *Id*. at 4-5.

24. *Id*. at 6.

25. *Id*. at 6-7.

26. *Id*. at 9.

27. *Id*. at 12.

28. *Id.* at 13. The Office of the Under Secretary of Defense, the Army, and the Defense Logistics Agency also joined with the Navy in asserting that the GAO's recommended corrective action would have a serious negative impact on multiple ongoing A-76 studies. *Id.*

29. *Id*. at 14 n.18. The GAO established that the effective date for the prospective application of the *Jones/Hill* decision was the date the redacted version of the decision was released to the public—10 December 2001. *Id*.

30. *Id*. at 14-15. The GAO decision also provides agencies with detailed guidance for its implementation with regard to ongoing cost comparison studies. *Id.*

31. Comp. Gen. B-289605.2, July 5, 2002, 2002 CPD ¶ 111.

32. *Id.* at 7. "NAFIs are not federal agencies or government corporations, and they are not typical private or commercial enterprises, although they may operate on a for-profit basis. Instead, they are 'a special breed of federal instrumentality which cannot be fully analogized to the typical federal agency supported by federal funds.'" *Id.* (quoting Cosme Nieves v. Deshler, 786 F.2d 445, 448 (1st Cir. 1986)). *See also* General Acct. Off., Principles of Appropriations Law vol. IV, GAO-01-179SP, ch. 17, pt. C (2001) (examining the history and legal status of NAFIs in detail). Employees of NAFIs receive lower wage rates and benefits levels than federal employees within the civil service. *Sodexho Mgmt. Inc.*, 2002 CPD ¶ 111, at 11.

personnel developed the government's in-house management plan and MEO. In the subsequent cost comparison, the agency determined that Sodexho's adjusted price for performing the required services was $82,641,457, while the adjusted in-house plan's cost would be $56,460,369, a difference of more than $26 million.[34] This resulted in a tentative decision to perform the requirements in-house. Sodexho protested to the GAO, arguing that the Navy's decision process was flawed and unfair because the cost comparison was based on an MEO that proposed to perform the PWS requirements using NAFI employees for eighty-two percent of its in-house workforce.[35]

Contrary to the protester's arguments, the GAO first determined that neither federal law nor the *RSH* necessarily barred the use of NAFI employees in an MEO.[36] The GAO thus did not find that the inclusion of NAFI employees in the MEO violated the procedures of *OMB Circular A-76*.[37] The GAO concluded, however, that the wholesale use of NAFI employees in the circumstances of this case resulted in an unfair competition. "In conducting an A-76 competition, as in any competition for a federal contract, an agency must provide private offerors with sufficient information to allow an intelligent competition on an equal basis."[38]

Here, neither the A-76 guidance nor the solicitation permitted Sodexho to reasonably anticipate the extensive use of NAFI employees. Accordingly, the GAO sustained the protest, holding that "fundamental fairness" dictated that the Navy should have provided commercial offerors adequate notice of the intended heavy reliance on the use of NAFI employees. Because the GAO did not find it unlawful for the Navy to rely so heavily on NAFI employees, and because Sodexho indicated that it would not have competed if the Navy had given it notice in this regard, the GAO had no basis to conclude that Sodexho would participate in a recompetition. As a result, the GAO recommended the Navy merely reimburse Sodexho for its bid proposal and protest costs.[39]

Government Employees and Judicial Standing—Again

In last year's *Year in Review*, the authors questioned whether the CAFC had finally ended the debate on whether government

33. *Sodexho Mgmt. Inc*., 2002 CPD ¶ 111, at 2. The solicitation divided the required support services into separate "annexes," including Navy family housing, bachelor housing, morale, welfare, and recreation (MWR) activities, and public affairs functions. *Id*.

34. *Id*. at 5. An administrative appeal by Sodexho resulted in a revised cost comparison; the new comparison study found that the difference between contract performance and in-house performance was $24,653,748. *Id.*

35. *Id*. at 26-28. The GAO considered and rejected Sodexho's other protest issues—that the MEO failed to meet numerous PWS requirements, that the independent review official's certification of the MEO was inadequately documented, and that the agency improperly failed to adjust the in-house offer to a level of performance and performance quality equal to that offered by Sodexho. *Id*.

36. *Id*. at 15.

> [W]hile we agree that the RSH's procedures and standard cost factors were designed for civil service employees under the GS [general schedule] and FWS [federal wage system] wage systems, we cannot conclude that the RSH's specification of these two wage systems, and no others, must be read to prohibit the use of NAFI employees in an MEO.

Id.

37. *Id*. at 17. The GAO did note, however, that the reliance on NAFI employees "raises significant policy concerns, which are to be resolved, not by our Office's bid protest function, but by the executive branch, and by OMB, in particular, as the agency responsible for the [A-76] Circular." *Id.*

38. *Id.* at 18 (citing Ameriko Maint. Co., Comp. Gen. B-243728, Aug. 23, 1991, 91-2 CPD ¶ 191, at 3; Draeger Safety, Inc., Comp. Gen. B-285366, B-285366.2, Aug. 23, 2000, 2000 CPD ¶ 139, at 4).

39. *Id.* at 29. One could argue that the GAO reached the wrong result in this protest. *Sodexho* clearly turns not on the use of NAFI employees per se—which the GAO did not find improper—but instead on the degree of reliance on NAFI employees without notifying commercial offerors of this first, which the GAO found unfair. What the GAO failed to take into account, however, was *who* was relying primarily upon NAFI employees and *who* had an obligation to provide offerors with sufficient information to allow an intelligent competition on an equal basis. Because the two were not the same entity here, the argument that the agency failed in its duty to provide Sodexho with adequate information is questionable. At the beginning of the decision, the GAO recognized that it was the MEO team that developed the in-house proposal and that it was the MEO's use of NAFI employees that Sodexho was challenging. *Id*. at 4, 6. The GAO blurred this critical distinction, however, when it found that it was the Navy's wholesale use of NAFI employees that was unfair, and that it was the Navy's intent to use NAFI employees for the great majority of the in-house work force. *Id*. at 18, 20-21. Because it was the MEO team that decided on the degree of reliance on NAFI employees for the in-house proposal, and because the GAO has determined that the MEO team is "essentially a competitor" in the competitive sourcing process, it is uncertain why the agency had any obligation to disclose this information to private sector offerors. Surprisingly, the Navy—the very agency affected by *Jones/Hill* and the decision that the MEO team was "essentially a competitor"—did not present this argument to the GAO. Because the GAO determined that the use of NAFI employees was not improper, the MEO team's decision to rely on such employees was essentially a fair competitive advantage of the in-house offeror. *OMB Circular A-76* requires that the agency "provide a level playing field between public and private offerors to a competition." *Id.* at 18 (quoting RSH, *supra* note 2, at iii). Neither *OMB Circular A-76* nor any other procurement statute or regulation requires or permits the agency to level the fair competitive advantages of the various offerors to a competition. *See* OMB A-76, *supra* note 1. The agency did not deprive Sodexho of the ability to make an intelligent business judgment about whether to compete; a fellow competitor, albeit a public one, deprived Sodexho the ability to make an *error-proof* business judgment about whether to compete. It is difficult to understand the legal and equitable rationales for sustaining this protest.

employees have standing to challenge *OMB Circular A-76* decisions.[40] As events of the past year have shown, this is an issue that will not go away.

Last year, in *American Federation of Government Employees, Local 1482 v. United States*,[41] the Federal Circuit affirmed the COFC decision that federal employees are not interested parties and do not have standing to challenge cost-comparison studies or the contract award decisions that resulting from them.[42] The employees and unions, having nothing to lose but their jobs, filed a petition for writ of certiorari with the Supreme Court. On 22 January 2002, the Supreme Court denied the petition without comment.[43]

While the Supreme Court decision closes the door on unions' and federal employees' attempts to challenge cost-comparison studies in court, other events of the past year indicate that legislation may result in same changes these parties sought in court. One congressman's attempt to sue personally on behalf of federal employees adversely affected by a cost-comparison study may be admirable (as well as the ultimate example of constituent services), but it did not prove successful. In *Kucinich v. Defense Finance & Accounting Service*,[44] Rep. Dennis J. Kucinich (D—Ohio) sued to challenge a Defense Finance & Accounting Service (DFAS) cost-comparison decision under *OMB Circular A-76*. Kucinich alleged that DFAS's cost comparison violated *OMB Circular A-76* and the Federal Activities Inventory Reform (FAIR) Act,[45] as well as the constitutional rights of due process, equal protection, and free speech of the affected federal employees, who unlike private sector offerors, were prohibited from seeking judicial review of the cost-comparison decision.[46]

Applying the Supreme Court precedent in *Raines v. Byrd*,[47] the district court determined that Kucinich was bringing the suit not to remedy the deprivation of a personal entitlement, but as a representative of his constituents (i.e., to vindicate an institutional injury).[48] As such, the court determined that Kucinich had "no more standing to sue than does any other taxpayer in the affected region," and his only remedy was "the one he possesses by virtue of his position as an elected official, that is, to convince his colleagues to amend the statutes regulating government contracts and forbidding federal court challenges by affected employees and unions."[49] Having concluded that Kucinich lacked standing, the court dismissed the case sua sponte for lack of jurisdiction.[50]

Sometimes You Can't Please Anyone

In a number of cost-comparison studies, in response to the myriad of issues raised, the agencies decided that the best thing to do was to cancel the solicitations. While "throwing in the towel" and starting over may have been prudent, such actions did not necessarily make everyone happy, and often resulted in protests.

In *IT Corp.*,[51] the GAO faced a protest objecting to the cancellation of a solicitation after the agency announced that it intended to award to the protester. The Navy had issued the

40. *2001 Year in Review*, *supra* note 3, at 82.

41. 258 F.3d 1294 (Fed. Cir. 2001).

42. *Id*. at 1299-1302. Although it affirmed the COFC's decision, the CAFC did so on different grounds. Unlike the trial court, the federal circuit applied the Competition in Contracting Act (CICA) jurisdictional standard, and found that neither the union nor the federal employees were actual or prospective offerors or bidders. *Id*. Similarly, the GAO has applied the same CICA jurisdictional standard and also determined that federal employees and their unions lack standing to protest adverse cost comparison study determinations. Am. Fed'n of Gov't Employees, Comp. Gen. B-282904.2, June 7, 2000, 2000 CPD ¶ 87.

43. Am. Fed'n of Gov't Employees v. United States, 258 F.3d 1294 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

44. 183 F. Supp. 2d 1005 (N.D. Ohio 2002).

45. 10 U.S.C. § 2464 (2000); 31 U.S.C. § 501 (2000).

46. *Kucinich*, 183 F. Supp. 2d at 1006-07.

47. 521 U.S. 811, 819-20 (1997).

48. *Kucinich*, 183 F. Supp. 2d at 1011. The court succinctly noted the fundamental concern with representational capacity standing: "Kucinich, a member of Congress, asks this Court to invalidate the actions of an agency duly given the authority to take such actions by Kucinich's peers in Congress and to declare unconstitutional certain procedural provisions that forbid the employees or their union from bringing a suit like this themselves." *Id.*

49. *Id.* at 1011-12. While the court expressed sympathy for Kucinich's claim that federal employees had fewer available remedies than similarly situated private-sector offerors, the court stated that "unfortunately, it is not this Court whom Kucinich must persuade, but his peers in Congress. Congress and duly appointed administrative bodies have determined that aggrieved employees cannot bring their claims to this Court, and the Constitution does not allow Representative Kucinich to raise the claims for them." *Id.* at 1012.

50. *Id*. at 1012.

51. Comp. Gen. B-289517.3, July 10, 2002, 2002 CPD ¶ 123.

solicitation as part of a cost-comparison study, under *OMB Circular A-76*, for base operation support services at the Marine Corps Base, Camp Pendleton, California. After selecting IT as the best value private-sector offeror, and determining that its proposal represented a significant cost savings in comparison to the government's in-house management plan for an MEO, the Navy awarded to IT. This decision resulted in the protest by another private-sector offeror, Del-Jen, Inc., which objected to the agency evaluation of proposals. In response to Del-Jen's protest, the Navy took corrective action and cancelled the solicitation. IT then protested the solicitation cancellation to GAO.[52]

The GAO held that in a negotiated procurement, an agency has broad authority to decide whether to cancel a solicitation; there need only be a reasonable basis for the cancellation. This authority extends to the cancellation of solicitations used to conduct A-76 cost comparisons. So long as an agency has a reasonable basis to exercise this authority, it may cancel a solicitation regardless of when the information precipitating the cancellation surfaces.[53] Here, the GAO agreed with the Navy that the solicitation was deficient because it did not adequately identify all of the required work and contained incomplete and misleading historical workload information. These defects resulted in an unfair competition and even caused at least one potential offeror not to submit a proposal. The GAO thus concluded that the Navy's decision to cancel the solicitation and resolicit proposals was reasonable.[54]

In *Imaging Systems Technology* (*IST*),[55] the GAO revisited a protest challenging an agency cost-comparison decision as violative of federal statute; this time, the GAO denied the protest. As last year's *Year in Review* reported,[56] the Air Force had originally issued a solicitation in 1999 to acquire logistics support services for the programmable indicator data processor (PIDP) air traffic control and landing system. IST protested after the Air Force cancelled the original RFP, after deciding to assign the PIDP support function work to government employees as "other duties as assigned."[57] The GAO found that because the Air Force had failed to comply with 10 U.S.C. § 2462,[58] the agency's decision to cancel the solicitation lacked a reasonable basis.[59] The Air Force then prepared a second solicitation in 2001 that reflected the agency's revised views regarding its requirements. When the Air Force again determined that the cost of in-house performance would be lower than contractor performance, IST again protested.[60]

IST asserted that unlike its proposal, the in-house proposal planned performance using only technicians and did not include engineers. The GAO determined, however, that there was nothing on the face of the revised solicitation expressly stating that engineer or engineering services were required, and the personnel skill level descriptions and other changes from an earlier solicitation suggested that the solicitation did not require engineering services. Having concluded that IST had misread the solicitation, and had thus proposed higher-cost staffing than was necessary to perform the work, the GAO found no basis to sustain the protest.[61]

The Commercial Activities Panel Report

Last year's *Year in Review* reported that Section 832 of the FY 2001 National Defense Authorization Act 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.[62] On 30 April 2002, the Commercial Activities Panel met its deadline and issued its lengthy and long-awaited report, *Improving the Sourcing Decisions of the Government*.[63]

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52. *Id.* at 2. Del-Jen cited the unusually low price of IT's proposal as evidence for its claim that the agency's technical and price evaluations were inadequate and unreasonable. The proposed corrective action included a review of the evaluations, as well as a review of the adequacy of the PWS included within the solicitation. The agency's corrective action rendered Del-Jen's protest academic. *Id*.

53. *Id*. at 3 (citing Rice Servs., Ltd., Comp. Gen. B-284997.5, Mar. 12, 2002, 2002 CPD ¶ 59, at 4; Lackland 21st Century Servs. Consol., Comp. Gen. B-285938.7, B-285938.8, Dec. 4, 2001, 2001 CPD ¶ 197, at 5).

54. *Id*. at 4.

55. Comp. Gen. B-289262, Feb. 1, 2002, 2002 CPD ¶ 26.

56. *2001 Year in Review*, *supra* note 3, at 79.

57. Imaging Sys. Tech., Comp. Gen. B-283817.3, Dec. 19, 2000, 2001 CPD ¶ 2.

58. *Id*. at 6-7; *see* 10 U.S.C. § 2462 (2000). The statute requires that Department of Defense (DOD) agencies acquire goods or services from private sector offerors when doing so is cheaper than in-house government performance. In making such a cost comparison determination, the statute—similar to *OMB Circular A-76*—also requires agencies to ensure that all costs considered are realistic and fair. *Id*.

59. *Imaging Sys. Tech.*, 2001 CPD ¶ 2, at 4-7.

60. *Id*. at 26. The revised RFP contemplated that "either the award of a contract to the lowest priced, technically acceptable offeror or, if the government cost estimate showed that the requirements could be performed in-house for a lower cost, cancellation of the solicitation." *Id.* at 2 (citing 10 U.S.C. § 2562).

61. *Id*. at 5.

After establishing its organizational framework,[64] the panel unanimously developed a set of ten principles that it believed should guide competitive sourcing policy.[65] Using these principles, the Panel then assessed the strengths and weaknesses of the current A-76 process and subsequently adopted specific recommendations for improvement.[66] The Panel found that the current A-76 process "may no longer be an effective tool for conducting competitions to identify the most efficient and effective service provider."[67] By contrast, the Panel observed that for private-private competitions, the government already had "an established mechanism that has been shown to work as a means to identify high-value service providers: the negotiated procurement process of the Federal Acquisition Regulation."[68]

Thus, instead of attempting to revise the current A-76 process dramatically, the panel recommended replacing A-76 with a FAR-based approach, modified as necessary to accommodate public-private competitions. Under such an "integrated competition process,"[69] the public sector would have the same basic rights and responsibilities as the private sector, including equivalent evaluation criteria, accountability for performance, and the right to protest. The public sector would also be able to submit proposals in response to a broad range of government solicitations, including new work and work that agencies currently contract to the private sector.[70]

Because implementation and development of an integrated FAR-type process would require some time, and because current competitive sourcing studies are expected to continue, the panel also recommended that "some modifications to the existing [A-76] process can and should be made."[71] These changes would, among other things, strengthen conflict of interest rules, improve auditing and cost accounting, and provide for the

62. *2001 Year in Review*, *supra* note 3, at 84 (citing Pub. L. No. 106-398, § 832, 114 Stat. 1654, 1654A-221 (2000)). "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." *Id.*

63. Gen. Acct. Off., Commercial Activities Panel, Improving the Sourcing Decisions of the Government (2002).

64. *Id*. at 32. At its organizational meeting, the panel

> adopted a mission statement that stressed the need to balance the diverse and frequently divergent interests of the various constituencies represented. The mission of the Panel was to devise a set of recommendations that would improve the current [competitive] sourcing framework and process so that they reflect a balance among taxpayer interests, government needs, employee rights, and contractor concerns.

Id.

65. The Panel's competitive sourcing principles were stated as follows:

> 1. Support agency missions, goals, and objectives.
> 2. Be consistent with human capital practices designed to attract, motivate, retain, and reward a high-performing federal work force.
> 3. Recognize that inherently governmental and certain other functions should be performed by federal workers.
> 4. Create incentives and processes to foster high-performing, efficient and effective organizations throughout the federal government.
> 5. Be based on a clear, transparent, and consistently applied process.
> 6. Avoid arbitrary full-time equivalent (FTE) or other arbitrary numerical goals.
> 7. Establish a process that, for activities that may be performed by either the public or the private sector, would permit public and private sources to participate in competitions for work currently performed in-house, work currently contracted to the private sector, and new work, consistent with these guiding principles.
> 8. Ensure that, when competitions are held, they are conducted as fairly, effectively, and efficiently as possible.
> 9. Ensure that competitions involve a process that considers both quality and cost factors.
> 10. Provide for accountability in connection with all sourcing decisions.

Id. at 33-36.

66. *Id*. at 5, 49. The panel adopted the recommendations by a two-thirds super-majority. *Id*.

67. *Id*. at 10. Noting that the original purpose of the A-76 process was to determine the "low-cost provider of a defined set of services," the panel observed that the federal procurement system has changed in the decades since the OMB first issued *Circular A-76* and has recognized that a "cost-only focus does not necessarily deliver the best quality or performance for the government." *Id.* The panel further stated that the A-76 process "has not worked well as the basis for competitions that seek to identify the best provider in terms of quality, innovation, flexibility, and reliability," and has become "an anomaly in the federal procurement process" and inconsistent with the panel's recommended principles. *Id.*

68. *Id.*

69. *Id.* "The Panel believes that in order to promote a more level playing field on which to conduct public-private competitions, the government needs to shift, as rapidly as possible, to a FAR-type process under which all parties compete under the same set of rules." *Id.*

70. *Id*. at 11.

71. *Id*.

establishment of "binding performance agreements" for successful MEOs.[72] Interestingly, the establishment of an MEO binding performance agreement, though not a contract, may constitute an "offer" in some cases, thereby giving its "offeror" legal standing under the CICA. Because the panel specifically found that federal employees should have standing to file protests against the conduct of public-private competitions,[73] the existence of binding performance agreements appears to be an expedient means—that is, one that does not require legislation—to achieve this end. Lieutenant Colonel Chiarella and Major Huyser.

72. *Id.* at 11, 52.

73. *Id.* at 9. ("Fairness requires that competing parties, both public and private, or their representatives, receive comparable treatment throughout the competition regarding, for example, . . . legal standing to challenge the way a competition has been conducted at all appropriate forums, including the General Accounting Office (GAO) and the United States Court of Federal Claims.").

Privatization

Nice Job, DOD, . . . but There Is Still a Long Way to Go

In a report to the Subcommittee on Military Construction of the House Committee on Appropriations, the General Accounting Office (GAO) reported that the Department of Defense (DOD) had achieved key financial goals for its Military Housing Privatization Initiative (MHPI).[1] The report recommended, however, that the DOD better define and assess its military housing needs, improve its life-cycle costs analysis, and make contractual and oversight changes to increase government protections in the housing privatization program.[2]

The GAO noted in its report that while implementation of the MHPI began slowly, the DOD has "picked up the pace" and has made the initiative the "primary means" for meeting a revised DOD goal of "eliminating inadequate housing by 2007, instead of the original goal of 2010."[3] Reviewing the first ten housing privatization projects within the DOD, the GAO reported that the DOD had exceeded its goal for leveraging government funds. The report found that "by investing about $185 million in the [ten] projects, DOD should obtain housing improvements that would have required about $1.19 billion in military construction funds" using conventional military construction funding procedures.[4] The GAO, based on DOD guidance, also estimated that the life-cycle costs of each of the first ten projects would "most likely" be less than the traditional military construction alternative.[5] The GAO cautioned, however, that these estimates were not necessarily reliable because of weaknesses in the methodology of the DOD's guidance for calculating such costs.[6]

While (or perhaps because) the pace of housing privatization has increased, the GAO remained critical of the DOD's inability to develop processes to determine housing needs consistently and accurately and to determine whether the local community is able to meet those needs at each installation.[7] Citing previous reports that have highlighted the same concern,[8] the GAO simply stated that the "DOD has failed to fix this longstanding problem."[9]

Finally, while noting that the DOD had included some contract safeguards to protect the government's long-term interests, the GAO recommended further improvements. First, the GAO found that the DOD could further protect the government with contract provisions for unexpected events. For instance, private developers received a significant increase in profits because their contracts did not adequately address increases in service member housing allowances.[10] Similarly, the DOD apparently had limited oversight of major reinvestment spending decisions. In all the privatization projects except one, the contract with the private developer included provisions "designed to capture at least a portion of any unanticipated rental revenues" and to accumulate these funds in project reinvestment accounts for future renovations, maintenance, and improvements.[11] Typically, installation officials and private developers decide how to use such funds jointly, with remaining amounts returning to the DOD for use on other privatization projects. The GAO questioned whether the service headquarters and the Office of the Secretary of Defense had adequate oversight over these spending decisions to ensure that such funds are not used unnecessarily.[12]

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1. GEN. ACCT. OFF., REP. NO. GAO-02-624, *Military Housing: Management Improvement Needed as Pace of Privatization Quickens* (June 2002) [hereinafter GAO-02-624]. The National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186, 547 (1995), granted the DOD temporary authority to provide direct loans, loan guarantees, and other financial incentives to encourage private developers to renovate, manage, and maintain existing military housing units, as well as to construct, manage, and maintain new military housing units. Congress extended this authority through 31 December 2012 in last year's Authorization Act. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 2805, 115 Stat. 1012, 1306 (2001) (amending 10 U.S.C. § 2885).

2. GAO-02-624, *supra* note 1, at 2-4.

3. *Id*. at 5.

4. *Id*. at 3.

5. *Id*. at 15.

6. *Id*. at 14-15. After adjusting the DOD's methodology and re-computing the data, the GAO estimated that "privatization would likely cost less than military construction in seven of the ten projects and cost more in the other three." *Id.* at 15.

7. *Id*. at 7-8.

8. *Id.* at 6 (citing GEN. ACCT. OFF., REP. NO. GAO-01-889, *Military Housing: DOD Needs to Address Long-Standing Requirements Determination* (Aug. 3, 2001)).

9. *Id*. at 7.

10. *Id*. at 21.

11. *Id*. at 22.

12. *Id*. at 23-24.

A Slower Pace for Utilities Privatization . . . the DOD Revises Its Goal

The pace of the DOD's utilities privatization program has been slower than it has been for housing. In 1998, *Defense Reform Initiative Directive (DRID) 49—Privatizing Utility Systems* (*DRID 49*) established a DOD goal of privatizing all DOD utility systems by 30 September 2003, except for those systems needed for unique security reasons, or when privatization is not economical.[13] On 9 October 2002, the DOD revised its goal and replaced *DRID 49* with its *Revised Guidance Memorandum*.[14] The revised goal establishes 30 September 2005 as the date by which "Defense Components shall complete a privatization evaluation of each utility system at every Active, Reserve, and National Guard installation, within the United States and overseas, that is not designated for closure under a base closure law."[15]

In addition to revising the milestones for utilities privatization, the *Revised Guidance Memorandum* provides updated instructions on "conducting the economic analysis, protecting the government's interests, making a determination to privatize, and conforming with state laws and regulations."[16] Among its several updates, the *Revised Guidance Memorandum* addresses the DOD's position concerning the applicability of state utility laws and regulations to the acquisition and conveyance of the government's utility systems.[17] The updates also include discussion of the recent class deviation from the cost principle at Federal Acquisition Regulation (FAR) section 31.205-20,[18] authorized by the DOD "for utilities privatization contracts under which previously government-owned utility systems are *conveyed* by a Military Department or Defense Agency to a contractor."[19] Finally, the new guidance specifically allows the service secretaries to include reversionary clauses in transaction documents, to provide for ownership to revert to the government in the event of a default or abandonment by the contractor.[20]

Fourth Circuit Says No Standing If Not an "Interested Party"

In last year's *Year in Review*, the authors reported on the unsuccessful efforts of the Baltimore Gas and Electric Company (BG&E) and the Maryland Public Service Commission (PSC) to challenge an Army solicitation to privatize the utility distribution system at Fort Meade, Maryland, in federal district court.[21] While BG&E elected not to appeal the district court's decision, the PSC sought relief from the Fourth Circuit Court of Appeals (Fourth Circuit), which dismissed the appeal for lack of jurisdiction after determining that the PSC was not an "inter-

13. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Department of Defense Reform Initiative Directive 49—Privatizing Utility Systems (23 Dec. 1998).

14. Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Revised Guidance for the Utilities Privatization Program (9 Oct. 2002) [hereinafter Revised Guidance Memo]. According to this memorandum, the DOD changed its goal as a partial result of comments from the utility industry that the volume of "more than 1300 utility systems . . . either in the solicitation phase or pending release of a request for proposal . . . would saturate the market, resulting in decreased competition." *Id.*

15. *Id.* at 1. The new "milestone" will be considered "satisfied when the Source Selection Authority makes a decision or the Defense Component submits an exemption." *Id*.

16. *Id*.

17. *Id*. at 3-4, app. B (reproducing a copy of Memorandum, General Counsel of the Department of Defense, to General Counsels of the Military Departments, subject: The Role of State Laws and Regulations in Utility Privatization (24 Feb. 2000)).

18. *Id*. at 10. Federal Acquisition Regulation section 31.205-20 generally classifies interest on borrowings as an unallowable cost. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.205-20 (July 2002).

19. Revised Guidance Memo, *supra* note 14, app. E (reproducing a copy of Memorandum, Director, Defense Procurement, to Directors of Defense Agencies, subject: Class Deviation—Interest Costs (15 Apr. 2002)). The class deviation further provides:

> [T]he utilities privatization contractor will be permitted to recover its interest costs associated only with capital expenditures to acquire, renovate, replace, upgrade, and/or expand utility systems, and the contractor will not be permitted to receive *facilities capital cost of money* as a contract cost under FAR 31.205-10, Cost of money.

Id.; *see also* Memorandum, Defense Contract Audit Agency, to Regional Directors, subject: Audit Guidance on CAS and FAR Part 31, Cost Principles Applicability to Utility Privatization Contracts (4 June 2002) (providing additional guidance about the Cost Accounting Standards and the FAR Part 31 costing principles, as applied to utility privatization contracts).

20. Revised Guidance Memo, *supra* note 14, at 12.

21. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 119-20 (discussing Baltimore Gas & Elec. Co. v. United States, 133 F. Supp. 2d 721 (D. Md. 2001)). Before filing suit in the district court, BG&E was also party to a GAO bid protest in 2000, which challenged the same Army solicitation on similar grounds. The GAO denied the protest. Virginia Elec. & Power Co., Baltimore Gas & Elec., Comp. Gen. B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 34. For a more complete discussion of that decision, see Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 61 [hereinafter *2000 Year in Review*].

ested party" under the Administrative Dispute Resolution Act[22] (ADRA), and therefore lacked standing.[23]

At the U.S. District Court for the District of Maryland (District Court), BG&E and the PSC, as an intervenor, argued that the Army's request for proposals (RFP) to privatize the electrical and natural gas distribution systems at Fort Meade failed to include provisions requiring an offeror to hold franchise rights and a PSC license, or one specifying that the PSC would have jurisdiction over the successful offeror.[24] The District Court found that the Army reasonably interpreted the applicable federal laws when it decided not to include such provisions in the solicitation.[25] On appeal, the PSC challenged that part of the District Court's decision that held that the Army did not have to require the successful offeror to submit to PSC jurisdiction. Because BG&E was no longer a party to the action, the Fourth Circuit found itself confronted with the issue of whether the PSC even had standing to challenge the Army RFP under the ADRA.[26]

The Fourth Circuit began by noting that in passing the ADRA, Congress granted standing to an "interested party objecting to a solicitation by a federal agency," but it left the term "interested party" undefined.[27] Next, the court observed that the Court of Appeals for the Federal Circuit (CAFC) had only recently clarified the use of the term "interested party" in the context of bid protests in the Court of Federal Claims (COFC), the primary federal court venue for bid protests.[28]

To understand the CAFC's views, the Fourth Circuit examined *American Federation of Government Employees, AFL-CIO v. United States*,[29] in which the CAFC reviewed the ADRA's legislative history to determine what meaning to give the term "interested party" in the context of the ADRA. Ultimately, the CAFC held that when Congress used the term "interested party" in the ADRA, it was cognizant that it had used the same term in the Competition in Contracting Act (CICA),[30] another bid protest jurisdiction-granting statute. The court concluded, therefore, that Congress must have "intended the same standing requirements that apply to protests under the CICA to apply to actions brought under [section] 1491(b)(1)" of the ADRA.[31] Finding the CAFC's analysis "sufficiently persuasive," the Fourth Circuit adopted it and applied the CICA standard to the ADRA. The court reasoned that because PSC's interest in the solicitation was "based solely on its desire as a state regulatory body to assert jurisdiction over the private entity that would eventually provide utility services at Fort Meade," it was neither an actual or prospective bidder or offeror. The Fourth Circuit thus held that the PSC did not have standing to bring a bid protest action or to appeal the District Court's decision.[32] Major Huyser.

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22. 28 U.S.C. § 1491(b)(1) (2000).

23. Maryland Pub. Serv. Comm'n v. United States, 290 F.3d 734 (4th Cir. 2002).

24. *Id*. at 735.

25. *Id*. at 736 (citing *Baltimore Gas & Elec*., 133 F. Supp. 2d at 721 (D. Md. 2001).

26. *Id*. The District Court had similarly questioned whether the PSC had standing to bring suit. The District Court avoided this issue, however, because another party, BG&E, the local Maryland utility the PSC had licensed in the Fort Meade area, satisfied the standing requirements. *Id*. (citing *Baltimore Gas & Elec*., 133 F. Supp. 2d at 727 n.8).

27. *Maryland Pub. Serv. Comm'n*, 290 F.3d at 736-37.

28. *Id*. at 737. The Fourth Circuit stated that it was "especially interested" in the CAFC's views on the subject, given the CAFC's "exclusive appellate jurisdiction over all ADRA cases filed on or after January 1, 2001" resulting from Congress's inclusion of a "sunset provision" in the ADRA. *Id*. (citing Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1331-32 (Fed. Cir. 2001) (discussing the pre-1997 bid protest jurisdiction of the federal district courts and the COFC)). Because the *Public Service Commission* plaintiffs filed suit before this sunset date, the Fourth Circuit would have had jurisdiction over the appeal if it determined that the PSC had standing. *Id.*; *see also 2000 Year in Review*, *supra* note 21, at 36-38 (discussing the end of bid protest jurisdiction in the federal district courts).

29. 258 F.3d 1294 (Fed. Cir. 2001).

30. *See* 31 U.S.C. § 3551(2) (2000) (defining "interested party" 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. *Maryland Pub. Serv. Comm'n*, 290 F.3d at 739 (quoting Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001)).

32. *Id*.

Construction Contracting

If You Throw Enough Mud Against a Wall, Something Will Stick

In *Comtrol, Inc. v. United States*,[1] Comtrol appealed a decision from the U.S. Court of Federal Claims (COFC) that granted a government motion for summary judgment. Comtrol had sued for various expenses arising from a contract with the Federal Aviation Administration (FAA) for construction work at the Salt Lake City International Airport. Comtrol sought reimbursement for: (1) differing site conditions and defective specifications based on the presence of quicksand at the work site;[2] (2) differing site conditions and defective specifications based on the placement of a fuel pipeline; (3) additional costs relating to alleged improvements to three underground duct banks; (4) additional overhead, time, and acceleration costs resulting from numerous change orders; and (5) damages resulting from an alleged breach of the government's implied contractual duties of cooperation, non-interference with contract performance, and good faith and fair dealing. Applying basic black-letter law procurement law, the U.S. Court of Appeals for the Federal Circuit (CAFC) denied the first two portions of Comtrol's appeal and remanded the remaining issues to the COFC for further consideration.[3]

The appellant based its differing site condition (quicksand) claim on a soil report that the government included in the contract by reference.[4] This report stated that "hard material . . . may be encountered," but generally characterized the soil at the site as consisting of a "relatively soft gray clay," and noted that the surveyors encountered ground water at the depth of two feet at several test sites.[5] Comtrol argued that the government misled it into believing that the soil at the site was dryer than it was; Comptrol argued that it was entitled to recovery under a Type I differing site condition theory.[6]

The CAFC dismissed this portion of the claim because Comtrol never reviewed the report before submitting its bid. Although the government incorporated the soil report into the contract by reference, Comtrol failed to obtain and review the document before submitting its bid. Because a contractor needs to establish reasonable reliance to prevail in a Type I differing site condition claim, the CAFC deemed Comtrol's arguments concerning the report's substance to be irrelevant and dismissed this portion of the appeal.[7]

Concerning the second claimed expense, increased costs associated with working around a fuel line that was not listed in the specifications, the CAFC observed that a pipeline drawing the agency provided to Comtrol noted that there was a pipeline on the excavation site. According to the CAFC, a reasonably alert contractor would have sought clarification from the government about the matter. As such, the CAFC concluded that Comtrol could not establish a differing site condition or defective specification claim because it was not reasonably prudent in interpreting the contract documents.[8]

The third portion of Comtrol's claim involved additional costs associated with changes to several duct banks that the FAA had ordered because of the wet soil conditions Comtrol encountered. At trial, the COFC granted summary judgment to the government for this portion of the claim, under the theory that the contractor bore the risk of additional costs associated with the wet site conditions, and as such, was required to pay for this work because it was a remedial to the extent that it was necessary to complete contract performance. Because of the paucity of facts in the record on this part of the claim, the CAFC could not determine whether the work was in fact remedial, or in the alternative, unrelated to the soil conditions. The CAFC remanded that portion of the claim for further consideration.[9]

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1. 294 F.3d 1357 (Fed. Cir. 2002).

2. The Differing Site Conditions (DSC) clause at FAR section 52.236-2 allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition. To recover for a Type I Differing Site Condition, the contractor must prove that: (1) the contract either implicitly or explicitly indicated a particular site condition; (2) the contractor reasonably interpreted and relied on the contract indications; (3) the contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract; and (4) the claimed costs were attributable solely to the differing site condition. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.236-2 (July 2002) [hereinafter FAR]; *see also* P.J. Dick, Inc., GSBCA No. 12036, 94-3 BCA ¶ 27,073; Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399.

3. *Comtrol*, 294 F.3d at 1359.

4. *Id*. at 1362-63.

5. *Id*. at 1360.

6. *Id*. at 1359-60.

7. *Id*. at 1362-63.

8. *Id*. at 1365.

9. *Id*. at 1366.

The fourth issue involved a request for equitable adjustment involving 142 change orders that Comtrol insisted were unrelated to the differing site conditions encountered at the work site. The CACF concluded that at least a few of the change orders were unrelated to the differing site conditions, and as such, remanded this issue to the COFC for further proceedings.[10]

Finally, Comtrol argued that the FAA violated its implied contractual duty to cooperate and not interfere with Comtrol's contract performance. Once again, the CAFC had no alternative but to remand this issue to the COFC because resolving the differing site condition issue did not automatically resolve this portion of the appeal.[11]

Not So Fast: CAFC Holds General Disclaimer Does Not Shift the Risk of a Design Flaw to the Contractor

In *Edsall Construction Co.*,[12] the Armed Services Board of Contract Appeals (ASBCA) determined that the government could not shift the responsibility for defective design specifications to a contractor with a general disclaimer. The CAFC recently examined the case and reached the same conclusion.[13]

The Army awarded Edsall a fixed-price construction contract for a facility to house Montana National Guard helicopters. The facility specifications included two hangars with 21,000-pound tilt-up canopy doors. The government included detailed design specification for a complex system of motors, cables, and pulleys, and counterweights to open and close the doors.[14] A general disclaimer provision in the contract stated that bidders were responsible for verifying the design before bidding, and "any condition that will require changes from the plans must be communicated to the architect for his approval prior to bidding and all of those changes must be included in the bid price."[15]

During the construction of the facility, Edsall encountered numerous problems with the door design. The design was unworkable; Edsall had to deviate from the government-provided design, at considerable expense to Edsall. Edsall submitted a claim to the contracting officer in the amount of $70,000 for costs attributed to the government's faulty design. The contracting officer rejected the claim because Edsall did not request the design change before bidding, as the disclaimer allegedly required. Edsall appealed this decision to the ASBCA.[16]

The ASBCA found that the specifications for the door incorporated a defective design. The board further found that Edsall's pre-bid review of the specifications was reasonable, and that the disclaimer on one drawing did not shift the risk of design inadequacies to Edsall.[17] On appeal, the government fared no better. The CAFC reasoned that "[w]hen the Government provides a contractor with a design specification, such that the contractor is bound by contract to build according to the specifications, the contract carries an implied warranty that the specifications are free from design defects."[18] With that said, "[g]eneral disclaimers requiring the contractor to check plans and determine project requirements do not overcome the implied warranty, and thus do not shift the risk of design flaws to contractors who follow the specifications."[19]

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10. *Id.* at 1366-67.

11. *Id.* at 1367. Comtrol argued that the COFC erred by dismissing, *sua sponte*, its breach of contract claim, which sought damages from the FAA for "breach of its implied contractual duties of cooperation, non-interference with work, and good faith and fair dealing." *Id.* The CAFC's decision does not explain in detail how the FAA allegedly breached this duty. *Id.*

12. ASBCA No. 51787, 01-2 BCA ¶ 31,425.

13. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (Fed. Cir. 2002); *see also* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 87 [hereinafter *2001 Year in Review*].

14. *Edsall*, 296 F.3d at 1083. For a detailed description of the door design, see *2001 Year in Review*, *supra* note 12, at 87.

15. *Edsall*, 296 F.3d at 1083.

16. *Id.*

17. *Edsall*, 01-2 BCA ¶ 31,425, at 155,181; *see also 2001 Year in Review*, *supra* note 12, at 88.

18. *Edsall*, 296 F.3d at 1084.

19. *Id.* at 1085.

Examining the ASBCA's logic, the CAFC noted that the board, by sustaining Edsall's appeal, did not render the language of the disclaimer meaningless. The CAFC reasoned that the language "canopy door details . . . must be verified by the contractor"[20] could reasonably mean that the contractor should check the physical details of the door's weight and dimensions without altering the design itself. The language of the disclaimer did not negate the government's implied warranty that the specifications were free from defects.[21]

Interestingly, this decision does not necessarily preclude the government from shifting the risk in design specification contracts. The court clearly noted that the Army could have drafted specifications that shifted the risk of design defects to the contractor, but that the disclaimer on the drawing was simply not specific enough to shift the risk in this case.[22] If the government had incorporated an express disclaimer, as opposed to the general disclaimer used in this case, the results may have been different.

Eternal Vigilance Is the Price of Contracting with the Government

A recent CAFC decision reinforces the lesson that contractors doing business with the government must exercise at least a minimal degree of due diligence. In *Franklin Pavkov Construction* (*FPC*),[23] the Air Force awarded the appellant a firm fixed-price contract to install four sets of three-story stairs on two dormitory style buildings at Shaw Air Force Base, South Carolina. Under the contract, the Air Force provided government furnished property (GFP) for use in the construction of the stairs. The appellant was to construct the stairs in accordance with Air Force drawings and specifications, the same drawings and specifications it used in the solicitation for bids.[24] Although the Air Force awarded the contract in 1995, it had (unsuccessfully) attempted to implement a similar project in the same buildings in 1991. The Air Force down-scoped the project from the 1991 version after encountering problems with it.[25]

Before the award, the solicitation for bids was to contain a set of 1995 specifications as well as the 1995 drawings. A government employee, however, inadvertently gave FPC a copy of the 1991 specifications from the prior unsuccessful project. The Air Force did not firmly establish the existence of the mistake until a government inspector compared his copy of the 1995 specifications with FPC's 1991 version. Unfortunately, the project was ninety percent completed by this point.[26]

FPC also alleged that the Air Force provided FPC with defective GFP for the project.[27] Although the contract was silent about the means and date of delivery of the GFP, the parties agreed to delivery in November 1995, at a location about 100 to 200 yards from the job site. The Air Force delivered the GFP on the agreed date; however, FPC failed to inventory it until several months latter. On 14 May 1996, about five months after delivery, FPC informed the government that the shipment of GFP did not contain several "stair nosings," devices used to prevent slipping on the stairs. Because manufacturing the stair nosings required a considerable amount of lead time, the government agreed to use a substitute aluminum channel.[28]

When it completed the project, FPC submitted a certified claim to the contracting officer for $117,129, for costs allegedly associated with the defective specifications, defective and missing GFP, and a differing site condition involving a drain grate for which the government directed additional work.[29] The contracting officer denied FPC's claim; FPC appealed to the ASBCA.[30] The ASBCA held that the appellant was entitled to increased costs associated with the drain grate, but denied FPC's claims relating to defective specifications and defective GFP.[31]

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20. *Id.* at 1086.

21. *Id.*

22. *Id.*

23. 279 F.3d 989 (Fed. Cir. 2002).

24. *Id.* at 991.

25. *Id.* at 991-92.

26. *Id.* at 992.

27. *Id.* at 996.

28. *Id.* at 992.

29. *Id.* at 993.

30. *See* Franklin Pankov Constr. Co., ASBCA No. 50828, 00-2 BCA ¶ 31,100.

31. *Id.* at 153,609.

The ASBCA reasoned that the allegedly defective specifications did not give FPC a basis for recovery because the 1995 specifications had down-scoped the project from the 1991 specifications. The board reasoned that even if it would have been easier for FPC to perform the work according to the 1995 specifications, FPC still performed the project it bid on—the stairways—using the 1991 specifications.[32]

The ASBCA held FPC's feet to the proverbial fire concerning the defective GFP. The board noted that paragraph (c) of the government-furnished property clause provided that upon delivery of the GFP, the contractor assumed the risk and responsibility for the loss.[33] In this case, over five months elapsed from the date of delivery until FPC notified the government that the equipment was missing. In the absence of timely notice that the GFP was deficient, the board held that the appellant could not recover for the missing equipment.[34]

On appeal, the CAFC twice adopted the reasoning of the ASBCA. The court noted that the mix-up with the specifications created "no additional costs flowing proximately from the defect" because the defective specifications did not require FPC to do any work above the project it bid on.[35] Concerning the deficient GFP, the CAFC observed that FPC failed in its duty to inspect and inventory the GFP. Because the government could have cured any deficiencies in the GFP if it had timely notice, the court determined that FPC should not be allowed to collect from the Air Force for this portion of its claim.[36]

Government Can't Trump a Mandatory FAR Provision

Withholding progress payments may make good business sense when a contractor is verging on default, but excessive withholding will not win many points with the ASBCA. In *All-State Construction* (*All-State*),[37] the Navy awarded All-State a contract to construct a hazardous waste storage facility. Section 01010 of the contract provided as follows:

> The obligation of the government to make any payments under any of the provisions of this contract shall in the discretion of the Officer in Charge of the Construction, be subject to . . . [a]ny claims which the government may have against the Contractor under or in connection with this contract.[38]

The general provisions of the contract, however, included FAR section 52.232-5, "Payments Under Fixed-Price Construction Contract (April 1989)," which limits "retainage" of progress payments for unsatisfactory performance to ten percent of the amount of the payment "until satisfactory progress is achieved."[39]

As contract performance progressed, All-State encountered various delays, the excusability of which the parties disputed. On several occasions, the government accepted revised completion schedules from All-State. On each occasion, the government expressly stated that it was accepting the revised schedules to mitigate damages and did not waive its right to assess liquidated damages or terminate the contract for default. As work progressed, All-State invoiced the government for progress payments seven times. The government accepted and paid the first six invoices, subject to some retainage. The government rejected the seventh invoice, however, after the contracting officer determined that "it is not prudent at this time to make further payments to you until we are sure that sufficient funds are available in the contract to cover costs of reprocurement and the assessment of liquidated damages if the contract is terminated for default."[40]

Before the government received the seventh invoice, it paid All-State $211,573.50; it had retained $33,100 for liquidated delay damages and other expenses. When the government received Invoice Number 7, it had retained a total of $127,198.67, thirty-eight percent of All-State's undisputed earned amount for the work it had completed.[41] This amount was more than three times the maximum allowed by the FAR Payments Clause at FAR section 52-232-5.[42] Shortly after the

32. *Id.* at 153,608.

33. *Id.*

34. *Id.* at 153,609.

35. Franklin Pankov Constr. Co., 279 F.3d 989, 996 (Fed. Cir. 2002).

36. *Id.* at 998; *see supra* Part III.D (discussing *Pankov* and other GFP issues).

37. ASBCA No. 50586, 02-1 BCA ¶ 31,794.

38. *Id.* at 157,020.

39. *Id.* at 157,019; *see also* FAR, *supra* note 2, at 52.232-5(e).

40. *All-State*, 02-1 BCA ¶ 31,794, at 157,020.

41. *Id.*

government rejected Invoice Number 7, All-State stopped work on the contract. The contracting officer then terminated the contract for default, and All-State appealed the default termination to the ASBCA.[43]

Upon receipt of All-State's motion for summary judgment, the board examined the legal effect of section 01010 of the contract, and whether the government breached the contract by retaining more than three times maximum allowed under the FAR. The board found that section 01010 of the contract contradicted the clear wording of the FAR Payments Clause. Since the FAR Payments Clause is mandated by regulation, the board concluded that the government could not benefit by inserting a contradictory clause. As such, the contradictory clause was without legal effect.[44] The board then determined that retaining thirty-eight percent of progress payments otherwise due to All-State constituted a government breach of the contract. Finally, the board determined that the government's refusal to provide progress payments, as required under the Payments Clause, justified All-State's work stoppage.[45]

Eichleay, *Schmeichleay*

The *Construction* section of the *Year in Review* would not be complete without at least passing mention of two *Eichleay*[46] delay cases. In *Williams v. White*,[47] the government awarded Williams, the appellant, a firm fixed-price contract to make various improvements and repairs on a building at a medical center in Colorado. As with many construction contracts, Williams encountered several delays, and upon completion of the project, invoiced the government for $98,642 for "extended overhead/unabsorbed overhead."[48] The agency denied the claim, and Williams appealed the claim to the ASBCA. After an evidentiary hearing, the board issued an opinion denying Williams's delay claim. In its opinion, the board stated that it adopted the conclusion of a Defense Contract Audit Agency auditor that the delay costs had been fully absorbed into the base contract price.[49]

Williams appealed the ASBCA's decision to the CAFC. On appeal, the CAFC expressed considerable concern that the ASBCA had simply adopted the auditor's opinion without making an independent determination. The court expected the board to have made its own findings to that effect, rather than "merely stating that the auditor had so found."[50] The CAFC was also disturbed that the board failed to examine two prerequisites for establishing recovery under the *Eichleay* formula: (1) that the contractor was on standby; and (2) that the contractor was unable to take on other work.[51] As a parting shot, the CAFC noted that it was not disagreeing with the board, but rather could not make a determination based on this record. The CAFC remanded the case to the board.[52]

A second COFC case stands for the proposition that the court will not sustain a delay claim that does not neatly fit the *Eichleay* formula. In *Nicon, Inc. v. United States*,[53] the COFC examined whether a contractor could recover for alleged unab-

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42. *Id.* at 157,020; *see also* FAR, *supra* note 2, at 52.232-7.

43. *All-State*, 02-1 BCA ¶ 31,794, at 157,020. Several days after the government terminated All-State's performance, All-State proposed a settlement with the government for this and other disputes, which would have increased the contract price by $330,191.27. *Id.*

44. *Id.* at 157,021.

45. *Id.* at 157,020.

46. *See* Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2,688, *recons. denied*, 61-1 BCA ¶ 2,894; *see also* West v. All State Boiler, Inc., 146 F.3d 1368, 1377 (Fed. Cir. 1998) ("[R]ecovery under the *Eichleay* formula is an extraordinary remedy designed to compensate a contractor for unabsorbed overhead costs that accrue when contract completion requires more time than originally anticipated because of a government-caused delay."). Under the *Eichleay* formula, unabsorbed overhead is calculated by multiplying the total cost incurred during the contract period by the ratio of billings for the delayed contract to total billings of the firm during the contract period. The daily contract overhead rate equals the allocable contract overhead divided by the days of contract performance. The recoverable amount equals the daily contract overhead rate multiplied by the number of days of government-caused delay. *See, e.g.*, Capital Elec. Co. v. United States, 729 F.2d 743 (Fed. Cir. 1984).

47. Charles G. Williams Constr., Inc. v. White, 271 F.3d 1055 (Fed. Cir. 2001).

48. *Id.* at 1057. Specifically, Williams calculated its unabsorbed overhead at $468 per day, which it multiplied by 330 (the total number of days of government-caused delay), for a total of $98,642. *Id.*

49. *Williams*, 271 F.3d at 1058 (citing Charles G. Williams Constr., Inc., ASBCA No. 49775, 00-2 BCA ¶ 31,047, at 153,321).

50. *Id.* at 1059.

51. *Id.* at 1058. The logic of this portion of the opinion is questionable. Had the board made a clear and unequivocal determination that the contract absorbed the overhead costs instead of simply restating the opinion of the auditor to that effect, there would be no reason to continue with this portion of the *Eichleay* analysis. The question of whether the contractor was on standby or otherwise unable to take on additional work is irrelevant if the base contract costs absorbed the overhead costs.

52. *Id.* at 1060.

53. 51 Fed. Cl. 324 (2001).

sorbed overhead costs resulting from a government delay in issuing a notice to proceed, in a contract that the government terminated for convenience before the beginning of performance.[54] Concluding that the *Eichleay* formula is the exclusive means available for calculating unabsorbed overhead resulting from a government-caused delay, the COFC ruled that a contractor cannot recover under *Eichleay*, or any other formula, if it has not begun to perform under a contract.[55] Major Dorn.

54. *Id*. at 324.

55. *Id*. at 328; *see also supra* Part IV.G (discussing the cost allowability aspects of the *Williams* and *Nicon* decisions).

