

## CONTRACT FORMATION

### Authority

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

In *Awad v. United States*,<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup>

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.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

Awad filed a complaint before the COFC seeking \$5 million in compensation.<sup>7</sup> In response, the government filed a motion to dismiss for lack of jurisdiction.<sup>8</sup> 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.’”<sup>9</sup> 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,<sup>10</sup> the court generally does not have jurisdiction over contracts the government makes in its sovereign capacity.<sup>11</sup>

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<sup>1</sup> 61 Fed. Cl. 281 (2004).

<sup>2</sup> *Id.* at 282.

<sup>3</sup> *Id.* at 282-83.

<sup>4</sup> *Id.* at 283.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (noting that Awad never articulated how he arrived at this figure).

<sup>8</sup> *Id.* at 282.

<sup>9</sup> *Id.* at 284.

<sup>10</sup> 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.*

<sup>11</sup> *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."<sup>12</sup> 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.'"<sup>13</sup> 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."<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

*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*<sup>17</sup> and *Sharp Electronics Corporation*,<sup>18</sup> 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.<sup>19</sup>

Major James Dorn.

## Competition

*Introduction: FAR Part 6 and Beyond!*

Once upon a time, "competition" meant Federal Acquisition Regulation (FAR) part 6.<sup>20</sup> There were three "levels" of competition: full and open; full and open after exclusion of sources; and, other than full and open competition.<sup>21</sup> 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.<sup>22</sup> 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,<sup>23</sup> 13,<sup>24</sup> and 16.5<sup>25</sup> determine "competition" standards.

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

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (citing *Silva v. United States*, 51 Fed. Cl. 374, 377 (Fed. Cl. 2002)).

<sup>14</sup> *Id.* at 284-85.

<sup>15</sup> *Id.* at 285.

<sup>16</sup> *Id.* See also *Home Bank of Tennessee, 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).

<sup>17</sup> 59 Fed. Cl. 627 (2004).

<sup>18</sup> No. 54475, 2004 ASBCA LEXIS 80 (Aug. 2, 2004).

<sup>19</sup> See *infra* section on Multiple Award Schedules.

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

<sup>21</sup> *Id.* subpts. 6.1, 6.2, and 6.3.

<sup>22</sup> 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.

<sup>23</sup> FAR, *supra* note 20, subpt. 8.4 (Federal Supply Schedules).

<sup>24</sup> *Id.* pt. 13 (Simplified Acquisition Procedures).

<sup>25</sup> *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.<sup>26</sup> The GAO sustained the protestors in two FSS decisions<sup>27</sup> and in one of three multiple award contract decisions.<sup>28</sup>

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.*<sup>29</sup> and *Simplicity Corp.*<sup>30</sup> The GAO cites those cases in this year's FSS scope decisions.<sup>31</sup> In *Information Ventures, Inc.*,<sup>32</sup> 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.<sup>33</sup> Upon review, the GAO found that NASA's requested services were outside the scope of Schedule 70, SIN 132-51.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> "Non-FSS products and services may not be purchased using FSS procedures."<sup>37</sup>

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."<sup>38</sup> 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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<sup>26</sup> 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.

<sup>27</sup> *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.

<sup>28</sup> 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.

<sup>29</sup> 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*].

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

<sup>31</sup> 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.

<sup>32</sup> Comp. Gen. B-293743, May 20, 2004, 2004 CPD ¶ 97.

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *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.*

<sup>35</sup> *Id.* at 3 (citing FAR section 8.401).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1.

ensure quality control of the data; and conduct outreach to increase database usage.<sup>39</sup> 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.”<sup>40</sup> The GAO found that the services NASA required “go well beyond the types of information technology services contemplated by Schedule 70, SIN 132-51.”<sup>41</sup> Sustaining the protest, the Comptroller General recommended acquiring the SPACELINE services through competitive procedures.<sup>42</sup> 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)*,<sup>43</sup> 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.<sup>44</sup> The “most significant hardware item” composing the portable digital recording system, however, was not on York’s FSS schedule.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> *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.*,<sup>48</sup> 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.<sup>49</sup> 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.”<sup>50</sup> The Smart Card program envisions federal employees, military members, military family members and federal beneficiaries using the Smart Card as identification cards.<sup>51</sup>

The Smart Card contract is a multiple award indefinite delivery/indefinite quantity (ID/IQ) task and delivery order contract.<sup>52</sup> The GSA issued task order requests (TOR) to four Smart Card contract awardees for electronic passport covers.<sup>53</sup> The passport covers are cloth coversheets with embedded integrated circuit chip inlays.<sup>54</sup> 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.<sup>55</sup> The GAO can, and will, however, review an allegation that an order is beyond the scope of the

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<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> Comp. Gen. B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79.

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *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.

<sup>48</sup> Comp. Gen. B-293523, Mar. 29, 2004, 2004 CPD ¶ 51.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 3-4.

<sup>55</sup> *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.<sup>56</sup>

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.<sup>57</sup> 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.<sup>58</sup>

Although the GAO recognized the “functional similarities” between the Smart Card and the electronic passport cover,<sup>59</sup> 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.<sup>60</sup> Next, certain “peripheral goods and services” under the passport cover TOR had no equivalent or similar requirement in the Smart Card contract.<sup>61</sup> 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.”<sup>62</sup> 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.”<sup>63</sup>

Two recent GAO decisions, *Computers Universal, Inc.*,<sup>64</sup> and *Specialty Marine, Inc.*,<sup>65</sup> 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.<sup>66</sup> 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.”<sup>67</sup> 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.”<sup>68</sup> 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.”<sup>69</sup> Specialty Marine alleged the task orders exceeded the scope of the multiple award ID/IQ contracts.<sup>70</sup>

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

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<sup>56</sup> *Id.*

<sup>57</sup> *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.*

<sup>58</sup> *Id.*

<sup>59</sup> 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.*

<sup>60</sup> 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.

<sup>61</sup> *Id.* at 6. Specifically, “passport covers, IC Chip inlays, adhesive, and travel” were “outside the scope” of the Smart Card contract. *Id.*

<sup>62</sup> *Id.* at 6 n.7.

<sup>63</sup> *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.

<sup>64</sup> Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78.

<sup>65</sup> Comp. Gen. B-293871, B-293871.2, June 17, 2004, 2004 CPD ¶ 130.

<sup>66</sup> *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).

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> *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.”<sup>71</sup> 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.”<sup>72</sup> 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.”<sup>73</sup> While the Section B CLINs called for specific work on specific ships, they did not restrict work to those ships.<sup>74</sup> 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.’”<sup>75</sup> Such breadth clearly encompassed life raft inspection and repair.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup>

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.”<sup>79</sup> “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.”<sup>80</sup> 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.”<sup>81</sup>

The GAO wasted little ink finding the ordered services within the scope of the broadly worded contract.<sup>82</sup> In a footnote, however, the GAO expressed “concern” over the use of “such broad long-term IDIQ contracts.”<sup>83</sup> The GAO recognized that multi-year undefined contracts undermine the goals of competition.<sup>84</sup> 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*.<sup>85</sup> 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.”<sup>86</sup> 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’).”<sup>87</sup> 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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<sup>71</sup> *Id.* at 4.

<sup>72</sup> *Id.* at 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2.

<sup>76</sup> *Id.* at 6.

<sup>77</sup> Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78.

<sup>78</sup> *Id.* at 3.

<sup>79</sup> *Id.* at 2.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2-3.

<sup>82</sup> *Id.* at 3-4.

<sup>83</sup> *Id.* at 3 n.5.

<sup>84</sup> *Id.*

<sup>85</sup> 61 Fed. Cl. 559 (2004).

<sup>86</sup> *Id.* at 563.

<sup>87</sup> *Id.*

“added traditional travel services to the contract.”<sup>88</sup> 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).<sup>89</sup> 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 . . . .”<sup>90</sup> The court first determined that the contract language in the Performance Work Statement did not require TRW to supply traditional travel services.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup> 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.”<sup>95</sup> 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.”<sup>96</sup>

*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*,<sup>97</sup> 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.<sup>98</sup> In response, the USDA asserted the COFC lacked jurisdiction to hear the issue and that the modification was proper.<sup>99</sup> Concerning jurisdiction, the USDA<sup>100</sup> asserted the public interest exception was “committed to agency discretion by law” and therefore the court was prohibited from hearing the case.<sup>101</sup> 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.”<sup>102</sup> Beginning in 1995, the USDA and the Army Corps of Engineers (COE) sought to create a single reservation system known

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<sup>88</sup> *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.

<sup>89</sup> *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)).

<sup>90</sup> *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).

<sup>91</sup> 61 Fed. Cl. at 572.

<sup>92</sup> *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.

<sup>93</sup> *Id.* at 574.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 58 Fed. Cl. 351 (2003).

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

<sup>99</sup> 58 Fed. Cl. at 352.

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

<sup>101</sup> *Id.* at 354.

<sup>102</sup> *Id.* at 353.

as the National Recreation Reservation System (NRRS).<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> The COFC addressed the jurisdiction issue in a decision on 3 November 2003 (*Spherix I*).<sup>107</sup> Two weeks later, in *Spherix II*, the COFC addressed the substantive question—was the public interest exception properly invoked?<sup>108</sup>

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.<sup>109</sup> The USDA asserted the public interest exception to full and open competition was "committed to agency discretion by law."<sup>110</sup> 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."<sup>111</sup> 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."<sup>112</sup>

Arguing against jurisdiction, the USDA relied principally upon *Webster v. Doe*.<sup>113</sup> 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."<sup>114</sup> CIA regulations did not in any way constrain this unfettered authority.<sup>115</sup> 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)."<sup>116</sup> The COFC noted that once an agency promulgates regulations, the court has authority to ensure the agency complies with those regulations.<sup>117</sup> In contrast to the *Webster* regulations, FAR section 6.302-7, limits an agency head's discretion.<sup>118</sup> The FAR provision provides a meaningful standard of review.<sup>119</sup> 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."<sup>120</sup>

Two weeks later, in *Spherix II*,<sup>121</sup> the COFC determined the Secretary properly exercised her discretion by showing,

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 353-54. Secretary of Agriculture Ann M. Venable notified Congress and waited the statutorily required thirty days.

<sup>107</sup> 58 Fed. Cl. 351 (2003).

<sup>108</sup> *Spherix, Inc. v. United States*, 58 Fed. Cl. 514 (2004).

<sup>109</sup> 58 Fed. Cl. at 354.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 354-55 (quoting 41 U.S.C. § 253(c)(7) (2000)).

<sup>112</sup> *Id.* at 355 (quoting FAR section 1.704).

<sup>113</sup> 486 U.S. 592 (1988).

<sup>114</sup> 58 Fed. Cl. at 355-56 (citing 50 U.S.C. § 403(c)).

<sup>115</sup> *Id.* at 357.

<sup>116</sup> *Id.* at 356.

<sup>117</sup> *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.

<sup>118</sup> *Id.* at 357.

<sup>119</sup> *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.

<sup>120</sup> *Id.* at 358.

<sup>121</sup> 58 Fed. Cl. 514 (2003).

clearly and convincingly, that a sole source modification was in the public interest.<sup>122</sup> All parties agreed the “underlying goal” of the procurement “was the creation of a One-Stop Recreation Reservation System.”<sup>123</sup> Spherix complained, however, that even after this procurement, two systems would continue to exist.<sup>124</sup> 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.”<sup>125</sup>

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’s] 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.”<sup>126</sup>

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.<sup>127</sup>

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.”<sup>128</sup> 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.<sup>129</sup> 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.”<sup>130</sup>

#### *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.*,<sup>131</sup> 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.”<sup>132</sup>

One portion of the RFQ clearly called for “eight in-house full time contract personnel.”<sup>133</sup> Other sections requiring additional personnel were not so clear.<sup>134</sup> 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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<sup>122</sup> *Id.* at 518.

<sup>123</sup> *Id.* at 516.

<sup>124</sup> *Id.*

<sup>125</sup> *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.”).

<sup>126</sup> *Id.* at 517.

<sup>127</sup> *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).

<sup>128</sup> *Id.* at 517.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> B-294159, B-294159.2, 2004 U.S. Comp. Gen. LEXIS 191 (Sept. 10, 2004).

<sup>132</sup> *Id.* at \*1.

<sup>133</sup> *Id.* at \*3.

<sup>134</sup> 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.”<sup>135</sup> The agency did not remedy the RFQ. The GAO observed that “the RFQ did not clearly convey the Army’s staffing requirements.”<sup>136</sup> As a result, the contracting officer could not meaningfully evaluate the offerors’ prices.<sup>137</sup>

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

Last year’s *Year in Review* discussed *USA Information Systems, Inc.*,<sup>138</sup> and the prospective offeror’s duty to “avail itself of every reasonable opportunity” to obtain solicitation documents.<sup>139</sup> 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.<sup>140</sup> The GAO denied the protest. This year, *Allied Materials and Equipment Comp., Inc.*<sup>141</sup> 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.<sup>142</sup> The DLA, however, failed to post the actual solicitation as required by FAR section 5.102(a)(1).<sup>143</sup> Although Allied monitored FedBizOpps.gov, it did not actually contact the DLA point of contact until 7 October 2004.<sup>144</sup>

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.<sup>145</sup> 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.”<sup>146</sup> In this case, the nearly seven week gap between the solicitation’s closing date and Allied’s phone call to the agency was unreasonable.<sup>147</sup> Allied “merely wait[ed]” and failed to “take steps to actively seek the solicitation.”<sup>148</sup> 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.”<sup>149</sup>

*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.<sup>150</sup> 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.<sup>151</sup> 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>.”<sup>152</sup>

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<sup>135</sup> *Id.* at \*7.

<sup>136</sup> *Id.* at \*13.

<sup>137</sup> The GAO sustained the protest. *Id.* at \*15.

<sup>138</sup> Comp. Gen. B-291488, Dec. 2, 2002, 2002 CPD ¶ 205.

<sup>139</sup> *2003 Year in Review*, *supra* note 29, at 17.

<sup>140</sup> 2002 CPD ¶ 205, at 3.

<sup>141</sup> Comp. Gen. B-293231, Feb. 5, 2004, 2004 CPD ¶ 27.

<sup>142</sup> *Id.* at 1.

<sup>143</sup> *Id.* at 1-2 (discussing FAR section 5.102(a)(1)).

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 2-3.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *2003 Year in Review*, *supra* note 29, at 18.

<sup>151</sup> Federal Acquisition Regulation; Elimination of the Standard Form 1417, 69 Fed. Reg. 59,699 (Oct. 5, 2004).

<sup>152</sup> *Id.*

## Unduly Restrictive Specifications

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

### *Extensive “Consolidation Analysis” Proves Significant Savings and Saves Procurement from CICA Bundling<sup>155</sup> 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.<sup>156</sup> This year, in *Teximara, Inc.*,<sup>157</sup> the Air Force consolidated “grounds maintenance with 13 other base operations support functions” at Keesler Air Force Base (AFB), Mississippi.<sup>158</sup> 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.”<sup>159</sup> *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.”<sup>160</sup> *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.<sup>161</sup>

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.<sup>162</sup> Consolidating requirements can have the effect of restricting competition by excluding potential offerors who cannot offer all the requirements.<sup>163</sup> In the context of an *OMB*

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<sup>153</sup> *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 Svcs., 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.

<sup>154</sup> 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.”).

<sup>155</sup> “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.

<sup>156</sup> *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.

<sup>157</sup> 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).

<sup>158</sup> *Teximara*, 2004 CPD ¶ 151 at 1. Note, the GAO opinion references “Kessler” AFB. The proper name is Keesler. *See* <http://www.keesler.af.mil>.

<sup>159</sup> *Teximara*, 2004 CPD ¶ 151, at 2.

<sup>160</sup> *Id.* at 6.

<sup>161</sup> *Id.* at 6-7.

<sup>162</sup> *Id.* at 6 (citing 10 U.S.C. § 2305(a)(1) (2000)).

<sup>163</sup> *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.”<sup>164</sup> Significant cost savings is a valid agency need.<sup>165</sup>

In *Teximara*, the Air Force conducted extensive analysis demonstrating the cost savings. Two “detailed documents” set forth the Air Force’s “consolidation analysis.”<sup>166</sup> First, an 80-page “initial linkage analysis,” prepared prior to the protest, cited both “management-related efficiencies”<sup>167</sup> and “efficiencies resulting from cross-utilization and cross-training.”<sup>168</sup> According to the GAO the linkage analysis included “specific examples of the efficiencies generated from the overlap” of the functions combined in the RFP.<sup>169</sup> 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.<sup>170</sup>

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.<sup>171</sup> 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.<sup>172</sup> 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.”<sup>173</sup>

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,<sup>174</sup> the U.S. Department of Health and Human Services (HHS) showed, in *NVT Technologies, Inc.*,<sup>175</sup> 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.<sup>176</sup> The RFP contained performance and payment bond requirements.<sup>177</sup> *NVT* alleged these requirements were unreasonable and unduly restricted small business participation.<sup>178</sup>

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.”<sup>179</sup> 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.”<sup>180</sup> 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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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 3.

<sup>167</sup> “[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.*

<sup>168</sup> “[I]n such areas as program management, finance, procurement and supply, customer support, training, transportation, and quality assurance.” *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 4.

<sup>171</sup> *Id.* at 7.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 10.

<sup>174</sup> FAR, *supra* note 20, at 28.103-1.

<sup>175</sup> B-292302.3, 2003 U.S. Comp. Gen. LEXIS 174 (Oct. 20, 2003).

<sup>176</sup> *Id.* at \*1-2 .

<sup>177</sup> Each bond had to be fifty percent of the contract price. *Id.* at \*2.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at \*7.

