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Article

Note from the Field

USALSA Report

United States Army Legal Services Agency

Environmental Law Division Notes

Who's on First—Do Contracting Officers Decide the Merits of Employment Discrimination Cases Filed Against Government Contractors After *Boeing v. Roche*?[1]

Major Gregory R. Bockin
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United States Army Legal Services Agency

> ***Costello:*** *Have you got a contract with the first baseman?*
> ***Abbott:*** *Absolutely.*
> ***Costello:*** *Who signs the contract?*
> ***Abbott:*** *Well, Naturally!*
> ***Costello:*** *When you pay the first baseman every month, who gets the money?*
> ***Abbott:*** *Every dollar. Why not? The man's entitled to it.*[2]

Imagine that you are in your office, when a contracting officer (CO) contacts you with a sexual harassment question. You remind the CO that you are a contracts attorney and offer to refer her to the labor counselor. She laughs, but insists that this is a contracts matter and begins telling you about a sexual harassment lawsuit against a government contractor. The CO tells you that on 18 November 1999, the Directorate of Contracting, Fort Bragg, North Carolina awarded Contract ABC123-45-99-C-0001 to *XYZ, Inc*.[3] (*XYZ*), a government and commercial contractor. Fort Bragg awarded *XYZ* a cost plus fixed-fee contract for labor, management, supervision, supplies, materials, equipment, tools, services supporting family housing maintenance and repair activities, and occupant self-help activities at Fort Bragg.[4]

The CO tells you that an *XYZ* employee, *Ms. B*, filed a lawsuit against *XYZ* alleging that she was fired as a reprisal for her complaints of sexual harassment.[5] That is all that the CO can tell you, because *Ms. B* has since settled the suit, and is now bound by the settlement's confidentiality agreement.[6] *XYZ* is requesting money for legal fees, and the CO wants to know if she should pay them.

This article provides an overview of the law regarding the cost allocability and allowability of a contractor's legal fees in the defense of civil suits filed by a contractor's employees. First, this article discusses the history of how the courts have dealt with the allocability and allowability of third-party legal fees. Second, it discusses the state of the law following the Court of Appeals for the Federal Circuit's (CAFC) 29 July 2002 decision in *Boeing North American, Inc. v. Roche* (*Boeing II*).[7] The discussion includes an application of the CAFC's *Boeing II* decision to a hypothetical set of facts. This analysis explains the issues, exposes the inherent weaknesses in the current standard, and reviews the CAFC's new "similarity test."[8] Third, this article explores the aftermath of unresolved contract issues regarding the scope of *Boeing II*. Finally, it concludes that the current standard creates a difficult situation that forces procurement professionals to evaluate the merits of complex civil actions, for which they have little training or experience.

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1. Boeing N. Am., Inc. v. Roche, 298 F.3d 1274 (Fed. Cir. 2002) [hereinafter Boeing II].

2. *The Colgate Comedy Hour* (NBC television broadcast, Jan. 7, 1951).

3. *XYZ* is a fictional company; however, some of the facts in this hypothetical scenario are loosely based upon the facts from the government's brief in a pending case. *See* Motion for a Board Order to Compel, Tecom, Inc., ASBCA No. 53884, (Oct. 7, 2002) (on file with author). The author wishes to express his appreciation to Craig Clarke, Esq., Supervisory Trial Attorney, and CPT Jennifer Zucker, Trial Attorney, both from the U.S. Army's Contract Appeals Division, for their assistance. Captain Zucker and Mr. Clarke are also government counsel for Tecom, Inc.

4. *See* Motion for a Board Order to Compel, Tecom, Inc., at 3.

5. *See id.*

6. *See id.*; U.S. Dep't of Agriculture, *What is a Confidentiality Agreement?*, *at* http://www.saa.ars.usda.gov/ott/whatisca.htm (last visited Sept. 30, 2003). A confidentiality agreement is an agreement not to disclose certain information to a third party. Generally, such agreements provide that in exchange for the consideration provided for within the settlement agreement, the parties agree not to disclose any of the terms of the settlement agreement. The agreement in the fictional scenario above includes a confidentiality provision which may hold *Ms. B* liable to pay *XYZ* $10,000 if she breached it. The agreement also contained a general "Breach of Agreement" provision that stated, "*B* further agrees that if she breaches this Agreement in any respect she will forfeit all monies due her under this Agreement." *See* Motion for a Board Order to Compel, Tecom, Inc., at 3-4.

7. *Boeing II*, 298 F.3d 1274 (Fed. Cir. 2002) (vacating an earlier CAFC decision in Boeing N. Am., Inc. v. Roche, 283 F.3d 1320 (Fed. Cir. 2002) [hereinafter Boeing I]).

8. *Boeing II*, 298 F.3d. at 1285.

The History of Cost Allocability and Allowability of Costs

One commentator has suggested that "unraveling the Federal Circuit's benefit concept begins by distinguishing allocability from allowability."[9] In the past, the concepts have been confusingly interchanged.[10] Under Federal Acquisition Regulation (FAR) section 31.201-1(b),[11] the total cost of performing a contract includes all costs that are properly allocable to the contract.[12] Section 31.201-4 of the FAR further defines which costs are allocable.[13] In general, allocability refers to whether a cost can be charged to a particular contract, and allowability refers to whether a cost can be charged to a government contract. The government, however, does not pay a contractor the total allocable cost of contract performance. Rather, the government pays the contractor only allowable costs, which are a portion of the costs actually allocable to the contract.[14] The FAR specifies five factors to determine whether costs are allowable.[15]

The confusion between allocability and allowability began with *Lockheed Aircraft Corp. v. United States*.[16] In *Lockheed*, the court held that "the criterion . . . for allocating indirect costs is 'benefit.'"[17] The court described the "benefit" requirement for indirect costs as the following:

> No one would quarrel with the general proposition that it is fair to allocate to government contracts the costs of services which facilitate performance of the particular contracts or are essential to the existence and continuance of the business entity. But the burden shall be on the contractor to show the benefit and a reasonable allocation among different government contracts and between government and commercial work generally.[18]

The "benefit theory" announced in *Lockheed* continued to develop in *Caldera v. Northrop Worldwide Aircraft Services, Inc.*[19] In *Northrop*, the contractor incurred legal fees in an Oklahoma state court during the unsuccessful defense of a wrongful employment termination claim by former employees. The employees claimed they were terminated because they refused to follow the contractor's "directions and participate in fraud against the Army in connection with the contract."[20] The jury agreed. Citing the language of FAR section 31.201-4, the

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9. John D. Inazu, Boeing v. Roche *and the Benefit Theory of Allocability: Unlocking Lockheed or Ignoring Northrop?*, 32 PUB. CONT. L.J. 39, 41 (2002).

10. Ralph C. Nash & John Cibinic, *Postscript: Allocability and Allowability of Costs*, 16 NASH & CIBINIC REP. 9, ¶ 45 (2002).

11. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.201-1(b) (July 2002) [hereinafter FAR].

12. Inazu, *supra* note 9, at 41. The FAR provides that "[w]hile the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to part 31 and applicable agency supplements." FAR, *supra* note 11, at 31.201(b).

13. *Id.* at 31.201-4. The following costs are allocable under the FAR:

> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—
>
> (a) Is incurred specifically for the contract;
> (b) *Benefits both the contract and other work*, and can be distributed to them in reasonable proportion to the *benefits* received; *or*
> (c) *Is necessary to the overall operation of the business*, although a direct relationship to any particular cost objective cannot be shown.

Id. (emphasis added).

14. *See supra* note 12.

15. The FAR determines whether a cost is allowable by considering the following factors:

> (1) Reasonableness.
> (2) Allocability.
> (3) Standards promulgated by the Cost Accounting Standards Board, if appropriate; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances.
> (4) Terms of the contract.
> (5) Any limitations set forth in this subpart.

FAR, *supra* note 11, at 31-201-2.

16. 375 F.2d 786 (Ct. Cl. 1967).

17. Inazu, *supra* note 9, at 44 (citing *Lockheed*, 375 F.2d at 793).

18. *Id*. (citing *Lockheed*, 375 F.2d at 794).

19. 192 F.3d 962 (Fed. Cir. 1999).

court held that the attorneys' fees were not allocable to the contract because they did not "benefit" the government as follows:

> 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." . . . 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.[21]

This background helps put the *Boeing II* decision into context—the "benefit theory" was the state of the law regarding cost analysis until March 2002.[22]

In *Boeing II*, the CAFC addressed the issue of the allowability of legal fees that a government contractor incurred while defending a shareholder derivative suit.[23] *Boeing II* rejected the government's reliance on the "benefit theory."[24] The case revolves around Rockwell International Corp. (Rockwell), a predecessor of Boeing North American, Inc., who was a large defense contractor. In June 1989, four Rockwell shareholders, with Citron as the plaintiff's representative, filed a shareholder's derivative complaint in Los Angeles County Superior Court.[25] The suit alleged that:

> "John Does" who were "officers, directors and other members of management and employees, who [sic] were involved in the wrongdoing complained of." The gravamen of the complaint was that the "defendants knowingly, recklessly, or culpably breached their fiduciary duties to the corporation by . . . failing to establish internal controls sufficient to insure that the corporation's business was carried on in a lawful manner . . . ."[26]

The complaint alleged that "the named defendants were 'controlling persons of Rockwell and had the power and influence, and exercised the same, to cause Rockwell to engage in the illegal practices complained of' and that the unidentified defendants aided, abetted, and participated in the wrongful acts and conduct."[27] In a joint statement of facts, "the parties stipulated that the Citron 'complaint did not directly allege that the director-defendants participated in, or had prior knowledge of, any of the . . . instances of wrongdoing' described in the complaint."[28]

During 1989 through 1991, "Rockwell incurred approximately $4,576,000 of legal fees and costs associated with the Citron action, including costs incurred for representing Rockwell, for representing the director defendants, for legal counsel to the SLC [special litigation committee], and for reimbursement of the plaintiff's legal fees and costs."[29] The company "included these costs as general and administrative ('G&A')[30] costs in its home office overhead for fiscal years 1989, 1990, and 1991, and it claimed reimbursement for a portion of the [Citron] costs under its various contracts with the government."[31]

The CO excluded the legal costs under "FAR [section] 31.204(c), which provides that [the] allowability of costs not specifically addressed by the FAR is to be based on the principles of the FAR and the 'treatment of similar or related . . . items [that are specifically addressed under the FAR].'"[32] The CO determined that Rockwell's legal fees were "'similar or related'[33] to the costs incurred in connection with or related to mischarging of costs on government contracts, which are expressly unallowable under FAR [section] 31.205-15,[34] and

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20. *Id.* at 965.