Bonds, Surety, and Insurance

The Government Is Not a Nanny

In Westchester Fire Insurance Co.,[1] the Court of Federal Claims (COFC) recently stated that the government is "not a nanny" for sureties that are less than diligent in protecting their interests vis-à-vis the government and its contractors.[2] The COFC required the surety to pay the government's reprocurement costs, even though the surety alleged that the government abused its discretion in its administration of the contract.[3]

In Westchester, the Coast Guard contracted with Zanis Contracting Corporation (Zanis) for a waterfront rehabilitation project at the Coast Guard facility at Eaton's Neck, New York.[4] Shortly after the award, Zanis furnished a performance bond for the project that listed Westchester Fire Insurance Company (Westchester) as the surety.[5] The contract incorporated the Davis-Bacon Act (DBA), which provides that workers on the job must be paid no less than the prevailing rates for the area.[6] The contract also authorized the contracting officer to withhold payments from the contractor if the contractor failed to pay its workers the Department of Labor (DOL) specified rates.[7]

Zanis' performance was less than stellar; the contracting officer issued several cure notices for various unexcused delays. The contracting officer provided Westchester copies of these notices as he issued them. The contracting officer also learned that a subcontractor was not paying several of its employees in accordance with DBA pay rates.[8] Despite the delays, Zanis made some progress on the project, and on 7 June 1994, the contracting officer approved a $32,940 progress payment.[9] On 15 June 1994, however, the Coast Guard issued Zanis a default termination notice for, among other deficiencies, "repeated lack of performance" and "repeated failure to ensure proper wage deficiencies are corrected."[10]

Shortly after termination, the DOL initiated an investigation of the DBA violations. On 21 November 1994, the DOL requested that the contracting officer withhold $69,105.12 in back wages due to the employees. The contracting officer complied with the DOL's request.[11] Several months later, the DOL reached a settlement with the subcontractor, allowing the Coast Guard to release $60,216.58 of the withheld funds to the General Accounting Office (GAO) for disbursement to the effected employees. The contracting officer applied the remaining $8888.54 towards reprocurement costs.[12]

Before the DOL reached a settlement with the subcontractor, the contracting officer entered into discussions with Westchester about a possible surety takeover of the contract.[13] During negotiations, Westchester expressed an interest in entering into a surety takeover agreement, but as a condition to the agreement, Westchester insisted that the agency make the funds withheld because of the DBA violations available for the follow-on contract. The contracting officer refused, and after completing the requirement, awarded the follow-on contract to another contractor.[14]

Upon completion of the project, the contracting officer issued a final decision assessing reprocurement costs against Westchester. Westchester appealed the contracting officer's decision to the COFC and filed a complaint seeking reversal of the contracting officer's decision. Specifically, Westchester alleged that the Coast Guard's demand for payment was erroneous as a matter of law because Westchester was entitled to the

1. Westchester Fire Ins. Co. v. United States, 52 Fed. Cl. 567 (2002).

2. *Id*. at 579.

3. *Id*. at 587.

4. *Id*. at 569.

5. *Id*. at 570.

6. 40 U.S.C. § 276a (2000).

7. *Westchester*, 52 Fed. Cl. at 569-70.

8. *Id*. at 571.

9. *Id.* The Coast Guard reduced this amount from the $42,821 that Zanis had requested, because of the its concern over the rate of performance, and questions about "previous payroll reports." *Id.*

10. *Id*. at 571-72.

11. *Id*. at 572.

12. *Id*. at 573-74.

13. *Id*. at 573.

14. *Id*. at 574.

money the Coast Guard set aside as a result of the DBA violation. Westchester also asserted that it was entitled to the amount of the progress payment that the Coast Guard paid Zanis because the Coast Guard owed Westchester a contractual duty to act with "reasoned discretion" in its administration of the contract.[15] The government filed a counterclaim, asserting that Westchester was liable to the Coast Guard, based on its performance bond for $151,449.58, which represented the excess costs the government had to pay under the reprocurement contract (minus the $8888.54 reduction of identified DBA violations).[16]

The COFC examined both issues Westchester raised and concluded that Westchester's arguments were without merit. First, concerning the progress payment, the court observed that, by definition, a surety agreement is designed to protect the government's interests, and not the surety's.[17] Thus, the government only owes the surety a duty once the surety informs the government that a contractor may be in default; as such, the surety could become a party to the bonded contract. Absent notice from the surety, the "Government's equitable duty to act with reasoned discretion"[18] towards the surety was never triggered. Further, it was not the government's responsibility "to divine the surety's thinking process, or act as a nanny for the surety and ask whether . . . it would like the Government to withhold progress payments to the contractor."[19]

Second, the court held that the government's withholding of money pursuant to the DBA violation was not a "voluntary act" on the part of the government, as alleged by Westchester.[20] Rather, the money represented unpaid earnings of the subcontractor's workers who had priority over the contractor's assignee to the funds. In the words of the court, "[A] surety cannot acquire by subrogation rights that the contractor itself did not have."[21]

Don't Call Us, They'll Call You

The Court of Appeals for the Federal Circuit (CAFC) will generally hear an appeal from a board of contract appeals only if the board's decision resolves all issues presented to the contracting officer in the contractor's claim.[22]

In United Pacific Insurance Co. v. Roche,[23] the CAFC recently ruled that a board decision that failed to list which claims were subject to a surety takeover agreement did not resolve all of the presented issues; the CAFC therefore declined jurisdiction.[24] In United Pacific, the appellant issued a performance bond on behalf of Castle Abatement Corporation (Castle) for a contract involving the repair of a secondary containment system at McGuire Air Force Base, New Jersey.[25] Castle discontinued work on the project once it began incurring substantial expenses for environmental remediation as a result of unanticipated soil contamination at the site. As the surety, United Pacific then entered into a takeover agreement with the government and arranged for completion of the project. Several months later, United Pacific filed a request for equitable adjustment, consisting of ten claims totaling $1,759,966.80. The basis for the claims was the differing site conditions Castle and the surety allegedly encountered.[26] The contracting officer granted a small portion of the claim, but denied most of the expenses United Pacific sought.[27] United Pacific then appealed

15. *Id.* Specifically, Westchester alleged that the government violated its duty to act with reasoned discretion towards Westchester when the contracting officer paid Zanis the $32,940 progress payment immediately before issuing the notice of default termination. *Id*. at 574-75.

16. *Id*. at 572-75.

17. *Id.*

18. *Id*. at 576.

19. *Id*. at 579.

20. *Id*. at 581.

21. *Id.* As icing on the cake, the COFC awarded the Coast Guard interest on the judgment. Although Westchester argued that it was not subject to the FAR clause requiring the payment of interest "from the date due" because it never entered into a takeover contract with the government, the court rejected Westchester's reasoning. The COFC noted that as a surety for the contracting parties, Westchester was liable for all amounts the contractor owed to the government, including interest. *Id.* at 584-87; *see also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.232 (July 2002) [hereinafter FAR].

22. *See* AAA Eng'g & Drafting, Inc. v. Widnall, 129 F.3d 602 (Fed. Cir. 1997).

23. United Pac. Ins. Co. v. Roche, 294 F.3d 1367 (Fed. Cir. 2002).

24. *Id.* at 1370.

25. *Id.* at 1368-69.

26. *Id*. at 1369.

27. *Id*. at 1368-69.

the decision to the Armed Services Board of Contract Appeals (ASBCA).[28]

The government filed a motion to dismiss the portions of the appellant's claims that arose before the takeover agreement for lack of jurisdiction.[29] In a slip opinion, the ASBCA granted the government's motion, but retained jurisdiction over the post-takeover portions of the equitable adjustment claims. The ASBCA opinion did not define which claims arose before the takeover agreement.[30] United Pacific appealed the decision to the CAFC. The government argued the ASBCA's decision was not final pursuant to the Contract Disputes Act.[31] The CAFC agreed with the government and dismissed the case. Specifically, the court noted that the decision was not final because it did not reach the full extent of the contracting officer's decision, which included a determination of the allowable quantum of the appellant's claims.[32]

No Cutting Corners on the Road to Paradise

In *Paradise Construction Co.*,[33] the GAO denied a bid protest when the Air Force found the protestor's bid bond defective, because it limited the surety's obligation to the difference between the protestor's bid amount and the amount of any replacement contract. In *Paradise*, the protestor bid on an Air Force contract for sealing four maintenance hangar roofs.[34] The invitation for bids (IFB) incorporated Federal Acquisition Regulation (FAR) section 52.228-1,[35] which provides that a bidder's failure to furnish the required bid guarantee in the proper format and amount "may be cause for rejection of the bid."[36] Further, subsection 1(e) provided that "[i]n the event the contract is terminated for default, the bidder is liable for any costs of acquiring work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference."[37] The Air Force concluded, and GAO later agreed, that this meant that a defaulting bidder would be liable for any reprocurement costs that the government may incur, and if the bidder failed to pay those costs, the bond would be available for that purpose.[38]

In response to the IFB, Paradise submitted a bid bond that provided that the surety would "pay to the obligee [the government] the difference not to exceed the penalty thereof between the amount specified in said bid and such larger amount for which the obligee may in good faith contract with . . . to perform the work covered by said bid."[39] The Air Force found that the quoted language rendered the bond nonresponsive because it limited the surety's obligation to the difference between the amount bid by Paradise and the amount of any new contract in the event Paradise defaulted. As such, it failed to cover additional expenses that the government could incur.[40] The GAO agreed, finding the bid-bond as submitted was a "significant diminution of the defaulting bidder's and its surety's obligation under FAR [section] 25.228-1 to pay all reprocurement costs (up to the penal amount)." As such, the protestor's bid was nonresponsive to the RFP.[41]

Bonds? We Don't Need No Stinking Bonds!

Under FAR section 28.103-1,[42] agencies should generally not require performance bonds for contracts that do not involve

28. United Pac. Ins. Co., ASBCA No. 52419, 01-1 BCA ¶ 31,296.

29. *United Pac.*, 294 F.3d at 1369. The motion argued that as a surety, United Pacific did not independently possess standing to pursue the claims of Castle, and that without an assignment by Castle to United Pacific, only Castle was in contractual privity with the government for such claims. *Id.*

30. *Id.* at 1369.

31. *Id.* at 1370; *see also* 41 U.S.C. §§ 606, 607(d) (2000).

32. *United Pac.*, 294 F.3d at 1370.

33. Paradise Constr. Co., Comp. Gen. B-289144, Nov. 26, 2001, 2001 CPD ¶ 192.

34. *Id.* at 1.

35. FAR, *supra* note 21, at 52.228-1.

36. *Id.* at 52.228-1(e).

37. *Paradise Constr.*, 2001 CPD ¶ 192, at 1.

38. *Id.* at 1-2.

39. *Id.*

40. *Id.*

41. *Id.* at 2-3.

42. FAR, *supra* note 21, at 28.103-1.

construction. Although the FAR allows for a number of limited exceptions,[43] in *Apex Support Services, Inc.*,[44] the GAO concluded that the General Services Administration (GSA) failed to establish how its contract fit into any of those exceptions. In *Apex*, the contractor protested a GSA RFP for a service contract involving the inspection and acceptance of construction work for the government. The solicitation included requirements for a bid guarantee and a performance bond.[45] Before issuing the RFP, the contracting officer documented the reasons for requiring a bond for this contract in a memorandum. The memorandum stated that bonding was necessary to protect the government's interests because, among other reasons, the contractor would have the use of government property, the government did not have the means to perform the services in the event the contractor defaulted, and "the health, welfare, and morale of visitors and employees . . . would be negatively affected should the contractor fail to perform."[46]

The GAO examined each of these stated reasons and concluded they were all valid reasons for requiring a performance bond. The facts of this case, however, simply did not fit any of these stated reasons. Specifically, the GSA failed to demonstrate to the GAO's satisfaction how a disruption in services would jeopardize anyone's health, safety, or welfare, or why the GSA would have difficulty in reprocuring the services should the contractor fail to perform. There was nothing so unique about this contract that the GSA should deviate from the general rule. As such, the government acted unreasonably in requiring a performance bond in this case.[47] Major Dorn.

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43. *Id.* at 28.103-2. This provision allows for the use of bonds for service contracts when it is necessary to protect the government's interests. The FAR gives four examples of such situations, which include:

> where the government will provide the contractor property or funds for its use or as partial compensation; where the government wants assurance that a contractor's successor-in-interest is financially capable; where the government must make substantial progress payments before delivery begins; and where the contract is for dismantling, demolition, or removal of improvements.

Id. The GAO has opined that this list is not exhaustive and that there may be other circumstances where a bond is necessary to protect the government's interest. *See also* RCI Mgmt., Inc., Comp. Gen. B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642.

44. Comp. Gen. B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202.

45. *Id.* Specifically, the RFP required a bid guarantee in an amount equal to twenty percent of the bid amount for the base period of performance, and a performance bond in an amount equal to twenty percent of the contract price for the initial twelve-month period. *Id.*

46. *Id.* at 3.

47. *Id.* at 3-4.

Cost and Cost-Accounting Standards

Allowable Relocation Costs Ceiling Raised

This past year, the Federal Acquisition Regulation[1] (FAR) Council issued a final rule relating to the allowability of certain employee relocation costs.[2] The FAR Council had initially proposed to eliminate the $1000 ceiling on the allowability of miscellaneous relocation costs if the employee uses the lump-sum basis. The FAR Council ultimately concluded, however, that "[t]o reduce the Government's risk in this area, the final rule maintains a ceiling for miscellaneous expenses when a contractor uses the lump-sum payment method, but increases the limit from $1000 to $5000."[3] If the employee's reimbursement was based upon actual allowable expenses, however, there is no ceiling for this cost principle except reasonableness.[4] The final rule also added two new categories of allowable relocation costs: (1) payments for increased employee income or Federal Insurance Contributions Act (FICA) taxes incident to reimbursed relocation costs; and (2) payments for spouse employee assistance.[5]

In response to comments that the proposed rule may increase claimed costs for reimbursable relocation costs, the FAR Council noted that the cost principles should ensure that contractors are treated fairly, and that the cost principles should not be used as a cost containment mechanism.[6]

Payments for Extended Leave Benefits to Activated Reservists Are Allowable

In a memorandum dated 5 October 2001,[7] the Under Secretary of Defense for Acquisition, Technology, and Logistics, E.C. Aldridge, Jr., announced that a government contractor's continuation of certain fringe benefits for Guard and Reserve members activated in response to the September 11 terrorist attacks would be considered an allowable cost under FAR section 31.205-6, "Compensation for Personal Services."[8] Under Secretary Aldridge referred to these fringe benefits as extended military leave benefits, which also included any payment for the difference between the activated employee's civilian and military salaries. He also noted that many companies have chosen to provide these extended military leave benefits voluntarily for past similar mobilizations and applauded these companies' efforts to help mitigate the hardships for activated Guard and Reserve members.

Subsequently, the Defense Contract Audit Agency (DCAA) published audit guidance that amended the DCAA Contract Audit Manual's (DCAAM) coverage for the extended military leave benefits. Paragraph 7-2117.2 of the DCAAM originally provided guidance on the allowability of extended military leave benefits to contractor employees who served during Operations Desert Shield and Desert Storm.[9] Interestingly, the amended paragraph does not specifically limit the allowability for extended military leave benefits to those Guard and Reserve members activated in response to the 11 September terrorist attacks and would presumably be an allowable cost for any subsequent call to active military duty.[10]

"How Would You Like Your Books Cooked—Rare, Medium or Well Done?" Refund of Previously Reimbursed State Taxes Through a Cost-Reimbursement Contract Is Allocated Back to the Government

The Court of Appeals for the Federal Circuit (CAFC) recently affirmed a Court of Federal Claims (COFC) decision allowing the government to recover its $4,725,000 allocable portion of a $10.5 million tax refund it received in 1995 for a 1987 Virginia tax that had been reimbursed as an allowable and allocable contract cost under a prior cost-reimbursement contract.[11] The prior cost-reimbursement contract was for the operation of an ammunition plant in Virginia. The disputed tax

1. General Servs. Admin. et al., Federal Acquisition Reg. (July 2002) [hereinafter FAR].

2. Federal Acquisition Circular 2001-08, 67 Fed. Reg. 43,512 (June 27, 2002). The council also amended the relocation cost allowability rules. FAR, *supra* note 1, at 31.205-35.

3. 67 Fed. Reg. at 43,516.

4. *Id.*

5. *See* FAR, *supra* note 1, at 31.205-35(a)(10)-(11).

6. 67 Fed. Reg. at 43,519.

7. Memorandum, E.C. Aldridge, Jr., Under Secretary of Defense, Acquisition, Technology, and Logistics, to Directors of Defense Agencies, Deputy for Acquisition and Business Management, ASN(RD&A), Deputy Assistant Secretary of the Air Force (Contracting), SAF/AQC, Deputy Assistant Secretary of the Army (Procurement), ASA(ALT), Executive Director, Logistics Policy & Acquisition Management (DLA), subject: Allowability of Contractor Costs for Employees Who Perform Active Military Duty in Conjunction With the Current National Emergency (5 Oct. 2001) [hereinafter Aldridge SRP Memo].

8. *See* FAR, *supra* note 1, at 31.205-6.

9. *See* U.S. Dep't of Defense, Defense Contract Audit Agency, DCAAM 7640.1, DCAA Contract Audit Manual para. 7-2117.2 (Jan. 2001) [hereinafter DCAAM].

refund resulted from the sale of a joint venture interest by Hercules Incorporated that Virginia taxed as a capital gain. Hercules sought reimbursement of its 1987 Virginia income and franchise tax liability, including the capital gain tax, on a direct cost allocation method between its Virginia operations. After an initial government denial of the requested reimbursement attributable to the capital gains tax, Hercules and the government stipulated to a reimbursable cost of $4,870,466 in the initial COFC proceeding.[12]

Subsequently, in 1995, Hercules received a $10.5 million Virginia tax refund attributable to the 1987 capital gains tax on the joint venture sale. In the subsequent COFC hearing and CAFC appeal, Hercules argued that the Cost Accounting Standards (CAS)[13] provided for tax refunds to be recorded as a reduction to the tax costs of the year in which the refund was received. Presumably, Hercules preferred this method of accounting in 1995 because it had started operating the plant on a firm fixed-price contract basis on 1 January of that year. If the cost-reimbursement contract had still been in place, the tax refund would have reduced Hercules' tax costs; the government's reimbursement would also have been lower because of the tax refund.

The government, of course, wanted its allocable portion of the tax refund using the same methodology used to allocate and reimburse the 1987 tax costs under the prior cost-reimbursement contract. Specifically, the government argued that FAR sections 31.205-41(d), 52.216-7(h)(2), and 31.201-5 "clearly instruct that any refund of a tax that has been allowed as a contract cost must be credited or paid to the government utilizing the same factors by which the costs were originally determined to be reimbursable."[14]

On appeal of the COFC's grant of summary judgment in the government's favor, the CAFC agreed with the government's interpretation. The CAFC also determined that the applicable FAR clauses did not conflict with the CAS because the CAS does not specifically address "how to calculate the amount of contractor liability to the government for tax refunds that have been allocated and reimbursed pursuant to the contracts that were in force during the tax year."[15] Accordingly, the CAFC seemed to draw a distinction between the applicability of the CAS for contract cost accounting and reporting and FAR clauses that directly relate to the financial matters between contracting parties.

"Did I Say That?"
CAFC Essentially Rejects Its Prior Holding in the Northrop Decision

Recently, in *Boeing North America, Inc. v. Roche*,[16] the CAFC explained and justified its analysis in *Caldera v. Northrop Worldwide Aircraft Services, Inc.* (*Northrop*)[17] to the maximum extent possible without actually overruling it altogether. In its 1999 *Northrop* decision, the CAFC ruled that legal costs were unallowable where the agency incurred the costs as the result of an unsuccessful defense of a wrongful termination suit. Four former employees who claimed they were discharged for refusing to participate in fraud against the Army brought the wrongful termination suit. The court reversed an earlier Armed Services Board of Contract Appeals (ASBCA) case and applied a "government benefit" analysis for allowability using the allocation principles of FAR section 31.201-4. In reversing the ASBCA, the court reasoned as follows:

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10. The amended version of the DCAAM states:

> a. Many companies choose to continue certain fringe benefits, such as health insurance, for employees who have been called to military duty. In addition, many companies pay these individuals the difference between their civilian and military salaries in an effort to help mitigate the hardships that those called to active military duty will experience. In accordance with an October 5, 2001 memorandum issued by the Under Secretary of Defense for Acquisition, Technology and Logistics, these types of supplemental benefits for extended military leave are to be considered allowable costs pursuant to FAR 31.205-6, Compensation for personal services.
> b. Allowable amounts are limited to the lesser of (a) the contractor's extended military leave benefits plus active duty pay, or (b) the total compensation of an employee at the time of entry into active military duty. For purposes of computing this limitation, active duty pay includes basic pay, all specialty pay, and all allowances, except for subsistence, travel, and uniform allowances.

Id. para. 7-2117.2.

11. Hercules, Inc. v. United States, 292 F.3d 1378 (Fed. Cir. 2002) [hereinafter *Hercules III*], *aff'g* Hercules, Inc. v. United States, 49 Fed. Cl. 80 (2001) [hereinafter *Hercules II*].

12. *See* Hercules, Inc. v. United States, 22 Cl. Ct. 301 (1991) [hereinafter *Hercules I*].

13. *See Hercules II*, 49 Fed. Cl. at 86; *Hercules III*, 292 F.3d at 1381. *Hercules III* specifically cited CAS 406, 48 C.F.R. § 9904.406-20, and CAS 410, *id.* § 9904.410-20. *Hercules III*, 292 F.3d at 1381.

14. *Hercules III*, 292 F.3d at 1381.

15. *Id*.

16. 283 F.3d 1320 (Fed. Cir. 2002).

17. 192 F.3d 962 (Fed. Cir. 1999).

> It is established that the contractor must show a benefit to government work from an expenditure of a cost that it claims is "necessary to the overall operation of the [contractor's] business." The Board erred in failing to make a determination of whether or not [the contractor's] defense of the Oklahoma lawsuit benefited the government. We can discern no benefit to the government in a contractor's defense of a wrongful termination lawsuit in which the contractor is found to have retaliated against the employees for the employees' refusal to defraud the government.[18]

This confusing analysis, which improperly mixed principles of allocability and allowability, subsequently reared its ugly head in *Boeing*. Boeing appealed a contracting officer's final decision that denied reimbursement for attorneys' fees and expenses related to a shareholders' derivative suit against the directors of Boeing's predecessor, Rockwell International Corp. (Rockwell).[19] The derivative suit alleged that Rockwell's directors failed to enforce adequate internal controls and fostered a climate that led to employee misconduct, resulting in criminal and civil corporate liability. The parties eventually settled the derivative suit with Rockwell, agreeing to pay the shareholders' legal fees and expenses and to indemnify the defendant directors against their attorneys' fees and expenses.[20]

Boeing claimed that FAR section 31.205-33 allowed the attorneys' fees and expenses as professional and consultant service costs. The government contended that the disputed costs were not allocable under FAR section 31.201-4 because there was not a beneficial relationship between the disputed costs and the contract requirements. The board held for the government, reasoning as follows:

> The rationale of *Northrop* can properly extend to the facts of this appeal so as to bar the allocability of the disputed costs under FAR 31.201-4(c). We can discern no benefit to the Government in a contractor's defense of a third party lawsuit in which the contractor's prior violations of federal laws and regulations were an integral element of the third party allegations.[21]

When properly interpreted, however, the benefit analysis for determining allocability under FAR section 31.201-4 is not related to a specific identifiable government benefit, but relates to an accounting concept as the CAFC described on appeal as follows:

> Allocability is an accounting concept involving the relationship between incurred costs and the activities or cost objectives (e.g., contracts) to which those costs are charged. Proper allocation of costs by a contractor is important because it may be necessary for the contractor to allocate costs among several government contracts or between government and non-government activities.[22]

The question of whether a cost is an allowable cost under a government contract is a separate analysis conducted only after the contract activity determines whether the cost is allocable. In *Boeing*, the court distinguished the concepts of allowability and allocability, reasoning, "The concept of cost allowability concerns whether a particular cost can be recovered from the government in whole or part. Allowability of a cost is governed by the FAR regulations, i.e., the cost principles expressed in Part 31 of the FAR and pertinent agency supplements."[23]

Accordingly, the CAFC held that the word "benefit" in FAR section 31.201-4(b) describes a nexus for accounting purposes and is not meant to allow an inquiry into whether the cost sufficiently benefits the government or not.[24] Although the CAFC agreed with Boeing on the proper concept of allocability, it did not agree that the costs were allowable as professional and consultant service costs.[25] Using the similarity test under FAR section 31.204(c)—because FAR section 31.205 did not directly address the allowability of this specific cost—the CAFC applied the cost allowability principles under FAR section 31.205-47, for similar legal proceedings brought by the government or through a relator under the False Claims Act.[26] Specifically, the third party relator settlement scenario of FAR section 31.205-47(c)(2),[27] which allowed reasonable costs if a contract-

18. *Id.* at 972 (citations omitted).

19. Boeing North America, Inc., ASBCA No. 49994, 00-2 BCA ¶ 30,970.

20. *Id.* at 152,844.

21. *Id.* at 152,848.

22. *Boeing*, 283 F.3d at 1326.

23. *Id.*

24. *Id.* at 1328.

25. *See* FAR, *supra* note 1, at 31.205-33.

ing officer determined that there was very little likelihood that a third party would prevail on the merits, was most similar.

The CAFC also conceded that its *Northrop* decision "has caused confusion about why the costs in question were not allowable."[28] The CAFC, however, backed up its *Northrop* decision as follows: "Properly understood, Northrop and FAR § 31.205-47 establish a simple principle—that the costs of unsuccessfully defending a private suit charging contractor wrongdoing are not allowable if the 'similar' costs would be disallowed under the regulations."[29]

The CAFC ultimately concluded that the board committed legal error by misapplying the allocability benefit analysis for allowability purposes. The CAFC then remanded the case to the board with the direction that the "[b]oard may allow the costs only if it determines that the plaintiffs in the [derivative] lawsuit had 'very little likelihood of success on the merits' of prevailing."[30]

"Oh, We're Not Through Yet"—The CAFC Vacates and Revises Its Earlier Boeing Decision

On 29 July 2002, the CAFC vacated its 15 March 2002 *Boeing* decision[31] and issued a revised opinion.[32] The CAFC's substantive conclusion that vacated and remanded the case to the ASBCA, however, remained unchanged. Essentially, the CAFC revised its discussion and references concerning the concept of allocability. Originally, the court had discussed the accounting concept of allocability in reference to FAR section 31.201-4.[33] In the revised opinion, the court held that "[c]ost allocability here is to be determined under the Cost Accounting Standards ('CAS'), 4 C.F.R. Parts 403, 410."[34] The court also noted the "general proposition that 'costs may be assignable and allocable under CAS, but not allowable under [the FAR].'"[35] The court then engaged in a complex discussion of the degree to which their earlier decision in *Northrop* bound them.[36] Specifically, the court questioned "whether we are also bound by the court's conclusion that the costs were not allocable because they did not benefit the government."[37] The court ultimately concluded, "Under our established precedent we are not bound by *Northrop* on the issue of allocability under the CAS standards since the CAS issue was neither argued nor discussed in our opinion."[38]

The CAFC once again remanded the case to the ASBCA, with the same direction as its vacated decision that the "[b]oard may allow the costs only if it determines that the plaintiffs in the [derivative] lawsuit had 'very little likelihood of success on the merits' of prevailing."[39]

The ASBCA Considers Appeal on the Allowability of Legal Defense Costs

Not content watching the CAFC jump through hoops to clarify *Northrop* in the two *Boeing* appeals, the ASBCA waded into the deep morass of legal defense cost allowability yet again. In *General Dynamics Corp.*,[40] the ASBCA held that a contractor may recover legal costs for a successful defense against government False Claims Act allegations, even if the contractor failed to successfully defend against other fraud allegations in the same lawsuit. To apportion the allowable successful defense

26. 31 U.S.C. § 3729 (2000).

27. *See* FAR, *supra* note 1, at 31.205-47(c)(2).

28. *Boeing*, 283 F.3d at 1327.

29. *Id.* at 1331.

30. *Id.* at 1334.

31. *Id.*

32. Boeing North America, Inc. v. Roche, 298 F.3d 1274 (Fed. Cir. 2002).

33. *Boeing*, 283 F.3d at 1326.

34. *Boeing*, 298 F.3d at 1280. The court clarified that the CAS provisions were subsequently codified at 48 C.F.R. pts. 9903-04. *Id.* at 1280 n.6.

35. *Id.* (citing United States v. Boeing Co., 802 F.2d 1390, 1394 (Fed. Cir. 1986)).

36. Caldera v. Northrop Worldwide Aircraft Svcs., Inc., 192 F.3d 962, 962 (fed. Cir. 1999).

37. *Boeing*, 298 F.3d at 1281.

38. *Id.* at 1283 (citations omitted).

39. *Id.* at 1290.

40. ASBCA No. 49372, 02-2 BCA ¶ 31,888.

costs from unallowable unsuccessful defense costs[41] under FAR section 31.205-47,[42] however, the ASBCA held that: (1) the successfully defended claims must not stem from the same wrongdoing as the unsuccessfully defended claims; and (2) there must be a reasonable basis to apportion the costs.[43] Major Kuhn.

41. The unsuccessful defense costs related to a settlement between General Dynamics and the Government for claims of subcontractor bribes to General Dynamics. *Id.* at 157,551.

42. The FAR disallows the following legal expenses:

> (b) Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees) . . . are unallowable if the result is—
>
> (1) In a criminal proceeding, a conviction;
>
> (2) In a civil or administrative proceeding, . . . a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct . . . ;
>
> . . . .
>
> (4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in paragraphs (b)(1) through (3) of this subsection . . . .

FAR, *supra* note 1, at 31.205-47.

43. *See Gen. Dynamics Corp.*, 02-2 BCA ¶ 31,888, at 157,567.

Deployment and Contingency Contracting

Brown & Root Services Awarded LOGCAP Contract

In December 2001, the U.S. Army awarded the Logistics Civil Augmentation Program (LOGCAP) contract to Halliburton KBR Government Operations division (Halliburton KBR), formerly Brown & Root Services, a division of Halliburton KBR of Arlington, Virginia.[1] The LOGCAP is defined as "a U.S. Army initiative for peacetime planning for the use of civilian contractors in wartime and other contingencies."[2] Through the LOGCAP, the Army is laying the foundation for awarding an umbrella support contract—a firm-fixed-price contract for peacetime contingency planning. The Army would obtain logistics, engineering, and construction services necessary for specific contingency operations by issuing cost-plus-award-fee or cost-plus-fixed-fee delivery orders.[3]

The third award of the LOGCAP contract "is a [ten]-year Task Order contract, with a one-year base period and nine one-year options."[4] Brown & Root Services, the predecessor of Halliburton KBR, was the original LOGCAP contractor from 1992 to 1997. The Army subsequently awarded Brown & Root Services a two-year sole-source contract to continue its services, specifically in the Balkans. Beginning in 1999, the Army competitively awarded Brown & Root Services a five-year contract for logistics services in the Balkans.[5]

Update of Special Authorities Invoked in the Wake of the 11 September 2001 Attacks

As last year's *Year in Review* reported, the federal government invoked a number of special authorities in response to the 11 September terrorist attacks.[6] President Bush declared a national emergency on 14 September 2001 through his issuance of Proclamation 7463.[7] On the same day, he issued Executive Order (EO) 13,223, which authorized the service secretaries to order any unit or member of the Ready Reserve of the Armed Forces to Active Duty for not more than twenty-four months, and to order stop loss for active and reserve forces.[8]

Through EO 13,235,[9] President Bush invoked the emergency construction authority at 10 U.S.C. § 2808.[10] The President delegated the emergency construction authority to the Secretary of Defense, who further delegated the authority to the Secretaries of the military departments.[11] The President's prior declaration of a national emergency and the subsequent invocation of emergency construction authority allow the undertaking of "military construction projects, not otherwise authorized by law[,] that are necessary to support . . . the armed forces."[12]

President Bush continued his declaration of a national emergency for another year by issuing a notice on 12 September 2002,[13] continuing these emergency authorities and others that require the declaration of a national emergency.

Last year's *Year in Review* also noted[14] that the anti-terrorist operations in Afghanistan and elsewhere—Operation Enduring Freedom—were declared a contingency operation under 10 U.S.C. § 101(a)(13)(B).[15] This change increased the simplified

1. Press Release, Halliburton Corp., Halliburton KBR Wins Logistics Civil Augmentation Contract from US Army (Dec. 17, 2001) [hereinafter Halliburton Press Release], *available at* http://www.halliburton.com/news/archive/2001/kbrnws.

2. U.S. Dep't of Army, Army Materiel Command, AMC Pam. 700-30, Logistics Civil Augmentation Program 3 (LOGCAP) (31 Jan. 2000).

3. *Id.* at 5.

4. *See* Halliburton Press Release, *supra* note 1.

5. *Id.*

6. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, Army Law., Jan./Feb. 2002, at 98-99 [hereinafter *2001 Year in Review*].

7. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

8. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001).

9. Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 20, 2001).

10. 10 U.S.C. § 2808 (2000); *see also supra* Part V.D. (analyzing the construction funding aspects of this authority).

11. Exec. Order No. 13,235, 66 Fed. Reg. at 58,343.

12. 10 U.S.C. § 2808(a).

13. Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 67 Fed. Reg. 58,317 (Sept. 12, 2002).

14. *See generally 2001 Year in Review*, *supra* note 6, at 98.

acquisition threshold at FAR section 101[16] from $100,000 to $200,000,[17] for acquisitions using the procedures of FAR part 13[18] to support contingency operations outside the United States.[19]

The amendment of DFARS section 213.301,[20] proposed before the 11 September attacks,[21] arrived just in time. This amendment allows contracting officers supporting contingency operations,[22] or humanitarian or peacekeeping operations,[23] to use the Government Purchase Card for purchases up to the increased $200,000 simplified acquisition threshold.[24] It remains to be seen, however, just how effective this authority will prove to be for operations in unsophisticated, cash-based economies such as Afghanistan.

Army Contracting Agency Is Deployable

On 22 August 2002, the Secretary of the Army, Thomas E. White, established the United States Army Contracting Agency (ACA).[25] The ACA, among other missions, is the Army's "primary point of contact for planning contingency contracting operations at the strategic and operational level to support the war-fighter worldwide."[26] To begin implementing this mission, the ACA established a Directorate of Contingency Contracting (DC^2) in its Falls Church, Virginia, headquarters. Under the ACA Implementation Plan,[27] the Director of DC^2 is the Army's Executive Agent for contingency contracting and operational contracting missions. The Director will coordinate and allocate ACA resources to support contingency and operational contracting requirements, update and develop Army and Joint doctrine affecting contingency contracting, and develop standard training guidance for contingency contracting personnel.[28] The Director also serves as the "FORSCOM/Army Service Component Command (ASCC) contingency contracting planner."[29] The ACA also plans to reorganize "contingency contracting such that the ACA operationally controls and evaluates [contingency contracting officers] CKOs [to] improve contracting support to the warfighter, and establish contingency contracting as a progressive career assignment."[30] Readers should expect

15. This provision states:

> The term "contingency operation" means a military operation that—
> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of [10 U.S.C. §§ 331-335], or any other provision of law during a war or during a national emergency declared by the President or Congress.

10 U.S.C. § 101(a)(13)(B).

16. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 2.101 (July 2002) [hereinafter FAR].

17. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 836, 115 Stat. 1012, 1192 (2001). Section 836 of the National Defense Authorization Act for Fiscal Year 2002 increases the simplified acquisition threshold for DOD procurements of supplies or services that facilitate the defense against terrorism or biological or chemical attack to $250,000. The limit is $500,000 if the procurement is outside the United States. *Id*.; *see also supra* Part II.F.

18. *See* FAR, *supra* note 16, pt. 13.

19. *See, e.g.*, Memorandum, Acting Deputy Assistant Secretary of the Army (Procurement) to Commanders, Program Executive Officers, and PARCs, subject: Simplified Acquisition Threshold Increase in Support of Operation Enduring Freedom (10 Oct. 2001).

20. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 213.301 (July 1, 2002) [hereinafter DFARS].

21. 65 Fed. Reg. 56,858 (proposed Sept. 20, 2000).

22. *See* 10 U.S.C. § 101(a)(13) (2000).

23. *See id*. § 2302(8).

24. Defense Federal Acquisition Regulation Supplement, 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).

25. Headquarters, Dep't of Army, Gen. Orders No. 6 (22 Aug. 2002) [hereinafter GO6].

26. *Id.* at 3.

27. U.S. DEP'T OF ARMY, IMPLEMENTATION PLAN, CONSOLIDATION OF U.S. ARMY CONTRACTING (29 Mar. 2002) [hereinafter ACA Implementation Plan] (on file with author).

28. *Id.* para. 6.4.1.

29. *Id.* para. 6.4.1.6.

interesting developments in the Army contingency contracting community.

Who Are You Going to Call for Air Force Contingency Contracting Support?

In a memorandum dated 1 October 2001, the Air Force Deputy Assistant Secretary for Contracting, Brigadier General Darryl A. Scott, clarified who is the Head of Contracting Activity (HCA) authority for Air Force contingency contracting officers (CCOs).[31] General Scott's purpose was "to clarify the language of AFFARS 5301.601-91(c), 5301.601-93(a) and Appendix CC, Part 2, Section CC-201."[32] In his memorandum, General Scott stated:

> For Contingency contracting officers (CCOs) deployed in support of JCS-declared contingency operations or exercises, the commander of the Air Force component command, tasked to support the "supported commander" (as defined in JP 1-02), is the HCA for contracting actions executed by the CCO, regardless of the geographic area of the CCO's deployment.[33]

General Scott recognized, however, that there are exceptions for CCOs who augment established contracting offices and for those contracting officers who provide collateral support.[34] Of course, prior planning and coordination by the unified command responsible for the operation with all supporting elements should go a long way toward establishing the "technical chain of command" supporting contracting officers. Major Kuhn.

30. *Id.* para. 6.1.

31. Memorandum, Deputy Assistant Secretary (Contracting) to the Air Force Assistant Secretary (Acquisition), to ALMAJCOM/FOA/DRU (CONTRACTING), subject: Head of Contracting Activity (HCA) Authority for Contingency Contracting (1 Oct. 2001) (on file with author).

32. *Id.* (citing U.S. DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. (8 May 2001)).

33. *Id.*

34. *Id.*

Environmental Contracting

Federal Agencies Continue to Struggle with "Recycled-Content" Purchases

Last year's *Year in Review*[1] highlighted a General Accounting Office (GAO) Report that discussed the difficulty federal agencies had in documenting their purchases of recycled-content items under the Resource Conservation and Recovery Act (RCRA) of 1976.[2] This past July, the Director of Natural Resource and Environmental Issues testified about RCRA compliance efforts before the Senate Committee on Environment and Public Works.[3] The Director's conclusions were similar to those in last year's report.

The Director's testimony focused on six federal agencies that submit annual purchase reports to the Office of Federal Procurement Policy and the Office of the Federal Environment Executive. He concluded that agencies report estimates instead of actual purchase data. Several of the agencies "[did] not clearly identify purchases of recycled-content products" and others "[did] not receive complete data from their headquarters and field offices or their contractors and grantees."[4] Only the Department of Defense's estimates could be characterized as "reliable."[5] Procurement agencies complain that the EPA's recycled-content list "contains more items than they can feasibly track" and that it is "costly and burdensome to update their tracking programs each time the EPA adds new items to the list."[6] Agencies also reported that they lack automated tracking systems for recycled-content products and experienced only limited success in efforts to promote awareness of the requirement to increase purchase recycled-content products.[7] This topic is likely to be the subject of discussion throughout the year.

Things Are Looking Greener Around Here

Two years ago, President Clinton signed an Executive Order (EO) entitled "Greening the Government Through Leadership in Environmental Management."[8] The Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) recently issued a proposed rule to amend the Federal Acquisition Regulation[9] to implement the EO.[10] The EO places responsibility on the head of each federal agency to integrate environmental accountability into short and long-term planning.[11] It also establishes environmental management goals through several initiatives, including "sound acquisition and procurement policies."[12] Specifically, the EO places limits on the purchases of toxic chemicals, hazardous substances, and other pollutants.[13] It also requires agencies to have acquisition and procurement practices that enhance "environmentally and economically beneficial practices."[14] Comments to the proposed rule were due no later than 28 October 2002.[15]

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1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 104 (discussing GEN. ACCT. OFF., REP. NO. GAO-01-430, *Federal Procurement: Better Guidance and Monitoring Needed to Assess Purchases of Environmentally Friendly Products* (June 22, 2001)).

2. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (2000) [hereinafter RCRA], gives the Environmental Protection Agency (EPA) the authority to control hazardous waste from cradle to grave. It requires each procuring agency that purchases more than $10,000 of an item per fiscal year that the EPA has designated as available with recycled content to have an affirmative procurement program to ensure that the agency purchases recycled-content products to the maximum extent practicable. *See* 42 U.S.C. § 6962.

3. *See* GEN. ACCT. OFF., REP. NO. GAO-02-928T, *Federal Procurement: Government Agencies' Purchases of Recycled-Content Products* (July 11, 2002).

4. *Id*. at 5. The six federal agencies are the Departments of Defense, Energy, Transportation, Veterans Affairs; the General Services Administration; and the National Aeronautics and Space Administration. *Id.*

5. *Id*. at 6.

6. *Id*. at 7-8.

7. *Id*. at 9-13.

8. Exec. Order No. 13,148, 65 Fed. Reg. 24,595 (Apr. 26, 2000).

9. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (July 2002) [hereinafter FAR].

10. 67 Fed. Reg. 55,670 (proposed Aug. 29, 2002) (to be codified in scattered sections of 48 C.F.R. pts. 23, 52).

11. *See* § 101, 65 Fed. Reg. at 24, 595.

12. *Id*. § 204.

13. *Id*. § 701.

HAZMAT Safety Obligations Relief on the Way for Contractors?

On 4 January 2002, the CAAC and the DARC proposed another amendment[16] to the FAR that "seeks to align the safety standards for federal employees in connection with hazardous materials [HAZMAT] furnished under government contracts with the protections afforded nonfederal employees under the Occupational Safety and Health Act."[17] The OSHA and the Federal Hazard Communications Standard (FHCS) require chemical manufacturers and importers to label their products and to provide detailed workplace safety information on Material Safety Data Sheets (MSDS). The OSHA and the FHCS do not protect public sector employees. Instead, the FAR implements *FED-STD-313*, which provides virtually the same information on HAZMAT for government contracts.[18]

Presently, HAZMAT means "any material defined as hazardous under the latest version of Federal Standard No. 313 (including revisions adopted during the term of the contract)."[19] The proposed rule would delete the parenthetical phrase and limit the contractors' compliance obligations to the *FED-STD-313* version "in effect on the date of issuance of the solicitation."[20] The revision would allow a contracting officer to modify the contract if a revision to *FED-STD-313* occurs during the course of performance. The proposed rule also plans to delete the FAR section that expands contractors' liability beyond that of chemical suppliers to the private sector. The proposed rule adds a new FAR provision that clarifies the applicability of HAZMAT-related regulations.[21] It also includes a pledge from the DARC to address contractors' concerns about requiring excess information and releasing proprietary data and trade secrets.[22]

Indemnification Clause Requires More than Crying over Spilled Oil

In *Cross Petroleum v. United States*,[23] an oil provider had contracts for diesel and unleaded fuel deliveries to different tank locations in the Klamath National Forest (KNF). The contractor, Cross Petroleum Inc. (Cross), made the contract for diesel fuel directly with the U.S. Forest Service; the contract included a provision holding the contractor liable and responsible for costs associated with oil spills. Cross also supplied unleaded oil to the KNF through a separate arrangement with the Defense Logistics Agency (DLA).[24] The contracts with the DLA were identical to the local contract with the Forest Service. After an uneventful delivery of diesel fuel, the contractor deposited two thousand gallons of unleaded fuel into the wrong tank, which unfortunately was perforated. The Forest Service contracting officer issued a final decision against Cross "in the amount of $705,657.72 for costs associated with the spill."[25]

The Court of Federal Claims (COFC) denied the contractor's summary judgment motion, which alleged that the Forest Service contract for diesel fuel deliveries did not apply to the unleaded fuel deliveries. Instead the COFC found that "the facts concerning the nature of the parties' agreement are woefully underdeveloped."[26] The COFC also rejected the argument that the Forest Service contract did not encompass damage caused by unleaded fuel spills. Although the contract did not

14. *Id*. § 704. The GAO will generally defer to an agency's solicitation requirement that meets certain policy goals. In *Mark Dunning Industries, Inc*., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46, the GAO rejected a prospective bidder's contention that requirements for an individual household weighing system and the use of a specific landfill site were unduly restrictive. The individual household weighing system was available to all contractors and would reasonably allow the government to meet the DOD's policy goals regarding trash disposal. *Id*. at 2. The use of the specific landfill site was reasonable because it offered the agency quick access in the event of unintended disposal of unexploded ordnance. *Id*. at 4.

15. *Mark Dunning Indus.*, 2002 CPD ¶ 46, at 4.

16. 67 Fed. Reg. 632 (proposed Jan. 4, 2002) (to be codified in scattered sections of 48 C.F.R. pts. 23, 52).

17. *Id*. The proposed amendment explained that "[t]he Occupational Safety and Health Act of 1970 (OSHA) and the Federal Hazard Communication Standard (FHCS) . . . provide protection for most of this nation's [private sector] employees against the hazards of exposure to domestically produced or imported chemicals." *Id*. (citing 29 C.F.R. § 1910.1200 (2002)).

18. FAR, *supra* note 9, subpt. 23.3.

19. *Id*. at 52.223-3(a).

20. *See* 67 Fed. Reg. at 634.

21. *Id.* at 633 (deleting FAR section 52.223-3(f), which states that "neither the requirements of this clause nor any act or failure to act by the Government shall relieve the contractor of any responsibility or liability for the safety of the Government, contractor, or subcontractor personnel or property").

22. *See Proposed FAR Rule to Ease Some Contract Obligations for HAZMAT Safety*, 44 GOV'T CONTRACTOR 1, ¶ 9 (Jan. 9, 2002) (discussing the proposed rule).

23. 51 Fed. Cl. 549 (2002).

24. *Id*. at 551-52.

25. *Id*. at 551.

explicitly mention "unleaded" fuel, "[t]he entire indemnity provision is cast in prophylactic terms" that required the contractor to "use reasonable care to avoid" damage and contamination, and addressed accidents involving "any" fuel.[27] The COFC found it "neither 'weird' nor 'inexplicable' that this provision should apply as long as [Cross] was in KNF in connection with the contract, and that the provision would continue to apply even though the parties made subsequent arrangements for additional deliveries in KNF."[28] Major Modeszto.

26. *Id*. at 553. The court noted that the contractor's own proposed findings of fact "reflect its own uncertainty as to whether the delivery of fuel to Oak Knoll was made under a 'blanket agreement' . . . , an informal 'open market' purchase, or the Forest Service's 'general authority for small purchases of miscellaneous supplies.'" *Id*.

27. *Id*. at 555.

28. *Id*. at 556.

Foreign Military Sales

"Dear Uncle Sam, Thank You So Much for Your Military Assistance. You Are Too Kind."

The General Accounting Office (GAO) recently reported that Saudi Arabia was the largest Middle Eastern recipient of military assistance,[1] receiving approximately $33.5 billion of military equipment under the Foreign Military Sales (FMS) program from fiscal year 1991 through fiscal year 2000.[2] With equipment transfers totaling almost $18 billion during the same ten-year period, Israel came in as the second-largest Middle Eastern recipient of military assistance.[3] The Middle East's largest recipient of U.S. military aid in the form of Foreign Military Financing grants was Israel, totaling over $19 billion. Egypt placed a close second, at $13 billion.[4]

Executive Order—National Emergency Housecleaning

In 1999, former President Clinton issued Executive Order (EO) 13,129,[5] which declared the Taliban's harboring of Osama Bin Laden and the al-Qaeda terrorist organization a national emergency.[6] After the U.S. military campaign successfully ousted the Taliban from power, President Bush issued Executive Order (EO)13,268, terminating EO 13,129.[7] Although the Taliban were no longer in control of Afghanistan, President Bush used EO 13,268 to add the Taliban and Mohammed Omar to the list of terrorist leaders and organizations identified in the national emergency declared in response to the terrorist attacks of 11 September 2001.[8]

President Bush also restored normal trade relations with Afghanistan through Proclamation 7553 of 3 May 2002.[9] Through Proclamation 7553, President Bush hoped to "facilitate increased trade [between the United States and Afghanistan], which could contribute to economic growth and assist Afghanistan in rebuilding its economy."[10] Subsequently, the State Department amended the International Traffic in Arms Regulations (ITAR) to allow the government to grant licenses or approve exports of defense articles or services to the current interim government of Afghanistan.[11]

President Bush Waives Missile Proliferation Sanctions Imposed on Pakistan and Continues Certain National Emergencies[12]

To support the war against terrorism, the State Department waived missile proliferation sanctions against Pakistan for those transactions needed to support Operation Enduring Freedom.[13]

In other actions, the President continued emergency declarations with respect to Weapons of Mass Destruction,[14] Iran,[15] Iraq,[16] Cuba,[17] and the former Yugoslavia.[18]

1. The GAO reported on five types of military assistance encompassing equipment, services, and training, including the Foreign Military Sales program, 22 U.S.C. §§ 2761-2770 (2000), the Foreign Military Financing program, 22 U.S.C. §§ 2763-2764, the International Military Education and Training program, 22 U.S.C. § 2347, the Excess Defense Articles authority, 22 U.S.C. § 2321j, and the Emergency Drawdown Authority, 22 U.S.C. § 2318. The Arms Export Control Act, 22 U.S.C. §§ 2751-2799, and the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2431 (as amended), govern all of these programs. *See* GEN. ACCT. OFF., REP. NO. GAO-01-1078, *Defense Trade: Information on U.S. Weapons Deliveries to the Middle East* (Sept. 20, 2001) [hereinafter GAO-01-1078].

2. GAO-01-1078, *supra* note 1, at 5.

3. *Id*.

4. *Id.* at 4 n.12.

5. Exec. Order No. 13,129, 64 Fed. Reg. 36,757 (July 7, 1999).

6. President Bush had last continued this national emergency declaration on 3 July 2001. 66 Fed. Reg. 35,363 (July 3, 2001).

7. Exec. Order No. 13,268, 67 Fed. Reg. 44,751 (July 3, 2002).

8. *Id.*

9. Proclamation No. 7553, 67 Fed. Reg. 30,535 (May 7, 2002).

10. *Id.* at 30,535.

11. Bureau of Political-Military Affairs: Amendment to the List of Proscribed Destinations in the International Traffic in Arms Regulations, 67 Fed. Reg. 44,352 (July 2, 2002) (to be codified at 22 C.F.R. § 126.1(g)).

12. 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.

13. Bureau of Nonproliferation; Waiver of Certain Missile Proliferation Sanctions Imposed on the Pakistani Ministry of Defense (MOD), 66 Fed. Reg. 56,892 (Nov. 13, 2001).

14. Continuation of Emergency Regarding Weapons of Mass Destruction, 66 Fed. Reg. 56,965 (Nov. 13, 2001).

"Sorry, No Act Today. Will an Executive Order Do?"

Last year, President Bush issued EO 13,222,[19] which declared a national emergency relating to the expiration of the Export Administration Act of 1979.[20] Through the issuance of EO 13,222, President Bush continued the provisions of the repealed Export Administration Act, the regulations established under the Act,[21] and delegations of authority, as if the Act was in full force and effect.[22] On 14 August 2002, President Bush signed Executive Order 13,222,[23] which continued the national emergency declaration for one year. The original declaration and the continuation were necessary because Congress failed to renew the Export Administration Act.[24]

State Department Export Licensing Procedures Need Improvement

The GAO recently criticized the State Department's export licensing procedures for processing delays, lost applications, and inconsistent licensing decisions.[25] The GAO reported that the lack of formal guidelines for determining when the State Department should refer license applications to other agencies was the primary cause of delays in the review process.[26] The GAO also stated that the State Department lacks adequate license tracking procedures, resulting in lost applications,[27] and that its licensing officers lacked adequate training, resulting in arbitrary and inconsistent results.[28] Subsequently, the State Department stated that it was planning and implementing a web-based export licensing program.[29] The GAO, however, characterized the State Department's proposed corrective action in its report as follows: "As we pointed out, past GAO work has proven that proceeding with information technology modernization without first correcting problems in current systems risks merely automating inefficient ways of doing business."[30]

Pick Your Poison—Commerce or State Jurisdiction Confusion for Missile Export Controls

The GAO also criticized the conflicting dual jurisdiction between the State Department and the Commerce Department over missile products and technology.[31] To "limit the proliferation of missiles capable of delivering nuclear, biological, and chemical weapons and their associated equipment and technology," the United States and six allies established the Missile Technology Control Regime (MTCR) in 1987.[32] The MTCR

15. Continuation of the National Emergency with Respect to Iran, 67 Fed. Reg. 11,553 (Mar. 14, 2002).

16. Continuation of the National Emergency with Respect to Iraq, 67 Fed. Reg. 50,339 (Aug. 1, 2002).

17. Continuation of the National Emergency Relating to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels, 67 Fed. Reg. 9387 (Feb. 28, 2002).

