

The board reviewed the wording of the disputed clause and stated that to prevail, the government's position must be substantially justified "both with respect to the agency's underlying action and the adversary adjudication."¹⁶⁰¹ The board then concluded that a reasonable person could not conclude that American Services's contract required a separate testing of the skid. From here, the board held that the agency should have granted American Services a reasonable time to test the skids and complete performance. Because this did not happen, the board reasoned that the termination should be converted and determined that American is entitled to EAJA fees, leaving the parties to negotiate quantum.¹⁶⁰²

Defenses

Anti-Deficiency Act Does Not Trump Indemnity Clause

Finally, a case involving indemnification and the Anti-Deficiency Act (ADA)¹⁶⁰³ is deserving of mention. In *E.I. du Pont de Nemours & Co. v. United States (DuPont)*¹⁶⁰⁴ appellant DuPont brought suit pursuant to the CDA to recover costs it incurred under the Comprehensive Environmental Response Compensation and Liability Act¹⁶⁰⁵ for an ordnance plant it built and operated for the government during World War II. At trial the COFC held the government had agreed to indemnify DuPont for the costs at issue. However, the COFC also concluded that the ADA barred DuPont's recovery.¹⁶⁰⁶

On appeal, the issue before the CAFC was whether the Contract Settlement Act (CSA) of 1944¹⁶⁰⁷ sheltered the indemnity agreement from the ADA's reach. Upon examination, the court observed the CSA gave considerable authority to contracting agencies to settle contract claims, and specifically allowed agencies to indemnify "the war contractor" against "any claims by any person in connection with such termination claims or settlement."¹⁶⁰⁸ Given the reach of the CSA, the court determined the indemnity agreement was "authorized by law" pursuant to the ADA, and thus enforceable against the government.¹⁶⁰⁹

Major James Dorn.

SPECIAL TOPICS

Competitive Sourcing

GAO says "In-House Competitors" Must Sit on the Bid Protest Sideline . . .

Following publication of *OMB Circular A-76 (Revised) [Revised A-76]* in May 2003,¹⁶¹⁰ one of the many issues raised by the several procedural changes was whether federal employees and their representatives had standing to challenge agency competitive sourcing decisions. Under the "old" *Circular A-76* procedures,¹⁶¹¹ the CAFC and the GAO had ruled that

¹⁶⁰¹ *Id.*

¹⁶⁰² *Id.*

¹⁶⁰³ The predecessor to the ADA, in effect at the time the parties entered into the indemnification agreement, provided in relevant part:

No executive department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.

31 U.S.C. § 665 (1940). The current version is available at 31 U.S.C.S. § 1341 (LEXIS 2004).

¹⁶⁰⁴ 365 F.3d 1367 (Fed. Cir. 2004).

¹⁶⁰⁵ 42 U.S.C.S. §§ 9601-75.

¹⁶⁰⁶ 54 Fed. Cl. 361 (2002).

¹⁶⁰⁷ 41 U.S.C.S. §§ 101-25.

¹⁶⁰⁸ *DuPont*, 365 F.3d 1367 at 1375 (citing 41 U.S.C.S. § 120a).

¹⁶⁰⁹ *Id.* at 1380. For a discussion of the Antideficiency Act aspects of this case, see *infra* section titled Antideficiency Act. See also *Ford Motor Co. v. United States*, 378 F.3d 1314 (Fed. Cir. 2004) (deciding, shortly after *DuPont*, that the ADA does not bar recovery under the CSA for environmental cleanup costs arising from performance of a World War II contract).

¹⁶¹⁰ U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003) [hereinafter REVISED A-76]. See also Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

¹⁶¹¹ See U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES (1999) [hereinafter OMB CIRCULAR A-76] and U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES (1996) [hereinafter RSH].

federal employees and unions were not “interested parties” under the CICA and therefore lacked standing to protest.¹⁶¹² As discussed in last year’s *Year in Review*,¹⁶¹³ the GAO actually sought comments on whether the “cumulative legal impact” of the *Revised A-76* changes should result in “standing” for the in-house competitor at the GAO.¹⁶¹⁴ Though not addressing the issue through a change in its Bid Protest Regulations,¹⁶¹⁵ the GAO did answer the question of standing in *Dan Dufrene et al.*, albeit temporarily.¹⁶¹⁶

In *Dufrene*, the United States Department of Agriculture (USDA), using the standard competition procedures under the *Revised A-76*, determined a private contractor, SERCO Management Services, Inc., could provide regional fleet maintenance services for the Forest Service more cost-effectively than the in-house Most-Efficient Organization (MEO).¹⁶¹⁷ Mr. Dan Dufrene, a regional vice president with the National Federation of Federal Employees (NFFE), protested the decision.¹⁶¹⁸

Originally, Mr. Dufrene, on behalf of the NFFE, filed an agency-level bid protest, but the USDA advised that Mr. Dufrene was not a “directly interested party,” thus he could not “contest” the agency’s decision.¹⁶¹⁹ After being elected as representative by a majority of the affected Forest Service employees, Mr. Dufrene filed a second agency-level protest with the USDA and again the USDA dismissed and denied the protest.¹⁶²⁰ Mr. Dufrene, “acting both as NFFE representative and as the ‘directly interested party’ representing a majority of the directly affected employees,” appealed the USDA’s decision to the GAO.¹⁶²¹

The NFFE argued that given the many significant changes in the *Revised A-76*, the affected civilian employees, and the NFFE as their statutorily appointed representative, met the definition of “interested party” under the CICA and the GAO’s Bid Protest Regulation.¹⁶²² Additionally, Mr. Dufrene met the definition of “directly interested party” under the *Revised A-76*, as a majority of the affected employees had elected him as representative.¹⁶²³ The GAO, however, concluded “there is no statutory basis for an in-house entity to file a protest at the [GAO].”¹⁶²⁴

The GAO again noted that the CICA, the GAO’s statutory authority for considering bid protests, defines “interested party” as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.”¹⁶²⁵ Citing prior opinions, the GAO briefly explained the reasons for concluding that under the “old” *Circular A-76* individual employees and union representatives did not meet the CICA’s definition of “interested party.”¹⁶²⁶ The GAO noted, for example, that neither individual employees, nor the MEO, nor union representatives could be considered offerors. The MEO did not meet the FAR’s definition of “offer” because the MEO was not submitted in response to a solicitation.¹⁶²⁷ Moreover, even if the agency adopted the MEO as more cost-effective than private sector performance, no contract would be awarded to the MEO.¹⁶²⁸

¹⁶¹² See *Am. Fed’n of Gov’t Employees, et al. v. United States*, 258 F.3d 1294 (Fed. Cir. 2001) and *Am. Fed’n of Gov’t Employees, AFL-CIO et al., Comp. Gen. B-282904.2*, June 7, 2000, 2000 CPD ¶ 87.

¹⁶¹³ *2003 Year in Review*, *supra* note 29, at 118.

¹⁶¹⁴ Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,412 (June 13, 2003).

¹⁶¹⁵ See 4 C.F.R. § 21.0(a) (2004).

¹⁶¹⁶ *Comp. Gen. B-293590.2; B-293590.3; B-293883; B-293887; B-293908*, Apr. 19, 2004, 2004 CPD ¶ 82.

¹⁶¹⁷ *Id.* at 1-2.

¹⁶¹⁸ *Id.* at 1.

¹⁶¹⁹ *Id.* at 2. The *Revised A-76* gives a “directly interested party” the right to “contest” various aspects of the standard competition, such as the solicitation or its cancellation, a determination to exclude an offer/tender from the competition, compliance with the costing provisions and other elements of the agency’s evaluation, and terminations of a contract or letter of obligation. *REVISED A-76*, *supra* note 1610, attach. B, ¶ F.1. For purposes of a “contest,” the *Revised A-76* definition of “directly interested party” includes the “agency tender official” or “a single individual appointed by a majority of directly affected employees as their agent.” *Id.* attach. D. The procedures at FAR section 33.103 govern the pursuit and resolution of a “contest.” *Id.* attach. B, ¶ F.1.

¹⁶²⁰ *Dan Dufrene*, 2004 CPD ¶ 82, at 2.

¹⁶²¹ *Id.*

¹⁶²² *Id.*

¹⁶²³ *Id.* at 2-3.

¹⁶²⁴ *Id.* at 3.

¹⁶²⁵ *Id.* (quoting 31 U.S.C. § 3551(2) (2000)).

¹⁶²⁶ *Id.* See, e.g., *Am. Fed’n of Gov’t Employees et al., Comp. Gen. B-282904.2*, June 7, 2000, 2000 CPD ¶ 87.

¹⁶²⁷ *Dan Dufrene*, 2004 CPD ¶ 82, at 3.

¹⁶²⁸ *Id.*

Observing that the *Revised A-76* “is more than a mere revision to the earlier one; it is essentially a new document that establishes new FAR-based ground rules,” the GAO next considered these significant changes.¹⁶²⁹ For example, the *Revised A-76* treats the “agency tender” as an offer in some respects, such as: (1) requiring the agency tender to satisfy the requirements of section L in a solicitation;¹⁶³⁰ (2) evaluating the agency tender against the same criteria applicable to private-sector proposals;¹⁶³¹ (3) permitting discussions and negotiations with the agency tender official;¹⁶³² and (4) allowing rejection of the agency tender as unacceptable.¹⁶³³ Additionally, if the agency tender “wins” the competition, the *Revised A-76* requires the contracting officer to enter into a “letter of obligation” with an agency official responsible for the MEO.¹⁶³⁴ Finally, if the MEO fails to perform the requirements identified in the letter of obligation, the contracting officer can terminate the action.¹⁶³⁵

Despite these significant changes, the GAO returned to the statutory language of the CICA and concluded the in-house entity lacks standing to protest.¹⁶³⁶ Chief among the GAO’s reasons was that the MEO still does not compete for a contract under the *Revised A-76* procedures.¹⁶³⁷ Addressing the new requirement for a letter of obligation if the agency tender prevails in the competition, the GAO noted the agreement is “not a mutually binding legal relationship between two signatory parties”¹⁶³⁸ Key to the GAO was that “the agency cannot seek legal redress against the MEO, for example, by seeking reimbursement of excess procurement costs if the MEO is ‘terminated’ for failure to meet its commitments.”¹⁶³⁹ Determining the letter of obligation was not a contract, the GAO concluded the agency tender could not be considered an “offer,” meaning that “no in-house entity can qualify as an ‘actual or potential offeror’” nor an interested party for purposes of filing a protest at the GAO.¹⁶⁴⁰ Thus, the GAO dismissed Mr. Dufrene’s protest.¹⁶⁴¹

. . . but Congress puts them in the Big Games!

Though dismissing Mr. Dufrene’s protest, the GAO also “recognize[d] the concerns of fairness that weigh in favor of correcting the current situation, where an unsuccessful private-sector offeror has the right to protest to [the GAO], while an unsuccessful public-sector competitor does not.”¹⁶⁴² As such the GAO recommended Congress amend the CICA to permit protests on the behalf of MEOs.¹⁶⁴³ And Congress followed that recommendation.

With the passage of the Ronald W. Reagan National Defense Authorization Act for FY 2005, Congress granted the agency tender officials (ATO) limited, yet significant bid protest rights.¹⁶⁴⁴ The Authorization Act amends the CICA’s definition of “interested party” by specifying that term includes ATOs in public-private competitions involving more than sixty-five FTEs.¹⁶⁴⁵ The new authority also provides that ATOs “shall file a protest” in a public-private competition at the request of a majority of the affected federal civilian employees “unless the [ATO] determines that there is no reasonable basis

¹⁶²⁹ *Id.* at 3-4.

¹⁶³⁰ *Id.* (referencing REVISED A-76, *supra* note 1610, atch. B, ¶ D.4.a(1)).

¹⁶³¹ *Id.* at 4 (referencing REVISED A-76, *supra* note 1610, atch. B, ¶ D.5.c(3)).

¹⁶³² *Id.*

¹⁶³³ *Id.*

¹⁶³⁴ *Id.* (referencing REVISED A-76, *supra* note 1610, atch. B, ¶ D.6.f(3)).

¹⁶³⁵ *Id.* (referencing REVISED A-76, *supra* note 1610, atch. B, ¶ E.6.a(2)).

¹⁶³⁶ *Id.*

¹⁶³⁷ *Id.* at 4-5.

¹⁶³⁸ *Id.* at 5.

¹⁶³⁹ *Id.* (comparing FAR section 49.402-2(e) which holds contractors liable to the government for the excess procurement costs when a contractor has been terminated for default).

¹⁶⁴⁰ *Id.*

¹⁶⁴¹ *Id.* The opinion also dismisses other protests filed by individuals in their capacity as union officials and as the individual selected by a majority of the affected employees. The dismissed protests involved challenges to *Revised A-76* competitive sourcing decisions at the Defense Finance and Accounting Service, the Department of Homeland Security, and the Equal Employment Opportunity Commission. *Id.* at 5-6.

¹⁶⁴² *Id.* at 6.

¹⁶⁴³ *Id.* The Comptroller General also suggested that any resulting change should also address the issue of representational capacity to speak for and represent the MEO. *Id.*

¹⁶⁴⁴ Pub. L. No. 108-375, § 326, 118 Stat. 1811, 1848 (2004).

¹⁶⁴⁵ *Id.* § 326(a) (amending 31 U.S.C. § 3551(2)).

for the protest.”¹⁶⁴⁶ The ATO’s determination whether to file a protest “is not subject to administrative or judicial review,” however, if the ATO determines there is no reasonable basis for a protest, the ATO must notify Congress.¹⁶⁴⁷ Further, in any protest filed by an interested party in competitions involving more than sixty-five FTEs, a representative selected by a majority of the affected employees may “intervene” in the protest.¹⁶⁴⁸ This new protest authority applies to protests “that relate to [Revised A-76] studies initiated . . . on or after the end of the 90-day period beginning on the date of enactment of [the Authorization Act].”¹⁶⁴⁹

While these protest rights apply directly only to the ATO in “big” competitions, the change is a significant one. And while seemingly answering one question (at least partially), the change also raises new issues such as who will provide legal advice to the ATO, how will the GAO’s protective order provisions apply to the ATO and their representative(s), and will there be a flood of protests slowing an already slow process? But these questions can be saved for another day, or *Year in Review*.¹⁶⁵⁰

The GAO Addresses a Couple of Additional Questions

Also noted in lasted year’s *Year in Review*,¹⁶⁵¹ the GAO’s June 2003 *Federal Register* notice further requested comments on other changes under the *Revised A-76*.¹⁶⁵² For example, the GAO noted the *Revised A-76* does not permit a party to contest any aspect of a streamlined competition,¹⁶⁵³ thus the GAO queried whether the GAO had a legal basis to consider protests in streamlined competitions.¹⁶⁵⁴ In *Vallie Bray* the GAO addressed this question.¹⁶⁵⁵

Following a streamlined competition under the *Revised A-76*, Ms. Vallie Bray, the local union president and the representative selected by a majority of the affected employees, protested the USDA’s Beltsville Agricultural Research Center’s (BARC) decision that a private contractor could perform the BARC’s security guard function more economically than the incumbent government employees.¹⁶⁵⁶ The competition involved twenty-four positions, and the USDA estimated the cost of private sector performance based on market research, as permitted by the *Revised A-76*’s streamlined competition procedures.¹⁶⁵⁷ The USDA issued no solicitation and ultimately implemented the decision to contract commercially by issuing an order under a GSA FSS.¹⁶⁵⁸

Noting the *Revised A-76*’s prohibition against contests in streamlined competitions, the GAO stated “the CICA, not the [Revised A-76] provides the basis for [GAO] authority.”¹⁶⁵⁹ As such, the GAO made clear, an “interested party” under

¹⁶⁴⁶ *Id.* § 326(b) (amending 31 U.S.C. § 3552).

¹⁶⁴⁷ *Id.*

¹⁶⁴⁸ *Id.* § 326(c) (amending 31 U.S.C. § 3553).

¹⁶⁴⁹ *Id.*

¹⁶⁵⁰ On 20 December 2004, the GAO proposed amending its Bid Protest Regulations to expand the definitions of “interested party” and “intervenor” pursuant to the authority in this new legislation. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 69 Fed. Reg. 75,878 (proposed Dec. 20, 2004) (to be codified at 4 C.F.R. pt. 21). The proposed rule change will also state that “the GAO will not review the decision of an agency tender official to file a protest (or not to file a protest) in connection with a public-private competition.” *Id.* at 75,879.

¹⁶⁵¹ 2003 *Year in Review*, *supra* note 29, at 119 n.1586.

¹⁶⁵² Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,412 (June 13, 2003).

¹⁶⁵³ *Id.* See REVISED A-76, *supra* note 1610, atch. B, ¶ F.2. The *Revised A-76* permits agencies to use a new “streamlined competition” process, if “65 or fewer FTEs and/or any number of military personnel” perform a commercial activity. *Id.* atch. B, ¶ A.5.b. In a streamlined competition the agency has flexibility in estimating the performance costs of the private sector and may rely upon documented market research or solicitations in establishing an estimated contractor performance price. *Id.* atch. B, ¶ C.1.b. The agency also has flexibility in determining the cost of agency performance, as the estimate may be based on the incumbent activity or the agency may “develop a more efficient organization, which may be an MEO.” *Id.* atch. B, ¶ C.1.a. *But see* Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 8014, 118 Stat. 951, 972 (2004) (requiring the DOD to develop a “most efficient and cost effective organization plan” prior to converting to contractor performance any function involving more than ten DOD civilian employees).

¹⁶⁵⁴ 68 Fed. Reg. at 35,413.

¹⁶⁵⁵ Comp. Gen. B-293840; B-293840.2, Mar. 30, 2004, 2004 CPD ¶ 52.

¹⁶⁵⁶ *Id.* at 1. Because the GAO dismissed the protest on other grounds, the GAO did not address the issue of federal employees’ standing under the CICA. *Id.* at 2 n.1.

¹⁶⁵⁷ *Id.* at 1-2. Additionally, in determining the in-house cost estimate the USDA simply used the incumbent activity instead of developing an MEO plan. *Id.* at 2.

¹⁶⁵⁸ *Id.*

¹⁶⁵⁹ *Id.*

the CICA may protest a streamlined competition if “the agency elects to use the procurement system and conducts a competition by issuing a solicitation”¹⁶⁶⁰ Here, however, the USDA’s use of the streamlined competition procedures in determining to contract with the private sector “was based solely on the agency’s internal analysis and was not made pursuant to a solicitation.”¹⁶⁶¹ Accordingly, under the CICA and GAO Bid Protest Regulations, the GAO lacked jurisdiction and dismissed Ms. Bray’s protest.¹⁶⁶²

In its June 2003 *Federal Register* notice, the GAO also requested comments on the doctrine of exhaustion and its applicability under the *Revised A-76*.¹⁶⁶³ Based on comity and efficiency considerations, the GAO generally would not consider a contractor’s bid protest until the contractor exhausted the prior *Circular A-76*’s unique agency administrative appeals process.¹⁶⁶⁴ The *Revised A-76*, however, replaced the agency administrative appeals procedures with “contests” conducted in accordance with FAR section 33.103.¹⁶⁶⁵ Currently, the GAO’s Bid Protest Regulations do not require protestors to exhaust agency-level protest procedures before pursuing a bid protest, thus the GAO sought input on whether it should continue to apply the “exhaustion doctrine” in *Revised A-76* contests.¹⁶⁶⁶ In *William A. Van Auken*,¹⁶⁶⁷ the GAO specifically left the question unanswered.

The protest in *Van Auken* involved the same facts and same *Revised A-76* competition challenged in *Dufrene*.¹⁶⁶⁸ Mr. Van Auken was apparently one of the individual employees affected by the USDA’s decision to contract out the fleet maintenance work, and he protested to the GAO; he also submitted a nearly identical challenge to the agency.¹⁶⁶⁹ The USDA requested dismissal of the protest as premature, stating it intended to address the protest through its FAR-based, agency-level protest procedures.¹⁶⁷⁰ As Mr. Van Auken did not object to the request, the GAO dismissed the protest. But the GAO also specifically stated, “Our decision today to close this file is based on the unopposed request for dismissal and does not constitute a decision on the exhaustion requirement.”¹⁶⁷¹

Revised A-76 and the DOD

The *Revised A-76* became effective upon issuance on 23 May 2003 and applied to all required inventories, as well as streamlined and standard competitions initiated after the effective date.¹⁶⁷² The new rules also provided a transition period for direct conversions and cost comparisons initiated but not completed by the effective date.¹⁶⁷³ Specifically, all direct conversions initiated were to be converted to the new streamlined or standard competition processes.¹⁶⁷⁴ For cost comparisons in which solicitations had been issued prior to the *Revised A-76* effective date, agencies could rely upon the

¹⁶⁶⁰ *Id.* at 2-3 (referencing Trajen, Inc., Comp. Gen. B-284310, B-284310.2, Mar. 28, 2000, 2000 CPD ¶ 61, at 3).

¹⁶⁶¹ *Id.* at 3.

¹⁶⁶² In a 20 December 2004 *Federal Register* notice, the GAO stated it “intends to follow the Vallie Bray precedent with respect to protests of streamlined competitions” under the *Revised A-76*. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 69 Fed. Reg. 75,878, 75,879 (Dec. 20, 2004).

¹⁶⁶³ Notice; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 68 Fed. Reg. 35,411, 35,413 (June 13, 2003).

¹⁶⁶⁴ *Id.* at 35,413 (referencing Intelcom Support Servs., Inc., Comp. Gen. B-234488, Feb. 17, 1989, 89-1 CPD ¶ 174; Direct Delivery Sys., Comp. Gen. B-198361, May 16, 1980, 80-1 CPD ¶ 343).

¹⁶⁶⁵ *Id.* See also REVISED A-76, *supra* note 1610, atch. B, ¶ F.1.

