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Contract and Fiscal Law Developments of 2004—The Year in Review

Major Kevin J. Huyser (USAF) (Editor), Lieutenant Colonel Michael J. Benjamin, Lieutenant Colonel Karl W. Kuhn, Major Bobbi J.W. Davis, Major Steven R. Patoir, Major James M. Dorn, Major Andrew S. Kantner, Lieutenant Colonel Louis A. Chiarella, Lieutenant Colonel John J. Siemietkowski, Major Katherine E. White, Major Kerry L. Erisman, Ms. Margaret K. Patterson

Contents

Editor, Captain Anita J. Fitch
Assistant Editor, Captain Jennifer L. Crawford
Technical Editor, Charles J. Strong

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CONTENTS

FOREWORD

Acquisition and Fiscal Accountability: Between Iraq and a Hard Place

In fiscal year (FY) 2004, the world saw the best that fast, flexible, discretion-friendly, rule-free (or nearly rule-free) acquisition can accomplish. The Commander's Emergency Response Program (CERP) in the newly liberated Iraq is a program liberated from the Federal Acquisition Regulation (FAR) and even liberated from most traditional fiscal law limitations. The CERP authorizes local military commanders to reconstruct Iraq and provide urgent humanitarian relief, "notwithstanding any other provision of law." In the aftermath of the invasion, commanders quickly contracted to repair roofs, schools, town halls, courthouses, and clinics; distribute food; purify water; maintain local governmental agencies; restore electricity (on small scales); re-open factories; and, restore communications systems. The procurement process was fast and effective.

On the other hand, in FY 2004, the world saw the worst that fast, flexible, discretion-friendly, rule-free (or nearly rule-free) acquisition can accomplish. Contract translators and interrogators, ordered through "efficient" federal supply schedules and multiple award contracts, were alleged to have participated in prisoner abuse at the detention center at Abu Ghraib. Many of these contractors were unsupervised; some were untrained. Further, the Army admitted that it had no effective way of tracking the growing number of contractors deployed with the military.

And sometimes, determined, devious individuals will cheat the system, regardless of layers of rules—witness the Darlene Druyun scandal.

This year's Contract and Fiscal Law Symposium, "Acquisition and Fiscal Accountability: Between Iraq and a Hard Place," took place from 7 until 10 December 2004 and confronted these issues head on. The *Year in Review* article is the Contract and Fiscal Law Department's* annual attempt to capture and analyze the past fiscal year's most important, relevant, and occasionally eccentric cases and developments. Although the individual pieces do not directly address the Symposium theme, accountability is a motif that runs through many of the subjects covered.

Although we could not cover every new decision or rule, we have tried to discuss topics most relevant to our readers. In addition, we have tried to spot trends and put developments into context. I hope we have succeeded and that you find this article useful in your practice, thought provoking, and a "good read." We have made one technological improvement this year. In response to many requests over the years, we have added an index. If you have other comments or suggestions, please email them to Contract-YIR@hqda.army.mil.

Lieutenant Colonel Michael Benjamin.

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* The Contract and Fiscal Law Department is composed of seven Judge Advocates (Lieutenant Colonel Michael Benjamin, Lieutenant Colonel Karl Kuhn, Major Bobbi Davis, Major Jim Dorn, Major Kevin Huyser (USAF), Major Andrew Kantner, and Major Steven Patoir) and our Secretary, Ms. Dottie Gross. Each officer has contributed sections to this work. Major Kevin Huyser deserves particular praise, as he has now edited the *Year in Review* two years running. Kevin's tremendous dedication, tenacity and attention to detail, are exceeded only by his steady, inspiring leadership. He is the ideal editor in chief. The Department would like to thank our outside contributing authors: Lieutenant Colonel Louis Chiarella, Major Kerry Erisman, Ms. Margaret Patterson, Lieutenant Colonel John Siemietkowski, and Major Katherine White. We greatly appreciate their expertise and contributions. Finally, the issue has benefited inordinately from diligent fine-tuning by the School's resident footnote guru, Mr. Chuck Strong. Thank you all!

CONTRACT FORMATION

Authority

You Promised Me $4 Million for My Testimony—I'm Here to Collect

In *Awad v. United States*,[1] the Court of Federal Claims (COFC) dismissed an action alleging the government breached a contract to pay plaintiff $4 million in exchange for his assistance prosecuting several members of a terrorist organization. Although the outcome was rather predictable, the case offers an interesting examination of the differences between contracting with the government in its proprietary capacity versus sovereign capacity.

In 1982, Mr. Adnan Awad, an Iraqi citizen, carried a suitcase bomb to Switzerland, at the behest of the May 15 terrorist organization. However, upon arrival he turned himself in to the U.S. Embassy. Thereafter, Awad was permitted to stay in Switzerland and "was given many amenities."[2] During this time, Awad met with several Department of Justice (DOJ) representatives, who allegedly offered a United States passport and citizenship, and told him "his life in the U.S. would be at least equal to what he enjoyed in Switzerland" and that he could return to Switzerland at any time if he was unsatisfied with his life in the United States. In return, the United States expected Awad to assist in prosecuting members of the May 15 terrorist organization.[3]

Awad decided to come to the United States, where he became involved in the Witness Security Program (WITSEC), which the U.S. Marshals Service (USMS) administered. Before he entered the program, the USMS required Awad to complete a memorandum of understanding, which contained a clause stating that the USMS would retain Mr. Awad's identification documents until he decided to "revert to his . . . true identity."[4] Awad left the WITSEC in 1986. At this point he requested his passport from the USMS, but was denied his request. In the late 1980s, Awad received a refugee travel document, but was not given a passport. To obtain a passport, Awad met with an FBI agent, who allegedly told him he would receive a passport and a reward of $4 million in six months.[5] Awad rejoined the WITSEC later that year, but was "terminated" from the program in 1991. Nevertheless, Awad traveled to Greece to testify in the trial of an alleged terrorist. Throughout this process, different government agents allegedly told Awad on several occasions that he would be receiving a passport shortly. However, Awad did not become a U.S. citizen until 2000.[6]

Awad filed a complaint before the COFC seeking $5 million in compensation.[7] In response, the government filed a motion to dismiss for lack of jurisdiction.[8] Upon examination, the court observed that the government has not waived its sovereign immunity with regard to all contracts that it makes with private entities. Rather, the application of sovereign immunity depends on the type of contract the government makes. The court noted the two main categories of contracts that the government makes are, respectively, proprietary and sovereign. "The United States generally has waived sovereign immunity with regard to proprietary contracts, which are contracts in which 'the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves.'"[9] In contrast, the court observed the government has not waived sovereign immunity for contracts that it makes in its sovereign, or governmental, capacity. As a result, the COFC has subject matter jurisdiction over most proprietary contracts, but under the Tucker Act,[10] the court generally does not have jurisdiction over contracts the government makes in its sovereign capacity.[11]

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[1] 61 Fed. Cl. 281 (2004).

[2] *Id*. at 282.

[3] *Id*. at 282-83.

[4] *Id*. at 283.

[5] *Id*.

[6] *Id*.

[7] *Id*. (noting that Awad never articulated how he arrived at this figure).

[8] *Id*. at 282.

[9] *Id*. at 284.

[10] 28 U.S.C.S. § 1491(a)(1) (LEXIS 2004). The Tucker Act, in relevant part, provides:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id.

[11] *Awad*, 61 Fed. Cl. at 284.

For the court, the alleged contract at issue was obviously made in the government's sovereign capacity, "since both counter-terrorism efforts and the granting of citizenship and passports are solely government functions, neither of which has a private analogue."[12] The court observed it "has found in many instances that, when the government makes a contract involving 'activities of the criminal justice system, [these] activities . . . , without question, lie at the heart of sovereign action.'"[13] In addition, "an alleged contract for citizenship and a passport is not the type of contract that a private person could make because only the government has the power to naturalize citizens and award passports."[14]

The court then observed that since the government made the alleged contract in its sovereign capacity, under the Tucker Act's waiver of sovereign immunity, the court would only have jurisdiction to entertain the case if the persons who made the contract had the authority to bind the government.[15] Based on the evidence available, the individuals who contacted Awad clearly lacked the actual authority to bind the government. Further, the court noted that Awad made no attempt to show these individuals had such authority to bind the government. Thus the court lacked jurisdiction to entertain the case.[16]

It's All About Authority, but We've Covered them as Multiple Award Schedule Matters

Two recent cases, *United Partition Systems, Inc. v. United States*[17] and *Sharp Electronics Corporation*,[18] involve schedule contracts and highlight the issue of who has the authority to address disputes that arise under Federal Supply Schedule/Multiple Award Schedule contracts ― the ordering contracting officer?, the schedule contracting officer?, or is it both? Though the crux of these cases deal with a contracting officer's authority, the *Year in Review* discusses these cases in greater detail in the Multiple Award Schedules section.[19]

Major James Dorn.

Competition

Introduction: FAR Part 6 and Beyond!

Once upon a time, "competition" meant Federal Acquisition Regulation (FAR) part 6.[20] There were three "levels" of competition: full and open; full and open after exclusion of sources; and, other than full and open competition.[21] Most contracts were competed fully and openly (meaning sealed bidding or competitive negotiations) or sole-sourced. "Once upon a time" was not that long ago.[22] Now we live in the increasingly complex and ambiguous world of Federal Supply Schedules and Task and Delivery Order Contracting. New standards, like "fair opportunity to compete" take center stage. FAR parts 8.4,[23] 13,[24] and 16.5[25] determine "competition" standards.

This section will discuss "traditional" competition issues―challenges to other than full and open competition, out of

[12] *Id*.

[13] *Id*. (citing Silva v. United States, 51 Fed. Cl. 374, 377 (Fed. Cl. 2002)).

[14] *Id*. at 284-85.

[15] *Id*. at 285.

[16] *Id*. *See also* Home Bank of Tennesse, F.S.B. v. United States, 57 Fed. Cl. 676 (2004) (ruling government officials involved in the acquisition of financially-troubled savings and loans lacked the authority to bind the government); Dureiko v. United States, 2004 U.S. Claims LEXIS 254 (holding government officials lacked authority to bind government to agreement to pay costs resulting from hurricane clean up); Arakaki v. United States, 2004 U.S. Claims LEXIS 231 (denying a government motion to dismiss, inter alia, because the issue of a Housing and Urban Development employee's authority to bind the government in a transaction involving the purchase of a housing unit involved a genuine dispute of material fact).

[17] 59 Fed. Cl. 627 (2004).

[18] No. 54475, 2004 ASBCA LEXIS 80 (Aug. 2, 2004).

[19] *See infra* section on Multiple Award Schedules.

[20] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 6 (Competition Requirements) (July 2004) [hereinafter FAR].

[21] *Id*. subpts. 6.1, 6.2, and 6.3.

[22] *See, e.g.*, Major Mary E. Harney, et al., *Contract and Fiscal Law Developments of 1999―The Year in Review,* ARMY LAW., Jan. 2000 at 4-7.

[23] FAR, *supra* note 20, subpt. 8.4 (Federal Supply Schedules).

[24] *Id*. pt. 13 (Simplified Acquisition Procedures).

[25] *Id*. subpt. 16.5 (Indefinite-Delivery Contracts).

scope issues—as well as competition issues that have arisen with acquisition reform.

Scope and the Federal Supply Schedules

During FY 2004, the Comptroller General heard five protestors allege the government awarded an order beyond the scope of the order's underlying FSS or multiple award contract.[26] The GAO sustained the protestors in two FSS decisions[27] and in one of three multiple award contract decisions.[28]

Last year's *Year in Review* discussed two protests alleging agencies had awarded contracts to FSS vendors for supplies or services not on the vendors' FSS contracts: *Omniplex World Services Corp*[29] and *Simplicity Corp*.[30] The GAO cites those cases in this year's FSS scope decisions.[31] In *Information Ventures, Inc*.,[32] the National Aeronautics and Space Administration (NASA) sought to obtain "SPACELINE database bibliographic services" from a vendor holding a Schedule 70 ("General Purpose Commercial Information Technology Equipment, Software, and Services"), Special Item Number (SIN) 132-51 ("Information Technology Services") contract.[33] Upon review, the GAO found that NASA's requested services were outside the scope of Schedule 70, SIN 132-51.[34] At bottom, NASA sought specialized subject matter expertise, while SIN 131-52 provides more general information technology technician-focused services.

As the GAO recognized in *Information Ventures, Inc*., the FSS provides a streamlined process to obtain commercial goods and services.[35] The full and open competition requirements are satisfied when an agency orders a commercial item or service from the FSS pursuant to FAR subpart 8.4 procedures.[36] "Non-FSS products and services may not be purchased using FSS procedures."[37]

The SPACELINE database at issue in *Information Ventures* "'collect[s], organize[s], and make[s] available to the scientific and educational communities and to the public, electronic references to the scientific literature of the space life sciences.'"[38] The NASA Request for Offers (RFO) requested services to monitor space life science literature and select publications to be included in the database; create new records for publications; add unique data to database records; help

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[26] Specialty Marine, Comp. Gen. B-293871, B-293871.2, June 17, 2004, 2004 CPD ¶ 130; Information Ventures, Comp. Gen. B-293743, May 20, 2004, 2004 CPD ¶ 97; Firearms Training, Comp. Gen. B-292819.2, et al., Apr. 26, 2004, 2004 CPD ¶ 107; Computers Universal, Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78; Anteon Corp, Comp. Gen. B-293523, Mar. 29, 2004, 2004 CPD ¶ 51; CourtSmart Digital, Comp. Gen. B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79. In *Firearms Training*, the protestor alleged that a FSS task order was improper because certain items on the order were not included on the awardee's schedule. The Comptroller General denied the protest finding that the agency had used full and open competitive procedures. The agency merely used a "task order against the awardee's FSS contract to implement the selection decision" as a matter of "administrative convenience." *Firearms Training*, 2004 CPD ¶ 107, at 10.

[27] *CourtSmart Digital*, 2004 CPD ¶ 79 and *Information Ventures,* 2004 CPD ¶ 97. *See also* Cross Match Technologies, Inc., B-293024.3, 2004 U.S. Comp. Gen. LEXIS 181 (June 25, 2004). In *Cross Match*, the GAO denied the protest in the absence of competitive prejudice, even though the GAO found: the agency incorporated noncompeted Schedule items into a blanket purchase agreement; the pricing for the noncompeted items exceeded the solicitation's pricing limitation; and, the incorporation was therefore inconsistent with the requirement to evaluate offers on an equal basis. *Cross Match Technologies, Inc*., B-293024.3, 2004 U.S. Comp. Gen. LEXIS 181, at *1.

[28] The Comptroller General sustained the protests in *Anteon Corp*, 2004 CPD ¶ 51, but denied the protests in *Computers Universal*, 2004 CPD ¶ 78; *Specialty Marine*, 2004 CPD ¶ 130.

[29] Comp. Gen. B-291105, Nov. 6, 2002, 2002 CPD ¶ 199. *See also* Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review,* ARMY LAW., Jan. 2004, at 53-54 [hereinafter *2003 Year in Review*].

[30] Comp. Gen. B-291902, Apr. 29, 2003, 2003 CPD ¶ 89. *See also 2003 Year in Review*, *supra* note 29, at 54.

[31] Interestingly, the GAO does not treat these FSS decisions as "scope" issues. The Comptroller General opinions ask whether an item or service is "on" a schedule, rather than asking whether the item or service is "within the scope" of the schedule contract. *See, e.g*., *CourtSmart Digital*, 2004 CPD ¶ 79 and *Information Ventures,* 2004 CPD ¶ 97 discussed *infra* at text accompanying notes 32 to 47. Further, the GAO does not use its line of precedents concerning out of scope orders and modifications. In contrast, the GAO does determine whether task or delivery orders placed against multiple award contracts are in or out of scope. *See, e.g*., *Specialty Marine*, 2004 CPD ¶ 130 and *Anteon Corp*, 2004 CPD ¶ 51, discussed *infra* at text accompanying notes 48 to 63. Conceptually, this author finds little difference between a supply schedule and a multiple award contract, for this purpose, and would argue that the same analysis should be applied.

[32] Comp. Gen. B-293743, May 20, 2004, 2004 CPD ¶ 97.

[33] *Id*. at 1.

[34] *Id*. at 4. "This type of work simply does not constitute the type of technical services reasonably contemplated for purchase under FSS, Schedule 70, SIN 132-51." *Id*.

[35] *Id*. at 3 (citing FAR section 8.401).

[36] *Id*.

[37] *Id*.

[38] *Id*. at 1.

ensure quality control of the data; and conduct outreach to increase database usage.[39] The scope of SIN 132-51 includes "resources and facilities management, database planning and design, systems analysis and design, network services, programming . . . data/records management, subscriptions/publications (electronic media), and other services."[40] The GAO found that the services NASA required "go well beyond the types of information technology services contemplated by Schedule 70, SIN 132-51."[41] Sustaining the protest, the Comptroller General recommended acquiring the SPACELINE services through competitive procedures.[42] While not directly stating so, the GAO appears to have precluded an attempt to use a different FSS Schedule or SIN.

While *Information Ventures* dealt with services being procured from the FSS*, CourtSmart Digital Systems, Inc*. (*CourtSmart*),[43] applied a similar rationale to procuring supplies from the FSS. In *CourtSmart,* the Social Security Administration (SSA) sought to obtain "portable digital recording systems" under the FSS. In response to the SSA's Request for Quotations (RFQ), York Telecom Corp. submitted the only quotation the SSA deemed technically acceptable.[44] The "most significant hardware item" composing the portable digital recording system, however, was not on York's FSS schedule.[45] Therefore, the GAO determined the order was improper.

The *CourtSmart* RFQ specifically required all components of the recording system to be on the vendor's FSS prior to contract award.[46] The audio mixer, a key component in the portable digital recording system, was not on York's schedule. Therefore, selection of York was improper and the GAO sustained the protest.[47] *CourtSmart* stands for the proposition that an FSS contractor cannot include a non-FSS major component in a system and then provide the system under FSS procedures.

Scope and the Multiple Award Contracts

In *Anteon Corp.*,[48] the protestor challenged as out of scope, a GSA task order for electronic passport covers under the GSA's "Smart Identification Card ('Smart Card')" contract.[49] Smart Cards are credit size cards with integrated chips. The cards "support visual identification, physical access control and logical access control functions on a single card."[50] The Smart Card program envisions federal employees, military members, military family members and federal beneficiaries using the Smart Card as identification cards.[51]

The Smart Card contract is a multiple award indefinite delivery/indefinite quantity (ID/IQ) task and delivery order contract.[52] The GSA issued task order requests (TOR) to four Smart Card contract awardees for electronic passport covers.[53] The passport covers are cloth coversheets with embedded integrated circuit chip inlays.[54] Anteon alleged the passport covers were beyond the scope of the Smart Card contract. The GAO agreed.

The GAO began by discussing its jurisdictional limitation: normally, federal statute prohibits bid protest review of task or delivery orders.[55] The GAO can, and will, however, review an allegation that an order is beyond the scope of the

[39] *Id*. at 2.

[40] *Id*.

[41] *Id*. at 4.

[42] *Id*. at 5.

[43] Comp. Gen. B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79.

[44] *Id*. at 4.

[45] *Id*. at 5.

[46] *Id*. at 2.

[47] *Id*. at 13. The GAO also found that the RFQ required the system to be compliant with section 508 of the Rehabilitation Act. The system was not 508 compliant. *Id*. at 8-9. Finally, the record called into question the fairness and reasonableness of the agency's evaluation. *Id*. at 13.

[48] Comp. Gen. B-293523, Mar. 29, 2004, 2004 CPD ¶ 51.

[49] *Id*. at 1.

[50] *Id*. at 2.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 3.

[54] *Id*. at 3-4.

[55] *Id*. at 4 (citing 41 U.S.C. § 253j(d) (2000)).

multiple award contract against which the order was placed. Otherwise, an agency could skirt statutory and regulatory competition requirements.[56]

To determine whether an order is out of scope, the GAO "looks to whether there is a material difference" between the order and the original contract.[57] To be fair to vendors who are not multiple awardees, the GAO asks whether the modification "is of a nature which potential offerors would reasonably have anticipated" at the time the original contract was solicited.[58]

Although the GAO recognized the "functional similarities" between the Smart Card and the electronic passport cover,[59] the differences outweighed the similarities. First, citing specific dimensions, the GAO observed the physical differences between the plastic, credit card sized Smart Cards and the larger cloth passport covers.[60] Next, certain "peripheral goods and services" under the passport cover TOR had no equivalent or similar requirement in the Smart Card contract.[61] Finally, the Smart Card "pool" of users—federal employees, military members, military family members and federal beneficiaries—was much smaller than the potential passport cover recipients—"all passport-holding private citizens."[62] In all, the GAO found, "potential contractors for the manufacture of cloth passport covers with electronic inlays could [not] have anticipated the use of the original Smart Card contract for this purpose."[63]

Two recent GAO decisions, *Computers Universal, Inc*.,[64] and *Specialty Marine, Inc.*,[65] demonstrated that if the scope of a contract is broad enough, it's easy to determine that resulting orders are "in scope."

In *Specialty Marine, Inc*., the Navy awarded four ID/IQ contracts in 2000 for "ship repair and shipalt installation" in the Norfolk, Virginia area.[66] The solicitation's scope of work encompassed all facets and phases of depot level ship repair, ship alteration, and ship maintenance on "U.S. Navy Strategic Sealift and other military ships."[67] Section B of the solicitation also included specific Contract Line Item Numbers (CLINs) for services for specific ships. The Section B CLINs were primarily for "Fast Sealift Ships—vessels which are 946 feet in length and displace 55,350 tons."[68] Specialty Marine protested the 2004 issuance of an RFQ for maintenance and repair services for the USNS MOHAWK and the USNS APACHE. Two hundred and twenty-six feet long and displacing 2,260 tons, the MOHAWK and the APACHE are "Fleet Ocean Tugs."[69] Specialty Marine alleged the task orders exceeded the scope of the multiple award ID/IQ contracts.[70]

Specifically, Specialty Marine alleged that "the underlying . . . contracts contemplated only work on ships larger

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[56] *Id*.

[57] *Id*. at 5. Specifically,

> Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; any changes in the type of work, performance period, and costs between the contract as awarded and the modification (or task or delivery order); and the potential for the type of modification (or task or delivery order) issued.

Id.

[58] *Id*.

[59] The GAO observed that "an electronic passport cover is essentially an identification document that is not materially different in function from a 'Smart Identification Card'; both are used to electronically identify the bearer." *Id*.

[60] Smart Cards are 3.370 inches wide, 2.125 inches high, and 0.030 inches thick. *Id*. at 2. The passport cover sheets are 7 1/16 inches wide, 15 7/8 inches high, and 0.35 inches thick. *Id*. at 3.

[61] *Id*. at 6. Specifically, "passport covers, IC Chip inlays, adhesive, and travel" were "outside the scope" of the Smart Card contract. *Id*.

[62] *Id*. at 6 n.7.

[63] *Id*. at 6. Sustaining the protest, the GAO recommended that the "GSA cancel the TOR and either hold a competition for these services, or prepare the appropriate justification required by CICA for other than full and open competition." *Id*. at 7.

[64] Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78.

[65] Comp. Gen. B-293871, B-293871.2, June 17, 2004, 2004 CPD ¶ 130.

[66] *Id*. at 2. "Shipalt" is short for ship alteration, which includes "any change in hull, machinery, equipment or fittings which involves change in design, materials, quantity, location . . . of an assembly." *Id*. at 2 n.2. (citing Fleet Modernization Program (FMP) Management and Operations Manual, SL720-AA-MAN-010, vol. 1, § 1-3.1).

[67] *Id*. at 2.

[68] *Id*. at 4.

[69] *Id*. at 3.

[70] *Id*. at 1. The protestor also alleged the task order improperly bundled requirements in violation of the Competition in Contracting Act. The GAO found this allegation untimely. *Id*. at 6-7.

than the MOHAWK and the APACHE."[71] In addition, the protestor argued that inspection and repair work on the MOHAWK's life rafts were beyond the scope because the ID/IQ contracts "did not specifically identify this type of work."[72] Relying on the broad language in the contract, the GAO rejected both arguments. The scope of the multiple award contracts included work on "U.S. Navy Strategic Sealift and other military ships."[73] While the Section B CLINs called for specific work on specific ships, they did not restrict work to those ships.[74] Further, the initial statement of work called for performing "the 'full range of depot level repairs, ShipAlt installation, alterations, troubleshooting, maintenance, installation and removal of major ship components and equipment.'"[75] Such breadth clearly encompassed life raft inspection and repair.[76]

In *Computers Universal, Inc*., the Army ordered non-destructive inspection (NDI) and non-destructive testing (NDT) services through a pre-existing Air Force multiple-award ID/IQ contract.[77] The Army used the NDI/NDT services to "perform modification, maintenance, or repair of various DOD weapon systems and support equipment" assigned to Army aviation units in Korea.[78]

According to the decision, the Air Force contract "did not include a statement of work as such. Rather, a two-page statement of objectives was appended to the RFP, which set forth one program objective, nine contract objectives, and one management objective, all of which were quite general."[79] "Quite general" might even be an understatement. The "program objective" provided for multi-level maintenance support for the "modification, maintenance and repair of various DOD [Department of Defense] weapons systems and associated support equipment."[80] The objective had no geographic boundaries, as it applied in the continental United States (CONUS) and outside CONUS. Further, the objective did not limit the contract to Defense agencies, but instead encompassed "any Federal Agency."[81]

The GAO wasted little ink finding the ordered services within the scope of the broadly worded contract.[82] In a footnote, however, the GAO expressed "concern" over the use of "such broad long-term IDIQ contracts."[83] The GAO recognized that multi-year undefined contracts undermine the goals of competition.[84] The GAO, however, did not suggest any limitations. So the question, "how broad is too broad?" remains unanswered.

The COFC confronted an out of scope modification in *CW Government Travel, Inc. v. United States*.[85] In 1998, the Military Traffic Management Command (MTMC) awarded TRW (whose successor is Northrop Grumman) the Defense Travel System, Defense Travel Region 6 (DTS DTR-6) contract for a "seamless, paperless, and complete travel management service."[86] Whereas "traditional travel services" are delivered through conventional means (i.e., live or telephonic interaction between traveler and travel agent) this contract envisioned an "automated travel management system to be known as the Common User Interface ('CUI')."[87] In essence, the contract sought a government equivalent of the services currently found on the web at Orbitz.com, Travelocity.com or Expedia.com.

In 2002, the government issued several modifications to restructure DTS DTR-6. The modifications, *inter alia*,

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[71] *Id*. at 4.

[72] *Id*. at 5.

[73] *Id*.

[74] *Id*.

[75] *Id*. at 2.

[76] *Id*. at 6.

[77] Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78.

[78] *Id*. at 3.

[79] *Id*. at 2.

[80] *Id*.

[81] *Id*. at 2-3.

[82] *Id*. at 3-4.

[83] *Id*. at 3 n.5.

[84] *Id*.

[85] 61 Fed. Cl. 559 (2004).

[86] *Id*. at 563.

[87] *Id*.

"added traditional travel services to the contract."[88] The plaintiff, CW Government Travel (Carlson), alleged that the modification constituted an out-of-scope change and that failing to compete the "traditional travel services" violated the Competition in Contracting Act (CICA).[89] The COFC treated the issue as a matter of contract interpretation. Citing familiar interpretation principles, the court sought to determine the parties' intent through the parties' "contemporaneous interpretation" during contract performance. The court sought an interpretation which gave all parts of the contract a reasonable meaning rather than one that left a portion of the contract "useless, inexplicable, inoperative [or] void . . . ."[90] The court first determined that the contract language in the Performance Work Statement did not require TRW to supply traditional travel services.[91] Further, the course of dealing between the parties during performance buttressed the interpretation that traditional travel services were beyond the scope of DTS DTR-6.[92]

The court next looked at whether the modification violated the CICA. The court recognized that materially modifying the original contract violates the CICA "by preventing potential bidders from . . . competing" for the new work.[93] If potential bidders, at the time of the original procurement's award, would not have anticipated that the new work could have been ordered under the changes clause, then the modification is beyond the scope of the contract and should be competed.[94] In the instant case, the COFC found the traditional travel services were beyond the scope of the DTS DTR-6 contract. Specifically, "a potential contractor bidding on the original contract to deploy and provide travel services using a CUI would not have anticipated that it could also be called upon under the changes clause to provide traditional travel services."[95] The court concluded, because the additional services materially altered the work required under the contract, "MTMC's failure to issue a competitive solicitation for the traditional travel services . . . violated CICA."[96]

Public Interest Exception to Competition: Dear Spherix—The Good News: We'll Hear the Case; The Bad News: You Lose

In *Spherix, Inc. v. United States*,[97] the United States Department of Agriculture (USDA) faced a challenge to a sole source modification issued pursuant to the agency's exercise of the public interest exception to CICA's full and open competition requirement.[98] In response, the USDA asserted the COFC lacked jurisdiction to hear the issue and that the modification was proper.[99] Concerning jurisdiction, the USDA[100] asserted the public interest exception was "committed to agency discretion by law" and therefore the court was prohibited from hearing the case.[101] The court disagreed.

The plaintiff, Spherix, Inc., and the intervenor, ReserveAmerica Holdings, Inc. (RHI), both provided services to federal agencies to "develop operate, and maintain electronic reservation systems serving federal recreation facilities."[102] Beginning in 1995, the USDA and the Army Corps of Engineers (COE) sought to create a single reservation system known

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[88] *Id*. at 564. Carlson also alleged that the modifications changed the nature of the CUI to an interface that was much easier to achieve and restructured the payment scheme. *Id*. The court did not reach the substantive issue of whether these modifications were out-of-scope. *Id*. at 576-79.

[89] *Id*. at 565-66 (discussing Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of titles 10, 31, and 41 U.S.C. (2000)).

[90] *Id*. at 571. Although the court did not discuss the requirement to examine the contract language first, in fact, the court first looked at the contract's language. *Id*.; *cf*. McAbee Constr., Inc. v. United States, 97 F.3d 1431 (Fed Cir. 1996) and Burnside-Ott Aviation Training Ctr. v. Dalton, 107 F.3d 854 (Fed. Cir. 1997).

[91] 61 Fed. Cl. at 572.

[92] *Id*. at 572-73. The COFC cited the following as indicators that the parties did not intend to include traditional travel services as part of DTS DTR-6: prior to the modification in question, the government did not order and TRW did not provide traditional travel services; other contractors (including Carlson) working under other competitively awarded contracts were providing traditional travel services; at least one of these other contracts had been extended on a sole source basis, which would not have been necessary had the TRW contract included traditional travel services; the modification added approximately fifty pages of requirements discussing traditional travel services; a TRW employee, before this controversy arose, stated "the provision of traditional travel services was not originally included." *Id*. at 572-74.

[93] *Id*. at 574.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] 58 Fed. Cl. 351 (2003).

[98] 41 U.S.C.S. § 253(c)(7) (LEXIS 2004); FAR, *supra* note 20, at 6.302-7(c).

[99] 58 Fed. Cl. at 352.

[100] ReserveAmerica Holdings, Inc., the incumbent contractor to whom the modification was issued, intervened on behalf of the USDA. *Id*. at 353-54.

[101] *Id*. at 354.

[102] *Id*. at 353.

as the National Recreation Reservation System (NRRS).[103] Nonetheless, as of 2003, complete consolidation had not occurred. At the time the claim arose, Spherix, Inc.'s contracts covered at least thirty National Park Service Parks while RHI's contracts included the NRRS and over 1900 USDA and COE campgrounds, camps, and other facilities.[104] The suit in question challenged the USDA's decision to issue a modification to RHI's NRSS contract to consolidate into the NRSS seventeen locations previously part of neither Spherix' nor RHI's contracts.[105]

In June 2003, the Secretary of Agriculture signed a written determination and findings (D & F) that "it is in the public interest to award a modification non-competitively" to RHI to integrate the seventeen facilities into the NRSS.[106] The COFC addressed the jurisdiction issue in a decision on 3 November 2003 (*Spherix I*).[107] Two weeks later, in *Spherix II*, the COFC addressed the substantive question—was the public interest exception properly invoked?[108]

In *Spherix I*, the COFC found that to overcome the presumption of judicial review of an agency action, a court must find "clear and convincing evidence" that Congress intended such action to evade judicial review.[109] The USDA asserted the public interest exception to full and open competition was "committed to agency discretion by law."[110] The public interest provision allows an agency to avoid competitive procedures when: "the head of the executive agency (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and (B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract."[111] The FAR further requires the agency head to support such a determination with written findings, setting forth "sufficient facts and circumstances to clearly and convincingly justify the specific determination made."[112]

Arguing against jurisdiction, the USDA relied principally upon *Webster v. Doe*.[113] The statute in question in *Webster* allowed the Director of the Central Intelligence Agency (CIA) to "in his discretion, terminate" an employee of the CIA, "whenever he shall deem such termination necessary or advisable."[114] CIA regulations did not in any way constrain this unfettered authority.[115] The Supreme Court found the statute in *Webster* nonreviewable. The COFC, however, rejected the analogy to *Webster*, stating "it is simply a non sequitur to conclude that because agency action under the statute in *Webster* was held nonreviewable, so to [sic] is agency action under § 253(c)(7)."[116] The COFC noted that once an agency promulgates regulations, the court has authority to ensure the agency complies with those regulations.[117] In contrast to the *Webster* regulations, FAR section 6.302-7, limits an agency head's discretion.[118] The FAR provision provides a meaningful standard of review.[119] The court, therefore, held it had "jurisdiction to decide whether the Secretary of Agriculture's determination that it is necessary in the public interest to make a sole source modification to intervenor's contract is clearly and convincingly justified."[120]

Two weeks later, in *Spherix II*,[121] the COFC determined the Secretary properly exercised her discretion by showing,

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[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*. at 353-54. Secretary of Agriculture Ann M. Venable notified Congress and waited the statutorily required thirty days.

[107] 58 Fed. Cl. 351 (2003).

[108] Spherix, Inc. v. United States, 58 Fed. Cl. 514 (2004).

[109] 58 Fed. Cl. at 354.

[110] *Id*.

[111] *Id*. at 354-55 (quoting 41 U.S.C. § 253(c)(7) (2000)).

[112] *Id*. at 355 (quoting FAR section 1.704).

[113] 486 U.S. 592 (1988).

[114] 58 Fed. Cl. at 355-56 (citing 50 U.S.C. § 403(c)).

[115] *Id*. at 357.

[116] *Id*. at 356.

[117] *Id*. at 355. The court explicitly avoided determining whether 41 U.S.C. § 253(c)(7) would be reviewable in the absence of implementing regulations. *Id*. at 358.

[118] *Id*. at 357.

[119] *Id*. at 358. The COFC rejected the USDA's other arguments against extending jurisdiction. For the COFC, Congressional review, alone, does not preclude judicial review. *Id*. at 357.

[120] *Id*. at 358.

[121] 58 Fed. Cl. 514 (2003).

clearly and convincingly, that a sole source modification was in the public interest.[122] All parties agreed the "underlying goal" of the procurement "was the creation of a One-Stop Recreation Reservation System."[123] Spherix complained, however, that even after this procurement, two systems would continue to exist.[124] The court rejected this concern because, based on a Presidential initiative, the National Recreation Reservation System (NRRS) had already been chosen as the "ultimate one-stop system."[125]

Spherix's true concern was that because RHI already had the contract for NRRS, adding additional locations would give RHI an unfair advantage in the future competition for NRRS. Spherix argued, "piecemeal addition of sites to either [RHI's] or [Spherix'] reservation systems does not advance creation of a single system or use of a single web-site—unless the winner of the competition for a consolidated system has been predetermined."[126]

Spherix, however, wrongly associated adding locations to NRRS with permanently adding locations to RHI's contracts. In fact, at the time this dispute was in litigation, the government already had definite plans to compete the NRRS contract, fully and openly, in 2004. During the 2004 competition, Spherix, RHI, and other vendors would have the opportunity to obtain the NRRS contract.[127]

Returning to 41 U.S.C. section 253(c)(7), the Secretary determined "it is in the public interest to include as many recreational sites in the NRRS as early as practicable."[128] The best way to accomplish that goal is to modify the NRRS contract, whose current holder is RHI, on a sole source basis, by adding facilities.[129] As such, the court held, "the Secretary was clearly and convincingly justified in making her determination that a sole source modification of intervenor's contract was in the public interest."[130]

You Want How Many Personnel? Vague RFQ Dooms Solicitation

A vague or ambiguous description of work may prevent offerors from understanding the government's needs and from competing on an equal basis. In *Alion Science & Technology Corp.*,[131] the GSA's RFQ for a U.S. Army stability and support operations training program lacked clarity and "resulted in uncertainty about the total cost of each vendor's approach."[132]

One portion of the RFQ clearly called for "eight in-house full time contract personnel."[133] Other sections requiring additional personnel were not so clear.[134] As the GSA contracting officer observed, "the hours and costs are all over the place. There is obviously a misunderstanding of the requirements. I need to go back out to get all of the contractors on

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[122] *Id*. at 518.

[123] *Id*. at 516.

[124] *Id*.

[125] *Id*. (referencing, "A letter dated December 12, 2003, addressed to selected heads of departments and agencies by the United States Office of Management and Budget Director Mitchell E. Daniels, Jr.").

[126] *Id*. at 517.

[127] *Id*. at 518. Interestingly, the court placed substantial weight on the government's intended future actions, stating:

> the government has represented at every turn in the present case and in a prior related case . . . that it anticipates issuing a solicitation for the operation of the consolidated reservation system in 2004. The court accepts these representations in good faith, including the statement contained in the USDA's finding that the solicitation "will be conducted using full and open competition and will be implemented consistent with the Administration's policy on contract bundling."

Id. (citations omitted).

[128] *Id*. at 517.

[129] *Id*.

[130] *Id*.

[131] B-294159, B-294159.2, 2004 U.S. Comp. Gen. LEXIS 191 (Sept. 10, 2004).

[132] *Id*. at *1.

[133] *Id*. at *3.

[134] For example, the RFQ stated the "contractor will provide personnel necessary to support each unit's training events at the exercise location (to be determined)," and also that "in addition to the in-house contractors and if so required, the contractor shall be responsible for overall management and coordination of matters pertaining to contract requirements" *Id*. at *3-4. The opinion provided several other RFQ examples that required undeterminable numbers of additional personnel. *Id*. at *3-5.

track."[135] The agency did not remedy the RFQ. The GAO observed that "the RFQ did not clearly convey the Army's staffing requirements."[136] As a result, the contracting officer could not meaningfully evaluate the offerors' prices.[137]

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

Last year's *Year in Review* discussed *USA Information Systems, Inc*.,[138] and the prospective offeror's duty to "avail itself of every reasonable opportunity" to obtain solicitation documents.[139] In *USA Information Systems*, the protestor failed to check "the FedBizOpps.gov website or register[] for the FedBizOpps email notification service" and thereby failed to learn about a solicitation amendment.[140] The GAO denied the protest. This year, *Allied Materials and Equipment Comp., Inc*.[141] reminds us that potential offerors must continue to be vigilant.

The Defense Logistics Agency (DLA) published at FedBizOpps.gov a solicitation synopsis on 18 July 2003. The notice envisioned a 20 August closing date.[142] The DLA, however, failed to post the actual solicitation as required by FAR section 5.102(a)(1).[143] Although Allied monitored FedBizOpps.gov, it did not actually contact the DLA point of contact until 7 October 2004.[144]

The GAO recognized that the government has duties to reasonably publicize its contract actions and provide solicitation documents to potential offerors. Contractors, however, also must "avail themselves of every reasonable opportunity" to obtain needed documents.[145] To balance these competing obligations, the Comptroller General looks to see which party "had the last clear opportunity to avoid the protestor's being precluded from competing."[146] In this case, the nearly seven week gap between the solicitation's closing date and Allied's phone call to the agency was unreasonable.[147] Allied "merely wait[ed]" and failed to "take steps to actively seek the solicitation."[148] Therefore, despite DLA's failure to post the solicitation, Allied's "inability to compete was primarily the result of its failure to fulfill its obligation to avail itself of every reasonable opportunity to obtain the RFP."[149]

Publicizing in the FedBizOpps.gov Era: Another Form Bites the Dust

Last year's *Year in Review* reported the demise of Standard Form 129 (SF 129), Solicitation Mailing List.[150] This year, to further "increase reliance on electronic business practices in procurement," the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council (FAR Councils) have agreed to eliminate the Standard Form 1417, Pre-Solicitation Notice (Construction Contract), effective 4 November 2004.[151] According to the FAR Councils, "use of the form has become unnecessary because contracting officers are required to provide access to pre-solicitation notices through the Government-wide point of entry (GPE) via the Internet at http://www.fedbizopps.gov."[152]

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[135] *Id*. at *7.

[136] *Id*. at *13.

[137] The GAO sustained the protest. *Id*. at *15.

[138] Comp. Gen. B-291488, Dec. 2, 2002, 2002 CPD ¶ 205.

[139] *2003 Year in Review*, *supra* note 29, at 17.

[140] 2002 CPD ¶ 205, at 3.

[141] Comp. Gen. B-293231, Feb. 5, 2004, 2004 CPD ¶ 27.

[142] *Id*. at 1.

[143] *Id*. at 1-2 (discussing FAR section 5.102(a)(1)).

[144] *Id*. at 2.

[145] *Id*.

[146] *Id*. at 2-3.

[147] *Id*. at 3.

[148] *Id*.

[149] *Id*.

[150] *2003 Year in Review*, *supra* note 29, at 18.

[151] Federal Acquisition Regulation; Elimination of the Standard Form 1417, 69 Fed. Reg. 59,699 (Oct. 5, 2004).

[152] *Id*.

Unduly Restrictive Specifications

During the past fiscal year, the Comptroller General considered four protests[153] alleging unduly restrictive government specifications in violation of the CICA.[154] The GAO denied all four.

Extensive "Consolidation Analysis" Proves Significant Savings and Saves Procurement from CICA Bundling[155] *Violation*

One type of unduly restrictive specification is an improperly bundled specification. Last year's *Year in Review* discussed three Army solicitations protested on this ground.[156] This year, in *Teximara, Inc*.,[157] the Air Force consolidated "grounds maintenance with 13 other base operations support functions" at Keesler Air Force Base (AFB), Mississippi.[158] Part of an agency effort to conduct an *Office of Management and Budget* (*OMB*) *Circular A-76* cost comparison study, the *Teximara* RFP combined "nine civil engineering functions—housing , operation and maintenance, grounds and site maintenance, emergency management, utilities and energy management, engineering services, environmental management, resources management, and space management—with community services, human resources, supply services, marketing and publicity, and weather support."[159] Teximara, a grounds maintenance contractor, alleged the consolidated RFP "preclude[d] the firm from submitting a proposal because it does not have the capacity to perform other than the grounds maintenance function."[160] Teximara asserted the improperly bundled requirements violated the CICA. The GAO found, even assuming the procurement restricted competition, the Air Force justified including grounds maintenance in the RFP.[161]

Laying out familiar black-letter law, the GAO explained that the CICA requires solicitations to contain restrictive provisions only when necessary to satisfy the agency's needs.[162] Consolidating requirements can have the effect of restricting competition by excluding potential offerors who cannot offer all the requirements.[163] In the context of an *OMB*

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[153] Teximara, Inc., Comp. Gen. B-293221.2, July 9, 2004, 2004 CPD ¶ 151; Reedsport Machine & Fabrication, Comp. Gen. B-293110.2, Apr. 13, 2004, 2004 CPD ¶ 91; Ocean Svs., LLC, Comp. Gen. B-2922511.2, Nov. 6, 2003, 2003 CPD ¶ 206 (finding enhanced safety requirements for oceanographic research vessels do not unduly restrict competition given the vessel's hostile operating environment (Alaskan coastal areas) and the agency's desire for a vessel with a "greater level of safety for its crew than that advocated by the protestor"); NVT Technologies, Inc., Comp. Gen. B-292302.3, Oct. 20, 2003, 2003 CPD ¶ 174. *Teximara, Inc* and *NVT Technologies, Inc.* are discussed in this section of the text. *Reedsport* is discussed in note 157; *Ocean Services* is referenced in this footnote and discussed, for other purposes, in section titled Negotiated Acquisitions.

[154] 10 U.S.C.S. § 2305(a)(1)(B)(ii) (LEXIS 2004) ("Specifications will 'include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as authorized by law.'"); 41 U.S.C.S. § 253a(a)(2)(B); *see also* FAR, *supra* note 20, at 11.002(a)(1) ("[A]gencies shall . . . [o]nly include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.").

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

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

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

[156] AirTrak Travel, Comp. Gen. B-292101, June 30, 2003, 2003 CPD ¶ 117; EDP Enters., Inc., Comp. Gen. B-284533.6, May 19, 2003, 2003 CPD ¶ 93; USA Info. Sys., Inc., Comp. Gen. B-291417, Dec. 30, 2002, 2002 CPD ¶ 224; *see also 2003 Year in Review*, *supra* note 29, at 6-9.

[157] Comp. Gen. B-293221.2, July 9, 2004, 2004 CPD ¶ 151. *Frasca International, Inc*. also concerned an allegation of improper bundling of requirements in violation of the CICA. The protestor alleged the Navy improperly consolidated pilot training with flight training devices. The GAO, however, did not decide the bundling issue, because the record did not show the consolidation prevented the protestor from having a reasonable chance of award. Absent competitive prejudice, the GAO denied the protest. Comp. Gen. B-293299, Feb. 6, 2004, 2004 CPD ¶ 38. *See also* Reedsport Machine and Fabrication, Comp. Gen. B-293110.2, B-293556, Apr. 13, 2004, 2004 CPD ¶ 91 (combining repair services for motor lifeboats at two different locations was not improper when agency considered the "broader competitive impact" of this approach, and a single contract was necessary to satisfy the agency's minimum needs).

[158] *Teximara*, 2004 CPD ¶ 151 at 1. Note, the GAO opinion references "Kessler" AFB. The proper name is Keesler. *See* http://www.keesler.af.mil.

[159] *Teximara*, 2004 CPD ¶ 151, at 2.

[160] *Id*. at 6.

[161] *Id*. at 6-7.

[162] *Id*. at 6 (citing 10 U.S.C. § 2305(a)(1) (2000)).

[163] *Id*.

Circular A-76 competition, the GAO will sustain a CICA bundling protest "unless the agency has a reasonable basis for its determination that bundling is necessary to satisfy the agency's needs."[164] Significant cost savings is a valid agency need.[165]

In *Teximara*, the Air Force conducted extensive analysis demonstrating the cost savings. Two "detailed documents" set forth the Air Force's "consolidation analysis."[166] First, an 80-page "initial linkage analysis," prepared prior to the protest, cited both "management-related efficiencies"[167] and "efficiencies resulting from cross-utilization and cross-training."[168] According to the GAO the linkage analysis included "specific examples of the efficiencies generated from the overlap" of the functions combined in the RFP.[169] Second, a "34-page supplemental linkage analysis, prepared in response" to the protest, "described in more detail the functional overlap" of the functions in the RFP.[170]

Apparently, the Air Force's documentation was persuasive enough that the protestor did not "dispute that the Air Force was able to demonstrate that certain 'synergies' and 'efficiencies' would be realized by bundling" certain functions.[171] While Teximara quibbled with the amount of savings, the GAO found those concerns unpersuasive. The agency's "extraordinarily detailed and comprehensive" analyses clearly impressed the GAO.[172] The GAO concluded, "the agency has reasonably shown that the anticipated efficiencies and savings resulting from consolidating grounds maintenance with the RFP's other . . . functions are significant and that consolidation is therefore necessary to meet its needs."[173]

The Air Force's efforts in *Teximara* are a great example of how to successfully fend off a protest alleging improper bundling of consolidated base support operations. In a time of contract consolidation and competitive sourcing growth, agencies should carefully analyze and document the savings and efficiencies of contract bundling.

Bonding for Good Reason

Although "generally" bonds are only required in construction contracts,[174] the U.S. Department of Health and Human Services (HHS) showed, in *NVT Technologies, Inc*.,[175] that under certain circumstances, bond requirements in service contracts are not unduly restrictive. Pursuant to *OMB Circular A-76*, the HHS sought a variety of real property management services at five of its facilities in Maryland, North Carolina, and Montana.[176] The RFP contained performance and payment bond requirements.[177] NVT alleged these requirements were unreasonable and unduly restricted small business participation.[178]

The GAO explained that bond requirements in non-construction contracts are acceptable "in appropriate circumstances" when needed to "secure fulfillment of the contractor's obligations."[179] Section 28.103-2 of the FAR provides specific guidance: "Performance bonds may be required . . . when necessary to protect the Government's interest," for example, when government property will be "provided to the contractor."[180] In *NVT Technologies, Inc*., the winning contractor was to be responsible for maintaining major research laboratories, critical care centers, an animal center, and a

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[164] *Id*.

[165] *Id*.

[166] *Id*. at 3.

[167] "[S]uch as 'broader spans of control, reduction in redundancies, increased supplier and performance management efficiencies, economies of scale and scope, and strategic leverage.'" *Id*.

[168] "[I]n such areas as program management, finance, procurement and supply, customer support, training, transportation, and quality assurance." *Id*.

[169] *Id*.

[170] *Id*. at 4.

[171] *Id*. at 7.

[172] *Id*.

[173] *Id*. at 10.

[174] FAR, *supra* note 20, at 28.103-1.

[175] B-292302.3, 2003 U.S. Comp. Gen. LEXIS 174 (Oct. 20, 2003).

[176] *Id*. at *1-2 .

[177] Each bond had to be fifty percent of the contract price. *Id*. at *2.

[178] *Id*.

[179] *Id*. at *7.

[180] *Id*. (discussing FAR section 28.103-2(a)).

gerontology research center. In addition, the continuous functioning of these facilities was critical to HHS' mission. Therefore, the GAO found the bonding requirements appropriate because

> the contractor will be responsible for maintaining substantial and critical HHS facilities that are involved in highly sensitive medical research and because a contractor's failure to properly perform real property management services at these facilities would serious compromise the agency's mission.[181]

That's So Complicated We'll Let You Sole Source It

In *Kearfott Guidance and Navigation Corp*.,[182] the protestor challenged The Navy Strategic Systems Programs' (SSP) sole-source award to The Charles Stark Draper Laboratories (Draper) to "establish and certify an integrated support facility for repair and refurbishment of the MK 6 guidance system used in the Trident II (D-5) submarine-launched ballistic missile."[183]

The MK 6 guidance system guides D-5 missiles, which the Navy launches from submerged Trident submarines. They have a range of "4,600 miles; can travel at speeds greater than 20,000 feet per second; and [are] capable of carrying multiple, nuclear-armed warheads, each of which can be independently targeted."[184] In other words, a lot rests on the accuracy of the guidance system. "Precise interaction" among six main subsystems determines the missiles' accuracy. The guidance system is one of those subsystems. The guidance system is composed of "two assemblies." The electronic assembly contains six computers. The guidance system is composed of, among other components, "inertial measurement units," gimbals, "pendulous integrating gyro accelerometers," and stellar sensors.[185] In other words, the guidance system is quite complex.

Submarine Launched Ballistic Missile (SLBM) nuclear weapons systems date back to the 1950s. From the very beginning and continuing to the current guidance system, Draper had been the sole prime contractor "responsible for the design, development, initial production and repair" of each generation of SLBM guidance system.[186] In 2003, the agency announced its intention to award Draper a sole-source contract "as the 'only known source' capable" of establishing an integrated support facility [ISF] "for repair and refurbishment of the Trident II (D-5) MK 6 missile guidance subsystem."[187] Kearfott protested, alleging it also had the capability to create and maintain the ISF.[188]

The SSP's Justification and Approval (J & A) for a non-competitive award cited 10 U.S.C. section 2304(c)(1)—only one responsible source would satisfy the agency's needs.[189] Focusing on the "rationale and conclusions" in the J & A, the GAO found the justification reasonable and therefore did not object to the award.[190] The Comptroller General concurred with the agency's evaluation that only Draper, with over "forty years as the sole design and development agent," had "overall knowledge" of all the key components of the guidance system.[191] Kearfott, a manufacturer of a component of the system, lacked "familiarity with at least two MK 6 guidance system components," and lacked overall knowledge of the interaction of the various subsystems.[192] Therefore, only Draper could adequately establish and certify an ISF for the MK 6 guidance system.[193]

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[181] *Id*. at *9-10.

[182] Comp. Gen. B-292895.2, May 25, 2004, 2004 CPD ¶ 123.

[183] *Id*. at 1.

[184] *Id*. at 2.

[185] *Id*.

[186] *Id*. at 3.

[187] *Id*. at 4.

[188] *Id*. at 5.

[189] *Id*. at 5 (discussing 10 U.S.C.S. § 2304(c)(1) (LEXIS 2004)).

[190] *Id*.

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

[192] *Id*. at 7.

[193] *Id*. at 10. Another sole-source-type decision was *Vertol Systems Company, Inc*. Comp. Gen. B-293644.6, B-293644.8, July 29, 2004, 2004 CPD ¶ 173. Vertol challenged an Economy Act order issued to the Army Threat Systems Management Office (TSMO) for "foreign threat systems aircraft." *Id*. at 1. Vertol alleged the agency's D & F incorrectly stated "no commercial sources" could provide the needed airworthy certified aircraft. *Id*. at 2. Further, Vertol challenged the need for certified "airworthy" aircraft. The GAO denied the protest finding airworthiness reasonably reflected the agency's needs and Vertol's aircraft could not satisfy these needs. *Id*. at 7. For additional discussion of *Vertol*, see *infra*, section titled Intragovenmental Acquisitions.

But Was It an Unfair Competitive Advantage?

If you look hard enough at a winning offeror, one could probably find a "competitive advantage:" a more efficient assembly line, more skilled workers, more experience, etc. Almost by definition, a contractor wins because it has some advantage. Therefore, only an unfair competitive advantage is a sustainable ground for protest.[194]

In *National General Supply, Inc*.,[195] the protestor complained that an Air Force solicitation for a contractor-operated civil engineering supply store (COCESS) allowed offerors to provide items from its "own inventory or catalogs."[196] National General alleged that this arrangement gives large businesses a pricing advantage over small businesses.[197]

The COCESS envisioned in the RFP would sell "building materials and tools" at the store and would provide items through an electronic catalog. Contract line item number (CLIN) 0001 encompassed 1400 regularly purchased hardware items. The solicitation indicated the Air Force would pay a fixed price for these items and would evaluate these items. CLIN 0002 included less common, special tools. The contractor would be paid on a cost reimbursement basis for these items. The prices of these items, however, would not be evaluated. Instead "plug" prices would be used to evaluate all proposals.[198] National General complained that CLIN 0002 allowed large businesses to buy from themselves and charge the government off-the-shelf prices. In this way, the contractors' reimbursement included profit. Smaller businesses, meanwhile, would have to buy from suppliers and would only be able to charge the government what they paid the suppliers.[199]

Rejecting the protestor's argument, the Comptroller General first observed that "no statutory or regulatory prohibition" prevents contractors from "providing items from their own inventory . . . and charging the government market price."[200] Further, no improper agency action provided large businesses an advantage. Rather, large offerors benefited only from their already existing "business structure."[201] That is, the solicitation did not "create an improper competitive advantage."[202]

These Could be "Competition" Write ups, but We've Covered them as Simplified Acquisitions

Two GAO decisions involving the same protestor, Information Ventures, Inc., involve competition concepts in simplified acquisitions.[203] The *Year in Review* discusses these cases in greater detail in the Simplified Acquisitions section.[204] In the 29 March 2004, *Information Ventures, Inc*., decision,[205] the GAO held that simplified acquisition procedures do not exempt an agency from providing potential vendors with adequate information regarding the agency's requirements so as to comply with the "maximum extent practicable" competition standard. In the 9 April 2004, *Information Ventures, Inc*., decision,[206] the GAO decided that simplified acquisition procedures require agencies to provide potential sources with a reasonable opportunity to respond to the notice or solicitation, particularly where the record failed to show a need for the short response period and the agency knew of the requirement well in advance of issuing the notice.

Lieutenant Colonel Michael Benjamin.

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[194] Last year's *Year in Review* discussed several allegations that incumbent contractors had unfair competitive advantages. *See 2003 Year in Review*, *supra* note 29, at 33-34. In cases involving incumbency, the Comptroller General looks to see if the incumbent has received an unfair advantage or preferential treatment; the inherent advantages of incumbency are not grounds for sustaining a protest, nor must an agency "equalize" an incumbent's advantages. *Id*.

[195] Comp. Gen. B-292696, Nov. 3, 2003, 2004 CPD ¶ 47.

[196] *Id*. at 1.

[197] *Id*.

[198] *Id*. at 1-2.

[199] *Id*. at 2.

[200] *Id*. at 3.

[201] *Id*.

[202] *Id*.

[203] Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76 and Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81.

[204] *See infra* section titled Simplified Acquisitions.

[205] Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76.

[206] Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81.

Contract Types

Task or Delivery Orders Contract Periods

The DOD issued an interim rule amending the Defense Federal Acquisition Regulation Supplement's (DFARS) parts 216 and 217 to implement section 843 of the National Defense Authorization Act for FY 2004.[207] This rule limits the contract period of a task or delivery order contract awarded pursuant to 10 U.S.C. section 2304a to no more than five years.[208]

The Ronald W. Reagan National Defense Authorization Act for FY 2005 addressed a gray area regarding the extent of the FY 2004 limitation. Section 812 applies the 5-year maximum limitation to the base period only; the maximum limit for modifications or options is now ten years. The head of an agency may extend the total contract period by documenting in writing "exceptional circumstances."[209]

Proposed Rule on Payment Withholding for Time and Materials or Labor-Hour Contracts

The FAR Councils proposed amending the FAR to remove the requirement that a contracting officer withhold five percent of payments due under a time and materials or labor-hour contract.[210] The Councils deemed the current mandatory clauses too burdensome, believing the clauses may exceed reasonable government needs. The proposed rule would give contracting officers the option to withhold these payments only when necessary to protect the government's interest.[211]

Proposed Rule on Share-in-Savings Contracting

As discussed in last year's *Year in Review*,[212] the FAR Councils proposed amending the FAR to authorize Share-in-Savings (SIS) contracts for information technology and published an advance notice on 1 October 2003 to solicit input.[213] Based on the input received, this year the FAR Councils issued a proposed rule change to the FAR to "motivate contractors and successfully capture the benefits of SIS contracting."[214] Under an SIS contract, the contractor finances the work and receives a percentage of any savings resulting from the work in future years. The agency would retain its share of the savings; the contractor, generally would only get paid if savings are realized.[215] The agency head may approve, in writing, award of an SIS contract for a period greater than five years, but not more than ten years.[216] The proposed rule requires the agency to fund any pre-negotiated termination costs and the first fiscal year; limited authority exists for contracts with unfunded contingent liability.[217] The GSA awarded six SIS blanket purchase agreements in July 2004 potentially worth up to $500 million.[218]

Final Rule on the Use of Provisional Award Fee Payments under Cost-Plus-Award-Fee Contracts

The DOD issued a final rule effective 13 January 2004 allowing provisional award fee payments under cost-plus-

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[207] Defense Federal Acquisition Regulation Supplement; Contract Period for Task and Delivery Order Contracts**,** 69 Fed. Reg. 13,478 (Mar. 23, 2004) (to be codified at 48 C.F.R. pts. 216 and 217).

[208] *Id*.

[209] Pub. L. No. 108-375, 118 Stat. 1811 (2004).

[210] Federal Acquisition Regulation; Payment Withholding, 69 Fed. Reg. 29,838 (proposed May 25, 2004) (to be codified at 48 C.F.R. pts. 14, 32, and 52).

[211] *Id*.

[212] *2003 Year in Review*, *supra* note 29, at 23-24.

[213] Federal Acquisition Regulation; Share-in-Savings Contracting, 68 Fed. Reg. 56,613 (proposed Oct. 1, 2003) (to be codified at 48 C.F.R. pts. 16 and 39).

[214] Federal Acquisition Regulation; Share-in-Savings Contracting, 69 Fed. Reg. 40,514 (July 2, 2004) (proposing to amend 48 C.F.R. pts. 16 and 39). The proposed rule implements the E-Government Act's section 210, which "sunsets" at the end of FY 2005. Pub. L. No. 107-347, 116 Stat. 2899, 2932-39 (2002).

[215] 69 Fed. Reg. at 40,516.

[216] *Id*.

[217] *Id.*

[218] Gail Repsher Emery, *GSA Jump-Starts Share in Savings*, WASH. TECH. (Aug. 2, 2004), *available at* http://www.washingtontechnology.com/news/19_9/cover-stories/24130-1.html (last visited 18 Nov. 2004).

award-fee contracts.[219] The rule defines a "provisional award fee payment" as a payment made within an evaluation period prior to a final evaluation for that period.[220] The payments are limited to fifty percent of the available award fee for initial evaluations. For subsequent evaluation periods, an award fee is limited to eighty percent of the period's evaluation score (e.g., a contractor who receives a perfect score for a three-month period may only get a maximum eighty percent of the award fee available for the next period as a provisional award).[221]

The rule foresees the possibility of a final award being lower than an interim evaluation and provides the contracting officer the ability to collect the overpayment.[222] In the comments accompanying the final rule notice, the DOD focused on the optional nature of this process and explained that the provisional award fee payments only change the timing of the payments rather than the entitlement, which is up to the contracting officer to determine with input from the award fee board or the fee determining official.[223] This rule does not apply to fixed price award fee contracts.

DOD Guidance on Service Contracts

On 13 September 2003, Ms. Deidre Lee, the Director of Defense Procurement and Acquisition Policy, issued a memorandum to all the service acquisition heads and all DOD agency directors directing increased vigilance and government oversight for service contracts issued on a cost-reimbursement or time and materials basis.[224] The guidance recommends appointing contracting officer representatives for those types of contracts in accordance with DFARS section 201-602.2, increasing scrutiny regarding the labor categories and hours for time and materials contracts, and focusing on fixed price contracts for follow-on contracts.[225]

Letter Ks and the DOD IG

A letter contract, or an Undefinitized Contract Action, is a binding commitment that allows work to start immediately without negotiating the details of the contract.[226] The contract should be definitized before the earlier of 180 days or the date obligations reach fifty percent of the negotiated ceiling price.[227] Under the DFARS, the maximum government liability without a definitized contract will not exceed fifty percent of the negotiated ceiling price. This liability can increase to seventy-five percent if the contractor submits a qualifying proposal before fifty percent liability is reached.[228]

On 30 August 2004, the DOD Inspector General (IG) issued a report reviewing letter contracts from FY 1998 through FY 2002.[229] The DOD IG reviewed seventy-two of the 1,453 letter contracts issued by the DOD during this time which represented $1.7 billion out of the total $12.5 billion.[230] The review concluded that contracting officials did not adequately justify fourteen percent (ten contracts) of the letter contracts, did not adequately definitize fifty-four percent (thirty-nine contracts) of the contracts within the required 180 day time frame, and did not adequately document the reasonableness of profit rates for eighty-three percent (sixty contracts) of the letter contracts.[231]

The DOD IG recommended preparing instructions for the field to provide guidance on properly assessing adverse mission impact to support issuing a letter contract. The DOD IG also recommended requiring contracting officers to

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[219] Defense Federal Acquisition Regulation Supplement; Provisional Award Fee Payments, 68 Fed. Reg. 64,561 (Nov. 14, 2003) (to be codified at 48 C.F.R. pt. 216).

[220] *Id*. at 64,568.

[221] *Id*.

[222] *Id*.

[223] *Id*. at 64,562.

[224] Memorandum, Director, Defense Procurement and Acquisition Policy, to Deputy Assistant Secretary of the Army (Policy and Procurement), et al., subject: Requirements for Service Contracts (13 Sept. 2004).

[225] *Id*.

[226] FAR, *supra* note 20, at 16.603-2.

[227] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 217.7404-3 (July 2004) [hereinafter DFARS].

[228] *Id*. at 217.7404-4.

[229] U.S. DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, D-2004-112, UNDEFINITIZED CONTRACTUAL ACTIONS (30 Aug. 2004).

[230] *Id*. at 2.

[231] *Id*. at 5.

document the adverse mission impact in the contract file and suggested requiring written justification in the contract file for surpassing the DFAS schedule milestones. Finally, the IG recommended more documentation in the contract file concerning how contracting officers developed allowable profit determinations.[232]

AF Letter Contracts for Operation Iraqi Freedom

On 25 September 2003, the Associate Deputy Assistant Secretary (Contracting) and the Assistant Secretary (Acquisition) for the Air Force issued a memorandum[233] that waived the limitations in DFARS sections 217.7404-3, Definitization Schedule,[234] and 217.7404-4, Limitations on Obligations[235] for Operation Iraqi Freedom. The waiver increased the DFARS threshold of fifty percent to seventy-five percent as the not-to-exceed price, and increased the DFARS limit of seventy-five percent to ninety percent for qualifying proposals. The Undefinitized Contract Action approving official has the authority to approve obligation up to one hundred percent under exceptional circumstances.[236]

Living at Risk is Jumping off the Cliff and Building Wings on the Way Down[237]

Three cases affirm the rule that one gets what one bargains for. In *Chem-Care Co., Inc.*,[238] the Armed Services Board of Contract Appeals (ASBCA) refused to read the clause at FAR section 52.216-2, Economic Price Adjustment—Standard Supplies,[239] into a fixed price, competitively bid procurement. The contract was a sealed-bid procurement for custodial services at Naval Station, Norfolk.[240] Chem Care Co. requested a contract adjustment of $12,719.43 for gas and paper price increases incurred during performance. By granting summary judgment, the ASBCA affirmed the rule that a contractor may not recover for increased prices of supplies in fixed price, competitively bid contracts.[241]

In *Drew v. Brownlee*,[242] the CAFC affirmed an ASBCA decision not to adjust a requirements contract simply because the Army's actual requirements were less than the estimates.[243] The Army had issued a repair and maintenance contract of its Automated Data Processing equipment for "all per call repairs."[244] The original contract was for $80,000 in materials and 3620 service hours per annum. Due to a lower demand than expected, however, modifications reduced these amounts to $29,000 and 1005 hours respectively.[245]

Agreeing with the ASBCA, the CAFC rejected the argument that the contract should have been converted through application of 50 U.S.C. section 1431[246] to a fixed price or ID/IQ contract, stating the issue was one of the agency's discretion and not the board's or court's.[247] The CAFC also found the requirements contract did not require the Army to

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[232] The Army generally nonconcurred with the recommendations; the Air Force generally concurred with the DOD IG though taking some exceptions to the IG's remarks. *Id*. at 11-14.

[233] Memorandum, Associate Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Undefinitized Contract Actions and Contingency Operations in Support of Operation Iraqi Freedom (25 Sept. 2003) [hereinafter UCA Memo].

[234] DFARS, *supra* note 227, at 217.7404-3.

[235] *Id.* at 217.7404-4.

[236] UCA Memo*, supra* note 233.

[237] Ray Bradbury, *available at* http://www.brainyquote.com/quotes/quotes/r/raybradbur102288 (last visited Nov. 18, 2004).

[238] ASBCA No. 53614, 04-1 BCA ¶ 32,593.

[239] FAR, *supra* note 20, at 52.216-2.

[240] *Chem-Care Co.*, 04-1 BCA ¶ 35,593, at 161,252.

[241] *Id*. at 161,253.

[242] 95 Fed. Appx. 978 (Fed. Cir. 2004).

[243] *Id*.

[244] *Id*. at 979.

[245] *Id*.

[246] This statute allows agencies involved in the national defense to enter into contracts or modifications without regard to other provisions of law. 50 U.S.C. §§ 1431-35 (2000). The claimant argued that this language gave the board authority to convert the requirements contract to another contract type. *Drew*, 95 Fed. Appx. at 981.

[247] *Drew*, 95 Fed. Appx. at 981.

order a minimum number of service hours, which negated an equitable adjustment theory based on adverse financial impact on the contractor.[248] This case clearly illustrates that a requirements contract will not be adjusted merely because actual work is less than the estimates in the solicitation.

In *Abatement Contracting Corp. v. United States*,[249] the COFC rejected a breach of contract claim on the grounds that the government had already ordered the minimum quantity in an ID/IQ contract.[250] The Naval Academy solicited bids for asbestos removal and insulation installation in June 1993; the solicitation amended the original requirements contract to an ID/IQ contract with a guaranteed contract minimum.[251] The dispute revolved around an asbestos encapsulation clause for which Abatement Contracting bid five dollars a square foot based on an estimated thirty-seven square feet.[252] Ultimately, the encapsulation need became more than anticipated and a dispute between the parties emerged; the parties, through a bilateral modification, adjusted the price to twenty-three cents per square foot.[253]

Abatement Contracting sued to recover the difference between the two amounts, alleging improper government estimates and undue economic duress concerning the modification.[254] The court granted the government's motion for summary judgment, primarily because by the modification date, the Navy had ordered more work than the contract minimum.[255] Because the Navy had no contractual obligation once the contract minimum was exceeded, both parties were free to alter the contract terms through the modification.[256] The court also found the Navy's conduct in preparing the estimate, while perhaps negligent,[257] did not reach the standard of "egregious conduct."[258]

Let's Get Ready to Rumble in the COFC (EPA Division)!

The COFC, in four separate cases, struggled with the fallout of *MAPCO Alaska Petroleum, Inc. v. United States* (*MAPCO*),[259] in which the COFC ruled that the Petroleum Marketing Monthly (PMM) Economic Price Adjustment (EPA) Clause used by the Defense Energy Support Center (DESC) in several contracts violated the FAR. In *MAPCO*, the EPA Clause was based on a PMM index, a compilation of all the sales prices and volumes for every petroleum refiner in the United States.[260] Among other arguments, DESC argued that this clause should qualify as an EPA clause based on "established prices" under the FAR.[261] The COFC disagreed, holding that established prices were limited to catalog prices or other methods to show the corporation's current price and could not encompass a price index like the PMM EPA.[262]

Four cases dealt with separate contractors who had DESC contracts with the PMM EPA clause. The first case, *Navajo Refining Co. and Montana Refining Co. v. United States* (*Navajo Refining*),[263] followed the *MAPCO* precedent and its progeny by granting partial summary judgment to the plaintiff affirming that the FAR clauses in question were illegal. In *Navajo Refining*, the court also reviewed attempted deviations through which DESC sought to resolve the aftershocks of *MAPCO*. DESC obtained an individual deviation for the solicitation under which individual contracts were awarded; however, the court held that the failure to obtain a deviation for each individual contract was a fatal error.[264] The court also

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[248] *Id*.

[249] 58 Fed. Cl. 594 (2003).

[250] *Id*. at 604.

[251] *Id*. at 595.

[252] *Id*. at 596-97.

[253] *Id*. at 601.

[254] The duress allegation was based on improper withholding of delivery orders. *Id*. at 602-03.

[255] Originally, the minimum was $3,000; through a modification, the minimum was increased to $50,000. *Id*. at 596.

[256] *Id*. at 611-12.

[257] The Navy failed to conduct an asbestos inventory despite being ordered, could not explain how the original estimate was made, and essentially copied the estimate from a prior contract. *Id*. at 613.

[258] *Id*.

[259] 27 Fed. Cl. 405 (1992).

[260] *Id*. at 407.

[261] FAR, *supra* note 20, at 16.203-1.

[262] *MAPCO*, 27 Fed. Cl. at 410.

[263] 58 Fed. Cl. 200 (2003).

[264] *Id*. at 207.

rejected an attempted class deviation due to the failure to publish the deviation for public comment under agency and statutory guidelines.[265] Finally, the court rejected a waiver argument based on government actions suggesting that companies could not challenge the EPA clause.[266]

Waiver proved the centerpiece in the second case, *Hermes Consolidated Inc., d/b/a Wyoming Refining Co. v. United States (Hermes)*.[267] In that case, Judge Block reviewed waiver cases in the COFC and focused on the conduct of the parties, good or bad, to determine equity.[268] The court found that *MAPCO* only construed an existing regulation and did not create new law under which the court would be forced to invalidate the contract clause in question.[269] Given that the plaintiff, a "sophisticated contractor," waited fourteen years from entering the first contract and eight years after it entered the last contract before filing suit, the court found the wavier doctrine applied, absent any allegations of government bad faith.[270] However, the court recommended the parties submit an interlocutory appeal due to recent conflicting cases,[271] especially *Williams Alaska Petroleum, Inc. and Williams Energy Marketing & Trading v. United States (Williams)*.[272]

In *Williams*, the court found that a plain reading of the FAR allowed market-based EPA clauses in the manner used by the DESC,[273] a result contrary to *MAPCO* and all the cases that followed. In addition, the *Williams* court found that the deviations obtained by DESC were sufficient to grant authority to use the EPA clause,[274] a finding also contrary to the line of cases which evaluated DESC's attempts to obtain a deviation for the contracts in question.

The fourth case*, Sunoco, Inc. & Puerto Rico Sun Oil Co. v. the United States* (*Sunoco*)[275] followed *Navajo Refining's* analysis of *MAPCO* and its progeny, holding the EPA clause illegal. The *Sunoco* court, however, followed *Hermes* waiver interpretation and refused to grant summary judgment finding a question of fact surrounding the contractor's failure to challenge the EPA clauses.[276] More litigation unraveling these four decisions is anticipated.

His Contract has Options Through the Year 2020 or Until the Last Rocky *Movie is Made*[277]

Two BCA cases serve as reminders that the government has to exercise options strictly in accordance with a contract's terms. In *White Sands Construction*,[278] the contract required the government to give notice of its intent to exercise an option at least sixty days before contract expiration. The contracting officer mailed the preliminary notice on 6 April 1998, exactly sixty days before contract expiration, and the contractor received the notice on 13 April 1998.[279]

The ASBCA found that the government failed to exercise the option in the manner required by the contract because "unless otherwise agreed, the exercise of an option is effective only upon receipt by the optioner."[280] The contractor, therefore, was entitled to recover the costs it incurred in performing the work plus a reasonable profit.[281]

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[265] *Id*. at 208.

[266] *Id*. at 214.

[267] 58 Fed. Cl. 409 (2003).

[268] *Id*. at 413.

[269] *Id*. at 417.

[270] *Id.* at 417-18.

[271] At the end of the opinion, the court certified two questions for interlocutory appeal. *Id*. at 420.

[272] 57 Fed. Cl. 789 (2003).

[273] *Id*. at 797.

[274] *Id*. at 800-01.

[275] 59 Fed. Cl. 390 (2004).

[276] *Id*. at 399.

[277] Dan Quisenberry (former Major League Baseball pitcher), *at* http://www.brainyquote.com/quotes/quotes/d/danquisenb139708.html (last visited Nov. 18, 2004).

[278] ASBCA Nos. 51875, 54029, 4-1 BCA ¶ 32,598.

[279] *Id*. at 161,300.

[280] *Id*. at 161,308.

[281] *Id*. The board remanded the case for a determination of profit, for which the contractor had not submitted a claim. *Id*.

In *NVT Technologies, Inc.*,[282] the Nuclear Regulatory Commission (NRC) attempted to exercise an option by submitting a proposed modification without the contracting officer's signature.[283] NVT Technologies refused to execute the unsigned modification and responded by saying that the period for exercising the option had expired and any future work would be on a cost plus ten percent fixed fee basis. After the contract expired, the NRC transmitted a unilateral modification that allegedly clarified the previous modification and exercised the option.[284]

The board found the attempted bilateral modification did not meet the requirements of the contract's option provision. The government's second attempt to unilaterally exercise the option, which was otherwise in accordance with the contract, was performed after the period for exercising the option had expired and was invalid. As a result, the Department of Energy BCA found the contractor was entitled to an equitable adjustment of the contract price.[285]

A third case, *C. Martin Co., Inc.*,[286] looked upon the exercise of an option in a more favorable light. In that case, the Navy's Facilities Engineering Command, Southwest Division constructed a clause giving the government the right to extend the contract for a term between one and twelve months.[287] The government gave the contractor timely preliminary notice that it intended to extend the contract three months. On 28 September 2001, the last workday of the contract, the government e-mailed the contractor a modification that extended the option for five months, or two months longer than previously notified. On 16 January 2002, the government sent another preliminary notice to extend the contract two more months; on 14 February 2002, the government extended the contract until 30 April 2002.[288]

The contractor argued that the government unlawfully excluded the clause at FAR section 52.217-9, Option to Extend the Term of the Contract,[289] from the contract which would have restricted the government's flexibility to exercise the option. The board found that including such clause was not mandatory. In addition, because the standard FAR clause allows the contracting officer the discretion to adjust the option notice period as required by the contract., the clause used in the contract was "substantially the same" as the standard FAR clause. Because the government complied with the terms of its specially-crafted clause, the option was valid.[290]

Analysas *Analysis*

In a case dealing with the applicability of a "Limitation of Cost" clause in an indefinite quantity task order contract, the ASBCA disagreed with Analysas Corporation's analysis and refused to render the clause, in the board's words, "inoperative or meaningless."[291] In this case, the contract included the FAR section 52.216-22, Indefinite Quantity clause,[292] but did not include the required FAR section 52.216-19, Delivery-Order Limitations clause. Therefore, the contract had no minimum or maximum quantities listed for a delivery order.[293] The contract incorporated by reference the FAR section 52.232-20, Limitation of Cost clause.[294]

The contractor submitted invoices for six delivery orders that exceeded costs estimated for each individual delivery order. The government limited payments for orders to the total estimated costs because the contractor did not notify the contracting officer that the costs would exceed seventy-five percent of the estimated cost in each delivery order.[295]

The contractor argued that the Limitation of Cost clause only required notification when costs would exceed

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[282] EBCA No. C-0401372, 04-2 BCA ¶ 32,660.

[283] The contract authorized unilateral exercise of options. *Id*. at 161,657.

[284] *Id*. at 161,658.

[285] *Id*. at 161,658-59.

[286] ASBCA No. 54182, 04-2 BCA ¶ 32,637.

[287] *Id*. at 161,495.

[288] *Id*. at 161,495-96.

[289] *See* FAR, *supra* note 20, at 52.217-9.

[290] *C. Martin Co., Inc.,* 04-2 BCA ¶ 32,637 at 161,497-98.

[291] Analysas Corp., ASBCA No. 54183, 04-1 BCA. ¶ 32,629.

[292] FAR, *supra* note 20, at 52.216-22.

[293] *Id*. at 52.216-19.

[294] *Analysas*, 04-1 BCA ¶ 32,629 at 161,443.

[295] *Id*. at 161,443-44.

seventy-five percent of the total estimated cost of the contract, and not each individual delivery order.[296] Reviewing the clause's language, the board ruled the words, "specified in the Schedule," had to encompass each delivery order for the Limitation of Cost clause to be effective, noting that the total contract amount indicated on the Standard Form 6 was "$-0-."[297] Thus, the board refused to use this language to in effect render the Limitation of Cost clause meaningless.

Estimate the Rule?

The courts and boards have continued to rule that contractors can recover for an inaccurate estimate in requirements or ID/IQ contracts that do not take into account facts known at the time of award. In *Hi-Shear Technology Corp. v. United States*,[298] the CAFC affirmed a COFC decision,[299] discussed in the *2002 Year in Review*,[300] granting damages due to a faulty estimate in a requirements contract. The appellate court rejected the contractor's argument that an equitable adjustment in the contract price was the only acceptable method for determining damages in this type of case.[301] The court affirmed the rule that "anticipatory lost profits are not available for the overestimated unordered quantities."[302] The court also rejected Hi-Shear's claim for reliance damages, stating that Hi-Shear's claim was another way to ask for total costs damages which is generally disfavored as a method of recovery.[303]

The COFC recalculated new estimates using a government witness' recommended formula. The COFC then granted partial fixed overhead costs and general and administrative costs based on the new estimates.[304] The CAFC found that the COFC's analysis reasonable and consistent with previous case law. The court emphasized that the lower courts had flexibility in determining damages in these types of cases.[305]

In *National Salvage and Service Corp.*,[306] the ASBCA ruled the Army failed to consider an Army Strategic Mobilization Plan decision to minimize new investment by a rail system, which affected the contract's funding source.[307] The final invoice for work under the contract was $848,798; the estimated price for one individual line item was $2,148,337.64.[308] The board directed the parties to negotiate a settlement award to the contractor.[309]

The case was not a total loss for the government's estimates. The board upheld an estimate that was based on a government employee's personal knowledge.[310] The board found the FAR allowed agencies to derive estimates from "records of previous requirements and consumption, or by other means."[311] This language would encompass an estimate based on an employee's personal experience, as long as it was reasonable.[312]

Sanford Cohen & Associates, Inc.[313] involved an Environmental Protection Agency appeal denying a breach of contract claim. The Department of Interior BCA administrative judge found that the government grossly overestimated its estimates for a level-of-effort, cost-reimbursement contract, and the contractor was entitled to an equitable adjustment in the

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[296] *Id*. at 161,445.

[297] *Id*.

[298] 356 F.3d 1372 (Fed. Cir. 2004).

[299] 53 Fed. Cl. 420 (2002).

[300] *See* Major Thomas C. Modeszto et al., *Contract and Fiscal Law Developments of 2002—The Year in Review,* ARMY LAW., Jan./Feb. 2003, at 22-23 [hereinafter *2002 Year in Review*].

[301] *Hi-Shear,* 356 F.3d. at 1378.

[302] *Id*. at 1380.

[303] *Id*. at 1383.

[304] *Hi-Shear*, 53 Fed. Cl. at 438-43.

[305] *Hi-Shear*, 356 F.3d. at 1381.

[306] ASBCA No. 53750, 04-2 BCA ¶ 32,654.

[307] *Id*. at 161,619.

[308] *Id*. at 161,618.

[309] *Id*. at 161,620.

[310] *Id*. at 161,619.

[311] *Id*. (quoting FAR section 16.503).

[312] *Nat'l Salvage Servs. Corp.*, 04-2 BCA ¶ 32,654 at 161,619.

[313] No. 4239/00, 2004 IBCA LEXIS 5 (Sept. 8, 2004).

price of units delivered.[314] The judge questioned the government's motive in changing key contract language in a modification. The original contract stated that the agency would order 119,000 direct labor hours per performance period. In the subsequent options, the contract language changed to state that the specific number of hours was a "best estimate."[315] The ordered hours during the contract period (a base period plus five one-year options) varied from 28,124 (the lowest yearly labor hours total) to 69,306 (the highest yearly total)—both totals well below the original government estimate.[316]

In *Maggie's Landscaping, Inc.*,[317] an estimates case that was a government victory, the ASBCA refused to grant a constructive change or partial termination due to the government's failure to place orders equivalent to the estimates.[318] In that case, the government awarded a requirements contract for grounds maintenance at the Edgewood Area of Aberdeen Proving Ground, Maryland. The government extended the contract for four option years, during which time the government ordered less mowing than estimated.[319]

The ASBCA held that the contractor assumed the risk that the government's needs would be less than the estimates. As long as the government acted in good faith, the ASBCA would not constructively change the contract.[320] The board found that the government "legitimately reduced its orders for valid business reasons, including the dry and wet conditions experienced, changes in desired maintenance levels by tenant agencies, and (the contractor's) failure to keep up with the work ordered."[321] The ASBCA did grant the government a credit for a reduction in the mowed area, due to a clause which allowed adjustment for an increase or decrease in the mowed area.[322]

Major Andrew Kantner.

Sealed Bidding

It Doesn't Quite Meet the Requirement, But That's OK

In an interesting late bid case, the GAO denied a protest and concurred with the contracting officer's acceptance of a "late" bid although the bid was not in the hand of a government official before bid opening. In *Weeks Marine, Inc.*,[323] a representative for Great Lakes Dredge & Dock Company (Great Lakes) arrived at the place designated in the solicitation at 10:50 a.m., ten minutes before bid opening.[324] Unfortunately, the invitation for bids (IFB) incorrectly identified the bid opening room, and by the time the Great Lakes representative arrived at the correct room, the bid opening official had read three of the eighteen line items in Weeks' bid.[325] The bid opening official accepted the bid from the out of breath Great Lakes representative at 11:01 a.m. but did not open the bid.[326] After bid opening, the contracting officer realized the mistake in the solicitation and accepted the bid, "noting that the bid was delivered in a sealed envelope and that there was no evidence of tampering."[327] Weeks protested the contracting officer's decision arguing Great Lakes' bid was not "received at the government installation designated for receipt of bids and was [not] under the agency's control, prior to the time set for receipt of bids."[328] The GAO agreed but concluded a strict application of the late bid regulations was not appropriate in this

[314] *Id*. at *12-13.

[315] *Id*. at *2.

[316] *Id*. at *6.

[317] ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647.

[318] *Id*. at 161,564.

[319] The estimated amount for the base period was $583,817. *Id*. The percentage of actual mowing to estimates varied from seventy-six percent to ninety-five percent. *Id*. at 161,559.

[320] *Id*. at 161,565.

[321] *Id*.

[322] *Id*. at 161,568.

[323] B-292758, 2003 U.S. Comp. Gen. LEXIS 171 (Oct. 16, 2003).

[324] *Id*. at *3.

[325] *Id*. at *5. The Great Lakes representative obtained directions to the designated room after being unable to locate the room. Unfortunately the room displayed two different room numbers. Two employees directed the representative to the bid opening room, on an alternate floor. *Id*. at *3.

[326] *Id*. at *5. The bid opening official took custody of the bid and testified that the representative appeared to be out of breath. *Id*.

[327] *Id*. at *6.

[328] *Id*. at *7. Great Lakes argued the bid was timely delivered to the room designated in the IFB, but the GAO concluded the bid was late and was not "received at the government installation designated for receipt of bids prior to the time set for receipt of bid." Consequently, the bid was also not in the government's control prior to the time of bid opening. *Id*.

case.[329]

Reviewing the purpose of the late bid rules, the GAO explained "that where a bidder had done all it could and should to fulfill its responsibility, it should not suffer if the bid is untimely because the government failed in its own responsibility, so long as acceptance of the bid would not cast doubt on the integrity of the bidding process."[330] The GAO concluded the agency was the paramount cause of Great Lakes' late delivery because the agency designated the wrong room in the IFB.[331] Although the bid was not in the government's control by 11:00 a.m., the GAO decided Great Lakes did not gain an unfair competitive advantage.[332] Finding no evidence that the Great Lakes representative actually heard any prices read by the bid opening official prior to entering the room or that Great Lakes substituted one bid package for another, the GAO concluded the acceptance of the bid did not compromise the integrity of the procurement.[333] The GAO also noted that the Great Lakes representative "appeared hurried and out of breath," when he delivered the bid and "seem[ed] credible in his declaration that he did not hear any prices being read."[334]

Bid Bonds—An Issue of Responsiveness and Responsibility

Over the past few years, the *Year in Review* has discussed the issue of powers of attorney (POA) and mechanical signatures as they relate to bid bonds.[335] The GAO has held that bid documents accompanying a bond must establish unequivocally at the time of bid opening that the bond would be enforceable against the surety.[336] Bid bonds accompanied by a photocopy of a POA are therefore unacceptable and the bid nonresponsive.[337] In *All Seasons Construction, Inc.*,[338] the GAO found that a computer generated POA with mechanically applied signatures "look[ed] more like a photocopy than a document generated by a computer printer."[339] The GAO acknowledged the authority to use mechanically applied signatures but only when the signature is affixed after the power of attorney has been generated.[340] The COFC agreed with the GAO, finding that "photocopies of bid guarantee documents generally do not satisfy the requirements for a bid guarantee since there is no way, other than by referring to the originals after bid opening, to be certain that there have not been alterations to which the surety has not consented, and that the government would therefore be secured."[341]

This year, in *Hawaiian Dredging Construction Co., Inc., v. United States*,[342] the COFC held that the contracting officer's rejection of a bid because the POA accompanying the bond included mechanically signed signatures was unreasonable.[343] Because the POA included a statement that the surety intended to be bound by

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[329] *Id*. at *8. For bids not transmitted through electronic commerce, the FAR states a bid "received at the government office designated in the IFB after the exact time specified for receipt of bids is 'late' and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late bid would not unduly delay the acquisition and there is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the date specified for receipt for bids." FAR, *supra* note 20, at 14.304 (b)(1)(ii). The GAO has created a third "late bid" rule pursuant to its bid protest authority. The rule states a bid is timely if the delivery of a bid that is hand-carried by the bidder (or a commercial carrier) is frustrated by the government such that the government is the paramount cause of the late delivery. *See* Kelton Contracting, Inc., Comp. Gen. B-262255, Dec. 12, 1995, 1995 CPD ¶ 254.

[330] *Weeks Marine, Inc*., 2003 U.S. Comp. Gen. LEXIS 171, at *10.

[331] *Id*. Weeks argued unsuccessfully that the Great Lakes representative failed to leave sufficient time before bid opening to submit its bid. *Id*. at *11.

[332] *Id*. at *13.

[333] *Id*. at *14. The door was locked when the Great Lakes representative arrived. After knocking on the door, someone in the audience opened the door. *Id*.

[334] *Id*. The GAO also relied on testimony from agency personnel that indicated they did not see anyone outside the bid opening room when the contracting officer announced the time for bid opening. *Id*.

[335] *See* Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 16 [hereinafter *2001 Year in Review*]; *see also 2003 Year in Review*, *supra* note 29, at 24.

[336] *See* Schrepfer Indus., Inc., Comp. Gen. B-286825, Feb. 12, 2001, 2001 CPD ¶ 23, at 3.

[337] *Id*.

[338] Comp. Gen. B-291166.2, Dec. 6, 2002, 2002 CPD ¶ 212.

[339] *Id*. at 4.

[340] *Id*. at 3.

[341] 55 Fed. Cl. 175, 180 (2003).

[342] 59 Fed. Cl. 305 (2004).

[343] *Id*. at 317.

all mechanically applied signatures, the court concluded the POA unequivocally established the surety agreed to be bound.[344]

Major Bobbi Davis.

Negotiated Acquisitions

Blood, Sweat, and Ultimately Tears for Offeror

In *The Haskell Co.*,[345] the GAO reviewed a protest that a winning proposal should have been rejected as late. The Naval Facilities Engineering Command issued an RFP for infrastructure upgrade and construction of a new aircraft parts store, flight simulator facility, and squadron operations aircraft maintenance unit facility at Travis AFB, California.[346] Proposals were due at the designated government office on "25 June 2003, 1400 hours (Pacific Time)."[347]

Haskell Company protested the acceptance of the James N. Gray's winning proposal. As the management assistant described the incident:

> The Gentleman who delivered the proposal came through the office doors bleeding pretty bad, his nail had ripped from his finger, in route to our office. When he did reach my desk, I looked at the clock and it had NOT turned to 14:01 as of yet, but due to the amount of blood that was coming from his hand, I hesitated to touch the box as it was put down, and I took additional seconds to angle the box so I wouldn't get blood on me and just as I stamped the box the time turned to 14:01.[348]

The GAO's discussion did not revolve around the bloody document, but whether the RFP's designated closing time—14:00 hours (Pacific time)—meant 14:00:00 or at or before 14:01:00.[349] The GAO held that the agency interpretation that the proposal was required before 14:01:00 was reasonable, particularly since the protestor had not complained prior to the delivery of proposals about the patently ambiguous solicitation.[350] The GAO further held that, because a government official was present at the desk to receive the proposal, the Navy received the proposal at the time the proposal was placed on the desk and the actual time/date stamp was not determinative.[351]

"It gets late early there"[352]

Three other late proposal cases centered on rejected proposals resulting from offeror error. First, in *On-site Environmental, Inc.; WRS Infrastructure & Environment, Inc.,*[353] an offeror sent its proposal to the wrong address based on an "ISSUED BY:" address in an amendment rather than relying on the original RFP hand delivery address.[354] The GAO determined the error resulted from "ignoring the clear delivery information in the RFP in favor of a tenuous interpretation of the address information in the amendment."[355]

Secondly, in *InfoGroup Inc.*,[356] the offeror submitted its proposal[357] through a FedEx courier but unfortunately

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[344] *Id*. For a complete discussion of the case and a related, proposed rule change to the FAR, see *infra* section titled Bonds, Sureties and Insurance.

[345] Comp. Gen. B-292756, Nov. 19, 2003, 2003 CPD ¶ 202.

[346] *Id*. at 1.

[347] *Id*. at 2.

[348] *Id*. at 3.

[349] *Id*. at 4. The RFP incorporated the clause at FAR section 52.215-1(c) (placing the responsibility on the offeror to deliver a proposal to the proper place and on time). *See* FAR, *supra* note 20, at 52.215-1(c).

[350] *Haskell*, 2003 CPD ¶ 202 at 4.

[351] *Id*. at 4-5.

[352] Yogi Berra, *available at* http://www.brainyquote.com/quotes/quotes/y/yogiberra139943.html (last visited Nov. 18, 2004).

[353] Comp. Gen. B-294057, B-294057.2, July 29 2004, 2004 CPD ¶ 138.

[354] *Id*. at 1-2.

[355] *Id*. at 3.

[356] B-294610, 2004 U.S. Comp. Gen. LEXIS 199 (Sept. 30, 2004).

[357] *Id*. at *1. The National Highway Traffic Safety Administration issued the RFP for traffic injury control evaluation and behavioral technology support. *Id*.

forgot to tell FedEx the room number for the receipt of proposals. The FedEx employee entered the Department of Transportation unescorted, attempted to call the contracting officer, and returned to FedEx unsuccessful. The GAO refused to hold the agency responsible for failing to have an escort available the day proposals were due.[358]

Finally, in *Immediate Systems Resources, Inc*.,[359] the GAO upheld the rejection of an (unfortunately-named) offeror's revised proposal as untimely. The offeror's president showed up at the guard station (either before or after the deadline—a disputed fact), had the guard date-stamp the package, and then handed the proposal to the contract specialist thirteen minutes late.[360] The GAO refused to accept the protestor's argument that government control was established by the guard signing for the package, particularly since the president of the company regained control to later personally hand-deliver the proposal to the contract specialist.[361]

If It Ain't Broke, Don't Fix It!

The GAO sustained a protest in *Security Consultants Group, Inc.,*[362] finding the DHS' decision to reopen a competition unreasonable without evidence that any offeror was prejudiced by the error that precipitated the reopening.[363] The DHS issued an RFP for security guard services. The DHS would award the contract on a "best value" basis, with proposals evaluated under four factors, including past performance.[364] Based on its evaluation, the DHS concluded that Security Consultants Group's (SCG) proposal represented the best value to the government and awarded it a task order under the offeror's FSS contract.[365]

Another offeror, Southwestern Security Services, Inc. (SSSI), filed a protest challenging the evaluation of its proposal and the award decision. Although GAO ultimately dismissed the SSSI protest for failure to state a valid basis, the DHS realized that the RFP had not disclosed the relative weights of the three technical factors, leaving offerors to assume all three were of equal importance.[366] In fact, the agency had assigned a weight of sixty percent to past performance and weights of twenty percent each to the other two technical factors.[367]

The DHS took corrective action by amending the RFP to clearly state the factors' relative weights and by providing offerors an opportunity to revise their proposals. SCG then protested, asserting that the agency's corrective action was unwarranted because the RFP's failure to set forth the correct weights did not prejudice any of the offerors, and that SCG was at a competitive disadvantage because its price had been disclosed.[368]

The GAO sustained the protest, holding that while "contracting agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure a fair and impartial competition,"[369] an exception exists:

> where the record establishes that there was no impropriety in the original evaluation and award, or that an actual impropriety did not result in any prejudice to offerors, reopening the competition after prices have been disclosed does not provide any benefit to the procurement system that would justify compromising the offerors' competitive positions.[370]

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[358] *Id*. at *2.

[359] Comp. Gen. B-292856, Dec. 9, 2003, 2003 CPD ¶ 227.

[360] *Id*. at 3.

[361] The GAO also held the offeror failed to timely protest the formatting requirements that may have caused the late delivery. The GAO also noted that the offeror failed to request an extension in a phone call an hour before the time due. *Id*. at 4.

[362] Comp. Gen. B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53.

[363] *Id*. at 4.

[364] *Id*. at 1-2.

[365] *Id*. at 2.

[366] *Id*.; *see* Maryland Off. Relocators, Comp. Gen. B-291092, Nov. 12, 2002, 2002 CPD ¶ 198, at 5.

[367] *Security Consultants*, 2004 CPD ¶ 53, at 2.

[368] *Id*.

[369] *Id*. (citing RS Info. Sys., Inc., Comp. Gen. B-287185.2, B-287185.3, May 16, 2001, 2001 CPD ¶ 98, at 4). Where an agency's corrective action is otherwise unobjectionable, a request for revised price proposals is not improper merely because the awardee's price has been exposed. Strand Hunt Constr., Inc., Comp. Gen. B-292415, Sept. 9, 2003, 2003 CPD ¶ 167, at 6.

[370] *Security Consultants*, 2004 CPD ¶ 53, at 2; *see also* Hawaii Int'l Movers, Inc., Comp. Gen. B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67, at 6 (recon. denied); Gunn Van Lines; Dept. of the Navy—Recon., Comp. Gen. B-248131.2, B-248131.4, Nov. 10, 1992, 92-2 CPD ¶ 336.

The GAO agreed with the DHS that the solicitation was defective, but found nothing in the record to establish a reasonable possibility that any offeror was prejudiced by the deficiency.[371] Based on that finding, and given that SCG's competitive position had been compromised by disclosure of its price, the GAO found no benefit to the procurement system that would justify reopening the competition.[372]

On Second Thought

The GAO supported two agency decisions to cancel RFPs. In *Superlative Technology*,[373] the GAO found that the agency had a reasonable basis to cancel an RFP that inadequately described the contract's proper staffing requirements.[374] The Air Force issued an RFP for computer support services at Hickam AFB, Hawaii.[375] After receiving two post-award protests, the contracting officer determined that the RFP's failure to state a minimum staffing level resulted in ten of eleven offers being rated marginal or worse under the technical approach subfactor.[376] The contracting officer resolicited the contract based on a clearer, revised statement of work.[377]

The GAO reviewed the resolicitation on a 'reasonable basis' standard.[378] The GAO found the original statement of work to be ambiguous and the reissued RFP sufficiently changed to warrant a new RFP.[379]

In *ELEIT Technology, Inc.*,[380] the GAO approved the cancellation of an RFP based on the agency's desire to have a single contract for a range of services, rather than separate contracts for each service as initially planned.[381] The GAO disagreed with the protestor's argument that the change could have been accomplished with modifications; the key for the agency was a 'shift to modularity,' which required integrated equipment fielding services that would have been difficult with separate contracts.[382] The GAO noted that cancellation was appropriate in this case as the agency reasonably determined that the RFP did not accurately describe its needs.[383]

The Missing Horse and the Closed Barn Door

In two cases, the GAO reasserted the principle that post-protest activities, in particular those conducted by personnel simultaneously involved in defending the protest, will be looked at with a skeptical eye.