<sup>180</sup> *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 seriously compromise the agency's mission.<sup>181</sup>

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

In *Kearfott Guidance and Navigation Corp.*,<sup>182</sup> 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."<sup>183</sup>

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."<sup>184</sup> 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.<sup>185</sup> 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.<sup>186</sup> 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."<sup>187</sup> Kearfott protested, alleging it also had the capability to create and maintain the ISF.<sup>188</sup>

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.<sup>189</sup> Focusing on the "rationale and conclusions" in the J & A, the GAO found the justification reasonable and therefore did not object to the award.<sup>190</sup> 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.<sup>191</sup> 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.<sup>192</sup> Therefore, only Draper could adequately establish and certify an ISF for the MK 6 guidance system.<sup>193</sup>

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<sup>181</sup> *Id.* at \*9-10.

<sup>182</sup> Comp. Gen. B-292895.2, May 25, 2004, 2004 CPD ¶ 123.

<sup>183</sup> *Id.* at 1.

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 3.

<sup>187</sup> *Id.* at 4.

<sup>188</sup> *Id.* at 5.

<sup>189</sup> *Id.* at 5 (discussing 10 U.S.C.S. § 2304(c)(1) (LEXIS 2004)).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 5-6.

<sup>192</sup> *Id.* at 7.

<sup>193</sup> *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 Intragovernmental 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.<sup>194</sup>

In *National General Supply, Inc.*,<sup>195</sup> 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.”<sup>196</sup> National General alleged that this arrangement gives large businesses a pricing advantage over small businesses.<sup>197</sup>

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.<sup>198</sup> 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.<sup>199</sup>

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.”<sup>200</sup> Further, no improper agency action provided large businesses an advantage. Rather, large offerors benefited only from their already existing “business structure.”<sup>201</sup> That is, the solicitation did not “create an improper competitive advantage.”<sup>202</sup>

### *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.<sup>203</sup> The *Year in Review* discusses these cases in greater detail in the Simplified Acquisitions section.<sup>204</sup> In the 29 March 2004, *Information Ventures, Inc.*, decision,<sup>205</sup> 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,<sup>206</sup> 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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<sup>194</sup> 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.*

<sup>195</sup> Comp. Gen. B-292696, Nov. 3, 2003, 2004 CPD ¶ 47.

<sup>196</sup> *Id.* at 1.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1-2.

<sup>199</sup> *Id.* at 2.

<sup>200</sup> *Id.* at 3.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76 and Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81.

<sup>204</sup> See *infra* section titled Simplified Acquisitions.

<sup>205</sup> Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76.

<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup>

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."<sup>209</sup>

### *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.<sup>210</sup> 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.<sup>211</sup>

### *Proposed Rule on Share-in-Savings Contracting*

As discussed in last year's *Year in Review*,<sup>212</sup> 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.<sup>213</sup> 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."<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup> The GSA awarded six SIS blanket purchase agreements in July 2004 potentially worth up to \$500 million.<sup>218</sup>

### *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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<sup>207</sup> 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).

<sup>208</sup> *Id.*

<sup>209</sup> Pub. L. No. 108-375, 118 Stat. 1811 (2004).

<sup>210</sup> 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).

<sup>211</sup> *Id.*

<sup>212</sup> *2003 Year in Review*, *supra* note 29, at 23-24.

<sup>213</sup> 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).

<sup>214</sup> 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).

<sup>215</sup> 69 Fed. Reg. at 40,516.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> 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](http://www.washingtontechnology.com/news/19_9/cover-stories/24130-1.html) (last visited 18 Nov. 2004).

award-fee contracts.<sup>219</sup> The rule defines a “provisional award fee payment” as a payment made within an evaluation period prior to a final evaluation for that period.<sup>220</sup> 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).<sup>221</sup>

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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup>

#### *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.<sup>226</sup> The contract should be definitized before the earlier of 180 days or the date obligations reach fifty percent of the negotiated ceiling price.<sup>227</sup> 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.<sup>228</sup>

On 30 August 2004, the DOD Inspector General (IG) issued a report reviewing letter contracts from FY 1998 through FY 2002.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup>

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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<sup>219</sup> 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).

<sup>220</sup> *Id.* at 64,568.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 64,562.

<sup>224</sup> 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).

<sup>225</sup> *Id.*

<sup>226</sup> FAR, *supra* note 20, at 16.603-2.

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

<sup>228</sup> *Id.* at 217.7404-4.

<sup>229</sup> U.S. DEP’T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, D-2004-112, UNDEFINITEZED CONTRACTUAL ACTIONS (30 Aug. 2004).

<sup>230</sup> *Id.* at 2.

<sup>231</sup> *Id.* at 5.

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

### *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<sup>233</sup> that waived the limitations in DFARS sections 217.7404-3, Definitization Schedule,<sup>234</sup> and 217.7404-4, Limitations on Obligations<sup>235</sup> 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 Unfinalized Contract Action approving official has the authority to approve obligation up to one hundred percent under exceptional circumstances.<sup>236</sup>

### *Living at Risk is Jumping off the Cliff and Building Wings on the Way Down*<sup>237</sup>

Three cases affirm the rule that one gets what one bargains for. In *Chem-Care Co., Inc.*,<sup>238</sup> the Armed Services Board of Contract Appeals (ASBCA) refused to read the clause at FAR section 52.216-2, Economic Price Adjustment—Standard Supplies,<sup>239</sup> into a fixed price, competitively bid procurement. The contract was a sealed-bid procurement for custodial services at Naval Station, Norfolk.<sup>240</sup> 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.<sup>241</sup>

In *Drew v. Brownlee*,<sup>242</sup> the CAFC affirmed an ASBCA decision not to adjust a requirements contract simply because the Army's actual requirements were less than the estimates.<sup>243</sup> The Army had issued a repair and maintenance contract of its Automated Data Processing equipment for "all per call repairs."<sup>244</sup> 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.<sup>245</sup>

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<sup>246</sup> 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.<sup>247</sup> The CAFC also found the requirements contract did not require the Army to

<sup>232</sup> The Army generally nonconcurrent 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.

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

<sup>234</sup> DFARS, *supra* note 227, at 217.7404-3.

<sup>235</sup> *Id.* at 217.7404-4.

<sup>236</sup> UCA Memo, *supra* note 233.

<sup>237</sup> Ray Bradbury, available at <http://www.brainyquote.com/quotes/quotes/r/raybradbur102288> (last visited Nov. 18, 2004).

<sup>238</sup> ASBCA No. 53614, 04-1 BCA ¶ 32,593.

<sup>239</sup> FAR, *supra* note 20, at 52.216-2.

<sup>240</sup> *Chem-Care Co.*, 04-1 BCA ¶ 35,593, at 161,252.

<sup>241</sup> *Id.* at 161,253.

<sup>242</sup> 95 Fed. Appx. 978 (Fed. Cir. 2004).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 979.

<sup>245</sup> *Id.*

<sup>246</sup> 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.

<sup>247</sup> *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.<sup>248</sup> 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*,<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup>

Abatement Contracting sued to recover the difference between the two amounts, alleging improper government estimates and undue economic duress concerning the modification.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup> The court also found the Navy's conduct in preparing the estimate, while perhaps negligent,<sup>257</sup> did not reach the standard of "egregious conduct."<sup>258</sup>

*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)*,<sup>259</sup> 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.<sup>260</sup> Among other arguments, DESC argued that this clause should qualify as an EPA clause based on "established prices" under the FAR.<sup>261</sup> 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.<sup>262</sup>

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)*,<sup>263</sup> 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.<sup>264</sup> The court also

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<sup>248</sup> *Id.*

<sup>249</sup> 58 Fed. Cl. 594 (2003).

<sup>250</sup> *Id.* at 604.

<sup>251</sup> *Id.* at 595.

<sup>252</sup> *Id.* at 596-97.

<sup>253</sup> *Id.* at 601.

<sup>254</sup> The duress allegation was based on improper withholding of delivery orders. *Id.* at 602-03.

<sup>255</sup> Originally, the minimum was \$3,000; through a modification, the minimum was increased to \$50,000. *Id.* at 596.

<sup>256</sup> *Id.* at 611-12.

<sup>257</sup> 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.

<sup>258</sup> *Id.*

<sup>259</sup> 27 Fed. Cl. 405 (1992).

<sup>260</sup> *Id.* at 407.

<sup>261</sup> FAR, *supra* note 20, at 16.203-1.

<sup>262</sup> *MAPCO*, 27 Fed. Cl. at 410.

<sup>263</sup> 58 Fed. Cl. 200 (2003).

<sup>264</sup> *Id.* at 207.

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

Waiver proved the centerpiece in the second case, *Hermes Consolidated Inc., d/b/a Wyoming Refining Co. v. United States (Hermes)*.<sup>267</sup> 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.<sup>268</sup> 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.<sup>269</sup> 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 waiver doctrine applied, absent any allegations of government bad faith.<sup>270</sup> However, the court recommended the parties submit an interlocutory appeal due to recent conflicting cases,<sup>271</sup> especially *Williams Alaska Petroleum, Inc. and Williams Energy Marketing & Trading v. United States (Williams)*.<sup>272</sup>

In *Williams*, the court found that a plain reading of the FAR allowed market-based EPA clauses in the manner used by the DESC,<sup>273</sup> 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,<sup>274</sup> 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)*<sup>275</sup> 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.<sup>276</sup> More litigation unraveling these four decisions is anticipated.

*His Contract has Options Through the Year 2020 or Until the Last Rocky Movie is Made*<sup>277</sup>

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*,<sup>278</sup> 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.<sup>279</sup>

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.”<sup>280</sup> The contractor, therefore, was entitled to recover the costs it incurred in performing the work plus a reasonable profit.<sup>281</sup>

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<sup>265</sup> *Id.* at 208.

<sup>266</sup> *Id.* at 214.

<sup>267</sup> 58 Fed. Cl. 409 (2003).

<sup>268</sup> *Id.* at 413.

<sup>269</sup> *Id.* at 417.

<sup>270</sup> *Id.* at 417-18.

<sup>271</sup> At the end of the opinion, the court certified two questions for interlocutory appeal. *Id.* at 420.

<sup>272</sup> 57 Fed. Cl. 789 (2003).

<sup>273</sup> *Id.* at 797.

<sup>274</sup> *Id.* at 800-01.

<sup>275</sup> 59 Fed. Cl. 390 (2004).

<sup>276</sup> *Id.* at 399.

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

<sup>278</sup> ASBCA Nos. 51875, 54029, 4-1 BCA ¶ 32,598.

<sup>279</sup> *Id.* at 161,300.

<sup>280</sup> *Id.* at 161,308.

<sup>281</sup> *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.*,<sup>282</sup> the Nuclear Regulatory Commission (NRC) attempted to exercise an option by submitting a proposed modification without the contracting officer's signature.<sup>283</sup> 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.<sup>284</sup>

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.<sup>285</sup>

A third case, *C. Martin Co., Inc.*,<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup>

The contractor argued that the government unlawfully excluded the clause at FAR section 52.217-9, Option to Extend the Term of the Contract,<sup>289</sup> 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.<sup>290</sup>

#### 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."<sup>291</sup> In this case, the contract included the FAR section 52.216-22, Indefinite Quantity clause,<sup>292</sup> 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.<sup>293</sup> The contract incorporated by reference the FAR section 52.232-20, Limitation of Cost clause.<sup>294</sup>

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.<sup>295</sup>

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

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<sup>282</sup> EBCA No. C-0401372, 04-2 BCA ¶ 32,660.

<sup>283</sup> The contract authorized unilateral exercise of options. *Id.* at 161,657.

<sup>284</sup> *Id.* at 161,658.

<sup>285</sup> *Id.* at 161,658-59.

<sup>286</sup> ASBCA No. 54182, 04-2 BCA ¶ 32,637.

<sup>287</sup> *Id.* at 161,495.

<sup>288</sup> *Id.* at 161,495-96.

<sup>289</sup> See FAR, *supra* note 20, at 52.217-9.

<sup>290</sup> *C. Martin Co., Inc.*, 04-2 BCA ¶ 32,637 at 161,497-98.

<sup>291</sup> Analysas Corp., ASBCA No. 54183, 04-1 BCA. ¶ 32,629.

<sup>292</sup> FAR, *supra* note 20, at 52.216-22.

<sup>293</sup> *Id.* at 52.216-19.

<sup>294</sup> *Analysas*, 04-1 BCA ¶ 32,629 at 161,443.

<sup>295</sup> *Id.* at 161,443-44.

seventy-five percent of the total estimated cost of the contract, and not each individual delivery order.<sup>296</sup> 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-."<sup>297</sup> 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*,<sup>298</sup> the CAFC affirmed a COFC decision,<sup>299</sup> discussed in the *2002 Year in Review*,<sup>300</sup> 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.<sup>301</sup> The court affirmed the rule that "anticipatory lost profits are not available for the overestimated unordered quantities."<sup>302</sup> 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.<sup>303</sup>

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.<sup>304</sup> 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.<sup>305</sup>

In *National Salvage and Service Corp.*,<sup>306</sup> 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.<sup>307</sup> The final invoice for work under the contract was \$848,798; the estimated price for one individual line item was \$2,148,337.64.<sup>308</sup> The board directed the parties to negotiate a settlement award to the contractor.<sup>309</sup>

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.<sup>310</sup> The board found the FAR allowed agencies to derive estimates from "records of previous requirements and consumption, or by other means."<sup>311</sup> This language would encompass an estimate based on an employee's personal experience, as long as it was reasonable.<sup>312</sup>

*Sanford Cohen & Associates, Inc.*<sup>313</sup> 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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<sup>296</sup> *Id.* at 161,445.

<sup>297</sup> *Id.*

<sup>298</sup> 356 F.3d 1372 (Fed. Cir. 2004).

<sup>299</sup> 53 Fed. Cl. 420 (2002).

<sup>300</sup> 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*].

<sup>301</sup> *Hi-Shear*, 356 F.3d. at 1378.

<sup>302</sup> *Id.* at 1380.

<sup>303</sup> *Id.* at 1383.

<sup>304</sup> *Hi-Shear*, 53 Fed. Cl. at 438-43.

<sup>305</sup> *Hi-Shear*, 356 F.3d. at 1381.

<sup>306</sup> ASBCA No. 53750, 04-2 BCA ¶ 32,654.

<sup>307</sup> *Id.* at 161,619.

<sup>308</sup> *Id.* at 161,618.

<sup>309</sup> *Id.* at 161,620.

<sup>310</sup> *Id.* at 161,619.

<sup>311</sup> *Id.* (quoting FAR section 16.503).

<sup>312</sup> *Nat'l Salvage Servs. Corp.*, 04-2 BCA ¶ 32,654 at 161,619.

<sup>313</sup> No. 4239/00, 2004 IBCA LEXIS 5 (Sept. 8, 2004).

price of units delivered.<sup>314</sup> 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."<sup>315</sup> 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.<sup>316</sup>

In *Maggie's Landscaping, Inc.*,<sup>317</sup> 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.<sup>318</sup> 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.<sup>319</sup>

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.<sup>320</sup> 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."<sup>321</sup> 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.<sup>322</sup>

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.*,<sup>323</sup> 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.<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup> 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."<sup>327</sup> 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."<sup>328</sup> The GAO agreed but concluded a strict application of the late bid regulations was not appropriate in this

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<sup>314</sup> *Id.* at \*12-13.

<sup>315</sup> *Id.* at \*2.

<sup>316</sup> *Id.* at \*6.

<sup>317</sup> ASBCA Nos. 52462, 52463, 04-2 BCA ¶ 32,647.

<sup>318</sup> *Id.* at 161,564.

<sup>319</sup> 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.

<sup>320</sup> *Id.* at 161,565.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 161,568.

<sup>323</sup> B-292758, 2003 U.S. Comp. Gen. LEXIS 171 (Oct. 16, 2003).

<sup>324</sup> *Id.* at \*3.

<sup>325</sup> *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.

<sup>326</sup> *Id.* at \*5. The bid opening official took custody of the bid and testified that the representative appeared to be out of breath. *Id.*

<sup>327</sup> *Id.* at \*6.

<sup>328</sup> *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.<sup>329</sup>

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.”<sup>330</sup> The GAO concluded the agency was the paramount cause of Great Lakes’ late delivery because the agency designated the wrong room in the IFB.<sup>331</sup> 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.<sup>332</sup> 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.<sup>333</sup> 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.”<sup>334</sup>

### *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.<sup>335</sup> 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.<sup>336</sup> Bid bonds accompanied by a photocopy of a POA are therefore unacceptable and the bid nonresponsive.<sup>337</sup> In *All Seasons Construction, Inc.*,<sup>338</sup> 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.”<sup>339</sup> 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.<sup>340</sup> 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.”<sup>341</sup>

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

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<sup>329</sup> *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.

<sup>330</sup> *Weeks Marine, Inc.*, 2003 U.S. Comp. Gen. LEXIS 171, at \*10.

<sup>331</sup> *Id.* Weeks argued unsuccessfully that the Great Lakes representative failed to leave sufficient time before bid opening to submit its bid. *Id.* at \*11.

<sup>332</sup> *Id.* at \*13.

<sup>333</sup> *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.*

<sup>334</sup> *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.*

<sup>335</sup> 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.

<sup>336</sup> See *Schrepfer Indus., Inc.*, Comp. Gen. B-286825, Feb. 12, 2001, 2001 CPD ¶ 23, at 3.

<sup>337</sup> *Id.*

<sup>338</sup> Comp. Gen. B-291166.2, Dec. 6, 2002, 2002 CPD ¶ 212.

<sup>339</sup> *Id.* at 4.

<sup>340</sup> *Id.* at 3.

<sup>341</sup> 55 Fed. Cl. 175, 180 (2003).