¹⁶⁶⁶ 68 Fed. Reg. 35,411, 35,413.

¹⁶⁶⁷ Comp. Gen. B-293590, Feb. 6, 2004, 2004 CPD ¶ 20.

¹⁶⁶⁸ For a discussion of the facts, see *supra* notes 1617 through 1641 and accompanying text.

¹⁶⁶⁹ *Van Auken*, 2004 CPD ¶ 20, at 1.

¹⁶⁷⁰ *Id.* at 2.

¹⁶⁷¹ *Id.* at 3 n.1. On 20 December 2004, the GAO specifically addressed the exhaustion requirement. In a *Federal Register* notice, the GAO stated it will not apply the exhaustion requirement to protests challenging Revised A-76 decisions. Government Accountability Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 69 Fed. Reg. 75,878, 75,879 (Dec. 20, 2004).

¹⁶⁷² REVISED A-76, *supra* note 1610, ¶ 6. See also Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

¹⁶⁷³ REVISED A-76, *supra* note 1610, ¶¶ 7.a and 7.b. See also Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

¹⁶⁷⁴ REVISED A-76, *supra* note 1610, ¶ 7.a and 7.b. See also Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

rules of the prior *Circular A-76*.¹⁶⁷⁵

At the time the OMB issued *Revised A-76*, the DOD had approximately 200 “in-progress” competitive sourcing initiatives.¹⁶⁷⁶ In a 24 October 2003 memo to the Office of Federal Procurement Policy (OFPP), the DOD Competitive Sourcing Official (CSO)¹⁶⁷⁷ requested a “deviation”¹⁶⁷⁸ of the *Revised A-76*’s transition provisions, allowing the DOD to use the prior *Circular A-76* for the majority of the in-progress cost-comparison studies.¹⁶⁷⁹ The DOD projected final decision determinations in the in-progress competitive sourcing initiatives by 30 September 2004.¹⁶⁸⁰

On 17 November 2003 the OFPP granted the DOD authority to proceed under the deviation proposal, as long as a solicitation had issued by 31 December 2003 in the on-going cost-comparisons.¹⁶⁸¹ While granting a deviation to determine a final decision in such studies, the OFPP further stated, “DOD will apply the post competition requirements in paragraph E of attachment B of the [*Revised A-76*] to activities in the transition plan.”¹⁶⁸² Additionally, the OFPP stated it expected the DOD to achieve final decision determinations by the projected 30 September 2004 date.¹⁶⁸³

Congress further limited the DOD’s ability to implement the *Revised A-76* by delaying implementation within the Department until forty-five days after the DOD submitted a report to Congress explaining the effects of the revisions.¹⁶⁸⁴ The DOD submitted the required report in February 2004 and the forty-five day waiting period ended on 26 April 2004.¹⁶⁸⁵

In a policy memo that followed, the DOD stated it is “committed to measured approach” in conducting competitions under the *Revised A-76*.¹⁶⁸⁶ And to ensure standardized implementation within the DOD, the military services and DOD components can expect increased Office of Secretary of Defense (OSD) oversight of *Revised A-76* competitions.¹⁶⁸⁷ Specifically, the memo states “DOD Components shall not make public announcement or congressional notification of a public-private competition (standard or streamlined competition) without the concurrence of [the Director, Housing and Competitive Sourcing].”¹⁶⁸⁸ The OSD expects the requirement for additional oversight and OSD notification will end by the

¹⁶⁷⁵ REVISED A-76, *supra* note 1610, ¶ 7.c. See also Office of Mgmt. & Budget, Revision to Office of Management and Budget Circular No. A-76, Performance of Commercial Activities, 68 Fed. Reg. 32,134 (May 29, 2003).

¹⁶⁷⁶ Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Associate Administrator, Office of Federal Procurement Policy, subject: Department of Defense Competitive Sourcing Transition Plan (24 Oct. 2003) [hereinafter DOD Transition Plan Memo]. The memo is available at <http://emissary.acq.osd.mil/inst/share.nsf> by clicking on the following links: “Library,” “Documents by Organization,” “Department of Defense,” “Policy,” and “DOD Deviation Request.”

¹⁶⁷⁷ Under the *Revised A-76*, the CSO is an agency assistant secretary or equivalent level official responsible for implementing the circular. REVISED A-76, *supra* note 1610, ¶ 4.f. Within the DOD, the designated CSO is the Deputy Under Secretary of Defense (Installations and Environment). Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: Designation of the Department of Defense Competitive Sourcing Official (12 Sept. 2003). The memo is available at <http://emissary.acq.osd.mil/inst/share.nsf> by clicking on the following links: “Library,” “Documents by Organization,” “Department of Defense,” “Policy,” and “Designation of DOD Competitive Sourcing Official.”

¹⁶⁷⁸ According to the *Revised A-76*, “The CSO (without delegation) shall receive prior written OMB approval to deviate from this circular” REVISED A-76, *supra* note 1610, ¶ 5.c.

¹⁶⁷⁹ DOD Transition Plan Memo, *supra* note 1676, at 2.

¹⁶⁸⁰ *Id.*

¹⁶⁸¹ Memorandum, Office of Management and Budget, Office of Federal Procurement Policy, to Deputy Under Secretary of Defense (Installations and Environment), subject: Competitive Sourcing Transition Plan for the DOD (17 November 2003), at 1 and encl. ¶ 2. The memo is available at <http://emissary.acq.osd.mil/inst/share.nsf> by clicking on the following links: “Library,” “Documents by Organization,” “Office of Management and Budget,” “Policy,” and “OMB’s Response to DOD Deviation Request.”

¹⁶⁸² *Id.* encl. ¶ 1.b.

¹⁶⁸³ *Id.* encl. ¶ 2.

¹⁶⁸⁴ National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, § 335, 117 Stat. 1392, 1444 (2003). Specifically, Congress required DOD’s report to address the following issues under the *Revised A-76*: (1) the opportunity for DOD employees to compete to retain their jobs; (2) appeal and protest rights of DOD employees; (3) safeguards to ensure all public-private competitions are fair, appropriate, and provide full and open competition; (4) DOD plans to ensure an appropriate phase-in period for the *Revised A-76*; (5) DOD plans to provide training to DOD employees regarding the revisions; (6) DOD plans to collect and analyze data on the costs and quality of work contracted out or retained in-house. *Id.* For additional discussion of legislation impacting the DOD’s competitive sourcing initiatives, see *infra* app. A: Department of Defense (DOD) Legislation for Fiscal Year 2005.

¹⁶⁸⁵ Ms. Annie Andrews, Assistant Director, Housing & Competitive Sourcing, Office for the Deputy Under Secretary of Defense (Installations and Environment), Address at the Revisiting the Revised A-76 Circular: Evaluations After One Year Conference (2 June 2004).

¹⁶⁸⁶ Memorandum, Director, Housing and Competitive Sourcing, to Deputy Assistant Chief of Staff for Installation Management, United States Army et al., subject: Oversight of DOD Public-Private Competitions (5 August 2004). This memo is available at <http://emissary.acq.osd.mil/inst/share.nsf> by clicking on the following links: “Library,” “Documents by Organization,” “Department of Defense,” “Policy,” and “Oversight of DOD Public-Private Competitions.”

¹⁶⁸⁷ *Id.*

¹⁶⁸⁸ *Id.*

end of December 2004.¹⁶⁸⁹

Finally, in a separate memorandum dated 29 March 2004, the DOD CSO appointed DOD Component CSOs (CCSO) and charged them with implementing the *Revised A-76* within their respective Components and issuing any applicable implementing guidance.¹⁶⁹⁰ Within the Army and Navy, their respective Assistant Secretaries (Installation and Environment) have been appointed CCSOs.¹⁶⁹¹ Within the Air Force, the Deputy Chief of Staff for Personnel has been designated.¹⁶⁹² And within all other Defense Agencies and DOD Field Activities, the Directors of such agencies and activities have been appointed CCSOs.¹⁶⁹³ The memorandum at Attachment 1 specifies the DOD CSO's responsibilities, and the memo at Attachment 2 addresses the delegated responsibilities of the CCSOs.¹⁶⁹⁴

Federal Manager's Guide to Competitive Sourcing

The OMB and Federal Acquisition Council (FAC) issued the second edition of the *Manager's Guide to Competitive Sourcing (Manager's Guide)* in February 2004.¹⁶⁹⁵ For practitioners new to competitive sourcing, the *Manager's Guide* includes a "primer" section, as well as an appendix for "frequently asked questions."¹⁶⁹⁶ The *Manager's Guide* also incorporates "best practices" from several federal agencies and includes web links to the training/guidance documents available from the various executive agencies.¹⁶⁹⁷

We have Something to Report

The OMB and the GAO each issued reports this past year that included some interesting statistics and comments on competitive sourcing results and process.¹⁶⁹⁸ In May 2004, the OMB issued a report summarizing the competitive sourcing results of individual agencies.¹⁶⁹⁹ According to the report, the competitive sourcing initiatives undertaken in FY 2003 will achieve \$1.1 billion in savings over the next three to five years.¹⁷⁰⁰ Interestingly, of the approximately 17,500 full-time equivalent (FTE) positions competed, nearly 89% of the FTEs were retained in house.¹⁷⁰¹

The GAO report also included statistics on the numbers of studies completed and their results, but also looked at the competitive sourcing process.¹⁷⁰² The GAO's review of approximately 17,500 FTEs studied during 2003 concluded 76% of all FTEs were retained in house.¹⁷⁰³ But the GAO went beyond mere statistics and recommended areas of improvement

¹⁶⁸⁹ *Id.*

¹⁶⁹⁰ Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to Assistant Secretary of the Army (Installations and Environment) et al., subject: Responsibilities of the Department of Defense (DOD) Competitive Sourcing Officials (CSO) and Component Competitive Sourcing Officials (CCSO) (29 Mar. 2004). The memo is available at <http://emissary.acq.osd.mil/inst/share.nsf> by clicking on the following links: "Library," "Documents by Organization," "Department of Defense," "Policy," and "Responsibilities Under OMB Circular A-76 (Revised May 2003)."

¹⁶⁹¹ *Id.*

¹⁶⁹² *Id.*

¹⁶⁹³ *Id.*

¹⁶⁹⁴ *Id.* attchs. 1 and 2.

¹⁶⁹⁵ FEDERAL ACQUISITION COUNCIL, *Manager's Guide to Competitive Sourcing* (Feb. 20, 2004) available at http://www.results.gov/agenda/competitive_sourcing.html.

¹⁶⁹⁶ *Id.* at 16-20 and app. C.

¹⁶⁹⁷ *Id.* at 5-15.

¹⁶⁹⁸ OFFICE OF MANAGEMENT AND BUDGET, *Report on Competitive Sourcing Results for Fiscal Year 2003* (May 2004) [hereinafter *Competitive Sourcing Results*]; GEN. ACCT. OFFICE, REP. NO. GAO-04-367, *Competitive Sourcing—Greater Emphasis Needed on Increasing Efficiency and Improving Performance* (Feb. 2004) [hereinafter REP. NO. GAO-04-367].

¹⁶⁹⁹ *Competitive Sourcing Results*, *supra* note 1698, at 4 (referencing the legislative requirement that agencies report competitive sourcing results for the prior fiscal year annually to Congress). See also Consolidated Appropriations Act for FY 2004, Pub. L. No. 108-199, div. F, § 647(b), 118 Stat. 3, 361 (2004).

¹⁷⁰⁰ *Competitive Sourcing Results*, *supra* note 1698, at 2.

¹⁷⁰¹ *Id.*

¹⁷⁰² REP. NO. GAO-04-367, *supra* note 1698.

¹⁷⁰³ *Id.* at 34. The difference between the OMB's and GAO's percentages may be due to the particular studies that were either included or excluded. For example, the OMB report included four standard competitions completed during the first quarter of FY 2004. *Competitive Sourcing Results*, *supra* note 1698, at 2.

within the competitive sourcing process. In addition to recommending the OMB work with agencies to be “more strategic in their sourcing decisions” and require agencies to develop competition plans that focus on achieving measurable outcomes, the GAO highlighted the need for greater consistency in the classification of positions as either inherently governmental or commercial.¹⁷⁰⁴

We Still Have Problems under the “Old” Circular A-76

As the *Revised A-76* is relatively new to the competitive sourcing scene, there are still protests, and lessons to be learned, under the “old” *Circular A-76*. In *Career Quest, a division of Syllan Careers, Inc.*,¹⁷⁰⁵ Career Quest challenged a GSA decision pursuant to an “old” *Circular A-76* cost comparison that it was more cost-effective to retain in-house the performance of GSA’s National Customer Support Center for Federal Supply Schedule users (NCSC).¹⁷⁰⁶

During the competition among private sector proposals, the GSA selected Career Quest’s proposal as representing the “best value” to the government. In the head-to-head cost comparison with the in-house MEO, the agency determined MEO performance would save approximately \$900,000.¹⁷⁰⁷ Career Quest appealed the decision to the agency appeal authority (AAA). Although the AAA upwardly adjusted the MEO’s cost by \$327,000, the AAA affirmed the GSA’s decision to retain performance in-house as the MEO’s cost was still approximately \$570,000 less than Career Quest’s offer.¹⁷⁰⁸ Career Quest protested to the GAO.

At the GAO, the GSA conceded certain errors regarding the failure to include costs associated with a full-time site manager and phase-in costs. These errors resulted in additional MEO costs of \$324,000, which reduced the cost difference between the MEO and Career Quest to \$245,268.¹⁷⁰⁹ Finding additional errors in the MEO’s proposed staffing and the agency’s evaluation, the GAO sustained the protest.

First, the GAO found the MEO’s technical performance plan (TPP), which proposed a total of 38.5 FTEs, conflicted with its cost proposal that included direct personnel costs for only 34.5 FTEs.¹⁷¹⁰ Although a response by MEO members argued the TPP wording failed to explain that the 38.5 FTE figure included 4 FTEs performing inherently governmental functions, “the cost of which was properly omitted from the MEO’s costs,” the GAO found the agency record “shows that the MEO affirmatively represented to the technical evaluators that it was using 38.5 FTEs to perform the requirement, which was inconsistent with the 34.5 FTEs used to calculate the MEO’s cost”¹⁷¹¹ Indeed, because the MEO’s TPP was unclear regarding staffing, the evaluators specifically asked the MEO for the total number of proposed FTEs. The MEO’s response was “unequivocal” in stating 38.5 FTEs.¹⁷¹² As the MEO’s costs reflected only 34 FTEs, the GAO found the agency’s evaluation “materially flawed.”¹⁷¹³

The GAO also found questionable the MEOs proposed staffing for the quality control activities under the PWS. The MEO proposed a “call monitoring program” requiring a quality control manager to monitor thirty calls per month.¹⁷¹⁴ Noting the agency received approximately 23,000 calls per month on average, the evaluators questioned the MEO about the basis for its sample size.¹⁷¹⁵ In response, the MEO informed the evaluators that its sample size was based on an American National Standards Institute/American Society for Quality (ANSI/ASQ) standard.¹⁷¹⁶ Career Quest argued the MEO miscalculated and that the ANSI/ASQ standards required the monitoring of 315 calls per month, which the MEO’s proposed single analyst

¹⁷⁰⁴ REP. NO. GAO-04-367, *supra* note 1698, at 23.

¹⁷⁰⁵ Comp. Gen. B-293435.2, B-293435.3, Aug. 2, 2004, 2004 CPD ¶ 152.

¹⁷⁰⁶ *Id.* at 1.

¹⁷⁰⁷ *Id.* at 2.

¹⁷⁰⁸ *Id.*

¹⁷⁰⁹ *Id.*

¹⁷¹⁰ *Id.*

¹⁷¹¹ *Id.* at 3.

¹⁷¹² *Id.* at 4.

¹⁷¹³ *Id.*

¹⁷¹⁴ *Id.*

¹⁷¹⁵ *Id.*

¹⁷¹⁶ *Id.*

could not possibly monitor.¹⁷¹⁷ The GAO agreed stating, “the approximately tenfold difference in the sample size required under the standard identified by the MEO versus the sample size it proposed” resulted in a “legitimate basis to question whether the evaluators properly considered whether the MEO proposed adequate staffing to perform the quality control activities”¹⁷¹⁸

Because these errors could result in additional staffing that could increase the MEO’s costs above Career Quest’s, the GAO found Career Quest had been prejudiced by GSA’s errors.¹⁷¹⁹ Giving the MEO yet another bite at the apple, the GAO recommended the GSA “obtain clarification of the MEO’s intended level of staffing,” reevaluate the MEO to determine the adequacy of its staffing levels, and perform a new cost comparison.¹⁷²⁰

COFC Rejects “Draconian” Reading of Circular A-76 Guidance

In *Federal Management Systems, Inc. v. United States*,¹⁷²¹ the COFC addressed the issue of organizational conflicts of interest (OCI) under the prior *Circular A-76*. The Department of Health and Human Services, National Institutes of Health (NIH) issued an RFP on 23 May 2003 as part of a *Circular A-76* study of various clerical and administrative support positions at the NIH.¹⁷²² Federal Management Systems, Inc. (FMSI) was the only firm to submit an offer, however, the SSEB found FMSI’s proposal technically unacceptable. As a result, the NIH cancelled the solicitation and the *Circular A-76* competition.¹⁷²³

FMSI filed suit alleging an improper OCI existed because seven of eight members on the SSEB held positions in the functions under the study, thus violating *Circular A-76*.¹⁷²⁴ More specifically, FMSI alleged the SSEB composition violated *Circular A-76 Transmittal Memorandum No. 22 (Memo 22)*, which stated, “Individuals who hold positions in the function under study should not be members of the [source selection evaluation] team, unless an exception is authorized by the head of the contracting activity.”¹⁷²⁵ FMSI also cited language from the commentary accompanying the *Memo 22* announcement in which the OMB stated it was a “poor business practice” to include federal employees on the SSEB, “when those employees are subject to losing their jobs or otherwise being adversely affected”¹⁷²⁶

Here, the function under study included administrative support activities “such as answering phones, filing and photocopying, and computer data entry.”¹⁷²⁷ Because the agency could demonstrate that none of these activities were assigned to the individuals serving on the SSEB, FMSI argued that an OCI existed and violated the *Circular A-76* because the SSEB members were “in the supervisory chain above the individuals who hold positions in the function under study, or because they interact with individuals in the function under study by directing them to schedule meetings, make copies, or enter information into databases.”¹⁷²⁸

The court rejected FMSI’s argument, holding that “[t]he fact that SSEB members interact with individuals who hold positions in the function under study, or direct some of their activities, is not sufficient to disqualify the SSEB members.”¹⁷²⁹ Electing not to endorse FMSI’s interpretation of the language found in FAR section 52.207-2 and the *Circular A-76* guidance on OCI, the court stated that “as a practical matter, exclusion of government employees holding similar positions to those in

¹⁷¹⁷ *Id.*

¹⁷¹⁸ *Id.* at 5.

¹⁷¹⁹ *Id.*

¹⁷²⁰ *Id.* at 5-6.

¹⁷²¹ 61 Fed. Cl. 364 (2004).

¹⁷²² *Id.* at 365.

¹⁷²³ *Id.*

¹⁷²⁴ *Id.* at 366.

¹⁷²⁵ *Id.* at 368 (quoting *Circular A-76 Transmittal Memorandum No. 22*, 65 Fed. Reg. 54,568 (Sept. 8, 2000)). The OMB issued the *Memo 22*, in part, to address the OCI issue that arose in an Air Force *Circular A-76* study in which the GAO found an OCI because fourteen of sixteen evaluators held positions in the function that was under study. See *DZS/Baker LLC; Morrison Knudsen Corp.*, Comp. Gen. B-281224, Jan. 12, 1999, 99-1 CPD ¶ 19.

¹⁷²⁶ *Fed. Mgmt. Sys., Inc.*, 61 Fed. Cl. at 368 (quoting *Circular A-76 Transmittal Memorandum No. 22*, 65 Fed. Reg. 54,568 (Sept. 8, 2000)).

¹⁷²⁷ *Id.* at 369.

¹⁷²⁸ *Id.*

¹⁷²⁹ *Id.*

Privatization

Paradise Lost (or at least Permanently Enjoined)

In *Hunt Building Co., Ltd. v. United States*,¹⁷³¹ the COFC granted the protestor permanent injunctive relief, preventing the Air Force from closing on a real estate transaction that would have privatized approximately half of the family housing units at Hickam AFB, Hawaii. The COFC found the relief warranted given “the Air Force failed to comply with its Solicitation, changed material terms without advising Hunt, and failed to treat all offerors fairly and equally”¹⁷³²

The project RFP, issued on 12 April 2002, contemplated a “non-Federal Acquisition Regulation (FAR), real estate transaction with the Successful Offeror (SO) under which the Government will convey 1356 existing housing units . . . and lease approximately 238 acres of land”¹⁷³³ Although not a FAR transaction, the solicitation stated the “intent to use fair, timely, and cost-effective procedures for evaluation and selection of the offer most advantageous to the Air Force.”¹⁷³⁴ The RFP provided for a three-stage process: first, competitive selection of an SO; second, finalization of “form legal documents”¹⁷³⁵ necessary for the real estate transaction between the SO and the Air Force; and finally, the actual real estate closing.¹⁷³⁶

Significantly, the solicitation required that the terms of the form legal documents that the Air Force would execute with the SO after selection would be “substantially identical” to the terms in the form legal documents appended to the solicitation.¹⁷³⁷ One such form was a Property Lease that included Condition 23.7.2 (Condition 23), which stated: “The Mortgagee’s Right to Postpone shall extend the date of termination of this Lease specified in the Termination Notice for a period of not more than six (6) months.”¹⁷³⁸

Hunt Building Co., Ltd. (Hunt) and Actus Lend Lease, LLC (Actus) each submitted offers in response to the RFP. Hunt’s initial proposal requested the government modify the proposed language in Condition 23 of the Property Lease by deleting the six-month limitation on a mortgagee’s ability to extend the lease termination date.¹⁷³⁹ Hunt requested the change because its lender had conditioned their financial commitment upon the Air Force’s agreement to make the requested changes.¹⁷⁴⁰ In its initial offer, Actus did not request any changes to the various legal documents.¹⁷⁴¹

After establishing a competitive range that included only Hunt and Actus, the Air Force issued evaluation notices (ENs) and requested comprehensive proposals from both offerors.¹⁷⁴² In its proposal, Hunt again requested changes to the Property Lease and other form legal documents. In response, the Air Force issued an EN stating, “the proposed modifications, if required by the Offeror [Hunt] to close the transaction, shall adversely affect the proposal risk and financial

¹⁷³⁰ *Id.* at 370. In reaching its conclusion, the court approvingly cited *JWL Int’l Corp. v. United States*, in which the COFC rejected plaintiff’s challenge to the SSEB composition in a *Circular A-76* study because certain SSEB members worked in components that interrelated with or relied upon the actual functions under study. 52 Fed. Cl. 650, 659 (2002), *aff’d*, 56 Fed. Appx. 474 (Fed. Cir. 2003).