In *ManTech Environmental Research Services Corp.*,[384] the EPA issued a solicitation to provide on-site technical support services for the EPA's Office of Research and Development in Ada, Oklahoma.[385] The agency awarded the contract to Shaw based on a superior technical proposal in spite of ManTech's cost/price advantage.[386] ManTech submitted a timely

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[371] The record established that the four top-scored offerors, including SCG, all received equally high scores under the past performance factor. While the public version of the GAO decision deleted what evaluation rating the four top-scored offerors had received, the rating was such that GAO concluded that the offerors were not misled into devoting fewer resources to proposal preparation in the past performance area. *Security Consultants*, 2004 CPD ¶ 53, at 3.

[372] *Id*. at 4.

[373] Comp. Gen. B-293709.2, June 18, 2004, 2004 CPD ¶ 116.

[374] *Id*. at 3.

[375] *Id*.

[376] *Id*. at 2.

[377] *Id*. at 3.

[378] *Id*.

[379] *Id*. at 4-6.

[380] B-294193.2, 2004 U.S. Comp. Gen. LEXIS 201 (Sept. 30, 2004).

[381] *Id*. at *2.

[382] The GAO also noted that it was illegal to award a contract with the intent to materially alter the terms after award. *Id*. at *2-3.

[383] *Id*. at *2.

[384] Comp. Gen. B-292602, Oct. 21, 2003, 2003 CPD ¶ 221.

[385] The RFP contemplated award of a cost-plus-fixed-fee, level-of-effort contract for a one-year base period and four one-year option periods. The RFP stated technical quality was more important than cost-price and listed the following technical evaluation factors in descending order of importance: demonstrated qualifications of key personnel, past performance, demonstrated corporate experience, quality of proposed program management plan, and appropriateness of proposed quality management plan. *Id*. at 2.

[386] *Id*. at 3.

protest; ManTech also submitted a supplemental protest after a protective order alleging errors in the evaluation record, including allegations of mathematical and transcription errors. In a submission to the GAO, the EPA admitted to clerical errors in the evaluation of Shaw's past performance which would have reduced the gap between the two offerors. The EPA then averred that the source selection official re-examined her decision while the protest was ongoing and affirmed her original source selection.[387]

The GAO, in its review, noted additional errors, in particular a lack of documentation supporting a change of rating for key personnel, which appeared to be based on a transcription error. The GAO opined that the evaluation record supporting Shaw's technical superiority was materially flawed.[388] The GAO then discounted the EPA's post-protest activities and sustained the protest due to the agency's material evaluation flaws. The GAO recommended the agency use different personnel to conduct the new evaluation and source selection decision.[389]

In *Continental RPVs*,[390] under similar facts but with a critical difference, the GAO approved an addendum to the source selection decision made after a protest. The U.S. Army Aviation and Missile Command issued an RFP for the acquisition of an aerial remotely piloted vehicle target system and services.[391] After a sustained protest,[392] the Army made a revised best value determination and affirmed the earlier award to Griffon Aerospace, Inc.[393]

The GAO found that the new price/technical tradeoff was reasonable in light of the benefits of the awardee's airframe design and power plant, which allowed for future growth.[394] Because the agency made its revised source selection *after* receiving the GAO decision in the earlier case, and not before, the revised source selection was not made in the "heat of the adversarial process" and the GAO refused to discount the selection merely because there was an "expeditious implementation" of the GAO's recommendations or that the decisions followed "closely on the heels of our decision in the prior protest."[395]

Discussions

All for One, and One for All!

In *Ridoc Enterprises, Inc./Myers Investigative & Security Services*,[396] the GAO sustained a protest stating that the EPA failed to conduct discussions with all the offerors in the competitive range. Even if the agency takes proper corrective action following a protest, the agency must conduct discussions with all offerors in the competitive range if the agency allows one offeror to submit a revised proposal prior to the protest.

On 28 April 2003, the EPA issued an RFP for security guard services in which all of the technical evaluation factors were significantly more important than price.[397] After the technical evaluation panel review, the EPA established a competitive range and conducted discussions with three offerors. The contracting officer eliminated two offerors, including Ridoc, and kept one offeror, Eagle, in the competitive range. The EPA then requested a revised proposal and conducted another round of discussions with only Eagle. Eagle submitted a second revised proposal which addressed some technical issues and reduced its price, so that ultimately Eagle submitted the lowest-priced offer. The EPA awarded the contract to Eagle, and Ridoc submitted a timely protest.[398] The EPA decided to take corrective action, and reevaluated the proposals, including all offerors in the competitive range. The EPA, however, did not conduct discussions because Eagle had the

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[387] *Id*. at 4-5.

[388] *Id*. at 6.

[389] *Id*. at 7.

[390] Comp. Gen. B-292768.6, Apr. 5, 2004, 2004 CPD ¶ 103.

[391] *Id*. at 1.

[392] The GAO found that there was no basis to support the awardee's past performance rating. Continental RPVs, Comp. Gen. B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56.

[393] *Continental RPVs,* 2004 CPD ¶ 103, at 3.

[394] *Id*. at 7.

[395] *Id*. at 9.

[396] Comp. Gen. B-293045.2, July 26, 2004, 2004 CPD ¶ 153.

[397] Seeking security guard services for EPA facilities in North Carolina, the RFP contemplated a fixed price contract for a base year with four one-year option periods. *Id*. at 1.

[398] *Id*. at 2.

highest technical score and lowest price. As a result, the EPA re-awarded the contract to Eagle.[399]

In Ridoc's protest to the GAO, Ridoc alleged that the EPA conducted a round of discussions solely with one offeror, Eagle. The GAO sustained the protest stating that the EPA, as part of its corrective action, had an obligation to conduct discussions with all firms in the competitive range because one offeror had that opportunity in the first action. The only way to ensure that all offerors had a fair chance to compete would be to allow all an opportunity to submit revised proposals after a discussion of the government's concerns regarding their proposal.[400]

In a second case, *SYMVIONICS, Inc.*,[401] the GAO sustained a protest when an agency failed to provide all offerors information that one contractor received in a debriefing. The Naval Facilities Engineering Command issued an RFP for military family housing maintenance and repair services.[402] The RFP indicated that if a housing site were to be placed in the Public Private Venture (PPV) program, it would be removed from the contract by unilateral contract modification without negotiating any costs for reduced work.[403]

Before the Navy awarded the contract to SYMVIONICS, and without informing the other offerors, the Navy asked the contractor to review the effect that a mistaken wage determination would have on its offer. The Navy awarded the contract to SYMVIONICS after reviewing its response.[404]

Another offeror, Eastern Maintenance & Services, Inc. (Eastern Maintenance), requested a debriefing and, after receiving the selected awardee's prices, alleged that SYMVIONICS had front-loaded its prices "knowing that PPV is to take over this contract."[405] The Navy responded by stating that "PPV would probably not happen as scheduled" and that the Navy would not pay more for SYMVIONICS' contract.[406] Eastern Maintenance filed a protest, and the Navy issued a corrective action reopening discussions, fixing the wage determination problem, and clarifying how the Navy would handle unbalanced bids.[407]

During the new discussions, SYMVIONICS requested the offerors' pricing information. After the Navy denied the request, SYMVIONICS filed a protest challenging this decision, and later, the Navy's action in disclosing the PPV program issue only to Eastern Maintenance.[408] The GAO sustained the protest on the latter ground; the GAO noted that the information relating to the PPV program would assist offerors in calculating risk into their prices. The Navy, once it disclosed this information to Eastern Maintenance in the debriefing, should have disclosed the same information to all offerors.[409]

The GAO also held that the release of SYMVIONICS pricing information was required, by law and regulation, in the post-award required debriefing; therefore, the agency was not required to level the playing field since the release was not due to preferential treatment or agency improper action.[410] However, the GAO did note that the agency has discretion to release all offeror prices to fix the potential competitive advantage for the debriefed offeror. The GAO went so far as to state that a full release of all pricing information would be preferable in this case, given the passage of time and the solicitation changes. The GAO recommended the agency release the PPV information and allow for the submission of revised proposals.[411]

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[399] *Id*. at 3.

[400] *Id*.

[401] B-293824.2, 2004 U.S. Comp. Gen. LEXIS 216 (Oct. 8, 2004).

[402] The Navy contemplated the award of a fixed price, ID/IQ contract for a base year and two one-year options to the lowest cost, technically acceptable offer. *Id*. at *2.

[403] *Id*.

[404] *Id*. at *2-3.

[405] *Id*. at *3.

[406] *Id*.

[407] *Id*.

[408] *Id*. at *4.

[409] *Id*. at *5.

[410] *Id*. at *6.

[411] *Id*. at *7.

Putting the Meaning in Meaningful

In *Lockheed Martin Corp.,*[412] the GAO commented on the rule that discussions, when conducted, must be meaningful.[413] The GAO made it clear that the agency, through its questions and especially its silence, must avoid misinforming the offeror about the government's requirements.[414]

The Army issued an RFP to perform system development and demonstration and low-rate initial production of the XM395 precision guided mortar munition.[415] A key element of the most important technical evaluation factor, ownership costs, revolved around the agency's assessment of the bidders' average unit production cost (AUPC). The RFP stated that the Army would evaluate AUPC for "desirability" and subject estimates to a cost realism assessment.[416]

The Army established a competitive range that included Lockheed Martin (Lockheed) and Alliant Techsystems Inc. (ATK). In evaluating Lockheed's AUPC proposal, the Army excluded all proposed costs that were contractor specific due to the possibility that the contractor may not work on the program during follow-on production. The Army's calculation for AUPC dealt with only design specific costs, using industry rates.[417]

During discussions with Lockheed, although the Army informed Lockheed of its AUPC rating, the Army did not inform Lockheed that it was excluding Lockheed's proposed savings from the cost realism analysis. Lockheed referred to both possible contractor-specific and design-specific savings during its discussions with the Army. In addition, although the Army made an error in evaluating Lockheed's cost factor, the Army failed to correct the error during discussions. After review of final proposal revisions, the Army selected ATK for award, in part because of the reduced rating on Lockheed's ownership costs due to the AUPC estimate.[418]

The GAO found that the discussions between the Army and Lockheed were not meaningful because the Army failed to indicate to Lockheed that contractor-specific savings were excluded from AUPC, and the Army failed to address with Lockheed that it understated the AUPC due to its application of improper cost factors.[419] As a result, the GAO recommended reevaluation of the award to ATK, to include redoing meaningful discussions with the competitive range offerors.[420]

Reopening: A Can of Worms?

Four cases explored when an agency can reopen discussions. In *National Shower Express, Inc.; Rickaby Fire Support*,[421] the GAO held that the agency could reopen discussions after discovering that an offeror received a second opportunity to revise its proposal. The National Interagency Fire Center of the U.S. Forest Service (Forest Service) issued an RFP for mobile shower facilities located near thirty cities in twelve western states.[422] The Forest Service awarded the contracts, and National Shower Express (National Shower) filed both an agency-level protest, which was denied, and a protest with the GAO.

After National Shower's protest, the Forest Service notified the GAO that the agency intended to reopen discussions with all offerors for the Idaho Falls contract. The agency reopened discussions because Rickaby Fire Support (Rickaby), the Idaho Falls contract awardee, was allowed to adjust its final proposed price due to a communication error. The agency incorrectly informed Rickaby that its price was too low; Rickaby responded by significantly increasing its price in its revised

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[412] Comp. Gen. B-293679 et al., May 27, 2004, 2004 CPD ¶ 115.

[413] *See also* Cygnus Corp., Inc., B-292649.3; B-292649.4, Dec. 30, 2003, 2004 CPD ¶ 162 (holding that the National Institute of Health failed to conduct meaningful discussions by neglecting to raise a major weakness under the single most important technical evaluation subcriterion).

[414] *Lockheed*, 2004 CPD ¶ 115, at 7.

[415] The RFP was to be awarded on a "best value" basis, and the evaluation factors were listed in descending order of importance: technical, program evaluation factors, costs, past performance, and small disadvantaged business participation. *Id*. at 2.

[416] *Id*. at 3.

[417] *Id*. at 4.

[418] *Id*. at 6-7.

[419] The GAO also found that the Army improperly credited ATK in meeting a required measure based on an agency advisor's perception on the capabilities of a subcontractor. Because ATK's proposal did not address this issue, it was improper for the Army to credit ATK for information outside the scope of its proposal. *Id*. at 9-10.

[420] *Id*. at 11.

[421] Comp. Gen. B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140.

[422] *Id*.

proposal. After closing, the agency attempted to correct the error by telling Rickaby that its overall price was neither low nor high. Rickaby then reduced its final price to a level consistent with its original proposal.[423]

Rickaby, who was awarded the initial contract, filed a protest challenging the agency's decision to reopen discussions in response to National Shower's protests.[424] The GAO held that reopening discussions for all offerors in the competitive range was proper since the Forest Service's original attempt to correct the error in communication with Rickaby resulted in an improper reopening of discussions with only one offeror.[425]

The GAO approved another agency corrective action to reopen discussions in *Ocean Services*,[426] holding that the Navy could disclose the total proposed prices to all offerors after the agency disclosed one contractor's total price during debriefings.[427]

The RFP was for a time charter contract for an oceanographic research vessel.[428] The Navy awarded the contract to Alpha Marine Services (Alpha Marine). The agency then informed debriefed offerors of Alpha Marine's proposed price. After a protest by Ocean Services, the Navy reopened discussions and provided all offerors with a spreadsheet that contained the bottom line pricing for all offerors but left out the identity of the offeror and the individual line items (such as fuel costs) which comprised the pricing data.[429]

The GAO held that neither the Procurement Integrity Act[430] nor the FAR absolutely prohibited the release of an offeror's pricing information; the GAO approved that the carefully crafted disclosure equalized competition while providing no more information than necessary.[431]

In a third reopening of discussions case, the GAO approved of a corrective action after the agency received dramatically different pricing proposals. In *PCA Aerospace, Inc*.,[432] the GAO held that dramatic price differentials often can lead to the reasonable conclusion that offerors misunderstood the RFP requirements.[433] The Air Force received bids with a wide price disparity, issued a letter asking for revised proposals, and awarded the contract to PCA Aerospace, Inc. (PCA).[434] After two agency-level protests, the Air Force reviewed the letter to offerors and rescinded the award to PCA because the Air Force determined that some offerors were confused about the pricing instructions.[435]

The GAO reviewed the corrective action and agreed that there were reasonable concerns about the "dramatic price differentials."[436] Clearly, agencies should evaluate prices in offerors' proposals and may reopen discussions if prices do not reflect a competitive marketplace.[437]

In a fourth case, the GAO looked at the other side of the coin. In *Kaneohe General Services*,[438] the GAO denied a protest in which the offeror argued that the agency improperly induced the offeror to increase its price. The Navy issued an RFP for grounds and tree maintenance services at Pearl Harbor, Hawaii.[439]

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[423] *Id*. at 8.

[424] *Id*. at 4.

[425] *Id*. at 8-9.

[426] Comp. Gen. B-292511.2, Nov. 6, 2003, 2003 CPD ¶ 206.

[427] *Id*. at 6.

[428] The RFP was a best value contract for a base period of one year, with three one-year and one eleven-month option periods. *Id*. at 2.

[429] *Id*. at 3.

[430] 41 U.S.C. § 423 (2000).

[431] *Ocean Services, LLC,* 2003 CPD ¶ 206, at 6.

[432] Comp. Gen. B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65.

[433] The Air Force issued the RFP as a small-business set-aside for the acquisition of up to 1900 titanium pylon ribs for the F-15 aircraft. *Id*. at 1.

[434] *Id*. at 2.

[435] *Id*. at 3.

[436] *Id*. at 4.

[437] *Id*.

[438] Comp. Gen. B-293097.2, Feb. 2, 2004, 2004 CPD ¶ 50.

[439] The RFP was issued as a competitive section 8 (a) set-aside for a fixed price contract with an indefinite-quantity item for a base year with four option one-year periods. Price and technical factors were equally weighted. *Id*. at 1.

After establishing the competitive range, the Navy informed Kaneohe that some of its prices were higher than the agency's estimates, and some prices lower, and released the government estimates in the process.[440] The GAO approved of the release of the government's estimate for "informational purposes" only and felt the agency's actions were an appropriate incentive for competitive proposals.[441] The GAO rejected Kaneohe's assertion that the government's actions misled it into raising its price, explaining that, in this case, the increase in price was a result of the offeror's business judgment and not improper government action.[442]

Opaque Clarifications

The GAO and the COFC each had cases that revolved around clarifications issues. In the first, *AHNTECH, Inc.*,[443] the GAO held that an offeror may not use a clarification as an excuse to submit an unsolicited proposal revision. In *AHNTECH*, the Air Force issued an RFP for operations and maintenance services in support of the F-16 fighter pilot training program at the Gila Bend Air Force Auxiliary Field and Barry M. Goldwater Range at Luke AFB, Arizona.[444] After the initial evaluation, the evaluators issued fifty-two clarification requests; after reviewing AHNTECH's responses, the agency deemed the proposal inadequate.[445]

While responding to the clarifications, AHNTECH submitted a number of proposal revisions. The agency, however, refused to consider the revisions because the questions were only intended as clarifications. AHNTECH, in its protest, argued that the agency's requests exceeded the boundaries of clarifications.[446]

The GAO found that the agency's requests were intended to clarify AHNTECH's proposal and that AHNTECH's actions disregarded the agency's intent. Generally, an offeror, by submitting an unsolicited revised proposal, may not unilaterally transform an agency's attempt to clarify.[447]

In *Gulf Group v. United States*,[448] the COFC dismissed an allegation claiming that the agency improperly failed to seek clarification on a past performance issue. The U.S. Army Corps of Engineers (COE) issued an RFP for construction work on MacDill AFB, Florida.[449] The RFP stated that the COE intended to award without discussions.[450] The evaluation team concluded that Gulf Group should be required to clarify some work for the past performance rating and issued a rating pending clarification.[451] The source selection authority made the award decision without seeking clarification from Gulf Group.[452] The contract was awarded to Kokolakasis; Gulf Group submitted a protest with the GAO, which twice denied Gulf Group's request for a fact-finding hearing. Gulf Group then filed a complaint with the COFC.[453]

The COFC held that, contrary to Gulf Group's assertions, there was no right to clarify information in proposals.[454] Although the court broadly noted that some explanation would have been helpful, the COFC found that since the regulatory language in FAR section 15.306 (a)(1)-(2)[455] was discretionary, there was no obligation to provide an explanation with such a

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[440] *Id*. at 2.

[441] *Id*. at 3.

[442] *Id*.

[443] Comp. Gen. B-293582, Apr. 13, 2004, 2004 CPD ¶ 113.

[444] The RFP contemplated the award of a fixed-price, ID/IQ contract for a five-month base period, with seven option years. *Id*. at 2.

[445] *Id*.

[446] *Id*. at 2-3.

[447] *Id*. at 4.

[448] 61 Fed. Cl. 338 (2004).

[449] The RFP was judged on a "best value" basis with a trade-off between price and past performance. *Id*. at 340.

[450] *Id*. at 342.

[451] *Id*. at 344.

[452] *Id*.

[453] *Id*. at 346.

[454] *Id*. at 361.

[455] *See* FAR, *supra* note 20, at 15.306.

decision.[456]

"Hey, Lama, hey, how about a little something, you know, for the effort, you know"[457]

The COFC, in *Gentex Corp. v. United States*,[458] found that the Air Force violated the FAR by treating offerors unequally. The COFC stressed the general rule that if an agency is going to allow noncompliance with the RFP's requirements, it should notify all offerors of the change.[459]

The Air Force issued an RFP for the System Development and Demonstration for the Joint Service Aircrew Masks program.[460] Gentex Corp. (Gentex) and Scott Aviation (Scott) were the only offerors. The Air Force awarded the contract to Scott, chiefly due to its dual-battery proposal—a proposed tradeoff which generated cost savings that was not in Gentex's offer.[461] Gentex submitted a protest to the GAO which the GAO denied.[462]

Gentex then challenged the award in the COFC arguing that the RFP contained no authorization to submit an offer with a pre-award "cost as an independent variable" (CAIV) tradeoff. In addition, Gentex argued that the Air Force conducted improper discussions by only suggesting the CAIV trade-off to Scott, leaving Gentex with the mistaken assumption that all solicitation requirements had to be complied with.[463]

The COFC agreed with Gentex stating that the RFP, while unclear in parts, allowed offerors to take exception to certain requirements which could disqualify the offer (i.e., Gentex reasonably felt that the submission of a separate CAIV tradeoff could have led to disqualification).[464] In addition, the RFP suggested that any CAIV tradeoff would be done post-award.[465] The COFC indicated that an e-mail from the Air Force to Scott, which suggested CAIV studies, was an improper discussion since the suggestion was not provided to Gentex.[466] In fact, the COFC noted that the Air Force was on notice that Gentex had a question with the CAIV since the company expressed concern about the excessive costs of its proposal.[467]

Evaluations

Proposal Evaluation 101: Consider Revised Proposals

In *Locus Technology, Inc.*,[468] the National Institutes of Health (NIH), Department of Health and Human Services, issued a request for proposals (RFP) for animal facility management software for the NIH Veterinary Research Program. The RFP provided for award to the offeror whose proposal was determined most advantageous, price and other enumerated factors considered. Five offerors, including the protestor and Topaz Technologies, Inc. (Topaz), submitted proposals. An

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[456] *Gulf Group,* 61 Fed. Cl. at 361.

[457] Bill Murray's character tells a story in which, after caddying for the Dalai Lama, receives "total consciousness" instead of a tip. CADDYSHACK (Orion Pictures 1980).

[458] 58 Fed. Cl. 634 (2003).

[459] *Id*. at 655. The Air Force overrode a GAO-ordered stay of contract performance based on the urgent and compelling need for the single mask system in combat operations. *Id*. at 647. Despite ruling for Gentex, the COFC refused to grant injunctive relief based on the compelling and urgent requirements of the Air Force to procure the items in question. The COFC, however, did rule that Gentex could recover its reasonable bid and proposal preparation costs. *Id*. at 656. In a later proceeding, the court excluded profit from the award of bid preparation and proposal costs. Gentex Corp. v. U.S., 61 Fed. Cl. 49 (2004).

[460] The RFP was for a follow-on contract for the Program Definition and Risk Reduction program that developed the prototypes for the mask system and allowed aircrew to fly in a chemical/biological warfare environment. *Gentex*, 58 Fed. Cl. at 636.

[461] *Id*. at 646-47.

[462] In one issue related to the COFC case, Gentex alleged that the agency conducted unequal discussions concerning battery costs. Although the Air Force informed Scott of its battery cost problem, since Gentex first questioned the Air Force's cost assumptions through an e-mail to the Air Force, the GAO held Gentex was aware of the potential problem. In addition, the Air Force modified its cost assumptions and Gentex changed its battery approach as a result. Therefore, the GAO found that the Air Force discussions were not misleading. Gentex Corp.—Western Ops., Comp. Gen. B-291793, et al., 2003 CPD ¶ 66.

[463] *Gentex Corp.*, 58 Fed. Cl. at 650.

[464] *Id*. at 651.

[465] *Id*.

[466] *Id*. at 652.

[467] *Id*. at 653.

[468] Comp. Gen. B-293012, Jan. 16, 2004, 2004 CPD ¶ 16.

agency technical evaluation panel (TEP) evaluated the proposals using a point-rating scheme.[469] The NIH, without explanation, canceled the solicitation. Two months later, the NIH reopened the solicitation and allowed offerors to revive and revise their proposals. Locus Technology, Inc. (Locus) submitted a revised proposal, which included updated past performance information. The contracting officer, based upon the TEP's recommendation, concluded that Topaz's proposal represented the best value to the government. Locus then protested.[470]

The GAO sustained the protest, stating that the agency's evaluation of proposals was not reasonable or consistent with the terms of the solicitation where the NIH failed to consider significant portions of Locus's final revised proposal in its evaluation.[471] The GAO found, with regard to the technical proposal/approach evaluation factor, "the record simply does not establish that the agency's evaluation even considered the revisions Locus made to its initial proposal."[472] The contemporaneous evaluation record consisted of two documents, the TEP's Evaluation Summary Report (ESR) and the Recommendation of Award. Both the date and the subject line on the ESR indicated that the document reflected evaluation findings based on the initial, and not revised, proposals.[473] More important, the actual ESR narrative describing the evaluators' findings with regard to Locus's proposal in no way acknowledged that Locus had submitted revisions, and the evaluators' observations reflected only the initial proposal.[474]

Similarly, with regard to the past performance factor, the GAO found the NIH also failed to consider Locus's revised proposal in the evaluation. The GAO stated, "In this regard, the ESR states that Locus 'did not furnish references for evaluation of past performance after multiple requests.' In fact, Locus submitted a list of 11 references with its final revised proposal."[475] Separately, the GAO also determined that the NIH failed to consider offerors' prices in its award determination. In sum, because the agency had essentially ignored Locus's revised proposal in the evaluation, the GAO found the evaluation unreasonable.[476]

Proposal Evaluation 201: Furnish an Adequate Rationale

In *Blue Rock Structures, Inc.*,[477] the GAO sustained a protest in which the source selection authority failed to adequately document his tradeoff decision.[478] The Navy issued an RFP for construction services at the Marine Corps Air Station at Cherry Point, North Carolina. The RFP contemplated an award of up to six ID/IQ contracts for a base and three option years in addition to a lump sum price for a seed project.[479] Technical factors[480] were significantly more important than price in the evaluation.[481] The source selection authority rejected the source selection board's recommendations for nine awards, "ignored the mechanics" of the board's rating adjustment process, performed his own price/technical tradeoff, and awarded six contracts to four firms.[482]

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[469] Topaz received a technical score of 77.3, and Locus received a technical score of 40.5. *Id*. at 2. The discrepancy between the two offerors' scores was almost entirely attributable to (1) the technical proposal/approach factor, under which Locus had a perceived failure to identify clearly in its written proposal the statement of work requirements that its software did or did not meet; and (2) the past performance factor, because Locus failed to submit past performance references with its initial proposal. *Id*. at 2-3.

[470] The NIH did not suspend performance upon receipt of the protest because Topaz's product had already been delivered and accepted. *Id*. at 4.

[471] *Id*.

[472] *Id*.

[473] *Id*. at 5. While the TEP members who signed the ESR dated their signatures in late August or September 2003, the date on the first page of the ESR was 16 January 2003, and the subject line of the report read "Initial Technical Evaluation Report." By comparison, initial proposals were submitted in September 2002, and revised proposals were submitted in early August 2003. *Id*.

[474] "(T)he ESR note[d] that Locus's technical proposal included statement 'N/A' as response to many specific government requirements." *Id*. The record showed, however, that while Locus's initial proposal did use the notation "N/A" in response to two of the ten specific requirements listed in the solicitation, the protester's revised proposal included no notations of "N/A," instead adding brief statements responding to the two requirements to which it had initially responded 'N/A.'" *Id*.

[475] *Id*. at 5-6 (quoting the ESR at 6).

[476] *Id*. at 6. Since the software product had already been delivered and accepted, GAO recommended that Locus be reimbursed both proposal preparation costs and its costs of filing and pursuing the protest. *Id*.

[477] Comp. Gen. B-293134, Feb. 6, 2004, 2004 CPD ¶ 63.

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

[479] *Id*. at 2.

[480] Technical factors were evaluated on the basis of three equally weighted factors: past performance, management and organization, and small business subcontracting effort. *Id*.

[481] Price was the sole basis for evaluating the seed project. *Id.* at 1-2.

[482] *Id*. at 3-4.

The GAO reviewed the source selection authority's decision which simply concluded that two companies with lower prices than Blue Rock's would be a better value to the agency. The decision stated that the proposals were essentially equal in technical merit despite Blue Rock's higher technical rating from the board.[483] The GAO found the source selection authority made a fatal error in failing to evaluate whether to pay a price premium for an offeror's technical advantage, particularly when price was secondary to technical considerations.[484] The GAO recommended a new source selection decision and reimbursement of the protestor's costs.[485]

What's Good for the Goose is Good for the Gander

In *Lockheed Martin Information Systems*,[486] the GAO sustained a protest based on a conclusion of disparate treatment. The GAO looked at the agency's evaluation of two proposals and determined that the agency evaluated each one differently, with one subjected to a more exacting standard. The GAO concluded that while either approach was arguably reasonable, the agency should choose one and consistently apply that standard to all proposals.[487]

The U.S. Department of Housing and Urban Development (HUD) issued an RFP for a wide range of information technology services[488] using performance-based service acquisition methods.[489] The award was based on best value, with capability[490] and past performance together evaluated as more important than price/cost.[491] The agency evaluators identified eight specific discriminators that favored award to Electronic Data Systems Corporation (EDS); the source selection official (SSO) identified seven specific discriminators that supported award to EDS.[492]

Lockheed Martin Information System (LMIS) submitted a protest to the GAO, which reviewed the award selection under the "reasonable and consistent" standard.[493] The GAO determined that four of the evaluators' and three of the SSO's discriminators were unsupported by the record.[494] In fact, the GAO determined that LMIS was held to a stricter standard than EDS Indeed, in at least one area, it appeared that EDS failed to meet a material solicitation requirement.[495] The GAO felt that the agency either unreasonably reached unsupportable conclusions for EDS or failed to thoroughly evaluate the proposals critically, particularly in light of the strict reading of LMIS's proposal. Ultimately, the GAO recommended the agency reopen discussions, obtain revised proposals, and make a new award determination.[496]

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

[484] *Id*. at 5.

[485] The GAO also rejected a selection of a company that received a credit in its technical rating for its low price. This double credit was unreasonable in light of the RFP evaluation factors and the ratings of the other offerors. *Id*. at 6.

[486] Comp. Gen. B-292836, et al., Dec. 18, 2003, 2003 CPD ¶ 230.

[487] *Id*. at 12.

[488] The HUD Information Technology Solution (HITS) contract was designed to support all of the agency's requirements for information processing, telecommunications and other related needs for a base period of up to one year, plus nine one-year options. *Id*. at 2.

[489] The RFP did not include a statement of work. The RFP included a statement of objectives, outlining the various core and non-core functions. Offerors were required to submit performance work statements, one or more service level agreements, and a contract work breakdown structure which would outline the "HITS solution." *Id*. at 2-3.

[490] Capability was divided into the following subfactors: technical/management solution, performance metrics, transition approach, and small business strategy. *Id*. at 3.

[491] *Id*.

[492] *Id*. at 4.

[493] *Id*.

[494] *Id*.

[495] The record showed that EDS failed to provide the remote access required by the RFP. *Id*. at 4-5. In addition, the record did not justify EDS' "superior" evaluation in the following areas: Oracle database support; single sign-on access capability; installation, moves, adds and changes support; and small business subcontracting. *Id*. at 6-8.

[496] The GAO also recommended that LMIS be reimbursed its costs, including reasonable attorneys' fees. *Id*. at 12.

"I Don't Get No Respect!"[497]

In *Computer Information Specialist, Inc.*,[498] the GAO sustained a protest in which one evaluator downgraded a proposal on reevaluation due to the "lack of respect" the evaluator felt the proposal showed to the agency.[499]

The National Library of Medicine of the NIH issued an RFP for a requirements contract for telecommunications support services for a base year with four one-year options. The RFP informed offerors that the award would be on a best value basis, with non-price factors being more important than price. The agency awarded the contract to Open Technology Group, Inc. (OTG), which had the highest ranked, lowest priced proposal.[500]

Computer Information Specialists, Inc. (CIS) submitted a timely protest to the GAO challenging the award. The GAO's review of the "limited" evaluation record noted that only one evaluator (out of five) submitted narrative materials to justify his scoring of CIS' revised proposal; he was the only one to downgrade CIS' score.[501] The first paragraph of his comments stated:

> I was dismayed and unfavorably impressed with both the tone and substance of the proposer's response for answers to technical questions and for additional information. I was shocked with the pedantry and the profound lack of intellect actually written in the response. I was disappointed with the visible disregard for manners and with the actual lack of respect written into and appearing in the lines of the response.[502]

The GAO was unable to identify any area that could reasonably be said to demonstrate a "lack of respect."[503] In addition, the evaluation appeared incorrect in its analysis concerning key personnel experience and past performance. The evaluator also mysteriously criticized proposed enhancements with the comments, "Therefore, all of that information is no more than a pipe dream, mere vapor to be dispersed with one's next breath."[504]

The GAO also found the agency misevaluated the OTG proposal which, upon review, failed to meet two requirements: providing letters of commitment (10 out of 14 submitted) and a security program plan.[505] The GAO recommended that the agency make a new source selection decision after reevaluating the proposals of the competitive range offerors.[506]

You Can't Ignore What You Know

Question: What happens when an evaluator knows something to be the case, even if it is not present in the offeror's proposal? Answer: Don't ignore what you realize to be true; to do so merely elevates form over substance. This issue and outcome succinctly define the GAO decision this past year in *The Arora*.[507]

In *Arora*, the Department of Health & Human Services (HHS) issued an RFP for occupational health services.[508] The solicitation established three evaluation factors—technical merit, past performance and price—with technical merit in turn having five evaluation subfactors (experience and capabilities, transition plan, quality assurance, qualifications of key

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[497] Signature statement of the late Rodney Dangerfield. *See* Mel Watkins, *Rodney Dangerfield, Comic Seeking Respect, Dies at 82*, N.Y. TIMES, Oct. 6, 2004, at A27.

[498] Comp. Gen. B-293049; B-293049.2, Jan. 23, 2004, 2004 CPD ¶ 1.

[499] *Id*. at 3.

[500] *Id*. at 1. The non-price factors were qualifications and availability of personnel (30 points), past performance (30 points), technical competence (20 points), and management approach (20 points). *Id*.

[501] *Id*. at 3.

[502] *Id*.

[503] *Id*. at 4.

[504] *Id*. at 5.

[505] The OTG proposal failed to provide the level of detail required by the solicitation, proposing the plan in four short paragraphs. *Id*. at 6.

[506] *Id*. at 6-7. The GAO also recommended reimbursement of CIS' protest costs. *Id*.

[507] Comp. Gen. B-293102, Feb. 2, 2004, 2004 CPD ¶ 61.

[508] *Id*. at 1. The services were for those required by the Federal Occupational Health Services (FOHS) in delivering occupational health and clinical services in the western area of the United States. *Id*.

personnel, and oral presentation).[509] A total of five offerors, including Arora and CasePro, Inc., submitted proposals. The agency determined that CasePro's proposal represented the best value to the government, notwithstanding Arora's higher past performance rating and lower evaluated price.[510] Justifying award based on a higher-priced proposal, the HHS noted that the resumes Arora provided for certain key personnel did not specifically indicate that the individuals had certain required certifications.[511] Arora protested, claiming that the HHS knew that its proposed personnel had the requisite certifications. The GAO sustained the protest.

The GAO held that when performing an evaluation an agency could not ignore what it knew to be true, and could not reasonably consider an "inconsequential matter of form" to be a significant proposal weakness or deficiency.[512] Here Arora's proposal included the resumes but not the required certifications of certain key personnel. The HHS was actually aware, however, that these individuals had the requisite certifications. Not only did Arora's proposal expressly state that it had confirmed that each of its proposed key personnel had the certifications, but the awardee's proposal also contained resumes for these same individuals showing the certifications.[513] Moreover, the individuals in question were the incumbent personnel, who HHS knew had the requisite certifications.[514] The GAO believed the only flaw in Arora's proposal—not including information in its proposal of which the agency was nonetheless aware—was essentially one of form that could not reasonably provide a proper basis for differentiating between the technical merit of the proposals submitted.[515] The GAO recommended that the agency reevaluate the protester's proposal and make a new source selection decision.[516]

Be Careful What You Ask For . . .

The GAO sustained a protest in *Atlantic Research Marketing Systems, Inc.*[517] because the agency improperly removed a proposal from consideration. The Navy issued an RFP for miniature day/night sight development for the special operations peculiar modification system.[518] The RFP contained minimum or threshold (T) requirements, and desired or objective (O) requirements. In addition, the RFP identified "Key Performance Parameters," and "Additional Performance Parameters," or "APPs." The solicitation stated that failure to meet T or O requirements for APPs would not remove a submission from further testing or consideration.[519]

After the protestor's oral presentation, the operational evaluation team found that Atlantic Research Marketing Systems, Inc.'s (ARMS's) models were operationally unsuitable and unacceptable and removed ARMS from the negotiated procurement. In a written debriefing letter, the contracting officer noted that the ARMS's models failed on two bases: a design flaw which resulted in decreased firing accuracy and an inability to mount the M203 grenade launcher free of the carbine barrel. ARMS filed a timely protest challenging the agency's technical evaluation.[520]

The GAO found that both grounds for the removal were APPs and removal on that basis was improper.[521] In addition, the GAO found no data to support the evaluation team's conclusion of decreased firing accuracy and determined

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[509] *Id*. at 2. The RFP was silent as to the relative importance of the technical merit and past performance evaluation factors; because of this, the factors were assumed to be approximately equal in importance. *Id*. at 2 n.2 (citing Beneco Enters., Inc., Comp. Gen. B-283154, Oct. 13, 1999, 2000 CPD ¶ 69, at 9).

[510] *Id*. at 3. CasePro's final proposal revision received 86 out of 100 points under the technical merit factor and a past performance rating of "good," at an evaluated price of $35,067,042. *Id*. at 2. By contrast, Arora's final revised proposal received 81 out of 100 points under the technical merit factor and an "excellent" past performance rating, at an evaluated price of $32,877,905. *Id*.

[511] Specifically, the resumes of two of Arora's five proposed area nurse managers did not "indicate the required certifications . . . for AED [automatic external defibrillator]/CPR [cardiopulmonary resuscitation]," as set forth in the RFP. *Id*. at 3.

[512] *Id*. at 4. *See also* Computer Assocs. Int'l, Inc., Comp. Gen. B-292077.3, B-292077.4, B-292077.5, Jan. 22, 2004, 2004 CPD ¶ 163, at 8; and Forest Regeneration Servs. LLC, Comp. Gen. B-290998, Oct. 30, 2002, 2002 CPD ¶ 187, at 6 (both explaining that an agency is not required to confine its evaluation to the "four corners" of an offeror's proposal and may properly consider other information known or available to it).

[513] *Arora*, 2004 CPD ¶ 61, at 4.

[514] *Id*.

[515] *Id*. (citing Son's Quality Food Co., Comp. Gen. B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424, at 7).

[516] In its follow-up action, the agency selected CasePro for award and Arora submitted another protest to the COFC. The COFC denied Arora's request for injunctive relief. The Arora Group, No. 04-366C, 2004 U.S. Claims LEXIS 267 (Aug. 31, 2004).

[517] Comp. Gen. B-292743, Dec. 1, 2003, 2003 CPD ¶ 218.

[518] The RFP called for the award of one or more ID/IQ, fixed price contracts for developmental test prototypes, operational test prototypes, limited user test items, and production quantities for the rail interface system and seven subsystems. *Id*. at 1-2.

[519] *Id*. at 2.

[520] *Id*. at 4.

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

that the team failed to take into account a positive user assessment submitted by ARMS.[522]

Close but No Cigar

Two cases highlight the fact that an agency can disregard an unsatisfactory proposal. In *DynCorp International, LLC*,[523] the Army awarded a contract to Aegis Defence Svs., Ltd. under an RFP for security services for contractor and government personnel in Iraq.[524] The RFP intended award without discussions. The source selection authority reviewed six proposals, disregarded two proposals, including DynCorp's, and awarded the contract to Aegis Defence Services Ltd.[525]

DynCorp protested its marginal rating and argued that the Army should have considered its proposal in a cost/technical tradeoff.[526] The GAO reviewed the evaluation and found that the agency reasonably concluded that DynCorp misread the RFP and proposed insufficient staffing for the security missions contemplated by the RFP.[527] In addition, DynCorp could not adjust its staffing unless the Army chose to conduct discussions; the Army was justified in disregarding DynCorp's proposal in making the decision to award without discussions.[528]

In *Nevada Real Estate Services, Inc.*,[529] the GAO found that the agency properly rejected a proposal that was incomplete. The HUD issued an RFP for management and marketing services for single-family properties.[530] The RFP required all offerors to submit a hard copy and a CD-ROM copy, and upload an electronic copy to a website by 4 p.m. on 5 September 2003.[531] After unpacking all the proposals, the HUD notified Nevada Real Estate Services (NRE) that its proposal would not be considered because it failed to submit the required business proposal.[532]

NRE maintained that it submitted its proposals on time. Upon review, the GAO found NRE submitted a hard copy proposal that contained no business proposals at all. Additionally, the uploaded and CD-ROM versions had some relevant pages but no completed documents. Finally, the NRE's past performance surveys were blank.[533] The GAO concluded that, contrary to NRE's allegations, the agency could not have lost the proposal since it was impossible for the agency to misplace omitted pricing information from the pricing sheets that the agency did receive.[534]

Organizational Conflicts of Interest

Oh, I see OCI!

The GAO has increased its scrutiny concerning organization conflicts of interest (OCI) issues. The FAR lays out the rules concerning OCI in subpart 9.5.[535] The goal of the FAR's OCI restriction is to prevent "the existence of conflicting roles that might bias a contractor's judgment" and "an unfair competitive advantage" for one contractor.[536] Contracting officers have a duty to "(a)void, neutralize, or mitigate significant potential conflicts before contract award."[537]

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[522] *Id*. at 6. The GAO recommended that the protestor be considered for pending award and be reimbursed for its protest costs. *Id*. at 9.

[523] B-294232; B-294232.2, 2004 U.S. Comp. Gen. LEXIS 192 (Sept. 13, 2004).

[524] The RFP contemplated the award of a cost-plus-fixed-fee contract for one-year with two one-year options. *Id*. at *2.

[525] *Id*. at *4. The SSA noted that even if the two excluded proposals were considered, the award would be the same. *Id*. at *5.

[526] The contract was a best value determination using the following factors: technical/management, past performance, and cost/price. Technical/management was slightly more important than past performance; the two factors together were more important than price. *Id*. at *2.

[527] *Id*. at *7.

[528] *Id*. at *9.

[529] Comp. Gen. B-293105, Feb. 3, 2004, 2004 CPD ¶ 36.

[530] *Id*. at 1.

[531] *Id*. at 2.

[532] *Id*.

[533] *Id*. at 3.

[534] *Id*. at 4.

[535] FAR, *supra* note 20, subpt. 9.5.

[536] *Id*. at 9.505.

[537] *Id*. at 9.504.

The GAO sustained a protest in *PURVIS Systems, Inc.*,[538] holding that the Navy failed to evaluate a potential OCI in awarding the contract to a company in the potential position of evaluating its own systems' performance.[539]

The Navy issued an RFP[540] to provide analytical and technical support for two Navy programs[541] and selected Northrop Grumman. PURVIS Systems, Inc. (PURVIS), after a debriefing, filed a protest with the GAO. Taking corrective action, the Navy requested that each offeror submit an OCI mitigation plan to be evaluated under the technical performance plan factor. After reevaluation, the Navy again selected Northrop Grumman for award.[542]

PURVIS again submitted a protest to the GAO, alleging that the agency failed to properly evaluate the OCI issue underlying the subjective assessments involved in contract performance. The Navy argued that, because the contract required only objective data measurement activities,[543] the OCI issues were nonexistent.[544]

The GAO agreed with PURVIS, stating that there appeared to be numerous activities in the statement of work that either expressly or inherently involved analysis, evaluation, and judgment on the part of the contractor.[545] Northrop Grumman acknowledged that the company makes twelve out of fifty-nine systems in the Navy inventory subject to testing and evaluation under the two programs for which the contract would provide analytical and technical support. However, Northrop Grumman dismissed the OCI issue as immaterial because the systems were mature, fielded systems beyond the standard procurement process, i.e., the OCI would only apply if the offeror would have to evaluate developing systems.[546]

The GAO dismissed this analysis as factually incorrect, noting "a classic example of 'impaired objectivity' OCI" in which a company would be "responsible for assessing the performance of systems it has manufactured."[547] Finally, the GAO found materially inadequate the mitigation plan offered by Northrop Grumman to deal with issues raised by its developmental systems.[548]

To properly evaluate the mitigation plans, the GAO held that the agency should have done the following: (1) compared Northrop Grumman's systems with competing systems, (2) considered the functions the offeror's systems would perform, (3) determined the impact the offeror's systems would have on any existing systems that the offeror would evaluate during the contract, and (4) considered the frequency with which OCI issues would have arisen and the impact of dealing with those issues would have on Northup Grumman's potential performance.[549]

The GAO also sustained an OCI protest in *Science Applications International Corporation* (SAIC).[550] The Environmental Protection Agency (EPA) issued an RFP for the award of an ID/IQ contract for system engineering services to assist the EPA "in meeting its strategic objectives and responsibilities under Federal legislation and executive orders."[551] The EPA awarded the contract to Lockheed Martin Services, Inc. (Lockheed). SAIC challenged the award alleging that Lockheed failed to disclose potential OCI issues. SAIC argued that, due to Lockheed's significant involvement with hazardous materials, Lockheed's judgment and objectivity may be impaired in performing tasks such as statistical services or

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[538] Comp. Gen. B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177.

[539] *Id*. at 11.

[540] The RFP was for a base year and four one-year option periods. The proposals were to be evaluated against the following factors, listed in descending order of importance: technical performance plan, past performance, cost, and socioeconomic factors. *Id*. at 2-3.

[541] The Ship Anti-submarine Warfare Readiness Effectiveness Measuring Program and the Mine Readiness Effectiveness Measuring Program. *Id*. at 1-2.

[542] *Id*. at 4-6.

[543] Activities included: "Obtaining or performing preexercise modeling and/or system performance prediction," "drafting scenarios to test specific tactics," "participating in exercise planning meetings and conferences," "incorporating testing and tactical evaluation of new systems and procedures in the exercise test plan," and "[p]lanning minefields and recommending settings for mine simulators." *Id*. at 6 n.2.

[544] *Id*. at 7.

[545] The GAO highlighted phrases from the statement of work: e.g., "*drafting scenarios to test specific tactics*" and "*recommending* settings for mine simulators." *Id*. at 8.

[546] *Id*. at 10-11.

[547] *Id*. at 11.

[548] *Id*. at 12. The OCI plan identified systems that Northrop Grumman was researching, developing, and testing. *Id*. at 10.

[549] *Id*. at 10.

[550] Comp. Gen. B-293601, et. al, May 3, 2004, 2004 CPD ¶ 96.

[551] *Id*. at 2.

environmental modeling in the contract.[552]

The GAO focused on the agency's failure to analyze the OCI issues.[553] The GAO evaluated the statement of work and felt that the agency could not reasonably conclude that no OCI evaluation was needed. The GAO then recommended a thorough evaluation of the statement of work and the potential OCI issues, and either award the contract to the offeror with best value or seek revised proposals after an amended solicitation.[554]

In a follow-up case,[555] SAIC challenged the EPA's corrective actions. The EPA performed an OCI analysis of Lockheed's environmentally-regulated activities. The EPA concluded that there were no actual or potential OCI in the statement of work, but the agency, before issuing any task order, would evaluate and mitigate any OCI issues.[556] The GAO, while not fully happy with the "no OCI" conclusion, found the record reasonably supported EPA's conclusion.[557] The GAO did note with approval the EPA's goal to independently evaluate and mitigate potential OCI issues prior to each task order.[558]

The GAO was not the only forum to address the issue of OCI. In *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Abraham (LeBoeuf)*,[559] the District of Columbia (D.C.) Court of Appeals vacated the lower court's summary judgment and ruled in favor of a law firm in an OCI case arising out of a Department of Energy (DOE) contract. *Leboeuf* involved the DOE's attempt to obtain an operating license from the Nuclear Regulatory Commission for the Yucca Mountain Nuclear Waste Repository site in Nevada (Yucca project).[560]

The DOE issued an RFP for expert legal counsel to assist with the licensing activities.[561] Only Leboeuf and Winston & Strawn (Winston) submitted proposals. Winston had been the legal advisor for TRW Environmental Safety Systems, Inc. (TRW) in an initial contract involving the Yucca project. In its proposal, Winston stated that "no actual or potential conflict of interest exists under the TRW Subcontract." A technical advisory committee and the contracting officer reviewed the statement and concluded that no OCI existed.[562]

The DOE awarded the contract to Winston, and LeBoeuf filed an administrative appeal alleging an OCI. Although a potential existed for Winston to review its prior legal advice to TRW, the DOE rejected the appeal on the basis that the work on the new contract was "substantially similar" to the prior contract.[563]

The GAO rejected a similar challenge on the grounds that the DOE's Revised Management Plan designated the DOE's Office of General Counsel as ultimately responsible for the final legal review of the license application thus obviating any OCI issues.[564] LeBoeuf then filed suit in federal court alleging the DOE acted in an "arbitrary and capricious" manner in awarding the contract despite the disqualifying OCI. The district court denied relief, ruling the issue was moot because the DOE terminated the contract with Winston, and granted summary judgment to the DOE finding that its OCI evaluation was

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[552] *Id*. at 4-5.

[553] *Id*. at 6.

[554] *Id*. at 8-9.

[555] Science Applications Int'l Corp., B-293601.5, 2004 U.S. Comp. Gen. LEXIS 196 (Sept. 21, 2004).

[556] *Id*. at *3-4.

[557] *Id*. at *4.

[558] *Id*. at *5. In the following decisions, the GAO denied protests involving OCI allegations: Abt Assoc., Inc., Comp. Gen. B-294130, Aug. 11, 2004, 2004 CPD ¶ 174 (finding the OCI allegation untimely); CDR Enter. Inc., Comp. Gen. B-293557, Mar. 26, 2004, 2004 CPD ¶ 46 (finding the protestor's OCI allegations were factually unsupported); Mech. Equip. Co., Inc.; Highland Eng'g, Inc.; Etnyre Int'l, Ltd.; Kara Aerospace, Inc., B-292789.2, et al., 2003 Comp. Gen. LEXIS 263 (Dec. 15, 2003) (finding the awardee's major subcontractor did not have a significant OCI where there was no evidence showing that the subcontractor had an unfair competitive advantage resulting from access to proprietary or source selection information of competitors); TDS Inc., Comp. Gen. B-292674, Nov. 12, 2003, 2003 CPD ¶ 204 (finding that monitoring, as opposed to evaluating, the activities of a related business entity does not, by itself, constitute an impaired objectivity OCI); Am. Artisan Prod., Inc., B-292559, B-292559.2, 2003 Comp. Gen. LEXIS 160 (Oct. 7, 2003) (finding the awardee's use of a subcontractor who had helped develop specifications was not an OCI "because the subcontractor had worked only on design aspects of the specifications, more than one contractor was involved in preparing the specifications, and the subcontractor was not in a position to draft specifications favoring its own products"); Computers Universal, Inc., Comp. Gen. B-292794, Nov. 18, 2003, 2003 CPD ¶ 201 (finding no OCI even though awardee would perform quality assurance of its own work because "any such quality assurance will not entail a subjective evaluation of its performance").

[559] 347 F.3d 315 (2003).

[560] *Id*. at 317.

[561] *Id*. at 318. The contract was for a five-year term, renewable for a maximum of ten years. *Id*.

[562] *Id*.

[563] *Id*.

[564] LeBoeuf, Lamb, Greene & MacRae, Comp. Gen. B-283825; B-283825.3, Feb. 3, 2000, 2000 CPD ¶ 35.

adequate.[565]

On appeal, the D.C. Court of Appeals dismissed the "follow-on" contract argument, holding a strong possibility existed that Winston would be in position of reviewing its previous work for TRW as part of a quality assurance process.[566] The court also held that the DOE erred in accepting "at face value" Winston's no-conflict OCI statement. The court highlighted that the DOE, as part of its obligation to screen for OCI, should have reviewed the TRW subcontract and other relevant interests.[567] The court focused on the question of material fact concerning the question of whether the DOE adequately evaluated the OCI issue in its cursory review of Winston's no-conflict statement.[568] The court then remanded the case to the district court to determine the adequacy of DOE's OCI evaluation.[569]

Rotten to the Core?

The GAO sustained a protest in *Research Analysis & Maintenance, Inc.; Westar Aerospace & Defense Group, Inc.*,[570] highlighting that an agency should evaluate proposals strictly in accordance with the RFP and should avoid misleading offerors through ambiguous language in the RFP or comments by the contracting officer in site visits.[571] The GAO also reinforced that agencies must evaluate Organizational Conflicts of Interest (OCI) issues consistently for all offerors.[572]

The Army Threat System Management Office (TSMO) issued an RFP for the maintenance and operation of foreign threat systems.[573] The TSMO would evaluate proposals on a "best value" basis looking at three evaluation factors: technical merit,[574] past and present performance, and cost. Technical merit was much more important than performance risk; performance risk was much more important than cost.[575]

The TSMO awarded the contract to Northrop Grumman Technical Services (NGTS). Research Analysis & Maintenance (RAM) submitted a protest. In response, the TSMO undertook corrective action by evaluating potential OCIs and again awarded the contract to NGTS.[576]

RAM protested this second award, arguing that the TSMO incorrectly downgraded its proposal under the technical merit factor by evaluating its effort as understaffed.[577] Reviewing the RFP, the GAO interpreted the language in question as requesting a core maintenance staff effort with a surge capability for increased operational tempo, contrary to TSMO's assertion that the RFP required a core staff both to maintain and operate the systems. In addition to the RFP's language, the GAO pointed to the contracting officer's non-binding statements which reinforced the assumption that the TSMO would look favorably on lower staffing proposals.[578] Because RAM was "competitively prejudiced by the evaluation deficiencies,"[579] the GAO sustained the protest.

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[565] LeBoeuf v. Abraham, 215 F. Supp. 2d 73 (D.D.C. 2002).

[566] *LeBoeuf*, 347 F.3d at 323.

[567] *Id*. at 324. The DOE IG found that Winston had violated the OCI provision by failing to disclose legal work and lobbying performed for the Nuclear Energy Institute, whose members included commercial utilities which would use the Yucca site. *Id*. at 319.

[568] *Id*. at 324.

[569] The court also asked the district court to review whether the DOE should directly award the contract to LeBoeuf, whether the DOE should reselect a new contractor under a new RFP, or whether LeBoeuf should recover its bid-preparation costs. *Id*. at 325-26.

[570] Comp. Gen. B-292587.4, et al., Nov. 17, 2003, 2004 CPD ¶ 100.

[571] *Id*. at 6.

[572] *Id*. at 8.

[573] The RFP contemplated an award of a cost-plus-award-fee/term contract, with a base period of three years, with six two-year award terms, for an overall term of fifteen years. *Id*. at 2.

[574] Technical merit was divided into the following subfactors in descending order of importance: competence and experience, program management, mission understanding, employee recruitment and retention, key personnel, and organizational conflict of interest. *Id*.

[575] *Id*.

[576] *Id*. at 3.

[577] *Id*. at 4.

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

[579] *Id*. at 8.

The GAO also sustained the protest based on an inconsistent OCI evaluation. The TSMO downgraded RAM's proposal due to its failure to articulate an approach to deal with the possibility of an OCI.[580] Because RAM did not develop weapons systems and it would recruit personnel from "alumni" who had no OCI concerns, RAM concluded that there were no "foreseeable actual or potential OCI issues." The TSMO evaluated the length of the contract, potentially fifteen years, and determined that this conclusion was unreasonable and created performance risk.[581]

NGTS submitted a proposed OCI mitigation plan with possible responses. The TSMO, in its evaluation of NGTS's OCI plan, rated the plan as acceptable because the TSMO could always "ask other military services or the intelligence community to provide operators, or award a short-term contract to another firm."[582] Essentially, the TSMO disregarded NGTS's OCI risk in a manner inconsistent with its evaluation of RAM, even though the underlying facts supporting the rationale were the same.

The GAO felt that the two disparate evaluations reflected an inequitable and unreasonable evaluation. The GAO felt that a "likely" OCI outcome should be evaluated with the same risk as a "failure to plan" for a potential OCI.[583] The GAO recommended an amended RFP with clearer staffing requirements, and reevaluation of the award to NGTS.[584]

Major Andrew Kantner.

Past Performance

This year has seen a veritable flurry of bid protest decisions in the area of past performance. Many of these decisions concern agency determinations of the relevance of an offeror's past performance, while others focus upon the proper attribution of prior contract efforts. As past performance continues to be an important and common evaluation factor in the award of government contracts, the decisions below provide some helpful pointers.

What Exactly is "Same or Similar"?

One recurring past performance evaluation issue has been the solicitation language of "same or similar" past performance. The bottom line for agencies is, if you're not sure what that means, then don't put it in your solicitations.

In *Continental RPVs*,[585] the Army issued an RFP for an aerial remotely piloted vehicle target (RPVT) system and services.[586] The solicitation set forth five evaluation factors, including past performance.[587] The solicitation required, as part of the past performance evaluation factor, offerors to submit information for contracts received or performed during the past three years which are the "same or similar" to the effort required by the RFP.[588] Continental and Griffon Aerospace, Inc. were among the offerors that submitted timely proposals. The Army rated both Griffon and Continental as "low risk" under the past performance factor. After the contracting officer determined that Griffon's proposal was most advantageous to the government, Continental protested various issues, including the reasonableness of the Army's evaluation of Griffon's past performance.[589]

The GAO sustained the protest. The GAO held that, when a solicitation makes "similarity" applicable, the

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[580] *Id*. at 7.

[581] *Id*.

[582] *Id*.

[583] *Id*. at 8.

[584] *Id*. The GAO also recommended reimbursement of RAM's protest costs. *Id*.

[585] Comp. Gen. B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56.

[586] *Id*. at 2. RPVTs are essentially radio-controlled, sub-scale aerial targets, and are a means by which the Army and the other military services provide training to short range air defense units in countering airborne threats at a reasonable cost; specifically, RPVTs permit live fire engagements by forces equipped with various missile and gun weapons systems. *Id*. In addition to the design and production of an estimated 400 RPVTs annually, the solicitation also required the successful offeror to provide operational support services (e.g., flight operations, maintenance services, equipment security) and engineering services for the RPVT system. *Id*.

[587] *Id*.

[588] *Id*. at 9. Among the past performance information deemed relevant by the solicitation and which offerors were required to provide was the dollar value, or price, of prior contract efforts. *Id*. at 9-10.

[589] *Id*. at 9.

reasonableness of an agency's past performance evaluation includes a determination of the similarity or relevance of the past performance information the agency considered.[590] Here the GAO found the record contained no basis upon which the agency could reasonably have determined that the awardee's past performance was in fact the "same or similar" in either scope or size to the RPVT solicitation requirements. The Army considered three Griffon contracts in evaluating the awardee's past performance, all of which involved the design of single items and related engineering services.[591] By contrast, the solicitation required not only design and engineering services, but also the production of an estimated 2000 RPVT units and extensive operational services.[592] Additionally, Griffon's largest prior effort was less than three percent the size of the contract contemplated here.[593] Having found the agency's past performance rating of the awardee to be unreasonable, the GAO recommended the Army reevaluate Griffon's performance risk in light of the RFP's requirement for "same or similar" past performance and make a new award decision.[594]

In *Si-Nor, Inc.*,[595] the protest also concerned the similarity of an offeror's past performance to the solicitation requirements. The RFP, issued by the Navy, was for family housing refuse and recycling collection services at various locations in Oahu, Hawaii.[596] Award was to be made to the offeror whose proposal represented the "best value," based on an evaluation of price, past performance/experience and technical approach factors and subfactors.[597] The RFP provided that the agency would evaluate offerors' experience and past performance under contracts similar in size, scope, and complexity to the solicitation requirements.[598] Four offerors, including Si-Nor and International Resource Recovery, Inc. (IRRI), submitted timely proposals.[599] In its tradeoff analysis the Navy concluded that IRRI's better past performance/experience and technical approach more than offset the offeror's higher evaluated price and made award to IRRI.[600] Si-Nor then protested, among other things, the agency's determination that IRRI's past performance and experience were similar to the solicitation requirements.[601] The GAO sustained the protest on that basis.

The Comptroller General held that the past performance evaluation review standard, like that for proposal evaluations, is whether the agency's evaluation was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations.[602] The Navy considered three prior contracts in its evaluation of IRRI, one of which was

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[590] *Id*.; *see also* CMC & Maint., Inc., Comp. Gen. B-292081, May 19, 2003, 2003 CPD ¶ 107, at 3; NavCom Def. Elecs., Inc., Comp. Gen. B-276163, May 19, 1997, 97-1 CPD ¶ 189, at 3.

[591] The contracts included: (1) a $937,124 contract for the design and construction of a sub-scale rocket-powered aerospace flight vehicle for the NASA electromagnetic-levitation launch-assist accelerator track; (2) a $435,000 subcontract for the design and test engineering of a 6 x 14 foot cryotank and related subcomponents for NASA; and (3) a $174,000 subcontract for the design and production of a magnetic resonance imaging (MRI) composite table. *Continental RPVs*, 2004 CPD ¶ 56, at 10. The Army reviewed each of Griffon's prior contracts against the RPVT solicitation efforts with the apparent goal of finding relevancy. For example, with regard to Griffon's cryotank contract, the agency evaluators found no similarities between it and the RPVT requirements, yet nonetheless deemed this past performance relevant and supportive of its performance risk assessment in that Griffon "met technical, cost and schedule requirements," and "consistently found way[s] to keep complex integration jobs on schedule, resolved unanticipated problems and developed recovery plans for items that fell behind." *Id*. at 10-11. The GAO found the agency's analysis here unconvincing, inasmuch as almost any contract effort would be relevant by this standard. *Id*. at 11.

[592] The RPVT production and operational services efforts together comprised approximately seventy-five percent of the total contract price. *Id*. at 11 n.9.

[593] *Id*. at 12. The Army did not contest that Griffon had not performed contracts similar in size to the RPVT solicitation, but instead argued that it did not need to take size into account. The GAO disagreed, given the RFP's language that deemed the dollar value of prior contract efforts as relevant past performance information, and that informed offerors that the past performance evaluation would focus upon an offerors performance as it related to all RPVT requirements, including price. *Id*.

[594] *Id*. at 12-13.

[595] Comp. Gen. B-292748.2, B-292748.3, B-292748.4, Jan. 7, 2004, 2004 CPD ¶ 10.

[596] *Id*. at 1-2.

[597] *Id*. at 2.

[598] *Id*. at 2-3. Specifically, with regard to experience, the RFP stated: "Submit a list of contracts and subcontracts of residential curbside pickup, collection and disposal of recyclable materials, and collection of bulk refuse . . . under contracts similar in size, scope and complexity . . . ." *Id*. at 2. With regard to past performance, offerors were to submit surveys "reflect[ing] [the offeror's] competency to perform contracts similar in size, scope, and complexity completed during the past three years or currently in progress . . . ." *Id*. at 3.

[599] *Id*. at 4.

[600] The agency's source selection decision succinctly stated:

> Based on both the technical ratings and price proposals of Si-Nor and IRRI, it is determined that IRRI is offering the government the best value. The difference in price of less than [deleted] per year between Si-Nor's and IRRI's proposal is worth paying given IRRI's proven satisfactory performance, clear and concise technical approach, and better past performance/experience and technical approach risk.

Id. at 10.

[601] *Id*.

[602] *Id*. at 12 (citing ViaSat, Inc., Comp. Gen. B-291152, B291152.2, Nov. 26, 2002, 2002 CPD ¶ 211, at 7).

substantially smaller in size than the RFP's requirements here (i.e., $691,200 over a period of approximately six years in comparison to approximately $10 million for a base period plus four option years).[603] Because this prior IRRI contract was so substantially smaller in terms of dollar value than the solicitation requirements, the GAO found unreasonable the agency's decision to evaluate the awardee's experience and past performance under the contract, given that the solicitation specified that only contracts similar in size, scope, and complexity to the work to be performed under the solicitation would be considered.[604] Further, because this prior contract was one of only three contracts considered by the Navy in evaluating IRRI's experience and past performance, the GAO found it reasonable to assume that the prior contract formed a material part of the agency's evaluation.[605]

In *KMR, LLC*,[606] the GAO sustained a challenge to a past performance evaluation, finding that the agency had unreasonably rated two vendors' quotations as equal under this evaluation factor, where the record did not support the agency's finding that the awardee's experience was in fact relevant to the solicitation's requirements. The Air Force issued an RFQ to FSS vendors for centralized appointment and referral services for military healthcare facilities at Eglin Air Force Base and Hurlburt Field, Florida.[607] The solicitation stated that award would be made to the vendor representing the "best value" to the government, and listed past performance, mission capability, and price as the evaluation factors.[608] For purposes of evaluating vendors' past performance, the solicitation indicated that the agency would consider relevant contracts for the "same or similar" services.[609]

Both KMR and MindLeaf Technologies, Inc. submitted responses to the RFQ.[610] The Air Force rated KMR's past performance as "very good" and found the incumbent contractor's prior efforts to be "relevant" to the services sought in the statement of work.[611] The agency also rated MindLeaf's past performance as "very good" and concluded that its past contracts were "somewhat relevant" to the statement of work.[612] After finding the two vendors' quotations to be "roughly equivalent" in terms of past performance and equally rated as to mission capability, the Air Force determined that MindLeaf's lower priced quotation represented the best value to the agency.[613] KMR then protested, contending that MindLeaf's past performance was not relevant to the statement of work and therefore could not reasonably be found to be "roughly equivalent" to its own. The GAO agreed.[614]

The Comptroller General noted that the RFQ indicated that the agency considered relevant only contracts involving

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[603] *Id*. at 16.

[604] *Id*. at 17. The Navy argued that IRRI's prior contract effort here "was considered relevant only to the extent it demonstrated evidence of the awardee's experience with work like the [indefinite-quantity/tipping fees] portion of the solicited effort." *Id*. at 16. The GAO found nothing in the record to suggest that the agency engaged in any contemporaneous analysis concerning the relative value of the RFP's indefinite-quantity requirements and the value of IRRI's prior contract. *Id*. at 17. Moreover, the RFP here was not limited to the indefinite-quantity portion of the RFP. *Id*.

[605] *Id*. at 17-18.

[606] Comp. Gen. B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

[607] *Id*. at 1.

[608] *Id*. at 2. The RFQ specified that the purpose of the past performance evaluation was "to allow the Government to assess the offeror's ability to perform the effort described in this [RFQ], based on the offeror's demonstrated present and past performance on relevant contracts." *Id*.

[609] *Id*. The solicitation also informed vendors that, "[I]n evaluating past performance, the Government reserves the right to give greater consideration to information on those contracts deemed most relevant to the effort described in the [RFQ]." *Id*.

[610] *Id*.

[611] *Id*. at 3.

[612] *Id*. Among its past performance references, MindLeaf identified a contract for which it provided "systems design and development to modernize the information systems that supports the Overpayment Tracking business processes," and a contract for which MindLeaf provided "HIPAA [Health Insurance Portability and Accountability Act] Translation tool software and support services." *Id*. While finding MindLeaf's past contracts were "somewhat relevant" under the past performance factor, the Air Force noted under the mission capability factor that MindLeaf's quotation "does not indicate any past appointment or referral management experience." *Id*. at 3 n.5.

[613] *Id*. at 4. The contracting officer's source selection decision concluded:

> After reviewing the information provided on [MindLeaf's] website, it is clear that MindLeaf has experience with IT [information technology] and healthcare. In addition, the type of work they have performed in the past is extremely technical in nature and they managed them well. I find nothing complex about the work included in the [statement of work] and nothing which would preclude MindLeaf from performing the duties.

Id.

[614] As a preliminary matter the GAO noted that an agency is not required to conduct a competition before determining whether ordering supplies or services from an FSS vendor represents the best value and meets the agency's needs at the lowest overall cost. *Id*. (citing FAR section 8.404; OSI Collection Servs., Inc., Comp. Gen. B-286597, B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18, at 6). However, where an agency decides to conduct a formal competition for award of a task order contract, the GAO will review the agency's actions to ensure that the evaluation was fair and reasonable and consistent with the solicitation. *Id*. (citing COMARK Fed. Sys., Comp. Gen. B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34, at 4-5).

the "same or similar" services for purposes of evaluating past performance. The GAO found that the Air Force unreasonably determined that the awardee's referenced contracts were relevant (i.e., "same or similar") to the effort described in the RFQ where MindLeaf's past contracts all related to IT and healthcare, and the statement of work requirements entailed operating call centers and appointment desks.[615] Although the agency essentially argued that MindLeaf had successfully performed the far more complex services involving IT and/or healthcare (and should therefore be able to successfully perform the far less complex services involved here), the GAO found that by adopting such an approach the agency had abandoned the RFQ's definition of "relevant" as indicating the same or similar work.[616] In sum, the GAO sustained the protest because the Air Force unreasonably determined that both the awardee's and protester's past performance were "roughly equivalent," given that KMR had directly relevant experience as the incumbent contractor and the awardee had no relevant experience.[617]

"Relevant" Doesn't Necessarily Mean Identical

In *SWR, Inc.*,[618] the GAO held that an offeror's past performance need not be identical to be considered relevant. Here the Air Force issued an RFP for aircraft corrosion prevention cleaning services.[619] The stated evaluation criteria were price and past performance/performance risk (pp/pr).[620] Under the pp/pr factor, offerors were to submit a description of their "relevant" contracts. The solicitation defined relevant contracts as including "but not limited to" contracts for "aircraft corrosion cleaning and lubrication services . . . of similar scope, magnitude and complexity to the services required to be performed [here] . . . ."[621] Eight offerors, including SWR and U.S. Logistics, Inc. (USL), submitted timely proposals. In evaluating USL under the pp/pr factor, the Air Force considered both prior USL contracts to be relevant.[622] After the agency determined that USL's proposal was most advantageous to the government, SWR protested various issues, including that the Air Force had misevaluated the relevance of USL's past performance.[623]

The GAO held the evaluation of proposals is a matter within the contracting agency's discretion, therefore the Comptroller General's review was limited to ensuring that the evaluation was reasonable and in accordance with the stated evaluation criteria and applicable procurement laws and regulations.[624] Here, SWR asserted that USL's pp/pr rating was improperly inflated because the awardee had not performed any contracts for aircraft corrosion prevention services, and that USL's past performance consisted solely of experience maintaining and washing tactical vehicles and aerospace ground equipment for the Army.[625] The GAO found the Air Force's evaluation unobjectionable. As the RFP had defined relevant contracts as "including, but not limited to" contracts requiring aircraft corrosion cleaning and lubrication services, the agency properly could determine that different types of contracts were relevant for purposes of the pp/pr evaluation.[626] Having found the agency's determination of relevance to be consistent with the RFP language and reasonable, the GAO denied the protest.[627]

How to Attribute Past Performance

Another contentious issue within the area of past performance has been how to properly attribute a prior contractor's

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[615] *Id*. at 5.

[616] *Id*. at 6.

[617] *Id*.

[618] Comp. Gen. B-292896.3, June 7, 2004, 2004 CPD ¶ 148.

[619] *Id*. at 1.

[620] *Id*. at 2. Award was to be made to the offeror whose conforming proposal was determined to be the "best value" to the government, considering pp/pr and price, with pp/pr significantly more important than price. *Id*.

[621] *Id*. Proposals were to be rated for both performance and relevance, which would result in an overall rating of exceptional, very good, satisfactory, none, marginal, or unsatisfactory. *Id*.

[622] *Id*. The agency also considered seven of the eight prior contracts for USL's subcontractor to be relevant in evaluating USL under the pp/pr factor. *Id*.

[623] *Id*. In making its tradeoff decision between USL and SWR, the Air Force determined that USL's higher pp/pr rating ("very good" versus "satisfactory") more than offset SWR's price advantage ($7,609,906 versus $7,983,805). *Id*.

[624] *Id*. at 3 (citing Eastern Colorado Builders, Inc., Comp. Gen. B-291332, Dec. 19, 2002, 2003 CPD ¶ 17, at 2).

[625] *Id*.

[626] *Id*. at 3-4. Moreover, the Air Force explained that it found USL's work on tactical vehicles relevant because the work involved "much of the magnitude and complexity that this solicitation requires with respect to corrosion control measures (to include corrosion identification, wash services, prevention, and abatement, fleet servicing, maintenance, modification, repair and vehicle upgrade)." *Id*. at 4.

[627] *Id*.

efforts to an offeror. While no offeror wants to claim ownership of bad past performance, it seems that good past performance is a commodity that offerors seek through joint ventures, subcontracting arrangements, etc. The trick for agencies is how (or to whom) to properly credit such past performance information.

In *Base Technologies, Inc.*,[628] the GAO determined that an agency may consider the references of one joint venture partner in evaluating a joint venture offeror's past performance where they are reasonably predictive of performance of the joint venture entity. The protest concerned an RFP issued by the Bureau of Public Debt, Department of Treasury, for financial crimes investigative services.[629] The solicitation provided that the agency would award to the offeror whose proposal was the "best overall value" to the government, considering past performance, technical merit, and price factors.[630] The agency received six proposals in response to the RFP, including those of incumbent Base Technologies, Inc. (BTI) and Lifecare-Advanta Joint Venture (LAJV).[631] In evaluating LAJV's past performance, the agency noted that LAJV had no past performance as a newly formed joint venture, so the agency evaluated one of the partners' relevant contracts.[632] Based on LAJV's higher past performance and technical merit score and lower evaluated price, the agency selected LAJV for award.[633] BTI protested, among other things, that LAJV should have received a lower past performance score because it was a new joint venture without any prior history of past performance.[634] The GAO disagreed.

The Comptroller General held that an agency may consider the performance history of one or more of the individual joint venture partners in evaluating the past performance of the entire joint venture, so long as doing so is not expressly prohibited by the RFP.[635] The solicitation here did not preclude considering a joint venture partner's past performance in lieu of performance by the joint venture entity, but instead contemplated that the agency would evaluate relevant contracts and subcontracts that were similar in nature to the RFP's requirements.[636] In its proposal, LAJV identified several prior contracts from one of its partners (LifeCare) who was proposed to provide investigation experts and analysts; LAJV's proposal also explained that LifeCare's "core competencies include legal counsel, forensic accounting, auditing, assessments and reviews, investigations, data analysis, data mining, case management, and centralized operations center management."[637] Given that the description of LifeCare's efforts encompassed most of the services required under the RFP, the GAO found that the agency could properly consider LifeCare's performance history to be reasonably predictive of the performance of the joint venture as a whole.[638]

In *Roca Management Education & Training, Inc.*,[639] the issue involved whether the agency properly considered a subcontractor's experience in evaluating an offeror's past performance. Here the Army issued an RFP for on-site truck driver instructor services for motor transport operator and petroleum vehicle operator courses at Fort Leonard Wood, Missouri.[640] The solicitation established four evaluation factors, including past performance.[641] Three offerors, including Roca and Orion Technology, Inc., submitted proposals.[642] Orion's proposal included a subcontractor, Eagle Support Service Corporation.[643]

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[628] Comp. Gen. B-293061.2; B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31.

[629] *Id.* at 2. The Department of Treasury Financial Crimes Investigative Network (FinCEN) provides intelligence and analytical support to the international, federal, state, and local law enforcement and regulatory communities. *Id*. The RFP here sought a contractor to provide on-site support for the FinCEN in the program areas of case management, the USA Patriot Act, the commercial database program, the gateway program, and the pro-active targeting program. *Id*.

[630] *Id*. at 3. The RFP specified that past performance would be evaluated for performance on "similar products or services . . . focus[ing] on information that demonstrates quality of performance relative to the size and complexity of the procurement under consideration." *Id*. at 4. The solicitation further stated that "[a]n offeror with no past performance information will receive a neutral rating (i.e., the rating will not add to or detract from its rating)." *Id*.

[631] *Id*. at 4. LAJV was a joint venture formed specifically to respond to the RFP here; the joint venture partners were LifeCare Management Partners and Advanta Medical Solutions, LLC. *Id*. at 2 n.1.

[632] *Id*. at 7.

[633] *Id*.

[634] *Id*. at 10.

[635] *Id*. (citing Northrop Grumman Tech. Servs., Inc.; Raytheon Tech. Servs. Co., Comp. Gen. B-291506 et al., Jan 14, 2003, 2003 CPD ¶ 25, at 30). Where an RFP requires the evaluation of offerors' past performance, the agency has the discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the RFP's requirements. *Id*. (citing Honolulu Shipyard, Inc., Comp. Gen. B-291760, Feb. 11, 2003, 2003 CPD ¶ 47, at 4).

[636] *Id*.

[637] *Id*. at 11.

[638] *Id*.

[639] Comp. Gen. B-293067, Jan. 15, 2004, 2004 CPD ¶ 28.

[640] *Id*. at 1.

[641] *Id*. at 2. The other evaluation criteria were technical capability, quality control, and price. The RFP stated that award would be made to the offeror whose proposal was deemed "most advantageous to the Government," all factors considered. *Id*.

[642] *Id*.

After the Army determined that Orion's higher priced, higher technically rated proposal offered the best value to the government, Roca protested. The protester argued, among other things, that the Army had misevaluated Orion's past performance by improperly attributing the experience of Orion's subcontractor to Orion.[644] In support, Roca contended that the solicitation language explicitly limited the experience proffered to that of the actual offeror itself.[645] The GAO disagreed.

The GAO held that an agency may consider an offeror's subcontractor's capabilities and experience under relevant evaluation factors where the solicitation allows for subcontractors use and does not prohibit considering a subcontractor's experience in the evaluation of proposals.[646] The GAO also found, contrary to Rosa's assertions, that the RFP did not preclude considering a subcontractor's experience in the evaluation of offerors' proposals.[647] Because Orion's proposal documented Eagle's very relevant, successful past performance and experience, and because Orion's proposal indicated that it would heavily rely upon Eagle's expertise, the GAO found that the Army could reasonably consider that the subcontractor's past performance would be reasonably predictive of Orion's performance under the contract.[648]

Lieutenant Colonel Louis Chiarella.

Simplified Acquisitions

The past year has certainly been busy in the area of simplified acquisitions. While the principles articulated were not always novel ones, the many decisions certainly provide practitioners with much more guidance when making use of simplified acquisition procedures.

Understanding What You're Buying

In *e-LYNXX Corporation*,[649] the GAO decided that agencies must still make rational price/technical tradeoff decisions when utilizing simplified acquisition procedures. The protest concerned an RFQ issued by the Government Printing Office (GPO) for a contractor-hosted, web-based printing procurement system.[650] The GPO provided the RFQ to three vendors and sought quotations for the printing system's one-year demonstration pilot program. The solicitation established that award would be made on a "best value" basis and would involve a price/technical tradeoff.[651] The technical evaluation of each vendor's system was based solely upon an oral presentation that was not formally recorded.[652] The GPO selected Noosh, Inc., based on its technical superiority and primarily because it offered to satisfy an "open posting" requirement that e-LYNXX allegedly did not.[653] e-LYNXX, which had submitted a lower price ($37,500 versus $98,500),

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[643] *Id*.

[644] *Id*. at 4. In this regard, Orion included no past performance references for itself in its proposal, and instead relied upon Eagle's references. *Id*.

[645] Roca noted that the proposal preparation instructions requested the offerors to "[p]rovide a list of all contracts and subcontracts completed and/or work experience that *you* have performed during the past three years." *Id*. at 4-5 (emphasis added). The protest provides no insight as to why Roca believed that the pronoun here was limited to only the second person singular, and not also the second person plural, declination.

[646] *Id*. at 5 (citing The Paintworks, Inc., Comp. Gen. B-292982, B-292982.2, Dec. 23, 2003, 2003 CPD ¶ 234 at 3; Cleveland Telecommunications Corp., Comp. Gen. B-257294, Sept. 19, 1994, 94-2 CPD ¶ 105, at 5; FAR section 15.305(a)(2)(iii)).

[647] *Id*.

[648] *Id*. *See* The Paintworks, Inc., Comp. Gen. B-292982, B-292982.2, Dec. 23, 2003, 2003 CPD ¶ 234, at 3; MCS of Tampa, Inc., Comp. Gen. B-288271.5, Feb. 8, 2002, 2002 CPD ¶ 52, at 6.

[649] Comp. Gen. B-292761, Dec. 3, 2003, 2003 CPD ¶ 219.

[650] In an effort to reduce government printing costs and to ensure permanent access to non-classified government publications, the GPO and the Office of Management and Budget (OMB) entered into a "compact" under which both agencies agreed to develop a mechanism that would allow federal agencies to place printing orders directly with print vendors through an on-line system operated by the GPO. *Id*. at 1. Accordingly, the agencies agreed that GPO would develop a "demonstration print procurement contract," utilizing the Internet for ordering and invoicing, for a federal department or agency selected by OMB. *Id*. at 2. The compact contemplated that the demonstration project would begin in FY 2004, and the competitive procurement process would be deployed throughout the government in FY 2005. *Id*.

[651] *Id*. at 3.

[652] Each vendor provided a two-hour oral presentation to the agency's evaluators and others (including the contracting officer), after which each vendor answered questions from the agency. The agency's four evaluators recorded their impressions from the oral presentations in contemporaneous handwritten notes, which the evaluators subsequently used to reach a consensus evaluation judgment. No other recordings of the oral presentations were made. *Id*.

[653] "Open posting" referred to the solicitation requirement for an on-line vendor registration and posting of RFQs to a website available to all registered vendors. *Id*. at 4. e-LYNXX contended that it had informed the GPO at the oral presentation that its software was modifiable to meet the open posting requirement. *Id*. at 7-8. Given the lack of a formal recording, the GAO found the record here was "replete with conflicting evidence, statements and testimony concerning what e-LYNXX presented orally to the GPO evaluators regarding the open posting requirement." *Id*. at 8.

then protested the agency's price/technical tradeoff determination.[654]

The GAO sustained the protest. The Comptroller General held that even when using simplified acquisition procedures, in a best value procurement the source selection authority must perform a rational tradeoff between price and non-price factors and determine whether one proposal's superiority under the non-price factor is worth a higher price.[655] Here, by contrast, the contracting officer who made the award selection could not articulate a cogent explanation for his tradeoff determination and admitted that although he selected Noosh primarily because of the open posting requirement, he did not know what open posting was and did not consult with persons that did understand the requirement.[656] The GAO found that the contracting officer failed to give any meaningful consideration to e-LYNXX's substantially lower price, given his inability to explain why Noosh's superiority was worth the higher price, and sustained e-LYNXX's protest on this basis.[657] In addition to recommending that the GPO perform a new source selection decision, the GAO also recommended that the agency either conduct new oral presentations (which it should record) or obtain written submissions from the vendors.[658]

The Saga that is Information Ventures

Ever heard of Information Ventures, Inc.? You should have! This year's MVP (i.e., "most visible protester") award goes to this information management services company, which filed a total of ninety-nine protests with the GAO during FY 2004![659] Not only was Information Ventures a prolific protester, but it was also highly successful, having had four protests sustained and another forty-seven protests result in agency corrective action.[660] Moreover, as many of these protests concerned simplified acquisitions, the company's litigation efforts have resulted in additional published guidance for all practitioners.

In *Information Ventures, Inc.*,[661] the GAO held that when using simplified acquisition procedures an agency must still provide potential vendors with adequate information regarding the agency's requirements so as to comply with applicable competition standards. The protest concerned a notice published by the U.S. Department of Health and Human Services (HHS) expressing its intent to award a sole-source contract for educating health and social service providers on the agency's "Get Connected Toolkit."[662] The notice stated that the procurement's specific objective was to plan and convene a conference regarding application of the Get Connected Toolkit, but provided few other details.[663] Information Ventures challenged the propriety of the notice, arguing, among other things, that the notice failed to adequately describe the contract tasks. The GAO agreed.

The GAO stated that simplified acquisition procedures, which are designed to promote efficiency and economy in

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[654] *Id*. at 4-5.

[655] *Id*. at 7. Although the price/technical tradeoff process allows an agency to accept other than the lowest-priced submission, the perceived benefit of the higher-priced alternative must merit the additional price. *Id*. at 7 (citing Beautify Prof'l Servs. Corp., Comp. Gen. B-291954.3, Oct. 6, 2003, 2003 CPD ¶ 178, at 5).

[656] In a moment of unusual candor at the GAO hearing, the contracting officer admitted that the open posting requirement "meant absolutely nothing" to him. *Id*.

[657] *Id*. The GAO summarized its holding here by succinctly stating, "We fail to see how the contracting officer can assign value for something he admittedly does not understand and for which he did not seek any advice." *Id*.

[658] *Id*. at 9-10.

[659] Bid Protest Statistics for Fiscal Year 2004 Regarding Information Ventures, Inc., compiled by Jerold D. Cohen, Assistant General Counsel, Procurement Law Division, Office of General Counsel, U.S. Government Accountability Office, Nov. 3, 2004 (notes on file with author).

[660] Specifically, the GAO sustained all four of the Information Ventures, Inc. merit protest decisions (sustains and denials combined), giving Information Ventures, Inc. a 100% sustain rate. *Id*. Additionally, of the sixty-seven protests filed by Information Ventures, Inc., that the GAO dismissed, forty-seven dismissals resulted from agency corrective action. *Id*.

[661] Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76.

[662] The HHS "Get Connected Toolkit" is a resource tool, which includes fact sheets, videos, consumer brochures, training guides and curricula and a services resource guide. The kit is intended to help service providers for older adults identify, educate, and screen the elderly for potential emotional and substance abuse problems by promoting new links between the aging community, service providers, and the substance abuse and mental health communities. *Id*. at 2.

[663] The notice stated, in relevant part:

> The specific objective of this procurement is to plan and convene a conference . . . and to teach [health and social services provides] how to apply the "Get Connected Toolkit" in real life settings . . . . The contractor has the relationships with its constituency to provide a conference for over 4,000 participants and the required training . . . . No solicitation is available.

Id. at 1-2.

contracting, are excepted from the normal full and open competition requirements, and agencies need only obtain competition to the maximum extent practicable.[664] The GAO held that in order to comply with the maximum-extent-practicable standard, however, an agency's synopsis notice must provide an "accurate description" of the property or services to be purchased and must be sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation.[665] Here the GAO found that the notice did not accurately describe the agency's requirements: while the synopsis expressed a need for a contractor to plan and convene a conference described as involving over 4000 participants, the record reflected that the HHS only wanted a contractor to provide a geriatrics specialist and a conference coordinator to prepare a one-day training course for up to sixty individuals.[666] Due to the short-term need for the training, the GAO elected not to disturb the contract award, but recommended that HHS's future requirements for these services be properly synopsized, such that potential contractors like Information Ventures are afforded a realistic opportunity to compete.[667]

In a different *Information Ventures, Inc.*,[668] the GAO decided that when using simplified acquisition procedures agencies must also provide potential sources with a reasonable opportunity to respond to the notice or solicitation, particularly where the record failed to show a need for the short response period and the agency knew of the requirement well before issuing the notice. Here the HHS published a pre-solicitation notice for research services associated with developing a list of drugs requiring additional study.[669] When Information Ventures challenged the synopsis and asked for a chance to demonstrate its ability to provide the services, the HHS then issued a "revised notice," advising that the agency now anticipated making a sole-source award and giving the company one and a half business days (from 31 December 2003 until noon on 5 January 2004) to respond.[670] Information Ventures attempted without success to contact the contracting officer during the response period. The company then protested, arguing that the RFQ did not provide adequate time or information to prepare a response.[671]

The GAO sustained the protest. The GAO held that in addition to the synopsizing requirement for procurements in excess of $25,000,[672] the maximum-extent practicable competition standard applicable to simplified acquisitions requires agencies to provide potential offerors a reasonable opportunity to respond.[673] Here the GAO found that the one and a half business days the HHS allowed Information Ventures to submit a response was not sufficient time so as to provide the company a meaningful opportunity to compete.[674] Because of the HHS decision to override the automatic stay associated

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[664] *Id*. at 2-3 (citing 41 U.S.C. § 427(c) (2000); FAR section 13.104; *see* Info. Ventures, Inc., Comp. Gen. B-290785, Aug. 26, 2002, 2002 CPD ¶ 152, at 2-3).

[665] *Id*. at 3 (citing 15 U.S.C. § 637(f); FAR section 5.207(c); *see also* Pac. Sky Supply, Inc., Comp. Gen. B-225420, Feb. 24, 1987, 87-1 CPD ¶ 206, at 4-5 (sustaining the protest where a sole-source synopsis identified only 2 of 15 items included in the solicitation, thereby failing to provide an "accurate description" of the procurement, as required by the Small Business Act)). In addition, a synopsis must provide prospective alternative sources a meaningful opportunity to demonstrate their ability to provide what the agency seeks to purchase. *Id*. (citing Sabreliner Corp., Comp. Gen. B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170, at 6-7 (protest challenging sole-source award sustained where both the justification and approval for the award and the published synopsis inaccurately described the requirements to overhaul helicopter engines).

[666] *Id*. at 3-4.

[667] *Id*. at 5. The GAO also recommended the HHS reimburse Information Ventures costs associated with pursuing the protest. *Id*.

[668] Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81.

[669] The list of drugs was to be provided to Congress, as required by the Best Pharmaceuticals for Children Act. *See* 42 U.S.C.S. § 284m(a) (LEXIS 2004). *Info. Ventures*, 2004 CPD ¶ 81, at 1. For each drug on a list to be provided, the contractor would perform an assessment of the relevant literature using a standardized search methodology, document the search methodology, and identify all information about the effect of the drug on neonates and children under the age of eighteen. *Id*. at 1-2.

[670] The "revised notice" was, in fact, an RFQ sent directly to Information Ventures by e-mail. There was no evidence in the record that this RFQ was sent to any other potential offeror; nor was there any evidence that a second notice—revised or otherwise—was published on the Federal Business Opportunities ("FedBizOpps") website. *Id*. at 2.

[671] During the course of the protest, the HHS decided to override the CICA stay requirement and awarded a sole source contract. *Id*. at 5 (referencing 31 U.S.C. § 3553(d)(3) (2000)).

[672] *Id*. at 3 (citing 15 U.S.C. § 637(e), 41 U.S.C. § 416). While exceptions to this synopsis requirement exist (*see* FAR, *supra* note 20, at 13.105, 5.101(a)(1) and 5.202), the GAO found none applied here (nor had the agency asserted that any applied). *Info. Ventures*, 2004 CPD ¶ 81, at 3. A synopsis must provide an "accurate description" of the property or services to be purchased and must be sufficient to allow a prospective contractor to make an informed business judgment as to whether to request a copy of the solicitation. *Id*. (citing 15 U.S.C. § 637(f); FAR section 5.207(c); *see* Pacific Sky Supply, Inc., Comp. Gen. B-225420, Feb 24, 1987, 87-1 CPD ¶ 206, at 4-5).

[673] *Id*. at 4 (citing 41 U.S.C. § 426(c); FAR section 5.203(b), 13.003(h)(2); Sabreliner Corp., Comp. Gen. B-288030, B-288030.2, Sept. 13, 2001, 2001 CPD ¶ 170, at 6-7). "What constitutes a reasonable opportunity to respond will depend on 'the circumstances of the particular acquisition, such as complexity, commerciality, availability, and urgency.'" *Id*. (citing FAR section 5.203(b)). "In short, the fundamental purpose of these notices, including the circumstance where an agency contemplates a sole-source award, is to enhance the possibility of competition." *Id*. (citing Pacific Sky Supply, Inc., Comp. Gen. B-225420, Feb 24, 1987, 87-1 CPD ¶ 206, at 4-5).

[674] While the HHS argued that the brief response time was necessary in order to meet a statutorily mandated date, the GAO found that no such mandate existed. The GAO also noted that the requirement was a recurring one and that the HHS had prepared a statement of work for this associated research effort three months earlier. *Id*.

with this preaward protest and because the work was completed, the GAO recommended only the award of protest costs.[675]

Lieutenant Colonel Louis Chiarella.

Special Emergency Thresholds

On 23 February 2004, the FAR Councils issued an interim rule[676] to implement the special emergency procurement authorities in the Services Acquisition Reform Act of 2003.[677] The interim rule increases the micro-purchase and simplified acquisition thresholds for supplies or services that the agency head determines are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack.[678] In such acquisitions, the interim rule increases the micro-purchase threshold to $15,000; the simplified acquisition threshold increases to $250,000 for any contract awarded and performed or the purchase made, inside the United States; or $500,000 for any contract awarded and performed, or purchase made, outside the United States.[679] The rule also authorizes the use of simplified acquisition procedures to acquire commercial items to the maximum extent practicable, up to five million dollars per FAR subpart 13.5.[680]

The interim rule expands the definition of a commercial item. The contracting officer may treat any acquisition as a commercial item if the agency head determines the supplier or services are to be used to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack[681] The simplified acquisition threshold increases to $10 million for such acquisitions.[682] The $5 million and $10 million thresholds do not apply to blanket purchase agreements established with Federal Supply Schedule contractors.[683]

In response to the interim rule, the Army and the Air Force delegated each agency head's special emergency procurement authority. The Army delegated the authority to the Army Contracting Agency (ACA) Principal Assistants Responsible for Contracting (PARCs).[684] The ACA PARCS may further delegate this authority to a level no lower than one level above the contracting officer.[685] The Air Force delegated the authority to the Head of the Contracting Activities, who may further delegate the authority no lower than the Buying Office Contracting Official, or the chief of the contracting office.[686]

Major Bobbi Davis.

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[675] *Id*. at 5. Because, however, this was the second case where HSS overrode a preaward protest on the basis that an override was in the "best interests" of the government—an override basis not provided under the CICA for preaward (versus post-award) protests—and because both improper overrides deprived the protester of any meaningful relief, the GAO sent a letter from the General Counsel to the Secretary of HHS pointing out the use of inappropriate bases for overriding automatic stays. *Id*. Although an agency has authority under the CICA to authorize performance of a contract during a protest filed after award with either a "best interest" or an "urgent and compelling" finding, it does not have that option during a protest filed before award. *Id*. at 5 n.1 (comparing 31 U.S.C. § 3553(c)(2) (protests filed before award), with 31 U.S.C. § 3553(d)(3)(C) (protests filed after award)). The same agency had similarly proceeded with a contract award in the face of a protest on the basis of a pre-award best interest determination in *Information Ventures, Inc.*, Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76. For further discussion of the HHS CICA override, see *infra* section titled Bid Protests.

[676] Federal Acquisition Regulation; Special Emergency Procurement Authority, 69 Fed. Reg. 8312 (Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 2, 10, 12, 13, 15, 19 and 25). The temporary emergency procurement authority for supplies or services to facilitate the defense against terrorism or nuclear, biological or chemical attack against the United States expired 30 October 2003. *See* National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 836, 115 Stat. 1012 (2001).

[677] National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, 117 Stat. 2797 § 1401. (2003)

[678] 69 Fed. Reg. at 8313.

[679] *Id*.

[680] *Id*. The $5 million and $10 million thresholds include options. *Id*.

[681] *Id*.

[682] *Id*.

[683] *Id*. at 8314.

[684] Memorandum, Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology), to Army Contracting Agency Principal Assistants Responsible for Contracting, subject: Delegation of Special Emergency Procurement Authority in Support of a Contingency Operation or to Facilitate Defense Against or Recovery from Nuclear, Biological, Chemical, or Radiological Attack (23 Apr. 2004).

[685] *Id*.

[686] Memorandum, Department of the Air Force, Office of the Assistant Secretary, to ALMACOM/FOA/DRU (CONTRACTING), subject: Delegation of Authority for Acquisition of Supplies or Services for Defense Against or Recovery from Nuclear, Biological, Chemical or Radiological Attack (5 Mar. 2004).

Contractor Qualifications: Responsibility

Though You May Get a Foot in the Door, the Door Can Still Be Slammed Shut

The past three *Year in Review* editions[687] have tracked the developments following the Court of Appeals for the Federal Circuit (CAFC's) decision in *Impresa Construzioni Geom. Domenico Garufi v. United States*, which opened the door to greater judicial review of agency affirmative responsibility determinations.[688] In one post-*Impresa* development, the GAO opened its bid protest doors just a bit by amending its Bid Protest Regulations to permit limited reviews of such determinations.[689] While several protestors sought to use the changed rule to get a foot in the door at GAO this past year, the GAO denied all such challenges and demonstrated that, though the review standard may have changed for the GAO to consider affirmative responsibility determinations, the door can still be slammed shut. The GAO's treatment of the issue in *Universal Marine & Industrial Services*, *Inc*.[690] typified the GAO's review of these protests.[691]

The protest in *Universal Marine* involved an IFB issued on 8 July 2003 by the U.S. Coast Guard for the production of steel ocean buoys. Universal Marine & Industrial Services, Inc. (Universal), the incumbent contractor, challenged the Coast Guard's award of the resulting requirements contract to Wallace Fabrication (Wallace) alleging the agency improperly determined Wallace responsible for purposes of performing the contract.[692] Buoyed by a Dunn & Bradstreet report, Universal argued it was "impossible to fathom" how the recently formed Wallace could meet the FAR's general responsibility standards[693] given that Wallace had no manufacturing facilities (but rather operated out of the owner's home), no published telephone, only one employee, and no sales prior to the solicitation date.[694]

Though noting affirmative responsibility determinations fall largely within a contracting officer's discretion and, thus, outside the GAO's consideration, the GAO cited the "specified exception" in its Bid Protest Regulations for "protests that identify evidence raising concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation."[695] The GAO agreed that Universal's protest satisfied the "threshold requirement" by "rais[ing] serious concern that the contracting officer may have failed to consider relevant responsibility information," but the GAO concluded the developed record proved either Universal's allegations wrong or that the contracting officer considered the information.[696]

The record, which included documentation of a pre-award survey at the Wallace facility on 16 September 2003, revealed that Wallace was not operating out of the owner's home but rather a leased 6,000 square foot fabrication shop.[697] The pre-award survey also established that Wallace had plans to lease or purchase a separate 73,000 square foot building, though the existing facility was sufficient to manufacture the buoys required under the contract.[698] During the visit, the contracting officer also noted Wallace had three phone lines and a fax number.[699] Additionally, the record reflected that

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[687] *See 2003 Year in Review*, *supra* note 29, at 44-47; *2002 Year in Review*, *supra* note 300, at 51-52; *2001 Year in Review*, *supra* note 335, at 55-56.