<sup>342</sup> 59 Fed. Cl. 305 (2004).

<sup>343</sup> *Id.* at 317.

all mechanically applied signatures, the court concluded the POA unequivocally established the surety agreed to be bound.<sup>344</sup>

Major Bobbi Davis.

## Negotiated Acquisitions

### *Blood, Sweat, and Ultimately Tears for Offeror*

In *The Haskell Co.*,<sup>345</sup> 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.<sup>346</sup> Proposals were due at the designated government office on “25 June 2003, 1400 hours (Pacific Time).”<sup>347</sup>

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.<sup>348</sup>

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.<sup>349</sup> 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.<sup>350</sup> 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.<sup>351</sup>

“It gets late early there”<sup>352</sup>

Three other late proposal cases centered on rejected proposals resulting from offeror error. First, in *On-site Environmental, Inc.; WRS Infrastructure & Environment, Inc.*,<sup>353</sup> 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.<sup>354</sup> 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.”<sup>355</sup>

Secondly, in *InfoGroup Inc.*,<sup>356</sup> the offeror submitted its proposal<sup>357</sup> through a FedEx courier but unfortunately

<sup>344</sup> *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.

<sup>345</sup> Comp. Gen. B-292756, Nov. 19, 2003, 2003 CPD ¶ 202.

<sup>346</sup> *Id.* at 1.

<sup>347</sup> *Id.* at 2.

<sup>348</sup> *Id.* at 3.

<sup>349</sup> *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).

<sup>350</sup> *Haskell*, 2003 CPD ¶ 202 at 4.

<sup>351</sup> *Id.* at 4-5.

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

<sup>353</sup> Comp. Gen. B-294057, B-294057.2, July 29 2004, 2004 CPD ¶ 138.

<sup>354</sup> *Id.* at 1-2.

<sup>355</sup> *Id.* at 3.

<sup>356</sup> B-294610, 2004 U.S. Comp. Gen. LEXIS 199 (Sept. 30, 2004).

<sup>357</sup> *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.<sup>358</sup>

Finally, in *Immediate Systems Resources, Inc.*,<sup>359</sup> 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.<sup>360</sup> 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.<sup>361</sup>

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

The GAO sustained a protest in *Security Consultants Group, Inc.*,<sup>362</sup> finding the DHS' decision to reopen a competition unreasonable without evidence that any offeror was prejudiced by the error that precipitated the reopening.<sup>363</sup> 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.<sup>364</sup> 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.<sup>365</sup>

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.<sup>366</sup> 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.<sup>367</sup>

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.<sup>368</sup>

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,"<sup>369</sup> 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.<sup>370</sup>

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<sup>358</sup> *Id.* at \*2.

<sup>359</sup> Comp. Gen. B-292856, Dec. 9, 2003, 2003 CPD ¶ 227.

<sup>360</sup> *Id.* at 3.

<sup>361</sup> 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.

<sup>362</sup> Comp. Gen. B-293344.2, Mar. 19, 2004, 2004 CPD ¶ 53.

<sup>363</sup> *Id.* at 4.

<sup>364</sup> *Id.* at 1-2.

<sup>365</sup> *Id.* at 2.

<sup>366</sup> *Id.*; see Maryland Off. Relocators, Comp. Gen. B-291092, Nov. 12, 2002, 2002 CPD ¶ 198, at 5.

<sup>367</sup> *Security Consultants*, 2004 CPD ¶ 53, at 2.

<sup>368</sup> *Id.*

<sup>369</sup> *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.

<sup>370</sup> *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.<sup>371</sup> 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.<sup>372</sup>

#### *On Second Thought*

The GAO supported two agency decisions to cancel RFPs. In *Superlative Technology*,<sup>373</sup> the GAO found that the agency had a reasonable basis to cancel an RFP that inadequately described the contract's proper staffing requirements.<sup>374</sup> The Air Force issued an RFP for computer support services at Hickam AFB, Hawaii.<sup>375</sup> 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.<sup>376</sup> The contracting officer resolicited the contract based on a clearer, revised statement of work.<sup>377</sup>

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

In *ELEIT Technology, Inc.*,<sup>380</sup> 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.<sup>381</sup> 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.<sup>382</sup> The GAO noted that cancellation was appropriate in this case as the agency reasonably determined that the RFP did not accurately describe its needs.<sup>383</sup>

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

<sup>371</sup> 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.

<sup>372</sup> *Id.* at 4.

<sup>373</sup> Comp. Gen. B-293709.2, June 18, 2004, 2004 CPD ¶ 116.

<sup>374</sup> *Id.* at 3.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 2.

<sup>377</sup> *Id.* at 3.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 4-6.

<sup>380</sup> B-294193.2, 2004 U.S. Comp. Gen. LEXIS 201 (Sept. 30, 2004).

<sup>381</sup> *Id.* at \*2.

<sup>382</sup> 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.

<sup>383</sup> *Id.* at \*2.

<sup>384</sup> Comp. Gen. B-292602, Oct. 21, 2003, 2003 CPD ¶ 221.

<sup>385</sup> 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.

<sup>386</sup> *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.<sup>387</sup>

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.<sup>388</sup> 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.<sup>389</sup>

In *Continental RPVs*,<sup>390</sup> 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.<sup>391</sup> After a sustained protest,<sup>392</sup> the Army made a revised best value determination and affirmed the earlier award to Griffon Aerospace, Inc.<sup>393</sup>

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.<sup>394</sup> 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."<sup>395</sup>

#### *Discussions*

#### *All for One, and One for All!*

In *Ridoc Enterprises, Inc./Myers Investigative & Security Services*,<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup> 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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<sup>387</sup> *Id.* at 4-5.

<sup>388</sup> *Id.* at 6.

<sup>389</sup> *Id.* at 7.

<sup>390</sup> Comp. Gen. B-292768.6, Apr. 5, 2004, 2004 CPD ¶ 103.

<sup>391</sup> *Id.* at 1.

<sup>392</sup> 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.

<sup>393</sup> *Continental RPVs*, 2004 CPD ¶ 103, at 3.

<sup>394</sup> *Id.* at 7.

<sup>395</sup> *Id.* at 9.

<sup>396</sup> Comp. Gen. B-293045.2, July 26, 2004, 2004 CPD ¶ 153.

<sup>397</sup> 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.

<sup>398</sup> *Id.* at 2.

highest technical score and lowest price. As a result, the EPA re-awarded the contract to Eagle.<sup>399</sup>

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.<sup>400</sup>

In a second case, *SYMVIONICS, Inc.*,<sup>401</sup> 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.<sup>402</sup> 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.<sup>403</sup>

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.<sup>404</sup>

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."<sup>405</sup> The Navy responded by stating that "PPV would probably not happen as scheduled" and that the Navy would not pay more for SYMVIONICS' contract.<sup>406</sup> 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.<sup>407</sup>

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.<sup>408</sup> 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.<sup>409</sup>

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.<sup>410</sup> 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.<sup>411</sup>

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<sup>399</sup> *Id.* at 3.

<sup>400</sup> *Id.*

<sup>401</sup> B-293824.2, 2004 U.S. Comp. Gen. LEXIS 216 (Oct. 8, 2004).

<sup>402</sup> 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.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at \*2-3.

<sup>405</sup> *Id.* at \*3.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at \*4.

<sup>409</sup> *Id.* at \*5.

<sup>410</sup> *Id.* at \*6.

<sup>411</sup> *Id.* at \*7.

## Putting the Meaning in Meaningful

In *Lockheed Martin Corp.*,<sup>412</sup> the GAO commented on the rule that discussions, when conducted, must be meaningful.<sup>413</sup> 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.<sup>414</sup>

The Army issued an RFP to perform system development and demonstration and low-rate initial production of the XM395 precision guided mortar munition.<sup>415</sup> 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.<sup>416</sup>

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.<sup>417</sup>

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.<sup>418</sup>

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.<sup>419</sup> As a result, the GAO recommended reevaluation of the award to ATK, to include redoing meaningful discussions with the competitive range offerors.<sup>420</sup>

### Reopening: A Can of Worms?

Four cases explored when an agency can reopen discussions. In *National Shower Express, Inc.; Rickaby Fire Support*,<sup>421</sup> 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.<sup>422</sup> 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

<sup>412</sup> Comp. Gen. B-293679 et al., May 27, 2004, 2004 CPD ¶ 115.

<sup>413</sup> 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).

<sup>414</sup> *Lockheed*, 2004 CPD ¶ 115, at 7.

<sup>415</sup> 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.

<sup>416</sup> *Id.* at 3.

<sup>417</sup> *Id.* at 4.

<sup>418</sup> *Id.* at 6-7.

<sup>419</sup> 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.

<sup>420</sup> *Id.* at 11.

<sup>421</sup> Comp. Gen. B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140.

<sup>422</sup> *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.<sup>423</sup>

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.<sup>424</sup> 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.<sup>425</sup>

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

The RFP was for a time charter contract for an oceanographic research vessel.<sup>428</sup> 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.<sup>429</sup>

The GAO held that neither the Procurement Integrity Act<sup>430</sup> 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.<sup>431</sup>

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.*,<sup>432</sup> the GAO held that dramatic price differentials often can lead to the reasonable conclusion that offerors misunderstood the RFP requirements.<sup>433</sup> 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).<sup>434</sup> 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.<sup>435</sup>

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

In a fourth case, the GAO looked at the other side of the coin. In *Kaneohe General Services*,<sup>438</sup> 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.<sup>439</sup>

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<sup>423</sup> *Id.* at 8.

<sup>424</sup> *Id.* at 4.

<sup>425</sup> *Id.* at 8-9.

<sup>426</sup> Comp. Gen. B-292511.2, Nov. 6, 2003, 2003 CPD ¶ 206.

<sup>427</sup> *Id.* at 6.

<sup>428</sup> 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.

<sup>429</sup> *Id.* at 3.

<sup>430</sup> 41 U.S.C. § 423 (2000).

<sup>431</sup> *Ocean Services, LLC*, 2003 CPD ¶ 206, at 6.

<sup>432</sup> Comp. Gen. B-293042.3, Feb. 17, 2004, 2004 CPD ¶ 65.

<sup>433</sup> 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.

<sup>434</sup> *Id.* at 2.

<sup>435</sup> *Id.* at 3.

<sup>436</sup> *Id.* at 4.

<sup>437</sup> *Id.*

<sup>438</sup> Comp. Gen. B-293097.2, Feb. 2, 2004, 2004 CPD ¶ 50.

<sup>439</sup> 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.<sup>440</sup> 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.<sup>441</sup> 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.<sup>442</sup>

### *Opaque Clarifications*

The GAO and the COFC each had cases that revolved around clarifications issues. In the first, *AHNTECH, Inc.*,<sup>443</sup> 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.<sup>444</sup> After the initial evaluation, the evaluators issued fifty-two clarification requests; after reviewing AHNTECH's responses, the agency deemed the proposal inadequate.<sup>445</sup>

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.<sup>446</sup>

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.<sup>447</sup>

In *Gulf Group v. United States*,<sup>448</sup> 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.<sup>449</sup> The RFP stated that the COE intended to award without discussions.<sup>450</sup> 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.<sup>451</sup> The source selection authority made the award decision without seeking clarification from Gulf Group.<sup>452</sup> The contract was awarded to Kokolakis; 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.<sup>453</sup>

The COFC held that, contrary to Gulf Group's assertions, there was no right to clarify information in proposals.<sup>454</sup> 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)<sup>455</sup> was discretionary, there was no obligation to provide an explanation with such a

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<sup>440</sup> *Id.* at 2.

<sup>441</sup> *Id.* at 3.

<sup>442</sup> *Id.*

<sup>443</sup> Comp. Gen. B-293582, Apr. 13, 2004, 2004 CPD ¶ 113.

<sup>444</sup> 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.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 2-3.

<sup>447</sup> *Id.* at 4.

<sup>448</sup> 61 Fed. Cl. 338 (2004).

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

<sup>450</sup> *Id.* at 342.

<sup>451</sup> *Id.* at 344.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 346.

<sup>454</sup> *Id.* at 361.

<sup>455</sup> See FAR, *supra* note 20, at 15.306.

decision.<sup>456</sup>

*“Hey, Lama, hey, how about a little something, you know, for the effort, you know”*<sup>457</sup>

The COFC, in *Gentex Corp. v. United States*,<sup>458</sup> 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.<sup>459</sup>

The Air Force issued an RFP for the System Development and Demonstration for the Joint Service Aircrew Masks program.<sup>460</sup> 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.<sup>461</sup> Gentex submitted a protest to the GAO which the GAO denied.<sup>462</sup>

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.<sup>463</sup>

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).<sup>464</sup> In addition, the RFP suggested that any CAIV tradeoff would be done post-award.<sup>465</sup> 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.<sup>466</sup> 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.<sup>467</sup>

## Evaluations

### *Proposal Evaluation 101: Consider Revised Proposals*

In *Locus Technology, Inc.*,<sup>468</sup> 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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<sup>456</sup> *Gulf Group*, 61 Fed. Cl. at 361.

<sup>457</sup> 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).

<sup>458</sup> 58 Fed. Cl. 634 (2003).

<sup>459</sup> *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).

<sup>460</sup> 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.

<sup>461</sup> *Id.* at 646-47.

<sup>462</sup> 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.

<sup>463</sup> *Gentex Corp.*, 58 Fed. Cl. at 650.

<sup>464</sup> *Id.* at 651.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.* at 652.

<sup>467</sup> *Id.* at 653.

<sup>468</sup> *Comp. Gen. B-293012*, Jan. 16, 2004, 2004 CPD ¶ 16.

agency technical evaluation panel (TEP) evaluated the proposals using a point-rating scheme.<sup>469</sup> 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.<sup>470</sup>

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.<sup>471</sup> 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."<sup>472</sup> 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.<sup>473</sup> 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.<sup>474</sup>

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."<sup>475</sup> 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.<sup>476</sup>

#### *Proposal Evaluation 201: Furnish an Adequate Rationale*

In *Blue Rock Structures, Inc.*,<sup>477</sup> the GAO sustained a protest in which the source selection authority failed to adequately document his tradeoff decision.<sup>478</sup> 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.<sup>479</sup> Technical factors<sup>480</sup> were significantly more important than price in the evaluation.<sup>481</sup> 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.<sup>482</sup>

<sup>469</sup> 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.

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

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *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.*

<sup>474</sup> "(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.*

<sup>475</sup> *Id.* at 5-6 (quoting the ESR at 6).

<sup>476</sup> *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.*

<sup>477</sup> Comp. Gen. B-293134, Feb. 6, 2004, 2004 CPD ¶ 63.

<sup>478</sup> *Id.* at 5-6.

<sup>479</sup> *Id.* at 2.

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

<sup>481</sup> Price was the sole basis for evaluating the seed project. *Id.* at 1-2.

<sup>482</sup> *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.<sup>483</sup> 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.<sup>484</sup> The GAO recommended a new source selection decision and reimbursement of the protestor's costs.<sup>485</sup>

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

In *Lockheed Martin Information Systems*,<sup>486</sup> 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.<sup>487</sup>

The U.S. Department of Housing and Urban Development (HUD) issued an RFP for a wide range of information technology services<sup>488</sup> using performance-based service acquisition methods.<sup>489</sup> The award was based on best value, with capability<sup>490</sup> and past performance together evaluated as more important than price/cost.<sup>491</sup> 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.<sup>492</sup>

Lockheed Martin Information System (LMIS) submitted a protest to the GAO, which reviewed the award selection under the "reasonable and consistent" standard.<sup>493</sup> The GAO determined that four of the evaluators' and three of the SSO's discriminators were unsupported by the record.<sup>494</sup> 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.<sup>495</sup> The GAO felt that the agency either unreasonably reached unsupported 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.<sup>496</sup>

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<sup>483</sup> *Id.* at 5-6.

<sup>484</sup> *Id.* at 5.

<sup>485</sup> 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.

<sup>486</sup> Comp. Gen. B-292836, et al., Dec. 18, 2003, 2003 CPD ¶ 230.

<sup>487</sup> *Id.* at 12.

<sup>488</sup> 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.

<sup>489</sup> 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.

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

<sup>491</sup> *Id.*

<sup>492</sup> *Id.* at 4.

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> 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.

<sup>496</sup> The GAO also recommended that LMIS be reimbursed its costs, including reasonable attorneys' fees. *Id.* at 12.

*“I Don’t Get No Respect!”*<sup>497</sup>

In *Computer Information Specialist, Inc.*,<sup>498</sup> 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.<sup>499</sup>

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.<sup>500</sup>

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.<sup>501</sup> 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.<sup>502</sup>

The GAO was unable to identify any area that could reasonably be said to demonstrate a “lack of respect.”<sup>503</sup> 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.”<sup>504</sup>

The GAO also found the agency miscalculated 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.<sup>505</sup> The GAO recommended that the agency make a new source selection decision after reevaluating the proposals of the competitive range offerors.<sup>506</sup>

*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*.<sup>507</sup>

In *Arora*, the Department of Health & Human Services (HHS) issued an RFP for occupational health services.<sup>508</sup> 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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<sup>497</sup> 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.

<sup>498</sup> Comp. Gen. B-293049; B-293049.2, Jan. 23, 2004, 2004 CPD ¶ 1.

<sup>499</sup> *Id.* at 3.

<sup>500</sup> *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.*

<sup>501</sup> *Id.* at 3.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 4.

<sup>504</sup> *Id.* at 5.

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

<sup>506</sup> *Id.* at 6-7. The GAO also recommended reimbursement of CIS’ protest costs. *Id.*

<sup>507</sup> Comp. Gen. B-293102, Feb. 2, 2004, 2004 CPD ¶ 61.