21. *Id*. at 972.

22. *Id*. *Boeing I* vacated a decision of the Armed Services Board of Contract Appeals disallowing legal costs on 15 March 2002. Boeing I, 283 F.3d 1320 (Fed. Cir. 2002); *see* Boeing N. Am., Inc., ABSCA No. 49994, 00-2 BCA ¶ 30,970.

23. *Boeing II*, 298 F.3d 1274 (Fed. Cir. 2002).

24. *Id*. at 1284.

25. *Id.* at 1276 (citing Citron v. Beall, No. C728809 (Cal. Super. Ct. June 26, 1989)).

26. *Id.*

27. *Id*. at 1277 n.2.

28. *Id*. The parties to *Citron* agreed that the following five instances of underlying misconduct formed the basis of the shareholder's suit: (1) the government alleged that Rockwell fraudulently mischarged the government for work performed on a contract in 1975-1977; (2) the government brought criminal charges against Rockwell for making false statements in connection with work performed under a government contract in 1982; (3) the government alleged that Rockwell had engaged in defective pricing related to a 1982-83 subcontract; (4) a *qui tam* lawsuit alleged that Rockwell permitted employees to use government assets for personal gain; and (5) the Department of Justice alleged that Rockwell engaged in hazardous waste dumping and other environmental law violations between 1975 and 1989. *Id*.

29. *Id*. at 1278.

'similar or related'[35] to costs for the unsuccessful defense of fraud charges, which are expressly unallowable under FAR [section] 31.205-47."[36] While the litigation was still ongoing, "in December 1996, [Rockwell] merged with a wholly owned subsidiary of the Boeing Company and changed its name to Boeing North American, Inc."[37] Boeing appealed the CO's decision to the Armed Services Board of Contract Appeals (ASBCA).[38] Boeing argued that the legal costs were allowable because "the costs were ordinary, necessary, and allowable 'professional services' costs under the FAR [section] 31.205-33(b)."[39] They also argued that "the costs were reasonable in relation to the services rendered, pursuant to FAR [sections] 31.201-3[40] and 31.205-33(b)."[41] Finally, Boeing stated that "the costs were allocable to the contract because they conferred

30. The Cost Accounting Standards define General and Administrative (G&A) expenses as follows:

> [A]ny management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period.

CCH GOVERNMENT CONTRACTS REPORTER, COST ACCOUNTING STANDARDS BOARD REGULATIONS pt. 9904.410-30(6) (1 July 2002) [hereinafter COST ACCOUNTING STANDARDS BOARD REGULATIONS].

31. *Boeing II*, 298 F.3d at 1278.

32. *Id*. at 1279. The FAR section regarding application of principles and procedures provides that:

> Section 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. *The determination of allowability shall be based on principles and standards in this subpart and the treatment of similar or related selected items*.

FAR, *supra* note 11, at 31.204 (emphasis added).

33. *Id*.

34. The FAR section regarding fines, penalties, and mischarging costs provides:

> (a) Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, Local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions with the CO.
>
> (b) Costs incurred in connection with, or related to, the mischarging of costs on Government contracts are unallowable when the costs are caused by, or result from, alteration or destruction of records, or other false or improper charging or recording of costs. Such costs include those incurred to measure or otherwise determine the magnitude of improper charging, and costs incurred to remedy or correct the mischarging, such as costs to rescreen and reconstruct records.

Id. at 31.205-15.

35. *Boeing II*, 298 F.3d at 1279.

36. *Id*. The FAR section regarding costs related to legal and other proceedings provides that costs

> incurred in connection with any proceeding brought by a Federal, State, local or foreign government for a violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is—
>
> (1) In a criminal proceeding, a conviction;
>
> (2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct;
>
> (3) A final decision by an appropriate official of an executive agency to—
>
> (i) Debar or suspend the contractor;
> (ii) Rescind or void a contract; or
> (iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation.

FAR, *supra* note 11, at 31.205-47(b).

37. *Boeing II*, 298 F.3d at 1276.

38. Boeing N. Am., Inc. ASBCA No. 49994, 00-2 BCA ¶ 30,970.

a benefit to the contract, in accordance with FAR [section] 31.204;[42] and the costs were not limited or disallowed by any FAR cost principles."[43] While that appeal was pending, the CAFC decided *Northrop*.[44]

The ASBCA denied Boeing's appeal because there could be "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's allegations."[45] The ASBCA "reasoned that 'but for' Rockwell's wrongdoing[,] the Citron suit would not have been brought, and the costs would not have been incurred."[46]

On 29 July 2002, the CAFC, acting en banc, issued the *Boeing II* decision.[47] The case established two new and important legal standards for allocability and allowability of costs under government cost-reimbursement contracts. With respect to allocability, the CAFC deviated from its earlier decisions, which provided that costs were allocable only if there was some "benefit to the government" for incurring the cost, and that the contractor had to 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.[48]

In *Boeing II*, the CAFC held that the proper test for determining the allocability is the cost accounting standards (CAS)[49]

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39. The FAR section regarding professional and consultant cost services provides that the "costs of professional and consultant services are allowable subject to this paragraph and paragraphs (c) through (f) of this subsection when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see 31.205-30 and 31.205-47)." FAR, *supra* note 11, at 31.205-33.

40. The FAR section regarding reasonableness determinations provides:

> (a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonable specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the CO or the CO's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.
>
> (b) What is reasonable depends upon a variety of considerations and circumstances, including—
>
> (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
> (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;
> (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and—
> (4) Any significant deviations from the contractor's established practices.

Id. at 31.201-3.

41. FAR, *supra* note 11, at 31.205-33.

42. The FAR section regarding the application of principles and procedures provides:

> *Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable under 31.201, 31.202, 31.203, and 31.205.* These criteria apply to all of the selected items that follow, even if particular guidance is provided for certain items for emphasis or clarity.

Id. at 31.204 (emphasis added).

43. *Boeing*, ASBCA No. 49994, BCA ¶ 30,970.

44. Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999).

45. Boeing, ASBCA No. 49994, BCA ¶ 30,970, at 24.

46. Boeing II, 298 F. 3d 1274, 1274 (Fed. Cir. 2002) (citing *Boeing*, ASBCA No. 49994, BCA ¶ 30,970, at 22-24).

47. *Boeing II*, 298 F. 3d 1274.

48. *See, e.g.*, FMC v. United States, 853 F.2d 882, 885 (Fed. Cir. 1988); Lockheed Aircraft Corp. v. United States, 375 F.2d 786 (Ct. Cl. 1967).

49. Cost Accounting Standards Board Regulations, *supra* note 30, ¶ 9904.410. The Cost Accounting Standards section regarding allocation of business unit general and administrative expenses to final cost objectives provides the following:

> The purpose of this Cost Accounting Standard is to provide criteria for the allocation of business unit general and administrative (G&A) expenses to business unit final cost objectives based on their beneficial or causal relationship. These expenses represent the cost of the management and administration of the business unit as a whole.

Id.

"nexus" test: "whether sufficient 'nexus' exists between the costs and the government contract."[50] The CAFC decided that the proper test for allowability is determining whether the legal costs sought by the contractor for third party civil suits were "similar or related" to costs allowable under the regulations.[51] *Boeing II* "recognized that it was bound by its *Northrop* decision, but concluded that the decision should have been based on allowability, not allocability."[52] Therefore, the CAFC distinguished between the concepts of cost allocability and cost allowability under the FAR, holding that the issue of legal costs in this case is one of allowability.[53]

The Similarity Test Under FAR Section 31.204(C)—Similar or Related

After deciding that the issue was one of allowability, *Boeing II* focused on FAR sections 31.204 and 31.205.[54] The CAFC began by disavowing Boeing's argument "that the only professional service costs that are not allowable under FAR [section] 31.205-33 are those costs that are specifically disallowed under another FAR provision."[55] The court reiterated that FAR section 31.201-2 explains the factors to consider in determining whether a cost is allowable, in conjunction with FAR section 31.204 (c), which "explains how to apply the principles and procedures, and FAR [section] 31.205 [which] contains over fifty subsections, each of which covers, in detail, the allowability of particular selected costs."[56]

In *Boeing II*, the court held that "[a]lthough the FAR [section] 31.205 subsections covering selected costs are extensive, FAR [section] 31.204 makes clear that 'section 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable.'"[57] When a cost is not specifically covered under FAR section 31.205, the CAFC noted, "FAR [section] 31.204(c) instructs us: 'The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items.'"[58]

The CAFC applied the "similar or related"[59] standard of FAR section 31.204 to the facts in *Northrop*. They concluded that Northrop's attorneys' fees were "similar"[60] to costs that FAR section 31.205-47 made specifically unallowable, but that consideration of the term "related"[61] was required in *Boeing II* as follows:

> Properly understood, *Northrop* and FAR [section] 31.205-47 taken together 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. The present case is, however, distinguishable from the situation involved in *Northrop*. Here the costs of defending the *Citron* lawsuit would not be, as in *Northrop*, "similar" to disallowed costs. The regulations disallowing particular items of cost do not address costs similar to the costs of defending a contractor's directors from charges that they tolerated inadequate controls concerning possible fraud or similar misconduct. However, we must also consider whether those costs are "related" to a category of disallowed costs, that is, costs of defending against government charges of contractor wrongdoing.[62]

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50. *Boeing II*, 298 F.3d at 1281.

51. *Id*. at 1286.

52. Brief for Respondent, Tecom, Inc., at 7, ASBCA No. 53884 (Oct. 7, 2002); *see Boeing II*, 298 F.3d at 1281.

53. *Boeing II*, 298 F.3d at 1280.

54. *Id*. at 1285.

55. *Id*.

56. *Id*.

57. *Id*. (citing FAR, *supra* note 11, at 31.204).

58. *Id*. (citing FAR, *supra* note 11, at 31.204(c)).

59. *Id*. at 1286.

60. *Id*.

61. *Id*.

62. *Id*. at 1286-87.