[688] 238 F.3d 1324 (Fed. Cir. 2001). In *Impresa*, the CAFC stated the standard of review in cases challenging contracting officer affirmative determinations of responsibility (i.e., an offeror is capable of performing the anticipated contract) should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis." *Id*. at 1333. Prior to the CAFC's ruling in *Impresa*, the COFC had generally followed the GAO "bad faith" standard regarding affirmative determinations of responsibility. *See* Steven W. Feldman, *The Impresa Decision: Providing the Correct Standard for Affirmative Responsibility Determinations*, 36 PROCUREMENT LAW. 2 (2001).

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

[690] Comp. Gen. B-292964, Dec. 23, 2003, 2004 CPD ¶ 7.

[691] The GAO also denied or dismissed challenges to agency affirmative responsibility determinations in the following cases: Int'l Roofing & Building Constr., Comp. Gen. B-292833, Nov. 17, 2003, 2003 CPD ¶ 212; Specific Sys., Ltd., Comp. Gen. B-292087.3, Feb. 20, 2004, 2004 CPD ¶ 119; The Refinishing Touch, Comp. Gen. B-293562 et al., Apr. 15, 2004, CPD ¶ 92; Consortium HSG Technischer Serv. GmBH and GeGe Gebaude-und Betriebstechnik GmBH Sudwest Co., Management KG, Comp. Gen. B-292699.6, June 24, 2004, CPD ¶ 134; Gov't Contracts Consultants, B-294335, 2004 U.S. Comp. Gen. LEXIS 190 (Sept. 22, 2004).

[692] *Universal Marine*, 2004 CPD ¶ 7, at 1-2.

[693] *Id*. at 2 (citing FAR section 9.104-1).

[694] *Id*.

[695] *Id*. (quoting 4 C.F.R. § 21.5(c) (2003)).

[696] *Id*. at 2-3.

[697] *Id*. at 1, 3.

[698] *Id*. at 3.

[699] *Id*.

Wallace submitted to the agency the resumes for four key and experienced employees, who actually participated in the pre-award survey meetings.[700] Further, Wallace had a list of potential production employees it could hire, which the agency believed reasonable given the large number of shipyards in the Mobile, Alabama, vicinity.[701]

Finally, the record showed that the contracting officer specifically considered that Wallace was a new business with no prior sales. Though newly formed, one of Wallace's officers had been an owner of American Industrial Marine.[702] Moreover, though Wallace had no prior buoy sales, the contracting officer's past performance review found that Wallace was currently satisfactorily managing the overhaul of a Coast Guard cutter, and that a Wallace vice-president had successfully managed the overhaul of a separate Coast Guard cutter.[703]

As the record established that the contracting officer had before her the information Universal claimed she failed to consider and that she in fact considered the information, the GAO denied the protest.[704]

Now Here's A Wild One

Wild Building Contractors, Inc.[705] further illustrates the limits of the GAO's review of affirmative responsibility determinations. In *Wild* the U.S. Army Corps of Engineers (COE) issued an IFB for the addition of a flight simulator facility at Ft. Rucker, Alabama, reserving award for registered HUBZone program firms. Following bid opening, the COE conducted a pre-award survey and found Compton Construction Co., Inc. (Compton Construction), the low bidder, responsible.[706]

Wild Building Contractors, Inc. (Wild Building) challenged the agency's responsibility determination arguing Compton lacked the necessary integrity given that its bid failed to disclose an "improper teaming arrangement" with a non-HUBZone firm, Howard W. Pence, Inc. (Pence, Inc.).[707] To support its protest, Wild Building presented the following evidence: (1) Norman Compton, the president of Compton Construction, had worked for Pence, Inc. for twenty-two years and was still employed there; (2) the two companies shared the same fax number; (3) Compton Construction used a Pence, Inc. e-mail address; (4) Compton Construction's phone number was Norman Compton's home phone number; (5) a Dun and Bradstreet report identified "virtually no business activity" for Compton Construction since being formed in 1992; (6) though Norman Compton was to serve as project superintendent, Mike Pence, who was present at the contract signing, was to serve as the project manager.[708]

As in *Universal Marine*, though the protest satisfied the initial "threshold requirement" by "rais[ing] serious concerns that the [contracting officer] may have failed to consider relevant responsibility information," the GAO concluded the agency record demonstrated the contracting officer was aware of and considered the information.[709] Specifically, the record showed neither Compton Construction tried to hide its connection with Pence, Inc., nor was the COE unaware of the affiliation between the two firms. For example, Mike Pence, an officer with Pence, Inc. for twenty-five years was also a co-founder of Compton Construction and listed as the point-of-contact for Compton Construction. Additionally, the pre-award survey showed that Compton Construction principals had worked on other COE projects, while employed by Pence, Inc.; work experience and involvement that the pre-award survey cited favorably. Finally, the COE verified Compton Construction's listing on the SBA website as an eligible HUBZone program participant.[710]

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[700] *Id*.

[701] *Id*.

[702] *Id*. at 4.

[703] *Id*.

[704] *Id*.

[705] Comp. Gen. B-293829, June 17, 2004, 2004 CPD ¶ 131.

[706] *Id*. at 1-2.

[707] *Id*. at 2. Wild Building originally challenged Compton Construction's eligibility as a HUBZone small business to the SBA, but the SBA dismissed the challenge as untimely. *Id*. Though the GAO does not consider HUBZone eligibility challenges, Wild Building argued "that the same facts that supported its SBA challenge to Compton's HUBZone eligibility suggest a lack of integrity on Compton's part . . . ." *Id*. at 3.

[708] *Id*. at 2-3.

[709] *Id*. at 3.

[710] *Id*. at 3-4. To the extent Wild Building alleged Compton Construction did not qualify as a HUBZone firm, the GAO noted such determinations belong to the SBA. *Id*. at 4. The GAO further noted that during the protest, the COE requested from the SBA a "program examination" of Compton Construction's status as a HUBZone participant. The SBA's examination found "no basis to question Compton's eligibility as a HUBZone concern." *Id*. at 4 n.2.

Wild Building pressed its case further by arguing the COE "did not conduct an adequate review to determine that Compton [Construction] had sufficient funding, facilities, or experience to be considered a responsible contractor."[711] As an example, Wild Building questioned the adequacy of Compton Construction's monthly cash balance for a project of the magnitude contemplated by solicitation.[712] But the GAO refused to answer the allegation as it "would require [the GAO] to review the reasonableness of the [contracting officer's] judgments about a matter that was clearly before the [contracting officer], as opposed to matters where there are serious concerns that the [contracting officer] failed to consider information he should have considered."[713] Emphasizing the limit of the recently granted exception to the general rule against reviewing affirmative responsibility determinations, the GAO reminded all that it will not review the reasonableness of contracting officer determinations of affirmative responsibility, as it does in challenges to negative responsibility determinations.[714] Referencing the Preamble to last year's changes in its Bid Protest Regulations, the GAO stated doing so would give "too little weight to the [contracting officer's] discretion in the area of affirmative responsibility determinations and also places a substantial unwarranted additional burden on contracting agencies."[715]

Major Kevin Huyser.

Commercial Items

FAR Updates

As in years past, there were several changes to the FAR this year impacting commercial item acquisitions. On 27 October 2003, the FAR Councils issued a proposed rule to amend FAR section 44.403 to require use of the clause at FAR section 52.244-6, Subcontracts for Commercial Items and Commercial Components, in solicitations and contracts other than those for commercial items.[716] The revised rule requires the clause's inclusion in all solicitations and contracts for supplies or services, other than those for commercial items.[717] The change also clarifies that a commercial item includes commercial construction materials but excludes the construction itself.[718]

On 15 January 2004, the FAR Councils issued a proposed rule to list the laws inapplicable to contracts for commercially available off-the-shelf items.[719] The list includes section 15 of the Small Business Act[720] and bid protest procedures.[721]

Effective 18 June 2004, the FAR Councils issued an interim rule authorizing government-wide authority for commercial item treatment of performance-based contracts or task orders.[722] The rule requires agencies to identify commercial item treatment of performance-based contracts.[723] The interim rule also revises the definition of commercial services to include performance-based terms,[724] incorporates the conditions for using FAR part 12 for any performance-based

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[711] *Id*. at 5.

[712] *Id*.

[713] *Id*.

[714] *Id*. For a recent negative responsibility determination bid protest, see *Kilgore Flares Co*. where the GAO found the contracting officer had a reasonable basis for determining the protestor nonresponsible given concerns about the protestor's ability to meet the solicitation's delivery schedule. Comp. Gen. B-292944 et al., Dec. 24, 2003, 2004 CPD ¶ 8.

[715] *Wild*, 2004 CPD ¶ 131, at 5.

[716] Federal Acquisition Regulation; Subcontracts for Commercial Items and Commercial Components, 68 Fed. Reg. 6,1302 (proposed Oct. 27 2003) (to be codified at 48 C.F.R. pts. 44 and 52).

[717] *Id*.

[718] *Id*.

[719] Federal Acquisition Regulation; Commercially Available Off-the Shelf (COTS) Items, 69 Fed. Reg. 2447 (proposed Jan. 15, 2004) (to be codified at 48 C.F.R. pts. 2, 3, 12). The proposed rule implements section 4203 of the Clinger-Cohen Act of 1996. *See* 41 U.S.C.S. § 431 (LEXIS 2004).

[720] 15 U.S.C.S. § 631.

[721] 69 Fed. Reg. 2447.

[722] Federal Acquisition Regulation; Incentives for Use of Performance Based Contracting for Services, 69 Fed. Reg. 34,226 (June 18, 2004) (to be codified at 48 CFR pts. 2, 4, 12, 37, and 52).

[723] *Id*. Agencies may use the Federal Procurement Data System-Next Generation to collect the data. The rule requires OMB to submit compliance reports. *Id*.

[724] The Authorization Act authorizes commercial item treatment for performance-based contracts or task orders for services under two conditions. First, each task must identify a specific end product or output to be achieved. Second, each task must contain a firm, fixed price for specific tasks performed or outcomes achieved. The interim rule implements the conditional requirements. *Id*.

contract or task order for services,[725] and adds performance-based terms to part 37, Service Contracts.[726]

Also on 18 June 2004, the FAR Councils issued a final rule clarifying that the Javits-Wagner-O'Day (JWOD) program is a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee).[727] The rule also added the website for the Procurement List and the address for the Committee offices.[728]

On 20 September 2004, the FAR Councils issued an advance notice of proposed rulemaking and notice of a public meeting regarding the use of time-and-materials (T&M) and labor-hour (LH) contracts for the procurement of commercial services.[729] The conditions to use FAR part 12 for such contracts include: "(1) the purchase must be made on a competitive basis; (2) the service must fall within certain categories prescribed by section 8002(d) of the Services Acquisition Reform Act; (3) the contracting officer must execute a determinations and findings (D&F) that no other contract type is suitable; and (4) the contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agencies."[730] The goal is to authorize FAR part 12 treatment only when conditions warrant and when the terms and conditions in the contract adequately protect the parties' respective interests.[731]

Major Bobbi Davis.

Multiple Award Schedules

Take an Alternate Course

The FAR provides an exception to the DFARS[732] fair opportunity competition requirements for FSS services exceeding $100,000 if the services are urgently needed.[733] Agencies should not use this exception, however, to avoid dealing with a protest. In *SMF Systems Technology Corp.*,[734] after SMF filed two protests, the agency cancelled the solicitation and acquired the services on a noncompetitive basis based on urgency.[735] The GAO sustained the protest concluding the agency's missteps in the acquisition process created the alleged urgency.[736]

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[725] A contracting officer may use FAR part 12 for any performance-based service acquistion if the contract or task order:

(1) is entered into on or before November 24, 2013;

(2) has a value of $25 million or less;

(3) meets the definition of performance-based contracting at FAR section 2.101;

(4) includes a quality assurance surveillance plan;

(5) includes performance incentives were appropriate;

(6) specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and

(7) is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

Id. at 34,227.

[726] FAR section 37.601 includes performance-based tasks orders. *Id*.

[727] Federal Acquisition Regulation; Procurement Lists, 69 Fed. Reg. 34,229 (June 18, 2004) (to be codified at 48 C.F.R. pts. 8 and 52).

[728] *Id*. at 34,230. The website is available at *http://www.jwod.gov/procurementlist*.

[729] Federal Acquisition Regulation; Additional Commercial Contract Types, 69 Fed. Reg. 56,316 (proposed Sept. 20, 2004) (to be codified a 48 C.F.R. pts 2, 10, 12, 16, 52).

[730] Section 1432 of the Services Acquisition Reform Act (SARA) "expressly authorizes the use of T&M and L-H contracts for the procurement of commercial services." *Id*. (citing Pub. L. No. 108-136, 117 Stat. 1392, 1672 (2003)).

[731] *Id*.

[732] DFARS section 208.404-70 (c) requires contracting officers to provide contractors with a fair notice of intent to make a purchase by providing a description of the work and the basis of award to as many schedule contractors as practicable. The contracting officer must receive offers from at least three contractors or document that no additional contractors can fulfill the work. DFARS, *supra* note 227, at 208.404-70(c).

[733] FAR section 16.505(b)(2)(i) provides an exception to the fair opportunity requirements if the agency need is so urgent that providing a fair opportunity would result in unacceptable delays. FAR, *supra* note 20, at 16.505(b)(2)(i).

[734] Comp. Gen. B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203.

[735] *Id*. at 4.

[736] *Id*. at 6.

In *SMF*, the Veterans Administration (VA) issued an RFQ to three FSS vendors on 21 May 2003, for video teleconferencing support services for the Air Force Surgeon General (AFSG).[737] The VA selected EDS to provide the services at a price significantly more than SMF's quoted price.[738] In a debriefing to SMF on 5 June 2003, SMF learned that the VA removed SMF's quotation from consideration for its failure to include resumes required by the RFQ.[739] On 10 June 2003, SMF protested to the GAO requesting corrective action and consideration of its quotation because the quotation included the required resumes.[740] The VA admitted it inadvertently overlooked the resumes and agreed to reevaluate SMF's quotation.[741] On 10 July 2003, the agency again selected EDS.[742] One day after a second debriefing, on 17 July 2003, SMF again protested to the GAO asserting the VA misevaluated its quotation and made an unreasonable cost/technical tradeoff.[743] On 18 August 2003, the VA advised the GAO of its intent to cancel the RFQ.[744]

Although the agency issued the RFQ pursuant to FAR section 8.404, the agency used FAR part 15 negotiated-type procedures, which the contracting officer alleged slowed the process contrary to the agency's interests.[745] As a result, the agency invoked the exception in DFARS section 208.404-70(b)(1) and FAR section 16.505(b)(2)(i) to avoid the competition requirements.[746]

After the agency cancelled the RFQ, the GAO dismissed SMF's protest.[747] SMF protested the agency's decision to cancel the RFQ arguing "there was no basis to forgo the competition already conducted."[748] SMF also alleged the VA cancelled the competition to avoid scrutiny because of the VA's "inability to get it right in a competitive setting."[749] SMF requested the GAO resolve the earlier protest challenging the evaluation of its quotation.[750] The GAO sustained the protest, finding the VA "unreasonably canceled a competitive acquisition, after receiving and evaluating quotations and selecting one for award, without a reasonable basis."[751]

The GAO held that the record suggested the acquisition's urgency resulted from the VA's inability to properly compete the procurement.[752] While the agency argued it violated the procurement regulations by using negotiated type procedure in a FSS buy, the GAO found the agency fulfilled FAR and DFAR requirements.[753] The GAO also noted that the time line of events did not appear to support the agency's allegation of urgent need.[754] The VA only alleged urgency as an issue after it twice evaluated the quotations and almost three months after issuing the RFQ.[755] The GAO also questioned the VA's failure to explain why it took one month to decide to cancel the RFQ instead of allowing the GAO to resolve the protest.[756] The GAO sustained SMF's protest and found "the decision to cancel appears to be . . . essentially an attempt to

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[737] *Id*. at 2. The AFSG oversees nearly 40,000 personnel providing direct medical care to more than 2.7 million beneficiaries worldwide. To conduct business with a staff located throughout the world, the AFSG staff conducts thirty to forty video teleconferences each week. *Id*. at 1.

[738] *Id*. at 2.

[739] *Id*.

[740] *Id*.

[741] *Id*. The GAO closed the file without further action based on the agency's corrective action. *Id*.

[742] *Id*.

[743] *Id*.

[744] *Id*.

[745] *Id*.

[746] *Id*.

[747] *Id*. at 4.

[748] *Id*.

[749] *Id*.

[750] *Id*. The agency responded to the protest, stating the agency's broad discretion to decide whether to cancel a solicitation and further elaborated on the agency's urgent need. *Id*.

[751] *Id*. at 6.

[752] *Id*.

[753] *Id*. at 5. The GAO found FAR subpart 8.4 does not prohibit the use of negotiated procurement type procedures for an FSS buy. *Id*.

[754] *Id*.

[755] *Id*. The agency took less than sixteen days to evaluate the quotations and make a selection decision. Three months passed from RFQ issuance to the letter of intent to cancel the RFQ based on urgency. *Id*.

[756] *Id*.

avoid further scrutiny and review" and held the VA's decision to cancel the RFQ unreasonable.[757] The GAO acknowledged, however, that their finding did not mean that the AFSG did not urgently need the services.[758] Because of wartime exigencies, the GAO did not recommend disturbing award to EDS. It recommended however, that the agency not exercise any options under the task order.[759]

Material Misrepresentations

Securing employee agreements from incumbent contractor personnel when you are not the incumbent contractor for a service contract can be difficult. However, misrepresenting employee intentions in a quotation may result in the GAO sustaining a protest. In *ACS Government Services, Inc*.,[760] the GAO found that a winning contractor materially misrepresented the commitment of three personnel in its quotation.[761] The GAO then recommended award to the protestor, ACS, after finding the material misrepresentation influenced the agency's evaluation.[762]

In *ACS*, the Army Medical Research Acquisition Activity (AMRAA) issued an RFQ to five vendors holding General Services Administration (GSA) Federal Supply Schedule (FSS) contracts.[763] The contract required the contractor to install an automated system and provide training.[764] The solicitation included four evaluation factors: technical qualifications of key personnel, past performance, management's technical approach and price.[765] Technical qualifications of key personnel and past performance were of equal importance and each was more important than management technical approach.[766] The solicitation further indicated all the non-price evaluation factors, when combined, were more important than price.[767] However, if the source selection evaluation board (SSEB) determined all quotations technically equivalent, the solicitation advised price could be the determining evaluation factor.[768] Three vendors, including ACS, the incumbent contractor, and Metrica, the incumbent prior to ACS, submitted offers.[769]

The SSEB rated ACS "excellent" in key personnel, past performance and technical approach.[770] Metrcia received an "excellent" rating in past performance and technical approach but only received an "above average rating" for key personnel.[771] The contracting officer concluded Metrica's quotation offered the best value to the government because ACS' superior key personnel rating did not justify ACS' higher priced quotation.[772] ACS protested the contracting officer's finding, alleging Metrica materially misrepresented the availability of three key personnel, who signed employment agreements with ACS, not Metrica.[773] ACS alleged the misrepresentation affected the award decision and the GAO agreed.[774]

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[757] *Id*. at 6. The VA admitted that SMF's protest and the requirement to reevaluate SMF's quotation contributed to the reason for canceling the solicitation. *Id*.

[758] *Id*.

[759] The GAO also recommended "SMF be reimbursed for the reasonable costs incurred in preparing its quotation . . . and the cost of filing and pursing all three protests, including reasonable attorney's fees." *Id*. at 7.

[760] Comp. Gen. B-293014, Jan. 20, 2004, 2004 CPD ¶ 18.

[761] *Id*. at 9.

[762] *Id*. at 11.

[763] *Id*. at 2.

[764] The information system is the Defense Medical Logistics Standard Systems Deployment Release 3.X (DMLSS Deployment Release 3.X) which "standardizes medical inventory management practices, equipment management, medical maintenance, financial accounting and tracking, customer area inventory management, electronic and web-based ordering, and warehousing function throughout a medical treatment facility (MTF) for defense health care operations." *Id*.

[765] *Id*.

[766] *Id*.

[767] *Id*.

[768] *Id*.

[769] *Id*. The third vendor was only identified as "Vendor C." *Id*.

[770] *Id*. at 3.

[771] *Id*.

[772] *Id*. The price difference between ACS and Metrica was $361,627. *Id*.

[773] *Id*.

[774] *Id*.

Metrica's offer included the names and resumes of eleven key personnel.[775] For eight of the names submitted, each person personally certified their availability to work for Metrica.[776] A Metrica representative signed the other three personnel resumes and certifications, not the named individuals.[777] Metricia submitted the names and resumes of these same three key personnel included with ACS' offer.[778] However, ACS' offer included signed statements from each of the three personnel providing ACS with the exclusive right to submit their resumes with the offer.[779] The GAO conducted a hearing to ascertain the facts and to assess the credibility of the respective parties' witnesses after ACS submitted affidavits from the three key personnel casting doubt on the Metrica certifications.[780]

The hearing revealed that Metrica's vice-president signed the three certifications based on information from the project manager (PM).[781] The PM conceded he had conversations with two of the three personnel and learned all three signed statements allowing only ACS the right to use their resumes.[782] The PM added, however, the three key personnel "never said that Metrica could not use their names and resumes, and Metrica never asked that question."[783] The three key personnel testified that they did not give Metrica the right to use their names or resumes, believing their certifications provided ACS with the exclusive right to submit their resumes.[784] Based on the testimony, the GAO found Metrica "failed to exercise due diligence to ensure the accuracy of its certifications that three of the key personnel had agreed to work on the contract."[785]

The GAO also found Metrica's actions after it was awarded the contract inconsistent with the certifications that the three employees agreed to work for the company.[786] After contract award, Metrica did not approach the three key personnel to sign work agreements.[787] Instead, Metrica publicly announced of award and invited interested incumbent employees to express an interest in working for Metrica.[788] The GAO concluded that Metrica's actions did not support a finding that Metricia could validly certify that the three employees agreed to work for it if awarded the contract.[789]

Metrica argued that the GAO had to find intentional misrepresentation, or bad faith with an intent to deceive the agency, before the GAO could find it misrepresented the availability of the personnel. The GAO stated, however, that " an offeror's misstatements need not be intentional ones to constitute misrepresentations."[790] The degree of negligence or intentionality associated with the misrepresentation is relevant to the remedy, not whether the statement is a misrepresentation.[791] The GAO then concluded the misrepresentations were material based on a review of the statement of work.[792]

The statement of work required a requisite number of personnel qualified to perform the identified tasks and certification of personnel availability.[793] The contracting officer testified that the agency relied on the names, resumes and

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[775] *Id*. at 4.

[776] *Id*. at 5.

[777] *Id*. at 6. Metrica updated the on-file resumes of three key personnel to reflect their employment with ACS. *Id*. at 11.

[778] *Id*. at 5.

[779] *Id*. The contracting officer stated he did not notice the vendors offered the same three key personnel in the offer nor the difference in the certifications for the three key personnel. *Id*. at 6.

[780] *Id*.

[781] *Id*.

[782] *Id*.

[783] *Id*.

[784] *Id*. at 7.

[785] *Id*.

[786] *Id*.

[787] *Id*. at 9.

[788] *Id*. Two of the three key personnel took other positions with ACS, forcing Metrica to find replacements. *Id*.

[789] *Id*.

[790] *Id*. (referencing ManTech Advanced Sys., Int'l, Inc., Comp. Gen. B-255719.2, May 4, 1998, 1998 CPD ¶ 139, at 6).

[791] *Id*. (citing Integration Tech. Group, Inc., Comp. Gen. B-291657, Feb. 13, 2003, 2003 CPD ¶ 55, at 5).

[792] *Id*.

[793] *ACS Gov't Sys., Inc*., 2004 CPD ¶ 18, at 9.

certification to determine if the vendor's quotation met the statement of work requirements.[794] Because Metrica received a higher score for key personnel than ACS, the GAO reasoned the misrepresentations "likely" had a significant impact and that absent the misrepresentations, the agency might not have Metrica for award.[795] Based on the finding, the GAO recommended the Army exclude Metrica's quotation from consideration and issue the purchase order to ACS.[796]

The Slippery Slope

A contracting officer who seeks "clarification" in an FSS vendor's oral presentation may be engaging in a "discussion" if the agency affords the vendor the opportunity to submit a revised or modified quotation.[797] In *TDS, Inc*., the Department of Justice (DOJ), issued an RFQ to an FSS vendor for help desk operation services supporting the agency's information technology requirement.[798] The RFQ listed six equally-weighted evaluation criteria: past performance, corporate experience, technical understanding, quality control, professional staff and team, and management approach.[799] Based on adjectival ratings, the vendor offering "best value," considering price and non-price criteria, with non-price considerations being more important than price, would be awarded the task order.[800] The agency invited the three vendors who submitted timely quotations to make oral presentations.[801] During the presentations, agency personnel asked questions and invited vendors to submit revised quotations based on areas mentioned during the oral presentations.[802] After the DOJ issued the task order to another vendor, TDS protested arguing that the DOJ failed to conduct a meaningful discussion with it during the oral presentation.[803]

To determine whether the DOJ engaged in a "discussion", the GAO utilized the standards applicable to negotiated procurements.[804] While acknowledging the provisions of FAR subpart 8.4 applied to the acquisition, because the DOJ "treated the vendor's responses as if it were conducting a negotiated procurement," the GAO analyzed the argument based on the applicable FAR part 15.[805] The DOJ argued they merely engaged in "clarifications" with TDS, but the GAO looked beyond the agency's characterization and decided that the "clarifications" constituted a discussion.[806] The GAO reiterated that dialogue may constitute a discussion once "agency personnel begin speaking, rather than merely listening."[807] Pursuant to the FAR, "where agency personnel comment on, or raise substantive questions or concerns about, vendors' quotations or proposals in the course of an oral presentation, and either simultaneously or subsequently afford the vendors an opportunity to make revisions in light of the agency personnel's comments and concerns, discussions have occurred."[808] Because the DOJ advised vendors that revisions were authorized based on questions in the oral presentations, and vendors actually made revisions to technical matters and to price, the GAO concluded the DOJ engaged in discussions.[809] The GAO went further and held that the DOJ failed to engage in meaningful discussions with TDS.[810]

Turning again to the applicable FAR part 15 provisions, the GAO reviewed the minimum discussion

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[794] *Id*.

[795] *Id*. The Army rated Metrica's staffing plan higher than ACS' staffing plan.

[796] *Id*. at 11.

[797] *See* FAR, *supra* note 20, at 15.102(g).

[798] Comp. Gen. B-292674, Nov. 12, 2003, 2003 CPD ¶ 204, at 2. The RFQ included two primary tasks, help desk support services and systems administration and network engineering. The DOJ issued the task order to Northrop Grummann. *Id*. at 11.

[799] *Id*.

[800] *Id*. The DOJ requested oral presentations after reviewing vendor submissions. *Id*.

[801] *Id*.

[802] *Id*.

[803] *Id*. at 5. The DOJ issued the task order to Northrop Grummann. The protestor also alleged one of Northrop Grumman's subcontractors had an organizational conflict of interest. The GAO denied that portion of the protest. *Id*.

[804] *Id*. at 6.

[805] *Id*.

[806] *Id*.

[807] *Id*.

[808] *Id*. (citing FAR section 15.102(g)).

[809] *Id*.

[810] *Id*.

requirements.[811] The contracting officer should discuss deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond.[812] The contracting officer should discuss other proposal aspects if the alteration or explanation would materially enhance the proposal's award potential.[813] Failure to engage in meaningful discussions, the GAO reasoned, limits a vendors "reasonable chance of being selected for contract award."[814] The GAO found the DOJ only asked TDS two general questions during the oral presentation, despite "a rather considerable list of weaknesses."[815] In contrast, the DOJ asked the two other vendors seven detailed questions tailored to their proposals and management approach.[816] Finding no explanation in the source selection decision document for the variation in treatment, the GAO determined the discussions were not equitable and sustained TDS' protest.[817]

The GAO recommended reopening the acquisition with all the vendors, engaging in meaningful discussions, obtaining and evaluating revised quotations and making a new source selection decision. [818] If a change resulted in the new source selection decision, the GAO recommended terminating the task order for convenience and making award to the proper vendor.[819] The teaching point for contracting officers is that the GAO will utilize the FAR part 15 negotiated procurement discussion requirements if the agency treats a FSS competition like a negotiated procurement. Contracting officers should therefore either avoid "discussions" during an oral presentation or engage in meaningful and equitable discussions with all vendors to avoid a sustained protest.

Let's be Reasonable

Under the FSS program, an agency is not required to conduct a formal, negotiated competition before determining whether the supplies or services of a FSS vendor represents the best value and meets the agency's needs at the lowest over-all cost.[820] However, if an agency conducts a formal competition before awarding a task order, the GAO will sustain a protest if the evaluation decision is not reasonable.[821] In *KMR, LLC*,[822] the GAO held the contracting officer's past performance ratings unreasonable and undocumented, and sustained KMR's protest.[823]

FSS and BPA Updates

Last year's *Year in Review* reported on a proposed FAR rule to improve the FSS rules for services acquisition.[824] This year the FAR Councils issued a final rule amending the FAR to incorporate special ordering procedures that address the acquisition of services.[825] The final rule also strengthens the procedures required to establish blanket purchase agreements (BPA) using the FSS.[826]

The rule adds a definitions section and defines ordering activity,[827] multiple award schedules,[828] requiring agency,[829]

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[811] *Id*. at 7 (citing FAR section 15.306(d)(3)).

[812] *Id*. at 6.

[813] *Id*. at 7.

[814] *Id*.

[815] *Id*. The two questions asked were, "What performance based standards will your operations use?" and "How do you propose to ensure that technical issues that come up are properly reported to the OJP and then handled by the correct people?" *Id*.

[816] *Id*.

[817] *Id*.

[818] *Id*. at 8.

[819] *Id*.

[820] FAR, *supra* note 20, at 8.404.

[821] Comark Fed. Sys., Comp. Gen. B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34, at 4.

[822] Comp. Gen. B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

[823] *Id*. at 1. For additional discussion of the past performance aspects of this case, see *supra* section titled Negotiated Acquisitions: Past Performance.

[824] *See 2003 Year in Review, supra* note 29, at 56.

[825] Federal Acquisition Regulation; Federal Supply Schedules and Blanket Purchase Agreements, 69 Fed. Reg. 34,231 (June 18, 2004) (to be codified at 48 C.F.R. pts. 8, 38, and 53).

[826] *Id*.

[827] An ordering activity is any activity that is authorized to place orders, or establish BPA's against GSA's Multiple Award Schedule (MAS). The list of eligible ordering activities is available at http://www.gsa.gov/schedules. 69 Fed. Reg. 34,234.

schedule e-library,[830] and special item numbers[831] to identify generically similar supplies or services.[832] The final rule also adds new requirements for schedule contractors. Schedule contractors must publish a FSS pricelist containing all the supplies and services offered by the schedule contractor.[833] Contracting officers can access the price lists on line or receive them upon request from the vendor.[834] The final rule also clarifies that the contracting officer who places an order or establishes a BPA is the contracting officer responsible for applying the requiring agency's regulatory and statutory rules.[835]

The rule implements new ordering procedures which are divided between supplies and services offered at a fixed price and services requiring a statement of work.[836] Installation, maintenance, and repair services offered at a fixed price for the performance of a specific task are examples of services that do not require a statement of work.[837] Services priced at an hourly rate, however, require a statement of work.[838] The final rule changed some of the rule applicable to ordering procedures but many of the procedures remain the same. Ordering procedures are still divided into three categories: orders at or below the micro-purchase threshold, orders exceeding the micro-purchase threshold but not exceeding the maximum order threshold and orders exceeding the maximum order threshold.[839] For services requiring a statement of work, however, the third category covers orders exceeding the maximum order threshold and the rules applicable to establishing a BPA.[840] The BPA procedures are also divided into three categories: single, multiple, or hourly rate services.[841] Agencies may use multi-agency BPA's if the BPA identifies the participating agencies and their estimated requirements.[842] The final rule also adds five new sections under FAR section 8.404: price reductions, small business, documentation, payment, and ordering procedures for mandatory schedules.[843]

The "price reductions" section encourages ordering contracting officers to seek a price reduction when the supplies or services are available elsewhere at a lower price or when establishing a BPA to fill recurring requirements.[844] In addition, contracting officers should seek even greater discounts when placing large volume orders.[845] However, the rule only requires schedule contractors to pass price reductions to ordering activities for a specific order.[846]

The "small business" section acknowledges that the FAR part 19 mandatory preference programs do not apply to orders placed against a schedule contractor.[847] However, the rule requires agencies to consider at least one small business if one is available.[848] In addition, when an order exceeds the micro-purchase threshold,[849] ordering activities should give a

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[828] Multiple Award Schedules are defined as contracts awarded by the GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, at varying prices. *Id*.

[829] A requiring agency is any agency needing the supplies or services. *Id*.

[830] The schedule e-Library is the on-line source for GSA and VA Federal Supply Schedule contract award information. *Id*. (identifying the website at http://www.gsa.gov/elibrary).

[831] Special Item Number or SIN, is a group of generically similar, but not identical, supplies or services that are intended to serve the same general purpose or function. *Id*.

[832] *Id*.

[833] *Id*. at 34,235.

[834] *Id*.

[835] *Id*.

[836] *Id*. at 34,236.

[837] *Id*.

[838] *Id*.

[839] *Id*.

[840] *Id*.

[841] *Id*. at 34,237.

[842] *Id*.

[843] *Id*.

[844] *Id*.

[845] *Id*.

[846] *Id*.

[847] *Id*.

[848] *Id*.

[849] The micro-purchase threshold is $2500, but is limited to $2000 for construction and increases to $15,000 for acquisitions that the agency head determines are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attach. *See* FAR, *supra* note 20, at 2.101.

preference to small business concerns' items when two or more items at the same delivered price will satisfy the requirement.[850] While the mandatory preference programs do not apply to orders placed against schedule contracts, the final rule reminds agencies that orders placed against a schedule contract are credited toward the ordering activity's small business goals.[851]

The final rule also revises the inspection and acceptance, and termination for cause and convenience sections and adds a section covering the rules applicable to sole source procurements under the schedules. The rule divides the inspection and acceptance requirements into two sections, one for supplies and another for services.[852] The provisions applicable to inspection and acceptance of supplies generally remain the same.[853] For the inspection and acceptance of services, however, the final rule adds language authorizing the ordering activity the right to inspect services to ensure the services comply with the contract requirements.[854] Any inspection or test utilized must comply with the order's quality assurance surveillance plan and not unduly delay the work.[855]

The termination provisions cover terminations for cause, for convenience, and disputes. Terminations for cause must comply with the FAR provisions governing commercial item terminations.[856] While the final rule authorizes the ordering activity contracting officer to terminate individual orders for cause, if the contractor alleges the failure was excusable, the ordering activity contracting officer must forward the dispute to the GSA FSS contracting officer.[857] The disputes provision authorizes the ordering activity contracting officer to issue final decisions if the dispute relates to the performance of the order.[858] In the alternative, the ordering activity contracting officer may refer the dispute to the schedule contracting officer.[859] For disputes relating to the schedule contract terms and conditions, however, the ordering activity contracting officer does not have an option and must refer the dispute to the schedule contracting officer.[860] A final change reinforces the documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders.[861]

The final rule outlines competition waiver authorities for sole source orders.[862] The approval authorities follow the requirements outlined in FAR section 6.304. For orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold,[863] the ordering activity contracting officer may waive competition and approve the solicitation of one source if the contracting officer determines that one source is reasonably available, and the agency does not require a higher approval level.[864] For orders exceeding the simplified acquisition threshold, but not exceeding $500,000, the ordering activity contracting officer must certify that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.[865] The rule authorizes higher approval authority.[866] The approval for sole source orders falling between $500,000 and $10 million, $10 million and $50 million, and exceeding $50 million, require the competition advocate, the head of the procuring activity, or the senior procurement executive of the agency, respectively, to

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[850] 69 Fed. Reg. at 34,237.

[851] *Id*.

[852] *Id*. at 34,238.

[853] *Id*.

[854] *Id*.

[855] *Id*.

[856] *Id*. at 34,239.

[857] *Id*.

[858] *Id*.

[859] *Id*.

[860] *Id*.

[861] *Id*. at 34,237.

[862] *Id*. The approval authorities follow the justification for other than full and open competition outlined in FAR section 6.304. *Id*.

[863] Generally, the simplified acquisition threshold is $100,000. If the agency head determines the acquisition supports a contingency operation or facilitates defense against or recovery from nuclear, biological, chemical, or radiological attack, the simplified acquisition threshold increases to $250,000 for contracts awarded and performed or purchased inside the United States, and increases to $500,000 for contracts awarded and performed or purchased outside the United States. *See* FAR, *supra* note 20, at 2.101.

[864] 69 Fed. Reg. at 34,237. Examples of a basis for determining only one source is reasonably available include urgency, exclusive licensing agreement, and industrial mobilization. *Id*.

[865] *Id*.

[866] *Id*.

approve the order.[867] Except for the senior procurement executive, the authority to approve sole source orders at $500,000 and above is not delegable.[868] On 13 September 2004, the Under Secretary of Defense for Acquisition, Technology and Logistics, issued a memorandum reiterating the approval levels outlined in the FAR and extending these approval levels to multiple award contracts (MAC).[869]

The memorandum acknowledges that the FAR approval levels are higher than the DFARS requirements and requires agencies to comply with the FAR approval levels.[870] The memorandum also applies the FAR approval levels to waive competition requirements for orders of supplies or services under MACs.[871] The approval levels apply to orders placed against a schedule by the DOD or by a non-DOD agency placing an order on behalf of the DOD.[872] The memorandum states the changes are necessary to ensure agencies place appropriate emphasis on promoting competition on orders placed against the FSS and MAC.[873]

Let's "Get It Right"

On 13 July 2004, the GSA and the DOD unveiled a joint initiative to improve deficiencies in government contracting.[874] The initiative is designed to ensure compliance with federal contracting regulations, make contracting policies and procedures clear and explicit, and ensure the integrity of GSA's contract vehicles and services. Contracting officers must ask whether a purchase over $100,000 is within the scope of the contract and if the agency could save money using an in-house contracting office before acquiring the good or service.[875] The initiative's goal is to improve competition and transparency, and ensure that taxpayers obtain the best value for their tax dollar.[876]

Major Bobbi Davis.

Too Many Cooks Can Ruin the Soup

As a result of a recent change to the FAR, ordering activity contracting officers may decide disputes involving performance under a FSS and multiple award schedule (MAS) contracts, while disputes pertaining to the terms and conditions of the schedule itself must be referred to the schedule contracting officer.[877] Two recent cases involving schedule

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[867] *Id*.

[868] The authority of the senior procurement executive is delegable. *See* FAR, *supra* note 20, at 6.304(a)(4).

[869] Memorandum, Office of the Under Secretary of Defense (Acquisition, Technology and Logistics), to Senior Procurement Executives and Directors of Defense Agencies, subject: Approval Levels for Sole Source Orders Under Federal Supply Schedules (FSSs) and Multiple Award Contracts (MACs) (13 Sept. 2004).

[870] For example, DFARS section 208.404-70 authorizes the contracting officer to waive competition requirements when ordering services greater than $100,000 under the FSS. *Id*.

[871] *Id*.

[872] *Id*.

[873] *Id*.

[874] Get It Right Plan, *available at* http://www.gsa.gov. There have been several reports and a significant amount of media attention regarding the alleged abuses of GSA schedules. *See* GEN. ACCT. OFF., No. GAO-04-874, *Guidance Needed to Promote Competition for Defense Task Orders* (July 30, 2004); Memorandum, United States Department of the Interior Office of the Inspector General, to Assistant Secretary for Policy, Management and Budget, subject: Review of 12 Procurements Placed Under General Services Administration Federal Supply Schedules 70 and 871 by the National Business Center (16 July 2004); U.S. DEP'T. OF DEF. OFF. OF THE INSPECTOR GEN., REP. NO. D-2004-1110, *Contracts Awarded by the Defense Threat Reduction Agency in Support of the Cooperative Threat Reduction Program*, 25 Aug. 2004; U.S. GEN. SERVS. ADMIN. OFF. OF INSPECTOR GEN., *Audit of Federal Technology Services*, REP. NO. A020144/T/5/Z04002, 8 Jan. 2004; GEN. ACCT. OFF., No, GAO-04-718, *Further Efforts Needed to Sustain VA's Program in Purchasing Medical Products and Services*, 22 June 2004.

[875] Get it Right Plan, *available at* http://www.gsa.gov.

[876] *Id*.

[877] FAR, *supra* note 20, at 8.406. This section provides, in relevant part:

> (a) Disputes pertaining to the performance of orders under a schedule contract.
>
> (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may-
>
> (i) Issue final decisions on disputes arising from performance of the order . . . or
>
> (ii) Refer the dispute to the schedule contracting officer.
>
> (2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.

contracts demonstrate the problems created when agencies cross these lines of authority.

In *United Partition Systems, Inc. v. United State*s,[878] the Air Force awarded United Partition a delivery order (DO) for various construction services under a GSA MAS contract.[879] The Air Force terminated United Partition's DO for default due to alleged poor performance.[880] In response, United Partition submitted a claim to the Air Force contracting officer alleging wrongful termination. The Air Force contracting officer then denied appellant's claim and asserted a government claim against United Partition for excess reprocurement costs.[881] United Partition appealed the default termination and the Air Force's affirmative claim to the ASBCA.[882] On appeal, the board, *sua sponte*, questioned whether it had jurisdiction to decide the appeals on the grounds the Air Force should have referred appellant's claim to the GSA for a GSA contracting officer's decision. The board observed that FAR section 8.405-7, as it read at the time of the dispute, required the "schedule contracting officer" to decide disputes.[883] Because the Air Force contracting officer did not have authority to determine whether appellant's failure was excusable, the ASBCA determined there was no valid contracting officer's decision and ordered the claim transferred to the GSA contracting officer.[884]

On the heels of the board's decision, United Partition filed an action before the COFC.[885] Soon after that, the Air Force transferred the claim to the GSA, as directed by the board.[886] Approximately three months later, the GSA contracting officer issued a decision consistent with that previously issued by the Air Force's contracting officer.[887] Shortly thereafter, the government filed a motion to dismiss, arguing that United Partition filed its case with the COFC prior to the GSA's issuance of a final decision.[888] Characterizing the case a "procedural tangle," the court dismissed the government's motion and granted United Partition leave to supplement its complaint to encompass the GSA contracting officer's final decision.[889]

In *Sharp Electronics Corporation*,[890] the Navy awarded Sharp an FSS DO for copiers and other related equipment pursuant to a forty-eight month Lease to Ownership Plan (LTOP). The DO performance period covered one year, and the contract provided for cancellation charges if the Navy chose to terminate the contract prior to the LTOP terms.[891] Nine months into the LTOP, the Navy decided to replace the copiers and equipment with copiers of another brand name. Sharp became aware of this decision and informed the Navy that under the LTOP there would be costs associated with early termination. The Navy responded with a letter stating:

> any term of the lease that does not comply with the law must be viewed as *void ab initio* . . . . [T]he lease is considered to be a one year lease . . . . The Antideficiency Act . . . simply does not allow for any other interpretation when annual appropriations are used, as is the case in this instance.[892]

Soon after the letter, the Navy returned the copiers and equipment to Sharp, and Sharp submitted a certified claim to the Navy contracting officer in the amount of $102,254.45.[893] The Navy issued a contracting officer's final decision denying the

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> (b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

Id.

[878] 59 Fed. Cl. 627 (2004).

[879] *Id*. at 632-33.

[880] *Id*. at 633.

[881] *Id*.

[882] *Id*. (referencing United Partition Sys., Inc., ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264).

[883] *Id*. at 635 (quoting United Partition Sys., Inc., 03-2 BCA ¶ 32,264 at 159,597).

[884] For a discussion of last year's ASBCA decision, see 2003 Year in Review, *supra* note 29, at 24.

[885] *United Partition Sys.*, 59 Fed. Cl. at 633.

[886] *Id*.

[887] *Id*.

[888] *Id*. at 631.

[889] *Id*.

[890] No. 54475, 2004 ASBCA LEXIS 80 (Aug. 2, 2004).

[891] *Id*. at *3-6.

[892] *Id*. at *6-7.

[893] *Id*. at *7-8.

claim, and Sharp appealed this decision to the ASBCA.[894]

The issue before the board was whether the Navy contracting officer had authority to issue a decision concerning the legality of the LTOP terms. The board observed that regardless of whether the pre-2002 version of FAR section 8.405-7 governed the dispute, only the GSA schedule contracting officer had the authority to issue a decision pertaining to the terms and conditions of the GSA schedule contract.[895] Thus, in the eyes of the board, the Navy's decision that the LTOP did not "comply with the law" was a nullity.[896]

Major James Dorn.

Electronic Commerce

Final and Interim Rule Updates

On 11 December 2003, the FAR Councils issued a final rule reflecting changes in contract action reporting to the Federal Procurement Data System—Next Generation (FPDS-NG).[897] As part of the federal government's plan to modernize the procurement data collection system, the FPDS-NG became operational on 1 October 2003 for transactions awarded after that date.[898] The original FPDS previously captured only data on contract actions over $25,000 and summary data on contract actions below $25,000.[899] The final rule requires all contract actions over $2500 after 30 September 2004 to be reported to FPDS-NG.[900]

On 27 January 2004, the FAR Councils issued a proposed ruleto require offerors to submit their representations and certification's electronically via the Business Partner Network (BPN) unless an exception applies.[901] The goal is to eliminate the need for contractors to submit representations and certifications to contracting offices after every contract award.[902] Contractors can complete the representations and certifications on-line through the BPN and procurement offices can access the information.[903] The proposed rule requires contractors to update information in the network as changes occur or at least annually.[904]

The DOD also updated several e-commerce related rules in the DFARS. Last year's *Year in Review* reported on the DOD's interim rule requiring contractors to submit, and the DOD to process, payment requests electronically.[905] On 15 December 2003, the DOD finalized the rule.[906] A change from the interim rule clarifies the authority to use scanned documents if the documents are part of a submission using an acceptable form of electronic transmission.[907]

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[894] *Id*. at *9.

[895] *Id*. at *12-14.

[896] *Id*. at *13-15. The board went on to conclude that because the contracting officer had no authority to issue the final decision, the board lacked jurisdiction to decide the merits of the appeal. Thus, the board dismissed the case without prejudice. *Id*.

[897] Federal Acquisition Regulation; Federal Procurement Data System, 68 Fed. Reg. 69,246 (Dec. 11, 2003) (to be codified at 48 C.F.R. pts. 4 and 53). The FPDS-NG "provides a comprehensive mechanism for assembling, organizing, and presenting contract placement data for the federal government. Federal agencies report data directly to the FPDS-NG, which collects, processes, and disseminates official statistical data on Federal contracting." *Id*. at 69,249. The FPDS-NG website is available at https://www.fpds.gov. *Id*. at 69,248.

[898] *Id*.

[899] *Id*. The rule eliminates the requirement to use Standard Form 279, Federal Procurement Data System Individual Contract Action Report and Standard Form 281, Federal Procurement Data System Summary Contract Action Report. *Id*.

[900] The final rule also "requires agencies to insert the Data Universal Numbering System Numbering in the solicitation when the expected award amount will result in the generation of an individual contract action report and the contract does not include the clause at FAR section 52.204-7, Central Contractor Registration." *Id*.

[901] Federal Acquisition Regulations; Electronic Representations and Certifications, 69 Fed. Reg. 4012 (proposed Jan. 27, 2004) (to be codified at 48 C.F.R. pts. 12, 14, 15, and 52).

[902] *Id*.

[903] *Id*.

[904] *Id*.

[905] *2003 Year in Review*, *supra* note 29, at 58.

[906] Defense Federal Acquisition Regulation Supplement; Electronic submission and Processing of Payment Requests, 68 Federal Register 69,628 (Dec. 15, 2003) (to be codified at 48 C.F.R. pts. 232 and 252).

[907] *Id*. at 69,629. The authorized forms of electronic payment are the "Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA), Web Invoicing System (WInS), and American National Standards Institute (ANSI) formats." DFARS, *supra* note 227, at 252.323-7003(b).

Reporting for Congress

The GAO issued several reports this year involving electronic commerce (e-commerce). In October of 2003, the GAO reviewed four Office of Management and Budget electronic government (e-government) initiatives that promote information technology.[908] The GAO reviewed the Office of Personnel Management payroll initiative,[909] the Department of Interior geospatial one-stop initiative,[910] the GSA's integrated acquisition environment initiative,[911] and the Small Business Administration's business gateway initiative.[912] The GAO acknowledged the progress the programs have made but determined that agencies have failed to implement the "high degree of interorganizational collaboration" required to ensure the programs success.[913] The GAO recommended more effective collaboration on the remaining tasks to improve the initiatives success.[914] The GAO also released two e-commerce reports addressing smart card[915] technology. In September 2004, the GAO released a report highlighting federal agency efforts to adopt smart card technology to improve the security of physical and information assets.[916] "As of June of 2004, fifteen federal agencies reported thirty-four ongoing smart card projects" and technical advances are improving the capabilities and cost effectiveness of smart cards.[917] In another September 2004 smart card report, the GAO provided an update to Congress regarding the progress federal agencies are making in promoting smart card technology.[918] The GAO found agencies discontinued twenty-eight of the fifty-two previously reported smart card programs.[919] Other projects, however, are thriving. The DOD's Common Access Card project is a large scale project resulting in 3.5 million cards issued to DOD-related personnel.[920] The report indicated agencies initiated ten additional projects since the GAO's last review with nine agencies developing and implementing integrated agency wide smart card initiatives.[921]

E-Government Act

The OMB issued e-authentication guidance for federal agencies on 16 December 2003.[922] The guidance implements the E-Government Act, which provides a comprehensive framework for information security standards and programs and uniform standards to protect the confidentiality of information.[923] The guidance "requires agencies to review new and existing electronic transactions to ensure that authentication processes provide the appropriate level of assurance."[924] Four

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[908] GOV'T. ACCT. OFF. REP. NO. GAO-04-6, *Electronic Government: Potential Exists for Enhancing Collaboration on Four Initiatives* (Oct. 10, 2003). E-government refers to the use of web-based internet applications using information technology to enhance the access to and delivery of government information and service to citizens, business partners, employees and agencies within the government. *Id*. at 1.

[909] The goal of the payroll initiative is to standardize payroll operations across all federal agencies. *Id*.

[910] The goal of the geospatial one-stop initiative is to coordinate the collection and maintenance of data associated with geographic locations. *Id*.

[911] The goal of the integrated acquisition environment initiative is to improve federal agencies acquisition of goods and services. *Id*.

[912] The goal of the business gateway initiative is to reduce the paperwork burden on small businesses and to help small businesses find, understand, and comply with federal, state, and local laws and regulations. *Id*.

[913] *Id*.

[914] The GAO recommended four key practices to improve collaboration across disparage organizations: establishing a collaborative management structure, maintaining collaborative relationships contributing resources equitably, facilitating communication and outreach, and adopting a common set of standards. *Id*. at 3.

[915] Smart cards are credit card-like devices that use integrated circuit chips to store and process data.

[916] GOV'T ACCT. OFF. REP. NO. GAO-05-84T, *Electronic Government: Smart Card Usage is Advancing Among Federal Agencies, Including the Department of Veterans Affairs* (Oct. 6, 2004).

[917] *Id*. at 1.

[918] GOV'T. ACCT. OFF. REP. NO. GAO-04-948, *Electronic Government: Federal Agencies Continue to Invest in Smart Card Technology* (Sept. 8, 2004) [hereinafter REP. NO. GAO-04-948]. The GAO provided the last progress report to Congress in January 2003. *See* GOV'T. ACCT. OFF. REP. NO. GAO 03-144, *Electronic Government: Progress in Promoting Adoption of Smart Card Technology* (Jan. 3, 2003).

[919] REP. NO. GAO-04-948, *supra* note 918, at 2.

[920] *Id*. The Transportation Security Administration's transportation worker identification credential is used by an estimated six million transportation workers. *Id*.

[921] *Id*. at 3.

[922] Memorandum, Executive Office of the President, Office of Management and Budget, to Heads of All Departments and Agencies, subject: E-Authentication Guidance for Federal Agencies (16 Dec. 2003) [hereinafter E-Authentication Memo].

[923] Electronic Government Act, 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002). The guidance is based on the E-Authentication E-Government Initiative and standards issued by the National Institute of Standards and Technology (NIST). E-Authentication Memo, *supra* note 922.

[924] *Id*.

levels of identity assurance establish the agency's assurance that the user presents some credential that refers to his or her identity.[925] The guidance outlines the steps to determine assurance levels.[926]

Major Bobbi Davis.

Socio-Economic Policies

Small Business

New SBA Webpage

The SBA released a website that should help connect small businesses with federal agencies. This webpage provides one-stop information regarding business development plans, financial assistance, taxes, laws and regulations, international trade, workplace issues, buying and selling, and access to federal forms. The address for this webpage is www.Business.gov.

New Small Business Set Aside Category: Service-Disabled, Veteran-Owned

To assist federal agencies in achieving the three-percent government-wide goal of purchasing goods and services from businesses owned by service-disabled veteran-owned businesses,[927] section 308 of the Veterans Benefits Act of 2003[928] created a new set aside category for Service-Disabled Veteran Owned Small Business (SDVOSB) concerns. Pursuant to this legislation, the FAR Councils issued an interim rule amending the FAR to allow contracting officers to restrict contract awards to SDVOSBs when there is a reasonable expectation that at least two SDVOSBs will submit fair market price bids.[929] In addition, contracting officers can award a sole source contract to a SDVOSB even if there is not a reasonable expectation that at least two such firms will bid, if the contract price will not exceed $5 million for manufacturing contracts or $3 million for all other contracts.[930] Procedurally, the SDVOSBs will self-certify their status and the SBA will resolve any size challenges.[931]

Do Not Overlook Teaming Agreements When Evaluating Small Business Subcontracting Plans

In *Burns and Roe Services Corp.,*[932] the GAO sustained a challenge to the Navy's award of a fixed-price, indefinite-quantity contract for naval base support services in the Caribbean. In this best value acquisition, price and the five technical evaluation factors carried equal weight. Small business support was one of the five technical evaluation factors. Both Burns, the protester, and Jones, the proposed awardee and incumbent, scored identical results on four of the five technical factors.[933] Burns, a large business, received a lower rating on the small business technical evaluation factor because the Navy failed to consider a teaming agreement Burns made with a small business.[934]

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[925] The four levels of assurance are identified as little or no confidence in the asserted identity's validity, some confidence in the asserted identity's validity, high confidence in the asserted identity's validity, and very high confidence in the asserted identity's validity. *Id*.

[926] *Id*.

[927] *See Regulations, SBA and FAR Council Create Service-Disabled Veteran-Owned Small Business Set-Aside*, 46 GOV'T CONTRACTOR 19, ¶ 201 (May 12, 2004).

[928] Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003) (amending 15 U.S.C. § 631 (2000)).

[929] Federal Acquisition Regulation; Procurement Program for Service-Disabled Veteran Owned Small Business Concerns, 69 Fed. Reg. 25,262 (May 5, 2004) (to be codified at 48 C.F.R. pts 2, 5, 6, 13, 14, 15, 19, 33, 36, and 52).

[930] *Id*.

[931] *Id.* Section 8(a), HUBZone, Small and Disadvantaged, and Women Owned Small Businesses are also eligible for the SDVOSB status if these businesses meet the requirements under this new rule. *Id*.; *see also SBA and FAR Council Create Service-Disabled, Veteran-Owned Small Business Set-Aside* 46 GOV'T CONTRACTOR 19, ¶ 201 (May 12, 2004).

[932] Comp. Gen. B-291530, Jan. 23, 2004, 2004 CPD ¶ 85; *see also Comp. Gen. Deems Agency Failure to Consider Teaming Agreement With Small Business for Best Value Determination Unreasonable*, 46 GOV'T CONTRACTOR 19, ¶ 205 (May 12, 2004).

[933] Burns and Jones each received a "good" rating for past performance and corporate experience. Both proposals received a "satisfactory" rating for staffing plan and work accomplishment. Burns received a "good–minus" and Jones a "good" rating for the small business, small disadvantaged business, and woman owned business program technical evaluation factor. *Burns*, 2004 CPD ¶ 85, at 3.

[934] In this teaming arrangement, Burns would have a small business, Ferguson-Williams, perform forty percent of the contract work. *Id.* at 6.

Burns protested to the GAO,[935] arguing that the Navy did not take into account a teaming arrangement Burns had with a small business to perform forty percent of the contract work.[936] Burns referenced both the solicitation which said the agency would evaluate the "extent of [small business] participation . . . in terms of the value of the total acquisition and the percentage of [the] subcontracted effort" and an amendment that required large businesses to "identify the extent of participation of small businesses in terms of the value of the total acquisition."[937]

The Comptroller General agreed, finding Burns' proposal clearly identified Burns' teaming agreement with Ferguson-Williams, identified Ferguson-Williams as a small business, and clearly stated that Ferguson-Williams would perform forty percent of the contract work. Thus, the GAO concluded that the Navy did not follow the directions contained in the solicitation, ruled that Burns may have been harmed by the Navy's technical evaluation of Burns' proposal, and recommended that the Navy re-evaluate the proposals consistent with the solicitation.[938]

In short, *Burns* instructs agencies to evaluate teaming arrangements and determine whether these arrangements comply with the stated evaluation criteria. In addition, *Burns* reminds agencies to always clearly advise offerors how the agency will evaluate submissions and then evaluate offers consistent with the stated criteria.

COFC Says Bid Preparation and Proposal Costs Incurred By Teammates Are Not Recoverable

In *Gentex Corp.*,[939] the COFC ruled that a company which has a teaming agreement with another company cannot recover bid preparation and proposal costs for its teammate when there is no legal obligation to reimburse its teammate for these costs. At an earlier hearing, the court concluded that the Air Force prejudiced Gentex by not notifying Gentex that it could "trade-off" a non-compliant solution for lower costs. However, instead of directing the Air Force to re-solicit, the court determined national security concerns required continued contract performance and directed that Gentex be awarded its bid preparation and proposal costs.[940]

Pursuant to the initial court order, Gentex submitted a claim for bid preparation and proposal costs. As part of its claim, Gentex sought approximately $248,000 for bid preparation and proposal costs on behalf of its two teammates. The government denied this part of the claim and this litigation followed.[941]

In reaching its conclusion that one teammate cannot recover bid preparation and proposal costs for another teammate, the court first considered the teaming agreements between the parties. The court noted that the parties agreed to pay for their own proposal costs.[942] Then, the court considered standing, explaining that in accordance with the Tucker Act[943] and the Competition in Contracting Act,[944] Gentex's teammates are not offerors and therefore do not have standing as interested parties.[945] The teammates did not submit an offer to the government like Gentex and there was no evidence that the parties formed a joint venture. Instead, the court explained, Gentex's two teammates are considered subcontractors and

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[935] Burns' proposed price proposed was $2,846,025 lower than Jones'. Although Burns' price was lower, the Navy determined that most of this difference resulted from the contract's indefinite-quantity work. After reviewing the historical data from the actual amount of work ordered from the indefinite-quantity part of past contracts, the Navy re-evaluated Burns' price advantage and concluded that Jones' price was one-half of one percent higher than Burns'. The Navy then balanced the proposed prices against the evaluation ratings and concluded that Burns' lower price did not offset the advantages offered by Jones and awarded the contract to Jones. *Id.* at 4.

[936] The Navy determined that it had only ordered thirty-seven percent of the indefinite-quantity work during the past five years. *Id.* at 3.

[937] *Id.* at 6. Apparently the original RFP's wording, the amendment to the RFP, and the Navy's evaluation of Burns' proposal confused Burns. Originally, the RFP listed the "Navy's goals in terms of [a] percentage of all subcontracted work in dollars" and advised offerors to submit subcontracting plans that demonstrated the extent of small business participation. Then, the agency's RFP explained that evaluations would consider "the extent of small businesses in terms of the total value of the acquisition" and required large businesses to "identify the extent of participation of small businesses in terms of the value of the total acquisition." *Id.*

[938] *Id.* at 8.

[939] 61 Fed. Cl. 49 (2004); *see also No B&P Costs for Teammates or Profit, Says COFC*, 46 GOV'T CONTRACTOR 25, ¶ 263 (June 30, 2004).

[940] *Gentex*, 61 Fed. Cl. at 50.

[941] *Id.*

[942] Gentex's agreement with ILC Dover specified "Each party shall bear its own costs during the proposal stage in support of winning the program." *Id.* at 52. Gentex's agreement with CUBRC said "Both CUBRC and GENTEX intend to expend a great deal of effort at their own expense with a view toward developing the best approach to the proposal." *Id.*

[943] 28 U.S.C. § 1491 (2000).

[944] Pub. L. No. 98-369, 98 Stat. 1175 (2004).

[945] *Gentex*, 61 Fed. Cl. at 52. An interested party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C.S. § 351(2) (LEXIS 2004).

teammates.[946]

GAO Sustains Size Protest

In *Tiger Enterprises*,[947] the GAO sustained a size protest and recommended that the Marine Corps terminate a small business set-aside contract awarded under "unusual and compelling" circumstances to a large business. The contract in question sought the lease and maintenance of washers and dryers. Initially, the Marine Corps set this contract aside for small businesses. Due to an error in the North American Industrial Classification System (NAICS) code and the selected size standard, the Marines mistakenly awarded the contract to a large business.[948] This mistake caused the Marine Corps to cancel the award and acquire these services without full and open competition under the "unusual and compelling" exception to the CICA.[949]

Although the Marine justification and approval document stated that it would synopsize this requirement and utilize full and open procedures when the urgent time constraints no longer existed, the Marines awarded a "temporary" contract to a large business.[950] Tiger protested the award to the SBA arguing that the awardee was a large business and therefore not eligible for award. Approximately six weeks later, the SBA released its opinion, agreeing that the awardee was "other than small."[951] Two days after the SBA's determination, the protester filed a protest with the GAO challenging the agency's "temporary contract" with a business that is "other than small."[952]

The agency suspended performance after the SBA ruling. The Marines asked the awardee to explain why the contract should not be terminated based on the awardee's false size certification. The awardee responded by explaining that the certification was made in good faith.[953] The Marines agreed and, accordingly, advised the Comptroller General that there was insufficient evidence to terminate the contract and explained that the Marines would proceed with contract performance.[954]

The GAO disagreed with the agency and sustained the protest. The GAO noted that SBA regulations specify that a "formal size determination becomes effective immediately and remains in full force unless and until reversed by [the Office of Hearings and Appeals]" and that a "timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest."[955] Furthermore, the Comptroller General observed that the awardee did not appeal the SBA's size determination and concluded that awarding a contract to a large business which is not eligible to receive the contract award would violate the integrity of the Small Business Act.[956]

In sum, the GAO recommended that the Marines terminate the awardee's contract and obtain these laundry services from a small business.[957]

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[946] The court implies that it may have reached a different outcome if the parties agreed in their written teaming agreement that Gentex was responsible for the bid and preparation costs of its teammates. *Gente*x, 61 Fed. Cl. at 53.

[947] Comp. Gen. B- 292815.3; 293439, Jan. 20, 2004, 2004 CPD ¶ 19.

[948] After the agency awarded the contract, the contracting officer concluded that the solicitation contained the wrong NAICS code and corresponding size standard. The contracting officer then terminated the contract for convenience. *Id.* at 2.

[949] The incumbent contractor was not interested in extending its contract and advised the Marines that it would remove its machines when the contract expired. Subsequently, the Marines executed a justification and approval document explaining that the "loss of laundry capabilities will significantly impact and degrade their overall health, welfare, and quality of life, thereby, impeding the mission of the Marine Corps." *Id.*

[950] This "temporary" contract included an eleven-month base period and three one-year option years. *Id.*

[951] *Id.*

[952] *Id.*

[953] The GAO does not explain why Tarheel thought its size certification was made in good faith. *Id.*

[954] *Id.*

[955] *Id.* at 3.

[956] *Id.*

[957] Tiger was also reimbursed reasonable costs for filing its protest. *Id.*

To Set Aside, a Contract Must Limit a Procurement to Small Businesses

In *Millennium Data Systems*,[958] the Comptroller General denied a protest challenging a task order issued to a Federal Supply Schedule contract holder that was not small, even though the task order was originally set aside for small disadvantaged businesses. The initial solicitation for information technology (IT) services included a NAICS code and set a small business size standard.[959] The agency revised the solicitation for the initial task order by deleting the original size standard. However, FAR clause 52.219-1, Small Business Program Representations, was inadvertently left in the revised solicitation.

The Environmental Protection Agency (EPA) placed the IT order with a business that was not small. Millennium, a small business, protested this decision. Millennium argued that the contract was still a set aside because the revised solicitation contained the clause at FAR section 52.219-1 and asserted that this solicitation should be a set-aside because the previous contract was set aside.[960]

The Comptroller General denied the protest, explaining that a government contract cannot be set aside unless the solicitation contains language that expressly identifies the procurement as a set-aside.[961] Here, the solicitation did not contain specific set-aside language. Instead, the solicitation generically provided space for agencies to identify the applicable NAICS code, the applicable size standard, and, space for offerors to declare their size status.[962] Furthermore, the solicitation included the standard clause at FAR section 52.219-1, which directs offerors to another section of the contract to learn more about any set-aside restrictions. This solicitation, however, did not contain additional instructions regarding a set-aside decision.[963] Because the solicitation lacked specific language, the GAO denied the protest, concluding that the agency did not set-aside this acquisition.[964]

Premature Issuance of COC Does Not Mandate Contract Award

In *Tenderfoot Sock Co. Inc.*,[965] the GAO concluded that a premature issuance of a certificate of competency (COC) does not require an agency to award a contract to the COC recipient. Here, the VA issued a small business set-aside RFP to manufacture socks for persons with diabetes. The agency instructed offerors to submit product samples for an initial testing. For the socks that passed this initial screening, the agency would evaluate the corresponding proposals on a technical, price and quality/past performance basis. After evaluation, the agency will award, without discussions, to the firm that offered the best value to the government.[966]

After the contracting specialist evaluated the socks and assessed the technical ratings, the contracting specialist considered Tenderfoot and other offerors for award. However, because the specialist could not make a financial responsibility determination for Tenderfoot, she forwarded the matter to the SBA for a COC determination.[967] After the agency sent this request to the SBA, the GAO received a protest from Apex Foot Health Industries, a competing offeror. The agency then suspended the procurement until the GAO resolved Apex's protest.[968]

While the GAO resolved Apex's protest, the SBA issued Tenderfoot a COC. After the GAO denied Apex's protest, the VA reviewed the technical evaluations and conducted a trade off analysis. The agency determined no quality difference existed between Tenderfoot's socks and Southern's, another offeror, to justify Tenderfoot's significantly higher price.[969]

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[958] Comp. Gen. B-292357.2, Mar. 12, 2004, 2004 CPD ¶ 48.

[959] The NAICS code was 541513 and the small business size standard was $21 million. *Id.* at 4.

[960] Millennium based its argument on the GSA manual which requires agencies to set aside FSS purchases when previous buys were set-asides. *Id.* at 9. The GAO rejected this argument, reasoning that FAR part 8, which exempts FSS task orders from set aside requirements, overrides any requirements in an internal GSA document. *Id.*

[961] *Id.* at 6.

[962] *Id.* at 7.

[963] *Id.*

[964] *Id.* at 6-7.

[965] Comp. Gen. B-293088.2, July 30, 2004, 2004 CPD ¶ 147. *See also GAO Rejects Assertion That COC Issuance Mandates Contract Award*, 46 GOV'T CONTRACTOR 32, ¶ 339 (Aug. 25, 2004).

[966] *Tenderfoot*, 2004 CPD ¶ 147, at 2.

[967] *Id.*

[968] *Id.*

[969] *Id.*

Noting Tenderfoot's price was $2.21 million more than Southern's, the agency determined that Southern offered the best value and awarded the contract accordingly.[970]

Tenderfoot protested the award, arguing that the SBA, by issuing a COC, determined that Tenderfoot was in line for award and that the agency could not change its initial decision to award to Tenderfoot.[971] The Comptroller General found no objection to the award to Southern, holding that the agency is not bound by a contract specialist's premature request for a COC determination. The GAO explained that because Tenderfoot was not otherwise in line for award, the VA was not required to award to Tenderfoot. The Comptroller General also stated that though the VA could not deny award to Tenderfoot based on non-responsibility matters, the agency "was not prohibited from . . . selecting another offeror for award based on a price/technical tradeoff in accordance with the RFP's evaluation scheme."[972]

COFC Revisits an SBA NAICS Code Determination

In *Red River Service, Corp. v. United States*,[973] the COFC, reversing an SBA finding, remanded a NAICS code determination to the agency for further consideration. The issue arose in an Air Force RFP for monthly operation and maintenance services for telecommunication systems covering four bases. To obtain these services, the contracting officer included the North American Industrial Classification Code System (NAICS) 811212, "Computer and Office Machine Repair and Maintenance" in the solicitation.[974] To qualify as a small business within this code category, a firm may not have more than $21 million in annual receipts.[975]

After seeing the solicitation's NAICS code, Red River called the contracting office and the local business specialist and requested that the Air Force change codes and use the "Wired Telecommunications Carriers" code instead.[976] To qualify as a small business within this code category, a firm may not have more than 1500 employees. Despite a recommendation from the Chief of the Contracting Division and the small business specialist to change codes, the contracting officer refused.[977]

Red River first appealed the code selection to the SBA. The SBA upheld the initial code selection, noting that the code 811212 best matches the statement of work and that Red River did not meet its burden to prove that the contracting officer's code selection was based on clear error of fact or law.[978] This protest to COFC followed.

The COFC first addressed jurisdiction. Although concluding that it did not have jurisdiction to review the SBA's NAICS determination, the COFC held that it has jurisdiction over this case because Red River is an interested party.[979] That is, Red River demonstrated a connection to the procurement and has an economic interest in the procurement.[980]

On the merits, Red River alleged the Air Force, in selecting the wrong NAICS code, "violated a statute or regulation in connection with a procurement" and requested a preliminary injunction stopping the Air Force from proceeding with the contract.[981] The COFC agreed. The court noted that the solicitation repeatedly used the word "telecommunication" or a

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[970] Tenderfoot's price was $3.78 million and Southern's $1.57 million. In addition, the agency rated Tenderfoot "very good" in the technical category and "highly acceptable" in past performance and rated Southern "acceptable" in both technical and past performance. The agency ultimately determined that Tenderfoot's better technical rating did not merit Tenderfoot's higher price. *Id.*

[971] *Id.* (relying on FAR sections 9.103(b), 9.104-3(d), and 19.602-4).

[972] *Id.* at 3.

[973] 60 Fed. Cl. 532 (2004).

[974] *Id.* at 533.

[975] *Id.* at 534.

[976] The NAICS number for this classification is 517110. *Id.*

[977] *Id.*

[978] *Id.* at 535.

[979] The COFC exercised jurisdiction pursuant to the Tucker Act. 28 U.S.C. § 1491 (2000). *Red River*, 60 Fed. Cl. at 538.

[980] The court found that, in accordance with the CICA, Red River was a protester who had the intent of submitting an offer in response to the solicitation, had a direct economic interest in being awarded the contract, and that the Air Force was not likely to solicit these services for another seven years. *Id.* at 539.

[981] *Id.* at 535.

derivative thereof,[982] and contrasted it with the selected "Computer and Office Machine Repair and Maintenance" NAICS code. This code continually used the word "computer" or a derivative thereof.[983] Highlighting the discrepancy between the solicitation's expressed needs and the NAICS code language, the court remanded the matter to the agency for further consideration.[984]

In addition, the court observed that the contracting officer did not give "primary consideration to the relative value and importance of the components of the procurement" when selecting the Computer and Office Machine Repair and Maintenance NAICS code. Furthermore, the determination that 63%-73% of the procurement is more closely related to telecommunications system maintenance than to computers also supported the court's ruling.[985]

GAO: Bundling Is Okay Here

In *Teximara, Inc.*,[986] the GAO held that the Air Force did not violate laws prohibiting contract bundling when it consolidated grounds maintenance work with thirteen other base operations support functions.[987] Teximara, a small business that performs grounds maintenance, protested the decision to consolidate the grounds maintenance work. It alleged the Air Force's consolidation decision violated the FAR's requirement to maximize small business opportunities as prime contractors and identify alternative strategies that reduce or minimize contract bundling.[988] The GAO denied the protest.[989]

The Comptroller General found that the Air Force did, in fact, maximize small business opportunities. For example, the agency set aside a satisfactory amount of prime contract dollars for small businesses; required a minimum small business participation of twenty-five percent under the larger base operation contract; encouraged a greater amount of small business participation through the contract's award fee incentive clause; and reserved approximately $15 million worth of construction and other miscellaneous work for small businesses.[990]

Noting the Air Force, in its acquisition plan, intended to set aside approximately $24.6 million to small businesses in this procurement, the GAO found the Air Force satisfied the FAR's requirement to "maximize small business participation in a manner consistent with its need for cost savings and efficiency."[991]

Lastly, the GAO rejected Teximara's allegation that the Air Force failed to identify alternative strategies for minimizing the effect of contract bundling. In reaching this conclusion, the GAO noted that the Air Force considered conducting two base operation studies, four or five studies on smaller bundled functions and seventeen separate studies that bundled no functions.[992] In addition, the Air Force considered withdrawing the grounds maintenance work from the underlying consolidated contract and awarding it as a separate, small business set-aside contract. However, after "considering the efficiencies" it would lose by not bundling, the Air Force did not pursue this idea.[993]

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[982] The solicitation read in part: "Base Telecommunications System (BTS) that will provide equipment and transmission media to support base telecommunications. The major groups of equipment that comprise the BTS are switching systems, switched associated and ancillary equipment, outside and inside cable plant, ancillary equipment, and premise equipment." *Id.* at 542.

[983] NAICS 811212 reads: "This U.S. industry comprises establishments primarily engaged in repairing and maintaining computers and office machines without retailing new computers and office machines, such as photocopying machines; and computer terminals, storage devices, printers; and CD-ROM drives." *Id.* at 543.

[984] *Id.* at 545.

[985] *Id.* at 548.

[986] Comp. Gen. B-293221.1, July 9, 2004, 2004 CPD ¶ 147. The case's competition-related bundling issues are discussed *supra* section titled Competition.

[987] This RFP was one of two solicitations issued as part of an *OMB Circular A-76* study of seventeen base operations support functions. In this RFP, the Air Force consolidated nine civil engineering functions—the base's housing, operation and maintenance, grounds and site maintenance, emergency management, utilities and energy management, engineering services, environmental management, resources management, and space management with community services, human resources, supply services, marketing and publicity, and weather support. 2004 CPD ¶ 147, at 1.

[988] "Substantial bundling" is any bundling that results in a contract or order that meets the dollar amounts specified in FAR section 7.104(d)(2). When the proposed acquisition strategy involves substantial bundling, the "acquisition strategy must additionally . . . specify actions designed to maximize small business participation as contractors . . . [and] subcontractors . . . [and] [i]dentify alternative strategies that would reduce or minimize the scope of the bundling . . . ." FAR, *supra* note 20, at 7.107.

[989] *Teximara*, 2004 CPD ¶ 147, at 2.

[990] The GAO redacted the small businesses set-aside amount from the record. *Id.* at 6.

[991] *Id.* at 11.

[992] *Id.* at 12.

[993] *Id.*

In sum, *Teximara* demonstrates that an agency can bundle contracts and prevail in litigation if the agency thoroughly plans the acquisition and documents its file throughout the contract planning and award stages.

Randolph Shepard Act

GAO Will Not Consider Protests from State Licensing Agencies for The Blind

In *Washington State Department of Services for the Blind,*[994] the Army issued an RFP to obtain a food services contract. The RFP stated that the procurement would comply with the Randolph-Sheppard Act and would also be set aside for small businesses. The RFP also instructed potential offerors that if the State Licensing Agency (SLA) was included in the competitive range and would have a reasonable chance for award, the government would only negotiate with the SLA.[995]

The Washington State Department of Services for the Blind (WSDSB)[996] was the only firm that submitted a proposal on time. However, the agency eliminated WSDSB's proposal from consideration because its price was excessive.[997] WSDSB protested the Army's decision to eliminate its offer to the GAO.

Ultimately, the Comptroller General dismissed the protest, concluding that GAO does not have jurisdiction to hear SLA challenges to an agency's decision to eliminate an SLA's offer from consideration, thereby not awarding a contract to a SLA. Instead, the GAO, citing 20 U.S.C. section 107, explained that the Secretary of Education has exclusive authority to conduct binding arbitration hearings involving SLAs and contracting agencies.[998] Under this authority, only the Secretary can resolve disagreements between an SLA and a procuring agency when an SLA alleges that a procuring agency has not complied with the Randolph-Sheppard Act.[999]

RSA Does Not Apply To Dining Facility Contract For Attendant Services

In another Randolph-Sheppard case from Fort Lewis, *Washington State Department of Services for the Blind and Robert Ott v. United States* (*Ott*),[1000] the COFC held that a contracting officer did not act "arbitrar[ily] capricious[ly], abuse [his] discretion or otherwise [violate] the law" when Fort Lewis did not apply the RSA to a contract for dining facility attendant services.[1001]

In *Ott*, Fort Lewis issued an initial solicitation to procure "Dining Facility Attendants and Full Food Services" as one contract.[1002] Fort Lewis intended to award this contract as an 8(a) set-aside.[1003] The Washington State Department of

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[994] Comp. Gen. B-293698.2, April 27, 2004, 2004 CPD ¶ 84. For a current overview of the Randolph-Sheppard Act, see Major Erik Christiansen, *The Applicability of the Randolph-Sheppard Act to Military Mess Halls*, ARMY LAW., Apr. 2004, at 1.

[995] 2004 CPD ¶ 84, at 1.

[996] The WSDSB is the designated SLA for this procurement. *Id*. at 2.

[997] Fort Lewis concluded this after comparing WSDSB's offer to the government's independent estimate and the current contract price. *Id*. at 3.

[998] *Id*. at 2.

[999] *Id*. The Randolph-Sheppard Act states:

> Whenever any [SLA] determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of [the Act] or any regulations issued thereunder . . . such [SLA] may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute . . . and the decision of such panel shall be considered final and binding on the parties except as otherwise provided in this chapter.

Id. at 2 (citing 20 U.S.C. § 107(d)(1)(b)(2000)).

[1000] 58 Fed. Cl. 781 (2003).

[1001] *Id*. at 783. The attendant services in this procurement included:

> (1) [p]repare, maintain and clean dining areas, (2) [c]lean tableware, (3) [c]lean spills and remove soiled dinnerware occasionally left by diners, (4) [c]lean dining room tables, chairs, booths, walls, baseboards, windows . . . ledges, doors/doorframes, ceiling fans, . . . light fixtures, . . . drapes, curtains, and Venetian blinds, (5) remove and replace tablecloths when stained or heavily soiled, (6) [c]lean all non-food contact surfaces, (7) [c]lean and sanitize all food contact surfaces, including dinnerware, utensils, and trays, (8) [c]lean floors and floor coverings in all areas, (9) [w]ax and buff floors, (10) [d]iscard garbage, (11) [c]lean restrooms.

Id.

[1002] *Id*. at 782.

[1003] *Id*.

Services for the Blind (WSDSB) and a blind vendor, Mr. Robert Ott, did not qualify as an 8(a) vendor so they challenged the set-aside decision.[1004] They argued to the Department of Education that the RSA gave them priority for this dining hall contract. Their initial appeal was successful, as the Department of Education agreed that the RSA applied to this procurement.[1005] Although disagreeing with this opinion, Fort Lewis withdrew the initial solicitation and then re-issued two solicitations: one for full food services, the second for dining facility attendant services.[1006] The WSDSB challenged the dining facility attendant services contract at the COFC, seeking a temporary restraining order enjoining Fort Lewis from proceeding with the contract. In addition, the WSDSB asked the COFC to determine if the RSA applied to this procurement.[1007]

The court first determined that it had jurisdiction to interpret the term "operation of a vending facility."[1008] Then, in resolving whether the contracting officer acted arbitrarily or capriciously, abused his discretion, or otherwise violated the law, the court considered the legislative history[1009] of the RSA and the plain meaning of the terms "operate" and "operation."[1010] The court also reviewed Department of Education policy letters[1011] and existing case law. In the end, the COFC held that the contracting officer's decision not to apply the RSA to the dining facility attendant contract was reasonable and concluded that the court would not substitute its opinion for the contracting officer's finding.[1012]

Foreign Purchases

DFARS Adds Ten Members of European Union to Trade Agreements Act List

Effective 25 June 2004, the DFARS added the following ten new European Union Member States to the list of countries whose products the DOD may acquire under the Trade Agreements Act: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia.[1013]

Environmental Issues

DOD Issues New Green Procurement Program

The DOD is changing its approach to environmental contracting. Philosophically, the DOD no longer thinks that "simply complying with environmental laws and regulations is enough."[1014] Instead of limiting its environmental compliance programs to ensuring that DOD activities do not violate the law, the DOD is improving the environment by requiring DOD agencies to seek out and buy "green friendly" products and services.[1015]

On 1 September 2004, the DOD released a new agency-wide "green procurement policy" (GPP) that seeks to "affirm . . . a 100-percent compliance with federal laws and executive orders [that] requir[e] purchase of environmentally

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[1004] *Id*.

[1005] *Id*.

[1006] *Id*. at 783.

[1007] *Id*. at 782. In an unrelated case, the Tenth Circuit held that the RSA applied to procurements for military mess halls; the Department of Education has authority to regulate the military's procurement of mess hall contracts; that the RSA is an exception to CICA's full and open competition requirement; and, that the specific wording of the RSA trumps the more generalized Javits-Wagner-O'Day Act when determining what priority applies to procuring military mess hall contracts. *See* Nish v. Rumsfeld, 348 F.3d 1263 (2003).

[1008] 58 Fed. Cl. at 787.

[1009] *Id*. at 792.

[1010] *Id*. at 789.

[1011] *Id*. at 794.

[1012] The COFC did not issue a temporary restraining order. *Id*. at 797.

[1013] Defense Federal Acquisition Regulation Supplement; Designated Countries - New European Union Members, 69 Fed. Reg. 35,535 (June 25, 2004) (to be codified at 48 C.F.R. pt. 252).

[1014] U.S. Dep't of Defense, *Office of the Assistant Secretary of Defense (Public Affairs) News Release, at* http://www.defenselink.mil/release/2004/nr20049011208.html (last visited 10 Nov. 2004) (discussing the DOD Green Procurement Policy).

[1015] Examples of environmentally friendly products include products made from recycled materials and biomass-produced goods. Biomass uses agricultural and organic wastes to create renewable energy such as electricity and industrial process heat and steam. U.S. Air Force, *Air Force Link (American Forces Press Service)*, *at* http://www.af.mil/news/story.asp?storyID=123008998 (last visited 10 Nov. 2004) (discussing the DOD Green Procurement Policy).

friendly . . . products and services."[1016] Officially, the stated purpose of the GPP is to "to enhance and sustain mission readiness through cost effective acquisition that achieves compliance and reduces resource consumption and [reduces] solid and hazardous waste generation."[1017]

To nurture this procurement policy, the DOD is fostering a close partnership between the environmental and procurement communities. Accordingly, DOD personnel will undergo required training to learn where and how to buy "green products and green services."[1018] In addition, the DOD is also developing a catalog to help procurement personnel locate "green products."[1019]

Lastly, the GPP does not require the agencies to buy green products and services that are more expensive, are scarce or have other limitations. Furthermore, the GPP applies to all acquisitions from major systems programs to individual unit supply and services acquisitions.[1020] Finally, the DOD is requiring agencies to compile metrics and report its compliance with the GPP.[1021]

Multiyear Procurement Authority for Environmental Remediation Services at Military Installations—Final Rule

Last year's *Year in Review*[1022] advised that the DOD, pursuant to section 827 of the National Defense Authorization Act for FY 2003, issued an interim rule authorizing DOD agencies to enter into multiyear contracts for environmental remediation services for military installations.[1023] On 13 May 2004, this interim rule became final.[1024] The final rule is identical to the interim rule.

Major Steven Patoir.

Federal Prison Industries

Last year's *Year in Review* discussed the clarifying rules regarding the requirement to conduct market research and use competitive procedures to acquire products if Federal Prison Industries (FPI) products are not comparable in terms of price, quality, and time of delivery.[1025] Effective 26 March 2004, no FY 2004 funds may be expended for FPI products or services unless the agency determines FPI offers the best value to the agency.[1026] The FAR Councils also finalized the requirement to seek a waiver from FPI for purchases at or below $2500.[1027]

[1016] U.S. Dep't of Defense, *Department of Defense Green Procurement Strategy*, *at* http://www.defenselink.mil/releases/2004/nr20040901-1208.html (last visited 10 Nov. 2004) [hereinafter DOD Green Procurement Strategy]. The DOD considers this document to be a "living document," which will be maintained and updated regularly. The GPP's objectives are: (1) educate DOD employees on the requirements of the Federal "green" procurement preference programs, the DOD employees' roles and responsibilities in these programs, and the opportunities to purchase green products and services; (2) increase the purchases of green products and services consistent with the demands of mission, efficiency, and cost effectiveness; (3) reduce the amount of solid waste generated; (4) reduce the consumption of energy and natural resources; and, (5) expand the market for green products and services. *Id*.

[1017] *Id*.

[1018] The objective is to raise DOD's awareness of "green opportunities" to the point that "buying green" becomes incorporated into DOD's daily operations. GreenBizLeaders, *DOD Officials Salute New Green Procurement Policy*, *at* http://www.greenbizleaders.com/NewsDetail.cfm?NewsID=27316 (last visited 10 Nov. 2004) (discussing DOD's green procurement policy).

[1019] DOD Green Procurement Strategy, *supra* note 1016.

[1020] *Id*.

[1021] DOD agencies will submit the DD Form 350 to report GPP metrics. *Id*.

[1022] *2003 Year in Review, supra* note 29, at 137.

[1023] Defense Federal Acquisition Regulation Supplement; Multiyear Procurement Authority for Environmental Services for Military Installations, 68 Fed. Reg. 43,332 (July 22, 2003) (to be codified at 48 C.F.R. pt. 217).

[1024] Defense Federal Acquisition Regulation Supplement; Multiyear Procurement Authority for Environmental Services for Military Installations, 69 Fed. Reg. 26,507 (May 13, 2004) (to be codified at 48 C.F.R. pt. 217).

[1025] *2003 Year in Review*, *supra* note 29, at 49.

[1026] Federal Acquisition Regulation; Purchases From Federal Prison Industries—Requirement for Market Research, 69 Fed. Reg. 16,148 (Mar. 26, 2004) (to be codified at 48 C.F.R. pts. 8, 19, 42, and 52).

[1027] Federal Acquisition Regulation; Increased Federal Prison Industries, Inc. Waiver Threshold, 68 Fed. Reg. 69,249 (Dec. 11, 2003) (to be codified at 48 C.F.R. pt. 8).

DFARS Updates

The *2002 Year in Review* reported on the market research requirement to determine whether FPI products are comparable to products available in the commercial market.[1028] On 14 November 2003, the DOD issued a final rule amending the DFARS to implement this requirement.[1029] The rule requires a written determination and the supporting rationale explaining the market research assessment[1030] The final rule also prohibits DOD contractors from requiring use of FPI as a subcontractor[1031] and inmate access to classified or sensitive information.[1032]

On 23 February 2004, the DOD issued a proposed rule to remove the Trade Agreements Act[1033] and Buy American Act[1034] from the list of laws inapplicable to subcontracts of commercial items.[1035] Because the Government does not apply the Buy American Act or the Trade Agreements Act restrictions at the subcontract level, inclusion of these laws on the list is unnecessary.[1036] The DOD's goal for the removal is to eliminate erroneous interpretations that have occurred.[1037]

Major Bobbi Davis.

Labor Standards

Regulation Updates

The FAR Councils proposed several changes to the FAR relating to labor standards in construction contracts.[1038] The Councils propose revising the definitions of "construction, alteration, or repair"[1039] and "site of the work"[1040] to conform

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[1028] *2002 Year in Review*, *supra* note 300, at 55.

[1029] Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases From a Required Source, 68 Fed. Reg. 54,559 (Nov. 14, 2003).

[1030] *Id*. at 64,561.

[1031] *Id*.

[1032] *Id*.

[1033] 19 U.S.C.S. § 2512 (LEXIS 2004).

[1034] 41 U.S.C.S. § 10.

[1035] Defense Federal Acquisition Regulation Supplement; Laws Inapplicable to Commercial Subcontracts, 69 Fed. Reg. 8151 (Feb. 23, 2004).

[1036] *Id*.

[1037] According to the DOD:

> In some cases, inclusion of the Buy American Act on the list of laws inapplicable to subcontracts for commercial items has been misinterpreted to mean that commercial components do not count in the calculation of whether domestic components exceed 50 percent of the value of the components of an end item. This is an erroneous interpretation, because the prime contractor must still comply with the Buy American Act when using commercial components . . . . In addition, inclusion of the Buy American Act and the Trade Agreements Act on the list has been misinterpreted to mean that the prime contractor need not comply with the Acts for subcontracted end items. This is also erroneous because, in accordance with FAR 12.501, waiver of the Buy American Act or the Trade Agreements Act is not applicable if the prime contractor is reselling or distributing commercial items of another contractor without adding value.

Id.

[1038] Federal Acquisition Regulation; Labor Standards for Contracts Involving Construction, 68 Fed. Reg. 74,403 (proposed Dec. 23, 2003) (to be codified at 48 C.F.R. pts. 22, 52, and 53).

[1039] The definition of "construction, alteration, or repair" now includes the transportation of materials and supplies between the site of work, the physical place of the construction (the primary site of the work) and any secondary "sites where a significant portion of the building or work is constructed," if the site is established specifically for the contract. This includes fabrication plants, factories and batch plants, etc., if they are "adjacent or virtually adjacent to the 'site of work.'" *Id*. at 74,406.

[1040] The proposed rule defines "site of the work" as:

> (1) the physical place or places where the construction called for in the contract will remain when the work on it is completed is completed (primary site of the work);
>
> (2) any secondary site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the construction or project; and
>
> (3) . . . fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the "site of the work."

to the Department of Labor's (DOL) revised definitions.[1041] The DOL revised the definitions pursuant to appellate court decisions,[1042] which concluded the DOL's application of the regulatory definitions was at odds with the language in the Davis-Bacon Act (DBA).[1043] The proposed rule revises the "site of work" definition to include material or supply sources or toll yards within the meaning of the "site of work" only when such sources or toll yards are dedicated to the covered construction project and are adjacent to or virtually adjacent to where the building or work is being constructed.[1044]

The FAR Councils have also proposed changes to the definitions of "apprentice,"[1045] "trainee,"[1046] "building or work," and "public building or public work."[1047] In addition, a revision clarifies the Contract Work Hours and Safety Standards Act (CWHSSA)[1048] flow down requirements.[1049] A change to the "statement and acknowledgment" form ensures subcontractor certification only occurs if the contractor includes the "Contract Work Hours and Safety Standards Act overtime compensation clause" in its contract.[1050] Other proposed changes include requiring funds withheld under the Davis Bacon Act to be directed to the Comptroller General for payment to owed employees[1051] and minor administrative updates to various clauses.[1052]

Wage Determinations Available Online

In a collaborative effort between various federal agencies, wage determinations for the Service Contract Act[1053] and the DBA are now available online.[1054] Wage Determinations On-Line (WDOL) provides one-stop access for wage determinations. Officials expect WDOL to improve the speed of the procurement process and provide for consistent application of labor laws.[1055] The DOL regulations and the FAR will be revised to implement the WDOL process.[1056]

The "site of the work" definition excludes secondary sites of work if they are permanent establishments and a particular federal contract does not determine their placement or continuance. *Id*.

[1041] The DOL finalized its revisions on 20 December 2000. *See* Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act), 65 Fed. Reg. 80,268 (Dec. 20, 2000) (codified at 29 C.F.R. pt. 5).

[1042] *See, e.g*., Bldg. and Constr. and Trades Dep't., AFL-CIO v. United States Dep't of Labor Wages Appeals Bd., 932 F.2d 985 (D.C. Cir. 1991); Ball, Ball, and Brossamer v. Reich, 24 F. 3d 1447 (D.C. Cir. 1994); and L.P. Cavett Co. v. U.S. Department of Labor, 101 F.3d 111 (6th Cir. Ct. 1996). *See also* 65 Fed. Reg. at 80,270.

[1043] *See* 40 U.S.C.S. § 3142 (LEXIS 2004). The DBA requires minimum wages for laborers and mechanics employed directly on the site of work in a construction contract. *Id*.

[1044] 68 Fed. Reg. at 74, 404.

[1045] The FAR Councils propose listing the definition of apprentice separately. Currently the definition is listed as a subcategory of laborer and mechanic. *Id*.

[1046] The proposal also lists the definition of trainee separately. Currently the definition is listed as a subcategory of laborer and mechanic. *Id*.

[1047] The terms "building or work" and "public building or work" have been combined into a single term of "building or work." *Id*.

[1048] 40 U.S.C.S. §§ 327-333.

[1049] The clause at FAR section 52.222-11 requires contractors and subcontractors to include certain requirements in their contracts with subcontractors. The proposed changes clarify that the requirements only flow down to subcontracts for construction within the United States. In addition the clarification provides the CWHSSA does not flow down unless it is included in the contract. Because the threshold for the CWHSSA is $100,000 and the threshold for the Davis-Bacon Act is $2000, whether the clause flows down depends on the dollar value of the construction contract. 68 Fed. Reg. at 74,404.

[1050] The form is Standard Form 1413, Statement and Acknowledgement. 68 Fed. Reg. at 74,405.

[1051] In a previous FAR change, the FAR Councils incorrectly changed FAR section 22.406-9(c) to allow the Secretary of the Treasury to withhold funds under the DBA. The proposed change solely identifies the Comptroller General as the withholding authority. *Id*.

[1052] The changes include adding "primary site of work" within various clauses based on the definitional changes, as well as inserting plain language changes to FAR section 22.407 and the clause at FAR section 52.222-11, Subcontracts (Labor Standards). 68 Fed. Reg. at 74,405.

[1053] 41 U.S.C.S. §§ 351-358 (LEXIS 2004).

[1054] Memorandum, Office of the Under Secretary of Defense, Acquisition, Technology, and Logistics, to Directors, Defense Agencies et al., subject: Wage Determinations On-Line (WDOL) (Apr. 29, 2004). The Military Departments, Department of Labor, Office of Management and Budget, General Services Administration, Department of Energy, and the Department of Commerce worked together on the project. *Id*.

[1055] The wage determinations are available on-line at http://www.wdol.gov. The project was developed within the Federal eGov Integrated Acquisition Environment (IAE) initiative. *Id*.

[1056] *Id*.

Service Contract Act

No Arms Length CBA, No Increased Wages

Under the Service Contract Act (SCA),[1057] a contracting agency is not required to grant a contractor a price adjustment under a collective bargaining agreement (CBA) providing for increased wages if the CBA is negotiated after contract award or execution of an option.[1058] In *Guardian Moving and Storage Co., Inc.*,[1059] the National Security Agency (NSA) awarded a contract to Guardian for cartage and drayage services for a base period beginning 20 November 2000 and ending 30 September 2001.[1060] The contract included options for four fiscal years.[1061] The contract also incorporated the SCA and included a wage determination (WD) that incorporated a CBA.[1062] The NSA exercised the first option to extend the performance period through FY 2002 and ending 30 September 2002.[1063] On 11 July 2002, however, the NSA notified Guardian and the union that based on new requirements the NSA intended to issue a new contract when the first option period ended.[1064] That same day, the NSA notified the DOL of its intent to issue a new solicitation and requested a wage determination.[1065] The new solicitation included labor categories not covered under the CBA.[1066] The DOL responded on 7 August 2002, reissuing the old WD and a new WD for the new labor categories.[1067]

On 2 September 2002, the NSA requested Guardian extend the contract performance period through 30 November 2002.[1068] On 24 September, Guardian sent the NSA a new CBA dated 24 September 2002.[1069] The CBA contained a conditional agreement stating the CBA would only be effective if the DOL issued a WD with an effective date of 1 October 2002, the date the NSA anticipated awarding the new contract.[1070] On 26 September, the NSA submitted the request for a WD to the DOL.[1071] The request included a copy of the new CBA and expressed the NSA's concern with the contingency clause.[1072] On 18 October 2002, a bilateral modification extended the performance period through 30 November 2002.[1073] The modification did not add the new WD or incorporate the new CBA.[1074]

On 29 October 2002, the NSA again requested Guardian extend the contract performance period through 31 January 2003.[1075] In November, the DOL issued two WDs responding to NSA's 26 September request.[1076] The DOL incorporated the new CBA in the original WD with an effective date of 1 October 2002 through 30 October 2004.[1077] The response failed to address the conditional agreement of the CBA.[1078] On 18 November 2002, the NSA requested the DOL to respond to the concerns it raised about the CBA's contingency provision.[1079] On 10 December 2002, the NSA issued another bilateral

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[1057] 41 U.S.C.S. §§351-388.

[1058] *Id.*

[1059] Guardian Moving and Storage Co., Inc., ASBCA Nos. 54248, 54479, 2004 ASBCA LEXIS 96 (Dec. 23, 2004).

[1060] *Id.* at *2.

[1061] *Id.*

[1062] *Id.*

[1063] *Id.* at *3.

[1064] *Id.*

[1065] *Id.*

[1066] *Id.*

[1067] *Id.* at *4.

[1068] *Id.*

[1069] *Id.*

[1070] *Id.*

[1071] *Id.* at *5.