¹⁷³¹ 61 Fed. Cl. 243 (2004).

¹⁷³² *Id.* at 247.

¹⁷³³ *Id.* at 248 (quoting the Solicitation).

¹⁷³⁴ *Id.* at 248-49.

¹⁷³⁵ The solicitation described the “form legal documents” as “governing the project” and “Key Controlling Documents.” *Id.* at 255 (referencing the Solicitation § 1.5). Examples of such legal documents provided by the solicitation included: lease of property, quitclaim deed, forward commitment, intercreditor agreement, lockbox agreement. *Id.* at 249 (referencing the Solicitation § 3.2.1).

¹⁷³⁶ *Id.* at 246, 248.

¹⁷³⁷ *Id.* at 247.

¹⁷³⁸ *Id.* at 256.

¹⁷³⁹ *Id.* at 257.

¹⁷⁴⁰ *Id.*

¹⁷⁴¹ *Id.* at 257-58.

¹⁷⁴² *Id.* at 258.

and technical ratings relating to the Offeror's Proposal."¹⁷⁴³ Hunt then submitted a revised proposal, deleting several, but not all, of the requested changes. The Air Force again responded, "If Hunt or any of the transaction participants requires modifications to the Transaction Documents that were rejected by the Government, such modifications shall cause Hunt's proposal to be evaluated less favorably or rejected."¹⁷⁴⁴ As a result, Hunt dropped several of its requested changes, including its objection to the Property Lease's six-month limitation on a lender's ability to postpone termination.¹⁷⁴⁵

Actus also submitted a comprehensive design proposal that sought changes to the form legal documents. Among the proposed changes was a request to extend the six-month limitation on postponing a termination of the lease.¹⁷⁴⁶ Issuing "the identical EN to Actus it had issued to Hunt," the Air Force rejected the proposed changes.¹⁷⁴⁷ In response, Actus filed an agency-level protest arguing the solicitation included unduly restrictive provisions.¹⁷⁴⁸ On 16 April 2003, the Air Force agreed to certain changes proposed by Actus, including extending the six-month limitation in Condition 23 of the Property Lease.¹⁷⁴⁹ Actus accepted the revisions and withdrew its protest.¹⁷⁵⁰ The Air Force did not inform Hunt of the protest or the modification it granted Actus concerning the six-month limitation.¹⁷⁵¹ Although both offers received the same ratings, the Air Force selected Actus as the SO on 22 August 2003 because the Actus proposal had "certain advantages"¹⁷⁵²

Following Actus' selection as the SO, the Air Force began negotiations with Actus to finalize the form legal documents and prepare to close the real estate transaction. During this phase, the RFP provided that the Property Lease and other legal documents could be revised to resolve administrative details.¹⁷⁵³ As the Air Force and Actus engaged in post-selection negotiations, the parties made several changes to the Property Lease and other legal documents.¹⁷⁵⁴ Additionally, Actus submitted post-selection "final proposal revisions" on three separate occasions to accommodate the various changes and to address other issues.¹⁷⁵⁵

Post-selection but prior to the transaction closing date, Hunt filed a protest with the COFC seeking permanent injunctive relief. The Air Force and Actus, as intervenor, first sought dismissal on various procedural grounds.¹⁷⁵⁶ Interestingly, the Air Force and Actus contended that because the CICA and FAR did not apply to the transaction the Air Force's actions could not be said to violate a statute or regulation.¹⁷⁵⁷ The court determined that the "thorny" legal issue of whether the CICA and FAR applied was "immaterial," because the court could sustain the protest "independent of any statutory or regulatory violations" ¹⁷⁵⁸ The court noted its authority to set aside award determinations extends to agency

¹⁷⁴³ *Id.* at 260 (quoting Evaluation Notice, 11 Sept. 2002). The EN further explained, "The Air Force has previously closed several [Military Housing Privatization Initiative] transactions with legal documents substantially similar to the Form Documents." *Id.*

¹⁷⁴⁴ *Id.* at 261.

¹⁷⁴⁵ *Id.*

¹⁷⁴⁶ *Id.* at 262.

¹⁷⁴⁷ *Id.*

¹⁷⁴⁸ *Id.* at 262-63.

¹⁷⁴⁹ *Id.* at 264. The Air Force agreed to modify Condition 23 to read:

The Mortgagee's Right to Postpone shall extend the date for the termination of this Lease specified in the Termination Notice for a period of six (6) months (or such longer period as may be approved in writing by the Government, which approval shall not be unreasonably withheld) so long as the mortgagee promptly commences all steps necessary to cure any Defaults of the Lessee

Id.

¹⁷⁵⁰ *Id.*

¹⁷⁵¹ *Id.* at 265.

¹⁷⁵² A fairly lengthy opinion of nearly forty pages, the decision is also redacted, which makes it impossible to discern any differences between the proposals. *See id.* at 264-65.

¹⁷⁵³ *Id.* at 265-66.

¹⁷⁵⁴ *Id.* at 266. These changes included new dispute resolution provisions before the Air Force could exercise its termination rights; base closure provisions to address the contingency of Hickam AFB's closure; expanding the definition of "excusable delay" to include "acts of terrorism;" making Hawaii law applicable in the absence of federal law. *Id.* at 266-67.

¹⁷⁵⁵ *Id.* at 267-68.

¹⁷⁵⁶ *Id.* at 269. The Air Force and Actus requested dismissal *id.* on grounds of ripeness, standing, timeliness, and waiver. The COFC denied each requested basis for dismissal. *Id.* at 269-71.

¹⁷⁵⁷ *Id.* at 272-73.

¹⁷⁵⁸ *Id.* at 273.

decisions that lack a rational basis or that result from a prejudicial violation of procurement procedures.¹⁷⁵⁹ The court observed that the agency's failure to follow the terms of the solicitation and selecting an offeror based upon different requirements were "quintessential examples of conduct which lacks a rational basis."¹⁷⁶⁰

On the merits, Hunt argued the Air Force improperly relaxed the six-month limitation on postponing lease termination for Actus after previously rejecting Hunt's request to do so. The Air Force contended that because the CICA and the FAR did not apply to the solicitation offerors were not limited to "proposing on the same basis," and the Air Force could accept or reject proposed alternatives.¹⁷⁶¹ The court observed, however, that though the RFP allowed offerors "to be creative in their solutions," the Air Force could not "apply different requirements to offerors."¹⁷⁶² Here, when the Air Force relaxed and extended the six-month limitation of Condition 23 for Actus but not Hunt, it "was not attributable to any enhancement in Actus' proposal—it was a modification of the ground rules on which offerors were competing. . . ."¹⁷⁶³ By doing so, regardless of whether the CICA and the FAR applied, "the Air Force violated the 'fundamental principle of government procurement . . . that [contracting officers] treat all offerors equally and consistently apply the evaluation factors listed in the Solicitation."¹⁷⁶⁴ Because risk was an evaluation factor, the relaxation of the six-month limitation on mortgagees made the financial risk greater for Hunt as compared to Actus, meaning it was "impossible for the [source selection evaluation team] to apply that evaluation factor fairly."¹⁷⁶⁵ The court also found the Air Force violated the solicitation because the RFP required the Air Force to amend the solicitation "with 'any information necessary in submitting offers' or if the lack thereof "would be prejudicial to any other prospective offerors."¹⁷⁶⁶

The COFC also took issue with the Air Force's post-selection changes to several material solicitation requirements. The solicitation did provide that post-selection "amendments" would be made to the formal legal documents, thus the Air Force agreed to and accepted several post-selection revisions.¹⁷⁶⁷ However, the court determined the solicitation "imposed an obligation on the Air Force to keep the revisions to the formal legal documents in the realm of administrative details" and required that such revised documents signed at closing "be 'substantially identical' to the form legal documents on which offerors based their proposals."¹⁷⁶⁸ By allowing several post-selection changes, the Air Force violated the solicitation and the "fundamental [principle] that evaluation and contract award must be made in accordance with the terms and conditions in the Solicitation."¹⁷⁶⁹

Moreover, the court ruled the solicitation did not allow the Air Force to request and accept post-selection "final proposal revisions."¹⁷⁷⁰ The Air Force, here, gave Actus three opportunities to submit revised proposals during the post-selection phase, which prejudiced Hunt by giving "Actus an edge that Hunt did not receive"¹⁷⁷¹ These post-selection revisions not only violated the solicitation but "rendered the competition . . . illusory."¹⁷⁷²

In addition to finding significant errors in the procurement process, the COFC also ruled Hunt had demonstrated it

¹⁷⁵⁹ *Id.* at 272-73. The COFC derives its pre-award bid protest jurisdiction from the Tucker Act, as amended by the Administrative Dispute Resolution Act of 1996. *Id.* at 268-69 (citing 28 U.S.C. § 1491(b)(1), as amended by Pub. L. No. 104-320, 110 Stat. 3870, 110 Stat. 3870 (1996)). The court reviews such bid protests under the standards of the Administrative Procedures Act, 5 U.S.C. § 706, 28 U.S.C. § 1491(b)(4) and may set aside awards if "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Id.* (citing *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1351 (Fed. Cir. 2004) (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001)).

¹⁷⁶⁰ *Id.* at 273.

¹⁷⁶¹ *Id.*

¹⁷⁶² *Id.*

¹⁷⁶³ *Id.*

¹⁷⁶⁴ *Id.* at 274.

¹⁷⁶⁵ *Id.*

¹⁷⁶⁶ *Id.*

¹⁷⁶⁷ *Id.* at 275.

¹⁷⁶⁸ *Id.* at 276. For a discussion of the various changes, see *supra* note 1754. Hunt had requested some of these same changes, but the Air Force denied the requests. *Id.* at 275-76.

¹⁷⁶⁹ *Id.* at 276.

¹⁷⁷⁰ *Id.* at 277.

¹⁷⁷¹ *Id.*

¹⁷⁷² *Id.*

had been competitively prejudiced by the Air Force's errors.¹⁷⁷³ Specifically, Hunt demonstrated through testimony from its lender that had Hunt received the same opportunity as Actus to modify the form legal documents, Hunt could have received more favorable financing terms.¹⁷⁷⁴

Finding permanent injunctive relief appropriate, in part because the transaction involved "a fifty-year project of enormous scope, which may include a follow-on sole-source procurement for the remaining privatization at Hickam AFB,"¹⁷⁷⁵ the court also noted "that equitable powers 'should be exercised in a way [that] limits judicial interference in contract procurement.'"¹⁷⁷⁶ As such the COFC did not require the Air Force "to go back to square one" and issue a new solicitation.¹⁷⁷⁷ Instead, the court set aside the selection of Actus and directed the Air Force "to reassess its needs, amend the Solicitation accordingly (or not) and evaluate final proposal revisions consistent with that solicitation."¹⁷⁷⁸

A Couple of Thoughts from the GAO on Housing Privatization

The GAO issued two separate reports¹⁷⁷⁹ that addressed in part the DOD's Military Housing Privatization Initiative.¹⁷⁸⁰ In a report that looked at issues related to the renovation of general officer quarters, the GAO was concerned the DOD and military services would lose spending oversight on the maintenance/repair of the increasing number of general officer quarters because the DOD lacked a consistent department-wide policy for the review of such maintenance/repair projects.¹⁷⁸¹ Under current DOD guidance, military service headquarters must review all maintenance/repair projects exceeding \$35,000 for government-owned general officer quarters.¹⁷⁸² This requirement does not apply to privatized quarters.¹⁷⁸³

According to the GAO, the Navy, Marine Corps, and the Air Force have developed draft guidance "that will provide more visibility over the spending to operate and maintain privatized general and flag officer quarters."¹⁷⁸⁴ The Air Force draft guidance implements essentially the same review procedure that currently exists for government-owned maintenance/repair to general officer housing.¹⁷⁸⁵ The Navy/Marine Corps are developing similar guidance but increase the limitation to "\$50,000 in one year for any one house."¹⁷⁸⁶ The Army has no plans for additional guidance or review beyond the current headquarters review of annual operating budgets for privatized housing.¹⁷⁸⁷

Responding to the GAO's recommendation that the DOD develop department-wide guidance that would apply equally to privatized and government-owned general officer quarters, the DOD non-concurred.¹⁷⁸⁸ The DOD believes that applying the same government oversight to privatized quarters as it does to government-owned quarters "contradicts the rules

¹⁷⁷³ *Id.* "To prevail in a bid protest, a protestor must show not only a significant error in the procurement process, but also that the error prejudiced it." Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996) (citing LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1556 (Fed. Cir. 1995)).

¹⁷⁷⁴ *Hunt Building*, 61 Fed. Cl. at 278.

¹⁷⁷⁵ *Id.* at 280.

¹⁷⁷⁶ *Id.*

¹⁷⁷⁷ *Id.*

¹⁷⁷⁸ *Id.*

¹⁷⁷⁹ GEN. ACCT. OFF., REP. NO. GAO-04-555, *Defense Infrastructure: Issues Related to the Renovation of General and Flag Officer Quarters* (May 2004) [hereinafter REP. NO. GAO-04-555]; GEN. ACCT. OFF., REP. NO. GAO-04-556, *Military Housing: Further Improvements Needed in Requirements Determinations and Program Review* (May 2004) [hereinafter REP. NO. GAO-04-556].

¹⁷⁸⁰ The National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186, 547 (1995), granted the DOD temporary authority to provide direct loans, loan guarantees, and other financial incentives to encourage private developers to renovate, manage, and maintain existing military housing units, as well as to construct, manage, and maintain new military housing units. Congress later extended this authority through 31 December 2012. National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 2805, 115 Stat. 1012, 1306 (2001) (amending 10 U.S.C. § 2885).

¹⁷⁸¹ REP. NO. GAO-04-555, *supra* note 1779, at 16. Though the military services had privatized only sixty-five of 784 general officer quarters by the end of FY 2003, the GAO noted that the services plan to privatize approximately fifty-four percent of these quarters by the end of FY 2008. *Id.*

¹⁷⁸² *Id.*

¹⁷⁸³ *Id.*

¹⁷⁸⁴ *Id.*

¹⁷⁸⁵ *Id.* The guidance is included in the "draft" of Air Force Instruction (AFI) 32-6007, Privatized Family Housing. According to the Air Force e-Publishing page, available at <http://www.e-publishing.af.mil/>, the AFI is not yet published (last visited 8 Nov. 2004).

¹⁷⁸⁶ REP. NO. GAO-04-555, *supra* note 1779, at 16.

¹⁷⁸⁷ *Id.*

¹⁷⁸⁸ *Id.* at 27.

of privatization.”¹⁷⁸⁹ The DOD argued that true spending control comes from “the project cash flows themselves as monitored by the private sector development entity who owns the housing.”¹⁷⁹⁰ As such, the DOD planned to rely on private sector mechanisms to control costs.¹⁷⁹¹

In a separate report, the GAO looked at the DOD process that determines military family housing needs.¹⁷⁹² While the GAO described current DOD guidance “a significant step in the right direction,” the GAO determined the guidance failed to result in “consistent and reliable assessments of family housing needs.”¹⁷⁹³ Reviewing the housing needs assessments from twelve installations, the GAO found the lack of detailed DOD guidance resulted in “the use of inconsistent methodologies, questionable assumptions, and outdated information.”¹⁷⁹⁴

Moreover, the GAO determined that DOD’s requirements determination process did not maximize reliance on local housing,¹⁷⁹⁵ the most cost effective means for meeting military family housing needs.¹⁷⁹⁶ Although the DOD’s “long-standing policy” has been to rely upon local communities near installations for military housing needs, the GAO found the DOD’s requirements determination process provided several exceptions to this general policy, not all of which were justified.¹⁷⁹⁷ The GAO’s concern was that use of these exceptions “could result in greater reliance on on-base family housing than is warranted”¹⁷⁹⁸

The GAO also criticized the DOD review process for traditional military family housing construction projects, noting the process is different from the review of housing privatization projects, which the GAO believed received greater scrutiny and oversight from the DOD.¹⁷⁹⁹ The GAO was concerned that DOD’s top-level review of housing construction projects did not include formal analysis of whether the planned improvements could be done cheaper through privatization.¹⁸⁰⁰ Citing examples where the services had budgeted money for military family housing construction projects at installations that were also planning housing privatization projects,¹⁸⁰¹ the GAO sought to “point to opportunities for DOD to provide a higher level assessment of justifications for such projects and their privatization potential before such projects are approved.”¹⁸⁰²

In response to the GAO’s concerns, the DOD stated detailed guidance for the housing determination was forthcoming in the DOD Housing Management Manual, currently scheduled for release in December 2004.¹⁸⁰³ Concerning the exceptions to using local community housing, the DOD stated it would review the supporting rationale for the exceptions, but “believe[d] the existing exceptions are sufficiently narrow and well-founded to support sound determinations of our housing requirements.”¹⁸⁰⁴ The DOD also stated the military services will be required “to explain why privatization is not

¹⁷⁸⁹ *Id.*

¹⁷⁹⁰ *Id.*

¹⁷⁹¹ *Id.*

¹⁷⁹² REP. NO. GAO-04-556, *supra* note 1779, at 1.

¹⁷⁹³ *Id.* at 16.

¹⁷⁹⁴ *Id.* at 17. For example, several of the studies relied upon surveys conducted between 1994 and 1997 to estimate military family home ownership; several studies excluded suitable community rental units simply because the agency determined the rent was too low; and several studies varied in defining the local community housing market. *Id.* at 17-20.

¹⁷⁹⁵ *Id.* at 21.

¹⁷⁹⁶ *Id.* at 3. The GAO found the average annual costs for providing military family housing were approximately “\$13,600 for local community housing, \$16,700 for privatized military housing, and \$19,000 for military-owned housing.” *Id.* at 3-4.

¹⁷⁹⁷ *Id.* at 21. Specifically, the exceptions include: (1) exception for key personnel, (2) exception to establish a military housing community, (3) exception to provide targeted economic relief, (4) exception for historic housing. *Id.* at 22. The GAO believed only one exception (i.e., exception for key personnel) was justified. *Id.*

¹⁷⁹⁸ *Id.*

¹⁷⁹⁹ *Id.* at 26-27.

¹⁸⁰⁰ *Id.* at 27. The military services indicated they consider military construction and privatization alternatives prior to submitting a housing construction request to the DOD. *Id.*

¹⁸⁰¹ For example, the Army had budgeted \$41 million for a military construction project at Ft. Knox, Kentucky, to replace 178 inadequate houses. The Army plans on conveying the new houses to a private developer as part of a planned privatization project scheduled for 2006. *Id.* at 28. In justifying use of military construction dollars, the services offered various explanations including immediate need for adequate housing and making privatization at a later time more financially feasible. *Id.* at 28-29.

¹⁸⁰² *Id.* at 29. The GAO did note that it was not saying that the cited uses of military construction were not justified. *Id.*

¹⁸⁰³ *Id.* at 39.

¹⁸⁰⁴ *Id.*

Construction Contracting

Basic Rules of Contract Interpretation Are Not Always So Basic

This year the CAFC handed down two opinions dealing with contract interpretation in the context of construction contracting. In *M.A. Mortenson v. Brownlee (Mortenson)*,¹⁸⁰⁶ the Army COE awarded Mortenson a contract for the construction of a medical facility.¹⁸⁰⁷ Mortenson in turn subcontracted out the project’s heating, ventilation, and air conditioning (HVAC) ductwork to SSM Industries, Inc. (SSM).¹⁸⁰⁸ The contract required manual balancing dampers be installed at specific points in the ductwork. To determine the number of manual balancing dampers required by the contract, SSM looked to both the specifications and the drawings of the contract.¹⁸⁰⁹ The contract specifications called for manual balancing dampers to “be provided at points on supply, return, and exhaust systems where submains, branch mains, or branches and run-outs are taken from larger ducts.”¹⁸¹⁰ However, the plan drawings required “a manual volume damper at each branch/runout take-off” and “a manual balancing damper at each terminal unit run-out duct.”¹⁸¹¹ SSM concluded from this information that the project required installation of 2936 manual balancing dampers, and Mortenson priced its bid accordingly.¹⁸¹²

After SSM purchased and installed the manual balancing dampers for the project, Mortenson requested the contracting officer verify SSM’s interpretation of the contract’s HVAC requirements.¹⁸¹³ The contracting officer disagreed with SSM’s interpretation, and ordered SSM provide manual balancing dampers at all locations specified in the specifications. SSM proceeded “under protest,” and as a result of the contracting officer’s instructions, installed an additional 1283 manual balancing dampers, at an additional cost of \$297,608.¹⁸¹⁴

Mortenson appealed to the ASBCA, which concluded that Mortenson was not entitled to an equitable adjustment.¹⁸¹⁵ On appeal, the CAFC affirmed the board’s decision. For the court, the “crux” of the appeal was whether the language of the specifications “provided at points” meant “provided at all points” or “provided at various points.”¹⁸¹⁶ The court looked to the plain language of the contract, and concluded the government’s interpretation of the contract was the only interpretation that could “effectuate its spirit and purpose giving reasonable meaning to all parts of the contract.”¹⁸¹⁷ The court specifically noted the language of the specifications “is not conditional in any way, and it makes no exceptions or distinctions for ductwork located in any particular section of the integrated building system.”¹⁸¹⁸ The court then characterized appellant’s argument that the drawings should dictate the requirements of the contract as “simply wrong,” and affirmed the board’s decision in its entirety.¹⁸¹⁹

Although the CAFC spoke with a united voice in *Mortenson*, such was not the case in *Turner Construction Co., Inc. v. United States (Turner)*.¹⁸²⁰ In *Turner*, the Veterans Administration (VA) awarded Turner a contract for the construction of

¹⁸⁰⁵ *Id.* at 40.