<sup>508</sup> *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).<sup>509</sup> 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.<sup>510</sup> 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.<sup>511</sup> 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.<sup>512</sup> 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.<sup>513</sup> Moreover, the individuals in question were the incumbent personnel, who HHS knew had the requisite certifications.<sup>514</sup> 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.<sup>515</sup> The GAO recommended that the agency reevaluate the protester's proposal and make a new source selection decision.<sup>516</sup>

*Be Careful What You Ask For . . .*

The GAO sustained a protest in *Atlantic Research Marketing Systems, Inc.*<sup>517</sup> 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.<sup>518</sup> 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.<sup>519</sup>

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.<sup>520</sup>

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

<sup>509</sup> *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).

<sup>510</sup> *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.*

<sup>511</sup> 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.

<sup>512</sup> *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).

<sup>513</sup> *Arora*, 2004 CPD ¶ 61, at 4.

<sup>514</sup> *Id.*

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

<sup>516</sup> 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).

<sup>517</sup> Comp. Gen. B-292743, Dec. 1, 2003, 2003 CPD ¶ 218.

<sup>518</sup> 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.

<sup>519</sup> *Id.* at 2.

<sup>520</sup> *Id.* at 4.

<sup>521</sup> *Id.* at 5-6.

that the team failed to take into account a positive user assessment submitted by ARMS.<sup>522</sup>

### *Close but No Cigar*

Two cases highlight the fact that an agency can disregard an unsatisfactory proposal. In *DynCorp International, LLC*,<sup>523</sup> the Army awarded a contract to Aegis Defence Svs., Ltd. under an RFP for security services for contractor and government personnel in Iraq.<sup>524</sup> 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.<sup>525</sup>

DynCorp protested its marginal rating and argued that the Army should have considered its proposal in a cost/technical tradeoff.<sup>526</sup> 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.<sup>527</sup> 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.<sup>528</sup>

In *Nevada Real Estate Services, Inc.*,<sup>529</sup> 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.<sup>530</sup> 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.<sup>531</sup> 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.<sup>532</sup>

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.<sup>533</sup> 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.<sup>534</sup>

### *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.<sup>535</sup> 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.<sup>536</sup> Contracting officers have a duty to "(a)void, neutralize, or mitigate significant potential conflicts before contract award."<sup>537</sup>

<sup>522</sup> *Id.* at 6. The GAO recommended that the protestor be considered for pending award and be reimbursed for its protest costs. *Id.* at 9.

<sup>523</sup> B-294232; B-294232.2, 2004 U.S. Comp. Gen. LEXIS 192 (Sept. 13, 2004).

<sup>524</sup> The RFP contemplated the award of a cost-plus-fixed-fee contract for one-year with two one-year options. *Id.* at \*2.

<sup>525</sup> *Id.* at \*4. The SSA noted that even if the two excluded proposals were considered, the award would be the same. *Id.* at \*5.

<sup>526</sup> 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.

<sup>527</sup> *Id.* at \*7.

<sup>528</sup> *Id.* at \*9.

<sup>529</sup> Comp. Gen. B-293105, Feb. 3, 2004, 2004 CPD ¶ 36.

<sup>530</sup> *Id.* at 1.

<sup>531</sup> *Id.* at 2.

<sup>532</sup> *Id.*

<sup>533</sup> *Id.* at 3.

<sup>534</sup> *Id.* at 4.

<sup>535</sup> FAR, *supra* note 20, subpt. 9.5.

<sup>536</sup> *Id.* at 9.505.

<sup>537</sup> *Id.* at 9.504.

The GAO sustained a protest in *PURVIS Systems, Inc.*,<sup>538</sup> 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.<sup>539</sup>

The Navy issued an RFP<sup>540</sup> to provide analytical and technical support for two Navy programs<sup>541</sup> 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.<sup>542</sup>

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,<sup>543</sup> the OCI issues were nonexistent.<sup>544</sup>

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.<sup>545</sup> 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.<sup>546</sup>

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."<sup>547</sup> Finally, the GAO found materially inadequate the mitigation plan offered by Northrop Grumman to deal with issues raised by its developmental systems.<sup>548</sup>

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 Northrop Grumman's potential performance.<sup>549</sup>

The GAO also sustained an OCI protest in *Science Applications International Corporation (SAIC)*.<sup>550</sup> 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."<sup>551</sup> 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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<sup>538</sup> Comp. Gen. B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177.

<sup>539</sup> *Id.* at 11.

<sup>540</sup> 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.

<sup>541</sup> The Ship Anti-submarine Warfare Readiness Effectiveness Measuring Program and the Mine Readiness Effectiveness Measuring Program. *Id.* at 1-2.

<sup>542</sup> *Id.* at 4-6.

<sup>543</sup> 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.

<sup>544</sup> *Id.* at 7.

<sup>545</sup> 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.

<sup>546</sup> *Id.* at 10-11.

<sup>547</sup> *Id.* at 11.

<sup>548</sup> *Id.* at 12. The OCI plan identified systems that Northrop Grumman was researching, developing, and testing. *Id.* at 10.

<sup>549</sup> *Id.* at 10.

<sup>550</sup> Comp. Gen. B-293601, et. al, May 3, 2004, 2004 CPD ¶ 96.

<sup>551</sup> *Id.* at 2.

environmental modeling in the contract.<sup>552</sup>

The GAO focused on the agency's failure to analyze the OCI issues.<sup>553</sup> 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.<sup>554</sup>

In a follow-up case,<sup>555</sup> 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.<sup>556</sup> The GAO, while not fully happy with the "no OCI" conclusion, found the record reasonably supported EPA's conclusion.<sup>557</sup> The GAO did note with approval the EPA's goal to independently evaluate and mitigate potential OCI issues prior to each task order.<sup>558</sup>

The GAO was not the only forum to address the issue of OCI. In *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Abraham (LeBoeuf)*,<sup>559</sup> 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).<sup>560</sup>

The DOE issued an RFP for expert legal counsel to assist with the licensing activities.<sup>561</sup> 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.<sup>562</sup>

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.<sup>563</sup>

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.<sup>564</sup> 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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<sup>552</sup> *Id.* at 4-5.

<sup>553</sup> *Id.* at 6.

<sup>554</sup> *Id.* at 8-9.

<sup>555</sup> Science Applications Int'l Corp., B-293601.5, 2004 U.S. Comp. Gen. LEXIS 196 (Sept. 21, 2004).

<sup>556</sup> *Id.* at \*3-4.

<sup>557</sup> *Id.* at \*4.

<sup>558</sup> *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").

<sup>559</sup> 347 F.3d 315 (2003).

<sup>560</sup> *Id.* at 317.

<sup>561</sup> *Id.* at 318. The contract was for a five-year term, renewable for a maximum of ten years. *Id.*

<sup>562</sup> *Id.*

<sup>563</sup> *Id.*

<sup>564</sup> *LeBoeuf, Lamb, Greene & MacRae*, Comp. Gen. B-283825; B-283825.3, Feb. 3, 2000, 2000 CPD ¶ 35.

adequate.<sup>565</sup>

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.<sup>566</sup> 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.<sup>567</sup> 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.<sup>568</sup> The court then remanded the case to the district court to determine the adequacy of DOE’s OCI evaluation.<sup>569</sup>

### *Rotten to the Core?*

The GAO sustained a protest in *Research Analysis & Maintenance, Inc.; Westar Aerospace & Defense Group, Inc.*,<sup>570</sup> 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.<sup>571</sup> The GAO also reinforced that agencies must evaluate Organizational Conflicts of Interest (OCI) issues consistently for all offerors.<sup>572</sup>

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

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.<sup>576</sup>

RAM protested this second award, arguing that the TSMO incorrectly downgraded its proposal under the technical merit factor by evaluating its effort as understaffed.<sup>577</sup> 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.<sup>578</sup> Because RAM was “competitively prejudiced by the evaluation deficiencies,”<sup>579</sup> the GAO sustained the protest.

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<sup>565</sup> LeBoeuf v. Abraham, 215 F. Supp. 2d 73 (D.D.C. 2002).

<sup>566</sup> *LeBoeuf*, 347 F.3d at 323.

<sup>567</sup> *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.

<sup>568</sup> *Id.* at 324.

<sup>569</sup> 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.

<sup>570</sup> Comp. Gen. B-292587.4, et al., Nov. 17, 2003, 2004 CPD ¶ 100.

<sup>571</sup> *Id.* at 6.

<sup>572</sup> *Id.* at 8.

<sup>573</sup> 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.

<sup>574</sup> 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.*

<sup>575</sup> *Id.*

<sup>576</sup> *Id.* at 3.

<sup>577</sup> *Id.* at 4.

<sup>578</sup> *Id.* at 5-6.

<sup>579</sup> *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.<sup>580</sup> 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.<sup>581</sup>

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."<sup>582</sup> 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.<sup>583</sup> The GAO recommended an amended RFP with clearer staffing requirements, and reevaluation of the award to NGTS.<sup>584</sup>

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*,<sup>585</sup> the Army issued an RFP for an aerial remotely piloted vehicle target (RPVT) system and services.<sup>586</sup> The solicitation set forth five evaluation factors, including past performance.<sup>587</sup> 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.<sup>588</sup> 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.<sup>589</sup>

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

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<sup>580</sup> *Id.* at 7.

<sup>581</sup> *Id.*

<sup>582</sup> *Id.*

<sup>583</sup> *Id.* at 8.

<sup>584</sup> *Id.* The GAO also recommended reimbursement of RAM's protest costs. *Id.*

<sup>585</sup> Comp. Gen. B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56.

<sup>586</sup> *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.*

<sup>587</sup> *Id.*

<sup>588</sup> *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.

<sup>589</sup> *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.<sup>590</sup> 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.<sup>591</sup> 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.<sup>592</sup> Additionally, Griffon's largest prior effort was less than three percent the size of the contract contemplated here.<sup>593</sup> 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.<sup>594</sup>

In *Si-Nor, Inc.*,<sup>595</sup> 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.<sup>596</sup> 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.<sup>597</sup> 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.<sup>598</sup> Four offerors, including Si-Nor and International Resource Recovery, Inc. (IRRI), submitted timely proposals.<sup>599</sup> 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.<sup>600</sup> Si-Nor then protested, among other things, the agency's determination that IRRI's past performance and experience were similar to the solicitation requirements.<sup>601</sup> 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.<sup>602</sup> The Navy considered three prior contracts in its evaluation of IRRI, one of which was

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<sup>590</sup> *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.

<sup>591</sup> 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.

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

<sup>593</sup> *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 offeror's performance as it related to all RPVT requirements, including price. *Id.*

<sup>594</sup> *Id.* at 12-13.

<sup>595</sup> Comp. Gen. B-292748.2, B-292748.3, B-292748.4, Jan. 7, 2004, 2004 CPD ¶ 10.

<sup>596</sup> *Id.* at 1-2.

<sup>597</sup> *Id.* at 2.

<sup>598</sup> *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.

<sup>599</sup> *Id.* at 4.

<sup>600</sup> 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.

<sup>601</sup> *Id.*

<sup>602</sup> *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).<sup>603</sup> Because this prior IRR 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.<sup>604</sup> Further, because this prior contract was one of only three contracts considered by the Navy in evaluating IRR'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.<sup>605</sup>

In *KMR, LLC*,<sup>606</sup> 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.<sup>607</sup> 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.<sup>608</sup> For purposes of evaluating vendors' past performance, the solicitation indicated that the agency would consider relevant contracts for the "same or similar" services.<sup>609</sup>

Both KMR and MindLeaf Technologies, Inc. submitted responses to the RFQ.<sup>610</sup> 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.<sup>611</sup> 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.<sup>612</sup> 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.<sup>613</sup> 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.<sup>614</sup>

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

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<sup>603</sup> *Id.* at 16.

<sup>604</sup> *Id.* at 17. The Navy argued that IRR'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 IRR's prior contract. *Id.* at 17. Moreover, the RFP here was not limited to the indefinite-quantity portion of the RFP. *Id.*

<sup>605</sup> *Id.* at 17-18.

<sup>606</sup> Comp. Gen. B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

<sup>607</sup> *Id.* at 1.

<sup>608</sup> *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.*

<sup>609</sup> *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.*

<sup>610</sup> *Id.*

<sup>611</sup> *Id.* at 3.

<sup>612</sup> *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.

<sup>613</sup> *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.*

<sup>614</sup> 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.<sup>615</sup> 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.<sup>616</sup> 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.<sup>617</sup>

### *“Relevant” Doesn’t Necessarily Mean Identical*

In *SWR, Inc.*,<sup>618</sup> 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.<sup>619</sup> The stated evaluation criteria were price and past performance/performance risk (pp/pr).<sup>620</sup> 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] . . . .”<sup>621</sup> 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.<sup>622</sup> 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.<sup>623</sup>

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.<sup>624</sup> 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.<sup>625</sup> 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.<sup>626</sup> Having found the agency’s determination of relevance to be consistent with the RFP language and reasonable, the GAO denied the protest.<sup>627</sup>

### *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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<sup>615</sup> *Id.* at 5.

<sup>616</sup> *Id.* at 6.

<sup>617</sup> *Id.*

<sup>618</sup> Comp. Gen. B-292896.3, June 7, 2004, 2004 CPD ¶ 148.

<sup>619</sup> *Id.* at 1.

<sup>620</sup> *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.*

<sup>621</sup> *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.*

<sup>622</sup> *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.*

<sup>623</sup> *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.*

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

<sup>625</sup> *Id.*

<sup>626</sup> *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.

<sup>627</sup> *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.*,<sup>628</sup> 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.<sup>629</sup> 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.<sup>630</sup> The agency received six proposals in response to the RFP, including those of incumbent Base Technologies, Inc. (BTI) and Lifecare-Advanta Joint Venture (LAJV).<sup>631</sup> 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.<sup>632</sup> Based on LAJV's higher past performance and technical merit score and lower evaluated price, the agency selected LAJV for award.<sup>633</sup> 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.<sup>634</sup> 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.<sup>635</sup> 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.<sup>636</sup> 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."<sup>637</sup> 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.<sup>638</sup>

In *Roca Management Education & Training, Inc.*,<sup>639</sup> 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.<sup>640</sup> The solicitation established four evaluation factors, including past performance.<sup>641</sup> Three offerors, including Roca and Orion Technology, Inc., submitted proposals.<sup>642</sup> Orion's proposal included a subcontractor, Eagle Support Service Corporation.<sup>643</sup>

<sup>628</sup> Comp. Gen. B-293061.2; B-293061.3, Jan. 28, 2004, 2004 CPD ¶ 31.

<sup>629</sup> *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.*

<sup>630</sup> *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.*

<sup>631</sup> *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.

<sup>632</sup> *Id.* at 7.

<sup>633</sup> *Id.*

<sup>634</sup> *Id.* at 10.

<sup>635</sup> *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).

<sup>636</sup> *Id.*

<sup>637</sup> *Id.* at 11.

<sup>638</sup> *Id.*

<sup>639</sup> Comp. Gen. B-293067, Jan. 15, 2004, 2004 CPD ¶ 28.

<sup>640</sup> *Id.* at 1.

<sup>641</sup> *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.*

<sup>642</sup> *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 misvaluated Orion's past performance by improperly attributing the experience of Orion's subcontractor to Orion.<sup>644</sup> In support, Roca contended that the solicitation language explicitly limited the experience proffered to that of the actual offeror itself.<sup>645</sup> 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.<sup>646</sup> 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.<sup>647</sup> 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.<sup>648</sup>

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*,<sup>649</sup> 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.<sup>650</sup> 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.<sup>651</sup> The technical evaluation of each vendor's system was based solely upon an oral presentation that was not formally recorded.<sup>652</sup> 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.<sup>653</sup> e-LYNXX, which had submitted a lower price (\$37,500 versus \$98,500),

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<sup>643</sup> *Id.*

<sup>644</sup> *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.*

<sup>645</sup> 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.

<sup>646</sup> *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)).

<sup>647</sup> *Id.*

<sup>648</sup> *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.

<sup>649</sup> Comp. Gen. B-292761, Dec. 3, 2003, 2003 CPD ¶ 219.

<sup>650</sup> 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.*

<sup>651</sup> *Id.* at 3.

<sup>652</sup> 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.*

<sup>653</sup> "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.<sup>654</sup>

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.<sup>655</sup> 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.<sup>656</sup> 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.<sup>657</sup> 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.<sup>658</sup>

### *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!<sup>659</sup> 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.<sup>660</sup> 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.*,<sup>661</sup> 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."<sup>662</sup> 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.<sup>663</sup> 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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<sup>654</sup> *Id.* at 4-5.

<sup>655</sup> *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).

<sup>656</sup> 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.*

<sup>657</sup> *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.*

<sup>658</sup> *Id.* at 9-10.

<sup>659</sup> 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).

<sup>660</sup> 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.*

<sup>661</sup> Comp. Gen. B-293518, B-293518.2, Mar. 29, 2004, 2004 CPD ¶ 76.

<sup>662</sup> 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.

<sup>663</sup> 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 providers] 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.<sup>664</sup> 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.<sup>665</sup> 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.<sup>666</sup> 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 synopsisized, such that potential contractors like Information Ventures are afforded a realistic opportunity to compete.<sup>667</sup>

In a different *Information Ventures, Inc.*,<sup>668</sup> 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.<sup>669</sup> 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.<sup>670</sup> 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.<sup>671</sup>

The GAO sustained the protest. The GAO held that in addition to the synopsisizing requirement for procurements in excess of \$25,000,<sup>672</sup> the maximum-extent practicable competition standard applicable to simplified acquisitions requires agencies to provide potential offerors a reasonable opportunity to respond.<sup>673</sup> 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.<sup>674</sup> Because of the HHS decision to override the automatic stay associated

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<sup>664</sup> *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*).