[1072] *Id.*

[1073] *Id.*

[1074] *Id.*

[1075] *Id.*

[1076] *Id.*

[1077] *Id.*

[1078] *Id.*

[1079] *Id.*

modification extending the period of contract performance through 31 January 2003.[1080] The modification did not include the new WD for new labor categories or incorporate the WD with the new CBA.[1081]

On 18 December 2002, the NSA received notice that the DOL rescinded the WD incorporating the new CBA.[1082] The DOL stated the contingency "agreement reflects a lack of arm's-length negotiations" and limits the contractor's obligation to comply with the SCA.[1083] The DOL advised the NSA that Guardian and the union could remove the clause from the CBA and request the NSA to resubmit the request for a WD, accept the original WD, or appeal the DOL's determination that the CBA did not reflect an arm's-length negotiation.[1084] On 10 January 2003, Guardian and the Union amended the CBA.[1085] The amended CBA removed the contingency clause, included the new labor categories, and back dated the agreement to 1 August 2002.[1086] On 13 January 2003, the NSA requested a WD from the DOL based on the amended CBA.[1087] On 23 January and 11 February, the NSA issued bilateral modifications extending the period of performance through 14 February and 28 February, respectively.[1088] The modifications did not incorporate the new CBA or its amended agreement.[1089] On 14 February 2003, the DOL reissued the 12 November 2002 WDs with no changes.[1090] That same day, the NSA requested the DOL address the effect of the CBA amended on 10 January 2003.[1091] On 5 March 2003, the NSA accepted the original WD dated 14 February 2003.[1092] The original WD included the amended CBA dated 10 January 2003.[1093] The NSA issued additional bilateral modifications on 6 March, 14 March, and 28 March to extend the performance period; however, only the last modification incorporated the WD with the amended CBA.[1094]

On 5 May 2003, Guardian submitted a certified claim for increased wages for work performed under the contract from 1 October 2002 through 28 March 2003.[1095] The contracting officer denied the claim arguing the NSA was not required to reimburse Guardian for retroactive application of the CBA.[1096] Guardian requested clarification from the DOL regarding whether it was required to pay its employees under the CBA retroactively to 1 October 2002.[1097] The DOL required Guardian to pay its employees in accordance with the CBA, as amended, retroactive to the effective date, 1 October 2002.[1098] The response did not, however, require the NSA to pay a price adjustment or apply the WD retroactively to the contract.[1099]

On 18 September 2003, Guardian submitted a revised certified claim for the two week period beginning 14 March.[1100] The contracting officer issued a final decision denying the price adjustment for 14 through 28 March. Guardian appealed to the ASBCA arguing the price adjustment clause required the NSA to reimburse Guardian for complying with the CBA as of 1 October 2002.[1101] The NSA argued the DOL should rescind the WD incorporating the new CBA because the

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[1080] *Id*. at *6.

[1081] *Id*.

[1082] *Id*.

[1083] *Id*.

[1084] *Id*. at *7.

[1085] *Id*. at *8.

[1086] *Id*.

[1087] *Id*.

[1088] *Id*.

[1089] *Id*.

[1090] *Id*.

[1091] *Id*.

[1092] *Id*. at *9.

[1093] *Id*.

[1094] *Id*.

[1095] *Id*. at *10. Guardian's claim sought $372,897.82 in increased wages. *Id*.

[1096] *Id*.

[1097] *Id*. at *11.

[1098] *Id*.

[1099] *Id*.

[1100] *Id*. at *12. Guardian claimed $18,346.67 in increased wages. On 23 September, Guardian revised the amount of the original claim to $354,551.15. On 21 October 2003, Guardian withdrew the 18 September claim and submitted a revised certified claim for $34,808.54 under the price adjustment clause. *Id*.

[1101] *Id*. at *13.

CBA was contingent on a DOL WD and a contract modification to incorporate the WD in the contract.[1102] The NSA also argued new WDs and new CBAs only apply to full-term successor contracts, not bilateral modifications.[1103] The ASBCA disagreed.

The ASBCA first decided what constitutes a new contract. The government argued contract extensions are not new contracts.[1104] The ASBCA determined that pursuant to the SCA, "whenever the terms of an existing contract are extended pursuant to an option clause or otherwise, the contract extension is considered to be a new contract."[1105] Therefore, each bilateral modification constitutes a new contract for SCA purposes.[1106] Because the SCA is self-executing, "the wages and benefits in a CBA are required to be recognized as the minimum wages and benefits for subsequent new contracts by operation of law."[1107] Therefore, NSAs receipt of the 10 January 2003 amended CBA required the NSA to reimburse Guardian for wage increases for any subsequent contract extension.[1108] The NSA owed Guardian increased wages for the modification issued on 23 January, covering a period of performance from 1 February 2003 through 14 February 2003.[1109] Unfortunately for Guardian, the contingency CBA resulted in the loss of reimbursement from 1 November 2002 through 31 January 2003.

We Goofed

In *Raytheon Aerospace*,[1110] the Air Force and an employee under the contract requested the DOL review a decision of the Administrator of the Wage and Hour Division (Administrator) within the DOL.[1111] Under the contract, Raytheon provides maintenance and logistical support for the Air Force C-21A fleet at various locations in the United States and abroad.[1112] The Air Force concluded the Walsh-Healey Public Contracts Act (PCA),[1113] not the SCA, applied to the contract.[1114] As a result, the Air Force did not include the SCA provisions or the applicable WDs in the contract.[1115]

The Administrator determined that the SCA did not apply in eight years of a ten year maintenance and logistical support contract for the Air Force's C-21A aircraft fleet.[1116] The contract included contractor logistical support which furnished the Air Force "organizational level maintenance services for the C-21A fleet."[1117] The base supply portion of the contract consisted of a parts supply store staffed by service personnel.[1118] After a lengthy investigation, the Administrator changed a previous decision and applied the SCA to the contract.[1119] The Administrator found the "day-to-day work" included "fueling, washing, towing the aircraft, servicing, testing, and repairing avionics, . . ." which are services covered by the SCA.[1120] The Administrator concluded the Air Force correctly classified major aircraft engine overhaul and repair work

[1102] *Id*. at *14. The NSA could have but did not request a hearing at DOL regarding the issue of the arm's-length agreement. *Id*. at *25.

[1103] *Id*. at *15.

[1104] *Id*. at *21.

[1105] *Id*.

[1106] *Id*. at *24.

[1107] *Id*. at *21.

[1108] *Id*. at *28.

[1109] *Id*.

[1110] Raytheon Aerospace, ARB Nos. 03-017, 03-019 (ARB May 21, 2004), *available at* http://www.oalj.dol.gov.

[1111] *Id*. at 1.

[1112] *Id*. at 3.

[1113] *See* 41 U.S.C.S. § 35 (LEXIS 2004). The PCA applies to federal contracts for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000. *Id*. The DOL has not enforced the PCA's prevailing wage provisions since the D.C. Court of Appeals held the Act required the DOL to conduct hearings to determine the prevailing wages under the statute. Wirtz v. Baldor Elec. Co., 337 F.2d 518 (D.C. Cir. 1963). The Secretary of Labor enforces the PCA by requiring employers to pay at least the federal minimum wage required under the Fair Labor Standards Act (29 U.S.C. S. § 201). 41 U.S.C.S. § 35.

[1114] *Raytheon Aerospace*, ARB Nos. 03-017, 03-019, at 3.

[1115] *Id*. at 2.

[1116] *Id*. at 3.

[1117] *Id*.

[1118] *Id*.

[1119] *Id*.

[1120] *Id*. at 4. The Administrator did not have enough information to classify other subcontractor work because the Air Force and the contractor failed to provide more specific information. *Id*. at 5.

by a subcontractor as "remanufacturing" work covered by the PCA.[1121] The Administrator, however, ruled against retroactive application of the SCA and only applied the SCA to the two remaining years of the contract.[1122] The Air Force and the intervenor (the parties) requested the Administrative Review Board (the Board) to determine if the Administrator correctly determined the "principal purpose" of the contract was to provide services.[1123] The parties also requested a review of the decision not to retroactively apply the SCA and whether the Administrator properly determined the SCA applied to the final two years of the contract.[1124] Ultimately, the Board agreed with the Administrator.

The Board found the Administrator used three factors to determine the principal purpose of the contract: "1) the stated purpose of the contract; 2) the amount and percentage of service labor hours performed on the contract; and 3) the amount and percentage of contract costs attributable to the service portion of the contract."[1125] The Administrator found the Air Force "repeatedly characterized the contract as maintenance and logistical support necessary to keep the fleet in airworthy condition."[1126] The investigation attributed ninety percent of the contract to services.[1127] The dollar amount of the contract costs attributable to service work, however, only amounted to twenty percent of the contract cost because the value of the PCA work included the cost of the engines and replacement parts.[1128] The Board found the Administrator's approach of discounting the high cost of the PCA contract items reasonable because the principal purpose of the contract was to furnish services, not to provide the Air Force with new or remanufactured engines.[1129] The Board therefore concluded the Administrator reasonably determined the SCA applied to the contract.[1130]

The Board also found reasonable the Administrator's decision not to apply the SCA retroactively.[1131] First, the record did not "demonstrate that the Air Force acted in bad faith when it determined the PCA applied."[1132] Second, the Administrator issued the new ruling nearly eight years into a ten year contract.[1133] Retroactive application "could be an overly onerous administrative and economic burden to the [Air Force]."[1134] Finally, the investigation disclosed the workers received wages and fringe benefits comparable to the wages and fringe benefits required under the SCA.[1135] Therefore, the Board concluded the Administrator "had three eminently reasonable bases for declining to require retroactive application."[1136] The Air Force requested the Board delay implementation of the ruling "so that it can implement this decision through the budget process."[1137] Finding no authority to delay implementation, however, the Board required the Air Force to pay the contractor SCA wages within thirty days of notification of the decision.[1138]

Davis-Bacon Act

Delay, Delay, Delay

In *Copeland v. Secretary of Agriculture*,[1139] the CAFC held the contracting officer's withholding of progress

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[1121] *Id*.

[1122] *Id*. at 7.

[1123] *Id*. at 5.

[1124] *Id*.

[1125] *Id*. at 6.

[1126] *Id*.

[1127] *Id*. at 9.

[1128] *Id*. at 10.

[1129] *Id*.

[1130] *Id*.

[1131] *Id*. at 12.

[1132] *Id*.

[1133] *Id*. at 13.

[1134] *Id*. at 12.

[1135] *Id*. at 11.

[1136] *Id*. at 12.

[1137] *Id*. at 14.

[1138] *Id*.

[1139] 350 F.3d 1230 (2003).

payments did not constitute excusable delay.[1140] In September 1991, the National Forest Service (Forest Service) awarded two contracts to Copeland to construct and reconstruct trails, the trail contract and the comfort station contract.[1141] The contracts incorporated the Davis-Bacon Act (DBA)[1142] requiring Copeland to pay wages set by the DOL.[1143] In March 1992, the contracting officer requested Copeland provide payroll information after employees complained of DBA violations.[1144] Based on a review of the documentation submitted by Copeland and employees, the contracting officer withheld $30,371.41 in progress payments.[1145] The Forest Service denied Copeland's appeal and referred the matter to the DOL.[1146] In July 1992, the DOL concluded that Copeland violated the DBA on the trail contract.[1147] The DOL requested the contracting officer withhold a total of $37,905, pending final resolution of the issue. The contracting officer withheld the additional $5,603 from the trail contract and $1,903.59 from the comfort station contract. After the contracting officer withheld progress payments, Copeland failed to complete the contracts by the deadline.[1148] On 18 September 1992, the Forest Service terminated the contracts for default for failure to complete the projects by the due date.[1149] Copeland appealed to the ASBCA, arguing the delay was excusable delay due to the erroneous DBA withholding.[1150] The ASBCA dismissed the appeal because the issue was still pending at the DOL.[1151]

The DOL failed to formally charge Copeland until July of 1994.[1152] Based on the delay, Copeland objected to the charges and the DOL failed to act for almost three years.[1153] In January 1997, the DOL judge dismissed the charges only to have the DOL appealed the dismissal to the Administrative Review Board (the Board).[1154] The board remanded to the DOL administrative law judge (ALJ) to determine whether Copeland was prejudiced.[1155] In 1999, the ALJ concluded Copeland violated the DBA but only in the amount of $3,951.[1156] Despite the violation, the ALJ dismissed the charges due to the delay and ordered all monies withheld returned to Copeland.[1157]

In October 2002, the ASBCA reinstated Copeland's default appeal.[1158] The ASBCA denied the appeal, however, finding Copeland failed to establish "an excusable reason to alter the default termination."[1159] Unfortunately, the CAFC affirmed the ASBCA's decision finding Copeland contributed to the problem.[1160] The CAFC required Copeland to establish excusable delay in light of the Forest Services' withholding.[1161] Copeland failed to provide documentation to demonstrate compliance with the DBA or in the alternative, a lesser amount owed. Based on the limited information Copeland provided to the contracting officer, the CAFC found the withholdings reasonable.[1162] The court acknowledged the DOL's extraordinary delay contributed to the problem.[1163] However, the CAFC suggested a different outcome if after providing the

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[1140] *Id*. at 1235.

[1141] *Id*. at 1231.

[1142] *See* 40 U.S.C.S. § 3142 (LEXIS 2004).

[1143] *Copeland*, 350 F.3d at 1231.

[1144] *Id*.

[1145] *Id*.

[1146] *Id*. at 1232.

[1147] *Id*.

[1148] The projected completion dates for the trail contract and the comfort station contract were 21 May 1992 and 20 June 1992, respectively. *Id*.

[1149] *Id*.

[1150] *Id*.

[1151] *Id*.

[1152] *Id*.

[1153] *Id*.

[1154] *Id*.

[1155] *Id*.

[1156] *Id*.

[1157] *Id*.

[1158] *Id*.

[1159] *Id*.

[1160] *Id*. at 1235.

[1161] *Id*. at 1234.

[1162] *Id*. at 1235.

[1163] *Id*.

DOL with a reasonable time to issue a final decision, Copeland requested the contracting officer release the funds based on unreasonable withholding.[1164]

Major Bobbi Davis.

Bid Protests

Coalition Provisional Authority & GAO Jurisdiction

In November 2003, the GAO dismissed Turkcell Consortium's protest challenging the Coalition Provisional Authority's (CPA) decision not to issue Turkcell a mobile telecommunication license.[1165] In dismissing this protest, the GAO explained that this procurement involved the CPA's decision to issue licenses "granting the right to . . . establish and sell mobile telecommunications services in Iraq to businesses and social users" and not a contract wherein the United States purchases or receives goods or services.[1166] The GAO concluded that because the license did not involve the purchase of goods or services for the United States, the GAO did not have jurisdiction over this matter.[1167]

In reaching this conclusion, the GAO did not address whether the CPA was a federal agency for bid protest purposes.[1168] Instead, the GAO left open the possibility that it could assume jurisdiction over a CPA procurement when a U.S. federal agency conducts the procurement on behalf of the CPA.[1169]

Protester Gets the Benefit of the Doubt Regarding Timeliness Matters

In *American Multi Media, Inc.*,[1170] the Comptroller General concluded that when an ambiguity exists regarding when a protester learned about an agency's initial adverse action,[1171] the agency should give the protester the benefit of the doubt as to the date of notification. The details of a phone conversation between the contracting officer and American Media were an issue. According to the government, American Media received notification of initial adverse agency action when the contracting officer called and reported that a portion of American Media's contract would be terminated and awarded to a non-profit competitor entitled to a price preference.[1172]

American Media argued that the contracting officer only informed them that the agency received a protest and that the agency was going to impose a stop work order until the GAO resolved the protest. Furthermore, American Media argued that it did not officially learn that the agency terminated American Media's portion of the contract until the agency issued the modification two weeks later. Coincidentally, American Media filed an agency protest objecting to the termination decision six days after receiving the modification.[1173]

The GAO found that the contracting officer led American Media to believe that the agency had not yet decided whether the agency was terminating a portion of the contract. Therefore, the Comptroller General ruled in favor of American Media, explaining that a protester should be given the benefit of the doubt regarding when the protester received notification of the agency's initial adverse agency action.[1174]

[1164] *Id*.

[1165] Turkcell Consortium, Comp. Gen. B-293048.2, Nov. 12, 1003, 2003 CPD ¶ 196.

[1166] *Id*. at 1.

[1167] *Id*. at 1. The GAO explained that the CICA gives it jurisdiction to decide bid protests that "encompass a written objection by an interested party to a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services." *Id*.

[1168] *Id*.

[1169] *Id*. at 2.

[1170] Comp. Gen. B-293782.2, Aug. 25, 2004, 2004 CPD ¶ 158. *See also "Defensive Protest" Unnecessary Prior to Agency Making Final Determination As To Adverse Actions*, 46 GOV'T CONTRACTOR 33, ¶ 349 (Sept. 1, 2004).

[1171] The triggering event for determining when the protester must file an agency level protest starts when the protester learns about the agency's initial adverse action. *See* 4 C.F.R. § 21.2 (a)(3).

[1172] Initially, Potomac Talking Book Services, a non-profit organization, did not receive its ten-percent price preference for nonprofit organizations that serve the blind and physically handicapped. *American Multi Media*, 2004 CPD ¶ 158, at 2.

[1173] *Id*.

[1174] *Id*. at 3.

Protest Submitted to the GAO on a Federal Holiday Results in Untimely Filing

In *Guam Shipyard*,[1175] the GAO dismissed as untimely a protest challenging the propriety of a solicitation, where the GAO received the protest after quotations were due. Here, the RFQ set the quotation due date as 6 July 2004, 4:30 p.m., "Far East time."[1176] Guam Shipyard faxed its protest to the GAO on 5 July 2004 at 2:42 p.m. (eastern time). The company also emailed its protest to the Comptroller General on 5 July 2004 at 3:22 p.m. Unfortunately for Guam Shipyard, 5 July 2004 was a U.S. federal holiday and the GAO was closed. Because of this, the GAO time/date stamped the protest as received on 6 July 2004, 8:30 a.m.[1177]

The Navy sought to dismiss Guam Shipyard's protest as untimely after noting the GAO received the protest after quotations were due, factoring in the difference in time zones between Washington, D.C., and Guam.[1178] Specifically, the Navy contended the Far East time zone is fifteen hours ahead of eastern time, meaning the GAO time/date stamped the protest approximately seven hours after the time set for receipt of quotations.[1179] The GAO agreed and then explained that complying with this timeline is important because agencies need adequate notice if they are going to remedy any acquisition deficiencies.[1180]

According to the GAO, its Bid Protest Regulations deem documents "filed" only on days and at times when its office is open.[1181] Because the GAO was closed for the 5 July holiday, the GAO deemed Guam Shipyard's protest filed on the next business day, 6 July 2004, which made the protest untimely due to the differences between time zones.[1182] Accordingly, the GAO dismissed the protest.

COFC: Equity Aids the Vigilant, Not Those Who Slumber on Their Rights

The COFC made it explicitly clear that it is not obligated to adopt the Comptroller General's bid protest timeliness rules. In *Mississippi Dept. of Rehabilitation Services v. United States,*[1183] the plaintiffs filed a pre-award protest alleging the Navy failed to give the protester preference under the Randolph-Sheppard Act.[1184] The contracting officer disqualified the protester's proposal four days after the protest was filed. The government argued that this defect in the solicitation should have been challenged before the proposal due date. The government then asserted the doctrine of laches[1185] barred this claim and that the court should dismiss the action accordingly.

The court rejected this argument explaining that the Tucker Act[1186] gives the COFC jurisdiction to review bid protests and that the Tucker Act does not "limit the time in which a bid protest may be brought, allowing suits to be brought before and after the award of a contract."[1187] The court then noted that a delay in filing a protest is a factor to consider when

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[1175] Comp. Gen. B-294287, Sept. 16, 2004, 2004 CPD ¶ 181.

[1176] *Id*. at 1.

[1177] *Id*.

[1178] *Id*. at 2.

[1179] *Id*.

[1180] *Id*. at 3.

[1181] *See* 4 C.F.R. § 21.0 (e) and (g). In a separate case, the GAO ruled that documents received after 1730 hours are considered filed on the next business day. *See* Computer One, Inc., Comp. Gen. B-249352.7, Sept. 27, 1993, 92-3 CPD ¶ 185.

[1182] The Comptroller General also stated that these rules apply to all protest submissions, whether received by fax or email. *Guam Shipyard*, 2004 CPD ¶ 181 at 3.

[1183] Mississippi Department of Rehabilitation v. United States, 2004 U.S. Claims LEXIS 140, June 4, 2004. As the solicitation sought cafeteria food services, most of the court's opinion discussed the applicability of the Randolph Sheppard Act to this Navy mess facility. In the end, the court concluded the RSA did apply. *Id*. at *36.

[1184] *See* 20 U.S.C.S. § 107 (2000).

[1185] To establish a laches defense, a party must show that the claimant, unreasonably and without excuse, delayed filing its claim and that this delay prejudiced the other party and impaired its ability to mount a defense. *Mississippi Department of Rehabilitation*, 2004 U.S. Claims LEXIS 140 at *32.

[1186] *See* 28 U.S.C.S. § 1491 (LEXIS 2004).

[1187] *Mississippi Department of Rehabilitation*, 2004 U.S. Claims LEXIS 140 at *32. In an unrelated Veterans Administration procurement, the COFC again refused to adopt the Comptroller General's bid protest timelines. In *Software Testing Solution Inc*., the COFC explained that the Tucker Act gives the COFC jurisdiction over bid protests "without regard to whether suit is instituted before or after contract award." 58 Fed. Cl. 533 (2003). Stating that a delay in filing a protest is one factor to consider when determining whether to issue an injunction, the COFC made it clear that if it adopted the GAO's bid protest timelines the court would have to apply all of the GAO's protest rules to include the "good cause shown" and "significant issue" exceptions to the timeliness

determining a remedy but it is not a jurisdictional bar.[1188]

CICA Overrides—GAO Publishes Letter to the Secretary of Health and Human Services Expressing Concern about HHS's Contract Override Practices

On 9 April 2004, the Comptroller General re-published *Information Ventures, Inc.*,[1189] sustaining a protest on grounds that the agency did not provide a reasonable time or enough information for offerors to prepare and submit a proposal.[1190] In this case, the U.S. Department of Health and Human Services (HHS) issued a solicitation for research services to identify a list of drugs requiring additional study under the Best Pharmaceuticals for Children Act.[1191] The initial pre-solicitation notice required all responses by 18 December 2003.[1192] On 18 December 2003, Information Ventures complained to the agency that the solicitation did not include essential details about the requested work and that it did not have adequate time to respond.[1193]

For reasons unexplained, on 31 December 2003, the HHS sent another RFQ only to Information Ventures and advised again that it intended to sole source this contract to Metaworks. The HHS also set 5 January 2004 as the new deadline for Information Ventures if it still wanted to submit a response.[1194] On 2 January 2004, Information Ventures protested to the GAO. Information Ventures alleged that it did not have adequate time to prepare a response and that the HHS did not have ample justification for sole sourcing this procurement to Metaworks.[1195] This protest triggered CICA's pre-award stay provisions.[1196]

On 23 January 2004, the agency overrode the CICA stay and proceeded with contract award and performance. The HHS concluded that proceeding was in the best interest of the United States.[1197]

On 9 April 2004, the Comptroller General sustained the protest. The GAO concluded that the HHS did not provide adequate time for Information Ventures to submit a response to the RFQ and that the agency's sole-source determination was not reasonable.[1198] It also noted that the HHS improperly used a post-award rationale for overriding this pre-award protest.[1199] This decision, concluded GAO, violated the CICA.[1200]

The Comptroller General also observed that the HHS recently used the same improper basis to override another pre-award protest by Information Ventures.[1201] Because the HHS twice used the same improper rationale, the Comptroller General attached to the protest decision a letter to the Secretary of HHS.

In its letter to the Secretary of HHS, the Comptroller General explains basic CICA stay override rules,[1202] advises the Secretary that HHS proceeded with contract award in a "manner inconsistent with the requirements of the [CICA] statute,"[1203] and concludes by directing the Secretary to advise the GAO of any action the Secretary takes in response to the

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rules. *Id*. at 535. The court then concluded that Congress did not intend for COFC's bid protest jurisdiction to rise or fall on such squishy considerations. *Id*.

[1188] *Mississippi Department of Rehabilitation*, 2004 U.S. Claims LEXIS 140 at *32.

[1189] Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81. For further discussion of the protest's merits, see *supra* section titled Simplified Acquisitions.

[1190] *Information Ventures*, 2004 CPD ¶ 81, at 2.

[1191] *See* 42 U.S.C. § 284m(a) (2000).

[1192] *Information Ventures*, 2004 CPD ¶ 81, at 1.

[1193] Information Ventures response caused the HHS to realize that it did not advise offerors that HHS intended to sole source this contract. *Id*.

[1194] The HHS gave Information Ventures one-and-a-half business days, New Year's Day, and one weekend to compile and submit its proposal. *Id*. at 2.

[1195] *Id*.

[1196] *Id*. at 4.

[1197] *Id*. at 5.

[1198] *Id*. at 4.

[1199] The agency used FAR section 33.104(c)(2)(i) to override Information Ventures' protest. *Id*. at 4.

[1200] *Information Ventures*, 2004 CPD ¶ 81, at 4.

[1201] *See* Comp. Gen. B-293518.2, March 29, 2004, 2004 CPD ¶ 76.

[1202] *Information Ventures*, 2004 CPD ¶ 81, at 6.

[1203] *Id*. at 7.

Comptroller General's letter.[1204] Specifically, the Comptroller General advised the HHS Secretary of the following:

> When protests are filed before award, an agency may proceed with award only after a written finding by the agency head of the procuring activity that "urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for [GAO's] decision. 31 U.S.C. § 3553(c)(2)(A). In contrast, when protests are filed after award, an agency may proceed with performance after making one of two possible written findings: (1) "performance of the contract is in the best interest of the United States"; or (2) "urgent and compelling circumstances that significantly affect interests of the Untied States will not permit waiting for [GAO's] decision." 31 U.S.C. § 3553(d)(3)(C). Under CICA, when an agency proceeds with performance in the face of a post-award protest on a "best interests" basis, our Office is required to recommend relief without regard to cost, or disruption from terminating, recompeting, or reawarding the contract. 31 U.S.C. § 3554(B)(2).[1205]

The Comptroller General also found the protester was denied meaningful relief.[1206] It is not known whether the HHS Secretary has taken any corrective action.

No Standing to Enjoin CICA Override

In *Sierra Military Health Services, Inc. v. United States*,[1207] the COFC determined that the protester was not an "interested party" and therefore lacked standing to enjoin two CICA override actions,[1208] but was an "interested party" regarding a third CICA override action. Accordingly, the GAO dismissed two of Sierra's complaints for lack of standing and denied the third complaint based on the evidence.

In *Sierra Military Health*, the DOD issued a solicitation seeking three health care management service contracts covering three separate regions.[1209] The solicitation advised prospective offerors that they may submit a proposal for any one or all three of the contracts, but an offeror would not be awarded more than one contract. Pursuant to these instructions, Sierra decided to submit one offer, hoping to win the contract for the Northern region.[1210]

The agency did not award the Northern region contract to Sierra. Sierra protested to the GAO,[1211] and tried to stop the agency from proceeding with the transition work that had to be completed before the awardees could commence performance. Sierra argued that the agency could not proceed with contract performance until Sierra's protest, along with protests filed by other unsuccessful offerors, were resolved. The agency responded by overriding the CICA stay.[1212]

At the COFC, Sierra sought to enjoin the agency's CICA override. Initially the COFC resolved whether Sierra had standing to enjoin contract performance in the South and West regions. Noting that Sierra did not submit a proposal for the Southern or Western regions, the court reasoned that Sierra lacked standing.[1213] The court stated that "Sierra is not an interested party because it failed to submit a proposal [for the Southern or Western regions] or to protest the RFP

[1204] *Id*.

[1205] *Id*. at 6.

[1206] *Id*.

[1207] 58 Fed. Cl. 573 (2003); *see also Actual Offeror Under One "Interconnected" Contract Lacked Standing to Enjoin CICA Stay Override Concerning Other Two Contracts*, 45 GOV'T CONTRACTOR 47, ¶ 525 (Dec. 17, 2003).

[1208] Sierra sought to enjoin the DOD from overriding the CICA stay pending resolution of Sierra's protests before the GAO challenging three separate health care management service contracts covering the Western, Southern, and Northern regions of the United States. *Sierra Military Health*, 58 Fed. Cl. at 576. *See* Sierra Military Health Services, Inc.; Aetna Government Health Plans, B-292780 et al., 2004 CPD ¶ 55 (Dec. 5, 2003) (denying protests alleging the TRICARE Management Activity improperly awarded contracts for health care administration services without conducting discussion with the protestors).

[1209] *Sierra Military Health*, 58 Fed. Cl. at 575.

[1210] *Id*.

[1211] *Sierra Military Health*, 2004 CPD ¶ 55, at 1.

[1212] *Sierra Military Health*, 58 Fed. Cl. at 575-76. The government's reasons for overriding the stay were as follows: (1) the adverse impact on the effective and efficient administration of TRICARE; (2) the impact on TRICARE beneficiaries; and, (3) the cost impact to the United States of continued suspension of contract performance. The government also explained that a shorter transition period adversely impacted similar contracts; that the GAO was critical of an earlier effort to transition this type of contract in six months; that not overriding the CICA stay would reduce the congressionally recommended nine-month transitional period; and, that there were challenges with extending the expiring contract. *Id*. at 576.

[1213] Sierra argued it had standing because the three contracts for the Northern, Southern, and Western regions were interconnected and that actions in the Southern and Western regions directly affected Sierra's interest in the Northern region. *Id.* at 578.

requirements before the end of the proposal period."[1214]

Although the COFC dismissed Sierra's protest as it pertained to the Southern and Western regions, the court allowed Sierra's Northern region protest to proceed. Ultimately, however, the COFC upheld the government's CICA override decision and also denied this injunction request.[1215]

COFC: No Jurisdiction to Hear Subcontractor Post-Award Protest

In *Blue Water Environmental Inc. v. United States*,[1216] COFC held that it lacked jurisdiction to hear a protest filed by a subcontractor of the prime. In *Blue Water*, the Department of Energy (DOE) issued a maintenance and operations contract to Brookhaven Science Associates to operate the Brookhaven National Laboratory. Brookhaven Science Associates, in turn, competed and awarded an environmental cleanup contract to Environcon. Disappointed that Brookhaven Science Associates did not award it the contract, Blue Water protested to the COFC.[1217]

The COFC, noting that the Tucker Act limits its authority to hear protests of federal procurements only, dismissed the case. Specifically, it noted, "plaintiffs must have competed in a government sponsored solicitation" and explained that a private firm awarded this contract. The court also stressed that the ordinary supervision the DOE exercised in this contract did not amount to government participation in the contract.[1218] Furthermore, the court also noted that the solicitation specified that Brookhaven Science would award this contract; that Brookhaven Science would evaluate proposals and would be responsible for contract award; that Brookhaven Science was authorized to reject or accept any proposal; and, lastly, that the subcontractor was not allowed to take any disputes to the DOE.[1219]

Ambiguity = Two or More Reasonable Interpretations of a Solicitation's Terms

In *Ashe Facility*,[1220] the Comptroller General sustained a protest, agreeing that a latent ambiguity in the solicitation prejudiced Ashe and recommending that the agency clarify the ambiguity and allow offerors to submit revised proposals. In this best value solicitation, the Navy sought offers for base support services.[1221] The RFP advised offerors to "separately price the fixed work items and the indefinite-quantity work items"[1222] and required lump sum pricing for the indefinite-quantity work.[1223] The RFP also "provided for a variable pricing element . . . specific to the fixed price work under the solicitation."[1224] Then the RFP's section M advised that "Price will be evaluated by adding the base, each option period quantities, each award-option period quantities, and add/delete/change services period totals for the firm fixed-priced items (Indefinite-quantity items will be reviewed for reasonableness)."[1225]

The protester and the agency disagreed on the Section M directions.[1226] The agency evaluated prices by adding all of the fixed-price and indefinite-quantity items together and then compared the proposals' total prices. Ashe, on the other

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[1214] *Id*. at 577.

[1215] The court determined that there was evidence to demonstrate that enjoining contract performance would threaten DOD's healthcare services and dramatically increase the government's costs. *Id* at 581. In an unrelated case, the COFC rejected the assertion that it lacked jurisdiction to review an agency's decision to award a contract noncompetitively after the agency determines that such award was made in the public's interest. The court specifically rejected the argument that the public interest exception to full and open competition was committed to the agency's discretion by law. *See* Spherix, Inc. v. United States, 58 Fed. Cl. 351 (2003). The merits of this decision are discussed *supra* section titled Competition.

[1216] 60 Fed. Cl. 48 (2004).

[1217] *Id*. at 48.

[1218] *Id*. at 52.

[1219] *Id*. at 49.

[1220] Comp. Gen. B-292218.3, Mar. 31, 2004, 2004 CPD ¶ 80. *See also Protestor Prejudiced By Latent Ambiguity in RFP Price Provision, Comp. Gen. Finds*, 46 GOV'T CONTRACTOR 18, ¶ 192 (May 5, 2004).

[1221] *Ashe Facility*, 2004 CPD ¶ 80, at 1.

[1222] *Id*. at 2.

[1223] *Id*. at 3.

[1224] The Navy anticipated adding, deleting, or changing work before the contract was completed. To pre-establish the cost of each potential change, the RFP required offerors to submit a cost factor for adding work and a separate cost factor for deleting work. The RFP clearly advised that the add/delete pricing was for the fixed price work. *Id*. at 2.

[1225] *Id*. at 4.

[1226] *Id*. at 9.

hand, thought that only the fixed-price items would constitute the total evaluated price and that the indefinite-quantity items would be considered solely for reasonableness.[1227]

The GAO concluded that Ashe's interpretation of Section M was reasonable.[1228] The GAO noted that because the base year, option years, and award option periods all had fixed-price and indefinite-quantity contract line items, Ashe was reasonable to think that the term "for the firm-fixed-priced items" meant that the government would total all firm-fixed-price items found in the base year, all option years, and all award option years. In addition, the GAO concluded that the phrase at the end of Section M suggested the agency would evaluate the indefinite-quantity items separately from the fixed-price work.[1229]

Based on the grammatical structure of the disputed directions, the government argued Ashe's interpretation was not reasonable.[1230] The GAO thought the agency's argument was logical, but noted that Ashe's interpretation was not unreasonable. Finding that each party had a reasonable interpretation, the GAO concluded that the solicitation's ambiguity was latent. The GAO reasoned that Ashe's interpretation did not conflict with any terms in the solicitation and the proposals were evaluated before the ambiguity was discovered.[1231]

COFC Orders Navy to Pay Attorney Fees Despite Navy's Objection that Corrective Action was Voluntarily and Unilaterally Undertaken

In *Rice Services v. United States,*[1232] the Navy solicited offers for dining services at the U.S. Naval Academy. The agency initially proposed awarding the contract to EC Management Services. After Rice protested this award, the agency reopened the solicitation, conducted further discussions, and obtained revised proposals.[1233] Successful in its protest, Rice sought reimbursement of its attorney fees. The Navy followed with a motion to dismiss and for a judgment on the record. The Navy argued that this corrective action plan was unilateral and voluntary and that the plaintiff was therefore not eligible to collect attorney fees.[1234]

The COFC's original opinion outlined the Navy's plan, ordered the Navy to carry out the plan, and dismissed the complaint without prejudice.[1235] When later addressing the issue of attorneys fees, the court explained that to be a prevailing party, "one must receive at least some relief on the merits which . . . alters the legal relationship of the parties."[1236] The court further noted that a judgment on the merits as well as court ordered consent decrees have "sufficient judicial imprimatur to materially alter the parties' legal relationship to form a basis for an attorney fee award."[1237] The court then determined that its order caused the Navy to take corrective action that altered the relationship between the parties. The COFC also explained

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[1227] *Id*. at 10.

[1228] *Id*.

[1229] The referenced phrase stated "Indefinite-quantity items will be reviewed for reasonableness." *Id*. at 4.

[1230] *Id*. at 20.

[1231] *Id*. at 24. Because Ashe would have changed its pricing structure had it known that the indefinite-quantity items were part of the total cost evaluation, the GAO also concluded that Ashe had demonstrated prejudice. *Id*. at 11.

[1232] 59 Fed. Cl. 619 (2004).

[1233] All original offers expressed an interest in participating in the additional discussions. *Id*. at 620.

[1234] *Id*.

[1235] *Id*. at 620. The court order stated:

> [The] [d]efendant's response [to plaintiff's motion for summary judgment] was to initiate remedial action and seek dismissal of this litigation. On July 18, 2002, the contracting officer unilaterally issued notices to each of the six original offerors. These notices advised the offerors that the Navy had decided to conduct discussions in reference to the solicitation and requested indications of interest in participation in the discussions. Each original offeror responded affirmatively. A schedule was established to have discussions, receive best and final offers, oral presentations, and for the Navy to make evaluations, and issue a contract award by November 20, 2002. EC Mgt. will not be awarded an option year under the current contract. However, the Navy may exercise the contract's continuity of service clause to obtain the needed wardroom dining service for midshipmen pending commencement of service under the new award contemplated for November 20, 2002 . . . . In this circumstance, it is concluded that further action by the Court is not required or justified in the present protest action and it is ORDERED that: (1) the remedial action described and promised in defendant's submissions shall be undertaken.

Id.

[1236] *Id*. at 621.

[1237] *Id*.

that court orders that incorporate the terms of a settlement offer are judicially enforceable.[1238]

In sum, despite taking what it considered voluntary and unilateral corrective action, the court concluded that the Navy's corrective action was taken in response to the court order. Accordingly, the COFC awarded Rice attorney fees.[1239]

GSBCA—Private Parties Cannot Agree to Exceed the Statutory Ceiling for Attorney Fees

Last year's *Year in Review* discussed *Sodexho Management, Inc.*,[1240] in which the Comptroller General awarded attorney fees in excess of the statutory cap.[1241] In *Sodhexo*, the Comptroller General clarified that the GAO—not agencies—had had authority to award attorney fees in excess of the authorized hourly rate. This year, in *NVT Technologies*,[1242] the General Services Administration Board of Contract Appeals (GSBCA) affirmed *Sodhexo* when it rejected a stipulation between the parties agreeing to pay attorney fees exceeding the statutory authorized limit. The GSBCA stated that awarding a fee "in excess of the statutory rate . . . by an administrative agency . . . [is not authorized] in the absence of an agency regulation addressing the issue."[1243]

Air Force—New Web Pages

The Air Force released a new guide for defending bid protests in 2004. The guide, titled *Protests to the GAO*, outlines how the Air Force practitioners should process and prepare responses to bid protests. Some of the topics covered include initial actions upon receipt of a protest; how to prepare the agency report; how to transmit the agency report; the process after the agency report is filed; how to resolve the protest; when to take corrective action; and when the stay of contract award or performance is mandatory. This guide is available at: http:// //www.safaq.hq. Af.mil/contracting/affars/5333/mandatory/MP5333.104-90-protests.doc.

2004: Bid Protests Filing with the GAO Increases

Fiscal year 2004 was another busy year for bid protest filers. The following chart illustrates this point and the trends in the GAO's Bid Protest section during the last five years.[1244]

Major Steven Patoir.

	FY 2004	FY 2003	FY 2002	FY 2001	FY 2000	FY 1999
Cases Filed	1,483 (up 6%)	1,352 (up 12%)	1,204 (up 5%)	1,146 (down 6%)	1,220 (down 13%)	1,399
Cases Closed	1,397	1,244	1,133	1,098	1,275	1,446
Merit (Sustain + Deny) Decisions	365	290	256	311	306	347
Number of Sustains	75	50	41	66	63	74
Sustain Rate	21%	17%	16%	21%	21%	21%

[1238] *Id*. at 622.

[1239] *Id*. at 624.

[1240] Comp. Gen. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136.

[1241] *2003 Year in Review, supra* note 29, at 75.

[1242] GSBCA No. 16195-C (16047), 2003 GSBCA LEXIS 210 (Oct. 24, 2003).

[1243] *Id*. at 6.

[1244] E-mail from Mr. Louis A. Chiarella, General Accounting Office, Bid Protest Section, to Major Steven R. Patoir, Professor, The Judge Advocate General's School, U.S. Army (10 Oct. 2004) (on file with author).

CONTRACT PERFORMANCE

Contract Interpretation/Changes

The Test for Recovery Based on Inaccurate Specifications is Whether Errors Misled the Contractor

In *Turner Construction Co.*,[1245] the CAFC stated that the test for recovery based on inaccurate government specifications is whether the errors misled the contractor. Applying this test, the CAFC held that Turner Construction Co. (Turner) acted as a reasonable and prudent contractor, correctly interpreted the contract specifications and drawings, and was entitled to additional costs.[1246]

Boston's Department of Veterans Affairs (VA) hospital awarded Turner a contract to build a new wing to its hospital. A dispute arose concerning exactly what fire-rated electrical feeders and panel boards had to be installed in the operating room. The VA insisted that the contract[1247] and its specifications and drawings and the local[1248] and national[1249] electrical codes required Turner to install certain fire-rated emergency systems in the operating room. Turner disagreed, countering that the explicit contract specifications and electrical drawings did not identify the operating room as part of the hospital's emergency electrical system.[1250] The VA ended the initial disagreement by ordering Turner to install the fire-rated emergency equipment in the operating room. Turner complied and then submitted a claim for additional costs. The VA denied Turner's claim and this litigation followed.[1251]

Turner appealed to the COFC, arguing the VA materially altered the contract in requiring the work and was thus liable for additional costs resulting from the work.[1252] The COFC did not agree with Turner's interpretation. The COFC found the contract was not ambiguous in requiring the work since the work, as directed by the VA, was necessary in order to conform to state electric code requirements.[1253]

On appeal, a divided CAFC reversed.[1254] The majority observed that the "test for recovery based on inaccurate specifications is whether the contractor was misled by these errors."[1255] For the majority, the specifications and drawings were clear that the additional work was not required. Turner's reading of the contract in conjuncture with the code requirements was, for the majority, "that of a prudent contractor."[1256] Dissenting from the majority, Judge Mayer agreed with the COFC's ruling that the contract fully defined the electrical system to include the work ordered by the VA.[1257]

Is Ambiguity Latent or Patent? Look for "Zone of Reasonableness"

In *NVT Technologies, Inc*.,[1258] the CAFC addressed the methodology for determining whether an ambiguity is patent

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[1245] 367 F.3d 1319 (Fed. Cir. 2004).

[1246] *Id*. at 1324.

[1247] The contract required Turner to "furnish and install electrical wiring systems, equipment and accessories in accordance with the specifications and drawings" and to comply with applicable electrical codes. *Id*. at 1321.

[1248] The VA argued that even if the contract was not clear, state electrical codes required fire-rated emergency electrical systems and that the operating room constituted an emergency electrical system. The Massachusetts code stated "All portions of the emergency system, such as feeders, . . . shall be enclosed within 2-hour fire rated enclosures." *Id*. at 1322 (quoting the Massachusetts State Electric Code).

[1249] The National Electrical Code for Hospitals states that "hospitals [must] have a separate emergency system for circuits essential to life[,] safety[,] and critical patient care." *Id*. at 1322 (quoting the National Electric Code Article 517-30). The VA argued that this code encompasses operating rooms and that Turner had a duty to clarify this patent ambiguity if it thought that operating rooms were not essential to life, safety, and critical patient care. *Id*. at 1322-23.

[1250] *Id*. at 1321.

[1251] *Id*. at 1320-23.

[1252] *Id*. at 1320 (citing Turner Constr. Co. v. United States, 54 Fed. Cl. 388 (2002)).

[1253] *Id*. (citing *Turner Constr. Co*., 54 Fed. Cl. at 394-95).

[1254] *Id*. at 1324.

[1255] *Id*. (citing Robins Maint., Inc. v. United States, 265 F.3d 1254, 1257 (Fed. Cir. 2001)).

[1256] *Id*.

[1257] *Id*. at 1325-26. In an unrelated contract changes and interpretation case, the CAFC held that the government was not liable for an ambiguous lease provision where the government showed that the contractor knew about the government's interpretation of the ambiguous term. For a good discussion on resolving patent ambiguity cases and applying the rule of *contra proferentum*, see HPI/GSA-3C, LLC. v. United States, 364 F.3d 1327 (2004).

[1258] 370 F.3d 1153 (Fed. Cir. 2004). *See also Patent Ambiguity In Solicitation Must Be Brought To Government's Attention Before Bidding, Federal Circuit Holds*, 46 GOV'T CONTRACTOR 24, ¶ 253 (June 23, 2004).

or latent. In sum, the analysis rests on whether the ambiguity falls within the "zone of reasonableness." That is, does the ambiguity support one interpretation or more?[1259]

After participating in a study pursuant to *OMB Circular A-76*, NVT protested the government's decision to retain the services in-house.[1260] NVT argued that an ambiguity in the solicitation unfairly caused its proposal to be more expensive than the government's most efficient organization's (MEO) proposal. More specifically, NVT argued the solicitation did not alert offerors that the pricing methodology for ceramic work differed from the remainder of the contract.[1261]

The COFC determined that the solicitation was only subject to one interpretation and concluded that the government's interpretation was the only reasonable one. Alternatively, even if NVT's interpretation was reasonable, the ambiguity was patent and therefore NVT had a duty to clarify the ambiguity prior to the proposal due date.[1262]

NVT appealed this ruling. The CAFC considered the issues and determined that the government's and NVT's interpretations were both within the "zone of reasonableness."[1263] The court found NVT's interpretation reasonable because NVT "applied the same logic to the thirteen disputed line items as applied to the hundreds of other line items present in the schedule," "the schedule [did not advise] that the data in the 'Number' and 'Frequency' columns were to be treated differently for the thirteen items in question," and that "the amount of tile work [NVT projected] was not wholly unreasonable."[1264]

Despite this initial good news for NVT, its glee was short lived. In addition to CAFC's "zone of reasonableness" finding, the court also ruled that the ambiguity was patent and that NVT could not recover because it failed to clarify the patent ambiguity.[1265] Specifically, the court held "Where, as here, a certain set of line items is expressed in a manner so different from hundreds of other line items, yielding results disproportionate to the remainder of the solicitation, we find the differences to be obvious, gross, [or] glaring, requiring NVT to inquire."[1266]

All Things Being Equal, the Simpler Explanation is Probably True

In *L.W. Matteson, Inc*.,[1267] the COFC provides a solid review of contract interpretation principles. This case arose because the plaintiff, L.W. Matteson (Matteson), an experienced government contractor and hydraulic dredging company, felt the Army COE caused it to incur significant cost overruns. Matteson alleged that the COE failed to notify Matteson of local opposition to the proposed dredging and of pertinent local environmental laws. This failure forced Matteson to change its proposal after contract award, which resulted in an unexpected financial loss.[1268]

The court discussed in detail two analytical steps for interpreting contracts. First, the need to construe the contract's plain language.[1269] More specifically, one must consider the contract as a whole and give a plain meaning to all contract parts without creating any conflict between different parts within the document.[1270] The second analytical step permits extrinsic evidence to resolve any ambiguities within the contract itself.[1271] A document is ambiguous only if competing interpretations

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[1259] *NVT*, 370 F.3d at 1159.

[1260] *Id*. at 1155. The Navy issued this solicitation for facility maintenance and utility services. *Id*.

[1261] NVT's price was $3,937,980 higher than the MEO's estimated cost. NVT asserted the solicitation caused it to overprice the requested ceramic tile work and argued the solicitation was ambiguous because the government, without notice, changed the pricing methodology in one small section of the solicitation. Specifically, NVT multiplied the "number column" by the "frequency column" and determined that there was approximately 76,000 square feet of tile work and approximately 28,600 man-hours. *Id*. at 1158. The Navy, on the other hand, changed its pricing methodology for the ceramic tile work. Instead of using the "frequency column" as a multiplier, the MEO based its proposal on 1354 square feet of tile work and 1354 man-hours. NVT argued that its own interpretation of the solicitation was reasonable. NVT claimed that had it known the solicitation changed the presentation of the pricing data, NVT would have proposed a lower price and therefore would have received this contract award. *Id*.

[1262] *Id*. at 1155 (referencing 54 Fed. Cl. 330 (2002)).

[1263] *See id*. at 1159 (providing a short review of solicitation/contract interpretation rules).

[1264] *Id*. at 1161.

[1265] *Id*. at 1162.

[1266] *Id*.

[1267] 61 Fed. Cl. 296 (2004).

[1268] *Id*. at 300.

[1269] *Id*. at 307.

[1270] *Id*.

[1271] *Id*.

are reasonable and consistent with the contract's language.[1272] In addition, parole evidence should not be used when the terms of the contract are unambiguous.[1273] Embedded throughout this analysis is the general concept that specific contract clauses trump general clauses.[1274]

In *Matteson*, the court sided with the government and held that Matteson assumed the responsibility to comply with all local, state, and federal environmental laws. The court reached this conclusion after reviewing the competing interpretations of the disputed clauses. The court found the following clause persuasive: "[n]ot withstanding the requirements of this section and not withstanding approval by the Contracting Officer of the Contractor's Environmental Protection Plan, nothing herein shall be construed as relieving the Contractor of all applicable Federal, State and local environmental protection laws and regulations."[1275] Furthermore, the court noted that the contract obligated the contractor "to obtain all permits and to comply with any federal, state, local laws, codes, and regulations applicable to the performance of work."[1276] Lastly, the court observed that the contract unequivocally obligated the contractor to ensure any subcontractors complied with all federal, state, and local environmental laws and regulations.[1277] After looking at these clauses, the court noted that the contract clearly and unequivocally assigned Matteson, a sophisticated contractor, the responsibility of complying with local, state, and federal environmental laws.[1278]

Major Steven Patoir.

Inspection, Acceptance, and Warranty

Baa Baa, Black Sheep. Have You Any Paratuberculosis?

In *Dodson Livestock Co.*,[1279] the COFC reviewed an allegation that the government violated a health warranty on the sale of a ram purchased at a U.S. Meat Animal Research Center (MARC) auction. The court held that there was no breach of warranty since the government's representation was a disclosure or disclaimer rather than a contractual warranty.[1280]

The MARC held an Annual Surplus Breeding Sheep Sale auction on 14 August 1992.[1281] Potential buyers received a catalog which included a statement that, "The MARC flocks harbor some level of Paratuberculosis (Johne's) and Ovine Progressive Pneumonia (OPP) infections. Based on the availability of reliable tests, or observations, efforts have been made to screen sale animals against these and other maladies."[1282] An auction supervisor also read this section verbatim prior to the sale beginning.[1283]

Dodson Livestock purchased eighteen purebred Texel sheep. About one year after the MARC auction, Dodson Livestock alleged that one ram was diagnosed with paratuberculosis. Dodson Livestock sold its entire flock for slaughter and filed a claim with the Department of Agriculture for $57,628,202 in lost profits. After three attempts to submit a properly certified claim, ultimately only the claim related to the one ram, number 806173, reached the court.[1284]

On 2 February 2001, the COFC granted the government's motion for summary judgment on the basis that the more specific statement of warning overruled any general theory of warranty. In addition, the efforts to screen the sale sheep for

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[1272] *Id*. at 308.

[1273] *Id*. at 307.

[1274] *Id*.

[1275] *Id*. at 301.

[1276] *Id*.

[1277] *Id*.

[1278] *Id*.

[1279] 61 Fed. Cl. 480 (2004).

[1280] *Id*. at 494.

[1281] *Id*. at 481.

[1282] *Id*. at 482.

[1283] *Id*.

[1284] The COFC granted a motion for dismissal, without prejudice, for all claims other than the claim for ram number 806173. Dodson Livestock Co. v. United States, 42 Fed. Cl. 455, 463 (1998). The contracting officer declined to render a final decision on the second and third claims, which were both presented to the government after the dismissal of the first case. Dodson did not amend its complaint prior to the rehearing. *Dodson Livestock Co.*, 61 Fed. Cl. at 484.

disease bolstered the warning theory.[1285] On appeal, the CAFC reversed the grant of summary judgment based on the existence of a question of material fact surrounding the effort to screen the sheep flock through various tests.[1286]

On remand, the COFC held an evidentiary hearing but was unconvinced by the plaintiff's conflicting evidence. The court held that the MARC representation was a disclosure, not a warranty; the MARC tested the sheep with reliable methods; and there was a question of fact as to the identity of ram number 806173.[1287]

The key to the warranty claim dismissal was that the language neither warranted that the animals would be free of paratuberculosis, nor stated that the independent testing would be foolproof. Instead, the government used a disclosure or disclaimer accompanied by a statement of intent to screen sheep for paratuberculosis prior to sale.[1288]

Final Rule on Production Surveillance and Reporting

The DOD issued a final rule amending the DFARS to eliminate requirements to perform production surveillance on "low-urgency contracts."[1289] The rule's goal is to focus more resources on critical and high-risk contracts.[1290] The final rule applies to all contracts classified as "Criticality Designator C." Production surveillance or contract monitoring for these low-urgency contracts is not required unless specifically requested by the contracting officer.[1291]

Air Force Changes Rules for Quality Assurance

The Air Force changed its policy regarding source inspection to be consistent with DOD policy and the changed DFARS rule. The memorandum states that there is no requirement for government contract quality assurance at source for contracts or delivery orders below $250,000.[1292] The memorandum lists exceptions for contracts mandated by regulation, required by memoranda of agreement, or determined by the contracting officer to have significant technical requirements, critical product features, or specific acquisition concerns.[1293]

A Game of Chicken

In *Land O'Frost*,[1294] the ASBCA rejected a warranty claim because the U.S. Army Soldier and Biological Chemical Command failed to provide the required notice in accordance with the warranty terms in the contract. The case involved the production of chicken breast filets for the Meals Ready-to-Eat (MRE) program. The specification involved inserting the filet into a polymer pouch, sealing the pouch, and thermoprocessing (or cooking) the entire package.[1295]

Although the Army had concerns about the solicitation,[1296] the Army awarded a contract to Land O'Frost for an indefinite quantity of chicken breast filets for a base year and one option year.[1297] The contract contained a non-standard warranty clause drafted by the Defense Personnel Support Center which stated that "(t)he contracting officer shall give

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[1285] *Dodson Livestock Co.*, 42 Fed. Cl. at 463.

[1286] Dodson Livestock Co. v. United States, 20 Fed. Appx. 989, 933 (Fed. Cir. 2002).

[1287] *Dodson Livestock Co.*, 61 Fed. Cl. at 486.

[1288] *Id*. at 488.

[1289] Defense Federal Acquisition Regulation Supplement; Production Surveillance and Reporting, 69 Fed. Reg. 31,912 (June 8, 2004) (to be codified at 48 C.F.R. pt. 242).

[1290] *Id*.

[1291] *Id*.

[1292] Memorandum, Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Changes in Acquisition Business Rules (19 Nov. 2003).

[1293] *Id*.

[1294] ASBCA Nos. 55012, 55241, 03-2 BCA ¶ 32,395.

[1295] The contract was the Army's first attempt to use a commercial item description for the food entrée. *Id*. at 160,299.

[1296] A Prenegotiation Briefing Memorandum stated the chicken breast filet was potentially "costly and difficult if not nearly impossible to produce in a commercial business." *Id*. at 160,301.

[1297] The minimum quantity was 1,703,240 and the maximum quantity was 2,129,050. *Id*.

written notice . . . within 7 months . . . from receipt of supplies at destination."[1298]

During the initial production, the Army rejected fourteen out of twenty-two lots based on a warranty inspection at the assembly plants.[1299] After a quality team inspection of the plants and a discussion between Land O'Frost and the Army regarding defect definitions, Land O'Frost stopped work and revamped its production process.[1300] The Army then placed a medical hold on all previously produced lots, and the contracting officer sent written notice to invoke warranty action against the seventeen remaining MRE lots. Because the seven month deadline was approaching, the contracting officer gave the notice without conducting warranty inspections of any of the 329,904 units and without finding any defects with any of the MREs in those lots.[1301] The Army demanded payment of $1,906,206.91 for the rework cost in attempting to reconstitute the production lots in order to conduct the inspection.[1302]

The ASBCA rejected the Army's warranty claim stating that the attempted warranty invocation failed to meet the requirement of giving Land O'Frost notice of a defect within seven months after receipt of the supplies.[1303] The Army first conducted inspections in January 1997, nearly two years after initial receipt and at least eighteen months after final receipt.[1304] Since the notice merely referred to the Army's intent to conduct inspections, rather than notice of a specific defect covered by the warranty, the ASBCA stated that the notice was an attempt to find extra time; strict compliance with the terms of the warranty mandated the conclusion that the government failed to submit a proper claim.[1305]

Gross Negligence in Sewage Clean-up Leaves a Bad Taste for the Contractor

In *Bender GmbH*,[1306] the ASBCA upheld a government revocation of final acceptance based on contractor gross negligence tantamount to fraud. The Army had awarded a contract to Bender GmbH (Bender) to clean and close a sewage treatment plant in Babenhausen, Germany.[1307]

Through a series of seven modifications, the Army extended the completion date from 18 March 1996[1308] to 7 April 1997[1309] and increased the price on the contract from German deutsche marks (DM) 187,246.57 to DM 486,788.57[1310] in part due to weather problems and heavy zinc contamination in a sludge sample.[1311] After a government attempt to perform a price audit, Bender could only provide weight slips for 229.12 cubic meters of disposed sludge out of a claimed 430 cubic meters.[1312]

The contracting officer refused to pay Bender's final invoice and directed the contractor to repay a claimed overpayment.[1313] The agency discovered that Bender had discharged waste into a canal rather than into a required treatment facility, while charging the government for the latter, more expensive, action.[1314] In addition, Bender failed to submit proper invoices for the claimed sludge clean-up, for which the contracting officer demanded repayment.[1315]

[1298] *Id*. at 160,303.

[1299] *Id*. at 160,307.

[1300] *Id*. at 160,308-09.

[1301] *Id*. at 160,310.

[1302] *Id*. at 160,314. Land O'Frost submitted an equitable adjustment, which the ASBCA denied, based on the government's superior knowledge concerning the difficulty of producing the chicken breast filets and the production delay caused by the dispute. *Id*. at 160,316-17.

[1303] *Id*. at 160,317-18.

[1304] *Id*. at 160,317.

[1305] *Id*. at 160,319.

[1306] ASBCA No. 52266, 04-1 BCA ¶ 32,474.

[1307] *Id*. at 160,605.

[1308] *Id*. at 160,607.

[1309] *Id*. at 160,608.

[1310] *Id*. at 160,605.

[1311] *Id*. at 160,608.

[1312] *Id*. at 160,612.

[1313] *Id*. at 160,613.

[1314] *Id*.

[1315] *Id*.

The ASBCA found that Bender, in submitting false invoices, acted with "wanton disregard of the facts," billing the government for 430 cubic meters of sludge while actually only disposing 229.12 cubic meters of sludge.[1316] Due to repeated false invoices, the ASBCA approved the Army's revocation of final acceptance due to Bender's gross mistakes amounting to fraud.[1317]

The Splice of Life

The ASBCA reviewed the economic waste principle in *Valenzuela Engineering, Inc.*,[1318] denying a claim in which a contractor used spliced rails in contravention of the contract. The claim revolved around an appeal from a contracting officer's decision demanding liquidated damages of $184,800.00. The contract, for Navy weapons facility improvements, included construction of a Type C magazine which required blast doors suspended from a track.[1319] The specification specifically stated, "Track sections shall not be spliced."[1320]

Valenzuela's subcontractor delivered spliced rails. After the Navy complained, Valenzuela assured the Navy it would correct the issue. The subcontractor, despite two letters from Valenzuela, installed the track with alignment splices.[1321] The subcontractor replaced the spliced rails and charged Valenzuela for the additional work; Valenzuela submitted a request for an equitable adjustment which the government denied.[1322]

On appeal, the ASBCA denied the claim holding that Valenzuela and its subcontractor failed to substantially comply with the contract. The board noted in particular the contractor's failure to provide expert testimony which would indicate that spliced rails would not interfere with the purpose of containing explosives.[1323] Discussing economic waste, the board stated that economic waste does not excuse non-performance, but merely limits excessive damages for the repair of non-conforming work. The rule provides that in the absence of economic waste, the government has the right "to get precisely what it ordered."[1324] In this case, doubt over the safety of the spliced rails coupled with the Navy's right to demand strict compliance with the contract specifications properly resulted in the Navy denying Valenzuela's claim for additional compensation.

Major Andrew Kantner.

Terminations for Default

Five Default Terminations Survive Tests at the United States Court of Appeals for the Federal Circuit

This past fiscal year, the CAFC affirmed three Board of Contract Appeals decisions and two COFC decisions upholding government default terminations. Despite a variety of challenges from the defaulted contractors/plaintiffs, the government prevailed in each case. Three of these cases are discussed below; two in other sections of the *Year in Review*.[1325]

After Two Years of Bending, the Army Terminates

In *Bender GmbH v. Brownlee*,[1326] an Army contract required the contractor to replace and repair portions of a

[1316] *Id*. at 160,616.

[1317] *Id*.

[1318] ASBCA Nos. 53608, 53936, 04-1 BCA ¶ 32,517.

[1319] *Id*. at 160,849.

[1320] *Id*.

[1321] *Id*. at 160,850.

[1322] *Id*. at 160,851.

[1323] *Id*. at 160,852.

[1324] *Id*.

[1325] Discussed in this section: Bender GmbH v. Brownlee, 106 Fed. Appx. 728 (Fed. Cir. 2004) (per curiam); PCL Construction Serv., Inc., v. United States, 96 Fed. Appx. 672 (Fed. Cir. 2004); Brett Arnold, P.C. v. United States, 98 Fed. Appx. 854 (Fed. Cir. 2004) (per curiam). Discussed elsewhere: Empire Energy Management Systems, Inc. v. Roche, 362 F.3d 1343 (Fed. Cir. 2004), *infra* section titled Construction Contracting, and Copeland v. Veneman, 350 F.3d 1230 (Fed. Cir. 2003), *supra* section titled Labor Standards.

[1326] 106 Fed. Appx. 728 (Fed. Cir. 2004) (per curiam).

retaining wall on the Nahe River near Baumholder, Germany.[1327] A series of events ultimately resulted in execution of Modification Number Four (Modification 4). In Modification 4, the Army agreed to extend the completion date to 9 October 1998 and agreed to accept the contractor's "revised structural analysis" (statical). In exchange, the contractor, waived "'any and all claims or requests for equitable adjustment arising from or connected to, alleged differing site conditions . . . .'"[1328] After the parties executed Modification 4, the Army warned Bender in a cure notice that "its failure to make adequate progress to ensure completion of the project by the contract deadline may result in termination of the contract."[1329] The Army terminated the contract on 24 November 1998.[1330]

The circuit court first determined that the government successfully carried its burden to prove it properly terminated Bender for default. Pursuant to FAR section 52.249.10, the government can terminate a contractor, if the contractor "fails to prosecute the work . . . with the diligence that will insure its completion" by the scheduled completion date.[1331] Applying the analogous clause in FAR section 52.249-9, the federal circuit held in 2003, adequate grounds for default exist if the contracting officer has "a reasonable belief . . . that there was 'no reasonable likelihood that the [contractor] could perform the entire contract effort within the time remaining for
contract performance.'"[1332] In the instant case, "repeated delays extending over two years" coupled with Bender's inability to provide evidence it could meet the completion deadline, justified the default termination.[1333]

Next, the court found Bender's delay was not excusable. First, Bender did not carry its burden to show that but for a partial suspension of work, it could have completed the project in a timely manner.[1334] Secondly, Bender could not pin delay on the Army for failing to obtain a necessary approval from the local German government, when the contract explicitly required the contractor to "obtain any necessary licenses and permits, and to comply with any . . . laws, codes, and regulations."[1335] The court affirmed the board's judgment upholding the termination for default.

Indivisible with Termination for All

In *Brett Arnold, P.C. v. United States*,[1336] Arnold agreed to provide real estate closing services to the HUD.[1337] A key provision of the contract required Arnold to timely wire sales proceeds to the HUD.[1338] One of four of Arnold's offices, "on numerous occasions" failed to provide such proceeds to the HUD within the contract's time limits.[1339] Arnold alleged the contract was "severable and divisible." Citing a 1964 Court of Claims decision, *Murphy v. United States*,[1340] Arnold argued the HUD should have terminated only the non-performing office.[1341]

According to the CAFC, in *Murphy*, a dam construction contract, the work subject to termination—irrigation work—was "wholly separate from and incidental to," the dam construction. The government had "no concerns" about timely completion of the dam.[1342] Because timely transmitting sales proceeds was a critical function of the contract and not "separate from" or "incidental to" the contract, *Murphy* did not apply and the HUD properly terminated the entire contract.[1343]

[1327] *Id*. at 729.

[1328] *Id*.

[1329] *Id*.

[1330] *Id*.

[1331] FAR, *supra* note 20, at 52.249(a).

[1332] Bender GmbH v. Brownlee, 106 Fed. Appx. at 730-31 (citing McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1017 (Fed. Cir. 2003), quoting Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987)).

[1333] *Id*. at 731.

[1334] *Id*.

[1335] *Id*.

[1336] 98 Fed. Appx. 854 (Fed. Cir. 2004).

[1337] *Id*. at 855.

[1338] *Id*. at 856.

[1339] *Id*. at 855.

[1340] 164 Ct. Cl. 332 (1964).

[1341] *Brett Arnold*, 98 Fed. Appx. at 856.

[1342] *Id*.

[1343] *Id*.

OK, So We Made Some Mistakes;
But You Can't Prove We Caused Your Delays and Increased Costs

In *PCL Construction Services, Inc., v. United States*,[1344] a third per curiam decision from the CAFC, the contractor alleged that the United States Bureau of Reclamation (USBR) breached PCL's fixed-price construction contract to build a parking structure and visitor's center near the Hoover Dam. The breach allegedly arose out of USBR's provision of inaccurate construction drawings.[1345]

PCL substantially completed the project on 12 May 1995, approximately fifteen months after the contract deadline. Alleging USBR caused the delays and increased costs, PCL filed a contract breach claim in July 1995. Between July 1995 and November 1996, USBR denied the claim, PCL stopped work, and USBR assessed liquidated damages and terminated the remaining portions of the contract for default.[1346] The COFC found "USBR had not breached the contract" and "it had properly terminated the contract for default."[1347]

Both parties agreed USBR had provided flawed drawings, that the contract allowed for some errors, and that USBR provided corrected drawings at government expense.[1348] Therefore, the CAFC determined causation was the pivotal issue: "The question is whether the failure to produce accurate drawings in a timely manner caused disruption or delay for which the USBR was responsible."[1349] PCL alleged USBR was responsible for all the delay costs. The CAFC found "not clearly erroneous," the COFC's finding that PCL failed to prove a "cause and effect relationship" between the contract changes and "PCL's increased costs."[1350] The CAFC appeared swayed by USBR's reasonable position, conceding responsibility for some of the delay and allocating costs between USBR and PCL.[1351] Because PCL did not satisfy its burden of proof, the CAFC would not disturb the COFC holding in favor of the government.[1352]

Government Condemned by its Own Documents or Why Didn't we Settle This?

The contractor's victory in *AST Anlagen-Und Sanierungstechnik GmbH*[1353] left this author wondering, why didn't the government settle this case when it had its chance(s)? The appeal's "long and tortuous history," stretched from 1989 until 2004 and included a dismissal (subject to consummation of an apparent agreement to settle), a separate 2003 opinion regarding whether the case had been settled in 1991,[1354] reinstatement, hearing adjournment, and ultimate decision by the ASBCA.[1355] The case did not involve any novel areas of the law. Further, the board apparently had little trouble sustaining the appeal based almost exclusively on government documents.

AST contracted with the Army to conduct "extensive repair work" on an Army building in Hanau, Germany.[1356] Nearly two years elapsed between contract award and the termination for default.[1357] AST encountered numerous delays and obstacles. Using predominantly Army documents, ASBCA Judge Michael Paul found the government responsible for nearly

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[1344] 96 Fed. Appx. 672 (Fed. Cir. 2004) (per curiam).

[1345] *Id*. at 673.

[1346] *Id*. at 674-75. The COFC decision most thoroughly discusses the termination for default. *See* PCL Construction Services, Inc., v. United States, 47 Fed. Cl. 745 (2000).

[1347] *PCL*, 96 Fed. Appx. at 674.

[1348] *Id*. at 675.

[1349] *Id*.

[1350] *Id*. at 675-76.

[1351] *Id*. at 676.

[1352] The CAFC decision focused on whether the government breached the contract. By affirming "the decision of the Court of Federal Claims," the CAFC also affirmed the COFC's denial of PCL's challenge to the termination for default. *Id*. at 678.

[1353] ASBCA Nos. 39576, 50802, 04-1 BCA ¶ 32,558.

[1354] AST Anlagen-Und Sanierungstechnik GmbH, ASBCA No. 39576, 03-2 BCA ¶ 32,377.

[1355] The case's procedural history is recounted at *AST Anlagen*, 04-1 BCA ¶ 32,558, at 161,033-34.

[1356] *Id*. at 161,033.

[1357] The contracting officer notified AST of award on 24 September 1987. The contracting officer terminated the contract for default on 5 September 1989. *Id*. at 161,034 and 161,043.

all these problems. Two main circumstances prevented AST from making timely progress. First, U.S. troops continued to occupy the premises after the notice to proceed had been issued.[1358] Secondly, "another renovation contract" was taking place on the roof of the same building AST was hired to repair (and AST's repair work included replacing "various roof structures").[1359] Both of these government-caused circumstances delayed AST's progress and caused problems between AST and its subcontractors.[1360] In addition, design flaws in the specifications for the bathroom walls and interior painting caused additional delays,[1361] and Army funding problems delayed payment for certain work.[1362]

Meanwhile, according to the ASBCA opinion, although AST was making "relatively rapid progress" the government issued a cure notice. The Army asserted progress was insufficient and AST was not timely paying its subcontractors.[1363] The ASBCA found that government-caused delays had hindered progress; insufficient evidence supported the allegation that AST failed to pay its subcontractors; and AST paid its subcontractors "out of its own funds" before receiving even its first progress payment from the Army.[1364]

Finally, Modification P00005, drafted to remedy the interior painting specification, left undetermined the contract completion date. The modification provided:

> A provisional revised completion date, by which the work described by title and Item # on page 1-2 of this modification and described in detail on the attached specification pages 1-16 MUST BE COMPLETED, is established as being 05 JUNE 1989. A final total contract completion date will be established upon finalization of this Change Order.[1365]

The ASBCA found that according to the "plain language" of this modification, a "'final total contract completion date' for the project did not exist."[1366]

In general, the ASBCA placed responsibility for all problems on the government. Judge Paul wrote, the "most likely explanation for AST's purported lack of progress at this time is the host of problems which were left unresolved by the contracting officer's unilateral issuance of Modification No. P00005 on 5 May 1989" and "the more likely explanation for any perceived difficulties with subcontractors was that, because of the various delays for which the Army was admittedly responsible, the subcontractors were not able to make efficient progress on the job site."[1367]

The Army based its decision to terminate for default on AST's "failure to diligently perform the work" and on statements by subcontractors that they had stopped work until they received a "written guarantee of payment of future invoices."[1368] The board found the Army's own reports belied the conclusions that AST was not diligently performing and that the subcontractors had stopped work. Further, the contracting officer did not conduct a study to determine "how long it would have taken AST to complete the work."[1369]

[1358] *Id*. at 161,035-36.

[1359] *Id*. at 161,035.

[1360] "AST would either have to delay paying its subcontractors for materials already ordered or it would have to pay these expenses our of its own funds." *Id*.

[1361] The government's initial specifications envisioned masonry and brick bathroom walls with a single steel beam in the basement supporting the walls. Stress analyses indicated a single steel beam could not support brick walls. Instead, the government modified the contract to substitute "prefabricated walls." The Directorate of Engineering's memo indicated the change was necessary due to a "design deficiency." *Id*. at 161,037. Later, the parties discovered that before painting certain walls, they had to be coated with spray-on plaster. Adding the spray-on plaster procedure to the contract was a change that the DEH director stated resulted from "differing site conditions and design deficiencies." *Id*. at 161,039.

[1362] "As a result of the Army's funding difficulties, AST was not to be paid for its work on the bathroom walls until the parties reached agreement on a" later negotiated modification. *Id*. at 161,037.

[1363] *Id*. at 161,038.

[1364] *Id*. at 161,039.

[1365] *Id*.

[1366] *Id*. A later modification provided, "In order to complete the additional work described in the attached specifications the performance completion date is extended until 15 September 1989." *Id*. at 161,042. The plain language of this provision seems to set a new total completion date. The board found, however, that the new date again "referred only to added work under the 'attached specifications'" and was "silent regarding a completion date for the remaining basic contractual effort." *Id*. at 161,045 n.10.

[1367] *Id*. at 161,041.

[1368] *Id*. at 161,043.

[1369] *Id*.

The board found the government did not carry its burden of proving a valid ground to terminate AST for default. First, the bilaterally established completion passed without government action. Modification P00005 left the government without a definitive completion date. Therefore, "the government cannot point to a valid completion date which can serve [as] a basis for default termination."[1370]

Had the Army been able to prove an enforceable deadline existed, the board would have still ruled against the government. The board clearly found the government was responsible for the "array of problems" causing substantial delays. Judge Paul wrote, "AST's attempts to complete the project were thwarted by a host of government-caused delays which were thoroughly documented by the contracting officer and his fellow government employees."[1371] He concluded, "any failure . . . to make rapid progress: was 'the fault of the government.'"[1372] The board converted the termination to one for convenience.[1373]

The Government Can "Waive" a Construction Contract Completion Date

Usually, the government is not found to have "waived" a contract deadline in construction cases.[1374] In *B.V. Construction, Inc*.,[1375] however, the lack of a liquidated damages clause coupled with the government's apparent complete lack of concern over the completion date, caused the ASBCA to find the government elected to waive the right to terminate the contract. Further, the government failed to properly re-establish a contract completion date.[1376]

On 7 June 1991, the National Aeronautics and Space Administration (NASA) contracted with B.V. Construction, Inc.(BV), to install a "patio covering known as a 'space frame.'"[1377] The initial completion date was 31 October 1991.[1378] A bilateral modification, signed by the contractor on 5 December 1991, extended the completion date to 17 January 1992.[1379] Nearly twenty months of differing site conditions, subcontractor problems, and design changes elapsed, with no definitive completion deadline re-established. During the twenty month gap, the parties exchanged letters and phone calls regarding, among other topics, design modifications, pricing of changes, and work schedules.[1380] BV continued work on the project and the contracting officer was aware of BV's efforts.[1381] On 27 September 1993, in an un-priced unilateral modification, the contracting officer required completion by 8 January 1994.[1382] On 22 December 1993, BV submitted a revised schedule showing final completion on 10 April 1994.[1383] Finally, on 11 February 1994, the contracting officer unilaterally set completion for 24 April 1994.[1384] The contracting officer did not indicate that she considered "BV's progress or lack thereof" since 22 December 1993—the date BV submitted its proposed schedule.[1385]

[1370] *Id*. at 161,044.

[1371] *Id*. The Army attempted to discredit the credibility of a key AST witness. However, since the "bulk of the evidence on which the board relied . . . was authored by government representatives," the witness' testimony "had little bearing" on the decision. *Id*.

[1372] *Id*.

[1373] *Id*. at 161,045.

[1374] Absent government manifestation that a performance date is no longer enforceable, the waiver doctrine generally does not apply to construction contracts. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448.

[1375] ASBCA Nos. 47766, 49337, 50553, 04-1 BCA ¶ 32,604.

[1376] *Id*. at 161,351-52.

[1377] *Id*. at 161,327.

[1378] "BV's contract provided that BV had 120 days to complete performance of the space-frame work. NASA issued BV's notice to proceed with contract work on 3 July 1991. The completion date for BV's contract accordingly was 31 October 1991." *Id*. at 161,350.

[1379] *Id*. at 161,333.

[1380] *Id*. at 161,333-38.

[1381] As the board wrote:

> For 20 months after the completion date passed, from January of 1992 to September of 1993, NASA continued to discuss and negotiate with BV proposed changes to the contract work . . . . BV s activities with respect to its space frame contract were known to NASA's CO [contracting officer] and constituted substantial reliance on an election having been made to not terminate the contract.

Id. at 161,351.

[1382] *Id*. at 161,342.

[1383] *Id*. at 161,344.

[1384] *Id*. at 161,345.

[1385] *Id*.

Additional problems ensued, and on 15 April 1994, the contracting officer issued BV two letters. The first denied BV additional time it had requested to complete the contract.[1386] The second, a cure notice, stated, "'the Government considers [BV's] failure to start space frame erection a condition that is endangering performance of the contract' and, 'unless this condition is cured within 10 days after receipt of this notice, the Government may terminate for default . . . this contract.'"[1387] On 25 April 1994, BV informed the contracting officer that it required three to four weeks to complete the work.[1388] The termination contracting officer terminated the contract on 26 April 1994.[1389] The notification provided, "'the act constituting the default is the failure to commence space frame erection and failure to order necessary materials.'"[1390] In addition, the notification stated that "BV's failure to perform is not excusable and that BV's response to NASA's cure notice dated 15 April 1994 'did not reflect a satisfactory course of action for progressing with the work and completing the requirement by the required date.'"[1391]

The board first noted, in familiar language, that a "default termination is a drastic sanction."[1392] The board further explained that liability for monetary damages "are a species of 'forfeiture' and must be strictly construed."[1393] The board discussed the issue of waiver, first observing that NASA did not terminate the contract until two and a quarter years after the extended contract completion date of 17 January 1992. Citing *DeVito v. United States*,[1394] the board laid out the two elements required to establish the government elected to waive default: "(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance of the contract by the contractor with the government's knowledge and implied or express consent."[1395]

Finding waiver in construction contracts is unusual because construction contracts usually include a liquidated damages clause and a clause entitling the contractor to be paid for work completed. Therefore, detrimental reliance usually can not be found merely from government forbearance and continued contractor performance.[1396] BV's contract, however, did not contain a liquidated damages clause.[1397] Further, NASA "permitted the original contract completion date to pass without apparent concern."[1398] While the government may have re-established 17 January 1992 as a valid completion date, by unilaterally establishing the two 1994 completion dates, the government at least "implicitly" conceded it waived the January 1992 deadline. Further, "NASA showed no degree of urgency in resolving" the various design problems that occurred at the contract's beginning, and the government was aware of BV's work efforts throughout the period in question.[1399] The board concluded, "based on these unique circumstances," NASA waived the January 1992 completion date.[1400]

Once a contract completion date has been waived, the board noted, the government must re-establish a new date to regain the ability to terminate the contract for failure to make progress or to complete. Either the contractor can agree on a new date (a bilateral agreement) or the government's proposed date must be "reasonable based on the contractor's performance capabilities" when the government re-established the date.[1401] On 11 February 1994, NASA unilaterally imposed 24 April 1994 as the contract completion deadline. This date, on its face, was unreasonable in light of BV's proposed schedule submitted on 22 December 1993.[1402] Further, NASA did not "consider BV's capabilities" as reflected in

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[1386] *Id*. at 161,346.

[1387] *Id*. at 161,347.

[1388] *Id*.

[1389] *Id*. at 161,348.

[1390] *Id*.

[1391] *Id*.

[1392] *Id*. at 161,350.

[1393] *Id*.

[1394] 413 F.2d 1147 (Ct. Cl. 1969).

[1395] *B.V. Constr.*, 04-1 BCA ¶ 32,604 at 161,350 (discussing DeVito v. United States, 413 F.2d 1147, 1154 (Ct. Cl. 1969)).

[1396] *Id*. (citing John R. Glenn, ASBCA No. 24028, 80-1 BCA ¶ 14,428, at 71,133 and Brent L. Sellick, ASBCA No. 21869, 78-2 BCA ¶ 13510, at 66,195).

[1397] *Id*. at 161,351.

[1398] *Id*.

[1399] *Id*.

[1400] *Id*.

[1401] *Id*.

[1402] *Id*. at 161,351-52.

its 22 December schedule. Finally, NASA did not present any evidence demonstrating the new completion date was reasonable.[1403] NASA's "attempt to reestablish a completion date for BV's contract, therefore, was ineffective and did not result in a legally enforceable completion date that could serve as a basis for a default termination. Accordingly, NASA's subsequent termination of BV's contract for default on 26 April 1994 was improper."[1404]

Rough Waives for the National Oceanic and Atmospheric Administration (NOAA)

This year, the General Services Administration Board of Contract Appeals (GSBCA) also had an opportunity to look at the issue of waiver and re-establishing a completion date.[1405] In *Divecon Services, LP v. Dep't of Commerce*,[1406] the NOAA contracted for charter of a remotely operated vehicle (ROV), support vessel, captain and crew for an eight-day cruise.[1407] Although the parties agreed the cruise would take place from 12 to 20 September 2002, mechanical difficulties delayed the start until 15 September 2002. Additional mechanical problems occurred on 16 September, requiring the ROV to return to port.[1408] Communications between the contractor and the NOAA indicated that they had agreed to begin again on 20 September. As of 1600 hours on 20 September, Divecon was mechanically, "ready, willing, and able to complete the contract."[1409] Earlier, however, differences concerning which party would pay for delays due to bad weather had arisen.[1410] The contract was silent as to the financial impact of bad weather,[1411] and the parties did not reach an agreement.[1412]

Soon after 1100 hours on 20 September 2002, the contracting officer orally terminated the contract. The reasoning for termination was unclear. It occurred, however, soon after the contract administrator noted the NOAA scientist, "would not agree to paying for weather days and decided she would rather lose the data than go back out and finish the survey under those conditions."[1413] Further, during the termination conversation, the parties did not discuss the mechanical status of the ROV.[1414]

The contract contained a termination for cause clause providing, in part:

> The Government may terminate this contract, or any part hereof [sic], for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance.[1415]

The NOAA asserted the termination was based on Divecon's inability "to make progress so as to endanger performance of the contract."[1416] To prevail on this termination ground, however, the board noted the government must show the contracting officer had a "reasonable belief that there was no reasonable likelihood the contractor could perform the entire contract effort within the time remaining for contract performance."[1417] The GSBCA found, however, that NOAA had effectively waived the 20 September 2002 completion date and did not establish a new date.[1418]

Judge Daniels noted that by 16 September it was mathematically impossible to complete the eight-day mission by 20

[1403] *Id*. at 161,352.

[1404] *Id*.

[1405] The waiver doctrine was raised, but not successful, in the Agriculture Board of Contract Appeals decision. Kadri Int'l Co., AGBCA No. 2000-170-1, 04-2 BCA ¶ 32,646.

[1406] GSBCA Nos. 15997, 16057, 04-2 BCA ¶ 32,656.

[1407] *Id*. at 161,626.

[1408] *Id*. at 161,627-28.

[1409] *Id*. at 161,631.

[1410] *Id*. at 161,630.

[1411] "The parties agree that the contract does not explicitly address, and the parties never discussed prior to award, how costs would be allocated if, on any cruise day or days, the weather was so bad that the ROV could not operate." *Id*. at 161,627.

[1412] *Id*. at 161,632.

[1413] *Id*. at 161,630.

[1414] *Id*.

[1415] *Id*. at 161,627.

[1416] *Id*. at 161,634.

[1417] *Id*.

[1418] *Id*.

September. Nonetheless, the government encouraged Divecon to conduct expensive repairs and to keep its personnel on stand-by.[1419] From 16 to 20 September, the government negotiated with Divecon, knowing that Divecon was hard at work attempting to repair the ROV. Therefore, the government waived the right to terminate the contract on 20 September.[1420]

The government also argued that Divecon abandoned performance.[1421] Apparently, the government believed that Divecon's refusal to accept financial liability for losses due to bad weather constituted abandonment. The board noted the absurdity of this position. The contract was silent on this issue. The government could not threaten a contractor to accept a change without consideration, that could have a significant negative financial impact on the contractor. "Permitting the government to terminate a contract on this ground would generally be a 'license for abuse of contractors.'"[1422]

Labor Conspiracy, Akin to a Strike, is a Valid Defense to T4D

On 20 November 2001, the Army awarded NTC Group Inc. (NTC) three contracts to operate oil analysis laboratories at Fort Bragg, North Carolina; Fort Drum, New York; and, Hunter Army Airfield (AAF), Georgia.[1423] NTC was not the incumbent contractor at any of these locations. The contracts each required two "Class A Logistic Support Activity (LOGSA) certified Technician/Evaluators."[1424] The contracts also contained additional training, skills and experience requirements. The ASBCA found there was a limited pool of Army Oil Analysis Program (AOAP) certified employees and that to fulfill the contracts' needs, NTC would have had to "either hire the incumbents or lure certified evaluators from other AOAP laboratories."[1425] The contract required evidence of successful staffing ten days after the government determined the lowest responsive, responsible bidder.[1426]

The manager of the Fort Bragg laboratory, in essence, successfully persuaded the Fort Drum and Hunter AAF managers to refuse employment with NTC.[1427] The managers, in turn, persuaded most of the other current employees to refuse to join NTC. These actions were taken with the explicit intent to thwart NTC's successful performance.[1428] In addition, LOGSA refused to provide NTC with a list of names of currently certified evaluators.[1429]

NTC could not obtain a sufficient number of certified evaluators at any of the three locations. The respective contracting officers terminated each contract for cause.[1430] The board found that failure to provide an adequate number of qualified personnel was a valid ground for terminating the contracts.[1431] The board also found, however, that the particular

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[1419] *Id*.

[1420] *Id*.

[1421] *Id*. at 161,635.

[1422] *Id*. at 161,635-36. The board also rejected two other government rationales. First, the government argued that the equipment failure was grounds to terminate. This argument was contrary to Divecon's assertion that it was "ready, willing and able to complete the contract" as of the afternoon of 20 September. *Id*. at 161,635. Next, the government asserted it terminated the contract because Divecon could not guarantee its equipment in seas rougher than "sea state 3." The contract, however, only required the equipment to function in sea states 3 or calmer. *Id*.

[1423] NTC Group, Inc., ASBCA Nos. 53720, 53721, 53722, 04-2 BCA ¶ 32,706.

[1424] "[T]rained in ferrographic procedures and methodology in accordance with TM 38-301." *Id*. Ferrography is "an analytical method of assessing machine health by quantifying and examining ferrous wear particles suspended in the lubricant or hydraulic fluid." OIL AND LUBRICATION ANALYSIS DICTIONARY, available at http://www.oilanalysis.com/dictionary/ (last visited Nov. 15, 2004).

[1425] *NTC Group, Inc*., 04-2 BCA ¶ 32,706 at 161,804.

[1426] *Id*. at 161,804.

[1427] *Id*. at 161,802-03.

[1428] *Id*. at 161,807.

[1429] *Id*. at 161,806. LOGSA denied the information request based on the Privacy Act. The ASBCA did not rule on the appropriateness of this Privacy Act decision. *Id*. at 161,811-12 n.9.

[1430] *Id*. at 161,807-09. The contract included the clause at FAR section 52.212-4, Contract Terms and Condition—Commercial Items (May 1999), which provided, in pertinent part:

> (m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

Id. at 161,805-06 (quoting the clause at FAR section 52.212-4).

[1431] *Id*. at 161,809.

labor situation NTC faced was beyond NTC's reasonable control and did not result from NTC's fault or negligence.[1432] The board found that a labor situation will only excuse performance "in the most unusual circumstances" or "where abnormal circumstances exist which could not have been anticipated."[1433] The board viewed the combination of the incumbent chief's conspiracy, the LOGSA requirements, and the LOGSA refusal to share names as just such an abnormal circumstance.[1434]

Lieutenant Colonel Michael Benjamin.

Terminations for Convenience

Extraordinary, but not so Extraordinary You Get Profit on a Subcontractor's Efforts in your Cost Plus Fixed Fee Contract

In *Lockheed Martin Corp., Naval Electronics and Surveillance Systems-Surface Systems*,[1435] Lockheed Martin was the "lead contractor" in a contract with the Naval Sea Systems Command (NAVSEA) to qualify Unisys Corp. (Unisys) and Westinghouse Electric Corp. (Westinghouse) as second source producers of key components of the AEGIS Weapon System's AN/SPY-1 Radar System.[1436] The prime contract was a cost plus fixed fee (CPFF) effort between NAVSEA and Lockheed Martin.[1437] Lockheed Martin, in turn, contracted with Unisys for antenna work and with Raytheon for transmitter work.[1438] When NAVSEA terminated the prime contract for the government's convenience, Lockheed sought to include as part of its termination settlement a fee on its subcontractor's efforts.[1439]

NAVSEA contracted with Lockheed Martin under the provisions of FAR subpart 17.4, Leader Company Contracting.[1440] This subpart authorizes "an extraordinary acquisition technique" to direct a "developer or sole producer of a product or system" to be the "leader company" of one or more designated "follower companies, so that the" follower companies can become "source[s] of supply."[1441] The prime contract divided the effort into two phases. Each phase included submission of various plans and other data as set forth in a "Contract Data Requirements List" (CDRL).[1442] According to Lockheed Martin's subcontracts, the subcontractors had to submit data pursuant to a Subcontractor Data Requirements List (SDRL).[1443]

When NAVSEA terminated the prime contract, Phase I had been completed.[1444] Phase II was ten to fifteen percent completed,[1445] and the required CDRLs and SDRLs had been delivered.[1446] In determining a settlement amount, NAVSEA and Lockheed differed in only one main respect: "whether Lockheed Martin [was] entitled to a fee based on subcontractor efforts."[1447] Lockheed Martin asserted "'costs incurred for services rendered to the date of termination by the first-tier subcontractors are fee/profit-bearing costs,' and that it was entitled to fee on its costs for services rendered to the date of

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[1432] *Id*. at 161,811.

[1433] *Id*. at 161,810.

[1434] *Id*. at 161,810-11.

[1435] ASBCA Nos. 53032, 54064, 03-2 BCA ¶ 32,408.

[1436] *Id*. at 160,387.

[1437] *Id*. at 160,388-89. NAVSEA and Lockheed actually entered into a letter contract that was never definitized. *Id*. at 160,396.

[1438] *Id*. at 160,392-93 and 160,394-95, respectively. On the antenna side, Unisys thereafter subcontracted with Westinghouse; while on the transmitter side, Raytheon, subcontracted with Unisys. *Id*. at 160,393-94 and 160,395-96. The best, concise, discussion of the contracting and subcontracting structure is found in the reconsideration of this decision, *Lockheed Martin Corp., Naval Electronics and Surveillance Systems-Surface Systems*, ASBCA Nos. 53032, 54064, 04-1 BCA ¶ 32,559, 2004 ASBCA LEXIS 16, at *1-2 (Mar. 10, 2004).

[1439] *Lockheed Martin*, 03-2 BCA ¶ 32,408, at 160,387.

[1440] *Id*. at 160,388 (discussing and citing FAR subpart 17.4).

[1441] *Id*. (citing FAR section 17.401). The decision sets forth the FAR's four prerequisites for use of this contracting technique: (1) The leader company has the necessary production know-how and is able to furnish required assistance to the follower(s); (2) No other source can meet the Government's requirements without the assistance of a leader company; (3) The assistance required of the leader company is limited to that which is essential to enable the follower(s) to produce the items; and (4) Its use is authorized in accordance with agency procedures. *Id*. (citing FAR section 17.402).

[1442] *Id*. at 160,390-91.

[1443] *Id*. at 160,393 and 160,395.

[1444] Phase I was completed in June 1989. *Id*. at 160,396. NAVSEA terminated the contract on 21 June 1990. *Id*. at 160,397.

[1445] *Id*.

[1446] *Id*. at 160,398.

[1447] *Id*. at 160,410.

termination, including such costs from its first and second tier subcontractors."[1448] The government's position was the FAR did not entitle a prime contractor to fee or profit on subcontractor work.[1449]

FAR section 49.305-1(a) applies to cost-reimbursement contracts terminated for convenience.[1450] It provides, in pertinent part:

> The TCO shall determine the adjusted fee to be paid, if any, in the manner provided by the contract. The determination is generally based on a percentage of completion of the contract or of the terminated portion . . . . The contractor's adjusted fee shall not include an allowance for fee for subcontract effort included in subcontractors' settlement proposals.[1451]

The relevant contract termination clause, FAR section 52.249-6(g)(4)(i) similarly denies the prime contractor a fee for subcontractor effort.[1452] In determining the prime contractors' fee, FAR section 52.249-6(g)(4)(i) explicitly calls for "excluding subcontract effort included in subcontractors' termination proposals."[1453] Apparently, both parties failed to discuss FAR section 52.249-6.[1454]

Lockheed Martin argued that FAR section 49.305-1(a) did not apply to subpart 17.4 contracts.[1455] The board disagreed. Nothing in FAR parts 17 or 49 indicate that Leader Contracts are exempt from FAR section 49.305-1(a).[1456] Further, while the parties conducted robust negotiations, there is no evidence the parties intended any interpretation besides the plain meaning of these provisions.[1457]

Prior ASBCA precedent bolstered this interpretation of the two far clauses. *Kollmorgen Corp., Electro-Optical Division*,[1458] involved the interpretation of FAR section 52.249-6's predecessor clause. Regarding Kollmorgen's ability to receive a fee on subcontractor effort after termination of its CPFF contract, the board wrote, "The termination clause and the regulations are very clear that the prime contractor . . . may not include a fee on subcontractor cost or effort included in the subcontractor's termination claim . . . Kollmorgen may not collect a fee on the amount of the settlement with [its subcontractor,] Westinghouse."[1459]

Lockheed Martin also argued it should at least recover a profit for the SDRLs actually delivered by the subcontractors to NAVSEA.[1460] This ground was also not persuasive in the face of FAR section 49.305-1(a), the FAR clause at section 52.249-6, and *Kollmorgen*. The board concluded, the two FAR clauses mandated that "subcontract effort, delivered SDRLs or otherwise, must be excluded in determining prime contractor fee so long as the prime contract is CPFF."[1461]

[1448] *Id*. at 160,402.

[1449] *Id*. at 160,410-11.

[1450] See FAR, *supra* note 20, subpt. 49.3, Additional Principles for Cost Reimbursement Contracts Terminated for Convenience, which includes section 49.305-1(a).

[1451] *Id*. at 49.305-1.

[1452] *Lockheed Martin*, 03-2 BCA ¶ 32,408, at 160,411.

[1453] *Id*. (quoting the clause at FAR section 52.249-6(g)(4)(i) (May 1986)).

[1454] *Id*.

[1455] In fact, Lockheed only wanted to exclude the profit-limiting portion of section 49.305-1. *Id*.

[1456] *Id*. at 160,411-12.

[1457] *Id.* at 160,412.

[1458] ASBCA No. 28480, 86-2 BCA ¶ 18,919.

[1459] *Lockheed Martin*, 03-2 BCA ¶ 32,408 at 160,412 (quoting Kollmorgen Corp., ASBCA No. 28480, 86-2 BCA ¶ 18,919, at 95,411).

[1460] *Id*. at 160,412-13.

[1461] *Id*. at 160,413. The board denied reconsideration in *Lockheed Martin Corp., Naval Elec. and Surveillance Systems-Surface Systems*, ASBCA Nos. 53032, 54064, 04-1 BCA ¶ 32,559, 2004 ASBCA LEXIS 16 (Mar. 10, 2004).

The Helicopter that Never Took Off

In late February 2004, the Army announced the cancellation of the Comanche helicopter program.[1462] Although the Army had invested over $6.9 billion in the program, the termination was expected to save approximately $14 billion.[1463] As of August 2004, reports indicated that the prime contractors, Boeing and Sikorsky, were preparing their termination settlement proposals.[1464] Termination settlement estimates run from $480 million to several billion dollars.[1465]

Delivery Order Estimates Don't Lock in Government

Maggie's Landscaping, Inc.,[1466] had a requirements contract to mow, clip and edge ninety-three areas at Aberdeen Proving Ground.[1467] The government issued monthly Delivery Orders (DOs) setting forth the "government's anticipated monthly requirements and clearly identified them as estimated mowing frequencies."[1468] Appellant knew the DOs contained estimates.[1469] Each week Maggie's would propose areas for mowing. The contracting officer's representative or alternate contracting officer's representative would then approve Maggie's list. Later, Maggie's prepared, and the government paid, monthly invoices based on actual mowing accomplished.[1470] The actual work, however, did not always match the monthly estimates.[1471] In all, actual mowing ordered was less each season that the DO estimates.[1472]

Upon completion of the base and four option years, Maggie's submitted a claim, alleging the government's scheduling of less mowing than the DO estimates constituted partial termination for convenience.[1473] Specifically, Maggie's asserted:

> the government has no obligation pursuant to a requirements contract to issue delivery orders equal to the government's estimated quantities . . . . However, once issued, a contract for the work encompassed by a delivery order is formed, and a subsequent reduction in the scope of the work ordered constitutes a partial termination.[1474]

The board disagreed for two reasons. First, in most cases, Maggie's had agreed, through bilateral modifications to "adjust the amounts in the DO estimates" to the amounts actually mowed.[1475] Second, the contract's terms made clear that the DOs were in fact estimates subject to weekly scheduling and not "unconditional commitment[s]."[1476] Thus, the government's failure to order exactly the same amounts as in the DOs did not result in a constructive partial termination for convenience.[1477]

Lieutenant Colonel Michael Benjamin.

[1462] *See DOD Cancels Comanche Helicopter Program*, 46 GOV'T CONTRACTOR 8, ¶ 81 (Feb. 25, 2004).

[1463] *Id*.

[1464] *U.S. Army Still Counting Cost of RAH-66*, DEF. NEWS, Aug. 2, 2004 at 20.

[1465] Claude M. Bolton, J., the Army's Assistant Secretary for Acquisition, Logistics, and Technology, estimated between $480 million and $650 million. An unnamed former Army aviation official was quoted in *Defense News* as saying, "Mark my words, after it's all said and done, it will be at least $2.5 billion." *Id*.

[1466] ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647.

[1467] *Id*. at 161,554.

[1468] *Id*. at 161,556.

[1469] *Id*.

[1470] *Id*. at 161,557.

[1471] *Id*.

[1472] *Id*. at 161,558.

[1473] *Id*. at 161,564.

[1474] *Id*.

[1475] *Id*.

[1476] *Id*.