¹⁸⁰⁶ 363 F.3d 1203 (Fed. Cir. 2004).

¹⁸⁰⁷ *Id.* at 1204.

¹⁸⁰⁸ *Id.*

¹⁸⁰⁹ *Id.*

¹⁸¹⁰ *Id.* at 1204-05.

¹⁸¹¹ *Id.* at 1205.

¹⁸¹² *Id.*

¹⁸¹³ *Id.*

¹⁸¹⁴ *Id.*

¹⁸¹⁵ *Id.* at 1204 (citing *M.A. Mortenson Co.*, ASBCA No. 53431, 03-1 BCA ¶ 32,078, at 158,527).

¹⁸¹⁶ *Id.* at 1205.

¹⁸¹⁷ *Id.* at 1206.

¹⁸¹⁸ *Id.*

¹⁸¹⁹ *Id.* at 1206-07.

¹⁸²⁰ 367 F.3d 1319 (Fed. Cir. 2004).

an addition to a VA hospital.¹⁸²¹ Among other requirements, the contract required Turner to “[f]urnish and install electrical wiring, systems, equipment and accessories in accordance with the specifications and drawings” and required that the work “comply with the applicable electrical codes.”¹⁸²² Based on this language, the government ordered Turner to install fire-rated electrical feeders and panel boards in the operating room area and on the third floor of the addition. Although the specifications and drawings clearly did not require Turner to provide this work, the VA concluded the state’s electrical code mandated the equipment be in place.¹⁸²³ Turner installed the required equipment and submitted a claim for the work, which the VA denied.¹⁸²⁴

Into Every Life a Little Rain Must Fall

In *Fraser Construction Co. v. United States*,¹⁸²⁵ the Army COE contracted with Fraser to excavate material from the bottom of a shallow reservoir. The project was scheduled to begin on 17 May 1993 and be completed by 1 September 1993.¹⁸²⁶ To perform the work, Fraser dug a trench and dike to divert stream water away from the reservoir. As built, the trench and dike was capable of withstanding 800 cubic feet of water per second (cfs). However, according to a U.S. Geological Survey, a water flow of more than 800 cfs could be expected approximately 2.4 times during an average summer.¹⁸²⁷ Needless to say, 1993 witnessed a wet summer, and the trench and dike was repeatedly damaged by overflow.¹⁸²⁸ Fraser asked the contracting officer for several time extensions, but was only given a total of only thirty additional days.¹⁸²⁹ Refusing to grant additional delay days, the government reasoned that Fraser should have anticipated that the trench and dike were inadequate for the conditions encountered.¹⁸³⁰

Upon completion of the project, Fraser submitted a claim to the contracting officer under a constructive acceleration theory, seeking a total \$659,760 above the contract amount.¹⁸³¹ Upon denial of the claim, Fraser filed an action before the COFC, seeking costs associated with the alleged constructive acceleration.¹⁸³²

At trial, the COFC found that Fraser had not established the basis for a constructive acceleration claim. Specifically, the court concluded it was foreseeable that Fraser’s dike would be overtopped several times during the summer of 1993 and that Fraser assumed this risk. For the court, the peak flows were foreseeable, and were “the genesis of most, if not all, of [Fraser’s] difficulties.”¹⁸³³

In a less than resounding endorsement of the COFC, the CAFC upheld the COFC’s holding, concluded the COFC’s holding did not amount to “clear error.”¹⁸³⁴ Specifically, the court agreed with the COFC that the overtopping of Fraser’s dikes was foreseeable, and that time would be lost in repairing the dikes and dealing with the inundation of flood water. Equally important, the court held the COFC “did not commit clear error in finding that Fraser failed to provide that there was

¹⁸²¹ *Id.* at 1321.

¹⁸²² *Id.*

¹⁸²³ *Id.* at 1321-22.

¹⁸²⁴ *Id.* at 1320.

¹⁸²⁵ 2004 U.S. App. LEXIS 20338 (Fed. Cir. 2004).

¹⁸²⁶ *Id.* at *2.

¹⁸²⁷ *Id.* at *2-3.

¹⁸²⁸ *Id.* at *3-4.

¹⁸²⁹ *Id.* at *12-13.

¹⁸³⁰ *Id.* at *13.

¹⁸³¹ *Id.* at *12-13.

A claim of acceleration is a claim for the increased costs that result when the government requires the contractor to complete its performance in less time than was permitted under the contract. The claim arises under the changes clause of a contract; the basis for the claim is that the government has modified the contract by shortening the time for performance, either expressly (in the case of actual acceleration) or implicitly through its conduct (in the case of constructive acceleration), and that under the changes clause the government is required to compensate the contractor for the additional costs incurred in effecting the change.

Id. at *15-16 (citing JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS, 450-51 (3d ed. 1995)).

¹⁸³² *Id.* at *13-14.

¹⁸³³ *Id.* at *20 (citing *Fraser Constr. Co. v. United States*, 57 Fed. Cl. 56, 60 (2003)).

¹⁸³⁴ *Id.* at *35.

any period for which it was entitled to an extension and its request for one was denied.”¹⁸³⁵

Environmental Concerns a Poor Pretext for Nonperformance

In *Empire Energy Management Systems, Inc. v. Roche*,¹⁸³⁶ the CAFC visited the issue of contractor delay, and a divided court concluded a contractor’s environmental concerns were no excuse for delayed performance.¹⁸³⁷ The case involved a contract between the Air Force and Empire to provide cogeneration of electricity, chilled and hot water, and steam to MacDill Air Force Base. To provide the utilities, the contract required Empire to build and operate an electric plant on a site leased by the Air Force. Complicating matters, the proposed plant was located adjacent to a site containing an oil-water separator/discharger which was subject to EPA regulation.¹⁸³⁸

During a work stoppage unrelated to the dispute, the Environmental Protection Agency (EPA) directed the Air Force to conduct a facility investigation pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA).¹⁸³⁹ Shortly after Empire resumed work, Empire reported it discovered oil-based contaminants and requested a stop work order from the Air Force. The Air Force hired a contractor to investigate, who reported the site was in compliance with all environmental laws.¹⁸⁴⁰ Shortly thereafter, the EPA informed the Air Force it did not object to the proposed project, after which the Air Force told Empire to continue work. However, three months later the EPA issued an ambiguous letter, suggesting the cogeneration site required further investigation. During this time-frame, Empire repeatedly refused Air Force demands it continue work, citing alleged environmental concerns. In response, the Air Force issues a cure notice, followed by a termination for default.¹⁸⁴¹

On appeal, the ASBCA determined that the environmental problems entitled Empire to fifty-three days for excusable delays. However, the board also found that Empire would have needed a total of 154 days to complete the project. Accordingly, the board upheld the termination for default.¹⁸⁴²

The CAFC majority adopted the board’s holding. The court reasoned “the mere assertion of a colorable claim by the contractor (later found to be meritless) that its actions would violate some regulatory requirement does not excuse performance.”¹⁸⁴³ Judge Mayer dissented from the majority’s holding. Judge Mayer concluded that Empire’s concerns were reasonable because it could have been held liable for violations of federal environmental law, despite the Air Force’s assurances. For Judge Mayer, “prudence prohibited Empire from resuming work at least until it received notification that the project area was not contaminated.”¹⁸⁴⁴

Major James Dorn.

Bonds, Sureties, and Insurance

Equitable Subrogation—Wasn’t This Issue Decided Last Year?

Last year the CAFC affirmed an ASBCA decision holding the board had no jurisdiction under the CDA¹⁸⁴⁵ to hear a

¹⁸³⁵ *Id.* at *28.

¹⁸³⁶ 362 F.3d 1343 (Fed. Cir. 2004).

¹⁸³⁷ *Id.* at 1357-58.

¹⁸³⁸ *Id.* at 1345-46.

¹⁸³⁹ *Id.* at 1346-47 (referencing 42 U.S.C.S. §§ 6901-87 (LEXIS 2004)).

¹⁸⁴⁰ *Id.* at 1347.

¹⁸⁴¹ *Id.* at 1347-48.

¹⁸⁴² *Id.* at 1349 (citing *Empire Energy Management Systems, Inc.*, ASBCA No. 46741, 03-1 BCA ¶ 32,079, at 158,552).

¹⁸⁴³ *Id.* at 1353.

¹⁸⁴⁴ *Id.* at 1358. See also *Bender GmbH v. Brownlee*, 106 Fed. Appx. 728 (Fed. Cir. 2004) (per curiam) (finding repeated delays extending over two years, coupled with appellant’s inability to provide evidence it could meet a completion deadline, justified default termination); *PCL Constr. Serv., Inc., v. United States*, 96 Fed. Appx. 672 (Fed. Cir. 2004) (determining “not clearly erroneous” the COFC’s finding that appellant could not prove a causal relationship between contract changes and alleged cost increases); *AST Anlagen-Und Sanierungstechnik GmbH*, ASBCA 39576, 50802, 04-1 BCA ¶ 32,558 (Aug. 11, 2004) (concluding the government did not carry its burden of proving a valid ground to terminate appellant for default). For further discussion of the *Bender*, *PCL Constr.*, and *AST* decisions, see *supra* section titled Terminations for Default.

¹⁸⁴⁵ 41 U.S.C.S. § 605(a).

surety's equitable subrogation claim.¹⁸⁴⁶ In *Fireman's Fund Insurance Co. v. England (Fireman's Fund)*,¹⁸⁴⁷ the CAFC opined that while it was "long established that a surety can sue the Government in the Court of Federal Claims (COFC) under the non-contractual doctrine of equitable subrogation"¹⁸⁴⁸ pursuant to the Tucker Act,¹⁸⁴⁹ the CDA (and thus the ASBCA's jurisdiction) only covers "all claims by a contractor against the government relating to a contract."¹⁸⁵⁰ Because there is no contract between the surety and the government prior to the parties signing a takeover agreement, the surety cannot be a "contractor" under the CDA. Therefore a board has no jurisdiction over a surety's pre-takeover claims.¹⁸⁵¹ Lest there be any ambiguity, two recent decisions make it clear that sureties seeking recovery against the government under an equitable subrogation theory should avoid the boards and take their cases to the COFC.

In *United Pacific Insurance Company v. Roche*,¹⁸⁵² United Pacific appealed an ASBCA decision holding the board lacked jurisdiction to resolve portions of the case involving the parties' conduct prior to signing the takeover agreement.¹⁸⁵³ Following the CAFC's recent holding in *Fireman's Fund*,¹⁸⁵⁴ that no CDA jurisdiction exists over a surety's pre-takeover claims, the board concluded it was "shorn of jurisdiction over the surety's equitable subrogation claims," and dismissed that portion of the case.¹⁸⁵⁵ Upon appeal to the CAFC, United Pacific argued, *inter alia*, it had a "contractual right" to assert its claim against the government because the takeover agreement reserved for United Pacific "all prior rights including but not limited to the Government's overpayment to" the prime contractor.¹⁸⁵⁶ Unimpressed, the court observed the CDA defines the board's jurisdiction, and the "[p]arties cannot, by agreement, confer upon a tribunal jurisdiction that it otherwise would not have."¹⁸⁵⁷

In *United States Fire Insurance Company v. United States*,¹⁸⁵⁸ the Air Force sought to dismiss a surety's complaint before the COFC, arguing the COFC lacked jurisdiction under the Tucker Act¹⁸⁵⁹ to entertain an equitable subrogation claim. The Air Force argued the Supreme Court's 1999 decision in *Department of the Army v. Blue Fox Inc. (Blue Fox)*¹⁸⁶⁰ invalidated equitable subrogation as a basis for establishing jurisdiction under the Tucker Act.¹⁸⁶¹ Upon examination, the COFC observed that the CAFC had already examined the validity of the equitable subrogation doctrine in the light of the *Blue Fox* precedent,¹⁸⁶² and concluded that *Blue Fox* "did not upset the long-standing rule that such a suit [based on subrogation] is not barred by the doctrine of sovereign immunity."¹⁸⁶³ Needless to say, the COFC denied the Air Force's motion to dismiss.¹⁸⁶⁴

¹⁸⁴⁶ The doctrine of equitable subrogation is a non-contractual doctrine of equity that entitles a surety that "takes over contract performance" or "finances completion of the defaulted contract" to "succeed to the contractual rights of a contractor against the government." See *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001). See also *2003 Year in Review*, *supra* note 29, at 129.

¹⁸⁴⁷ 313 F.3d 1344 (Fed. Cir. 2002).

¹⁸⁴⁸ *Id.* at 1351 (citing *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985); *Transamerica v. United States*, 989 F.2d 1188 (Fed. Cir. 1993)).

¹⁸⁴⁹ 28 U.S.C.S. § 1491(a)(1). The Tucker Act confers jurisdiction on the COFC over claims against the federal government founded either upon the Constitution, any act of Congress, any regulation of an executive department, or on any express or implied contract with the federal government. *Id.*

¹⁸⁵⁰ *Id.* (quoting 41 U.S.C.S. § 605(a)).

¹⁸⁵¹ *Id.* at 1351.

¹⁸⁵² 280 F.3d 1352 (Fed. Cir. 2004).

¹⁸⁵³ See *United Pac. Ins. Co.*, No. 53051, 2003 ASBCA LEXIS 57 (June 4, 2003). See also *2003 Year in Review*, *supra* note 29, at 130.

¹⁸⁵⁴ 313 F.3d 1344 (Fed. Cir. 2002).

¹⁸⁵⁵ *United Pac. Ins.*, 2003 ASBCA LEXIS 57, at *83.

¹⁸⁵⁶ *United Pac. Ins.*, 280 F.3d at 1356.

¹⁸⁵⁷ *Id.*

¹⁸⁵⁸ 61 Fed. Cl. 494 (2004).

¹⁸⁵⁹ 28 U.S.C.S. § 1491(a)(1) (LEXIS 2004).

¹⁸⁶⁰ 525 U.S. 255 (1999).

¹⁸⁶¹ *Fire Ins.*, 61 Fed. Cl. at 499.

¹⁸⁶² 234 F.3d 1367 (Fed. Cir. 2001).

¹⁸⁶³ *Fire Ins.*, 61 Fed. Cl. at 500 (citing *Ins. Co. of the West*, 243 F.3d at 1369).

¹⁸⁶⁴ *Id.* at 501.

Form Over Substance

In *Hawaiian Dredging Construction Company v. United States (Hawaiian Dredging)*,¹⁸⁶⁵ the COFC held a contracting officer did not have a reasonable basis for rejecting appellant's bids where the bid bonds were accompanied by computer generated powers of attorney with mechanically reproduced signatures. The contracting officer based his decision to reject the bid largely on the GAO's decision in *All Seasons Construction, Inc.*,¹⁸⁶⁶ which states a photocopied power of attorney is only valid if accompanied by an original certification "attesting to its authenticity and continuing validity."¹⁸⁶⁷ The COFC, though highly critical of the GAO's decision, stopped short of calling the decision unreasonable. The court did, however, conclude the contracting officer's application of the GAO's decision was unreasonable in this case because the power of attorney documents unequivocally established the authority of the person who signed the bonds, as well as the surety's intent to be bound by the documents.¹⁸⁶⁸

On the heels of the *Hawaiian Dredging* decision, the FAR Councils proposed a FAR amendment that would have made the case moot. The proposed amendment establishes that a copy of an original power of attorney, when submitted in support of a bid bond, is sufficient evidence of the surety's authority to be bound. Under the proposed rule, the authenticity and enforceability of the power of attorney will be treated as a matter of responsibility at bid opening.¹⁸⁶⁹

Trust Me, I've Got You Covered—Not!

Two recent cases stand for the proposition that the government is entitled to clear evidence a contractor is fully bonded. In *Airport Industrial Park, Inc. d/b/a P.E.C. Contracting Engineers v. United States*,¹⁸⁷⁰ P.E.C.'s bond surety became insolvent after P.E.C. completed approximately fifty percent of a construction project. The government ordered P.E.C. to secure replacement payment and performance bonds.¹⁸⁷¹ P.E.C. obtained a replacement for its performance bond, but failed to secure a replacement payment bond. As a result, the government terminated the contract for default.¹⁸⁷² On appeal before the COFC, P.E.C. argued that the agreement "clearly contemplates and covers both the performance and the payment bond."¹⁸⁷³ Upon examination, the COFC was unimpressed. The court noted that the Miller Act¹⁸⁷⁴ requires that contractors furnish the government a payment bond and a performance bond, and that under the act, the bonds are "distinct and separate undertakings by the surety."¹⁸⁷⁵ The court found that the reinsurance agreement's language applied only to the performance bond. Thus the termination for default was justified.¹⁸⁷⁶

In *Horizon Shipbuilding Inc.*,¹⁸⁷⁷ Horizon protested the Army COE rejection of its proposal for an inland river towboat. The RFP required each offeror to provide a bid guarantee, or in the alternative, receive progress payments for contract work, or finance the contract independently and wait until delivery and acceptance to receive complete payment.¹⁸⁷⁸ Horizon chose to submit a bid bond in the form of a standard form (SF) 24 Bid Bond.¹⁸⁷⁹ The signature of Robert Joe

¹⁸⁶⁵ 59 Fed. Cl. 305 (2004).

¹⁸⁶⁶ Comp. Gen. B-291166.2, Dec. 6, 2002, 2002 CPD ¶ 212.

¹⁸⁶⁷ *Id.* at 3.

¹⁸⁶⁸ *Hawaiian Dredging*, 59 Fed. Cl. at 314-15. The court noted that unlike the document in *All Seasons*, the powers of attorney submitted by plaintiff clearly stated its intent to be bound by facsimile signatures on powers of attorney or any certificates relating to the power of attorneys. This affirmation, combined with a facially valid appointment and original corporate seal, established to the courts satisfaction the surety's unequivocal intent to be bound. *Id.* at 315.

¹⁸⁶⁹ Federal Acquisition Regulation; Powers of Attorney for Bid Bonds; Proposed Rule, 69 Fed. Reg. 51,936 (proposed Aug. 23, 2004) (to be codified at 48 C.F.R. pt. 28).

¹⁸⁷⁰ 59 Fed. Cl. 332 (2004).

¹⁸⁷¹ *Id.* at 336. Citing black-letter law, the court observed "[t]he performance bond must designate the United States as the obligee and it is for the exclusive protection of the government The payment bond furnished under the Act is for the protection of laborers and materialmen, and not the United States." *Id.* (citing 8 JOHN COSGROVE MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS § 49A.70 (2003)).

¹⁸⁷² *Id.* at 332.

¹⁸⁷³ *Id.* at 333.

¹⁸⁷⁴ See 40 U.S.C.S. §§ 3131-3134 (LEXIS 2004).

¹⁸⁷⁵ *P.E.C.*, 59 Fed.Cl. at 336 (citing 8 JOHN COSGROVE MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS § 49A.60 (2003)).

¹⁸⁷⁶ *Id.* at 338.

¹⁸⁷⁷ Comp. Gen. B-292992, Dec. 8, 2003, 2003 CPD ¶ 223.

¹⁸⁷⁸ *Id.* at 1.

¹⁸⁷⁹ See FAR, *supra* note 20, at 53.301-24 (Standard Form 24, Bid Bond).

Hanson appeared on the form's individual surety line, however, horizon did not include an SF 28, Affidavit of Individual Surety,¹⁸⁸⁰ but instead included a document captioned "Power of Attorney."¹⁸⁸¹ Upon evaluation of the proposals, the COE decided to make award without discussions. Although Horizon's proposal was the lowest priced, the COE rejected Horizon's proposal as nonresponsive because Horizon had failed to furnish a valid bid bond.¹⁸⁸² Horizon protested the award to the GAO, which denied Horizon's protest. The GAO observed that the surety's identity was unclear from the face of the bond. If the surety was Global Bonding, it could not act as a corporate surety because it was not on the Department of Treasury's list of approved sureties.¹⁸⁸³ Alternatively, if Robert Joe Hanson acted in his capacity as an individual surety, Horizon failed to submit an SF 28 with its bid guarantee as the RFP required.¹⁸⁸⁴

Major James Dorn.

Deployment and Contingency Contracting

Continuing Update of Special Emergency Procurement Authorities

As reported in prior *Years in Review*,¹⁸⁸⁵ the government invoked a number of special procurement authorities in response to the 11 September 2001 terrorist attacks (9-11 attacks). From a deployment contracting perspective, at the forefront of these special authorities are the expanded simplified acquisition thresholds (SAT) allowing the use of simplified acquisition procedures beyond the normal \$100,000 limit. These expanded SATs are usually available when there is a declared contingency operation.