<sup>665</sup> *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)).

<sup>666</sup> *Id.* at 3-4.

<sup>667</sup> *Id.* at 5. The GAO also recommended the HHS reimburse Information Ventures costs associated with pursuing the protest. *Id.*

<sup>668</sup> *Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81.*

<sup>669</sup> 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.

<sup>670</sup> 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.

<sup>671</sup> 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)).

<sup>672</sup> *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*).

<sup>673</sup> *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*).

<sup>674</sup> 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.<sup>675</sup>

Lieutenant Colonel Louis Chiarella.

### *Special Emergency Thresholds*

On 23 February 2004, the FAR Councils issued an interim rule<sup>676</sup> to implement the special emergency procurement authorities in the Services Acquisition Reform Act of 2003.<sup>677</sup> 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.<sup>678</sup> 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.<sup>679</sup> 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.<sup>680</sup>

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.<sup>681</sup> The simplified acquisition threshold increases to \$10 million for such acquisitions.<sup>682</sup> The \$5 million and \$10 million thresholds do not apply to blanket purchase agreements established with Federal Supply Schedule contractors.<sup>683</sup>

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).<sup>684</sup> The ACA PARCs may further delegate this authority to a level no lower than one level above the contracting officer.<sup>685</sup> 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.<sup>686</sup>

Major Bobbi Davis.

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<sup>675</sup> *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.

<sup>676</sup> 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).

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

<sup>678</sup> 69 Fed. Reg. at 8313.

<sup>679</sup> *Id.*

<sup>680</sup> *Id.* The \$5 million and \$10 million thresholds include options. *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

<sup>683</sup> *Id.* at 8314.

<sup>684</sup> 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).

<sup>685</sup> *Id.*

<sup>686</sup> 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<sup>687</sup> have tracked the developments following the Court of Appeals for the Federal Circuit (CAFC's) decision in *Impresa Costruzioni Geom. Domenico Garufi v. United States*, which opened the door to greater judicial review of agency affirmative responsibility determinations.<sup>688</sup> 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.<sup>689</sup> 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.*<sup>690</sup> typified the GAO's review of these protests.<sup>691</sup>

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.<sup>692</sup> 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<sup>693</sup> 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.<sup>694</sup>

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."<sup>695</sup> 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.<sup>696</sup>

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.<sup>697</sup> 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.<sup>698</sup> During the visit, the contracting officer also noted Wallace had three phone lines and a fax number.<sup>699</sup> Additionally, the record reflected that

<sup>687</sup> 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.

<sup>688</sup> 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).

<sup>689</sup> 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).

<sup>690</sup> Comp. Gen. B-292964, Dec. 23, 2003, 2004 CPD ¶ 7.

<sup>691</sup> 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).

<sup>692</sup> *Universal Marine*, 2004 CPD ¶ 7, at 1-2.

<sup>693</sup> *Id.* at 2 (citing FAR section 9.104-1).

<sup>694</sup> *Id.*

<sup>695</sup> *Id.* (quoting 4 C.F.R. § 21.5(c) (2003)).

<sup>696</sup> *Id.* at 2-3.

<sup>697</sup> *Id.* at 1, 3.

<sup>698</sup> *Id.* at 3.

<sup>699</sup> *Id.*

Wallace submitted to the agency the resumes for four key and experienced employees, who actually participated in the pre-award survey meetings.<sup>700</sup> 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.<sup>701</sup>

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.<sup>702</sup> 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.<sup>703</sup>

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.<sup>704</sup>

### *Now Here's A Wild One*

*Wild Building Contractors, Inc.*<sup>705</sup> 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.<sup>706</sup>

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.).<sup>707</sup> 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.<sup>708</sup>

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.<sup>709</sup> 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.<sup>710</sup>

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<sup>700</sup> *Id.*

<sup>701</sup> *Id.*

<sup>702</sup> *Id.* at 4.

<sup>703</sup> *Id.*

<sup>704</sup> *Id.*

<sup>705</sup> Comp. Gen. B-293829, June 17, 2004, 2004 CPD ¶ 131.

<sup>706</sup> *Id.* at 1-2.

<sup>707</sup> *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.

<sup>708</sup> *Id.* at 2-3.

<sup>709</sup> *Id.* at 3.

<sup>710</sup> *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.”<sup>711</sup> As an example, Wild Building questioned the adequacy of Compton Construction’s monthly cash balance for a project of the magnitude contemplated by solicitation.<sup>712</sup> 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.”<sup>713</sup> 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.<sup>714</sup> 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.”<sup>715</sup>

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.<sup>716</sup> The revised rule requires the clause’s inclusion in all solicitations and contracts for supplies or services, other than those for commercial items.<sup>717</sup> The change also clarifies that a commercial item includes commercial construction materials but excludes the construction itself.<sup>718</sup>

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.<sup>719</sup> The list includes section 15 of the Small Business Act<sup>720</sup> and bid protest procedures.<sup>721</sup>

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.<sup>722</sup> The rule requires agencies to identify commercial item treatment of performance-based contracts.<sup>723</sup> The interim rule also revises the definition of commercial services to include performance-based terms,<sup>724</sup> incorporates the conditions for using FAR part 12 for any performance-based

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<sup>711</sup> *Id.* at 5.

<sup>712</sup> *Id.*

<sup>713</sup> *Id.*

<sup>714</sup> *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.

<sup>715</sup> *Wild*, 2004 CPD ¶ 131, at 5.

<sup>716</sup> 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).

<sup>717</sup> *Id.*

<sup>718</sup> *Id.*

<sup>719</sup> 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).

<sup>720</sup> 15 U.S.C.S. § 631.

<sup>721</sup> 69 Fed. Reg. 2447.

<sup>722</sup> 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).

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

<sup>724</sup> 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,<sup>725</sup> and adds performance-based terms to part 37, Service Contracts.<sup>726</sup>

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).<sup>727</sup> The rule also added the website for the Procurement List and the address for the Committee offices.<sup>728</sup>

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.<sup>729</sup> 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 determination 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."<sup>730</sup> 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.<sup>731</sup>

Major Bobbi Davis.

## Multiple Award Schedules

### *Take an Alternate Course*

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

<sup>725</sup> A contracting officer may use FAR part 12 for any performance-based service acquisition 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.

<sup>726</sup> FAR section 37.601 includes performance-based tasks orders. *Id.*

<sup>727</sup> 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).

<sup>728</sup> *Id.* at 34,230. The website is available at <http://www.jwod.gov/procurementlist>.

<sup>729</sup> 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).

<sup>730</sup> 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)).

<sup>731</sup> *Id.*

<sup>732</sup> 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).

<sup>733</sup> 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).

<sup>734</sup> Comp. Gen. B-292419.3, Nov. 26, 2003, 2003 CPD ¶ 203.

<sup>735</sup> *Id.* at 4.

<sup>736</sup> *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).<sup>737</sup> The VA selected EDS to provide the services at a price significantly more than SMF's quoted price.<sup>738</sup> 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.<sup>739</sup> On 10 June 2003, SMF protested to the GAO requesting corrective action and consideration of its quotation because the quotation included the required resumes.<sup>740</sup> The VA admitted it inadvertently overlooked the resumes and agreed to reevaluate SMF's quotation.<sup>741</sup> On 10 July 2003, the agency again selected EDS.<sup>742</sup> One day after a second debriefing, on 17 July 2003, SMF again protested to the GAO asserting the VA misvaluated its quotation and made an unreasonable cost/technical tradeoff.<sup>743</sup> On 18 August 2003, the VA advised the GAO of its intent to cancel the RFQ.<sup>744</sup>

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.<sup>745</sup> 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.<sup>746</sup>

After the agency cancelled the RFQ, the GAO dismissed SMF's protest.<sup>747</sup> SMF protested the agency's decision to cancel the RFQ arguing "there was no basis to forgo the competition already conducted."<sup>748</sup> 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."<sup>749</sup> SMF requested the GAO resolve the earlier protest challenging the evaluation of its quotation.<sup>750</sup> 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."<sup>751</sup>

The GAO held that the record suggested the acquisition's urgency resulted from the VA's inability to properly compete the procurement.<sup>752</sup> 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.<sup>753</sup> The GAO also noted that the time line of events did not appear to support the agency's allegation of urgent need.<sup>754</sup> The VA only alleged urgency as an issue after it twice evaluated the quotations and almost three months after issuing the RFQ.<sup>755</sup> 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.<sup>756</sup> The GAO sustained SMF's protest and found "the decision to cancel appears to be . . . essentially an attempt to

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<sup>737</sup> *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.

<sup>738</sup> *Id.* at 2.

<sup>739</sup> *Id.*

<sup>740</sup> *Id.*

<sup>741</sup> *Id.* The GAO closed the file without further action based on the agency's corrective action. *Id.*

<sup>742</sup> *Id.*

<sup>743</sup> *Id.*

<sup>744</sup> *Id.*

<sup>745</sup> *Id.*

<sup>746</sup> *Id.*

<sup>747</sup> *Id.* at 4.

<sup>748</sup> *Id.*

<sup>749</sup> *Id.*

<sup>750</sup> *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.*

<sup>751</sup> *Id.* at 6.

<sup>752</sup> *Id.*

<sup>753</sup> *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.*

<sup>754</sup> *Id.*

<sup>755</sup> *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.*

<sup>756</sup> *Id.*

avoid further scrutiny and review” and held the VA’s decision to cancel the RFQ unreasonable.<sup>757</sup> The GAO acknowledged, however, that their finding did not mean that the AFSG did not urgently need the services.<sup>758</sup> 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.<sup>759</sup>

### *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.*,<sup>760</sup> the GAO found that a winning contractor materially misrepresented the commitment of three personnel in its quotation.<sup>761</sup> The GAO then recommended award to the protestor, ACS, after finding the material misrepresentation influenced the agency’s evaluation.<sup>762</sup>

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.<sup>763</sup> The contract required the contractor to install an automated system and provide training.<sup>764</sup> The solicitation included four evaluation factors: technical qualifications of key personnel, past performance, management’s technical approach and price.<sup>765</sup> Technical qualifications of key personnel and past performance were of equal importance and each was more important than management technical approach.<sup>766</sup> The solicitation further indicated all the non-price evaluation factors, when combined, were more important than price.<sup>767</sup> However, if the source selection evaluation board (SSEB) determined all quotations technically equivalent, the solicitation advised price could be the determining evaluation factor.<sup>768</sup> Three vendors, including ACS, the incumbent contractor, and Metrica, the incumbent prior to ACS, submitted offers.<sup>769</sup>

The SSEB rated ACS “excellent” in key personnel, past performance and technical approach.<sup>770</sup> Metrcia received an “excellent” rating in past performance and technical approach but only received an “above average rating” for key personnel.<sup>771</sup> 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.<sup>772</sup> 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.<sup>773</sup> ACS alleged the misrepresentation affected the award decision and the GAO agreed.<sup>774</sup>

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<sup>757</sup> *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.*

<sup>758</sup> *Id.*

<sup>759</sup> The GAO also recommended “SMF be reimbursed for the reasonable costs incurred in preparing its quotation . . . and the cost of filing and pursuing all three protests, including reasonable attorney’s fees.” *Id.* at 7.

<sup>760</sup> Comp. Gen. B-293014, Jan. 20, 2004, 2004 CPD ¶ 18.

<sup>761</sup> *Id.* at 9.

<sup>762</sup> *Id.* at 11.

<sup>763</sup> *Id.* at 2.

<sup>764</sup> 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.*

<sup>765</sup> *Id.*

<sup>766</sup> *Id.*

<sup>767</sup> *Id.*

<sup>768</sup> *Id.*

<sup>769</sup> *Id.* The third vendor was only identified as “Vendor C.” *Id.*

<sup>770</sup> *Id.* at 3.

<sup>771</sup> *Id.*

<sup>772</sup> *Id.* The price difference between ACS and Metrica was \$361,627. *Id.*

<sup>773</sup> *Id.*

<sup>774</sup> *Id.*

Metrica's offer included the names and resumes of eleven key personnel.<sup>775</sup> For eight of the names submitted, each person personally certified their availability to work for Metrica.<sup>776</sup> A Metrica representative signed the other three personnel resumes and certifications, not the named individuals.<sup>777</sup> Metrica submitted the names and resumes of these same three key personnel included with ACS' offer.<sup>778</sup> 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.<sup>779</sup> 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.<sup>780</sup>

The hearing revealed that Metrica's vice-president signed the three certifications based on information from the project manager (PM).<sup>781</sup> 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.<sup>782</sup> 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."<sup>783</sup> 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.<sup>784</sup> 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."<sup>785</sup>

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.<sup>786</sup> After contract award, Metrica did not approach the three key personnel to sign work agreements.<sup>787</sup> Instead, Metrica publicly announced of award and invited interested incumbent employees to express an interest in working for Metrica.<sup>788</sup> The GAO concluded that Metrica's actions did not support a finding that Metrica could validly certify that the three employees agreed to work for it if awarded the contract.<sup>789</sup>

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."<sup>790</sup> The degree of negligence or intentionality associated with the misrepresentation is relevant to the remedy, not whether the statement is a misrepresentation.<sup>791</sup> The GAO then concluded the misrepresentations were material based on a review of the statement of work.<sup>792</sup>

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

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<sup>775</sup> *Id.* at 4.

<sup>776</sup> *Id.* at 5.

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

<sup>778</sup> *Id.* at 5.

<sup>779</sup> *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.

<sup>780</sup> *Id.*

<sup>781</sup> *Id.*

<sup>782</sup> *Id.*

<sup>783</sup> *Id.*

<sup>784</sup> *Id.* at 7.

<sup>785</sup> *Id.*

<sup>786</sup> *Id.*

<sup>787</sup> *Id.* at 9.

<sup>788</sup> *Id.* Two of the three key personnel took other positions with ACS, forcing Metrica to find replacements. *Id.*

<sup>789</sup> *Id.*

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

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

<sup>792</sup> *Id.*

<sup>793</sup> *ACS Gov't Sys., Inc.*, 2004 CPD ¶ 18, at 9.

certification to determine if the vendor's quotation met the statement of work requirements.<sup>794</sup> 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.<sup>795</sup> Based on the finding, the GAO recommended the Army exclude Metrica's quotation from consideration and issue the purchase order to ACS.<sup>796</sup>

### *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.<sup>797</sup> 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.<sup>798</sup> The RFQ listed six equally-weighted evaluation criteria: past performance, corporate experience, technical understanding, quality control, professional staff and team, and management approach.<sup>799</sup> 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.<sup>800</sup> The agency invited the three vendors who submitted timely quotations to make oral presentations.<sup>801</sup> During the presentations, agency personnel asked questions and invited vendors to submit revised quotations based on areas mentioned during the oral presentations.<sup>802</sup> 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.<sup>803</sup>

To determine whether the DOJ engaged in a "discussion", the GAO utilized the standards applicable to negotiated procurements.<sup>804</sup> 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.<sup>805</sup> 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.<sup>806</sup> The GAO reiterated that dialogue may constitute a discussion once "agency personnel begin speaking, rather than merely listening."<sup>807</sup> 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."<sup>808</sup> 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.<sup>809</sup> The GAO went further and held that the DOJ failed to engage in meaningful discussions with TDS.<sup>810</sup>

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

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<sup>794</sup> *Id.*

<sup>795</sup> *Id.* The Army rated Metrica's staffing plan higher than ACS' staffing plan.

<sup>796</sup> *Id.* at 11.

<sup>797</sup> See FAR, *supra* note 20, at 15.102(g).

<sup>798</sup> 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 Grumman. *Id.* at 11.

<sup>799</sup> *Id.*

<sup>800</sup> *Id.* The DOJ requested oral presentations after reviewing vendor submissions. *Id.*

<sup>801</sup> *Id.*

<sup>802</sup> *Id.*

<sup>803</sup> *Id.* at 5. The DOJ issued the task order to Northrop Grumman. 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.*

<sup>804</sup> *Id.* at 6.

<sup>805</sup> *Id.*

<sup>806</sup> *Id.*

<sup>807</sup> *Id.*

<sup>808</sup> *Id.* (citing FAR section 15.102(g)).

<sup>809</sup> *Id.*

<sup>810</sup> *Id.*

requirements.<sup>811</sup> 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.<sup>812</sup> The contracting officer should discuss other proposal aspects if the alteration or explanation would materially enhance the proposal's award potential.<sup>813</sup> Failure to engage in meaningful discussions, the GAO reasoned, limits a vendors "reasonable chance of being selected for contract award."<sup>814</sup> The GAO found the DOJ only asked TDS two general questions during the oral presentation, despite "a rather considerable list of weaknesses."<sup>815</sup> In contrast, the DOJ asked the two other vendors seven detailed questions tailored to their proposals and management approach.<sup>816</sup> 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.<sup>817</sup>

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.<sup>818</sup> 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.<sup>819</sup> 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.<sup>820</sup> 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.<sup>821</sup> In *KMR, LLC*,<sup>822</sup> the GAO held the contracting officer's past performance ratings unreasonable and undocumented, and sustained KMR's protest.<sup>823</sup>

### *FSS and BPA Updates*

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

The rule adds a definitions section and defines ordering activity,<sup>827</sup> multiple award schedules,<sup>828</sup> requiring agency,<sup>829</sup>

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<sup>811</sup> *Id.* at 7 (citing FAR section 15.306(d)(3)).

<sup>812</sup> *Id.* at 6.

<sup>813</sup> *Id.* at 7.

<sup>814</sup> *Id.*

<sup>815</sup> *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.*

<sup>816</sup> *Id.*

<sup>817</sup> *Id.*

<sup>818</sup> *Id.* at 8.