The CAFC admitted that it had not previously interpreted FAR section 31.204(c), but that the ASBCA had previously applied this regulation on several occasions.[63] In *Boeing II*, the CAFC noted that the ASBCA has previously found "similar or related" costs in several cases.[64] For example, fees for "the issuance of state tax-exempt bonds were unallowable because they were 'similar or related' to 'interest on borrowed capital.'"[65] However, "launching and roll out costs for a new aircraft were allowable because they were similar to advertising and sales promotion costs."[66] The ASBCA had previously decided that "[d]ividends paid to a contractor's employees on restricted stock were allowable because they were 'similar or related to' allowable cash compensation or stock bonuses."[67] Stock appreciation rights "were allowable because they were 'similar or related to' allowable cash or stock bonuses."[68]

The CAFC then interpreted the term "related," concluding that "related" did not mean "but for."[69] It stated, "[W]e think it unlikely that the related test under FAR [section] 31.204(c) was designed to make a particular cost item unallowable simply because it would not have occurred but for the occurrence of an event that resulted in a disallowed cost."[70] Rather, the court decided that "[i]n order for a particular cost to be 'related,' there must be a more direct relationship to the disallowed cost."[71] Applying this standard, the court held that the "required direct relationship, we think, would exist here if there were a judicial determination that the Rockwell directors had failed to maintain adequate controls to prevent the occurrence of the wrongdoing against the government."[72] However, in *Boeing II*, no judicial determination was made, because the *Citron* suit was settled. Therefore, the CAFC looked to "the regulations for guidance as to the treatment of settlements."[73]

The CAFC then reviewed the FAR[74] and determined that the regulations "reflect a policy judgment that [when] the action is brought by a federal or state government entity and the costs would be disallowed in an unsuccessful suit, the defense costs should also be disallowed in a settlement situation, see FAR [section] 31.205-47(b)(4)."[75] This does not apply if the "U.S. government specifically agrees that they will be allowable."[76] The CAFC concluded that this FAR provision represented a policy judgment "based on the assumption that suits brought by government entities in most situations are likely to be meritorious, thus justifying a bright line rule that does not look behind the settlement."[77]

The court refused to extend this same assumption to private suits, however. Rather, the court opined that:

> [W]here a private suit is involved[,] an inquiry is necessary to determine whether the plaintiff was likely to prevail . . . . This approach is most clearly reflected in the FAR regulations' treatment of settlements of private suits brought under the False Claims Act where the government does not intervene. FAR [section] 31.205-47(c)(2)."[78]

The CAFC explained that under this new standard, "costs may be allowable if the contracting officer determines that there was

63. *Id.* at 1285.

64. *Id*. at 1286.

65. *Id*. (citing Stanford Univ., ASBCA No. 28240, 85-3 BCA ¶ 18,446).

66. *Id*. (citing Gen. Dynamics Corp., ASBCA No. 31359, 92-1 BCA ¶ 24,698).

67. *Id*. (citing Grumman Aerospace Corp., ASBCA No. 34665, 90-1 BCA ¶ 22,417).

68. *Id*. (citing Boeing Co., ASBCA No. 24089, 81-1 BCA ¶ 14,864).

69. *Id.* at 1287.

70. *Id.*

71. *Id*.

72. *Id*.

73. *Id*. at 1287-88.

74. FAR, *supra* note 11, at 31.205-47(b)(4).

75. *Boeing II*, 298 F.3d at 1288.

76. *Id*. (citing, FAR, *supra* note 11, at 31.205-47(c)).

77. *Id*.

78. *Id*.

'very little likelihood that the third party [plaintiffs] would have been successful on the merits.'"[79] Applying this test to the facts in *Boeing II*, the CAFC held that for "the costs to be allowable in a settlement situation (where the costs of an unsuccessful defense would be disallowed), Boeing must show that the allegations in the Citron action had 'very little likelihood of success on the merits.'"[80]

John D. Inazu, an Associate General Counsel for the Department of the Air Force, has suggested that this new standard means that for legal fees to be allowable, the costs must be dissimilar to, but also unrelated to, costs disallowed under the FAR.[81] Focusing on the frivolous nature of some modern lawsuits, he argues that "while 'the costs of defending corporate directors against frivolous lawsuits are essential to any business operation,' if the lawsuits were not 'frivolous,' then the costs would not be 'related' to costs of defending against government charges of contractor wrongdoing."[82] Mr. Inazu concludes that the CAFC essentially "held that a proper determination of allowability depended on a showing by the contractor that the shareholder suits were frivolous."[83]

Applying the *Boeing II* Standard to the *XYZ* Scenario

To properly understand the current state of the law, it is helpful to apply this new CAFC standard to the hypothetical situation discussed earlier. These are the theoretical facts: [84] *XYZ* hired *Ms. B*. as a carpenter and she began working at a commercial construction project. At that job site, another carpenter, *Mr. T*, took an interest in *Ms. B* and asked her out for a date. At first, *Ms. B* made excuses why she could not go out with him. After he had asked her out for the second time, *Ms. B* told him that she was not interested. Following this incident, *Mr. T* began to make derisive comments to *Ms. B* at the job site in front of other workers. *Ms. B* said nothing at the time, having experienced the rough language of construction sites during her career.

A short time later, *XYZ* learned of the damage that Hurricane Oscar caused at Fort Bragg in April 2001. Hurricane Oscar destroyed the roofs on five barracks buildings on Fort Bragg. Under contract ABC123-45-99-C-0001, *XYZ* sent out crews to repair the barracks. *Ms. B* and *Mr. T* were part of the crews that *XYZ* sent to Fort Bragg. After several days, *Mr. T* again asked *Ms. B* for a date while only he and *Ms. B* were present; the foreman was working at another location on Fort Bragg. After work, *Ms. B* complained to the foreman about *Mr. T*'s comments and behavior. The foreman listened politely, but said nothing. A week later, the foreman told her that the work at Fort Bragg was almost complete, and he didn't have any large jobs lined up. He told *Ms. B* to finish out the day but that he would have to lay her off.

On 3 July 2001, *Ms. B* hired an employment law attorney, *Ms. W.* On behalf of *Ms. B*, *Ms. W* filed a claim on 10 July 2001 alleging unlawful workplace harassment due to unwelcome or unsolicited speech or conduct based upon sex.[85] On 13 October 2001, the State of North Carolina informed *Ms. W* that the agency finished processing *Ms. B*'s claim, and would soon issue a final decision. This news made *Ms. B* impatient and she fired *Ms. W.* On 18 November 2001, *Ms. B* hired another employment law attorney, *Mr. S.* On 20 November 2001, *Mr. S* filed a

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79. *Id*.

80. *Id*. at 1288-89 (quoting FAR, *supra* note 11, at 31.205).

81. Inazu, *supra* note 9, at 55 (citing *Boeing II*, 298 F.3d at 1286).

82. *Id*. (citing *Boeing II*, 298 F.3d at 1288).

83. *Id*.

84. The author has created these background facts to aid in the hypothetical. *See generally* Opinion and Order on Government's Motion to Compel, Tecom, Inc., ASBCA No. 53884, (Dec. 4, 2002) (on file with author) (denying government's motion to compel and holding that the court has "no jurisdiction to require the release of any confidentiality agreement").

85. *See* Motion for a Board Order to Compel, Tecom, Inc., at 3, ASBCA No. 53884 (Oct. 7, 2002). North Carolina state law provides:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees. It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

N.C. GEN. STAT. § 143-422.2 (2002).

> The plain language of this statute provides no guidance concerning the requisite elements to establish a prima facie case of a claim under it and there is no basis in the decisional or statutory law of North Carolina for determining even such crucial matters as the burden of proof, which party is to bear that burden, whether there is a defense to a claim flowing from this section, or even whether damages may be compensatory only or punitive.

Newton v. Lat Purser & Assocs., 843 F. Supp. 1022 (W.D.N.C. 1994).

complaint with the Equal Employment Opportunity Commission (EEOC) alleging harassment in violation of Title VII of the Civil Rights Act of 1964, because they were still within the 300-day statute of limitations.[86]

XYZ's corporate counsel, *Ms. R.*, decided to settle the case. She knew that the contract incorporated by reference FAR section 52.222-26, Equal Opportunity. This section states that "[t]he Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin."[87] After reviewing all of the facts in this case, and considering the mounting legal fees that *XYZ* incurred defending the pending state claim, as well as the potential cost of the EEOC matter, *Ms. R* entered into settlement negotiations with *Mr. S*. The parties executed a settlement agreement on 19 February 2002. *XYZ* paid *Ms. B* $39,000 and $1000 for court costs. The settlement agreement addressed the state and federal claims, and contained a confidentiality agreement.[88]

Ms. R sent a letter to the CO, dated 25 February 2002, requesting payment in the amount of $140,000 for legal expenses and settlement costs relating to a layoff, which was alleged to be retaliation against an employee for filing a sexual harassment charge. The CO now comes to you and asks for help. You contact *Ms. B*, through her counsel, and inquire if she would discuss the sexual harassment allegations. *Ms. B* desperately wants to discuss them, but is concerned about the confidentiality provisions of her settlement agreement. On the advice of her attorney, *Ms. B* indicates that if *XYZ* waives the confidentiality and breach provisions of the settlement agreement, she would be willing to testify about her allegations of sexual harassment. *XYZ* declines to waive the confidentiality provision in the settlement agreement, and thus, the government cannot depose *Ms. B*.[89]

On 3 March 2002, the government advised *XYZ* that for the expenses to be allocable,[90] *XYZ* must demonstrate how the defense and settlement of a wrongful termination lawsuit, predicated on sexual harassment, benefited the government.[91]

On 6 March 2002, *Ms. M*, a government cost and price analyst, requested that the Defense Contract Audit Agency (DCAA) audit *XYZ*'s legal and settlement expenses in relation to this claim. That audit revealed the following expenses:

Legal Fees:	$100,000
Settlement Costs:	39,000
Court Costs:	1000
Total:	$140,000

The DCAA audit revealed that the legal and settlement costs that *XYZ* proposed as a direct charge to the contract were accu-

86. The U.S. Equal Employment Opportunity Commission is an independent federal agency originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of 1964. The Commission is composed of five commissioners and a general counsel appointed by the President and affirmed by the Senate. The EEOC is also responsible for enforcing the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I and V of the Americans with Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991. The EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies. Equal Employment Opportunity Commission, *What is the EEOC and How Does It Operate*, *at* http://www.eeoc.gov/facts/qanda.htm (last visited Sept. 30, 2003); *see* Civil Rights Act of 1964, 42 U.S.C. 2000 (2000).