[1477] *Id*. at 161,564-65. The board rejected Maggie's other bases for recovery: ordering less than the estimates did not constitute a constructive change, nor a cardinal change; nor did the government act in bad faith. *Id*. at 161,565-66.

Jurisdiction

If We Could Only Get to the Merits!

This year has given rise to a bumper-crop of court and board decisions involving jurisdictional and procedural issues. Though some may view this abundance as the welcomed result of aggressive lawyering, at least one prominent commentator has bemoaned the inability of the courts and boards to cut through the morass of procedural issues and get to the merits.[1478] Be that as it may, several decisions handed down this year warrant examination.

In *England v. Swanson Group* (*Swanson*)[1479] the CAFC held it lacked jurisdiction over a contractor's appeal because the contractor's request for an extension for filing a settlement proposal was not a "claim" under the Contract Disputes Act (CDA).[1480] In *Swanson*, the Navy awarded Swanson a guard services contract in 1991. In 1992, the Navy ordered Swanson to cure what the Navy perceived as Swanson's failure to comply with the contract terms.[1481] Shortly thereafter, the Navy terminated the contract for default. Swanson filed a timely appeal of the default to the ASBCA, whereupon the board ordered the Navy to convert the termination for default to a termination for convenience.[1482]

In accordance with the clause at FAR section 52.249-2(e),[1483] when the government terminates a contract for convenience, a contractor has one year to submit a termination for convenience settlement proposal. If a contractor fails to submit a proposal within that time, the contracting officer "may determine, on the basis of the information available, the amount, if any, due the Contractor."[1484] In the present case, Swanson did not submit a termination settlement within the one-year period, but prior to the expiration of the period, requested a one-year extension with the Navy. The Navy denied this request, and shortly after the end of the one-year period, unilaterally determined Swanson was entitled to $12,294.21 in termination settlement costs. Swanson appealed the Navy's decision, whereupon the ASBCA awarded Swanson $249,840.38 in costs over and above the $12,294.21 paid by the Navy.[1485]

On appeal to the CAFC, the Navy, for the first time, argued the board lacked jurisdiction to entertain the quantum appeal because Swanson failed to submit a claim, or alternatively, a settlement proposal that could ripen into a claim, prior to the contracting officer's settlement determination.[1486] The court agreed with the Navy's argument. Specifically, the court observed that while the board addressed whether Swanson had complied with the requirements of FAR section 52.249-2(e), it did not address the jurisdictional prerequisites of the CDA itself. Because Swanson submitted neither a claim, nor a termination settlement proposal that could have ripened into a claim, prior to the contracting officer's settlement determination, Swanson could not appeal the contracting officer's settlement determination. To the court, "Swanson's appeal was not authorized by the CDA because it was not an appeal from a contracting officer's final decision on a claim that Swanson had submitted."[1487] Accordingly, the court vacated the board's decision and remanded the case to the board with instruction that the case be dismissed.[1488]

[1478] *See* Ralph C. Nash & John Cibinic, *Postscript: Late Convenience Termination Settlement Proposals,*18 NASH & CIBINIC REP. 4 ¶ 13 (2004).

[1479] 353 F.3d 1375 (Fed. Cir. 2004).

[1480] 41 U.S.C.S. §§ 601-613 (LEXIS 2004).

[1481] *Swanson*, 353 F.3d at 1376-77. The underlying dispute involved the number of qualified guards Swanson posted at required facilities. *Id.*

[1482] *See* The Swanson Group, Inc., ASBCA No. 44664, 98-2 ¶ 29,896.

[1483] FAR, *supra* note 20, at 52.249-2(e).

[1484] *Id*.

[1485] *See* The Swanson Group, Inc., ASBCA No. 52109, 02-1 BCA ¶ 31,836. Swanson requested reconsideration based on math errors in the board's decision, whereupon the board increased the amount by $15,941.66. *See* The Swanson Group, Inc., ASBCA No. 52109, 02-2 BCA ¶ 31,906.

[1486] *Swanson*, 353 F.3d at 1377-78.

[1487] *Id.* at 1379.

[1488] *Id.* at 1380. If it is any consolation to Swanson, the CAFC left the appellant some hope. To the court, the fact that the board lacked jurisdiction over Swanson's previous appeal did not bar Swanson from submitting a termination settlement proposal to the contracting officer. "If Swanson submits such a proposal now, the contracting officer will be in a position either to reject it on the ground that it is untimely or to consider it on the merits. If the contracting officer rules the proposal untimely, Swanson will have the option of appealing that decision as a denial of a claim under the CDA." *Id. See also* C.J. Machine Inc., ASBCA No. 54249, 04-1 BCA ¶ P32,515 (holding that the government's silence in response to contractor's termination for convenience settlement proposal, coupled with contractors request for a final decision, was sufficient evidence that an impasse existed concerning the proposal).

Pursuant to the CDA, a party has 120 days to appeal an adverse board decision to the CAFC.[1489] In a case of first impression, the CAFC recently held that it has jurisdiction to entertain issues involving both entitlement and quantum in a timely appeal of a board's quantum ruling, even when the entitlement decision was issued well outside the 120 day period.

In *Brownlee v. DynCorp*,[1490] the Army awarded DynCorp a cost-plus-award-fee contract for base support services at Fort Irwin, California, in 1991.[1491] In 1992, the Army Criminal Investigation Division (CID) began investigating allegations of criminal activity by DynCorp and its employees relating to DynCorp's performance of the contract.[1492] Upon completion of the investigation, the government declined to prosecute the contractor, but charged a DynCorp employee in a single-count information.[1493] The employee subsequently entered into a plea agreement with the government, pleading guilty to a charge of unauthorized access to a government computer.[1494] The government filed no criminal or civil actions against DynCorp as a result of the investigations.[1495]

In 1996, DynCorp submitted a certified claim to the Army seeking reimbursement for costs it incurred in connection with the criminal investigation.[1496] The Army denied the claim, and shortly thereafter DynCorp appealed the decision to the ASBCA.[1497] On 21 June 2000, the ASBCA rendered an entitlement decision, holding that DynCorp could recover a portion of its defense costs.[1498] Between 2000 and 2002, the parties could not arrive at an acceptable quantum settlement, so on 15 May 2002, the ASBCA issued a final judgment against the Army for $585,650.[1499] The Army then filed a notice of appeal with the CAFC on 11 September 2002, within 120 days of the quantum decision, but more than two years after the entitlement decision.[1500]

On appeal, the government argued that its decision not to appeal the earlier board decision did not render the present appeal of entitlement issues as time barred.[1501] Upon examination, the court agreed with the government. To the court, allowing an aggrieved party to wait for a truly final judgment before appealing the case furthers both the CDA's purpose, as well as the doctrine of finality.[1502] "A contrary rule would force the government or the contractor to appeal each and every Board entitlement decision that was appealable . . . or lose the right to appeal those issues . . . . Requiring appeals under such circumstances would compel premature appeals that might in fact be mooted if the parties awaited a judgment concerning quantum, thus wasting the parties' and this court's resources."[1503] As such, the court concluded the appeal was not time barred and proceeded directly to the merits.[1504]

The CAFC wasted little time in applying *DynCorp* as precedent, this time in favor of the appellant. In *J.C.*

[1489] 41 U.S.C.S. § 607(g)(1)(A) (LEXIS 2004).

[1490] 349 F.3d 1343 (Fed. Cir. 2003).

[1491] *Id.* at 1345.

[1492] *Id.* at 1345-46.

[1493] *Id.* at 1346. The information alleged that Mr. Marcum inputted into a government accounting system "estimated hours, which represented the average time among all work centers using [the government accounting system] for performing a particular scheduled service," rather than the actual work hours his employees had expended. *Id.*

[1494] *See* 18 U.S.C. § 1030(a)(3) (2000).

[1495] *DynCorp*, 348 F.3d at 1346.

[1496] *Id*. DynCorp excluded from its claim the fees charged by the lawyers for the employee's defense. *Id*.

[1497] *Id*. at 1346-47.

[1498] *See* DynCorp, ASBCA No. 49714, 00-2 BCA ¶ 30,986, at 152,930. The board accepted the government's argument that FAR section 31.205-47(b) barred recovery of defense costs for a proceeding in which only the contractor's agent or employee, not the contractor itself, was convicted. However, the board also found that the FAR provision was "inconsistent" with 10 U.S.C.S. § 2324 and 41 U.S.C.S. § 256. Accordingly, the ASBCA held the provision was an unenforceable "mere nullity." *Id*.

[1499] DynCorp, ASBCA No. 53098, 2002 ASBCA LEXIS 60, at *5.

[1500] *DynCorp*, 348 F.3d at 1346.

[1501] *Id.* at 1347.

[1502] *Id*.

[1503] *Id*. at 1347-48.

[1504] *Id*. at 1349. Once the court established it had jurisdiction over the entitlement portion of the appeal, the court examined the issue of whether FAR section 31.205-47(b) barred recovery of defense costs for a proceeding in which only the contractor's employee, not the contractor itself, was convicted. Reversing the board, the court concluded the costs were not allowable. *Id*. at 1356. For a discussion of the fraud aspects of this case, *see infra* section titled Procurement Fraud.

Equipment Corporation v. England (*J.C.*),[1505] appellant J.C. timely appealed an adverse ASBCA quantum decision to the CAFC.[1506] Once before the CAFC, J.C. launched an attack on both the ASBCA's quantum decision, as well as entitlement issues that had been the subject of a much earlier ASBCA decision.[1507] In response to a government motion to limit the scope of J.C.'s appeal to only quantum, the court cited *DynCorp* as dispositive and proceeded to an examination of both entitlement and quantum.[1508]

NAFIs: Something Old, Something New

In 2002 the CAFC created something of a stir with *Pacrim Pizza Co. v. Secretary of the Navy*,[1509] when the court held it lacked jurisdiction to entertain a claim brought by a non-appropriated fund instrumentality (NAFI) not affiliated with a post exchange because the Tucker Act only confers jurisdiction over cases where the judgment is to be paid from appropriated funds.[1510] Last year, the CAFC reaffirmed it lacked jurisdiction over claims involving NAFI funds in a case involving a Federal Prison Industries contract.[1511] This year, the CAFC has once again informed a contractor it lacks jurisdiction over a claim involving NAFI funds. In *AINS Inc. v. United States*,[1512] the CAFC affirmed the COFC's dismissal of appellant's claim against the U.S. Mint for lack of jurisdiction.[1513] In doing so, the CAFC established a four-part test for determining whether a government instrumentality is a NAFI.

In CAFC's eyes, a government instrumentality is a NAFI if: (1) it does not receive its monies by congressional appropriation; (2) it derives its funding primarily from its own activities, services, and product sales; (3) absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity; and, (4) there is a clear expression by Congress that the agency was to be separated from general federal revenues.[1514] Looking to the present action, the CAFC observed that the U.S. Mint met all four factors. Thus AINS was without remedy before the CAFC.[1515]

Although the NAFI doctrine may work hardships for contractors seeking redress from NAFIs, a recent ASBCA decision demonstrates that contractors are not entirely without redress. In *SUFI Network Services Inc.*[1516] appellant SUFI entered into a contract with the U.S. Air Force Services Agency (a NAFI not affiliated with the Army and Air Force Exchange System) to install and operate a lodging facility telecommunication system at designated Air Force lodgings facilities in Europe for fifteen years.[1517] Pursuant to the contract, SUFI dug trenches, laid telephone cable, and performed other work at no expense to the Air Force. Upon completion of this work, SUFI was to be paid by guests who placed local or long distance phone calls from the lodging facilities.[1518]

During the course of performance, a dispute arose concerning the extent to which SUFI could take measures to block guests' access to toll-free cards and take other measures to ensure guests did not bypass SUFI's services.[1519] In November, 2003, SUFI requested a final decision from the Air Force concerning the Air Force's interpretation of the

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[1505] 360 F.3d 1311 (Fed. Cir. 2004).

[1506] *Id*. at 1312.

[1507] *Id*. at 1314.

[1508] *Id*. Unfortunately for appellant, upon examination of the merits the court agreed with the government on all points and affirmed the ASBCA's decisions. *Id*. at 1319.

[1509] 304 F.3d 1291 (Fed. Cir. 2002).

[1510] *Id*. *See also 2002 Year in Review, supra* note 300, at 209.

[1511] *See* Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331 (Fed. Cir. 2003). *See also 2003 Year in Review, supra* note 29, at 106.

[1512] 365 F.3d 1333 (Fed. Cir. 2004).

[1513] AINS, Inc. v. United States, 56 Fed. Cl. 522 (2003).

[1514] *AINS*, 365 F.3d at 1342.

[1515] *Id.* at 1344-45. The CAFC was not entirely without sympathy for appellant, noting that "in reaching this legally correct conclusion, the Court of Federal Claims lamented that 'the extension of the NAFI doctrine [may] ultimately increase the price of government goods and services by denying the efficiency of the market place to institutions, such as private enterprise funds, ironically established to mimic the market place.' The Court of Federal Claims also reminded us of Abraham Lincoln's observation in his 1861 message to Congress: 'It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.'" *Id*. at 1344.

[1516] ASBCA No. 54503, 04-1 BCA ¶ 32,606.

[1517] *Id*. at 161,364.

[1518] *Id*. at 161,364-65.

[1519] *Id*. at 161,365.

contract. The Air Force responded with a decision that was significantly at odds with SUFI's contract interpretation. SUFI then appealed the Air Force's final decision to the ASBCA. The appeal did not seek monetary relief, but rather was a request for the ASBCA's interpretation of the contract.[1520]

Once before the board, the Air Force sought to dismiss the appeal for lack of jurisdiction.[1521] The board quickly distinguished the case from *Pacrim Pizza*,[1522] observing that appellant did not seek monetary damages, but rather non-monetary relief.[1523] The board observed that in *Alliant Techsystems, Inc. v. United States* (*Alliant*)[1524] the CAFC held that the Tucker Act,[1525] as amended in 1992, defined the COFC's jurisdiction to render judgments in CDA disputes to include certain specific kinds of non-monetary disputes, "and other non-monetary disputes on which a decision of the [contracting officer] has been issued under . . . the [CDA]."[1526] Thus, under *Alliant* the COFC (as well as the ASBCA) had jurisdiction to issue a declaratory judgment.[1527] The board reasoned that its conclusion that it had jurisdiction to issue a declaratory relief "was consistent with the decisions of most of the boards of contract appeals, which have held that they have authority under the CDA, as they did under pre-CDA law, to grant declaratory relief when appropriate."[1528]

Counting the Days Away

A recent COFC case stands for the proposition that it is a good idea to regularly check your mailbox. In *Riley & Ephriam Construction Co. Inc. v. United States*[1529] the government awarded plaintiff a contract requiring demolition and other construction services. During the course of performance, plaintiff encountered several unanticipated problems, and filed an equitable adjustment claim with the contracting officer.[1530] The contracting officer issued a final decision denying the claim, which was delivered via certified mail to a post office box address that the contractor provided as its business address when it submitted its claim.[1531] Upon arrival of the letter, the post office placed a notice in plaintiff's post office box stating the letter had arrived. Plaintiff failed to pick up the letter, and twenty-nine days later, the post office returned the letter to the contracting officer.[1532] Upon receipt of the returned letter, the contracting officer faxed a copy of the final decision to the plaintiff's attorney, who later claimed he never saw the fax.[1533]

Ultimately, plaintiff brought suit before the COFC, seeking damages associated with the claim for equitable adjustment.[1534] At the time plaintiff filed the suit, more than one year had passed from the date the final decision was received in the post office box, but less than one year had passed from the date the contracting officer faxed the final decision to plaintiff's counsel.[1535]

Once before the court, the government challenged the court's jurisdiction to entertain the case.[1536] The issue before the court was whether plaintiff had "received" the contracting officer's final decision when the decision was accepted by the post office where plaintiff held a post office box. Looking to the plain wording of the CDA, the court observed the CDA requires that: "[t]he contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the

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[1520] *Id*. at 161,365-66.

[1521] *Id*. at 161,366.

[1522] 304 F.3d 1291 (Fed. Cir. 2002).

[1523] *SUFI*, 04-1 BCA ¶ 32,606, at 161,366.

[1524] 178 F.3d 1260, *reh'g denied*, 186 F.3d 1379 (Fed. Cir. 1999).

[1525] 28 U.S.C.S. § 1491(a)(2) (LEXIS 2004).

[1526] *Id*.

[1527] *SUFI*, 04-1 BCA ¶ 32,606, at 161,366.

[1528] *Id*. (citing Garrett v. Gen. Elec. Co., 987 F.3d 747, 750-51 (Fed. Cir. 1993)).

[1529] 61 Fed. Cl. 405 (2004).

[1530] *Id*. at 407.

[1531] *Id*.

[1532] *Id*.

[1533] *Id*. at 408.

[1534] *Id*.

[1535] *Id*.

[1536] *Id*.

decision to the contractor."[1537] Further, under the act, the contractor may bring an action before the COFC only where the action is "filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim."[1538] Applying this standard, the court concluded that "receipt" took place upon arrival of the final decision at plaintiff's post office box. The court observed that plaintiff implicitly consented to allow the U.S. Postal Service to handle and accept mail on plaintiff's behalf. Further, in accepting the letter, the Postal employees "were acting within the scope of their employment . . . and in accordance with the obligations arising from Plaintiff's rental of the post office box."[1539] As such, the Postal Service was "authorized, and expected, to accept mail directed to the Plaintiff."[1540]

In another case involving the triggering of the appeal period, the ASBCA held where a contracting officer both hand-delivered and mailed a copy of a final decision to a contractor, the contractor's receipt of the mailed copy triggered the ninety-day appeal period under the CDA.[1541] In *AST Anlagen-und Sanierungstechnik GmbH*[1542] appellant AST submitted a delay and acceleration cost claim to the Army contracting officer on 30 June 1996.[1543] On 5 August 1998, the contracting officer mailed a copy of the final decision directly to AST, and also hand delivered a copy to a colleague of AST's attorney. AST received the mailed copy of the final decision on 8 August 1998, and on 4 November 1998, appellant's attorney filed a notice of appeal to the ASBCA.[1544] Needless to say, the notice of appeal was within the ninety-day appeal period from the date AST received mailed delivery, but outside the ninety-day window if delivery were deemed to have taken place on 5 August 1998,[1545] the date the government hand delivered the final decision to appellant.

Upon examination of the government's motion to dismiss, the board observed that the contracting officer failed to inform appellant as to which version of the final decision was legally effective. Accordingly, the board held that AST was entitled to rely on the mailed copy as triggering the 90-day appeal period.[1546]

Other Cases in the Spotlight

Several other recent cases involving jurisdiction warrant mention. In *Roxco Ltd. v. United States* (*Roxco*),[1547] the COFC held that appellant's equitable adjustment claim was timely under the CDA, even though over one year had passed between the Air Force's termination of appellant's contract for default and appellant's filing before the COFC. In *Roxco*, appellant abandoned performance on an Air Force construction contract, whereupon the Air Force terminated the contract for default on 21 December 1998, and entered into a takeover agreement with Roxco's surety.[1548] On 30 March 2001, appellant submitted a claim for equitable adjustment with the Air Force. On 9 November 2001, the contracting officer returned the claim to appellant, determining the claim was an untimely challenge to the earlier termination for default.[1549] On 7 March 2002, Roxco filed a complaint before the COFC. The government responded with a motion to dismiss, arguing appellant's appeal was untimely.[1550] The court dismissed the government's motion, holding, inter alia, that Roxco was not challenging the earlier termination for default decision, but rather, the contracting officer's rejection of its claim for equitable adjustment.[1551]

In *Floor Pro Inc.* (*Floor Pro*),[1552] the ASBCA addressed whether under the CDA a subcontractor was authorized to

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[1537] 41 U.S.C.S. § 609 (a)(3) (LEXIS 2004).

[1538] 41 U.S.C.S. § 605(a).

[1539] *Riley & Ephriam*, 61 Fed. Cl. 405 at 410.

[1540] *Id*.

[1541] Under the CDA, a board lacks jurisdiction over a case if the appeal is filed more than ninety days after the contractor's receipt of a contracting officer's valid final decision. 41 U.S.C.S. § 606.

[1542] ASBCA No. 51854, 2004 ASBCA LEXIS 83 (Aug. 11, 2004).

[1543] *Id*. at *2.

[1544] *Id*.

[1545] *Id*. at *2-3.

[1546] *Id*. at *4-5.

[1547] 60 Fed. Cl. 39 (2004).

[1548] *Id*. at 40-41.

[1549] *Id*. at 41.

[1550] *Id*.

[1551] *Id*. at 46.

[1552] ASBCA No. 54143, 04-1 BCA ¶ 32,571.

bring an appeal where the government promised the subcontractor it would issue it a two-party check for work the subcontractor performed on a government contract. In *Floor Pro*, appellant subcontracted with the prime contractor, G.M. & W. Construction Corp., to install a floor coating at a Marine Corps warehouse in Albany, Georgia.[1553] When it appeared the prime contractor was not going to pay Floor Pro for the work it performed, Floor Pro complained to the government contracting officer. In response, the contracting officer issued a modification to the contract which provided Floor Pro would be issued a two-party check for work it performed.[1554] Unfortunately for Floor Pro, the Defense Financing and Accounting Service (DFAS) did not honor the modification, and paid the prime contractor the disputed amount.[1555] Upon appeal to the board, the board characterized this as a "rare, exceptional case" where appellant was a direct beneficiary of the contract, and as such entitled to third-party beneficiary status.[1556] Accordingly, the ASBCA held it had jurisdiction to hear the subcontractor's appeal.[1557]

Finally, in *Tiger Natural Gas, Inc. v. United States*,[1558] the COFC examined whether a contractor's suit was rendered moot where the government refused to concede to a contractor's interpretation of a contract, but nevertheless returned funds the government offset as a result of the dispute. In *Tiger*, the GSA awarded Tiger a contract to install a propane backup system at a federal building in Fort Worth, Texas.[1559] After installing the system, the GSA paid Tiger the amount due under the contract. However, the GSA asserted that Tiger guaranteed the government would realize a certain level of savings from the system, which the government never realized.[1560] The GSA proceeded to setoff payments due Tiger under other contracts, whereupon Tiger filed a complaint before the COFC contesting GSA's claim and the subsequent setoff.[1561]

About six months after Tiger filed its complaint, the GSA had a change of heart and paid Tiger the money that had been setoff, but refused to concede that Tiger's contract interpretation was correct. Tiger continued the action before the COFC, and the GSA moved to have the case dismissed as moot.[1562] Upon examination, the court concluded the complaint was not moot because the GSA maintained its interpretation of the contract concerning the alleged performance guarantee, which the parties still disputed. Accordingly, the court held there was a genuine issue regarding whether the GSA would pursue this claim in the future.[1563] Further, the court observed that Tiger could potentially be entitled to interest from the GSA under the CDA if the court found the government's claim and subsequent offset were improper.[1564] Accordingly, the COFC denied the government's motion, finding there was a "live dispute" between the government and Tiger concerning the government's claim over the alleged savings guarantee and the issue of Tiger's potential entitlement to interest.[1565]

Remedies

Supreme Court: Failure to Allege Government's Position Not "Substantially Justified" is Not a Bar to Recovery Under EAJA

The Supreme Court recently addressed whether a a federal court should bar petitioner from recovery under the Equal Access to Justice Act (EAJA)[1566] where the applicant failed to include the standard language in his request that "the position

[1553] *Id*. at 161,177.

[1554] *Id*. (stating that the contracting officer and the president of G.M. & W. agreed that the government would issue a two-party check payable to both appellant and G.M. & W., rather than following the electronic payment method as provided in the contract).

[1555] *Id*. 161,181.

[1556] *Id*.

[1557] *Id*. at 161,184.

[1558] 61 Fed. Cl. 287 (2004).

[1559] *Id*. at 288.

[1560] *Id*. at 289-90.

[1561] *Id*. at 290.

[1562] *Id*. at 293-94.

[1563] *Id*. at 294.

[1564] *Id.* at 294-95; *see* 41 U.S.C.S. § 611 (LEXIS 2004), providing "interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim . . . from the contractor until payment thereof."

[1565] *Tiger*, 61 Fed. Cl. at 296.

[1566] 28 U.S.C.S. § 2412. The EAJA authorizes the payment of attorney's fees to a prevailing party in an action against the United States, absent a showing by the government that its position in the underlying litigation "was substantially justified." *Id*. § 2412 (d)(1)(A). Section 2412 (d)(1)(B) of the act sets a deadline of thirty days after final judgment for the filing of a fee application, and directs that the application include: (1) a showing that the applicant is a "prevailing party"; (2) a showing that the applicant is "eligible to receive an award"; and (3) a statement of "the amount sought, including an itemized statement from any attorney . . . stating the actual time expended and the rate" charged. *Id*. § 2412 (d)(1)(B). Section 2412(d)(1)(B) further requires the applicant to "allege that the position of the United States was not substantially justified." *Id*.

of the United States was not substantially justified."[1567] In siding with petitioner, the majority held the "substantially justified" language is not a jurisdictional prerequisite, but simply an allegation or pleading requirement. Thus, petitioner's failure to allege the required language in the EAJA application did not bar recovery under the act.[1568]

In *Scarborough v. Principi*, petitioner Scarborough prevailed before the Court of Appeals for Veterans Claims (CAVC) in an action for disability benefits.[1569] Scarborough's counsel filed a timely application for attorney's fees and costs pursuant to the EAJA. The application stated Scarborough was the prevailing party in the underlying litigation and was eligible to receive an award. Scarborough's counsel also stated the total amount sought, and itemized the hours and rates of work. However, the application failed to allege that "the position of the United States was not substantially justified."[1570] The government moved to dismiss the application on the grounds that Scarborough's counsel had failed to make the required "no substantial justification" allegation. Scarborough's counsel then filed an amended application adding the language to his application. However, in the interim, the thirty-day fee application filing period expired. As a result, the CAVC granted the government's motion to dismiss Scarborough's fee application.[1571]

On appeal, the CAFC affirmed the CAVC's decision.[1572] The CAFC reasoned that the EAJA effects a partial waiver of sovereign immunity. Thus, the courts must strictly construe the act's requirements in the government's favor. To the CAFC, the statute's "plain and unambiguous" language requires that a requesting party enumerate all required allegations within the thirty-day time period.[1573]

On appeal, the Court's majority rejected the CAFC's reasoning. Writing for the majority, Justice Ginsburg concluded the "not substantially justified" allegation imposes no proof burden on the applicant, but is simply an allegation or pleading requirement.[1574] So understood, "the allegation does not serve an essential notice-giving function; the government is fully aware, from the moment a fee application is filed, that to defeat the application on the merits, it will have to prove its position 'was substantially justified.'"[1575] To the majority, a failure to make the allegation should not be fatal where no doubt exists as to who is applying for the fees, from what judgment, and to which court.[1576]

The majority's opinion generated a dissent from Justices Thomas and Scalia.[1577] Writing for the dissent, Justice Thomas reasoned "the EAJA requirement for filing a timely fee application with the statutorily prescribed content is a condition on the United States' waiver of sovereign immunity . . . . As such, the scope of the waiver must be carefully construed."[1578]

Post-Judgment Interest? As Clear as Mud

In *Marathon Oil Company and Mobil Oil Exploration & Producing Southeast, Inc. v. United States*,[1579] the CAFC

[1567] Scarborough v. Principi, 124 S. Ct. 1856 (2004).

[1568] *Id*. at 1865-66.

[1569] *Id*. at 1860.

[1570] *Id*.

[1571] *Id*.

[1572] Scarborough v. Principi, 273 F.3d 1087 (Fed. Cir. 2001).

[1573] *Id*. at 1090-91. Shortly after the CAFC issued its decision, Scarborough petitioned the Supreme Court for a writ of certiorari. The Court granted Scarborough's writ, vacated the CAFC's judgment, and remanded the case in light of the Court's recent decision in *Edelman v. Lynchburg College (Edelman)*, 535 U.S. 106 (2002). *Edelman* concerned an Equal Employment Opportunity Commission (EEOC) regulation that allowed applicants of employment discrimination complaints timely filed with the EEOC to add, after the filing deadline had passed, the required, but initially absent, verification. The Court upheld this regulation, citing "a long history of practice." *Id*. at 116. On remand of Scarborough's case to the same CAFC panel, two of the three judges adhered to the panel's unanimous earlier decision and distinguished *Edelman*. Scarborough v. Principi, 319 F.3d 1346 (2003). Unlike the civil rights statute in *Edelman*, the court of appeals majority held, as a "remedial scheme" in which laypersons often initiate the process, the EAJA is directed to attorneys, who do not need "paternalistic protection." *Id.* at 1353. Chief Judge Mayer dissented. In light of EAJA's purpose "to eliminate the financial disincentive for those who would defend against unjustified governmental action and thereby deter it," Chief Judge Mayer concluded, "it is apparent that Congress did not intend the EAJA application process to be an additional deterrent to the vindication of rights because of a missing averment." *Id.* at 1356. In 2003, the Court again granted certiorari. Scarborough v. Principi, 539 U.S. 986 (2003).

[1574] *Scarborough*, 124 S. Ct. at 1865.

[1575] *Id*. at 1867.

[1576] *Id*.

[1577] *Id*. at 1871.

[1578] *Id*. at 1872.

[1579] 374 F.3d 1123 (Fed. Cir. 2004).

denied appellants' claim for post judgment interest from an earlier CAFC judgment. The case merits examination, if only due to the extent to which the majority and dissent disagreed on the applicability of 28 U.S.C. section 1961(c)(2)[1580] to the facts of this case.

From start to finish, the case followed a long and tortuous path. In 1981, appellants (collectively "the Oil Companies") purchased interests in oil and gas leases from the federal government. In 1990, new federal legislation impacted the Oil Companies' rights under the lease contracts. The Oil Companies sued for breach of contract in the COFC and won, receiving judgments in an amount of over $78 million each.[1581] On appeal, the CAFC reversed the COFC.[1582] The Supreme Court then granted certiorari, and reversed the CAFC, holding that the government had breached its contracts with the Oil Companies.[1583] On 28 December 2000, the CAFC rejected an argument by the government on remand that the damages award should be reduced, and affirmed the initial judgments of the COFC. The government did not seek further review before the Supreme Court, and on 28 February 2001, the CAFC reinstated its initial judgments in favor of the Oil Companies. [1584]

On 1 May 2001, the government paid the amounts specified in the judgments to the Oil Companies, but refused to pay interest on the judgment. In response, the Oil Companies brought suit in the COFC, seeking post-judgment interest from 28 December 2000—the date of the Federal Circuit's contract judgment on remand from the Supreme Court—through 1 May 2001—the date on which the government paid the contract judgment.[1585]

Before the COFC, the Oil Companies argued that 28 U.S.C. section 1961(c)(2) waives the government's sovereign immunity from post-judgment interest on the contract judgment because the statute requires the government pay post-judgment interest on "all final judgments against the United States in the United States Court of Appeals for the Federal Circuit."[1586] The COFC disagreed and dismissed the complaint.[1587] The court stated two reasons why section 1961(c)(2) did not waive sovereign immunity for post-judgment interest on the Oil Companies' contract judgment. First, the COFC held "the plaintiffs received their awards . . . pursuant to final judgments of the Court of Federal Claims, not the U.S. Court of Appeals for the Federal Circuit."[1588] Therefore, the "'judgment' of the Federal Circuit on December 28, 2000 was not a 'final judgment' within the contemplation of 28 U.S.C. § 1961(c)(2) . . . ."[1589] Second, the COFC held that, even assuming the Federal Circuit judgment was the "final judgment" for the purposes of section 1961(c)(2), the waiver of sovereign immunity for post-judgment interest on some CAFC judgments that is embodied in section 1961(c)(2) did not unambiguously encompass interest on the Oil Companies' contract judgment.[1590]

[1580] In relevant part, the statute provides:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . . Such interest shall be calculated from the date of the entry of the judgment . . . .
>
> (b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.
>
> (c) . . .
>
> (2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).
>
> (3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law.
>
> (4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

28 U.S.C.S. § 1961(c)(2) (LEXIS 2004).

[1581] Conoco, Inc. v. United States, 35 Fed. Cl. 309 (1996).

[1582] Marathon Oil Co. v. United States, 177 F.3d 1331 (Fed. Cir. 1999).

[1583] Marathon Oil Co. v. United States, 528 U.S. 1002 (1999).

[1584] Marathon Oil Co. v. United States, 236 F.3d 1313, 1315-16 (2000).

[1585] Marathon Oil Co. v. United States, 56 Fed. Cl. 768, 769 (2003).

[1586] *Id*. at 776.

[1587] *Id*.

[1588] *Id*. at 773.

[1589] *Id*.

[1590] *Id*. at 774-75.

Writing for the majority, Judge Clevenger summarily rejected the COFC determination that the 28 December 2000 judgment was a not a final judgment under section 1961(c)(2).[1591] For Judge Clevenger, the key issue before the court was whether section 1961(c)(2) unambiguously waived sovereign immunity for post-judgment interest on "all" judgments of the Federal Circuit. After an exhaustive analysis of the doctrine of sovereign immunity and the reach of section 1961(c)(2), Judge Clevenger concluded the section did not unambiguously waive sovereign immunity in this case. Central to Judge Clevenger's conclusion was the fact the express language of section 1961(c)(2) cross-referenced four distinct statutory provisions.[1592] After attempting to untangle the interaction of the various statutes referenced by section 1961(c)(2), Judge Clevenger concluded section 1961(c)(2) was "subject to plausible readings under which Congress has not waived sovereign immunity for post-judgment interest on judgments of the Federal Circuit against the United States that the United States does not seek to have reviewed in the Supreme Court."[1593]

Judge Prost respectfully dissented from the majority's opinion. To Judge Prost, "there is only one plausible reading of the statutory language at issue. It is the reading that maintains that 'interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in [§ 1961(a)] and as provided in [§ 1961(b)].'"[1594]

ASBCA: Conversion of T4D to T4C Entitles Contractor To EAJA Fees

The ASBCA determined that a contractor who prevailed in converting a termination for default into a termination for convenience is entitled to collect Equal Access to Justice Act (EAJA)[1595] fees. In *American Service & Supply, Inc.*,[1596] the Air Force awarded a contract to American Services to replace two air compressors and their gas engines. During performance, the government required American Services test the engine skids separately. American Services, believing that this requirement was not a contractual requirement, agreed to do so but requested an extra five months to complete contract performance. The agency, believing that the contract required skid testing, refused to extend the performance period.[1597]

The agency terminated the contract for default after both parties agreed that American Services would not be able to complete the skid testing and the remainder of the contract on time.[1598]

American Services contested the termination for default and prevailed. The ASBCA converted the termination for default to a termination for convenience. After this ruling, American Services requested EAJA fees. It argued that it was a prevailing party in the termination litigation and the government's position was not substantially justified.[1599]

The Air Force countered that its decision to terminate American's contract for default was substantially justified and therefore American Services was not entitled to collect EAJA fees. In other words, the Air Force argued that its decision is "substantially justified [because] a reasonable person could think it correct [and the decision] has a reasonable basis in law and fact."[1600]

[1591] Marathon Oil Co. and Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 374 F.3d 1123, 1127 (Fed. Cir. 2004).

[1592] Specifically, section 1961(c)(2) provides that "interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit . . . as provided in subsection (b)." 28 U.S.C.S. § 1961(c)(2) (LEXIS 2004). Section 1961(b) states that "interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually." *Id*. § 1961(b). Section 2516(b), in turn, provides that: "interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at" the same rate specified in 28 U.S.C. § 1961(a). *Id*. § 2516(b). Finally, 31 U.S.C. § 1304 provides, in relevant part, "[i]nterest may be paid from the appropriation made by this section—on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government . . . [or] on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516b) of title 28 . . . ." 31 U.S.C.S. § 1304.

[1593] *Marathon*, 374 F.3d at 1132.

[1594] *Id*. at 1141 (citing 28 U.S.C. § 1961(c)(2)). *See also* England v. Contel Advanced Sys., 2004 U.S. App. LEXIS 20844 (reversing the ASBCA, finding that appellant's claimed damages was interest that was barred by the no-interest rule).

[1595] 28 U.S.C. § 2412 (2000).

[1596] ASBCA No. 49309, 50606, 04-2 BCA ¶ 32,675, 2004 ASBCA Lexis 74, July 15, 2004. *See also Board Finds Agency Actions Not Substantially Justified, Awards EAJA Fees,* 46 GOV'T CONTRACTOR 30, ¶ 316 (Aug. 11, 2004).

[1597] The government argued that the following contract language required separate testing of the skid: "the compressor and engine shall be rated for continuous duty . . . all components shall be mounted on a structural base [the skid]. The units shall be factory assembled and test run prior to shipping." *Am. Svs. & Supply*, 04-2 BCA ¶ 32,675, at 161,722.

[1598] *Id*.

[1599] *Id*.

[1600] *Id*.

The board reviewed the wording of the disputed clause and stated that to prevail, the government's position must be substantially justified "both with respect to the agency's underlying action and the adversary adjudication."[1601] The board then concluded that a reasonable person could not conclude that American Services's contract required a separate testing of the skid. From here, the board held that the agency should have granted American Services a reasonable time to test the skids and complete performance. Because this did not happen, the board reasoned that the termination should be converted and determined that American is entitled to EAJA fees, leaving the parties to negotiate quantum.[1602]

Defenses

Anti-Deficiency Act Does Not Trump Indemnity Clause

Finally, a case involving indemnification and the Anti-Deficiency Act (ADA)[1603] is deserving of mention. In *E.I. du Pont de Nemours & Co. v. United States* (*DuPont*)[1604] appellant DuPont brought suit pursuant to the CDA to recover costs it incurred under the Comprehensive Environmental Response Compensation and Liability Act[1605] for an ordnance plant it built and operated for the government during World War II. At trial the COFC held the government had agreed to indemnify DuPont for the costs at issue. However, the COFC also concluded that the ADA barred DuPont's recovery.[1606]

On appeal, the issue before the CAFC was whether the Contract Settlement Act (CSA) of 1944[1607] sheltered the indemnity agreement from the ADA's reach. Upon examination, the court observed the CSA gave considerable authority to contracting agencies to settle contract claims, and specifically allowed agencies to indemnify "the war contractor" against "any claims by any person in connection with such termination claims or settlement."[1608] Given the reach of the CSA, the court determined the indemnity agreement was "authorized by law" pursuant to the ADA, and thus enforceable against the government.[1609]

Major James Dorn.

SPECIAL TOPICS

Competitive Sourcing

GAO says "In-House Competitors" Must Sit on the Bid Protest Sideline . . .

Following publication of *OMB Circular A-76 (Revised)* [*Revised A-76*] in May 2003,[1610] one of the many issues raised by the several procedural changes was whether federal employees and their representatives had standing to challenge agency competitive sourcing decisions. Under the "old" *Circular A-76* procedures,[1611] the CAFC and the GAO had ruled that

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[1601] *Id*.

[1602] *Id*.

[1603] The predecessor to the ADA, in effect at the time the parties entered into the indemnification agreement, provided in relevant part:

> No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.

31 U.S.C. § 665 (1940). The current version is available at 31 U.S.C.S. § 1341 (LEXIS 2004).

[1604] 365 F.3d 1367 (Fed. Cir. 2004).

[1605] 42 U.S.C.S. §§ 9601-75.

[1606] 54 Fed. Cl. 361 (2002).

[1607] 41 U.S.C.S. §§ 101-25.

[1608] *DuPont*, 365 F.3d 1367 at 1375 (citing 41 U.S.C.S. § 120a).

[1609] *Id*. at 1380. For a discussion of the Antideficiency Act aspects of this case, *see infra* section titled Antideficiency Act. *See also* Ford Motor Co. v. United States, 378 F.3d 1314 (Fed. Cir. 2004) (deciding, shortly after *Dupont*, that the ADA does not bar recovery under the CSA for environmental cleanup costs arising from performance of a World War II contract).

[1610] U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter REVISED A-76]. *See also* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

[1611] *See* U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1999) [hereinafter OMB CIRCULAR A-76] and U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (1996) [hereinafter RSH].

federal employees and unions were not "interested parties" under the CICA and therefore lacked standing to protest.[1612] As discussed in last year's *Year in Review*,[1613] the GAO actually sought comments on whether the "cumulative legal impact" of the *Revised A-76* changes should result in "standing" for the in-house competitor at the GAO.[1614] Though not addressing the issue through a change in its Bid Protest Regulations,[1615] the GAO did answer the question of standing in *Dan Dufrene et al.*, albeit temporarily.[1616]

In *Dufrene*, the United States Department of Agriculture (USDA), using the standard competition procedures under the *Revised A-76*, determined a private contractor, SERCO Management Services, Inc., could provide regional fleet maintenance services for the Forest Service more cost-effectively than the in-house Most-Efficient Organization (MEO).[1617] Mr. Dan Dufrene, a regional vice president with the National Federation of Federal Employees (NFFE), protested the decision.[1618]

Originally, Mr. Dufrene, on behalf of the NFFE, filed an agency-level bid protest, but the USDA advised that Mr. Dufrene was not a "directly interested party," thus he could not "contest" the agency's decision.[1619] After being elected as representative by a majority of the affected Forest Service employees, Mr. Dufrene filed a second agency-level protest with the USDA and again the USDA dismissed and denied the protest.[1620] Mr. Dufrene, "acting both as NFFE representative and as the 'directly interested party' representing a majority of the directly affected employees," appealed the USDA's decision to the GAO.[1621]

The NFFE argued that given the many significant changes in the *Revised A-76*, the affected civilian employees, and the NFFE as their statutorily appointed representative, met the definition of "interested party" under the CICA and the GAO's Bid Protest Regulation.[1622] Additionally, Mr. Dufrene met the definition of "directly interested party" under the *Revised A-76*, as a majority of the affected employees had elected him as representative.[1623] The GAO, however, concluded "there is no statutory basis for an in-house entity to file a protest at the [GAO]."[1624]

The GAO again noted that the CICA, the GAO's statutory authority for considering bid protests, defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."[1625] Citing prior opinions, the GAO briefly explained the reasons for concluding that under the "old" *Circular A-76* individual employees and union representatives did not meet the CICA's definition of "interested party."[1626] The GAO noted, for example, that neither individual employees, nor the MEO, nor union representatives could be considered offerors. The MEO did not meet the FAR's definition of "offer" because the MEO was not submitted in response to a solicitation.[1627] Moreover, even if the agency adopted the MEO as more cost-effective than private sector performance, no contract would be awarded to the MEO.[1628]

[1612] *See* Am. Fed'n of Gov't Employees, et al. v. United States, 258 F.3d 1294 (Fed. Cir. 2001) and Am. Fed'n of Gov't Employees, AFL-CIO et al., Comp. Gen. B-282904.2, June 7, 2000, 2000 CPD ¶ 87.

[1613] *2003 Year in Review*, *supra* note 29, at 118.

[1614] Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,412 (June 13, 2003).

[1615] *See* 4 C.F.R. § 21.0(a) (2004).

[1616] Comp. Gen. B-293590.2; B-293590.3; B-293883; B-293887; B-293908, Apr. 19, 2004, 2004 CPD ¶ 82.

[1617] *Id*. at 1-2.

[1618] *Id*. at 1.

[1619] *Id*. at 2. The *Revised A-76* gives a "directly interested party" the right to "contest" various aspects of the standard competition, such as the solicitation or its cancellation, a determination to exclude an offer/tender from the competition, compliance with the costing provisions and other elements of the agency's evaluation, and terminations of a contract or letter of obligation. REVISED A-76, *supra* note 1610, attch. B, ¶ F.1. For purposes of a "contest," the *Revised A-76* definition of "directly interested party" includes the "agency tender official" or "a single individual appointed by a majority of directly affected employees as their agent." *Id*. attch. D. The procedures at FAR section 33.103 govern the pursuit and resolution of a "contest." *Id*. attch. B, ¶ F.1.

[1620] *Dan Dufrene*, 2004 CPD ¶ 82, at 2.

[1621] *Id*.

[1622] *Id*.

[1623] *Id*. at 2-3.

[1624] *Id*. at 3.

[1625] *Id*. (quoting 31 U.S.C. § 3551(2) (2000)).

[1626] *Id*. *See, e.g.*, Am. Fed'n of Gov't Employees et al., Comp. Gen. B-282904.2, June 7, 2000, 2000 CPD ¶ 87.

[1627] *Dan Dufrene*, 2004 CPD ¶ 82, at 3.

[1628] *Id*.

Observing that the *Revised A-76* "is more than a mere revision to the earlier one; it is essentially a new document that establishes new FAR-based ground rules," the GAO next considered these significant changes.[1629] For example, the *Revised A-76* treats the "agency tender" as an offer in some respects, such as: (1) requiring the agency tender to satisfy the requirements of section L in a solicitation;[1630] (2) evaluating the agency tender against the same criteria applicable to private-sector proposals;[1631] (3) permitting discussions and negotiations with the agency tender official;[1632] and (4) allowing rejection of the agency tender as unacceptable.[1633] Additionally, if the agency tender "wins" the competition, the *Revised A-76* requires the contracting officer to enter into a "letter of obligation" with an agency official responsible for the MEO.[1634] Finally, if the MEO fails to perform the requirements identified in the letter of obligation, the contracting officer can terminate the action.[1635]

Despite these significant changes, the GAO returned to the statutory language of the CICA and concluded the in-house entity lacks standing to protest.[1636] Chief among the GAO's reasons was that the MEO still does not compete for a contract under the *Revised A-76* procedures.[1637] Addressing the new requirement for a letter of obligation if the agency tender prevails in the competition, the GAO noted the agreement is "not a mutually binding legal relationship between two signatory parties . . . ."[1638] Key to the GAO was that "the agency cannot seek legal redress against the MEO, for example, by seeking reimbursement of excess reprocurement costs if the MEO is 'terminated' for failure to meet its commitments."[1639] Determining the letter of obligation was not a contract, the GAO concluded the agency tender could not be considered an "offer," meaning that "no in-house entity can qualify as an 'actual or potential offeror'" nor an interested party for purposes of filing a protest at the GAO.[1640] Thus, the GAO dismissed Mr. Dufrene's protest.[1641]

. . . but Congress puts them in the Big Games!

Though dismissing Mr. Dufrene's protest, the GAO also "recognize[d] the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to [the GAO], while an unsuccessful public-sector competitor does not."[1642] As such the GAO recommended Congress amend the CICA to permit protests on the behalf of MEOs.[1643] And Congress followed that recommendation.

With the passage of the Ronald W. Reagan National Defense Authorization Act for FY 2005, Congress granted the agency tender officials (ATO) limited, yet significant bid protest rights.[1644] The Authorization Act amends the CICA's definition of "interested party" by specifying that term includes ATOs in public-private competitions involving more than sixty-five FTEs.[1645] The new authority also provides that ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis

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[1629] *Id*. at 3-4.

[1630] *Id*. (referencing REVISED A-76, *supra* note 1610, attch. B, ¶ D.4.a(1)).

[1631] *Id*. at 4 (referencing REVISED A-76, *supra* note 1610, attch. B, ¶ D.5.c(3)).

[1632] *Id*.

[1633] *Id*.

[1634] *Id*. (referencing REVISED A-76, *supra* note 1610, attch. B, ¶ D.6.f(3)).

[1635] *Id*. (referencing REVISED A-76, *supra* note 1610, attch. B, ¶ E.6.a(2)).

[1636] *Id*.

[1637] *Id*. at 4-5.

[1638] *Id*. at 5.

[1639] *Id*. (comparing FAR section 49.402-2(e) which holds contractors liable to the government for the excess reprocurement costs when a contractor has been terminated for default).

[1640] *Id*.

[1641] *Id*. The opinion also dismisses other protests filed by individuals in their capacity as union officials and as the individual selected by a majority of the affected employees. The dismissed protests involved challenges to *Revised A-76* competitive sourcing decisions at the Defense Finance and Accounting Service, the Department of Homeland Security, and the Equal Employment Opportunity Commission. *Id*. at 5-6.

[1642] *Id*. at 6.

[1643] *Id*. The Comptroller General also suggested that any resulting change should also address the issue of representational capacity to speak for and represent the MEO. *Id*.

[1644] Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).

[1645] *Id*. § 326(a) (amending 31 U.S.C. § 3551(2)).

for the protest."[1646] The ATO's determination whether to file a protest "is not subject to administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.[1647] Further, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may "intervene" in the protest.[1648] This new protest authority applies to protests "that relate to [*Revised A-76*] studies initiated . . . on or after the end of the 90-day period beginning on the date of enactment of [the Authorization Act]."[1649]

While these protest rights apply directly only to the ATO in "big" competitions, the change is a significant one. And while seemingly answering one question (at least partially), the change also raises new issues such as who will provide legal advice to the ATO, how will the GAO's protective order provisions apply to the ATO and their representative(s), and will there be a flood of protests slowing an already slow process? But these questions can be saved for another day, or *Year in Review*.[1650]

The GAO Addresses a Couple of Additional Questions

Also noted in lasted year's *Year in Review*,[1651] the GAO's June 2003 *Federal Register* notice further requested comments on other changes under the *Revised A-76*.[1652] For example, the GAO noted the *Revised A-76* does not permit a party to contest any aspect of a streamlined competition,[1653] thus the GAO queried whether the GAO had a legal basis to consider protests in streamlined competitions.[1654] In *Vallie Bray* the GAO addressed this question.[1655]

Following a streamlined competition under the *Revised A-76*, Ms. Vallie Bray, the local union president and the representative selected by a majority of the affected employees, protested the USDA's Beltsville Agricultural Research Center's (BARC) decision that a private contractor could perform the BARC's security guard function more economically than the incumbent government employees.[1656] The competition involved twenty-four positions, and the USDA estimated the cost of private sector performance based on market research, as permitted by the *Revised A-76's* streamlined competition procedures.[1657] The USDA issued no solicitation and ultimately implemented the decision to contract commercially by issuing an order under a GSA FSS.[1658]

Noting the *Revised A-76's* prohibition against contests in streamlined competitions, the GAO stated "the CICA, not the [*Revised A-76*] provides the basis for [GAO] authority."[1659] As such, the GAO made clear, an "interested party" under

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[1646] *Id*. § 326(b) (amending 31 U.S.C. § 3552)).

[1647] *Id*.

[1648] *Id*. § 326(c) (amending 31 U.S.C. § 3553).

[1649] *Id*.

[1650] On 20 December 2004, the GAO proposed amending its Bid Protest Regulations to expand the definitions of "interested party" and "intervenor" pursuant to the authority in this new legislation. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 69 Fed. Reg. 75,878 (proposed Dec. 20, 2004) (to be codified at 4 C.F.R. pt. 21). The proposed rule change will also state that "the GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) n connection with a public-private competition." *Id*. at 75,879.

[1651] *2003 Year in Review*, *supra* note 29, at 119 n.1586.

[1652] Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,412 (June 13, 2003).

[1653] *Id*. *See* REVISED A-76, *supra* note 1610, attch. B, ¶ F.2. The *Revised A-76* permits agencies to use a new "streamlined competition" process, if "65 or fewer FTEs and/or any number of military personnel" perform a commercial activity. *Id*. attch. B, ¶ A.5.b. In a streamlined competition the agency has flexibility in estimating the performance costs of the private sector and may rely upon documented market research or solicitations in establishing an estimated contractor performance price. *Id*. attch. B, ¶ C.1.b. The agency also has flexibility in determining the cost of agency performance, as the estimate may be based on the incumbent activity or the agency may "develop a more efficient organization, which may be an MEO." *Id*. attch. B, ¶ C.1.a. *But see* Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014, 118 Stat. 951, 972 (2004) (requiring the DOD to develop a "most efficient and cost effective organization plan" prior to converting to contractor performance any function involving more than ten DOD civilian employees).

[1654] 68 Fed. Reg. at 35,413.

[1655] Comp. Gen. B-293840; B-293840.2, Mar. 30, 2004, 2004 CPD ¶ 52.

[1656] *Id*. at 1. Because the GAO dismissed the protest on other grounds, the GAO did not address the issue of federal employees' standing under the CICA. *Id*. at 2 n.1.

[1657] *Id*. at 1-2. Additionally, in determining the in-house cost estimate the USDA simply used the incumbent activity instead of developing an MEO plan. *Id*. at 2.

[1658] *Id*.

[1659] *Id*.

the CICA may protest a streamlined competition if "the agency elects to use the procurement system and conducts a competition by issuing a solicitation . . . ."[1660] Here, however, the USDA's use of the streamlined competition procedures in determining to contract with the private sector "was based solely on the agency's internal analysis and was not made pursuant to a solicitation."[1661] Accordingly, under the CICA and GAO Bid Protest Regulations, the GAO lacked jurisdiction and dismissed Ms. Bray's protest.[1662]

In its June 2003 *Federal Register* notice, the GAO also requested comments on the doctrine of exhaustion and its applicability under the *Revised A-76*.[1663] Based on comity and efficiency considerations, the GAO generally would not consider a contractor's bid protest until the contractor exhausted the prior *Circular A-76's* unique agency administrative appeals process.[1664] The *Revised A-76*, however, replaced the agency administrative appeals procedures with "contests" conducted in accordance with FAR section 33.103.[1665] Currently, the GAO's Bid Protest Regulations do not require protestors to exhaust agency-level protest procedures before pursuing a bid protest, thus the GAO sought input on whether it should continue to apply the "exhaustion doctrine" in *Revised A-76* contests.[1666] In *William A. Van Auken*,[1667] the GAO specifically left the question unanswered.

The protest in *Van Auken* involved the same facts and same *Revised A-76* competition challenged in *Dufrene*.[1668] Mr. Van Auken was apparently one of the individual employees affected by the USDA's decision to contract out the fleet maintenance work, and he protested to the GAO; he also submitted a nearly identical challenge to the agency.[1669] The USDA requested dismissal of the protest as premature, stating it intended to address the protest through its FAR-based, agency-level protest procedures.[1670] As Mr. Van Auken did not object to the request, the GAO dismissed the protest. But the GAO also specifically stated, "Our decision today to close this file is based on the unopposed request for dismissal and does not constitute a decision on the exhaustion requirement."[1671]

Revised A-76 and the DOD

The *Revised A-76* became effective upon issuance on 23 May 2003 and applied to all required inventories, as well as streamlined and standard competitions initiated after the effective date.[1672] The new rules also provided a transition period for direct conversions and cost comparisons initiated but not completed by the effective date.[1673] Specifically, all direct conversions initiated were to be converted to the new streamlined or standard competition processes.[1674] For cost comparisons in which solicitations had been issued prior to the *Revised A-76* effective date, agencies could rely upon the

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[1660] *Id*. at 2-3 (referencing Trajen, Inc., Comp. Gen. B-284310, B-284310.2, Mar. 28, 2000, 2000 CPD ¶ 61, at 3).

[1661] *Id*. at 3.

[1662] In a 20 December 2004 *Federal Register* notice, the GAO stated it "intends to follow the Vallie Bray precedent with respect to protests of streamlined competitions" under the *Revised A-76*. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 69 Fed. Reg. 75,878, 75,879 (Dec. 20, 2004).

[1663] Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,413 (June 13, 2003).

[1664] *Id*. at 35,413 (referencing Intelcom Support Servs., Inc., Comp. Gen. B-234488, Feb. 17, 1989, 89-1 CPD ¶ 174; Direct Delivery Sys., Comp. Gen. B-198361, May 16, 1980, 80-1 CPD ¶ 343).

[1665] *Id*. *See also* REVISED A-76, *supra* note 1610, attch. B, ¶ F.1.

[1666] 68 Fed. Reg. 35,411, 35,413.

[1667] Comp. Gen. B-293590, Feb. 6, 2004, 2004 CPD ¶ 20.

[1668] For a discussion of the facts, see *supra* notes 1617 through 1641 and accompanying text.

[1669] *Van Auken*, 2004 CPD ¶ 20, at 1.

[1670] *Id*. at 2.

[1671] *Id*. at 3 n.1. On 20 December 2004, the GAO specifically addressed the exhaustion requirement. In a *Federal Register* notice, the GAO stated it will not apply the exhaustion requirement to protests challenging Revised A-76 decisions. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 69 Fed. Reg. 75,878, 75,879 (Dec. 20, 2004).

[1672] REVISED A-76, *supra* note 1610, ¶ 6. *See also* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

[1673] REVISED A-76, *supra* note 1610, ¶¶ 7.a and 7.b. *See also* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

[1674] REVISED A-76, *supra* note 1610, ¶ 7.a and 7.b. *See also* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

rules of the prior *Circular A-76*.[1675]

At the time the OMB issued *Revised A-76*, the DOD had approximately 200 "in-progress" competitive sourcing initiatives.[1676] In a 24 October 2003 memo to the Office of Federal Procurement Policy (OFPP), the DOD Competitive Sourcing Official (CSO)[1677] requested a "deviation"[1678] of the *Revised A-76's* transition provisions, allowing the DOD to use the prior *Circular A-76* for the majority of the in-progress cost-comparison studies.[1679] The DOD projected final decision determinations in the in-progress competitive sourcing initiatives by 30 September 2004.[1680]

On 17 November 2003 the OFPP granted the DOD authority to proceed under the deviation proposal, as long as a solicitation had issued by 31 December 2003 in the on-going cost-comparisons.[1681] While granting a deviation to determine a final decision in such studies, the OFPP further stated, "DOD will apply the post competition requirements in paragraph E of attachment B of the [*Revised A-76*] to activities in the transition plan."[1682] Additionally, the OFPP stated it expected the DOD to achieve final decision determinations by the projected 30 September 2004 date.[1683]

Congress further limited the DOD's ability to implement the *Revised A-76* by delaying implementation within the Department until forty-five days after the DOD submitted a report to Congress explaining the effects of the revisions.[1684] The DOD submitted the required report in February 2004 and the forty-five day waiting period ended on 26 April 2004.[1685]

In a policy memo that followed, the DOD stated it is "committed to measured approach" in conducting competitions under the *Revised A-76*.[1686] And to ensure standardized implementation within the DOD, the military services and DOD components can expect increased Office of Secretary of Defense (OSD) oversight of *Revised A-76* competitions.[1687] Specifically, the memo states "DOD Components shall not make public announcement or congressional notification of a public-private competition (standard or streamlined competition) without the concurrence of [the Director, Housing and Competitive Sourcing]."[1688] The OSD expects the requirement for additional oversight and OSD notification will end by the

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[1675] REVISED A-76, *supra* note 1610, ¶ 7.c. *See also* Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

[1676] Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Associate Administrator, Office of Federal Procurement Policy, subject: Department of Defense Competitive Sourcing Transition Plan (24 Oct. 2003) [hereinafter DOD Transition Plan Memo]. The memo is available at http://emissary.acq.osd.mil/inst/share.nsf by clicking on the following links: "Library," "Documents by Organization," "Department of Defense," "Policy," and "DOD Deviation Request."

[1677] Under the *Revised A-76*, the CSO is an agency assistant secretary or equivalent level official responsible for implementing the circular. REVISED A-76, *supra* note 1610, ¶ 4.f. Within the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The memo is available at http://emissary.acq.osd.mil/inst/share.nsf by clicking on the following links: "Library," "Documents by Organization," "Department of Defense," "Policy," and "Designation of DOD Competitive Sourcing Official."

[1678] According to the *Revised A-76*, "The CSO (without delegation) shall receive prior written OMB approval to deviate from this circular . . . ." REVISED A-76, *supra* note 1610, ¶ 5.c.

[1679] DOD Transition Plan Memo, *supra* note 1676, at 2.

[1680] *Id*.

[1681] Memorandum, Office of Management and Budget, Office of Federal Procurement Policy, to Deputy Under Secretary of Defense (Installations and Environment), subject: Competitive Sourcing Transition Plan for the DOD (17 November 2003), at 1 and encl. ¶ 2. The memo is available at http://emissary.acq.osd.mil/inst/share.nsf by clicking on the following links: "Library," "Documents by Organization," "Office of Management and Budget," "Policy," and "OMB's Response to DOD Deviation Request."

[1682] *Id*. encl. ¶ 1.b.

[1683] *Id*. encl. ¶ 2.

[1684] National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, § 335, 117 Stat. 1392, 1444 (2003). Specifically, Congress required DOD's report to address the following issues under the *Revised A-76*: (1) the opportunity for DOD employees to compete to retain their jobs; (2) appeal and protest rights of DOD employees; (3) safeguards to ensure all public-private competitions are fair, appropriate, and provide full and open competition; (4) DOD plans to ensure an appropriate phase-in period for the *Revised A-76*; (5) DOD plans to provide training to DOD employees regarding the revisions; (6) DOD plans to collect and analyze data on the costs and quality of work contracted out or retained in-house. *Id*. For additional discussion of legislation impacting the DOD's competitive sourcing initiatives, see *infra* app. A: Department of Defense (DOD) Legislation for Fiscal Year 2005.

[1685] Ms. Annie Andrews, Assistant Director, Housing & Competitive Sourcing, Office for the Deputy Under Secretary of Defense (Installations and Environment), Address at the Revisiting the Revised A-76 Circular: Evaluations After One Year Conference (2 June 2004).

[1686] Memorandum, Director, Housing and Competitive Sourcing, to Deputy Assistant Chief of Staff for Installation Management, United States Army et al., subject: Oversight of DOD Public-Private Competitions (5 August 2004). This memo is available at http://emissary.acq.osd.mil/inst/share.nsf by clicking on the following links: "Library," "Documents by Organization," "Department of Defense," "Policy," and "Oversight of DOD Public-Private Competitions."

[1687] *Id*.

[1688] *Id*.

end of December 2004.[1689]

Finally, in a separate memorandum dated 29 March 2004, the DOD CSO appointed DOD Component CSOs (CCSO) and charged them with implementing the *Revised A-76* within their respective Components and issuing any applicable implementing guidance.[1690] Within the Army and Navy, their respective Assistant Secretaries (Installation and Environment) have been appointed CCSOs.[1691] Within the Air Force, the Deputy Chief of Staff for Personnel has been designated.[1692] And within all other Defense Agencies and DOD Field Activities, the Directors of such agencies and activities have been appointed CCSOs.[1693] The memorandum at Attachment 1 specifies the DOD CSO's responsibilities, and the memo at Attachment 2 addresses the delegated responsibilities of the CCSOs.[1694]

Federal Manager's Guide to Competitive Sourcing

The OMB and Federal Acquisition Council (FAC) issued the second edition of the *Manager's Guide to Competitive Sourcing* (*Manager's Guide*) in February 2004.[1695] For practitioners new to competitive sourcing, the *Manager's Guide* includes a "primer" section, as well as an appendix for "frequently asked questions."[1696] The *Manager's Guide* also incorporates "best practices" from several federal agencies and includes web links to the training/guidance documents available from the various executive agencies.[1697]

We have Something to Report

The OMB and the GAO each issued reports this past year that included some interesting statistics and comments on competitive sourcing results and process.[1698] In May 2004, the OMB issued a report summarizing the competitive sourcing results of individual agencies.[1699] According to the report, the competitive sourcing initiatives undertaken in FY 2003 will achieve $1.1 billion in savings over the next three to five years.[1700] Interestingly, of the approximately 17,500 full-time equivalent (FTE) positions competed, nearly 89% of the FTEs were retained in house.[1701]

The GAO report also included statistics on the numbers of studies completed and their results, but also looked at the competitive sourcing process.[1702] The GAO's review of approximately 17,500 FTEs studied during 2003 concluded 76% of all FTEs were retained in house.[1703] But the GAO went beyond mere statistics and recommended areas of improvement

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[1689] *Id*.

[1690] Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the Department of Defense (DOD) Competitive Sourcing Officials (CSO) and Component Competitive Sourcing Officials (CCSO) (29 Mar. 2004). The memo is available at http://emissary.acq.osd.mil/inst/share.nsf by clicking on the following links: "Library," "Documents by Organization," "Department of Defense," "Policy," and "Responsibilities Under OMB Circular A-76 (Revised May 2003)."

[1691] *Id*.

[1692] *Id*.

[1693] *Id*.

[1694] *Id*. attchs. 1 and 2.

[1695] FEDERAL ACQUISITION COUNCIL, *Manager's Guide to Competitive Sourcing* (Feb. 20, 2004) *available at* http://www.results.gov/agenda/competitive sourcing.html.

[1696] *Id*. at 16-20 and app. C.

[1697] *Id*. at 5-15.

[1698] OFFICE OF MANAGEMENT AND BUDGET, *Report on Competitive Sourcing Results for Fiscal Year 2003* (May 2004) [hereinafter *Competitive Sourcing Results*]; GEN. ACCT. OFFICE, REP. NO. GAO-04-367, *Competitive Sourcing—Greater Emphasis Needed on Increasing Efficiency and Improving Performance* (Feb. 2004) [hereinafter REP. NO. GAO-04-367].

[1699] *Competitive Sourcing Results*, *supra* note 1698, at 4 (referencing the legislative requirement that agencies report competitive sourcing results for the prior fiscal year annually to Congress). *See also* Consolidated Appropriations Act for FY 2004, Pub. L. No. 108-199, div. F, § 647(b), 118 Stat. 3, 361 (2004).

[1700] *Competitive Sourcing Results*, *supra* note 1698, at 2.

[1701] *Id*.

[1702] REP. NO. GAO-04-367, *supra* note 1698.

[1703] *Id*. at 34. The difference between the OMB's and GAO's percentages may be due to the particular studies that were either included or excluded. For example, the OMB report included four standard competitions completed during the first quarter of FY 2004. *Competitive Sourcing Results*, *supra* note 1698, at 2.

within the competitive sourcing process. In addition to recommending the OMB work with agencies to be "more strategic in their sourcing decisions" and require agencies to develop competition plans that focus on achieving measurable outcomes, the GAO highlighted the need for greater consistency in the classification of positions as either inherently governmental or commercial.[1704]

We Still Have Problems under the "Old" Circular A-76

As the *Revised A-76* is relatively new to the competitive sourcing scene, there are still protests, and lessons to be learned, under the "old" *Circular A-76*. In *Career Quest, a division of Syllan Careers, Inc.*,[1705] Career Quest challenged a GSA decision pursuant to an "old" *Circular A-76* cost comparison that it was more cost-effective to retain in-house the performance of GSA's National Customer Support Center for Federal Supply Schedule users (NCSC).[1706]

During the competition among private sector proposals, the GSA selected Career Quest's proposal as representing the "best value" to the government. In the head-to-head cost comparison with the in-house MEO, the agency determined MEO performance would save approximately $900,000.[1707] Career Quest appealed the decision to the agency appeal authority (AAA). Although the AAA upwardly adjusted the MEO's cost by $327,000, the AAA affirmed the GSA's decision to retain performance in-house as the MEO's cost was still approximately $570,000 less than Career Quest's offer.[1708] Career Quest protested to the GAO.

At the GAO, the GSA conceded certain errors regarding the failure to include costs associated with a full-time site manager and phase-in costs. These errors resulted in additional MEO costs of $324,000, which reduced the cost difference between the MEO and Career Quest to $245,268.[1709] Finding additional errors in the MEO's proposed staffing and the agency's evaluation, the GAO sustained the protest.

First, the GAO found the MEO's technical performance plan (TPP), which proposed a total of 38.5 FTEs, conflicted with its cost proposal that included direct personnel costs for only 34.5 FTEs.[1710] Although a response by MEO members argued the TPP wording failed to explain that the 38.5 FTE figure included 4 FTEs performing inherently governmental functions, "the cost of which was properly omitted from the MEO's costs," the GAO found the agency record "shows that the MEO affirmatively represented to the technical evaluators that it was using 38.5 FTEs to perform the requirement, which was inconsistent with the 34.5 FTEs used to calculate the MEO's cost . . . ."[1711] Indeed, because the MEO's TPP was unclear regarding staffing, the evaluators specifically asked the MEO for the total number of proposed FTEs. The MEO's response was "unequivocal" in stating 38.5 FTEs.[1712] As the MEO's costs reflected only 34 FTEs, the GAO found the agency's evaluation "materially flawed."[1713]

The GAO also found questionable the MEOs proposed staffing for the quality control activities under the PWS. The MEO proposed a "call monitoring program" requiring a quality control manager to monitor thirty calls per month.[1714] Noting the agency received approximately 23,000 calls per month on average, the evaluators questioned the MEO about the basis for its sample size.[1715] In response, the MEO informed the evaluators that its sample size was based on an American National Standards Institute/American Society for Quality (ANSI/ASQ) standard.[1716] Career Quest argued the MEO miscalculated and that the ANSI/ASQ standards required the monitoring of 315 calls per month, which the MEO's proposed single analyst

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[1704] REP. NO. GAO-04-367, *supra* note 1698, at 23.

[1705] Comp. Gen. B-293435.2, B-293435.3, Aug. 2, 2004, 2004 CPD ¶ 152.

[1706] *Id*. at 1.

[1707] *Id*. at 2.

[1708] *Id*.

[1709] *Id*.

[1710] *Id*.

[1711] *Id*. at 3.

[1712] *Id*. at 4.

[1713] *Id*.

[1714] *Id*.

[1715] *Id*.

[1716] *Id*.

could not possibly monitor.[1717] The GAO agreed stating, "the approximately tenfold difference in the sample size required under the standard identified by the MEO versus the sample size it proposed" resulted in a "legitimate basis to question whether the evaluators properly considered whether the MEO proposed adequate staffing to perform the quality control activities . . . ."[1718]

Because these errors could result in additional staffing that could increase the MEO's costs above Career Quest's, the GAO found Career Quest had been prejudiced by GSA's errors.[1719] Giving the MEO yet another bite at the apple, the GAO recommended the GSA "obtain clarification of the MEO's intended level of staffing," reevaluate the MEO to determine the adequacy of its staffing levels, and perform a new cost comparison.[1720]

COFC Rejects "Draconian" Reading of Circular A-76 *Guidance*

In *Federal Management Systems, Inc. v. United States*,[1721] the COFC addressed the issue of organizational conflicts of interest (OCI) under the prior *Circular A-76*. The Department of Health and Human Services, National Institutes of Health (NIH) issued an RFP on 23 May 2003 as part of a *Circular A-76* study of various clerical and administrative support positions at the NIH.[1722] Federal Management Systems, Inc. (FMSI) was the only firm to submit an offer, however, the SSEB found FMSI's proposal technically unacceptable. As a result, the NIH cancelled the solicitation and the *Circular A-76* competition. [1723]

FMSI filed suit alleging an improper OCI existed because seven of eight members on the SSEB held positions in the functions under the study, thus violating *Circular A-76*.[1724] More specifically, FMSI alleged the SSEB composition violated *Circular A-76 Transmittal Memorandum No. 22* (*Memo 22*), which stated, "Individuals who hold positions in the function under study should not be members of the [source selection evaluation] team, unless an exception is authorized by the head of the contracting activity."[1725] FMSI also cited language from the commentary accompanying the *Memo 22* announcement in which the OMB stated it was a "poor business practice" to include federal employees on the SSEB, "when those employees are subject to losing their jobs or otherwise being adversely affected . . . ."[1726]

Here, the function under study included administrative support activities "such as answering phones, filing and photocopying, and computer data entry."[1727] Because the agency could demonstrate that none of these activities were assigned to the individuals serving on the SSEB, FMSI argued that an OCI existed and violated the *Circular A-76* because the SSEB members were "in the supervisory chain above the individuals who hold positions in the function under study, or because they interact with individuals in the function under study by directing them to schedule meetings, make copies, or enter information into databases."[1728]

The court rejected FMSI's argument, holding that "[t]he fact that SSEB members interact with individuals who hold positions in the function under study, or direct some of their activities, is not sufficient to disqualify the SSEB members."[1729] Electing not to endorse FMSI's interpretation of the language found in FAR section 52.207-2 and the *Circular A-76* guidance on OCI, the court stated that "as a practical matter, exclusion of government employees holding similar positions to those in

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[1717] *Id*.

[1718] *Id*. at 5.

[1719] *Id*.

[1720] *Id*. at 5-6.

[1721] 61 Fed. Cl. 364 (2004).

[1722] *Id*. at 365.

[1723] *Id*.

[1724] *Id*. at 366.

[1725] *Id*. at 368 (quoting Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (Sept. 8, 2000)). The OMB issued the *Memo 22*, in part, to address the OCI issue that arose in an Air Force *Circular A-76* study in which the GAO found an OCI because fourteen of sixteen evaluators held positions in the function that was under study. *See* DZS/Baker LLC; Morrison Knudsen Corp., Comp. Gen. B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19.

[1726] *Fed. Mgmt. Sys., Inc.*, 61 Fed. Cl. at 368 (quoting Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568 (Sept. 8, 2000)).

[1727] *Id*. at 369.

[1728] *Id*.

[1729] *Id*.

this SSEB would be draconian."[1730]

Major Kevin Huyser.

Privatization

Paradise Lost (or at least Permanently Enjoined)

In *Hunt Building Co., Ltd. v. United States*,[1731] the COFC granted the protestor permanent injunctive relief, preventing the Air Force from closing on a real estate transaction that would have privatized approximately half of the family housing units at Hickam AFB, Hawaii. The COFC found the relief warranted given "the Air Force failed to comply with its Solicitation, changed material terms without advising Hunt, and failed to treat all offerors fairly and equally . . . ."[1732]

The project RFP, issued on 12 April 2002, contemplated a "non-Federal Acquisition Regulation (FAR), real estate transaction with the Successful Offeror (SO) under which the Government will convey 1356 existing housing units . . . and lease approximately 238 acres of land . . . ."[1733] Although not a FAR transaction, the solicitation stated the "intent to use fair, timely, and cost-effective procedures for evaluation and selection of the offer most advantageous to the Air Force."[1734] The RFP provided for a three-stage process: first, competitive selection of an SO; second, finalization of "form legal documents"[1735] necessary for the real estate transaction between the SO and the Air Force; and finally, the actual real estate closing.[1736]

Significantly, the solicitation required that the terms of the form legal documents that the Air Force would execute with the SO after selection would be "substantially identical" to the terms in the form legal documents appended to the solicitation.[1737] One such form was a Property Lease that included Condition 23.7.2 (Condition 23), which stated: "The Mortgagee's Right to Postpone shall extend the date of termination of this Lease specified in the Termination Notice for a period of not more than six (6) months."[1738]

Hunt Building Co., Ltd. (Hunt) and Actus Lend Lease, LLC (Actus) each submitted offers in response to the RFP. Hunt's initial proposal requested the government modify the proposed language in Condition 23 of the Property Lease by deleting the six-month limitation on a mortgagee's ability to extend the lease termination date.[1739] Hunt requested the change because its lender had conditioned their financial commitment upon the Air Force's agreement to make the requested changes.[1740] In its initial offer, Actus did not request any changes to the various legal documents.[1741]

After establishing a competitive range that included only Hunt and Actus, the Air Force issued evaluation notices (ENs) and requested comprehensive proposals from both offerors.[1742] In its proposal, Hunt again requested changes to the Property Lease and other form legal documents. In response, the Air Force issued an EN stating, "the proposed modifications, if required by the Offeror [Hunt] to close the transaction, shall adversely affect the proposal risk and financial

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[1730] *Id*. at 370. In reaching its conclusion, the court approvingly cited *JWL Int'l Corp. v. United States*, in which the COFC rejected plaintiff's challenge to the SSEB composition in a *Circular A-76* study because certain SSEB members worked in components that interrelated with or relied upon the actual functions under study. 52 Fed. Cl. 650, 659 (2002), *aff'd*, 56 Fed. Appx. 474 (Fed. Cir. 2003).

[1731] 61 Fed. Cl. 243 (2004).

[1732] *Id*. at 247.

[1733] *Id*. at 248 (quoting the Solicitation).

[1734] *Id*. at 248-49.

[1735] The solicitation described the "form legal documents" as "governing the project" and "Key Controlling Documents." *Id*. at 255 (referencing the Solicitation § 1.5). Examples of such legal documents provided by the solicitation included: lease of property, quitclaim deed, forward commitment, intercreditor agreement, lockbox agreement. *Id*. at 249 (referencing the Solicitation § 3.2.1).

[1736] *Id*. at 246, 248.

[1737] *Id*. at 247.

[1738] *Id*. at 256.

[1739] *Id*. at 257.

[1740] *Id*.

[1741] *Id*. at 257-58.

[1742] *Id*. at 258.

and technical ratings relating to the Offeror's Proposal."[1743] Hunt then submitted a revised proposal, deleting several, but not all, of the requested changes. The Air Force again responded, "If Hunt or any of the transaction participants requires modifications to the Transaction Documents that were rejected by the Government, such modifications shall cause Hunt's proposal to be evaluated less favorably or rejected."[1744] As a result, Hunt dropped several of its requested changes, including its objection to the Property Lease's six-month limitation on a lender's ability to postpone termination.[1745]

Actus also submitted a comprehensive design proposal that sought changes to the form legal documents. Among the proposed changes was a request to extend the six-month limitation on postponing a termination of the lease.[1746] Issuing "the identical EN to Actus it had issued to Hunt," the Air Force rejected the proposed changes.[1747] In response, Actus filed an agency-level protest arguing the solicitation included unduly restrictive provisions.[1748] On 16 April 2003, the Air Force agreed to certain changes proposed by Actus, including extending the six-month limitation in Condition 23 of the Property Lease.[1749] Actus accepted the revisions and withdrew its protest.[1750] The Air Force did not inform Hunt of the protest or the modification it granted Actus concerning the six-month limitation.[1751] Although both offers received the same ratings, the Air Force selected Actus as the SO on 22 August 2003 because the Actus proposal had "certain advantages"[1752]

Following Actus' selection as the SO, the Air Force began negotiations with Actus to finalize the form legal documents and prepare to close the real estate transaction. During this phase, the RFP provided that the Property Lease and other legal documents could be revised to resolve administrative details.[1753] As the Air Force and Actus engaged in post-selection negotiations, the parties made several changes to the Property Lease and other legal documents.[1754] Additionally, Actus submitted post-selection "final proposal revisions" on three separate occasions to accommodate the various changes and to address other issues.[1755]

Post-selection but prior to the transaction closing date, Hunt filed a protest with the COFC seeking permanent injunctive relief. The Air Force and Actus, as intervenor, first sought dismissal on various procedural grounds.[1756] Interestingly, the Air Force and Actus contended that because the CICA and FAR did not apply to the transaction the Air Force's actions could not be said to violate a statute or regulation.[1757] The court determined that the "thorny" legal issue of whether the CICA and FAR applied was "immaterial," because the court could sustain the protest "independent of any statutory or regulatory violations . . . ."[1758] The court noted its authority to set aside award determinations extends to agency

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[1743] *Id*. at 260 (quoting Evaluation Notice, 11 Sept. 2002). The EN further explained, "The Air Force has previously closed several [Military Housing Privatization Initiative] transactions with legal documents substantially similar to the Form Documents." *Id*.

[1744] *Id*. at 261.

[1745] *Id*.

[1746] *Id*. at 262.

[1747] *Id*.

[1748] *Id*. at 262-63.

[1749] *Id*. at 264. The Air Force agreed to modify Condition 23 to read:

> The Mortgagee's Right to Postpone shall extend the date for the termination of this Lease specified in the Termination Notice for a period of six (6) months (or such longer period as may be approved in writing by the Government, which approval shall not be unreasonably withheld) so long as the mortgagee promptly commences all steps necessary to cure any Defaults of the Lessee . . . .

Id.

[1750] *Id*.

[1751] *Id*. at 265.

[1752] A fairly lengthy opinion of nearly forty pages, the decision is also redacted, which makes it impossible to discern any differences between the proposals. *See id*. at 264-65.

[1753] *Id*. at 265-66.

[1754] *Id*. at 266. These changes included new dispute resolution provisions before the Air Force could exercise its termination rights; base closure provisions to address the contingency of Hickam AFB's closure; expanding the definition of "excusable delay" to include "acts of terrorism;" making Hawaii law applicable in the absence of federal law. *Id*. at 266-67.

[1755] *Id*. at 267-68.

[1756] *Id*. at 269. The Air Force and Actus requested dismissal on grounds of ripeness, standing, timeliness, and waiver. The COFC denied each requested basis for dismissal. *Id*. at 269-71.

[1757] *Id*. at 272-73.

[1758] *Id*. at 273.

decisions that lack a rational basis or that result from a prejudicial violation of procurement procedures.[1759] The court observed that the agency's failure to follow the terms of the solicitation and selecting an offeror based upon different requirements were "quintessential examples of conduct which lacks a rational basis."[1760]

On the merits, Hunt argued the Air Force improperly relaxed the six-month limitation on postponing lease termination for Actus after previously rejecting Hunt's request to do so. The Air Force contended that because the CICA and the FAR did not apply to the solicitation offerors were not limited to "proposing on the same basis," and the Air Force could accept or reject proposed alternatives.[1761] The court observed, however, that though the RFP allowed offerors "to be creative in their solutions," the Air Force could not "apply different requirements to offerors."[1762] Here, when the Air Force relaxed and extended the six-month limitation of Condition 23 for Actus but not Hunt, it "was not attributable to any enhancement in Actus' proposal—it was a modification of the ground rules on which offerors were competing. . . ."[1763] By doing so, regardless of whether the CICA and the FAR applied, "the Air Force violated the 'fundamental principle of government procurement . . . that [contracting officers] treat all offerors equally and consistently apply the evaluation factors listed in the Solicitation."[1764] Because risk was an evaluation factor, the relaxation of the six-month limitation on mortgagees made the financial risk greater for Hunt as compared to Actus, meaning it was "impossible for the [source selection evaluation team] to apply that evaluation factor fairly."[1765] The court also found the Air Force violated the solicitation because the RFP required the Air Force to amend the solicitation "with 'any information necessary in submitting offers' or if the lack thereof "would be prejudicial to any other prospective offerors.'"[1766]

The COFC also took issue with the Air Force's post-selection changes to several material solicitation requirements. The solicitation did provide that post-selection "amendments" would be made to the formal legal documents, thus the Air Force agreed to and accepted several post-selection revisions.[1767] However, the court determined the solicitation "imposed an obligation on the Air Force to keep the revisions to the formal legal documents in the realm of administrative details" and required that such revised documents signed at closing "be 'substantially identical' to the form legal documents on which offerors based their proposals."[1768] By allowing several post-selection changes, the Air Force violated the solicitation and the "fundamental [principle] that evaluation and contract award must be made in accordance with the terms and conditions in the Solicitation."[1769]

Moreover, the court ruled the solicitation did not allow the Air Force to request and accept post-selection "final proposal revisions."[1770] The Air Force, here, gave Actus three opportunities to submit revised proposals during the post-selection phase, which prejudiced Hunt by giving "Actus an edge that Hunt did not receive . . . ."[1771] These post-selection revisions not only violated the solicitation but "rendered the competition . . . illusory."[1772]

In addition to finding significant errors in the procurement process, the COFC also ruled Hunt had demonstrated it

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[1759] *Id*. at 272-73. The COFC derives its pre-award bid protest jurisdiction from the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996. *Id*. at 268-69 (citing 28 U.S.C. § 1491(b)(1), as amended by Pub. L. No. 104-320, 110 Stat. 3870, 110 Stat. 3870 (1996)). The court reviews such bid protests under the standards of the Administrative Procedures Act, 5 U.S.C. § 706, 28 U.S.C. § 1491(b)(4) and may set aside awards if "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Id*. (citing Banknote Corp. of Am. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (quoting Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

[1760] *Id*. at 273.

[1761] *Id*.

[1762] *Id*.

[1763] *Id*.

[1764] *Id*. at 274.

[1765] *Id*.

[1766] *Id*.

[1767] *Id*. at 275.

[1768] *Id*. at 276. For a discussion of the various changes, see *supra* note 1754. Hunt had requested some of these same changes, but the Air Force denied the requests. *Id*. at 275-76.

[1769] *Id*. at 276.

[1770] *Id*. at 277.

[1771] *Id*.

[1772] *Id*.

had been competitively prejudiced by the Air Force's errors.[1773] Specifically, Hunt demonstrated through testimony from its lender that had Hunt received the same opportunity as Actus to modify the form legal documents, Hunt could have received more favorable financing terms.[1774]

Finding permanent injunctive relief appropriate, in part because the transaction involved "a fifty-year project of enormous scope, which may include a follow-on sole-source procurement for the remaining privatization at Hickam AFB,"[1775] the court also noted "that equitable powers 'should be exercised in a way [that] limits judicial interference in contract procurement.'"[1776] As such the COFC did not require the Air Force "to go back to square one" and issue a new solicitation.[1777] Instead, the court set aside the selection of Actus and directed the Air Force "to reassess its needs, amend the Solicitation accordingly (or not) and evaluate final proposal revisions consistent with that solicitation."[1778]

A Couple of Thoughts from the GAO on Housing Privatization

The GAO issued two separate reports[1779] that addressed in part the DOD's Military Housing Privatization Initiative.[1780] In a report that looked at issues related to the renovation of general officer quarters, the GAO was concerned the DOD and military services would lose spending oversight on the maintenance/repair of the increasing number of general officer quarters because the DOD lacked a consistent department-wide policy for the review of such maintenance/repair projects.[1781] Under current DOD guidance, military service headquarters must review all maintenance/repair projects exceeding $35,000 for government-owned general officer quarters.[1782] This requirement does not apply to privatized quarters.[1783]

According to the GAO, the Navy, Marine Corps, and the Air Force have developed draft guidance "that will provide more visibility over the spending to operate and maintain privatized general and flag officer quarters."[1784] The Air Force draft guidance implements essentially the same review procedure that currently exists for government-owned maintenance/repair to general officer housing.[1785] The Navy/Marine Corps are developing similar guidance but increase the limitation to "$50,000 in one year for any one house."[1786] The Army has no plans for additional guidance or review beyond the current headquarters review of annual operating budgets for privatized housing.[1787]

Responding to the GAO's recommendation that the DOD develop department-wide guidance that would apply equally to privatized and government-owned general officer quarters, the DOD non-concurred.[1788] The DOD believes that applying the same government oversight to privatized quarters as it does to government-owned quarters "contradicts the rules

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[1773] *Id*. "To prevail in a bid protest, a protestor must show not only a significant error in the procurement process, but also that the error prejudiced it." Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996) (citing LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1556 (Fed. Cir. 1995)).

[1774] *Hunt Building*, 61 Fed. Cl. at 278.

[1775] *Id*. at 280.

[1776] *Id*.

[1777] *Id*.

[1778] *Id*.

[1779] GEN. ACCT. OFF., REP. NO. GAO-04-555, *Defense Infrastructure: Issues Related to the Renovation of General and Flag Officer Quarters* (May 2004) [hereinafter REP. NO. GAO-04-555]; GEN. ACCT. OFF., REP. NO. GAO-04-556, *Military Housing: Further Improvements Needed in Requirements Determinations and Program Review* (May 2004) [hereinafter REP. NO. GAO-04-556].

[1780] The National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186, 547 (1995), granted the DOD temporary authority to provide direct loans, loan guarantees, and other financial incentives to encourage private developers to renovate, manage, and maintain existing military housing units, as well as to construct, manage, and maintain new military housing units. Congress later extended this authority through 31 December 2012. National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 2805, 115 Stat. 1012, 1306 (2001) (amending 10 U.S.C. § 2885).

[1781] REP. NO. GAO-04-555, *supra* note 1779, at 16. Though the military services had privatized only sixty-five of 784 general officer quarters by the end of FY 2003, the GAO noted that the services plan to privatize approximately fifty-four percent of these quarters by the end of FY 2008. *Id*.

[1782] *Id*.

[1783] *Id*.

[1784] *Id*.

[1785] *Id*. The guidance is included in the "draft" of Air Force Instruction (AFI) 32-6007, Privatized Family Housing. According to the Air Force e-Publishing page, *available at* http://www.e-publishing.af.mil/, the AFI is not yet published (last visited 8 Nov. 2004).

[1786] REP. NO. GAO-04-555, *supra* note 1779, at 16.

[1787] *Id*.

[1788] *Id*. at 27.

of privatization."[1789] The DOD argued that true spending control comes from "the project cash flows themselves as monitored by the private sector development entity who owns the housing."[1790] As such, the DOD planned to rely on private sector mechanisms to control costs.[1791]

In a separate report, the GAO looked at the DOD process that determines military family housing needs.[1792] While the GAO described current DOD guidance "a significant step in the right direction," the GAO determined the guidance failed to result in "consistent and reliable assessments of family housing needs."[1793] Reviewing the housing needs assessments from twelve installations, the GAO found the lack of detailed DOD guidance resulted in "the use of inconsistent methodologies, questionable assumptions, and outdated information."[1794]

Moreover, the GAO determined that DOD's requirements determination process did not maximize reliance on local housing,[1795] the most cost effective means for meeting military family housing needs.[1796] Although the DOD's "long-standing policy" has been to rely upon local communities near installations for military housing needs, the GAO found the DOD's requirements determination process provided several exceptions to this general policy, not all of which were justified.[1797] The GAO's concern was that use of these exceptions "could result in greater reliance on on-base family housing than is warranted . . . ."[1798]

The GAO also criticized the DOD review process for traditional military family housing construction projects, noting the process is different from the review of housing privatization projects, which the GAO believed received greater scrutiny and oversight from the DOD.[1799] The GAO was concerned that DOD's top-level review of housing construction projects did not include formal analysis of whether the planned improvements could be done cheaper through privatization.[1800] Citing examples where the services had budgeted money for military family housing construction projects at installations that were also planning housing privatization projects,[1801] the GAO sought to "point to opportunities for DOD to provide a higher level assessment of justifications for such projects and their privatization potential before such projects are approved."[1802]

In response to the GAO's concerns, the DOD stated detailed guidance for the housing determination was forthcoming in the DOD Housing Management Manual, currently scheduled for release in December 2004.[1803] Concerning the exceptions to using local community housing, the DOD stated it would review the supporting rationale for the exceptions, but "believe[d] the existing exceptions are sufficiently narrow and well-founded to support sound determinations of our housing requirements."[1804] The DOD also stated the military services will be required "to explain why privatization is not

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[1789] *Id*.

[1790] *Id*.

[1791] *Id*.

[1792] REP. NO. GAO-04-556, *supra* note 1779, at 1.

[1793] *Id*. at 16.

[1794] *Id*. at 17. For example, several of the studies relied upon surveys conducted between 1994 and 1997 to estimate military family home ownership; several studies excluded suitable community rental units simply because the agency determined the rent was too low; and several studies varied in defining the local community housing market. *Id*. at 17-20.

[1795] *Id*. at 21.

[1796] *Id*. at 3. The GAO found the average annual costs for providing military family housing were approximately "$13,600 for local community housing, $16,700 for privatized military housing, and $19,000 for military-owned housing." *Id*. at 3-4.

[1797] *Id*. at 21. Specifically, the exceptions include: (1) exception for key personnel, (2) exception to establish a military housing community, (3) exception to provide targeted economic relief, (4) exception for historic housing. *Id*. at 22. The GAO believed only one exception (i.e., exception for key personnel) was justified. *Id*.

[1798] *Id*.

[1799] *Id*. at 26-27.

[1800] *Id*. at 27. The military services indicated they consider military construction and privatization alternatives prior to submitting a housing construction request to the DOD. *Id*.

[1801] For example, the Army had budgeted $41 million for a military construction project at Ft. Knox, Kentucky, to replace 178 inadequate houses. The Army plans on conveying the new houses to a private developer as part of a planned privatization project scheduled for 2006. *Id*. at 28. In justifying use of military construction dollars, the services offered various explanations including immediate need for adequate housing and making privatization at a later time more financially feasible. *Id*. at 28-29.

[1802] *Id*. at 29. The GAO did note that it was not saying that the cited uses of military construction were not justified. *Id*.

[1803] *Id*. at 39.

[1804] *Id*.

viable when choosing to use military construction."[1805]

Major Kevin Huyser.

Construction Contracting

Basic Rules of Contract Interpretation Are Not Always So Basic

This year the CAFC handed down two opinions dealing with contract interpretation in the context of construction contracting. In *M.A. Mortenson v. Brownlee* (*Mortenson*),[1806] the Army COE awarded Mortenson a contract for the construction of a medical facility.[1807] Mortenson in turn subcontracted out the project's heating, ventilation, and air conditioning (HVAC) ductwork to SSM Industries, Inc. (SSM).[1808] The contract required manual balancing dampers be installed at specific points in the ductwork. To determine the number of manual balancing dampers required by the contract, SSM looked to both the specifications and the drawings of the contract.[1809] The contract specifications called for manual balancing dampers to "be provided at points on supply, return, and exhaust systems where submains, branch mains, or branches and run-outs are taken from larger ducts."[1810] However, the plan drawings required "a manual volume damper at each branch/runout take-off" and "a manual balancing damper at each terminal unit run-out duct."[1811] SSM concluded from this information that the project required installation of 2936 manual balancing dampers, and Mortenson priced its bid accordingly.[1812]

After SSM purchased and installed the manual balancing dampers for the project, Mortenson requested the contracting officer verify SSM's interpretation of the contract's HVAC requirements.[1813] The contracting officer disagreed with SSM's interpretation, and ordered SSM provide manual balancing dampers at all locations specified in the specifications. SSM proceeded "under protest," and as a result of the contracting officer's instructions, installed an additional 1283 manual balancing dampers, at an additional cost of $297,608.[1814]

Mortenson appealed to the ASBCA, which concluded that Mortenson was not entitled to an equitable adjustment.[1815] On appeal, the CAFC affirmed the board's decision. For the court, the "crux" of the appeal was whether the language of the specifications "provided at points" meant "provided at all points" or "provided at various points."[1816] The court looked to the plain language of the contract, and concluded the government's interpretation of the contract was the only interpretation that could "effectuate its spirit and purpose giving reasonable meaning to all parts of the contract."[1817] The court specifically noted the language of the specifications "is not conditional in any way, and it makes no exceptions or distinctions for ductwork located in any particular section of the integrated building system."[1818] The court then characterized appellant's argument that the drawings should dictate the requirements of the contract as "simply wrong," and affirmed the board's decision in its entirety.[1819]

Although the CAFC spoke with a united voice in *Mortenson*, such was not the case in *Turner Construction Co., Inc. v. United States* (*Turner*).[1820] In *Turner*, the Veterans Administration (VA) awarded Turner a contract for the construction of

[1805] *Id*. at 40.

[1806] 363 F.3d 1203 (Fed. Cir. 2004).

[1807] *Id*. at 1204.

[1808] *Id*.

[1809] *Id*.

[1810] *Id*. at 1204-05.

[1811] *Id*. at 1205.

[1812] *Id*.

[1813] *Id*.

[1814] *Id.*

[1815] *Id*. at 1204 (citing M.A. Mortenson Co., ASBCA No. 53431, 03-1 BCA ¶ 32,078, at 158,527).

[1816] *Id*. at 1205.

[1817] *Id*. at 1206.

[1818] *Id*.

[1819] *Id*. at 1206-07.

[1820] 367 F.3d 1319 (Fed. Cir. 2004).

an addition to a VA hospital.[1821] Among other requirements, the contract required Turner to "[f]urnish and install electrical wiring, systems, equipment and accessories in accordance with the specifications and drawings" and required that the work "comply with the applicable electrical codes."[1822] Based on this language, the government ordered Turner to install fire-rated electrical feeders and panel boards in the operating room area and on the third floor of the addition. Although the specifications and drawings clearly did not require Turner to provide this work, the VA concluded the state's electrical code mandated the equipment be in place.[1823] Turner installed the required equipment and submitted a claim for the work, which the VA denied.[1824]

Into Every Life a Little Rain Must Fall

In *Fraser Construction Co. v. United States*,[1825] the Army COE contracted with Fraser to excavate material from the bottom of a shallow reservoir. The project was scheduled to begin on 17 May 1993 and be completed by 1 September 1993.[1826] To perform the work, Fraser dug a trench and dike to divert stream water away from the reservoir. As built, the trench and dike was capable of withstanding 800 cubic feet of water per second (cfs). However, according to a U.S. Geological Survey, a water flow of more than 800 cfs could be expected approximately 2.4 times during an average summer.[1827] Needless to say, 1993 witnessed a wet summer, and the trench and dike was repeatedly damaged by overflow.[1828] Fraser asked the contracting officer for several time extensions, but was only given a total of only thirty additional days.[1829] Refusing to grant additional delay days, the government reasoned that Fraser should have anticipated that the trench and dike were inadequate for the conditions encountered.[1830]

Upon completion of the project, Fraser submitted a claim to the contracting officer under a constructive acceleration theory, seeking a total $659,760 above the contract amount. [1831] Upon denial of the claim, Fraser filed an action before the COFC, seeking costs associated with the alleged constructive acceleration.[1832]

At trial, the COFC found that Fraser had not established the basis for a constructive acceleration claim. Specifically, the court concluded it was foreseeable that Fraser's dike would be overtopped several times during the summer of 1993 and that Fraser assumed this risk. For the court, the peak flows were foreseeable, and were "the genesis of most, if not all, of [Fraser's] difficulties."[1833]

In a less than resounding endorsement of the COFC, the CAFC upheld the COFC's holding, concluded the COFC's holding did not amount to "clear error."[1834] Specifically, the court agreed with the COFC that the overtopping of Fraser's dikes was foreseeable, and that time would be lost in repairing the dikes and dealing with the inundation of flood water. Equally important, the court held the COFC "did not commit clear error in finding that Fraser failed to provide that there was

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[1821] *Id*. at 1321.

[1822] *Id*.

[1823] *Id*. at 1321-22.

[1824] *Id*. at 1320.

[1825] 2004 U.S. App. LEXIS 20338 (Fed. Cir. 2004).

[1826] *Id*. at *2.

[1827] *Id*. at *2-3.

[1828] *Id*. at *3-4.

[1829] *Id*. at *12-13.

[1830] *Id*. at *13.

[1831] *Id*. at *12-13.

> A claim of acceleration is a claim for the increased costs that result when the government requires the contractor to complete its performance in less time than was permitted under the contract. The claim arises under the changes clause of a contract; the basis for the claim is that the government has modified the contract by shortening the time for performance, either expressly (in the case of actual acceleration) or implicitly through its conduct (in the case of constructive acceleration), and that under the changes clause the government is required to compensate the contractor for the additional costs incurred in effecting the change.

Id. at *15-16 (citing JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS, 450-51 (3d ed. 1995)).

[1832] *Id*. at *13-14.

[1833] *Id*. at *20 (citing Fraser Constr. Co. v. United States, 57 Fed. Cl. 56, 60 (2003)).