18. Continuation of Emergency with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), 67 Fed. Reg. 37,661 (May 29, 2002).

19. 66 Fed. Reg. 44,025 (Aug. 22, 2001).

20. *See* 50 U.S.C. §§ 2401-2419 (2000) (repealed 2001).

21. *See* 15 C.F.R. pts. 730-774 (2002).

22. Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 22, 2001).

23. 67 Fed. Reg. 53,721 (Aug. 16, 2002).

24. *See* Notice of August 14, 2002, 67 Fed. Reg. at 53,721 (Aug. 16, 2002); Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 22, 2001).

25. *See* GEN. ACCT. OFF., REP. NO. GAO-02-203, *Reengineering Business Processes can Improve Efficiency of State Department License Reviews* (Dec. 31, 2001) [hereinafter GAO-02-203].

26. *Id.* at 6.

27. *Id.* at 8.

28. *Id.* at 6-7.

29. *See State Department Plans Web-Based Export Licensing Program*, 44 GOV'T CONTRACTOR 2, ¶ 15 (Jan. 16, 2002).

30. GAO-02-203, *supra* note 25, at 15.

31. GEN. ACCT. OFF., REP. NO. GAO-02-120, *Export Controls: Clarification of Jurisdiction for Missile Technology Items Needed* (Oct. 9, 2001) [hereinafter GAO-02-120].

32. *Id.* at 3. The seven founding members of the MTCR are Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. Since its founding in 1987, twenty-six other countries have joined the MTCR. *Id.* at 3 n.3.

established export policy guidelines and a list of controlled missile systems, components and technologies (hereinafter Regime items).[33]

The GAO reported, however, that the United States has established conflicting export control regulations to fulfill its MTCR responsibilities. Under the authority of the Arms Export Control Act,[34] the State Department uses the U.S. Munitions List established in the International Traffic in Arms Regulations[35] to control Regime items.[36] Alternatively, under the Export Administration Act of 1979,[37] the Commerce Department identifies dual-use items and technologies in the Commerce Control List of the Export Administration regulations[38] to control Regime items.[39] The GAO identified two factors that have contributed to unclear jurisdiction for missile sensitive items and technologies:

> First, officials at the Departments of Commerce and State have expressed different understandings of how to define which Regime items are Commerce Department-controlled and which are State Department-controlled.
>
> Second, consultations between the Departments of Commerce and State on Regime-related changes to their regulations have not ensured that items are clearly subject to the jurisdiction of one Department or the other.[40]

The GAO found that unclear jurisdiction may result in conflicting restrictions and reviews "which may affect U.S. national interests and companies' ability to export Regime items."[41] The GAO recommended a joint review of the Regime items between the Departments of Commerce and State to determine the appropriate jurisdictional control. It also recommended that the Commerce Department provide a cross-reference to the U.S. Munitions List if dual-use Regime items meet certain parameters that subject them to the State Department's jurisdiction.[42] Major Kuhn.

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33. *Id.* at 3.

34. 22 U.S.C. §§ 2751-2799 (2000).

35. 22 C.F.R. pts. 120-130 (2002).

36. GAO-02-120, *supra* note 31, at 4.

37. 50 U.S.C. §§ 2401-2419 (2000) (repealed 2001).

38. 15 C.F.R. pts. 730-774 (2002).

39. GAO-02-120, *supra* note 31, at 4.

40. *Id.* at 7.

41. *Id.* at 9.

42. *Id.* at 12.

Government Information Practices

Re-Solicitation of Service Contracts: New Limits on the Release of Unit Prices Under The Freedom of Information Act?

In *R & W Flammann GmbH v. United States*,[1] the United States Court of Federal Claims (COFC) decided a pre-award bid protest suit partially upon the government's disclosure of previous contract prices under the provisions of the Freedom of Information Act (FOIA).[2] The plaintiff, R & W Flammann GmbH (Flammann), was a German business entity that had contracted with the Army "to provide 'between occupancy maintenance' for the U.S. Government Housing facilities in Heidelberg, Germany."[3] Flammann, the "lowest-priced responsive bidder under a sealed bid solicitation," received the government award.[4] The contract, for one base year with four one-year options, was to run from 1 February 2001 through 31 January 2006; however, "[a]s early as October 2001, [the Army] expressed that it would *not* exercise the first-year option under the incumbent contract."[5] Instead, the Army intended to issue a new solicitation for a new contract.[6] During the second solicitation, and pursuant to a FOIA request, the government "released plaintiff's unit prices for the current and future [option] years to its competitor," SKE Gmbh (SKE).[7] The plaintiff filed suit on 18 July 2002, after the government dismissed the plaintiff's pre-award bid protest.[8]

The crux of the case was the nature of the government's second solicitation for the between-occupancy maintenance (BOM) services. The first contract followed sealed bid solicitations, but the "new" solicitation used "two-step bidding,"[9] in which the government issued an initial Request for Technical Proposals on 5 October 2001, and then issued an Invitation for Bids (IFB) on 2 July 2002.[10] While the court's opinion did not disclose the reason for the government's decision not to exercise the option,[11] it clearly stated that the government "characterizes" the second solicitation for BOM services "as a 'new' solicitation."[12] The government's position was "that the contracts are 'extremely different' due to . . . the change in the contract type from a requirement-type to an indefinite-type" and the additional requirement that each work crew include one English speaking person.[13] On the other hand, Flammann "observed by the Statement of Work that the re-solicitation is substantially similar to its incumbent contract."[14] In support of its view, Flammann reported that "some 87.5% of the [contract line item numbers (CLINs)] of the two contracts 'correspond directly.'"[15]

The court agreed that "[t]o the extent that the defendant is in fact soliciting for BOM services for the U.S. Government Housing facilities at Heidelberg, Germany, as was the case in the incumbent contract, the current solicitation *is* a re-solicitation."[16] The court, however, did not rest its opinion upon "the precise similarities (or differences, for that matter) between the

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1. 53 Fed. Cl. 647 (2002). Pursuant to a protective order from the Court of Federal Appeals, this case was filed under seal on 28 August 2002. Because neither party filed a notice or proposed redactions, the court's opinion was published on 23 September 2002. *Id*. at 648.

2. 5 U.S.C. § 552 (2000). The FOIA requires the government to release information upon request unless that information is exempt from release under one or more of the statute's exemptions. *Id*.

3. *Flammann*, 53 Fed. Cl. at 649. The "between occupancy maintenance," or BOM, "included carpentry, electrical, sanitation, interior painting, cleaning, stairwell maintenance, and floor repair, among other things." *Id.* at 648-49.

4. *Id*. at 649.

5. *Id.*

6. *Id*.

7. *Id*. at 648.

8. *Id*. at 650. The plaintiff's bid protest was based upon the government's release of plaintiff's contract unit prices. *Id.*

9. *See generally* GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.503 (July 2002) [hereinafter FAR] (outlining "two-step" sealed bidding procedures).

10. *Flammann*, 53 Fed. Cl. at 650.

11. The court did acknowledge in a footnote that it "is well settled that defendant may exercise its option at *its* discretion," and that "there is a (rebuttable) presumption of 'good faith' when government agents discharge their duties." *Id*. at 649 n.7 (citations omitted). The court was somewhat uncharitable in the text of the opinion, however. "To date, defendant has failed to provide plaintiff with a coherent explanation why it chose *not* to exercise its option." *Id.* at 649.

12. *Id*. at 649 n.4 (citing the government's reply brief).

13. *Id.* at 649 n.6 (citing the government's reply brief).

14. *Id*. at 649.

15. *Id*. at 649 n.6.

contracts, but rather on the germane issue of *fundamental fairness* in the procurement process."[17]

The court based its determination of fairness on the administrative record. According to the record, it was "undisputed" that the plaintiff's original contract bid became publicly available upon bid opening.[18] The record also reflects that the government decision not to exercise the option was not due to the plaintiff's performance; that the government invited the plaintiff to participate in the second solicitation; and that Flammann did submit a technical proposal and a subsequent bid. After issuing the Request for Technical Proposals, the government received SKE's FOIA request for a copy of Flammann's present contract.[19] On 20 November 2001, the government provided Flammann with "submitter notice"[20] of SKE's request.[21] While Flammann "warmly objected"[22] to the proposed disclosure, remarkably, it did not file a "reverse FOIA"[23] suit to enjoin the government's release. About five months[24] after providing notice to Flammann, the government released the plaintiff's contract to SKE.[25] Flammann then filed an agency protest, but an independent protest review official affirmed the contracting officer's decision. Flammann then sought injunctive relief from the COFC on 18 July 2002.[26] Shortly thereafter, a third successful step-one offeror, Facilma GmbH (Facilma), informed the government that it would not submit a step-two bid because the government's release of Flammann's contract price to just one bidder "violate[d] all applicable German and

16. *Id.* at 649 n.4.

17. *Id.* at 649 n.6. Aside from mentioning the positions taken by the parties in their written submissions and stating that the asserted "facts may be probative," the court did not discuss the merits of either side's arguments regarding the similarities or differences in the two contracts. *Id.* Later in the opinion, however, the court quickly dispatched the government's attempt to distinguish the two contracts:

> Defendant argues that the incumbent contract and the prospective contract are "extremely different." This is not so, and the court does not weigh the effects of the differences other than to observe and find that, on the face of the solicitation, the Statements of Work are, in fact, substantially similar in most, if not all, material particulars.

Id. at 655 (quoting the government's reply brief).

18. *Id.* at 653. The court correctly noted that,

> plaintiff's unit prices do not fit within Exemption 4 of FOIA, because publicly available information cannot meet part one of the *National Parks* "confidential" standard. . . . "[T]o the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality—a *sine qua non* of Exemption 4."

Id. (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987)). Moreover, the court specifically acknowledged that "[b]idders are flatly precluded from protecting information submitted through sealed bids as proprietary information." *Id.* at 653 n.20 (citing Warner Labs., Inc., B-189502, 1977 U.S. Comp. Gen. LEXIS 1952 (Oct. 21, 1977). Interestingly, all of the bidders' contract prices became public upon the opening of the sealed bids. This result is in stark contrast to the protections afforded to the contract proposals of unsuccessful offerors submitted in response to solicitations for competitive proposals. Congress enacted this general restriction on the release of unsuccessful offeror's competitive proposals in 1996. *See* 10 U.S.C. § 2305(g) (2000).

19. *Id.* at 649. SKE GmbH requested the Flammann contract's "current cost schedule contained in the 'Supplies or Services and Price/Costs' section," which included "some 360 CLINs for the unit pricing of the current and future option years." *Id.* at 649 n.9.

20. *See* Exec. Order No. 12,600, 3 C.F.R. 235 (1987 Comp.), *reprinted in* 5 U.S.C. § 552 note (2000); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, VIII FOIA UPDATE 2, at 2-3 (1987). "Submitter notice" is the procedure whereby an agency provides pre-disclosure notice to a non-governmental source, when a third party has requested the information the non-governmental source provided to the agency. This administrative practice is governed by Executive Order 12,600, which requires each government agency "to establish pre-disclosure notification procedures which will assist agencies in developing adequate administrative records." U.S. DEP'T OF JUSTICE, OFFICE OF INFO. AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 217 (2000) (citing 3 C.F.R. 235 (2000)) [hereinafter FOIA GUIDE]; *see generally* U.S. DEP'T OF DEFENSE, DIR. 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM para. 5-207 (14 Apr. 1997) [hereinafter DODD 5400.7-R] (outlining Department of Defense "submitter notice" procedures).

21. *Flammann*, 53 Fed. Cl. at 649.

22. *Id.*

23. A "reverse FOIA" suit is an action in which the submitter of information, "'usually a corporation or other business entity' that has supplied an agency with 'data on its policies, operations or products—seeks to prevent the agency that collected the information from revealing it to a third party [usually] in response to the latter's FOIA request.'" FOIA GUIDE, *supra* note 20, at 640 (quoting CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987)).

24. According to its own guidelines, the government should have provided Flammann with a reasonable time to object to the release. *See* DODD 5400.7-R, *supra* note 20, para. 5-207a. Department of Defense components should give submitters thirty days to object to proposed disclosures, "unless it is clear that there can be no valid basis for objection." *Id.*

25. *Flammann*, 53 Fed. Cl. at 649.

26. *Id*.

European contracting rules as well as the ethics of fair competition."[27]

While "fundamental fairness" appears to be the basis of the court's decision, it is interesting to note that the plaintiff did not raise or pursue the issue of procurement integrity. The court found that the plaintiff "averred a vague inference that there may have been a modicum of bad faith on the part of the defendant in its failure to exercise option year one."[28] Even after the court's inquiry, however, the "plaintiff never developed any argument before the court to overcome the presumption of good faith on the part of the government."[29]

The court also interpreted the mere filing of Flammann's complaint as an implicit accusation of unfairness.[30] The gravamen of the plaintiff's complaint, however, was that its unit prices were exempt from public disclosure[31] under the Trade Secrets Act[32] and FOIA Exemption 4.[33] Flammann argued that under the *National Parks* test,[34] "it would suffer substantial competitive harm in the re-solicitation for a new contract covering largely the same time period and scope of work because it would be forced to 'ratchet down' its prices and/or otherwise could be underbid" by competitors.[35] Even after ruling that sealed bid contract prices were not exempt under the FOIA[36] and are generally not protected by the Trade Secrets Act,[37] the court returned to the issue of fairness, finding that the plaintiff's unit prices were only "*generally* subject to release under FOIA" and that "*under the peculiar facts at bar*," the government's release was arbitrary, capricious, or otherwise not in accordance with law.[38]

In the "peculiar facts at bar," an incumbent contractor was ostensibly providing a new contract bid for a contract period for which he arguably had a previous winning bid.[39] In this situation, there was more than a distinct possibility that Flammann's second bid would either be similar to its first contract or priced lower so as to remain viable against the "educated" bid of its competitor. In either situation, Flammann would be disadvantaged. For this reason, the court may have been persuaded that release of Flammann's incumbent contract prices was tantamount to the release of its second bid, prior to the bid opening.[40] Although the court did not explicitly cite this reasoning as a

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27. *Id.* at 650 n.10. Facilma GmbH's letter also averred that the government's actions "leave the impression that the sole purpose of the subject solicitation is the underbidding of the current contract unit prices." *Id.*

28. *Id*. at 649 n.7.

29. *Id*.

30. *Id*. at 655. "Plaintiff's contention [by this lawsuit] that it will be harmed clearly goes to an appearance or perception of impropriety." *Id.*

31. *Id*. at 651-52.

32. 18 U.S.C. § 1905 (2000).

33. 5 U.S.C. § 552b(4) (2000).

34. *See* Nat'l Parks and Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* decision outlined a test to determine whether information submitted to the government merited protection as "confidential" commercial or financial information under FOIA Exemption 4. The *National Parks* test, which is customarily viewed as consisting of two disjunctive prongs, provides Exemption 4 protection to information whose disclosure "would impair the government's future ability to obtain necessary information or cause substantial harm to the competitive position of the submitter." 5 U.S.C. § 552b(4); *see generally* FOIA GUIDE, *supra* note 20, at 187-221.

35. *Flammann*, 53 Fed. Cl. at 651. The "ratcheting-down" of prices by competitors is not the type of competitive harm typically contemplated by the *National Parks* test, however, the landmark decision of *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir 1999), recently applied this theory to the "ratcheting-down" of prices. *See* Major Timothy M. Tuckey, *The Changing Definition of Unit Prices: Another Blow to the Government's Efforts to keep the Public Informed?*, ARMY LAW., Dec. 2001, at 13 (analyzing *National Parks* and the government policy changes related to the release of contract unit prices).

36. *Flammann*, 53 Fed. Cl. at 653. In this case,

> [I]t is undisputed that sealed bids upon bid opening become publicly available, as did Flammann's incumbent contract, on January 8, 2001. For that reason alone, plaintiff's unit prices do not fit within Exemption 4 of FOIA, because publicly available information cannot meet part one of the National Parks "confidential" standard.

Id. (citations omitted).

37. *Id.* at 654 (citing the Trade Secrets Act, 18 U.S.C. § 1905 (2000)). Unit "price information does not fall under [the Trade Secrets Act] because overhead, profit margin, and other cost multipliers cannot be derived from unit prices." *Id*. (citing Acumenics Research & Tech. v. Dep't of Justice, 843 F.2d 800, 808 (4th Cir. 1988); Pac. Architects and Eng'rs, Inc. v. Dep't of State, 906 F.2d 1345, 1348 (9th Cir. 1990)).

38. *Flammann*, 53 Fed. Cl. at 654.

39. The court described the facts as "an imminent re-solicitation of a substantially similar contract covering largely the same period as those prices to be released on unperformed option years." *Id.* at 655.

basis for its decision, it ultimately held that in the interests of fairness, the contracting officer had a duty to withhold Flammann's contract prices, "particularly that of the future unperformed option years."[41] From the ensuing discussion of procurement integrity, the court appears to have accepted Facilma's assertion that the government's purpose in the resolicitation was a desire to lower contract prices.[42]

The essence of the court's decision is that contracting officers have a legal requirement to manage the procurement process in a fair and impartial manner; that the protection of the plaintiff's unit prices, though not confidential, is necessary to preserve the integrity of the contracting process; and that the maintenance of procurement integrity is more important than compliance with the FOIA's disclosure requirement; therefore, the contracting officer erred by effecting an otherwise lawful release of the plaintiff's unit price under the FOIA.

The logic behind the decision initially seems rational, but closer examination reveals its flaws. The weakest premise in the court's analysis is that the requirement to avoid an improper appearance trumps the requirement to release government records not exempt from disclosure under the FOIA. Moreover, very little precedent supports the decision.

The court's opinion appears to rest primarily on a line of reasoning adopted in *NFK Engineering, Inc. v. United States*.[43] In *NFK Engineering*, the court held that it was not irrational, arbitrary, or capricious for a contracting officer to disqualify a bidder based upon an appearance of impropriety.[44] In *NFK Engineering*, the contracting officer suspected that a former government employee—later employed by a government contractor—provided inside information or other improper assistance to the contractor. This information related to a project on which the employee had worked as a government expert.[45] These facts reflected a clear appearance of impropriety and the possibility of a violation of the law.

Observers who disagree with *Flammann*'s decision might argue that its facts are easily distinguished from those in *NFK Engineering*. In *NFK Engineering*, the court evaluated the contracting officer's judgment and response to what appeared to be an illegal act. In *Flammann*, the court evaluated the contracting officer's judgment and actions related to a legal act—the lawful and legally required disclosure of information under the FOIA. In *NFK Engineering*, the court ruled that it was not irrational, arbitrary, or capricious to disqualify a tainted contractor. In *Flammann*, the court ruled that the contracting officer should not have complied with Federal Acquisition Regulation (FAR) and FOIA disclosure requirements;[46] it also averred that compliance with the FAR and FOIA disclosure requirements was arbitrary and capricious, or otherwise violated the FAR requirement "to provide a level playing field for all bidders."[47]

The *Flammann* decision raises three concerns. First, the court's opinion appears to countenance a disregard for one of

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40. The court may have also contrasted the "arbitrary and capricious" nature of the government's release of the Flammann contract against the care with which the government would have protected its own cost estimates for the contracted work. In "outsourcing" the BOM services, the government could have submitted an in-house bid. The government's cost estimates and data related to its "most efficient organization" (MEO), however, would have been best protected under FOIA Exemption 5, which would permit the withholding of information the release of which would place the government at a competitive disadvantage.

41. *Flammann*, 53 Fed. Cl. at 655.

42. *Id.* at 650 n.10.

43. 805 F.2d 372 (Fed. Cir. 1986).

44. *Id*. at 378.

45. *Id.* at 374.

46. *Flammann*, 53 Fed. Cl. at 656.

> In answering the charge to the contracting officer to safeguard the interests of the United States in its contractual relationships by maintaining, in appearance and in fact, a fair and open competition not marred by fraud or favoritism, the contracting officer under the current solicitation had the authority to withhold plaintiff's unit prices.

Id.

47. *Id*.; *see also* GEN. SERVS. ADMIN. ET AL., FED. ACQUISITION REG. 1.602 (June 1997) [hereinafter FAR]**.** This provision of the FAR outlines the contracting officer's responsibilities:

> Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall—
> (a) Ensure that the requirements of 1.602-1(b) have been met, and that sufficient funds are available for obligation;
> (b) Ensure that contractors receive impartial, fair, and equitable treatment; and
> (c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

Id.

the fundamental rules of statutory or legislative construction—that specific provisions within a rule supersede more general provisions. In this case, the court asserted that the contracting officer's "general" duty to ensure fairness[48] trumps that officer's duty to disclose the results of the earlier sealed bid.[49] This position subordinates the more specific provision of the regulation to the more general provision. While the court attempts to harmonize the two provisions,[50] it did not address the contradictory results that compliance with the separate provisions could create. Implicit in the court's equitable construction, however, is the assumption that compliance with either provision would result in the agency's non-compliance with the other provision.

Second, the court failed to note the distinction between statutory and regulatory requirements. *Flammann* highlights the differences between 5 U.S.C. § 552, a statute, and FAR section 14.402, a regulation. When there is a distinction between the requirements of statutes and regulations, traditional rules of construction require the court to follow the rule promulgated by the higher of the two authorities.[51] In *Flammann*, application of this maxim would have resulted in the court's dismissal of the plaintiff's complaint.[52]

Third, the absence of a clear factual analysis in the opinion and the inconsistencies discussed above suggest that the court misapplied the standard of review. The court clearly stated the standard to be applied in bid protest cases—an agency's decision "is to be set aside *only* if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[53] The opinion also outlined both the court's limited ability to "second-guess" the agency[54] and the plaintiff's heavy burden to establish the "unreasonable" nature of the agency's actions.[55] After acknowledging that the agency has broad discretion,[56] however, the opinion's reasoning provides little evidence that the court gave the government's decision any deference. The opinion does not specifically state how the government's disclosure of Flammann's contract prices was arbitrary, capricious or unlawful. Instead, the court refers to the "*peculiar facts at bar.*"[57]

The court appears to advocate—but fails to address—that these peculiar facts could be analyzed under the often overlooked third prong of the *National Parks* test.[58] In earlier cases, courts have protected information submitted to the government when the disclosure "would hinder the agency in fulfilling its statutory mandate."[59] While the application of this third prong would have provided some interesting analysis, it is unlikely

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48. FAR, *supra* note 47, at 1.602-2.

49. *Flammann*, 53 Fed. Cl. at 656; *see* FAR, *supra* note 47, at 14.402.

50. *Flammann*, 53 Fed. Cl. at 656. The court asserted that the withholding of Flammann's unit prices under FAR section 1.602 would not "apparently" be

> contrary to the public access requirements of 48 CFR § 14.402(c), where "[e]xamination of bids by interested persons shall be permitted *if it does not interfere unduly with the conduct of government business*," that is to say, if public access does not unduly interfere with the prime directive of the contracting officer which is to "[e]nsure that contractors receive impartial, fair, and equitable treatment."

Id. (quoting 48 C.F.R. § 14.402(c) (2002)).

51. *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984).

52. The absence of any discussion of this issue may lead readers to assume that the court specifically avoided this analysis because its primary goal was to fashion an equitable remedy for a plaintiff, whom the court believed had been wronged either by the government's failure to exercise the contract option or by the "re-solicitation" of the contract so closely after it was originally let.

53. *Flammann*, 53 Fed. Cl. at 650-51 (citing 5 U.S.C. § 706(2)(A) (2000)).

54. *Id*. at 651. "Where an agency's decision is found to be reasonable, a court may not substitute its own judgment for that of the agency." *Id.* (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

55. *Id*. The plaintiff bears the burden to prove that the agency acted arbitrarily, capriciously, or unlawfully.

> Because it is well-settled that procurement officials are entitled to broad discretion in the evaluation of bids and in the application of procurement regulations, the plaintiff bears a heavy burden of showing, by clear and convincing evidence, either that (1) the agency decision-making process lacked a rational or reasonable basis, or (2) the procurement procedure involved a clear and prejudicial violation of applicable statutes or regulations.

Id. (citing Day & Zimmerman Serv., Inc. v. United States, 38 Fed. Cl. 591, 597 (1997)).

56. *Id*.

57. *Id*. at 654. The court's decision is even more remarkable because of its earlier conclusion that the plaintiff failed to "overcome the presumption of good faith on the part of the government." *Id.* at 649 n.7. It is difficult to escape the conclusion that the only arbitrary or capricious conduct the court can point to was the government's failure to provide a "coherent explanation" for its failure to exercise the Flammann contract option. *Id.* at 649.

58. Nat'l Parks and Conservation Assoc. v. Morton, 498 F.2d 765, 765 (D.C. Cir. 1974). In that case, the court "specifically left open the possibility of a third prong that would protect other governmental interests, such as compliance and program effectiveness." FOIA GUIDE, *supra* note 20, at 221.

that it would have supported the court's opinion that the government should have withheld Flammann's contract prices from SKE. Any analysis of the facts returns practitioners to the inescapable conclusion that the government cannot protect confidential information if that information has already been made public.

The facts at bar are not the only peculiar aspect of *Flammann*. While the court has wide latitude to fashion equitable remedies for injustices, it appears that the court did not fully embrace the FOIA's overarching purpose—to disclose information within the government's possession, unless it is clearly exempt from disclosure.[60] In this case, after identifying the competitive harm the release of contract prices caused,[61] the court acknowledged that the FAR makes sealed bid contract prices public,[62] explained that the "public availability" of sealed bid contract prices "logically nullifies any prospect of a confidentiality exemption" under the FOIA,[63] and then asserted that the contracting officer should have withheld the contract price information[64] in clear violation of the disclosure mandates of both the FAR and the FOIA.

The court's order also included a peculiar provision. The court predictably declared the re-solicitation to be null and void and enjoined the government from opening the affected bids or awarding a contract. The court also ordered the government to provide all bidders with copies of the contract unit prices that had previously been released to SKE.[65] The court then ordered the government to "level the playing field" by providing Flammann with the unit prices of all other bidders under its incumbent contract.[66] While this gesture initially seems to be fair, especially because Flammann had only sought its predecessor's unit prices,[67] it raises significant concerns. First, in relation to the unit prices of its predecessor, this order merely provided Flammann with another means of access to information that it had previously requested under the FOIA. Second, in relation to the unit prices of the unsuccessful bidders for the incumbent contract, the order merely provided Flammann with the information to which it had access at the time of the bid opening. While the court suggests that it is giving the plaintiff a benefit, it is difficult to identify just how this order assists Flammann in the next round of solicitations.

It is too early to speculate whether the government will appeal *Flammann* or merely assert that the court's holding is limited to the specific "peculiar facts" of that case. Consequently, contracting officers and attorneys may not be affected by the ruling. However, the case does "muddy the waters" in an already unsettled pool of unit price decisions. To paraphrase an old adage, the decision may prove that "peculiar facts" make peculiar law. Major Tuckey.

59. Pub. Citizen Health Research Group v. Nat'l Inst. of Health, 209 F. Supp. 2d 37, 45 (D.C. Cir. 2002).

60. "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 [section] 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. *See* 5 U.S.C. § 552 (2000).

61. *Flammann*, 53 Fed. Cl. at 652.

62. *Id.* at 653.

63. *Id.* at 654.

64. *Id.* at 655.

65. *Id.* at 657.

66. *Id.* at 657-58.

67. Flammann informed the court that "it submitted a FOIA request to the Army on 22 April 2002 to obtain the unit prices of its predecessor" and had not received those prices. *Id.* at 656 n.22.

Information Technology (IT)

Smart Cards[1]

Agencies are moving forward to procure smart cards for federal workers. The Department of Defense (DOD) Naval Inventory Control Point awarded four contracts to develop a common access card (CAC) software device to communicate with a microchip in the smart card.[2] An authentication certificate in the microchip verifies the identity of a computer network operator or provides digital signatures.[3] The CACs are another step to increase paperless contracting and electronic business.[4] The Defense Travel System in the Air Force also uses the CACs. Digital identification in the CACs is designed to certify travel orders and vouchers.[5] The General Services Administration (GSA) has also awarded a contract to develop a smart card for Department of Treasury employees.[6] The Electronic Treasury Enterprise Card (E-TREC) smart card "will provide access to buildings and computers as well as biometric identification and public key infrastructure."[7] Federal agencies are issuing smart cards to federal employees, but the idea to issue a smart card to all Americans is still a topic of debate.[8]

Moving Slowly Along

Last year's *Year in Review* reported on the Navy Marine Corps Intranet (NMCI) information technology outsourcing project.[9] The goal is to connect desktops and provide secure access to voice, data, and video communications for technology, maintenance, and help desk support. Only 21,000 employees are connected, although the current plan provides for connecting 100,000 employees. The $6.9 billion dollar project is moving "from the individual computer mentality to computing as an enterprise activity."[10] Enhanced computer security is built into the intranet project due to the interconnectivity of the system. The Navy plans to connect all 350,000 desktops and 200 networks to the NMCI by September 2003.[11]

IT Phone Home

The General Accounting Office (GAO) addressed numerous IT issues this year. The GAO addressed protection of critical IT infrastructure in two reports this past year. In October 2001, the GAO identified information-sharing practices to defend against cyber attacks.[12] In March 2002, the GAO recommended IT improvements for two agencies. It recommended that the Defense Logistics Agency strengthen its IT investment decisions,[13] and that the Defense Information Systems Agency improve IT investment planning and management controls.[14] In July 2002, the GAO recommended a comprehensive approach to enhance the nation's cyber infrastructures.[15]

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1. A recent article explained the concept of smart cards as follows:

> Smart cards are equipped with an electronic chip, magnetic strip and a barcode. They are used as an identification card and can grant physical access to defense facilities and electronically access computer networks. Smart cards can hold information about service members' inoculations, medical and dental records, finance allotments and other data.

Linda D. Kozaryn, *DoD to Implement Smart Card Program*, DefenseLINK (Oct. 27, 1999), *at* http://www.defenselink.mil/news/Oct1999/n102799_991027.html.

2. *Despite Obstacles, DOD Expands Common Access Card Use*, 44 GOV'T CONTRACTOR 30, ¶ 311 (Aug. 14, 2002).

3. *Id.*

4. The DOD pilot program reported the cards provided legally binding digital signatures, paperless business cost-savings, and network security. *Id.*

5. *Id.* at 5.

6. *GSA Task Order Contractor to Furnish Smart Cards to the Department of Treasury*, 44 GOV'T CONTRACTOR 31, ¶ 325 (Aug. 21, 2002).

7. *Id.* "The card serves as the individual identification key, or PKI for 'public key infrastructure.'" *See* Kozaryn, *supra* note 1, at 5.

8. Karen D. Schwartz, *Lawmakers, Agencies Study Smart Cards*, GovExec.com (Aug. 28, 2002), *at* http://www.govexec.com/dailyfed/0802/082802sl.htm.

9. "The NMCI is the Navy and Marine Corps [project] to outsource the technical, maintenance, and help desk support for over 350,000 desktops and 200 networks." Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002, at 114 [hereinafter *2001 Year in Review*].

10. Karen Robb, *NMCI Starts Slower Than Planned*, DefenseNews (Sept. 28, 2002), *available at* http://www.defensenews.com.

11. *2001 Year in Review, supra* note 9, at 114.

12. GEN. ACCT. OFF., REP. NO. GAO-22-24, *Information Sharing: Practices That Can Benefit Critical Infrastructure Protection* (Oct. 15, 2001).

13. GEN. ACCT. OFF., REP. NO. GAO-02-314, *DLA Needs to Strengthen Its Investment Management Capability* (Mar. 15, 2002).

Finally, in September 2002, the GAO issued one of a series of reports reviewing the DOD's use of best practices in acquiring information technology health care systems.[16] In July 2002, the Director of the Office of Management and Budget (OMB) released a memo addressing IT concerns. The memo directed consolidating the Department of Homeland Security IT spending.[17] In addition, the OMB temporarily ceased IT infrastructure system developments and planned modernization efforts exceeding $500,000.[18] This delay will allow for the review and development of an integrated and universal IT system that best supports homeland security.[19]

IT Overlap?

The GSA hired an independent management and technology consulting firm, Accenture, to assess overlap between Federal Supply Service and Federal Technology Service IT contracts.[20] The report revealed that the GSA "has the right mix of products and services to serve federal customers," but also addressed inefficiencies in its performance.[21] Accenture recommended that the GSA "re-align the functional areas that focus on market research, marketing, customer planning and management, sales, service delivery, and contract development and maintenance."[22] The Accenture study affirmed that the recommendations should assist the GSA to improve its customer service.[23]

Electronic and Information Technology Accessibility

Last year's *Year in Review* reported on the requirement for federal departments and agencies to ensure that the electronic and information technology the government develops, procures, or maintains is accessible to federal employees and members of the public with disabilities.[24] On 27 June 2002, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council solicited comments regarding the need for guidance to promote more consistent and effective implementation of section 508.[25] Specifically, the councils requested that the respondents discuss the advantages and disadvantages of additional guidance, the form of the guidance,[26] and the focus of the types of IT purchases.[27] Major Davis.

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14. GEN. ACCT. OFF., REP. NO. GAO-02-50, *Information Technology: Defense Information Systems Agency Can Improve Investment Planning and Management Controls* (Mar. 15, 2002).

15. GEN. ACCT. OFF., REP. NO. GAO-02-474, *Critical Infrastructure Protection: Federal Efforts Require a More Coordinated and Comprehensive Approach for Protecting Information Systems* (July 15, 2002).

16. GEN. ACCT. OFF., REP. NO. GAO-02-345, *Information Technology: Greater Use of Best Practices Can Reduce Risks in Acquiring Defense Health Care System* (Sept. 15, 2002).

17. Memorandum from the Office of Management and Budget to the Heads of Selected Departments and Agencies, subject: Reducing Redundant IT Infrastructure Related to Homeland Security (July 19, 2002) (on file with author).

18. *Id.*

19. *Id.*

20. Findings and Recommendations, Accenture, Ltd., GSA Delivery of Best Value Information Technology Services to Federal Agencies, Analysis of FSS and FTS Structure and Services (Apr. 30, 2002) [hereinafter Accenture Study]. The study also reviewed overlapping offerings of telecommunications. *Id.*

21. *Id.* at 1. The Accenture study found:

1. Customers greatly value GSA services;
2. Industry partners also value GSA, though they see room to improve efficiencies in their interactions with GSA;
3. Overlap exists between FSS and FTS in the areas of IT sales and marketing and IT contract offerings; and
4. There is opportunity to expand GSA's delivery of best value in IT products and services.

Id.

22. *Id.* at 2.

23. *Id.*

24. *2001 Year in Review*, *supra* note 9, at 114.

25. Section 508 Contract Clause, 67 Fed. Reg. 43,523 (June 27, 2002) (to be codified at 48 C.F.R. pts. 39, 52).

26. The form of the guidance could be a FAR clause, a solicitation provision, other FAR coverage, or non-regulatory guidance.

27. 67 Fed. Reg. at 43,523.

Intellectual Property

During the past year, there were several noteworthy intellectual property cases in the federal courts and boards. All of these cases shared a common theme—contractors' claims that the government improperly took their intellectual property.

Statutory Prerequisites to Claim Damages—Infringement Must Occur in the United States

Outside the context of government contracts, if a patent owner believes someone is infringing on his patent, he may sue in any district court seeking compensation and injunctive relief to prevent further use.[1] If the government or a contractor working for the government is the alleged patent infringer, however, the patent owner's sole remedies are to file an administrative claim against the agency,[2] or to sue the government in the COFC, under 28 U.S.C. § 1498(a). In *Zoltek Corp. v. United States*,[3] the COFC held that the government was only liable under 28 U.S.C. § 1498 for patent infringements that occurred in the United States.[4]

In *Zoltek*, the government contracted with Lockheed Martin Corp. to design and build F-22 fighters. Lockheed, in turn, subcontracted with Nippon Carbon Co. and Ube Industries, two Japanese firms, to provide silicon carbide fiber materials. Zoltek Corp. owned a patent for silicon carbide fiber products, and alleged that these two Japanese firms infringed on Zoltek's patent by manufacturing the materials and delivering them to Lockheed Martin. Zoltek consequently sought compensation against the United States under 28 U.S.C. § 1498(a).[5] The government responded that 28 U.S.C. § 1498(c), which states that "[this] section shall not apply to any claim arising in a foreign country," precluded recovery where at least one element of the infringement occurred outside the United States.[6]

Despite the plain meaning of the statute, Zoltek argued that Congress intended the coverage of section 1498 to be co-extensive with the liability under 35 U.S.C. § 271, which defines what constitutes infringement when only private parties are involved.[7] If the coverage was not co-extensive, Zoltek argued, it would be without any remedy at all because section 1498(a) would bar a claim directly against Lockheed, and section 1498(c) would bar a claim against the United States.[8] Zoltek also pointed to several occasions in which Congress expressed a desire that infringement should not depend upon the identity of the infringer. The court agreed that this was Congress's expressed intent, but noted that even this express intent could not supersede the plain meaning of section 1498(c).[9]

Although the court found that section 1498(c) barred Zoltek's claim, it ordered the parties to file supplemental briefs addressing the question of whether the patent infringement constitutes a Fifth Amendment taking, and if so, whether section 1498(c) violates the requirement to provide just compensation.[10] Because the court also held in dicta that section 1498 literally only applies to manufacture or use—as opposed to sale or importation—of a patented invention,[11] the court's decision may mean that Zoltek can file suit directly against Lockheed and obtain an injunction preventing the importation of the Japanese firms' infringing products—an unpalatable outcome for the government.

Statutory Prerequisites to Claim Damages—The Statute of Limitations

Another COFC case applied the Fifth Amendment's takings clause to the Invention Secrecy Act.[12] When the U.S. Patent and Trademark Office (PTO) issues a patent, it discloses all the details necessary to replicate the underlying invention to the general public. This disclosure can have grave implications if

1. *See* 35 U.S.C. § 271 (2000).

2. *See* U.S. Dep't of Defense, Defense Federal Acquisition Reg. Supp. 227.7000 (21 Sept. 1999) [hereinafter DFARS].

3. 51 Fed. Cl. 829 (2002).

4. *Id.* at 839.

5. *Id.* at 829, 831.

6. *Id*. at 831-32 (quoting 28 U.S.C. § 1498(c) (2000)).

7. *Id.* at 832. The scope of 35 U.S.C. § 271 specifically includes importing a product from abroad that was made using an infringed patented process. *See* 35 U.S.C. § 271(a).

8. 51 Fed. Cl. at 832.

9. *Id.* at 837-38 (noting it could not fill the legislative gap in section 1498).

10. *Id.* at 838-39.

11. *Id.* at 838.

12. 15 U.S.C. §§ 181-188 (2000).

the invention has national security implications. The Invention Secrecy Act permits the Commissioner of Patents to place a "secrecy order" on a patent application if a government agency determines that publication or disclosure of the invention might be detrimental to the national security. If the Commissioner imposes a secrecy order, the PTO seals the patent application and prevents the issuance of a patent.[13]

The story of *Hornback v. United States*[14] began in August 1987, when the PTO notified Hornback that it was imposing a secrecy order on a patent application that he had filed. About a month later, the PTO issued Hornback a "Notice of Allowability," which stated that the PTO would have issued him a patent but for the secrecy order. The government did not rescind the secrecy order until April 1999, thus delaying Hornback's ability to obtain a patent on his invention. Hornback sued the government in January 1999, claiming that the government took his patent without just compensation in violation of the Fifth Amendment's Takings Clause.[15] The government contended that that COFC's six-year statute of limitations barred Hornback's claim.[16]

The government contended that Hornback's claim arose in August 1987, when the PTO initially imposed the secrecy order on Hornback's patent application. In contrast, Hornback argued that the claim did not arise until October 1993 because the government improperly classified the subject matter contained in the patent application in 1987 and did not correct that improper classification until 1993.[17] The court rejected Hornback's arguments, specifically noting that "if the government has taken property and has done so in a legally improper manner, it has committed two violations of the property owner's rights . . . giving rise to two separate causes of action."[18] The court went on to reason that the government's improper classification of the subject matter contained in Hornback's patent application did not affect his ability to file a claim for just compensation.[19]

Hornback alternatively argued that the "continuing claim" doctrine prevented his claim from being entirely time-barred.[20] The theory behind the continuing claim doctrine is that it is actually a series of distinct events rather than one single action by the defendant that wrongs the plaintiff. The Invention Secrecy Act prohibits the imposition of a secrecy order for more than one year, but it does permit the Patent Commissioner to renew the order for additional periods of up to one year if the agency that requested the secrecy order affirmatively determines that national interest requires the renewal.[21] Hornback contended each annual renewal of the secrecy order was a recurring individual wrong, and consequently, his action was not time-barred. The court held that the continuing claim doctrine did not apply to Hornback's case because the periodic renewals of the initial secrecy order were but "one act of imposition producing a harm that continued over a period of time."[22] The court held that Hornback's cause of action under the Fifth Amendment's Takings Clause was time-barred because he filed suit in 1999, more than six years after the imposition of the initial secrecy order.[23]

Contractors Must Mark Their Proprietary Information

In *General Atronics Corp.*,[24] the ASBCA ruled that a contractor's failure to precisely follow the regulatory requirements to mark its software with the appropriate rights legend before delivering it to the government resulted in the government having unlimited rights to that software. In 1992, the Navy issued a solicitation for the design and manufacture of data terminals. General Atronics Corp. (GAC) was the sole offeror. GAC's offer proposed several enhancements to the software and hard-

13. *See id.*; 35 U.S.C. § 181 (2000).

14. 52 Fed. Cl. 374 (2002).

15. *Id*. at 375-76 (citing U.S. CONST. amend. V, cl. 4).

16. *Id*. at 376.

17. 52 Fed. Cl. at 379.

18. *Id*. at 381 (citing *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), and noting that one cause of action would arise for just compensation and another for the improprieties committed in the course of the taking).

19. *Id*. at 388-89.

20. *Id*. at 378-79.

21. *Id*.

22. *Id.* at 379. The court did not fully explain its logic in reaching this conclusion; it is arguably incorrect because one could view each renewal of the secrecy order as a discrete event. *Id.*

23. *Id*. at 389.

24. ASBCA No. 49196, 02-1 BCA ¶ 31,798.

ware required by the solicitation. These enhancements would enable the data terminals to perform a greater number of applications and to work with two existing data terminals in the Navy's inventory. After negotiating for these enhancements, the Navy awarded GAC a $1,140,030 fixed-price contract for 194 data terminals. Shortly after the award, the parties began to dispute whether the contract required GAC to furnish only the hardware enhancements or both the hardware and software enhancements. GAC ultimately supplied the software enhancements under protest, but later submitted a claim for $203,684, which the government denied. Since the government's post-negotiation memorandum only discussed the hardware enhancements, the board sustained GAC's initial appeal.[25]

GAC and the Navy then began to dispute what rights the Navy had in the software enhancements. The solicitation and the Navy's resulting contract with GAC contained the "Rights in Technical Data and Computer Software (October 1988)" clause.[26] Among other things, this clause gives the government unlimited rights to any computer software that a contractor delivers to the government without a "Restricted Rights Legend."[27] It also prohibits a contractor from placing such a legend on any computer software until the government agrees to such restrictions in a license agreement, which must be incorporated into the contract between the contractor and the government.[28]

The cover page of GAC's proposal had a legend indicating that the proposal contained data that GAC considered to be proprietary and that the government could not disclose or use. Each page of the proposal also had a footer referencing the title page's legend. The software that GAC delivered as part of the data terminals, however, did not contain any restricted rights legend.[29] Although GAC attempted to remedy this omission by placing legends on the diskettes that it delivered to the Navy in 1995, the board ruled this was too late; the board held that by that time, the Navy had "gained unlimited rights" in the software.[30] The board also noted that the Navy never entered into a license agreement with GAC and highlighted the fact that GAC did not even propose to enter into a license agreement until long after it had started delivering the initial data terminals.[31]

Although GAC failed to comply with the regulatory requirements, it is difficult to fault GAC entirely. First, the regulations in this area are very complex and difficult to comprehend. Second, even though GAC did not place the appropriate marking on any of its delivered items, GAC did place notices on other hardware and data that indicated that they were proprietary. Most importantly, the regulations did not permit GAC to deliver the software with any restrictions on the government's rights to it unless GAC first obtained an advance license agreement that was made a part of the contract. Had the software been an initial requirement under the contract, it would not seem harsh to require GAC to comply with the regulatory requirements. Since the software enhancements were not part of the initial contract that GAC had with the government, however, it is troubling that the board was so unsympathetic to the contractor.

The last noteworthy case in this area is *Xerxe Group, Inc. v. United States*,[32] which applies a very strict and narrow interpretation of the marking requirements of the FAR provisions governing unsolicited proposals.[33] In *Xerxe*, an offeror submitted an unsolicited proposal[34] dealing with the privatization of utilities at Patrick Air Force Base. The government rejected Xerxe's proposal and subsequently published a Request for Information (RFI) that Xerxe claimed included proprietary information that the government had obtained from Xerxe's unsolicited proposal. Xerxe objected to the RFI and submitted a claim for $72 million in damages resulting from the government's alleged violation of the FAR's confidentiality provisions and improper dissemination of its proprietary information to the general public. In November 2000, the COFC, in an unreported decision, held that Xerxe's failure to comply with the requirements of FAR 15.609(b) "vitiated any protection against disclosure."[35] Xerxe appealed that ruling to the CAFC.[36]

25. *Id*. at 157,066.

26. DFARS, *supra* note 2, at 252.227-7013.

27. *Id*. at 252.227-7013(c).

28. *Id*.

29. *General Atronics*, 94-3 BCA ¶ 27,112, at 157,066-67.

30. *Id*. at 157,068. Interestingly, the board did not expressly address DFARS 227.7203-10(c), which allows a contractor to "request permission" to insert an inadvertently omitted legend. As previously discussed, the board indicated in a footnote that GAC had submitted software with restrictive legends, but followed this with a note that the contracting officer "took exception" to the markings. *Id*. at 157,068 n.2.

31. *Id*.

32. 278 F.3d 1357 (Fed. Cir. 2002).

33. General Servs. Admin. et al., Federal Acquisition Reg. 15.609 (Sept. 1997) [hereinafter FAR].

34. An "unsolicited proposal" is a proposal for a new or innovative idea that is not submitted in response to a government solicitation or announcement. FAR, *supra* note 33, at 2.101; *see also id*. subpt. 15.6.

The FAR requires anyone submitting an unsolicited proposal containing proprietary information to mark the title page to the proposal with a specific legend that places the government on notice that it must protect the proprietary information from disclosure.[37] It also requires the submitter to mark each page of the proposal with a different legend that cross-references the one placed on the title page to the proposal.[38] If these two steps are done properly, government personnel are prohibited from disclosing the marked information.[39] Unfortunately, the contractor in *Xerxe* only placed the required legend on the offer's title page. The CAFC found the lack of any marking on the individual pages within the proposal to be dispositive and upheld the lower court's opinion.[40]

The CAFC failed to address several other FAR provisions that would argue against the government's ability to use the unmarked information in Xerxe's proposal. In addition to prohibiting the disclosure of properly marked information, the FAR also prohibits government personnel from using "any data, concept, idea or other part of an unsolicited proposal" in a solicitation or negotiation with any other firm.[41] This prohibition does not depend upon whether the provider appropriately marked the information. If the government intends to have any non-government personnel evaluate an unsolicited proposal, the FAR requires the government to obtain the offeror's written permission before it may release the proposal to those individuals. Again, this requirement applies regardless of whether the proposal contains any markings indicating that it contains proprietary information.[42] Before *Xerxe*, a contractor—particularly one with little government contracting experience—could reasonably read FAR subpart 15.6 to mean that the government could not disseminate information from an unsolicited proposal outside the government, regardless of whether the information was properly marked. Like *General Atronics Corp.*, *Xerxe* established an exacting obligation on contractors to comply with the precise marking requirements created by confusing and extensive regulations. Major Sharp.

35. *Xerxe*, 278 F.3d at 1358 (citing Xerxe Group, Inc. v. United States, No. 99-924-C (Ct. Fed. Cl. Nov. 30, 2000)).

36. *Id*.

37. *See* FAR, *supra* note 33, at 15.609(a).

38. *Id*. at 15.609(b).

39. *Id*. at 15.608(b).

40. 278 F.3d at 1359-60.

41. FAR, *supra* note 33, at 15.608(a).

42. *Id*. at 15.609(h).

Non-FAR Transactions

Although neither case law nor legislation enacted during the past year dealt with contracts falling outside the purview of the Federal Acquisition Regulation (FAR),[1] several agencies issued proposed and final rules in the area. In addition, both houses of Congress introduced multiple bills that would have extended Other Transaction authority to either the Homeland Security Department[2] or to all civilian agencies.[3] If this past year is any indication of what the future has in store for non-FAR transactions, it appears that agencies will continue to rely on them to an increasing degree, but at the same time, the government will subject them to greater scrutiny and more regulation.

DOD Proposes Greater Flexibility in Technology Investment Agreements

Beginning in 1947, Congress gave the Department of Defense (DOD) the authority to engage in research projects using contractual methods that did not have to comply with the normal statutory and regulatory government contract rules. First, Congress enacted 10 U.S.C. § 2358,[4] which gave the DOD the authority to engage in research efforts through the use of either a Cooperative Agreement or a grant. In 1989, Congress enacted 10 U.S.C. § 2371,[5] giving the DOD the authority to use "Other Transactions"[6] for such research. Neither of these authorities permits the DOD to acquire an actual product; they merely allow the DOD to make investments to stimulate research in scientific fields of interest to DOD, with the expectation that the DOD may actually use the research in one or more of its weapon systems.[7]

To implement these statutory authorities, the DOD promulgated the DOD Grant and Agreement Regulations (DODGARs). One of the contractual vehicles discussed in this regulation is a Technology Investment Agreement (TIA), which could be either a Cooperative Agreement or an Other Transaction.[8]

Last year, the DOD proposed a rule that would add a new part 37 to the DODGARs.[9] The proposed rule would provide guidance to agreements officers on the policies and procedures concerning the award and administration of TIAs. The proposed rule, which is written in a question-and-answer format, would also make some minor changes to existing parts 21, 22, 32, and 34 of the DODGARs. One of the major purposes for the proposed revision is to ensure that agreements officers are more aware of the flexibility they have in negotiating and awarding TIAs, potentially enabling the DOD to attract nontraditional defense contractors to conduct research work for it.[10]

GAO's Access to 845 Agreement Records

As discussed above, Congress has given the DOD limited authority to acquire actual quantities of end items, as opposed to just stimulating research using an Other Transaction. This sort of transaction is alternatively referred to as either an Other Transaction for Prototype or an 845 Agreement. In Section 801 of the National Defense Authorization Act for Fiscal Year 2000,[11] Congress required the DOD to include a clause in every 845 Agreement involving payments of over $5 million; this clause gives the GAO the ability to examine the records of any of the parties involved. Congress allowed for certain exceptions to this requirement, most notably, exempting any party

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1. Commonly called "non-FAR Transactions."

2. *See* H.R. 5005, 107th Cong. (2002); S. 2794, 107th Cong. (2002).

3. *See* H.R. 3426, 107th Cong. (2001); S. 1780, 107th Cong. (2001); H.R. 4694, 107th Cong. (2002) (restricting this authority to situations when the research facilitates defending or recovering from terrorism, or from a nuclear, biological, chemical, or radiological attack).

4. Pub. L. No. 85-599, 72 Stat. 520 (1947).

5. Pub. L. No. 101-189, 103 Stat. 1403 (1989).

6. 10 U.S.C. § 2371 (2000). The phrase "Other Transaction" has become the term of art for instruments the statute refers to as "transactions (other than contracts, cooperative agreements, and grants)." *Id*.

7. In 1993, Congress also gave the DOD the authority to enter into "Other Transactions," in which the DOD acquires limited amounts of prototype items rather than just the underlying research. This sort of Other Transaction is alternatively referred to as an "other transaction for prototype" or an "845 Agreement" because it arose out of section 845 of the National Defense Authorization Act for Fiscal Year 1994. *See* Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1993).

8. U.S. Dep't of Defense, Reg. 210.6-R, DOD Grant and Agreement Regulations (13 Apr. 1998), *available at* http://www.dtic.mil/whs/directives/corres/html/32106r.htm.