87. FAR, *supra* note 11, at 52.222-26(b)(1).

88. *See* Motion for a Board Order to Compel, Tecom, Inc., at 3, ASBCA No. 53884 (Oct. 7, 2002).

89. *See id.* at 6.

90. The FAR determines allocability as follows:

> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—
>
> (a) Is incurred specifically for the contract;
>
> (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
>
> (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

FAR, *supra* note 11, at 31.201-4.

91. Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999). In this case, the CAFC held that attorneys' fees were not allocable to a contract because they did not "benefit" the government.

> It is established that the contractor must show a benefit to government work from an expenditure that it claims is 'necessary to the overall operation of the [contractor's] business." . . . 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 employee's refusal to defraud the government.

Id. at 972.

mulated and charged to the G&A expense pool and allocated to all contracts for fiscal years 1997 through 2001. *XYZ* denied that it charged the settlement amount of $40,000 to G&A.[92]

On 4 April 2002, the CO issued a final decision demanding the $100,000 in legal fees that *XYZ* charged to G&A during fiscal years 1997 through 2001. The letter further stated that the government could not reimburse *XYZ* for its settlement costs ($39,000) and court costs ($1000), unless *XYZ* shows that the sexual harassment allegations have "very little likelihood of success."[93]

The government and *XYZ* were clearly at an impasse at the time of their last communication on 26 April 2002. *XYZ* saw the expenses as compensable and the government did not. The president of *XYZ* sent an invoice for the settlement fees to the government. *XYZ* filed a complaint with the ASBCA on 5 August 2002, claiming reimbursement for legal fees and settlement costs associated with the sexual harassment claims of a former employee. The government responded that it would not reimburse *XYZ* until it meets the burden of proof under the case law, the FAR, and the CAS.[94] As the contract attorney, you tell the CO that you will study the issue, and get back to her.

Based on the foregoing analysis, assume the *Boeing II* standard applies in this hypothetical case. Therefore, *XYZ* must prove that *Ms. B*'s lawsuit had "very little likelihood of success" in order to establish that its legal fees are allowable.[95] First, the CO would consider allocability. As CAFC noted, "[a]llocability 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."[96] The CAFC further explained that "[p]roper 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."[97]

The CAFC added that "[t]he concept of cost allocability concerns whether a particular cost can be recovered from the government in whole or in part. Cost allocability here is to be determined under the CAS, 4 C.F.R. Parts 403, 410."[98] The concept of allocability addresses whether a sufficient nexus exists between the cost and a government contract.[99] Although a cost may be allocable to a contract, the cost is not necessarily allowable. In *Boeing II*, the CAFC agreed that costs might be assignable and allocable under the CAS[100] but not allowable under the FAR.[101]

The FAR makes clear that while the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the government are limited to those allocable costs that are allowable under the FAR and the applicable agency supplements.[102] The CAS governs if there is a direct conflict between the CAS and the FAR on issues of allocability.[103]

In *Boeing II*, the court held that "[a]llocability is an accounting concept and the CAS does not require that a cost directly benefit the government's interests for the cost to be allocable."[104] The CAFC concluded that the "word 'benefit' is used in allocability provisions to describe the nexus required for accounting purposes between the cost and the contract to which it is allocated."[105]

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92. *See* Motion for a Board Order to Compel, Tecom, Inc., at 4-5, ASBCA No. 53884 (Oct. 7, 2002).

93. Boeing II, 298 F.3d 1274, 1288-89 (Fed. Cir. 2002).

94. *Id.* at 1274. On 29 July 2002, the CAFC established two new and important legal standards for allocability and allowability of costs under government cost-reimbursement contracts. With respect to allocability, the court deviated from its earlier decisions which provided that costs were allocable only if there was some "benefit to the government" for incurring the cost, and that the contractor had to 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. *Id.* at 1290. The CAFC now held that the costs for attorneys' fees in third-party civil suits may be allowed only if it has been determined that the plaintiffs had "very little likelihood of success on the merits" of prevailing. *Id*. at 1290.

95. *Id*. at 1288-89.

96. *Id*. at 1280.

97. *Id*.

98. *Id*.

99. *Id*. at 1281.

100. *See supra* note 49.

101. *Boeing II*, 298 F.3d at 1285.

102. FAR, *supra* note 11, at 31.201-1(b).

103. *Boeing II*, 298 F.3d at 1283.

104. *Id.* at 1284.

Since *Boeing II*, contractors must allocate the costs between government and non-government contracts. In this case, *Mr. T* began his alleged harassment of *Ms. B* at a commercial construction site. The harassment continued at a government contract site. *XYZ* may have to determine when the harassment began, the effect of *Mr. T*'s actions at each site, and allocate the costs of defending the lawsuits accordingly. The CO will judge whether this allocation is proper. Once the CO answers the allocability question, she must address allowability. Whether *Boeing II* applies or not, will depend on the ASBCA's interpretation of the term "related," a word in FAR section 31.204 that played a central role in *Boeing II*.[106]

With respect to the settlement payment, the Army would "argue that they are 'related' to penalties made unallowable by FAR [section] 31.205-15."[107] As explained, the CAFC's discussion in *Boeing II* "favors a broad application of the 'related' standard."[108] *XYZ* paid *Ms. B* $39,000 to settle her case. Although this payment might be encompassed by the above allowability argument concerning legal fees, there is another basis for finding it unallowable. FAR section 31.205 -15(a) states the following:

> Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the CO.[109]

Practitioners have addressed this issue since *Boeing II*. In the government's brief in support of its Motion to Compel in *Tecom Inc.*,[110] U.S. Army Contract Appeals Division (CAD) attorneys argued that "[a] payment in a settlement of a civil suit is a substitute for the fine or penalty that was at risk in the action filed" by the plaintiff.[111] "Therefore, it is 'related' to the unallowable fines and penalties in FAR [section] 31.205-15 (a),[112] Fines, Penalties, and Mischarging Costs."[113] They reiterated that "[t]here is no 'little likelihood of success' standard in FAR [section] 31.205-15 (a), and that standard should not apply to the settlement payment."[114] Applying this argument to the *XYZ* scenario, the $39,000 plus $1000 should be "unallowable even if the legal fees are determined to be allowable under the little likelihood of success standard in *Boeing*."[115] According to the CAD, this is a reasonable outcome because *XYZ* paid the $39,000 plus $1000 to *Ms. B* to "limit its risk for the alleged wrongdoing and such a payment is undoubtedly 'related' to a penalty."[116]

Concerning the attorneys' fees, the Army argues, "the 'related' standard is broad enough to sweep in non-fraud wrongdoing, such as sexual harassment, pursuant to FAR [section] 31.205-47."[117] The CO must now decide whether *Ms. B*'s

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105. *Id.*

106. FAR, *supra* note 11, at 31.204.

107. Brief for Respondent, Tecom, Inc., at 2, ASBCA No. 53884 (Dec. 4, 2002) (citing *Boeing II*, 298 F.3d at 1285).

108. *Id.*

109. FAR, *supra* note 11, at 31.205-15(a).

110. Tecom, Inc., ASBCA No. 53884 (Oct. 7, 2002). This is a case subsequent to *Boeing II* addressing the allowability of contractor legal costs for defending a third-party civil case.

111. *See supra* note 3, Motion for a Board Order to Compel, Tecom, Inc., at 3, ASBCA No. 53884 (Oct. 7, 2002)

112. The FAR section regarding fines, penalties and mischarging costs provides:

> (a) Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the CO.
>
> (b) Costs incurred in connection with, or related to, the mischarging of costs on Government contracts are unallowable when the costs are caused by, or result from, alteration or destruction of records, or other false or improper charging or recording of costs. Such costs include those incurred to measure or otherwise determine the magnitude of the improper charging, and costs incurred to remedy or correct the mischarging, such as costs to rescreen and reconstruct records.

FAR, *supra* note 11, at 31.205-15.

113. Brief for Respondent, Tecom, Inc., at 12-13, ASBCA No. 53884 (Oct. 7, 2002).

114. *Id.*

115. *Id.*

116. *Id.*

claim had "very little likelihood of success on the merits."[118] If so, the legal costs are allowed. If not, the legal costs are disallowed.

This is where the difficulty arises. The CO would be called upon to decide timeliness issues, such as whether the federal discrimination claim has been timely filed, given that the state court action is pending. Also, she must assess the evidence and decide whether *Ms. B* is likely to prevail before a judge or a jury on her claim. Because there were better witnesses at the commercial site than at the government site, the CO may decide that there is a substantiated harassment claim at the commercial site but not for the harassment allocable to the government contract. Finally, she would have to decide where "success on the merits" would apply.[119] It might apply at: (1) an alternative dispute resolution; (2) before an EEOC administrative judge; (3) before a state court judge; or (4) before a federal court judge or jury.[120]

These issues are challenging even for experienced employment law judges. The COs would certainly find these issues challenging and would likely have difficulty with them; COs are not trained in employment discrimination nor are they trained to determine whether suits are meritorious. Although one can persuasively argue that the new *Boeing II* standard requires COs to make these determinations, they are not well equipped to do so. Additionally, the CO would not be able to adequately assess these issues without a factual basis for the claims. In the *XYZ* scenario, the plaintiff's version of the facts would be unavailable because *Ms. B* is bound by a confidentiality agreement.

The Aftermath of the *Boeing II* Decision

Following *Boeing II*, attorneys with extensive government procurement experience disagreed about the scope of the CAFC's ruling. Practitioners were concerned with the practical effects that an overly broad scope would have on the COs in the field. One attorney stated the following:

> I am concerned that COs will improperly misinterpret *Boeing* [II] to apply the standard from FAR [section] 31.205-47(c)(2) to any third-party civil cases filed against government contractors. As an example, the application of that standard to employment litigation alleging wrongful discharge based on discrimination would create a terrible and very costly problem for contractors. COs will have free rein to second guess settlement decisions, and disallow legal costs if they believe that the plaintiffs had more than a 'very little likelihood of success on the merits.' Such second-guessing is inconsistent with the Government emphasis on alternative dispute resolution, the settlement of litigation, and judicial economy. Further, if *Boeing* is so interpreted by COs, it raises the serious question of what expertise and training do COs possess to determine whether plaintiffs were likely to prevail before a judge or jury on a sex, age, or racial discrimination charge against Government contractors. How are COs and their legal advisors to determine between meritorious suits and suits that lack merit?[121]

Professors Ralph C. Nash[122] and John Cibinic[123] (Nash and Cibinic) have opined that these concerns are misplaced. Their position is that "[w]e do not believe it appropriate for COs, the board of contract appeals, or the courts to extend the 'very little likelihood of success on the merits' standard to any 'third-party civil cases.'"[124] Rather, they believe that *Boeing II* "makes it clear that the key for application of FAR [section] 31.204(c) is the specific disallowance of a type of cost in FAR [section]

117. *Id*. at 1-2.