For a better understanding of how the expanded authorities have evolved in response to the 9-11 attacks, through Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), a recap is necessary. In response to the 9-11 attacks, President Bush declared a national emergency on 14 September 2001 through issuance of Proclamation 7463.¹⁸⁸⁶ He also issued Executive Order (EO) 13,223, which authorized the service secretaries to order any unit or member of the Ready Reserve of the Armed Forces to active duty for not more than twenty-four months, and other stop loss authorities for active and reserve forces.¹⁸⁸⁷ President Bush continued the original declaration of a national emergency for three additional years by issuing notices dated 12 September 2002,¹⁸⁸⁸ 10 September 2003,¹⁸⁸⁹ and 10 September 2004.¹⁸⁹⁰

As noted in the *2003 Year in Review*,¹⁸⁹¹ President Bush's yearly declarations of a continuing national emergency and EO 13,223 have continued the status of OEF and OIF as "contingency operations" as defined by 10 U.S.C. section 101(a)(13)(B).¹⁸⁹² Until this last year, the SAT defined at FAR section 2.101 increased only from \$100,000 to \$200,000 for

¹⁸⁸⁰ *Id.* at 53.301-28 (Affidavit of Individual Surety).

¹⁸⁸¹ *Horizon*, 2003 CPD ¶ 223, at 2.

¹⁸⁸² *Id.* at 3.

¹⁸⁸³ See FAR, *supra* note 20, at 28.202(a)(1) (recognizing "[c]orporate sureties offered for bonds furnished with contracts . . . must appear on the list contained in the Department of Treasury Circular 570 . . .").

¹⁸⁸⁴ *Horizon*, 2003 CPD ¶ 223, at 3-4. Other decisions this fiscal year involving bonds, sureties, and insurance include *Am. Ins. Co. v. United States*, 62 Fed. Cl. 151 (2004) (holding that where the surety assumed control over a struggling construction contract but did not enter into a formal takeover agreement with the government, the surety cannot recover for an alleged improper release of progress payments to the contractor) and *NVT Tech., Inc.*, 2003 U.S. Comp. Gen. LEXIS 174 (Oct. 20, 2003) (bonding requirement on service contract reasonable where the contractor was responsible for major research laboratories and critical care centers). For further discussion of the *NVT Tech.* case, see *supra* section titled Competition.

¹⁸⁸⁵ See *2003 Year in Review*, *supra* note 29, at 137; *2002 Year in Review*, *supra* note 300, at 159; *2001 Year in Review*, *supra* note 335, at 98-99.

¹⁸⁸⁶ Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

¹⁸⁸⁷ Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001). Executive Order 13,223 was subsequently amended by Executive Order 13,253, 67 Fed. Reg. 2791 (Jan. 18, 2002) to grant the Secretary of Transportation similar authority to call up members of the Coast Guard to active duty.

¹⁸⁸⁸ 67 Fed. Reg. 58,317 (Sept. 12, 2002).

¹⁸⁸⁹ 68 Fed. Reg. 53,665 (Sept. 12, 2003).

¹⁸⁹⁰ 69 Fed. Reg. 55,313 (Sept. 13, 2004).

¹⁸⁹¹ *2003 Year in Review*, *supra* note 29, at 137.

¹⁸⁹² 10 U.S.C.S. § 101(a)(13)(B) (LEXIS 2004) states:

The term "contingency operation" means a military operation that-

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304,

acquisitions using the procedures of FAR part 13 in support of these contingency operations in Iraq and Afghanistan.¹⁸⁹³ However, in section 1443 of the Services Acquisition Reform Act of 2003 (included as title XIV in the National Defense Authorization Act for FY 2004), Congress expanded the SAT for purchases supporting a contingency operation or “to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack [NBCR attack] against the United States” to \$250,000 inside the United States and \$500,000 outside the United States.¹⁸⁹⁴ Entitled “Special Emergency Procurement Authority” (SEPA), section 1443 also increased the micropurchase threshold from \$2500 to \$15,000 if the purchase similarly supports contingency operations or defense against or recovery from NBCR attack.¹⁸⁹⁵ However, the expanded micropurchase threshold makes no distinction between purchases inside or outside the United States.¹⁸⁹⁶

Implementation of the Special Emergency Procurement Authority

In February 2004, the FAR Councils issued an interim rule amending the FAR to implement the SEPA.¹⁸⁹⁷ Accordingly, interim rule amended FAR sections 2.101 and 13.003 to provide for the expanded SAP of \$250,000 for purchases inside the United States and \$500,000 for purchases outside the United States.¹⁸⁹⁸ Additionally, the interim rule amended FAR sections 2.101 and 13.201 to provide for the increased micro-purchase threshold of \$15,000 when there is a “clear and direct relationship to the support of a contingency operation or the defense against or recovery from an [NBCR] attack.”¹⁸⁹⁹

Because the SEPA and FAR section 2.101 require the agency head to determine the purchase supports a contingency operation or is in defense against or recovery from an NBCR attack, Mr. Claude Bolton, the Assistant Secretary of the Army (Acquisition, Logistics and Technology), issued a memorandum dated 24 March 2004 delegating the determination authority to each Army Head of Contracting Activity (HCA).¹⁹⁰⁰ Likewise, Mr. Charlie E. Williams, Jr., the Air Force Deputy Assistant Secretary for Contracting and Assistant Secretary for Acquisition, delegated the determination authority to the Air Force HCAs by memorandum dated 5 March 2004.¹⁹⁰¹

The Army Contracting Agency (ACA) HCA further delegated the Army SEPA delegation to each ACA Principal Assistant Responsible for Contracting (PARC) with further re-delegation authority “to a level no lower than one level above the contracting officer.”¹⁹⁰² However, the Army and ACA SEPA delegations share a limitation that may prove to hinder efficient use of the SEPA expansion, especially for purchases actually made in the contingency operation theater. Echoing similar language from the Army SEPA delegation, the ACA SEPA delegation requires that “[e]ach determination made under this authority shall be made on an individual basis and the written determination with its underlying rationale shall be placed in all contract files of awards made under the individual determination.”¹⁹⁰³ Presumably, a field ordering officer in Iraq

12305, or 12406 of this title, chapter 15 of this title [10 USCS §§ 331-335.], or any other provision of law during a war or during a national emergency declared by the President or Congress.

Id.

¹⁸⁹³ See, e.g., Memorandum, Deputy Assistant Secretary of the Air Force (Contracting) and Assistant Secretary of the Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Emergency Acquisitions in Direct Support of U.S. or Allied Forces Deployed in Military Contingency Operations during Operation Iraqi Freedom (21 Mar. 2003).

¹⁸⁹⁴ Pub. L. No. 108-136, tit. XIV, § 1443, 117 Stat. 1392, 1675 (2003).

¹⁸⁹⁵ *Id.*

¹⁸⁹⁶ For discussion of the SEPA expansion of the SAT from \$5 million to \$10 million under the commercial item test program, see *supra* section II.F. Simplified Acquisitions.

¹⁸⁹⁷ Federal Acquisition Regulation; Special Emergency Procurement Authority, 69 Fed. Reg. 8312 (Feb. 23, 2004).

¹⁸⁹⁸ *Id.* at 8313.

¹⁸⁹⁹ *Id.* at 8314.

¹⁹⁰⁰ Memorandum, Assistant Secretary of the Army (Acquisition, Logistics and Technology), to Heads of Contracting Activities, et al., subject: Delegation of Special Emergency Procurement Authority in Support of a Contingency Operation or to Facilitate Defense Against or Recovery from Nuclear, Biological, Chemical, or Radiological Attack (24 Mar. 2004).

¹⁹⁰¹ Memorandum, Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), to ALMAJCOM/FOA/DRU (Contracting), subject: Delegation of Authority for Acquisition of Supplies or Services for Defense Against or Recovery from Nuclear, Biological, Chemical or Radiological Attack (FAC 2001-20) (5 Mar. 2004) [hereinafter Air Force SEPA Delegation].

¹⁹⁰² Memorandum, Head of Contracting Activity Army Contracting Agency, to U.S. Army Contracting Agency Principal Assistants Responsible for Contracting, et al., subject: Delegation of Special Emergency Procurement Authority in Support of a Contingency Operation or to Facilitate Defense Against or Recovery from Nuclear, Biological, Chemical, or Radiological Attack (23 Apr. 2004).

¹⁹⁰³ *Id.*

making an SF 44 micro-purchase¹⁹⁰⁴ above \$2500 but under the SEPA increased micro-purchase threshold of \$15,000 would be required to seek an individual determination at one level above the contracting officer. If adhered to in practice, this limitation would surely defeat the purpose for simplified acquisition procedures to “promote efficiency and economy in contracting; and [a]void unnecessary burdens for agencies and contractors.”¹⁹⁰⁵ The Air Force SEPA delegation does not require an individual determination.¹⁹⁰⁶

“Don’t be Greedy—You Already Have all that You Could Possibly Want.” DOD Emergency Procurement Flexibilities

By memorandum dated 20 May 2004, Ms. Deidre Lee, the Director of Defense Procurement and Acquisition Policy (DPAP), summarized “[e]xisting laws and regulations [that] provide considerable flexibility for acquisitions that support urgent situations and national security requirements.”¹⁹⁰⁷ Ms. Lee highlighted the SEPA simplified acquisition and micro-purchase expansion discussed above, the combined synopsis and solicitation procedure for commercial items acquisition, and the unusual and compelling urgency exception to the Competition in Contracting Act.¹⁹⁰⁸ An attached matrix to the DOD memorandum lists these highlighted emergency procurement flexibilities, as well as numerous others.¹⁹⁰⁹ Ms. Lee’s memorandum also lists service specific acquisition flexibilities documents with links accessible through the electronic version of her memorandum available on the DPAP website.¹⁹¹⁰

Acquisition Flexibility a Little too Loose for the Coalitional Provisional Authority (CPA)—Unauthorized Commitments (UACs) Reigned In

By memorandum dated 14 April 2004, the CPA HCA, Brigadier General Stephen Seay, warned CPA personnel that “recurring actions concerning the unauthorized commitment¹⁹¹¹ of U.S. appropriated funds and Iraqi funds have become an issue.”¹⁹¹² General Seay reminded CPA personnel that a UAC “is an agreement that is not binding on the Government because the individual who made the agreement lacked the authority to enter into the agreement on behalf of the Government.”¹⁹¹³

Air Force Contingency Contracting Officers (CCO) Working Together Electronically

The Air Force Deputy Assistant Secretary for Contracting and Assistant Secretary for Acquisition, Mr. Charlie E. Williams, Jr., established a Contingency Contracting Community of Practice (CoP) through Contracting Policy Memo 04-C-06 dated 1 June 2004.¹⁹¹⁴ The Contingency Contracting CoP is intended “to facilitate and foster knowledge sharing and learning across organizational and geographic boundaries” by using software collaboration technology.¹⁹¹⁵ Mr. Williams’ staff developed the Contingency Contracting CoP to provide a centralized electronic location for contingency contracting resources and to link together CCOs to share individual experiences and expertise.¹⁹¹⁶ An attachment to the memo also provides instructions for joining the Contingency Contracting CoP through the Defense Acquisition University Acquisition Community Connection web portal at http://acc.dau.mil/simplify/ev_en.php.

¹⁹⁰⁴ See FAR, *supra* note 20, at 13.306.

¹⁹⁰⁵ *Id.* at 13.002(c) and (d).

¹⁹⁰⁶ See Air Force SEPA Delegation, *supra* note 1901.

¹⁹⁰⁷ Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies et al., subject: Emergency Procurement Flexibilities (May 20, 2004), available at <http://www.acq.osd.mil/dpap/general/newsandevents.htm>.

¹⁹⁰⁸ *Id.*

¹⁹⁰⁹ *Id.*

¹⁹¹⁰ *Id.* The DPAP website is available at <http://www.acq.osd.mil/dpap>.

¹⁹¹¹ See FAR, *supra* note 20, at 1.602-3.

¹⁹¹² Memorandum, Head of Contracting Activity—CPA, to Personnel Assigned to Coalition Provision Authority, subject: Unauthorized Commitments (14 Apr. 2004).

¹⁹¹³ *Id.*; see also FAR, *supra* note 20, at 1.602-3.

¹⁹¹⁴ Memorandum, Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), to ALMAJCOM/FOA/DRU (CONTRACTING), subject: Contingency Contracting Community of Practice (CoP) (1 June 2004).

¹⁹¹⁵ *Id.*

¹⁹¹⁶ *Id.*

Strengthened Oversight Needed for Logistics Support Contracts such as LOGCAP

On 19 July 2004, the GAO issued a report calling for improved planning and training for strengthened oversight of the logistics support contracts used during contingency operations.¹⁹¹⁷ The GAO focused its efforts “on four contracts: (1) the Army Logistics Civil Augmentation Program (LOGCAP) Contract; (2) the Air Force Contract Augmentation Program (AFCAP) Contract; (3) the U.S. Army, Europe, Balkans Support Contract (BSC); and (4) the Navy Construction Capabilities (CONCAP) Contract . . . [with] [t]he Army’s LOGCAP contract [as] . . . by far the largest of these contracts.”¹⁹¹⁸

Generally, the GAO found that effective planning for contractor contingency support required collaboration “with the contractor to develop comprehensive and clear statements of work in the early stages of planning.”¹⁹¹⁹ Although the GAO found that the AFCAP, CONCAP, BSC, and some work under the LOGCAP had used more-effective planning techniques, the Army Central Command had not used proper LOGCAP planning guidance for support of Operation Iraqi Freedom.¹⁹²⁰ As a result, task orders were frequently revised and untimely (i.e., late) planning led to higher costs for hectic last-minute support. Further, late planning would not allow sufficient time for logistics planners to consider less costly alternatives to LOGCAP.¹⁹²¹

The GAO also found that “contract oversight processes were generally good but not always properly implemented.”¹⁹²² Significant portions of LOGCAP contract oversight were delegated to the Defense Contract Management Agency (DCMA) that generally resulted in cost savings.¹⁹²³ However, the GAO found that the DCMA had not appointed a contracting officer’s technical representative (COTR) for all individual functional areas (e.g., food service and maintenance). Accordingly, appointing a COTR “for each functional area at each division and camp would improve government oversight.”¹⁹²⁴

Regarding the LOGCAP contractor, Kellogg Brown and Root Services (KBR), the GAO reported DCMA’s concerns that contractor cost reports are inadequate, contractually required task order schedules are occasionally late and not met, and there are “inadequate controls over purchasing and subcontractors.”¹⁹²⁵ Accordingly, “LOGCAP contract management is made more difficult by recurring contractor problems.”¹⁹²⁶

The GAO also noted that the DOD had not provided sufficient personnel to manage the LOGCAP, and available personnel lacked adequate training to effectively use and monitor LOGCAP (and AFCAP) services.¹⁹²⁷

Lieutenant Colonel Karl Kuhn.

¹⁹¹⁷ GOV. ACCT. OFF., REP. NO. GAO-04-854, *Military Operations: DOD’s Extensive Use of Logistics Support Contracts Requires Strengthened Oversight* (July 2004).

¹⁹¹⁸ *Id.* at 1.

¹⁹¹⁹ *Id.* at 15.

¹⁹²⁰ *See id.* at 14.

¹⁹²¹ *Id.* at 20.

¹⁹²² *Id.*

¹⁹²³ *Id.*

¹⁹²⁴ *Id.* at 25.

¹⁹²⁵ *Id.*

¹⁹²⁶ *Id.*

¹⁹²⁷ *Id.* at 42.

Contractors Accompanying the Forces

Efforts to Improve Contracting for Contractors Who Accompany Deployed Forces

Contractors who accompany the military forces made headlines in 2004.¹⁹²⁸ In addition to the news coverage regarding their achievements and sacrifices, the DOD and the Army addressed contractor issues by introducing standardized contract provisions designed to help acquire these services in a consistent manner.

On 23 March 2004, the DOD proposed a rule to include a new contract clause when contractor employees accompany the forces on contingency, humanitarian, peacekeeping or combat operations.¹⁹²⁹ This proposed clause requires contractors to acknowledge the inherent danger in the operation;¹⁹³⁰ specifies that contractors are responsible for providing support to its employees;¹⁹³¹ clarifies that contractor employees are required to comply with all host nation, U.S., and international laws;¹⁹³² details that contractor employees have to abide by the combatant commander's orders and policies;¹⁹³³ requires contractors to provide current lists to the government identifying where their employees are located and have a plan for replacing deployed personnel;¹⁹³⁴ states that contractor personnel cannot wear military uniforms and carry weapons unless specifically authorized;¹⁹³⁵ addresses next of kin notification requirements,¹⁹³⁶ contractor personnel insurance issues¹⁹³⁷ and evacuation matters;¹⁹³⁸ identifies processing and departures locations;¹⁹³⁹ covers the purchase of scarce commodities,¹⁹⁴⁰ and, requires that the substance of this contract provision be included in all subcontracts.¹⁹⁴¹

Significantly, the DOD clause allows the "ranking military commander in the immediate area of operations [to] direct the . . . contractor[s] employee[s] to undertake any action [except engaging in armed conflict]" when the forces are located outside the continental United States, the contracting officer is not available, and enemy action, terrorist activity or a natural disaster requires emergency action.¹⁹⁴² The contract provision also permits a contractor to submit a request for equitable adjustment to cover additional costs.¹⁹⁴³

The clause also specifies that the contractor employee, when traveling to an area where the force is deployed, must comply with the Combatant Commander's instructions regarding all transportation, logistical and support requirements.¹⁹⁴⁴ In addition, the clause clarifies that a Combatant Commander's order trumps the contract's terms, if they conflict.¹⁹⁴⁵ Lastly, the clause permits a contractor to submit a request for an equitable adjustment if complying with the Combatant Commander's orders causes additional work or loss of property.¹⁹⁴⁶

There is one significant shortcoming in DOD's proposed rule: it does not provide a definition of "support." For this reason, it is possible that industry and the military may disagree on who is responsible for providing force protection to the

¹⁹²⁸ P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B-3; James Cox, *Last-minute Decisions in Iraq Confuse Contractors*, USA TODAY, June 29, 2004, at 1B; Samantha M. Shapiro, *Iraq, Outsourced*, N.Y. TIMES, Dec. 14, 2003, at 76.

¹⁹²⁹ Defense Federal Acquisition Regulation Supplement, *Contractors Accompanying a Force Deployed*, 69 Fed. Reg. 13,500 (proposed Mar. 23, 2004) (to be codified at 48 C.F.R. pts. 207, 212, 225, and 252).

¹⁹³⁰ *Id.* at 13,501.

¹⁹³¹ *Id.*

¹⁹³² *Id.*

¹⁹³³ *Id.*

¹⁹³⁴ *Id.*

¹⁹³⁵ *Id.*

¹⁹³⁶ *Id.*

¹⁹³⁷ *Id.*

¹⁹³⁸ *Id.*

¹⁹³⁹ *Id.*

¹⁹⁴⁰ *Id.*

¹⁹⁴¹ *Id.*

¹⁹⁴² *Id.*

¹⁹⁴³ *Id.*

¹⁹⁴⁴ *Id.*

¹⁹⁴⁵ *Id.*

¹⁹⁴⁶ *Id.*

contractor employees.

Like the DOD, the Army, on 23 November 2003, released an interim rule establishing a contract clause to address the unique situations encountered when contractors send employees to accompany the forces on contingency, humanitarian, peacekeeping or combat operations.¹⁹⁴⁷ Besides having contractors acknowledge the inherent danger of contract performance in these environments, this clause covers issues such as the possession of weapons;¹⁹⁴⁸ the issuance of protective clothing and gear;¹⁹⁴⁹ the requirement that contractor personnel report their duty location when entering, moving within or exiting theater;¹⁹⁵⁰ the need for recording of emergency data information;¹⁹⁵¹ the identification of legal status issues regarding deployed contractor personnel;¹⁹⁵² the issuance of identification card matters;¹⁹⁵³ the requirement that contractor personnel comply with all orders, instructions and directives of the Combatant Commander;¹⁹⁵⁴ the requirement that contractor personnel comply with U.S., local and international laws, regulations and agreements;¹⁹⁵⁵ and, the requirement that contractor personnel comply with DOD and military service regulations and policies such as general order number one.¹⁹⁵⁶

Unlike the proposed DFARS clause, the interim AFARS clause does not articulate situations where the Combatant Commander or ranking military commander may direct contractor employees to take action. Instead, the AFARS clause places broad responsibility on the contractor to ensure its employees comply with “all orders, directives, and instructions of the combatant command relating to non-interference in military operations, force protection, health, and safety.”¹⁹⁵⁷

Furthermore, to help commanders exercise control over contractor employees, the AFARS clause states that “commanders, in conjunction with the Contracting Officer . . . may direct the Contractor . . . to replace . . . and repatriate any Contractor personnel who fail[s] to comply with this [AFARS] provision.”¹⁹⁵⁸ Lastly, the AFARS provision shifts the cost of any contractor replacement or repatriation action to the contractor.¹⁹⁵⁹

Major Steven Patoir.

Government Information Practices

The Never Ending Saga of Unit Prices: To Disclose or Not to Disclose, That is the Question

The Freedom of Information Act (FOIA)¹⁹⁶⁰ “generally provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions”¹⁹⁶¹ The FOIA’s exemption 4 governs the question of whether unit prices contained in awarded government contracts must be disclosed. Specifically, exemption 4 protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹⁹⁶² Few areas have stirred more

¹⁹⁴⁷ Department of the Army Federal Acquisition Regulation Supplement, Deployment of Contractor Personnel, 68 Fed. Reg. 66,738 (Nov. 28, 2003) (to be codified at 48 C.F.R. pt. 5152).

¹⁹⁴⁸ *Id.* at 66,741.

¹⁹⁴⁹ *Id.*

¹⁹⁵⁰ *Id.*

¹⁹⁵¹ *Id.*

¹⁹⁵² *Id.*

¹⁹⁵³ *Id.*

¹⁹⁵⁴ *Id.*

¹⁹⁵⁵ *Id.*

¹⁹⁵⁶ *Id.*

¹⁹⁵⁷ *Id.*

¹⁹⁵⁸ *Id.*

¹⁹⁵⁹ *Id.*

¹⁹⁶⁰ 5 U.S.C.S. § 552 (LEXIS 2004).