9. *See* DOD Grant and Agreement Regulations, 67 Fed. Reg. 21,486 (proposed Apr. 30, 2002) (to be codified at 32 C.F.R. pt. 37).

10. *Id.*

11. Pub. L. No. 106-65, § 8801, 113 Stat. 512, 700 (1999).

who had not entered into an Other Transaction that provided audit access during the preceding year.[12]

In section 804 of the National Defense Authorization Act for Fiscal Year 2001,[13] Congress carved out an additional exception to the mandate to attain record access. Congress indicated that if the party to the 845 Agreement had only done business with the government during the past year via an Other Transaction or a Cooperative Agreement, then the mandated clause in the current 845 Agreement would only need to grant the GAO the same access rights that the previous agreement permitted. This past year, the DOD issued a final rule incorporating the congressional mandate discussed above.[14]

Restrictions on the Use of 845 Agreements

In addition to expanding the exceptions to the GAO's record access, the National Defense Authorization Act for Fiscal Year 2001 limited the DOD's ability to enter into 845 Agreements.[15] Congress authorized the DOD to use 845 Agreements only under three circumstances: (1) where a non-traditional defense contractor participates to a significant extent; (2) where one or more non-federal government parties pays at least one-third of the funds for the project; or (3) where the agency's senior procurement executive makes a determination that exceptional circumstances exist, such that the 845 Agreement allows them to accomplish what would not be feasible under a contract. Congress also provided a statutory definition for "nontraditional defense contractor."[16] Last year, the DOD issued a proposed rule that would implement these statutory requirements.[17] This proposed rule also called for the inclusion of clauses granting the DOD audit rights in any agreement relying upon the "at least one-third private funding" justification, or any agreement where payment was based upon that party's costs.[18] In response to multiple comments regarding the audit rights provisions,[19] the DOD ultimately decided to issue a final rule that addressed only the restrictions on using 845 Agreements.[20] A separately issued memorandum indicates that the DOD eventually plans to issue an additional rule covering the audit provisions.[21]

GAO Report Calls for Changes in 845 Agreement Reporting Requirements

Currently, the DOD is required to submit an annual report to Congress covering its 845 Agreements.[22] In a recently issued report, the GAO commended the DOD on its implementation of the 845 Agreement authority to date, but also called for the DOD to provide better, more straightforward information regarding nontraditional contractor involvement in its annual reports.[23] The GAO specifically called for a summary table that indicated the number of nontraditional contractors that the DOD enticed to do business with it through the use of an 845 Agreement.[24] It also recommended that the DOD provide, as

12. *Id.*

13. Pub. L. No. 106-398, § 804, 114 Stat. 1654, 1654A-206 (2000).

14. *See* Transactions Other than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 66 Fed. Reg. 57,381 (Nov. 15, 2001).

15. Pub. L. No. 106-398, § 803, 114 Stat. 1654, 1654A-205 (2000).

16. *Id*. at 1654A-205-06. This law defines a "nontraditional defense contractor" as follows:

> [A]n entity that has not, for a period of at least one year prior to the date that a transaction (other than a contract, grant, or cooperative agreement) for a prototype project under the authority of this section is entered into, or performed with respect to—(1) any contract that is subject to full coverage under the cost accounting standards prescribed pursuant to section 26 of the Office of Federal Procurement Policy Act (41 U.S.C. 422) and the regulations implementing such section; or (2) any other contract in excess of $500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency, that is subject to the Federal Acquisition Regulation.

Id.

17. *See* Transactions Other than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 66 Fed. Reg. 57,422 (Nov. 21, 2001).

18. *Id*. at 58,423.

19. *See, e.g.*, *Other Transactions: Bar Group, Dual-Use Commercial Firms Urge DOD to Withdraw OT Audit Rights Proposal*, 77 BNA FED. CONT. REP. 95 (JAN. 31, 2002).

20. *See* Transactions Other than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 67 Fed. Reg. 54,955 (Aug. 27, 2002).

21. *See* Memorandum, Director of Defense Procurement, to the Directors of Defense Agencies, and Deputy Assistant Service Secretaries, subject: Clarification Regarding Conditions on Use of "Other Transaction" Agreements for Prototype Projects (Aug. 27, 2002), *available at* http://www.acq.osd.mil/dp/dsps/ot/dpmemo8272002.pdf.

22. *See* 10 U.S.C. § 2371(h) (2000).

23. *See* GEN. ACCT. OFF., REP. NO. GAO-03-150, *DOD Has Implemented Section 845 Recommendations but Reporting Can Be Enhanced* (Oct. 9, 2002).

part of its submission to Congress, an assessment of the benefits ensuing from projects completed during the preceding year.[25]

SBIR Changes

In 1982, Congress enacted the Small Business Innovation Development Act (SBIDA).[26] The Act created the Small Business Innovative Research (SBIR) Program, an effort designed to increase the role that small business concerns could play in federally funded research and development. This program authorizes certain designated federal agencies to award "phased" contracts not governed by the FAR in order to promote scientific and technological innovation in fields that are of interest to the respective agencies.[27] Although the SBIDA initially set an expiration date of 1 October 1988 for the Program,[28] Congress has subsequently reauthorized it several times. The most recent reauthorization was in 2000;[29] along with it came several statutorily prescribed changes to the SBIR Program. To implement these prescribed changes, the Small Business Administration has issued a revised policy directive that applies to all agencies involved in the program.[30]

Some of the more important changes required in the 2000 legislation included: (1) requiring the SBA to clarify that the government's rights in data apply to data generated in any of the three contract phases;[31] (2) creating a database which would enable the public to search through information related to past SBIR awards;[32] (3) requiring an applicant for a Phase II award to describe their commercialization plan; (4) requiring an agency to report to the SBA whenever it determined that a Phase III award would not be practicable; and (5) creating the Federal and State Technology (FAST) Partnership, which adds state and local entities to the SBIR process.[33] In addition to providing a copy of the revised policy directive, the Federal Register notice does an excellent job of providing a section-by-section analysis of the changes and also discusses the public comments.[34]

Grant Me Some Improvements!

In 1999, Congress enacted the Federal Financial Assistance Management Improvement Act.[35] The purpose of the Act was to streamline and improve the effectiveness of the various federal grant programs. The Act noted that there were over 600 grant programs in existence, and that the lack of uniformity among these programs was creating inefficiencies. Consequently, Congress directed the Office of Management and Budget (OMB) to streamline the regulations dealing with grants and to establish standard ways to award and administer them.[36]

In response to this congressional directive, the OMB issued five notices last year concerning revisions to its old guidance, as well as new guidance that would streamline and standardize the award and administration of federal grants. First, the OMB proposed to amend *OMB Circular A-133*[37] by increasing the thresholds that the grantee would have to meet before being subject to an audit.[38] The OMB also proposed to amend OMB Circulars A-21,[39] A-87,[40] and A-122.[41] Currently, there are occasional differences between how each of these three circulars describes or defines cost items. There is also a lack of con-

24. *See id*. at 9 (indicating that the DOD non-concurred with this recommendation in agency comments it sent to the GAO).

25. *Id*. at 9-10 (noting that the DOD concurred with this recommendation, but also indicating that it would provide such information on an *ad hoc*, as opposed to a regular, basis).

26. Pub. L. No. 97-219, 96 Stat. 217 (1982).

27. 96 Stat. at 218.

28. 96 Stat. at 221.

29. *See* Pub. L. No. 106-554, 114 Stat. 2763A-668 (2000) (extending the SBIR Program through 30 September 2008).

30. *See* Small Business Innovation Research Policy Directive, 67 Fed. Reg. 60,072 (Sept. 24, 2002).

31. 114 Stat. at 2763A-673.

32. *Id*. at 2763A-670-71.

33. *Id*. at 2763A-674.

34. *See* Small Business Innovation Research Policy Directive, 67 Fed. Reg. 60,072 (Sept. 24, 2002).

35. Pub. L. No. 106-107, 113 Stat. 1486 (1999).

36. *Id.* at 1488.

37. U.S. Office of Mgmt. and Budget, Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations (June 24, 1997).

38. *See* Audits of States, Local Governments, and Non-Profit Organizations, 67 Fed. Reg. 52,545 (Aug. 12, 2002).

sistency in cost policy between these circulars. The proposed revisions do away with these inconsistencies.[42]

One of the OMB notices deals with a proposal to issue a new policy mandating a standardized format for publicizing agency announcements.[43] A second OMB notice proposes to standardize the data to include in synopses sent to FedBizOpps.[44] Both of these efforts would enable potential grant applicants to screen agency announcements more quickly, to determine if the proposed funding opportunity deals with an area that interests them. The OMB also issued a notice concerning its decision not to change OMB Circular A-110.[45] The OMB had previously planned to revise this circular so that grantees having multiple grants with an agency could request payments on a "pooled" rather than a grant-by-grant basis. Ultimately, the OMB decided not to make this change because of the disparity in public comments on the proposal.[46]

NASA Grant and Agreement Revisions

In section 431 of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act for Fiscal Year 1999,[47] Congress authorized the National Aeronautics and Space Administration (NASA) to indemnify anyone that develops an "experimental aerospace vehicle" under a Cooperative Agreement with NASA. In section 319 of the NASA Authorization Act for Fiscal Year 2000,[48] Congress announced that it believed that any non-profit recipient of a grant or Cooperative Agreement should purchase only American-made products when spending that assistance. A final NASA rule implements these statutes, making changes to both its "Grant and Cooperative Agreements" regulations and its "Cooperative Agreements with Commercial Firms" regulations. This final rule also made some changes to both sets of regulations dealing with publishing requirements and the evaluation and selection of competing firms.[49] Major Sharp.

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39. U.S. Office of Mgmt. and Budget, Circular A-21, Cost Principles for Educational Institutions (Aug. 8, 2000).

40. U.S. Office of Mgmt. and Budget, Circular A-87, Cost Principles for State, Local and Indian Tribal Governments (Aug. 29, 1997).

41. U.S. Office of Mgmt. and Budget, Circular A-122, Cost Principles for Non-Profit Organizations (June 1, 1998).

42. *See* Cost Principles for Educational Institutions, for State, Local and Indian Tribal Governments and for Non-Profit Organizations, 67 Fed. Reg. 52,558 (proposed Aug. 12, 2002), *available at* http://www.whitehouse.gov/omb/fedreg/cost_principle_nprm_table.pdf) (citing a chart of the inconsistencies and proposed changes).

43. Office of Federal Financial Management Policy Directive on Financial Assistance Program Announcements, 67 Fed. Reg. 52,548 (proposed Aug. 12, 2002).

44. Standard Data Elements for Electronically Posting Synopses of Federal Agencies' Financial Assistance Program Announcements at FedBizOpps, 67 Fed. Reg. 52,554 (proposed Aug. 12, 2002).

45. U.S. Office of Mgmt. and Budget, Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations (Sept. 30, 1999).

46. *See* U.S. Office of Mgmt. and Budget, Circular A-110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, 67 Fed. Reg. 52,547 (Aug. 12, 2002).

47. Pub. L. No. 105-276, § 431, 112 Stat. 2461, 2513-16 (1998).

48. Pub. L. No. 106-391, § 319, 114 Stat. 1577, 1597 (2000).

49. *See* NASA Grant and Cooperative Agreement Handbook—Rewrite of Section D—Cooperative Agreements with Commercial Firms and Implementation of Section 319 of Public Law 106-391, Buy American Encouragement, 67 Fed. Reg. 45,790 (July 10, 2002) (codified at 14 C.F.R. pts. 1260, 1274).

Payment and Collection

Not So Fast There, Buddy!

In a memorandum issued on 30 May 2002, the Director of Defense Procurement, Ms. Deidre Lee, cautioned Department of Defense (DOD) paying officials about using fast payment procedures without first meeting all of the requirements of Federal Acquisition Regulation (FAR) section 13.402.[1] Ms. Lee noted that "[t]he fast payment procedure allows payment under limited conditions to a contractor prior to the government's verification that supplies have been received and accepted."[2] Federal Acquisition Regulation section 13.402 provides six conditions, however, which must be present before paying officials can use the fast payment procedures.[3]

The catalyst for Ms. Lee's caution was a Defense Finance and Accounting Service (DFAS) observation that paying offices had used fast payment procedures when there was no geographical separation or lack of adequate communications facilities that made it impractical to make timely payment based on evidence of government acceptance. The DFAS also observed that the receiving activities frequently would not forward it a copy of the receiving report as a follow-up to a fast payment.[4] Ms. Lee stated in her memorandum that "[i]n today's e-business environment, use of fast payment procedures should be employed only when payment must be made inside the United States for deliveries made outside the United States."[5] Ms. Lee ordered DOD components to review their fast payment procedures and ensure they "have the necessary internal controls in place and are complying with all the requirements of FAR 13.402."[6]

Garbage In, Garbage Out—Contracting Officers Should Structure Payment Terms Properly for Correct and Timely Payment

A couple of weeks after issuing the fast payment procedures memo, Ms. Lee issued another memorandum, this one emphasizing that contracting activities need to input payment and delivery information into automated systems properly, so that contractors receive correct and timely payments.[7] Ms. Lee's 11 June 2002 memo reminded DOD components of the following contract formation issues that may cause delays in payment:

> (1) CLIN [Contract Line Item Number] structure inconsistent with contractors' shipping [and] billing methods;
>
> (2) Unit pricing by lot when contractor[s] could deliver separately priced items as partial shipments; and

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1. Memorandum, Deidre A. Lee, Director, Defense Procurement, to Directors of Defense Agencies, Deputy Assistant Secretary of the Army (Procurement), Deputy for Acquisition and Business Management, ASN (RD&A)/ABM, Deputy Assistant Secretary of the Air Force (Contracting), SAF/AQC, Executive Director, Logistics Policy & Acquisition Management (DLA), subject: Fast Payment Procedures (30 May 2002) [hereinafter Lee FPP Memo] (citing GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 13.402 (July 2002) [hereinafter FAR]).

2. Lee FPP Memo, *supra* note 1. Ms. Lee defined "identified fast payment procedures" as the FAR describes them. *See* FAR, *supra* note 1, at 13.401(a).

3. The FAR lists six conditions that paying officials must meet before they use the fast payment procedures:

> (1) the individual purchasing instruments does not exceed $25,000;
> (2) deliveries of supplies are to occur at locations where there is both a geographical separation and a lack of adequate communications facilities between the Government receiving and disbursing activities that will make it impractical to make timely payment;
> (3) title to the supplies passes to the Government upon delivery to a post office or common carrier for mailing or shipment to destination, or, upon receipt by the Government if the shipment is by means other than Postal Service or common carrier;
> (4) the supplier agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements;
> (5) the purchasing instrument is a firm-fixed-price contract, a purchase order, or a delivery order for supplies; and
> (6) a system is in place to ensure documentation of evidence of contractor performance under fast payment purchases, timely feedback to the contracting officer in case of contractor deficiencies, and identification of suppliers that have a current history of abusing the fast payment procedure.

FAR, *supra* note 1, at 13.402.

4. *See* Lee FPP Memo, *supra* note 1.

5. *Id.*

6. *Id.*

7. Memorandum, Deidre A. Lee, Director, Defense Procurement, to Directors of Defense Agencies, Deputy for Acquisition and Business Management, ASN (RD&A), Deputy Assistant Secretary of the Air Force (Contracting), SAF/AQC, Deputy Assistant Secretary of the Army (Procurement) ASA(ALT), Executive Director, Logistics Policy & Acquisition Management (DLA), subject: Contract Payment (11 June 2002) [hereinafter Lee Payment Memo].

> (3) Requirement description by reference to the contractor's proposal when receiving, accepting and paying activities may not have that information.[8]

Ms. Lee placed special emphasis on contracts with commercial suppliers inexperienced with government business processes:

> We must ensure that our contracts are written clearly with all the information necessary for receipt, acceptance, and payment (including the military address for delivery) so that commercial suppliers receive timely payment and are more likely to continue to do business with the Department.[9]

Ms. Lee also advised contracting officers to consider recently added GSA schedule items on the DOD E-Mall because commercial suppliers may find this automated ordering procedure more familiar than the traditional purchase order system.[10]

From a DOD efficiency standpoint, Ms. Lee noted that the DOD "cannot afford to use scarce human resources to manually reconcile inconsistent information, or to search for missing information."[11]

"Count Your Change!" GAO Releases Yet Another Report Saying That DOD Overpayments Continue

Department of Defense overpayment problems are nothing new for the GAO, which initially reported on DOD contractor overpayments in 1994.[12] As last year's *Year in Review* noted, the GAO recently issued several more reports criticizing government payment and collection systems.[13] In May 2002, the GAO released yet another report indicating that DOD officials continue to make overpayments on contracts.[14] While the GAO noted that the DOD had begun several initiatives to reduce overpayments, it also reported as follows:

> [The DOD] still does not yet have basic accounting control over contractor debt and underpayments because its procedures and practices do not fully meet federal accounting standards and federal financial system requirements for the recording of accounts receivable and liabilities. As a result, DOD managers do not have important information for effective financial management, such as ensuring that contractor debt is promptly collected.[15]

Overall, DFAS Columbus records revealed that the DOD made approximately $488 million in overpayments during fiscal year (FY) 2001.[16]

"We Are Here to Help!" Congress Requires Agency Programs for Identifying Payment Errors

Last year's *Year in Review* noted that Representative Dan Burton introduced the Erroneous Payments Recovery Act of 2001 to address government overpayments.[17] This legislation eventually gave birth to section 831 of the National Defense Authorization Act for FY 2002.[18] Section 831 amended Title 31 of the U.S. Code[19] to require that the head of each executive agency with contracts totaling over $500 million in a fiscal year

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8. *Id*.

9. *Id*.

10. *Id*.

11. *Id*.

12. GEN. ACCT. OFF., REPT. NO. GAO/NSAID-94-106, *DOD Procurement: Millions in Overpayments Returned by DOD Contractors* (Mar. 14, 1994).

13. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 119 [hereinafter *2001 Year in Review*].

14. GEN. ACCT. OFF., REP. NO. GAO-02-635, *DOD Contract Management: Overpayments Continue and Management and Accounting Issues Remain* (May 30, 2002).

15. *Id*. at 3.

16. *Id*. at 2.

17. *See 2001 Year in Review*, *supra* note 13, at 119.

18. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 831, 115 Stat. 1012, 1186 (2001). On 6 June 2002, Representative Stephen Horn (R-Cal.) introduced a bill, to provide for federal agency reduction of improper payments. The proposed act would not only require each agency to annually identify all programs and activities that may be susceptible to significant improper payments, the agency must also subsequently estimate the amount of improper payments and report that estimate in their budget submissions and annual program performance reports. H.R. 4878, 107th Cong. (2002).

establish a cost-effective program for identifying payment errors and for the recovery of overpayments.[20] Major Kuhn.

19. *See* 31 U.S.C. §§ 3561-3567 (2000).

20. *Id*.. § 3561(a).

Performance-Based Service Contracting

New Rules on Performance-Based Service Contracting

In last year's *Year in Review,* the authors noted a change to the Army Federal Acquisition Regulation Supplement (AFARS)[1] that required all service contracts to be performance-based and fixed-price.[2] Just seven months later, the Army deleted this newly created provision entirely when it issued Version 4 of the AFARS.[3] All practitioners, including those in the Army, obviously must still follow the relevant Federal Acquisition Regulation (FAR) guidance regarding performance-based service contracts (PBSCs). In that regard, the General Accounting Office (GAO) issued a final rule last year,[4] implementing the preference for PBSCs established in section 821 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001.[5] The final rule adopted the previous year's interim rule guidance on PBSCs,[6] but also amended FAR section 7.105(b)(4) "to clarify that contracting officers must provide a rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis (see [FAR sections] 37.102(a) and 16.505(a)(3))."[7]

Additionally, on 6 December 2001, the Department of Defense (DOD) issued an interim amendment to the Defense Federal Acquisition Regulation Supplement (DFARS), adding section 212.102, which allows the DOD to treat certain PBSCs and task orders as contracts for the procurement of commercial items.[8] The rule permits contracting officers to use the commercial item acquisition procedures under FAR part 12 for firm fixed-price PBSCs or task orders with a value of $5 million or less, if the contract satisfies certain conditions. First, the contract or task order must define each specific task to be performed in "measurable, mission-related terms," and "identify the specific end products or output to be achieved for each task."[9] The contractor also must provide "similar services at the same time to the general public under terms and conditions similar to those in the contract," and the agency must not use the procedures in FAR subpart 13.5, Test Program for Certain Commercial Items.[10] Noting that contracts under FAR part 12 incorporate the clauses at FAR sections 52.212-4 and 52.212-5, the interim rule notice advises contracting officers of the potential need to modify the inspection and acceptance provisions at section 52.212-4(a) to protect the government's interests adequately. The notice informs agencies, for example, that they must include commercial remedies such as the extension of contract performance or the right to reduce contract price when reperformance cannot correct defects in the services provided.[11]

The DOD finalized the interim rule with minor revisions on 25 October 2002.[12] The final rule adds the phrase "or task order" to the end of the requirement that the contractor offer "similar services at the same time to the general public under terms and conditions similar to those in the contract."[13] Because the word "tailor" is consistent with terminology used elsewhere in FAR part 12, the new rule also adopts its use instead of the term "modify," in conjunction with possible

1. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. (Jan. 25, 2002) [hereinafter AFARS].

2. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002, at 14.

3. *See* AFARS, *supra* note 1. Before this deletion, a January 2002 interim change exempted service contracts related to architecture and engineering, construction, certain supply contracts, and A-76 studies from the general policy. *Id.*

4. Federal Acquisition Regulation; Preference for Performance-Based Contracting, 67 Fed. Reg. 21,532 (Apr. 30, 2002) (to be codified at 48 C.F.R. pts. 2, 7, and 37).

5. Pub. L. No. 106-398, § 821, 114 Stat. 1654, 1654A-217 (2000).

6. Federal Acquisition Regulation; Preference for Performance-Based Contracting, 66 Fed. Reg. 22,082 (May 2, 2001). The rule defined performance-based contracting as "structuring all aspects of an acquisition around the purpose of the work to be performed with the contract requirement set forth in clear, specific, and objective terms with measurable outcomes." GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 2.101(b) (Sept. 2001) [hereinafter FAR]. The rule also stated that agencies must use performance-based contracting methods "to the maximum extent practicable," except for architect-engineer, construction, and utility services and services incidental to supply contracts. *Id.* at 37.102.

7. 67 Fed. Reg. at 21,532.

8. Defense Federal Acquisition Regulation Supplement; Performance-Based Contracting Using Federal Acquisition Regulation Part 12 Procedures, 66 Fed. Reg. 63,335 (Dec. 6, 2001) (implementing section 821(b) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 821, 114 Stat. 1654, 1654A-218 (2000)).

9. *Id*.

10. *Id*.

11. *Id*. at 63,336.

12. Defense Federal Acquisition Regulation Supplement; Performance-Based Contracting Using Federal Acquisition Regulation Part 12 Procedures, 67 Fed. Reg. 65,512 (Oct. 25, 2002) (to be codified at 48 C.F.R. pts. 212, 226, and 237).

13. *Id*. at 65,513.

changes to applicable FAR clauses.[14] More significantly, the final rule also amends section 226.104 to clarify that "there is no restriction on use of the clause at [section] 252.226-7001 [Utilization of Indian Organizations and Indian-Owned Economic Enterprises—DOD Contracts] in [PBSCs] that either are not commercial items, or are treated as commercial items solely as a result of the authority in [section] 212.102."[15] The final rule applies to qualifying contracts or task orders entered into by or before 30 October 2003.[16]

Actual Use of PBSCs Occurring, but More Guidance Is Needed

In a recent report, the GAO concluded that while agencies are using PBSCs, agencies need more guidance to increase their understanding of PBSCs and the best ways take advantage of the methodology.[17] The GAO evaluated twenty-five service contracts that various agencies, including the DOD, characterized as performance-based, to determine whether the contracts indeed contained performance-based attributes.[18] Of the contracts the GAO examined, nine "clearly exhibited" the identified performance-based attributes.[19] Most of these contracts were for rather uncomplicated services, such as custodial services and building maintenance. The GAO also found four contracts for similar services that "could have incorporated all of the attributes but did not."[20] The twelve remaining contracts involved more complex and technical services, which were unique to the government or high risk in nature.

Because of the risk and complexity of these contracts, the GAO found that while the agencies incorporated some performance-based attributes, the contracts also included detailed specifications or other measures to ensure oversight control.[21] Citing "concern" as to whether agencies had a good understanding of performance-based contracting or knew how to best take advantage of the methodology, the GAO concluded that more and better guidance is necessary, especially "when acquiring more unique and complex services that require strong government oversight."[22] The GAO also learned that agency officials needed better criteria for determining which contracts should in fact be labeled "performance-based."[23] Major Huyser.

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14. *Id*.

15. *Id*.

16. *Id*.

17. GEN. ACCT. OFF., REP. NO. GAO-02-1049, *Contract Management: Guidance Needed for Using Performance-Based Service Contracting* (Sept. 2002) [hereinafter GAO-02-1049]. "In 2001, agencies reported using performance-based contracting methods on about $28.6 billion, or twenty-one percent of the $135.8 billion total obligations incurred for services." *Id*. at 3.

18. Based on guidance from the Office of Federal Procurement Policy (OFPP), the GAO evaluated the purported PBSCs for the following attributes:

> 1. Describe the requirements in terms of results required rather than the methods of performance of the work;
> 2. Set measureable performance standards;
> 3. Describe how the contractor's performance will be evaluated in a quality assurance plan;
> 4. Identify positive and negative incentives, when appropriate.

Id. at 3-4; *see also* FAR, *supra* note 6, at 37.601.

19. GAO-02-1049, *supra* note 17, at 4.

20. *Id*. at 6. For example, a Treasury Department contract for dormitory management contained forty-seven pages of specifications that detailed such requirements as the cotton-polyester fiber content of towels, the components necessary for making beds, and the minimum thickness standards for trash can liners. *Id*.

21. *Id*. at 7. For example, the operation of a nuclear facility and Navy tactical test ranges. *Id*.

22. *Id*. at 8. In response to the GAO's report, the OFPP indicated that it was "in the initial stages of developing new guidance examining how to improve agencies' use of performance-based contracting." *Id*. Acquisition officials seeking assistance on procuring and managing PBSCs in the interim may wish to consult a new interagency Web-based guide entitled *Seven Steps to Performance-Based Services*. This guide, developed by the Department of Commerce in coordination with other agencies, such as the DOD and the General Services Administration, is available at http://oamweb.osec.doc/pbsc/index.html.

23. *Id*. at 8.

Procurement Fraud

Supremes to Decide Whether Municipalities Are People Too

In one of the more important developments this year, the U.S. Supreme Court granted certiorari in a case involving the status of municipalities under the False Claims Act (FCA).[1] On 28 June 2002, the Justices issued a writ of certiorari to the Court of Appeals for the Seventh Circuit, deciding to hear the case of *United States ex rel. Janet Chandler v. Cook County* (*Chandler*).[2]

The grant of certiorari follows a 2000 Supreme Court decision involving the status of states under the FCA. In *Vermont Department of Natural Resources v. United States ex rel. Stevens* (*Stevens*),[3] the Court decided that states are not "persons" for False Claims Act (FCA) purposes. The Court partially based its decision on the longstanding interpretive presumption that a "person" does not include the "sovereign" (for example, a sovereign state). The Court held that it could only disregard this presumption of sovereignty if it saw some affirmative showing of statutory intent to the contrary. The Court could not find any affirmative indications that the term "person" included states for purposes of *qui tam* liability in either the FCA's text or its legislative history.[4] The conclusion was further buttressed by the rule of statutory construction that if Congress intends to alter the usual constitutional balance between states and the federal government, it must make its intention to do so unmistakably clear in the statute's language.[5] The *Stevens* decision left open the question of whether non-state units of local government could be "persons" for purposes of the FCA.

In *Chandler*, Doctor Janet Chandler brought a *qui tam* action against Cook County, Illinois, alleging misconduct in the handling of a $5 million federal research grant that the federal government gave Cook County Hospital to study the treatment of drug-dependent pregnant women. The allegations of misconduct included treating "ghost" participants who did not exist and tampering with test protocols. At the district court, Cook County filed a motion to dismiss the FCA action on the grounds that it was not a "person" for purposes of the FCA.[6] Cook County relied heavily on the Supreme Court's *Stevens* decision, arguing that the same logic applied to municipal governments. The county further argued that the FCA's treble damages were punitive, and thus violated the long-standing common law rule against assessing punitive damages against municipal units of government.[7]

The judge denied the county's motion. Specifically, the court concluded that the *Stevens* reasoning did not apply to municipalities and other non-state units of local government.[8] One provision that swayed the Court was the Civil Investigative Demand of the FCA, which defined "person" as "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State."[9] The district court further held that the FCA treble damages provision was not punitive; thus, this provision did not violate, impinge on, or implicate municipalities' traditional immunity from punitive damages.[10]

On appeal, the U.S. Court of Appeals for the Seventh Circuit painstakingly analyzed the Supreme Court's *Stevens* decision and concluded that its reasoning did not protect municipalities from liability under the FCA. Specifically, the Seventh Circuit found that the presumption that a "person" does not include a state protects the standing of states as sovereign units of government under the American system of federalism. The court concluded that the presumption "cuts the other way for municipalities" because "the Supreme Court has never imposed the

1. 31 U.S.C. §§ 3729-33 (2000). The FCA is the primary civil remedy for combating procurement fraud. It imposes liability on any "person" who "knowingly presents or causes to be presented," a false or fraudulent claim, or conspires to defraud the government by having a false or fraudulent claim allowed or paid. The act allows for treble damages, in addition to civil penalties in the amount of $5000 to $10,000 per claim. The FCA also allows an individual to bring suit in the name of the United States under the *qui tam* provisions of the FCA. *Id.*

2. 277 F.3d 969 (7th Cir.), *cert. granted*, 122 S. Ct. 2657 (2002).

3. 529 U.S. 765 (2000).

4. *Id.* at 787-88.

5. *Id.* at 786-88.

6. Chandler v. Hektoen Inst., 35 F. Supp. 2d 1078 (N.D. Ill. 1999).

7. *Chandler*, 277 F.3d at 977 (discussing City of Newport v. Fact Concerts, 453 U.S. 247 (1981)).

8. *Id.* at 972-73 (discussing *Chandler*, 35 F. Supp. 2d at 1084).

9. *See* 31 U.S.C. § 3733(l)(4) (2000); *Chandler*, 35 F. Supp. 2d at 1084.

10. *Chandler*, 35 F. Supp. 2d at 1084. Shortly after the Supreme Court decided *Stevens*, Cook County filed a motion requesting that the district court reconsider its decision. In light of the *Stevens* decision, the district court held that the treble damages provision of the FCA was punitive and dismissed the case against Cook County. Doctor Chandler subsequently appealed the second decision to the Court of Appeals. *See Chandler*, 277 F.3d at 970; Chandler v. Hektoen Inst., 118 F. Supp. 2d 902 (2000).

same requirement on Congressional efforts to make municipal entities amenable to federal legislation."[11]

The Fifth Circuit has also examined the issue of municipal immunity under the FCA, and in an equally well-reasoned opinion, held that municipalities are not "persons" for purposes of the FCA, and are thus shielded from liability under the Act.[12] Specifically, the Fifth Circuit held that the treble damages provision of the FCA is punitive and thus violates the common-law rule that municipalities are immune from punitive damages in civil proceedings.[13] Who is right and who is wrong in the eyes of the Supreme Court? Stay tuned.

How Original Is Original?

Although the pending *Chandler* case seems to be taking up most of the *qui tam* limelight this year, no *Year in Review* would be complete without at least passing mention of one "original source" case. In *United States ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health Systems Corp.*,[14] the U.S. Court of Appeals for the Eighth Circuit examined the "original source" requirement under the FCA[15] and joined the majority of federal appellate courts, holding that the FCA prohibits claims that are "supported by" facts that were "publicly disclosed" before a relator brings a *qui tam* action.[16] In adopting this standard, the court rejected the minority test, which interprets "based upon" a "public disclosure" to mean "derived from."[17] The court reasoned that the minority's interpretation of the "based upon" exception makes it virtually impossible for a would-be *qui tam* relator to bring an action. Specifically,

> [I]f a suit is only based upon a public disclosure if it results from the disclosure, as the minority interpretation would have it, then the statute's additional provision allowing suit if the relator is "an original source" of the underlying information is of no effect, because no one could be an original source if his knowledge was derived from public disclosure.[18]

The court reasoned that it is "inconceivable that Congress would have drafted the statute so poorly as to have included a provision that could never have any effect."[19]

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11. *Chandler*, 277 F.3d at 980-81.

12. United States *ex rel.* Garibaldi v. Orleans Parish School Bd., 244 F.3d 486 (5th Cir. 2001).

13. *Id*. at 491.

14. 276 F.3d 1032 (8th Cir. 2002).

15. The FCA provides,

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4) (2000). Subsection (B) of this statute defines "original source" as: "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id*. § (e)(4)(B).

16. The majority view is that a *qui tam* suit is "based upon" a public disclosure whenever the allegations in the suit and in the disclosure are the same, "regardless of where the relator obtained his information." *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1045; *see also* United States *ex rel.* Mistick PBT v. Housing Auth., 186 F.3d 376, 385-88 (3d Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1017 (7th Cir. 1999); United States *ex rel*. Biddle v. Bd. of Trustees of the Leland Stanford, Jr., Univ., 161 F.3d 533, 536-40 (9th Cir. 1998); United States *ex rel.* McKenzie v. Bell South Telecom., Inc., 123 F.3d 935, 940 (6th Cir. 1997); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 682-85 (D.C. Cir. 1997); Cooper v. Blue Cross and Blue Shield, 19 F.3d 562, 567 (11th Cir. 1994); United States *ex rel*. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552-53 (10th Cir. 1992); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992).

17. *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1045. The minority view, which is shared by only the Fourth Circuit and one panel of the Seventh Circuit (in schism with another panel), is that "based upon" should be given its ordinary meaning of "derived from," so that the *qui tam* allegation must have resulted from the disclosure in order to bar jurisdiction. *Id.* at 1044-1045; *see* United States v. Bank of Farmington, 166 F.3d 853, 863 (7th Cir. 1999); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir. 1994).

18. *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1045; *see also Eighth Circuit Adopts "Supported By" Reading of the FCA Public Disclosure Bar, but Finds Association Is "Original Source,"* 44 GOV'T CONTRACTOR 6, ¶ 60 (Feb. 13, 2002).

19. *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1045.

Greed Is Good (Not!)

On 3 July 2002, a federal grand jury indicted five individuals for their alleged involvement in a bribery scheme in Korea. Those indicted include Colonel (COL) James Moran, Commander of the U.S. Army Contracting Command, Korea (USA-CCK); COL Moran's wife, Gina Moran; and three other civilians allegedly involved in the bribery scheme. The scheme centered around COL Moran, who allegedly influenced the award of several contracts after soliciting bribes. As the commander of the USA-CCK, COL Moran oversaw an agency that awarded more than $300 million worth of contracts each year.[20] COL Moran recently agreed to plead guilty to soliciting more than $800,000 in bribes, and Mrs. Moran will plead guilty to making a false statement.[21]

The indictment alleged that COL Moran improperly influenced the award of at least four contracts. The contractors paid COL Moran primarily in $100 bills; in one instance, he demanded $500,000 for his services. Since the contractor did not have the total amount available, COL Moran put the contractor on an installment plan.[22]

During the search of COL Moran's quarters, Army Criminal Investigation Division (CID) agents seized approximately $700,000 in $100 bills. Gina Moran, who was indicted for obstruction of justice, allegedly attempted to move money from the living room sofa to the bedroom during the search.[23]

Enron, Arthur Andersen Suspended

On 15 March 2002, the General Services Administration (GSA) suspended Enron Corporation, Arthur Andersen, and several present and former Enron and Arthur Andersen officials from conducting new business with the federal government. The GSA's reason for the suspensions is "adequate evidence" that Enron and Andersen "engaged in misconduct and lacked internal controls."[24] The suspensions are for twelve months for all parties, except for Arthur Andersen, which was suspended for the duration of its indictment.[25]

Both Enron and Andersen did relatively little business with the government. In the latest list of top government contractors, Andersen hardly made it to the ranks of the top two hundred. Enron did not even make the list.[26] The government has not suspended WorldCom, whose former Chief Financial Officer has been indicted for fraud.[27] WorldCom is ranked as the twenty-sixth-largest contractor with the DOD, and the forty-sixth largest contractor government-wide.[28]

The suspensions of Enron and Arthur Andersen set an interesting precedent because the stated reason for the suspensions did not involve their performance on government contracts. In fact, the GSA has conceded that there have been no performance problems with either Enron or Arthur Andersen on any government contract. At least one commentator has noted that the suspensions introduce an unwarranted degree of political subjectivity into the suspension and debarment process.[29]

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20. Press Release, Office of the U.S. Attorney for the Central District of California (July 3, 2002) [hereinafter DOJ Press Release], *available at* http://www.usdoj.gov/usao/cac/pr2002/103.html. The indictment is available on FindLaw, at http://news.findlaw.com/hdocs/docs/crim/usmoran702ind.pdf.

21. Monte Morin, *Army Officer to Admit He Solicited Kickbacks*, L.A. TIMES, Jan. 25, 2003.

22. DOJ Press Release, *supra* note 20. The indictment alleged that COL Moran agreed to award a local contractor a contract for a barracks upgrade and renovation project in exchange for a $500,000 bribe. Mrs. Moran, who coordinated the transfer of money and information between COL Moran and various contractors, was able to collect $150,000 from the contractor on this contract before their arrest. COL Moran was also accused of taking bribes to fix the contract for the Korean security guards who protect the gates of several U.S. installations. *Id.*

23. *Id*.

24. *See* Kellie Lunney, *GSA Suspends Enron and Andersen from New Business*, GOV'T EXEC. MAG., March 15, 2002, *at* http://www.govexec.com/dailyfed/0302/031502m2.htm.

25. *Id*. On 15 June 2002, a federal jury convicted Arthur Andersen of obstruction of justice and for impeding a federal investigation into the financial collapse of Enron. Soon afterward, Andersen informed the government that it would cease auditing public companies, effectively ending the life of the eighty-nine-year-old firm. Kurt Eichenwald, *Arthur Andersen: Guilty as Charged*, N.Y. TIMES, June 16, 2002, *available at* www.nytimes.com/2002/06/16/business/yourmoney/16HANK.html.

26. *See Top 100 Defense Contractors*, GOV'T EXEC. MAG., Aug. 15, 2002, *available at* http://www.govexec.com/top200/02top/s3chart1.htm.

27. *See* Brock N. Meeks, *Ex-WorldCom CFO Indicted*, MSNBC.com, Aug. 28, 2001, *at* http://www.msnbc.com/news/800173.asp.

28. *See Top 100 Defense Contractors*, *supra* note 26. Specifically, WorldCom did $513,666,000 in business with the U.S. Government during fiscal year 2001. The vast majority of that business ($483,369,000) was with the DOD. *Id.*

29. *See* Steven L. Schooner, *Suspensions Are Just a Side Show*, GOV'T EXEC. COM., May 1, 2002, *at* http://www.govexec.com/features/0502/0502view1.htm.

Contractor Blacklisting Rule Scrapped

In a move of dubious timing, the Bush administration recently revoked a Clinton-era policy that set ethics, labor, and environmental standards for companies seeking to do business with the federal government.[30] The revocation took effect on 27 December 2001, just weeks before the Enron and Arthur Andersen debacles became front-page news.

Last year's *Year in Review* reported that on 20 December 2000, the Federal Acquisition Regulation (FAR)[31] Council published a "final rule" in the *Federal Register* addressing contractor responsibility, labor relations, and environmental standards.[32] The rule generated considerable controversy, and on 3 April 2001, under a new Administration, the FAR Council published a new rule staying enforcement of the final rule until it determines whether the burdens imposed by the rule outweighed its benefits.[33] During the period of the stay, the FAR Council recommended revoking the rule in its entirety. In the text of the Federal Register, the FAR Council noted that "contracting officers will continue to have the authority and duty to make responsibility decisions," and "debarring officials will continue to have the authority and duty to make determinations whether to suspend or debar a contractor."[34]

Hit the Road Jack, and Don't You Come Back
No More, No More, No More, No More . . . .

The General Accounting Office (GAO) is no longer in the suspension and debarment business. In *Shinwha Electronics*,[35] Shinwha protested the Army's decision to suspend it from competing on future government contracts pending completion of a criminal investigation. When the Army issued the suspension, Shinwha was under investigation for allegedly submitting falsified payment records for work it did not actually perform on a contract for the maintenance and repair of fire safety systems at American military installations in Korea. The suspension precluded Shinwha from competing on a contract for the maintenance and repair of a fire alarm and detection system at Kunsan Air Base, Korea.[36] Because the suspension came on the heels of another procurement in which it was competing, Shinwha asserted that it had standing to bring the protest before the GAO as an "interested party."[37] Shinwha also demanded to see all the evidence upon which the government based the suspension, and noted in passing that the government had obtained much of its information in violation of the attorney-client privilege.[38]

The GAO agreed to hear the protest because the suspension occurred on the heels of the fire alarm contract. Beyond that, the GAO was unimpressed with Shinwha's case. The GAO examined the Army's procedures and concluded that the Army acted reasonably in protecting its rights under the FAR to suspend a contractor from the award of future contracts where the Army suspected misconduct. The GAO also observed that under the FAR, Shinwha had no right to see the government's case during an ongoing criminal investigation. Simply put, "the protestor was afforded the level of due process to which it [was] entitled."[39] More important than the plight of Shinwha is the revelation that the GAO will no longer review cases involving suspension and debarment. The GAO noted that the FAR sets forth specific procedures for both imposing and challenging a suspension or debarment action.[40]

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30. 66 C.F.R. pt. 248 (2002); *see also* Jason Peckenpaugh, *Bush Administration Scraps Contractor Responsibility Rule*, GOV'T EXEC. COM., Dec. 28, 2001, *at* http://www.govexec.com/dailyfed/1201/122801pl.htm.

31. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (July 2002) [hereinafter FAR].

32. 65 C.F.R. pt. 80,255 (2000); *see also* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review,* ARMY LAW., Jan./Feb. 2002, at 55 [hereinafter *2001 Year in Review*].

33. 66 C.F.R. pt. 17,754.

34. 66 C.F.R. pt. 248 (2002). In an interesting development, on 26 September 2002, the *Government Executive* leaked word that the Office of Government Ethics issued a letter to attorneys and ethics officials, requesting feedback as to whether there should be a mandatory "code of conduct" for companies that do business with the government. *See* Shane Harris, *Ethics Office Launches Inquiry into Procurement Practices*, GOV'T EXEC. COM., Sept. 26, 2002, *at* http://www.govexec.com/dailyfed/0902/0902602h1.htm. The GAO also recently revised the "independence standard" set forth in *Government Auditing Standards*, otherwise known as the *Yellow Book*. This is part of a complete overhaul of the *Yellow Book*, spurred on in part by the Enron and Arthur Andersen debacles. *Id.*; *see supra* Part IV T (discussing the "independence standard" in relation to the *Government Auditing Standards*).

35. Shinwha Elecs., B-290603, B-290603.2, 2002 U.S. Comp. Gen. LEXIS 130 (Sept. 3, 2002).

36. *Id.* at *2.

37. *Id.* at *1.

38. *Id.*

39. *Id.* at *5.

A Raisin in the Sun

In a case that has many in the government procurement community upset, the Court of Federal Claims (COFC) recently held that the U.S. Department of Agriculture (USDA) acted arbitrarily and capriciously in suspending a raisin contractor after awarding five previous contracts to the contractor, and when the USDA was aware of the misconduct at the time it awarded the previous contracts. In *Lion Raisins*,[41] the USDA suspended Lion from contracting with the government for one year. The suspension was based on a USDA investigation that revealed that Lion had forged several raisin certifications, and on at least one certification, changed the certificate for the grade of raisins from "Grade C" to "Grade B."[42] The USDA completed the preliminary report of investigation on 26 May 1999, but did not issue the notice of the suspension until 12 January 2001.[43] From the date the USDA completed its preliminary report until it issued the suspension notice, Lion and the USDA entered into five relatively small contracts for the sale of raisins. After the USDA issued the suspension notice, Lion was precluded from bidding on a much larger contract.[44]

Shortly after the USDA issued the suspension notice, Lion requested a hearing. During the hearing, Lion's vice president, Mr. Bruce Lion, noted that the misconduct was the result of a rogue employee who had since been fired and subsequently convicted for stealing company funds. Mr. Lion also identified fraud abatement measures he took to ensure that the problems would not be repeated (such as, video surveillance, better inspection processes, etc.), and requested that the suspension be lifted. The USDA was unimpressed and issued a final decision upholding the suspension.[45] At the COFC, Lion filed a motion for summary judgment to overturn the USDA's suspension. Lion also asked for bid preparation costs and lost profits for the contract on which Lion was precluded from bidding.[46]

The COFC concluded that the USDA acted in an arbitrary and capricious manner in suspending Lion. Specifically, the court admonished the USDA for awarding five contracts to Lion between the date the USDA completed the preliminary investigation and the date it issued the suspension notice. The COFC emphasized that the USDA made five affirmative responsibility determinations before it issued the five contracts. Based on the same available evidence, however, the suspending authority found Lion to not be a responsible contractor.[47] In granting Lion's motion for summary judgment, the court reversed the USDA decision to suspend Lion, but denied Lion's request for lost profits.[48]

From the government's standpoint, *Lion Raisins* is problematic for several reasons. Practically, it is often imprudent to suspend a contractor who is the subject of an investigation prematurely; the early disclosure of evidence may hinder other aspects of the case, such as criminal prosecution. In this case, the court explicitly stated that it was not holding that it was *per se* arbitrary and capricious for the government not to suspend a contractor immediately pending further investigation.[49] The decision, however, clearly undercuts the government's ability to time a suspension so that it does not jeopardize an ongoing investigation. Arguably, the decision may foster a "use it or lose it" attitude in cases of suspected procurement fraud (that is, the government will waive the right if it does not exercise it quickly). The decision is also problematic in that it grants a quasi-res judicata status to contracting officers' responsibility determinations in later suspension and debarment proceedings. Quite simply, it is inconceivable that a contracting officer's potentially erroneous determination of affirmative responsibil-

40. *Id.* at *6; *see also* FAR, *supra* note 31, §§ 9.406-3(b), 9.407-3(b). Although the GAO will no longer entertain protests involving suspensions and debarments, contractors are not without options beyond the agency level. Pursuant to the Tucker Act, the Court of Federal Claims (COFC) has jurisdiction to review post-award bid protests, including those predicated on agency suspension or debarment actions, where the protestors can establish "irreparable injury." *See* 28 U.S.C. § 1491(b) (2000). Typically, the COFC will find irreparable injury when the government announces an invitation for bids or proposals, and but for the suspension or the debarment, the suspended or disbarred contractor could have competed for the contract. The court must set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or made "without observance of procedure as required by law." 5 U.S.C. § 706(2)(A), (D) (2000); *see also* Ramcor Serv. Group, Inc. v. United States, 185 F.3d 1286 (Fed. Cir. 1999) (explaining the adoption of agency review standards into Tucker Act amendments). Under the "arbitrary and capricious" standard, the court may not substitute its judgment for that of agency officials. Rather, inquiry must focus on whether the agency "examined the relevant data and articulated a satisfactory explanation for its action." Motor Vehicle Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 43 (1983).

41. Lion Raisins v. United States, 51 Fed. Cl. 238 (2001).

42. *Id.* at 240.

43. *Id.* at 240-41.

44. *Id.* at 241-43.

45. *Id.* at 242.

46. *Id.* at 242-43.

47. *Id.* at 247-48.

48. *Id.* at 251; *see supra* Part II.O (discussing the court's decisions concerning lost profits under an implied-in-fact contract theory).

49. *Lion Raisins*, 51 Fed. Cl. at 249.

ity on a previous contract should bind suspension and debarment officials.

Busted: CAFC Upholds Use of CDA Anti-Fraud Provision

The government rarely uses the Contract Disputes Act's (CDA) Anti-Fraud provision.[50] As such, it is pure poetry to read a CAFC opinion that upholds the COFC when it allows the government to use the CDA's Anti-Fraud provision against a crooked contractor.[51]

In *Larry D. Barnes, Inc. v. United States*,[52] the government awarded Larry D. Barnes, also known as Tri-Ad Construction (Tri-Ad), a contract that required Tri-Ad, among other requirements, to perform excavation work in an area containing a large number of underground utility obstructions. During contract performance, Tri-Ad told the contracting officer that the number of underground obstructions Tri-Ad encountered greatly exceeded the number expected. Shortly thereafter, Tri-Ad issued a certified claim to the contracting officer for about $1.3 million, seeking compensation for differing site conditions, lost profits, a work stoppage, and "added costs" for which it offered no reasonable explanation. The contracting officer ordered an audit; the Defense Contract Audit Agency (DCAA) found the claim to be completely without merit and requested additional documents from Tri-Ad. Tri-Ad complied and offered additional explanations why it was entitled to additional money. Tri-Ad then amended its claim and reduced the requested amount to $808,000. The contracting officer then denied the amended claim, and Tri-Ad appealed the contracting officer's decision to the COFC.[53]

Tri-Ad fared poorly at trial. The government argued that Tri-Ad had violated three statutes: (1) the Forfeiture of False Claims Act;[54] (2) the Contract Disputes Act's Anti-Fraud Provision;[55] and (3) the False Claims Act.[56] The COFC agreed that Tri-Ad had violated all three statutes. On appeal to the CAFC, Tri-Ad disputed each statute's applicability, and once again fared poorly. Concerning the Forfeiture of False Claims Act, the CAFC observed that Tri-Ad's vice president testified that he knew that lost profits on deleted work were not recoverable, but "let it ride."[57] The court also observed that the weight of evidence, including Tri-Ad's own internal records, contradicted Tri-Ad's claims.[58] Concerning the False Claims Act violation, the court again concluded that the government had proved that Tri-Ad presented a false or fraudulent claim, or at the very best,

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50. 41 U.S.C. § 604 (2000); s*ee* United States *ex rel.* Wilson v. North Am. Constr., 101 F. Supp. 2d 500, 533 (S.D. Tex. 2000) (refusing to enforce 41 U.S.C. § 604, in part because there were "very few cases applying 41 U.S.C. 604").

51. *See* Larry D. Barnes, Inc. v. United States, No. 98-668C, slip op. (Ct. Fed. Cl. Aug. 31, 2000).

52. Larry D. Barnes, Inc. v. United States, No. 01-5020, 2002 U.S. App. LEXIS 16595 (Aug. 14, 2002).

53. *Id.* at *14-15.

54. 28 U.S.C. § 2514 (2000). The Forfeiture of False Claims Act provides:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

Id.

55. 41 U.S.C. § 604 (2000). The CDA Anti-Fraud provision states:

> If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within six years of the commission of such misrepresentation of fact or fraud.

Id.

56. 31 U.S.C. § 3729 (2000). The relevant section provides:

> (a) Liability for certain acts—Any person who—(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment . . . is liable to the United States Government for a civil penalty of not less than $5000 and not more than $ 10,000, plus [three] times the amount of damages which the Government sustains because of the act of that person . . . ."

Id.

57. *Larry D. Barnes*, 2002 U.S. App. LEXIS 16595, at *14.