118. Boeing II, 298 F.3d 1274, 1288-89 (Fed. Cir. 2002).

119. *Id*. at 1288-89.

120. *See generally id.* (explaining that the "regulations suggest that where a private suit is involved an inquiry is necessary to determine whether the plaintiff was likely to prevail").

121. Nash & Cibinic, *supra* note 10, ¶ 45 (quoting an unnamed attorney).

122. Ralph C. Nash, Jr. received an A.B. from Princeton University and a Juris Doctor from The George Washington University. He has written and lectured extensively in the government contracts field. In 1960, he founded the George Washington University's government contracts program, and served as its director from 1960 to 1966 and from 1979 to 1984. He taught at the law school from 1960 to 1993, retiring to become Professor Emeritus. He also is a consultant for law firms, government agencies, and private corporations. JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS vii (3d ed. 1998).

123. John Cibinic, Jr. received an A.B. from the University of Pittsburgh and a Juris Doctor from The George Washington University. He has written and lectured extensively in the government procurement field. He taught at the George Washington University Law School from 1963 to 1993, retiring to become a Professor Emeritus. He was Director of the government contracts program from 1966 through 1974. In addition to teaching, he is a consultant for private corporations, law firms, and government agencies. *Id.*

124. Nash & Cibinic, *supra* note 10, ¶ 45.

31.205."[125] They believe the CAFC "found no similarity in the case of suits against boards of directors because FAR [section] 31.205 did not 'address' the costs of defending boards of directors from 'charges that they tolerated inadequate controls concerning possible fraud or similar misconduct.'"[126] Thus, Nash and Cibinic explain that CAFC created a "relatively strict test for determining whether costs are 'similar.' FAR [section] 31.205 must deal specifically with the type of conduct upon which the civil suit is based for the 'similar' test to be invoked. Since FAR [section] 31.205 does not deal with suits against directors, the costs were not similar."[127]

With respect to the *Boeing II* "related" test,[128] Nash and Cibinic do not believe that COs will have to apply this test because the related test also requires coverage in FAR section 31.205.[129] Nash and Cibinic argue that *Boeing II* addresses civil suits involving fraud.[130] They explain that "[s]ince costs relating to fraud against the government are covered in FAR [section] 31.205-47 ('Costs related to legal and other proceedings') and the allegations in this suit included fraud against the Government, the court found the test in that section should be applied to the costs in this case."[131] Based on the fraud analysis, Nash and Cibinic conclude that "[t]he 'very little likelihood of success on the merits' test is not covered by any provision in FAR [section] 31.205 other than FAR [section] 31.205-47(b). Since that provision deals only with fraud against the government, it would be improper to use its test for any other type of cost."[132]

Others, however, disagree with Nash and Cibinic's conclusion that *Boeing II* is limited to fraud cases. For example, the U.S. Army CAD has responded to the position that *Boeing II* does not apply in the employment discrimination context. In its brief in support of a Motion to Compel in *Tecom Inc*.,[133] the Army argued that:

> the wrongdoing involved in the *Citron* litigation was not fraud. The costs in *Boeing* were legal fees associated with settling a shareholders' lawsuit charging that management "breached their fiduciary duties to the corporation by . . . failing to establish internal controls sufficient to insure that the corporation's business was carried on in a lawful manner."[134]

In fact, the parties stipulated that the *Citron* "complaint did not directly allege that the director-defendants participated in, or had prior knowledge of, any of the . . . instances of wrongdoing" described in the complaint.[135] Therefore, breach of fiduciary duty was the true underlying misconduct.[136]

The CAD noted that in *Boeing II*, the CAFC held that under FAR sections 31.204 and 31.205-47, the breach of fiduciary duty was related to "a proceeding brought by a third party under the False Claims Act in which the United States did not intervene."[137] They argued that once the CAFC "found that the costs were 'related,' the *Boeing II* court applied the 'very little likelihood of success' standard for allowability in FAR [section] 31.205-47 (c)(2)."[138] The Army's attorneys reiterated the CAFC's holding that such costs may be allowable if the CO determines that there was "very little likelihood that the third party [plaintiffs] would have been successful on the merits."[139]

A complaint for breach of fiduciary duty is not a claim of fraud.[140] Therefore, the CAD applied the *Boeing II* "related"[141]

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125. *Id.*

126. *Id.*

127. *Id.*

128. Boeing II, 298 F.3d 1274, 1285 (Fed. Cir. 2002).

129. Nash & Cibinic, *supra* note 10, ¶ 45.

130. *Id.*

131. *Id.*

132. *Id.*

133. Brief for Respondent, Tecom, Inc., at 11, ASBCA No. 53884 (Oct 7, 2002) (citing Boeing II, 298 F.3d 1274, 1276-1277 (Fed. Cir. 2002)).

134. *Id.*

135. *Boeing II*, 298 F.3d at 1277.

136. Brief for Respondent, Tecom, Inc., at 11, ASBCA No. 53884 (Oct. 7, 2002) (citing Boeing N. Am., Inc. v. Roche, 298 F.3d 1274, 1276-77 (Fed. Cir. 2002).

137. *Id.* (citing *Boeing II*, 298 F.3d at 1286).

138. *Id.* (citing *Boeing II*, 298 F.3d at 1286-87).

139. *Id.*

standard and reasoned "if a breach of fiduciary duty is 'related' to conduct that violates the False Claim Act, which is fraudulent, there is no reason why other non-fraudulent conduct may not likewise be considered 'related' to FAR [section] 31.205 (c)(2) for the purposes of evaluating allowability."[142]

The Army wrote that "[s]exual harassment is a breach of contract and illegal conduct. However, it, like breach of fiduciary duty, is not fraud . . . . Arguably, sexual harassment is worse behavior than breach of fiduciary duty."[143] They argued that "if breach of fiduciary duty is related to False Claims Act violations for allowability purposes, so is sexual harassment."[144] The Army concluded that "the *Boeing* [II] standard applies in the case of employment discrimination. The contractor must prove that the employee's lawsuit had 'very little likelihood of success' in order to establish that its legal fees are allowable."[145]

The CAD's position is more persuasive than that of Nash and Cibinic for one critical reason. As the government correctly pointed out, "[b]reach of fiduciary duty is not fraud."[146] Much of Nash and Cibinic's analysis centers on the idea that the *Boeing II* costs were fraud-related, and costs relating to fraud against the government are covered under FAR section 31.205-47. Therefore, the CAFC found the test in that section should be applied to the costs.[147] This portion of their analysis, properly understood, significantly weakens their position that *Boeing II* will be narrowly applied. Hence, the Army's conclusion that "if breach of fiduciary duty is related to False Claims Act violations for allowability purposes, so is sexual harassment"[148] appears to be the most accurate statement of the law in this area. The *Boeing II* standard would apply in the case of employment discrimination.[149]

Although Nash and Cibinic suggest that *Boeing II* is limited to fraud cases, there are no reported cases that deal with the interpretation of the language "similar" or "related" in FAR section 31.204. Recently, in the appeal of *Tecom, Inc.*, the Army attempted to secure the testimony of a terminated employee bound by a confidentiality agreement, in order to properly perform the *Boeing II* cost analysis.[150] The ASBCA, however, did not decide the issue in that case, instead holding that it lacked jurisdiction to require the release of any confidentiality agreement.[151] Thus, it appears that contractors, COs, attorneys, and commentators will be left to struggle with these issues until the ASBCA or the federal courts resolve them.

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140. *Id*. at 11.

141. Boeing II, 298 F.3d 1274, 1276-1277 (Fed. Cir. 2002).

142. Brief for Respondent, Tecom, Inc., at 12, ASBCA No. 53884 (Dec. 4, 2002) (citing *Boeing II*, 298 F.3d at 1285).

143. *Id*.

144. *Id*.

145. *Id*.

146. *Id.*

147. *Id*.

148. *Id*.

149. *Id*.

150. Tecom, Inc., ASBCA No. 53884 (Dec. 4, 2002).

151. Opinion and Order on Government's Motion to Compel, Tecom, Inc., at 11, ASBCA No. 53884 (Dec. 4, 2002).

Limiting Application of the Late Proposal Rule: One Time, One Place, One Method

Major Gregg A. Engler[1]

A government agency has issued a solicitation requiring interested contractors to submit electronic copies of their proposals to a digital location, along with three paper copies to two different geographic locations. The solicitation instructs the contractors that they must submit the electronic and paper copies to the designated locations by the time set for receipt of proposals. Contractor X *submits all required copies of its proposal to the proper locations on time. Contractor* Y *submits a single paper copy of its proposal to only one location on time but does not bother to submit an electronic copy. Contractor* Z *submits no paper copies of its proposal, but does submit a timely electronic copy. The contracting officer (CO) wants to reject the proposals of Contractors* Y *and* Z *as late. Should she do so?*

The general rule governing the late submission of proposals is that late is late.[2] Normally, a CO can confidently reject proposals received after the exact time specified for the receipt.[3] Although the General Accounting Office (GAO) has strictly followed this mandate,[4] a CO must not substitute form over substance in its application. Solicitations requiring multiple submission methods make evaluations of proposals more efficient and advanced technology makes multiple submission-methods possible. Use of multiple submission methods, however, can obscure limitations on a CO's discretion to reject submissions as late.[5] The GAO recently revisited limitations on applying the late rule in *Tishman Construction Corp*.[6]

In *Tishman*, the GAO applied form-over-substance limitations on the late rule, to the modern electronic era. The solicitation required offerors to submit both paper and electronic versions of their proposals. In the solicitation's submission instructions, it specifically stated that the paper copy would be the "official copy for recording timely receipt of proposals."[7] The protester submitted a timely electronic version of its proposal, but submitted its paper version seventy-three minutes late. As a result, the CO rejected the protester's proposal as late.[8]

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1. The author is currently assigned as a trial attorney at the U.S. Army Contract Appeals Division.