¹⁹⁶¹ U.S. DEP’T OF JUSTICE OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 5 (May 2004) [hereinafter FOIA GUIDE].

¹⁹⁶² 5 U.S.C.S. § 552 (b)(4).

controversy and uncertainty in the FOIA's thirty-seven year history.¹⁹⁶³

The latest litigation controversy began in 1997 when the Air Force issued an RFP to provide supplies and services for KC-10 and KDC-10 aircraft.¹⁹⁶⁴ The RFP required potential bidders to submit detailed cost and pricing information in order to have their bids considered.¹⁹⁶⁵ McDonnell Douglas Corp. (McDonnell Douglas) submitted a detailed contract proposal that contained, in pertinent part, option year prices, Vendor Pricing Contract Line Item Number (CLINs), and Over and Above Work CLINs for specific tasks.¹⁹⁶⁶ On 29 June 1998, the Air Force awarded the contract to McDonnell Douglas.¹⁹⁶⁷ The contract called for one base year with eight one-year options, and incorporated the detailed pricing information submitted by McDonnell Douglas in its bid.¹⁹⁶⁸ One week later on 6 July 1998, Lockheed Martin Aircraft and Logistics Center submitted a FOIA request to the Air Force requesting a copy of the awarded contract.¹⁹⁶⁹ The Air Force, in response to this request, provided McDonnell Douglas "submitter notice"¹⁹⁷⁰ in accordance with Executive Order 12,600.¹⁹⁷¹ McDonnell Douglas responded by agreeing that a large portion of the contract was releasable.¹⁹⁷² However, it specifically objected to the Air Force releasing the option year prices, Vendor Pricing CLINs, and Over and Above CLINs.¹⁹⁷³

Over the next two years, the Air Force requested comments from McDonnell Douglas three times and McDonnell Douglas submitted comments eleven times.¹⁹⁷⁴ Despite the protests by McDonnell Douglas, the Air Force issued a twelve-page Final Administrative Decision Letter that "addressed each point of fact and law made by McDonnell Douglas in its comments and provided an explanation as to why [the Air Force] disagreed with McDonnell Douglas' interpretations of the law and the facts."¹⁹⁷⁵

After receiving the letter, McDonnell Douglas filed a "reverse" FOIA lawsuit¹⁹⁷⁶ in the United States District Court for the District of Columbia seeking to prevent disclosure of the option year, Vendor Pricing CLINs, and Over and Above Work CLINs prices.¹⁹⁷⁷ McDonnell Douglas first argued that the Air Force erred in determining that the option year prices and certain CLIN prices were not exempt from disclosure pursuant to FOIA Exemption 4.¹⁹⁷⁸ In addition, McDonnell Douglas advocated that the Air Force's decision to release the contract pricing information was "arbitrary, capricious, and contrary to law" and "violated the Trade Secrets Act."¹⁹⁷⁹

The district court first defined the proper standard for determining whether the disputed information was within the

¹⁹⁶³ See, e.g., U.S. Dep't of Justice, *FOIA Counselor: Unit Prices Under Exemption 4*, FOIA UPDATE, vol. IV, No. 4, Fall 1983, available at <http://www.usdoj.gov/oip/foi-upd.htm>.

¹⁹⁶⁴ *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 215 F. Supp. 2d 200, 203 (D.C. Cir. 2002) [hereinafter *McDonnell Douglas I*].

¹⁹⁶⁵ *Id.*

¹⁹⁶⁶ *Id.*

¹⁹⁶⁷ *Id.*

¹⁹⁶⁸ *Id.*

¹⁹⁶⁹ *Id.*

¹⁹⁷⁰ "Submitter notice" requires agencies to use good-faith efforts to advise submitters of requests for confidential commercial information, and ensures that agencies create and maintain a thorough administrative record. Once notification is made, the agency must allow the submitter a reasonable period of time to object and state the grounds upon which any disclosure is opposed. If the agency, after considering a submitter's comments, determines that the information in question is releasable, it must provide the submitter a written explanation why the submitter's objections are not sustained and a proposed disclosure date. Executive Order 12,600, 52 Fed. Reg. 23,781 (1987); 3 C.F.R. pt. 235 (1988).

¹⁹⁷¹ *McDonnell Douglas I*, 215 F. Supp. 2d at 203.

¹⁹⁷² *Id.*

¹⁹⁷³ *Id.*

¹⁹⁷⁴ *Id.*

¹⁹⁷⁵ *Id.*

¹⁹⁷⁶ The D.C. Circuit Court has defined a "reverse" FOIA action as "one in which the submitter of information - usually a corporation or other business entity that has supplied an agency with data on its policies, operations, or products - seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request." FOIA GUIDE, *supra* note 1961, at 860 (citing *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987)).

¹⁹⁷⁷ *McDonnell Douglas I*, 215 F. Supp. 2d at 203.

¹⁹⁷⁸ *Id.*

¹⁹⁷⁹ *Id.* at 203-04. The court granted the Air Force's request for summary judgment on McDonnell Douglas' claim under the Trade Secrets Act (18 U.S.C.S. § 1905 (LEXIS 2004)) on the ground that the Act "does not afford a private right of action to enjoin disclosure in violation of the statute." *Id.* at 204 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979)).

scope of FOIA Exemption 4.¹⁹⁸⁰ The United States Court of Appeals for the District of Columbia has previously held, “the applicability of [FOIA] Exemption 4 depends on whether the information that a party seeks to have disclosed by the government was provided to the government voluntarily or under compulsion.”¹⁹⁸¹ If the Government requires submission of the information, the so-called “*National Parks*” test provides, it is confidential and within the scope of FOIA Exemption 4 if disclosure is likely to either “impair the Government’s ability to obtain necessary information in the future” or “cause substantial harm to the competitive position of the person from whom the information was obtained.”¹⁹⁸² In contrast, the “*Critical Mass*” test covers financial or commercial information submitted voluntarily to the government and states such information “is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.”¹⁹⁸³

The court determined that McDonnell Douglas’ pricing submissions were required and not voluntary.¹⁹⁸⁴ Had McDonnell Douglas originally failed to include the pricing information in its submissions, the Air Force would not have considered the proposal.¹⁹⁸⁵ Because the submissions were mandatory, the court evaluated the information in question using the *National Parks* test.¹⁹⁸⁶ The court noted that the test presents two “distinct alternatives for denying disclosure of commercial information submitted to the government.”¹⁹⁸⁷ The court first looked at whether releasing the contested information would, as McDonnell Douglas argued, impair the Government’s ability to obtain necessary information in the future.¹⁹⁸⁸ The court rejected this argument and found that the Air Force was “in the best position to determine whether an action will impair its information gathering in the future.”¹⁹⁸⁹ To find otherwise would simply “overjudicialize the administrative process.”¹⁹⁹⁰

The court also rejected McDonnell Douglas’ argument that releasing the contested pricing information would likely cause the company substantial competitive harm.¹⁹⁹¹ The court reasoned that the “harm from disclosure is a matter of speculation and when a reviewing court finds that an agency has supplied an equally reasonable and thorough prognosis, it is for the agency to choose between the contesting party’s prognosis and its own.”¹⁹⁹² It concluded that the Air Force “presented reasoned accounts of the effect of disclosure based on its experiences with government contracting.”¹⁹⁹³ Therefore, the district court upheld the Air Force’s decision to release the information.¹⁹⁹⁴

McDonnell Douglas appealed the decision to the United States Court of Appeals for the District of Columbia Circuit.¹⁹⁹⁵ On 27 July 2004, in a split decision (2-1), the court affirmed in part and reversed in part the lower court’s decision and ruled that the Air Force must release several of the contested contract prices.¹⁹⁹⁶ Specifically, the court’s majority affirmed the district court’s ruling to release the Over and Above Work CLINs.¹⁹⁹⁷ It disagreed, however, with the district court’s decision pertaining to the release of the option year prices and Vendor Pricing CLINs, and reversed, ordering those prices to be withheld.¹⁹⁹⁸

¹⁹⁸⁰ *Id.* at 204.

¹⁹⁸¹ *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999). For further discussion of this case, see Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 82-83.

¹⁹⁸² *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁹⁸³ *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc).

¹⁹⁸⁴ *McDonnell Douglas I*, 215 F. Supp. 2d at 205.

¹⁹⁸⁵ *Id.*

¹⁹⁸⁶ *Id.*

¹⁹⁸⁷ *Id.*

¹⁹⁸⁸ *Id.* at 206.

¹⁹⁸⁹ *Id.* See also *Comdisco, Inc. v. Gen. Serv. Admin.*, 864 F. Supp. 510, 515-16 (E.D. Va. 1994) (noting that when an agency “wants to disclose the disputed pricing information, it would be nonsense to block disclosure under the purported rationale of protecting government interests”).

¹⁹⁹⁰ *McDonnell Douglas I*, 215 F. Supp. 2d at 206.

¹⁹⁹¹ *Id.* at 208-09.

¹⁹⁹² *Id.* at 205.

¹⁹⁹³ *Id.* at 209.

¹⁹⁹⁴ *Id.*

¹⁹⁹⁵ *McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force (McDonald Douglas II)*, 375 F.3d 1182, 1185 (D.C. Cir. 2004).

¹⁹⁹⁶ *Id.* at 1193-94.

¹⁹⁹⁷ *Id.*

¹⁹⁹⁸ *Id.*

Concerning the Over and Above CLINs, the appellate court found that McDonnell Douglas “present[ed] neither a viable theory nor any evidence to support its claim that release of the [prices] would enable a competitor to derive its Labor Pricing Factor.”¹⁹⁹⁹ The court emphasized that McDonnell Douglas submitted significantly different rates for similar aircraft at another location, and concluded that competitors would be unable to determine the Labor Pricing Factor that McDonnell Douglas would use in future bids.²⁰⁰⁰ The court also emphasized that benefits provided to employees are a large part of the Labor Pricing Factor, and that the release of these prices would not reveal this information.²⁰⁰¹

On the contrary, the court determined that release of the option year prices would “significantly increase the probability McDonald Douglas’ competitors would underbid it in the event the Air Force rebids the contract.”²⁰⁰² The court reasoned that because the Air Force was not bound to McDonnell Douglas during the option years, it was free to rebid the contract.²⁰⁰³ Competitors armed with the specific knowledge of the option year contract terms would have a distinct competitive advantage over McDonnell Douglas by underbidding it.²⁰⁰⁴ Additionally, the court accepted McDonnell Douglas’ argument that since the CLINs were “composed predominantly of the costs of materials and services it procures from other vendors,” releasing this information would “enable its competitors to derive the percentage (called the ‘Vendor Pricing Factor’) by which McDonnell Douglas marks up the bids it receives from subcontractors.”²⁰⁰⁵ Consequently, the court found that both the option year prices and the Vendor Pricing CLINs should be withheld under FOIA Exemption 4.²⁰⁰⁶

In a lengthy dissenting opinion, Judge Merrick B. Garland strongly disagreed with the majority’s ruling.²⁰⁰⁷ Judge Garland argued that “the analysis adopted and result reached [in the majority’s] opinion comes perilously close to a per se rule that line-item prices—prices the government agrees to pay out of appropriated funds for goods or services provided by private contractors—may never be revealed to the public through a [FOIA] request.”²⁰⁰⁸ He stated that barring the disclosure of such prices “should be the exception rather than the rule.”²⁰⁰⁹ Judge Garland opined that the Vendor Pricing CLINs should be released because they:

are not mere offer or bid prices; they are prices that the government agreed to pay, and that it did pay, for specified services that it purchased from the company. Disclosure of such information permits the public to evaluate whether the government is receiving value for taxpayer funds, or whether the contract is instead an instance of waste, fraud, or abuse of the public trust Such disclosure thus comes within the core purpose of FOIA: to inform citizens about “what their government is up to.”²⁰¹⁰

Expanding on this argument, Judge Garland questioned whether prices actually paid by the government could ever qualify for withholding as FOIA Exemption 4 information.²⁰¹¹ “It is indeed ‘passing strange’ to regard an agency’s agreement to expend a specified amount of public funds as a corporate secret rather than a government decision—a category that is not encompassed by [the FOIA].”²⁰¹²

Judge Garland also argued that the Government should disclose the option year prices in response to Lockheed Martin Aircraft’s FOIA request.²⁰¹³ Judge Garland pointed out that the majority’s decision to withhold the option year prices

¹⁹⁹⁹ *Id.* at 1192.

²⁰⁰⁰ *Id.*

²⁰⁰¹ *Id.*

²⁰⁰² *Id.* at 1189.

²⁰⁰³ *Id.*

²⁰⁰⁴ *Id.*

²⁰⁰⁵ *Id.* at 1190-91.

²⁰⁰⁶ *Id.* at 1193-94.

²⁰⁰⁷ *Id.* at 1194.

²⁰⁰⁸ *Id.*

²⁰⁰⁹ *Id.*

²⁰¹⁰ *Id.* (quoting U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)); see also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (stating that “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed”).

²⁰¹¹ *McDonald Douglas II*, 375 F.3d at 1203.

²⁰¹² *Id.* at 1204 (quoting McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306 (D.C. Cir. 1999)).

²⁰¹³ *Id.* at 1198-99.

was “based solely upon McDonnell Douglas’ argument that: “[I]n the event the Air Force does decide to rebid the contract, its competitors will be able to use that information to underbid it.”²⁰¹⁴ Judge Garland dismissed this reasoning because “the contractor must establish that it is at least likely that there will be a rebid. This is just another way of restating the threshold requirement of our *National Parks* test: that the contractor must ‘actually face competition.’”²⁰¹⁵

Judge Garland stated that McDonnell Douglas could point to no facts that even remotely suggested the Air Force would rebid the contract.²⁰¹⁶ On the contrary, the Air Force proffered evidence that rebidding was unlikely because option year contracts “are usually exercised,” particularly so for contracts “to service military aircraft which are critical to [the Air Force’s] core mission.”²⁰¹⁷ The dissent further pointed out that contract solicitations may not include option clauses unless the “contracting officer has determined that there is a reasonable likelihood that the option will be exercised.”²⁰¹⁸ The Air Force strengthened its argument by showing that its regulations instruct it to “take into account the Government’s need for continuity of operations and potential costs of disrupting operations” in deciding whether to exercise an option.²⁰¹⁹

The Saga of Unit Prices Continues

In September 2004, based on Judge Garland’s dissent and “in recognition of the ‘exceptional importance’ of the issue the case presents,” the Department of Justice petitioned the D.C. Circuit Court (which currently consists of nine judges) for rehearing en banc in *McDonnell Douglas Corp. v. United States*.²⁰²⁰ The government has sought the rehearing before the full court “in an effort to alleviate the practical difficulties and uncertainties that loom large in this long-controversial area of FOIA law if this decision is left to stand.”²⁰²¹ The Department of Justice, Office of Information and Privacy, has stated that “government agencies must now await a final ruling in this case before knowing with certainty whether the law of the D.C. Circuit has conclusively shifted.”²⁰²² The outcome will no doubt “have an impact on agency decision-making on such [FOIA] Exemption 4 issues as a matter of sound administrative practice and policy.”²⁰²³

Major Kerry Erisman.

Information Technology (IT)

Suspicious Minds

During the past year, the GAO issued three reports analyzing and often criticizing aspects of DOD’s use of information technology.²⁰²⁴ In a December 2003 report, the GAO noted “inconsistencies, inaccuracies, and omissions” from DOD’s FY 2004 IT budget submission.²⁰²⁵ Specifically, the GAO found budget discrepancies totaling \$1.6 billion between DOD’s budget submission and its “Capital Investment Reports.”²⁰²⁶ Finding that the DOD “has not devoted sufficient

²⁰¹⁴ *Id.* at 1198.

²⁰¹⁵ *Id.* (quoting *Nat’l Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976)).

²⁰¹⁶ *Id.* at 1198-99.

²⁰¹⁷ *Id.* at 1199 (quoting the government’s brief at 19).

²⁰¹⁸ *Id.* (referencing 48 C.F.R. § 17.208(c)(4)).

²⁰¹⁹ *Id.* (referencing 48 C.F.R. § 17.207(e), which provides that options may be included in service contracts in “recognition of (1) the Government’s need in certain service contracts for continuity of operations and (2) the potential cost of disrupted support”). The Air Force further illustrated the fact that it “has exercised the past four option years for this contract each time they have come up.” *Id.* (quoting the government’s brief at 20)

²⁰²⁰ Petition for reh’g en banc, No. 02-5342 (D.C. Cir. Sept. 30, 2004). Quotes from U.S. Dep’t of Justice, Office of Information and Privacy, FOIA POST, *Full Court Review Sought in McDonnell Douglas Unit Price Case*, Oct. 7, 2004, available at www.usdoj.gov/oip/foiapost/2004foiapost31.htm.

²⁰²¹ *Id.*

²⁰²² *Id.*

²⁰²³ *Id.*

²⁰²⁴ During the past year, the GAO also published IT reports that are not specific to the DOD. See GEN. ACCT. OFF., REP. NO. GAO-04-49, *Information Technology Management: Governmentwide Strategic Planning, Performance Measurement, and Investment Management Can Be Further Improved* (Jan. 2004); GEN. ACCT. OFF., REP. NO. GAO-04-394G, *Information Technology Investment Management: A Framework for Assessing and Improving Process Maturity* (Mar. 2004); GEN. ACCT. OFF., REP. NO. GAO-04-791, *Information Technology: Training Can Be Enhanced by Greater Use of Leading Practices* (June 2004).

²⁰²⁵ GEN. ACCT. OFF., REP. NO. GAO-04-115, *Information Technology: Improvements Needed in the Reliability of Defense Budget Submissions* at 2 (Dec. 2003).

²⁰²⁶ *Id.*

management attention and . . . does not have adequate management controls and supporting systems in place,”²⁰²⁷ the GAO issued eight recommendations to help the DOD “improve the consistency, accuracy, and completeness” of its future IT budget submissions.²⁰²⁸

In a July 2004 report, the GAO critiqued DOD’s IT acquisition policies and guidance.²⁰²⁹ Finding that DOD’s IT acquisition “policies and guidance largely incorporate 10 best practices²⁰³⁰ for acquiring any type of . . . IT business system,” the GAO also found that DOD’s policies and guidance “generally do not incorporate [an additional] 8 best practices relating to the acquisition of commercial component-based systems.”²⁰³¹ The GAO therefore issued fourteen recommendations “aimed at strengthening DOD’s acquisition policy and guidance by including additional business systems acquisition best practices and controls for ensuring that best practices are followed.”²⁰³²

Also in a July 2004 report, the GAO analyzed, without necessarily criticizing, DOD’s development of the Global Information Grid (GIG).²⁰³³ Modeled after the Internet, the GIG is designed to “enable data access for a variety of systems and users in the network no matter which military service owns a weapons system or where a user might be . . .”²⁰³⁴ Begun in the late 1990’s and planned for full implementation around 2020, the DOD believes that the GIG will enable commanders to “access and exchange information quickly, reliably, and securely through linked systems and military components,” thus enhancing their capability to “identify threats more effectively, make informed decisions, and respond with greater precision and lethality.”²⁰³⁵

While recognizing the great potential of this “gee-whiz” system, the GAO also cautioned the DOD to plan more carefully for this IT transformation. For example, the GAO noted that the DOD does not know “which investments will take priority over others” or how it will “assess the overall progress of the GIG and determine whether the network as a whole is providing a worthwhile return on investment . . .”²⁰³⁶ Moreover, the GAO warned that the DOD faces “risks related to protecting data within the thousands of systems that will be integrated into the network.”²⁰³⁷

Giving Teeth to Section 508

In *CourtSmart Digital Sys., Inc.*,²⁰³⁸ the Comptroller General addressed the issue of whether an agency could properly award a contract to a bidder whose proposal indicated non-compliance with Section 508.²⁰³⁹ In *CourtSmart*, the agency’s request for quotations (RFQ)²⁰⁴⁰ required bidders to demonstrate compliance with Section 508.²⁰⁴¹ Although the

²⁰²⁷ *Id.* at 21.

²⁰²⁸ *Id.* at 22-23. These recommendations include ensuring that “amounts are properly categorized,” working towards budget submissions that “fully account for all relevant costs,” and “assess[ing] approaches to reduce or eliminate requirements for duplicative manual entry of information . . .” *Id.*

²⁰²⁹ GEN. ACCT. OFF., REP. NO. GAO-04-722, *Information Technology: DOD’s Acquisition Policies and Guidance Need to Incorporate Additional Best Practices and Controls* (July 2003) [hereinafter REP. NO. GAO-04-722].

²⁰³⁰ “Best practices,” a rather amorphous concept, are “tried and proven methods, processes, techniques, and activities that organizations define and use to minimize risks and maximize chances for success.” *Id.* at 3. In the context of IT acquisition, an example is “basing any decision to modify commercial components on a thorough analysis of the impact of doing so or on preparing system users for the business process and job roles and responsibilities changes that are embedded in the functionality of commercial IT products.” *Id.* at Highlights. For an earlier GAO report addressing DOD’s use of best practices, see GEN. ACCT. OFF., REP. NO. GAO-04-53, *Defense Acquisitions: DOD’s Revised Policy Emphasizes Best Practices, but More Controls Are Needed* (Nov 2003).

²⁰³¹ REP. NO. GAO-04-722, *supra* note 2029, at Highlights.

²⁰³² *Id.* at 2, 23-25. These recommendations include, for example, ensuring that “[a]cquisition project management activities are communicated to all stakeholders,” and that “[a]cquisition reviews include the status of identified risks.” *Id.* at 24.

²⁰³³ GEN. ACCT. OFF., REP. NO. GAO-04-858, *Defense Acquisitions: The Global Information Grid and Challenges Facing Its Implementation* (July 2004).

²⁰³⁴ *Id.* at Highlights, 1.

²⁰³⁵ *Id.* at 1.

²⁰³⁶ *Id.* at 3-4.

²⁰³⁷ *Id.* at 4.