58. *Id.* at *14-15.

acted with deliberate ignorance or reckless disregard of the claim's truth or falsity.[59]

This was not the first time the CAFC decided a case involving the CDA's Anti-Fraud Provision.[60] Nevertheless, given the lack of cases involving this provision, it is surprising that the court was very matter-of-fact in its analysis of the applicability of this provision. The court observed that Tri-Ad, in its certified claim, asserted that the government owed it over $1.3 million in nonexistent "added costs" due to, among other things, "loss of production."[61] To support this claim, Tri-Ad asserted various inconsistent explanations, all of which were rejected by the COFC.[62] Given that Tri-Ad deliberately pressed a fraudulent claim before the contracting officer and the COFC, the CAFC was more than willing to apply the CDA Anti-Fraud provision in this case.[63]

What Were You Thinking?—CAFC Reverses ASBCA in Fraud Case

Another CAFC case that will delight government procurement attorneys is *Navy v. Systems Management American Corp.*[64] In *Systems Management American* (*SMA*), it is not just the crooked contractor that fared poorly before the CAFC; the CAFC reversed the Armed Services Board of Contract Appeals (ASBCA) for its questionable decision to grant SMA's appeal in the face of obvious fraud. Specifically, in *SMA*, the CAFC reversed an ASBCA decision that awarded a contractor an equitable adjustment and breach damages when the agency denied the contractor the opportunity to bid on a contract because the contractor was under investigation for fraud involving a related contract.[65]

The Navy awarded SMA three contracts to procure "SNAP II," a computer system for various Navy surface ships and submarines. A necessary condition of the contract award was SMA's status as a small business under the Small Business Act.[66] In April 1987, SMA entered into a fourth contract with the Navy, which the parties initiated as a letter contract for a basic quantity of computer upgrades. The parties made this letter agreement subject to "definitization" by 30 September 1987, meaning that they had to set the price for both the base and option year equipment by that date.[67] In September 1987, SMA learned that under a policy established by the Small Business Administration (SBA), the contract had to be definitized by 21 October 1987. This was because SMA was "graduating" from the SBA program on that date, and under the SBA policy, SMA could no longer compete on contracts set aside for small businesses after that date.[68]

On 30 September 1987, the Navy and SMA agreed on a price for the base-year contract and entered into a modification establishing the contract price. In early October 1987, the parties agreed to a price on the option year. Because the option price exceeded the contracting officer's authority, the parties needed the approval of the Assistant Secretary of the Navy (Logistics and Shipbuilding) for the option. On 16 October 1987, however, a U.S. Attorney issued a press release stating that a former SMA employee had plead guilty to federal charges of conspiracy to defraud the government in a kickback scheme involving senior officials of SMA and purchase orders charged to a contract with the Navy. Because the investigation was still ongoing, the Assistant Secretary of the Navy delayed approval of the option, citing the "current [criminal] investigations regarding SMA."[69] Because of this delay, the SBA deadline of 21 October passed, rendering SMA ineligible for award of the contract option.[70]

As events unfolded, it became apparent that the concerns of the Assistant Secretary were warranted. In July 1991, SMA plead guilty to one count of conspiring to defraud the Navy for

59. *Id.* at *13-16.

60. *See* UMC Elecs. v. United States, 249 F.3d 1337 (Fed. Cir. 2001).

61. *Larry D. Barnes*, 2002 U.S. App. LEXIS 16595, at *18.

62. *Id.* at *18-19.

63. *Id.* at *16-19.

64. England v. Sys. Mgmt. Am. Corp., 38 Fed. Appx. 567 (Fed. Cir. 2002).

65. *Id*. at 567-68.

66. *See* 15 U.S.C. §§ 631(a), (d), (j), 697(c) (2000) (codifying Congress's policy of encouraging small businesses through assistance from the Small Business Administration).

67. *SMA*, 38 Fed. Appx. at 568.

68. *Id.* at 568-69.

69. *Id.* at 568.

70. *Id.*

actions relating to the first two contracts. Five SMA employees, including two senior vice presidents, also plead guilty to multiple counts of fraud related to the two contracts.[71] SMA eventually completed performance of the base-year requirements of the fourth contract, and in 1991 and 1994, filed claims with the contracting officer for an equitable adjustment.[72] SMA also claimed breach damages, arguing that the Navy failed to approve the options in a timely manner, as required under the letter contract. The contracting officer denied the claims, and SMA appealed to the ASBCA.[73]

In a split decision,[74] the board upheld the denial of the equitable adjustment claim, but partially sustained SMA's appeal of the breach claim.[75] Specifically, the board found that while the Navy had no obligation to exercise the options with SMA, the Secretary of the Navy acted in bad faith when he delayed the approval of otherwise finalized options. In sum, the board concluded that the Navy breached its duty to negotiate in good faith and awarded SMA $31,025 for preparation costs and interest.[76]

Two of the board's five judges dissented.[77] While they agreed with the majority that the parties had an agreement to negotiate in good faith, the issue then became whether the Navy Secretary acted arbitrarily and capriciously or otherwise acted in bad faith by delaying the approval of the options. In the dissenting judges' view, the Navy should not have to pay for SMA's failure to meet the SBA deadline.[78] As the dissent stated, "[SMA] and its employees engaged in criminal conduct under the very program now before us and must bear the natural and reasonable consequences that resulted from a revelation of such conduct."[79]

The Navy appealed the board's decision to the CAFC.[80] On appeal, the court agreed that the pertinent issue was whether the Navy, faced with credible evidence of fraud, acted in good faith in its dealings with SMA. The court agreed with the ASBCA's dissent.[81] The CAFC's reasoning was logical and to-the-point:

> [W]e believe the Board erred by concluding that the Assistant Secretary abused his considerable discretion and had "no reasonable basis" to support the decision to delay approval of SMA's definitized options. Simply put, we believe the Assistant Secretary could have reasonably deemed it in the best interests of his agency to secure additional information about a current criminal investigation involving SMA and the SNAP II program itself before approving these options. Indeed, we agree that had the Assistant Secretary acted otherwise, one might reasonably characterize his prompt approval of the parties' agreement as "derelict" or else unreasonable.[82]

The Sins of the Sub Shall Be Visited Upon the Prime—But Not This Time

The COFC recently thwarted the government in its efforts to use the FCA forfeiture provision at 28 U.S.C. § 2514[83] against a contractor whose subcontractor had criminally dumped PCBs and other pollutants into Baltimore Harbor. In *N.R. Acquisition Corp. v. United States*,[84] the Defense Reutilization and Marketing Service (DRMS) awarded Acquisition Corp. a contract

71. *Id.*

72. *Id*. at 568-69. At the hearing, SMA presented no evidence for its request for equitable adjustment. In the absence of any evidence to support the claim, the ASBCA treated the claims as abandoned and denied them. *See* Sys. Mgmt. Am. Corp., ASBCA Nos. 45704, 49607, 2000-2 BCA ¶ 31,112, at 153,662.

73. *SMA*, 38 Fed. Appx. at 569.

74. Anecdotally, split decisions from the ASBCA are rare.

75. SMA, 2000-2 BCA ¶ 31,112, at 153,662.

76. *SMA*, 38 Fed. Appx. at 569-70; *see also* SMA, 2000-2 BCA ¶ 31,112, at 153,663.

77. *SMA*, 38 Fed. Appx. at 570; *SMA*, 2000-2 BCA ¶ 31,112, at 153,664.

78. *SMA*, 38 Fed. Appx. at 570-71; *SMA*, 2000-2 BCA ¶ 31,112, at 153,664-65.

79. *SMA*, 38 Fed. Appx. at 570 (quoting *SMA*, 2000-2 BCA ¶ 31,112, at 153,665).

80. *Id.* at 568.

81. *Id.* at 571.

82. *Id.*

83. *See* 28 U.S.C. § 2514 (2000).

84. 52 Fed. Cl. 490 (2002).

under which Acquisition Corp. paid the DRMS $748,999 to scrap the recently decommissioned *USS Coral Sea.* Under the terms of the contract, the DRMS required Acquisition Corp. to perform the scrapping in accordance "with all applicable Federal, State, and Local laws, ordinances, regulations, etc., with respect to human safety and the environment."[85]

After contract award, Acquisition Corp. discovered the ship contained significantly higher levels of PCBs and asbestos than expected—so much so that Acquisition Corp. submitted a claim to the DRMS for $8,871,416 for clean-up and other related costs.[86] Acquisition Corp. subcontracted much of the work to Seawitch Salvage, which discovered a cost-effective way to reduce its cleaning-related expenses significantly—dumping the contaminated material into Baltimore Harbor. A court subsequently convicted Seawitch's owner and president, Kerry Ellis, for the illegal dumping. Acquisition Corp. continued to press the claim, however, and upon the DRMS's denial, appealed the matter to the COFC.[87]

At issue was whether Seawitch's criminal conduct served to forfeit Acquisition Corp's claim.[88] The government argued that the criminal actions of Seawitch should be imputed to the plaintiff, Acquisition Corp., because it had hired Seawitch, knowing that Seawitch was an unlicensed asbestos removal contractor, although the contract required the plaintiff to have licensed personnel perform the work.[89] In response, Acquisition Corp. argued that the court should deny the government's motion for summary judgment because Seawitch's violations of environmental law, standing alone, did not constitute "fraud" within the meaning of the FCA. Acquisition Corp. also argued that there were no grounds for imputing Seawitch's actions upon itself because it was not a party to Seawitch's conviction.[90]

The COFC concluded that it could not render judgment because too many questions remained unanswered. Specifically, the court observed that neither party had established the extent of Acquisition Corp.'s involvement in Seawitch's criminal misconduct.[91] The court thus denied both parties' motions and cross-motions pending resolution of the issue of Acquisition Corp.'s involvement, if any, in Seawitch's criminal conduct.[92]

High-Value Item Clause Does Not Negate Right of Government to Bring FCA Case

In a recent split decision by the U.S. Court of Appeals for the Sixth Circuit,[93] the court held that the FAR's High-Value Items Clause (HVIC)[94] did not preclude liability under the FCA.[95] In *United States ex rel. Roby v. Boeing*,[96] a relator brought a *qui tam* action against Boeing, alleging that Boeing and its supplier, Speco, had violated the FCA by making false statements about the manufacture and sale of defective transmission gears to the Army.[97] The government intervened in the action and alleged that the defective transmission gears were directly responsible for the crash of a Ch-47D Chinook helicopter over Saudi Arabia in January 1991. In response to the *qui tam* action, Boeing asserted, among other defenses, that the HVIC of the helicopter contract precluded liability under the FCA. Before trial, the

85. *Id.* at 491.

86. *Id.*

87. *Id.* at 492-93.

88. *Id.* at 495.

89. *Id.* at 495-96.

90. *Id.* at 496-97.

91. *Id.* at 501.

92. *Id.* at 501-02.

93. United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637 (6th Cir. 2002).

94. The High-Value Item Clause at FAR section 52.246-24 provides:

> (a) Except as provided in paragraphs (b) through (e) of this clause, and notwithstanding any other provision of this contract, the Contractor shall not be liable for loss of or damage to property of the Government (including the supplies delivered under this contract) that—(1) Occurs after Government acceptance of the supplies delivered under this contract; and (2) Results from any defects or deficiencies in the supplies.

FAR *supra* note 33, at 52.246-24. The purpose of the clause is to reduce government procurement costs by limiting contractor risk. *See id.*

95. *See* 31 U.S.C. §§ 3729-33 (2000); *see also supra* note 1.

96. 302 F.3d 637 (6th Cir. 2002).

97. *Id.* at 639-40.

parties settled the claim. A $15 million portion of the settlement, however, was contingent upon the outcome of an interlocutory appeal to the Sixth Circuit. The issue on appeal was whether the HVIC precluded liability under the FCA.[98]

After the Court of Appeals examined the history and purpose of both the FCA and the HVIC, the majority concluded that the HVIC did not shield contractors from liability under the FCA.[99] Specifically, the majority concluded that Boeing's interpretation of the HVIC would preclude the government from ever recouping a civil penalty of more than $10,000 for damages sustained for a false claim involving a high-value item, even though the government's actual damages could be far greater.[100] The majority looked at Congress's explicit recognition while amending the FCA that a significant number of fraud cases involve high-dollar items. It struck the majority as "incongruous that the HVIC would relieve contractors for high-value items from the FCA's damages provision."[101]

Judge Boggs's dissent did not focus on the history of the FCA so much as the wording and history of the HVIC clause. Specifically, he noted that the original 1971 version of the DOD's self-insurance policy stated that the clause did not protect government contractors "when the defects or deficiencies in such supplies . . . resulted from fraud or gross negligence as amounts to fraud, on the part of *any personnel of the Contractor*."[102] He went on to observe that Congress changed the clause in 1974 at the behest of the defense industry. The reissued clause removed the phrase involving fraud and replaced it with language similar to the present clause, excluding only "willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, . . . managers, superintendents, or other equivalent representatives."[103] In light of the fact that Judge Boggs's analysis is not entirely unreasonable, regulators should consider revising the HVIC clause and re-inserting the fraud language. Major Dorn.

98. *Id.* at 640.

99. *Id.* at 649.

100. *Id.* at 641-42.

101. *Id.* at 645.

102. *Id.* at 651 (Boggs, J., dissenting).

103. *Id.* Because the misconduct involving the transmission gears did not involve the "contractor's directors, or officers, . . . managers, superintendents" or the like, both parties stipulated that the facts of the case did not implicate this specific provision. *Id.* at 641-42.

Taxation

Still Fretting Over the FRET

When the Department of Defense (DOD) purchases military tactical vehicles, it must pay Federal Retail Excise Tax (FRET) through the manufacturer.[1] The Internal Revenue Service (IRS) collects the tax and deposits it into the Highway Trust Fund to help maintain the nation's roads. The Secretary of the Treasury has the authority to exempt the federal government from certain excise taxes if he determines that imposing such taxes would create a substantial burden or expense.[2] In January 2002, the Secretary of Defense (SECDEF) requested that the Secretary of the Treasury exercise the exemption for the DOD. The SECDEF reasoned that the FRET imposes a "substantial and unreasonable expense" on the DOD, costing it $228 million over the next five years.[3] The SECDEF also noted that "[t]he military vehicles that pay FRET rarely use the highway systems that FRET supports."[4]

The Department of the Treasury (DOT) denied the DOD's request, citing a lack of evidence of substantial "nontax" burden or expense.[5] The letter also reiterates the DOT's longstanding policy of not exercising its exemption authority with respect to taxes dedicated to the Highway Trust Fund.[6]

Seeing Red over a Piece of Green Paper

The Court of Appeals for the Federal Circuit (CAFC) recently affirmed a decision from the Court of Federal Claims (COFC) denying a contractor's claim for reimbursement for sales and use taxes, which the contractor failed to include in its fixed-price bid.[7] The contractor argued that the government had a duty to clarify an ambiguity in the solicitation, an ambiguity which was created by the inclusion of a "Special Tax Notice" printed on green paper.[8]

The CAFC held that the Special Tax Notice did not introduce ambiguity because it did not contradict the plain language of the Federal Acquisition Regulations (FAR).[9] The CAFC also concluded that the Special Tax Notice did not obligate the government to designate the contractor as its agent to qualify for an exemption under state law.[10]

Hercules Had a Weak Argument

In *Hercules Inc. v. United States*,[11] the CAFC affirmed the COFC's conclusion that the incorporated FAR "Taxes,"[12] "Credits,"[13] and "Allowable Cost and Payment"[14] provisions do not conflict with Cost Accounting Standard (CAS) 406 because CAS 406 does not require the allocation of tax refunds as independent indirect costs. Hercules contended that CAS 406 requires the government to follow the traditional cost accounting practice of including state income tax refunds in its mea-

1. The excise tax on the retail sale of heavy trucks and trailers is twelve percent. 26 U.S.C. §§ 4051-4053 (2000).

2. *Id*. § 4293.

3. Letter from the Honorable Donald H. Rumsfeld, Secretary of Defense, to the Honorable Paul H. O'Neill, Secretary of Treasury (29 Jan. 2002) (on file with author).

4. *Id*.

5. Letter from Mark A. Weinberger, Assistant Secretary of Treasury (Tax Policy), to the Honorable Donald H. Rumsfeld, Secretary of Defense (11 Apr. 2002) (emphasis added) (on file with author). The DOT's view is that the amount of the tax is not the type of burden to which the exemption should apply because the net revenue effect of a tax on the government is always zero. The DOT's letter cites legislative history to support its position that the burden or expense relates to "paperwork, inconvenience, and simplicity rather than the amount of the tax." *Id.*

6. *Id*. (citing the denial of past DOD exemption requests in 1984 and 1999, a 1996 Department of Energy request, and a 1991 Forest Service request).

7. Hunt Constr. Group, Inc. v. United States, 281 F.3d 1369 (2002).

8. *Id*. at 1372. The "green sheet" advised bidders that sales and use tax exemptions should be sought where applicable. *Id.*

9. *Id*. (citing General Servs. Admin. et al., Federal Acquisition Reg. 52.229-3 (July 2002) [hereinafter FAR]). Under this section of the FAR, the contract price includes all applicable federal, state, and local taxes and duties. *Id.*

10. *Hunt Constr.*, 281 F.3d at 1372. The CAFC was aware that the government disfavors agency agreements, citing a FAR section which provides that: "Prime contractors and subcontractors shall not normally be designated as agents of the Government for the purpose of claiming immunity from State or local sales and use taxes." FAR, *supra* note 9, at 29.303(a).

11. 292 F.3d 1378 (2002).

12. FAR, *supra* note 9, at 31.205-41(d).

13. *Id*. at 31.201-5.

14. *Id*. at 52.216-7(h)(2).

surement of tax costs in the year it receives the refunds.[15] Instead, the CAFC agreed with the government's interpretation that incorporated FAR clauses clearly state that any refund of a tax allowed as a contract cost must be credited or paid to the government using the same factors as when costs were originally deemed reimbursable.[16]

Don't Buck the Result, However Derived

In *Western Kentucky Coca-Cola Bottling Co. v. Revenue Cabinet*,[17] the Kentucky Court of Appeals held that the sale of canned soft drinks to the Army-Air Force Exchange Service (AAFES) for resale in vending machines was immune from the imposition of state sales tax under the Buck Act.[18] While its opinion contained a lengthy discussion of case law governing federal sovereign immunity,[19] the court relied most heavily on Section 107 of the Buck Act to arrive at its conclusion that the sales to AAFES were immune from sales tax.[20]

Although the court reached the same conclusion as the Kentucky Board of Tax Appeals (KYBTA), it did not invoke an exemption contained in the applicable Kentucky tax regulations.[21] The KYBTA did invoke the exception, which precluded the application of sales tax to receipts from sales to instrumentalities of the federal government. The *Western Kentucky* court did not explain why it did not rely on Kentucky's tax regulation.[22]

National Park Service Tells County Where to Park It

An Edmonson County, Kentucky, ordinance imposes a license tax on recreational businesses and businesses providing ticketing or reservation services for recreational businesses.[23] The tax was the lesser of twenty percent of the cost of each ticket or fifty cents per ticket. The Department of Interior, through its National Park Service (NPS), uses a contractor, Biospherics, Inc., to operate a nationwide computerized reservation and ticketing system for admission to national parks, including Mammoth Cave National Park in Edmonson County, Kentucky. Biospherics operates from a facility in Cumberland, Maryland. The NPS pays Biospheric a flat rate for each sale. Biospherics then transfers all payments by the visitors for admission or tours to the United States. When Biospherics challenged the Kentucky tax, the Edmonson County Circuit Court upheld its validity. The federal government directed that Biospherics stop paying the tax and filed suit in the U.S. District Court for the Western District of Kentucky.[24] The court concluded that the recreational license tax violated both the Supremacy Clause[25] and the dormant Commerce Clause[26] of the Constitution.[27]

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15. *Hercules*, 292 F.3d at 1381.

16. *Id*. at 1382.

17. 80 S.W.3d 787 (Ky. App. 2001).

18. 4 U.S.C. §§ 105-110 (2000).

19. *Western Kentucky*, 80 S.W.3d at 791-93.

20. *Id.* Federal statute provides that the waivers of sovereign immunity under sections 105 and 106 "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof." 4 U.S.C. § 107 (2000).

21. *See Western Kentucky*, 80 S.W.3d at 794-95. Kentucky law provides that the "sales tax does not apply to receipts from sales to the federal government." 30 KY. ADMIN. REGS. 235(1) (2000).

22. *See Western Kentucky*, 80 S.W.3d at 794-95.

23. EDMONSON COUNTY, KY. ORD. EC 98-20 (1998).

24. United States v. Edmonson County, No. 1:00CV-155-RG, 2001 U. S. Dist. LEXIS 17660 (D. Ky. Oct. 1, 2001).

25. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme Law* of the Land; and the Judges in every State shall be bond thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added).

26. "Dormant" refers to a negative command within the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." *Id.* The Supreme Court has held that the "dormant" Commerce Clause prohibits certain state taxation even when Congress has failed to legislate on the subject. *See, e.g.*, Oklahoma Tax Comm. v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

27. *Edmonson County*, 2001 U. S. Dist. LEXIS 17660, at *19.

The court held that the license tax violated the Supremacy Clause because it imposed a tax directly on the revenues and activities of the United States.[28] Further, the court found a violation of the dormant Commerce Clause because the tax was not applied to an activity with a substantial nexus to the county, was not fairly apportioned, and was not fairly related to services provided by the county.[29]

Statement About Mississippi Taxes Was Not Muddy

In *Holmes & Narver Constructors, Inc.*,[30] the Armed Services Board of Contract Appeals (ASBCA) denied a contractor relief on a claim that the government provided misleading tax information during the solicitation process. During a pre-proposal conference, the contracting officer deferred answering a question about the applicability of "Mississippi sales taxes" to the construction project, indicating that the Air Force would respond later in writing.[31] The subsequent amendment to the Request for Proposals (RFP) included a question and answer as follows:

> QUESTION: Are Mississippi State Taxes applicable?
> ANSWER: The State of Mississippi assesses a 3.5% contractor tax on all construction contracts over $10,000, except residential construction. However, it is the contractor's responsibility to ensure compliance with all state and local taxes.[32]

The contractor alleged that he relied on this information, and apparently without consulting with its own counsel, removed the cost of the sales tax from the proposal. Unfortunately, Mississippi has both a "sales tax" and a "contractor tax," and although the project was largely exempt from the contractor tax, it was still fully subject to the state's seven-percent sales tax. After the award, the contractor sought reformation of its contract to increase the price by the amount of the sales tax on a "mutual mistake" theory.[33] The contractor reasoned that the government's answer falsely implied that the project would be exempt from Mississippi sales tax.[34]

The ASBCA concluded that the Air Force did not misrepresent the applicability of Mississippi sales taxes to the project. The ASBCA observed that even though the government's response "was silent regarding sales tax," it "emphasized it was the 'contractor's responsibility to ensure compliance with all state and local taxes.'"[35] The ASBCA also pointed to the inclusion of the FAR's standardized taxes clause, which places the burden of determining which taxes apply to the contractor.[36]

House Has D.C.'s Number

In its most recent decision concerning 911 emergency surcharges, the General Accounting Office (GAO) examined whether the U.S. House of Representatives (House) must pay the 911 emergency surcharge and a right-of-way charge which appear on the House's monthly statement from its local telephone service carrier.[37] The GAO's analysis hinged on whether the emergency surcharges are taxes directly imposed on the federal government. If the surcharges were taxes, these "vendee taxes are not payable by the federal government unless expressly authorized by Congress."[38] The GAO concluded that the 911 emergency surcharge is a District of Columbia (DC) vendee tax which is specifically removed from the telephone company's base rate. The federal government is therefore immune from the 911 emergency surcharge.[39]

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28. *Id.*

29. *Id*. at *27-31.

30. ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849.

31. *Id*. at 157,395.

32. *Id*. at 157,395-96.

33. *Id*. at 157,396.

34. *Id.* "According to appellant, 'it did not occur to H&N that in response to the question whether Mississippi State Taxes were applicable, the Government would respond by mentioning only a type of tax that was not applicable, while failing to mention a different type of state tax that was applicable.'" *Id*.

35. *Id*. at 157,400.

36. *Id.* The FAR provides that provides that "the contract price includes all applicable Federal, State, and local taxes and duties." FAR, *supra* note 9, at 52.229-3.

37. 911 Emergency Surcharge and Right-of-Way Charge, Comp. Gen. B-288161, Apr. 8, 2002 (on file with author), *available at* http://www.gao.gov/decisions/appro/288161.htm.

38. *Id*. at 3.

39. *Id*. at 5.

The GAO reached a different conclusion regarding the right-of-way charge. Unlike the 911 emergency surcharge, the telephone company did not collect the right-of-way charge from its subscribers for the DC government's benefit. The GAO would have reached the same result even if the right-of-way charge was a "tax" instead of a "fee" because the legal incidence of that charge falls on the telephone company, not the end user.[40] The telephone company's ability to increase its rates to pass on the tax, and then to itemize it on the statement "does not necessarily mean that the legal incidence falls on the vendee."[41] The GAO concluded that the right-of-way charge is a rental fee, not a tax that falls on the federal government; the House may pay the charge.[42] Mrs. Patterson.

40. *Id*. at 6.

41. *Id*.

42. *Id*.

Contract Pricing

GAO Questions DOD's Use of TINA Waivers[1]

To determine whether proposed purchase prices are fair and reasonable, contracting officers can, under certain conditions, request certified cost or pricing data in accordance with the Truth in Negotiations Act (TINA).[2] The usual scenario for requiring certified cost or pricing data is sole-source contract actions that exceed $550,000.[3] The head of the contracting activity (HCA), however, can grant a waiver from requiring submission of cost or pricing data under Federal Acquisition Regulation (FAR) section 15.403-1(b)(4), if there is sufficient information available to determine price reasonableness.[4] The General Accounting Office (GAO), however, recently reported that "[t]here was a wide spectrum in the quality of the data and analysis being used" to determine price reasonableness when the HCA waived certified cost or pricing data.[5]

The GAO recently noted that Congress expressed concern "that regulations do not provide adequate guidance on when waivers should be used."[6] The GAO reviewed "[twenty] waivers valued at more than $5 million each in fiscal year 2000" totaling approximately $4.4 billion.[7] To determine price reasonableness for these contracting actions with cost or pricing data waivers, the GAO found that most contracting officers conducted a price analysis by reviewing the proposed price without a supporting cost breakdown.[8] Although some of the price analyses involved complex price analysis methods or a review of uncertified cost data,[9] the GAO concluded, "[the Department of Defense (DOD)] is at a greater risk of inflated pricing because it is waiving the requirement [for certified cost or pricing data]."[10] The GAO ultimately recommended amendments to the FAR to "(1) clarify situations in which an exceptional case waiver may be granted, (2) identify what type of data and analyses are recommended for arriving at a price when waivers are granted, and (3) identify what kinds of outside assistance should be obtained."[11]

The DOD generally agreed with the GAO's findings, but disagreed with the recommendation to incorporate the guidance in the FAR. Instead, the DOD plans to incorporate the GAO's guidance in its Contract Pricing Reference Guides. The GAO, however, still believed that incorporating the guidance into the FAR "would help clarify the regulation" and is appropriate because the FAR "is the definitive source for contract management."[12]

"I Think I'll Take a Mulligan"
The ASBCA Reverses Its Defective Pricing Entitlement Decision in Its Quantum Decision

In the original *Black River Limited Partnership*[13] entitlement decision, the Armed Services Board of Contract Appeals (ASBCA) found that the appellant, Black River, was entitled to the reinstatement of a withdrawn equitable adjustment under a tax adjustment clause.[14] The tax adjustment clause provided for an upward adjustment to Black River's monthly capacity charge for a high temperature water (HTW) facility at Fort Drum when certain tax law changes affected their after-tax rate of return on the investment.[15] The originally withdrawn equita-

1. GEN. ACCT. OFF., REP. NO. GAO-02-502, *Contract Management: DOD Needs Better Guidance on Granting Waivers for Certified Cost or Pricing Data* (Apr. 22, 2002) [hereinafter GAO-02-502].

2. 10 U.S.C. § 2306a (2000); 41 U.S.C. § 254b (2000).

3. *See* GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 15.403-4(a)(1), 15.403-1(b) (July 2002) [hereinafter FAR].

4. *Id*. at 15.403-1(b)(4).

5. GAO-02-502, *supra* note 1, at 2.

6. *Id*. at 1.

7. *Id*. at 2.

8. *Id*. at 7.

9. *Id*. at 8.

10. *Id*. at 14.

11. *Id*. at 14-15.

12. *Id*. at 15.

13. ASBCA Nos. 46790, 47020, 97-2 BCA ¶ 29,077.

14. *Id*. at 144,752.

15. *Id*. at 144,716.

ble adjustment had provided for a rate of 68.6%.[16] The ASBCA, however, also determined that "[the] data supplied by appellant in support of its tax adjustment request . . . was not current, complete and accurate, as required by TINA, and thereby entitled the Government to a price adjustment under the contract."[17]

Due to the findings of entitlement for the government and Black River, the ASBCA remanded the case to the parties for quantum negotiations.[18] As often happens, Black River and the government were unable to agree on an adjusted amount for the capacity charge; accordingly, Black River brought a subsequent quantum appeal to the ASBCA.[19] In preparation for the hearing, Black River introduced proposed trial exhibits and testimony that related to the adequacy of its cost or pricing data submitted for the modification related to the tax adjustment clause.[20] Before the quantum appeal hearing, the government filed a motion in limine to exclude evidence of the cost or pricing data's adequacy because the earlier entitlement decision had ruled on that issue. The presiding judge denied the motion, but permitted the government to renew the motion in its post-hearing brief.[21]

In its brief, the government argued that the doctrines of law of the case and res judicata prevented Black River from relitigating matters presented and decided in the prior entitlement hearing.[22] Unfortunately for the government, this argument did not persuade the board. Specifically, the board decided that its prior ruling in the entitlement decision was not binding and considered the evidence necessary for resolving a central quantum issue before the board.[23] The board described this responsibility by stating, "The fact that our findings and conclusions here differ in some respects from those in our earlier decision does not stand in the way of our obligation to resolve the quantum issue."[24]

The board also noted that "[u]nder the law of the case doctrine, the judicial tribunal retains discretion to reconsider or consider more fully a prior ruling."[25] The board then denied the government's renewed motion and reconsidered the original TINA entitlement decision because the additional evidence was directly probative to the quantum decision.[26] The board also noted that:

> the far more extensive record [from the quantum hearing] presents evidence which is substantially different than in our earlier proceedings and, as reflected in [the findings and merits of the decision], our initial decision was clearly erroneous resulting in a manifest injustice to appellant to warrant our application of the exception to the law of the case doctrine.[27]

In contrast to its original decision, the board ultimately found that "[t]he data submitted to the government by appellant in support of its tax adjustment request did not violate TINA."[28]

"Son, I Do Not Want to Know About What Is in That Package You Were Carrying out of the Liquor Store, but Let's Open up a Bottle of Jack Daniels on Your 21st Birthday Next Week"

In *Aerojet Solid Propulsion Co.*,[29] the U.S. Court of Appeals for the Federal Circuit (CAFC) upheld an ASBCA decision holding that the TINA[30] required the disclosure of its receipt of sealed vendor bids during contract price negotiations with the

16. *Id.* at 144,724.

17. Black River Ltd. P'ship., ASBCA No. 51754, 02-1 BCA ¶ 31,839 (summarizing the ASBCA's reasoning in its subsequent quantum decision).

18. *Black River Ltd. P'ship*, 97-2 BCA ¶ 29,077, at 144,752.

19. *Black River Ltd. P'ship*, 02-1 BCA ¶ 31,839, at 157,310.

20. *Id.* at 157,319, 157,324.

21. *Id.* at 157,324.

22. *Id.* (describing and defining the law of the case doctrine).

23. *Id.* at 157,324-25.

24. *Id.* at 157,324.

25. *Id.*

26. *Id.*

27. *Id.* at 157,325.

28. *Id.* at 157,327.

29. Aerojet Solid Propulsion Co. v. White, 291 F.3d 1328 (Fed. Cir. 2002).

Army.[31] Aerojet was the military's sole supplier of nitroplasticizer, an ingredient used in ordnance propellants and some explosives. During price negotiations, Aerojet had presented the government a cost of $1.98 per pound for nitroethane, the primary component of nitroplasticizer. The costs of nitroethane and other components were derived from "price in effect" quotes from Aerojet's suppliers, which are not binding, but merely represent the current price.[32]

During the later stages of price negotiations, Aerojet solicited and received sealed bids for nitroethane from two of its suppliers. In accordance with Aerojet's internal policy, these bids remained unopened until after the bid deadline, which was after the conclusion of Aerojet's price negotiations with the Army. The Army negotiators were never informed of this, however, and they were unaware of the sealed bids Aerojet held. When the agency opened the sealed bids, the suppliers had quoted the price of nitroethane at $1.45 and $1.47 per pound.[33] After a post-award Defense Contract Audit Agency audit, the Army determined that the nondisclosure constituted defective pricing data, and the Army sought a $483,813 reduction in the contract price.[34] Aerojet disagreed and appealed the case to the ASBCA. The board held for the Army because the board determined that the existence of the unopened bids was relevant cost or pricing data that Aerojet should have disclosed during negotiations.[35] On appeal to the CAFC, the court affirmed the board's decision and stated:

> With chemical prices fluctuating wildly, a reasonable buyer or seller would recognize that mere knowledge of the undisclosed sealed nitroethane bids might give one negotiator an advantage during contract price negotiations. Hence, the Board did not err in determining that Aerojet's duty to disclose cost or pricing data required disclosure of the existence of the sealed nitroethane bids and the opening date of such bids.[36]

The court also noted that Aerojet would have had expectations of the current potential pricing quoted by its suppliers in the sealed bids. Depending on Aerojet's expectation of higher or lower pricing, as quoted in the sealed bids, the court believed that Aerojet could have delayed or hastened its negotiations with the Army to achieve its best bargaining position.[37] The court affirmed the ASBCA's decision, concluding:

> In sum, receipt of the new sealed nitroethane bids clearly was information a prudent buyer or seller reasonably would expect to affect price negotiations significantly. Therefore, Aerojet had an obligation to disclose their receipt under the plain language of [the TINA].[38]

Major Kuhn.

30. 10 U.S.C. 2306a (2000). The Truth in Negotiations Act requires offerors, contractors, and subcontractors to submit certified cost or pricing data during price negotiations of statutorily specified contracting actions. *Id.*

31. *See* Aerojet Solid Propulsion Co., ASBCA Nos. 44568, 46057, 00-1 BCA ¶ 30,855.

32. *Aerojet Solid Propulsion*, 291 F.3d at 1329.

33. *Id*.

34. *Id*. at 1330.

35. *See Aerojet Solid Propulsion*, 00-1 BCA ¶ 30,855.

36. *Aerojet Solid Propulsion Co.*, 291 F.3d. at 1331.

37. *Id*.

38. *Id*. at 1332.

Auditing

GAO Revises Auditor Independence Standard

With accounting scandals dominating headlines, the General Accounting Office (GAO) has revised the independence standard set forth in its publication, *Government Auditing Standards*, also known as the *Yellow Book*.[1] The January 2002 revision is part of a complete and ongoing overhaul of the *Yellow Book*.[2] The change, although not prompted by the most recent scandals, certainly will address them. As the Comptroller General noted in releasing guidance concerning the standard, "recent private sector accounting and reporting scandals have served to re-enforce the critical importance of having tough but fair auditor independence standards to protect the public and [e]nsure the credibility of the auditing profession."[3]

The independence standard is one of several legally binding professional requirements at the core of the accounting profession. These requirements range from those dealing with auditors' professional qualifications to the quality of audit efforts and characteristics of audit reports.[4] The *Yellow Book* specifies the standards applicable to audits of government organizations and functions;[5] its formulation of the independence standard provides that "in all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, should be free both in fact and appearance from personal, external, and organizational impairments to independence."[6]

Amendment 3 covers a range of auditor independence issues, including the three general classes of independence "impairments"—personal, external, and organizational. Generally, the standard requires that auditors decline engagements when impairments would affect the auditor's capability to perform work and report results impartially, and exhorts auditors to avoid situations that "could lead reasonable third parties with knowledge of the relevant facts and circumstances to conclude that the auditor is not able to maintain independence."[7] In those situations in which the government auditor cannot decline because of legislative or other requirements, the auditor must report those impairments. The standard also requires audit organizations to establish policies to identify, avoid, and where necessary, mitigate impairments.[8]

The most significant change in Amendment 3 relates to non-audit services. Auditors perform a variety of services, including audit and non-audit services. Non-audit services need not comply with the *Yellow Book*, and are often referred to as management advisory services. Non-audit services include gathering or explaining information and providing technical advice. Often, these services also involve gathering questions for a hearing, preparing reports from unverified or verified data, developing audit methods and plans, and providing advice concerning information systems and controls. Non-audit services differ from audit services in that they either directly support an entity's operations, such as processing payroll or developing internal controls, or do not involve the verification or evaluation of management-provided data. The concern addressed by Amendment 3 is that non-audit engagements might impair an

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1. Among its responsibilities, the GAO establishes auditing and accounting standards and principles for the U.S. Government. *See* Office of Federal Procurement Policy Act, 41 U.S.C. § 422 (2000).

2. In January 2002, the GAO issued its "exposure draft" of the revised *Yellow Book* for comment, and explained that the draft revision was intended, among other things, to strengthen and streamline standards This draft did not include the independence standard, however, which the GAO was revising separately. The comment period closed in April 2002. According to the GAO's Web site, the revised *Yellow Book* will issue in early 2003. *See* GAO Presentation, AICPA National Governmental Accounting and Auditing Update Conference, Washington, D.C., "What Will Change in the New Yellow Book, GAO-02-1081SP" (Aug. 2002), *available at* http://www.gao.gov/govaud/gao021081sp.pdf.

3. Press Statement, General Accounting Office (July 2, 2002) [hereinafter GAO Press Statement], *available at* http://www.gao.gov/govaud/pressreleaseqa.pdf. Underscoring this link between audit standards and recent accounting scandals, the Comptroller General also explained:

> One issue that has recently been in the press is the largely unexpected bankruptcy of one of the United States' largest corporations, Enron Corporation. A few bad actors who do bad things can have catastrophic consequences for many innocent people. With regard to the Enron situation, it seems pretty clear that a number of players failed to properly discharge their respective responsibilities. These breaches of trust have sent a shock wave through the accountability profession and the investor community.

Hon. David M. Walker, Comptroller General of the United States, Address at the Fourteenth Biennial Forum of Government Auditors, Providence, Rhode Island, "The Role of GAO and Other Government Auditors in the 21st Century" (May 20, 2002) [hereinafter Walker Address], *available at* http://www.gao.gov/cghome/14thbf.html.

4. *See* U.S. Dep't. of Defense, Contract Audit Agency Manual 7640.1, DCAA Contract Audit Manual ch. 2 (1 Jan. 2001) [hereinafter CAM].

5. Section 4 of the Inspector General Act of 1978 requires that federally appointed inspectors general observe the Comptroller General's standards when auditing federal organizations and functions. 5 U.S.C. app. § 3 (2000) (as amended).

6. Gen. Acct. Off., Rep. No. 02-388G, *Government Auditing Standards, Amendment No. 3, Independence* (Jan. 25, 2002) [hereinafter *Amendment 3*].

7. *Id.* at 1.

8. *Id.*

audit organization's independence if it becomes necessary to audit data or systems created, designed, or administered pursuant to a non-audit engagement in which the organization participated.[9]

To avoid these "impairments" to independence, Amendment 3 provides a principle-based threshold test, supplemented with a few safeguards.[10] The new standard is based on two overarching principles: (1) auditors should not perform management functions or make management decisions; and (2) auditors should not audit their own work or provide non-audit services in situations where the amounts or services involved are significant or material to the subject matter of the audit.[11] If an auditor or audit organization cannot be certain that a proposed engagement passes that test, the auditor or organization may not accept the engagement. If the engagement passes this principles test, certain supplemental safeguards, designed to ensure that there is no conflict or misunderstanding arising out of the non-audit engagement, must also be observed.[12]

The new standard expressly prohibits auditors from providing certain bookkeeping or record-keeping services, and limits payroll processing and certain other services, all of which are presently permitted under auditing standards of the American Institute of Certified Public Accountants (AICPA).[13] At the same time, the standard permits auditors to provide routine advice and answer technical questions without violating the two overarching principles or having to meet the supplemental safeguards. The standard also provides examples of how certain services would be treated under the new rules.[14]

Following the issuance of Amendment 3, a host of questions arose concerning its timing and implementation. The GAO considered these questions to be so substantial that it extended Amendment 3's effective date from 1 October 2002 to 1 January 2003. Similarly, the GAO grandfathered any non-audit services that were initiated, agreed to, or performed by 30 June 2002, provided that the non-audit services were completed by 30 June 2003.

In July 2002, the GAO gave a lengthy response to these questions.[15] The questions and answers concerned the sort of practical details that only an auditor or his lawyer would appreciate, but also addressed the concepts underlying the amendment. The practical details underscored the amendment's burdens and concerned such thorny issues as whether an organization's independence would be impaired by completing non-audit work even shortly after the June 2003 deadline. Reflecting the seriousness with which the GAO views this matter, the guidance explained that even if an audit organization took until July 2003 to complete a non-audit service engagement (for example, implementing a client's accounting system), the audit organization would be precluded from performing an audit of the client's financial statement (unless, for example, the accounting system was subsequently redesigned).[16] In addition to addressing these practical details, the GAO addressed the concepts underlying the new rules, discussing questions such as what constitutes a "management function," the meaning of "significance/materiality," and the scope of the impairment.[17] Generally, the guidance provides that an auditor must examine the "totality of the circumstances" in determining whether any non-audit work impairs the auditor's independence.[18]

According to the Comptroller General, this amendment is the first of several planned steps in connection with non-audit services covered by the *Yellow Book*. Specifically, the Comptroller General has stated that he plans to work with the Federal Accounting Standards Advisory Board, which develops generally accepted accounting principles for the federal government, to determine what type of additional disclosures relating to non-audit services may be appropriate. He has also suggested that the AICPA "raise its independence standards to those contained in this new standard in order to eliminate any inconsistency between this standard and their current standards."[19] The Comptroller General also has asked his Advisory Council on

9. *Id*. at 6.

10. The Comptroller General has described Amendment 3 as employing "a principles-based approach instead of a rules-based approach." Walker Address, *supra* note 3.

11. *Amendment 3*, *supra* note 6, at 7.

12. *Id*. at 9.

13. *Id*. at 2.

14. *Id*. at 8.

15. GEN. ACT. OFF., REP. NO. 02-870G, *Government Auditing Standards, Answers to Independence Standard Questions* (July 2, 2002).

16. *Id*. at 6-7.

17. *Id*. at 11.

18. *Id*. at 20.

19. GAO Press Statement, *supra* note 3.

Government Auditing Standards to review and monitor this area to determine what, if any, additional steps may be appropriate. Although many of these changes would not appear to affect the average government contract audit, practitioners must be aware of the core principles under which auditors operate to ensure that their work product is not compromised. Moreover, because the DCAA now offers a plethora of management advisory services, the new standard and its guidance will require considerable study.[20] Colonel Gillingham.

20. *See generally* CAM, *supra* note 4, ch. 15.

Nonappropriated Funds (NAF) Contracting

Pizza! Pizza!

In *Pacrim Pizza Co. v. Secretary of the Navy*,[1] a Marine Corps Morale, Welfare, and Recreation (MWR) non-appropriated fund instrumentality (NAFI) awarded a fast food services contract to the plaintiff, Pacrim. After the contracting officer terminated the contract for default, Pacrim appealed the decision to the Armed Services Board of Contract Appeals (ASBCA). The ASBCA sustained the termination, and Pacrim appealed to the U.S. Court of Appeals for the Federal Circuit (CAFC), pursuant to a clause in the contract declaring that the CAFC had jurisdiction under the Contract Disputes Act (CDA).[2] The CAFC acknowledged that it had jurisdiction over appeals from agency boards of contract appeals when the Contract Disputes Act (CDA) applied.[3] The CDA itself, however, limits the court's jurisdiction to covered NAFI contracts of the armed forces exchanges; therefore, the CAFC held that the non-appropriated funds doctrine deprived it of jurisdiction.[4] As the court stated, "A NAFI may be a covered contracting entity under the Contract Disputes Act if it is closely affiliated with a post exchange and meets a three part test."[5] The court held that the contract failed to meet the "threshold requirement that the NAFI be closely affiliated with a post exchange."[6] The contract's declaration of jurisdiction was not controlling. The CAFC found that "only Congress can grant waivers of sovereign immunity; parties may not by contract bestow jurisdiction on a court."[7] The CAFC dismissed the appeal, holding that the enumerated exchange exceptions excluded the MWR entity.[8]

AAFES, Yes; Other-Than-Contract Claims, No.

The CAFC recently affirmed the U.S. Court of Federal Claims (COFC) in *Taylor v. United States*,[9] holding that the court lacked jurisdiction over a suit by former employees of the Army and Air Force Exchange Services (AAFES). In *Taylor*, the plaintiffs retired early from AAFES during the 1990 military drawdown. The plaintiffs argued that a statute authorized the use of appropriated funds for NAFI separation pay. At the time, 5 U.S.C. § 5597 authorized the Secretary of Defense to pay a voluntary separation incentive of up to $25,000 "to encourage eligible employees to separate from the service voluntarily."[10] AAFES refused to pay the separation pay. The plaintiffs sued, alleging that 5 U.S.C. § 5597 waived sovereign immunity.[11]

While "Congress amended the Tucker Act[12] to authorize contract claims against AAFES and certain other NAFIs, the

1. 304 F.3d 1291 (Fed. Cir. 2002).

2. *Id*. at 1292. The Navy alleged that Pacrim failed to comply with the accounting and discrimination provisions of the contract and the equal employment opportunities clause in the contract. *Id*.

3. *Id*. The CAFC has jurisdiction over appeals from final decisions of agency boards of contract appeals. 28 U.S.C. § 1295(a)(10) (2000).

4. *Pacrim*, 304 F.3d at 1292-93; *see* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (limiting coverage of NAFI contracts to express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration). "The general rule is that the Court of Federal Claims lacks jurisdiction to grant judgment against the United States on a claim against a NAFI because the United States has not assumed the financial obligations of those entities by appropriating funds to them." Taylor v. United States, 303 F.3d 1357, 1361 (2002).

5. *Pacrim*, 304 F.3d at 1292-93. The three part test is: "[I]t must have sufficient assets to reimburse the United States the cost of a judgment, be clearly defined as within the resale system, and provide financial data sufficient to predict the governments potential liability." McDonald's Corp. v. United States, 926 F.2d 1126 (Fed. Cir. 1991).

6. *Pacrim*, 304 F.3d at 1293. The court held that the three-part test did not apply until the facts of the case met the threshold requirement. *Id.*

7. *Id*. at 1294.

8. *Id*.

9. 303 F.3d. 1357 (Fed. Cir. 2002).

10. *Id*. at 1359.

11. *Id.* at 1360. The plaintiffs originally filed suit in the U.S. District Court for the Northern District of Texas. The district court "determined COFC had exclusive jurisdiction over the retirees' section 5597 claim under the Tucker Act because the retirees sought more than $10,000." *Id.* at 1359. The COFC determined that it lacked jurisdiction and dismissed. The retirees appealed. *Id.*

12. 28 U.S.C. § 1491(a)(1) (2000). The court stated:

> The jurisdictional grant in the Tucker Act is limited by the requirement that judgments awarded by the Court of Federal Claims must be paid out of appropriated funds. Hence, the Tucker Act generally does not provide the Court of Federal Claims with jurisdiction over claims against NAFIs such as AAFES.

Taylor, 303 F.3d at 1360.

plaintiffs acknowledged their claim was not based in contract."[13] Absent an express statute waiving sovereign immunity, the CAFC affirmed the COFC's holding that it lacked jurisdiction.[14] The CAFC held that "§ 5597 did not expressly extend to the NAFI employees."[15] The court also stated that although a Department of Defense (DOD) memo later authorized "NAFI separation payments from appropriated funds, . . . without express congressional authorization, the DOD memo was irrelevant to the jurisdictional issue because only an express statute may waive the sovereign immunity of the United States."[16] The CAFC affirmed the COFC's dismissal.[17]

UNICOR Is a NAFI

Last year, the CAFC affirmed a COFC holding that it lacked jurisdiction over a self-funding government agency.[18] This year, in *Aaron v. United States*,[19] the COFC held that Federal Prison Industries, Inc. (UNICOR) is a NAFI, and that the court therefore lacked jurisdiction over claims against UNICOR. In *Taylor*, UNICOR employees alleged that UNICOR violated the Federal Employees Pay Act[20] (FEPA) by failing to pay overtime for pre-shift and post-shift activities.[21] The COFC held that UNICOR is a NAFI and that the "[c]ourt's jurisdiction under the Tucker Act[22] must be confined to cases in which appropriated funds can be obligated."[23] The COFC found that Congress clearly intended to keep the financial obligations of UNICOR separate from the general treasury.

The COFC concluded it that lacked jurisdiction under the Tucker Act because the non-appropriated fund exception applied.[24] The court dismissed the plaintiffs' appeal because no express language in the FEPA waived the bar of sovereign immunity.[25]

The COFC reiterated that UNICOR is a NAFI in *Core Concepts of Florida, Inc. v. United States*.[26] In *Core Concepts*, UNICOR terminated the plaintiff's requirements contract.[27] The government moved to dismiss the plaintiff's claim, based on the ruling in *Aaron*.[28] The COFC reviewed the relevant statutes and their legislative history, and concluded that Congress "decreed that UNICOR's operation employs funds derived from the sale of products or byproducts by UNICOR or services of federal prisoners."[29] The COFC held that it lacked jurisdiction and granted the government's motion to dismiss.[30]

13. *Taylor*, 303 F.3d at 1360.

14. *Id*. In 1999, the CAFC ruled that the COFC had jurisdiction over the claim of a NAFI employee who sued under the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) (2000), because the Act contained a wavier of sovereign immunity. El-Sheikh v. United States, 177 F.3d 1321 (Fed. Cir. 1999); *see also* Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 43 [hereinafter *2000 Year in Review*].

15. *Taylor*, 303 F.3d at 1361.

16. *Id*.

17. *Id*.

18. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 138 [hereinafter *2002 Year in Review*]; Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir 2001). *Furash* involved the U.S. Finance Board, an independent government agency supported by assessments on member banks rather than by appropriated funds. *Id.*

19. 51 Fed. Cl. 690 (2002). The plaintiffs were employees or former employees of Federal Prison Industries, Inc., also known as UNICOR. *Id.* at 690-91.

20. 5 U.S.C. §§ 5542, 5544 (2000).

21. *Aaron*, 51 Fed. Cl. at 690-91. "The plaintiffs also alleged UNICOR violated the Fair Labor Standards Act, . . . but agreed at oral arguments that only FEPA claims were at issue." *Id.*

22. 28 U.S.C. § 1491(a)(1) (2000).

23. *Aaron*, 51 Fed. Cl. at 691.

24. *Id*. at 694.

25. *Id*. at 695.

26. No. 00-3080C (Ct. Fed. Cl. Aug. 23, 2002) (unpublished), *available at* http://www.contracts.ogc.doc.gov/cld/cofcdec.html#cofc.

27. *Id*. at 1.

28. *Aaron*, 51 Fed. Cl. 690 (2002).

29. *Core Concepts*, No. 00-3080C, at 2.

30. *Id*.

Federal Retirement Thrift Investment Board Is Not a NAFI

In *American Management Systems, Inc. v. United States*,[31] the COFC held that the Federal Retirement Thrift Investment Board (Thrift Board) is not a NAFI.[32] In 1997, the Thrift Board awarded a $30 million contract to American Management Systems (AMS) to design, develop, and implement an automated record-keeping system. The Thrift Board terminated the contract after numerous delays and substantial cost increases. When AMS challenged the termination, the Thrift Board moved to dismiss.[33] The Thrift Board asserted that it was a NAFI, arguing that it does not receive any appropriations, and that it pays its expenses from private funds. The COFC disagreed, finding that the Thrift Board receives appropriated funds and therefore is not a NAFI.[34]

The court found that 5 U.S.C. § 8437(c) specifically provides that "the sums in the Thrift Savings Fund are appropriated and shall remain available without fiscal year limitation to pay administrative expenses of the Federal Retirement Thrift Investment Management System."[35] While the statute identified contributions and net earnings to be held in trust for the employees, the COFC held that the statute subjected the funds to a condition to pay the expenses of the Thrift Board. The court determined that the condition "attaches to those funds at the instant of their appropriation by Congress."[36] The court also noted that the Thrift Board was required to prepare an annual budget that, if approved, would be made part of the federal budget, and which would be subject to congressional review.[37] The COFC concluded that the "Thrift Board is a governmental agency whose administrative expenses are payable out of public funds made available through a congressional appropriation" and denied the government's motion to dismiss.[38]
Major Davis.

31. 53 Fed. Cl. 525 (2002).

32. *Id.* at 529. "The Thrift Board is responsible for managing the assets of the Thrift Savings Fund, a tax-deferred saving account created under the Federal Employees' Retirement System Act. The Board manages funds for federal employees and members of the uniformed services." *Id.* at 525-26.

33. *Id.* at 526.

34. *Id.* at 526-27. Specifically, the defendants argued that 5 U.S.C. §§ 8437(d) and (e)(1) "taken together demonstrate that the Thrift Board is not granted any appropriations of its own. Instead, the Thrift Board is required to draw its funding from monies that originate as appropriations granted to employer agencies for the payment of contributions on behalf of their employees." *Id.* at 527; *see* 5 U.S.C. §§ 8351, 8401-8479 (codifying the Federal Employees Retirement System).