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.208(b) (July 2003) [hereinafter FAR]. The FAR provides as follows:

> (1) Any proposal, modification, or revision, that is received at the designated Government office after the exact time specified for receipt of proposals is "late" and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late proposal would not unduly delay the acquisition; and—
>
> (i) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or
>
> (ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of proposals; or
>
> (iii) It was the only proposal received.
>
> (2) However, a late modification of an otherwise successful proposal, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

Id.

3. *Id.*

4. *See, e.g.*, Logistics Mgmt. Inst., Comp. Gen. B-276143, May 15, 1997, 97-1 CPD ¶ 186 (seven minutes late); Med-Nat'l, Inc., Comp. Gen. B-277430, Sept. 8, 1997, 97-2 CPD ¶ 67; Koba Assocs., Inc., Comp. Gen. B-265854, Nov. 8, 1995, 95-2 CPD ¶ 212 (three minutes late); Hallcrest Sys., Inc., Comp. Gen. B-215328, Sept. 24, 1984, 84-2 CPD ¶ 334 (one minute late); Priest & Fine, Inc., Comp. Gen. B-213606, Mar. 27, 1984, 84-1 CPD ¶ 358 (two minutes late).

5. FAR, *supra* note 2, at 15.208(b).

6. Comp. Gen. B-292097, May 29, 2003, 03-1 CPD ¶ 94.

7. *Id.*

8. *Id.*

In addressing the CO's use of the late rule to enforce compliance with multiple submission methods, the GAO re-examined its decision in *Abt Associates, Inc.*[9] In *Abt*, the agency required multiple submission locations.[10] The agency required offerors to submit their proposals both to the agency's project office in Zaire and to its regional contracting office in the Ivory Coast.[11] Abt's proposal reached the regional contracting office in the Ivory Coast on time, but was five days late to the project office in Zaire.[12] Consequently, the CO rejected Abt's proposal as late.[13]

Arguing for rejection of Abt's proposal, the agency claimed that the continuity of the program being competed was at stake and that time was limited.[14] The agency required multiple delivery locations to properly coordinate the evaluation of proposals with the government of Zaire while conducting the procurement out of the agency's regional contracting office in the Ivory Coast.[15]

The GAO acknowledged that an agency may impose conditions on offerors that reflect the "actual and reasonable needs of the agency," but rejected the notion that the needs of the agency could trump basic contract principles.[16] According to the GAO, timely submission of one complete proposal legally represented the submission of an offer that could be evaluated and accepted, resulting in a binding contract.[17] The principles of offer and acceptance did not depend on the agency's desire for multiple copies[18] or multiple submission locations. Thus, applying the late rule, in this instance, exalted form over substance.[19]

The GAO noted that this outcome would be different if an offeror could obtain an unfair advantage by a late submission to the second location, but found no such advantage in *Abt*.[20] Consequently, the GAO characterized Abt's failure to timely deliver copies to both locations as an "informality or minor irregularity"[21] that the CO should have waived.[22]

The GAO's *Abt* decision provided the blueprint for *Tishman.*[23] Requiring submission by two methods, electronic and paper, was analogous to requiring submission to two locations.[24] Even though the solicitation in *Tishman* specifically gave notice that the official copy for timeliness purposes was the paper copy, timely submission of the electronic copy still provided an offer that could be accepted.[25] As such, the

9. Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513.

10. *Id.*

11. *Id.* A complete submission actually included a technical proposal along with a business proposal. Offerors were required to submit three copies of their technical proposal and one copy of their business proposal to the agency's project office in Kinshasa, Zaire, and one copy of their technical proposal, along with two copies of their business proposal, to the agency's contracting office in Abidjan, Ivory Coast by 3:00 p.m. local time on 31 December 1986. *Id*. at 1-2.

12. *Id*. at 2. The contractor blamed this mishap on misrouting by the courier service. As a result, the requisite submission did not reach the project office in Kinshasa, Zaire until 5 January 1987. *Id*.

13. *Id*.

14. *Id*. at 3.

15. *Id*.

16. *Id*.

17. *Id*. at 4-5.

18. The GAO has consistently held that submitting less than the required number of proposal copies is a minor irregularity that agencies should waive. *See, e.g*., RGII Techs., Inc., Comp. Gen. B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 (submitting required copies but omitting original); Limbach Co., 51 Comp. Gen. 329 (1971).

19. *See* Abt Assocs., Inc., Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513.

20. *Id.* The GAO held the following:

> [There was] no possibility that Abt, by virtue of the late delivery of its proposal to the second location, either could take advantage of changed circumstances or of an improper disclosure of information concerning other offers during the interim, since the contents of its proposal already had been disclosed at the first location.

Id. at 6.

21. A CO has the discretion to waive informalities and minor irregularities in proposals. FAR, *supra* note 2, at 52.215-1(f)(3); *see also id.* at 14.405 (defining a minor informality or irregularity as one "that is merely a matter of form and not of substance").

22. *Abt Assocs., Inc.*, 87-1 CPD ¶ 513, at 6-7.

23. Tishman Constr. Corp., Comp. Gen. B-292097, May 29, 2003, 03-1 CPD ¶ 94.

agency's attempt to designate the paper copy as the official copy was meaningless for timeliness purposes.[26]

As in *Abt*, the GAO found no possibility that unfair advantage could result from consideration of Tishman's proposal.[27] Tishman's failure to submit its paper copy on time was a minor informality given that it submitted a complete copy of its proposal by the other required method of submission.[28] Thus, as in *Abt*, the CO should have waived this minor informality. In its opinion, the GAO acknowledged that a CO retains discretion to waive minor irregularities in proposals and indicated that failure to grant a waiver under the circumstances of this case was an abuse of that discretion.[29]

The GAO's decision in *Tishman* is clear and probably could have been foretold given its previous decision in *Abt*.[30] The larger picture, however, is important for practitioners. Agencies may instruct offerors to submit multiple copies of their proposals through multiple methods and to multiple locations to assist their evaluation and logistical needs. For purposes of the late rule, however, only one timely copy submitted to one authorized location by one authorized method is necessary.[31] If a CO receives one timely copy at an authorized location by authorized means, he should not reject it as late unless the particular circumstances indicate that the offeror in question would receive an unfair advantage.[32]

In the initial hypothetical, the CO should not reject the proposals of contractors *Y* and *Z* as late. They each submitted at least one timely copy of their proposals by one authorized method and to one authorized location. Additionally, there is no indication that contractors *Y* and *Z* have gained or could gain an unfair advantage.[33] Consequently, as the *Tishman* opinion reminds us, the CO should consider their proposals along with the proposal of Contractor *X*.

24. *Id.* at 3, 8.

25. *Id.*

26. *Id.*

27. The GAO stated that the late rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal later than the deadline set for all competitors. *Id*. at 7 (citing Inland Serv. Corp., Comp. Gen. B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266). The policy against confusion and unequal treatment, however, appears significant only as it relates to whether an offeror has received an unfair advantage. The GAO summarily noted that the unequal treatment of Tishman was not material.

28. *Id*. at 8-9.

29. *See id* at 8-9.

30. *See Tishman Constr. Corp.*, 03-1 CPD ¶ 94; Abt Assocs., Inc., Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513, at 6-7. Indeed, the GAO emphasized that it had notified the agency at an outcome prediction alternative dispute resolution conference that Tishman's protest was likely to be sustained for the reasons explained in its opinion. The agency declined to take corrective action. *See* Tishman Constr. Corp., B-292097, May 29, 2003, 03-1 CPD ¶ 94.

31. *See, e.g*., RGII Techs., Inc., B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 (submitting required copies but omitting original).

32. *See, e.g.*, *id.*

33. An unfair advantage could occur where an offeror that is required to submit both electronic and hard copies of its proposal, submits its electronic copy on time but submits its hard copy late after taking additional time to improve its proposal. The CO could reject the hard copy submission as late because the additional time could be construed as an unfair advantage. The FAR, however, does allow the late modification of an otherwise successful proposal where the terms become more favorable to the government. FAR, *supra* note 2, at 15.208(b)(2); *see also id.* at 14.304(b)(2). If the modifications are not more favorable to the government, the agency should reject them as late because the additional time to make those modifications amounts to an unfair advantage over those who did not get the additional time. An unfair advantage could also result where late modifications make a technically unacceptable proposal acceptable. Consequently, the contracting officer should not accept a late modification that attempts to make it technically acceptable.

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the *Army Environmental Law Bulletin*, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The August 2003, Army *Environmental Law Bulletin*, is reproduced in part, below.

Fifth Circuit Reverses *Aviall*—Broadens Superfund Contribution Right

Industrial groups and the Environmental Protection Agency (EPA) officials recently breathed a collective sigh of relief when the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, in *Aviall Services, Inc., v. Cooper Industries, Inc.* (*Aviall II*), affirmed the ability of potentially responsible parties (PRPs) to seek contribution from other PRPs under section 113(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), "at whatever time in the cleanup process the party, seeking contribution, decides to pursue it."[1] The decision reverses a controversial opinion issued by a divided panel of the same court (*Aviall I*) that held that a PRP could "only" seek contribution from other PRPs if there was a prior or pending administrative abatement order under section 106 or a cost recovery action by a non-responsible party under section 107.[2] Critics argued that the earlier decision threatened to undermine a decade of CERCLA precedent, the EPA's long-term enforcement policy, and CERCLA's goal of encouraging PRPs to clean up contaminated sites voluntarily.[3]

In 1981, Aviall purchased an aircraft engine maintenance business and associated facilities from Cooper Industries. Aviall discovered that the facilities were contaminated from Cooper's past activities and from its own operation at the site. Aviall notified the state environmental regulators which responded with letters informing Aviall that is was violating the state environmental laws. Neither the state regulators nor the EPA, however, took any action to force Aviall to remediate the site. Aviall cleaned-up the site and eventually sued Cooper to recover its response costs under section 113(f)(1) of CERCLA and state law. The district court granted summary judgment in favor of Cooper, ruling that Aviall could not seek response costs from Cooper under section 113(f)(1) "unless Aviall had incurred or at least faced liabliity under a CERCLA administrative abatement or cost recovery action."[4] *Aviall I* affirmed that decision.