²⁰³⁸ Comp. Gen. B-292995.2; B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79.

²⁰³⁹ Section 508 refers to the requirement to make most government electronic and information technology accessible to those with disabilities. See generally Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508, 87 Stat. 355 (codified as amended by the Workforce Investment Act of 1998 at 29 U.S.C. § 794d (2000)); U.S. Gen’l Servs. Admin., *Section 508*, at <http://www.section508.gov> (last visited Oct. 14, 2004); see also Major John Siemietkowski, *Procurement Disabilities Initiative Takes Effect*, ARMY LAW., Sept./Oct. 2001, at 27.

²⁰⁴⁰ The RFQ was for a portable digital recording system. *CourtSmart*, 2004 CPD ¶ 79, at 1.

²⁰⁴¹ *Id.* at 2.

RFQ plainly stated that the agency would test 508 compliance during the evaluation process, the agency tested only the winning vendor for 508 compliance and in fact found its quotation to be non-compliant.²⁰⁴² Moreover, the agency did not evaluate the other vendors' quotations for compliance.²⁰⁴³

Rejecting the agency's argument that "the RFQ allowed for award based on an otherwise technically acceptable quotation that was not section 508 compliant if there were no other technically acceptable quotations,"²⁰⁴⁴ the Comptroller General found that the "terms of the RFQ plainly do not permit the agency to ignore the section 508 evaluation criterion in determining whether a proposal was technically acceptable"²⁰⁴⁵ Although the Comptroller General did not sustain this protest solely because of the 508 issue,²⁰⁴⁶ this decision points out the importance of complying with Section 508 requirements when bidding on a contract. Perhaps more importantly, it emphasizes the need for agencies to properly evaluate IT bids/quotes for 508 compliance.

From the Halls of Cyberspace to the Shores of Data Transfer

Prior *Years in Review* have reported on the development and progress of the Navy-Marine Corps Intranet (NMCI).²⁰⁴⁷ Unfortunately, during the past year, user complaints about poor connectivity and slow delivery have plagued the program.²⁰⁴⁸ Nonetheless, 350,000 users could soon be connected to the NMCI, which would make it the world's largest intranet.²⁰⁴⁹ Navy Secretary England appointed Rear Admiral James Godwin as the new NMCI chief in August 2004.²⁰⁵⁰

Lieutenant Colonel John Siemietkowski.

Intellectual Property

Patented "Proprietary" Data May be Disclosed, but . . .

In *Wesleyan Company, Inc.*,²⁰⁵¹ the ASBCA highlighted the protection afforded proprietary data once that data becomes public as part of a patented invention. Wesleyan Company, Inc. (Wesleyan) had claimed the Army improperly disclosed and used proprietary data Wesleyan submitted in conjunction with unsolicited proposals to supply the Army with drinking systems for use in nuclear, biological, chemical (NBC) contaminated environments.²⁰⁵² As requested by the Army, Wesleyan's first proposal, submitted in April 1983, contained the required Defense Acquisition Regulation (DAR) proprietary rights data legend,²⁰⁵³ as well as a required Memorandum of Understanding (MOU).²⁰⁵⁴ In addition to explaining the Army accepted the proposal solely for evaluating and determining the Army's interest, the MOU stated the Army did not

²⁰⁴² *Id.* at 3-4.

²⁰⁴³ *Id.* at 4. The protestor, CourtSmart, indicated in its proposal that it was 508 compliant. *Id.*

²⁰⁴⁴ *Id.* at 8.

²⁰⁴⁵ *Id.* at 9.

²⁰⁴⁶ The Comptroller General also sustained the protest because the awardee's bid included a non-Federal Supply Schedule (FSS) item, even though the RFQ was limited to FSS vendors. *Id.* at 13. For further discussion of this issue, see *supra* section titled Competition. The record also raised questions regarding the technical and past performance evaluations. *CourtSmart*, 2004 CPD ¶ 79, at 13.

²⁰⁴⁷ See *2000 Year in Review*, *supra* note 1981, at 85-86; *2001 Year in Review*, *supra* note 335, at 114.

²⁰⁴⁸ See David McGlinchey, *Navy Appoints New Leader for NMCI*, GovExec.com (Aug. 17, 2004), at <http://www.govexec.com/dailyfed/0804/081704dl.htm>; David McGlinchey, *Navy Streamlines its Intranet Contract*, GovExec.com (Oct. 6, 2004), at <http://www.govexec.com/dailyfed/1004/100604dl.htm>.

²⁰⁴⁹ *Id.*

²⁰⁵⁰ McGlinchey, *Navy Appoints New Leader for NMCI*, *supra* note 2048. Apparently, the change in NMCI leadership is due to the Navy's normal assignment rotations. *Id.*

²⁰⁵¹ ASBCA No. 53896, 04-1 BCA ¶ 32,628.

²⁰⁵² *Id.* at 161,438.

²⁰⁵³ As the unsolicited proposal pre-dated the FAR and DFARS, the DAR applied and required a proprietary rights data legend for unsolicited proposals that stated in relevant part:

This data . . . shall not be disclosed outside the Government and shall not be duplicated, used or disclosed in whole or in part for any purpose other than to evaluate the proposal This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction

Id. at 161,439 (citing DAR 3-507.1(a) and 32 C.F.R. pts. 1-39, vol. 1 at 143 (1 Sept. 1982)).

²⁰⁵⁴ *Id.*

“assume any obligation for disclosure or use of any information in the proposal to which the [Army] would otherwise lawfully be entitled.”²⁰⁵⁵

To assist in the evaluation and upon the Army’s request, Wesleyan loaned its proposed “FIST/FLEX” protective mask drinking system to ILC Dover, a manufacturer of NBC protective suits, for incorporation into a prototype suit.²⁰⁵⁶ In March 1985, Wesleyan received a patent for the “FIST/FLEX” system, and subsequently submitted an unsolicited proposal to the Army for the revised version of the system.²⁰⁵⁷ Though Wesleyan’s subsequent unsolicited proposals²⁰⁵⁸ did not include the required proprietary data rights legend, the company president executed the same MOU with each submission.²⁰⁵⁹

To assist again in evaluating the unsolicited proposal, the Army purchased several of Wesleyan’s patented systems over the next few years.²⁰⁶⁰ Ultimately, however, the Army concluded the FIST/FLEX system was unacceptable for use in an NBC contaminated environment.²⁰⁶¹ Nonetheless, the Army continued to pursue development of an effective drinking mask system, eventually acquiring such a system from CamelBak Products, Inc.²⁰⁶² In April 2002, Wesleyan submitted a claim for \$20,776,000 alleging the Army improperly disclosed “the concepts, processes and devices in its FIST/FLEX and FIST Fountain proposals to non-government third parties.”²⁰⁶³ The Army denied the claim entirely and Wesleyan appealed.

At the ASBCA, Wesleyan argued the Army’s contractual obligations to protect the proprietary data associated with the unsolicited proposals continued even after the patents were issued for the FIST/FLEX and FIST Fountain systems.²⁰⁶⁴ The board agreed the Army’s acceptance of the unsolicited proposals with the required DAR legend and the MOUs “created an implied-in-fact contract licensing government use of the proprietary data in those proposals in accordance with the DAR legend and memoranda of understanding.”²⁰⁶⁵ However, the ASBCA noted the last sentence in each MOU specifically stated “the [Army] did not ‘assume any obligation for disclosure or use of any information in the proposal to which the [Army] would otherwise be lawfully entitled.’”²⁰⁶⁶ The board then explained that patents protect against the unauthorized use, making, offering to sell or selling of a patented invention; not the disclosure of patented data.²⁰⁶⁷ Thus, “[t]o the extent proprietary data in Wesleyan’s proposals was disclosed in the two patents, the government was lawfully entitled to disclose that data after the patents were issued.”²⁰⁶⁸ As a result, the ASBCA granted the Army’s motion for summary judgment to the extent Wesleyan’s claim sought recovery for disclosure of proprietary data in the patents after the issuance of the patents.²⁰⁶⁹

²⁰⁵⁵ *Id.*

²⁰⁵⁶ *Id.*

²⁰⁵⁷ *Id.* at 161,440.

²⁰⁵⁸ In addition to its unsolicited proposal for FIST/FLEX system, in 1985 Wesleyan submitted an unsolicited proposal for its “FIST Fountain” system, which provided a means for filling empty canteens in an NBC contaminated environment. *Id.* Wesleyan received a patent for the FIST Fountain system in December 1987. *Id.*

²⁰⁵⁹ *Id.*

²⁰⁶⁰ *Id.*

²⁰⁶¹ *Id.*

²⁰⁶² *Id.*

²⁰⁶³ *Id.* Wesleyan’s claimed damages were for projected royalties on the sales of the Camelbak drinking systems to the U.S., U.K., Canadian, and Australian armed forces between the years 2001 and 2015. *Id.*

²⁰⁶⁴ *Id.* at 161,441.

²⁰⁶⁵ *Id.*

²⁰⁶⁶ *Id.*

²⁰⁶⁷ *Id.* (citing 35 U.S.C. § 271(a) (2000)).

²⁰⁶⁸ *Id.*

²⁰⁶⁹ *Id.* Regarding the rest of Wesleyan’s claim, the board found:

genuine issues of material fact as to whether there was (i) unauthorized disclosure or use, before the patents were issued, of proprietary proposal data; (ii) unauthorized disclosure or use, after the patents were issued of proprietary proposal data that was not published in the patents; and (iii) unauthorized use, after the patents issued, of the proprietary proposal data that was published in the patents.

Id.

No Written Assurance Needed

Last year's National Defense Authorization Act amended 10 U.S.C. section 2320(b) to eliminate the requirement for contractors to furnish written assurance that technical data delivered to the DOD was complete and accurate and satisfied the contract requirements.²⁰⁷⁰ This year the DOD issued an interim rule amending the DFARS to implement this legislative change.²⁰⁷¹ The interim rule amends DFARS subpart 227.71, by deleting the references to the prior requirement for written assurances, and removes the Declaration of Technical Data Conformity clause at DFARS section 252.227-7036.²⁰⁷² While reducing the amount of paperwork for contractors, the change "does not diminish the contractor's obligation to provide technical data that is complete and adequate, and that complies with contract requirements."²⁰⁷³

Out of the FAR and Into the DFARS

Last year's *Year in Review* reported on the FAR Councils' proposed revisions to FAR part 27.²⁰⁷⁴ Included among the proposed changes was the deletion of the Patent Rights—Retention by the Contractor (Long Form) clause found at FAR section 52.227-12, because the DOD is the only agency that uses the clause.²⁰⁷⁵ Based on this proposed change, the DOD proposed amending the DFARS to include a clause "substantially the same as the clause at FAR section 52.227-12."²⁰⁷⁶ As the clause addresses patent rights under contracts awarded to large businesses for experimental, developmental, or research work, the clause will be titled Patent Rights—Ownership by the Contractor (Large Business).²⁰⁷⁷ The proposed clause also includes "changes for consistency with current statutory provisions" and the proposed changes to FAR part 27.²⁰⁷⁸

Major Kevin Huyser.

Losing Rights to Intellectual Property: The Perils of Contracting with the Federal Government

Ervin and Associates, Inc. v. United States

In a case of first impression, the COFC, in *Ervin and Associates, Inc. v. United States (Ervin)*,²⁰⁷⁹ construed the scope of the "Rights In Data-General" clause at FAR section 52.227-14. The outcome of this case calls for government contractors to have a sophisticated, even nuanced, knowledge of the relevant statutes and regulations governing the procurement of technical data, as well as the underlying intellectual property laws.²⁰⁸⁰ Without such knowledge, government contractors risk unknowingly forfeiting their rights to technical data and other intellectual property. Contractors must learn the benefits to using available standard contract clauses to protect valuable intellectual property instead of allowing such clauses to disadvantage the contractors themselves.²⁰⁸¹

In *Ervin*, the HUD sent out RFPs to procure a computerized system to automate the loan portfolio management of multifamily apartment projects.²⁰⁸² Regulations required owners of these loans to submit each year an audited annual financial statement (AFS) to the HUD.²⁰⁸³ The HUD sought to electronically collect the AFSs and automate the analysis as

²⁰⁷⁰ Pub. L. No. 108-136, § 844, 117 Stat. 1392, 1552 (2003).

²⁰⁷¹ Defense Federal Acquisition Regulation Supplement; Written Assurance of Technical Data Conformity, 69 Fed. Reg. 31,911 (June 8, 2004) (to be codified at 48 C.F.R. pts. 227 and 252).

²⁰⁷² *Id.*

²⁰⁷³ *Id.*

²⁰⁷⁴ 2003 *Year in Review*, *supra* note 29, at 150.

²⁰⁷⁵ *Id.* (referencing 68 Fed. Reg. 31,790, 31,811).

²⁰⁷⁶ Defense Federal Acquisition Regulation Supplement; Patent Rights—Ownership by the Contractor, 69 Fed. Reg. 58,377 (proposed 30 Sept. 2004) (to be codified at 48 C.F.R. pts. 227 and 252).

²⁰⁷⁷ *Id.* at 58,379.

²⁰⁷⁸ *Id.* at 58,378.

²⁰⁷⁹ 59 Fed. Cl. 267 (2004).

²⁰⁸⁰ *Id.* at 270.

²⁰⁸¹ See Ralph C. Nash & John Cibinic, *The FAR "Rights in Data—General" Clause: Interpreting Its Provisions*, 18 NASH & CIBINIC REP. 5 ¶ 19, at 70 (2004).

²⁰⁸² *Ervin*, 59 Fed. Cl. at 270.

²⁰⁸³ *Id.*

to whether the AFSs complied with HUD regulations and any other data manipulation requested.²⁰⁸⁴ The HUD made several amendments to its initial proposal because the projects costs exceeded HUD's funding limitations.²⁰⁸⁵ The HUD removed the requirement that the successful contractor develop a "trend analysis" comparing the current year forms with those of the previous two years.²⁰⁸⁶ Most importantly, the HUD reduced the number of AFS forms to be reviewed from 100% to 30% of HUD's multifamily portfolio.²⁰⁸⁷ Out of all of the offerors, Ervin reduced its price the most and was awarded the contract.²⁰⁸⁸ Ervin maintained that it was able to reduce its bid from \$39,428,625 to \$12,328,000 because the amendments eliminated some of the original HUD requirements.²⁰⁸⁹ Because of this scope reduction, Ervin would maintain ownership over any database improvements and consequently was comfortable reducing its performance price significantly.²⁰⁹⁰

Even though the HUD eliminated the contract requirements for the successful contractor to provide a comprehensive computer database, do trend analysis, and review 100% of HUD's portfolio, Ervin decided to do a significant amount of work that was originally requested at no extra charge.²⁰⁹¹ That is to say, Ervin thought the HUD would need a "comprehensive computer database of financial statement data for all of its multifamily loans in the future."²⁰⁹² Ervin, thus, agreed to deliver to the HUD "reviews of all information entered into its database for each of HUD's 16,000 properties" as well as engage in trend analysis.²⁰⁹³ In its best and final offer, Ervin hailed the company's "ability and desire to provide incremental value at no incremental cost."²⁰⁹⁴ The resulting contract incorporated by reference Ervin's technical proposal.²⁰⁹⁵

Once performance began, Ervin provided the HUD with almost all of the data and computer programs Ervin had created. Ervin did not mark this data or these programs as proprietary, but declared that the HUD possessed no rights to give or share Ervin's intellectual property to other contractors.²⁰⁹⁶ Although some employees agreed that the HUD had no rights to Ervin's intellectual property, other employees made Ervin's technical data and computer software available to competitors.²⁰⁹⁷ Because Ervin could not stop the HUD from disseminating its property, Ervin sued the HUD and other complicit contractors; consequently the HUD terminated Ervin for default.²⁰⁹⁸ Thereafter, the HUD and Ervin settled their differences, except for the intellectual property disputes.²⁰⁹⁹ Ervin filed claims with the Office of the Chief Procurement Officer to seek recourse for HUD's improper disclosure of Ervin's intellectual property to its competitors.²¹⁰⁰ All claims were denied; Ervin filed a second complaint to the COFC.²¹⁰¹

Ervin's complaint comprised several claims against the HUD including, *inter alia*, breach of contract, constructive change to the contract, and copyright infringement. The COFC dismissed all counts on summary judgment.²¹⁰² The most critical issue the court addressed was whether the standard FAR "Rights In Data-General Clause" was read into the AFS Contract. Although the AFS Contract referred to this clause, there was no specific language incorporating it by reference, in contrast to other FAR sections expressly included.²¹⁰³ In interpreting the contract, the court treated the "Rights In Data-General Clause" as "missing language" necessary to bring meaning to the contract, or in the alternative, the court placed the

²⁰⁸⁴ *Id.* at 271.

²⁰⁸⁵ *Id.*

²⁰⁸⁶ *Id.*

²⁰⁸⁷ *Id.*

²⁰⁸⁸ *Id.* at 273.

²⁰⁸⁹ *Id.*

²⁰⁹⁰ *Id.*

²⁰⁹¹ *Id.* at 272-73.

²⁰⁹² *Id.* at 272.

²⁰⁹³ *Id.*

²⁰⁹⁴ *Id.*

²⁰⁹⁵ *Id.* at 273-74.

²⁰⁹⁶ *Id.* at 277-85.

²⁰⁹⁷ *Id.* at 276, 279, 281-82.

²⁰⁹⁸ *Id.* at 283.

²⁰⁹⁹ *Id.* at 285-86. During settlement, the HUD agreed to convert the termination for default to a termination for convenience.

²¹⁰⁰ *Id.* at 287.

²¹⁰¹ *Id.* at 288.

²¹⁰² *Id.* at 303-04.

²¹⁰³ *Id.* at 294.

burden on Ervin, as an experienced contractor, to take action to bring this patent ambiguity to the Government's attention. Consequently, the court incorporated the clause into the AFS contract. The court concluded that the result of reading the clause into the AFS contract meant that the HUD would have unlimited rights to Ervin's technical data, despite the fact that there are portions of FAR section 27.404 that would not require Ervin to grant the Government unlimited rights.

In FAR section 27.404 (b), a contractor has a right to withhold limited rights and restricted software data from the Government, except when an agency has a need to obtain delivery of such data and software. When this is necessary, the "Rights In Data-General" clause may be used with its Alternates II²¹⁰⁴ or III²¹⁰⁵ that put the burden on the contracting officer to selectively request the delivery of limited rights data and restricted software.²¹⁰⁶ As part of the negotiations between the Government and the contractor, the contract may specify what data and restricted software the contractor will deliver and, if delivered, the Government will obtain limited rights.²¹⁰⁷

In *Ervin*, however, the contracting officer did not make such a request and Ervin did not specifically identify data or restricted software. The court found that all data and software delivered fell under the "Rights In Data-General" clause without reference to whether the contracting officer should have added Alternates II and III to the clause.²¹⁰⁸ The court places the burden on the contractor to have affixed the appropriate notice and clauses to the data and software. Without such, delivery defaulted to granting unlimited rights to the HUD.²¹⁰⁹ Even if the data and software were developed at private expense, because the contractor did not withhold delivery, the Government acquired unlimited rights.²¹¹⁰

This holding should alert contractors that they are responsible for having the appropriate contract clauses in the contract. If the contracting officer does not add Alternates II²¹¹¹ or III²¹¹² to the contract, the default rule is that the Government obtains unlimited rights to data and restricted software, thus forcing the contractor to lose rights to its intellectual property inadvertently. This requires the contractor to have a sophisticated knowledge of how to appropriately contract with the Government and take action to correct errors the contracting officer makes.²¹¹³

The COFC also found that the AFS contract required "Ervin to provide HUD with data from the AFS forms by downloading it in a manner that can be utilized in HUD's automated systems."²¹¹⁴ In making this determination, the court looked at the text of the contract but also noted that HUD did not provide Ervin with the required software that could incorporate the data for delivery. According to the court, the HUD did not breach its contract with Ervin.²¹¹⁵

In addition, the court said there was no constructive change to the AFS contract. The HUD maintained that it had made no changes of an extra-contractual nature and, regardless, that Ervin failed to properly inform the HUD of any such changes. Apparently, Ervin made the mistake of not directly talking with the contracting officer and informing the contracting officer that the data downloads were not a contract requirement. Ervin merely spoke to those HUD employees who had access to the contracting officer and could have conveyed such information to the contracting officer. According to the court, because Ervin is an experienced contractor, Ervin knew or should have known of the requirement to inform the contracting officer directly of any issues regarding the contract.²¹¹⁶ Therefore, the court found no constructive change in the contract.

In order to discontinue HUD's ability to freely give away Ervin's data to its competitors, Ervin applied for and received a copyright on certain aspects of the data.²¹¹⁷ The court rejected each and every copyright infringement claim.

²¹⁰⁴ See FAR, *supra* note 20, at 27.404 (d)-(e) and 52.227-14 (g)(1)-(g)(2).

²¹⁰⁵ See *id.* at 27.404 (d)-(e) and 52.227-14 (g)(3).

²¹⁰⁶ *Id.* at 27.404 (b).

²¹⁰⁷ *Id.* at 27.404 (d)-(e).

²¹⁰⁸ *Ervin*, 59 Fed. Cl. at 297.

²¹⁰⁹ *Id.*

²¹¹⁰ *Id.*

²¹¹¹ See FAR, *supra* note 20, at 27.404 (d)-(e) and 52.227-14 (g)(1)-(g)(2).

²¹¹² *Id.* at 27.404 (d)-(e) and 52.227-14 (g)(3).

²¹¹³ See *Nash & Cibinic*, *supra* note 2081, at 67.

²¹¹⁴ *Ervin*, 59 Fed. Cl. at 292.

²¹¹⁵ *Id.*

²¹¹⁶ *Id.* at 293.

²¹¹⁷ See *id.* at 298.