35. *Am. Mgmt. Sys.*, 53 Fed. Cl. at 527.

36. *Id.*

37. *Id.* at 528.

38. *Id.* at 529.

FISCAL LAW

General Fiscal

Have No Fear!

Last year, Congress unanimously passed the Notification and Federal Employee Anti-Discrimination and Retaliation Act (No FEAR Act).[1] Section 201 of the Act requires federal agencies to reimburse the Judgment Fund for certain payments they make as the result of whistleblower or discrimination cases.[2] The purpose behind the Act is to hold the particular agency—rather than the government as a whole—financially accountable for the wrongdoing.[3]

Publication of the Long-Awaited Fifth Volume

In April 2002, the General Accounting Office (GAO) published Volume V of the *Principles of Federal Appropriations Law*.[4] Volume V contains an alphabetical listing of the topics covered in Volumes I-IV. It also contains tables of authority that cross-reference constitutional provisions, U.S. Code provisions, public and private laws, statutes, court cases, boards of contract appeals decisions, Code of Federal Regulation provisions, Federal Register documents, Department of Justice opinions, and GAO opinions and decisions discussed in Volumes I-IV.

Purpose

Let Them Eat Bison (But Only if It Is Native American Bison)

In *Intertribal Bison Cooperative*,[5] the Comptroller General stewed over the issue of whether funds available for the purchase of bison meat had to be used to purchase solely from Native American producers. The earmark at issue was part of the U.S. Department of Agriculture's (USDA) appropriation to carry out the Food Stamp program. The program provided the USDA up to $3 million to spend on the purchase of ground bison and bison stew meat that would be distributed to participants in the Food Distribution Program for Native Americans on Reservations. The earmark specifically required the USDA to "purchase such bison from Native American producers and Cooperative Organizations without competition."[6]

The controversy arose when the USDA issued a Request for Proposals (RFP), indicating that it contemplated the award of a contract for ground bison and bison stew meat to a cooperative organization on a best-value basis. The RFP's statement of work indicated that the awardee cooperative organization would produce ground bison by slaughtering live bison the USDA had acquired from Native American producers and blending that meat with non-Native American bison to produce a final ground product that consisted of fifteen to twenty percent Native American bison. The RFP also stated that the awardee would produce the stew meat entirely from non-Native American sources. The Intertribal Bison Cooperative immediately filed a protest with the GAO, claiming that the USDA could only use the earmarked funds to purchase bison from Native American sources, and could only do so on a non-competitive basis.[7] The USDA responded by claiming that if it were going to purchase from a producer, that producer had to be a Native American firm, but if it were purchasing from a cooperative organization, it was free to purchase from a non-Native American source.[8]

The USDA also argued that the appropriation language was ambiguous and that its interpretation was entitled to deference. The USDA contended that the Native American sources had insufficient slaughtering and meat processing facilities. It maintained that any interpretation other than its own would thwart the purpose of the appropriation unless the GAO adopted its interpretation.[9] The court responded that if the USDA had interpreted the appropriation in a formal rule-making or adjudication process, then it would have granted the USDA's interpretation great deference.[10] In this case, because the USDA failed to develop its interpretation through a formal-

1. Pub. L. No. 107-174, 116 Stat. 566 (2002).

2. 116 Stat. at 568.

3. *Id*. at 566.

4. Gen. Acct. Off., Principles of Federal Appropriations Law, GAO-02-271SP (2d ed. 2002), *available at* http://www.gao.gov/special.pubs/d02271sp.pdf.

5. B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).

6. *Id*. at *2.

7. *Id*. at *2-3.

8. *Id*. at *3. The USDA's argument was essentially that the modifier "Native American" only applied to the word immediately adjacent to it—producer—and not to the entire phrase. The opinion never explains the USDA's rationale for why it believed it could purchase the bison meat on a competitive basis. *Id.*

9. *Id*. at *5.

10. *Id*. at *4-5 (citing Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

ized process, the interpretation did not deserve such deference.[11]

The Comptroller General then reviewed several factors that both courts and boards have historically used to interpret a statute. First, it worked through the language in the appropriation to determine if there was any evidence to support something other than the plain meaning of the statute; it could not find any.[12] The opinion next reviewed other similar and related statutes to determine Congress's intent. This review also supported an interpretation of the appropriation that required the USDA to purchase solely from Native Americans on a non-competitive basis.[13]

The opinion next looked at whether the USDA applied this interpretation consistently. It first noted that this was the first time the provision had appeared in the USDA's appropriation, so there was no agency interpretation of prior years' appropriations provisions to gauge whether the agency had been consistent. The decision noted, however, that the USDA's interpretation of this year's appropriation was inconsistent because the USDA had restricted itself from purchasing live bison from only Native American sources, whereas it permitted itself to purchase bison meat from non-Native American sources.[14] Lastly, the opinion discussed the role of post-enactment statements by individual members of Congress to ascertain the statute's intent. The decision concluded that such statements are not legislative history, and therefore are not persuasive evidence of congressional intent without other corroborating evidence.[15] Applying all the above factors, the Comptroller General ultimately determined that the agency's interpretation of the appropriation was unreasonable, sustained the protest, and recommended the cancellation of the solicitation.[16]

The decision also responded to the USDA's argument that any interpretation other than its own would thwart the purpose of the appropriation because there were not enough Native American slaughterers and meat processors. The decision relied upon the "necessary expense" test to come up with a possible solution. First, it noted that the appropriation only required the USDA to purchase bison meat from Native Americans; there was no requirement that the meat be slaughtered or processed before purchase. The decision then reasoned that if the USDA had to purchase live bison from Native American sources because of insufficient slaughtering and processing capacity, the USDA could separately acquire slaughtering and processing services from a non-Native American source. It also determined that the expenses associated with such slaughtering and processing would be a necessary expense of purchasing consumable bison; therefore, the USDA could use "its otherwise available operating appropriations (including this earmarked appropriation)" to purchase those services.[17]

Maritime Administration Floats a Proposed Exception to the Miscellaneous Receipts Statute to the GAO

In *Maritime Administration—Disposition of Funds Recovered from Private Party for Damage to Government Building,*[18] the Maritime Administration (MARAD) requested an advance opinion from the GAO concerning whether funds deposited into an escrow account had to be deposited into the general fund of the Treasury as miscellaneous receipts. The issue first appeared when a contractor, who was supposed to replace garage doors on a building at the U.S. Merchant Marine Academy, caused a fire that resulted in over $1 million in damages to the building. The contractor's insurance company initially paid only $166,000; the government sued the contractor for the difference under the Contract Disputes Act.[19] Counsel for the MARAD recognized that if the government eventually succeeded on its claim, it would have to deposit any recoveries into the Treasury's general fund.[20]

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11. *Id.* at *4. The decision also notes there are exceptions to this general rule when an agency's interpretation is granted deference, even though it was the result of an informal process, but the court eventually found that none of those exceptions applied to this particular case. *Id*. at *4 n.5.

12. *Id*. at *6-7.

13. *Id*. at *8-9. The opinion looks at 15 U.S.C. § 637(a), commonly referred to as section 8(a) of the Small Business Act, which permits agencies to make purchases from certain disadvantaged small businesses on a non-competitive basis, and 25 U.S.C. § 47 (2000) which authorizes agencies to purchase solely from Native American firms. *Id.*

14. *Id*. at *9.

15. *Id.* Apparently, several members of Congress sent individual letters to the USDA suggesting that the USDA should purchase the bison meat from particular suppliers. *Id.*

16. *Id*. at *10.

17. *Id*. at *5-6.

18. Comp. Gen. B-287738, May 16, 2002, *available at* http://frwebgate.access.gpo.gov/cgi-bin/multidb.cgi.

19. *Id*. at 1-2.

20. *Id*. at 2 (noting that this was a requirement of the Miscellaneous Receipts Statute, at 31 U.S.C. § 3302(b) (2000)).

The MARAD counsel proposed that the contractor and the government could jointly stipulate to dismiss the lawsuit and then establish an escrow account controlled by the contractor. The government and other contractors doing repair work on the damaged building could then invoice the cost of the repairs. The Department of Justice attorneys who were involved in the litigation did not concur with the escrow account concept. They felt it would "contravene the express language of the miscellaneous receipts statute."[21] The contractor's insurer eventually agreed to pay an additional $730,000 in full settlement for the damages to the building, and the MARAD deposited all amounts received into the general fund.[22]

The MARAD then asked the Comptroller General whether it could handle future instances of damages by having the tort feasor place the settlement money into an escrow account that the tort feasor established and out of which the MARAD could draw funds to pay for repairs. The decision began by noting that the Miscellaneous Receipts Statute establishes the general rule that agencies must deposit all receipts of money into the general fund. It then noted that the Miscellaneous Receipts Statute does not apply where the tort feasor replaces or repairs the damaged government property rather than paying damages.[23] The decision refused to extend this exception to the instant case, when the government did not technically receive the funds but still controlled their use. Without expressly stating it, the decision essentially rested its reasoning on the notion that a government agency may not deflect incoming money to another entity in order to avoid application of the Miscellaneous Receipts Statute.[24]

Cleaning up the Water?

Another interesting decision discussing the purpose of an appropriation was *The Honorable Lane Evans*.[25] In *Lane Evans*, the Coast Guard asked the GAO for an opinion as to whether it could use funds appropriated to pay claims arising under the Oil Pollution Act[26] to pay the administrative costs associated with processing those claims as well.[27] Congress passed the Oil Pollution Act in 1990. It requires parties who spilled oil in the ocean to compensate others injured as a result of the spill. It also permits uncompensated injured parties to file claims with the Coast Guard.[28] Section 1012(a)(4) of the Act established a trust fund, which the Coast Guard would use to pay these claims.[29] Section 6002 of the Act made appropriations deposited into the fund no-year appropriations.[30] Section 1012(a)(5) also permits the Coast Guard to use up to $25 million from the trust fund to pay the Coast Guard's "administrative, operational, and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration, and enforcement of this Act."[31] Before the Coast Guard could use the trust fund for this purpose, however, Congress had to provide an annual dollar amount that the Coast Guard could use for that particular year.[32] Anticipating a rapid escalation in the number of Oil Pollution Act claims, the Chief Counsel of the Coast Guard opined in 1998 that the Coast Guard could also use the no-year appropriations that Congress was depositing into the trust fund to pay its indirect expenses from processing the claims.[33]

The decision first noted that if Section 1012(a)(5) had not been in the Act, the Coast Guard Chief Counsel's contention that the entire balance of no-year funds would have been available to cover the costs of processing the claims would probably have been correct. This is because Section 1012(a)(4) permits the fund to be used for the "payment of claims," and the pro-

21. *Id*.

22. *Id*.

23. *Id*. at 3. This is because the statute only covers the receipt of *funds*. *See* 31 U.S.C. § 3302(b).

24. *Maritime Administration*, Comp. Gen B-287738, at 4-6.

25. B-289209, 2002 U.S. Comp. Gen. LEXIS 145 (May 31, 2002).

26. 33 U.S.C. § 2712 (2000).

27. *Lane Evans*, 2002 U.S. Comp. Gen. LEXIS 145, at *1-2.

28. 33 U.S.C. § 2712.

29. *See id.* § 2712(a)(4).

30. *See id.* § 2752.

31. *See id.* § 2712(a)(5).

32. *Lane Evans*, 2002 U.S. Comp. Gen. LEXIS 145, at *4.

33. *Id*. at *3-5.

cessing of those claims would be a necessary and incidental cost of the payment process. The decision notes, however, that Congress included section 1012(a)(5) as part of the Act, and as such specifically provided an appropriation out of which the Coast Guard would pay the administrative costs of processing claims.[34]

Had the decision ended there, it would have been a straightforward application of the general rule that if a more specific appropriation is available, it must be used in preference to the more general appropriation. Unfortunately, the decision also addresses the need for the Coast Guard to correct its accounting records. The decision indicates that this would require the Coast Guard to de-obligate the claims processing expenses from the no-year appropriation, and to charge these expenses "instead to the annual operating expense appropriation in effect at the time those expenses were incurred."[35]

It is unclear how the use of these annual operating expense appropriations does not also violate the same rule of construction concerning specific and general appropriations. Past decisions have indicated that even when the specific appropriation is exhausted—as it would have been in the instant case because the Coast Guard was spending over $25 million a year on administrative expenses—the agency may not use the general appropriation as a back-up.[36]

DOD ORF Regulation Updated

The Department of Defense (DOD) reissued an updated version of the directive dealing with official representation funds (ORF) on 10 September 2002.[37] Although the DOD modified the structure of the directive to some extent, the substantive provisions remain relatively unchanged. Major Sharp.

34. *Id.* at *9-11.

35. *Id.* at *16.

36. *See, e.g.*, Secretary of the Navy, 20 Comp. Gen. 272 (1940).

37. U.S. DEP'T OF DEFENSE, DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (10 Sept. 2002), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d725013_091002/d725013p.pdf.

Time

We've Got a Long Way to Go: GAO Cites Improvements in DOD Bookkeeping Practices, but Notes Need for More Corrective Actions

Lest one think that questionable accounting practices are strictly a private-sector phenomenon, the General Accounting Office (GAO) was hounding the Department of Defense (DOD) for creative accounting long before Enron and Arthur Andersen were household names. In July 2001, the GAO released a stinging report that concluded that the DOD, more than any other federal agency, had difficulty complying with rules intended to prevent illegal or improper adjustments to closed appropriations.[1] Specifically, the report noted that in fiscal year (FY) 2000, the DOD made illegal or improper adjustments to closed appropriations accounts amounting to $615 million.[2] Recently, the GAO issued a follow-on report revealing the degree to which the DOD has corrected past discrepancies in its accounting practices.[3] As the title of the report suggests, the DOD has made improvements to its accounting practices; however, the report concludes that the DOD still needs improvement.[4]

In 1990, Congress addressed the issue of inadequate controls over appropriations to the DOD and other federal agencies.[5] Specifically, Congress required that appropriation accounts close five years after the period of availability of a fixed-termed appropriation. After closing, government agencies cannot use funds from the closed account for any purpose. Because agencies were required to keep accurate records, however, government agencies could, under very limited circumstances, adjust accounting records on closed accounts to correct unrecorded or improperly charged disbursements.[6]

Upon examining the DOD's records, the GAO determined that between FYs 1997 and 2001, the DOD made approximately $12 billion in adjustments affecting closed appropriations accounts. Of this amount, $2.7 billion represented FY 2000 adjustments alone. In its July 2001 report, the GAO concluded that in FY 2000, over $615 million of the $2.7 billion in adjustments on closed accounts represented illegal or otherwise improper adjustments.[7]

In its July 2002 report, the GAO concluded that the DOD has corrected about $592 million of the $615 million of problematic FY 2000 adjustments. While one would think this correction (96% of the total dollar value) would placate the most aggressive bean-counters, the GAO report stated that "this is just the starting point in addressing the problem transactions we identified."[8] The GAO concluded that "the challenge to correct the account after reversing these transactions is larger than the specific illegal or otherwise improper adjustments we identified."[9] As an example, the report noted that correcting an improper adjustment of $210 million on a $590 million closed contract account required revising the entire contract account. Based on DOD estimates, the GAO reported that improper FY 2000 transactions will require over 21,000 staff hours to correct.[10]

The good news, however, is that the GAO concluded that the DOD's actions to resolve its problems are beginning to produce positive short-term results. This conclusion is based on the GAO's observation that during the first six months of FY 2002, DOD closed account adjustments totaled only about $200 million. This is about 80% less than the over $1 billion of closed accounting adjustments the DOD reportedly made during the same period in FY 2001.[11]

The GAO cited two possible courses of action to correct the problem. First, Congress can enact new legislation to prohibit

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1. *See* GEN. ACCT. OFF., REP. NO. GAO-01-697, *Canceled DOD Appropriations, $615 Million of Illegal or Otherwise Improper Adjustments* (July 26, 2001) [hereinafter GAO-01-697].

2. *Id.* at 9-10, tbl. 1; *see also* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan. /Feb. 2002, at 132 [hereinafter *2001 Year in Review*].

3. GEN. ACCT. OFF., REP. NO. GAO-02-747, *Canceled DOD Appropriations, Improvements Made but More Corrective Actions Needed* (July 31, 2002) [hereinafter GAO-02-747].

4. *Id.* at 3-6.

5. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405, 104 Stat. 1678 (1990) (codified as amended at 31 U.S.C. §§ 1551-1558 (2000)).

6. *Id.*; *see also 2001 Year in Review*, *supra* note 2, at 132; GAO-02-747, *supra* note 3, at 1.

7. *See* GAO-02-747, *supra* note 3, at 2.

8. *Id.* at 3.

9. *Id.*

10. *Id.* at 3-4.

11. *Id.* at 12.

any adjustments to a closed appropriation account.[12] This would certainly prevent future irregular adjustments on closed accounts. This would not allow for the correction of erroneous records, however, and could cause hardships (not to mention litigation) when the DOD failed to pay contractors for goods or services they had already rendered.[13] A second option is to refrain from legislative action and allow the DOD to correct its practices internally.[14] After allowing the DOD to comment on its draft report, the GAO recommended against legislative changes for now. Instead, it recommended that the Secretary of Defense direct further actions to correct past improper adjustments, and monitor and prohibit such improper adjustments in the future.[15] Based on this feedback from the DOD, the report noted that the DOD should complete all of its audits and corrective actions by 30 September 2004.[16] Major Dorn.

12. *Id.* at 19.

13. *Id.* at 19-20.

14. *Id.* at 18.

15. *Id.* at 20.

16. *Id.* at 22.

Anti-Deficiency Act

It Can Happen to the Best of Us

In a letter to the Chairman of the House Committee on Appropriations,[1] the General Accounting Office (GAO) found that both the Office of Management and Budget (OMB) and the Air Transportation Stabilization Board (ATSB)[2] had violated the Anti-Deficiency Act (ADA).[3] The two agencies failed to transmit an appropriate request to Congress, as required under the Air Transportation Safety and System Stabilization Act (Stabilization Act),[4] which resulted in the agencies' apportioning and obligating funds without budget authority.

The circumstances of this ADA violation involved a loan guarantee for America West Airlines under the Stabilization Act. Under the Stabilization Act, Congress authorized the President to extend air passenger carriers up to $10 billion in loan guarantees for losses they incurred because of the 11 September 2001 terrorist attacks.[5] Although the Act designated this new budget authority as an "emergency requirement" under the Balanced Budget and Emergency Deficit Control Act of 1985 (Balanced Budget Act),[6] the Act required the President to send Congress a "request, that includes designation of such amount as an emergency requirement" before exercising this budget authority.[7]

On 28 December 2001, the ATSB approved America West's loan guarantee application. As a result, on 18 January 2002, the OMB apportioned $172 million "to support the subsidy cost associated with the loan guarantee."[8] Later that same day, the ATSB signed the loan guarantee, which created a legal obligation for purposes of the ADA.[9] It was not until 15 May 2002, however, that the President transmitted the required request to Congress, designating the amount as an "emergency requirement," which meant that there was no budget authority available for apportionment and obligation. As the GAO stated, "[e]ven though the [Stabilization Act] envisions no further congressional action in response to the President's request, the availability of the budget authority provided in the Act is expressly contingent upon the transmission of the request."[10]

Citing the ADA's provisions at 31 U.S.C. § 1341,[11] the GAO found that when the OMB apportioned the $172 million without first ensuring that the President submitted the required request, it improperly authorized the obligation of funds that were not yet available. The ATSB, relying on the OMB's improper apportionment, also violated the ADA when it obligated funds before they were available, which in turn resulted in an obligation in excess of available amounts.[12]

This case highlights the need for agencies to ensure that they obtain all necessary approvals and notifications before they authorize or obligate appropriated funds. Quoting language from the ATSB's 25 June 2002 report of the ADA violation, the GAO stated that "[b]oth OMB and [the ATSB] erroneously assumed that all necessary steps to make the funds available had been completed."[13] To prevent similar occurrences in the future, the ATSB stated that it would "include a copy of the executed presidential emergency designation letter"[14]—general guidance that all agencies should follow.

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1. Hon. Bill Young, Comp. Gen. B-290600, July 10, 2002.

2. The ATSB reviews and approves air passenger carriers' applications for loan guarantees. Members of ATSB include the Secretary of Transportation, the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, and the Comptroller General, who is a nonvoting member, or their designees. *Id.* at 1 (citing the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 102(b), 115 Stat. 230, 231 (2001)).

3. *See* 31 U.S.C. §§ 1341(a), 1512(1), 1523(b) (2000).

4. Pub. L. No. 107-42, 115 Stat. 230 (2001).

5. *Hon. Bill Young*, Comp. Gen. B-290600, at 1-2 (citing Pub. L. No. 107-42, § 101(a)(1), 115 Stat. 230 (2001)).

6. *See* 2 U.S.C. § 901(e) (2000).

7. *Hon. Bill Young*, Comp. Gen. B-290600, at 2 (quoting Pub. L. No. 107-42, § 101(b), 115 Stat. 230 (2002)).

8. *Id.* at 2 n.2.

9. *Id.* (citing 2 U.S.C. § 661c(d)(1)).

10. *Id*. at 2.

11. *Id.* at 3 (noting that the relevant ADA provision "prohibits both the making or authorizing of obligations or expenditures in advance of, or in excess of, available appropriations").

12. *Id*. at 3.

13. *Id*.

14. *Id*.

Authority and the Right "Color of Money"

The GAO provided a good review of the relationship between the Purpose Statute[15] and the ADA in a letter to the Chairman of the House Committee on Government Reform.[16] The GAO found that the Fish and Wildlife Services (FWS) violated provisions of both laws when it contracted for legal services from private law firms without proper authority, incurring and paying $155,000 from the FWS resource management fund, a general appropriation that provided for the "necessary expenses" of the FWS.[17]

Examining the purpose issue first, the GAO found that the resource management appropriation was not available for legal services. While acknowledging that the resource management appropriation provided for the "necessary expenses" of the FWS,[18] the GAO noted that the Department of Interior Solicitor's Office was "solely responsible for the legal work" of the entire Department, to include the FWS, and received an appropriation each year to fund such work.[19] The GAO reiterated the well-settled rule that "even an expenditure which may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation."[20] Given the exclusive responsibility, mission, and appropriations of the Solicitor's Office, the legal costs in question were not a "necessary expense" of the FWS's resource management appropriation. The FWS thus violated the Purpose Statute when it spent its funds on private legal services.[21]

The GAO next addressed whether the FWS's actions also violated the ADA. Even though the FWS had terminated the contracts in question because the FWS "had no appropriation available for legal work," the GAO quickly determined that the FWS "incurred obligations and made payments of $155,000 in excess of available appropriations."[22] As such, the GAO concluded, the FWS's actions violated the ADA's provision at 31 U.S.C. § 1341(a), which prohibits incurring obligations in excess or advance of appropriations.[23]

"Open-Ended" Indemnification Clauses Still Contravene the ADA

The U.S. Court of Federal Claims (COFC) also had the opportunity to address the ADA this past year in a decision that demonstrated once again that the courts disfavor "open-ended" indemnification clauses.[24] In *Union Pacific Railroad Corp. v. United States*,[25] a claim arose out of a 1970 Lead Track Agreement (LTA) between the General Services Administration (GSA) and the Union Pacific Railroad (Union Pacific) that granted Union Pacific an easement over certain railroad tracks which the GSA owned. Under the terms of the LTA, the GSA agreed to maintain the tracks. Additionally, the LTA included a general indemnification provision that stated: "The GSA will indemnify the Railroads to the extent permitted by the Federal Tort Claims Act, against claims of third persons arising from the negligence or misconduct of employees of the United States of America."[26]

In September 1998, a gap in the lead track caused a derailment, which injured a Union Pacific employee. The employee sued Union Pacific and the GSA. After settling the employee's claim, Union Pacific sought to enforce the LTA's indemnification provision against the GSA.[27]

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15. *See* 31 U.S.C. § 1301(a) (2000).

16. Unauthorized Legal Services Contracts Improperly Charged to Resource Management Appropriation, B-290005, 2002 U.S. Comp. Gen. LEXIS 150 (July 1, 2002).

17. *Id*. at *2-3.

18. *Id*. at *7 (citing Pub. L. No. 106-291, 114 Stat. 922, 926 (2000)).

19. *Id*. at *2-3 (referencing 43 U.S.C. § 1455 (2000) and a Department of Interior manual).

20. *Id*. at *7 (citing Honorable Bill Alexander, B-213137, 1984 U.S. Comp. Gen. LEXIS 972 (June 22, 1984); Decision of the General Counsel, B-289209, 2002 Comp. Gen. LEXIS 145 (May 31, 2002); Decision of the Comptroller General, B-139510, 1959 U.S. Comp. Gen. LEXIS 2385 (May 13, 1959)).

21. *Id*.

22. *Id*.

23. *Id*.

24. *See, e.g.*, Hercules, Inc. v. United States, 516 U.S. 417 (1996); Jarvis v. United States, 45 Fed. Cl. 19 (1999). The GAO has also long held a similar view. *See generally* U.S. Park Police Indemnification Agreement, 1991 Comp. Gen. 1070 (1991); Assumption by Government of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361, 83-1 CPD ¶ 501.

25. 52 Fed. Cl. 730 (2002).

26. *Id*. at 731.

Moving to dismiss for failure to state a claim, the government argued that the LTA's indemnification provision was an "open-ended" and unenforceable clause under the ADA provisions at 31 U.S.C. § 1341(a)(1). More specifically, the government contended that because no appropriation specifically "earmarked" funds to cover the potential costs of the indemnification clause under the LTA, the provision violated the ADA.[28]

Noting that the government failed to cite authority for its proposition that an appropriation must "earmark" funds for indemnification clauses, the COFC pointed out that Congress had appropriated funds to the GSA for the "necessary expenses" related to "property management," both at the time the parties executed the LTA and at the time the employee's claim arose.[29] Nevertheless, the court agreed with the government that the indemnification provision here was simply too "open-ended, as to contravene the [ADA]."[30]

In determining whether the LTA's indemnification provision violated the ADA, the COFC analyzed whether the obligation was "quantifiable such that it is possible to ascertain whether existing appropriations could cover the liability."[31] Ultimately, the court decided that the indemnification clause did not meet this test because it was "impossible to predict the dollar amount of tort claims to which GSA would be subject."[32]

While the court sided with the government and granted its motion to dismiss, the COFC's ruling held open the possibility of a recovery by Union Pacific. First, the court noted that contract reformation was an available remedy if Union Pacific could demonstrate that "the contract terms reflect a mutual mistake of material fact, resulting in a contract which does not faithfully embody the parties' actual intent."[33] Although the COFC expressed no opinion about the likelihood that Union Pacific could succeed in such a course, it granted Union Pacific leave to seek reformation of the indemnification clause to bring it "within the realm of a definite obligation."[34] The COFC also noted that while Union Pacific's claim was based on the LTA's indemnification clause, "if plaintiff can establish that the settlement paid to its employee was the direct and foreseeable consequence of GSA's breach of some other contractual duty, plaintiff may seek recovery independent of GSA's obligations" under the agreement's indemnification clause.[35] Award on this basis would not contravene the ADA because the "Judgment Fund"[36] provides funds from which courts and boards may order payments.[37] Major Huyser.

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27. *Id*. The employee filed suit in federal district court and Union Pacific cross-claimed against the GSA for indemnification. Based on the parties' agreement that jurisdiction over the LTA indemnification clause lay with COFC, the federal district court dismissed Union Pacific's cross-claim. *Id.*

28. *Id*. at 732.

29. *Id*. at 733. Congress had appropriated $307 million to the GSA for such purposes in Fiscal Year (FY) 1970, and had similarly appropriated approximately $464 million to the GSA in FY 2001. *Id*. (citing Pub. L. No. 91-126, 83 Stat. 221, 224 (1969); Pub. L. No. 106-554, 114 Stat. 2763A-141 (2000)).

30. *Id*. at 733-34.

31. *Id*. at 734.

32. *Id*. The court cited two cases where the court and the GAO, respectively, had found otherwise: *National Railroad Passenger Corp. v. United States*, 3 Cl. Ct. 516 (1983) (holding that a clause providing for complete indemnification within the insurance deductible limits was not an open-ended provision), and *Honorable Howard M. Metzenbaum*, 63 Comp. Gen. 145, 148 (1984) (finding the agency's right to terminate the contract limited the government's liability under an indemnification clause such that the provision was not open-ended). *Id.*

33. *Union Pacific*, 52 Fed. Cl. at 735 (citing Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20, 41-42 (2000)).

34. *Id*. at 735. Union Pacific proposed reforming the applicable provision to specify that the government's liability would not exceed available appropriations, and that nothing in the contract would be construed as a promise that Congress would appropriate sufficient funds to meet any deficiencies. *Id*. at 734-35.

35. *Id*. at 733.

36. 31 U.S.C. § 1304(a) (2000).

37. *Union Pacific*, 52 Fed. Cl. at 733.

Construction Funding

DOD O&M Construction Ceiling Raised to $750,000 or $1.5 Million

In the fiscal year (FY) 2002 Department of Defense (DOD) Authorization Act, Congress raised the statutory thresholds for construction projects funded with Operations and Maintenance (O&M) funds from $500,000 to $750,000, and from $1 million to $1.5 million under the expanded life, health, and safety authority.[1] With the change, the secretary of a military department may use O&M funds to finance unspecified minor military construction projects costing less than $1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety;[2] if the project has any other purpose, the limit is $750,000. The statutory change became effective on 28 December 2001. Projects approved before that date continue to carry the $500,000 or $1 million limitation. The services will need to revise their regulations to reflect this statutory change.[3]

You Want It, You Pay For It

On 4 October 2002, the Army Deputy General Counsel (Ethics & Fiscal), Mr. Matt Reres, issued an opinion stating that the Army Corps of Engineers may not provide oversight on a State Department construction project in Afghanistan without being compensated for the service.[4] Mr. Reres cited a 1984 Comptroller General opinion stating that the "DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)."[5]

On 22 February 2000, Mr. Reres issued an opinion stating that O&M funds were the proper funding source for construction "clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations."[6] Within the Army, this memorandum has been interpreted as permitting the Army to use O&M funds to construct structures intended to meet a "temporary" need during combat or contingency operations, even where the costs exceed the statutory thresholds codified at 10 U.S.C. § 2805(c)(1).[7] In his 4 October 2002 memo, Mr. Reres cites to his 22 February 2000 opinion and notes that the construction envisioned by the State Department is neither "temporary" nor intended to "facilitate combat or contingency operations."[8]

You Built It, You Fix It

In addition to the new statutory ceilings for O&M construction projects, the Defense Authorization Act for FY 2002 allows the Army to experiment with the idea of making builders responsible for the upkeep of facilities they construct. This pilot program authorizes the Army to enter into three construction contracts per year for the next four years that require contractors to maintain the facilities during the first five years of operation.[9]

Given the amount of time it takes to plan and initiate government construction contracting, it will be several years before

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1. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 2801, 115 Stat. 1012, 1305 (2001) (codified at 10 U.S.C. § 2805(c)(1) (2000)).

2. The Authorization Act and its legislative history provide no guidance about what constitutes a "deficiency that threatens life, health, or safety." The DOD regulations and the Service regulations do not answer this question, either. At least one Army Major Command (MACOM), U.S. Army Forces Command (FORSCOM), has issued guidance that installations must document life, health, and safety deficiencies and verbally discuss proposed projects with FORSCOM prior to using this authority. *See* Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, to Subordinate Commanders, subject: Funding and Approval Authority (6 Mar. 2000). The Air Force requires prior approval by the Deputy Assistant Secretary of the Air Force (Installations) and congressional notification for projects solely to correct a life, health, or safety deficiency that exceed $500,000. *See* U.S. DEP'T OF AIR FORCE, INSTR. 32-1032, PLANNING AND PROGRAMMING APPROPRIATED FUND MAINTENANCE, REPAIR, AND CONSTRUCTION PROJECTS para. 5.1.2.1 (25 Sept. 2001).

3. At the time of publication, the Army had not updated its governing regulation to reflect the new statutory dollar limits. *See* U.S. DEP'T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF PUBLIC WORKS (15 Apr. 1997). Pursuant to a memorandum issued 18 January 2002 by the Army Assistant Chief of Staff for Installation Management, however, MACOM commanders may approve projects for up to the new statutory limits at their level. Memorandum, Army Assistant Chief of Staff for Installation Management, to MACOM Commanders, subject: MACOM Maintenance and Repair Project Approval Authority (18 Jan. 2002).

4. Memorandum, Army Deputy General Counsel (Ethics & Fiscal), to Under Secretary of the Army, subject: Availability of Defense Appropriations for Construction in Afghanistan (4 Oct. 2002) [hereinafter Reres Memo].

5. *See generally* Hon. Bill Alexander, 63 Comp. Gen. 422 (1984) (concluding that the Purpose Statute applies to OCONUS military exercises) and (discussing the DOD's failure to apply existing construction funding restrictions to construction projects undertaken during a series of joint and combined exercises in Honduras in the 1980s).

6. *See* Memorandum, Army Deputy General Counsel (Ethics & Fiscal), to Assistant Secretary of the Army (Financial Management), subject: Construction and Contingency Facility Requirements (22 Feb. 2000).

7. *See* 10 U.S.C. § 2805(c)(1) (2000).

8. See Reres Memo, *supra* note 4. Reading between the lines of the 4 October 2002 memo, it appears that the guidance Mr. Reres issued on 22 February 2000 is still alive and well.

the Army will be able to determine whether the program is a success. It is also uncertain how much of the anticipated expense for maintenance and repair will be added to a contract's price. Of course, this program will not affect the huge backlog for maintenance on existing facilities.[10]

President Signs Emergency Construction Authority

On 16 November 2001, President Bush invoked his authority under the National Emergencies Act[11] to authorize the Secretary of Defense (SECDEF) to use the emergency construction authority at 10 U.S.C. § 2808 to carry out emergency projects that are necessary to support the American response to the 11 September terrorist attacks.[12] This is only the second time a president has invoked this authority, the first being in response to the Iraqi invasion of Kuwait.[13]

Under this authority, the SECDEF may use unobligated military construction funds to carry out construction projects necessary to support the DOD's response to the national emergency.[14] Although the SECDEF must notify the appropriate committees of Congress,[15] there is no waiting period associated with the use of this authority.[16]

Army Creating Agency to Manage Facilities

The Army is creating a new 200-person organization to better manage its aging facilities. On 30 October 2001, the Secretary of the Army approved a plan calling for the formation of the Installation Management Agency (IMA), whose task will be to ensure better management and oversight of the Army's 166,000 buildings and facilities, many of which are falling apart from lack of maintenance. The Army will house the new organization at the Pentagon. The IMA will be the single Army organization devoted to installation management.[17]

As a result of what has been termed an "only fix what's broken"[18] attitude, the Army has spent only sixty to seventy percent of the amount needed to maintain and repair its rapidly-aging inventory of buildings adequately over the last two decades, according to Major General Robert Van Antwerp, the Assistant Army Chief of Staff for Installation Management. General Antwerp noted that the Army is trying to reverse this trend, setting aside $1.8 billion in the FY 2002 budget for building maintenance and repairs.[19]

Our Barracks Are Falling Apart

A recent General Accounting Office (GAO) report confirms what many in the DOD have known for some time—many of the barracks housing basic trainees need extensive repairs.[20] Specifically, the GAO observed that DOD barracks facilities are plagued with maintenance and repair problems, such as inadequate heating and air conditioning, inadequate ventilation, and plumbing-related problems.[21] Although base officials told the GAO that they were able to accomplish their overall mission in spite of the problems, they noted that the deficiencies

9. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 2814, 115 Stat. 1012, 2710 (2001).

10. *See* Rick Maze, *Builders Responsible for Upkeep Under Army Test*, FED. TIMES, Jan. 21, 2002.

11. 50 U.S.C. § 1631 (2000).

12. Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 9, 2001).

13. *See* Exec. Order No. 12,734, 55 Fed. Reg. 48,099 (Nov. 14, 1990).

14. The Secretary of a military department must forward construction requests to the SECDEF through the Under Secretary of Defense for Acquisition, Technology, and Logistics. U.S. DEP'T OF DEFENSE, DIR. 4270.36, DOD EMERGENCY, CONTINGENCY, AND OTHER UNPROGRAMMED CONSTRUCTION para. 4.2.3 (17 May 1997).

15. 10 U.S.C. § 2808(b) (2000). Before exercising this authority, the SECDEF must notify the appropriate committees of Congress of: (1) the decision to use this authority; and (2) the estimated cost of the construction projects. *Id.*

16. Given the fact Congress gave the DOD a $4 billion supplemental emergency appropriation almost immediately after the 11 September attack, there has been little need to tap into this authority. *See* 2001 Emergency Supplemental Act, Pub. L. No. 107-117, div. B, 115 Stat. 2230 (2002); *see also* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 151-53.

17. George Cahlink, *New Army Agency to Focus on Fixing Old Buildings*, GOV'T EXEC. COM., Apr. 23, 2002, *at* http://www.govexec.com/dailyfed/0402/042302g1.htm.

18. *Id.*

19. *Id.*

20. GEN. ACCT. OFF., REP. NO. GAO-02-782, *Defense Infrastructure: Most Recruit Training Barracks Have Significant Deficiencies* (June 13, 2002) [hereinafter GAO-02-782].

21. *Id.* at 1-2.

had an adverse impact on the quality of life for recruits and were a burden on trainers.[22]

To compile the report, the GAO visited all ten basic training installations (five Army, three Marine Corps, one Navy, and one Air Force), and after examining the condition of these facilities, concluded that most needed significant repairs in varying degrees. The GAO observed that most barracks' exteriors presented a good appearance. Most of the buildings' infrastructures, however, had repair problems that had persisted over time, primarily because of inadequate maintenance.[23]

Although inadequate spending is one obvious culprit, the GAO reserved judgment on whether Congress should allocate greater military construction for barracks repair, pending completion of its broader, ongoing examination of the physical condition and maintenance of all DOD facilities.[24]

GAO Busy on the Property Management Front

In addition to the barracks report, two other GAO reports requested by the House Subcommittee on Economic Development—Public Buildings, and Emergency Management—warrant passing mention.[25] In the first report, the Subcommittee tasked the GAO with examining whether district judges should be making greater use of shared courtroom facilities, considering the mounting cost of courthouse construction.[26] On 12 April 2002, the GAO reported that given the judiciary's belief "in the strong relationship between ensured courtroom availability and the administration of justice," significant courtroom sharing is unlikely in the foreseeable future.[27]

A few days after releasing its courtroom report, the GAO issued a second report citing serious deficiencies in the way the GSA and other government agencies manage federal property.[28] For about fifty years the GSA maintained the government's worldwide inventory of real property. This inventory covers over thirty federal agencies (including the DOD) and encompasses hundreds of thousands of real property assets worth billions of dollars.[29] In its investigation, the GAO found that the worldwide inventory for FY 2000 was not current for twelve of thirty-one real property-holding agencies, and that the data for nine agencies had not been updated since 1997.[30] The report notes that the GSA recognizes the problems and is taking action, such as developing a real-time database, to resolve these deficiencies.[31]

You Want Drachmas, I'll Give You Drachmas

The Armed Services Board of Contract Appeals (ASBCA) recently held that, absent a currency fluctuation clause, the U.S. Navy's denial of a claim resulting from currency fluctuations was not unreasonable. In Elter S.A.,[32] the appellant contracted with the Navy to build a bowling alley in Greece. The government awarded Elter a firm-fixed price contract for 567,000,000 Greek drachmas, which equaled about $2,362,500 at the time of the award.[33] Approximately half the contract costs consisted of procuring bowling center equipment from American firms. The contract did not have a currency fluctuation clause. At the time of the award, the exchange rate was about 240 drachmas per dollar.[34] By the beginning of contract performance, the drachma had plummeted to 323 per dollar. This left the appel-

22. *Id.* at 6-7.

23. *Id.* at 9-10. In general, the GAO found the conditions of the Air Force and Marine Corps San Diego barracks to be the best, while many Army and Navy barracks, along with the Marine Corps barracks at Parris Island, South Carolina, were among the worst. *Id.*

24. *Id.* at 1-2.

25. GEN. ACCT. OFF., REP. NO. GAO-02-341, *Courthouse Construction, Information on Courtroom Sharing* (April 12, 2002) [hereinafter GAO-02-341]; GEN. ACCT. OFF., REP. NO. GAO-02-342, *Federal Real Property, Better Government Wide Data Needed for Strategic Decision Making* (Apr. 16, 2002) [hereinafter GAO-02-342].

26. GAO-02-341, *supra* note 26 at 1, 3. The judiciary's most recent five-year construction plan calls for the construction of forty-five courthouses at a cost of approximately $2.6 billion. *Id.*

27. *Id.* at 2.

28. *See* GAO-02-342, *supra* note 26, at 2.

29. *Id.* at 2-3.

30. *Id.* at 3. Besides containing obsolete data, the GAO also determined that the inventory did not contain certain key information, such as data concerning space utilization, facility condition, security, and age. In the GAO's opinion, this data would be very useful for budgeting and strategic management of these assets. *Id.* at 5-7. The GAO cited several factors that contributed to the problems, including poor communication between the GSA and other federal agencies, technical difficulties with agency data, resource constraints, and the GSA's lack of specific statutory authority to require agencies to submit data. *Id.* at 3.

31. *Id.* at 31-32.

32. ASBCA Nos. 52792, 53082, 02-1 BCA ¶ 31,667.

33. *Id.* at 156,483.

lant unable to purchase the bowling equipment from the American suppliers.[35]

At the hearing, the appellant argued that the American government had reaped a windfall by paying with devalued drachmas and it was unconscionable to make Elter bear the loss resulting from the currency fluctuation.[36] The board rejected this argument. Specifically, the board noted that by signing the contract, Elter entered into a "conscious gamble with known risks."[37] Because the defense of unconscionability is not available where a loss results from an error in business judgment, the board denied Elter's appeal.[38] Major Dorn.

34. *Id.* at 156,484.

35. *Id.* at 156,484-85. By the time of contract performance, the award price devalued to the equivalent of $1,755,400, leaving Elter about $600,000 in the hole. *Id.*

36. *Id.* at 156,485.

37. *Id.* at 156,486.

38. *Id.*

Intragovernmental Acquisitions

GAO Report Scrutinizes Multi-Agency Contract Use

Last year's *Year in Review* reported that the Senate Governmental Affairs Committee directed the General Accounting Office (GAO) to study the government's use of multi-agency contracts, with a focus on fees charged by agencies.[1] A recently released GAO Report[2] validates the Committee's suspicions about the appropriateness and use of fees associated with multi-agency transactions.

The GAO focused on three issues of seven separate interagency contract programs.[3] The first issue was "whether the [interagency contract] programs reported total annual revenues in excess of costs (earnings or (losses)) in accordance with the Office of Management and Budget's (OMB) guidance on accounting for actual costs."[4] The second issue was "whether agencies with government-wide acquisition contracts (GWAC)[5] operate their programs consistent with OMB guidance to transfer earnings to the Treasury."[6] The third issue was "whether and to what extent fees charged by the General Services Administration's (GSA) Federal Supply Schedule program have generated revenues in excess of costs."[7]

The GAO found that some GWACs do not "identify or accurately report the full cost of providing interagency contract services."[8] Furthermore, some agencies used GWAC earnings to operate other programs under their revolving funds instead of transferring the earnings to the miscellaneous receipts account of the U.S. Treasury's General Fund.[9] Regarding GSA's Schedules Program,[10] the GAO concluded that the GSA overcharged schedules program customers by failing to "adjust their fees" downward, despite hefty earnings attributable to information technology sales.[11] The GAO recommends that GWACs comply with OMB guidance on fees, submit an annual GWAC financial report to the OMB, improve OMB-GWAC coordination on the issue of handling earnings and fees adjustment, and adjust fees related to the GSA's Schedules Program.[12]

Fees Are the Tip of the Iceberg

According to the OMB, problems with charging and handling fees are only two of several problems associated with intragovernmental acquisitions (IGAs).[13] The OMB report cites the "government's inability to account for *billions* of dollars of transactions between Federal Government entities."[14] The OMB continues that IGAs "are paper-based, which

1. *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 136-137; *see also Senate Committee Taps GAO to Study Multi-Agency Contracts*, 43 GOV'T CONTRACTOR 18, at 178 (May 2, 2001).

2. *See* GEN. ACCT. OFF., REP. NO. GAO-02-734, *Contract Management: Interagency Contract Program Fees Need More Oversight* (July 25, 2002) [hereinafter GAO-02-734].

3. *Id.* The seven agencies include five designated by the Office of Management and Budget (OMB) to operate information technology Government-Wide Acquisition Contracts, the Interior Department's franchise fund pilot program, and the General Services Administration's schedules program. *See Contract Management: GAO Finds Interagency Contract Services Fees Exceeds Costs*, 78 BNA FED. CONT. REP. 16, at 276 (Sept. 10, 2002).

4. *See* GAO-02-734, *supra* note 2, at 1.

5. *Id*. at 4. The report describes the origin, function and logistics of GWACs as follows:

> The Clinger Cohen Act . . . authorized creation of GWACs, which are typically multiple-award contracts for information technology that allow an indefinite quantity of goods or services (within specified limits) to be furnished during a fixed period, with deliveries scheduled through orders with the contractor. The providing agency awards the contract, and other agencies order from it.

Id. (citing Clinger-Cohen Act, 40 U.S.C. § 1401 (2000); 41 U.S.C. § 251(2000)).

6. *Id*.

7. *Id*. at 1-2.

8. *Id*. at 3. Performing agencies should charge fees to ordering agencies based on direct and indirect costs associated with filling the order. The failure to document these costs adequately begs the question of whether the fees are inflated or deflated. The OMB was unaware that agencies were not following its guidance because agencies were not required to file annual reports. *Id*.

9. *Id*.

10. "The schedules program offers a large group of commercial products and services ranging from office supplies to information technology services." *Id*. at 4.

11. *Id*. at 3. The GSA is now considering options for adjusting the fees and "plans to discuss the issue with the OMB in the development of the President's fiscal year 2004 budget request." *Id*. at 4.

12. *Id*. at 14-15.

13. *See* OFFICE OF MGMT. AND BUDGET, FEDERAL FIN. MGMT. REP., *$20 Billion Erroneously Paid by Federal Government in "01"* (May 1, 2002), *available at* http://www.omb.gov/financial/2002/report_pdf.

increases the risk of errors, omissions, and discrepancies" and that "the lack of standardization [between the performing and ordering agencies] makes it practically impossible to verify that both parties to the business transaction have captured it correctly."[15]

The OMB Report refers to "creat[ing] a gateway and clearing house to implement E-Government between Federal agencies."[16] This concept should come to fruition soon. On 15 February 2002, the government issued a proposed rule that would create a new FAR subpart designed to make it easier for federal agencies to monitor and cross-reference IGAs through a database.[17] In addition to providing an Internet address to access the database, the new subpart would require contracting activities "to enter information into the database by a specific date on all existing contracts and other procurement instruments intended for multi-agency use."[18] Major Modeszto.

14. *Id*. at 18 (emphasis added).

15. *Id*.

16. *Id*. at 19.

17. Federal Acquisition Regulation; Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency, 67 Fed. Reg. 7255 (proposed Feb. 15, 2002) (to be codified at 48 C.F.R. pt. 5).

18. *Id*. This requirement would include all existing contracts and new contracts within ten days of award. *Id.*

Revolving Funds

Illegally Parked

Generally, the Economy Act[1] requires agencies to deobligate funds for incomplete or unperformed orders at the end of the fiscal year. Acquisitions in revolving funds may cross fiscal years if a bona fide need exists, and if the need is identified at the time the funds are obligated.[2] The Department of Defense (DOD) Office of the Inspector General (IG) recently issued a report illustrating how funds "parked" in a revolving fund with an unspecific contract or task order attached may violate the bona-fide needs rule and the Anti-Deficiency Act.[3] The DOD IG Report instructs agencies to identify their bona fide needs clearly for revolving fund acquisitions crossing fiscal years.[4]

The DOD IG Report recommended that the "Under Secretary of Defense (Comptroller) issue fiscal guidance on the use of the General Services Administration Federal System Integration and Management Center (GSA FEDSIM) Information Technology Fund (IT fund)."[5] The U.S. Army Claims Service (USARCS) issued Military Interdepartmental Purchase Requests (MIPR) to the GSA to procure information technology support services and products from September 1997 through September 2000.[6] The USARCS issued the GSA about $8.5 million at the end of each fiscal year.[7] "Although USARCS could technically obligate funds at the end of a fiscal year"[8] if the obligation is based on a valid need in the fiscal year of the appropriation, the IG determined that the USARCS failed to establish that a bona fide need existed at the time it provided funds to the GSA.[9]

The IG stated that the USARCS's inadequate planning and unspecified MIPRs "indicated the requirements existed in the future, not the year the funds were appropriated."[10] He added, "according to 31 U.S.C. [§] 1501(a)(1), agencies must have documented evidence of a binding agreement for specific goods or services to record valid obligations in financial records."[11] The MIPR may establish an agreement, but the IG believed that "the MIPRs were so unspecific as to be ineffective in establishing an obligation for a bona fide need in the fiscal year in question" and constituted "a mechanism to 'park' funds."[12] The USARCS alleged that the GSA could retain funds in its IT fund for up to five years.[13] The GSA IG indicated, however, that this practice failed to comply with GSA policy.[14] The IG also found that the USARCS's failure to plan a four-phased software development project adequately "resulted in the use of funds from the wrong fiscal year."[15] Ultimately, the IG recommended that the Army investigate potential Anti-Deficiency Act violations for obligating funds without establishing a bona fide need and using funds from the wrong year.[16]

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1. 31 U.S.C. § 1535 (2000).

2. Continued Availability of Expired Appropriations for Additional Project Phases, B-286929, 2001 U.S. Comp. Gen. LEXIS 211 (Apr. 25, 2001).

3. U.S. Dep't of Defense, Office of the Inspector General, Rep. No. D-2002-109, *Army Claims Service Military Interdepartmental Purchase Requests* (June 19, 2002) [hereinafter DOD IG Report].

4. *Id*. at 8.

5. *Id.* at 12. The GSA IT fund is a revolving fund.

6. *Id* at 1. The USARCS's seven approved projects "covered the following areas: GSA administrative costs; hardware and software acquisitions; hardware, software, and network acquisitions; European software development; torts and affirmative claims software development, hardware, and software acquisition support; and personnel claims software development." *Id.* at 5.

7. *Id.* at 2. The USARCS issued a total of about $11.6 million to the GSA during fiscal years (FY) 1997 to 2000. "About $8.5 million were [sic] issued during the last three days of FY 97 to FY 00." *Id.*

8. *Id*. at 7.

9. *Id*. at 8.

10. *Id.*

11. *Id.*

12. *Id.* The IG concluded, "USARCS had about $2.8 million dollars 'banked' in the GSA IT fund to meet future requirements." *Id.* at 4.

13. *Id.* at 5.

14. *Id.* at 7; *see* General Servs. Admin., Office of the Inspector General, Rep. No. A001031 (Feb. 22, 2001), *Review of Center for Information Security Services* .

15. *See* DOD IG Report, *supra* note 3, at 8.

16. *Id*. at 9.

On 9 April 2002, the Air Force Headquarters Materiel Command issued a memorandum detailing the funding rules for ordering information technology from the GSA FEDSIM. The memorandum stated that the "remaining uncommitted funds must be deobligated from the IT fund if no further need for the requirement exists or the requirements are not within the scope of the original order."[17] The message is that agencies must clearly define requirements that cross fiscal years at the time of the obligation, or risk losing the funds to the general treasury at the end of the fiscal year. Major Davis.

17. Memorandum, Headquarters, Air Force Materiel Command, to ALHQCTR/FM/SC, subject: Funding Rules for Ordering Information Technology Services from General Services Administration (GSA) (9 Apr. 2002).