At issue during the en banc hearing was the plain meaning of the first sentence of section 113(f)(1) ("Any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)] during or following any civil action under" sections 106 or 107(a)) and its relationship with the so-called savings clause.[5] *Aviall I* concluded that "may," when used in an enabling clause, meant "shall" or "must" and "establishe[d] an exclusive cause of action."[6] The *Aviall I* court harmonized that interpretation with the savings clause in 113(f)(1)[7] by concluding that Congress intended the savings clause to preserve a "party's ability to bring contribution actions based on state law."[8]

The Court's en banc opinion flatly rejected the "exclusivity" interpretation adopted in *Aviall I* and supported by the Department of Justice as amicus curiae in favor of an admittedly "expansive reading of section 113(f)(1)"—that allows a contribution claim whenever a PRP decides to pursue it.[9] The court held that this result is more consistent with the text, legislative history and cases interpreting CERCLA. *Aviall II* dismisses

1. Aviall Servs., Inc., v. Cooper Indus., Inc., 312 F.3d 677, 686 (5th Cir. 2002) (*Aviall II*).

2. Aviall Servs., Inc., v. Cooper Indus., Inc., 263 F.3d 134, 137 (5th Cir. 2001) (*Aviall I*).

3. 42 U.S.C. § 9606, 9607(a) (2000) (containing CERCLA).

4. *Aviall I*, 263 F.3d at 135.

5. *Id.* at 138-39.

6. *Id.* at 139.

7. "Nothing in this section shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [sections 106 or 107]." *See* 42 U.S.C. § 9613(f).

8. *Aviall II*, 312 F.3d 677, 686 (5th Cir. 2002).

9. *Id.* at 686.

the notion that the court should read restrictive language into CERCLA where none exists, especially when Congress has demonstrated an ability to do so elsewhere in the statute, but chose a permissive term instead. In the court's view, section 113(f)(1) simply identifies a "non-exclusive list of circumstances in which actions for contribution may be brought."[10] That reading, the court explained, comports with case law preceding the adoption of section 113(f) in 1986 that recognized an implicit right of contribution under section 107.[11] Further proof is found in the legislative history that indicated that section 113(f) was enacted to "confirm" those earlier court decisions and bring some uniformity to that area of the law.[12] Finally, the *Aviall II* court interpreted the savings clause in section 113(f)(1) as preserving a PRP's implicit right to seek what the Supreme Court has called, a "somewhat overlapping" remedy in section 107, rather than the somewhat anemic state law remedy suggested by *Aviall I*.[13] Read together, the enabling and savings clauses of section 113(f)(1) "combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous waste site cleanups."[14]

The Fifth Circuit's en banc decision will not be the last word on this issue. In February 2003, Cooper Industries petitioned the Supreme Court to overturn the *Aviall II* decision.[15] The Court has agreed to hear the case and, as occured in the lower courts, the United States has been invited to file briefs expressing its views on this issue.[16] Lieutenant Colonel David Harney.

To Exclude or Not to Exclude? The Ninth Circuit Demands Clarification Regarding NEPA Categorical Exclusions

In *California v. Department of Interior*,[1] the U.S. of Court of Appeals for the Ninth Circuit (Ninth Circuit) reminds us of the importance of providing contemporaneous documentation of agency National Environmental Policy Act (NEPA)-related decisions, even if the decision is to invoke the use of a categorical exclusion.

Under the Outer Continental Shelf Lands Act,[2] leases for exploration and production of oil and gas are set for terms of five to ten years.[3] Normally, such leases expire after their initial term, unless lessees are able to produce paying quantities of oil or gas, or drilling is underway. If production or drilling is not underway at the end of the initial term of the lease, it expires.[4] The statute, however, provides that if production or drilling is not underway, the Department of Interior (DOI) may "suspend" the lease term. The suspension is, in effect, an exten-

10. *Id.*

11. *Id.*

12. *Id.* at 684.

13. *Id.* at 685.

14. *Id*. at 688.

15. Cooper Indus., Inc. v. Aviall Servs. Inc. No. 0201192, *pet. for cert. filed* (U.S. Feb. 12, 2003).

16. *Id.*; 123 S. Ct. 1832 (April 21, 2003).

1. 311 F.3d 1162 (9th Cir. 2002).

2. 43 U.S.C. §§ 1331-1356a (2000).

3. *Dep't of Interior*, 311 F.3d at 1168.

4. *Id*.

5. *Id.*

6. 16 U.S.C. §§ 1331-1356a (2000).

7. 42 U.S.C. §§ 4321-70d.

8. *Dep't of Interior*, 311 F.3d at 1169.

9. *Id.* at 1169-70. The circuit court upheld the District Court's decision that the suspension of the leases was a "federal agency activity" under 16 U.S.C. 1456(c)(1), which required a consistency determination under the CZMA. *Id.* at 1170-73. Further discussion of this portion of the case is beyond the scope of this article.

10. *Id.* at 1175; 40 C.F.R. subpt. 1508.4 requires an agency adopting a categorical exclusion to "provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." Categorical Exclusion, 40 C.F.R. subpt. 1508.4 (2001).

11. *Dep't of Interior*, 311 F.3d at 1176 (citing Bicycle Trails Council v. Babbit, 82 F.3d 1445, 1456 n.5 (9th Cir. 1996).

sion of the term of the lease, and is granted to allow the lessee the opportunity to develop the lease.[5]

In this case, there were thirty-six off-shore oil and gas leases located between the Channel Islands National Marine Sanctuary and the Monterey Bay National Marine Sanctuary near the California coast. The DOI approved the suspension of these leases without making a consistency determination under the Coastal Zone Management Act (CZMA)[6] or performing an environmental impact statement (EIS) or environmental assessment (EA) as required by NEPA.[7] The State of California challenged the lease suspension decision in federal district court, alleging that the DOI failed to make the consistency determination called for by the CZMA and perform the EA or EIS required by NEPA.[8] The District Court ruled in favor of the plaintiffs, which caused the DOI and the lessee oil companies to appeal to the ciruit court as interveners.[9]

The DOI argued that the decision to suspend the leases fit within a properly adopted categorical exclusion, and therefore, that no further environmental review was required. As required by the Council on Environmental Quality (CEQ) regulations implementing NEPA, the DOI's categorical exclusion includes exceptions under which the exclusion would not apply.[10] While the DOI acknowledged that the administrative record does not include any documentation demonstrating that it made a categorical exclusion determination *at the time the lease suspension decision* was made, it argues that the record is sufficient because it shows that a proper categorical exclusion applies.

The court found the DOI's argument unpersuasive and explained the requirement for proper application of a categorical exclusion: "An agency satisfie[s] NEPA if it applies its categorical exclusions and determines that neither an EA or EIS is required, so long as the application of the exclusions to the facts of a particular action is not arbitrary or capricious."[11] The court also noted that while the Ninth Circuit previously upheld the application of a categorical exclusion in *Bicycle Trails Council v. Babbit*,[12] the agency made specific findings of fact and applied them to its categorical exclusion in a Record of Decision published in the Federal Register.[13] According to the court, if there is no such finding in the administrative record, it is unclear on review if the agency actually considered the environmental consequences of its action as part of the decision process.[14]

It is difficult for a reviewing court to determine if the application of an exclusion is arbitrary and capricious if there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a categorical exclusion to the facts of a particular decision. Post hoc invocation of a categorical exclusion does not provide assurance that the agency actually considered the environmental effects of its action before the decision was made.[15] The Ninth Circuit remanded the case to the District Court to determine what further NEPA documentation may be required, noting that in this case, if one or more of the "extraordinary circumstances" are present, the use of the categorical exclusion would be precluded.[16]

Army Regulation 200-2, Environmental Effects of Army Actions and *Federal Regulations* impose similar documentation requirements for the use of categorical exclusions (CX) within the Army.[17] *Federal Regulations* address categorical exclusions, and a CX listing is included in Appendix B.[18] It also discusses the appropriate use of Records of Environmental Consideration (RECs), which are most frequently used to document the use of a CX.[19] A review of the CX listing in Appendix B indicates that all but the most routine types of categorical exclusions require an REC. Given the Ninth Circuit's emphasis on contemporaneous documentation of the application of categorical exclusions, environmental coordinators and the attorneys who advise them should pay careful attention to this requirement. Lieutenant Colonel Scott Romans.

12. *Babbit*, 82 F.3d at 1445.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* *See* 40 C.F.R. subpt. 1508.4 (2001).

17. Environmental Analysis of Army Actions, 32 C.F.R. pt. 651 (2002); U.S. Dep't of Army, Reg. 200-2, Environmental Effects of Army Actions (23 Dec. 1998).

18. 32 C.F.R. § 651.29.

19. *Id.* at 651.19.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. 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 non-unit 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, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA 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, U.S. Army, 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 (August 2003 - September 2005)

Course Title	Dates	ATTRS No.
	GENERAL	
52d Graduate Course	18 August 03 - 27 May 04	(5-27-C22)
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
162d Basic Course	16 September - 10 October 03 (Phase I - Ft. Lee)	(5-27-C20)
	10 October - 18 December 03 (Phase II - TJAGSA)	(5-27-C20)
163d Basic Course	6 - 30 January 04 (Phase I - Ft. Lee)	(5-27-C20)
	30 January - 9 April 04 (Phase II - TJAGSA)	(5-27-C20)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee)	(5-27-C20)
	25 June - 3 September 04 (Phase II - TJAGSA)	(5-27-C20)
165th Basic Course	14 September - 8 October 04 (Phase I - Ft. Lee)	(5-27-C20)
	8 October - 16 December 04 (Phase II - TJAGSA)	(5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee)	(5-27-C20)
	28 January - 8 April 05 (Phase II - TJAGSA)	(5-27-C20)

167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
168th Basic Course	13 September - thru TBD (Phase I- Ft. Lee) TBD (Phase II – TJAGSA)	(5-27-C20)
8th Speech Recognition Training	1- 12 December 03	(512-27DC4)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)
12th Court Reporter Course	25 August - 28 October 03	(512-27DC5)
13th Court Reporter Course	26 January - 26 March 04	(512-27DC5)
14th Court Reporter Course	26 April - 25 June 04	(512-27DC5)
15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)
17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August - 5 October 05	(512-27DC5)
3d Court Reporting Symposium	17 - 21 November 03	(512-27DC6)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
179th Senior Officers Legal Orientation Course	17 - 21 November 03	(5F-F1)
180th Senior Officers Legal Orientation Course	26 - 30 January 04	(5F-F1)
181st Senior Officers Legal Orientation Course	22 - 26 March 04	(5F-F1)
182d Senior Officers Legal Orientation Course	17 - 21 May 04	(5F-F1)
183d Senior Officers Legal Orientation Course	13 - 17 September 04	(5F-F1)
184d Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185d Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)
186d Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)
187d Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)