[1834] *Id*. at *35.

any period for which it was entitled to an extension and its request for one was denied."[1835]

Environmental Concerns a Poor Pretext for Nonperformance

In *Empire Energy Management Systems, Inc. v. Roche*,[1836] the CAFC visited the issue of contractor delay, and a divided court concluded a contractor's environmental concerns were no excuse for delayed performance.[1837] The case involved a contract between the Air Force and Empire to provide cogeneration of electricity, chilled and hot water, and steam to MacDill Air Force Base. To provide the utilities, the contract required Empire to build and operate an electric plant on a site leased by the Air Force. Complicating matters, the proposed plant was located adjacent to a site containing an oil-water separator/discharger which was subject to EPA regulation.[1838]

During a work stoppage unrelated to the dispute, the Environmental Protection Agency (EPA) directed the Air Force to conduct a facility investigation pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA).[1839] Shortly after Empire resumed work, Empire reported it discovered oil-based contaminates and requested a stop work order from the Air Force. The Air Force hired a contractor to investigate, who reported the site was in compliance with all environmental laws.[1840] Shortly thereafter, the EPA informed the Air Force it did not object to the proposed project, after which the Air Force told Empire to continue work. However, three months later the EPA issued an ambiguous letter, suggesting the cogeneration site required further investigation. During this time-frame, Empire repeatedly refused Air Force demands it continue work, citing alleged environmental concerns. In response, the Air Force issues a cure notice, followed by a termination for default.[1841]

On appeal, the ASBCA determined that the environmental problems entitled Empire to fifty-three days for excusable delays. However, the board also found that Empire would have needed a total of 154 days to complete the project. Accordingly, the board upheld the termination for default.[1842]

The CAFC majority adopted the board's holding. The court reasoned "the mere assertion of a colorable claim by the contractor (later found to be meritless) that its actions would violate some regulatory requirement does not excuse performance."[1843] Judge Mayer dissented from the majority's holding. Judge Mayer concluded that Empire's concerns were reasonable because it could have been held liable for violations of federal environmental law, despite the Air Force's assurances. For Judge Mayer, "prudence prohibited Empire from resuming work at least until it received notification that the project area was not contaminated."[1844]

Major James Dorn.

Bonds, Sureties, and Insurance

Equitable Subrogation—Wasn't This Issue Decided Last Year?

Last year the CAFC affirmed an ASBCA decision holding the board had no jurisdiction under the CDA[1845] to hear a

[1835] *Id*. at *28.

[1836] 362 F.3d 1343 (Fed. Cir. 2004).

[1837] *Id*. at 1357-58.

[1838] *Id*. at 1345-46.

[1839] *Id*. at 1346-47 (referencing 42 U.S.C.S. §§ 6901-87 (LEXIS 2004)).

[1840] *Id*. at 1347.

[1841] *Id*. at 1347-48.

[1842] *Id*. at 1349 (citing Empire Energy Management Systems, Inc., ASBCA No. 46741, 03-1 BCA ¶ 32,079, at 158,552).

[1843] *Id*. at 1353.

[1844] *Id*. at 1358. *See also* Bender GmbH v. Brownlee, 106 Fed. Appx. 728 (Fed. Cir. 2004) (per curiam) (finding repeated delays extending over two years, coupled with appellant's inability to provide evidence it could meet a completion deadline, justified default termination); PCL Constr. Serv., Inc., v. United States, 96 Fed. Appx. 672 (Fed. Cir. 2004) (determining "not clearly erroneous" the COFC's finding that appellant could not prove a causal relationship between contract changes and alleged cost increases); AST Anlagen-Und Sanierungstechnik GmbH, ASBCA 39576, 50802, 04-1 BCA ¶ 32,558 (Aug. 11, 2004) (concluding the government did not carry its burden of proving a valid ground to terminate appellant for default). For further discussion of the *Bender*, *PCL Constr.*, and *AST* decisions, see *supra* section titled Terminations for Default.

[1845] 41 U.S.C.S. § 605(a).

surety's equitable subrogation claim.[1846] In *Fireman's Fund Insurance Co. v. England* (*Fireman's Fund*),[1847] the CAFC opined that while it was "long established that a surety can sue the Government in the Court of Federal Claims (COFC) under the non-contractual doctrine of equitable subrogation"[1848] pursuant to the Tucker Act,[1849] the CDA (and thus the ASBCA's jurisdiction) only covers "all claims by a contractor against the government relating to a contract."[1850] Because there is no contract between the surety and the government prior to the parties signing a takeover agreement, the surety cannot be a "contractor" under the CDA. Therefore a board has no jurisdiction over a surety's pre-takeover claims.[1851] Lest there be any ambiguity, two recent decisions make it clear that sureties seeking recovery against the government under an equitable subrogation theory should avoid the boards and take their cases to the COFC.

In *United Pacific Insurance Company v. Roche*,[1852] United Pacific appealed an ASBCA decision holding the board lacked jurisdiction to resolve portions of the case involving the parties' conduct prior to signing the takeover agreement.[1853] Following the CAFC's recent holding in *Fireman's Fund*,[1854] that no CDA jurisdiction exists over a surety's pre-takeover claims, the board concluded it was "shorn of jurisdiction over the surety's equitable subrogation claims," and dismissed that portion of the case.[1855] Upon appeal to the CAFC, United Pacific argued, *inter alia*, it had a "contractual right" to assert its claim against the government because the takeover agreement reserved for United Pacific "all prior rights including but not limited to the Government's overpayment to" the prime contractor.[1856] Unimpressed, the court observed the CDA defines the board's jurisdiction, and the "[p]arties cannot, by agreement, confer upon a tribunal jurisdiction that it otherwise would not have."[1857]

In *United States Fire Insurance Company* v. *United States*, [1858] the Air Force sought to dismiss a surety's complaint before the COFC, arguing the COFC lacked jurisdiction under the Tucker Act[1859] to entertain an equitable subrogation claim. The Air Force argued the Supreme Court's 1999 decision in *Department of the Army v. Blue Fox Inc*. (*Blue Fox*)[1860] invalidated equitable subrogation as a basis for establishing jurisdiction under the Tucker Act.[1861] Upon examination, the COFC observed that the CAFC had already examined the validity of the equitable subrogation doctrine in the light of the *Blue Fox* precedent,[1862] and concluded that *Blue Fox* "did not upset the long-standing rule that such a suit [based on subrogation] is not barred by the doctrine of sovereign immunity."[1863] Needless to say, the COFC denied the Air Force's motion to dismiss.[1864]

[1846] The doctrine of equitable subrogation is a non-contractual doctrine of equity that entitles a surety that "takes over contract performance" or "finances completion of the defaulted contract" to "succeed to the contractual rights of a contractor against the government." *See* Ins. Co. of the West v. United States, 243 F.3d 1367, 1370 (Fed. Cir. 2001). *See also 2003 Year in Review, supra* note 29, at 129.

[1847] 313 F.3d 1344 (Fed. Cir. 2002).

[1848] *Id*. at 1351 (citing Balboa Ins. Co. v. United States, 775 F.2d 1158, 1160 (Fed. Cir. 1985); Transamerica v. United States, 989 F.2d 1188 (Fed. Cir. 1993)).

[1849] 28 U.S.C.S. § 1491(a)(1). The Tucker Act confers jurisdiction on the COFC over claims against the federal government founded either upon the Constitution, any act of Congress, any regulation of an executive department, or on any express or implied contract with the federal government. *Id*.

[1850] *Id*. (quoting 41 U.S.C.S. § 605(a)).

[1851] *Id*. at 1351.

[1852] 280 F.3d 1352 (Fed. Cir. 2004).

[1853] *See* United Pac. Ins. Co., No. 53051, 2003 ASBCA LEXIS 57 (June 4, 2003). *See also 2003 Year in Review, supra* note 29, at 130.

[1854] 313 F.3d 1344 (Fed. Cir. 2002).

[1855] *United Pac. Ins.*, 2003 ASBCA LEXIS 57, at *83.

[1856] *United Pac. Ins.*, 280 F.3d at 1356.

[1857] *Id*.

[1858] 61 Fed. Cl. 494 (2004).

[1859] 28 U.S.C.S. § 1491(a)(1) (LEXIS 2004).

[1860] 525 U.S. 255 (1999).

[1861] *Fire Ins.*, 61 Fed. Cl. at 499.

[1862] 234 F.3d 1367 (Fed. Cir. 2001).

[1863] *Fire Ins.*, 61 Fed. Cl. at 500 (citing *Ins. Co. of the West*, 243 F.3d at 1369).

[1864] *Id*. at 501.

Form Over Substance

In *Hawaiian Dredging Construction Company v. United States* (*Hawaiian Dredging*),[1865] the COFC held a contracting officer did not have a reasonable basis for rejecting appellant's bids where the bid bonds were accompanied by computer generated powers of attorney with mechanically reproduced signatures. The contracting officer based his decision to reject the bid largely on the GAO's decision in *All Seasons Construction, Inc*.,[1866] which states a photocopied power of attorney is only valid if accompanied by an original certification "attesting to its authenticity and continuing validity."[1867] The COFC, though highly critical of the GAO's decision, stopped short of calling the decision unreasonable. The court did, however, conclude the contracting officer's application of the GAO's decision was unreasonable in this case because the power of attorney documents unequivocally established the authority of the person who signed the bonds, as well as the surety's intent to be bound by the documents.[1868]

On the heels of the *Hawaiian Dredging* decision, the FAR Councils proposed a FAR amendment that would have made the case moot. The proposed amendment establishes that a copy of an original power of attorney, when submitted in support of a bid bond, is sufficient evidence of the surety's authority to be bound. Under the proposed rule, the authenticity and enforceability of the power of attorney will be treated as a matter of responsibility at bid opening.[1869]

Trust Me, I've Got You Covered—Not!

Two recent cases stand for the proposition that the government is entitled to clear evidence a contractor is fully bonded. In *Airport Industrial Park, Inc. d/b/a P.E.C. Contracting Engineers v. United States*,[1870] P.E.C's bond surety became insolvent after P.E.C. completed approximately fifty percent of a construction project. The government ordered P.E.C. to secure replacement payment and performance bonds.[1871] P.E.C. obtained a replacement for its performance bond, but failed to secure a replacement payment bond. As a result, the government terminated the contract for default.[1872] On appeal before the COFC, P.E.C. argued that the agreement "clearly contemplates and covers both the performance and the payment bond."[1873] Upon examination, the COFC was unimpressed. The court noted that the Miller Act[1874] requires that contractors furnish the government a payment bond and a performance bond, and that under the act, the bonds are "distinct and separate undertakings by the surety."[1875] The court found that the reinsurance agreement's language applied only to the performance bond. Thus the termination for default was justified.[1876]

In *Horizon Shipbuilding Inc.*,[1877] Horizon protested the Army COE rejection of its proposal for an inland river towboat. The RFP required each offeror to provide a bid guarantee, or in the alternative, receive progress payments for contract work, or finance the contract independently and wait until delivery and acceptance to receive complete payment.[1878] Horizon chose to submit a bid bond in the form of a standard form (SF) 24 Bid Bond.[1879] The signature of Robert Joe

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[1865] 59 Fed. Cl. 305 (2004).

[1866] Comp. Gen. B-291166.2, Dec. 6, 2002, 2002 CPD ¶ 212.

[1867] *Id*. at 3.

[1868] *Hawaiian Dredging*, 59 Fed. Cl. at 314-15. The court noted that unlike the document in *All Seasons*, the powers of attorney submitted by plaintiff clearly stated its intent to be bound by facsimile signatures on powers of attorney or any certificates relating to the power of attorneys. This affirmation, combined with a facially valid appointment and original corporate seal, established to the courts satisfaction the surety's unequivocal intent to be bound. *Id*. at 315.

[1869] Federal Acquisition Regulation; Powers of Attorney for Bid Bonds; Proposed Rule, 69 Fed. Reg. 51,936 (proposed Aug. 23, 2004) (to be codified at 48 C.F.R. pt. 28).

[1870] 59 Fed. Cl. 332 (2004).

[1871] *Id*. at 336. Citing black-letter law, the court observed "[t]he performance bond must designate the United States as the obligee and it is for the exclusive protection of the government . . . . The payment bond furnished under the Act is for the protection of laborers and materialmen, and not the United States." *Id*. (citing 8 JOHN COSGROVE MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS § 49A.70 (2003)).

[1872] *Id*. at 332.

[1873] *Id*. at 333.

[1874] *See* 40 U.S.C.S. §§ 3131-3134 (LEXIS 2004).

[1875] *P.E.C.*, 59 Fed.Cl. at 336 (citing 8 JOHN COSGROVE MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS § 49A.60 (2003)).

[1876] *Id*. at 338.

[1877] Comp. Gen. B-292992, Dec. 8, 2003, 2003 CPD ¶ 223.

[1878] *Id*. at 1.

[1879] *See* FAR, *supra* note 20, at 53.301-24 (Standard Form 24, Bid Bond).

Hanson appeared on the form's individual surety line, however, horizon did not include an SF 28, Affidavit of Individual Surety,[1880] but instead included a document captioned "Power of Attorney."[1881] Upon evaluation of the proposals, the COE decided to make award without discussions. Although Horizon's proposal was the lowest priced, the COE rejected Horizon's proposal as nonresponsive because Horizon had failed to furnish a valid bid bond.[1882] Horizon protested the award to the GAO, which denied Horizon's protest. The GAO observed that the surety's identity was unclear from the face of the bond. If the surety was Global Bonding, it could not act as a corporate surety because it was not on the Department of Treasury's list of approved sureties.[1883] Alternatively, if Robert Joe Hanson acted in his capacity as an individual surety, Horizon failed to submit an SF 28 with its bid guarantee as the RFP required.[1884]

Major James Dorn.

Deployment and Contingency Contracting

Continuing Update of Special Emergency Procurement Authorities

As reported in prior *Years in Review*,[1885] the government invoked a number of special procurement authorities in response to the 11 September 2001 terrorist attacks (9-11 attacks). From a deployment contracting perspective, at the forefront of these special authorities are the expanded simplified acquisition thresholds (SAT) allowing the use of simplified acquisition procedures beyond the normal $100,000 limit. These expanded SATs are usually available when there is a declared contingency operation.

For a better understanding of how the expanded authorities have evolved in response to the 9-11 attacks, through Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), a recap is necessary. In response to the 9-11 attacks, President Bush declared a national emergency on 14 September 2001 through issuance of Proclamation 7463.[1886] He also issued Executive Order (EO) 13,223, which authorized the service secretaries to order any unit or member of the Ready Reserve of the Armed Forces to active duty for not more than twenty-four months, and other stop loss authorities for active and reserve forces.[1887] President Bush continued the original declaration of a national emergency for three additional years by issuing notices dated 12 September 2002,[1888] 10 September 2003,[1889] and 10 September 2004.[1890]

As noted in the *2003 Year in Review*,[1891] President Bush's yearly declarations of a continuing national emergency and EO 13,223 have continued the status of OEF and OIF as "contingency operations" as defined by 10 U.S.C. section 101(a)(13)(B).[1892] Until this last year, the SAT defined at FAR section 2.101 increased only from $100,000 to $200,000 for

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[1880] *Id*. at 53.301-28 (Affidavit of Individual Surety).

[1881] *Horizon*, 2003 CPD ¶ 223, at 2.

[1882] *Id*. at 3.

[1883] *See* FAR, *supra* note 20, at 28.202(a)(1) (recognizing "[c]orporate sureties offered for bonds furnished with contracts . . . must appear on the list contained in the Department of Treasury Circular 570 . . . .").

[1884] *Horizon*, 2003 CPD ¶ 223, at 3-4. Other decisions this fiscal year involving bonds, sureties, and insurance include Am. Ins. Co. v. United States, 62 Fed. Cl. 151 (2004) (holding that where the surety assumed control over a struggling construction contract but did not enter into a formal takeover agreement with the government, the surety cannot recover for an alleged improper release of progress payments to the contractor) and NVT Tech., Inc., 2003 U.S. Comp. Gen. LEXIS 174 (Oct. 20, 2003) (bonding requirement on service contract reasonable where the contractor was responsible for major research laboratories and critical care centers). For further discussion of the *NVT Tech*. case, see *supra* section titled Competition.

[1885] *See 2003 Year in Review*, *supra* note 29, at 137; *2002 Year in Review*, *supra* note 300, at 159; *2001 Year in Review*, *supra* note 335, at 98-99.

[1886] Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

[1887] Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001). Executive Order 13,223 was subsequently amended by Executive Order 13,253, 67 Fed. Reg. 2791 (Jan. 18, 2002) to grant the Secretary of Transportation similar authority to call up members of the Coast Guard to active duty.

[1888] 67 Fed. Reg. 58,317 (Sept. 12, 2002).

[1889] 68 Fed. Reg. 53,665 (Sept. 12, 2003).

[1890] 69 Fed. Reg. 55,313 (Sept. 13, 2004).

[1891] *2003 Year in Review*, *supra* note 29, at 137.

[1892] 10 U.S.C.S. § 101(a)(13)(B) (LEXIS 2004) states:

> The term "contingency operation" means a military operation that-
>
> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304,

acquisitions using the procedures of FAR part 13 in support of these contingency operations in Iraq and Afghanistan.[1893] However, in section 1443 of the Services Acquisition Reform Act of 2003 (included as title XIV in the National Defense Authorization Act for FY 2004), Congress expanded the SAT for purchases supporting a contingency operation or "to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack [NBCR attack] against the United States" to $250,000 inside the United States and $500,000 outside the United States.[1894] Entitled "Special Emergency Procurement Authority" (SEPA), section 1443 also increased the micropurchase threshold from $2500 to $15,000 if the purchase similarly supports contingency operations or defense against or recovery from NBCR attack.[1895] However, the expanded micropurchase threshold makes no distinction between purchases inside or outside the United States.[1896]

Implementation of the Special Emergency Procurement Authority

In February 2004, the FAR Councils issued an interim rule amending the FAR to implement the SEPA.[1897] Accordingly, interim rule amended FAR sections 2.101 and 13.003 to provide for the expanded SAP of $250,000 for purchases inside the United States and $500,000 for purchases outside the United States.[1898] Additionally, the interim rule amended FAR sections 2.101 and 13.201 to provide for the increased micro-purchase threshold of $15,000 when there is a "clear and direct relationship to the support of a contingency operation or the defense against or recovery from an [NBCR] attack."[1899]

Because the SEPA and FAR section 2.101 require the agency head to determine the purchase supports a contingency operation or is in defense against or recovery from an NBCR attack, Mr. Claude Bolton, the Assistant Secretary of the Army (Acquisition, Logistics and Technology), issued a memorandum dated 24 March 2004 delegating the determination authority to each Army Head of Contracting Activity (HCA).[1900] Likewise, Mr. Charlie E. Williams, Jr., the Air Force Deputy Assistant Secretary for Contracting and Assistant Secretary for Acquisition, delegated the determination authority to the Air Force HCAs by memorandum dated 5 March 2004.[1901]

The Army Contracting Agency (ACA) HCA further delegated the Army SEPA delegation to each ACA Principal Assistant Responsible for Contracting (PARC) with further re-delegation authority "to a level no lower than one level above the contracting officer."[1902] However, the Army and ACA SEPA delegations share a limitation that may prove to hinder efficient use of the SEPA expansion, especially for purchases actually made in the contingency operation theater. Echoing similar language from the Army SEPA delegation, the ACA SEPA delegation requires that "[e]ach determination made under this authority shall be made on an individual basis and the written determination with its underlying rationale shall be placed in all contract files of awards made under the individual determination."[1903] Presumably, a field ordering officer in Iraq

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12305, or 12406 of this title, chapter 15 of this title [10 USCS §§ 331-335.], or any other provision of law during a war or during a national emergency declared by the President or Congress.

Id.

[1893] *See, e.g.*, Memorandum, Deputy Assistant Secretary of the Air Force (Contracting) and Assistant Secretary of the Air Force, to ALMAJCOM/FOA/ /DRU (Contracting), subject: Emergency Acquisitions in Direct Support of U.S. or Allied Forces Deployed in Military Contingency Operations during Operation Iraqi Freedom (21 Mar. 2003).

[1894] Pub. L. No. 108-136, tit. XIV, § 1443, 117 Stat. 1392, 1675 (2003).

[1895] *Id*.

[1896] For discussion of the SEPA expansion of the SAT from $5 million to $10 million under the commercial item test program, see *supra* section II.F. Simplified Acquisitions.

[1897] Federal Acquisition Regulation; Special Emergency Procurement Authority, 69 Fed. Reg. 8312 (Feb. 23, 2004).

[1898] *Id*. at 8313.

[1899] *Id*. at 8314.

[1900] Memorandum, Assistant Secretary of the Army (Acquisition, Logistics and Technology), to Heads of Contracting Activities, et al., subject: Delegation of Special Emergency Procurement Authority in Support of a Contingency Operation or to Facilitate Defense Against or Recovery from Nuclear, Biological, Chemical, or Radiological Attack (24 Mar. 2004).

[1901] Memorandum, Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), to ALMAJCOM/FOA/DRU (Contracting), subject: Delegation of Authority for Acquisition of Supplies or Services for Defense Against or Recovery from Nuclear, Biological, Chemical or Radiological Attack (FAC 2001-20) (5 Mar. 2004) [hereinafter Air Force SEPA Delegation].

[1902] Memorandum, Head of Contracting Activity Army Contracting Agency, to U.S. Army Contracting Agency Principal Assistants Responsible for Contracting, et al., subject: Delegation of Special Emergency Procurement Authority in Support of a Contingency Operation or to Facilitate Defense Against or Recovery from Nuclear, Biological, Chemical, or Radiological Attack (23 Apr. 2004).

[1903] *Id*.

making an SF 44 micro-purchase[1904] above $2500 but under the SEPA increased micro-purchase threshold of $15,000 would be required to seek an individual determination at one level above the contracting officer. If adhered to in practice, this limitation would surely defeat the purpose for simplified acquisition procedures to "promote efficiency and economy in contracting; and [a]void unnecessary burdens for agencies and contractors."[1905] The Air Force SEPA delegation does not require an individual determination.[1906]

"Don't be Greedy—You Already Have all that You Could Possibly Want." DOD Emergency Procurement Flexibilities

By memorandum dated 20 May 2004, Ms. Deidre Lee, the Director of Defense Procurement and Acquisition Policy (DPAP), summarized "[e]xisting laws and regulations [that] provide considerable flexibility for acquisitions that support urgent situations and national security requirements."[1907] Ms. Lee highlighted the SEPA simplified acquisition and micro-purchase expansion discussed above, the combined synopsis and solicitation procedure for commercial items acquisition, and the unusual and compelling urgency exception to the Competition in Contracting Act.[1908] An attached matrix to the DOD memorandum lists these highlighted emergency procurement flexibilities, as well as numerous others.[1909] Ms. Lee's memorandum also lists service specific acquisition flexibilities documents with links accessible through the electronic version of her memorandum available on the DPAP website.[1910]

Acquisition Flexibility a Little too Loose for the Coalitional Provisional Authority (CPA)—Unauthorized Commitments (UACs) Reigned In

By memorandum dated 14 April 2004, the CPA HCA, Brigadier General Stephen Seay, warned CPA personnel that "recurring actions concerning the unauthorized commitment[1911] of U.S. appropriated funds and Iraqi funds have become an issue."[1912] General Seay reminded CPA personnel that a UAC "is an agreement that is not binding on the Government because the individual who made the agreement lacked the authority to enter into the agreement on behalf of the Government."[1913]

Air Force Contingency Contracting Officers (CCO) Working Together Electronically

The Air Force Deputy Assistant Secretary for Contracting and Assistant Secretary for Acquisition, Mr. Charlie E. Williams, Jr., established a Contingency Contracting Community of Practice (CoP) through Contracting Policy Memo 04-C-06 dated 1 June 2004.[1914] The Contingency Contracting CoP is intended "to facilitate and foster knowledge sharing and learning across organizational and geographic boundaries" by using software collaboration technology.[1915] Mr. Williams' staff developed the Contingency Contracting CoP to provide a centralized electronic location for contingency contracting resources and to link together CCOs to share individual experiences and expertise.[1916] An attachment to the memo also provides instructions for joining the Contingency Contracting CoP through the Defense Acquisition University Acquisition Community Connection web portal at http://acc.dau.mil/simplify/ev_en.php.

[1904] *See* FAR, *supra* note 20, at 13.306.

[1905] *Id.* at 13.002(c) and (d).

[1906] *See* Air Force SEPA Delegation, *supra* note 1901.

[1907] Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies et al., subject: Emergency Procurement Flexibilities (May 20, 2004), *available at* http://www.acq.osd.mil/dpap/general/newsandevents.htm.

[1908] *Id*.

[1909] *Id*.

[1910] *Id*. The DPAP website is available at http://www.acq.osd.mil/dpap.

[1911] *See* FAR, *supra* note 20, at 1.602-3.

[1912] Memorandum, Head of Contracting Activity—CPA, to Personnel Assigned to Coalition Provision Authority, subject: Unauthorized Commitments (14 Apr. 2004).

[1913] *Id.*; *see also* FAR, *supra* note 20, at 1.602-3.

[1914] Memorandum, Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), to ALMAJCOM/FOA/DRU (CONTRACTING), subject: Contingency Contracting Community of Practice (CoP) (1 June 2004).

[1915] *Id*.

[1916] *Id*.

Strengthened Oversight Needed for Logistics Support Contracts such as LOGCAP

On 19 July 2004, the GAO issued a report calling for improved planning and training for strengthened oversight of the logistics support contracts used during contingency operations.[1917] The GAO focused its efforts "on four contracts: (1) the Army Logistics Civil Augmentation Program (LOGCAP) Contract; (2) the Air Force Contract Augmentation Program (AFCAP) Contract; (3) the U.S. Army, Europe, Balkans Support Contract (BSC); and (4) the Navy Construction Capabilities (CONCAP) Contract . . . [with] [t]he Army's LOGCAP contract [as] . . . by far the largest of these contracts."[1918]

Generally, the GAO found that effective planning for contractor contingency support required collaboration "with the contractor to develop comprehensive and clear statements of work in the early stages of planning."[1919] Although the GAO found that the AFCAP, CONCAP, BSC, and some work under the LOGCAP had used more-effective planning techniques, the Army Central Command had not used proper LOGCAP planning guidance for support of Operation Iraqi Freedom.[1920] As a result, task orders were frequently revised and untimely (i.e., late) planning led to higher costs for hectic last-minute support. Further, late planning would not allow sufficient time for logistics planners to consider less costly alternatives to LOGCAP.[1921]

The GAO also found that "contract oversight processes were generally good but not always properly implemented."[1922] Significant portions of LOGCAP contract oversight were delegated to the Defense Contract Management Agency (DCMA) that generally resulted in cost savings.[1923] However, the GAO found that the DCMA had not appointed a contracting officer's technical representative (COTR) for all individual functional areas (e.g., food service and maintenance). Accordingly, appointing a COTR "for each functional area at each division and camp would improve government oversight."[1924]

Regarding the LOGCAP contractor, Kellogg Brown and Root Services (KBR), the GAO reported DCMA's concerns that contractor cost reports are inadequate, contractually required task order schedules are occasionally late and not met, and there are "inadequate controls over purchasing and subcontractors."[1925] Accordingly, "LOGCAP contract management is made more difficult by recurring contractor problems."[1926]

The GAO also noted that the DOD had not provided sufficient personnel to manage the LOGCAP, and available personnel lacked adequate training to effectively use and monitor LOGCAP (and AFCAP) services.[1927]

Lieutenant Colonel Karl Kuhn.

[1917] GOV. ACCT. OFF., REP. NO. GAO-04-854, *Military Operations: DOD's Extensive Use of Logistics Support Contracts Requires Strengthened Oversight* (July 2004).

[1918] *Id*. at 1.

[1919] *Id*. at 15.

[1920] *See id*. at 14.

[1921] *Id*. at 20.

[1922] *Id*.

[1923] *Id*.

[1924] *Id*. at 25.

[1925] *Id*.

[1926] *Id*.

[1927] *Id*. at 42.

Efforts to Improve Contracting for Contractors Who Accompany Deployed Forces

Contractors who accompany the military forces made headlines in 2004.[1928] In addition to the news coverage regarding their achievements and sacrifices, the DOD and the Army addressed contractor issues by introducing standardized contract provisions designed to help acquire these services in a consistent manner.

On 23 March 2004, the DOD proposed a rule to include a new contract clause when contractor employees accompany the forces on contingency, humanitarian, peacekeeping or combat operations.[1929] This proposed clause requires contractors to acknowledge the inherent danger in the operation;[1930] specifies that contractors are responsible for providing support to its employees;[1931] clarifies that contractor employees are required to comply with all host nation, U.S., and international laws;[1932] details that contractor employees have to abide by the combatant commander's orders and policies;[1933] requires contractors to provide current lists to the government identifying where their employees are located and have a plan for replacing deployed personnel;[1934] states that contractor personnel cannot wear military uniforms and carry weapons unless specifically authorized;[1935] addresses next of kin notification requirements,[1936] contractor personnel insurance issues[1937] and evacuation matters;[1938] identifies processing and departures locations;[1939] covers the purchase of scare commodities;[1940] and, requires that the substance of this contract provision be included in all subcontracts.[1941]

Significantly, the DOD clause allows the "ranking military commander in the immediate area of operations [to] direct the . . . contractor[s] employee[s] to undertake any action [except engaging in armed conflict]" when the forces are located outside the continental United States, the contracting officer is not available, and enemy action, terrorist activity or a natural disaster requires emergency action.[1942] The contract provision also permits a contractor to submit a request for equitable adjustment to cover additional costs.[1943]

The clause also specifies that the contractor employee, when traveling to an area where the force is deployed, must comply with the Combatant Commander's instructions regarding all transportation, logistical and support requirements.[1944] In addition, the clause clarifies that a Combatant Commander's order trumps the contract's terms, if they conflict.[1945] Lastly, the clause permits a contractor to submit a request for an equitable adjustment if complying with the Combatant Commander's orders causes additional work or loss of property.[1946]

There is one significant shortcoming in DOD's proposed rule: it does not provide a definition of "support." For this reason, it is possible that industry and the military may disagree on who is responsible for providing force protection to the

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[1928] P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B-3; James Cox, *Last-minute Decisions in Iraq Confuse Contractors*, USA TODAY, June 29, 2004, at 1B; Samantha M. Shapiro, *Iraq, Outsourced*, N.Y. TIMES, Dec. 14, 2003, at 76.

[1929] Defense Federal Acquisition Regulation Supplement, Contractors Accompanying a Force Deployed, 69 Fed. Reg. 13,500 (proposed Mar. 23, 2004) (to be codified at 48 C.F.R. pts. 207, 212, 225, and 252).

[1930] *Id*. at 13,501.

[1931] *Id*.

[1932] *Id*.

[1933] *Id*.

[1934] *Id*.

[1935] *Id*.

[1936] *Id*.

[1937] *Id*.

[1938] *Id*.

[1939] *Id*.

[1940] *Id*.

[1941] *Id*.

[1942] *Id*.

[1943] *Id*.

[1944] *Id*.

[1945] *Id*.

[1946] *Id*.

contractor employees.

Like the DOD, the Army, on 23 November 2003, released an interim rule establishing a contract clause to address the unique situations encountered when contractors send employees to accompany the forces on contingency, humanitarian, peacekeeping or combat operations.[1947] Besides having contractors acknowledge the inherent danger of contract performance in these environments, this clause covers issues such as the possession of weapons;[1948] the issuance of protective clothing and gear;[1949] the requirement that contractor personnel report their duty location when entering, moving within or exiting theater;[1950] the need for recording of emergency data information;[1951] the identification of legal status issues regarding deployed contractor personnel;[1952] the issuance of identification card matters;[1953] the requirement that contractor personnel comply with all orders, instructions and directives of the Combatant Commander;[1954] the requirement that contractor personnel comply with U.S., local and international laws, regulations and agreements;[1955] and, the requirement that contractor personnel comply with DOD and military service regulations and policies such as general order number one.[1956]

Unlike the proposed DFARS clause, the interim AFARS clause does not articulate situations where the Combatant Commander or ranking military commander may direct contractor employees to take action. Instead, the AFARS clause places broad responsibility on the contractor to ensure its employees comply with "all orders, directives, and instructions of the combatant command relating to non-interference in military operations, force protection, health, and safety."[1957]

Furthermore, to help commanders exercise control over contractor employees, the AFARS clause states that "commanders, in conjunction with the Contracting Officer . . . may direct the Contractor . . . to replace . . . and repatriate any Contractor personnel who fail[s] to comply with this [AFARS] provision."[1958] Lastly, the AFARS provision shifts the cost of any contractor replacement or repatriation action to the contractor.[1959]

Major Steven Patoir.

Government Information Practices

The Never Ending Saga of Unit Prices: To Disclose or Not to Disclose, That is the Question

The Freedom of Information Act (FOIA)[1960] "generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions . . . ."[1961] The FOIA's exemption 4 governs the question of whether unit prices contained in awarded government contracts must be disclosed. Specifically, exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[1962] Few areas have stirred more

[1947] Department of the Army Federal Acquisition Regulation Supplement, Deployment of Contractor Personnel, 68 Fed. Reg. 66,738 (Nov. 28, 2003) (to be codified at 48 C.F.R. pt. 5152).

[1948] *Id*. at 66,741.

[1949] *Id*.

[1950] *Id*.

[1951] *Id*.

[1952] *Id*.

[1953] *Id*.

[1954] *Id*.

[1955] *Id*.

[1956] *Id*.

[1957] *Id*.

[1958] *Id*.

[1959] *Id*.

[1960] 5 U.S.C.S. § 552 (LEXIS 2004)).

[1961] U.S. DEP'T OF JUSTICE OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 5 (May 2004) [hereinafter FOIA GUIDE].

[1962] 5 U.S.C.S. § 552 (b)(4).

controversy and uncertainty in the FOIA's thirty-seven year history.[1963]

The latest litigation controversy began in 1997 when the Air Force issued an RFP to provide supplies and services for KC-10 and KDC-10 aircraft.[1964] The RFP required potential bidders to submit detailed cost and pricing information in order to have their bids considered.[1965] McDonnell Douglas Corp. (McDonnell Douglas) submitted a detailed contract proposal that contained, in pertinent part, option year prices, Vendor Pricing Contract Line Item Number (CLINs), and Over and Above Work CLINs for specific tasks.[1966] On 29 June 1998, the Air Force awarded the contract to McDonnell Douglas.[1967] The contract called for one base year with eight one-year options, and incorporated the detailed pricing information submitted by McDonnell Douglas in its bid.[1968] One week later on 6 July 1998, Lockheed Martin Aircraft and Logistics Center submitted a FOIA request to the Air Force requesting a copy of the awarded contract.[1969] The Air Force, in response to this request, provided McDonnell Douglas "submitter notice"[1970] in accordance with Executive Order 12,600.[1971] McDonnell Douglas responded by agreeing that a large portion of the contract was releasable.[1972] However, it specifically objected to the Air Force releasing the option year prices, Vendor Pricing CLINs, and Over and Above CLINs.[1973]

Over the next two years, the Air Force requested comments from McDonnell Douglas three times and McDonnell Douglas submitted comments eleven times.[1974] Despite the protests by McDonnell Douglas, the Air Force issued a twelve-page Final Administrative Decision Letter that "addressed each point of fact and law made by McDonnell Douglas in its comments and provided an explanation as to why [the Air Force] disagreed with McDonnell Douglas' interpretations of the law and the facts."[1975]

After receiving the letter, McDonnell Douglas filed a "reverse" FOIA lawsuit[1976] in the United States District Court for the District of Columbia seeking to prevent disclosure of the option year, Vendor Pricing CLINs, and Over and Above Work CLINs prices.[1977] McDonnell Douglas first argued that the Air Force erred in determining that the option year prices and certain CLIN prices were not exempt from disclosure pursuant to FOIA Exemption 4.[1978] In addition, McDonnell Douglas advocated that the Air Force's decision to release the contract pricing information was "arbitrary, capricious, and contrary to law" and "violated the Trade Secrets Act."[1979]

The district court first defined the proper standard for determining whether the disputed information was within the

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[1963] *See*, *e.g.*, U.S. Dep't of Justice, *FOIA Counselor*: *Unit Prices Under Exemption 4*, FOIA UPDATE, vol. IV, No. 4, Fall 1983, *available at* http://www.usdoj.gov/oip/foi-upd.htm.

[1964] McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 203 (D.C. Cir. 2002) [hereinafter McDonnell Douglas I].

[1965] *Id*.

[1966] *Id*.

[1967] *Id*.

[1968] *Id*.

[1969] *Id*.

[1970] "Submitter notice" requires agencies to use good-faith efforts to advise submitters of requests for confidential commercial information, and ensures that agencies create and maintain a thorough administrative record. Once notification is made, the agency must allow the submitter a reasonable period of time to object and state the grounds upon which any disclosure is opposed. If the agency, after considering a submitter's comments, determines that the information in question is releasable, it must provide the submitter a written explanation why the submitter's objections are not sustained and a proposed disclosure date. Executive Order 12,600, 52 Fed. Reg. 23,781 (1987); 3 C.F.R. pt. 235 (1988).

[1971] *McDonnell Douglas I*, 215 F. Supp. 2d at 203.

[1972] *Id*.

[1973] *Id*.

[1974] *Id*.

[1975] *Id*.

[1976] The D.C. Circuit Court has defined a "reverse" FOIA action as "one in which the submitter of information - usually a corporation or other business entity that has supplied an agency with data on its policies, operations, or products - seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request." FOIA GUIDE, *supra* note 1961, at 860 (citing CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987)).

[1977] *McDonnell Douglas I*, 215 F. Supp. 2d at 203.

[1978] *Id*.

[1979] *Id*. at 203-04. The court granted the Air Force's request for summary judgment on McDonnell Douglas' claim under the Trade Secrets Act (18 U.S.C.S. § 1905 (LEXIS 2004)) on the ground that the Act "does not afford a private right of action to enjoin disclosure in violation of the statute." *Id*. at 204 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 316-17 (1979)).

scope of FOIA Exemption 4.[1980] The United States Court of Appeals for the District of Columbia has previously held, "the applicability of [FOIA] Exemption 4 depends on whether the information that a party seeks to have disclosed by the government was provided to the government voluntarily or under compulsion."[1981] If the Government requires submission of the information, the so-called "*National Parks*" test provides, it is confidential and within the scope of FOIA Exemption 4 if disclosure is likely to either "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained."[1982] In contrast, the "*Critical Mass*" test covers financial or commercial information submitted voluntarily to the government and states such information "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."[1983]

The court determined that McDonnell Douglas' pricing submissions were required and not voluntary.[1984] Had McDonnell Douglas originally failed to include the pricing information in its submissions, the Air Force would not have considered the proposal.[1985] Because the submissions were mandatory, the court evaluated the information in question using the *National Parks* test.[1986] The court noted that the test presents two "distinct alternatives for denying disclosure of commercial information submitted to the government."[1987] The court first looked at whether releasing the contested information would, as McDonnell Douglas argued, impair the Government's ability to obtain necessary information in the future.[1988] The court rejected this argument and found that the Air Force was "in the best position to determine whether an action will impair its information gathering in the future."[1989] To find otherwise would simply "overjudicialize the administrative process."[1990]

The court also rejected McDonnell Douglas' argument that releasing the contested pricing information would likely cause the company substantial competitive harm.[1991] The court reasoned that the "harm from disclosure is a matter of speculation and when a reviewing court finds that an agency has supplied an equally reasonable and thorough prognosis, it is for the agency to choose between the contesting party's prognosis and its own."[1992] It concluded that the Air Force "presented reasoned accounts of the effect of disclosure based on its experiences with government contracting."[1993] Therefore, the district court upheld the Air Force's decision to release the information.[1994]

McDonnell Douglas appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.[1995] On 27 July 2004, in a split decision (2-1), the court affirmed in part and reversed in part the lower court's decision and ruled that the Air Force must release several of the contested contract prices.[1996] Specifically, the court's majority affirmed the district court's ruling to release the Over and Above Work CLINs.[1997] It disagreed, however, with the district court's decision pertaining to the release of the option year prices and Vendor Pricing CLINs, and reversed, ordering those prices to be withheld.[1998]

[1980] *Id*. at 204.

[1981] McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 304 (D.C. Cir. 1999). For further discussion of this case, see Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 82-83.

[1982] Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

[1983] Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

[1984] *McDonnell Douglas I*, 215 F. Supp. 2d at 205.

[1985] *Id*.

[1986] *Id*.

[1987] *Id*.

[1988] *Id*. at 206.

[1989] *Id*. *See also* Comdisco, Inc. v. Gen. Serv. Admin., 864 F. Supp. 510, 515-16 (E.D. Va. 1994) (noting that when an agency "wants to disclose the disputed pricing information, it would be nonsense to block disclosure under the purported rationale of protecting government interests").

[1990] *McDonnell Douglas I*, 215 F. Supp. 2d at 206.

[1991] *Id*. at 208-09.

[1992] *Id*. at 205.

[1993] *Id*. at 209.

[1994] *Id*.

[1995] McDonnell Douglas Corp. v. U.S. Dep't of the Air Force (McDonald Douglas II), 375 F.3d 1182, 1185 (D.C. Cir. 2004).

[1996] *Id*. at 1193-94.

[1997] *Id*.

[1998] *Id*.

Concerning the Over and Above CLINs, the appellate court found that McDonnell Douglas "present[ed] neither a viable theory nor any evidence to support its claim that release of the [prices] would enable a competitor to derive its Labor Pricing Factor."[1999] The court emphasized that McDonnell Douglas submitted significantly different rates for similar aircraft at another location, and concluded that competitors would be unable to determine the Labor Pricing Factor that McDonnell Douglas would use in future bids.[2000] The court also emphasized that benefits provided to employees are a large part of the Labor Pricing Factor, and that the release of these prices would not reveal this information.[2001]

On the contrary, the court determined that release of the option year prices would "significantly increase the probability McDonald Douglas' competitors would underbid it in the event the Air Force rebids the contract."[2002] The court reasoned that because the Air Force was not bound to McDonnell Douglas during the option years, it was free to rebid the contract.[2003] Competitors armed with the specific knowledge of the option year contract terms would have a distinct competitive advantage over McDonnell Douglas by underbidding it.[2004] Additionally, the court accepted McDonnell Douglas' argument that since the CLINs were "composed predominantly of the costs of materials and services it procures from other vendors," releasing this information would "enable its competitors to derive the percentage (called the 'Vendor Pricing Factor') by which McDonnell Douglas marks up the bids it receives from subcontractors."[2005] Consequently, the court found that both the option year prices and the Vendor Pricing CLINs should be withheld under FOIA Exemption 4.[2006]

In a lengthy dissenting opinion, Judge Merrick B. Garland strongly disagreed with the majority's ruling.[2007] Judge Garland argued that "the analysis adopted and result reached [in the majority's] opinion comes perilously close to a per se rule that line-item prices—prices the government agrees to pay out of appropriated funds for goods or services provided by private contractors—may never be revealed to the public through a [FOIA] request."[2008] He stated that barring the disclosure of such prices "should be the exception rather than the rule."[2009] Judge Garland opined that the Vendor Pricing CLINs should be released because they:

> are not mere offer or bid prices; they are prices that the government agreed to pay, and that it did pay, for specified services that it purchased from the company. Disclosure of such information permits the public to evaluate whether the government is receiving value for taxpayer funds, or whether the contract is instead an instance of waste, fraud, or abuse of the public trust . . . . Such disclosure thus comes within the core purpose of FOIA: to inform citizens about "what their government is up to."[2010]

Expanding on this argument, Judge Garland questioned whether prices actually paid by the government could ever qualify for withholding as FOIA Exemption 4 information.[2011] "It is indeed 'passing strange' to regard an agency's agreement to expend a specified amount of public funds as a corporate secret rather than a government decision—a category that is not encompassed by [the FOIA]."[2012]

Judge Garland also argued that the Government should disclose the option year prices in response to Lockheed Martin Aircraft's FOIA request.[2013] Judge Garland pointed out that the majority's decision to withhold the option year prices

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[1999] *Id*. at 1192.

[2000] *Id*.

[2001] *Id*.

[2002] *Id*. at 1189.

[2003] *Id*.

[2004] *Id*.

[2005] *Id*. at 1190-91.

[2006] *Id*. at 1193-94.

[2007] *Id*. at 1194.

[2008] *Id*.

[2009] *Id*.

[2010] *Id*. (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)); *see also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (stating that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed").

[2011] *McDonald Douglas II*, 375 F.3d at 1203.

[2012] *Id*. at 1204 (quoting McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306 (D.C. Cir. 1999)).

[2013] *Id*. at 1198-99.

was "based solely upon McDonnell Douglas' argument that: '[I]n the event the Air Force does decide to rebid the contract, its competitors will be able to use that information to underbid it.'"[2014] Judge Garland dismissed this reasoning because "the contractor must establish that it is at least likely that there will be a rebid. This is just another way of restating the threshold requirement of our *National Parks* test: that the contractor must 'actually face competition.'"[2015]

Judge Garland stated that McDonnell Douglas could point to no facts that even remotely suggested the Air Force would rebid the contract.[2016] On the contrary, the Air Force proffered evidence that rebidding was unlikely because option year contracts "are usually exercised," particularly so for contracts "to service military aircraft which are critical to [the Air Force's] core mission."[2017] The dissent further pointed out that contract solicitations may not include option clauses unless the "contracting officer has determined that there is a reasonable likelihood that the option will be exercised."[2018] The Air Force strengthened its argument by showing that its regulations instruct it to "take into account the Government's need for continuity of operations and potential costs of disrupting operations" in deciding whether to exercise an option.[2019]

The Saga of Unit Prices Continues

In September 2004, based on Judge Garland's dissent and "in recognition of the 'exceptional importance' of the issue the case presents," the Department of Justice petitioned the D.C. Circuit Court (which currently consists of nine judges) for rehearing en banc in *McDonnell Douglas Corp. v. United States*.[2020] The government has sought the rehearing before the full court "in an effort to alleviate the practical difficulties and uncertainties that loom large in this long-controversial area of FOIA law if this decision is left to stand."[2021] The Department of Justice, Office of Information and Privacy, has stated that "government agencies must now await a final ruling in this case before knowing with certainty whether the law of the D.C. Circuit has conclusively shifted."[2022] The outcome will no doubt "have an impact on agency decision-making on such [FOIA] Exemption 4 issues as a matter of sound administrative practice and policy."[2023]

Major Kerry Erisman.

Information Technology (IT)

Suspicious Minds

During the past year, the GAO issued three reports analyzing and often criticizing aspects of DOD's use of information technology.[2024] In a December 2003 report, the GAO noted "inconsistencies, inaccuracies, and omissions" from DOD's FY 2004 IT budget submission.[2025] Specifically, the GAO found budget discrepancies totaling $1.6 billion between DOD's budget submission and its "Capital Investment Reports."[2026] Finding that the DOD "has not devoted sufficient

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[2014] *Id*. at 1198.

[2015] *Id*. (quoting Nat'l Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976)).

[2016] *Id*. at 1198-99.

[2017] *Id*. at 1199 (quoting the government's brief at 19).

[2018] *Id*. (referencing 48 C.F.R. § 17.208(c)(4)).

[2019] *Id*. (referencing 48 C.F.R. § 17.207(e), which provides that options may be included in service contracts in "recognition of (1) the Government's need in certain service contracts for continuity of operations and (2) the potential cost of disrupted support"). The Air Force further illustrated the fact that it "has exercised the past four option years for this contract each time they have come up." *Id*. (quoting the government's brief at 20)

[2020] Petition for reh'g en banc, No. 02-5342 (D.C. Cir. Sept. 30, 2004). Quotes from U.S. Dep't of Justice, Office of Information and Privacy, FOIA POST, *Full Court Review Sought in McDonnell Douglas Unit Price Case*, Oct. 7, 2004, *available at* www.usdoj.gov.oip/foiapost/2004foiapost31.htm.

[2021] *Id*.

[2022] *Id*.

[2023] *Id*.

[2024] During the past year, the GAO also published IT reports that are not specific to the DOD. *See* GEN. ACCT. OFF., REP. NO. GAO-04-49, *Information Technology Management: Governmentwide Strategic Planning, Performance Measurement, and Investment Management Can Be Further Improved* (Jan. 2004); GEN. ACCT. OFF., REP. NO. GAO-04-394G, *Information Technology Investment Management: A Framework for Assessing and Improving Process Maturity* (Mar. 2004); GEN. ACCT. OFF., REP. NO. GAO-04-791, *Information Technology: Training Can Be Enhanced by Greater Use of Leading Practices* (June 2004).

[2025] GEN. ACCT. OFF., REP. NO. GAO-04-115, *Information Technology: Improvements Needed in the Reliability of Defense Budget Submissions* at 2 (Dec. 2003).

[2026] *Id*.

management attention and . . . does not have adequate management controls and supporting systems in place,"[2027] the GAO issued eight recommendations to help the DOD "improve the consistency, accuracy, and completeness" of its future IT budget submissions.[2028]

In a July 2004 report, the GAO critiqued DOD's IT acquisition policies and guidance.[2029] Finding that DOD's IT acquisition "policies and guidance largely incorporate 10 best practices[2030] for acquiring any type of . . . IT business system," the GAO also found that DOD's policies and guidance "generally do not incorporate [an additional] 8 best practices relating to the acquisition of commercial component-based systems."[2031] The GAO therefore issued fourteen recommendations "aimed at strengthening DOD's acquisition policy and guidance by including additional business systems acquisition best practices and controls for ensuring that best practices are followed."[2032]

Also in a July 2004 report, the GAO analyzed, without necessarily criticizing, DOD's development of the Global Information Grid (GIG).[2033] Modeled after the Internet, the GIG is designed to "enable data access for a variety of systems and users in the network no matter which military service owns a weapons system or where a user might be . . . ."[2034] Begun in the late 1990's and planned for full implementation around 2020, the DOD believes that the GIG will enable commanders to "access and exchange information quickly, reliably, and securely through linked systems and military components," thus enhancing their capability to "identify threats more effectively, make informed decisions, and respond with greater precision and lethality."[2035]

While recognizing the great potential of this "gee-whiz" system, the GAO also cautioned the DOD to plan more carefully for this IT transformation. For example, the GAO noted that the DOD does not know "which investments will take priority over others" or how it will "assess the overall progress of the GIG and determine whether the network as a whole is providing a worthwhile return on investment . . . ."[2036] Moreover, the GAO warned that the DOD faces "risks related to protecting data within the thousands of systems that will be integrated into the network."[2037]

Giving Teeth to Section 508

In *CourtSmart Digital Sys., Inc.*,[2038] the Comptroller General addressed the issue of whether an agency could properly award a contract to a bidder whose proposal indicated non-compliance with Section 508.[2039] In *CourtSmart*, the agency's request for quotations (RFQ)[2040] required bidders to demonstrate compliance with Section 508.[2041] Although the

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[2027] *Id*. at 21.

[2028] *Id*. at 22-23. These recommendations include ensuring that "amounts are properly categorized," working towards budget submissions that "fully account for all relevant costs," and "assess[ing] approaches to reduce or eliminate requirements for duplicative manual entry of information . . . ." *Id*.

[2029] GEN. ACCT. OFF., REP. NO. GAO-04-722, *Information Technology: DOD's Acquisition Policies and Guidance Need to Incorporate Additional Best Practices and Controls* (July 2003) [hereinafter REP. NO. GAO-04-722].

[2030] "Best practices," a rather amorphous concept, are "tried and proven methods, processes, techniques, and activities that organizations define and use to minimize risks and maximize chances for success." *Id*. at 3. In the context of IT acquisition, an example is "basing any decision to modify commercial components on a thorough analysis of the impact of doing so or on preparing system users for the business process and job roles and responsibilities changes that are embedded in the functionality of commercial IT products." *Id*. at Highlights. For an earlier GAO report addressing DOD's use of best practices, *see* GEN. ACCT. OFF., REP. NO. GAO-04-53, *Defense Acquisitions: DOD's Revised Policy Emphasizes Best Practices, but More Controls Are Needed* (Nov 2003).

[2031] REP. NO. GAO-04-722, *supra* note 2029, at Highlights.

[2032] *Id*. at 2, 23-25. These recommendations include, for example, ensuring that "[a]cquisition project management activities are communicated to all stakeholders," and that "[a]cquisition reviews include the status of identified risks." *Id*. at 24.

[2033] GEN. ACCT. OFF., REP. NO. GAO-04-858, *Defense Acquisitions: The Global Information Grid and Challenges Facing Its Implementation* (July 2004).

[2034] *Id*. at Highlights, 1.

[2035] *Id*. at 1.

[2036] *Id*. at 3-4.

[2037] *Id*. at 4.

[2038] Comp. Gen. B-292995.2; B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79.

[2039] Section 508 refers to the requirement to make most government electronic and information technology accessible to those with disabilities. *See generally* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508, 87 Stat. 355 (codified as amended by the Workforce Investment Act of 1998 at 29 U.S.C. § 794d (2000)); U.S. Gen'l Servs. Admin., *Section 508*, *at* http://www.section508.gov (last visited Oct. 14, 2004); *see also* Major John Siemietkowski, *Procurement Disabilities Initiative Takes Effect*, ARMY LAW., Sept./Oct. 2001, at 27.

[2040] The RFQ was for a portable digital recording system. *CourtSmart*, 2004 2004 CPD ¶ 79, at 1.

[2041] *Id*. at 2.

RFQ plainly stated that the agency would test 508 compliance during the evaluation process, the agency tested only the winning vendor for 508 compliance and in fact found its quotation to be non-compliant.[2042] Moreover, the agency did not evaluate the other vendors' quotations for compliance.[2043]

Rejecting the agency's argument that "the RFQ allowed for award based on an otherwise technically acceptable quotation that was not section 508 compliant if there were no other technically acceptable quotations,"[2044] the Comptroller General found that the "terms of the RFQ plainly do not permit the agency to ignore the section 508 evaluation criterion in determining whether a proposal was technically acceptable . . . ."[2045] Although the Comptroller General did not sustain this protest solely because of the 508 issue,[2046] this decision points out the importance of complying with Section 508 requirements when bidding on a contract. Perhaps more importantly, it emphasizes the need for agencies to properly evaluate IT bids/quotes for 508 compliance.

From the Halls of Cyberspace to the Shores of Data Transfer

Prior *Years in Review* have reported on the development and progress of the Navy-Marine Corps Intranet (NMCI).[2047] Unfortunately, during the past year, user complaints about poor connectivity and slow delivery have plagued the program.[2048] Nonetheless, 350,000 users could soon be connected to the NMCI, which would make it the world's largest intranet.[2049] Navy Secretary England appointed Rear Admiral James Godwin as the new NMCI chief in August 2004.[2050]

Lieutenant Colonel John Siemietkowski.

Intellectual Property

Patented "Proprietary" Data May be Disclosed, but . . .

In *Wesleyan Company, Inc.*,[2051] the ASBCA highlighted the protection afforded proprietary data once that data becomes public as part of a patented invention. Wesleyan Company, Inc. (Wesleyan) had claimed the Army improperly disclosed and used proprietary data Wesleyan submitted in conjunction with unsolicited proposals to supply the Army with drinking systems for use in nuclear, biological, chemical (NBC) contaminated environments.[2052] As requested by the Army, Wesleyan's first proposal, submitted in April 1983, contained the required Defense Acquisition Regulation (DAR) proprietary rights data legend,[2053] as well as a required Memorandum of Understanding (MOU).[2054] In addition to explaining the Army accepted the proposal solely for evaluating and determining the Army's interest, the MOU stated the Army did not

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[2042] *Id*. at 3-4.

[2043] *Id*. at 4. The protestor, CourtSmart, indicated in its proposal that it was 508 compliant. *Id*.

[2044] *Id*. at 8.

[2045] *Id*. at 9.

[2046] The Comptroller General also sustained the protest because the awardee's bid included a non- Federal Supply Schedule (FSS) item, even though the RFQ was limited to FSS vendors. *Id*. at 13. For further discussion of this issue, see *supra* section titled Competition. The record also raised questions regarding the technical and past performance evaluations. *CourtSmart*, 2004 2004 CPD ¶ 79, at 13.

[2047] *See 2000 Year in Review*, *supra* note 1981, at 85-86; *2001 Year in Review*, *supra* note 335, at 114.

[2048] *See* David McGlinchey, *Navy Appoints New Leader for NMCI*, GovExec.com (Aug. 17, 2004), *at* http://www.govexec.com/dailyfed/0804/081704dlhtm; David McGlinchey, *Navy Streamlines its Intranet Contract*, GovExec.com (Oct. 6, 2004), *at* http://www.govexec.com/dailyfed/1004/100604dl.htm.

[2049] *Id*.

[2050] McGlinchey, *Navy Appoints New Leader for NMCI*, *supra* note 2048. Apparently, the change in NMCI leadership is due to the Navy's normal assignment rotations. *Id*.

[2051] ASBCA No. 53896, 04-1 BCA ¶ 32,628.

[2052] *Id*. at 161,438.

[2053] As the unsolicited proposal pre-dated the FAR and DFARS, the DAR applied and required a proprietary rights data legend for unsolicited proposals that stated in relevant part:

> This data . . . shall not be disclosed outside the Government and shall not be duplicated, used or disclosed in whole or in part for any purpose other than to evaluate the proposal . . . . This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction . . . .

Id. at 161,439 (citing DAR 3-507.1(a) and 32 C.F.R. pts. 1-39, vol. 1 at 143 (1 Sept. 1982)).

[2054] *Id*.

"assume any obligation for disclosure or use of any information in the proposal to which the [Army] would otherwise lawfully be entitled."[2055]

To assist in the evaluation and upon the Army's request, Wesleyan loaned its proposed "FIST/FLEX" protective mask drinking system to ILC Dover, a manufacturer of NBC protective suits, for incorporation into a prototype suit.[2056] In March 1985, Wesleyan received a patent for the "FIST/FLEX" system, and subsequently submitted an unsolicited proposal to the Army for the revised version of the system.[2057] Though Wesleyan's subsequent unsolicited proposals[2058] did not include the required proprietary data rights legend, the company president executed the same MOU with each submission.[2059]

To assist again in evaluating the unsolicited proposal, the Army purchased several of Wesleyan's patented systems over the next few years.[2060] Ultimately, however, the Army concluded the FIST/FLEX system was unacceptable for use in an NBC contaminated environment.[2061] Nonetheless, the Army continued to pursue development of an effective drinking mask system, eventually acquiring such a system from CamelBak Products, Inc.[2062] In April 2002, Wesleyan submitted a claim for $20,776,000 alleging the Army improperly disclosed "the concepts, processes and devices in its FIST/FLEX and FIST Fountain proposals to non-government third parties."[2063] The Army denied the claim entirely and Wesleyan appealed.

At the ASBCA, Wesleyan argued the Army's contractual obligations to protect the proprietary data associated with the unsolicited proposals continued even after the patents were issued for the FIST/FLEX and FIST Fountain systems.[2064] The board agreed the Army's acceptance of the unsolicited proposals with the required DAR legend and the MOUs "created an implied-in-fact contract licensing government use of the proprietary data in those proposals in accordance with the DAR legend and memoranda of understanding."[2065] However, the ASBCA noted the last sentence in each MOU specifically stated "the [Army] did not 'assume any obligation for disclosure or use of any information in the proposal to which the [Army] would otherwise be lawfully entitled.'"[2066] The board then explained that patents protect against the unauthorized use, making, offering to sell or selling of a patented invention; not the disclosure of patented data.[2067] Thus, "[t]o the extent proprietary data in Wesleyan's proposals was disclosed in the two patents, the government was lawfully entitled to disclose that data after the patents were issued."[2068] As a result, the ASBCA granted the Army's motion for summary judgment to the extent Wesleyan's claim sought recovery for disclosure of proprietary data in the patents after the issuance of the patents.[2069]

[2055] *Id*.

[2056] *Id*.

[2057] *Id*. at 161,440.

[2058] In addition to its unsolicited proposal for FIST/FLEX system, in 1985 Wesleyan submitted an unsolicited proposal for its "FIST Fountain" system, which provided a means for filling empty canteens in an NBC contaminated environment. *Id*. Wesleyan received a patent for the FIST Fountain system in December 1987. *Id*.

[2059] *Id*.

[2060] *Id*.

[2061] *Id*.

[2062] *Id*.

[2063] *Id*. Wesleyan's claimed damages were for projected royalties on the sales of the Camelbak drinking systems to the U.S., U.K., Canadian, and Australian armed forces between the years 2001 and 2015. *Id*.

[2064] *Id*. at 161,441.

[2065] *Id*.

[2066] *Id*.

[2067] *Id*. (citing 35 U.S.C. § 271(a) (2000)).

[2068] *Id*.

[2069] *Id*. Regarding the rest of Wesleyan's claim, the board found:

> genuine issues of material fact as to whether there was (i) unauthorized disclosure or use, before the patents were issued, of proprietary proposal data; (ii) unauthorized disclosure or use, after the patents were issued of proprietary proposal data that was not published in the patents; and (iii) unauthorized use, after the patents issued, of the proprietary proposal data that was published in the patents.

Id.

No Written Assurance Needed

Last year's National Defense Authorization Act amended 10 U.S.C. section 2320(b) to eliminate the requirement for contractors to furnish written assurance that technical data delivered to the DOD was complete and accurate and satisfied the contract requirements.[2070] This year the DOD issued an interim rule amending the DFARS to implement this legislative change.[2071] The interim rule amends DFARS subpart 227.71, by deleting the references to the prior requirement for written assurances, and removes the Declaration of Technical Data Conformity clause at DFARS section 252.227-7036.[2072] While reducing the amount of paperwork for contractors, the change "does not diminish the contractor's obligation to provide technical data that is complete and adequate, and that complies with contract requirements."[2073]

Out of the FAR and Into the DFARS

Last year's *Year in Review* reported on the FAR Councils' proposed revisions to FAR part 27.[2074] Included among the proposed changes was the deletion of the Patent Rights—Retention by the Contractor (Long Form) clause found at FAR section 52.227-12, because the DOD is the only agency that uses the clause.[2075] Based on this proposed change, the DOD proposed amending the DFARS to include a clause "substantially the same as the clause at FAR section 52.227-12."[2076] As the clause addresses patent rights under contracts awarded to large businesses for experimental, developmental, or research work, the clause will be titled Patent Rights—Ownership by the Contractor (Large Business).[2077] The proposed clause also includes "changes for consistency with current statutory provisions" and the proposed changes to FAR part 27.[2078]

Major Kevin Huyser.

Losing Rights to Intellectual Property: The Perils of Contracting with the Federal Government

Ervin and Associates, Inc. v. United States

In a case of first impression, the COFC, in *Ervin and Associates, Inc. v. United States* (*Ervin*),[2079] construed the scope of the "Rights In Data-General" clause at FAR section 52.227-14. The outcome of this case calls for government contractors to have a sophisticated, even nuanced, knowledge of the relevant statutes and regulations governing the procurement of technical data, as well as the underlying intellectual property laws.[2080] Without such knowledge, government contractors risk unknowingly forfeiting their rights to technical data and other intellectual property. Contractors must learn the benefits to using available standard contract clauses to protect valuable intellectual property instead of allowing such clauses to disadvantage the contractors themselves.[2081]

In *Ervin*, the HUD sent out RFPs to procure a computerized system to automate the loan portfolio management of multifamily apartment projects.[2082] Regulations required owners of these loans to submit each year an audited annual financial statement (AFS) to the HUD.[2083] The HUD sought to electronically collect the AFSs and automate the analysis as

[2070] Pub. L. No. 108-136, § 844, 117 Stat. 1392, 1552 (2003).

[2071] Defense Federal Acquisition Regulation Supplement; Written Assurance of Technical Data Conformity, 69 Fed. Reg. 31,911 (June 8, 2004) (to be codified at 48 C.F.R. pts. 227 and 252).

[2072] *Id*.

[2073] *Id*.

[2074] *2003 Year in Review*, *supra* note 29, at 150.

[2075] *Id*. (referencing 68 Fed. Reg. 31,790, 31,811).

[2076] Defense Federal Acquisition Regulation Supplement; Patent Rights—Ownership by the Contractor, 69 Fed. Reg. 58,377 (proposed 30 Sept. 2004) (to be codified at 48 C.F.R. pts. 227 and 252).

[2077] *Id*. at 58,379.

[2078] *Id*. at 58,378.

[2079] 59 Fed. Cl. 267 (2004).

[2080] *Id*. at 270.

[2081] *See* Ralph C. Nash & John Cibinic, *The FAR "Rights in Data—General" Clause: Interpreting Its Provisions*, 18 NASH & CIBINIC REP. 5 ¶ 19, at 70 (2004).

[2082] *Ervin*, 59 Fed. Cl. at 270.

[2083] *Id*.

to whether the AFSs complied with HUD regulations and any other data manipulation requested.[2084] The HUD made several amendments to its initial proposal because the projects costs exceeded HUD's funding limitations.[2085] The HUD removed the requirement that the successful contractor develop a "trend analysis" comparing the current year forms with those of the previous two years.[2086] Most importantly, the HUD reduced the number of AFS forms to be reviewed from 100% to 30% of HUD's multifamily portfolio.[2087] Out of all of the offerors, Ervin reduced its price the most and was awarded the contract.[2088] Ervin maintained that it was able to reduce its bid from $39,428,625 to $12,328,000 because the amendments eliminated some of the original HUD requirements.[2089] Because of this scope reduction, Ervin would maintain ownership over any database improvements and consequently was comfortable reducing its performance price significantly.[2090]

Even though the HUD eliminated the contract requirements for the successful contractor to provide a comprehensive computer database, do trend analysis, and review 100% of HUD's portfolio, Ervin decided to do a significant amount of work that was originally requested at no extra charge.[2091] That is to say, Ervin thought the HUD would need a "comprehensive computer database of financial statement data for all of its multifamily loans in the future."[2092] Ervin, thus, agreed to deliver to the HUD "reviews of all information entered into its database for each of HUD's 16,000 properties" as well as engage in trend analysis.[2093] In its best and final offer, Ervin hailed the company's "ability and desire to provide incremental value at no incremental cost."[2094] The resulting contract incorporated by reference Ervin's technical proposal.[2095]

Once performance began, Ervin provided the HUD with almost all of the data and computer programs Ervin had created. Ervin did not mark this data or these programs as proprietary, but declared that the HUD possessed no rights to give or share Ervin's intellectual property to other contractors.[2096] Although some employees agreed that the HUD had no rights to Ervin's intellectual property, other employees made Ervin's technical data and computer software available to competitors.[2097] Because Ervin could not stop the HUD from disseminating its property, Ervin sued the HUD and other complicit contractors; consequently the HUD terminated Ervin for default.[2098] Thereafter, the HUD and Ervin settled their differences, except for the intellectual property disputes.[2099] Ervin filed claims with the Office of the Chief Procurement Officer to seek recourse for HUD's improper disclosure of Ervin's intellectual property to its competitors.[2100] All claims were denied; Ervin filed a second complaint to the COFC.[2101]

Ervin's complaint comprised several claims against the HUD including, *inter alia*, breach of contract, constructive change to the contract, and copyright infringement. The COFC dismissed all counts on summary judgment.[2102] The most critical issue the court addressed was whether the standard FAR "Rights In Data-General Clause" was read into the AFS Contract. Although the AFS Contract referred to this clause, there was no specific language incorporating it by reference, in contrast to other FAR sections expressly included.[2103] In interpreting the contract, the court treated the "Rights In Data-General Clause" as "missing language" necessary to bring meaning to the contract, or in the alternative, the court placed the

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[2084] *Id*. at 271.

[2085] *Id*.

[2086] *Id*.

[2087] *Id*.

[2088] *Id*. at 273.

[2089] *Id*.

[2090] *Id*.

[2091] *Id*. at 272-73.

[2092] *Id*. at 272.

[2093] *Id*.

[2094] *Id*.

[2095] *Id*. at 273-74.

[2096] *Id*. at 277-85.

[2097] *Id*. at 276, 279, 281-82.

[2098] *Id*. at 283.

[2099] *Id*. at 285-86. During settlement, the HUD agreed to convert the termination for default to a termination for convenience.

[2100] *Id*. at 287.

[2101] *Id*. at 288.

[2102] *Id*. at 303-04.

[2103] *Id*. at 294.

burden on Ervin, as an experienced contractor, to take action to bring this patent ambiguity to the Government's attention. Consequently, the court incorporated the clause into the AFS contract. The court concluded that the result of reading the clause into the AFS contract meant that the HUD would have unlimited rights to Ervin's technical data, despite the fact that there are portions of FAR section 27.404 that would not require Ervin to grant the Government unlimited rights.

In FAR section 27.404 (b), a contractor has a right to withhold limited rights and restricted software data from the Government, except when an agency has a need to obtain delivery of such data and software. When this is necessary, the "Rights In Data-General" clause may be used with its Alternates II[2104] or III[2105] that put the burden on the contracting officer to selectively request the delivery of limited rights data and restricted software.[2106] As part of the negotiations between the Government and the contractor, the contract may specify what data and restricted software the contractor will deliver and, if delivered, the Government will obtain limited rights.[2107]

In *Ervin*, however, the contracting officer did not make such a request and Ervin did not specifically identify data or restricted software. The court found that all data and software delivered fell under the "Rights In Data-General" clause without reference to whether the contracting officer should have added Alternates II and III to the clause.[2108] The court places the burden on the contractor to have affixed the appropriate notice and clauses to the data and software. Without such, delivery defaulted to granting unlimited rights to the HUD.[2109] Even if the data and software were developed at private expense, because the contractor did not withhold delivery, the Government acquired unlimited rights.[2110]

This holding should alert contractors that they are responsible for having the appropriate contract clauses in the contract. If the contracting officer does not add Alternates II[2111] or III[2112] to the contract, the default rule is that the Government obtains unlimited rights to data and restricted software, thus forcing the contractor to lose rights to its intellectual property inadvertently. This requires the contractor to have a sophisticated knowledge of how to appropriately contract with the Government and take action to correct errors the contracting officer makes.[2113]

The COFC also found that the AFS contract required "Ervin to provide HUD with data from the AFS forms by downloading it in a manner that can be utilized in HUD's automated systems."[2114] In making this determination, the court looked at the text of the contract but also noted that HUD did not provide Ervin with the required software that could incorporate the data for delivery. According to the court, the HUD did not breach its contract with Ervin.[2115]

In addition, the court said there was no constructive change to the AFS contract. TheHUD maintained that it had made no changes of an extra-contractual nature and, regardless, that Ervin failed to properly inform the HUD of any such changes. Apparently, Ervin made the mistake of not directly talking with the contracting officer and informing the contracting officer that the data downloads were not a contract requirement. Ervin merely spoke to those HUD employees who had access to the contracting officer and could have conveyed such information to the contracting officer. According to the court, because Ervin is an experienced contractor, Ervin knew or should have known of the requirement to inform the contracting officer directly of any issues regarding the contract.[2116] Therefore, the court found no constructive change in the contract.

In order to discontinue HUD's ability to freely give away Ervin's data to its competitors, Ervin applied for and received a copyright on certain aspects of the data.[2117] The court rejected each and every copyright infringement claim.

[2104] *See* FAR, *supra* note 20, at 27.404 (d)-(e) and 52.227-14 (g)(1)-(g)(2).

[2105] *See id*. at 27.404 (d)-(e) and 52.227-14 (g)(3).

[2106] *Id*. at 27.404 (b).

[2107] *Id*. at 27.404 (d)-(e).

[2108] *Ervin*, 59 Fed. Cl. at 297.

[2109] *Id*.

[2110] *Id*.

[2111] *See* FAR, *supra* note 20, at 27.404 (d)-(e) and 52.227-14 (g)(1)-(g)(2).

[2112] *Id*. at 27.404 (d)-(e) and 52.227-14 (g)(3).

[2113] *See* Nash & Cibinic, *supra* note 2081, at 67.

[2114] *Ervin*, 59 Fed. Cl. at 292.

[2115] *Id*.

[2116] *Id*. at 293.

[2117] *See id*. at 298.

In obtaining a copyright, Ervin sought to protect against the unauthorized use of its standardized methods and approaches. In other words, Ervin wanted to safeguard the way in which Ervin processed individual AFSs. The court, citing *Atari Games Corp. v. Nintendo of America, Inc.*,[2118] held that such subject matter is not copyrightable. "To protect processes or methods of operation, a creator must look to patent law."[2119] That is to say, to accomplish its goal, Ervin should have sought patent protection instead of copyright protection. Further, Ervin complained that the HUD reverse-engineered Ervin's system without permission. Again, the court stressed that Ervin should have received patent protection to prevent reverse engineering. Under the "Fair Use Doctrine," reverse engineering is permitted and is not a copyright infringement.[2120]

Every other concern Ervin had regarding how its computer programs and teaching materials were being used was not prohibited by copyright.[2121] Either the Government had unlimited rights because of the contract scope, or what was developed was not at private expense.[2122] The "Rights-In- Data General" clause governed the court's opinion.[2123]

Lastly, the court stated that Ervin's databases were not copyright eligible under *Feist Publications v. Rural Telephone Service*.[2124] In that case, the Supreme Court held that white pages to a telephone book, because they contain only raw facts, are not eligible for copyright protection. In *Ervin*, the COFC interpreted *Feist* as requiring a minimal degree of creativity in order for databases to be copyrightable. According to the court, because Ervin had not proffered any evidence of such creativity and the databases merely compile the intrinsic logic of the AFS forms and information the HUD specified, the databases are not copyrightable. Even if such databases were copyrightable, the court said Ervin had the duty to withhold a database in order to seek "limited rights" protection, unless delivery is required under the contract. If delivery were required, Ervin should have affixed the mandatory "Limited Rights Notice" at time of delivery, which Ervin did not do.[2125]

In summary, contractors should never voluntarily provide material not expressly requested in the contract.[2126] Any proprietary materials should be appropriately marked as proprietary. Contractors should ensure the contracting officer includes only the appropriate clauses in the contract and be able to document which material was created at private expense. The *Ervin* court did not take into account the reduced cost of the contract in exchange for Ervin keeping its intellectual property rights in material delivered. Thus, courts may not recognize such a bargained for exchange without appropriate legends affixed and clauses expressly included in the agreement.

Finally, when contracting with the Government, contractors must become more sophisticated in obtaining the appropriate intellectual property for what they are trying to protect.[2127] Knowledge of what copyright protection does versus patent protection was critical in this case.

Data Enterprises of the Northwest v. General Services Administration

In *Data Enterprises of the Northwest v. General Services Administration*,[2128] the GSBCA demonstrated its inability to adequately compensate a contractor where the Government blatantly breached its contract and distributed proprietary software to others without permission. Because the Government's breach was a copyright infringement, a cause of action over which the GSBCA has no jurisdiction,[2129] the GSBCA sought an equitable division in trying to compensate for the contractor's loss. Although the GSBCA held the Government liable,[2130] the lack of creativity in calculating damages left the contractor less than fully compensated.

[2118] 975 F.2d 832, 842 (Fed. Cir. 1992).

[2119] *Ervin*, 59 Fed. Cl. at 298 (quoting Atari Games Corp. v. Nintendo of Am., Inc. 975 F.2d 832, 842 (Fed. Cir. 1992)).

[2120] *Id*. at 299 (citing Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 347-48 (1991)).

[2121] *Id*. at 300.

[2122] *Id*. at 301.

[2123] *Id*. at 300-01.

[2124] 499 U.S. 340 (1991).

[2125] *Ervin*, 59 Fed. Cl. at 301.

[2126] *See* Nash & Cibinic, *supra* note 2081, at 70.

[2127] *See id*.

[2128] GSBCA No. 15607, 04-1 BCA ¶ 32,539.

[2129] *Id*. at 160,949.

[2130] *Id*. at 160,960-61.

The contractor's software is a tool for inventory management.[2131] The contract at issue was a Federal Supply Schedule, Multiple Award Schedule contract.[2132] The contract comprised acquiring licenses to use existing commercial software that was not developed at Government expense.[2133] The dispute arose because of the differing views on the Government's right to use the contractor's proprietary information.[2134] The Government had disclosed the contractor's proprietary information to a third party to develop competing software. The Government maintained it had acquired unlimited rights to such information. Conversely, the contractor maintained the Government breached the licensing agreement by disclosing the information to develop competing software to a third-party developer.[2135]

The GSBCA agreed with the contractor. Because the contractor's information was developed at private expense, it was considered restricted software.[2136] As such, the contractor negotiated specific rights with the Government that were expressly set forth in the "Utilization Limitations" clause.[2137] The "Utilization Limitations" clearly did not grant the Government unlimited rights to the software and related proprietary information.[2138] In fact, the Government promised not to disclose or copy contractor's software and proprietary information consistent with contractor's commercial license.[2139] When the Government allowed a third party access, the Government breached the agreement.[2140]

In determining what damages to award the contractor for the Government's breach, the GSBCA stated that the non-breaching party was entitled to be restored to an economic position in which it would have been had the various breaches of contract not occurred.[2141] Because calculating damages based on a reasonable royalty is a remedy for copyright infringement, and the GSBCA has no jurisdiction over copyright infringement, the GSBCA refused to award these damages.[2142] Instead, the GSBCA awarded lost profits on the contract sales the contractor would have made had there been no breach.[2143] To keep these damages solely contract related, the GSBCA insisted it could not award lost profits on transactions not directly related to the breached contract.[2144]

The GSBCA noted that giving the third party access to the contractor's information "played a critical role" in developing the competing software.[2145] The third party saved money, time, and effort in developing competing software because the Government had improperly given access to the contractor's software and proprietary information.[2146] The GSBCA took these advantages into account in calculating damages by measuring the time the Government would have had to continue licensing from contractor because the competing software was not yet available.[2147] The GSBCA stated that it was clear from the evidence that the Government was able to replace contractor's system more quickly through using its proprietary information in developing the competing software.[2148] Accordingly, the GSBCA determined that it would have taken another ten months for the Government to develop the software had it not breached. Thus, the board calculated lost profits over another ten months to compensate the contractor.[2149]

[2131] *Id*. at 160,950.

[2132] *Id*.

[2133] *Id*. at 160,953.

[2134] *Id*. at 160,952.

[2135] *Id*. at 160,952-53.

[2136] *Id*. at 160,956.

[2137] *Id*. at 160,955.

[2138] *Id* at 160,955-56.

[2139] *Id*. at 160,958.

[2140] *Id*. at 160,961.

[2141] *Id*. at 160,963.

[2142] *Id*. at 160,964. This damage characterization sounds like reliance damages, but the GSBCA actually attempts to award expectation damages. For a discussion on contract remedies, see E. ALLAN FARNSWORTH, CONTRACTS §§ 12.1-12.3 (4th ed. 2004).

[2143] *Id*.

[2144] *Id*.

[2145] *Id*. at 160,963.

[2146] *Id*. at 160,965.

[2147] *Id*.

[2148] *Id*.

[2149] *Id*. at 160,967.

Unfortunately, the contractor was limited to contract damages and did not receive damages for copyright infringement, which would have significantly increased the compensation level. Indeed, the GSBCA could have been more creative in calculating damages. For example, restitution is a contract remedy.[2150] The GSBCA could have calculated how much the Government was unjustly enriched by the breach. Such unjust enrichment could have been calculated from the record, which showed that for the Government to have received permission to disclose the software to a third party the contractor would have required an "up front" $1,000,000 fee plus a royalty on all sales of the resulting competing software licenses.[2151] Although expectation damages are the general measure of damages in breach of contract cases, the board could make an exception here to more adequately compensate the contractor for the Government's breach.

Major Katherine White.

Major Systems Acquisition

The Defense Acquisition Guidebook

As discussed in last year's *Year in Review*, the DOD issued its revised and streamlined 5000 series regulations on 12 May 2003 to remove restrictions and give program managers greater flexibility.[2152] In addition to implementing a new directive[2153] and instruction,[2154] the DOD replaced the prior regulation,[2155] a 193-page document, with an *Interim Defense Acquisition Guidebook* (*Interim Guidebook*).

On 8 October 2004, the DOD replaced the *Interim Guidebook* with an "electronic" *Defense Acquisition Guidebook* (*Guidebook*).[2156] The memo introducing the *Guidebook* states that while last year's issuance of a new directive and instruction "explain 'what' acquisition managers are required to do, the [*Guidebook*] complements those documents by explaining 'how.'"[2157] The *Guidebook* provides "non-mandatory staff expectations" for meeting the requirements in the instruction.[2158] And as the *Guidebook* advertises, it is much more than a "book;"[2159] it is an interactive resource with different viewing settings,[2160] internal links, as well as links to statutes, regulations and lessons learned.

DFARS Part 242 Gets Even Slimmer

As part of the DFARS Transformation initiative, the DOD proposed making part 234, Major System Acquisition, slimmer by deleting or moving language to other DFARS parts.[2161] For example, the proposed rule deletes the definitions of "systems" and "systems acquisition" from the definitions at DFARS section 234.001 because the terms are not used elsewhere in part 234.[2162] The proposed changes also move the text on "earned value management systems (EVMS)" from

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[2150] *See* RESTATEMENT (SECOND) OF CONTRACTS, § 371 (1981); *see also* FARNSWORTH, *supra* note 2142, § 12.3.

[2151] GSBCA No. 15607, 04-1 BCA ¶ 32,539, at 160,964.

[2152] *2003 Year in Review*, *supra* note 29, at 144-46.

[2153] U.S. DEP'T OF DEFENSE, DIR. 5000.1, THE DEFENSE ACQUISITION SYSTEM (12 May 2003), *available at* http://dod5000.dau.mil/DOCS/DoD%20Directive%205000.1-signed%20(May%2012,%202003).doc.

[2154] U.S. DEP'T OF DEFENSE, INSTR. 5000.2, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (12 May 2003), *available at* http://dod5000.dau.mil/DOCS/DoDI%20h5000.2-signed%20(May%2012,%202003).doc.

[2155] U.S. DEP'T OF DEFENSE, REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (5 Apr. 2002).

[2156] Memorandum, Under Secretary of Defense (Acquisition, Technology, and Logistics), to Secretaries of the Military Departments *et al*., subject: The Defense Acquisition Guidebook (9 Oct. 2004), *available at* http://akss.dau.mil/docs/GBMemo.Wynne.pdf [hereinafter Acquisition Guide Memo]. The *Defense Acquisition Guidebook* is available at http://akss.dau.mil/dag.

[2157] Acquisition Guide Memo, *supra* note 2156.

[2158] *Defense Acquisition Guidebook*, Document View, foreword *available at* http://akss.dau.mil/dag.

[2159] *Id*.

[2160] *Id*. There are three ways to view and navigate through the Guidebook's information: (1) the Document View allows review of information page-by-page, (2) the Lifecycle Framework view permits review of statutory and regulatory requirements and related best practices for each milestone and acquisition phase, and (3) the Functional/Topic View provides comprehensive discussions of key acquisition topics. *Id*.

[2161] Defense Federal Acquisition Regulation Supplement; Major Systems Acquisitions, 69 Fed. Reg. 8155 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 134, 242, and 252).

[2162] *Id*. at 8156.

DFARS part 234 to part 242 because the EVMS requirements are not limited to major systems acquisitions.[2163] Similarly, the text requiring contracting officers to coordinate assistance from the administrative contracting officer when determining the adequacy of a proposed EVMS plan would move to the new DFARS PGI.[2164] The proposed changes would also provide updated references to the OMB circulars and DOD 5000 series documents, including the Defense Acquisition Guidebook.[2165]

DFARS Part 235 Gets Slimmer Too

Also part of the DFARS Transformation initiative, the DOD proposed deleting entirely DFARS subpart 235.70, Research and Development Streamlined Contracting Procedures.[2166] Because of technological advances since the implementation of the guidance, the DOD has determined the procedures obsolete.[2167]

In a separate proposed rule announcement, the DOD would also delete as unnecessary the text at DFARS section 235.007, Solicitations, and DFARS section 235.015, which addresses research contracts with educational and nonprofit organizations.[2168] The proposed change would also delete DFARS section 235.010 and move its guidance on scientific and technical reports to the DFARS Procedures, Guidance, and Information (PGI).[2169]

Major Kevin Huyser.

Non-FAR Transactions and Technology Transfer

DOD Finalizes Follow-On Production Rule in "Other Transaction for Prototype" Agreements

As discussed in prior *Years in Review*, the DOD has various legislative authorities to engage in research projects using contracting methods that do not comply with the normal statutory and regulatory contracting rules.[2170] Section 2358 of Title 10 grants the DOD authority to engage in research using grants or cooperative agreements.[2171] Additionally, under section 2371 of Title 10, the DOD has authority to engage in research using "other transaction" (OT) agreements.[2172] Generally, these authorities apply to research and do not permit the DOD to acquire an actual product.[2173] In 1993, however, Congress granted the DOD "Other Transaction for Prototype" authority to acquire a limited amount of prototype items in addition to the underlying research.[2174] And in 2001, Congress amended this authority to allow the DOD in certain circumstances to award follow-on production contracts, without competition, to the recipients of an Other Transaction for Prototype agreement.[2175] This past year, the DOD amended its OT regulations and the DFARS to implement this competition exception and identify the circumstance in which it would apply.[2176] Pursuant to the legislation, the DOD's regulatory provisions permit the award of a follow-on production contract without competition if the Other Transaction Prototype agreement resulted from competitive procedures, required "at least one-third non-Federal cost share," and the DOD established and evaluated, at the time the OT agreement was awarded, the price and quantity of the units to be purchased

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[2163] *Id*.

[2164] *Id*.

[2165] *Id*.

[2166] Defense Federal Acquisition Regulation Supplement; Removal of Obsolete Research and Development Contracting Procedures, 69 Fed. Reg. 8157 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pt. 235).

[2167] *Id*. at 8158.

[2168] Defense Federal Acquisition Regulation Supplement; Research and Development Contracting, 69 Fed. Reg. 8158 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 235 and 252).

[2169] *Id*. For discussion of the DOD's DFARS Transformation initiative and the DFARS PGI, see *supra* section titled Miscellaneous.

[2170] *2003 Year in Review*, *supra* note 29, at 159; *2002 Year in Review*, *supra* note 300, at 180.

[2171] Congress established this authority in 1947. Pub. L. No. 85-599, 72 Stat. 520 (1947).

[2172] Congress granted this authority in 1989. Pub. L. No. 101-189, 103 Stat. 1403 (1989).

[2173] *See 2003 Year in Review*, *supra* note 29, at 159.

[2174] Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1993). Because section 845 of the National Defense Authorization Act for FY 1994 granted this authority, Other Transactions for Prototype agreements are also called "845 Agreements." *See id*.

[2175] National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, 115 Stat. 1012, 1182-83 (2001) (adding sec. 845(f) to tit. 10).

[2176] Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 69 Fed. Reg. 16,481 (Mar. 30, 2004) (amending 32 C.F.R. pt. 3); Defense Federal Acquisition Regulation Supplement; Follow-On Production Contracts for Products Developed Pursuant to Prototype Projects, 69 Fed. Reg. 31,907 (June 8, 2004) (amending 48 C.F.R. pt. 206).

under the production contract.[2177]

Grant Me a Few More Changes

The past two *Years in Review*[2178] have also followed the OMB's response to the Federal Financial Assistance Management Improvement Act (FFAMIA),[2179] which directs the OMB to streamline the regulations dealing with grants and standardize the means of awarding and administering grants among the various agencies. Last year's article described OMB final rules establishing a standardized format and location for announcing discretionary grant and cooperative agreement funding opportunities, increasing audit thresholds for states, local governments, and non-profit organizations, and requiring grant and cooperative agreement recipients to use Dun & Bradstreet Numbering System (DUNS) numbers to be eligible for assistance.[2180] This past year, the DOD proposed updating the DOD Grant and Agreement Regulations (DODGARS) to conform the regulations to the changes made by the OMB last year.[2181] The proposed update also amends the DODGARS to conform to the recently updated government-wide common rules on nonprocurement debarment and suspension and on drug-free workplace requirements.[2182] Finally, the proposed changes provide additional guidance on the congressional prohibitions against funding by grant institutions that prevent the operation of ROTC units on campus or deny military recruiters to campus.[2183]

In another FFAMIA related development, the OMB announced this year that it is establishing a new title 2 in the Code of Federal Regulations that consolidates the location of OMB guidance and federal agency regulations on the award and administration of grants and agreements.[2184] The new title 2 consists of two subtitles: A and B. Subtitle A will consist of OMB guidance to federal agencies on grants and agreements—"guidance that currently is in seven separate OMB Circulars and other OMB policy documents."[2185] Subtitle A consists of two chapters because the OMB continues efforts to streamline and simplify guidance for awarding and administering grants, as required by the FFMIA.[2186] Chapter II contains "OMB guidance in its initial form—before completion of revisions" pursuant to the FFMIA.[2187] After revisions to a part are finalized, the guidance will be removed from Chapter II and placed into Chapter I.[2188]

Subtitle B of the new title 2 contains federal agency regulations that implement the OMB guidance.[2189] The OMB notice, as well as the language in title 2, highlight that the agency regulations in subtitle B differ from the guidance in subtitle A in that the latter is only guidance and not regulatory.[2190]

Major Kevin Huyser.

[2177] 69 Fed. Reg. 16,481; 69 Fed. Reg. 31,907.

[2178] *2003 Year in Review*, *supra* note 29, at 155-56; *2002 Year in Review*, *supra* note 300, at 182.

[2179] Pub. L. No. 106-107, 113 Stat. 1486 (1999).

[2180] *2003 Year in Review*, *supra* note 29, at 155-56.

[2181] DOD Grant and Agreement Regulations, 69 Fed. Reg. 44,990 (proposed July 28, 2004) (to be codified at 32 C.F.R. pts. 21, 22, 25, 32, 33, 34, and 37).

[2182] *Id*. at 44,991. Previously the DOD amended the DODGARS to include the updated nonprocurement debarment and suspension rule and drug-free workplace rules. Nonprocurement Debarment and Suspension and Drug-Free Workplace Requirements, 68 Fed. Reg. 66,534 (Nov. 26, 2003) (to be codified at 32 C.F.R. pts. 25 and 26).

[2183] 69 Fed. Reg. 44,990.

[2184] Governmentwide Guidance for Grants and Agreements; Federal Agency Regulations for Grants and Agreements, 69 Fed. Reg. 26,276 (May 11, 2004) (to be codified at 2 C.F.R. subtitles A and B).

[2185] *Id*. For example, the OMB has published Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," in the new title 2, subtitle A. *Id*. at 26,280.

[2186] *Id*.

[2187] *Id*.

[2188] *Id*.

[2189] *Id*.

[2190] *Id*.

DFARS Final Rule Issued for Electronic Invoicing—Further along the Road to Paper-less Contracting

As reported last year,[2191] section 1008 of the National Defense Authorization Act for FY 2001 required "contractors to submit, and the DOD to process, payment requests in electronic form" by 1 October 2002.[2192] Albeit late, the DOD subsequently issued an interim rule implementing this new requirement.[2193] In response to comments received, the DOD issued the final rule with some minor changes.[2194] Initially, the interim rule allowed the contracting officer to allow an exemption for electronic submission if the following conditions were met:

> The contractor is unable to submit, or DOD is unable to receive, a payment request in electronic form; and
>
> The contracting officer, the payment office, and the contractor mutually agree to an alternate method.[2195]

After revision, the final rule included the contract administration office in the mutual decision to exempt the contractor from the required electronic submission of invoices and allow an alternative method.[2196]

The final rule also clarified that "scanned documents, by themselves, are not acceptable electronic forms for submission of payment requests . . . unless they are part of a submission using one of the forms of acceptable electronic transmission."[2197] Section 252.232-7003(a)(2) of the DFARS now reads as follows with the clarifying additional language in bold type:

> (2) Electronic form means any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail, and scanned documents are not acceptable electronic forms for submission of payment requests. *However, scanned documents are acceptable when they are part of a submission of payment request made using one of the electronic forms provided for in paragraph (b) of this clause*.[2198]

As a reminder of the three primary means of transmitting electronic forms, DFARS section 232.7003 remains unchanged (except for updated web sites) from the initial interim rule and provides:

> (1) Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA). Information regarding WAWF-RA is available on the Internet at https://wawf.eb.mil.
> (2) Web Invoicing System (WInS). Information regarding WInS is available on the Internet at https://ecweb.dfas.mil.
> (3) American National Standards Institute (ANSI) X.12 electronic data interchange (EDI) formats.
> (i) Information regarding EDI formats is available on the Internet at https://www.X12.org.
> (ii) EDI implementation guides are available on the Internet at http://www.dfas.mil/ecedi.[2199]

Required Registration in the Central Contractor Registration (CCR)

To move further along the road toward paper-less contracting (officially referred to as "e-business applications"), the FAR Councils issued a final rule requiring contractors to register in the web-based CCR "to eliminate the need to maintain paper-based sources of contractor information."[2200] Contractors must register in the CCR database prior to contract

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[2191] *2003 Year in Review*, *supra* note 29, at 162.

[2192] Pub. L. No. 106-398, 114 Stat. 1654.

[2193] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 8450 (Feb. 21, 2003). The DOD was unable to meet the deadline because the "automated payment systems were limited to certain types of payment requests. *Id.* at 8454.

[2194] Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 69,628 (Dec. 15, 2003) (codified at 48 C.F.R. pts. 232 and 252).

[2195] 68 Fed. Reg. at 8455 (listing the interim DFARS at 232.7002(a)(6)).

[2196] 68 Fed. Reg. at 69,630 (listing the final revision of DFARS at 232.7002(a)(6)).

[2197] *Id*. at 69,629.

[2198] *Id*. at 69,630 (listing DFARS section 252.232-7003(a)(2)) (emphasis added).

[2199] DFARS, *supra* note 227, at 252.232-7003(b)(1-3).

[2200] Federal Acquisition Regulation; Central Contractor Registration, 68 Fed. Reg. 56,669, 56,671 (Oct. 1, 2003).

award, to include basic agreements, basic ordering agreements, or blanket purchase agreements. Additionally, the rule directs contracting officers to modify existing contracts that extend beyond 31 December 2003 to require CCR registration before the same date.[2201] By establishing the CCR as the "common source of vendor data for the Government,"[2202] the CCR will also benefit other systems, such as the aforementioned methods of electronically submitting payment requests, with increased integration opportunities for electronic invoice submission and payment by electronic fund transfer.[2203]

"We are all Gentlemen here, no Need to Withhold 5%, Mr. KO, You'll get your Release in Due Time."

The DOD issued a final rule adding DFARS sections 232.111(b) and 252.232-7006, Alternate A that should clarify whether to withhold payments under time-and-materials and labor-hour contracts.[2204] Generally, FAR section 52.232-7(a)(2) requires the contracting officer to withhold five percent of the amounts due under the aforementioned contracts, up to a total maximum of $50,000 unless the contract provides otherwise.[2205] These retained funds are disbursed as a final payment when the contractor provides "a release discharging the Government . . . from all liabilities, obligations, and claims arising out of or under [the] contract."[2206] Accordingly, the new DFARS provision and clause specify that, normally, there is no need to withhold contractor payments when the contractor has a record of timely release submission.[2207] However, the administrative contracting officer (ACO) may use DFARS section 252.232-7006, Alternate A, by issuing a unilateral modification to withhold five percent of payment amounts due, up to a maximum of $50,000 if the ACO believes it is necessary to protect the Government's interest.[2208]

As mentioned in the response to comments to the final rule, the Defense Acquisition Regulations (DAR) Council is also working with the Civilian Agency Acquisition Council to revise the FAR to allow optional withholding for time-and-materials and labor-hour contracts.[2209] Not surprisingly, the FAR Council issued a proposed rule on 25 May 2004 to remove the requirement for five percent withholding under the aforementioned contract types.[2210] The proposed rule would "add FAR [section] 32.111(a)(7)(iii) to permit contracting officers to use their judgment regarding whether to withhold payments under time-and-materials and labor-hour contracts so that the withhold would be applied only when necessary to protect the Government's interests."[2211] The FAR Council is considering the revision "because the current withholding provisions are administratively burdensome and may . . . result in the withholding of amounts that exceed reasonable amounts needed to protect the Government's interests."[2212] Additionally, the FAR Councils noted that a contractor has an incentive to provide a release as a condition for the final payment.[2213]

Lieutenant Colonel Karl Kuhn.

[2201] *Id*. at 56,669.

[2202] *Id*. at 56,672 (citing FAR section 4.1100(b)).

[2203] *See* FAR, *supra* note 20, at 32.1110(a).

[2204] Defense Federal Acquisition Regulation Supplement; Payment Withholding, 68 Fed. Reg. 69,631 (Dec. 15, 2003) (codified at 48 C.F.R. pts. 232 and 252).

[2205] FAR, *supra* note 20, at 52.232-7(a)(2).

[2206] *Id*. at 52.232-7(f).

[2207] 68 Fed. Reg. at 69,631.

[2208] *Id*. at 69,632.

[2209] *See id*. at 69,631 (DOD Response to Comment 3).

[2210] Federal Acquisition Regulation; Payment Withholding, 69 Fed. Reg. 29,838 (proposed May 25, 2004) (to be codified at 48 C.F.R. pts. 14, 32, and 52).

[2211] *Id*. at 29,838.

[2212] *Id*.

[2213] *Id*.