Environmental Funding

Wartime Rubber Producer Not Exposed to CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] gives the Environmental Protection Agency (EPA) broad authority to provide for remediation of sites contaminated by hazardous waste. The EPA can either conduct the cleanup itself or direct "responsible" parties to conduct it.[2] CERCLA allows responsible parties, including the government, to seek contributions from other alleged responsible parties.[3] This was the situation in *Cadillac Fairview/California Inc. v. Dow Chemical Co*.,[4] a case in which the federal government sought shared liability costs from Dow Chemical Co. (Dow) for cleanup costs associated with a synthetic rubber facility in Torrance, California.[5]

The rubber facility, vitally important to the nation's defense during World War II,[6] included a Dow-operated "styrene" plant.[7] Dow built the facility, but the government owned the land, plant, raw materials, by-products, wastes, and rubber. The "Rubber Reserve," through which the government entered into agreements with private companies, exercised "unrestricted control" of all activities at the site. The contract required Dow to "carry out the orders, instructions, and specifications of [the] Rubber Reserve."[8] Dow was responsible for waste disposal, but was entitled to compensation for the task. The contract also included a "broad 'hold harmless'" agreement, which stated that Dow "shall in no event be liable for, but shall be held harmless by [the United States] against, any damage to or destruction of property . . . in any manner, arising out of or in connection with the work hereunder."[9] Furthermore, the government made a policy decision not to divert scarce resources to stop pollution to the soil and water, although the government knew it was occurring.[10]

Ownership of the facility eventually passed to Cadillac Fairview, which along with Shell Oil Company,[11] Dow, and the federal government, was a party to a CERCLA lawsuit to determine each party's share of the liability remediation expense. The U.S. Court of Appeals for the Ninth Circuit (Court of Appeals) found the government's efforts to avoid payment "shocking" and affirmed a district court decision holding that placed all of the remediation expense on the United States.[12] The Court of Appeals rejected the government's contention that Dow's discretion in the waste disposal process made it partially liable. The court noted that the government "knew just what Dow was doing" with the waste and made a decision to do nothing about it.[13] Furthermore, the court noted the "hold harmless" clause in the contract and held that only "highly unusual facts" would allow it to impose costs on Dow.[14] The Court of Appeals gave no weight to the government's argument that the court should consider the benefits to the rubber companies for their participation.[15] Instead, the court observed that "[r]eimbursement is, of course, no benefit at all, merely a squaring up."[16] The court's strong language and bewilderment with the government's theory may discourage future attempts

1. 42 U.S.C. §§ 9601-9675 (2000).

2. *Id*. § 9607.

3. *Id*. § 9613(f)(1).

4. 299 F.3d 1019 (9th Cir. 2002).

5. *Id*. at 1023-24.

6. Before the construction of the facility in 1942, President Roosevelt established the "Baruch Committee" to investigate why the United States was unprepared to meet its critical demand. The committee reported that "90% of our [nation's] prewar sources of natural rubber had been lost to Japan, and we had no substantial synthetic rubber industry." *Id*. at 1022.

7. *Id*. at 1021-23. In 1942, Dow was the only commercial producer of Styrene, a necessary component of synthetic rubber. *Id*.

8. *Id*. Dow's role was "more nearly analogous to a soldier's than to a commercial tenant's." *Id*. at 1027.

9. *Id*. at 1023.

10. *Id*.

11. *Id*. Shell owned the site from 1955 to 1972. *Id.*

12. *Id*. at 1029.

13. *Id*. at 1026.

14. *Id*.

15. *Id*. at 1025.

16. *Id*. at 1026.

to pursue cleanup costs from private companies under similar circumstances.[17]

Reports Unveil DOD's Cleanup Cost Difficulties

Two General Accounting Office (GAO) Reports revealed the Defense Department's (DOD) continuing difficulties in reporting costs for site cleanup costs. *GAO-02-103*[18] focused on fiscal years 1998 and 1999 at twelve cleanup sites and concluded that DOD guidance does not provide sufficient detail to ensure the effective collection, verification, and reporting of data on cost recoveries.[19] The lack of guidance resulted in inflated, incorrect, and varied recovery cost methods throughout the DOD.[20] The GAO recommended that the Deputy Undersecretary of Defense for Installations and Environment "modify existing guidance in areas where it is silent or unclear and provide specific guidance" related to "cost sharing arrangements," the "costs of pursuing recovery," reporting "cumulative and fiscal year data," and "capturing and reporting amounts spent by non-DOD parties under cost sharing arrangements."[21]

GAO-02-117[22] made similar conclusions after visiting 221 sites on six installations—two each from the Army, Air Force, and Navy. The good news is that the GAO found the "environmental site records maintained for regulatory purposes at the individual installations to be reasonably accurate."[23] The bad news is that "installation property records used to maintain accountability over related land, buildings, and structures were significantly flawed."[24] The result is incomplete data from which to forecast cleanup costs, presently calculated as $259.3 million.[25] The GAO also recommended that the Deputy Under Secretary of Defense for Installations and Environment ensure the reconciliation of environmental site and real property records. Finally, the GAO recommended that the DOD Comptroller revise the DOD Financial Management Regulation to reflect the "expanded definition of cleanup," and provide guidance to capture all cleanup costs accurately.[26]

The recommendations in *GAO-02-103* and *GAO-02-117* may assist the DOD to develop strategies that characterize and identify cleanup costs on active military installations. Two other GAO reports, however, illustrate the challenges of identifying and quantifying costs on "formerly used" defense sites. Although one report, *GAO-02-423*,[27] focuses on a specific geographical area, Guam, *GAO-02-658*[28] illustrates that the Army Corps of Engineers (COE) has systemic problems with the methods it uses to identify cleanup sites and estimate cleanup costs on formerly used defense sites (FUDS). The GAO concluded that the COE did "not have a sound basis for determining that about 38 percent, or 1468, of 3840 [FUDS] do not need further study or cleanup action."[29] Major Modeszto.

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17. *Id*. at 1029. At one point during oral argument, the court expressed amazement when the government admitted that as a "theoretical matter," American soldiers who fought the Japanese on the Aleutian Islands could be liable to pay costs for lead contamination to the ground. *Id*.

18. GEN. ACCT. OFF., REP. NO. GAO-02-103, *Defense Environmental Issues: Improved Guidance Needed for Reporting on Recovered Cleanup Costs* (Oct. 26, 2001) [hereinafter GAO-02-103]. A "site" is described as a "place on an installation where hazardous materials were released into the environment." *Id.* at 1.

19. *Id*. at 4.

20. *Id*. at 6.

21. *Id*. at 8-9.

22. GEN. ACCT. OFF., REP. NO. GAO-02-117, *Environmental Liabilities: Cleanup Costs From Certain DOD Operations Are Not Being Reported* (Dec. 14, 2001) [hereinafter GAO-02-117].

23. *Id.* at 4. "Cleanup costs are those associated with hazardous waste removal, containment, or disposal and include contamination, decommissioning, site restoration, site monitoring, closure, and postclosure costs." *Id*. at 1 n.1.

24. *Id*. at 4.

25. *Id*. at 41.

26. *Id*. at 22.

27. GEN. ACCT. OFF., REP. NO. GAO-02-423, *Environmental Cleanup: Better Communication Needed for Dealing with Formerly Used Defense Sites in Guam* (Apr. 11, 2002) (recommending several measures to improve coordination between EPA regulators and Army officials on Guam regarding contamination on formerly used defense sites).

28. GEN. ACCT. OFF., REP. NO. GAO-02-658, *Environmental Contamination: Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup* (Aug. 23, 2002).

29. *Id*. at 4.

Liability of Accountable Officers

For the Love of Pets

In *Relief of Accountable Officers—American Embassy, Brazzaville, Republic of Congo*,[1] the General Accounting Office (GAO) determined that the U.S. Department of State provided insufficient information to either grant or deny relief from liability for a U.S. Embassy employee. In 1991, widespread violence required the U.S. Embassy staff in Kinshasa, Zaire, to evacuate to the embassy in Brazzaville, Congo. Ms. Slocum, the administrative officer for the Brazzaville Embassy, denied requests from Kinshasa embassy personnel to evacuate their pets, and she informed them that such expenses were personal and not payable with government funds. Some unknown person evacuated the pets on Air Afrique, but no one could establish who authorized or arranged the evacuation. Air Afrique later billed the embassy employees for the pet evacuation.[2]

In June 1993, violence again required the Brazzaville Embassy personnel to evacuate. Air Afrique demanded $27,634.07 for the 1991 Kinshaza pet evacuation before it would agree to evacuate the embassy personnel. Ms. Slocum relied on Kinshasa embassy staff instructions and paid Air Afrique from Kinshasa's Suspense Deposit Abroad (SDA) account. The SDA account is "a fund maintained at overseas posts from which payments for personal expenses can be made on behalf of and as directed by" embassy employees and other authorized individuals.[3] Normally, embassy personnel deposit funds into the account before any withdrawals, but there was no record of any deposits into the SDA account before Ms. Slocum's payment.[4] The Department of State Chairperson for the Committee of Inquiry into Fiscal Irregularities (Committee) requested that the GAO relieve Ms. Slocum from liability.[5]

The GAO is authorized to relieve certifying officers of liability for the loss of public money when "the certification is based on official records and the official did not know and by reasonable diligence and inquiry could not have discovered the correct information."[6] The Committee, however, failed to provide the information needed to grant or deny this relief.[7] The GAO acknowledged the "less than ideal" circumstances surrounding the payment, but required more specific information to "evaluate the circumstances of the Air Afrique payment, the liabilities of the parties involved, and whether any relief is warranted."[8] Major Davis.

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1. Letter from the U.S. General Accounting Office to Mr. Ronald L. Miller, Chairperson, Committee of Inquiry into Fiscal Irregularities, U.S. Department of State (May 29, 2002) [hereinafter GAO Letter] (on file with author). Zaire is now known as the Democratic Republic of the Congo. CountryWatch.com, *Congo (DRC)* (Jan. 10, 2003), *at* http://www.countrywatch.com/cw_country.asp?vcountry=40.

2. GAO Letter, *supra* note 1, at 1-2. Ms. Slocum learned about the pet evacuation from a cable communication indicating that Embassy personnel were billed for pet evacuations.

3. *Id*. at 2.

4. *Id*. Embassy employees would deposit money into the fund "from which payments for personal expenses could be made on behalf of and as directed by the depositors." *Id.*

5. *Id*. at 1.

6. *Id*. at 2 (citing 31 U.S.C. § 3528(b)(1)(A) (2002)).

7. Specifically, the GAO considered the following factors:

> the authority under which the Embassy holds and administers the SDA account; the accountability guidance or procedures regarding the administration of the SDA account; the role/identity of the Kinshasa Embassy official who approved the payment and the State Department's view of that individuals responsibility in the matter; the specific source of the payment and the role/identity of the disbursing officer who paid Air Afrique, and the State Department's view of that individual's responsibility in this matter.

Id. at 4-5.

8. *Id*. at 3. The GAO indicated that other personnel, including the disbursing officer, could be liable for the improper payment. *Id.* at 3.

Appendix A

Department of Defense (DOD) Legislation for Fiscal Year 2003

As in past issues, this *Year in Review* examines some of the more significant provisions in the annual Department of Defense (DOD) legislative acts that impact the fields of government contracting and fiscal law. The bulk of this article addresses the annual DOD Authorization and Appropriations Acts,[1] but in the aftermath of 11 September 2001 and during a continuing global War on Terrorism, Congress passed additional legislation to address increased funding needs and security concerns. This year's summary provides an overview of some of those acts—the Supplemental Appropriations Act,[2] the Security Assistance Act,[3] the Homeland Security Act,[4] and the Afghanistan Freedom Support Act[5]—and discusses certain provisions that could affect the DOD and the government contracting and fiscal law community.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT FOR 2003

After what one article deemed a "tortured and dysfunctional appropriations season,"[6] President Bush signed the fiscal year (FY) 2003 Department of Defense Appropriations Act (Appropriations Act) on 23 October 2002.[7] The Appropriations Act appropriated about $355.1 billion to the DOD[8]—about $20.8 billion more than Congress appropriated for FY 2002, but about $11.6 billion less than what President Bush requested.[9]

Military Personnel

Department of the Army

Congress appropriated about $26.85 billion for "Military Personnel, Army,"[10] an increase of about $3 billion over last year's appropriation.[11] This amount is sufficient to continue to support an active force of 480,000 soldiers.[12]

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1. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 401, 116 Stat. 2458, 2554 (2002) [hereinafter 2003 DOD Authorization Act]; Dep't of Defense Appropriations Act, 2003, Pub. L. No. 107-248, 116 Stat. 1519 (2002) [hereinafter 2003 DOD Appropriations Act].

2. Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States, 2002, Pub. L. No. 107-206, 116 Stat. 820 [hereinafter Supplemental Appropriations Act].

3. Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, div. B, 116 Stat. 1350, 1425 (2002) [hereinafter 2003 FRAA].

4. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 296 [hereinafter HSA].

5. Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327, 116 Stat. 2797 [hereinafter AFSA].

6. *Congress Faces Crucial Week on Spending Bills*, GOVEXEC.COM (Sept. 23, 2002), *at* http://207.27.3.29/dailyfed/0902/092302cdam1.htm.

7. 2003 DOD Appropriations Act, Pub. L. No. 107-248, 116 Stat. 1519 (2002). The joint conference report accompanying the Appropriations Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate reports, unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 107-732, at 61 (2002); *see also* H.R. REP. NO. 107-532 (2002); S. REP. NO. 107-213 (2002).

8. H.R. CONF. REP. NO. 107-732, at 331 (2002). The conference report breaks down the appropriations as follows:

> Military Personnel—$93,577,552,000;
> Operations and Maintenance—$114,780,258,000;
> Procurement—$71,548,217,000;
> Research, Development, Test, and Evaluation—$58,608,506,000;
> Revolving and Management Tools—$2,727,585,000;
> Other DOD Programs—$17,372,813,000.

Id. at 63, 89, 139, 228, 389-90.

9. *Id*. at 331.

10. 2003 DOD Appropriations Act, tit. I, 116 Stat. 1519 (2002). Congress also appropriated about $3.4 billion for "Reserve Personnel, Army," and about $5.1 billion for "National Guard Personnel, Army." *Id*. These amounts represent increases of about $800 million and $1 billion, respectively, over last year's appropriation. *See* 2002 Dep't of Defense Appropriations Act for Fiscal Year 2002, Pub. L. No. 107-117, div. A, tit. I, 115 Stat. 2230, 2231-32 [hereinafter 2002 DOD Appropriations Act].

Department of the Navy

Congress appropriated about $21.9 billion for "Military Personnel, Navy" and about $8.5 billion for "Military Personnel, Marine Corps,"[13] an increase of about $2.3 billion for the Navy and $1.2 billion for the Marine Corps over last year.[14] These amounts are sufficient to support an active force of 375,700 sailors and 175,000 marines.[15]

Department of the Air Force

Congress appropriated about $21.9 billion for "Military Personnel, Air Force," an increase of about $2.1 billion compared to last year.[16] This amount is sufficient to support an active force composed of 359,000 airmen.[17]

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."[18] 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.[19]

Overseas Contingency Operations Transfer Fund (OCOTF)

Congress appropriated $5 million for "expenses directly relating to Overseas Contingency Operations by U.S. military forces."[20] As in past years, funds appropriated to the OCOTF remain available until expended; however, the SECDEF may transfer them to the

11. *See* 2002 DOD Appropriations Act, div. A, tit. I, 115 Stat. at 2231-32.

12. *See* 116 Stat. at 2554.

13. 2003 DOD Appropriations Act tit. I. Congress also appropriated $1.9 billion for "Reserve Personnel, Navy," and $554 million for "Reserve Personnel, Marine Corps." *Id.* The Navy appropriation represents an increase of about $200 million and the Marine Corps appropriation a slight decrease—about $8 million—from last year. *See* 2002 DOD Appropriations Act, div. A, tit. I, 115 Stat. at 2231-32.

14. *See id*.

15. *See* 2003 DOD Authorization Act § 401. These figures represent a decrease of 300 sailors and an increase of 2400 marines compared to last year's end-strength numbers. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 401, 115 Stat. 1012, 1069 (2001) [hereinafter 2002 DOD Authorization Act].

16. 2003 DOD Appropriations Act tit. I. Congress also appropriated about $1.2 billion for "Reserve Personnel, Air Force," and $2.1 billion for "National Guard Personnel, Air Force." *Id*. These amounts represent increases of about $100 million and $300 million, respectively, compared to last year. 2002 DOD Appropriations Act, div. A., tit. I.

17. *See* 2003 DOD Authorization Act § 401. This figure represents an increase of 200 airmen from last year. *See* 2002 DOD Authorization Act, § 401.

18. 2003 DOD Appropriations Act tit. II. Congress capped this authority at $10,818,000 for the Army, $4,415,000 for the Navy, $7,902,000 for the Air Force, and $34,500,000 for the DOD. *Id.*; *see also* 10 U.S.C.S. § 127 (LEXIS 2003) (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"). Additionally, while recognizing that the practice of retaining a portion of operation and maintenance in reserve for emergency needs has some "utility," the conference report expressed "concern . . . with the recent growth in the amounts retained in management reserve funds." H.R. CONF. REP. NO. 107-732, at 90 (2002). Stating that the growth in such reserve funds "call[s] into question the budget justification process," the conference report directs limits on the amounts the service department chiefs and secretaries may hold in these reserve funds at $50,000,000 for the Army, Navy, and Air Force, and $10,000,000 for the Marines. *Id*.

19. 2003 DOD Appropriations Act tit. II (Operation and Maintenance, Defense-Wide); *see also* 10 U.S.C.S § 166a (LEXIS 2003) (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the CINC Initiative Fund to combatant commanders for specified purposes). The Appropriations Act also provides $4,675,000 "for expenses relating to certain classified activities." 2003 DOD Appropriations Act tit. II (Operation and Maintenance, Defense-Wide). The funds remain available until expended; the SECDEF may transfer such funds to O&M appropriations or to research, development, test, and evaluation (RDT&E) accounts. The $100,000 ceiling on investment items purchased with O&M funds does not apply under these circumstances. *Id.*; *cf. id*. § 8040.

20. 2003 DOD Appropriations Act tit. II (Overseas Contingency Operations Transfer Fund). This is a decrease of $45 million from last year and a significant decrease from the nearly $4 billion that Congress gave the DOD in fiscal year (FY) 2001. *See* 2002 DOD Appropriations Act, div. A, tit. II (Overseas Contingency Operations Transfer Fund); Department of Defense Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-259, 114 Stat. 656, 661 (2001). The reduction reflects Congress's belief that it should fund operations in such places as the Balkans and in Southwest Asia, previously funded through the OCOTF, through the services' O&M and military personnel appropriations. *See* H.R. CONF. REP. NO. 107-350, at 209 (2001).

military personnel accounts; O&M accounts; the Defense Health Program appropriation; procurement accounts; research, development, test, and evaluation (RDT&E) accounts; or working capital funds.[21] The transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is also prohibited, and the SECDEF must submit a report each fiscal quarter detailing certain transfers to the congressional appropriations committees.[22]

Overseas Humanitarian, Disaster, and Civic Aid

Congress appropriated $58.4 million for the DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.[23] These funds are available until 30 September 2004.[24]

Former Soviet Union Threat Reduction

Congress appropriated $416.7 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. Congress again included authority to use these funds for "defense and military contacts."[25] These funds are available until 30 September 2005.[26]

Drug Interdiction and Counter-Drug Activities

The Department of Defense received $882 million for drug interdiction and counter-drug activities.[27]

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.[28]

Multi-Year Procurement Authority

Congress again prohibited the service secretaries from awarding multi-year contracts that: (1) exceed $20 million for any one year of a contract; (2) provide for unfunded contingent liability that exceeds $20 million; or (3) are advance procurements which will lead to multi-year contracts in which procurement will exceed $20 million in any one year of a contract, unless the service secretary notifies Congress at least thirty days before award. Congress also continues to prohibit the service secretaries from awarding multi-year contracts for more than $500 million unless Congress specifically provided for the procurement in the Appropriations Act.[29] Congress specifically provided for three multi-year procurements in this year's Appropriations Act: the Air Force's procurement of C-130 aircraft; the Army's procurement under the Family of Medium Tactical Vehicles (FMVT); and the Navy and Marine Corps procurement of engines for the F/A-18E and F.[30]

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21. 2003 DOD Appropriations Act tit. II (Overseas Contingency Operations Transfer Fund).

22. *Id*. § 8130.

23. *Id*. tit. II (Overseas Humanitarian, Disaster, and Civic Aid). 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, 2547, 2551 (2000).

24. 2003 DOD Appropriations Act tit. II (Overseas Humanitarian, Disaster, and Civic Aid).

25. *Id*. tit. II (Former Soviet Union Threat Reduction).

26. *Id*.

27. *Id*. tit. VI (Drug Interdiction and Counter-Drug Activities, Defense).

28. *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*.

29. *Id*. § 8008. Congress continued the requirements for a present-value analysis to determine whether a multi-year contract will provide the government with the lowest total cost, as well as an advance notice at least ten days before terminating a multi-year procurement contract. *Id.*

Commercial Activities Studies

Under current law, if a DOD agency wishes to convert a function it currently performs in-house to contractor performance, the agency must first notify Congress of its intent and conduct a cost analysis to determine whether contractor performance will be cheaper.[31] In this year's Appropriations Act, Congress once again granted the DOD a waiver to the study requirement, permitting agencies to make direct conversions of their functions if the performance of those functions will go to: (1) a Javits-Wagner-O'Day (JWOD) Act[32] firm that employs severely handicapped or blind employees; or (2) a firm that is fifty-one percent under the control of an American Indian tribe or Native Hawaiian organization.[33] Congress also continued the prohibition on the use of funds to perform studies under *Office of Management and Budget* (*OMB*) *Circular A-76* 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.[34]

Military Installation Transfer Fund

Congress continued to authorize the SECDEF to enter into executive agreements that permit the DOD to deposit the funds it receives from North Atlantic Treaty Organization (NATO) member nations for the return of overseas military installations to those nations into a separate account. The DOD may use this money to build facilities which Congress has approved to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.[35]

Limit on Transfer of Defense Articles and Services

The Appropriations Act again prohibits the transfer of defense articles or services (other than intelligence services) to another nation or international organization during peacekeeping, peace enforcement, or humanitarian assistance operations, without advance congressional notification.[36]

Limitation on Training of Foreign Security Forces

Unless the SECDEF determines that a waiver is required, the DOD may not use funds available under the 2003 Appropriations Act to support training programs of foreign security forces units if "credible information" exists that the unit has committed a gross violation of human rights.[37]

Required Actions of DOD Chief Information Officer

No funds appropriated in the 2003 Appropriations Act are available for a mission-critical or mission-essential information technology system until the system is registered with the DOD Chief Information Officer (CIO).[38] For major automated information systems, the CIO must also certify that the system is compliant with the Clinger-Cohen Act of 1996[39] before Milestone A, B, or full-rate

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30. *Id.*; *cf. infra* notes 84-86.

31. 10 U.S.C.S. § 2461 (LEXIS 2003).

32. *See* 41 U.S.C.S. §§ 46-48c (LEXIS 2003).

33. 2003 DOD Appropriations Act § 8014.

34. *Id*. § 8022.

35. *Id*. § 8018.

36. *Id.* § 8066. This provision originally appeared in the Defense Appropriations Act for FY 1996, Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995).

37. 2003 DOD Appropriations Act § 8080. Congress has included this same provision in DOD appropriations acts since FY 1999. *See, e.g.*, Department of Defense Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998).

38. 2003 DOD Appropriations Act § 8088(a). The Department of Defense Appropriations Act for FY 2000 first required registration with the Chief Information Officer. Pub. L. No. 106-79, § 8121(a), 113 Stat. 1212, 1261 (1999).

39. Pub. L. No. 104-106, §§ 4001-4002, 110 Stat. 642 (1996) (codified in scattered sections of 10, 40, and 41 U.S.C.).

production approval.[40]

Matching Disbursements with Obligations

Section 8106 of the Defense Appropriations Act, 1997,[41] required the DOD, before making a disbursement for more than $500,000, to match that intended disbursement with an obligation. In this year's Appropriations Act, Congress extends that requirement to cover disbursements made in FY 2003.[42]

U.S.S. Greenville Claims

The Secretary of the Navy is again granted the authority to settle any admiralty claims arising from the collision between the *U.S.S. Greenville* and the *Ehime Maru*, regardless of their dollar amount.[43]

Funds for the War on Terrorism

The Appropriations Act specifies that of the O&M funds appropriated under Title II, not less than $1 billion is available for prosecuting the global War on Terrorism.[44]

Building and Maintaining Strong Families

The Appropriations Act gives the service secretaries the authority to use available FY 2003 departmental O&M funds to support chaplain-led programs that assist in building and maintaining strong families. Covered costs include "transportation, food, lodging, supplies, fees, and training materials for members of the Armed Forces and their family members while participating in such programs, including participation at retreats and conferences."[45]

Boeing Lease Program

Last year, Congress granted the Air Force authority to establish a multi-year pilot program to lease up to 100 Boeing 767s and four Boeing 737s.[46] In granting this authority to the Air Force, Congress also exempted the pilot program from the normal lease-versus-purchase analysis usually required in government contracting.[47] This year, Congress revised its guidance to permit the Air Force to make payments under the leasing program for up to a year in advance, and to allow the Air Force to make these payments from O&M, lease, or aircraft procurement funds available at the time of lease or when payment is due.[48]

F-22 Limitations

The 2003 Appropriations Act provides no funds for the acquisition of more than sixteen F-22 aircraft until the Undersecretary of Defense for Acquisition, Technology, and Logistics provides the appropriate congressional committees a formal risk assessment

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40. 2003 DOD Appropriations Act § 8088(c). The Undersecretary of Defense (Comptroller) must certify that the DOD is developing and managing the system in accordance with the DOD Financial Management Modernization Plan. *Id*. § 8088(b).

41. Pub. L. No. 104-208, § 8106, 110 Stat. 3009, 3111 (1996).

42. 2003 DOD Appropriations Act § 8098.

43. *Id*. § 8102 (indicating that the payment source will be O&M, Navy appropriations).

44. *Id*. § 8114.

45. *Id*. § 8116.

46. 2002 DOD Appropriations Act, § 8159.

47. *Id*. (exempting the program from 10 U.S.C. § 2401a (2000)).

48. *Id*. § 8117. For additional discussion of legislative provisions related to the Boeing Lease Program, see *infra* notes 72-73 and 87-88.

for increasing F-22 quantities and a certification that increasing these quantities in FY 2003 involves lower risk and lower total program costs than keeping the number at sixteen.[49]

Financing and Fielding of Key Army Capabilities

The Appropriations Act also directs the DOD and the Department of the Army to make budget and program plans to fully finance the Non-Line of Sight Objective Force cannon and resupply vehicle program, and to ensure that the Army fields the system by 2008.[50] To provide interim capability for light and medium forces before deployment of the Objective Force, the Appropriations Act further directs the Army to ensure that program and budget plans provide for the fielding of no fewer than six Stryker Brigade Combat Teams between 2003 and 2008.[51]

Government Purchase and Travel Cards

In response to reported abuses of the DOD government purchase card and government travel card, the Appropriations Act limits the total number of accounts for DOD purchase and travel cards to 1.5 million accounts during FY 2003. The Appropriations Act also requires the DOD to evaluate the creditworthiness of individuals before it issues them purchase or travel cards, and prohibits the DOD to issue cards to individuals it finds are not creditworthy. Additionally, the Appropriations Act requires the DOD to establish disciplinary guidelines and procedures for the "improper, fraudulent, or abusive use" of the cards.[52] The guidelines and procedures are to apply "uniformly among the Armed Forces and among the elements of the Department."[53]

SUPPLEMENTAL APPROPRIATIONS ACT FOR FURTHER RECOVERY FROM AND RESPONSE TO TERRORIST ATTACKS ON THE UNITED STATES, 2002

On 2 August 2002, President Bush signed the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States (Supplemental Appropriations Act).[54] The Supplemental Appropriations Act appropriated an additional $29 billion for homeland security and defense, as well as aid for relief efforts in New York City.[55] Interestingly, of the $29 billion in additional funding, Congress earmarked nearly $5 billion as emergency contingency funds, but required the President to either accept all of the contingent amounts within thirty days of the Supplemental Appropriations Act's enactment, or reject the funds entirely.[56] President Bush elected not to designate the entire contingent funds as "emergency," and thus rejected the additional $5 billion in funding.[57]

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49. 2003 DOD Appropriations Act § 8119. The Appropriations Act also provides no funds for the sale of the F-22 to foreign governments. *Id.* § 8077.

50. *Id.* § 8121. This system is seen as a lighter and more deployable alternative to the recently cancelled Crusader program. Global Security, *Objective Force Cannon, Non-Line-of-Sight (NLOS) Cannon* (Dec. 1, 2002), *at* http://www.globalsecurity.org/military/systems/ground/fcs-nlos.htm.

51. 2003 DOD Appropriations Act § 8121.

52. *Id*. § 8149.

53. *Id*.

54. Pub. L. No. 107-206, tit. I, 116 Stat. 820 (2002). Title II of the Supplemental Appropriations Act enacts the American Service Members' Protection Act (ASMPA), addressing the International Criminal Court and its lack of jurisdiction over members of the U.S. Armed Forces. *Id*. tit. II.

55. *Id*. The Supplemental Appropriations Act appropriated about $14.3 billion to the DOD. H.R. CONF. REP. NO. 107-593, at 127 (2002). The Committee Report breaks down the appropriations as follows:

> Military Personnel—$206,000;
> Operations and Maintenance—$12,947,135;
> Procurement—$1,455,265;
> Research, Development, Test, and Evaluation—$282,600.

Id.

56. Supplemental Appropriations Act § 1401; *see also* H.R. CONF. REP. NO. 107-593, at 186.

57. *President Bush Rejects $5 Billion in Contingent Emergent Spending*, 44 GOV'T CONTRACTOR 31, ¶ 321 (2002) (noting that the President viewed only $1 billion of the contingency funds as "needed, while the other $4 billion was unrelated to a national emergency").

O&M Funds

O&M Funds, Defense-Wide

The Supplemental Appropriations Act provides $722 million in Defense-Wide O&M funds, to remain available until 30 September 2003. From this amount, $390 million is available to reimburse Pakistan, Jordan, and other "key cooperating nations" for support they provided for the War on Terrorism. The Supplemental Appropriations Act further provides that the SECDEF may make these payments "in his discretion, based on documentation determined by [him] to adequately account for the support provided, in consultation with [the OMB] and [fifteen] days following notification to the appropriate Congressional committees."[58]

Defense Emergency Response Fund

To fund the incremental costs of military operations and mobilization to conduct the War on Terrorism,[59] the Supplemental Appropriations Act appropriates $11.9 billion for the Defense Emergency Response Fund, to remain available until 30 September 2003. Of this amount, $77.9 million will be available for enhancements to the North American Air Defense Command.[60]

RDT & E Funds

Crusader Next Generation Artillery System

While the Supplemental Appropriations Act does not mention the Crusader artillery system, the accompanying conference report made it clear the conferees "strongly oppose" the process the DOD used to terminate the Crusader program.[61] The "usual practice" for such a policy decision includes proposing the action in the initial budget submission "to allow Congress sufficient time . . . to scrutinize the merits."[62] The DOD did not follow this practice in the case of the Crusader. Instead, after submitting an initial FY 2003 budget request of about $475 million for the program, the DOD submitted a budget amendment on 29 May 2002 to "immediately terminate the Crusader program," giving Congress "virtually no time to properly examine the merits" of the proposal.[63] The conferees nevertheless concluded that "the justification for the Crusader program has diminished significantly" based on the Army's plan to "accelerate the fielding of the Future Combat System to the 2008 timeframe."[64] Believing it "imperative that the Army accelerate its plan to develop a next generation artillery cannon . . . to take advantage of the $2 billion investment in . . . technology developed under the Crusader program," the conferees directed the Army to enter "a follow-on contract immediately to leverage Crusader technology to the maximum degree possible."[65]

V-22 Osprey Funds Available for Special Operations Forces

The Supplemental Appropriations Act amends the "Research, Development, Test and Evaluation, Navy" provision in the Defense Appropriations Act, 2002,[66] to provide that funds appropriated and made available under the paragraph for the V-22 Osprey program "may be used to meet unique requirements of the Special Operation Forces."[67]

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58. Supplemental Appropriations Act, tit. I, ch. 3 (Operation and Maintenance, Defense-Wide).

59. H.R. CONF. REP. NO. 107-593, at 128 (2002).

60. Supplemental Appropriations Act, tit. I, ch. 3 (Defense Emergency Response Fund).

61. H.R. CONF. REP. NO. 107-593, at 132 (2002).

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*.

66. 2002 DOD Appropriations Act, Pub. L. No. 107-117, div. A, tit. IV, 115 Stat. 2230, 2243 (2002).

67. Supplemental Appropriations Act, § 301. The conference report provides additional guidance, stating the funds are available "for the Special Operations Forces requirements related to the V-22 aircraft." H.R. CONF. REP. NO. 107-593, at 133 (2002).

Assistance to Colombia

Granting "broader authority" to the DOD for assistance to Colombia,[68] the Supplemental Appropriations Act allows the DOD to use funds available for assistance to Colombia to support a "unified campaign against narcotics trafficking, against activities by organizations designated as terrorist organizations, . . . and to take actions to protect human health and welfare in emergency circumstances, including undertaking rescue operations."[69] The SECDEF must certify to Congress that a proposed action satisfies the Supplemental Appropriations Act's provisions at section 601(b) before taking such an action.[70] The Supplemental Appropriations Act also prohibits the participation of U.S. Armed Forces personnel or contractor employees in "any combat operation" in connection with such assistance, except for purposes of "self defense."[71]

Boeing Lease Program

The Supplemental Appropriations Act provides that "[d]uring the current fiscal year and hereafter" the provisions at 10 U.S.C. § 2533a[72] do not apply to "to any transaction entered into to acquire or sustain aircraft" under the authority granted in the Defense Appropriations Act, 2002, establishing the Boeing Lease Program.[73]

Bilateral Economic Assistance

Foreign Military Financing Program

The Supplemental Appropriations Act provides an additional $387 million, to remain available until 30 June 2003, for the Foreign Military Financing Program (FMFP)[74] for emergency expense activities related to combating international terrorism.[75] Of this amount, up to $2 million is available to the DOD for "necessary expenses, including the purchase of passenger motor vehicles for use outside of the United States, for the general cost of administering military assistance and sales."[76]

Peacekeeping Operations

The Supplemental Appropriations Act appropriates an additional $20 million, available until 30 June 2003, for peacekeeping operations for emergency expenses related to combating international terrorism. The additional funding is only available for such expenses in Afghanistan.[77]

Military Construction

The Supplemental Appropriations Act allows the DOD to use funds it made available to carry out military construction projects

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68. Supplemental Appropriations Act § 301.

69. *Id*. § 305. Congress later amended this authority to apply to "fiscal years 2002 and 2003." 2003 DOD Appropriations Act, Pub. L. No. 107-248, § 8145, 116 Stat. 1519, 1571 (2002).

70. Supplemental Appropriations Act § 305. Section 601(b) requires the Secretary of State to report to the Appropriations Committees that the newly elected President of Colombia has committed his government to establishing policies to combat illicit drug activities and respect for human rights, and to implementing budgetary and personnel reforms in the Colombian Armed Forces. *Id*. § 601.

71. *Id*. § 305.

72. Section 2533a requires the DOD to buy certain items from American sources. 10 U.S.C. § 2533a (2000).

73. Supplemental Appropriations Act § 308.

74. Through the FMFP, eligible countries receive grants to help purchase U.S. defense articles, services, or training through one of the Foreign Military Sales programs. *See* 22 U.S.C. §§ 2763-2754 (2000).

75. Supplemental Appropriations Act, tit. I, ch. 6 (Foreign Military Financing Program).

76. *Id*.; *see also* H.R. CONF. REP. NO. 107-593, at 150 (2002).

77. Supplemental Appropriations Act, tit. I, ch. 6 (Peacekeeping Operations).

not otherwise authorized by law.[78] Such construction projects need not be authorized via the normal military construction (MILCON) project procedures[79] if the SECDEF determines that the projects are designed to "respond to or protect against acts or threatened acts of terrorism."[80] The SECDEF must notify Congress and wait fifteen days before obligating funds for such projects.[81]

BOB STUMP NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003

On 2 December 2002, the President signed the Bob Stump National Defense Authorization Act for FY 2003 (Authorization Act).[82]

Procurement

Sale of Articles and Services from Army Industrial Facilities

Congress has extended the pilot program that authorizes 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—through 30 September 2004. Participating Army facilities that sell manufactured articles and services for more than $20 million must also transfer a percentage of the total amount from the Army Working Capital Fund for unused plant capacity to appropriations available during the following fiscal year, for demilitarization of conventional ammunition.[83]

Multi-Year Procurement Authority

Congress authorized the Army to enter into a multi-year contract for the procurement of vehicles under the Family of Medium Tactical Vehicles Programs, subject to submitting a certification that the contracts meet "all key performance parameters," and that the total cost of using multi-year contracts is at least ten percent less than the cost of using successive one-year contracts.[84] The Authorization Act also extended the Navy's authority to enter into multi-year contracts for the procurement of DDG-51 class destroyers.[85] It also authorized the Air Force to enter into a multi-year contract for the procurement of up to forty C-130J aircraft in the CC-130J configuration, and up to twenty-four C-130J aircraft in the KC-130J configuration. The appropriation is subject to qualification testing of the CC-130J for use in air assault operations, and installation of software upgrades in all existing C-130J and CC-130J aircraft in the Air Force's inventory.[86]

Boeing Lease Program

Before entering into a lease for the acquisition of tanker aircraft under section 8159 of the 2002 DOD Appropriations Act,[87] the Authorization Act requires the Air Force to acquire the authorization and appropriation of needed funds or to submit a new start reprogramming notification to the congressional defense committees in accordance with applicable reprogramming procedures.[88]

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78. *Id*. § 1001.

79. *See* 10 U.S.C. § 2802 (2000).

80. Supplemental Appropriations Act § 1001.

81. *Id*.

82. 2003 DOD Authorization Act, Pub. L. No. 107-314, 116 Stat. 2458 (2002). Representative Stump served as chair of the House Armed Services Committee during the 107th Congress. He has served in Congress since 1976. *Id*. § 1.

83. *Id*. § 111.

84. *Id*. § 113.

85. *Id*. § 121 (amending the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 122(b), 110 Stat. 2446 (1996), as amended by the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 122, 113 Stat. 534 (1999), and the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 122(a), 114 Stat. 1654A-24 (2000)).

86. *Id*. § 131.

87. Pub. L. No. 107-117, § 8159, 115 Stat. 2230, 2284 (2002).

RDT&E Funds

Future Combat Systems Non-Line-of-Sight Cannon

The Authorization Act directs the SECDEF to provide the Army a "self-propelled Future Combat Systems non-line-of-sight cannon indirect fire capability to equip the objective force" by FY 2008.[89] Congress further directs the SECDEF to submit a report on the proposed investments in non-line-of-sight indirect fire programs.[90]

Ballistic Missile Defense

The 2002 Defense Authorization Act amended 10 U.S.C. § 224 to permit the SECDEF to transfer a program from the Ballistic Missile Defense Organization to one of the services, after properly notifying Congress and waiting at least sixty days.[91] The 2003 Authorization Act further amends section 224(e), concerning follow-on research, development, test, and evaluation. The SECDEF must ensure that for each such program transferred to one of the services, "responsibility for research, development, test, and evaluation related to system improvements for that program remains with the Director [of the Missile Defense Agency]."[92]

DOD Test Resource Management Center

The Authorization Act establishes a DOD Test Resource Management Center (TRMC), a Field Activity headed by a director, who is a three-star officer. The TRMC is responsible for reviewing and certifying proposed DOD budgets for test and evaluation activities, developing and maintaining a strategic plan for DOD test and evaluation resources, and administering the Central Test and Evaluation Investment Program and the DOD program for testing and evaluation of science and technology.[93]

Technology Transition Initiative

The Authorization Act directs the SECDEF to establish the Technology Transition Initiative to "facilitate the rapid transition" of new technologies from DOD science and technology programs into acquisition programs for such technologies.[94] In a related effort to accelerate the introduction of new and innovative technology into DOD acquisition programs,[95] Congress also directed the establishment of a Defense Acquisition Challenge Program. Under the program, DOD and non-DOD individuals and activities may propose alternatives, called "challenge proposals," to existing DOD acquisition programs to improve the performance, affordability, manufacturability, or operation capability of the program. Proponents may submit the challenge proposals through the unsolicited proposal process or in response to a broad agency announcement.[96] The Authorization Act also establishes an outreach program for small businesses and non-traditional defense contractors to review and evaluate research activities and new technologies that have the potential for meeting DOD requirements for combating terrorism. As with the Challenge Program, individuals may submit proposals through the unsolicited proposal process or in response to a broad agency announcement.[97]

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88. 2003 DOD Authorization Act § 133.

89. *Id*. § 216.

90. *Id.* To deliver such a system by FY 2008, the conferees stated that "maximum advantage should be taken of technology developed through other programs, such as the composite armored vehicle, Crusader, and the joint United States-United Kingdom Future Scout and Calvary System." H.R. CONF. REP. NO. 107-772, at 561 (2002). The conferees also shifted $475.6 million in Crusader funding to the new project and authorized the distribution of an additional $293 million in various related program elements. *Id.*

91. 2002 DOD Authorization Act, Pub. L. No. 107-107, § 231, 115 Stat. 1012, 1035 (2001).

92. 2003 DOD Authorization Act § 222. The Authorization Act also now references the change in name from the Ballistic Missile Defense Organization to the Missile Defense Agency. *Id.* § 225.

93. *Id*. § 231.

94. *Id*. § 242.

95. H.R. CONF. REP. NO. 107-772, at 571 (2002).

96. 2003 DOD Authorization Act § 243.

97. *Id*. § 244.

O&M Funds

Funding Environmental Restoration Projects

The Authorization Act requires the DOD to fund environmental restoration projects through the DOD's Environmental Restoration Accounts, not as Military Construction projects.[98]

Incidental Taking of Migratory Birds

While the Migratory Bird Treaty Act generally prohibits the incidental takings of migratory birds,[99] the Authorization Act grants an interim exemption to military members participating in authorized military readiness activities. The exemption applies until the Department of Interior establishes regulations authorizing incidental takings by members of the Armed Forces during military readiness activities.[100]

Use of Commissary and MWR Facilities by National Guard Members

The Authorization Act amends 10 U.S.C. § 1063a to provide an additional basis to authorize National Guard members to use commissaries and MWR retail facilities while serving during a "national emergency."[101]

Uniform Funding and Management of MWR Programs

The Authorization Act amends Chapter 147 of Title 10 to authorize the SECDEF to establish a Uniform Funding and Management program and to treat and expend appropriated funds under rules applicable to nonappropriated funds when those funds are used for morale, welfare, and recreation (MWR) programs. The DOD may use appropriated funds for such MWR programs only if such programs are authorized to receive appropriated fund support, and only in authorized amounts.[102]

Competitive Sourcing Notification Requirements

The Authorization Act amends 10 U.S.C. § 2461 to require the SECDEF to notify Congress of the outcome of a competitive sourcing study, regardless of whether the study recommends converting to contractor performance or retaining the function in-house.[103]

Contractor Performance of Security Guard Functions

Under 10 U.S.C. § 2465, the DOD generally may not enter into contracts for security guard or firefighting services on installations within the United States, unless a contractor already performed such services on or before 24 September 1983.[104] The Authorization Act grants the SECDEF and the service secretaries temporary authority to enter into contracts for any "increased performance" of security guard functions at military facilities in response to the 11 September 2001 terrorist attacks, and to waive the prohibition under 10 U.S.C. § 2465. This three-year authority applies when: (1) without the contract, military members would perform the increased security functions; (2) the service secretary determines that the contractor personnel are appropriately trained

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98. *Id*. § 313.

99. 16 U.S.C. § 703 (2000).

100. 2003 DOD Authorization Act § 315.

101. *Id*. § 322 (amending 10 U.S.C. § 1063a (2000)).

102. *Id*. § 323.

103. *Id*. § 331.

104. 10 U.S.C. § 2465. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 granted the DOD a temporary exception to the prohibition against procuring security services. The exception applies for the duration of Operation Enduring Freedom and 180 days thereafter, and requires the DOD to contract with proximately located state or local governments to procure such security services. Pub. L. No. 107-56, § 1010, 115 Stat. 272, 395-96.

and supervised; and (3) contract performance would not result in a reduction in security.[105]

Educational Agencies Affected by Military Housing Privatization

Under the Elementary and Secondary Act of 1965, school districts near military installations are eligible for federal assistance, depending on the number of DOD dependents who reside on the installation and attend school in the local district.[106] The Authorization Act amends 20 U.S.C. § 7703(b)(2), providing that heavily impacted local school districts that received financial support during the previous fiscal year, but which became ineligible for such payments because of the conversion of military housing units to private housing, are still eligible for payments while the DOD is privatizing the housing units.[107]

Military Personnel Authorizations

Expanded Authority to Increase Active Duty End Strengths

Although congressional conferees believe that "active duty end strengths should be increased substantially," the conferees were unable to increase active duty authorizations "due to insufficient additional appropriations."[108] Congress amended 10 U.S.C. § 115, however, and granted the SECDEF expanded authority to increase active duty end strength by up to three percent. The Authorization Act also provides the service secretaries the authority to increase the services' active duty end strength by up to two percent.[109] "In recognition of the conferees' strong view that active duty end strength should not be reduced any further,"[110] the Authorization Act also eliminates the SECDEF's authority to reduce end strength numbers below authorized levels.[111]

Military Personnel Policy

Use of Reserves to Defend Against Terrorism

The Authorization Act amends 10 U.S.C. § 12304 and 10 U.S.C. § 12310 to authorize the use of Reserves to protect against "a terrorist attack in the United States that results, or could result, in a catastrophic loss of life or property."[112]

Wear of Abayas *by Female Military Members*

The Authorization Act prohibits commanders from ordering or encouraging subordinates to wear the *abaya* garment[113] while the member is serving in Saudi Arabia. It also prohibits the use of appropriated funds to acquire *abayas* for issuance to military members or contract personnel accompanying the armed forces in Saudi Arabia.[114]

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105. 2003 DOD Authorization Act § 332.

106. 20 U.S.C. § 7703 (2000).

107. 2003 DOD Authorization Act § 344.

108. H.R. CONF. REP. NO. 107-772, at 634-35 (2002).

109. 2003 DOD Authorization Act § 403.

110. H.R. CONF. REP. NO. 107-772, at 635 (2002).

111. 2003 DOD Authorization Act § 402 (repealing 10 U.S.C. § 691(e) (2000)).

112. *Id.* § 514.

113. Ed Williams, *Lt. Col. McSally Deserves the Saudis' Respect; It's Outrageous to Order a Combat Pilot to Dress as a Muslim Woman*, CHARLOTTE OBSERVER, May 19, 2002, at 3D. An *abaya* is a full-body garment with an accompanying scarf. *Id.*

114. 2003 DOD Authorization Act § 563.

Study of Basic Instruction Courses for Judge Advocates

The SECDEF must study the desirability and feasibility of consolidating the separate Army, Navy, and Air Force basic instruction courses for new judge advocates into a single course at a single location. The resulting report was due to the congressional armed services committees no later than 1 February 2003.[115]

Compensation and Other Personnel Benefits

Basic Pay Increases

Effective 1 January 2003, all members of the uniformed services will receive a 4.1% increase in their monthly base pay, with mid-grade and senior noncommissioned officers and mid-grade officers receiving pay raises of up to 6.5% in targeted increases.[116]

Special Compensation for Disabled Retirees

Facing the possibility of a presidential veto over the issue of "concurrent receipt,"[117] the conferees reached a compromise[118] and authorized special compensation for certain disabled veterans. The Authorization Act authorizes payments to military retirees with a "qualifying combat-related disability."[119] A "qualifying combat-related disability" is any disability rated at ten or more percent, for which the member received the Purple Heart or a combat injury rated at sixty percent or higher.[120]

Health Care Provisions

Changes to TRICARE Prime Remote

The Authorization Act authorizes TRICARE Prime Remote benefits[121] for eligible dependents when the sponsoring military member is reassigned to an unaccompanied permanent duty station.[122] The Authorization Act also extends TRICARE Prime Remote benefits to dependents of Reservists ordered to active duty in remote locations for more than thirty days.

Acquisition Policy, Acquisition Management, and Related Matters

Buy-to-Budget of End Items

The Authorization Act adds 10 U.S.C. § 2308, granting the DOD the authority to acquire a greater quantity of an end item than that specified in an authorization or appropriations law, if the agency determines that acquisition of the greater quantity is possible without additional funding. Prior congressional notification is not required; however, the agency must notify the congressional defense committees within thirty days of the agency's decision.[123]

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115. *Id*. § 582.

116. *See id.* § 601.

117. Vernon Loeb, *Bush Threatens Veto of Defense Bill; President Wants Costly New Disabled Military Pension Benefits Eliminated*, WASH. POST, Oct. 7, 2002, at A2. The "concurrent receipt" provision would have permitted military retirees to receive both military retirement benefits and Department of Veterans' Affairs (VA) disability benefits at the same time. *Id*. Under current law, the government reduces a retiree's military pension benefits by the amount of VA disability benefits the retiree receives. *Id*.; *see also* 38 U.S.C. §§ 5304-5305 (2000).

118. H.R. CONF. REP. NO. 107-772, at 657-58 (2002). While the Senate bill provided for the repeal of the prohibition against concurrent receipt, the House version phased in a repeal of the provision for those veterans with a disability rating of sixty percent or higher over five years. *Id*.

119. 2003 DOD Authorization Act § 636.

120. *Id*.

121. Current law provides TRICARE Prime Remote benefits to dependents who reside with their military sponsors at assigned remote locations (i.e., more than fifty miles, or about one hour driving time, from the nearest military medical treatment facility). 10 U.S.C. 1079(p) (2000). If the military member is later reassigned and dependents are not authorized to accompany the member to the new duty assignment, the dependents are no longer eligible for these benefits. *See id.*

122. 2003 DOD Authorization Act § 702.OD

"Spiral Development" Authorization

The Authorization Act grants the SECDEF permanent authorization to conduct major defense acquisition programs as "spiral development programs."[124] Establishing minimum requirements for spiral development plans, the Authorization Act requires the SECDEF to issue implementation guidance within 120 days of enactment.[125] It also requires the SECDEF to report to the congressional committees on the approach the DOD intends to take in applying certain legislative and regulatory requirements to major defense acquisition programs that use the "evolutionary acquisition process."[126]

Performance Goals for Procuring Services

Last year, to improve the management of DOD services contracts, Congress set savings goals for DOD services contracts over the next ten fiscal years.[127] Because the DOD was unable to develop a method for measuring savings from improved management techniques, Congress repealed last year's goals and established new goals for competition and performance-based contracting under multiple award contracts (MACs).[128] The Authorization Act establishes goals for the competitive purchase of services under MACs of forty percent for FY 2003, fifty percent for FY 2004, and seventy-five percent by FY 2005. The Authorization Act also sets new goals for performance-based purchases of services under MACs of twenty-five percent in FY 2003, thirty-five percent in FY 2004, fifty percent in FY 2005, and seventy percent in FY 2011. The SECDEF may adjust any of the percentage goals if he determines in writing that the goal is "too high and cannot reasonably be achieved."[129]

Rapid Acquisition and Deployment Procedures

Within 180 days of the Authorization Act's enactment, the SECDEF must develop procedures for the rapid acquisition and deployment of items that unified combatant commanders urgently need. The procedures must address streamlined communication of needs and proposed items between the Joint Chiefs of Staff, the acquisition community, and the research and development community.[130] In a separate provision also concerned with expediting procurements, the Authorization Act requires the Undersecretary of Defense for Acquisition, Technology, and Logistics to establish a "quick-reaction special projects acquisition team" to examine and advise the Undersecretary on actions that the service can take to expedite the acquisition of urgently needed systems.[131]

Limitation Period for Task and Delivery Order Contracts

The Authorization Act extends the application of the multi-year contract provisions of 10 U.S.C. § 2306c, "including the authority to enter into contracts for periods of not more than five years," applicable to task and delivery order contracts.[132] Implementing regulations will establish a preference for meeting such multi-year requirements with separate awards to two or more sources to the maximum extent practicable.[133]

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123. *Id.* § 801.

124. *Id.* § 803. The Authorization Act defines "spiral development program" as a research and development program "conducted in discrete phases or blocks, each of which will result in the development of fieldable prototypes; and will not proceed into acquisition until specific performance parameters . . . have been met." *Id.*

125. *Id.*

126. *Id.* § 802. The Authorization Act defines "evolutionary acquisition process" as a "process by which an acquisition program is conducted through discrete phases or blocks, with each phase or block consisting of the planned definition, development, production or acquisition, and fielding of hardware or software that provides operationally useful capability." *Id.*

127. 2002 DOD Authorization Act, Pub. L. No. 107-107, § 802, 115 Stat. 1012, 1178 (2001). By FY 2001, the DOD was to achieve a ten-percent reduction in expenditures from FY 2000, beginning with a three-percent reduction during FY 2002. *Id.*

128. H.R. CONF. REP. NO. 107-772, at 669 (2002).

129. 2003 DOD Authorization Act § 805.