188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
10th RC General Officers Legal Orientation Course	21- 23 January 04	(5F-F3)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
34th Staff Judge Advocate Course	7 - 11 June 04	(5F-F52)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
7th Staff Judge Advocate Team Leadership Course	7 - 9 June 04	(5F-F52-S)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2004 Reserve Component Judge Advocate Workshop	19 - 22 April 04	(5F-F56)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)
2004 JAOAC (Phase II)	4 - 16 January 04	(5F-F55)
2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)
2003 JAG Annual CLE Workshop	6 - 10 October 03	(5F-JAG)
2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
15th Legal Administrators Course	21 - 25 June 04	(7A-550A1)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
15th Law for Paralegal NCOs Course	29 March - 2 April 04	(512-27D/20/30)
16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)

15th Senior Paralegal NCO Management Course	14 - 18 June 04	(512-27D/40/50)
16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
8th Chief Paralegal NCO Course	14 - 18 June 04	(512-27D- CLNCO)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOC	25 October - 10 November 04	
5th 27D ANCOC	10 - 28 January 05	
6th 27D ANCOC	25 April - 13 May 05	
7th 27D ANCOC	18 July - 5 August 05	
4th JA Warrant Officer Advanced Course	12 July - 6 August 04	(7A-270A2)
11th JA Warrant Officer Basic Course	31 May - 25 June 04	(7A-270A0)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

2d Advanced Federal Labor Relations Course	22 - 24 October 03	(5F-F21)
3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
57th Federal Labor Relations Course	20 - 24 October 03	(5F-F22)
58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)

53d Legal Assistance Course	3 - 7 November 03	(5F-F23)
54th Legal Assistance Course	10 - 14 May 04	(5F-F23)
55th Legal Assistance Course	1 - 5 November 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2003 USAREUR Legal Assistance CLE	20 - 24 Oct 03	(5F-F23E))
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)
28th Admin Law for Military Installations Course	8 - 12 March 04	(5F-F24)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)
2004 USAREUR Administrative Law CLE	13 - 17 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 16 September 05	(5F-F24E)
2003 Federal Income Tax Course (Montgomery, AL)	15 - 19 December 03	(5F-F28)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 Hawaii Estate Planning Course	20 - 23 January 05	(5F-F27H)
2003 USAREUR Income Tax CLE	8 - 12 December 03	(5F-F28E)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2004 Hawaii Income Tax CLE	12 - 16 January 04	(5F-F28H)
2005 Hawaii Income Tax CLE	11 - 14 January 05	(5F-F28H)
2004 PACOM Income Tax CLE	5 - 9 January 2004	(5F-F28P)
2005 PACOM Income Tax CLE	3 - 7 January 2005	(5F-F28P)
22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)
2d Ethics Counselors Course	12 - 16 April 04	(5F-F202)

3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)

CONTRACT AND FISCAL LAW

152d Contract Attorneys Course	23 February - 5 March 04	(5F-F10)
153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
154th Contract Attorneys Course	28 February - 11 March 05	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)
6th Advanced Contract Law (Intellectual Property & Non-FAR Transactions)	15 - 19 March 04	(5F-F103)
5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2003 Government Contract Law Symposium	2 - 5 December 03	(5F-F11)
2004 Government Contract Law Symposium	7 - 10 December 04	(5F-F11)
67th Fiscal Law Course	27 - 31 October 03	(5F-F12)
68th Fiscal Law Course	26 - 30 April 04	(5F-F12)
69th Fiscal Law Course	3 - 7 May 04	(5F-F12)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
11th Comptrollers Accreditation Course (Fort Bragg)	20 - 24 October 03	(5F-F14)
12th Comptrollers Accreditation Course (Hawaii)	26 - 30 January 04	(5F-F14)
13th Comptrollers Accreditation Course (Fort Monmouth)	14 - 17 June 04	(5F-F14)
6th Procurement Fraud Course	1 - 3 June 04	(5F-F101)
2004 USAREUR Contract & Fiscal Law CLE	12 - 16 January 04	(5F-F15E)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)

2004 Maxwell AFB Fiscal Law Course	10 - 13 February 04	
2005 Maxwell AFB Fiscal Law Course	7 - 11 February 05	

CRIMINAL LAW

10th Military Justice Managers Course	23 - 27 August 04	(5F-F31)
11th Military Justice Managers Course	22 - 26 August 05	(5F-F31)
47th Military Judge Course	26 April - 14 May 04	(5F-F33)
48th Military Judge Course	25 April - 13 May 05	(5F-F33)
21st Criminal Law Advocacy Course	15 - 26 March 04	(5F-F34)
22d Criminal Law Advocacy Course	13 - 24 September 04	(5F-F34)
23d Criminal Law Advocacy Course	14 - 25 March 05	(5F-F34)
24d Criminal Law Advocacy Course	12 - 23 September 05	(5F-F34)
27th Criminal Law New Developments Course	17 - 20 November 03	(5F-F35)
28th Criminal Law New Developments Course	15 - 19 November 04	(5F-F35)
2004 USAREUR Criminal Law CLE	5 - 9 January 04	(5F-F35E)
2005 USAREUR Criminal Law CLE	3 - 7 January 05	(5F-F35E)

INTERNATIONAL AND OPERATIONAL LAW

3d Domestic Operational Law Course	27 - 31 October 03	(5F-F45)
4d Domestic Operational Law Course	25 - 29 October 04	(5F-F45)
1st Basic Intelligence Law Course (TJAGSA)	28 - 29 June 04	(5F-F41)
2d Basic Intelligence Law Course	27 - 28 June 05	(5F-F41)
1st Advanced Intellgience Law (National Ground Intelligence Center)	30 June - 2 July 2004	(5F-F43)
2d Advanced Intellgience Law	29 June - 1 July 2004	(5F-F43)

81st Law of War Course	2 - 6 February 04	(5F-F42)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84d Law of War Course	11 - 15 July 05	(5F-F42)
41st Operational Law Course	23 February - 5 March 04	(5 F-F47)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44d Operational Law Course	8 - 19 August 05	(5F-F47)
2004 USAREUR Operational Law CLE	12 - 16 January 2004	(5F-F47E)
2005 USAREUR Operational Law CLE	10 - 14 January 2005	(5F-F47E)

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. 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 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 judge advocate 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. 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 JT. Parker, telephone (800) 552-3978, ext. 3357, or e-mail JT.Parker@hqda.army.mil.

5. 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	Virginia	31 October annually
Tennessee*	1 March annually	Washington	31 January triennially
	Minimum credits must be completed by last day of birth month each year	West Virginia	31 July biennially
		Wisconsin*	1 February biennially
Texas	Minimum credits must be completed by last day of birth month each year	Wyoming	30 January annually
Utah	31 January		
Vermont	2 July annually		

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2003 issue of *The Army Lawyer.*

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096	Government Contract Law Deskbook, vol. 1, JA-501-1-95.
AD A301095	Government Contract Law Deskbook, vol. 2, JA-501-2-95.
AD A265777	Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

AD A384333	Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).
AD A333321	Real Property Guide—Legal Assistance, JA-261 (1997).
AD A326002	Wills Guide, JA-262 (1997).
AD A346757	Family Law Guide, JA 263 (1998).
AD A384376	Consumer Law Guide, JA 265 (2000).
AD A372624	Uniformed Services Worldwide Legal Assistance Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998).

AD A350514	The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).
AD A329216	Legal Assistance Office Administration Guide, JA 271 (1997).
AD A276984	Deployment Guide, JA-272 (1994).
AD A360704	Uniformed Services Former Spouses' Protection Act, JA 274 (2002).
AD A326316	Model Income Tax Assistance Guide, JA 275 (2001).
AD A282033	Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829	Defensive Federal Litigation, JA-200 (2000).
AD A327379	Military Personnel Law, JA 215 (1997).
AD A255346	Reports of Survey and Line of Duty Determinations, JA-231 (2002).
AD A347157	Environmental Law Deskbook, JA-234 (2002).
AD A377491	Government Information Practices, JA-235 (2000).
AD A377563	Federal Tort Claims Act, JA 241 (2000).
AD A332865	AR 15-6 Investigations, JA-281 (1997).

Labor Law

AD A360707	The Law of Federal Employment, JA-210 (1998).
AD A360707	The Law of Federal Labor-Management Relations, JA-211 (1999).

Legal Research and Communications

AD A332958	Military Citation, Sixth Edition, JAGS-DD (1997).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301 (2003).
AD A303842	Trial Counsel and Defense Counsel Handbook, JA-310 (1995).
AD A302445	Nonjudicial Punishment, JA-330 (1995).
AD A302674	Crimes and Defenses Deskbook, JA-337 (1994).
AD A274413	United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522	Operational Law Handbook, JA-422 (2003).

Reserve Affairs

AD A345797	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA (1998).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8.

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

The following provides information on how to obtain *Manuals for Courts-Martial*, *DA Pamphlets*, *Army Regulations*, *Field Manuals*, and *Training Circulars*.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. Consult *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program* (15 July 2002). The U.S. Army Publishing Agency web site provides administrative depart-

mental publications and forms to include Army regulations, circulars, pamphlets, optional forms, standard forms, Department of Defense forms and Department of the Army forms. The web site to access the departmental publications and forms is http://www.usapa.army.mil. Consult Table 5-1, *AR 25-30*, for official departmental publications web sites.

3. 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 TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on 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.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the September 2003 issue of *The Army Lawyer.*

5. Legal Technology Management Office (LTMO)

The Judge Advocate General's School, U.S. Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout TJAGSA.

The Judge Advocae General's School, U.S. Army, 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) 971-3314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the 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 TJAGSA. Dial-up internet access is available in TJAGSA billets.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you to the appropriate department or directorate. For additional information, please contact the Legal Technology Management Office at (434) 971-3264.

6. 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 & Legal Center, United States Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.Lavering@hqda.army.mil.

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By Order of the Secretary of the Army:

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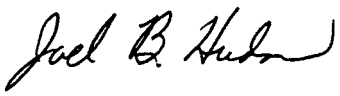

JOEL B. HUDSON
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Secretary of the Army
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