<sup>819</sup> *Id.*

<sup>820</sup> FAR, *supra* note 20, at 8.404.

<sup>821</sup> Comark Fed. Sys., Comp. Gen. B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34, at 4.

<sup>822</sup> Comp. Gen. B-292860, Dec. 22, 2003, 2003 CPD ¶ 233.

<sup>823</sup> *Id.* at 1. For additional discussion of the past performance aspects of this case, see *supra* section titled Negotiated Acquisitions: Past Performance.

<sup>824</sup> See 2003 *Year in Review*, *supra* note 29, at 56.

<sup>825</sup> 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).

<sup>826</sup> *Id.*

<sup>827</sup> 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,<sup>830</sup> and special item numbers<sup>831</sup> to identify generically similar supplies or services.<sup>832</sup> 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.<sup>833</sup> Contracting officers can access the price lists on line or receive them upon request from the vendor.<sup>834</sup> 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.<sup>835</sup>

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.<sup>836</sup> 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.<sup>837</sup> Services priced at an hourly rate, however, require a statement of work.<sup>838</sup> 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.<sup>839</sup> 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.<sup>840</sup> The BPA procedures are also divided into three categories: single, multiple, or hourly rate services.<sup>841</sup> Agencies may use multi-agency BPA's if the BPA identifies the participating agencies and their estimated requirements.<sup>842</sup> 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.<sup>843</sup>

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.<sup>844</sup> In addition, contracting officers should seek even greater discounts when placing large volume orders.<sup>845</sup> However, the rule only requires schedule contractors to pass price reductions to ordering activities for a specific order.<sup>846</sup>

The "small business" section acknowledges that the FAR part 19 mandatory preference programs do not apply to orders placed against a schedule contractor.<sup>847</sup> However, the rule requires agencies to consider at least one small business if one is available.<sup>848</sup> In addition, when an order exceeds the micro-purchase threshold,<sup>849</sup> ordering activities should give a

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<sup>828</sup> 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.*

<sup>829</sup> A requiring agency is any agency needing the supplies or services. *Id.*

<sup>830</sup> 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>).

<sup>831</sup> 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.*

<sup>832</sup> *Id.*

<sup>833</sup> *Id.* at 34,235.

<sup>834</sup> *Id.*

<sup>835</sup> *Id.*

<sup>836</sup> *Id.* at 34,236.

<sup>837</sup> *Id.*

<sup>838</sup> *Id.*

<sup>839</sup> *Id.*

<sup>840</sup> *Id.*

<sup>841</sup> *Id.* at 34,237.

<sup>842</sup> *Id.*

<sup>843</sup> *Id.*

<sup>844</sup> *Id.*

<sup>845</sup> *Id.*

<sup>846</sup> *Id.*

<sup>847</sup> *Id.*

<sup>848</sup> *Id.*

<sup>849</sup> 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 attack. *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.<sup>850</sup> 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.<sup>851</sup>

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.<sup>852</sup> The provisions applicable to inspection and acceptance of supplies generally remain the same.<sup>853</sup> 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.<sup>854</sup> Any inspection or test utilized must comply with the order's quality assurance surveillance plan and not unduly delay the work.<sup>855</sup>

The termination provisions cover terminations for cause, for convenience, and disputes. Terminations for cause must comply with the FAR provisions governing commercial item terminations.<sup>856</sup> 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.<sup>857</sup> The disputes provision authorizes the ordering activity contracting officer to issue final decisions if the dispute relates to the performance of the order.<sup>858</sup> In the alternative, the ordering activity contracting officer may refer the dispute to the schedule contracting officer.<sup>859</sup> 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.<sup>860</sup> A final change reinforces the documentation requirements generally and adds new guidance addressing the documentation of orders for services and sole source orders.<sup>861</sup>

The final rule outlines competition waiver authorities for sole source orders.<sup>862</sup> 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,<sup>863</sup> 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.<sup>864</sup> 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.<sup>865</sup> The rule authorizes higher approval authority.<sup>866</sup> 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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<sup>850</sup> 69 Fed. Reg. at 34,237.

<sup>851</sup> *Id.*

<sup>852</sup> *Id.* at 34,238.

<sup>853</sup> *Id.*

<sup>854</sup> *Id.*

<sup>855</sup> *Id.*

<sup>856</sup> *Id.* at 34,239.

<sup>857</sup> *Id.*

<sup>858</sup> *Id.*

<sup>859</sup> *Id.*

<sup>860</sup> *Id.*

<sup>861</sup> *Id.* at 34,237.

<sup>862</sup> *Id.* The approval authorities follow the justification for other than full and open competition outlined in FAR section 6.304. *Id.*

<sup>863</sup> 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.

<sup>864</sup> 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.*

<sup>865</sup> *Id.*

<sup>866</sup> *Id.*

approve the order.<sup>867</sup> Except for the senior procurement executive, the authority to approve sole source orders at \$500,000 and above is not delegable.<sup>868</sup> 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).<sup>869</sup>

The memorandum acknowledges that the FAR approval levels are higher than the DFARS requirements and requires agencies to comply with the FAR approval levels.<sup>870</sup> The memorandum also applies the FAR approval levels to waive competition requirements for orders of supplies or services under MACs.<sup>871</sup> 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.<sup>872</sup> The memorandum states the changes are necessary to ensure agencies place appropriate emphasis on promoting competition on orders placed against the FSS and MAC.<sup>873</sup>

### *Let's "Get It Right"*

On 13 July 2004, the GSA and the DOD unveiled a joint initiative to improve deficiencies in government contracting.<sup>874</sup> 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.<sup>875</sup> The initiative's goal is to improve competition and transparency, and ensure that taxpayers obtain the best value for their tax dollar.<sup>876</sup>

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.<sup>877</sup> Two recent cases involving schedule

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<sup>867</sup> *Id.*

<sup>868</sup> The authority of the senior procurement executive is delegable. See FAR, *supra* note 20, at 6.304(a)(4).

<sup>869</sup> 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).

<sup>870</sup> 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.*

<sup>871</sup> *Id.*

<sup>872</sup> *Id.*

<sup>873</sup> *Id.*

<sup>874</sup> 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.

<sup>875</sup> Get it Right Plan, available at <http://www.gsa.gov>.

<sup>876</sup> *Id.*

<sup>877</sup> 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 States*,<sup>878</sup> the Air Force awarded United Partition a delivery order (DO) for various construction services under a GSA MAS contract.<sup>879</sup> The Air Force terminated United Partition's DO for default due to alleged poor performance.<sup>880</sup> 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 procurement costs.<sup>881</sup> United Partition appealed the default termination and the Air Force's affirmative claim to the ASBCA.<sup>882</sup> 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.<sup>883</sup> 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.<sup>884</sup>

On the heels of the board's decision, United Partition filed an action before the COFC.<sup>885</sup> Soon after that, the Air Force transferred the claim to the GSA, as directed by the board.<sup>886</sup> Approximately three months later, the GSA contracting officer issued a decision consistent with that previously issued by the Air Force's contracting officer.<sup>887</sup> 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.<sup>888</sup> 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.<sup>889</sup>

In *Sharp Electronics Corporation*,<sup>890</sup> 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.<sup>891</sup> 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.<sup>892</sup>

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.<sup>893</sup> 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.*

<sup>878</sup> 59 Fed. Cl. 627 (2004).

<sup>879</sup> *Id.* at 632-33.

<sup>880</sup> *Id.* at 633.

<sup>881</sup> *Id.*

<sup>882</sup> *Id.* (referencing *United Partition Sys., Inc.*, ASBCA Nos. 53915, 53916, 03-2 BCA ¶ 32,264).

<sup>883</sup> *Id.* at 635 (quoting *United Partition Sys., Inc.*, 03-2 BCA ¶ 32,264 at 159,597).

<sup>884</sup> For a discussion of last year's ASBCA decision, see 2003 Year in Review, *supra* note 29, at 24.

<sup>885</sup> *United Partition Sys.*, 59 Fed. Cl. at 633.

<sup>886</sup> *Id.*

<sup>887</sup> *Id.*

<sup>888</sup> *Id.* at 631.

<sup>889</sup> *Id.*

<sup>890</sup> No. 54475, 2004 ASBCA LEXIS 80 (Aug. 2, 2004).

<sup>891</sup> *Id.* at \*3-6.

<sup>892</sup> *Id.* at \*6-7.

<sup>893</sup> *Id.* at \*7-8.

claim, and Sharp appealed this decision to the ASBCA.<sup>894</sup>

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.<sup>895</sup> Thus, in the eyes of the board, the Navy's decision that the LTOP did not "comply with the law" was a nullity.<sup>896</sup>

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).<sup>897</sup> 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.<sup>898</sup> The original FPDS previously captured only data on contract actions over \$25,000 and summary data on contract actions below \$25,000.<sup>899</sup> The final rule requires all contract actions over \$2500 after 30 September 2004 to be reported to FPDS-NG.<sup>900</sup>

On 27 January 2004, the FAR Councils issued a proposed rule to require offerors to submit their representations and certification's electronically via the Business Partner Network (BPN) unless an exception applies.<sup>901</sup> The goal is to eliminate the need for contractors to submit representations and certifications to contracting offices after every contract award.<sup>902</sup> Contractors can complete the representations and certifications on-line through the BPN and procurement offices can access the information.<sup>903</sup> The proposed rule requires contractors to update information in the network as changes occur or at least annually.<sup>904</sup>

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.<sup>905</sup> On 15 December 2003, the DOD finalized the rule.<sup>906</sup> 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.<sup>907</sup>

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<sup>894</sup> *Id.* at \*9.

<sup>895</sup> *Id.* at \*12-14.

<sup>896</sup> *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.*

<sup>897</sup> 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.

<sup>898</sup> *Id.*

<sup>899</sup> *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.*

<sup>900</sup> 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.*

<sup>901</sup> 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).

<sup>902</sup> *Id.*

<sup>903</sup> *Id.*

<sup>904</sup> *Id.*

<sup>905</sup> 2003 *Year in Review*, *supra* note 29, at 58.

<sup>906</sup> 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).

<sup>907</sup> *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.<sup>908</sup> The GAO reviewed the Office of Personnel Management payroll initiative,<sup>909</sup> the Department of Interior geospatial one-stop initiative,<sup>910</sup> the GSA's integrated acquisition environment initiative,<sup>911</sup> and the Small Business Administration's business gateway initiative.<sup>912</sup> 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.<sup>913</sup> The GAO recommended more effective collaboration on the remaining tasks to improve the initiatives success.<sup>914</sup> The GAO also released two e-commerce reports addressing smart card<sup>915</sup> 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.<sup>916</sup> "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.<sup>917</sup> 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.<sup>918</sup> The GAO found agencies discontinued twenty-eight of the fifty-two previously reported smart card programs.<sup>919</sup> 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.<sup>920</sup> 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.<sup>921</sup>

## E-Government Act

The OMB issued e-authentication guidance for federal agencies on 16 December 2003.<sup>922</sup> 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.<sup>923</sup> The guidance "requires agencies to review new and existing electronic transactions to ensure that authentication processes provide the appropriate level of assurance."<sup>924</sup> Four

<sup>908</sup> 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.

<sup>909</sup> The goal of the payroll initiative is to standardize payroll operations across all federal agencies. *Id.*

<sup>910</sup> The goal of the geospatial one-stop initiative is to coordinate the collection and maintenance of data associated with geographic locations. *Id.*

<sup>911</sup> The goal of the integrated acquisition environment initiative is to improve federal agencies acquisition of goods and services. *Id.*

<sup>912</sup> 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.*

<sup>913</sup> *Id.*

<sup>914</sup> The GAO recommended four key practices to improve collaboration across disparate 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.

<sup>915</sup> Smart cards are credit card-like devices that use integrated circuit chips to store and process data.

<sup>916</sup> 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).

<sup>917</sup> *Id.* at 1.

<sup>918</sup> 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).

<sup>919</sup> REP. NO. GAO-04-948, *supra* note 918, at 2.

<sup>920</sup> *Id.* The Transportation Security Administration's transportation worker identification credential is used by an estimated six million transportation workers. *Id.*

<sup>921</sup> *Id.* at 3.

<sup>922</sup> 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].

<sup>923</sup> 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.

<sup>924</sup> *Id.*

levels of identity assurance establish the agency's assurance that the user presents some credential that refers to his or her identity.<sup>925</sup> The guidance outlines the steps to determine assurance levels.<sup>926</sup>

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](http://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,<sup>927</sup> section 308 of the Veterans Benefits Act of 2003<sup>928</sup> 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.<sup>929</sup> 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.<sup>930</sup> Procedurally, the SDVOSBs will self-certify their status and the SBA will resolve any size challenges.<sup>931</sup>

#### *Do Not Overlook Teaming Agreements When Evaluating Small Business Subcontracting Plans*

In *Burns and Roe Services Corp.*,<sup>932</sup> 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.<sup>933</sup> 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.<sup>934</sup>

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<sup>925</sup> 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.*

<sup>926</sup> *Id.*

<sup>927</sup> See *Regulations, SBA and FAR Council Create Service-Disabled Veteran-Owned Small Business Set-Aside*, 46 GOV'T CONTRACTOR 19, ¶ 201 (May 12, 2004).

<sup>928</sup> Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003) (amending 15 U.S.C. § 631 (2000)).

<sup>929</sup> 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).

<sup>930</sup> *Id.*

<sup>931</sup> *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).

<sup>932</sup> 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).

<sup>933</sup> 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.

<sup>934</sup> 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,<sup>935</sup> 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.<sup>936</sup> 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.”<sup>937</sup>

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.<sup>938</sup>

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.*,<sup>939</sup> 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.<sup>940</sup>

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.<sup>941</sup>

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.<sup>942</sup> Then, the court considered standing, explaining that in accordance with the Tucker Act<sup>943</sup> and the Competition in Contracting Act,<sup>944</sup> Gentex’s teammates are not offerors and therefore do not have standing as interested parties.<sup>945</sup> 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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<sup>935</sup> 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.

<sup>936</sup> The Navy determined that it had only ordered thirty-seven percent of the indefinite-quantity work during the past five years. *Id.* at 3.

<sup>937</sup> *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.*

<sup>938</sup> *Id.* at 8.

<sup>939</sup> 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).

<sup>940</sup> *Gentex*, 61 Fed. Cl. at 50.

<sup>941</sup> *Id.*

<sup>942</sup> 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.*

<sup>943</sup> 28 U.S.C. § 1491 (2000).

<sup>944</sup> Pub. L. No. 98-369, 98 Stat. 1175 (2004).

<sup>945</sup> *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).

*GAO Sustains Size Protest*

In *Tiger Enterprises*,<sup>947</sup> 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.<sup>948</sup> 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.<sup>949</sup>

Although the Marine justification and approval document stated that it would synopsise 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.<sup>950</sup> 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.”<sup>951</sup> 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.”<sup>952</sup>

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.<sup>953</sup> 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.<sup>954</sup>

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.”<sup>955</sup> 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.<sup>956</sup>

In sum, the GAO recommended that the Marines terminate the awardee’s contract and obtain these laundry services from a small business.<sup>957</sup>

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<sup>946</sup> 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. *Gentex*, 61 Fed. Cl. at 53.

<sup>947</sup> Comp. Gen. B- 292815.3; 293439, Jan. 20, 2004, 2004 CPD ¶ 19.

<sup>948</sup> 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.

<sup>949</sup> 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.*

<sup>950</sup> This “temporary” contract included an eleven-month base period and three one-year option years. *Id.*

<sup>951</sup> *Id.*

<sup>952</sup> *Id.*

<sup>953</sup> The GAO does not explain why Tarheel thought its size certification was made in good faith. *Id.*

<sup>954</sup> *Id.*

<sup>955</sup> *Id.* at 3.

<sup>956</sup> *Id.*

<sup>957</sup> 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*,<sup>958</sup> 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.<sup>959</sup> 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.<sup>960</sup>

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.<sup>961</sup> 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.<sup>962</sup> 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.<sup>963</sup> Because the solicitation lacked specific language, the GAO denied the protest, concluding that the agency did not set-aside this acquisition.<sup>964</sup>

*Premature Issuance of COC Does Not Mandate Contract Award*

In *Tenderfoot Sock Co. Inc.*,<sup>965</sup> 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.<sup>966</sup>

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.<sup>967</sup> 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.<sup>968</sup>

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.<sup>969</sup>

<sup>958</sup> Comp. Gen. B-292357.2, Mar. 12, 2004, 2004 CPD ¶ 48.

<sup>959</sup> The NAICS code was 541513 and the small business size standard was \$21 million. *Id.* at 4.

<sup>960</sup> 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.*

<sup>961</sup> *Id.* at 6.

<sup>962</sup> *Id.* at 7.

<sup>963</sup> *Id.*

<sup>964</sup> *Id.* at 6-7.

<sup>965</sup> 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).

<sup>966</sup> *Tenderfoot*, 2004 CPD ¶ 147, at 2.

<sup>967</sup> *Id.*

<sup>968</sup> *Id.*

<sup>969</sup> *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.<sup>970</sup>

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.<sup>971</sup> 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."<sup>972</sup>

#### *COFC Revisits an SBA NAICS Code Determination*

In *Red River Service, Corp. v. United States*,<sup>973</sup> 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.<sup>974</sup> To qualify as a small business within this code category, a firm may not have more than \$21 million in annual receipts.<sup>975</sup>

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.<sup>976</sup> 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.<sup>977</sup>

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.<sup>978</sup> 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.<sup>979</sup> That is, Red River demonstrated a connection to the procurement and has an economic interest in the procurement.<sup>980</sup>

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.<sup>981</sup> The COFC agreed. The court noted that the solicitation repeatedly used the word "telecommunication" or a

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<sup>970</sup> 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.*

<sup>971</sup> *Id.* (relying on FAR sections 9.103(b), 9.104-3(d), and 19.602-4).