Performance-Based Service Acquisitions

What's in a Name? That Which We Call (Performance-Based Service Contracting) by Any Other Word Would Smell as Sweet.[2214]

Last year's *Year in Review*[2215] discussed an Office of Federal Procurement Policy (OFPP) interagency working group report that recommended several changes in performance-based service contracting (PBSC) to make PBSC more flexible and increase agency use of such methods.[2216] One of the group's recommendations proposed use of the term "performance-based service acquisitions (PBSA)" vice PBSC "to provide common terminology throughout the government."[2217] On 21 July 2004, the FAR Councils proposed to amend the FAR by replacing the referenced terms "performance-based contracting (PBC) and performance-based service contracting (PBSC)" with "performance-based acquisition (PBA) and performance-based service acquisition (PBSA)."[2218]

More significantly, to "make PBA more flexible, thus increasing agency use of PBA methods on service contracts and task orders,"[2219] the FAR Councils proposed several FAR modifications that relax the description and discussion of required elements of PBSA.[2220] For example, the proposed language simply requires that PBSA contracts or orders include a performance work statement (PWS) and measurable performance standards, which may be objective or subjective.[2221] Fee reductions or price decreases for non-performance would no longer be required, as the proposed modifications simply permit performance incentives, which "may be of any type, including positive, negative, monetary or non-monetary."[2222] And the requirement for quality assurance surveillance plans (QASP) would be eased with direction that QASPs should be tailored to the complexity of the acquisition and should "utilize commercial practices to the maximum extent practicable."[2223]

The proposed modifications also add definitions for "performance work statement" and "statement of objectives (SOO)" to FAR part 2.[2224] While PBSA contracts and task orders must include a PWS, under the rule change, the PWS "may be prepared by the Government or result from a SOO prepared by the Government where the offeror proposes the PWS."[2225] Additionally, the FAR Councils' proposal amends the order of preference for requirements documents at FAR section 11.101 to read "Performance or function-related documents."[2226]

To give meaning to the proposed name change and other PBSA developments, practitioners may wish to use a

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[2214] WILLIAM SHAKESPEARE, ROMEO AND JULIET, act II, sc. ii.

[2215] *2003 Year in Review*, *supra* note 29, at 166-68.

[2216] FEDERAL OFFICE OF MANAGEMENT AND BUDGET, *Office of Federal Procurement Policy, Performance-Based Service Acquisition: Contracting for the Future* (July 2003)) [hereinafter *Contracting for the Future*].

[2217] *Id*. at 5.

[2218] Department of Defense, General Services Administration, National Aeronautics and Space Administration, Federal Acquisition Regulation; Performance-Based Service Acquisition; Proposed Rule, 69 Fed. Reg. 43,712 (July 21, 2004) (to be codified at 48 C.F.R. pts. 2, 7, 11, 16, 37, and 39). The Air Force lexicon for PBSC has also officially changed to PBSA. *See* U.S. DEP'T OF AIR FORCE, INSTR. 63-124, PERFORMANCE-BASED SERVICE ACQUISITIONS (9 Feb. 2004) (revising numerous provisions concerning PBSA including the overview to identify what an acquisition must include to be considered "performance-based").

[2219] 63 Fed. Reg. 43,712.

[2220] *Id*. Most of the Councils' proposed changes are based on the recommendations and suggested language of the OFPP's interagency working group report. *See Contracting for the Future*, *supra* note 2216.

[2221] 63 Fed. Reg. at 43,714. Currently the FAR states PBSA contracts and orders include the following attributes:

1. describes requirements in terms of required results rather than methods;
2. uses measurable performance standards;
3. uses quality assurance surveillance plans;
4. identifies positive and negative incentives when appropriate.

See FAR, *supra* note 20, at 37.601.

[2222] 63 Fed. Reg. 43,714.

[2223] *Id*.

[2224] *Id*. at 43,713.

[2225] *Id*.

[2226] *Id*.

PSBA training module now available on-line at the Defense Acquisition University's Continuous Learning Center.[2227] For good basic information on PBSA, *The Seven Steps to Performance-Based Service Acquisition* remains available on-line.[2228]

PBSA Odds and Ends

Last year's *Year in Review* noted section 1431 of the National Defense Authorization Act for FY 2004,[2229] which expanded government-wide the authority to treat certain PBSA up to $25 million as "commercial item" acquisitions and thus use the streamlined acquisition procedures under FAR part 12.[2230] To qualify for "commercial item" treatment under section 1431, the contract or task order must set forth specifically each task and define the task in measurable, mission-related terms, identify specific end products or output, contain firm-fixed prices for the tasks or outcomes, and be awarded to a contractor that provides similar services to the general public under conditions similar to those offered the federal government.[2231]

On 18 June 2004, the FAR Councils issued an interim rule amending the FAR to implement the section 1431 authority.[2232] The interim rule amends FAR section 12.102 by adding a paragraph (g), which authorizes a contracting officer to use FAR part 12 for any performance-based acquisition that does not meet the FAR's definition of "commercial item," as long as the contract or task order satisfies the section 1431 criteria.[2233] As partial satisfaction of the various section 1431 requirements for "commercial item" treatment, the interim rule requires the contracts or task orders to meet the definition of "performance-based contracting"[2234] at FAR section 2.201.[2235] Additionally, the interim rule adds a cross reference to FAR section 12.102(g) in FAR section 37.601 "to ensure consistency with the overarching policy in FAR [section] 37.601 that applies to performance-based contracting for services."[2236] Finally, to satisfy section 1341's data tracking and reporting requirements,[2237] the interim rule amends FAR section 4.601 to require data collection by using the Federal Procurement Data System—Next Generation.[2238]

The *2003 Year in Review* also reported on the DAR Council's interim rule adding DFARS section 237.170, Approval of Contracts and Task Orders for Services, as well as the Army and Air Force policy guidance on review structure and processes for service acquisitions.[2239] This past year the Army revised the AFARS, implementing approval requirement thresholds for service contracts and task orders and guidance on the management and oversight of service acquisitions.[2240] The Air Force issued additional interim guidance to resource advisors, instructing that acquisitions for services about the simplified acquisition threshold must be performance-based unless approval of a Services Designated Official (SDO) is

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[2227] *See* http://clc.dau.mil. To access the training module, first select the "Learning Center," then the "Course Information & Access" link, then select the PBSA course from the listing. Recall the DOD's requirement that all DOD personnel who prepare service contract PWS must receive training in PBSA by 30 September 2005. *See 2003 Year in Review*, *supra* note 29, at 168 (discussing the Acting Under Secretary of Defense's (Acquisition, Technology, and Logistics) goals for PBSA contract awards and training).

[2228] *See* http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/.

[2229] Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003).

[2230] *2003 Year in Review*, *supra* note 29, at 165-66, 218. Section 821(b) of the Floyd D. Spence National Defense Authorization Act for FY 2001 previously granted only the DOD this authority. Pub. L. No. 106-398, § 821, 114 Stat. 1654, 1654A-217 (2000). On 25 June 2004, the DOD amended the DFARS to remove sections 212.102 and 237.601, as the authority granted by section 821(b) expired on 30 October 2003. Department of Defense, Defense Federal Acquisition Regulation Supplement, Use of FAR Part 12 for Performance-Based Contracting For Services, Final Rule, 69 Fed. Reg. 35,532 (June 25, 2004) (to be codified at 48 C.F.R. pts. 212 and 237). The new government-wide authority remains available through 24 November 2013. National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003).

[2231] Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003).

[2232] General Services Administration et al., Federal Acquisition Regulation; Incentives for Use of Performance-Based Contracting for Services, Interim Rule with Request for Comments, 69 Fed. Reg. 34,226 (June 18, 2004) (to be codified at 48 C.F.R. pts. 2, 4, 12, 37, and 52).

[2233] *Id*. at 34,227.

[2234] The interim rule uses the term "performance-based contracting" vice "performance-based acquisition," as the name change from PBSC to PBSA is still just a proposal. *See supra* notes 2217 to 2218 and accompanying text.

[2235] 69 Fed. Reg. 34,226.

[2236] *Id*.

[2237] National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003). *See also 2003 Year in Review*, *supra* note 29, at 165-66 (discussing a GAO report that cited the DOD's lack of a reporting system or other tracking mechanism to collect data on the section 821(b) authority).

[2238] 69 Fed. Reg. 34,226-27.

[2239] *2003 Year in Review*, *supra* note 29, at 164-65 (noting the interim rule implements section 8011(b) of the National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 8011(b), 115 Stat. 1012, 1175 (2001)).

[2240] U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REGULATION SUPPLEMENT (2004) subpts. 5137.170 and 5137.5 (AFARS Revision No. 10, Apr. 30, 2004).

received.[2241]

Major Kevin Huyser.

Procurement Fraud

False Claims Act: No Blockbusters, But Quite a Few Interesting Developments

As in recent years, FY 2004 witnessed a considerable number of developments on the False Claims Act (FCA)[2242] front. The Fourth Circuit Court of Appeals, affirmed a district court holding that a contractor's certification of no organizational conflict of interest (OCI) was both false and material under the FCA. In *United States ex rel. Edwin P. Harrison v. Westinghouse Savannah River Company*,[2243] appellant Westinghouse submitted a no-OCI certification to the Department of Energy (DOE), even though a subcontractor employee was intimately involved in preparing procurement sensitive documents for the DOE.[2244] At the district court, a jury determined the no-OCI certification was false, and that appellant knew it was false when appellant made it. In addition, the court determined the no-OCI certification was material under the FCA.[2245] The appellate court agreed, holding the no-OCI certification was material because DOE would have disqualified the subcontractor (and thus the contractor) had DOE known of the conflict of interest.[2246]

Turning to the D.C. Circuit, the court recently determined that Amtrak was not the "government" under the FCA. Thus a supplier of defective rail cars did not violate the FCA by delivering and subsequently billing Amtrak for those cars. In *United States ex rel. Edward L. Totten v. Bombardier Corp. and Envirovac, Inc*.,[2247] the court's majority concluded that Amtrak's receipt of federal funds did not create liability under the FCA. Rather, the majority reasoned for liability to arise under the Act, the contractor would have to have requested the government pay or approve the payment of the invoices.[2248] In response to the majority's reasoning, Judge Garland wrote a spirited dissent.[2249] After thoroughly examining the FCA's legislative history, Judge Garland concluded the majority's interpretation of the FCA "significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, withdrawing False Claims Act protection with respect to a broad swath of false claims inflicting injury on the federal fisc."[2250]

The Ninth Circuit determined a state contractor who knowingly submitted false claims to the Federal Emergency Management Agency was not shielded from liability under the FCA. In *United States ex rel. Ali v. Mann, Johnson & Mendenhall*,[2251] the district court determined a construction management firm, which was a contractor for California State University, was an agent of the university for the purpose of FCA liability. Thus, under the Supreme Court's holding in *Vermont Department of Natural Resources v. United States ex rel. Stevens* (*Stevens*),[2252] the contractor was immune from liability under the FCA because it was acting as an agent of the state within the scope of its official duties.[2253] On appeal, the

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[2241] Memorandum, Associate Deputy Secretary of the Air Force (Contracting) and Assistant Secretary of the Air Force (Acquisition), to ALMAJCOM-FOA-DRU (Contracting & Comptrollers), subject: Interim Procurement Guidance for Resource Advisors Requesting the Acquisition of Services (10 Mar. 2004), *available at* http://www.safaq.hq.af.mil/contracting/affars/5337/library-5337.html.

[2242] 31 U.S.C.S. §§ 3729-33 (LEXIS 2004). The FCA is often considered the primary civil remedy available for combating procurement fraud. It imposes liability on any "person" who "knowingly presents or causes to be presented," a false or fraudulent claim, or conspires to defraud the government by having a false or fraudulent claim allowed or paid. The act allows for treble damages, in addition to civil penalties in the amount of five to ten thousand dollars per claim. The FCA also allows an individual to bring suit under the *qui tam* provisions of the FCA in the name of the United States. *Id*.

[2243] 352 F.3d 908 (4th Cir. 2004).

[2244] *Id*. at 911.

[2245] *Id*. at 911-12.

[2246] *Id*. at 917.

[2247] 380 F.3d 488 (D.C. Cir. 2004).

[2248] *Id*. at 491-92. The majority concluded the government "failed to connect the dots" in that for a claim to be actionable under the FCA, the claim "must be presented to an officer or employee of the United States Government." Thus, for the majority, the source of the funds was not the focus of the analysis, but rather whether the claim is presented to the government. *Id*. at 493.

[2249] *Id*. at 503. To quote Judge Garland: "the court's interpretation is not just inconsistent, but irreconcilable, with the legislative history of the [FCA] . . . . The court marches on nonetheless, surrounding itself on all sides with 'canons' of statutory construction, which serve here as 'cannons' of statutory destruction." *Id*.

[2250] *Id*. at 515-16.

[2251] 355 F.3d 1140 (9th Cir. 2004).

[2252] 529 U.S. 765 (2000). In *Stevens* the Court decided that states are not "persons" amenable to suit under the FCA. The Court based that decision, in part, on the "longstanding interpretive presumption" that a "person" does not include the "sovereign" (i.e., a sovereign state). *Id*. at 786-88.

[2253] *Ali*, 355 F.3d at 1144.

Ninth Circuit disagreed. For the circuit court, the fact that the contractor's employees were working on behalf of the university did not cause them to become government officials for immunity purposes under *Stevens*.[2254] Applying an "arm-of-the-state" test for sovereign immunity,[2255] the court observed that a judgment against the contractor would not be satisfied from public funds, but with contractor funds. To the court, this was more dispositive than whether the contractor performed a central government function. Accordingly, the court concluded the facts weighed against granting the contractor sovereign immunity for its actions on behalf of the state university.[2256]

In *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*,[2257] a divided Fourth Circuit concluded that retaliation claims are subject to the FCA's six-year statute of limitations, rather than a state's three-year limitations period for wrongful discharge actions.[2258] In holding as such, the Fourth Circuit rejected the Ninth's Circuit's interpretation that the FCA's statute of limitations does not apply to retaliation claims under the Act,[2259] and adopted the Seventh Circuit's more expansive interpretation of the FCA.[2260]

Finally, a case from the D.C. District Court established that a contractor did not violate the FCA where it intentionally submitted a low bid on a contract intending to make up the loss on change orders. In *United States ex rel. Bettis v. Odebrecht Contractors of California*,[2261] the relator alleged a construction contractor violated the FCA by intentionally submitting a low bid, intending to later seek false modifications during the course of performance.[2262] Upon examination, the court concluded the relator's theory was "premised on a legally-flawed application of the fraud-in-the-inducement theory."[2263] To the court, the contractor's submission of a deflated bid, in and of itself, could not suffice to impose liability under the FCA. "Such a proposition completely ignores the reality of government contracting where it is common for a contract that was bid at one price to ultimately cost far more."[2264]

The Sad Saga of Darleen Druyun

On 1 October 2004, former Air Force procurement official Darleen Druyun was sentenced by a federal judge to nine months in prison after admitting she extracted personal favors from Boeing, and give the contractor preferential treatment in connection with at least four major Air Force procurements.[2265]

On 20 April 2004, Druyun plead guilty to one felony count of conspiracy in connection with her discussions with

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[2254] *Id*. at 1145.

[2255] The "arm-of-the-state" test for sovereign immunity has been applied by the Ninth Circuit in a number of settings. As applied in the present case, the court examined: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity. The court determined the most important factor was whether a money judgment would be satisfied out of state funds, because "a plaintiff who successfully sued an arm of the state would have a judgment with the same effect as if it were rendered against the State." *Id*. at 1147 (citing Mitchell v. Los Angeles Comty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988)).

[2256] *Id*. *See also* United States *ex rel*. Adrian v. Regents of the Univ. of California, 363 F.3d 398 (5th Cir. 2004) (holding the Board of Regents of the University of California, in managing the Lawrence Livermore National Laboratory, is a state entity and thus not amendable to suit under the FCA).

[2257] 367 F.3d 245 (4th Cir. 2004).

[2258] *Id*. at 247.

[2259] United States *ex rel*. Lujan v. Hughes Aircraft Co., 162 F.3d 1027 (9th Cir. 1997).

[2260] Neal v. Honeywell, Inc., 33 F.3d 860 (7th Cir. 1994).

[2261] 297 F. Supp. 2d 272 (D.D.C. 2004).

[2262] *Id*. at 273.

[2263] *Id*. at 279.

[2264] *Id*. at 281. Other FCA cases of interest decided this year include United States *ex rel*. Riley v. St. Luke's Episcopal Hosp., 355 F.3d 370 (5th Cir. 2004) (ruling a nurse's allegation that defendant sought reimbursement for medically unnecessary procedures was sufficient to state a claim under the FCA); Fanslow v. Chicago Mfg. Center, Inc. 2004 U.S. App. LEXIS 19510 (holding an information technology employee was not required to allege illegality in order to put employer on notice he was filing a whistleblower complaint); Brooks v. United States, 2004 U.S. App. LEXIS 19037 (finding the proceeds of a qui tam suit are taxable income); Kennard v. Comstock Res. Inc., 363 F.3d 1039 (10th Cir. 2004) (determining the relators qualified as an original source where substance of allegations was based on Indian tribe's investigation into oil and gas leases); United States *ex rel.* Barron v. Deloitte & Touche, 381 F.3d 438 (5th Cir. 2004) (ruling that the defendant insurance company was not entitled to Eleventh Amendment immunity under FCA).

[2265] *Procurement Integrity: Ex-USAF Official Druyun Admits Boeing Offers Of Job Influenced Her, Draws 9 Months in Jail*, BNA FED. CONT. DAILY (Oct. 4, 2004) [hereinafter *Druyun Draws 9 Months in Jail*]. In addition to nine months in prison, the court sentenced Druyun to seven months of community confinement, 150 hours of community service, and a fine of $5,000. *Id*.

Boeing concerning potential employment with the contractor.[2266] At that time, Druyun insisted those discussions did not influence her dealings with Boeing. As part of her plea agreement, Druyun was required to provide "full, complete and truthful cooperation to the government." However, after Druyun entered the plea agreement she failed a polygraph test and ultimately admitted she had not been truthful in her prior statements.[2267]

After failing the polygraph, Druyun admitted she provided "favors" to Boeing, and as a result of her "loss of objectivity, took actions which harmed the United States."[2268] Specifically, in negotiations with Boeing concerning a lease agreement for one-hundred Boeing KC 767A tanker aircraft, Druyun admitted she agreed to a higher price for the aircraft than she believed was appropriate. She did so as a "parting gift to Boeing" because of her "desire to ingratiate herself with Boeing," her future employer. She also wished to garner favor for her daughter and son-in-law, who were both then employed by Boeing.[2269] The DOD has since put the deal on hold.[2270]

In addition to Druyun's admissions concerning the tanker deal, she also admitted to showing favoritism to Boeing in negotiations concerning the restructuring of the NATO AWACS program, where she admitted settling for an amount which was lower than appropriate. She stated the agreement "was influenced by her daughter's and son-in-law's relationship with Boeing," as well as her own employment negotiations.[2271] Druyun also admitted she was not objective in a four billion dollar deal with Boeing to upgrade the avionics of C-130 aircraft,[2272] and in a negotiated settlement with Boeing involving C-17 aircraft.[2273]

In response to questions regarding her original plea, Druyun's attorney stated "the human condition got in the way of getting to the truth."[2274]

The COFC Giveth, the COFC Taketh Away

Two recent COFC cases involving, respectively, waiver and forfeiture warrant mention. In *Aptus Co. v. United States*,[2275] the COFC held the government waived its right to assert fraud as an affirmative defense in a contract termination case because it failed to terminate the contract when it first became aware of the alleged fraud.[2276] The case involved an Army COE contract to design and install a several high-voltage electrical devices. Pursuant to the contract, Aptus, a sole proprietorship, was required to perform portions of the work "with either a Graduate Mechanical Engineer with two (2) years of experience, or a person possessing at least five (5) years of related experience."[2277] Aptus failed to secure an engineer with the required level of experience. However, the COE was apparently aware of this fact and never objected to this deficiency during contract performance.[2278] Aptus also failed to make satisfactory progress, and approximately ten months into the contract, the COE issued Aptus a show cause notice, followed by termination of the contract.[2279]

The COE defended the termination before the COFC by arguing, inter alia, that Aptus' failure to provide an

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[2266] Supplemental Statement of Facts, The Defendant's Post Plea Admissions, U.S. v. Darleen A. Druyun, U.S. District Court for the Eastern District of Virginia, Criminal No. 04-150-A, *at* http://www.govexec.com/pdfs/druyunpostpleaadmission.pdf (last visited 12 Nov. 2004) [hereinafter Supplemental Statement of Facts].

[2267] *Druyun Draws 9 Months in Jail*, *supra* note 2265.

[2268] Supplemental Statement of Facts, *supra* note 2266, at 2.

[2269] *Id*. at 2-3.

[2270] *Druyun Draws 9 Months in Jail*, *supra* note 2265.

[2271] Supplemental Statement of Facts, *supra* note 2266, at 2.

[2272] *Id*. at 3.

[2273] *Id*.

[2274] *Druyun Draws 9 Months in Jail*, *supra* note 2265. The collateral damage from the Druyun case will most likely be felt for some time. On 7 October 2004, the President's nominee for Commander, U.S. Pacific Command, Air Force General Gregory Martin, requested his name be withdrawn after questions arose concerning his part in the Boeing air-refueling tanker deal. *See U.S. General's Pacific Nomination Withdrawn*, WASH. TIMES, Oct. 8, 2004, *available at* http://washingtontimes.com/upi-breaking/20041007-040259-2360r.htm (last visited 12 Nov. 2004).

[2275] 61 Fed. Cl. 638 (2004).

[2276] *Id*. at 649-50.

[2277] *Id*. at 648-49.

[2278] *Id*. at 649-50.

[2279] *Id*. at 643.

engineer with the required level of experience constituted fraud. The COFC was not very responsive to this defense.[2280] Observing the government "irrefutably knew about the alleged fraud," the court held that "justifying the termination based on this principle would be unconscionable." To the court, "holding to the contrary would represent a blatant violation of the principles of fundamental fairness."[2281]

In *American Heritage Bancorp v. United States* (*AHB*),[2282] the government successfully argued that plaintiff's claim should be forfeited under the Forfeiture of Fraudulent Claims statute.[2283] The case is deserving of note because the fraud in question took place during contract formation, rather than as a "fraudulent claim."[2284]

In *AHB*, plaintiff sued the government for an alleged breach of contract involving the purchase of a bank.[2285] In a motion for summary judgment, the government argued as an affirmative defense that AHB's suit should be forfeited under the Forfeiture of Fraudulent Claims statute because one of AHB's directors fraudulently misstated his financial position in AHB's application to the Federal Home Loan Bank of Boston, a government body responsible for approving AHB's bank acquisition.[2286]

Upon examination, the court imputed the misconduct of the director to AHB.[2287] More importantly, the court adopted an expansive reading of the Forfeiture of Fraudulent Claims statute, and concluded the statute applies to fraud during formation of a contract.[2288] Citing earlier precedent, the COFC rejected the proposition that the statute's scope is limited to only fraudulent claims. Specifically, under *O'Brien Gear & Machine Co. v. United States*,[2289] the court observed that "Congress intended . . . that every suit brought in the Court of Claims should be subject to the forfeiture provided, on the commission of the specified fraud."[2290] Further, the court cited *Little v. United States*[2291] for the proposition that where "fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it."[2292] Accordingly, the court concluded a "narrow reading does not represent the full extent of the force of § 2514."[2293] Thus, it was appropriate "to apply the forfeiture statute to situations outside the strict terms of the statute, as logic has dictated."[2294]

Major Fraud Act: No Stretching the Statute of Limitations

In *United States v. Reitmeyer et al.*,[2295] the Tenth Circuit held that for purposes of determining when the seven year statute of limitations for the Major Fraud Act[2296] begins to toll, the defendants "executed" their alleged scheme to defraud and obtain money from the United States when they filed their claim for equitable adjustment. Thus, the statute of limitations

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[2280] *Id*. at 649-50.

[2281] *Id*. Once the court brushed the fraud issue to the side, the court observed the contractor failed to establish an excuse for his lack of progress and dismissed the complaint in its entirety. *Id*. at 664.

[2282] 61 Fed. Cl. 376 (2004).

[2283] 28 U.S.C.S. § 2514 (LEXIS 2004). The Forfeiture of Fraudulent Claims statute provides:

> A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

Id.

[2284] *AHB*, 61 Fed. Cl. at 385-86.

[2285] *Id*. at 377-78.

[2286] *Id*. at 378-79.

[2287] *Id*. at 394-95.

[2288] *Id*. at 388-89.

[2289] 591 F.2d 666 (Ct. Cl. 1979).

[2290] *AHB*, 61 Fed. Cl. at 386 (citing *O'Brien*, 591 F.2d at 680).

[2291] 152 F. Supp. 84 (Ct. Cl. 1957).

[2292] *AHB*, 61 Fed. Cl. at 386 (citing *Little*, 152 F. Supp. at 87-88).

[2293] *Id*.

[2294] *Id*.

[2295] 356 F.3d 1313 (10th Cir. 2004).

[2296] 18 U.S.C.S. § 1031 (LEXIS 2004).

under the Act began running on the date the defendant's claim was filed.[2297] The court rejected the government's contention that defendants' subsequent actions, including a meeting with the COE, were a necessary part of the scheme and a part of the "execution" for purposes of the statute of limitations.[2298] The court also held that the "execution" of the scheme to defraud or obtain money was not a continuing offense for statute of limitations purposes.[2299]

You Want Me to Pay What? Cost Associated with Criminal Defense Not Recoverable

The CAFC recently held a contractor could not recover costs incurred in defending against a criminal investigation where one of its employees was convicted, even though the contractor itself was never charged with criminal misconduct. In *Brownlee v. DynCorp*,[2300] the Army awarded DynCorp a cost-plus-award-fee contract for base support services at Fort Irwin, California in 1991.[2301] In 1992, the Army Criminal Investigation Division (CID) began investigating allegations of criminal activity by DynCorp and its employees relating to DynCorp's contract performance. In accordance with the law of Delaware (DynCorp's state of incorporation), and DynCorp's bylaws, DynCorp paid the costs of its defense and the defense of its employees.[2302] Ultimately, the government declined to prosecute the contractor, but charged a DynCorp employee in a single-count information.[2303] The employee subsequently pled guilty to a charge of unauthorized access to a government computer.[2304] No criminal or civil actions against DynCorp resulted from the investigations.[2305]

In 1996, DynCorp submitted a certified claim to the Army seeking reimbursement for costs it incurred in connection with the criminal investigation.[2306] The Army denied the claim, and shortly thereafter DynCorp appealed the decision to the ASBCA.[2307] In 2000, the ASBCA rendered an entitlement decision, holding that DynCorp could recover a portion of its defense costs.[2308] On appeal the CAFC reversed, remanding the case back to the ASBCA for a determination as to whether the proceedings were separate, and if so, whether they involved the same contractor misconduct.[2309]

The CAFC observed that the Defense Procurement Improvement Act of 1985 (1985 Act)[2310] specifically barred the recovery of "costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded *nolo contendere* to a charge of fraud or similar proceeding (including filing of a false certification)."[2311] However, after a lengthy examination of the act, the court found the act's language ambiguous as it related to the word "contractor" and "conviction." In the end, the court concluded the regulation disallowed costs incurred in the unsuccessful defense of criminal proceedings where an employee is convicted, even if the contractor is not.[2312]

[2297] *Reitmeyer*, 356 F.3d at 1318-19.

[2298] *Id*. 1319-20.

[2299] *Id*.

[2300] 349 F.3d 1343 (Fed. Cir. 2003).

[2301] *Id*. at 1345.

[2302] *Id*. at 1345-46.

[2303] *Id*. at 1346. The information alleged that Mr. Marcum input into a government accounting system "estimated hours, which represented the average time among all work centers using [the government accounting system] for performing a particular scheduled service," rather than the actual work hours his employees had expended. *Id.*

[2304] *See* 18 U.S.C. § 1030(a)(3) (LEXIS 2004).

[2305] *DynCorp*, 349 F.3d at 1346.

[2306] *Id*. DynCorp excluded costs from its claim associated with the employee's defense. *Id*.

[2307] *Id*. at 1346-47.

[2308] *See* DynCorp**,** ASBCA No. 49714, 00-2 BCA ¶ 30,986, at 152,930. The board accepted the government's argument that FAR section 31.205-47(b) barred recovery of defense costs for a proceeding in which only the contractor's agent or employee, not the contractor itself, was convicted. However, the board also found that the FAR provision was "inconsistent" with 10 U.S.C. § 2324 and 41 U.S.C. § 256. Accordingly, the ASBCA held the provision was an unenforceable "mere nullity." *Id*.

[2309] *DynCorp*, 349 F.3d at 1356.

[2310] Pub. L. No. 99-145, 99 Stat. 583, 682-704 (1985).

[2311] *DynCorp*, 349 F.3d at 1349 (citing 1985 Act § 911(a), 99 Stat. at 683 (codified at 10 U.S.C. § 2324(e)(1)(C)).

[2312] *Id*. at 1355. *See also* Rumsfeld v. Gen. Dynamics, 365 F.3d 1380 (Fed. Cir. 2004) (ruling that 10 U.S.C. § 2324k does not permit the apportionment of contractor costs associated with a proceeding among various claims where the proceeding is resolved through consent or compromise, and no such costs are allowable except as expressly provided by the settlement agreement).

Revised Air Force Instruction

On 21 October 2003 the Air Force updated Air Force Instruction 51-1101, *The Air Force Procurement Fraud Remedies Program*.[2313] The revision transfers overall responsibility for managing the Air Force Procurement Fraud Remedies Program from the Office of the Deputy Air Force General Counsel for Acquisition (SAF/GCQ) to the Deputy Air Force General Counsel for Contractor Responsibility (SAF/GCR).[2314] The revision also requires the Major Commands, Field Operating Units, and Direct Reporting Units designate at least one attorney as the "permanent" Acquisition Counsel at each location.[2315]

Major James Dorn.

Taxation

Retain Interest on Tax Refunds? Nice try!

The Department of Energy (DOE) reimbursed Fluor Hanford, Inc. (FHI) for allowable costs of work performed under its contract, including Washington State business and occupation (B&O) taxes.[2316] Believing it might be eligible for a refund of B&O taxes previously paid, and with DOE's concurrence, FHI applied for and received a refund, which included interest accrued under state law. FHI then promptly turned the entire amount, including interest, over to the Government.[2317]

Disposition of the principal amount of the B&O taxes was not at issue; it was credited to DOE's appropriations as a refund of an amount that had been previously paid out.[2318] However, the DOE asked the Comptroller General whether the interest may be credited to DOE's appropriations, or whether DOE must deposit it into the general fund of the Treasury as "miscellaneous receipts" pursuant to 31 U.S.C. section 3302(b).[2319]

The DOE argued that it should be allowed to retain the interest component of the state refund because it "merely 'restores the appropriated funds to an amount adjusted for net present value.'"[2320] The Comptroller General, however, was not persuaded, pointing out that Congress does not appropriate funds on a net present value basis, and that, had the DOE not previously reimbursed FHI for the B&O taxes, its appropriation would still only contain the unadjusted amount of the taxes, without interest.[2321] Allowing the DOE to retain the interest, the Comptroller General said, would constitute an illegal augmentation and violate the Miscellaneous Receipts Statute.[2322]

Ring-a-Ding-Ding

Two more Comptroller General decisions examining telephone 911 charges came calling since last year. The first case[2323] addressed the emergency 911 telephone charge assessed by the state of Georgia under the Georgia Emergency Telephone Number "911" Service Act of 1977, as amended.[2324] The Comptroller General found that the Georgia emergency 911 charge is a vendee tax that the state may not assess against the federal government under the U.S. Constitution unless

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[2313] U.S. DEP'T OF AIR FORCE, INSTR. 51-1101, THE AIR FORCE PROCUREMENT FRAUD REMEDIES PROGRAM (21 Oct. 2003).

[2314] *Id*. at 1.

[2315] *Id*.

[2316] Department of Energy—Disposition of Interest Earned on State Tax Refund Obtained by Contractor, B-302366, 2004 U.S. Comp. Gen. LEXIS 163 (July 12, 2004).

[2317] *Id*. at *3-4.

[2318] *Id*. at *2 n.2.

[2319] *Id*. at *2. Specifically, the "Miscellaneous Receipts Statute" provides: "An official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any claim or charge." 31 U.S.C.S. § 3302(b) (LEXIS 2004).

[2320] *Distribution of Interest Earned*, at *13 (quoting Letter from Keith A. Klein, to David M. Walker, Dec. 11, 2003).

[2321] *Id*.

[2322] *Id*. at *15. For additional discussion of the opinion, see *infra* section titled Purpose.

[2323] National Weather Service - Georgia 911 Charge, B-301126, 2003 U.S. Comp. Gen. LEXIS 231 (Oct. 22, 2003).

[2324] *See* GA. CODE ANN. §§ 46-5-120 to 139 (1992 & Supp. 2003).

expressly authorized by Congress.[2325] Furthermore, the Comptroller General found that Georgia law in fact bars application of the 911 charge to federal entities.[2326] Accordingly, the GAO ruled the National Weather Service was not to pay those portions of its telephone bill which assess the 911 charges.[2327]

The second GAO decision[2328] involved a reconsideration of the District of Columbia's 911 emergency telephone surcharge. The GAO had advised in an earlier opinion[2329] that the District's 911 emergency telephone surcharge was a vendee tax from which the federal government is constitutionally immune. Recognizing the enormous loss of revenue from federal agency telephones in the city, the District amended its statute to impose the legal incidence of the tax on the provider of the telephone service, rather than the user, and asked the Comptroller General whether those amendments cured the problems identified in the earlier opinion.[2330] The Comptroller General held the changes did correct the defects, and that, under the amended statute, federal agencies may now pay service provider bills that include itemization of the amended District 911 surcharge.[2331]

To date, the GAO has addressed the 911 telephone charges of twenty states and the District of Columbia. Other than the District of Columbia's surcharge, the GAO has only found Arizona's 911 telephone charge a vendor tax.[2332] Prudent contract attorneys should examine their agency's/installation's phone bills for 911 surcharges and check the underlying state statute. If it appears the charges include an inappropriate vendee tax, contact your agency tax advisor.[2333]

Another Case of Bad Tax Advice

In *AG Engineering, Inc.*,[2334] the contractor sought reimbursement for amounts the state assessed for unpaid sales taxes, which AG Engineering had failed to include in its bid. The ASBCA declined to do so, finding that AG Engineering had been advised during negotiations that it was not exempt from sales tax and that such taxes should be included in its bid.[2335] While AG Engineering claimed an SBA representative had advised it prior to award that the contract was tax exempt, the board found this allegation unsubstantiated. The board noted that the contract incorporated FAR section 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract), which states that "the contract price includes all applicable Federal, State, and local taxes and duties."[2336]

Ms. Margaret Patterson.

[2325] *National Weather Serv.*, 2004 U.S. Comp. Gen. LEXIS 231, at *8-9.

[2326] *Id*. at *8 (referencing GA. CODE ANN. §§ 46-5-134(a)(1) and (a)(2)(C)).

[2327] *Id*. at *1.

[2328] Reconsideration of District of Columbia 9-1-1 Emergency Telephone System Surcharge and Effect of New Amendments, B-302230, 2003 U.S. Comp. Gen. LEXIS 249 (Dec. 30, 2003).

[2329] 911 Emergency Surcharge and Right-of-Way Charge, B-288161, 2002 U.S. Comp. Gen. LEXIS 262 (Apr. 8, 2002).

[2330] *Reconsideration*, 2003 U.S. Comp. Gen. LEXIS 249, at *31.

[2331] *Id*. at *36-37.

[2332] B-238410, 1990 U.S. Comp. Gen. LEXIS 953 (Sept. 7, 1990). In contrast, the GAO has found the following states' 911 telephone surcharges to be vendee taxes, and thus not payable by the Federal Government: Alabama, B-300737 (June 27, 2003); Alaska, B-259029, 1995 U.S. Comp. Gen. LEXIS 371 (May 30, 1995); Colorado, B-247501, 1992 U.S. Comp. Gen. LEXIS 1175 (May 4, 1992); Florida, B-215735.2, 1987 U.S. Comp. Gen. LEXIS 1248 (May 20, 1987); Georgia, B-301126, 2003 U.S. Comp. Gen. LEXIS 231 (Oct. 22, 2003); Indiana, B-248363, 1992 U.S. Comp. Gen. LEXIS 536 (Apr. 17, 1992); Kentucky, B-246517, 1992 U.S. Comp. Gen. LEXIS 575 (Apr. 17, 1992); Maryland, B-215735, 1986 U.S. Comp. Gen. LEXIS 455 (Sept. 26, 1986); Michigan, B-254628, 1994 U.S. Comp. Gen. LEXIS 320 (Apr. 7, 1994); North Carolina, B-254712, 1994 U.S. Comp. Gen. LEXIS 312 (Feb. 14, 1994); Nebraska, B-249007, 1993 U.S. Comp. Gen. LEXIS 111 (Jan. 19, 1993); Pennsylvania, B-253695, 1993 U.S. Comp. Gen. LEXIS 869 (July 28, 1993); Rhode Island, B-239608, 1990 U.S. Comp. Gen. LEXIS 1372 (Dec. 14, 1990); Tennessee, B-230691, 1988 U.S. Comp. Gen. LEXIS 454 (May 12, 1988); Texas, B-215735, 1985 U.S. Comp. Gen. LEXIS 912 (July 1, 1985); Utah, B-283464 (Feb. 28, 2000); Washington, B-248777, 1992 U.S. Comp. Gen. LEXIS 835 (July 6, 1992); Wisconsin, B-248907, 1993 U.S. Comp. Gen. LEXIS 113 (Jan. 19, 1993); Wyoming, B-255092, 1994 U.S. Comp. Gen. LEXIS 313 (Feb. 14, 1994).

[2333] Army personnel confronted with such an issue may contact the author, Ms. Patterson, at (703) 588-6753 or margaret.patterson@hqda.army.mil.

[2334] ASBCA No. 53370, 2003 ASBCA LEXIS 121 (Dec. 10, 2003).

[2335] *Id*. at *9.

[2336] *Id*. at *7.

Auditing

DCAA to Audited Company Personnel: Search for your own Closet Skeletons

In June 2003, the GAO issued the 2003 Revision of the *Government Auditing Standards*, commonly referred to as the "Yellow Book."[2337] The GAO's web site states that the Yellow Book contains audit standards for government organizations and activities as well as non-government activities receiving government assistance. These standards are referred to as generally accepted government auditing standards or GAGAS. The GAGAS pertain to the auditor's professional qualifications, audit quality, and audit characteristics.[2338]

Recently the American Institute of Certified Public Accountants (AICPA) issued its Statement on Auditing Standards (SAS) No. 99 that "established standards, provided guidance, and increased the documentation requirements for auditors in fulfilling . . ." their responsibility in assuring that audited financial statements are free of material misstatement.[2339] Subsequently, the Defense Contract Audit Agency (DCAA) issued audit guidance advising that "SAS 99 is written specifically for the audit of financial statements . . . [and] are not directly applicable to DCAA audits, . . ." which are considered attestations under the Yellow Book.[2340] Although SAS 99 does not specifically cover DCAA audits, the DCAA Contract Audit Manual (DCAAM) was modified to include a requirement, similar to SAS 99 that DCAA auditors at major contractor locations inquire of top company officials on their views of fraud risk.[2341]

Lieutenant Colonel Karl Kuhn.

Nonappropriated Fund Contracting

APF MOA's with NAFI's

Prior to 1996, appropriated fund entities had limited authority to enter into agreements with Nonappropriatied Fund Instrumentalities (NAFI) for goods or services.[2342] In 1996, Congress added section 2482a to title 10 and generally authorized "interrelations between Government organizations that manage appropriated funds and those that manage nonappropriated funds."[2343] More specifically, the statute authorized a DOD agency or instrumentality that supports the operation of a DOD exchange or Morale, Welfare, and Recreation (MWR) system to enter into a contract or other agreement with another DOD element or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the exchange or MWR system.[2344]

This year, the Air Force Office of the General Counsel (AF OGC) issued a memorandum discussing how agencies may use the statute and implementing policies.[2345] The AF OGC stressed the importance of using a memorandum of agreement (MOA) to document the parties understanding in writing.[2346] While the AF OGC stated the authority operates like an Economy Act[2347] transaction, no special determinations and findings are required.[2348] The AF OGC also outlined statutes

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[2337] GEN. ACCT. OFF., REP. NO. GAO-03-673G, *Government Auditing Standards 2003 Revision* (June 2003).

[2338] The Yellow Book is available at http://www.gao.gov/govaud/ybk01.htm.

[2339] *See* Memorandum 04-PAS-003(R), Assistant Director Policy and Plans, Defense Contract Audit Agency, to Regional Directors, DCAA and Director, Field Detachment, DCAA, subject: Audit Guidance Regarding Statement on Auditing Standards (SAS) No. 99, Considerations of Fraud in a Financial Statement Audit (Jan. 8, 2004).

[2340] *Id*.

[2341] U.S. DEP'T OF DEFENSE, DEFENSE CONTRACT AUDIT AGENCY, DCAAM 7640.1, DCAA CONTRACT AUDIT MANUAL para. 5-103 (July 2004).

[2342] The National Defense Authorization Act for FY 1996 created the Uniform Resource Demonstration and authorized the use of nonappropriated fund laws and regulations to spend appropriated funds authorized for Morale, Welfare, and Recreation (MWR) programs. *See* Pub. L. No. 104-106, § 335, 110 Stat. 186, 262 (1996).

[2343] Memorandum, Office of the General Counsel, U.S. Air Force, to AF/ILV, subject: Use of Memoranda of Agreement (MOA) with Nonappropriated Fund Instrumentalities (NAFI) for Goods and Services (25 Mar. 2004) [hereinafter Use of NAFI's MOA Memo]. *See also* 10 U.S.C.S. § 2482a.

[2344] 10 U.S.C.S. § 2482a.

[2345] Use of NAFI's MOA Memo, *supra* note 2343. The memo referred to Air Force policies and *DOD Directive 4105.67* (the memo mistakenly identified the DOD source as *DOD Instruction 4105.67*). The Directive specifically authorizes DOD components to enter into contracts or agreements with NAFIs and indicates the FAR only applies when the DOD component uses a contract; not when using an agreement with the NAFI. U.S. DEP'T OF DEFENSE, DIR. 4105.67, NONAPPROPRIATED FUND (NAF) PROCUREMENT POLICY para. 4.10 (2 May 2001).

[2346] Use of NAFI's MOA Memo, *supra* note 2343.

[2347] 31 U.S.C.S. § 1535.

[2348] Use of MOA with NAFIs Memo, *supra* note 2343.

that do not apply when agencies use the authority.[2349] The memorandum concluded that "the primary legal criterion for use of a NAF MOA is the 'benefit' to efficient management and operation of the Morale Welfare and Recreation system (or exchange system)."[2350] Because the authority is based on statue, other services can rely on the memorandum for guidance.

NAFI Jurisdiction Again

Last year's *Year in Review* reported on the continuing saga of the COFC and the CAFC's lack of jurisdiction over claims involving NAFI funds.[2351] This year in *AINS Inc. v. United States*,[2352] the CAFC held it lacked jurisdiction over a U.S. Mint claim after applying a four part test it established to determine whether a government instrumentality is a NAFI.[2353] In a possible turn of events, however, the ASBCA denied a government motion to dismiss for lack of jurisdiction in a case involving a NAFI claim, holding it is appropriate for the board to render declaratory relief in an appeal by a NAFI.[2354]

Major Bobbi Davis.

Miscellaneous

Transforming the DFARS

"Transformation" is a buzzword frequently heard and discussed within the DOD,[2355] and the DFARS[2356] is no longer exempt. The DOD's DFARS Transformation initiative seeks to "dramatically change the purpose and content of the DFARS."[2357] Under the initiative, the DOD proposes trimming the DFARS to include only "requirements of law, DOD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DOD or a significant cost or administrative impact on contractors or offerors."[2358] While slimming the DFARS, the DOD will create a "DFARS companion resource" called the "Procedures, Guidance, and Information (PGI)," which will provide "mandatory and non-mandatory internal DOD procedures, non-monetary guidance, and supplemental information."[2359] As the PGI will not be published in the Code of Federal Regulations, thus avoiding the sometimes lengthy notice and comment review period, the DOD should be able to "more rapidly convey internal administrative and procedural information to the acquisition workforce."[2360] Under the proposal, the PGI will adopt DFARS numbering but the numerical designation will be preceded by the letters "PGI."[2361] The Defense Acquisition Regulation Council will have oversight and implementation responsibility for the DFARS PGI, which will be available at http://www.acq.osd.mil/dp/dars/dfars.html.[2362]

[2349] Statutes that are inapplicable include: the Small Business Act (15 U.S.C.S. § 631), the Javits-Wagner-O'Day Act (41 U.S.C.S. §§ 46-48c), and the *Office of Management and Budget (OMB) Circular A-76* (2003).

[2350] Use of MOA with NAFI's Memo, *supra* note 2343.

[2351] *2003 Year in Review*, *supra* note 29, at 179.

[2352] 365 F.3d 1333 (Fed. Cir. 2004).

[2353] *Id*.

[2354] ASBCA No. 54503, 04-1 BCA ¶ 32,606. For a more detailed discussion of the jurisdictional issues in these cases, see *supra* section titled Contract Disputes Act Litigation.

[2355] *See, e.g.*, Mahon Apgar & John M. Keene, *New Business with the New Military*, HARV. BUS. REV., Sept. 2004, at 45.

[2356] *See* DFARS, *supra* note 227.

[2357] Defense Federal Acquisition Regulation Supplement; Procedures, Guidance, and Information, 69 Fed. Reg. 8145 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 201 and 202). For additional information on the DFARS Transformation initiative, see http://www.acq.osd.mil/dp/dars/transf.htm.

[2358] 69 Fed. Reg. 8145.

[2359] *Id*.

[2360] *Id*.

[2361] *Id*.

[2362] *Id*. at 8146.

Transformation has also hit the AFFARS. Available on-line, the new AFFARS now has embedded hyperlinks within each section, as well as an information library feature.[2363] The embedded hyperlinks provide the practitioner easy access to source and related documents "such as the FAR, DFARS, AFFARS, statutes, regulations, instructions, forms, etc."[2364] And the "library toolbar" located at the top of each AFFARS part provides five information categories with hyperlinks to corresponding information.[2365]

In a seemingly contradictory effort to "locate all policy, guidance, and procedures in one place while maintaining a streamlined AFFARS,"[2366] the Air Force has also incorporated information from various existing Air Force guides into "Mandatory Procedures (MP)" or "Information Guidance (IG)."[2367] Imbedded as hyperlinks within relevant AFFARS text, the MP "must be followed and carry the same weight as the AFFARS or an [Air Force Instruction]," while the IG simply provide "help" to contracting professionals.[2368]

Major Kevin Huyser.

FISCAL LAW

Purpose

Something Cooking in the Kitchen: Comptroller General Approves Use of Appropriated Funds for Kitchen Appliances

Those following GAO appropriations decisions may be aware that until very recently, the GAO generally viewed workplace food storage and preparation equipment as a "personal expense." Specifically, under the "necessary expense"[2369] analysis, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment only when the purchase was "reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees."[2370] This situation generally arose only when no commercial eating facilities were available in the location,[2371] or when employees worked extended hours and restaurants were not open during much of this time.[2372]

On 25 June 2004, the GAO revisited this issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment reasonably related to the efficient performance of agency activities. Thus appropriated funds could be spent for these items.[2373]

The decision responded to a request from U.S. Pacific Command (USPACOM) concerning the use of appropriated funds to purchase refrigerators, microwave ovens, and commercial coffee makers for central kitchen areas in its new command building.[2374] The new facility had twenty "interdivision kitchen areas" complete with sinks, cupboards, and storage cabinets. In the interests of fire safety, USPACOM directed that building personnel could not have personal coffee makers in their workspaces. Accordingly, USPACOM installed commercial grade coffee makers into the existing plumbing

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2363 AFFARS Transformation—New Features (Feb. 2004), *at* http://farsite.hill.af.mil/vfaffara.htm.

2364 *Id*.

2365 *Id*. The categories include: laws/regulations/policies; informational guidance; training; community advice; and suggestion box. *Id*.

2366 Air Force Acquisition Circular (AFAC) 2004-0205 (5 Feb. 2004), *available at* http://farsite.hill.af.mil/vfaffara.htm.

2367 *Id*.

2368 AFFARS Transformation, *supra* note 2363.

2369 Under the necessary expense rule, an expenditure is permissible only if it is "reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function . . . ." Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987).

2370 Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230, at 1 (June 26, 1997).

2371 *Id*. at 2 (determining that commercial facilities were not proximately available when the nearest eating establishment was a 15-minute commute from the federal workplace).

2372 *See* Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked twenty-four hours a day, seven days a week and restaurants were not open during much of this time).

2373 Use of Appropriated Funds to Purchase Kitchen Appliances, Comp. Gen. B-302993, June 25, 2004.

2374 *Id*. at 1.

in the kitchen areas at a cost of $12,210.95.[2375]

Supporting its decision, the GAO observed that these items reasonably related to workplace safety in that, as a result of fire safety measures, employees were not allowed to have coffee makers in their workspace areas.[2376] However, the opinion went beyond the issue of safety. The GAO noted that providing such equipment resulted in benefits for the agency, "including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment."[2377] Further, the GAO observed that purchasing such equipment "is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies."[2378]

Samplings Do Not a Full Buffet Make

Moving on from food preparation and storage equipment to food itself, the GAO recently determined that appropriated funds were not available to pay for "samplings" of food provided in support of an ethnic observance when the samplings amounted to a full buffet lunch.[2379]

The Army COE requested the GAO provide a decision regarding the purchase of food for a Black History Month program.[2380] The program's flyer characterized the food as a "sampling." Nevertheless, the program was scheduled from 11:30 a.m. to 1:30 p.m., and the food provided included, among other offerings, smothered chicken, fried fish, pan-chopped barbeque, cabbage, string beans, corn bread and rolls, potato salad, peach cobbler, and pecan pie. The total cost for the food came to $399.12. Needless to say, the COE's certifying officer denied the request for reimbursement.[2381]

In its decision, the GAO first cited the time-honored rule that appropriated funds are not available to purchase food for government employees.[2382] Turning to an established exception, the GAO observed that agencies may use appropriated funds to pay for samples of ethnic food "prepared and served as an integral part of a celebration intended to promote EEO objectives by increasing employee appreciation for the cultural heritage of ethnic groups."[2383] However, in this case, the COE's program went beyond a "sampling" and constituted a full meal. Specifically, the GAO observed the food was consumed during lunch time and was provided in an amount more consistent with a "meal" than a "sampling."[2384] Because appropriated funds are generally not available to purchase food for government employees, by offering more than a sampling of food, the COE moved beyond the exception and into the general prohibition. Thus the COE could not fund costs associated with the program with appropriated funds.[2385]

The GAO's decision does not offer much meat (pun intended) as to where to draw the line between a "sampling" and a "meal." However, the GAO cited several factors, to include: (1) when the food was offered (i.e., during lunch time); (2) the amount of food offered; and (3) whether the food offered "represented all of the various courses that would constitute a full meal, ranging from breads and vegetables to meats and deserts."[2386] Additionally, the GAO noted the CEO did not have a standard operating procedure for cultural awareness programs, and lacked evidence that the COE's EEO Director made a written determination that "the program will advance EEO objectives and make the audience aware of the cultural or ethnic history being celebrated."[2387]

[2375] *Id*. at 2.

[2376] *Id*. at 5.

[2377] *Id*.

[2378] *Id*.

[2379] U.S. Army Corps of Engineers, North Atlantic Division—Food for a Cultural Awareness Program, B-301184, 2004 U.S. Comp. Gen. LEXIS 202 (Jan. 15, 2004).

[2380] *Id*. at *1.

[2381] *Id*. at *2.

[2382] *Id*. at *3.

[2383] *Id*. at *4.

[2384] *Id*. at *13-14.

[2385] *Id*. at *15.

[2386] *Id*. at *14.

[2387] *Id*. at *10.

The GAO's opinion obviously does not impact food provided by program participants in their personal capacity, which is how many agencies conduct their Special Emphasis programs.

Scope of Professional Credentials Statute: Does This Have Anything to do With Your Job?

As with food, the GAO has traditionally looked at professional credentialing as personal expenses under the "necessary expense" rule. The GAO reasoned that employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered personal expenses rather than "necessary expenses" of the government.[2388] The one exception to this rule was when the license was primarily for the benefit of the government and not to qualify the employee for his position.[2389]

Section 1112 of the National Defense Authorization Act for FY 2002[2390] changed the rule for civilian competitive service employees by permitting government agencies to reimburse civilian employees for costs associated with professional accreditation, state-imposed professional licenses, professional certification, and the costs of any examinations required to obtain such credentials.[2391]

Recently, the Department of Agriculture Risk Management Agency asked the GAO to examine the scope of this recent statutory change.[2392] Specifically, a Risk Management Agency employee asked the agency to pay for her Certified Public Accountant (CPA) license, as well as membership in the California Society of Certified Public Accountants (CalCPA). Although the employee's position required her to be a licensed CPA, membership in the CalCPA was not a condition of employment. Accordingly, the Risk Management Agency certifying officer determined that the agency had the authority to pay for the CPA license, but was uncertain as to whether the statute applied to the CalCPA membership fee.[2393]

Turning to the statute's plain wording, the GAO observed that "credential" as well as "certification" suggest that "these terms would include only those items that are official documentation of professional authority . . . ."[2394] Thus, the GAO concluded the plain meaning of the statute "suggests that professional credentials would include only those items that are required for an individual to be licensed or otherwise certified to practice a particular profession."[2395] Thus, the statute permits an agency to pay for certain costs associated with licensing, but not for memberships in professional associations where membership is not a prerequisite for the employee to obtain qualification.[2396]

What Do You Mean I'm Not Getting Paid?

A recent GAO decision demonstrates the extent to which Congress's "power of the purse" can be both harsh and pervasive. In *Department of Health and Human Services—Chief Actuary's Communications with Congress*[2397] the GAO determined that appropriated funds were not available to pay the salary of a federal official who prohibited a subordinate from releasing information requested by Congress.[2398]

[2388] *See* A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (determining that an employee's fee for admission to Court of Appeals not payable).

[2389] National Security Agency—Request for Advance Decision, Comp. Gen. B-257895, (Oct. 28, 1994) (unpub.) (finding payable fees for drivers' licenses for scientists and engineers to perform security testing at remote sites).

[2390] Pub. L. No. 107-107, 115 Stat. 1654 (2001) (codified at 5 U.S.C.S. § 5757 (LEXIS 2004)).

[2391] *Id*. This provision applies to civilian competitive service employees only. It does not affect uniformed military personnel, for whom professional credentialing remains a "personal expense."

[2392] Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen LEXIS 176 (Aug. 20, 2004).

[2393] *Id*. at *2.

[2394] *Id*. at *7.

[2395] *Id*. at *8-9.

[2396] *Id*. at *13-14. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to Major Command (MACOM) Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. *See* http://www.asmccertification.com/documents/Army-Reimbursement-Policy-20030620.pdf (last visited 12 Nov. 2004). *See also* http://www.hq.usace.army.mil/cehr/d/traindevelop/USACE-credentials-policy-aug03.pdf (providing Army Corps of Engineers implementing guidance) (last visited 11 Nov. 2004).

[2397] B-302911, 2004 U.S. Comp. Gen. LEXIS 2004 (Sept. 7, 2004).

[2398] *Id*. at *1.

Pursuant to a provision contained in the Consolidated Appropriations Acts for FY 2003 and FY 2004, appropriated funds may not be used to pay the salary of a federal official who prohibits another federal employee from communicating with Congress.[2399] In the present case, several members of Congress requested that Richard Foster, the Chief Actuary for the Centers for Medicare & Medicaid Services (CMS), provide cost estimates for various Medicare bills then under debate. According to a U.S. Department of Health and Human Services (HHS) Inspector General report, Thomas Scully, the former CMS Administrator, told Foster there would be "adverse consequences" if Foster released the information to Congress.[2400]

The question before the GAO was whether the acts prohibited the CMS from using appropriated funds to pay the salary of Mr. Scully. Upon examination, the GAO noted this case would raise Constitutional concerns if applying the provisions involved privileged information or directed the agency as to how it should communicate its official positions to Congress.[2401] However, in this case Congress simply asked Foster for cost estimates and other technical assistance. Thus, to the GAO, the Constitution did not prohibit the application of the provisions in this instant. Turning to the acts, the GAO concluded that Scully's actions clearly fell within the prohibitions specified in the provisions. Thus the appropriated funds, which were otherwise available to pay Scully's salary, were now unavailable for this purpose.[2402]

Publicity, Propaganda or Information: You Decide

Several decisions arose this year involving the elusive line of demarcation between permissible information activities and impermissible publicity and propaganda programs. In a decision involving the HHS,[2403] several senators and representatives[2404] requested the GAO determine the legality of the HHS's use of appropriated funds to produce and distribute a flyer, as well as print and television advertisements, concerning the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).[2405] Specifically, the GAO was asked by the Senators and Representatives whether the HHS's use of appropriated funds constituted a violation of the "publicity or propaganda" prohibitions in the Consolidated Appropriations Acts for FY 2003 and FY 2004.[2406]

On examining the material in question, the GAO concluded the HHS materials had "notable omissions and other weaknesses."[2407] However, the GAO concluded the HHS's use of appropriated funds to produce and disseminate the materials did not violate the publicity or propaganda prohibitions in the appropriations acts.[2408] Specifically, the GAO noted that HHS had explicit authority to inform Medicare beneficiaries about changes to Medicare resulting from the MMA. Thus, the GAO concluded the HHS should be afforded considerable deference, despite apparent problems with the material.[2409]

[2399] Pub. L. No. 108-7, div. J, tit. V, 620, 117 Stat. 11, 468 (2003); Pub. L. No. 108-199, div. F, tit. VI, 618, 188 Stat. 3, 354 (2004). The provisions are identical in both acts, and read:

> No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.

Pub. L. No. 108-199, div. F, tit. VI, 618, 188 Stat. 3, 354 (2004); Pub. L. No. 108-7, div. J, tit. V, 620, 117 Stat. 11, 468 (2003).

[2400] Department of Health and Human Services—Chief Actuary's Communications with Congress, 2004 U.S. Comp. Gen. LEXIS 183, at *4-5.

[2401] *Id*. at *27-28.

[2402] *Id*. at *31.

[2403] Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504 (Mar.10, 2004).

[2404] *Id*. at *1. The requesters included: Senators Lautenberg, Kennedy, Kerry, and Corzine, as well as Representatives Schakowsky, Pallone, Stark, Rangel, and Davis. *Id*.

[2405] Pub. L. No. 108-173, 117 Stat. 2066 (2003).

[2406] Pub. L. No. 108-7, div. J, tit. VI, § 626, 117 Stat. 11, 470 (2003); Pub. L. No. 108-199, div. F, tit. VI, § 624, 118 Stat. 3 (2004) (stating that "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.").

[2407] Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504, 2004 U.S. Comp. Gen. LEXIS 57, at *4-5 (Mar. 10, 2004) (noting, for example, that though the material failed to inform participants they may be charged an annual fee to participate in the program, and that savings from the discount cards could vary across covered drugs, the materials were not so partisan as to be unlawful in light of prior decisions and opinions).

[2408] *Id*.

[2409] *Id*. In its decision, the GAO noted it did not examine or express a view on the overall economy, efficiency, or effectiveness of the print and television advertisements. The GAO did question, however, "the prudence and appropriateness" of HHS's decision to communicate with Members of Congress and

Two months later, the GAO took a considerably less deferential look at the HHS's informational practices.[2410] This time members of Congress asked the GAO to examine video news releases (VNRs) prepared by the CMS, an agency of HHS. The VNRs consisted of prepackaged news reports and anchor scripts containing, among other scenes, footage of President Bush with members of Congress signing the MMA into law, and clips showing seniors engaged in various leisure and health-related activities.[2411] The VNRs did not include statements noting that it had been prepared by CMS. Rather, they appeared tailored for use by television stations and other media as plug-in footage for their MMA coverage.[2412]

For the GAO, the VNRs amounted to impermissible publicity and propaganda. The GAO observed that "[w]hile Congress authorized HHS to conduct a wide-range of informational activities, CMS was given no authority to produce and disseminate unattributed news stories."[2413] The GAO reasoned "the publicity or propaganda restriction helps to mark the boundary between an agency making information available to the public and agencies creating news reports unbeknownst to the receiving audience."[2414] In this case, the VNRs appeared to be independent news storys when they clearly was not. Therefore, the GAO concluded the HHS misused appropriated funds, violating the publicity or propaganda prohibition, and the Antideficiency Act.[2415]

In another decision, the GAO found no legal objection with the Forest Service using appropriated funds to produce a brochure and film promoting the government's tree thinning policy on federal lands.[2416] As with the first HHS opinion, the GAO noted the Forest Service's material did not provide a balanced picture of the positive and negative aspects of the agency's policies.[2417] Nevertheless, the GAO observed the Forest Service clearly articulated its rationale, which was to "better inform the public about the very complicated issue of fire management and protection from catastrophic wildfire."[2418] Given that the material was not self-aggrandizing, did not constitute covert propaganda, and was not clearly partisan in nature, "the Forest Service was authorized to disseminate such materials under its information dissemination authority and in defense of its policies."[2419]

Finally, examining a somewhat low-tech information campaign, the GAO determined the Air Force could use appropriated funds to paint decals of units assigned at Grissom Air Force Base on a water tower located just outside the base.[2420] In its request for an advance decision, the Air Force noted that as a result of a base realignment, many local community residents were unaware the base was still open. To increase the base's "footprint," the base commander wished to paint unit decals on a near by water-tower, owned by a local utility company. The commander noted the project would contribute to recruiting and "inform the public that there is a military presence in Indiana."[2421] Upon examination, the GAO found no legal objection to the proposed expenditure. Specifically, the GAO noted that agencies may use appropriated funds to convey information to the public about their authorized activities.[2422]

Phones, Coins, ORFs, and Other Recent Fiscal Changes

Moving from miscellaneous receipts to miscellaneous topics, several recent developments warrant brief mention.

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congressional staff by placing an advertisement in the *Roll Call*, a newspaper directed primarily at Members of Congress and congressional staffers. To the GAO, "there are any number of more effective vehicles to communicate with Members of Congress, and at less cost, than advertising in a newspaper." *Id*.

[2410] Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004).

[2411] *Id*. at *11-12.

[2412] *Id*. at *18-19.

[2413] *Id*. at *29-30.

[2414] *Id*.

[2415] *Id*. at *34 (referencing 31 U.S.C.S. § 1341(a) (LEXIS 2004)).

[2416] Forest Service—Sierra Nevada Forest Plan Amendment Brochure and Video Materials, B-302992, 2004 U.S. Comp. Gen. LEXIS 188 (Sept. 10, 2004).

[2417] *Id*. at *31-32.

[2418] *Id*. at *22-23.

[2419] *Id*. at *18-20.

[2420] Department of the Air Force—Purchase of Decals for Installation on Public Utility Water Tower, B-301367, 2003 U.S. Comp. Gen. LEXIS 230 (Oct. 23, 2003).

[2421] *Id*. at *2.

[2422] *Id*. at *6.

First, regarding government cellular telephones, on 13 May 2004, the Air Force issued Interim Change (IC) 2004-1 to Air Force Instruction (AFI) 33-111, *Telephone Systems Management*.[2423] Pursuant to paragraph 25.5 of the IC, the same rules that govern the use of other communications equipment apply to the use of Air Force cell phones. Thus short, infrequent personal calls on Air Force cellular telephones are authorized to the extent they would be authorized from a desk-top phone. Alternatively, the IC does not authorize excessive personal calls, or calls that would violate Air Force communications policy (i.e., obscene/harassing calls, calls for commercial gain, or calls that generate additional fees).[2424]

Not to be outdone, on 1 June 2004 the Army updated its policy concerning the personal use of cellular phones.[2425] Pursuant to paragraph 6-4.w.(1) of Army Regulation 25-1, "official use of [cellular phones] will be limited to requirements that cannot be satisfied by other available telecommunication methods" (i.e., "wired" telephones).[2426] However, "authorized personal use of cellular phones is subject to the same restrictions and prohibitions that apply to other communication systems."[2427] Translation: personal cellular phone use on government cellular phones is now subject to the same rules as regular phones.

Moving from phones to coins, on 11 February 2004, the Army Chief of Staff issued a policy memorandum establishing policies for the procurement and presentation of coins by the Headquarters, Department of the Army (HQDA), its field operating agencies, and Joint Department of Defense agencies administratively supported by the HQDA.[2428] The memorandum establishes, *inter alia*, that "[o]nly principle officials holding the rank of brigadier general . . . or Senior Executive Service (SES) civilians . . . , the Sergeant Major of the Army, and commanders or directors of field operating agencies . . ." may purchase coins with appropriated funds.[2429] Coin procurement authority, however, may be delegated no lower than the GS-15 or O-6 level.[2430] It also establishes that the Administrative Assistant to the Secretary of the Army must approve any coin acquisitions in excess of $5,000 in any one fiscal year. Finally, the memorandum clarifies who may receive coins, and explicitly notes that contractor personnel shall not receive coins purchased with appropriated funds.[2431]

On 12 March 2004, the Army updated its representation fund regulation.[2432] The change resulted, in part, from recent changes to the DOD directive covering official representation funds (ORFs).[2433] The new regulation transfers proponency for the regulation from the General Counsel of the Army to the Administrative Assistant to the Secretary of the Army,[2434] increases the level of expenditure for any one event to $20,000 per event,[2435] and changes the dollar amount authorized for gifts to $285 per gift.[2436] The regulation also prohibits the use of representational funds to purchase gifts or mementos for DOD personnel.[2437]

Finally, on 10 August 2004, the Army updated its motor vehicle regulation.[2438] Among the changes is a new policy regarding the procurement and use of sport utility vehicles (SUVs). In sum, the regulation states that SUVs will not be acquired or purchased to enhance the comfort or prestige of the individual, and Army activities will use the smallest, most

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[2423] U.S. DEP'T. OF AIR FORCE, INT. CHANGE 2004-1, INSTR. 33-111, TELEPHONE SYSTEMS MANAGEMENT (13 May 2004).

[2424] *Id.* at 18.

[2425] U.S. DEP'T OF ARMY, REG. 25-1, ARMY KNOWLEDGE MANAGEMENT AND INFORMATION TECHNOLOGY MANAGEMENT (1 June 2004).

[2426] *Id*. at 44.

[2427] *Id*.

[2428] Memorandum, Headquarters, Department of the Army, to Headquarters Department of the Army and its Field Operating Agencies, subject: Procurement and Presentation of Coins by Headquarters Department of the Army Principle Officials (11 Feb. 2004).

[2429] *Id*. at 2.

[2430] *Id*.

[2431] *Id*.

[2432] U.S. DEP'T OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY (12 Mar. 2004) [hereinafter AR 37-47].

[2433] U.S. DEP'T OF DEF., DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (17 Feb. 2004) [hereinafter DOD DIR. 7250.13].

[2434] AR 37-47, *supra* note 2432, at 1.

[2435] *Id*. at 4.

[2436] *Id*.

[2437] *Id*. at 6; *but cf*. DOD DIR. 7250.13, *supra* note 2433, at 12 (permitting the use of representational funds up to $40 to purchase gifts or mementos for specified DOD personnel).

[2438] U.S. DEP'T. OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES (10 Aug. 2004).

fuel efficient vehicle capable of meeting the agency needs.[2439]

Major James Dorn.

A Purpose Extra—Building Strong and Ready Families

Last year's *Year in Review* reported on a new authority to use appropriated funds for a chaplain-led military support program.[2440] The program, Building Strong and Ready Families (BSRF), authorizes appropriated funds for the "costs of transportation, food, lodging, child care, supplies, fees, and training materials for members of the armed forces and their family members while participating in" the program.[2441] This year, the Office of the Chief of Chaplains, issued a training Memorandum of Instruction (MOI) outlining the responsibilities and policies for the BSRF. Building Strong and Ready Families is a commander's training program, led by brigade chaplains to support family readiness.[2442] The MOI provides for up to thirty couples per iteration of the program.[2443] Coordinating instructions and a format for funding requests are also outlined in the MOI.[2444]

Major Bobbi Davis.

Time

A Bona Fide Stitch in Time Saves $500,000 for the Library of Congress.

On 17 May 2004, the Comptroller General released an opinion concerning a 30 September transfer of FY 2003 funds from the Library of Congress (Library) to the Office of the Architect of the Capitol (Architect).[2445] The Comptroller General held that because the Library had a bona fide need in September 2003 when it entered into an interagency agreement with the Architect, FY 2003 funds were available in future years to cover costs in accordance with the terms of the interagency agreement.[2446]

Under the statutory division of labor under 2 U.S.C. section 141 (c), the Architect is responsible for the architectural, structural, and mechanical work of the Library building and grounds, while the Library has responsibility over furnishing, equipping, and maintaining the interior of the buildings.[2447] The statutory authority also grants the Library and the Architect authority to enter into agreements with each other and transfer funds between them with the approval of the House and Senate Appropriations Committees and the Joint Committee on the Library.[2448]

On 30 July 2003, the Library requested approval from the appropriate committees to transfer $500,000 to redesign and renovate a loading dock at the Library's Madison Building. After receiving approval, the Library entered into an interagency agreement on 26 September 2003. The Library transferred the funds electronically on 29 September 2003 and obligated them on 30 September 2003.[2449] The project was estimated to start in May 2004.[2450]

[2439] *Id*. at 6.

[2440] *2003 Year in Review*, *supra* note 29, at 211.

[2441] 10 U.S.C. § 1789 (LEXIS 2004). The statute defines immediate family member as "the member's spouse and any child (as defined in 10 U.S.C. § 1072(6)) of the member who is described in subparagraph (D) of 10 U.S.C. § 1072(2). *See* 10 U.S.C. §§ 1072 (6) and 1072(2) (LEXIS 2004).

[2442] Memorandum, Office of the Chief of Chaplains, U.S. Army, to Commanders, subject: FY 2004-05 Building Strong and Ready Families Training MOI (17 Feb. 2004). Brigade Chaplains serve as the lead action officer in cooperation with the Community Health Nurse and Army Family Team building for education, risk assessment, counseling, and to target intervention strategies. The fund is centrally managed by the Office of the Chief of Chaplains. *Id*.

[2443] The program encompasses three phases and four components. The components are: (1) the marriage education and skill building sessions using the Prevention and Relationship Enhancement Program, (2) Standardized Health Promotion and Disease prevention sessions for Phase I and Phase II, (3) Army Family Team Building Level One, and (4) surveys for couples for Phase I and Phase III. *Id*.

[2444] *Id*.

[2445] Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capital, B-302760, 2004 U.S. Comp. Gen. LEXIS 105 (May 17, 2004).

[2446] *Id*. at *2.

[2447] *Id*. at *4.

[2448] *Id*. at *6.

[2449] *Id*. at *9.

[2450] *Id*. at *10.

The Comptroller General first noted that questions arise whenever funds are transferred from a one-year appropriation, in this case, the Library's "Salaries and Expenses," to one that is available for more than one year, such as the Architect's "Library Building and Grounds" fund, which includes one-year, three-year, and no-year funds.[2451] The Comptroller then stated that although the relevant statute granted transfer authority and defined the purposes for which it could be used, it did not alter the general time constraints imposed by fiscal law. Therefore, the transfer would only be lawful if the incurred obligation was a FY 2003 bona fide need of the Library.[2452]

The Comptroller General's analysis focused on the nature of the interagency transaction in question. Because this type of transaction allowed the Library to advance the funds to the Architect for a nonseverable task, the renovation of the loading dock, the obligated funds could be used in future years as long as they were limited to cover the work ordered in the agreement.[2453] The Comptroller General was careful to distinguish this specific interagency transaction authority from a general Economy Act transaction, under which an agency is required to deobligate funds to the extent the performing agency has not performed.[2454]

The Comptroller General concluded that because the Library first identified the need to renovate the dock as early as 1996, hired a design firm in February 2002, and formally requested transfer authority in July 2003, the Library had a bona fide need from 1996 that extended into subsequent fiscal years. The Comptroller General cited the rule that, from a bona fide need perspective, so long as the agency has identified a prior legitimate need that continues to exist, the appropriation current at the time the agency acts upon that need is available for the agency to use to satisfy that need, even though here the Library would not benefit from the renovation until after the fiscal year during which it obligated the funds.[2455]

Final Rule on Multiyear Contracting Authority

The DOD adopted as final, without change, an interim rule amending DFARS subpart 217.1 to implement Section 820 of the National Defense Authorization Act for FY 2003.[2456] Section 820 restricts the use of multiyear contracts for supplies to only those for complete and usable end items, and restricts the use of advanced procurement to only those long-lead items necessary to meet a planned delivery schedule for complete major end items.[2457] This additional restriction continues a trend of increased Congressional scrutiny in this area of contracting.

DOD IG Report on Closed Appropriations

On 15 September 2003, the DOD IG issued a report reviewing the Defense Finance Accounting Service's (DFAS) control over closed appropriations.[2458] The IG found that DFAS did not have effective control over the adjustments of closed appropriations.[2459] The IG reviewed thirty-seven adjustments and found that twenty-one were unsupported.[2460] Recommendations included implementing standard operating procedures and restricting approval of adjustments to senior managers at central accounting sites.[2461]

Major Andrew Kantner.

[2451] *Id*. at *11.

[2452] *Id*. at *13 (discussing 2 U.S.C. § 141 (c)).

[2453] *Id*. at *17.

[2454] *Id*. at *18.

[2455] *Id*. at *21.

[2456] Defense Federal Acquisition Regulation Supplement; Multiyear Contracting Authority Revisions, 69 Fed. Reg. 13,478 (Mar. 23, 2004) (to be codified at 48 C.F.R. pt. 217).

[2457] Pub. L. No. 107-314, 116 Stat. 2458 (2003).

[2458] OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE, D-2003-133, CONTROLS OVER DOD CLOSED APPROPRIATIONS (15 Sept. 2003).

[2459] *Id*.

[2460] *Id*. at 9.

[2461] *Id*. at 15-16.

Antideficiency Act

Upon Further Review . . . .

Last year's *Year in Review*[2462] discussed *E.I. DuPont De Nemours v. United States*,[2463] in which the COFC held that "regardless of how shocking or disappointing the outcome,"[2464] the broad indemnification and reimbursement provisions in a 1940 contract between the Army and E.I. DuPont De Nemours (DuPont) were unenforceable because they violated the Antideficiency Act (ADA).[2465] On appeal, the CAFC agreed with the lower court that the government had agreed contractually to indemnify DuPont for the costs at issue, however, ruled the COFC erred in concluding the ADA barred recovery.[2466]

As a quick recap of the facts, on 28 November 1940, DuPont entered into a contract to build and operate a chemical production facility in Morgantown, West Virginia.[2467] Under the terms of the cost-plus-fixed-fee (CPFF) contract, the government included broadly worded indemnification and reimbursement clauses.[2468] When World War II concluded, the government terminated for convenience the contract and entered a "Termination Supplement" agreement, which included an "Unknown Claims Clause" and "Preservation of Indemnity Clause."[2469] In the 1980s, the Environmental Protection Agency, pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[2470] notified DuPont that it was considering listing the ordnance facility on its priorities list for environmental clean-up.[2471] Eventually, DuPont paid approximately $1.3 million in attorney and consultant fees for a remedial investigation and feasibility study of the environmental issues related to the site.[2472] DuPont filed a claim pursuant to the CDA and later filed suit contending that under the contract's indemnification and reimbursement clauses, the government was ultimately responsible for the CERLCA costs DuPont incurred.[2473] The COFC ruled that though the Termination Supplement included the Unknown Claims Clause and Preservation of Indemnity Clause and that the indemnification clause in the original contract was "drafted broadly enough to be properly interpreted to place the risk of unknown liabilities on the government, including liability for costs incurred pursuant to CERCLA," the ADA barred recovery. [2474]

On appeal, the CAFC did not question the lower court's conclusion that express open-ended indemnification provisions violate the ADA's prohibition against contracting in excess or in advance of an available appropriation.[2475] The appellate court focused instead on the ADA's exception to the general prohibition, which states "unless such contract or obligation is authorized by law."[2476] Here, DuPont argued the Contract Settlement Act of 1944 (CSA)[2477] "exempt[ed] the Preservation of Indemnity Clause (and, therefore, the Indemnification Clause) from the reach of the ADA."[2478]

A prime objective of the CSA, observed the court, was to "assur[e] prime contractors and subcontractors, small and

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[2462] *2003 Year in Review*, *supr*a note 29, at 186.

[2463] 54 Fed. Cl. 361 (2002).

[2464] *Id*. at 372.

[2465] *Id*. *See* 31 U.S.C.S. §§ 1341(a), 1512(1), and 1523(b) (LEXIS 2004).

[2466] E.I. DuPont De Nemours v. United States, 365 F.3d 1367 (2004).

[2467] *Id*. at 1369.

[2468] *Id*. at 1369-70.

[2469] *Id*. at 1370-71.

[2470] *See* 42 U.S.C.S. §§ 9601-75.

[2471] *Du Pont*, 365 F.3d at 1371.

[2472] *Id*.

[2473] *Id*.

[2474] *Id*. (quoting E.I. Du Pont De Nemours v. United States, 54 Fed. Cl. 361, 365, 367).

[2475] *Id*. at 1374.

[2476] *Id*. The ADA language in effect at the time the parties entered into the indemnification agreement provided in relevant part:

> No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.

31 U.S.C. § 665 (1940).

[2477] 41 U.S.C. § 101-25 (2000).

[2478] *Du Pont*, 365 F.3d at 1374.

large, speedy and equitable final settlement of claims under terminated war contracts."[2479] Moreover, the CSA specifically provided: "Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this chapter . . . to indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement."[2480]

While agreeing the CSA exempted certain contract actions from the ADA's general prohibition, the government argued the CSA did not exempt the Termination Supplement's Preservation of Indemnity Clause.[2481] Noting that the CSA's indemnification authority was limited to "termination claims," the government contended the provision covered only compensation for work performed under a terminated contract, citing as examples "claims by direct employees or vendors."[2482] As such, the government contended, the CSA's indemnification authority "does not extend to an indemnification commitment broad enough to encompass DuPont's CERCLA liability."[2483]

Although acknowledging the CSA's language "is not a model of clarity,"[2484] the court noted the Act authorizes indemnification "against . . . any claims by any person in connection with such termination claims or settlements."[2485] The court attached particular significance to the phrase "or settlement," arguing that "by distinguishing between 'termination claims,' on the one hand, and a 'settlement,' on the other, the language of the statute makes clear that Congress intended to provide contracting agencies the flexibility to negotiate concerning two classes of third-party claims. . . ."[2486] The court further explained:

> To the extent a contractor came into termination negotiations having already had one or more third-party claims asserted against it, the contracting agency had the authority to "agree to assume" those existing "termination claims." The language of [the CSA] indicates that Congress was cognizant, however, that contractors undergoing termination would also be concerned about potential future (i.e., unknown, unasserted) third-party claims they might face. Accordingly, Congress gave contracting agencies the power to resolve, as between the government and the contractor, those unknown, unasserted third-party claims as well, by agreeing to "indemnify the war contractor . . . against any claims by any person in connection with such . . . settlement."[2487]

In addition to the statutory authority found in the CSA, the CAFC noted that the War Department issued contemporaneous regulatory guidance interpreting the statute to give such indemnification authority.[2488]

Notably, the CAFC did not alter the long-standing rule among courts and the GAO that the ADA generally prohibits open-ended indemnification clauses.[2489] Here, the CAFC found the CSA satisfied the ADA's "unless otherwise authorized by law" exception and authorized the government to include the Preservation of Indemnity Clause in the Termination Supplement, and that clause ratified and preserved the broad and indefinitely enduring indemnity the government granted in the original 1940 contract with DuPont.[2490]

In a separate but similar case involving a reimbursement claim for CERCLA costs arising out of a World War II-era contract, which included an indemnification provision, the CAFC again overturned the lower court and found in the contractor's favor.[2491] Previously the COFC had dismissed the complaint because the plaintiff failed to first exhaust the

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[2479] *Id*. at 1375 (quoting 41 U.S.C. § 101).

[2480] *Id*. (quoting 41 U.S.C. § 120(a)).

[2481] *Id*. at 1375.

[2482] *Id*. at 1377.

[2483] *Id*.

[2484] *Id*. at 1377 n.16.

[2485] *Id*. (quoting 41 U.S.C. § 120(a)(3)).

[2486] *Id*.

[2487] *Id*. at 1377-78.

[2488] *Id*. at 1378.

[2489] *See* Hercules, Inc. v. United States, 516 U.S. 417 (1996), Union Pacific R.R. Corp. v. United States, 52 Fed. Cl. 730 (2002), Jarvis v. United States, 45 Fed. Cl. 19 (1999), United States Park Police Indemnification Agreement, 1991 Comp. Gen. 1070 (1991), Assumption by Government of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361, 83-1 CPD ¶ 501.

[2490] *Du Pont*, 365 F.3d at 1380.

[2491] Ford Motor Co. v. United States, 378 F.3d 1314 (2004).

contract's Disputes Clause procedures prior to bringing suit.[2492] The court further stated that even if the plaintiff had properly initiated its suit under the CSA, the contract's reimbursement provisions for "unknown claims" were not intended to be unlimited.[2493] Based on the CSA's provisions, the COFC found the contract's "unknown" claims clause covered only claims "where liability accrued during the contract performance period and costs [were] in temporal proximity to contract termination . . . ."[2494] Because the CERLCA did not exist until a number of years later, the liability and costs associated with its application "lack[ed] the temporal proximity to contract performance required for recovery as a Contract Settlement Act of 1944 claim . . . ."[2495] In a footnote, the COFC further reasoned that even if it were to interpret the contract's "unknown claims" clause to mean unlimited liability, doing so "would raise serious issues as to its viability in view of the Anti-Deficiency Act . . . ."[2496]

On appeal, the CAFC, relying upon its earlier *DuPont* decision, overturned the lower court and ruled Ford's termination agreement preserved the original contract's indemnification clause, which was sufficiently broad to cover the CERCLA claim at issue.[2497] Though the government did not "press the Anti-Deficiency Act" argument, the CAFC noted that *DuPont* resolved the issue, holding "the Anti-Deficiency Act does not bar recovery under the CSA of environmental cleanup costs arising from performance during World War II."[2498]

Judge Schall wrote an interesting dissent. Although agreeing the CSA applied to the claim and that Ford timely filed the claim, Judge Schall did not agree with the majority's interpretation of Ford's World War II contract.[2499] Judge Schall distinguished *DuPont* by contrasting the indemnification provisions in the two separate war contracts. In *DuPont*, the indemnification provision covered claims against "any loss, expense (including expense of litigation), or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever . . . ."[2500] In *Ford*, by contrast, the indemnification clause only applied to claims against "loss or destruction of or damage to property"—language Judge Schall believed was "insufficient to transfer the financial responsibility for Ford's CERCLA costs to the United States."[2501]

DOD Rule Change for Processing ADA Investigations

On 19 November 2003, the DOD Comptroller issued new guidance on the processing of ADA violation cases.[2502] "[T]o ensure that an ADA violation has occurred before any administrative or disciplinary action is taken," the military departments and agencies are now required to submit a preliminary summary report of violation to the DOD Comptroller and to DFAS, after counsel coordination.[2503] The DOD Comptroller will forward the preliminary report to the DOD General Counsel's office for a final determination regarding whether there has been a violation. If the DOD-level review determines there is no violation, the Comptroller will return the report to the service to close the case. If the DOD-level review determines a violation occurred, the service will process the case for administrative/disciplinary action in accordance with the DOD Financial Management Regulation (FMR), Volume 14, Chapter 9 "Disciplinary Action."[2504]

Major Kevin Huyser.

[2492] Ford Motor Co. v. United States, 56 Fed. Cl. 85, 96 (2003).

[2493] *Id*. at 97.

[2494] *Id*. at 98.

[2495] *Id*.

[2496] *Id*. (referencing Hercules, Inc. v. United States, 516 U.S. 417 (1996); California-Pacific Utils. Co. v. United States, 194 Ct. Cl. 701, 715; 719-21 (1971)).

[2497] Ford Motor Co. v. United States, 378 F.3d 1314, 1319-20 (2004).

[2498] *Id*. at 1320.

[2499] *Id*.

[2500] *Id*. at 1323 (quoting E.I. Du Pont De Nemours v. United States, 365 F.3d 1367, 1372 (2004)).

[2501] *Id*. at 1322.

[2502] Memorandum, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management and Comptroller) et al., subject: Processing of Antideficiency Act (ADA) Violation Cases (19 Nov. 2003).

[2503] *Id*.

[2504] *Id*. The memorandum informs the new policy will be published in the DOD FMR, Volume 14, however, to date there has been no update. *See* http://www.dod.mil/comptroller/fmr/ (last visited 15 Nov. 2004).

Construction Funding

Combat and Contingency Related Construction: "Upon this Point, a Page of History is Worth a Volume of Logic"[2505]

Over the course of the last eighteen months, *The Army Lawyer* has followed the trials and tribulations of the DOD's use of Operations and Maintenance (O&M) funds for combat and contingency related construction.[2506] To understand the latest developments, it is necessary to briefly examine how the DOD has arrived at this present state.

On 22 February 2000, the Army issued a policy memorandum stating that the Army's use of O&M funds in excess of the $750,000 construction funding threshold[2507] was proper when erecting structures or facilities in direct support of combat or contingency operations.[2508] This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this policy was that O&M funds were the primary funding source supporting contingency or combat operations. Therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper. On 27 February 2003, the DOD issued a memorandum that, in effect, adopted the Army's policy at the DOD level.[2509]

On 16 April 2003, the President signed the Emergency Wartime Supplemental Appropriations Act for FY 2003 (EWSAA).[2510] Unfortunately for the DOD, buried in the act's conference report was harsh language stating the conferees' legal objections to the DOD's 27 February 2003 policy memorandum.[2511] The conference report had the practical effect of invalidating the policy articulated in both the DOD's 27 February 2003 memorandum, as well as the Army's 22 February 2000 memorandum.

The EWSAA created considerable consternation for those in DOD seeking legal authority to fund construction projects in support of operations in Iraq and Afghanistan. However, on 6 November 2003 the President signed the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004.[2512] Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 2004 where the Secretary of Defense determined:

> The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forcers in support of Operation Iraqi Freedom or the Global War on Terrorism; (2) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence; (3) the United States has no intention of using the construction after the operational requirements have been satisfied; and, (4) the level of construction is the minimum necessary to meet the temporary operational requirements.[2513]

Pursuant to the act, Congress limited the temporary funding authority to $150 million for FY 2004.[2514] However, with the passage of the Military Construction Appropriations Act for FY 2004 Congress increased this amount to $200 million.[2515]

Turning to the latest developments, on 1 April 2004, the Deputy Secretary of Defense issued implementing guidance

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[2505] Words of Justice Oliver Wendell Holmes, Jr., New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[2506] *See* Major James M. Dorn, *So How Are We Supposed to Pay For This? The Frustrating and as of Yet Unresolved Saga of Combat and Contingency Related O&M Funded Construction*, ARMY LAW., Sept. 2003, at 35; *2003 Year in Review*, *supra* note 29, at 190.

[2507] 10 U.S.C.S. § 2805(c)(1) (LEXIS 2004). Under this statute, the Secretary of a military department may use O&M funds to finance unspecified minor military construction projects only if the complete project costs $750,000 or less, or $1.5 million or less if the project is intended solely to "correct a deficiency that threatens life, health, or safety. *Id*.

[2508] Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (on file with author).

[2509] *See* Memorandum, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management & Comptroller) et al., subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) (on file with author).

[2510] Pub. L. No. 108-11, 117 Stat. 539 (2003).

[2511] *Id*. § 1901.

[2512] Pub. L. No. 108-106, 117 Stat. 1209 (2003).

[2513] *Id*. § 1301(a).

[2514] *Id*. § 1301(b).

[2515] Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the Authorization Act increased the amount of O&M funds the DOD could spend on contingency and combat related construction in FY 2004 to $200 million, and adopted, unchanged, the determination requirements of the Emergency Supplemental Appropriation for FY 2004.

for this new temporary, statutory authority.[2516] Pursuant to this guidance, Military Departments or Defense Agencies must submit candidate construction projects exceeding $750,000 to the Under Secretary of Defense (Comptroller). The request will include a project description and estimated cost, as well as a Service Secretary or Agency Director certification that the project meets the conditions stated in Section 2808 of the National Defense Authorization Act for FY 2004.[2517] The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and then notify the Military Department or Defense Agency when to proceed with the construction project.[2518]

And fortunately for the DOD, Congress has extended the life of the temporary authority for one more year. Section 2810 of the Ronald W. Reagan National Defense Authorization Act for 2005[2519] extends the funding authority to use O&M funds for such projects into FY 2005, limited to $200 million for the fiscal year.[2520] So for the time being at least, the temporary statutory authority continues.

GAO: Our Bases are Falling Apart (Tell us Something We Don't Already Know!)

On 24 February 2004, the GAO issued a report detailing the challenges facing the DOD in managing its construction and repair programs.[2521] Of note, the GAO cited a recent Office of the Secretary of Defense estimate that it would cost as much as $164 billion "to improve facilities to a level that would meet the department's goals."[2522] The report noted that the process of "prioritizing and resourcing projects provides an important means of improving whole categories of facilities."[2523] However, the GAO also observed the process can result in deferring projects that do not fall within an emphasized category, but nevertheless are important to the DOD's mission.[2524]

The report also recommended that Congress consider the advantages and disadvantages of increasing current funding thresholds for unspecified minor military construction (UMMC) projects. This, the GAO concluded, would give the DOD more flexibility in funding such construction projects.[2525] Some in Congress apparently listened to the GAO, as the Senate considered increasing the funding threshold for UMMC projects from $1.5 million to $2.5 million.[2526] However, draft legislation which would have made this change did not make it into the final version of the National Defense Authorization Act for FY 2005 as signed by the President. So for the time being, the UMMC funding threshold remains unchanged.[2527]

Major James Dorn.

[2516] *See* Memorandum, Deputy Secretary of Defense, to Secretary of the Army, et al., subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004).

[2517] *Id*.

[2518] *Id*.

[2519] Pub. L. No. 108-767, 118 Stat. 1811, 2128 (2004).

[2520] *Id*. § 2810. This section of the Authorization Act was economical in its use of language. The Act amended section 2808 of the Military Construction Authorization Act for FY 2004 by simply striking "2004" and inserting "2005" where appropriate. *Id*. (amending Pub. L. No. 108-136, div. B, 117 Stat. 1392, 1723). Also of note, the authority to carry out construction under the act shall commence only after the Secretary of Defense submits to congress the quarterly reports required under the Military Construction Authorization Act for FY 2004. *Id*.

[2521] GOV. ACCT. OFF., REP. NO. GAO-04-288, *Defense Infrastructure: Long-term Challenges in Managing the Military Construction Program* (Feb. 24, 2004).

[2522] *Id*. at 1.

[2523] *Id*. at 5.

[2524] *Id*.

[2525] *Id*. at 2-3.

[2526] *See* Ronald W. Reagan National Defense Authorization Act for FY 2005, H.R. 4200 ENR (Engrossed Amendment as Agreed to by Senate), 108th Cong., § 2801(2004), *available at* http://thomas.loc.gov/cgi-bin/query /C?c108:./temp/~c108ZnQxxZ (last visited 13 Nov. 2004). In addition to increasing the UMMC funding threshold to $2.5 million, the proposed legislation would have increased the funding threshold for construction projects intended to correct a deficiency that is life-threatening, health-threatening, or safety threatening from $3 million to $4 million. *Id*.

[2527] Of note, section 2801 of the final act increases the threshold for approval of repair projects below the Service Secretary level, per 10 U.S.C. § 2811(b), from $5 million to $7.5 million. Nevertheless, the act also decreases the threshold for Congressional notification for repair projects from $10 million to $7.5 million. *See* Ronald W. Reagan National Defense Authorization Act for 2005 Pub. L. No. 108-767, § 2801, 118 Stat. 1811, 2119 (2004). Given the degree of control the various Services exercise over such projects, this author is skeptical this legislative change will streamline the approval process.

Best Interest of the Government

The Economy Act statute requires agency orders to be in the best interest of the government.[2528] Generally, as long as the agency rationally substantiates utilizing another agency to acquire a good or service, the agency satisfies the statutory requirement.[2529] In *Vertol Systems Co*., Vertol protested the U.S. Joint Forces Command (JFCOM) and the Air Force Special Operations Command (AFSOC) decision to procure aircraft from another agency.[2530] The GAO denied Vertol's protest because the determinations and findings (D&F) provided a rational basis for the agency's decision to procure aircraft from another agency.[2531]

In Vertol, the Joint National Training Center, JFCOM and the AFSOC (the agencies) acquired foreign threat systems aircraft under the Economy Act from the Army's Threat Systems Management Office (TSMO).[2532] The JFCOM needed the foreign aircraft to represent enemy aircraft in a joint training exercise.[2533] Military instructions and regulations required airworthiness certifications to ensure the safety of the aircraft personnel and employees on the ground during the exercise.[2534] The JFCOM determined only TSMO could provide the aircraft with the required airworthiness certification.[2535] The AFSOC also executed a D&F concluding that only authorized aircraft with Federal Aviation Administration (FAA) air worthiness certificates or military equivalent certification met the safety requirements.[2536] Because Vertol's aircraft did not meet the certification requirements, the AFSOC concluded TSMO was the only source capable of meeting the agency's needs.[2537] Vertol protested, alleging the agencies improperly procured the aircraft from TSMO in violation of the Competition in Contracting Act[2538] and the Small Business Act.[2539]

The GAO denied Vertol's arguments because the certification requirement "reasonably reflect[ed] the agency's needs."[2540] The JFCOM also provided a reasonable explanation for determining Vertol unable to obtain the certifications in time to participate in the exercise.[2541] However, GAO's analysis did not include an assessment of whether the agency met the statutory requirements of the Economy Act.[2542] Only a footnote highlighting the economic savings the agency reaped using TSMO seemed to address the agency's decision to procure from the TSMO.[2543] The GAO simply concluded Vertol failed to "furnish a basis for objecting to the agencies proceeding under the Economy Act" and denied the protest.[2544]

[2528] 31 U.S.C. S. § 1535 (LEXIS 2004).

[2529] *Id*.

[2530] Comp. Gen. B-293644.6, B-93644.7, B-293644.8, B-293644.9, B-293644.10, July 29, 2004, 2004, 2004 CPD ¶ 173. Vertol also challenged the AFSOC acquisition of aircraft under the United States Special Operations Command's existing ID/IQ contract. The GAO denied the challenge because Vertol failed to establish itself as an interested party. *Id*. at 8.

[2531] *Id*. at 7.

[2532] *Id*. at 1.

[2533] *Id*. at 2.

[2534] *Id*. The JFCOM D&F stated there were no commercial vendors that could provide the aircraft with the required certification. *Id*.

[2535] *Id*.

[2536] *Id*. at 3. The AFSOC D&F included a request for a Russian Mi-8 transport helicopter, flight crew, support and maintenance crew and instructor pilot to support the training of pilots and troops. *Id*.

[2537] *Id*. The AFSOC knew Vertol owned a helicopter with only an experimental FAA airworthiness certificate. *Id*. at 2.

[2538] *See* 10 U.S.C. § 2304(a)(1)(A) (2000).

[2539] *See* 10 U.S.C. § 644(a). Vertol also protested the agency's requirement for offerors to acquire an airworthiness certification before award considering the agency's use of aircraft with experimental FAA airworthiness certificates in the past. *Vertol Systems Company, Inc*., 2004 CPD ¶ 173, at 3. The GAO determined the agency provided a reasonable basis for requiring certification before award given the time required to obtain certification. *Id*. at 4. The services admitted to not complying with the airworthiness certification requirements in the past, but the GAO stated "an agency's acceptance of an approach as acceptable under a prior procurement does not require the agency to find the same approach acceptable under the present procurement." *Id*. at 6.

[2540] *Vertol Sys. Co., Inc*., 2004 CPD ¶ 173, at 3.

[2541] *Id*. at 4. The JFCOM documented a two to four month process for a military airworthiness assessment and two to eight month process for necessary modifications. Vertol provided no evidence that the agency estimates were unreasonable. *Id*.

[2542] *Id*. at 7.

[2543] *Id*. at 3.

[2544] *Id*. at 7.

On 14 June 2004, the GAO outlined Economy Act requirements in its attempt to assist the Air Force Office of Scientific Research (AFOSR) with a debt owed to the Department of Energy (DOE).[2545] On 25 September 1998, the AFOSR signed an interagency agreement with the DOE for government-wide online research and education information services for colleges, universities, and other grantee organizations.[2546] The agreement indicated the DOE took the leadership role in developing and implementing the online service through a cooperative agreement with Federal Information Exchange, Inc. (FIE).[2547] The agreement also contained evidence of a previous agreement between the AFOSR and the DOE, however, a copy of that agreement was not provided to the GAO.[2548] Based on the programs past success, the AFOSR decided to continue its participation with the online service known as FEDIX, and agreed to transfer $131,000 to the DOE for services rendered from 1 September 1998 to 31 August 1999.[2549] The DOE could not provide any information documenting a financial obligation incurred on behalf of the AFOSR, and the AFOSR could not provide any evidence that it transferred funds due to DOE.[2550] The DOE did not request payment until 3 June 2003.[2551] The AFOSR asked the GAO whether FY 1999 funds could be used to pay the money owed to the DOE. Because the GAO had no details about the transaction, the GAO issued a general opinion about the interagency agreement.

The GAO first attempted to determine under what authority the AFOSR and the DOE entered into the agreement.[2552] Recognizing that if other specific authority existed for the agreement the Economy Act would not apply, the GAO assumed the parties entered into an interagency agreement.[2553] The GAO next tackled the issue of what year funds the AFOSR should use to pay the debt.[2554] The parties signed the agreement in FY 1998 but the services rendered covered FY 1998 and FY 1999.[2555] In addition, the GAO indicated "the situation is further complicated because we do not know the relationship between the DOE and the FIE."[2556] If the DOE entered into a contract with FIE for the full cost of the AFOSR services on 25 September 1998, the AFOSR could use FY 1998 funds to reimburse the DOE.[2557] On the other hand, if the DOE entered into a contract one or after 1 October 1998 but before 30 September 1999, the AFOSR could use FY 1999 funds to reimburse the DOE.[2558] Another alternative involved the possibility of a DOE contract with FIE covering multiple years whereby charges would accrue to AFOSR as services were rendered.[2559] Whatever the relationship between the DOE and the FIE, the AFOSR may only utilize FY 1999 funds to utilize because the account for FY 1998 funds would close on 30 September 2003.[2560]

The GAO review of the availability of funds issue concluded with the possibility of using FY 1999 funds or current funds to meet AFOSR's obligation.[2561] The FY 1998 funds expired on 30 September 1998 and closed on 30 September 2003.[2562] While the FY 1999 funds expired on 30 September 1999, the FY 1999 funds remained available to pay the debt until 30 September 2004.[2563] The final option for the AFOSR involved using current funds to pay the obligation under the agreement.[2564] The GAO failed to provide a definite answer to the question, but the AFOSR received a thorough review of

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[2545] Major Jess Wood, Chief, Financial Management Division, Air Force Office of Scientific Research, B-301561 (June 4, 2004), *available at* www.gao.gov.