130. *Id.* § 806.

131. *Id.* § 807.

132. *Id.* § 811.

133. *Id.*

Extension of Test Program for Commercial Items

Congress extended the test program authorizing the use of simplified acquisition procedures to acquire certain commercial items; the program is now set to expire on 1 January 2004.[134] The Authorization Act also requires the Comptroller General to submit a report on the use, benefits, and impact of the test program to Congress by 15 March 2003.[135]

Extension of Contract Goal for Small Disadvantaged Businesses

In 1986, Congress set a goal of five-percent participation in DOD contracts by small disadvantaged businesses and minority institutions of higher education.[136] The Authorization Act extends this goal through FY 2006.[137]

Contracting with Federal Prison Industries—Additional Clarification

A federal agency must generally purchase products made by the Federal Prison Industries (FPI) if those products meet the agency's requirements, are timely, available, and no more expensive than current market prices.[138] Last year, Congress enacted 10 U.S.C. § 2410n, which establishes prerequisites before the FPI preference will apply to future DOD purchases. These include the need to conduct market research to determine whether an FPI product is comparable to similar private sector products in price, quality, and timeliness, and if not, to use competitive procedures to purchase the item.[139]

The Authorization Act clarifies and adds to the procedural requirements for contracting with FPI. Under the amended language, if the DOD determines that an FPI product is not comparable in price, quality, or (no longer "and") time of delivery, the DOD must use competitive procedures to purchase the product or make a purchase under a MAC.[140] To emphasize that it is the contracting officer's sole discretion whether the FPI product or service is comparable to that offered in the private sector,[141] the Authorization Act provides that such a determination is not subject to the arbitration procedure under 18 U.S.C. § 4124(b).[142] Congress also added language specifying that the government may not require contractors and potential contractors to use FPI as a subcontractor for performance of the DOD contract. The Authorization Act also prohibits the DOD from entering into a contract with FPI that could give an inmate worker access to classified data or other security, personal, or financial information.[143]

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134. *Id.* § 812; *see also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 13.5 (July 2001) [hereinafter FAR] (describing the implementation of this program).

135. 2003 DOD Authorization Act § 812.

136. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 99-661, § 1207, 100 Stat. 3816, 3973 (1996) (codified as amended at 10 U.S.C. § 2323). The participation goal is also applicable to Coast Guard and National Aeronautics and Space Administration contracts. *Id*. For additional guidance and procedures related to setting such goals, see FAR, *supra* note 134, pt. 19.

137. 2003 DOD Authorization Act § 816.

138. *See* 18 U.S.C. § 4124 (2000). The FAR provisions implementing this statutory preference, however, do not track the statute. *See* FAR, *supra* note 134, subpt. 8.6. More specifically, the FAR requires agencies to obtain a "clearance" or waiver from the FPI before making an outside purchase, and indicates that FPI would not normally issue clearances merely because other sources could provide the supply at a lower price. *Id.* at 8.605.

139. 2002 DOD Authorization Act, Pub. L. No. 107-107, § 811, 115 Stat. 1012, 1180-81 (2001). For interim implementing regulations within the DOD, see Competition Requirements for Purchases from a Required Source, 67 Fed. Reg. 20,687 (Apr. 26, 2002) (to be codified at 48 C.F.R. pts. 208, 210) (amending U.S. DEP'T OF DEFENSE, FEDERAL ACQUISITION REG. SUPP. 208.602, .606, 210.001 (July 2002)) [hereinafter DFARS].

140. 2003 DOD Authorization Act § 819. To satisfy this section's competition requirement, purchases under existing MACs must follow the competition requirements under section 803 of the 2002 DOD Authorization Act; *see* H.R. CONF. REP. NO. 107-772, at 672 (2002). For proposed guidance on the competition requirements under MACs, see Competition Requirements for Purchase of Services Under Multiple Award Contracts, 67 Fed. Reg. 15,351 (Apr. 1, 2002) (to be codified at 48 C.F.R. pts. 208, 216) (amending DFARS, *supra* note 139, at 208.216)).

141. *See* H.R. CONF. REP. NO. 107-772, at 672 (2002).

142. 2003 DOD Authorization Act § 819. Under 18 U.S.C. § 4124, a board consisting of the Attorney General, the Administrator of General Services, and the President, or their representatives arbitrates disputes about the price, quality, character, or suitability of FPI products. 18 U.S.C. § 4124 (2000); *see also* Federal Prison Industries, Inc., B-290546, 2002 U.S. Comp. Gen. LEXIS 101 (July 15, 2002) (finding that 10 U.S.C. § 2410a made no express changes to the arbitration board's authority with regard to DOD purchases, thus determining that the authority to resolve disputes between DOD agencies and FPI remained intact).

143. 2003 DOD Authorization Act § 819.

Revision to Multi-Year Contracting Authority

The Authorization Act amends 10 U.S.C. § 2306b(i) to clarify that the DOD may obligate funds for the procurement of an end item under a multi-year contract only for "a complete and useable end item."[144] Where otherwise authorized by law, the Authorization Act also permits the DOD to purchase economic order quantities of long-lead items necessary to meet a planned delivery schedule for complete major end items.[145]

Intellectual Property Arrangements

Apparently concerned with the DOD's ability to negotiate intellectual property arrangements properly, Congress has tasked the SECDEF to evaluate the training, knowledge, and resources the DOD needs to negotiate intellectual property rights effectively, and to report the results to Congress by 1 February 2003.[146]

Intra-Governmental Acquisitions Assessment

The Authorization Act also requires the SECDEF to assess DOD purchases of products and services through contracts with other federal departments and agencies. This report is also due to Congress by 1 February 2003; the report must address the total amount of fees the DOD paid for such acquisitions, assess whether such fees were excessive, and describe the benefits the DOD received from the use of such contracts.[147]

Multi-Year Procurement Authority for Environmental Services

The Authorization Act amends 10 U.S.C. § 2306c by adding "environmental remediation services" at military installations and former DOD sites to the list of "covered services" for which the DOD may enter into multi-year contracts.[148]

Effects of the New Army Contracting Agency

The Army must submit a report on the effects of its newly established Army Contracting Agency (ACA).[149] The report must include the Army's justification for creating the ACA, the impact on small business participation in contracts, and a description of the Army's plans to address any negative effects on small business participation.[150]

DOD Organization and Management

Duties Relating to Homeland Defense and Combating Terrorism

Section 902 of the Authorization Act establishes the new position of Assistant Secretary of Defense for Homeland Security and entrusts this new position with supervision of the DOD's homeland defense activities. The Authorization Act also transfers responsibility for the overall direction for policy, program planning and execution, and allocation of resources for the DOD's activities in combating terrorism to the Undersecretary of Defense for Policy.[151]

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144. *Id*. § 820.

145. *Id*.

146. *Id*. § 821.

147. *Id*. § 824.

148. *Id*. § 827. Department of Defense agencies may enter into contracts for periods of not more than five years for certain "covered services" and supply items related to such services. 10 U.S.C. § 2306c (2000).

149. 2003 DOD Authorization Act § 828. The ACA, activated 1 October 2002, centralizes most of the Army's installation contracting activities under a single headquarters, as part of the Army's effort to streamline its business operations. Ann Roosevelt, *Army Streamlines Contracting, Installation Management*, DEFENSE WEEK, Oct. 7, 2002.

150. 2003 DOD Authorization Act § 828.

Oversight of Space Acquisition Programs

The Authorization Act requires the SECDEF to provide oversight of space defense programs through appropriate organizations within the Office of Secretary of Defense (OSD), and to submit a detailed plan for OSD oversight of these programs to the appropriate congressional committees.[152] This provision reflects congressional recognition of the DOD's plans to change the oversight procedures of space programs to reduce decision cycle times, as well as the inherently joint nature of space defense programs.[153]

General Provisions

Authorization of Supplemental Appropriations, 2002

The Authorization Act authorizes the supplemental DOD appropriations that Congress provided in the 2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States. The Authorization Act also requires the SECDEF to report on all DOD transfers from the Defense Emergency Response Fund and other transfer accounts during FY 2002.[154]

Liability of Accountable Officers

In 1998, the DOD authorized the designation of persons providing information or data on which certifying officials would rely in the certification of payment vouchers as "accountable officers." The regulation also held such "accountable officers" financially liable for erroneous payments resulting from the negligent performance of their duties.[155] The General Accounting Office (GAO), however, found no statutory authority that would permit such an action. In an advance decision in 2000, the GAO determined that the regulation's liability provision was unenforceable.[156] The Authorization Act provides the DOD with such authority in a new 10 U.S.C. § 2773a, which states that the government may hold "departmental accountable officials" financially liable for illegal or erroneous payments resulting from their negligence.[157]

Uniform DOD Standards for Reports of Survey

The Authorization Act extends the Army and Air Force report of survey procedures to Navy, Marine Corps, and DOD civilian employees in a new 10 U.S.C. § 2787, which grants all armed forces officers and designated DOD civilian employees the authority to act on reports of survey in accordance with the implementing regulations required under the Authorization Act.[158]

Government Purchase Card Management

In response to reported abuses of the government purchase card within the DOD, Congress amended and added several new provisions to 10 U.S.C. § 2784, in an effort to improve the management of the purchase card program. In addition to requiring periodic audits and appropriate training for cardholders and overseers, the Authorization Act states that the DOD must periodically review whether each cardholder has a need for the purchase card, develop specific policies regarding the number of cards issued, and provide for administrative and criminal penalties for violations of the rules.[159]

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151. *Id.* § 902.

152. *Id.* § 911.

153. H.R. CONF. REP. NO. 107-772, at 677-78 (2002).

154. 2003 DOD Authorization Act § 1002.

155. U.S. DEP'T OF DEFENSE, DIR. 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION vol. 5, ch. 33, para. 330505 (Aug. 1998).

156. Department of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

157. 2003 DOD Authorization Act § 1005. The Authorization Act defines a "departmental accountable official" as an individual, designated in writing, who is responsible for providing DOD officials with "information, data, or services that are directly relied upon by the certifying official in the certification of vouchers for payment." *Id.*

158. *Id.* § 1006.

Government Travel Card Management

The Authorization Act also adds a new 10 U.S.C. § 2784a to address problems with the government travel card. This section authorizes the SECDEF to require DOD members to cover their travel expenses through direct payment to the issuing bank. The Authorization Act also allows the DOD to deduct and withhold up to fifteen percent of a member's basic pay for any delinquent amount the member owes for charges of official travel expenses. The DOD may similarly deduct and withhold such debts from the retirement pay of former DOD members.[160]

Clearance of Misrecorded Transactions

The Authorization Act authorizes the DOD to cancel certain long-standing debit and credit transactions that the DOD cannot otherwise clear from its accounts because of misrecording to the wrong appropriation. This authority exists for two years after the Authorization Act's effective date.[161] To ensure oversight, the conferees directed the Comptroller General to review and report on the DOD's use of this authority.[162]

Law Enforcement Use of DOD-Maintained DNA Samples

The DOD must now release DNA samples under the terms of a valid order of a federal or military judge. Such an order must be for "investigation or prosecution of a felony, or any sexual offense, for which no other source of DNA information is reasonably available."[163]

Authority to Obtain Foreign Language Services

Section 1064 of the Authorization Act authorizes the SECDEF to establish a National Foreign Language Skills Registry of persons proficient in a critical foreign language and willing to provide linguistic services to the United States during a war or national emergency.[164] The Authorization Act also amends 10 U.S.C. § 1588[165] to authorize the acceptance of such voluntary translation and interpretation services.[166]

Rewards for Assistance in Combating Terrorism

Congress has amended 10 U.S.C. § 127b, adding a new section authorizing the SECDEF to provide monetary or in-kind rewards to individuals who provide U.S. personnel with information or nonlethal assistance. The assistance must benefit an activity of the armed forces outside the United States, conducted against international terrorism or for protection of the armed forces. The amount of the reward may not exceed $200,000. Service secretaries may delegate the authority for such rewards for up to $50,000 to combatant commanders. Combatant commanders may further delegate this authority for up to $2500.[167]

Space and Services to Military Welfare Societies

The Authorization Act authorizes the service secretaries to provide space and services to military welfare societies without

159. *Id.* § 1007.

160. *Id.* § 1008.

161. *Id.* § 1009.

162. H.R. CONF. REP. NO. 107-772, at 686-87 (2002).

163. 2003 DOD Authorization Act § 1063.

164. *Id.* § 1064.

165. The service secretaries may accept certain voluntary services, notwithstanding the Anti-Deficiency Act's general prohibition. *See* 10 U.S.C. § 1588 (2000); 31 U.S.C. § 1342 (2000).

166. 2003 DOD Authorization Act § 1064.

167. *Id.* § 1065.

charge. A "military welfare society" includes only the Army Relief Society, the Navy-Marine Corps Relief Society, and the Air Force Aid Society.[168]

Matters Relating to Other Nations

Administrative Services and Support for Coalition Liaison Officers

The Authorization Act adds a new 10 U.S.C. § 1051a, allowing the DOD to provide administrative services and support to foreign liaison officers performing duties in connection with coalition operations. The DOD may also pay the travel, subsistence, and personal expenses directly necessary for a liaison officer from a developing country to carry out his duties.[169]

Travel of Partnership for Peace Program Participants

The Authorization Act amends 10 U.S.C. § 1051(b) to authorize the DOD to pay the travel expenses of foreign defense personnel participating in the North Atlantic Treaty Organization's (NATO) Partnership for Peace Program (PFP) between the participant country and the NATO country.[170]

Homeland Security

Transfer of Technology Items and Equipment

To support homeland security, the Authorization Act requires the SECDEF to designate a senior DOD official to coordinate DOD efforts to "identify, evaluate, deploy, and transfer" technology items and equipment that may enhance public safety and improve homeland security, to federal, state, and local first responders.[171] The Authorization Act also requires the SECDEF to submit a report on the DOD's "responsibilities, mission, and plans for military support of homeland security" to the congressional defense committees.[172]

Authorization of Appropriations for the War on Terrorism

The Authorization Act also gives the DOD a $10 billion appropriation for FY 2003 for the conduct of Operation Noble Eagle and Operation Enduring Freedom.[173] Before the DOD transfers such funds to the normal budget accounts, it must give the congressional defense committees prior notice and wait fifteen days.[174]

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168. *Id.* § 1066. The term "services" includes "lighting, heating, cooling, electricity, office furniture, office machines and equipment, telephone and other information technology services (including installation of lines and equipment, connectivity, and other associated services), and security systems (including installation and other associated expenses)." *Id*.

169. *Id.* § 1201. The Authorization Act defines "administrative services and support" as "base or installation support services, office space, utilities, copying services, fire and police protection, and computer support." *Id.*

170. *Id.* § 1202.

171. *Id.* § 1401.

172. *Id.* § 1404.

173. *Id.* § 1501. The Authorization Act further specifies that of the $10 billion authorized, only $2.55 billion is available for transfer to FY 2003 military personnel accounts; only $4.27 billion is available for transfer to FY 2003 O&M accounts and working capital funds; only $1 billion is available for transfer to FY 2003 procurement and RDT&E accounts; only $1.98 billion is available by transfer for unspecified intelligence and classified activities; and only $200 million is available by transfer for the procurement of ammunitions. *Id*. §§ 1502-1506.

174. *Id.* § 1508.

Military Construction General Provisions

Services for Housing Privatization Projects

Under 10 U.S.C. § 2872a, the service secretaries may now furnish certain covered utilities and services to housing privatization projects on a reimbursement basis.[175] The Authorization Act amends this section by adding firefighting and fire protection services, as well as police protection services, to the list of services that the secretaries may now provide.[176]

Pilot Housing Privatization Authority for Unaccompanied Housing

In 1996, Congress granted the DOD additional authority to acquire military housing by non-traditional means, including the use of loan and rental guarantees, the conveyance of existing housing and facilities, and differential lease payments.[177] The Authorization Act authorizes the Navy to conduct up to three pilot projects using the private sector to acquire or construct military unaccompanied housing in the United States. The Navy's authority for such projects expires on 30 September 2007.[178]

MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2003

President Bush signed the Military Construction Appropriations Act, 2003 (MCAA), on 23 October 2002.[179] The MCAA appropriated nearly $10.5 billion for military construction, family housing, and base closure activities.[180] This amount is a minimal decrease, about $100,000, from FY 2002, but the amount is about $835 million more than the administration requested.[181] These appropriations include nearly $112 million for unspecified minor military construction projects, an increase of about $12 million over last year, and $10 million for contingency construction.[182]

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175. 10 U.S.C.S. § 2872a (LEXIS 2003).

176. 2003 DOD Authorization Act § 2802.

177. *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).

178. 2003 DOD Authorization Act § 2803.

179. Military Construction Appropriations Act for Fiscal Year 2003, Pub. L. No. 107-249, 116 Stat. 1578 (2002) [hereinafter Military Construction Appropriations Act, 2003].

180. H.R. REP. NO. 107-731, at 49 (2002). The MCAA breaks the appropriations down as follows:

> Military Construction, Army—$1,683,710,000;
> Military Construction, Navy—$1,305,128,000;
> Military Construction, Air Force—$1,080,247,000;
> Military Construction, Defense-Wide—$874,645,000;
> Military Construction, Army National Guard—$241,377,000;
> Military Construction, Air National Guard—$203,813,000;
> Military Construction, Army Reserve—$100,554,000;
> Military Construction, Naval Reserve—$74,921,000;
> Military Construction, Air Force Reserve—$67,226,000;
> NATO Security Investment Program—$167,200,000;
> Family Housing Construction, Army—$280,356,000;
> Family Housing Operation and Maintenance, Army—$1,106,007,000;
> Family Housing Construction, Navy and Marine Corps—$376,468,000;
> Family Housing Operation and Maintenance, Navy and Marine Corps—$861,788,000;
> Family Housing Construction, Air Force—$684,824,000;
> Family Housing Operation and Maintenance, Air Force—$863,050,000;
> Family Housing Construction, Defense-Wide—$5,480,000;
> Family Housing Operation and Maintenance, Defense-Wide—$42,395,000;
> DOD Family Housing Improvement Fund—$2,000,000;
> Base Realignment and Closure Account—$561,138,000.

Military Construction Appropriations Act, 2003, 116 Stat. at 1578-82. The sum total of these appropriations is $10,582,327,000, but Congress also rescinded a total of $83,327,000, leaving a net amount of $10,499,000,000 in new obligation authority. *Id*.

181. H.R. REP. NO. 107-246, at 49.

NAVY-MARINE CORPS INTRANET

In 2001, as part of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Congress imposed several restrictions on the Navy's ability to implement its purchase of intranet work stations.[183] Last year, Congress again provided guidance and requirements in the National Defense Authorization Act for Fiscal Year 2002, permitting the Navy to contract for additional work stations conditioned upon appropriate approval within the DOD and the successful operation of the work stations on the intranet. Last year's MCAA also required the Navy to submit a report to Congress on the status of testing and implementation of the intranet.[184] This year, Congress addressed the Navy-Marine Corps Intranet in a separate legislative act that authorizes the Navy to extend the term of its intranet contract for up to seven years, notwithstanding the general five-year limitation provided in 10 U.S.C. § 2306c.[185]

IMPROPER PAYMENTS INFORMATION ACT OF 2002

On 26 November 2002, the President signed the Improper Payments Information Act of 2002 (IPIA).[186] The IPIA requires executive agency heads to review all programs and activities within their jurisdiction annually, and identify those programs and activities that may be susceptible to significant improper payments. For each identified program and activity, the agency head must estimate the annual amount of improper payments and provide the estimate to Congress before March 31 of the following year. If the estimate exceeds $10 million, the agency head must also provide a report on the agency's actions to reduce the improper payments.[187]

THE SECURITY ASSISTANCE ACT OF 2002[188]

On 30 September 2002, the President signed the Security Assistance Act of 2002 (SAA), as division B of the Foreign Relations Authorization Act for Fiscal Year 2003. The next section discusses a few of the provisions of the SAA that significantly impact the security assistance programs of the Department of State and the DOD.

Foreign Military Sales and Financing Authorities

In FY 2003, the SAA authorizes about $4.1 billion for grant assistance under section 23 of the Arms Export Control Act,[189] an increase of about $500 million from FY 2002.[190]

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182. The conference report accompanying the MCAA provides the following amounts for unspecified minor military construction:

> Unspecified Minor Construction, Army—$26,975,000;
> Unspecified Minor Construction, Navy—$26,187,000;
> Unspecified Minor Construction, Air Force—$12,620,000;
> Unspecified Minor Construction, Defense-Wide—$16,293,000;
> Unspecified Minor Construction, Army National Guard—$13,985,000;
> Unspecified Minor Construction, Air National Guard—$5,900,000;
> Unspecified Minor Construction, Army Reserve—$2,850,000;
> Unspecified Minor Construction, Navy Reserve—$780,000;
> Unspecified Minor Construction, Air Force Reserve—$5,996,000.

Id. at 44-45.

183. *See* Pub. L. No. 106-398, § 814, 114 Stat. 1654, 1654A-215 (2000).

184. *See* Pub. L. No. 107-107, § 362, 115 Stat. 1012, 1065 (2001).

185. Pub. L. No. 107-254, 116 Stat. 1733 (2002).

186. Pub. L. No. 107-300, 116 Stat. 2350 (2002).

187. *Id*. § 2.

188. FRAA , Pub. L. No. 107-228, div. B, 116 Stat. 1350, 1425 (2002).

189. *Id*. § 1201. Under the Arms Export Control Act, these funds assist designated countries through grants and loan subsidies. *See* 22 U.S.C. § 2763 (2000). For designation of foreign governments receiving such assistance, see Security Assistance Act, 2002, §§ 1221-1224.

190. *See* Security Assistance Act of 2000, Pub. L. No. 106-280, § 101, 114 Stat. 845, 846.

International Military Education and Training

Congress authorized $85 million for FY 2003 to fund the International Military Education and Training (IMET) program,[191] up from $65 million in FY 2002.[192] The IPIA also amends Foreign Assistance Act (FAA)[193] provisions related to the IMET program, adding a new requirement for the Secretary of State to report human rights violations by foreign participants in the IMET program to Congress.[194] The FAA requires the SECDEF to maintain and appropriately update the database of foreign participants to reflect any such finding.[195]

Excess Defense Article and Drawdown Authorities

The IPIA grants an exception to the FAA's general prohibition against using DOD funds to pay for transportation and related costs of transferring excess defense articles.[196] During FY 2003, this exception permits the DOD to use available funds for "crating, packing, handling, and transportation" expenses related to the transfer of excess defense articles to certain countries.[197] The IPIA also amends the FAA to include the Philippines on the "priority list" of countries to receive such excess transfers.[198]

HOMELAND SECURITY ACT OF 2002

On 25 November 2002, President Bush signed the Homeland Security Act of 2002 (HSA). This historic legislation began a massive reorganization of the federal government and created a new Department of Homeland Security (DHS), headed by the Secretary of Homeland Security (SHS).[199] Although the extent of the HSA's impact on the field of government contract and fiscal law is uncertain, the next section discusses a few notable provisions related to acquisitions and the DOD.

Acquisitions

The HSA gives the DHS non-FAR, "other transaction" contracting authority for research and development projects[200] under a five-year pilot program similar to that which Congress has already authorized for the DOD.[201] The HSA also grants the SHS the authority to procure temporary personal service contracts for experts and consultants.[202]

The HSA also gives the SHS special streamlined acquisition authority through 30 September 2007.[203] Under this authority, the SHS may increase the micro-purchase threshold to $7500 for certain DHS employees.[204] The SHS may also increase the simplified

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191. Security Assistance Act, 2002, § 1211.

192. Security Assistance Act, 2000, § 201.

193. *See* 22 U.S.C.S. § 2347 (LEXIS 2003).

194. Security Assistance Act, 2002, § 1212.

195. *Id*.; *see* 22 U.S.C.S. § 2347. The Security Assistance Act of 2000 required the SECDEF to create and maintain a database containing detailed information on IMET participants, to include training received, and to the extent practicable, the participants' career progressions after the training. Security Assistance Act, 2000, § 202.

196. *See* 22 U.S.C.S. 2321j(e).

197. Security Assistance Act, 2002, § 1231. The countries covered include Albania, Bulgaria, Croatia, Estonia, the Former Yugoslav Republic of Macedonia, Georgia, India, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Pakistan, Romania, Slovakia, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. *Id*.

198. *Id*. § 1234; *see also* 22 U.S.C.S. 2321j(c)(2).

199. Pub. L. No. 107-296, 116 Stat. 296 (2002).

200. *Id*. § 831.

201. *See* 10 U.S.C. § 2371 (2000).

202. Homeland Security Act § 832.

203. *Id*. § 833.

acquisition threshold[205] to $200,000 for contracts within the United States and $300,000 for contracts outside the United States.[206] Addressing commercial item acquisitions, the HSA gives the SHS the broad authority to "deem any item or service to be a commercial item for the purpose of Federal procurement laws" and increases the DHS's threshold for using simplified acquisition procedures to buy such commercial items[207] to $7.5 million.[208]

The HSA also directs revision of the FAR's rules on unsolicited proposals.[209] Specifically, Congress instructs the revised regulations to require the agency "contact point" to consider, "before initiating a comprehensive evaluation," that the unsolicited proposal "is not submitted in response to a published agency requirement" and "contains technical and cost information for evaluation."[210] Finally, the HSA prohibits the SHS from contracting with "corporate expatriates," U.S. companies that have relocated outside the country. The provision is not as stringent as originally proposed; the HSA permits the SHS to waive the prohibition if the interest of homeland security requires, to prevent the loss of any jobs in the United States, or to prevent additional costs to the government.[211]

Federal Emergency Procurement Flexibility

The HSA gives all executive agencies[212] additional authority to use streamlined acquisition procedures for procuring property and services for use in the "defense against or recovery from terrorism or nuclear, biological, chemical, or radiological attack," provided that the DHS issues the solicitations for such procurements during the one-year period after the HSA's enactment.[213] For Section 852 acquisitions in support of humanitarian or peacekeeping operations or contingency operations, the HSA increases the simplified acquisition threshold[214] to $200,000 for contracts and purchases inside the United States and $300,000 for such purchases outside the United States.[215] The HSA also increases the micro-purchase threshold[216] for Section 852 purchases to $7500[217] and authorizes executive agencies to use simplified acquisition procedures in all Section 852 procurements "without regard to whether the property or services are commercial items."[218] Finally, the HSA eliminates the $5 million threshold[219] that generally applies in such situations.[220]

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204. *Id.*; *cf.* 41 U.S.C. § 428 (2000).

205. *See* 41 U.S.C. § 403(11).

206. Homeland Security Act § 833.

207. *See* 41 U.S.C. 253(g)(1)(B); 427(a)(2).

208. Homeland Security Act § 833.

209. *Id.* § 834. For current guidance on rules and procedures for accepting and evaluating unsolicited proposals, see FAR, *supra* note 134, subpt. 15.6.

210. Homeland Security Act § 834.

211. *Id.* § 835.

212. The term "executive agency" has the same meaning as in the Office of Federal Procurement Act. *Id.* § 851; *see also* 41 U.S.C. 403(1).

213. Homeland Security Act § 852. Section 856 states that executive agencies "shall" use authorized streamlined acquisition procedures when appropriate for "section 852" procurements. *Id.* § 856 (citing 41 U.S.C. § 253 (addressing other than competitive procurement procedures); 41 U.S.C. § 253j (relating to task and delivery orders); 10 U.S.C. § 2304 (2000) (addressing other-than-competitive procurement procedures); 10 U.S.C. § 2304c (relating to task and delivery orders; 41 U.S.C. 416(c) (2000) (making otherwise required procurement notices inapplicable in some circumstances)).

214. 10 U.S.C.S. § 2302(7) (LEXIS 2003) ; 41 U.S.C.S. §§ 259(d), 403(11) (LEXIS 2003).

215. Homeland Security Act § 853.

216. *See* 41 U.S.C.S. § 428.

217. Homeland Security Act § 853.

218. 10 U.S.C.S. § 2304(g); 41 U.S.C.S. §§ 253(g), 427, 430.

219. 10 U.S.C.S. § 2304(g)(1)(B); 41 U.S.C.S. §§ 253(g)(1)(B), 427(a)(2).

220. Homeland Security Act § 855. The HSA directs the OMB to issue guidance and procedures for using simplified acquisition methods for procurements exceeding $5 million. *Id.*

The HSA clearly states that the authority for military and defense activities remains with the DOD; it specifies that the SHS has no authority for such actions and that the HSA in no way limits the DOD's existing authority.[221]

AFGHANISTAN FREEDOM SUPPORT ACT OF 2002

On 4 December 2002, President Bush signed the Afghanistan Freedom Support Act of 2002 (AFSA).[222] In Title II of the AFSA, Congress authorizes the President to exercise "drawdown" authority under the Foreign Assistance Act[223] to support Afghanistan and other eligible foreign countries and international organizations participating in operations aimed at restoring or maintaining peace and security in Afghanistan.[224] The AFSA authorizes up to $300 million in assistance, and may include providing defense articles and services, counter-narcotics assistance, crime control and police training services, military education and training, and other support; the U.S. government may acquire most or all of this assistance by contract.[225] The President must notify the appropriate congressional committees at least fifteen days before providing the assistance.[226] The AFSA's drawdown authority expires on 30 September 2006.[227] Major Huyser.

221. *Id.* § 876.

222. Pub. L. No. 107-327, 116 Stat. 2797 (2002).

223. *See* 22 U.S.C. § 2318 (2000).

224. Afghanistan Freedom Support Act §§ 202-203.

225. *Id.* § 202.

226. *Id.* § 205.

227. *Id.* § 208.

Appendix B

Government Contract & Fiscal Law Web Sites and Electronic Newsletters

Table I below contains hypertext links to Web sites that practitioners in the government contract and fiscal law fields utilize most often. If you are viewing this document in an on-line commercial database, you should be able to click on the Web address in the second column. Your computer's Web browser should automatically open the Web site.

Table II contains links to Web sites that allow you to subscribe to various electronic newsletters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your E-mail address. These electronic newsletters are convenient methods of keeping informed about recent or upcoming changes in the field of law. Major Sharp.

Table I—Links to Common Contract Law Sources

Web Site Name	Address
A	
Acquisition Reform Network (AcqNet)	http://www.arnet.gov
Acquisition Reform Virtual Library	http://www.arnet.gov/Library/
Acquisition Review Quarterly (from DAU)	http://www.dau.mil/pubs/arqtoc.asp
Acquisition Sharing Knowledge System (formerly the Defense Acquisition Deskbook)	http://deskbook.dau.mil/jsp/default.jsp
Acquisition Streamlining and Standardization Information System (ASSIST)	http://astimage.daps.dla.mil/online/new/
ACQWeb (Office of Undersecretary of Defense for Acquisition Logistics & Technology)	http://www.acq.osd.mil
Agency for International Development	http://www.info.usaid.gov
Air Force Acquisition	http://www.safaq.hq.af.mil/
Air Force Acquisition Training Office	http://www.safaq.hq.af.mil/acq_workf/training/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mil
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force FAR Site	http://farsite.hill.af.mil
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Home Page	http://www.af.mil/
Air Force Logistics Management Agency	http://www.aflma.hq.af.mil/

Air Force Materiel Command	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command Contracting Toolkit	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm
Air Force Materiel Command Staff Judge Advocate	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://www.e-publishing.af.mil/
American Bar Administration (ABA) Legal Technology Resource Center	http://www.lawtechnology.org/lawlink/home.html
American Bar Administration (ABA) Network	http://www.abanet.org/
American Bar Administration (ABA) Public Contract Law Journal (PCLJ)	http://www.abanet.org/contract/operations/lawjournal/journal.html
American Bar Administration (ABA) Public Contract Law Section	http://www.abanet.org/contract/
American Bar Administration (ABA) Public Contract Law Section Webpage on Agency Level Bid Protests	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Armed Services Board of Contract Appeals (ASBCA)	http://www.law.gwu.edu/asbca
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/
Army Acquisition Corps	http://asc.rdaisa.army.mil/default.cfm
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://aca.saalt.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.hq.usace.army.mil/cecc/maincc.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command	http://www.amc.army.mil/
Army Materiel Command Command Counsel	http://www.amc.army.mil/amc/command_counsel/
Army Portal	https://www.us.army.mil/portal/portal_home.jhtml
Army Publications	http://www.usapa.army.mil
Army Single Face to Industry (ASFI)	http://acquisition.army.mil/

B

Bid Protests Webpage from the American Bar Administration (ABA) Public Contract Law Section	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Boards of Contract Appeals Bar Association	http://www.bcabar.org/
Budget of the United States	http://w3.access.gpo.gov/usbudget/index.html

C

Central Contractor Registration (CCR)	http://www.ccr.gov/
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Electronic Code of Federal Regulations (eCFR)	http://www.access.gpo.gov/ecfr
Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Decisions via GPO Access	http://www.access.gpo.gov/su_docs/aces/aces170.shtml
Comptroller General Legal Products	http://www.gao.gov/legal.htm
Congressional Bills	http://www.access.gpo.gov/congress/cong009.html
Congressional Documents	http://www.access.gpo.gov/su_docs/legislative.html
Congressional Documents via Thomas	http://thomas.loc.gov/
Congressional Record	http://www.access.gpo.gov/su_docs/aces/aces150.html
Contract Pricing Reference Guides	http://www.acq.osd.mil/dp/cpf/pgv1_0/pgchindex.html
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards (CAS – found in the Appendix to the FAR)	http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/farapndx1.htm
Cost Accounting Standards Board (CASB)	http://www.whitehouse.gov/omb/procurement/casb.html
Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
Court of Federal Claims (COFC)	http://www.uscfc.uscourts.gov/

D

Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Deskbook (now known as the Acquisition Knowledge Sharing System)	http://deskbook.dau.mil/jsp/default.jsp
Defense Acquisition Regulations Directorate (the DAR Council)	http://www.acq.osd.mil/dp/dars/
Defense Acquisition University (DAU)	http://www.dau.mil/
Defense Competitive Sourcing & Privatization	http://www.acq.osd.mil/installation/csp/
Defense Comptroller	http://www.dtic.mil/comptroller/

Defense Contract Audit Agency (DCAA)	http://www.dcaa.mil/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Electronic Business Program Office (formerly JECPO)	http://www.defenselink.mil/acq/ebusiness/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
Defense Finance and Accounting Service (DFAS) Electronic Commerce Home Page	http://www.dfas.mil/ecedi/
Defense Logistics Agency (DLA) Electronic Commerce Home Page	http://www.supply.dla.mil//Default.asp
Defense Procurement	http://www.acq.osd.mil/dp/
Defense Standardization Program	http://dsp.dla.mil/
Defense Systems Management College (DSMC)	http://www.dsmc.dsm.mil/default.htm
Defense Technical Information Center	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	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Veterans Affairs	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals	http://www.va.gov/bca/index.htm
Directorate for Information Operations and Reports Home Page - Procurement Coding Manual/FIPS/ CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Acquisition Reform (DUSD(AR))	http://www.acq.osd.mil/ar/
DOD Busopps	http://www.dodbusopps.com/
DOD Contract Pricing Reference Guide	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DOD E-Mall	https://emall.prod.dodonline.net/scripts/emLogon.asp
DOD Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.osd.mil
DOD Instructions and Directives	http://www.dtic.mil/whs/directives/
DOD Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
DOD Single Stock Point for Military Specifications, Standards and Related Publications	http://www.dodssp.daps.mil/
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/

E

Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.access.gpo.gov/nara/nara003.html
Executive Orders (alternate site)	http://www.archives.gov/federal_register/executive_orders/disposition_tables.html
Export Administration Regulations	http://w3.access.gpo.gov/bis/index.html

F

FAR Site (Air Force)	http://farsite.hill.af.mil
Federal Acquisition Institute (FAI)	http://www.faionline.com/kc/login/log-in.asp?kc_ident=kc0001
Federal Acquisition Regulation (FAR) (GSA)	http://www.arnet.gov/far/
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE)	https://aflsa.jag.af.mil/flite/home.html
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	http://www.fpdc.gov/
Federal Register	http://www.access.gpo.gov/nara
Federal Register via GPO Access	http://www.access.gpo.gov/su_docs/aces/aces140.html
Federally Funded R&D Centers (FFRDC)	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
FindLaw	http://www.findlaw.com
FirstGov	http://www.firstgov.gov/

G

General Accounting Office (GAO) Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
General Accounting Office (GAO) Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
General Accounting Office (GAO) Comptroller General Decisions via GPO Access	http://www.access.gpo.gov/su_docs/aces/aces170.shtml

General Accounting Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
General Accounting Office (GAO) Home Page	http://www.gao.gov
General Services Administration (GSA) Advantage	http://www.gsa.gov/Portal/content/offerings_content.jsp?contentOID=116381&contentType=1004
General Services Administration (GSA) Federal Supply Service (FSS)	http://www.gsa.gov/Portal/content/orgs_content.jsp?contentOID=22892&contentType=1005
General Services Administration Board of Contract Appeals (GSABCA)	http://www.gsbca.gsa.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Contracts Resource Guide	http://www.law.gwu.edu/burns/research/gcrg/gcrg.htm
Government Online Learning Center	http://www.golearn.gov/
Government Printing Office (GPO)	http://www.gpo.gov
Government Printing Office Board of Contract Appeals (GPOBCA)	http://www.gpo.gov/contractappeals/index.html

J

JAGCNET (Army JAG Corps Homepage)	http://www.jagcnet.army.mil/
JAGCNET (Contract & Fiscal Law publications)	http://www.jagcnet.army.mil/ContractLaw
JAGCNET (The Army JAG School Homepage)	http://www.jagcnet.army.mil/TJAGSA
Javits-Wagner-O'Day Act (JWOD)	http://www.jwod.gov/jwod/index.html
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/jel/jointpub.htm
Joint Travel Regulations (JFTR/JTR)	http://www.dtic.mil/perdiem/trvlregs.html

L

Library of Congress	http://lcweb.loc.gov
Logistics Joint Administrative Management Support Services (LOGJAMMS)	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm

M

Marine Corps Home Page	http://www.usmc.mil
Marine Corps Regulations	https://www.doctrine.quantico.usmc.mil/
MEGALAW	http://www.megalaw.com

Mil Standards (DoD Single Stock Point for Military Specifications, Standards and Related Publications)	http://www.dodssp.daps.mil/
MWR Home Page (Army)	http://www.ArmyMWR.com

N

NAF Financial (Army)	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Aeronautics and Space Administration (NASA) Aquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Industries for the Blind (NIB)	www.nib.org
National Industries for the Severely Handicapped (NISH)	www.nish.org
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	http://govinfo.library.unt.edu/npr/index.htm
Naval Supply Systems Command (NAVSUP)	http://www.navsup.navy.mil/index.jsp
Navy Acquisition Reform	http://www.acq-ref.navy.mil/index.cfm
Navy Electronic Commerce On-line	http://www.neco.navy.mil/
Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy Financial Management Career Center	http://www.nfmc.navy.mil/index.htm#HomepageLogo
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Regulations	http://neds.nebt.daps.mil/
Navy Research, Development and Acquisition	http://www.hq.navy.mil/RDA/
North American Industry Classification System (formerly the Standard Industry Code)	http://www.osha.gov/oshstats/sicser.html

O

Office of Acquisition Policy within GSA	http://hydra.gsa.gov/staff/ap.htm
Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.acqnet.gov/Library/OFPP/BestPractices/
Office of Government Ethics (OGE)	http://www.usoge.gov
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/

P

Per Diem Rates (CONUS)	http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.shtml
Per Diem Rates (Military)	http://www.dtic.mil/perdiem/
Per Diem Rates (OCONUS)	http://www.state.gov/m/a/als/prdm/
Producer Price Index	http://www.bls.gov/ppi/
Program Manager (a periodical from DAU)	http://www.dau.mil/pubs/pmtoc.asp
Public Contract Law Journal	http://www.law.gwu.edu/pclj/
Public Papers of the President of the United States	http://www.access.gpo.gov/nara/pubpaps/srchpaps.html
Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm

R

Rand Reports and Publications	http://www.rand.org/publications/

S

SearchMil (search engine for .mil websites)	http://www.searchmil.com/
Service Contract Act Directory of Occupations	http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm
Share A-76 (DOD site)	http://emissary.acq.osd.mil/inst/share.nsf
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR)	http://www.acq.osd.mil/sadbu/sbir/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner/

T

Travel Regulations	http://www.dtic.mil/perdiem/trvlregs.html

U

U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov
U.S. Code	http://www.access.gpo.gov/congress/cong013.html
U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
U.S. Department of Agriculture (USDA) Graduate School	http://grad.usda.gov/
UNICOR (Federal Prison Industries, Inc.)	http://www.unicor.gov/

W

Where in Federal Contracting?	http://www.wifcon.com/

Table II—Government Contract Newslettes

Newsletter Name	Web Address to Subscribe
Air Force Materiel Command (AFMC) Contract Update	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/e-signup.htm
Army Acquisition Policy	http://dasapp.saalt.army.mil/register.htm
Defense and Security Publications via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=gpo-defpubs-l&A=1
Defense Federal Acquisition Regulation Supplement (DFARS) News	http://www.acq.osd.mil/dp/dars/dfarmail.htm
DOD Acquisition Initiatives (DUSD(AR))	http://aitoday.dau.mil/Register.asp
Federal Acquisition Regulation (FAR) News	http://www.arnet.gov/far/mailframe.html
Federal Register via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=fedregtoc-l&A=1
General Accounting Office (GAO) Reports Testimony, and/or Decisions	http://www.gao.gov/subtest/subscribe.html
Public Laws Issued	http://hydra.gsa.gov/cgi-bin/wa?SUBED1=publaws-l&A=1

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.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, extension 304.

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, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2003

February 2003

3-7 February	79th Law of War Course (5F-F42).
10-14 February	2003 Maxwell AFB Fiscal Law Course.
10-14 February	2002 USAREUR Operational Law CLE (5F-F47E) (**Cancelled)**.
24-28 February	65th Fiscal Law Course (5F-F12).
24 February - 7 March	39th Operational Law Course (5F-F47).

March 2003

3-7 March	66th Fiscal Law Course (5F-F12).
10-14 March	27th Administrative Law for Military Installations Course (5F-F24).
17-21 March	4th Advanced Contract Law Course (5F-F103).
17-28 March	19th Criminal Law Advocacy Course (5F-F34).
24-28 March	176th Senior Officers' Legal Orientation Course (5F-F1).
31 March - 4 April	14th Law for Paralegal NCOs Course (512-27D/20/30).

April 2003

7-11 April	9th Fiscal Law Comptroller Accreditation Course (Korea).
14-17 April	2003 Reserve Component Judge Advocate Workshop (5F-F56).
21-25 April	1st Ethics Counselors' Course (5F-F202).
21-25 April	14th Law for Paralegal NCOs Course (512-27D/20/30).
28 April - 9 May	150th Contract Attorneys' Course (5F-F10).
28 April - 16 May	46th Military Judge Course (5F-F33).
28 April - 27 June	10th Court Reporter Course (512-27DC5).

May 2003

5-16 May	2003 PACOM Ethics Counselors Workshop (5F-F202-P).

12-16 May	52d Legal Assistance Course (5F-F23).

June 2003

2-6 June	6th Intelligence Law Course (5F-F41).
2-6 June	177th Senior Officers' Legal Orientation Course (5F-F1).
2-27 June	10th JA Warrant Officer Basic Course (7A-550A0).
3-27 June	161st Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
9-11 June	6th Team Leadership Seminar (5F-F52S).
9-13 June	10th Fiscal Law Comptroller Accreditation Course (Alaska) (5F-F14-A).
9-13 June	33d Staff Judge Advocate Course (5F-F52).
23-27 June	14th Legal Administrators' Course (7A-550A1).
27 June - 5 September	161st Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2003

7 July - 1 August	4th JA Warrant Officer Advanced Course (7A0550A2).
14-18 July	80th Law of War Course (5F-F42).
21-25 July	7th Chief Paralegal NCO Course (512-27D-CLNCO).
21-25 July	14th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 July	34th Methods of Instruction Course (5F-F70).
28 July - 8 August	151st Contract Attorneys Course (5F-F10).

August 2003

4-8 August	21st Federal Litigation Course (5F-F29).
4 August - 3 October	11th Court Reporter Course (512-27DC5).
11-22 August	40th Operational Law Course (5F-F47).
11 August 03 - 22 May 04	52d Graduate Course (5-27-C22).
25-29 August	9th Military Justice Managers Course (5F-F31).

September 2003

8-12 September	178th Senior Officers' Legal Orientation Course (5F-F1).
8-12 September	2003 USAREUR Administrative Law CLE (5F-F24E).
15-26 September	20th Criminal Law Advocacy Course (5F-F34).
16 September - 9 October	162d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2003

6-10 October	2003 JAG Worldwide CLE (5F-JAG).
10 October - 18 December	162d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
20-24 October	57th Federal Labor Relations Course (5F-F22).
20-24 October	2003 USAREUR Legal Assistance CLE (5F-F23E).
22-24 October	2d Advanced Labor Relations Course (5F-F21).
26-27 October	8th Speech Recognition Training (512-27DC4).
27-31 October	3d Domestic Operational Law Course (5F-F45).
27-31 October	67th Fiscal Law Course (5F-F12).
27 October - 7 November	6th Speech Recognition Course (512-27DC4).

November 2003

3-7 November	53d Legal Assistance Course (5F-F23).
12-15 November	27th Criminal Law New Developments Course (5F-F35).
17-21 November	3d Court Reporting Symposium (512-27DC6).
17-21 November	179th Senior Officers' Legal Orientation Course (5F-F1).
17-21 November	2003 USAREUR Operational Law CLE (5F-F47E).

December 2003

1-5 December	2003 USAREUR Criminal Law CLE (5F-F35E).
2-5 December	2003 Government Contract & Fiscal Law Symposium (5F-F11).
8-12 December	7th Income Tax Law Course (5F-F28).

January 2004

4-16 January	2004 JAOAC (Phase II) (5F-F55).
5-9 January	2004 USAREUR Contract & Fiscal Law CLE (5F-F15E).
5-9 January	2004 USAREUR Income Tax Law CLE (5F-F28E).
6-29 January	163d Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
12-16 January	2004 PACOM Income Tax Law CLE (5F-F28P).
20-23 January	2004 Hawaii Income Tax Law CLE (5F-F28H).
21-23 January	10th Reserve Component General Officers Legal Orientation Course (5F-F3).
26-30 January	9th Fiscal Law Comptroller Accreditation Course (Hawaii) (5F-F14-H).
26-30 January	180th Senior Officers' Legal Orientation Course (5F-F1).
26 January - 26 March	12th Court Reporter Course (512-27DC5).
30 January - 9 April 04	163d Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

February 2004

2-6 February	81st Law of War Course (5F-F42).
9-13 February	2004 Maxwell AFB Fiscal Law Course.
23-27 February	68th Fiscal Law Course (5F-F12).
23 February - 5 March	41st Operational Law Course (5F-F47).

March 2004

1-5 March	69th Fiscal Law Course (5F-F12).
8-12 March	28th Administrative Law for Military Installations Course (5F-F24).
15-19 March	5th Contract Litigation Course (5F-F102).
15-26 March	21st Criminal Law Advocacy Course (5F-F34).
22-26 March	181st Senior Officers' Legal Orientation Course (5F-F1).

April 2004

12-15 April	2004 Reserve Component Judge Advocate Workshop (5F-F56).
19-23 April	6th Ethics Counselors' Course (5F-F202).
19-23 April	15th Law for Paralegal NCOs Course (512-27D/20/30).
26 April - 7 May	152d Contract Attorneys' Course (5F-F10).
26 April - 14 May	47th Military Judge Course (5F-F33).
26 April - 25 June	13th Court Reporter Course (512-27DC5).

May 2004

10-14 May	53d Legal Assistance Course (5F-F23).
24-28 May	182d Senior Officers Legal Orientation Course (5F-F1).

June 2004

1-3 June	6th Procurement Fraud Course (5F-F101).
1-25 June	11th JA Warrant Officer Basic Course (7A-550A0).
2-24 June	164th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
7-9 June	7th Team Leadership Seminar (5F-F52S).
7-11 June	34th Staff Judge Advocate Course (5F-F52).
12-16 June	82d Law of War Workshop (5F-F42).
14-18 June	8th Chief Paralegal NCO Course (512-27D-CLNCO).
14-18 June	15th Senior Paralegal NCO Management Course (512-27D/40/50).
21-25 June	15th Legal Administrators' Course (7A-550A1).
25 June - 2 September	164th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2004

12 July - 6 August	5th JA Warrant Officer Advanced Course (7A-550A2).
19-23 July	35th Methods of Instruction Course (5F-F70).
27 July - 6 August	153d Contract Attorneys' Course (5F-F10).

August 2004

2-6 August	22d Federal Litigation Course (5F-F29).
2 August - 1 October	14th Court Reporter Course (512-27DC5).
9-20 August	42d Operational Law Course (5F-F47).
9 August - 22 May 05	53d Graduate Course (5-27-C22).
23-27 August	10th Military Justice Managers' Course (5F-F31).

September 2004

7-10 September	2004 USAREUR Administrative Law CLE (5F-F24E).
13-17 September	54th Legal Assistance Course (5F-F23).
13-24 September	22d Criminal Law Advocacy Course (5F-F34).

October 2004

4-8 October	2004 JAG Worldwide CLE (5F-JAG).

3. Civilian-Sponsored CLE Courses

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099

(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

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	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
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, hours must be completed in compliance period July 1 to June 30
Kentucky	10 August; 30 June is the end of the educational year
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 April 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	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually Minimum credits must be completed by last day of birth month each year

Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	31 October annually
Washington	31 January triennially
West Virginia	31 July biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September 2002 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 2003***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2004 ("2004 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2004 JAOAC will be held in January 2004, and is a prerequisite for most JA captains to be promoted to major.

A 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 2003). If the student receives notice of the need to re-do any examination or exercise after 1 October 2003, 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 2004 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 J T. Parker, telephone (800) 552-3978, ext. 357, or e-mail JT.Parker@hqda.army.mil.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2002-2003 Academic Year)

DATE	TRNG SITE/HOST UNIT	GENERAL OFFICER AC/RC	SUBJECT	ACTION OFFICER
8-9 Mar 03	Washington, DC 10th LSO	BG Black BG Pietsch	Criminal Law; Administrative Law	CPT Mike Zito (301) 599-4440 mzito@juno.com
22-23 Mar 03	West Point, NY	TBA	Eastern States Senior JAG Workshop	COL Randall Eng (718) 520-3482 reng@courts.state.ny.us
26-27 Apr 03	Boston, MA 94th RSC	MG Marchand/ BG Arnold	Administrative Law; Contract Law	SSG Neoma Rothrock (978) 796-2143 neoma.rothrock@us.army.mil
16-18 May 03	Kansas City, MO 89th RSC	BG Carey/ BG Pietsch	Criminal Law; International Law	MAJ Anna Swallow (316) 781-1759, est. 1228 anna.swallow@usarc-emh2.army.mil SGM Mary Hayes (816) 836-0005, ext. 267 mary.hayes@usarc-emh2.army.mil
17-18 May 03	Birmingham, AL 81st RSC	BG Wright/ BG Arnold	Criminal Law; International Law	CPT Joseph Copeland (205) 795-1980 joseph.copeland@se.usar.army.mil
	Charlottesville, VA OTJAG	All General Officers scheduled to attend	Spring Worldwide CLE	

***** 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 2002 issue of *The Army Lawyer.*

3. Regulations and Pamphlets

For detailed information, see the September 2002 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 service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. 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) U.S. Army JAG Corps civilian 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 U.S. Army JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(a) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(b) Follow the link that reads "Enter JAGCNet."

(c) 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.

(d) 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.

(e) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(f) 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.

(g) Once granted access to JAGCNet, follow step (c), above.

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the September 2002 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, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who 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. Dial-up internet access is available in the TJAGSA billets.

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 (434) 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) must be notified before 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.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School, United States Army, ATTN: JAGS-ADL-L, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 488-6306, commercial: (434) 972-6306, or e-mail at Daniel Lavering@hqda.army.mil.

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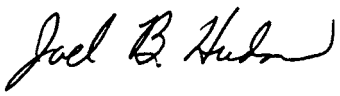

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