<sup>972</sup> *Id.* at 3.

<sup>973</sup> 60 Fed. Cl. 532 (2004).

<sup>974</sup> *Id.* at 533.

<sup>975</sup> *Id.* at 534.

<sup>976</sup> The NAICS number for this classification is 517110. *Id.*

<sup>977</sup> *Id.*

<sup>978</sup> *Id.* at 535.

<sup>979</sup> The COFC exercised jurisdiction pursuant to the Tucker Act. 28 U.S.C. § 1491 (2000). *Red River*, 60 Fed. Cl. at 538.

<sup>980</sup> 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.

<sup>981</sup> *Id.* at 535.

derivative thereof,<sup>982</sup> 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.<sup>983</sup> 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.<sup>984</sup>

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.<sup>985</sup>

#### *GAO: Bundling Is Okay Here*

In *Teximara, Inc.*,<sup>986</sup> 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.<sup>987</sup> *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.<sup>988</sup> The GAO denied the protest.<sup>989</sup>

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.<sup>990</sup>

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.”<sup>991</sup>

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.<sup>992</sup> 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.<sup>993</sup>

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<sup>982</sup> 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.

<sup>983</sup> 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.

<sup>984</sup> *Id.* at 545.

<sup>985</sup> *Id.* at 548.

<sup>986</sup> Comp. Gen. B-293221.1, July 9, 2004, 2004 CPD ¶ 147. The case’s competition-related bundling issues are discussed *supra* section titled Competition.

<sup>987</sup> 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.

<sup>988</sup> “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.

<sup>989</sup> *Teximara*, 2004 CPD ¶ 147, at 2.

<sup>990</sup> The GAO redacted the small businesses set-aside amount from the record. *Id.* at 6.

<sup>991</sup> *Id.* at 11.

<sup>992</sup> *Id.* at 12.

<sup>993</sup> *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*,<sup>994</sup> 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.<sup>995</sup>

The Washington State Department of Services for the Blind (WSDSB)<sup>996</sup> was the only firm that submitted a proposal on time. However, the agency eliminated WSDSB's proposal from consideration because its price was excessive.<sup>997</sup> 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.<sup>998</sup> 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.<sup>999</sup>

#### *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)*,<sup>1000</sup> 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.<sup>1001</sup>

In *Ott*, Fort Lewis issued an initial solicitation to procure "Dining Facility Attendants and Full Food Services" as one contract.<sup>1002</sup> Fort Lewis intended to award this contract as an 8(a) set-aside.<sup>1003</sup> The Washington State Department of

<sup>994</sup> 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.

<sup>995</sup> 2004 CPD ¶ 84, at 1.

<sup>996</sup> The WSDSB is the designated SLA for this procurement. *Id.* at 2.

<sup>997</sup> Fort Lewis concluded this after comparing WSDSB's offer to the government's independent estimate and the current contract price. *Id.* at 3.

<sup>998</sup> *Id.* at 2.

<sup>999</sup> *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)).

<sup>1000</sup> 58 Fed. Cl. 781 (2003).

<sup>1001</sup> *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.*

<sup>1002</sup> *Id.* at 782.

<sup>1003</sup> *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.<sup>1004</sup> 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.<sup>1005</sup> 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.<sup>1006</sup> 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.<sup>1007</sup>

The court first determined that it had jurisdiction to interpret the term “operation of a vending facility.”<sup>1008</sup> 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<sup>1009</sup> of the RSA and the plain meaning of the terms “operate” and “operation.”<sup>1010</sup> The court also reviewed Department of Education policy letters<sup>1011</sup> 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.<sup>1012</sup>

### *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.<sup>1013</sup>

### *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.”<sup>1014</sup> 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.<sup>1015</sup>

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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<sup>1004</sup> *Id.*

<sup>1005</sup> *Id.*

<sup>1006</sup> *Id.* at 783.

<sup>1007</sup> *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).

<sup>1008</sup> 58 Fed. Cl. at 787.

<sup>1009</sup> *Id.* at 792.

<sup>1010</sup> *Id.* at 789.

<sup>1011</sup> *Id.* at 794.

<sup>1012</sup> The COFC did not issue a temporary restraining order. *Id.* at 797.

<sup>1013</sup> 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).

<sup>1014</sup> U.S. Dep’t of Defense, *Office of the Assistant Secretary of Defense (Public Affairs) News Release*, at <http://www.defenselink.mil/release/2004/nr200490-1-1208.html> (last visited 10 Nov. 2004) (discussing the DOD Green Procurement Policy).

<sup>1015</sup> 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.”<sup>1016</sup> 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.”<sup>1017</sup>

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.”<sup>1018</sup> In addition, the DOD is also developing a catalog to help procurement personnel locate “green products.”<sup>1019</sup>

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.<sup>1020</sup> Finally, the DOD is requiring agencies to compile metrics and report its compliance with the GPP.<sup>1021</sup>

#### *Multiyear Procurement Authority for Environmental Remediation Services at Military Installations—Final Rule*

Last year’s *Year in Review*<sup>1022</sup> 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.<sup>1023</sup> On 13 May 2004, this interim rule became final.<sup>1024</sup> 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.<sup>1025</sup> 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.<sup>1026</sup> The FAR Councils also finalized the requirement to seek a waiver from FPI for purchases at or below \$2500.<sup>1027</sup>

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<sup>1016</sup> 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.*

<sup>1017</sup> *Id.*

<sup>1018</sup> 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).

<sup>1019</sup> DOD Green Procurement Strategy, *supra* note 1016.

<sup>1020</sup> *Id.*

<sup>1021</sup> DOD agencies will submit the DD Form 350 to report GPP metrics. *Id.*

<sup>1022</sup> *2003 Year in Review*, *supra* note 29, at 137.

<sup>1023</sup> 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).

<sup>1024</sup> 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).

<sup>1025</sup> *2003 Year in Review*, *supra* note 29, at 49.

<sup>1026</sup> 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).

<sup>1027</sup> 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.<sup>1028</sup> On 14 November 2003, the DOD issued a final rule amending the DFARS to implement this requirement.<sup>1029</sup> The rule requires a written determination and the supporting rationale explaining the market research assessment<sup>1030</sup> The final rule also prohibits DOD contractors from requiring use of FPI as a subcontractor<sup>1031</sup> and inmate access to classified or sensitive information.<sup>1032</sup>

On 23 February 2004, the DOD issued a proposed rule to remove the Trade Agreements Act<sup>1033</sup> and Buy American Act<sup>1034</sup> from the list of laws inapplicable to subcontracts of commercial items.<sup>1035</sup> 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.<sup>1036</sup> The DOD's goal for the removal is to eliminate erroneous interpretations that have occurred.<sup>1037</sup>

Major Bobbi Davis.

## Labor Standards

### Regulation Updates

The FAR Councils proposed several changes to the FAR relating to labor standards in construction contracts.<sup>1038</sup> The Councils propose revising the definitions of "construction, alteration, or repair"<sup>1039</sup> and "site of the work"<sup>1040</sup> to conform

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<sup>1028</sup> *2002 Year in Review*, *supra* note 300, at 55.

<sup>1029</sup> Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchases From a Required Source, 68 Fed. Reg. 54,559 (Nov. 14, 2003).

<sup>1030</sup> *Id.* at 64,561.

<sup>1031</sup> *Id.*

<sup>1032</sup> *Id.*

<sup>1033</sup> 19 U.S.C.S. § 2512 (LEXIS 2004).

<sup>1034</sup> 41 U.S.C.S. § 10.

<sup>1035</sup> Defense Federal Acquisition Regulation Supplement; Laws Inapplicable to Commercial Subcontracts, 69 Fed. Reg. 8151 (Feb. 23, 2004).

<sup>1036</sup> *Id.*

<sup>1037</sup> 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.*

<sup>1038</sup> 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).

<sup>1039</sup> 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.

<sup>1040</sup> 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.<sup>1041</sup> The DOL revised the definitions pursuant to appellate court decisions,<sup>1042</sup> which concluded the DOL's application of the regulatory definitions was at odds with the language in the Davis-Bacon Act (DBA).<sup>1043</sup> 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.<sup>1044</sup>

The FAR Councils have also proposed changes to the definitions of "apprentice,"<sup>1045</sup> "trainee,"<sup>1046</sup> "building or work," and "public building or public work."<sup>1047</sup> In addition, a revision clarifies the Contract Work Hours and Safety Standards Act (CWHSSA)<sup>1048</sup> flow down requirements.<sup>1049</sup> 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.<sup>1050</sup> Other proposed changes include requiring funds withheld under the Davis Bacon Act to be directed to the Comptroller General for payment to owed employees<sup>1051</sup> and minor administrative updates to various clauses.<sup>1052</sup>

### *Wage Determinations Available Online*

In a collaborative effort between various federal agencies, wage determinations for the Service Contract Act<sup>1053</sup> and the DBA are now available online.<sup>1054</sup> 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.<sup>1055</sup> The DOL regulations and the FAR will be revised to implement the WDOL process.<sup>1056</sup>

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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.*

<sup>1041</sup> 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).

<sup>1042</sup> *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.

<sup>1043</sup> *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.*

<sup>1044</sup> 68 Fed. Reg. at 74, 404.

<sup>1045</sup> The FAR Councils propose listing the definition of apprentice separately. Currently the definition is listed as a subcategory of laborer and mechanic. *Id.*

<sup>1046</sup> The proposal also lists the definition of trainee separately. Currently the definition is listed as a subcategory of laborer and mechanic. *Id.*

<sup>1047</sup> The terms "building or work" and "public building or work" have been combined into a single term of "building or work." *Id.*

<sup>1048</sup> 40 U.S.C.S. §§ 327-333.

<sup>1049</sup> 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.

<sup>1050</sup> The form is Standard Form 1413, Statement and Acknowledgement. 68 Fed. Reg. at 74,405.

<sup>1051</sup> 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.*

<sup>1052</sup> 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.

<sup>1053</sup> 41 U.S.C.S. §§ 351-358 (LEXIS 2004).

<sup>1054</sup> 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.*

<sup>1055</sup> 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.*

<sup>1056</sup> *Id.*

Service Contract Act

No Arms Length CBA, No Increased Wages

Under the Service Contract Act (SCA),<sup>1057</sup> 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.<sup>1058</sup> In *Guardian Moving and Storage Co., Inc.*,<sup>1059</sup> 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.<sup>1060</sup> The contract included options for four fiscal years.<sup>1061</sup> The contract also incorporated the SCA and included a wage determination (WD) that incorporated a CBA.<sup>1062</sup> The NSA exercised the first option to extend the performance period through FY 2002 and ending 30 September 2002.<sup>1063</sup> 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.<sup>1064</sup> That same day, the NSA notified the DOL of its intent to issue a new solicitation and requested a wage determination.<sup>1065</sup> The new solicitation included labor categories not covered under the CBA.<sup>1066</sup> The DOL responded on 7 August 2002, reissuing the old WD and a new WD for the new labor categories.<sup>1067</sup>

On 2 September 2002, the NSA requested Guardian extend the contract performance period through 30 November 2002.<sup>1068</sup> On 24 September, Guardian sent the NSA a new CBA dated 24 September 2002.<sup>1069</sup> 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.<sup>1070</sup> On 26 September, the NSA submitted the request for a WD to the DOL.<sup>1071</sup> The request included a copy of the new CBA and expressed the NSA's concern with the contingency clause.<sup>1072</sup> On 18 October 2002, a bilateral modification extended the performance period through 30 November 2002.<sup>1073</sup> The modification did not add the new WD or incorporate the new CBA.<sup>1074</sup>

On 29 October 2002, the NSA again requested Guardian extend the contract performance period through 31 January 2003.<sup>1075</sup> In November, the DOL issued two WDs responding to NSA's 26 September request.<sup>1076</sup> The DOL incorporated the new CBA in the original WD with an effective date of 1 October 2002 through 30 October 2004.<sup>1077</sup> The response failed to address the conditional agreement of the CBA.<sup>1078</sup> On 18 November 2002, the NSA requested the DOL to respond to the concerns it raised about the CBA's contingency provision.<sup>1079</sup> On 10 December 2002, the NSA issued another bilateral

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<sup>1057</sup> 41 U.S.C.S. §§351-388.

<sup>1058</sup> *Id.*

<sup>1059</sup> *Guardian Moving and Storage Co., Inc.*, ASBCA Nos. 54248, 54479, 2004 ASBCA LEXIS 96 (Dec. 23, 2004).

<sup>1060</sup> *Id.* at \*2.

<sup>1061</sup> *Id.*

<sup>1062</sup> *Id.*

<sup>1063</sup> *Id.* at \*3.

<sup>1064</sup> *Id.*

<sup>1065</sup> *Id.*

<sup>1066</sup> *Id.*

<sup>1067</sup> *Id.* at \*4.

<sup>1068</sup> *Id.*

<sup>1069</sup> *Id.*

<sup>1070</sup> *Id.*

<sup>1071</sup> *Id.* at \*5.

<sup>1072</sup> *Id.*

<sup>1073</sup> *Id.*

<sup>1074</sup> *Id.*

<sup>1075</sup> *Id.*

<sup>1076</sup> *Id.*

<sup>1077</sup> *Id.*

<sup>1078</sup> *Id.*

<sup>1079</sup> *Id.*

modification extending the period of contract performance through 31 January 2003.<sup>1080</sup> The modification did not include the new WD for new labor categories or incorporate the WD with the new CBA.<sup>1081</sup>

On 18 December 2002, the NSA received notice that the DOL rescinded the WD incorporating the new CBA.<sup>1082</sup> 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.<sup>1083</sup> 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.<sup>1084</sup> On 10 January 2003, Guardian and the Union amended the CBA.<sup>1085</sup> The amended CBA removed the contingency clause, included the new labor categories, and back dated the agreement to 1 August 2002.<sup>1086</sup> On 13 January 2003, the NSA requested a WD from the DOL based on the amended CBA.<sup>1087</sup> On 23 January and 11 February, the NSA issued bilateral modifications extending the period of performance through 14 February and 28 February, respectively.<sup>1088</sup> The modifications did not incorporate the new CBA or its amended agreement.<sup>1089</sup> On 14 February 2003, the DOL reissued the 12 November 2002 WDs with no changes.<sup>1090</sup> That same day, the NSA requested the DOL address the effect of the CBA amended on 10 January 2003.<sup>1091</sup> On 5 March 2003, the NSA accepted the original WD dated 14 February 2003.<sup>1092</sup> The original WD included the amended CBA dated 10 January 2003.<sup>1093</sup> 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.<sup>1094</sup>

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.<sup>1095</sup> The contracting officer denied the claim arguing the NSA was not required to reimburse Guardian for retroactive application of the CBA.<sup>1096</sup> Guardian requested clarification from the DOL regarding whether it was required to pay its employees under the CBA retroactively to 1 October 2002.<sup>1097</sup> The DOL required Guardian to pay its employees in accordance with the CBA, as amended, retroactive to the effective date, 1 October 2002.<sup>1098</sup> The response did not, however, require the NSA to pay a price adjustment or apply the WD retroactively to the contract.<sup>1099</sup>

On 18 September 2003, Guardian submitted a revised certified claim for the two week period beginning 14 March.<sup>1100</sup> 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.<sup>1101</sup> The NSA argued the DOL should rescind the WD incorporating the new CBA because the

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<sup>1080</sup> *Id.* at \*6.

<sup>1081</sup> *Id.*

<sup>1082</sup> *Id.*

<sup>1083</sup> *Id.*

<sup>1084</sup> *Id.* at \*7.

<sup>1085</sup> *Id.* at \*8.

<sup>1086</sup> *Id.*

<sup>1087</sup> *Id.*

<sup>1088</sup> *Id.*

<sup>1089</sup> *Id.*

<sup>1090</sup> *Id.*

<sup>1091</sup> *Id.*

<sup>1092</sup> *Id.* at \*9.

<sup>1093</sup> *Id.*

<sup>1094</sup> *Id.*

<sup>1095</sup> *Id.* at \*10. Guardian’s claim sought \$372,897.82 in increased wages. *Id.*

<sup>1096</sup> *Id.*

<sup>1097</sup> *Id.* at \*11.

<sup>1098</sup> *Id.*

<sup>1099</sup> *Id.*

<sup>1100</sup> *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.*

<sup>1101</sup> *Id.* at \*13.

CBA was contingent on a DOL WD and a contract modification to incorporate the WD in the contract.<sup>1102</sup> The NSA also argued new WDs and new CBAs only apply to full-term successor contracts, not bilateral modifications.<sup>1103</sup> The ASBCA disagreed.

The ASBCA first decided what constitutes a new contract. The government argued contract extensions are not new contracts.<sup>1104</sup> 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.”<sup>1105</sup> Therefore, each bilateral modification constitutes a new contract for SCA purposes.<sup>1106</sup> 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.”<sup>1107</sup> Therefore, NSAs receipt of the 10 January 2003 amended CBA required the NSA to reimburse Guardian for wage increases for any subsequent contract extension.<sup>1108</sup> 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.<sup>1109</sup> 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*,<sup>1110</sup> 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.<sup>1111</sup> 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.<sup>1112</sup> The Air Force concluded the Walsh-Healey Public Contracts Act (PCA),<sup>1113</sup> not the SCA, applied to the contract.<sup>1114</sup> As a result, the Air Force did not include the SCA provisions or the applicable WDs in the contract.<sup>1115</sup>

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.<sup>1116</sup> The contract included contractor logistical support which furnished the Air Force “organizational level maintenance services for the C-21A fleet.”<sup>1117</sup> The base supply portion of the contract consisted of a parts supply store staffed by service personnel.<sup>1118</sup> After a lengthy investigation, the Administrator changed a previous decision and applied the SCA to the contract.<sup>1119</sup> 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.<sup>1120</sup> The Administrator concluded the Air Force correctly classified major aircraft engine overhaul and repair work

<sup>1102</sup> *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.