[2546] *Id*. at 1.

[2547] *Id*. The online information service, FEDIX, makes information about the government's research, development, and education programs readily available at no cost to colleges, universities, and grantee organizations. *Id*.

[2548] *Id*. at 2.

[2549] *Id*.

[2550] The DOE failed to provide paperwork to establish a financial obligation incurred on behalf of the AFSOR. *Id*.

[2551] *Id*.

[2552] *Id*.

[2553] *Id*.

[2554] *Id*. at 3.

[2555] *Id*.

[2556] *Id*.

[2557] *Id*.

[2558] *Id*. at 4.

[2559] *Id*.

[2560] *Id*.

[2561] *Id*.

[2562] *Id*.

[2563] *Id*. at 5.

[2564] *Id*.

intragovernmental acquisitions requirements.

Major Bobbi Davis.

Revolving Funds

Depot Maintenance Improvements Needed

This year the GAO issued several reports recommending various improvements for depots. The GAO recommended the DOD implement a plan to mitigate the potential for exceeding the requirement that military departments and defense agencies use no more than fifty percent of annual depot maintenance funding for work performed by private-sector contractors.[2565] As the GAO stated, "recurring weaknesses in DOD's data gathering, reporting processes and financial systems prevented the GAO from determining with precision if the military services complied with the 50-50 requirement."[2566] The GAO recommended that the service secretaries submit a plan to the Office of the Secretary of Defense, if the 50-50 reporting data is within two percent of exceeding the fifty percent threshold.[2567] The plan must outline actions the military departments will take to ensure compliance.[2568] Other recommendations included requiring the military departments to use their audit agencies or an agreed upon alternative to ensure past errors in data collection are corrected, as well as training to ensure proper 50-50 data gathering and reporting.[2569]

In a related development, the GAO also issued a report recommending that the Army improve its ability to identify how much depot level maintenance takes place outside its five public depots.[2570] A 2003 report identified limitations to the Army's 50-50 reporting requirements and outlined twenty-nine recommendations.[2571] The GAO found, however, that the Army has not yet developed an action plan that identifies priorities, time frames, roles and responsibilities, evaluation criteria, and resources for managing the implementation of the recommendations.[2572] The DOD concurred with the GAO's recommendation to develop an action plan to implement the 2003 recommendations.[2573]

In an Air Force depot maintenance report, Congress asked the GAO to determine why the price for in-house work for FYs 2000 and 2004 almost doubled.[2574] Congress also requested the GAO determine the factors responsible for the increase and whether the Air Force has taken steps to improve efficiency and control costs.[2575] The GAO found an increase in material costs accounted for about sixty-seven percent of the price increase, but due to the Air Forces' inability to effectively and comprehensively analyze material cost increase, the GAO could not substantiate the Air Force's other rationales for the remaining increase.[2576] Despite the increased material prices, the Air Force did not pass the increase to their customers for the work performed in FYs 2000 to 2003.[2577] The Air Force implemented changes to bring prices in line with operating costs, but the GAO still found the Air Force had failed to develop a methodology to analyze the reasons for the cost

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[2565] *See* GOVT. ACCT. OFF., REP. NO. GAO-04-871, *Depot Maintenance: DOD Needs Plan to Ensure Compliance with Public and Private Sector Funding Allocation* (Sept. 29 2004) [hereinafter REP. NO. GAO-04-871]. *See also* 10 U.S.C.S. § 2466 (LEXIS 2004).

[2566] The DOD submits two reports annually to Congress on the division of depot maintenance funding between the public and private sectors. One report outlines the percentage of funds spent the two previous fiscal years, and the other outlines the current and four succeeding fiscal years. The GAO accesses compliance with the 50-50 requirement and submits a report to Congress. REP. NO. GAO-04-871, *supra* note 2565, at 1.

[2567] *Id*. at 23.

[2568] *Id*.

[2569] The recommendation also suggested requiring management implement the level of attention needed to produce accurate and complete 50-50 reporting and that the Marine Corps compile a consolidated report on depot maintenance funding allocation between the public and private sectors for the command responsible for weapon systems management. *Id*.

[2570] GOVT. ACCT. OFF., REP. NO. GAO-04-220, *Depot Maintenance: Army Needs Plan to Implement Depot Maintenance Report's Recommendations* (Jan. 8, 2004) [hereinafter REP. NO. GAO-04-220].

[2571] GOVT. ACCT. OFF., REP. NO. GAO-03-1023, *Depot Maintenance: DOD's 50-50 Reporting Should Be Streamlined* (Sept. 5, 2003).

[2572] REP. NO. GAO-04-220, *supra* note 2570, at 20.

[2573] *Id*. at 27.

[2574] GOVT. ACCT. OFF., REP. NO. GAO-04-498, *Air Force Depot Maintenance: Improved Pricing and Cost Reduction Practices Needed* (June 17, 2004).

[2575] *Id*. at 2.

[2576] *Id*. at 3.

[2577] An Air Force official admitted to "artificially constraining prices to help ensure that the group's customers would be able to get needed work done with the amount of funds provided to them through the budget process." *Id*. The GAO found however that the cash balance of the AF working capital funds was $1.3 billion higher than the maximum level allowed by DOD policy. *Id*.

increase.[2578] In addition, the GAO also concluded the Air Force needed to utilize an established data repository to determine whether cost savings initiatives have been successful.[2579] Other recommendations included setting prices to recover all estimated costs, controlling costs, and developing a methodology to analyze cost variances.[2580]

The Cost of Doing Business

A revolving fund is designed to function like a self-sustaining business. But what happens if a vendor to which the fund makes advance payments goes bankrupt without fulfilling placed orders? Does the revolving fund cover the loss or assign the loss to the agencies which placed orders with the vendor? The GAO answered this question for the Library of Congress (Library) after a subscription vendor filed for bankruptcy. In *Assignment of Losses Incurred by the Library of Congress FEDLINK Revolving Fund*, [2581] the GAO decided that the Library should use the administrative fees collected from all customers to cover the loss.[2582]

The Library of Congress FEDLINK, an intragovernmental revolving fund, is a "cooperative procurement, accounting, and training program designed to provide access to online databases, periodical subscriptions, books, and other library and information support services from commercial suppliers with which the Library has negotiated contracts."[2583] Federal agencies place orders for FEDLINK products and services and take advantage of volume discounts.[2584] The Library has authority to collect advance payments from customers that it uses to pay subscription vendors.[2585] In FY 2003, the Library learned a vendor failed to place subscription orders or make required payments to publishers.[2586] The Library terminated the contract and the vendor subsequently filed for bankruptcy protection.[2587] Determining that it would not be reimbursed for approximately $500,000, the Library requested the GAO recommend "whether the subscribing federal agencies or the FEDLINK revolving fund should bear the loss associated with [the] bankruptcy."[2588] Reviewing the statutory authority and the legislative history of the Library's revolving fund authority, the GAO decided the losses are a "legitimate business cost" and therefore the funds from administrative fees should be used to cover the loss.[2589]

While the statutory authority failed to directly address the issue, the legislative history indicated the purpose of the legislation was to allow "FEDLINK to operate as a private enterprise" and "to place the Library's service program operations 'on a more business-like foundation."[2590] The GAO therefore decided to review how the private sector would deal with the issue and found generally, "the default of a subcontractor or supplier is a 'risk allocated to the seller absent a specific provision to the contrary in the contract.'"[2591] An informal survey of other funds confirmed the practice that funds bear the cost resulting from contractor defaults.[2592] To cover the loss, the GAO concluded the Library should utilize the

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[2578] *Id*.

[2579] *Id*. at 4.

[2580] *Id*. at 27.

[2581] Comp. Gen. B-301714, Jan 30, 2004, *available at* www.gao.gov.

[2582] *Id*.

[2583] *Id*.

[2584] *Id*.

[2585] *Id*. at 2. *See* 10 U.S.C.S. § 3324(d)(2) (LEXIS 2004).

[2586] *Assignment of Losses*, Comp. Gen. B-301714, Jan 30, 2004. The vendor was RoweCom.

[2587] *Id*.

[2588] The Library filed a claim for $3.5 million but determined it was unlikely to receive full reimbursement. *Id*.

[2589] *Id*. at 3.

[2590] *Id*.

[2591] *Id*.

[2592] *Id*.

administrative reserves Congress authorized for legitimate business costs.[2593] The recommendation included adding a clause to contractor contracts to allocate the costs differently in the future.[2594]

Major Bobbi Davis.

Liability of Accountable Officers

Who Has Authority?

Beginning in 1941, Congress enacted a series of statutes establishing liability of and relief for accountable officers who were found to be without fault.[2595] The statutes tasked the GAO with the responsibility for granting relief and also authorized accountable officers to request advance decisions from the GAO regarding the propriety of a certification or disbursement.[2596] In some instances the GAO delegated this authority to the agency.[2597] In 1995, however, Attorney General Janet Reno issued a memorandum and a draft order advising accountable officers to seek the advice of their component general counsel when in doubt about the legality of authorizing an obligation or disbursement.[2598] The rationale for the advice stemmed from a 1991 DOJ Office of Legal Counsel (OLC) opinion which stated that the statutory authority granted to the GAO to relieve executive branch officials from liability is unconstitutional.[2599] Because GAO is an agent of Congress, Congress "does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch."[2600] Therefore, according to the DOJ, under current law "accountable officers receive no legal protection from Comptroller General decisions purporting to relieve them from liability."[2601]

On 28 January 2004, the DOJ OLC responded to a U.S. Department of Treasury request for assistance with implementing the OLC opinion.[2602] The OLC recommended the agency adopt an internal order based on the 1995 DOJ draft order.[2603] The OLC response went further by stating that adoption of similar internal orders by all executive branch agencies "would significantly advance the President's interest in maintaining the constitutional separation of powers against the legislative intrusions that the 1991 OLC opinion identifies."[2604] Obviously agencies did not adopt draft order provisions as a result of the 1991 legal opinion or the 1995 memorandum. Only time will tell if accountable officers will seek advance decisions and relief from agency general counsel based on the latest message traffic between the Treasury Department and the DOJ.

Major Bobbi Davis.

[2593] *Id*. The fund consisted of two components, advance payments to cover the cost of the services provided and administrative fees to reimburse the Library for the cost associated with operating the program. The Library used the administrative fees to build a reserve to finance future improvements and replace outdated equipment. *Id*.

[2594] *Id*. at 4. The agreement would include a cost-reimbursement provision by customer agencies if a contractor defaulted. *Id*.

[2595] GOVT. ACCT. OFF., OGC-91-5, *Appropriations Laws-Vol-II* 9-7 (2d ed. year) [hereinafter GOVT. ACCT. OFF., OGC-91-5].

[2596] *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, § 204, 110 Stat. 3826, 3845-46.

[2597] GOVT. ACCT. OFF., OGC-91-5, *supra* note 2595, at 9-7. The GAO delegated the authority to issue advance decisions to the Department of Defense (DOD) for military pay allowances, travel, transportation costs, survivor benefits and retired pay. The GAO delegated the authority to issue advance decisions to the Office of Personnel Management for civilian compensation and leave issue. The authority is delegated to the General Services Administration Board of Contract Appeals for civilian employee travel, transportation, and relocation allowances. *See* The General Accounting Act of 1996, Pub. L. No. 104-316. § 204, 110 Stat. 3826, 3845-46.

[2598] Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (15 Nov. 1995).

[2599] *Id*.

[2600] *Id*.

[2601] *Id*.

[2602] Memorandum, U.S. Department of Justice, Office of the Assistant Attorney General, to U.S. Department of Treasury General Counsel, subject Response to Department of Treasury (28 Jan. 2004).

[2603] *Id*.

[2604] *Id*.

Update of the CERP—a New Paradigm for Humanitarian Assistance within Iraq and Afghanistan

As reported last year,[2605] the Commander's Emergency Response Program (CERP) was initially created through Fragmentary Order 89 (FRAGO 89) as a Coalition Provisional Authority (CPA) "funded authority . . . for reconstruction assistance to the Iraqi people."[2606] FRAGO 89 defined reconstruction assistance as "building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq."[2607] Initially, the CPA funded the CERP with vested and seized Iraqi funds for "the benefit of the Iraqi people."[2608] Subsequently, the Emergency Supplemental Appropriations Act for FY 2004 (ESAA) expanded the CERP's capabilities with $180 million of appropriated funding.[2609] Congress also allowed these appropriated funds to expand the CERP into Afghanistan.[2610]

For FY 2005, Congress continued to fund the CERP for Iraq and Afghanistan with $300 million of appropriated funds.[2611] Congress also exempted the CERP from normal statutory fiscal and contracting controls by allowing the appropriated funds to "be used, notwithstanding any other provision of law."[2612] However, to regulate this fairly liberal appropriation from Congress, the U.S. military commands within Iraq have provided controls and other procedures to ensure proper use of CERP funds.[2613] Multi-National Force—Iraq (MNF-I) is currently the military command over all U.S. and coalition forces within Iraq and has issued a series of orders concerning proper use and accountability of CERP funds. Fragmentary Order 087 (FRAGO 087) is the most recent primary order issued by MNF-I that regulates the CERP "to allow commanders to respond to urgent humanitarian relief and reconstruction assistance by executing programs that will assist the Iraqi people."[2614] Paragraph 3.B of FRAGO 087 continues to list fairly broad examples of projects, to include: "water and sanitation infrastructure; food production and distribution; agriculture; electrical power generation and distribution; healthcare; education; telecommunications; economic, financial, management improvements; transportation; rule of law and governance; irrigation; civic clean-up activities; civic support vehicles; [and] repair to civic or cultural facilities."[2615]

To provide accountability for CERP funded projects, FRAGO 087 establishes certain controls. For example, FRAGO 087 provides:

> Commanders are not authorized to deliberately over-pay for projects. Document every effort to verify the costs are reasonable. For projects over $10,000, the brigade or division commander should ensure that three bids are obtained from vendors, and that an individual is identified to manage the project. If you are precluded from obtaining three quotes or bids based on compelling circumstances, this must be documented. Payments should be made based upon percent complete as opposed to a one-time lump sum payment.[2616]

FRAGO 087 also directs that projects up to $100,000 be documented and paid with a Standard Form 44 Purchase Order-Invoice-Voucher (SF 44) and those projects exceeding $100,000 requires contracting by a warranted contracting officer.[2617]

[2605] *2003 Year in Review*, *supra* note 29, at 195.

[2606] COMBINED JOINT TASK FORCE—7, FRAGMENTARY ORDER 89 TO OPERATIONS ORDER 03-036, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (19 June 2003).

[2607] *Id.* ¶ 3.B.4. This paragraph also lists examples of reconstruction assistance as: (1) financial management improvements, (2) restoration of the rule of law and governance initiatives, (3) day laborers for civic cleaning projects, and (4) purchase or repair of civic support vehicles. *Id.*

[2608] Memorandum, Deputy Secretary of Defense, to Administrator of the Coalitional Provisional Authority, subject: Certain State- or Regime-Owned Property in Iraq (29 May 2003); *see also 2003 Year in Review*, *supra* note 29, at 195.

[2609] Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003).

[2610] *Id.*

[2611] Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 9007, 117 Stat. 1054 (2004).

[2612] *Id.*

[2613] *See, e.g.*, COMBINED JOINT TASK FORCE—7, FRAGMENTARY ORDER 1268 TO OPERATIONS ORDER 03-036, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (22 Dec. 2003).

[2614] MULTI-NATIONAL FORCE - IRAQ, FRAGMENTARY ORDER 087, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (29 June 2004). MNF-I subsequently issued Fragmentary Orders 318 and 845 that revised certain portions of FRAGO 087.

[2615] *Id.* ¶ 3.B.1.A—N.

[2616] *Id.* ¶ 3.C.3.

[2617] *Id.* ¶¶ 3.C.4. and 5.

There are also numerous other controls concerning project limits at certain command levels, fund obligation requirements, restrictions on reward payments or weapon buy-back programs, comingling of funds restrictions, and disallowance of projects for the benefit of individuals or private businesses.[2618] Finally, FRAGO 087 also includes detailed coordinating instructions for audits, internal reviews, payment and budget reconciliation, and project reporting requirements.[2619]

FY 2005 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA) Policy and Program Guidance Issued

By joint message dated 25 February 2004, the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) provided "policy and program management direction for FY 2005 OHDACA planning and execution, including the humanitarian mine action program, and also addresses the O&M funded humanitarian civic assistance (HCA) program."[2620] Compared to the FY 2004 guidance,[2621] the recent FY 2005 guidance[2622] provides a much clearer distinction between OHDACA funded humanitarian assistance[2623] and the O&M funded HCA program.[2624] As a brief reminder from last year's *Year in Review,* "[t]he funding for OHDACA activities is provided annually through the DOD Appropriations Act for programs provided under 10 U.S.C. §§ 401, 402, 404, 2547, and 2561 . . . [h]owever, humanitarian and civic assistance costs authorized under 10 U.S.C. § 401 (with the exception of demining activities) are not funded with the OHDACA appropriation but are funded with the general operation and maintenance appropriation."[2625]

The FY 2005 guidance clearly sets out separate HCA guidance that primarily reiterates the 10 U.S.C. section 401 requirements and distinguishes it from other humanitarian assistance activities.[2626] Additionally, the FY 2005 guidance provides a supplemental checklist (in addition to the general checklist) for HCA project submissions to the DOD. Generally, the supplemental checklist contains items necessary for compliance with 10 U.S.C. section 401 as follows:

- Project is provided in conjunction with military operation/exercise
- Promotes specific operational readiness skills of U.S. military forces participating in project
- Labor will be performed by U.S. military forces
- Project falls into one of the [10 U.S.C. §401 HCA activities].[2627]

The general checklist within the FY 2005 guidance provides points that have to be addressed for all OHDACA funded and O&M funded HCA projects. Selected general checklist requirements include whether the project supports the Global War on Terror (GWOT) objectives, contributes to DOD coalition building, strengthens the host nation's security and stability, enhances DOD's image and "ability to shape the regional security environment," and whether appropriate partnering with host nation militaries is accomplished to further goals of interoperability and coalition-building.[2628] In addition to the HCA supplemental checklist at paragraph 13, the FY 2005 guidance includes supplemental checklists for humanitarian assistance (HA) under 10 U.S.C. section 2561, foreign disaster relief under 10 U.S.C. section 404, and humanitarian mine action under 10 U.S.C. section 401.

Paragraph 9C of the FY 2004 guidance required that all projects "involve visible U.S. military participation to ensure that the projects are effective security cooperation tools" and that "DOD's role must not be reduced simply to providing funding."[2629] The FY 2005 guidance provides similar military participation requirements but provides even

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[2618] *Id.* ¶ 3.C.8.

[2619] *Id.* ¶¶ 3.D. and E.

[2620] Message, 251658Z Feb 2004, Secretary of Defense, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA) [hereinafter FY05 OHDACA and HCA Message].

[2621] Message, 100935Z Mar 2003, Secretary of Defense, subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities [hereinafter FY04 OHDACA Message].

[2622] FY05 OHDACA and HCA Message, *supra* note 2620.

[2623] *See, e.g.*, Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, tit. II, 117 Stat. 1054 (2004).

[2624] *See, e.g.*, *id.* § 8009.

[2625] *2003 Year in Review, supra* note 29, at 196 (citations omitted).

[2626] FY05 OHDACA and HCA Message, *supra* note 2620, ¶ 8.

[2627] *Id.* ¶ 13.

[2628] *Id.* ¶ 9. Understanding the bulletized general checklist points at paragraph 9 requires an in-depth reading of the policy guidance throughout the message.

[2629] FY04 OHDACA Message, *supra* note 2621, ¶ 9.C.

stronger emphasis as follows:

> Participation of U.S. military forces: All HA projects . . . should maximize visible U.S. military participation to ensure that the projects are effective security cooperation tools. Active DOD participation improves the prospects for developing channels of influence and access, potentially provides operational readiness benefits, and generates unique training opportunities. DOD's role must not be reduced to simply providing resources or writing checks.[2630]

Lieutenant Colonel Karl Kuhn.

[2630] FY05 OHDACA and HCA Message, *supra* note 2620, ¶ 4.C.

Appendix A

Department of Defense Legislation for Fiscal Year 2005

While the appropriations bills impacting civilian agencies languished in the hallowed halls of the Capitol until after the fiscal year's end, the Congress finished worked on the DOD Appropriations Act by mid-summer and completed the Ronald W. Reagan National Defense Authorization Act, 2005, weeks later. As in years past, this year's *Year in Review* addresses some of the more significant provisions in the annual DOD legislative acts that impact the government contracting and fiscal law fields, as well as a few other provisions some may find interesting.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2005

President Bush signed into law the Department of Defense Appropriations Act, 2005, on 5 August 2004.[1] The Act appropriated approximately $391.1 billion to the DOD for fiscal year (FY) 2005.[2] This amount is approximately $25.3 billion more than Congress appropriated for the DOD in FY 2004 and only about $1.6 billion less than President Bush requested for FY 2005.[3]

Emergency and Extraordinary Expenses and Combatant Commander Initiative Fund

Congress continued to authorize the Secretary of Defense (SECDEF) and the Service Secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for "emergencies and extraordinary expenses."[4] In addition, Congress made available to the SECDEF $40 million in the Defense-Wide O&M appropriations for the Combatant Commander Initiative Fund[5] account.[6]

Overseas Contingency Operations Transfer Account

Congress appropriated $10 million this year for "expenses directly relating to Overseas Contingency Operations by U.S. military forces . . . ."[7] As in past years, funds appropriated to this account remain available until expended; however, the

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[1] Department of Defense Appropriations Act 2005 DOD Appropriations Act0), 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004). The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate Reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 108-622, at 67 (2004). *See also* H.R. REP. NO. 108-553 (2004); S. REP. NO. 108-284 (2004).

[2] H.R. CONF. REP. NO. 108-622, at 388. The Conference Report breaks down the several appropriations as follows:

Military Personnel	$103,731,158,000;
Operations and Maintenance	$121,062,969,000;
Procurement	$77,679,803,000;
Research, Development, Test, and Evaluation	$69,932,182,000;
Revolving and Management Funds	$2,378,836,000;
Other DOD Programs	$20,655,510,000.

Id. at 70, 97, 139, 239, 360-61.

[3] *Id*. at 346.

[4] 2005 DOD Appropriations Act, tit. II. Congress capped this authority at $11,144,000 for the Army, $4,525,000 for the Navy, $7,699,000 for the Air Force, and $32,000,000 for the DOD. *Id*; s*ee also* 10 U.S.C.S. § 127 (2004) (authorizing the Secretary of Defense, the DOD Inspector General, and the Secretaries of the military departments to provide for "any emergency or extraordinary expense which cannot be anticipated or classified").

[5] Formerly known as "CINC Initiative Funds," the National Defene Authorization Act, 2004, re-designated the account as the "Combatant Commander Initiative Fund." Pub. L. No. 108-136, § 902, 117 Stat. 1392, 1558 (2003) (amending 10 U.S.C. § 166a (2000)).

[6] 2005 DOD Appropriations Act, tit. II (Operation and Maintenance, Defense-Wide); *see also* 10 U.S.C.S § 166a (2004) (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the Combatant Commander Initiative Fund to combatant commanders for specified purposes). The Act also provides $4,000,000 "for expenses relating to certain classified activities." 2005 DOD Appropriations Act, tit. II (Operation and Maintenance, Defense-Wide). The funds remain available until expended and the SECDEF is granted authority to transfer such funds to operations and maintenance appropriations or research, development, test and evaluation accounts. *Id*. Finally, the $250,000 ceiling on investment items purchased with operation and maintenance funds does not apply under the circumstances of this specific transfer authority. *Id*. *Cf*. *id*. § 8040.

[7] 2005 DOD Appropriations Act, tit. II (Overseas Contingency Operations Transfer Account).

SECDEF may transfer the funds to the military personnel accounts, O&M accounts, the Defense Health Program appropriation, procurement accounts, research, development, test, and evaluation (RDT&E) accounts, and to working capital funds.[8] Further, transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is prohibited, and the SECDEF must provide the congressional appropriations committees a report each fiscal quarter detailing certain transfers.[9]

Overseas Humanitarian, Disaster, and Civic Aid

Congress again appropriated $59 million for DOD's Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.[10] These funds are available until 30 September 2006.[11]

Former Soviet Union Threat Reduction

Congress appropriated $409.2 million for assistance to the republics of the former Soviet Union.[12] This assistance is limited to activities related to the elimination, safe and secure transportation, and storage of nuclear, chemical, and other weapons in those countries, including efforts aimed at non-proliferation of these weapons.[13] Of the amount appropriated, $15 million specifically supports the dismantling and disposal of nuclear submarines, submarine reactor components, and warheads in the Russian Far East.[14] Congress again included authority to use these funds for "defense and military contacts."[15] These funds are available until 30 September 2007.[16]

Defense Health Program

Though Congress provided the DOD with more than $18 billion in funding for the Defense Health Program,[17] the conferees "expressed concern with the lack of third-party collections,"[18] as identified in a recent GAO report.[19] The conferees directed the DOD "to make the necessary business process improvements to ensure that [military treatment facilities] are collecting all appropriate third party payments," and to submit a status of collections report quarterly to the Congress.[20]

Drug Interdiction and Counter-Drug Activities

The DOD received approximately $906.5 million for drug interdiction and counter-drug activities.[21] As in year's past, these funds may be transferred to appropriations for military personnel of the reserve components, O&M, procurement,

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[8] *Id*. Upon transfer, the funds are "merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred . . . ." *Id*.

[9] *Id*. § 8114.

[10] *Id*. tit. II (Overseas Humanitarian, Disaster, and Civic Aid). The DOD provides humanitarian, disaster, and civic aid to foreign governments pursuant to various statutory authorities. *See, e.g.*, 10 U.S.C.S. §§ 401-02, 404, 2557, and 2561 (LEXIS 2004).

[11] 2005 DOD Appropriations Act, tit. II (Overseas Humanitarian, Disaster, and Civic Aid).

[12] *Id*. tit. II (Former Soviet Union Threat Reduction Account).

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*. tit. VI (Defense Health Program).

[18] H.R. CONF. REP. NO. 108-622, at 368 (2004). The DOD is authorized to bill insurance companies under the Third Party Collections Program when DOD beneficiaries with private health insurance coverage receive treatment at a military treatment facility (MTF). *See* 10 U.S.C.S. § 1095 (LEXIS 2004).

[19] The GAO reported that "conservatively, tens of millions of dollars are not being collected each year because key information required to effectively bill and collect from third-party insurers is often not properly collected, recorded, or used by the MTFs." GEN. ACCT. OFFICE, MILITARY TREATMENT FACILITIES: IMPROVEMENTS NEEDED TO INCREASE DOD THIRD-PARTY COLLECTIONS, GAO-04-332R, at 2 (Feb. 20, 2004).

[20] H.R. CONF. REP. NO. 108-622, at 368.

[21] 2005 DOD Appropriations Act, tit. VI (Drug Interdiction and Counter-Drug Activities, Defense).

and RDT&E.[22]

End-of-Year Spending Limited

Congress again limited the ability of the SECDEF and the Service Secretaries to obligate funds during the last two months of the fiscal year to twenty percent of the applicable appropriation.[23]

General Transfer Authority

The Act increases to $3.5 billion the level of the DOD's general transfer authority.[24] Additionally, the Act provides that transfers between military personnel appropriations shall not be taken into account for purposes of this increased limitation amount.[25]

Multiyear Procurement Authority

Congress continued to prohibit the Service Secretaries from awarding a multiyear contract that: (1) exceeds $20 million for any one year of the contract; (2) provides for an unfunded contingent liability that exceeds $20 million; or (3) is an advance procurement which will lead to a multiyear contract in which procurement will exceed $20 million in any one year of the contract, unless the Service Secretary notifies Congress at least thirty days in advance of award.[26] Additionally, Congress continues to prohibit the Service Secretaries from awarding multiyear contracts in excess of $500 million unless Congress specifically provides for the procurement in the Appropriations Act.[27] Congress specifically noted just one multiyear procurement in this year's Act: the lightweight 155mm Howitzer.[28]

Congress further provided this year that no funds are available for a multiyear contract unless the SECDEF has submitted to Congress a budget request for full funding of the contract; the contract's cancellation provisions do not consider the contractor's recurring manufacturing costs for producing the unfunded units to be provided under the contract; the contract provides that payments shall not be incurred prior to the incurred costs on the funded units; and the contract does not provide for a price adjustment for failure to perform the follow-on contract.[29]

Limitations on *OMB Circular A-76* Competitions[30]

As in prior years, the DOD Appropriations Act provides no funding to convert a commercial activity to contractor performance if more than ten DOD civilian employees perform the activity, unless the conversion decision is based on a public-private competition in which the agency has developed a "most efficient and cost effective organization."[31] In such

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[22] *Id*. Upon transfer, these funds are "available for obligation for the same time period and for the same purpose as the appropriation to which transferred . . . ." *Id*.

[23] *Id*. § 8004. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officers' Training Corps (ROTC) cadets. *Id*.

[24] *Id*. § 8005. In recent years, the level of the DOD's general transfer authority has been between $2 and $2.5 billion. *See* Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8005, 117 Stat. 1054, 1071 (2003); Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002); Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8005, 115 Stat. 2230, 2247 (2002); Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8005, 114 Stat. 656, 674 (2000).

[25] 2005 DOD Appropriations Act § 8005.

[26] *Id*. § 8008. Congress continued the requirement for a present-value analysis to determine whether a multiyear contract will provide the government with the lowest total cost, as well as the requirement of an advance notice at least ten days prior to terminating a multiyear procurement contract. *Id*.

[27] *Id*.

[28] *Id*. *See also* Ronald W. Reagan National Defense Authorization Act, 2005, Pub. L. No. 108-375, § 111, 118 Stat. 1811, 1827 (2004) (authorizing the Army and Navy, pursuant to 10 U.S.C. § 2306b, to jointly enter into a multiyear contract for procurement of the light weight 155-millimeter howitzer).

[29] 2005 DOD Appropriations Act, § 8008.

[30] *See* U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter REVISED A-76]. *See supra* section titled Competitive Sourcing (providing additional discussion of recent developments in *Revised A-76* competitions).

[31] *Id*. § 8014(a)(1). This language limits DOD's ability to fully implement the *Revised A-76*, which permits agencies to use a "streamlined competition" process, if "65 or fewer [civilian employees] and/or any number of military personnel" perform a commercial activity. REVISED A-76, *supra* note 30, attch. B, ¶ A.5.b. In a streamlined competition the agency has flexibility in estimating agency performance costs, as the estimate may be based on the incumbent activity or the agency may "develop a more efficient organization, which may be an MEO [most efficient organization]." *Id*. attch. B, ¶ C.1.a.

public-private competitions, the agency must also determine that the contractor's performance costs would be less costly to the DOD by an amount that is ten percent of the most efficient organization's estimated costs or $10 million, whichever is less.[32] This year's Act adds a new limitation that states the contractor cannot receive an advantage for a proposal that reduces DOD costs by "not making an employer-sponsored health insurance plan available" to the workers who will perform the work under the proposal, or by "offering to such workers an employer-sponsored health benefits plan that the requires the employer to contribute less towards the premiums" than the amount paid by the DOD under chapter 89, title 5 of the United States Code.[33]

On 12 November 2004, in a memo to the OMB, the DOD objected to this new "health insurance" restriction arguing the provision "may impose unfair limitations on the private sector, thereby putting contractors at a disadvantage vis-à-vis the agency tender."[34] Stating the new provision has a disproportionate impact on small businesses and citing difficulty in incorporating the provision into the competitive sourcing process, the DOD requested repeal of section 8014(a)(3). If repeal of the provision is not possible, the DOD requests a "grandfathering" of the provision "so as not to affect our in-progress public-private competitions upon the enactment of the Department of Defense Appropriations Act."[35]

In a separate provision in the Appropriations Act, the Congress continued the prohibition on the use of appropriated funds to perform competitive sourcing studies if the government exceeds twenty four months to perform a study of a single function activity or thirty months for a multi-function activity.[36]

Military Installation Transfer Fund

Congress again authorized the SECDEF to enter into executive agreements that permit the DOD to deposit into a separate account the funds received from North Atlantic Treaty Organization (NATO) member nations for the return of overseas military installations to those nations.[37] The DOD may use this money to build facilities which have been approved by congressional act to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.[38]

Burden Sharing Contributions by Kuwait

Again this year, the Appropriations Act authorizes the DOD to accept cash contributions from the Kuwait government and to incur obligations not to exceed $350 million for the purposes specified in section 2350j(c) of title 10.[39]

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[32] 2005 DOD Appropriations Act § 8014(a)(2). Again, this limitation in DOD competitive sourcing decisions is more restrictive than the *Revised A-76*'s requirements. Under the *Revised A-76*, the "ten percent of personnel costs/$10 million" cost-conversion differential applies only to "standard competitions," which generally involve more than sixty-five civilian employees. REVISED A-76, *supra* note 30, attch. B, ¶¶ A.5 and D.5.c(4)(c).

[33] 2005 DOD Appropriations Act § 8014(a)(3). As in prior years, the Act does grant the DOD a waiver to the above-mentioned requirement for establishing a "most efficient and cost-effective organization," the application of the "ten percent of personnel costs/$10 million" cost-conversion, as well as the new requirement to consider contractor health insurance coverage, if the DOD agency directly converts performance of a commercial activity to: (1) a firm that is listed on the procurement list by the JavitsWagner-O'Day Act (41 U.S.C.S §§ 46-48c (LEXIS 2004)) which employs severely handicapped or blind employees or is planned to be converted by a qualified nonprofit agency in accordance with that Act; or (2) a firm that is at least fifty-one percent owned by an American Indian tribe or Native Hawaiian organization. *Id*. § 8014(b). Whether the DOD would rely upon this authority is doubtful, as the OMB and the *Revised A-76* make clear that the use of "direct conversions" is no longer permitted. *See* REVISED A-76, *supra* note 30, ¶ 4.c and Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

[34] Memorandum, Office of the Under Secretary of Defense (Installations and Environment), to Deputy Director for Management, Office of Management and Budget (12 Nov. 2004).

[35] *Id*. at 1-2.

[36] 2005 DOD Appropriations Act § 8022. In last year's DOD Appropriations Act, the Congress reduced from forty-eight months to thirty months the time permitted the DOD to complete a multi-function study. *See* Department of Defense Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-87, § 8022, 117 Stat. 1054, 1077 (2003). This change jeopardized and halted numerous on-going DOD competitive sourcing studies that were almost complete but past or near the new thirty-month deadline. *See* Jason Peckenpaugh, *Pentagon to Get Authority to Finish Stalled Job Competitions*, Gov't Exec. Com., Dec. 9, 2003, *at* http://www.govexec.com/dailyfed/1203/120903p1.htm. The DOD, however, requested and received legislative relief. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. H, § 111, 118 Stat. 3, 438 (2004) (providing that the forty-eight months limitation, vice thirty months, applied to DOD cost studies of a multi-function activity for which the DOD had solicited private sector proposals as of 30 September 2003).

[37] 2005 DOD Appropriations Act § 8018.

[38] *Id*.

[39] *Id*. § 8026. The statute authorizes the acceptance of contributions from designated countries and specifies that such contributions are only available for compensation of DOD local national employees, DOD military construction projects, and DOD supplies and services. 10 U.S.C.S. § 2350j(c) (LEXIS 2004).

Prohibition Against Divesting Army Corps of Engineers' Missions

The Appropriations Act again prohibits the use of appropriated funds for purposes of studying or implementing any plans to privatize, divest, or transfer any of the Army Corps of Engineers' civil works missions or responsibilities.[40]

Investment/Expense Threshold

The Appropriations Act maintains the investment/expense threshold at its current level, permitting the DOD during FY 2005 to use O&M funds to purchase investment items costing not more than $250,000.[41]

Limit on Transfer of Defense Articles and Services

The Appropriations Act again prohibits the transfer of defense articles or services (other than intelligence services) to another nation or international organization during peacekeeping, peace-enforcement, or humanitarian assistance operations without advance congressional notification.[42]

Limitation on Training of Foreign Security Forces

Unless the SECDEF determines that a waiver is required, Congress has again stated that no funds available under the Appropriations Act may be used to support training programs of foreign country security forces units where "credible information" exists that the unit has committed a gross violation of human rights.[43]

Government Travel and Purchase Cards Refunds

Previously Congress authorized the DOD to credit refunds attributable to the use of Government Travel and Purchase Cards to O&M accounts current when the refunds are received.[44] This year's Appropriations Act grants the same authority but also permits the DOD to credit such refunds to RDT&E accounts current when the refunds are received.[45]

Required Actions of DOD Chief Information Officer

The Appropriations Act again prohibits the use of appropriated funds for a mission critical or mission essential information technology system until the system is registered with the DOD Chief Information Officer (CIO).[46] In addition, for major automated information systems, the CIO must certify that the system is compliant with the Clinger-Cohen Act of 1996[47] prior to Milestone I, II, or III approval.[48]

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[40] *Id*. § 8035.

[41] *Id*. § 8040.

[42] *Id*. § 8064. This provision originally appeared in the Department of Defense Appropriations Act, 1996. *See* Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995).

[43] *Id*. § 8076. Congress has included this provision in Department of Defense Appropriations Acts since FY 1999. *See* Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998).

[44] *See, e.g.*, Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8083, 117 Stat. 1054, 1091 (2003).

[45] 2005 DOD Appropriations Act § 8082. The provision also applies to refunds attributable to official travel arranged by Government Contracted Travel Management Centers. *Id*.

[46] *Id*. § 8083(a). The Department of Defense Appropriations Act, 2000, first required registration with the Chief Information Officer. Pub. L. No. 106-79, § 8121(a), 113 Stat. 1212, 1261 (1999).

[47] *See* 40 U.S.C.S. §1401 (LEXIS 2004).

[48] 2005 DOD Appropriations Act § 8083(c).

Matching Disbursements with Obligations

Since 1996 Congress has required the DOD to match an intended disbursement with an obligation before making any disbursement in excess of $500,000.[49] Congress extends this requirement to cover disbursements made in FY 2005.[50]

Financing and Fielding of Key Army Capabilities

The Appropriations Act again directs the DOD and the Department of the Army to make budget and program plans to fully finance the Non-Line of Sight Objective Force cannon and resupply vehicle program, however, the language revises the fielding date for this system from the 2008 timeframe to FY 2010, "consistent with the broader plan to field the Future Combat System (FCS) in fiscal year 2010."[51] Congress further directs the Army to ensure that program and budget plans provide for the fielding of no fewer than seven Stryker Brigade Combat Teams.[52]

Defense Counter-Terrorism Fellowship Program

Congress again provided that of the funds appropriated for "Operation and Maintenance—Defense-Wide" $20 million is available for the Regional Defense Counter-Terrorism Fellowship Program.[53] The program funds the education and training of foreign military officers, defense civilians, and other foreign security officials, to include U.S. military officers and civilian officials whose participation directly contributes to the education and training of the foreign students.[54]

Limitation on Integration of Foreign Intelligence

Congress prohibits the use of appropriated funds for the integration of foreign intelligence information "unless the information has been lawfully collected and processed during the conduct of authorized foreign intelligence activities . . . ."[55] Moreover, such information relating to "United States persons" must be "handled in accordance with the protections provided in the Fourth Amendment of the United States Constitution as implemented through Executive Order No. 12333."[56]

Reservist Notification of Mobilization Duration

When Service Secretaries order Reservists to active duty pursuant to section 12302(a) of title 10, the Appropriations Act requires written notification to each member stating "the expected period during which the member will be mobilized."[57] The SECDEF may waive this requirement if necessary "to respond to a national security emergency or to meet dire operational requirements . . . ."[58]

Additional War-Related Appropriations

In title IX of the Appropriations Act, Congress provided the DOD with $25 billion in additional war-related appropriations,[59] which became available to the DOD upon enactment of the Appropriations Act (5 August 2004).[60] A few of

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[49] Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, § 8106, 110 Stat. 3009, 3111 (1996).

[50] 2005 DOD Appropriations Act § 8091.

[51] *Id*. § 8109.

[52] *Id*.

[53] *Id*. § 8119.

[54] *Id*.

[55] *Id*. § 8124.

[56] *Id*.

[57] *Id*. § 8128.

[58] *Id*.

[59] H.R. CONF. REP. NO. 108-622, at 377 (2004). The Conference Report breaks down the several appropriations as follows:

Iraq Freedom Fund	$103,731,158,000;
Military Personnel	$3,800,000,000;

the more significant provisions are discussed below.

Iraq Freedom Fund

The Appropriations Act provides the DOD with $3.8 billion in additional funds for authorized "Iraq Freedom Fund"[61] purposes.[62] These additional funds remain available for transfer until 30 September 2006. Additionally, the SECDEF may transfer these funds to accounts for military personnel, O&M, OHDACA, procurement, military construction, the Defense Health Program, and working capital funds.[63] The authority again requires the SECDEF to notify Congress at least five days prior to transferring funds and to submit a report each fiscal quarter summarizing the details of any transfer from the fund.[64]

Train and Equip (T&E) Funding for the Iraqi and Afghan Armies

With State Department concurrence, the SECDEF has an additional $500 million to train, equip, and provide related assistance to the Iraqi and Afghan Armies "to enhance their capability to combat terrorism and to support U.S. military operations in Iraq and Afghanistan."[65]

Commander's Emergency Response Program Funding

Congress provided an additional $300 million to fund the Commander's Emergency Response Program (CERP).[66] The CERP funds are available to military commanders "to respond to urgent humanitarian relief and reconstruction requirements . . . by carrying out programs that will immediately assist the Iraqi people, and . . . the people of Afghanistan."[67] The conferees specifically identified the CERP as "one of the most successful humanitarian assistance programs in Iraq and Afghanistan."[68]

"Lift and Sustain" Authority in Support of Coalition Forces

The Appropriations Act authorizes the use of O&M appropriations "to provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq and Afghanistan."[69] The SECDEF must provide quarterly reports to Congress regarding such support.[70]

Operations and Maintenance	$16,405,000,000;
Procurement	$1,384,000,000;
Revolving and Management Funds	$1,478,000,000;
Other DOD Programs	$683,000,000.

Id.

[60] 2005 DOD Appropriations Act § 9001.

[61] The Emergency Wartime Supplemental Appropriations, 2003, established a special "Iraq Freedom Fund" and provided approximately $16 billion to remain available for transfer until 30 September 2004 for expenses in ongoing military operations in Iraq and other activities related to the Global War on Terrorism. Pub. L. No. 108-11, tit. I, 117 Stat. 559, 563 (2003).

[62] 2005 DOD Appropriations Act, tit. IX (Iraq Freedom Fund).

[63] *Id*.

[64] *Id*.

[65] *Id*. § 9006.

[66] *Id*. § 9007.

[67] *Id*.

[68] H.R. CONF. REP. NO. 108-622, at 377 (2004).

[69] 2005 DOD Appropriations Act § 9009. In a separate authority pursuant to the Emergency Supplemental Appropriations Act for Defense and the Reconstruction of Iraq and Afghanistan, 2004, the DOD received authority to use up to $1.15 billion in the supplemental Operations and Maintenance, Defense-Wide funds provided "to reimburse Pakistan, Jordan, and other key cooperating nations, for logistical and military support" to U.S. military operations in Iraq and the Global War on Terrorism. Pub. L. No. 108-106, tit. I (Operations and Maintenance, Defense-Wide), 117 Stat. 1209, 1210 (2003). This authority remains until the $1.15 billion is expended. *Id*.

[70] 2005 DOD Appropriations Act § 9009.

Promotional Materials Authority

The Appropriations Act provides authority to the SECDEF to "present promotional materials, including a United States flag," to Active Duty and Reserve members, who participate in Operation Enduring Freedom or Operation Iraqi Freedom.[71]

MILITARY CONSTRUCTION APPROPRIATIONS AND EMERGENCY HURRICANE SUPPLEMENTAL APPROPRIATIONS ACT, 2005

President Bush signed the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005 (Military Construction Appropriations Act) on 13 October 2004.[72] This Act appropriated approximately $10 billion for military construction, family housing, and base closure activities.[73] This amount represents an increase of approximately $162 million compared to FY 2004 and about $449 million more than the President requested.[74] These appropriations include approximately $100 million for unspecified minor military construction projects and $10 million for contingency construction.[75]

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[71] *Id*. § 9014.

[72] Pub. L. No. 108-324, 118 Stat. 1220 (2004).

[73] H.R. CONF. REP. NO. 108-773, at 91 (2004). The Conference Report breaks the appropriations down as follows:

Military Construction, Army	$1,981,084,000;
Military Construction, Navy and Marine Corps	$1,069,947,000;
Military Construction, Air Force	$866,331,000;
Military Construction, Defense-wide	$686,055,000;
Military Construction, Army National Guard	$446,748,000;
Military Construction, Air National Guard	$243,043,000;
Military Construction, Army Reserve	$92,377,000;
Military Construction, Naval Reserve	$44,246,000;
Military Construction, Air Force Reserve	$123,977,000;
NATO Security Investment Program	$165,800,000;
Family Housing Construction, Army	$636,099,000;
Family Housing Operation and Maintenance, Army	$926,507,000;
Family Housing Construction, Navy and Marine Corps	$139,107,000;
Family Housing Operation and Maintenance, Navy and Marine Corps	$696,304,000;
Family Housing Construction, Air Force	$846,959,000;
Family Housing Operation and Maintenance, Air Force	$853,384,000;
Family Housing Construction, Defense-wide	$49,000;
Family Housing Operation and Maintenance, Defense-wide	$49,575,000;
DOD Family Housing Improvement Fund	$2,500,000;
Base Realignment and Closure Account	$246,116,000.

Id. at 1-6.

[74] *Id*. at 91.

[75] The Conference Report identifies the following amounts for unspecified minor military construction:

Unspecified Minor Construction, Army	$20,885,000;
Unspecified Minor Construction, Navy	$12,000,000;
Unspecified Minor Construction, Air Force	$13,280,000;
Unspecified Minor Construction, Defense-wide	$20,938,000;
Unspecified Minor Construction, Army National Guard	$9,200,000;
Unspecified Minor Construction, Air National Guard	$5,840,000;
Unspecified Minor Construction, Army Reserve	$2,923,000;

RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2005

On 28 October 2004, the President signed into law the Ronald W. Reagan National Defense Authorization Act for FY 2005 (Authorization Act).[76]

Procurement

Multiyear Aircraft Lease Pilot Program (a.k.a. Boeing Lease) Grounded

Pursuant to the Department of Defense Appropriations Act, 2002, the Air Force received authority to establish a multiyear pilot program to lease up to 100 Boeing 767 and four Boeing 737 aircraft to accelerate the Air Force's desire to replace its aging tanker refueling fleet.[77] In granting this authority, Congress also exempted the pilot program from the normal lease versus purchase analysis required in government contracting.[78] Last year, in the midst of great criticism of an Air Force plan to lease the 100 Boeing aircraft,[79] Congress limited the Air Force's leasing authority to twenty of the tanker aircraft.[80] This year, amid even greater criticism and scrutiny following the Darleen Druyen controversy,[81] Congress specifically stated the Air Force "shall lease no tanker aircraft."[82]

Research, Development, Test, and Evaluation Future Combat Systems

The Authorization Act directs the Secretary of the Army to "establish and implement a program strategy for the Future Combat Systems acquisition program of the Army."[83] The purpose of the strategy is "to provide and effective, affordable, producible, and supportable military capability with a realistic schedule and a robust cost estimate."[84] As an incentive, Congress limits funding to $2.2 billion for the Future Combat System acquisition program, until the Army certifies that it has established and implemented the required program strategy.[85]

Operation & Maintenance

Contractor Performance of Security Guard Functions

In general, section 2465 of title 10 prohibits the DOD from entering into contracts for security guard (and firefighting) services on installations within the United States.[86] The Bob Stump National Defense Authorization Act, 2003, granted the DOD authority to enter into contracts for any "increased performance" of security guard functions due to the

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Unspecified Minor Construction, Air Force Reserve	$5,263,000.

Id. at 86-87.

[76] Pub. L. No. 108-375, 118 Stat. 1811 (2004) (2005 National Defense Authorization Act).

[77] *See* Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8159, 115 Stat. 2230, 2284 (2002).

[78] *Id*. § 8159 (exempting the program from 10 U.S.C. § 2401a (2000)).

[79] *See* Charles Pope, *McCain Presses White House to Check Tanker Deal*, SEATTLE POST-INTELLIGENCER, Oct. 23, 2003, at C2.

[80] National Defense Authorization Act, 2004, Pub. L. No. 108-136, § 135, 117 Stat. 1392, 1413 (2003). While limiting the Air Force's leasing authority, Congress authorized a multiyear procurement program, using incremental funding, for up to eighty additional aerial refueling aircraft. *Id*.

[81] *See supra* section titled Procurement Fraud (providing further discussion of the Darleen Druyen controversy).

[82] 2005 National Defense Authorization Act § 133. While eliminating the Air Force's leasing authority for the aircraft, Congress increased to 100 the number of additional aerial refueling aircraft the Air Force may acquire through a more traditional multiyear procurement program. *Id*. This year's Authorization Act also prohibits the Air Force from retiring any of its KC-135E air refueling aircraft. *Id*. § 131.

[83] *Id*. § 211.

[84] *Id*.

[85] *Id*.

[86] 10 U.S.C.S. § 2465 (LEXIS 2004). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 granted the DOD a temporary exception to the prohibition against procuring security functions. The exception applies for the duration of Operation Enduring Freedom and 180 days thereafter and permits the DOD to contract with "a proximately located local or State government" for such security services. Pub. L. No. 107-56, § 1010, 115 Stat. 272, 395-96 (2001).

terrorist attacks on 11 September 2001, notwithstanding the prohibition under section 2465 of title 10.[87] Congress provided the authority temporarily, with an expiration date of 1 December 2005.[88] This year's Authorization Act extends this authority to 30 September 2006, unless the SECDEF fails to submit a required report by 1 December 2005 to Congress on the use and impact of contract security guards.[89]

Army Pilot Program for Purchasing Certain Municipal Services

The Authorization Act permits the Army to initiate a limited pilot program to procure specified municipal services, including: refuse collection and disposal; library services; recreation services; facility maintenance and repair; and utilities.[90] This authority terminates on 30 September 2010.[91]

Bid Protests by Federal Employees in OMB Circular A-76 Competitions

The Authorization Act amends the Competition in Contracting Act of 1984[92] by specifying the term "interested party" for purposes of filing a bid protest includes an agency tender official (ATO) in an *OMB Circular A-76*[93] public-private competition involving more than sixty-five full-time equivalent employees (FTEs).[94] Additionally, the legislation states ATOs "shall file a protest" in a public-private competition at the request of a majority of the affected federal civilian employees "unless the [ATO] determines that there is no reasonable basis for the protest."[95] The ATO's determination whether to file a protest "is not subject to administrative or judicial review," however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.[96] Further, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may "intervene" in the protest.[97] This new protest authority applies to protests "that relate to [*OMB Circular A-76*] studies initiated . . . on or after the end of the 90-day period beginning on the date of enactment of [the Authorization Act]."[98]

Conversion Differential in OMB Circular A-76 Competitions

Similar to a recurring provision in recent Department of Defense Appropriations Acts,[99] this year's Authorization Act provides that agencies must determine that a contractor's performance costs would be less costly to the DOD by an amount that is ten percent of the most efficient organization's estimated costs or $10 million, whichever is less, prior to converting a commercial activity to contractor performance.[100] Whereas the Appropriations Act requires application of the "conversion differential" in those competitions involving more than ten civilian employees,[101] the Authorization Act simply states the conversional differential applies to *Revised A-76* competitions where the DOD is "required to include a formal comparison of the cost" of contractor performance and continued federal employee performance.[102]

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[87] Pub. L. No. 107-314, § 332, 116 Stat. 2458, 2513 (2002). The DOD may rely upon the authority where, without the contract, military members are or would perform the increased security functions, and the Secretary concerned determines that the contractor personnel are appropriately trained and supervised and that contract performance will not result reduce security. *Id*.

[88] *See id*.

[89] 2005 National Defense Authorization Act § 324.

[90] *Id*. § 325.

[91] *Id*.

[92] Pub. L. No. 98-369, tit. VII, § 2701, 98 Stat. 1175 (codified in various sections of titles 10, 31, and 41 U.S.C.).

[93] *See* REVISED A-76, *supra* note 30.

[94] 2005 National Defense Authorization Act § 326 (amending 31 U.S.C. § 3551(2)). For additional discussion of this development, see *supra* section titled Competitive Sourcing.

[95] 2005 National Defense Authorization Act § 326 (amending 31 U.S.C. § 3552).

[96] *Id*.

[97] *Id*. (amending 31 U.S.C. § 3553).

[98] *Id*.

[99] *See* discussion *supra* notes 31-32 and accompanying text.

[100] 2005 National Defense Authorization Act § 327.

[101] *See* discussion *supra* notes 31-32 and accompanying text.

[102] 2005 National Defense Authorization Act § 327.

Reimbursement for Protective Equipment Purchased by or for Military Members Deployed in Contingency Operations

The Authorization Act directs the SECDEF to reimburse military members "for the cost (including any shipping cost) of any protective, safety, or health equipment" purchased by the military member or by another person in the member's behalf "in anticipation of, or during, the deployment of the member in connection with Operation Enduring Freedom, or Operation Iraqi Freedom . . . ."[103] The reimbursement requirement applies only if the SECDEF certifies the equipment was critical to the military member's protection, safety, or health; the member was not issued the equipment prior to deployment; and the military member purchased the equipment between 11 September 2001 and 31 July 2004.[104] Not later than 120 days following the Act's enactment, the SECDEF must issue rules to "expedite the provision of reimbursement . . . ."[105] Following issuance of the implementation guidance, military members will have one year to submit qualifying reimbursement claims.[106]

Other O&M Matters

The Act's O&M title also addresses several Environmental Provisions,[107] matters relating to Information Technology,[108] and Extensions of Program Authorities.[109]

Military Personnel Policy

JAG Independence

Amending several sections of title 10 relating to the authorities of The Judge Advocates General of the respective Services, the Authorization Act states no DOD officer or employee may interfere with the ability of The Judge Advocates General "to give independent legal advice" to their respective Service Secretary or Chief of Staff.[110] The amendments also specify no DOD officer or employee shall interfere with the ability of Army, Navy, Marine Corps, and Air Force judge advocates "to give independent legal advice to commanders."[111]

Authority to Provide Civilian Clothing for Travel in Connection with Medical Evaluation

The Authorization Act amends section 1047 of title 10 to give the DOD authority to provide civilian clothing to enlisted members who are "medically evacuated for treatment in a medical facility by reason of an illness or injury incurred or aggravated while on active duty" or are in an "authorized travel status from a medical facility . . . after being medically evacuated . . . ."[112] The civilian clothing provided, or the reimbursement for such clothing, may not exceed $250.[113]

Operation Hero Miles Program

Adding section 2613 to title 10, the Authorization Act grants the SECDEF the authority to accept donated "travel

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[103] *Id*. § 351.

[104] *Id*. The Act limits the amount of reimbursement to $1100 per qualifying equipment item. *Id*.

[105] *Id*. Such rules are to address "the circumstances under which the United States will assume title or ownership of any protective, safety, or health equipment for which reimbursement is made." *Id*.

[106] *Id*.

[107] *Id*. §§ 311-318.

[108] *Id*. §§ 331-333.

[109] *Id*. §§ 341-343.

[110] *Id*. § 584 (amending 10 U.S.C. §§ 3037, 5148, 5046, and 8037).

[111] *Id*.

[112] *Id*. § 584.

[113] *Id*.

benefits" to facilitate the travel of armed forces members on authorized leave who are otherwise deployed in support of a contingency operation.[114] The SECDEF may also accept travel benefits to facilitate family member visitation of members injured in the line of duty during such deployments.[115] The new provision tasks the DOD with designating a single office to develop rules and procedures for accepting and distributing donated travel benefits.[116] For tax purposes, the Authorization Act also excludes from gross income the benefits received under the program.[117]

Compensation and Other Personnel Benefits

Basic Pay Increases

Effective 1 January 2005, the monthly base pay of uniformed service members will increase by 3.5 percent.[118] Last year Congress authorized a monthly basic pay rate increase for members of the uniformed services based on the Employment Cost Index (ECI).[119] This year, the Act waived that increase.[120]

Eligibility for Supplemental Subsistence Allowance, Imminent Danger Pay, Family Separation Allowance, and Other Federal Assistance

Section 402a of title 37 authorizes up to $500 per month for family supplemental subsistence allowance (FSSA) to low-income members of the armed forces to improve their standard of living.[121] This year, the Authorization Act excludes the amount received in family separation allowance and hostile fire and imminent danger pay from the calculation of household income when determining eligibility to receive FSSA.[122] The Act also excludes the amount of FSSA received when determining eligibility for other federal assistance programs.[123]

Family Separation Basic Allowance for Housing

Congress authorizes a basic allowance for housing for service family members when the family is prohibited from joining the service member at the member's duty station.[124] This year the Authorization Act extends permissive authority for Service Secretaries to decline to pay the family separation housing allowance if the service member's circumstances do not justify the payments.[125] The Act is clear that service members stationed world-wide should receive the family separation housing allowance when family members are prohibited from joining the service member at the member's duty station and government provided quarters are unavailable to the service member at the duty location.[126]

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[114] *Id*. § 585. Under the new section, "the term 'travel benefits' means frequent flyer miles, credits for tickets, or tickets for air or surface transportation . . . ." *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *See id*. § 601.

[119] *See, e.g.*, National Defense Authorization Act, 2004, Pub. L. No. 108-136, 117 Stat. 1495 (2004). The ECI is the wages and salaries of private industry workers published by the Bureau of Labor Statistics. The increase is the percentage, rounded to the nearest one-tenth of one percent, by which the ECI for the base quarter of the year before the preceding year exceeds the ECI for the base quarter of the second year before the preceding calendar year, if at all. Congress required an increase of one-half of one percentage point higher than the percentage that would otherwise be applicable for FYs 2004-2006. *Id*.

[120] 2005 National Defense Authorization Act § 601.

[121] 37 U.S.C.S. § 402a (LEXIS 2004).

[122] 2005 National Defense Authorization Act § 602.

[123] *Id*. Receipt of FSSA may not affect eligibility for school lunch assistance, Head Start, and other federal programs administered by the states. *Id*.

[124] 37 U.S.C.S. § 403(d).

[125] 2005 National Defense Authorization Act § 603.

[126] *Id*.

Family Separation Allowance

The Act maintains the family separation allowance at $250 per month through 31 December 2005.[127]

Hostile File and Imminent Danger Pay

The Act maintains the hostile fire and imminent danger pay at $225 per month through 31 December 2005.[128]

Family Member Attendance of Burial or Memorial Service

The Authorization Act amends section 411f of title 37 to clarify that family members and parents of a service member who dies on active duty may travel at government expense to the service member's burial site.[129]

Family Member Travel to Ill or Injured Service Members

The Authorization Act also increases from two to three the number of family members entitled to transportation at the government's expense to visit an ill or injured service member.[130] The Act also grants family members the option of receiving per diem or reimbursement for the expenses associated with visiting the service family member.[131]

Acquisition Policy, Acquisition Management, and Related Matters

Internal Controls of DOD Procurements through GSA's Client Support Centers

The Act requires the Inspectors General of the DOD and the General Services Administration (GSA) to review the policies and administration of the policies, procedures, and internal controls of each Client Support Center of the GSA Federal Technology Service (Center).[132] By 15 March 2005, the Inspector General must report whether each Center complies with defense procurement requirements or has made significant progress toward compliance.[133] If not, the Act requires the Inspectors General to submit a second compliance report by 15 March 2006 and prohibits the DOD from placing orders for products or services exceeding $100,000 from the non-compliant Center, until the Center meets the procurement requirements or makes significant progress.[134] If the Under Secretary of Defense (Acquisition, Technology, and Logistics) determines procuring from the Center is in the DOD's interest, the Act authorizes a one year exception to the prohibition.[135]

Multiyear Task and Delivery Order Contracts

The National Defense Authorization Act, 2004, amended section 2304a of title 10 to authorize the head of an agency to enter into a task or delivery order contract for not more than five years.[136] This year the Act amends Section 2304a(f) of title 10, authorizing the head of an agency to extend task or delivery order contracts for up to ten years.[137] The contract period may exceed ten years if the agency head documents exceptional circumstances in writing.[138] The Act requires the

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[127] *Id*. § 623.

[128] *Id*.

[129] *Id*. § 631. Congress imposed a $2 million ceiling on FY 2005 expenditures. *Id*.

[130] *Id*. § 632. Congress also granted Service Secretaries the authority to waive the family member limitation. *Id*.

[131] *Id*.

[132] *Id*. § 802. The Act defines the GSA Client Support Center as the Client Support Center of the Federal Technology Service of the GSA. *Id*.

[133] *Id*. The Center complies with defense procurement requirements if the policies, procedures, and internal controls, as administered, comply with the DOD procurement laws and regulations. *Id*.

[134] *Id*.

[135] *Id*. The exception must be in writing. The Act authorizes one year exceptions to the prohibition and a one year extension. *Id*.

[136] Pub. L. No. 108-136, § 843, 117 Stat. 1392, 1553 (2003).

[137] 2005 National Defense Authorization Act § 813.

[138] *Id*.

Secretary of Defense to report contract extensions beyond the ten year limitation within sixty days of the end of the fiscal year.[139]

Funding Ceiling for Certain Multiyear Procurement Contracts

Amending sections 2306b(g) and 2306c(d) of title 10, which address multiyear procurement contracts with cancellation ceilings in excess of $100,000,000, the Act requires the head of an agency to notify the congressional defense committees if the budget does not include funding the cancellation ceiling costs established in the contract.[140]

Increased Threshold for Other Than Competitive Procedures

The Act requires head of the procuring activity approval for contracts using other than competitive procedures and that exceed $10 million but are less than $75 million.[141] The Senior Procurement Executive must approve contracts using other than competitive procedures that exceed $75 million.[142]

Commercial Item Test Program

The Act extends until 1 January 2009 the commercial item test program authority to use simplified acquisition procedures to procure commercial items up to $5 million in value.[143]

Increased Thresholds for Special Emergency Procurement Authority

This year the Authorization Act maintains the micro-purchase threshold at $15,000 if the head of an agency determines the contract supports a contingency operation or facilitates defense against or recovery from nuclear, chemical, biological, or radiological attack against the United States.[144] Outside the United States, the micro-purchase threshold increases to $25,000 and the simplified acquisition threshold increases from $500,000 to $1 million.[145]

Defense Procurements Made Through Contracts of Other Agencies

Effective 6 April 2005, interagency orders[146] by the head of a DOD agency to a non-DOD agency that exceed the simplified acquisition threshold must comply with the DOD agency head's reviewing and approving requirements for inter-agency procurements.[147] The requirement does not apply to printing, binding, or blank-book services by the government Printing Office or services from the Library of Congress' Federal Library and Information Network and Federal Research Programs.[148] The Act also requires the Service Secretaries, heads of Defense Agencies, and heads of Defense Field Activities to submit reports to the SECDEF detailing the service charges imposed for such contracts.[149]

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[139] *Id*. The Act requires reports for FYs 2005 through 2009. The report requires a discussion of the exceptional circumstances and the justification for the determination of exceptional circumstances. *Id*.

[140] *Id*. § 814. The Act requires written notification of: "(1) the cancellation ceilings amounts planned for each program year in the proposed multiyear procurement contract, together with the reasons for the amounts planned; (2) the extent to which costs of contract cancellation are not included in the budget for the contract; and (3) a financial risk assessment of not including budgeting for costs of contract cancellation." *Id*.

[141] *Id*. § 815. The Act increases the authority from $50 million to $75 million. *Id*.

[142] *Id*.

[143] *Id*. § 817.

[144] *Id*. § 822.

[145] *Id*.

[146] The new approval requirements apply to interagency orders for information technology placed under government-wide acquisition contracts. *Id*.

[147] *Id*. § 854. The Act defines head of an agency as the SECDEF or Service Secretary. *Id*.

[148] *Id*.

[149] *Id*.

DOD Organization and Management

Extension of Authority for Commercial Intelligence Collection Activities Abroad

The Act amends section 421(a) of title 10 and extends until 31 December 2006 the SECDEF's authority to engage in commercial activities that provide security for authorized intelligence collection activities abroad.[150]

General Provisions

Transfer Authority

The Act authorizes the SECDEF to transfer no more than $3.5 billion of FY 2005 authorizations provided the transfer is in the national interest and the authorizations are only used for items that have a higher priority than the items from which transferred.[151]

Retention of Fees for Licensing of Intellectual Property

Adding section 2260 to title 10, the Act authorizes the SECDEF to license intellectual property and expend the fees earned to pay the costs of securing trademarks and operating the licensing programs.[152] The Act also authorizes the SECDEF to use excess fees for morale, welfare, and recreation activities.[153]

Working Capital Fund Transfer Notifications

Adding a new subsection to section 2208 of title 10, the Act requires the SECDEF to notify Congress before transferring funds from or to a working capital fund.[154]

Military Extraterritorial Jurisdiction over Contractors Supporting Oversea Defense Missions

Amending the definitions in section 3267(1)(A) of title 18, the Act expands military extraterritorial jurisdiction. The Act includes personnel employed by or contracting with any other Federal agency or provisional authority if their employment supports the DOD mission overseas.[155] Previously jurisdiction only extended to DOD civilian employees (including a nonappropriated fund instrumentalities), DOD contractors, and DOD contractor employees.[156]

Matters Relating to Other Nations

Commanders Emergency Response Program (CERP)

The Act authorizes up to $300 million in FY 2005 DOD O&M funds for the CERP in Iraq and Afghanistan.[157] The SECDEF may waive any law prohibiting the implementation of the programs but must submit quarterly reports to Congressdetailing the source, use, and allocation of the funds for the program.[158]

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[150] *Id*. § 921.

[151] *Id*. § 1001. The transfer may not be used to provide authority for an item Congress denied authorizations.

[152] *Id*. § 1004. Fees are available for obligation for a three year period beginning with the year retained. *Id*.

[153] *Id*.

[154] *Id*. § 1009.

[155] *Id*. § 1088.

[156] 18 U.S.C.S. 3267 (LEXIS 2004).

[157] 2005 National Defense Authorization Act § 1201. *See supra* notes 66 to 68 and accompanying text providing further discussion of legislation related to CERP funding).

[158] 2005 National Defense Authorization Act § 1201. The Act also requires the SECDEF to submit a report to the Armed Services Committees in the House and Senate identifying laws that prohibit, restrict, or constrain the CERP. *Id*.

Assistance to Iraq and Afghanistan Military and Security Forces

The Authorization Act authorizes the SECDEF to use O&M funds to equip, supply, service, and train Iraq and Afghanistan military and security forces to enhance their ability to combat terrorism and support the United States or coalition military operations.[159] Assistance may not exceed $500 million in FY 2005 O&M funds.[160] The Act also requires the SECDEF to notify Congress not less than fifteen days before providing any assistance.[161]

Guidance on Contractors Supporting Deployed Forces in Iraq

The Act requires the SECDEF to issue guidance on how the DOD will manage contractor personnel supporting deployed forces and requires the Service Secretaries to develop procedures to implement the guidance.[162] Within thirty days of issuing the guidance, the Act requires the SECDEF to issue a report on the guidance to the Armed Services Committees in the House and Senate.[163]

Report on Contractors Supporting Deployed Forces and Reconstruction Efforts in Iraq

By 6 April 2005, the SECDEF must submit a report to the Armed Services Committees in the House and Senate detailing contractors supporting deployed forces and reconstruction efforts in Iraq.[164]

Military Construction Authorizations

Approval and Notification Requirements for Repair Projects

The Act requires advance approval by the Service Secretary concerned and notification to Congress for major repair projects exceeding $7.5 million.[165] If a repair project exceeds $10 million, the justification for the repair and estimated cost of the project must include the total cost of all phases of the project for multi-year projects to a single facility.[166]

General and Flag Officer Military Family Housing Reporting Requirements

Amending section 2831 of title 10, the Act requires the SECDEF to submit to Congress a report identifying the total cost of operating, repairing, and maintaining general and flag officer military family housing that exceeds $35,000.[167] The Act also requires the SECDEF to report the total cost of operation, maintenance, utilities, lease and repairs of general and flag officer family housing.[168] For repairs exceeding $35,000, the Act requires the Service Secretary to justify the repair to the congressional defense committees and wait twenty-one days.[169] The SECDEF must also report the anticipated need for general and flag officer housing in the National Capital Region in addition to submitting a report identifying the cost of operating general and flag officer family housing worldwide.[170]

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[159] *Id*. § 1202. The Act defines military and security forces as "national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces and police." *Id*.

[160] *Id*.

[161] *Id*.

[162] *Id*. § 1205. The guidance will establish policies, delineate the roles and responsibilities of commanders for contractor personnel, and integrate into one document other guidance affecting DOD responsibility for contractors. The guidance will also address warning, locating, identifying, sharing of information, and assisting contractor security personnel. *Id*.

[163] *Id*.

[164] *Id*. § 1206. The report will include a description of the overall chain of command and oversight mechanisms, available sanctions, past disciplinary and criminal actions, an explanation of the legal status of contractor employees engaged in security functions, and a description of incidents in which contractor employers have been engaged in hostile file or other incidents. The report will also include a plan to establish and implement contractor data collection. *Id*.

[165] *Id*. § 2801. The approval requirement increased from $5 million, and the notification requirement decreased from $10 million. *Id*.

[166] *Id*.

[167] *Id*. § 2802.

[168] *Id*. The Act requires the report within 120 days from the end of the fiscal year. *Id*.

[169] The Secretary may proceed after fourteen days if the justification and estimate are provided electronically. *Id*.

[170] *Id*.

Continued Limited Authority to Use O&M Funds for Construction

The Act extends the limited authority to use O&M funds for construction for temporary operational requirements outside the United States related to war, national emergency or contingency requirements, provided the DOD continues to submit quarterly reports to Congress.[171] The Act also directs the DOD to determine whether permanent authority is required for this authority.[172]

Majors Kevin Huyser and Bobbi Davis.

[171] *Id*. § 2810.

[172] *Id*.

Appendix B

Government Contract and Fiscal Law Websites and Electronic Newsletters

The first table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields utilize most often. If you are viewing this document in an electronic format, you can click on the web address in the second column and open the requested website. It may be easier to access the AF secure sites through WebFLITE.

The second table on the final page below contains links to websites that allow you to subscribe to various electronic newsletters of interest to practitioners. Once you have joined one of these news lists, the list administrator will automatically forward electronic news announcements to your email address. These electronic newsletters are convenient methods of keeping informed about recent and/or upcoming changes in the field of law.

Website Name	Web Address
A	
Acquisition Network (AcqNet)	http://www.arnet.gov
Acquisition Review Quarterly (from DAU)	http://www.dau.mil/pubs/arqtoc.asp
AT&L Knowledge Sharing System	http://deskbook.dau.mil/jsp/default.jsp
Acquisition Streamlining and Standardization Information System (ASSIST)	http://dodssp.daps.mil/assist.htm
ACQWeb (Office of Undersecretary of Defense for Acquisition Logistics & Technology)	http://www.acq.osd.mil
Agency for International Development	http://www.usaid.gov/
Air Force Acquisition	http://www.safaq.hq.af.mil/
Air Force Acquisition Training Office	http://www.safaq.hq.af.mil/acq_workf/training/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mil
Air Force Audit Agency	https://www.afaa.hq.af.mil/domainck/index.shtml
Air Force Contracting	https://www.safaq.hq.af.mil/contracting/restricted/index.cfm
Air Force Contracting Toolkit	http://www.safaq.hq.af.mil/contracting/toolkit/
Air Force FAR Site	http://farsite.hill.af.mil
Air Force FAR Supplement	http://farsite.hill.af.mil/vfaffar1.htm
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/vfafmc1.htm
Air Force Materiel Command Homepage	https://www.afmc-mil.wpafb.af.mil/index.htm
Air Force Materiel Command Contracting Toolkit	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkopr1.htm
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Home Page	http://www.af.mil/
Air Force Logistics Management Agency	https://www.aflma.hq.af.mil/
Air Force Materiel Command	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command Staff Judge Advocate	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://www.e-publishing.af.mil/
American Bar Administration (ABA) Legal Technology Resource Center	http://www.lawtechnology.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Journal (PCLJ)	http://www.law.gwu.edu/pclj/
ABA Public Contract Law Section	http://www.abanet.org/contract/
ABA Public Contract Law Section Webpage on Agency Level Bid Protests	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Armed Services Board of Contract Appeals (ASBCA)	http://www.law.gwu.edu/asbca
Army Acquisition (ASA(ALT))	https://webportal.saalt.army.mil/

Army Acquisition Corps	http://asc.rdaisa.army.mil/default.cfm
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Contracting Agency	http://aca.saalt.army.mil/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.hq.usace.army.mil/cecc/maincc.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://www.hqda.army.mil/ogc/
Army Home Page	http://www.army.mil/
Army Materiel Command (AMC)	http://www.amc.army.mil/
AMC Contracting Policy Vault	http://www.amc.army.mil/amc/rda/pvault.html
AMC Counsel	http://www.amc.army.mil/amc/command_counsel/
Army Portal	https://www.us.army.mil/portal/portal_home.jhtml
Army Publications	http://www.usapa.army.mil
Army Single Face to Industry (ASFI)	https://acquisition.army.mil/asfi/

B

Bid Protests Webpage from the American Bar Administration (ABA) Public Contract Law Section	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Boards of Contract Appeals Bar Association	http://www.bcabar.org/
Budget of the United States	http://www.gpoaccess.gov/usbudget/

C

Central Contractor Registration (CCR)	http://www.ccr.gov/
Checklist (AF Electronic Systems Command Contract Review Checklist)	https://centernet.hanscom.af.mil/JA/CRG/checklist.htm
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Electronic Code of Federal Regulations (eCFR)	http://www.gpoaccess.gov/ecfr
Comptroller General Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
Comptroller General Legal Products	http://www.gao.gov/legal.htm
Comptroller General Principles of Federal Appropriations Law	http://www.gao.gov/legal.htm
Comptroller General Principles of Federal Appropriations Law Update Service (A Commercial Source)	http://www.managementconcepts.com/publications/financial/ALMGAO.asp
Congressional Bills	http://www.gpoaccess.gov/bills/index.html
Congressional Documents	http://www.gpoaccess.gov/legislative.html
Congressional Documents via Thomas	http://thomas.loc.gov/
Congressional Record	http://www.gpoaccess.gov/crecord/index.html
Contingency Contracting (Army AMC)	http://dasapp.saalt.army.mil/Contingency%20Contracting%20Site/ck/ck-prime.htm
Contract Pricing Reference Guides	http://www.acq.osd.mil/dp/cpf/pgv1_0/pgchindex.html
Contract Review Checklist (AF Electronic Systems Command)	https://centernet.hanscom.af.mil/JA/CRG/checklist.htm
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards (CAS—found in the Appendix to the FAR)	http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/farapndx1.htm
Cost Accounting Standards Board (CASB)	http://www.whitehouse.gov/omb/procurement/casb.html
Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
Court of Federal Claims (COFC)	http://www.uscfc.uscourts.gov/
Iraq CPA IG	http://www.cpa-ig.org/index.html

Davis Bacon Wage Determinations	http://www.gpo.gov/davisbacon/
Debarred List (known as the Excluded Parties Listing System)	http://epls.arnet.gov
Defense Acquisition Guidebook	http://akss.dau.mil/dag/
Defense Acquisition Regulations Directorate (the DAR Council)	http://www.acq.osd.mil/dpap/dars/index.htm
Defense Acquisition University (DAU)	http://www.dau.mil/
Defense Competitive Sourcing & Privatization	http://www.acq.osd.mil/installation/csp/
Defense Comptroller	http://www.dtic.mil/comptroller/
Defense Contract Audit Agency (DCAA)	http://www.dcaa.mil/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Procurement and Acquisition Policy (DPAP) Electronic Business	http://www.acq.osd.mil/dpap/ebiz/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
DFAS Electronic Commerce Home Page	http://www.dfas.mil/ecedi/
Defense Logistics Agency (DLA) Electronic Commerce Home Page	http://www.supply.dla.mil//Default.asp
Defense Procurement and Acquisition Policy (DPAP)	http://www.acq.osd.mil/dpap/
Defense Standardization Program	http://dsp.dla.mil/
Defense Technical Information Center	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.ogc.doc.gov/ogc/contracts/cld/cld.html#ContractLaw
Department of Energy Acquisition Guide	http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Guide?OpenDocument
Department of Energy Acquisition Regulation	http://professionals.pr.doe.gov/ma5/MA-5Web.nsf/Procurement/Acquisition+Regulation?OpenDocument
Department of the Interior Acquisition Regulation	http://www.ios.doi.gov/pam/aindex.html
Department of Justice	http://www.usdoj.gov
Department of Justice Legal Opinions	http://www.usdoj.gov/olc/opinionspage.htm
Department of Labor Acquisition Regulation	http://www.dol.gov/dol/allcfr/OASAM/Title_48/Part_2901/toc.htm
Department of State Acquisition Regulation	http://www.statebuy.state.gov/dosar/dosartoc.htm
Department of Transportation Acquisition Regulation	http://www.dot.gov/ost/m60/tamtar/
Department of Transportation Acquisition Manual	http://www.dot.gov/ost/m60/earl/tam.htm
Department of Veterans Affairs (VA)	http://www.va.gov
VA Board of Contract Appeals	http://www1.va.gov/bca/
Directorate for Information Operations and Reports Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Contract Pricing Reference Guide	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DOD E-Mall	https://emall.prod.dodonline.net/scripts/emLogon.asp
DOD Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.osd.mil
DOD Instructions and Directives	http://www.dtic.mil/whs/directives/
DOD Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm
DOD Single Stock Point for Military Specifications, Standards and Related	http://www.dodssp.daps.mil/

Publications	
DOD Standards of Conduct Office (SOCO)	http://www.defenselink.mil/dodgc/defense_ethics/

E

ESI, International (training in government contracts)	http://www.esi-intl.com/public/contracting/governmentcontracting.asp
Excluded Parties Listing System	http://epls.arnet.gov
Executive Orders	http://www.gpoaccess.gov/wcomp/index.html
Executive Orders (alternate site)	http://www.archives.gov/federal_register/executive_orders/disposition_tables.html
Export Administration Regulations	http://www.gpo.gov/bis/index.html

F

FAR Site (Air Force)	http://farsite.hill.af.mil
FAR—GSA Alternate Site	http://www.arnet.gov/far/
Federal Acquisition Institute (FAI)	http://www.faionline.com/kc/login/login.asp?kc_ident=kc0001
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE) (AF WebFLITE)	https://aflsa.jag.af.mil/php/dlaw/dlaw.php (registration required)
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	https://www.fpds.gov/
Federal Publications	http://www.fedpubseminars.com/seminar/gcplist.html
Federal Register via GPO Access	http://www.gpoaccess.gov/fr/index.html
Federally Funded R&D Centers (FFRDC)	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations	http://www.dod.mil/comptroller/fmr/
FindLaw	http://www.findlaw.com
FirstGov	http://www.firstgov.gov/

G

Government Accountability Office (GAO) Appropriation Decisions	http://www.gao.gov/decisions/appro/appro.htm
GAO Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
GAO Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
GAO Comptroller General Legal Products	http://www.gao.gov/legal.htm
GAO Red Book Update Service (A Commercial Source)	http://www.managementconcepts.com/publications/financial/ALMGAO.asp
GAO Home Page	http://www.gao.gov
General Services Administration (GSA) Acquisition Manual	http://www.arnet.gov/GSAM/gsam.html
GSA Advantage	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelId=-13827
GSA Federal Supply Service (FSS)	http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=10322&contentType=GSA_BASIC
GSA Board of Contract Appeals (GSABCA)	http://www.gsbca.gsa.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/content/homepage
Government Contracts Resource Guide	http://www.law.gwu.edu/burns/research/gcrg/gcrg.htm
Government Online Learning Center	http://www.golearn.gov/
Government Printing Office (GPO) Access	http://www.gpoaccess.gov/index.html
GPO Board of Contract Appeals (GPOBCA) (As of 1 Jul 04, appeals go to VABCA)	http://www.gpo.gov/contractappeals/index.html

J

JAGCNET (Army JAG Corps Homepage)	http://www.jagcnet.army.mil/
TJAGLCS Homepage	http://www.jagcnet.army.mil/TJAGSA
Javits-Wagner-O'Day Act (JWOD)	http://www.jwod.gov/jwod/index.html
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/jel/jointpub.htm
Joint Travel Regulations (JFTR/JTR)	http://www.dtic.mil/perdiem/trvlregs.html

L

Library of Congress	http://lcweb.loc.gov
Logistics Joint Administrative Management Support Services (LOGJAMMS)	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm

M

Marine Corps Home Page	http://www.usmc.mil
Marine Corps Regulations	http://www.usmc.mil/directiv.nsf/web+orders
MEGALAW	http://www.megalaw.com
Mil Standards (DoD Single Stock Point for Military Specifications, Standards and Related Publications)	http://www.dodssp.daps.mil/
MWR Home Page (Army)	http://www.ArmyMWR.com

N

NAF Financial (Army)	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Aeronautics and Space Administration (NASA) Acquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Contract Management Association	http://www.ncmahq.org/
National Industries for the Blind (NIB)	www.nib.org
National Industries for the Severely Handicapped (NISH)	www.nish.org/
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	http://govinfo.library.unt.edu/npr/index.htm
Naval Supply Systems Command (NAVSUP)	http://www.navsup.navy.mil/npi/
Navy Acquisition One Source	http://www.abm.rda.hq.navy.mil/
Navy Acquisition Reform	http://www.acq-ref.navy.mil/index.cfm
Navy Electronic Commerce On-line	http://www.neco.navy.mil/
Navy Financial Management and Comptroller	http://www.fmo.navy.mil/policies/regulations.htm
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Directives and Regulations	http://neds.nebt.daps.mil/
Navy Research, Development and Acquisition	http://www.hq.navy.mil/RDA/
North American Industry Classification System (the Standard Industry Code)	http://www.osha.gov/oshstats/sicser.html

O

Office of Acquisition Policy within GSA	http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8203&channelPage=/ep/channel/gsaOverview.jsp&channelId=-13069
Office of Federal Procurement Policy (OFPP) Best Practices Guides	http://www.acqnet.gov/Library/OFPP/BestPractices/
Office of Government Ethics (OGE)	http://www.usoge.gov
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/

P

Per Diem Rates (GSA)	http://policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.htm
Per Diem Rates (DoD)	http://www.dtic.mil/perdiem/
Per Diem Rates (OCONUS)	http://www.state.gov/m/a/als/prdm/
Producer Price Index	http://www.bls.gov/ppi/
Program Manager (a periodical from DAU)	http://www.dau.mil/pubs/pmtoc.asp
Public Contract Law Journal	http://www.law.gwu.edu/pclj/
Public Papers of the President of the United States	http://www.access.gpo.gov/nara/pubpaps/srchpaps.html
Purchase Card Program	http://purchasecard.saalt.army.mil/default.htm

R

Rand Reports and Publications	http://www.rand.org/publications/

S

SearchMil (search engine for .mil websites)	http://www.searchmil.com/
Service Contract Act Directory of Occupations	http://www.dol.gov/esa/regs/compliance/whd/wage/main.htm
Share A-76 (DOD site)	http://emissary.acq.osd.mil/inst/share.nsf
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR)	http://www.acq.osd.mil/sadbu/sbir/
Standard Industry Code (now called the North American Industry Classification System)	http://www.osha.gov/oshstats/sicser.html
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner/

T

Travel Regulations	http://www.dtic.mil/perdiem/trvlregs.html

U

U.S. Business Advisor (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov/search/criteria.php
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Congress on the Net	http://thomas.loc.gov
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.fedcir.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
U.S. Department of Agriculture (USDA) Graduate School	http://grad.usda.gov/
UNICOR (Federal Prison Industries, Inc.)	http://www.unicor.gov/

W

Wage Determination On-Line	http://www.wdol.gov/
Where in Federal Contracting?	http://www.wifcon.com/
Newsletter Name	
Air Force Contracting	http://www.safaq.hq.af.mil/contracting/toolkit/distribution-list.html
Air Force Materiel Command (AFMC) Contract Update	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pkp/polvault/e-signup.htm
Army Material Command (AMC) Updates (see	http://www.amc.army.mil/amc/rda/pvault.html

subscribe link bottom of website)	
Defense and Security Publications via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=gpo-defpubs-l&A=1
Defense Federal Acquisition Regulation Supplement (DFARS) News	http://www.acq.osd.mil/dp/dars/dfarmail.htm
DOD Acquisition Initiatives (DUSD(AR))	http://acquisitiontoday.dau.mil/
Federal Acquisition Regulation (FAR) News	http://www.arnet.gov/far/mailframe.html
Federal Register via GPO Access	http://listserv.access.gpo.gov/scripts/wa.exe?SUBED1=fedregtoc-l&A=1
Government Accountability Office (GAO) Reports Testimony, and/or Decisions	http://www.gao.gov/subtest/subscribe.html
GPO Listserv	http://listserv.access.gpo.gov/
GSA Listserv	http://listserv.gsa.gov/archives/index.html
Navy Acquisition One Source website updates	http://www.abm.rda.hq.navy.mil/navyaos/content/view/full/3218

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 U.S. 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—155th Contract Attorneys Course 5F-F10
Course Number—155th Contract Attorneys Course 5F-F10
Class Number—155th Contract Attorneys 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 2004 - September 2006)

Course Title	Dates	ATTRS No.
GENERAL		
53d Graduate Course	16 August 04—25 May 05	5-27-C22
54th Graduate Course	15 August 05—25 May 06	5-27-C22
166th Basic Course	4—27 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—23 June 05 (Phase I—Ft. Lee)	5-27-C20
	24 June—1 September 05 (Phase II—TJAGSA)	5-27-C20
168th Basic Course	13 September—6 October 05 (Phase I—Ft. Lee)	5-27-C20
	7 October—15 December 05 (Phase II—TJAGSA)	5-27-C20
169th Basic Course	3—26 January 06 (Phase I—Ft. Lee)	5-27-C20
	27 January—7 April 06 (Phase II—TJAGSA)	5-27-C20
170th Basic Course	30 May—22 June (Phase I—Ft. Lee)	5-27-C20
	23 June—31 August (Phase II—TJAGSA)	5-27-C20

171st Basic Course	12 September 06—TBD (Phase I—Ft. Lee)	5-27-C20
10th Speech Recognition Training	17—28 October 05	512-71DC4
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
19th Court Reporter Course	31 January—24 March 06	512-27DC5
20th Court Reporter Course	24 April—23 June 06	512-27DC5
21st Court Reporter Course	31 July—6 October 06	512-27DC5
6th Court Reporting Symposium	31 October—4 November 05	512-27DC6
185th Senior Officers Legal Orientation Course	24 –28 January 05	5F-F1
186th Senior Officers Legal Orientation Course	28 March—1 April 05	5F-F1
187th Senior Officers Legal Orientation Course	13—17 June 05	5F-F1
188th Senior Officers Legal Orientation Course	12—16 September 05	5F-F1
189th Senior Officers Legal Orientation Course	14—18 November 05	5F-F1
190th Senior Officers Legal Orientation Course	30 January—3 February 06	5F-F1
191st Senior Officers Legal Orientation Course	27—31 March 06	5F-F1
192d Senior Officers Legal Orientation Course	12—16 June 06	5F-F1
193d Senior Officers Legal Orientation Course	11—15 September 06	5F-F1
11th RC General Officers Legal Orientation Course	19—21 January 05	5F-F3
12th RC General Officers Legal Orientation Course	25—27 January 06	5F-F3
35th Staff Judge Advocate Course	6—10 June 05	5F-F52
36th Staff Judge Advocate Course	5—9 June 06	5F-F52
8th Staff Judge Advocate Team Leadership Course	6—8 June 05	5F-F52S
9th Staff Judge Advocate Team Leadership Course	5—7 June 06	5F-F52S
2005 JAOAC (Phase II)	2—14 January 05	5F-F55
2006 JAOAC (Phase II)	8—20 January 06	5F-F55
36th Methods of Instruction Course	31 May—3 June 05	5F-F70
37th Methods of Instruction Course	30 May—2 June 06	5F-F70
2005 JAG Annual CLE Workshop	3—7 October 05	5F-JAG
16th Legal Administrators Course	20—24 June 05	7A-270A1
17th Legal Administrators Course	19—23 June 06	7A-270A1
3d Paralegal SGM Training Symposium	6—10 December 2005	512-27D-50
16th Law for Paralegal NCOs Course	28 March—1 April 05	512-27D/20/30
17th Law for Paralegal NCOs Course	27—31 March 06	512-27D/20/30
16th Senior Paralegal NCO Management Course	13—17 June 05	512-27D/40/50
9th Chief Paralegal NCO Course	13—17 June 05	512-27D- CLNCO
2d 27D BNCOC	27 January—24 February 05	
3d 27D BNCOC	18 March—14 April 05	
4th 27D BNCOC	20 May—17 June 05	
5th 27D BNCOC	23 July—19 August 05	
6th 27D BNCOC	10 September—9 October 05	

2d 27D ANCOC	18 March—10 April 05	
3d 27D ANCOC	24 July—16 August 05	
4th 27D ANCOC	17 September—9 October 05	
12th JA Warrant Officer Basic Course	31 May—24 June 05	7A-270A0
13th JA Warrant Officer Basic Course	30 May—23 June 06	7A-270A0
JA Professional Recruiting Seminar	12—15 July 05	JARC-181
JA Professional Recruiting Seminar	11—14 July 06	JARC-181
6th JA Warrant Officer Advanced Course	11 July—5 August 05	7A-270A2
ADMINISTRATIVE AND CIVIL LAW		
4th Advanced Federal Labor Relations Course	19—21 October 05	5F-F21
59th Federal Labor Relations Course	17—21 October 05	5F-F22
56th Legal Assistance Course (Family Law focus)	16—20 May 05	5F-F23
57th Legal Assistance Course (Estate Planning focus)	31 October—4 November 05	5F-F23
58th Legal Assistance Course (Family Law focus)	15—19 May 06	5F-F23
2005 USAREUR Legal Assistance CLE	17—21 October 05	5F-F23E
29th Admin Law for Military Installations Course	14—18 March 05	5F-F24
30th Admin Law for Military Installations Course	13—17 March 06	5F-F24
2005 USAREUR Administrative Law CLE	12—16 September 05	5F-F24E
2006 USAREUR Administrative Law CLE	11—14 September 06	5F-F24E
2005 Maxwell AFB Income Tax Course	12—16 December 05	5F-F28
2005 USAREUR Income Tax CLE	5—9 December 05	5F-F28E
2005 Hawaii Income Tax CLE	10—14 January 05	5F-F28H
2006 Hawaii Income Tax CLE	TBD	5F-F28H
2005 USAREUR Claims Course	28 November—2 December 05	5F-F26E
2005 PACOM Income Tax CLE	3—7 January 05	5F-F28P
2006 PACOM Income Tax CLE	9—13 June 2006	5F-F28P
23d Federal Litigation Course	1—5 August 05	5F-F29
24th Federal Litigation Course	31 July—4 August 06	5F-F29
3d Ethics Counselors Course	18—22 April 05	5F-F202
4th Ethics Counselors Course	17—21 April 06	5F-F202
CONTRACT AND FISCAL LAW		
7th Advanced Contract Attorneys Course	20—24 March 06	5F-F103
154th Contract Attorneys Course	Not conducted	
155th Contract Attorneys Course	25 July—5 August 05	5F-F10
156th Contract Attorneys Course	24 July—4 August 06	5F-F10

5th Contract Litigation Course	21—25 March 05	5F-F102
7th Contract Litigation Course	20—24 March 06	5F-F102
2005 Government Contract & Fiscal Law Symposium	6—9 December 05	5F-F11
71st Fiscal Law Course	25—29 April 05	5F-F12
72d Fiscal Law Course	2—6 May 05	5F-F12
73d Fiscal Law Course	24—28 October 05	5F-F12
74th Fiscal Law Course	24—28 April 06	5F-F12
75th Fiscal Law Course	1—5 May 06	5F-F12
1st Operational Contracting Course	28 February—4 March 05	5F-F13
2d Operational Contracting Course	27 February—3 March 06	5F-F13
12th Comptrollers Accreditation Course (Hawaii)	26—30 January 04	5F-F14
13th Comptrollers Accreditation Course (Fort Monmouth)	14—17 June 04	5F-F14
7th Procurement Fraud Course	31 May —2 June 05	5F-F101
2005 USAREUR Contract & Fiscal Law CLE	29 March—1 April 05	5F-F15E
2006 USAREUR Contract & Fiscal Law CLE	28—31 March 06	5F-F15E
2005 Maxwell AFB Fiscal Law Course	7—10 February 05	
2006 Maxwell AFB Fiscal Law Course	6—9 February 06	
CRIMINAL LAW		
11th Military Justice Managers Course	22—26 August 05	5F-F31
12th Military Justice Managers Course	21—25 August 06	5F-F31
48th Military Judge Course	25 April—13 May 05	5F-F33
49th Military Judge Course	24 April—12 May 06	5F-F33
23d Criminal Law Advocacy Course	14—25 March 05	5F-F34
24th Criminal Law Advocacy Course	12—23 September 05	5F-F34
25th Criminal Law Advocacy Course	13—17 March 06	5F-F34
26th Criminal Law Advocacy Course	11—15 September 06	5F-F34
29th Criminal Law New Developments Course	14—17 November 05	5F-F35
2005 USAREUR Criminal Law CLE	3—7 January 05	5F-F35E
2006 USAREUR Criminal Law CLE	9—13 January 06	5F-F35E
INTERNATIONAL AND OPERATIONAL LAW		
5th Domestic Operational Law Course	24—28 October 05	5F-F45
83d Law of War Course	31 January—04 February 05	5F-F42
84th Law of War Course	11—15 July 05	5F-F42
85th Law of War Course	30 January—3 February 06	5F-F42
86th Law of War Course	10—14 July 06	5F-F42
43d Operational Law Course	28 February—11 March 05	5F-F47
44th Operational Law Course	8—19 August 05	5F-F47
45th Operational Law Course	27 February—10 March 06	5F-F47

46th Operational Law Course	7—18 August 06	5F-F47
2004 USAREUR Operational Law Course	29 November—2 December 05	5F-F47E

3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2004 issue of *The Army Lawyer*.

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 2005***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 ("2006 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, 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, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, 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 1 November 2005 will not be cleared to attend the 2006 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 (434) 971-3357, 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 every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually

Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year

Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the September 2004 issue of *The Army Lawyer*.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005)

8 - 9 Jan 05	Charleston, SC 12th/174th LSO	Criminal Law, Administrative and Civil Law	COL Daniel Shearouse (803) 734-1080 Dshearouse@scjd.state.sc.us
8 - 9 Jan 05	Anaheim, CA 63d RRC	Criminal Law, Contract Law	SGM Rocha (714) 229-3700 MAJ Diana Mancia diana.mancia@us.army.mil
29 - 30 Jan 05	Seattle, WA 70th RRC	Criminal Law, International and Operational Law	MAJ Brad Bales (206) 296-9486 (253) 223-8193 (cell) brad.bales@metrokc.gov
4 - 6 Feb 05	San Antonio, TX 90th RRC	Contract Law, Administrative and Civil Law	MAJ Charmaine E. Betty-Singleton (501) 771-8962 (work) (501) 771-8977 (office) charmaine.bettysingleton@us.army.mil
26 - 27 Feb 05	Denver, CO 87th LSO	Criminal Law, International and Operational Law	CPT Bret Heidemann (303) 394-7206 bret.heidemann@us.army.mil
5 - 6 Mar 05	Washington, DC 10th LSO	Contract Law, Administrative and Civil Law	LTC Philip Luci, Jr. (703) 482-5041 pluci@cox.net
11 - 13 Mar 05	Columbus, OH 9th LSO	Criminal Law, International and Operational Law	1LT Matthew Lampke (614) 644-8392 MLampke@ag.state.oh.us
16 - 17 Apr 05	Ayer, MA 94th RRC	International and Operational Law, Administrative and Civil Law	SFC Daryl Jent (978) 784-3933 darly.jent@us.army.mil
23 - 24 Apr 05	Indianapolis, IN INARNG	Contract Law, Administrative and Civil Law	COL George Thompson (317) 247-3491 george.thompson@in.ngb.army.mil
14 - 15 May 05	Nashville, TN 81st RRC	Contract Law, Administrative and Civil Law	CPT Kenneth Biskner (205) 795-1511 kenneth.biskner@us.army.mil
14 - 15 May 05	Rosemont, IL 91st LSO	Administrative and Civil Law, International and Operational Law	CPT Douglas Lee (630) 954-3123 douglas.lee@nationalcity.com
20 - 23 May 05	Kansas City, KS 89th RRC	Criminal Law, Administrative and Civil Law, Claims	MAJ Anna Swallow (800) 892-7266, ext. 1228 (316) 681-1759, ext. 1228 lynette.boyle@us.army.mil

2. 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:

(1) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) 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.

(4) 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.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) 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.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the September 2004 issue of *The Army Lawyer*.

4. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS 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 TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

5. 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 Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at Dottie.Evans@hqda.army.mil.

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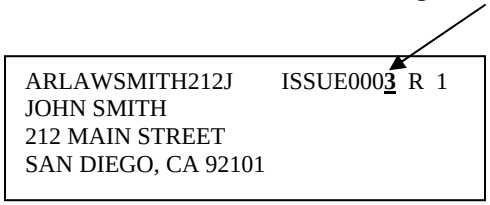

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