<sup>1103</sup> *Id.* at \*15.

<sup>1104</sup> *Id.* at \*21.

<sup>1105</sup> *Id.*

<sup>1106</sup> *Id.* at \*24.

<sup>1107</sup> *Id.* at \*21.

<sup>1108</sup> *Id.* at \*28.

<sup>1109</sup> *Id.*

<sup>1110</sup> *Raytheon Aerospace*, ARB Nos. 03-017, 03-019 (ARB May 21, 2004), available at <http://www.oalj.dol.gov>.

<sup>1111</sup> *Id.* at 1.

<sup>1112</sup> *Id.* at 3.

<sup>1113</sup> 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.

<sup>1114</sup> *Raytheon Aerospace*, ARB Nos. 03-017, 03-019, at 3.

<sup>1115</sup> *Id.* at 2.

<sup>1116</sup> *Id.* at 3.

<sup>1117</sup> *Id.*

<sup>1118</sup> *Id.*

<sup>1119</sup> *Id.*

<sup>1120</sup> *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.<sup>1121</sup> The Administrator, however, ruled against retroactive application of the SCA and only applied the SCA to the two remaining years of the contract.<sup>1122</sup> 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.<sup>1123</sup> 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.<sup>1124</sup> 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.”<sup>1125</sup> The Administrator found the Air Force “repeatedly characterized the contract as maintenance and logistical support necessary to keep the fleet in airworthy condition.”<sup>1126</sup> The investigation attributed ninety percent of the contract to services.<sup>1127</sup> 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.<sup>1128</sup> 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.<sup>1129</sup> The Board therefore concluded the Administrator reasonably determined the SCA applied to the contract.<sup>1130</sup>

The Board also found reasonable the Administrator’s decision not to apply the SCA retroactively.<sup>1131</sup> First, the record did not “demonstrate that the Air Force acted in bad faith when it determined the PCA applied.”<sup>1132</sup> Second, the Administrator issued the new ruling nearly eight years into a ten year contract.<sup>1133</sup> Retroactive application “could be an overly onerous administrative and economic burden to the [Air Force].”<sup>1134</sup> Finally, the investigation disclosed the workers received wages and fringe benefits comparable to the wages and fringe benefits required under the SCA.<sup>1135</sup> Therefore, the Board concluded the Administrator “had three eminently reasonable bases for declining to require retroactive application.”<sup>1136</sup> The Air Force requested the Board delay implementation of the ruling “so that it can implement this decision through the budget process.”<sup>1137</sup> 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.<sup>1138</sup>

*Davis-Bacon Act*

*Delay, Delay, Delay*

In *Copeland v. Secretary of Agriculture*,<sup>1139</sup> the CAFC held the contracting officer’s withholding of progress

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<sup>1121</sup> *Id.*

<sup>1122</sup> *Id.* at 7.

<sup>1123</sup> *Id.* at 5.

<sup>1124</sup> *Id.*

<sup>1125</sup> *Id.* at 6.

<sup>1126</sup> *Id.*

<sup>1127</sup> *Id.* at 9.

<sup>1128</sup> *Id.* at 10.

<sup>1129</sup> *Id.*

<sup>1130</sup> *Id.*

<sup>1131</sup> *Id.* at 12.

<sup>1132</sup> *Id.*

<sup>1133</sup> *Id.* at 13.

<sup>1134</sup> *Id.* at 12.

<sup>1135</sup> *Id.* at 11.

<sup>1136</sup> *Id.* at 12.

<sup>1137</sup> *Id.* at 14.

<sup>1138</sup> *Id.*

<sup>1139</sup> 350 F.3d 1230 (2003).

payments did not constitute excusable delay.<sup>1140</sup> 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.<sup>1141</sup> The contracts incorporated the Davis-Bacon Act (DBA)<sup>1142</sup> requiring Copeland to pay wages set by the DOL.<sup>1143</sup> In March 1992, the contracting officer requested Copeland provide payroll information after employees complained of DBA violations.<sup>1144</sup> Based on a review of the documentation submitted by Copeland and employees, the contracting officer withheld \$30,371.41 in progress payments.<sup>1145</sup> The Forest Service denied Copeland's appeal and referred the matter to the DOL.<sup>1146</sup> In July 1992, the DOL concluded that Copeland violated the DBA on the trail contract.<sup>1147</sup> 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.<sup>1148</sup> On 18 September 1992, the Forest Service terminated the contracts for default for failure to complete the projects by the due date.<sup>1149</sup> Copeland appealed to the ASBCA, arguing the delay was excusable delay due to the erroneous DBA withholding.<sup>1150</sup> The ASBCA dismissed the appeal because the issue was still pending at the DOL.<sup>1151</sup>

The DOL failed to formally charge Copeland until July of 1994.<sup>1152</sup> Based on the delay, Copeland objected to the charges and the DOL failed to act for almost three years.<sup>1153</sup> In January 1997, the DOL judge dismissed the charges only to have the DOL appealed the dismissal to the Administrative Review Board (the Board).<sup>1154</sup> The board remanded to the DOL administrative law judge (ALJ) to determine whether Copeland was prejudiced.<sup>1155</sup> In 1999, the ALJ concluded Copeland violated the DBA but only in the amount of \$3,951.<sup>1156</sup> Despite the violation, the ALJ dismissed the charges due to the delay and ordered all monies withheld returned to Copeland.<sup>1157</sup>

In October 2002, the ASBCA reinstated Copeland's default appeal.<sup>1158</sup> The ASBCA denied the appeal, however, finding Copeland failed to establish "an excusable reason to alter the default termination."<sup>1159</sup> Unfortunately, the CAFC affirmed the ASBCA's decision finding Copeland contributed to the problem.<sup>1160</sup> The CAFC required Copeland to establish excusable delay in light of the Forest Services' withholding.<sup>1161</sup> 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.<sup>1162</sup> The court acknowledged the DOL's extraordinary delay contributed to the problem.<sup>1163</sup> However, the CAFC suggested a different outcome if after providing the

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<sup>1140</sup> *Id.* at 1235.

<sup>1141</sup> *Id.* at 1231.

<sup>1142</sup> See 40 U.S.C.S. § 3142 (LEXIS 2004).

<sup>1143</sup> *Copeland*, 350 F.3d at 1231.

<sup>1144</sup> *Id.*

<sup>1145</sup> *Id.*

<sup>1146</sup> *Id.* at 1232.

<sup>1147</sup> *Id.*

<sup>1148</sup> The projected completion dates for the trail contract and the comfort station contract were 21 May 1992 and 20 June 1992, respectively. *Id.*

<sup>1149</sup> *Id.*

<sup>1150</sup> *Id.*

<sup>1151</sup> *Id.*

<sup>1152</sup> *Id.*

<sup>1153</sup> *Id.*

<sup>1154</sup> *Id.*

<sup>1155</sup> *Id.*

<sup>1156</sup> *Id.*

<sup>1157</sup> *Id.*

<sup>1158</sup> *Id.*

<sup>1159</sup> *Id.*

<sup>1160</sup> *Id.* at 1235.

<sup>1161</sup> *Id.* at 1234.

<sup>1162</sup> *Id.* at 1235.

<sup>1163</sup> *Id.*

DOL with a reasonable time to issue a final decision, Copeland requested the contracting officer release the funds based on unreasonable withholding.<sup>1164</sup>

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.<sup>1165</sup> 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.<sup>1166</sup> 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.<sup>1167</sup>

In reaching this conclusion, the GAO did not address whether the CPA was a federal agency for bid protest purposes.<sup>1168</sup> 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.<sup>1169</sup>

### *Protester Gets the Benefit of the Doubt Regarding Timeliness Matters*

In *American Multi Media, Inc.*,<sup>1170</sup> the Comptroller General concluded that when an ambiguity exists regarding when a protester learned about an agency's initial adverse action,<sup>1171</sup> 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.<sup>1172</sup>

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.<sup>1173</sup>

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.<sup>1174</sup>

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<sup>1164</sup> *Id.*

<sup>1165</sup> Turkcell Consortium, Comp. Gen. B-293048.2, Nov. 12, 2003, 2003 CPD ¶ 196.

<sup>1166</sup> *Id.* at 1.

<sup>1167</sup> *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.*

<sup>1168</sup> *Id.*

<sup>1169</sup> *Id.* at 2.

<sup>1170</sup> 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).

<sup>1171</sup> 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).

<sup>1172</sup> 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.

<sup>1173</sup> *Id.*

<sup>1174</sup> *Id.* at 3.

*Protest Submitted to the GAO on a Federal Holiday Results in Untimely Filing*

In *Guam Shipyard*,<sup>1175</sup> 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.”<sup>1176</sup> 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.<sup>1177</sup>

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.<sup>1178</sup> 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.<sup>1179</sup> 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.<sup>1180</sup>

According to the GAO, its Bid Protest Regulations deem documents “filed” only on days and at times when its office is open.<sup>1181</sup> 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.<sup>1182</sup> 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*,<sup>1183</sup> the plaintiffs filed a pre-award protest alleging the Navy failed to give the protester preference under the Randolph-Sheppard Act.<sup>1184</sup> 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<sup>1185</sup> barred this claim and that the court should dismiss the action accordingly.

The court rejected this argument explaining that the Tucker Act<sup>1186</sup> 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.”<sup>1187</sup> The court then noted that a delay in filing a protest is a factor to consider when

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<sup>1175</sup> Comp. Gen. B-294287, Sept. 16, 2004, 2004 CPD ¶ 181.

<sup>1176</sup> *Id.* at 1.

<sup>1177</sup> *Id.*

<sup>1178</sup> *Id.* at 2.

<sup>1179</sup> *Id.*

<sup>1180</sup> *Id.* at 3.

<sup>1181</sup> 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.

<sup>1182</sup> 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.

<sup>1183</sup> *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.

<sup>1184</sup> See 20 U.S.C.S. § 107 (2000).

<sup>1185</sup> 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.

<sup>1186</sup> See 28 U.S.C.S. § 1491 (LEXIS 2004).

<sup>1187</sup> *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.<sup>1188</sup>

*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.*,<sup>1189</sup> 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.<sup>1190</sup> 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.<sup>1191</sup> The initial pre-solicitation notice required all responses by 18 December 2003.<sup>1192</sup> 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.<sup>1193</sup>

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.<sup>1194</sup> 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.<sup>1195</sup> This protest triggered CICA’s pre-award stay provisions.<sup>1196</sup>

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.<sup>1197</sup>

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.<sup>1198</sup> It also noted that the HHS improperly used a post-award rationale for overriding this pre-award protest.<sup>1199</sup> This decision, concluded GAO, violated the CICA.<sup>1200</sup>

The Comptroller General also observed that the HHS recently used the same improper basis to override another pre-award protest by Information Ventures.<sup>1201</sup> 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,<sup>1202</sup> advises the Secretary that HHS proceeded with contract award in a “manner inconsistent with the requirements of the [CICA] statute,”<sup>1203</sup> 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.*

<sup>1188</sup> *Mississippi Department of Rehabilitation*, 2004 U.S. Claims LEXIS 140 at \*32.

<sup>1189</sup> Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81. For further discussion of the protest’s merits, see *supra* section titled Simplified Acquisitions.

<sup>1190</sup> *Information Ventures*, 2004 CPD ¶ 81, at 2.

<sup>1191</sup> See 42 U.S.C. § 284m(a) (2000).

<sup>1192</sup> *Information Ventures*, 2004 CPD ¶ 81, at 1.

<sup>1193</sup> Information Ventures response caused the HHS to realize that it did not advise offerors that HHS intended to sole source this contract. *Id.*

<sup>1194</sup> 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.

<sup>1195</sup> *Id.*

<sup>1196</sup> *Id.* at 4.

<sup>1197</sup> *Id.* at 5.

<sup>1198</sup> *Id.* at 4.

<sup>1199</sup> The agency used FAR section 33.104(c)(2)(i) to override Information Ventures’ protest. *Id.* at 4.

<sup>1200</sup> *Information Ventures*, 2004 CPD ¶ 81, at 4.

<sup>1201</sup> See Comp. Gen. B-293518.2, March 29, 2004, 2004 CPD ¶ 76.

<sup>1202</sup> *Information Ventures*, 2004 CPD ¶ 81, at 6.

<sup>1203</sup> *Id.* at 7.

Comptroller General's letter.<sup>1204</sup> 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 United 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).<sup>1205</sup>

The Comptroller General also found the protester was denied meaningful relief.<sup>1206</sup> 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*,<sup>1207</sup> the COFC determined that the protester was not an "interested party" and therefore lacked standing to enjoin two CICA override actions,<sup>1208</sup> 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.<sup>1209</sup> 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.<sup>1210</sup>

The agency did not award the Northern region contract to Sierra. Sierra protested to the GAO,<sup>1211</sup> 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.<sup>1212</sup>

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.<sup>1213</sup> 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

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<sup>1204</sup> *Id.*

<sup>1205</sup> *Id.* at 6.

<sup>1206</sup> *Id.*

<sup>1207</sup> 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).

<sup>1208</sup> 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 protesters).

<sup>1209</sup> *Sierra Military Health*, 58 Fed. Cl. at 575.

<sup>1210</sup> *Id.*

<sup>1211</sup> *Sierra Military Health*, 2004 CPD ¶ 55, at 1.

<sup>1212</sup> *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.

<sup>1213</sup> 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.”<sup>1214</sup>

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.<sup>1215</sup>

*COFC: No Jurisdiction to Hear Subcontractor Post-Award Protest*

In *Blue Water Environmental Inc. v. United States*,<sup>1216</sup> 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.<sup>1217</sup>

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.<sup>1218</sup> 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.<sup>1219</sup>

*Ambiguity = Two or More Reasonable Interpretations of a Solicitation’s Terms*

In *Ashe Facility*,<sup>1220</sup> 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.<sup>1221</sup> The RFP advised offerors to “separately price the fixed work items and the indefinite-quantity work items”<sup>1222</sup> and required lump sum pricing for the indefinite-quantity work.<sup>1223</sup> The RFP also “provided for a variable pricing element . . . specific to the fixed price work under the solicitation.”<sup>1224</sup> 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).”<sup>1225</sup>

The protester and the agency disagreed on the Section M directions.<sup>1226</sup> 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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<sup>1214</sup> *Id.* at 577.

<sup>1215</sup> 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.

<sup>1216</sup> 60 Fed. Cl. 48 (2004).

<sup>1217</sup> *Id.* at 48.

<sup>1218</sup> *Id.* at 52.

<sup>1219</sup> *Id.* at 49.

<sup>1220</sup> 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).

<sup>1221</sup> *Ashe Facility*, 2004 CPD ¶ 80, at 1.

<sup>1222</sup> *Id.* at 2.

<sup>1223</sup> *Id.* at 3.

<sup>1224</sup> 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.

<sup>1225</sup> *Id.* at 4.

<sup>1226</sup> *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.<sup>1227</sup>

The GAO concluded that Ashe's interpretation of Section M was reasonable.<sup>1228</sup> 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.<sup>1229</sup>

Based on the grammatical structure of the disputed directions, the government argued Ashe's interpretation was not reasonable.<sup>1230</sup> 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.<sup>1231</sup>

*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*,<sup>1232</sup> 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.<sup>1233</sup> 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.<sup>1234</sup>

The COFC's original opinion outlined the Navy's plan, ordered the Navy to carry out the plan, and dismissed the complaint without prejudice.<sup>1235</sup> 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."<sup>1236</sup> 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."<sup>1237</sup> 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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<sup>1227</sup> *Id.* at 10.

<sup>1228</sup> *Id.*

<sup>1229</sup> The referenced phrase stated "Indefinite-quantity items will be reviewed for reasonableness." *Id.* at 4.

<sup>1230</sup> *Id.* at 20.

<sup>1231</sup> *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.

<sup>1232</sup> 59 Fed. Cl. 619 (2004).

<sup>1233</sup> All original offers expressed an interest in participating in the additional discussions. *Id.* at 620.

<sup>1234</sup> *Id.*

<sup>1235</sup> *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.*

<sup>1236</sup> *Id.* at 621.

<sup>1237</sup> *Id.*

that court orders that incorporate the terms of a settlement offer are judicially enforceable.<sup>1238</sup>

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.<sup>1239</sup>

*GSBCA—Private Parties Cannot Agree to Exceed the Statutory Ceiling for Attorney Fees*

Last year’s *Year in Review* discussed *Sodexo Management, Inc.*,<sup>1240</sup> in which the Comptroller General awarded attorney fees in excess of the statutory cap.<sup>1241</sup> In *Sodexo*, 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*,<sup>1242</sup> the General Services Administration Board of Contract Appeals (GSBCA) affirmed *Sodexo* 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.”<sup>1243</sup>

*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.<sup>1244</sup>

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%

<sup>1238</sup> *Id.* at 622.

<sup>1239</sup> *Id.* at 624.

<sup>1240</sup> Comp. Gen. B-289605.3, Aug. 6, 2003, 2003 CPD ¶ 136.

<sup>1241</sup> 2003 *Year in Review*, *supra* note 29, at 75.

<sup>1242</sup> GSBCA No. 16195-C (16047), 2003 GSBCA LEXIS 210 (Oct. 24, 2003).

<sup>1243</sup> *Id.* at 6.

<sup>1244</sup> 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).