In obtaining a copyright, Ervin sought to protect against the unauthorized use of its standardized methods and approaches. In other words, Ervin wanted to safeguard the way in which Ervin processed individual AFSs. The court, citing *Atari Games Corp. v. Nintendo of America, Inc.*,²¹¹⁸ held that such subject matter is not copyrightable. “To protect processes or methods of operation, a creator must look to patent law.”²¹¹⁹ That is to say, to accomplish its goal, Ervin should have sought patent protection instead of copyright protection. Further, Ervin complained that the HUD reverse-engineered Ervin’s system without permission. Again, the court stressed that Ervin should have received patent protection to prevent reverse engineering. Under the “Fair Use Doctrine,” reverse engineering is permitted and is not a copyright infringement.²¹²⁰

Every other concern Ervin had regarding how its computer programs and teaching materials were being used was not prohibited by copyright.²¹²¹ Either the Government had unlimited rights because of the contract scope, or what was developed was not at private expense.²¹²² The “Rights-In- Data General” clause governed the court’s opinion.²¹²³

Lastly, the court stated that Ervin’s databases were not copyright eligible under *Feist Publications v. Rural Telephone Service*.²¹²⁴ In that case, the Supreme Court held that white pages to a telephone book, because they contain only raw facts, are not eligible for copyright protection. In *Ervin*, the COFC interpreted *Feist* as requiring a minimal degree of creativity in order for databases to be copyrightable. According to the court, because Ervin had not proffered any evidence of such creativity and the databases merely compile the intrinsic logic of the AFS forms and information the HUD specified, the databases are not copyrightable. Even if such databases were copyrightable, the court said Ervin had the duty to withhold a database in order to seek “limited rights” protection, unless delivery is required under the contract. If delivery were required, Ervin should have affixed the mandatory “Limited Rights Notice” at time of delivery, which Ervin did not do.²¹²⁵

In summary, contractors should never voluntarily provide material not expressly requested in the contract.²¹²⁶ Any proprietary materials should be appropriately marked as proprietary. Contractors should ensure the contracting officer includes only the appropriate clauses in the contract and be able to document which material was created at private expense. The *Ervin* court did not take into account the reduced cost of the contract in exchange for Ervin keeping its intellectual property rights in material delivered. Thus, courts may not recognize such a bargained for exchange without appropriate legends affixed and clauses expressly included in the agreement.

Finally, when contracting with the Government, contractors must become more sophisticated in obtaining the appropriate intellectual property for what they are trying to protect.²¹²⁷ Knowledge of what copyright protection does versus patent protection was critical in this case.

Data Enterprises of the Northwest v. General Services Administration

In *Data Enterprises of the Northwest v. General Services Administration*,²¹²⁸ the GSBCA demonstrated its inability to adequately compensate a contractor where the Government blatantly breached its contract and distributed proprietary software to others without permission. Because the Government’s breach was a copyright infringement, a cause of action over which the GSBCA has no jurisdiction,²¹²⁹ the GSBCA sought an equitable division in trying to compensate for the contractor’s loss. Although the GSBCA held the Government liable,²¹³⁰ the lack of creativity in calculating damages left the contractor less than fully compensated.

²¹¹⁸ 975 F.2d 832, 842 (Fed. Cir. 1992).

²¹¹⁹ *Ervin*, 59 Fed. Cl. at 298 (quoting *Atari Games Corp. v. Nintendo of Am., Inc.* 975 F.2d 832, 842 (Fed. Cir. 1992)).

²¹²⁰ *Id.* at 299 (citing *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347-48 (1991)).

²¹²¹ *Id.* at 300.

²¹²² *Id.* at 301.

²¹²³ *Id.* at 300-01.

²¹²⁴ 499 U.S. 340 (1991).

²¹²⁵ *Ervin*, 59 Fed. Cl. at 301.

²¹²⁶ See *Nash & Cibinic*, *supra* note 2081, at 70.

²¹²⁷ See *id.*

²¹²⁸ GSBCA No. 15607, 04-1 BCA ¶ 32,539.

²¹²⁹ *Id.* at 160,949.

²¹³⁰ *Id.* at 160,960-61.

The contractor's software is a tool for inventory management.²¹³¹ The contract at issue was a Federal Supply Schedule, Multiple Award Schedule contract.²¹³² The contract comprised acquiring licenses to use existing commercial software that was not developed at Government expense.²¹³³ The dispute arose because of the differing views on the Government's right to use the contractor's proprietary information.²¹³⁴ The Government had disclosed the contractor's proprietary information to a third party to develop competing software. The Government maintained it had acquired unlimited rights to such information. Conversely, the contractor maintained the Government breached the licensing agreement by disclosing the information to develop competing software to a third-party developer.²¹³⁵

The GSBCA agreed with the contractor. Because the contractor's information was developed at private expense, it was considered restricted software.²¹³⁶ As such, the contractor negotiated specific rights with the Government that were expressly set forth in the "Utilization Limitations" clause.²¹³⁷ The "Utilization Limitations" clearly did not grant the Government unlimited rights to the software and related proprietary information.²¹³⁸ In fact, the Government promised not to disclose or copy contractor's software and proprietary information consistent with contractor's commercial license.²¹³⁹ When the Government allowed a third party access, the Government breached the agreement.²¹⁴⁰

In determining what damages to award the contractor for the Government's breach, the GSBCA stated that the non-breaching party was entitled to be restored to an economic position in which it would have been had the various breaches of contract not occurred.²¹⁴¹ Because calculating damages based on a reasonable royalty is a remedy for copyright infringement, and the GSBCA has no jurisdiction over copyright infringement, the GSBCA refused to award these damages.²¹⁴² Instead, the GSBCA awarded lost profits on the contract sales the contractor would have made had there been no breach.²¹⁴³ To keep these damages solely contract related, the GSBCA insisted it could not award lost profits on transactions not directly related to the breached contract.²¹⁴⁴

The GSBCA noted that giving the third party access to the contractor's information "played a critical role" in developing the competing software.²¹⁴⁵ The third party saved money, time, and effort in developing competing software because the Government had improperly given access to the contractor's software and proprietary information.²¹⁴⁶ The GSBCA took these advantages into account in calculating damages by measuring the time the Government would have had to continue licensing from contractor because the competing software was not yet available.²¹⁴⁷ The GSBCA stated that it was clear from the evidence that the Government was able to replace contractor's system more quickly through using its proprietary information in developing the competing software.²¹⁴⁸ Accordingly, the GSBCA determined that it would have taken another ten months for the Government to develop the software had it not breached. Thus, the board calculated lost profits over another ten months to compensate the contractor.²¹⁴⁹

²¹³¹ *Id.* at 160,950.

²¹³² *Id.*

²¹³³ *Id.* at 160,953.

²¹³⁴ *Id.* at 160,952.

²¹³⁵ *Id.* at 160,952-53.

²¹³⁶ *Id.* at 160,956.

²¹³⁷ *Id.* at 160,955.

²¹³⁸ *Id.* at 160,955-56.

²¹³⁹ *Id.* at 160,958.

²¹⁴⁰ *Id.* at 160,961.

²¹⁴¹ *Id.* at 160,963.

²¹⁴² *Id.* at 160,964. This damage characterization sounds like reliance damages, but the GSBCA actually attempts to award expectation damages. For a discussion on contract remedies, see E. ALLAN FARNSWORTH, CONTRACTS §§ 12.1-12.3 (4th ed. 2004).

²¹⁴³ *Id.*

²¹⁴⁴ *Id.*

²¹⁴⁵ *Id.* at 160,963.

²¹⁴⁶ *Id.* at 160,965.

²¹⁴⁷ *Id.*

²¹⁴⁸ *Id.*

²¹⁴⁹ *Id.* at 160,967.

Unfortunately, the contractor was limited to contract damages and did not receive damages for copyright infringement, which would have significantly increased the compensation level. Indeed, the GSBCA could have been more creative in calculating damages. For example, restitution is a contract remedy.²¹⁵⁰ The GSBCA could have calculated how much the Government was unjustly enriched by the breach. Such unjust enrichment could have been calculated from the record, which showed that for the Government to have received permission to disclose the software to a third party the contractor would have required an “up front” \$1,000,000 fee plus a royalty on all sales of the resulting competing software licenses.²¹⁵¹ Although expectation damages are the general measure of damages in breach of contract cases, the board could make an exception here to more adequately compensate the contractor for the Government’s breach.

Major Katherine White.

Major Systems Acquisition

The Defense Acquisition Guidebook

As discussed in last year’s *Year in Review*, the DOD issued its revised and streamlined 5000 series regulations on 12 May 2003 to remove restrictions and give program managers greater flexibility.²¹⁵² In addition to implementing a new directive²¹⁵³ and instruction,²¹⁵⁴ the DOD replaced the prior regulation,²¹⁵⁵ a 193-page document, with an *Interim Defense Acquisition Guidebook (Interim Guidebook)*.

On 8 October 2004, the DOD replaced the *Interim Guidebook* with an “electronic” *Defense Acquisition Guidebook (Guidebook)*.²¹⁵⁶ The memo introducing the *Guidebook* states that while last year’s issuance of a new directive and instruction “explain ‘what’ acquisition managers are required to do, the [*Guidebook*] complements those documents by explaining ‘how.’”²¹⁵⁷ The *Guidebook* provides “non-mandatory staff expectations” for meeting the requirements in the instruction.²¹⁵⁸ And as the *Guidebook* advertises, it is much more than a “book;”²¹⁵⁹ it is an interactive resource with different viewing settings,²¹⁶⁰ internal links, as well as links to statutes, regulations and lessons learned.

DFARS Part 242 Gets Even Slimmer

As part of the DFARS Transformation initiative, the DOD proposed making part 234, Major System Acquisition, slimmer by deleting or moving language to other DFARS parts.²¹⁶¹ For example, the proposed rule deletes the definitions of “systems” and “systems acquisition” from the definitions at DFARS section 234.001 because the terms are not used elsewhere in part 234.²¹⁶² The proposed changes also move the text on “earned value management systems (EVMS)” from

²¹⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS, § 371 (1981); see also FARNSWORTH, *supra* note 2142, § 12.3.

²¹⁵¹ GSBCA No. 15607, 04-1 BCA ¶ 32,539, at 160,964.

²¹⁵² 2003 *Year in Review*, *supra* note 29, at 144-46.

²¹⁵³ U.S. DEP’T OF DEFENSE, DIR. 5000.1, THE DEFENSE ACQUISITION SYSTEM (12 May 2003), available at [http://dod5000.dau.mil/DOCS/DoD%20Directive%205000.1-signed%20\(May%2012,%202003\).doc](http://dod5000.dau.mil/DOCS/DoD%20Directive%205000.1-signed%20(May%2012,%202003).doc).

²¹⁵⁴ U.S. DEP’T OF DEFENSE, INSTR. 5000.2, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (12 May 2003), available at [http://dod5000.dau.mil/DOCS/DoDI%20h5000.2-signed%20\(May%2012,%202003\).doc](http://dod5000.dau.mil/DOCS/DoDI%20h5000.2-signed%20(May%2012,%202003).doc).

²¹⁵⁵ U.S. DEP’T OF DEFENSE, REG. 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (5 Apr. 2002).

²¹⁵⁶ Memorandum, Under Secretary of Defense (Acquisition, Technology, and Logistics), to Secretaries of the Military Departments *et al.*, subject: The Defense Acquisition Guidebook (9 Oct. 2004), available at <http://akss.dau.mil/docs/GBMemo.Wynne.pdf> [hereinafter Acquisition Guide Memo]. The *Defense Acquisition Guidebook* is available at <http://akss.dau.mil/dag>.

²¹⁵⁷ Acquisition Guide Memo, *supra* note 2156.

²¹⁵⁸ *Defense Acquisition Guidebook*, Document View, foreword available at <http://akss.dau.mil/dag>.

²¹⁵⁹ *Id.*

²¹⁶⁰ *Id.* There are three ways to view and navigate through the Guidebook’s information: (1) the Document View allows review of information page-by-page, (2) the Lifecycle Framework view permits review of statutory and regulatory requirements and related best practices for each milestone and acquisition phase, and (3) the Functional/Topic View provides comprehensive discussions of key acquisition topics. *Id.*

²¹⁶¹ Defense Federal Acquisition Regulation Supplement; Major Systems Acquisitions, 69 Fed. Reg. 8155 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 134, 242, and 252).

²¹⁶² *Id.* at 8156.

DFARS part 234 to part 242 because the EVMS requirements are not limited to major systems acquisitions.²¹⁶³ Similarly, the text requiring contracting officers to coordinate assistance from the administrative contracting officer when determining the adequacy of a proposed EVMS plan would move to the new DFARS PGI.²¹⁶⁴ The proposed changes would also provide updated references to the OMB circulars and DOD 5000 series documents, including the Defense Acquisition Guidebook.²¹⁶⁵

DFARS Part 235 Gets Slimmer Too

Also part of the DFARS Transformation initiative, the DOD proposed deleting entirely DFARS subpart 235.70, Research and Development Streamlined Contracting Procedures.²¹⁶⁶ Because of technological advances since the implementation of the guidance, the DOD has determined the procedures obsolete.²¹⁶⁷

In a separate proposed rule announcement, the DOD would also delete as unnecessary the text at DFARS section 235.007, Solicitations, and DFARS section 235.015, which addresses research contracts with educational and nonprofit organizations.²¹⁶⁸ The proposed change would also delete DFARS section 235.010 and move its guidance on scientific and technical reports to the DFARS Procedures, Guidance, and Information (PGI).²¹⁶⁹

Major Kevin Huyser.

Non-FAR Transactions and Technology Transfer

DOD Finalizes Follow-On Production Rule in "Other Transaction for Prototype" Agreements

As discussed in prior *Years in Review*, the DOD has various legislative authorities to engage in research projects using contracting methods that do not comply with the normal statutory and regulatory contracting rules.²¹⁷⁰ Section 2358 of Title 10 grants the DOD authority to engage in research using grants or cooperative agreements.²¹⁷¹ Additionally, under section 2371 of Title 10, the DOD has authority to engage in research using "other transaction" (OT) agreements.²¹⁷² Generally, these authorities apply to research and do not permit the DOD to acquire an actual product.²¹⁷³ In 1993, however, Congress granted the DOD "Other Transaction for Prototype" authority to acquire a limited amount of prototype items in addition to the underlying research.²¹⁷⁴ And in 2001, Congress amended this authority to allow the DOD in certain circumstances to award follow-on production contracts, without competition, to the recipients of an Other Transaction for Prototype agreement.²¹⁷⁵ This past year, the DOD amended its OT regulations and the DFARS to implement this competition exception and identify the circumstance in which it would apply.²¹⁷⁶ Pursuant to the legislation, the DOD's regulatory provisions permit the award of a follow-on production contract without competition if the Other Transaction Prototype agreement resulted from competitive procedures, required "at least one-third non-Federal cost share," and the DOD established and evaluated, at the time the OT agreement was awarded, the price and quantity of the units to be purchased

²¹⁶³ *Id.*

²¹⁶⁴ *Id.*

²¹⁶⁵ *Id.*

²¹⁶⁶ Defense Federal Acquisition Regulation Supplement; Removal of Obsolete Research and Development Contracting Procedures, 69 Fed. Reg. 8157 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pt. 235).

²¹⁶⁷ *Id.* at 8158.

²¹⁶⁸ Defense Federal Acquisition Regulation Supplement; Research and Development Contracting, 69 Fed. Reg. 8158 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 235 and 252).

²¹⁶⁹ *Id.* For discussion of the DOD's DFARS Transformation initiative and the DFARS PGI, see *supra* section titled Miscellaneous.

²¹⁷⁰ 2003 *Year in Review*, *supra* note 29, at 159; 2002 *Year in Review*, *supra* note 300, at 180.

²¹⁷¹ Congress established this authority in 1947. Pub. L. No. 85-599, 72 Stat. 520 (1947).

²¹⁷² Congress granted this authority in 1989. Pub. L. No. 101-189, 103 Stat. 1403 (1989).

²¹⁷³ See 2003 *Year in Review*, *supra* note 29, at 159.

²¹⁷⁴ Pub. L. No. 103-160, § 845, 107 Stat. 1547, 1721 (1993). Because section 845 of the National Defense Authorization Act for FY 1994 granted this authority, Other Transactions for Prototype agreements are also called "845 Agreements." See *id.*

²¹⁷⁵ National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, 115 Stat. 1012, 1182-83 (2001) (adding sec. 845(f) to tit. 10).

²¹⁷⁶ Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects, 69 Fed. Reg. 16,481 (Mar. 30, 2004) (amending 32 C.F.R. pt. 3); Defense Federal Acquisition Regulation Supplement; Follow-On Production Contracts for Products Developed Pursuant to Prototype Projects, 69 Fed. Reg. 31,907 (June 8, 2004) (amending 48 C.F.R. pt. 206).

under the production contract.²¹⁷⁷

Grant Me a Few More Changes

The past two *Years in Review*²¹⁷⁸ have also followed the OMB's response to the Federal Financial Assistance Management Improvement Act (FFAMIA),²¹⁷⁹ which directs the OMB to streamline the regulations dealing with grants and standardize the means of awarding and administering grants among the various agencies. Last year's article described OMB final rules establishing a standardized format and location for announcing discretionary grant and cooperative agreement funding opportunities, increasing audit thresholds for states, local governments, and non-profit organizations, and requiring grant and cooperative agreement recipients to use Dun & Bradstreet Numbering System (DUNS) numbers to be eligible for assistance.²¹⁸⁰ This past year, the DOD proposed updating the DOD Grant and Agreement Regulations (DODGARS) to conform the regulations to the changes made by the OMB last year.²¹⁸¹ The proposed update also amends the DODGARS to conform to the recently updated government-wide common rules on nonprocurement debarment and suspension and on drug-free workplace requirements.²¹⁸² Finally, the proposed changes provide additional guidance on the congressional prohibitions against funding by grant institutions that prevent the operation of ROTC units on campus or deny military recruiters to campus.²¹⁸³

In another FFAMIA related development, the OMB announced this year that it is establishing a new title 2 in the Code of Federal Regulations that consolidates the location of OMB guidance and federal agency regulations on the award and administration of grants and agreements.²¹⁸⁴ The new title 2 consists of two subtitles: A and B. Subtitle A will consist of OMB guidance to federal agencies on grants and agreements—"guidance that currently is in seven separate OMB Circulars and other OMB policy documents."²¹⁸⁵ Subtitle A consists of two chapters because the OMB continues efforts to streamline and simplify guidance for awarding and administering grants, as required by the FFMIA.²¹⁸⁶ Chapter II contains "OMB guidance in its initial form—before completion of revisions" pursuant to the FFMIA.²¹⁸⁷ After revisions to a part are finalized, the guidance will be removed from Chapter II and placed into Chapter I.²¹⁸⁸

Subtitle B of the new title 2 contains federal agency regulations that implement the OMB guidance.²¹⁸⁹ The OMB notice, as well as the language in title 2, highlight that the agency regulations in subtitle B differ from the guidance in subtitle A in that the latter is only guidance and not regulatory.²¹⁹⁰

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²¹⁷⁷ 69 Fed. Reg. 16,481; 69 Fed. Reg. 31,907.

²¹⁷⁸ 2003 *Year in Review*, *supra* note 29, at 155-56; 2002 *Year in Review*, *supra* note 300, at 182.

²¹⁷⁹ Pub. L. No. 106-107, 113 Stat. 1486 (1999).

²¹⁸⁰ 2003 *Year in Review*, *supra* note 29, at 155-56.

²¹⁸¹ DOD Grant and Agreement Regulations, 69 Fed. Reg. 44,990 (proposed July 28, 2004) (to be codified at 32 C.F.R. pts. 21, 22, 25, 32, 33, 34, and 37).

²¹⁸² *Id.* at 44,991. Previously the DOD amended the DODGARS to include the updated nonprocurement debarment and suspension rule and drug-free workplace rules. Nonprocurement Debarment and Suspension and Drug-Free Workplace Requirements, 68 Fed. Reg. 66,534 (Nov. 26, 2003) (to be codified at 32 C.F.R. pts. 25 and 26).

²¹⁸³ 69 Fed. Reg. 44,990.

²¹⁸⁴ Governmentwide Guidance for Grants and Agreements; Federal Agency Regulations for Grants and Agreements, 69 Fed. Reg. 26,276 (May 11, 2004) (to be codified at 2 C.F.R. subtitles A and B).

²¹⁸⁵ *Id.* For example, the OMB has published Circular A-110, Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," in the new title 2, subtitle A. *Id.* at 26,280.

²¹⁸⁶ *Id.*

²¹⁸⁷ *Id.*

²¹⁸⁸ *Id.*

²¹⁸⁹ *Id.*

²¹⁹⁰ *Id.*

Payment and Collection

DFARS Final Rule Issued for Electronic Invoicing—Further along the Road to Paper-less Contracting

As reported last year,²¹⁹¹ section 1008 of the National Defense Authorization Act for FY 2001 required “contractors to submit, and the DOD to process, payment requests in electronic form” by 1 October 2002.²¹⁹² Albeit late, the DOD subsequently issued an interim rule implementing this new requirement.²¹⁹³ In response to comments received, the DOD issued the final rule with some minor changes.²¹⁹⁴ Initially, the interim rule allowed the contracting officer to allow an exemption for electronic submission if the following conditions were met:

The contractor is unable to submit, or DOD is unable to receive, a payment request in electronic form; and

The contracting officer, the payment office, and the contractor mutually agree to an alternate method.²¹⁹⁵

After revision, the final rule included the contract administration office in the mutual decision to exempt the contractor from the required electronic submission of invoices and allow an alternative method.²¹⁹⁶

The final rule also clarified that “scanned documents, by themselves, are not acceptable electronic forms for submission of payment requests . . . unless they are part of a submission using one of the forms of acceptable electronic transmission.”²¹⁹⁷ Section 252.232-7003(a)(2) of the DFARS now reads as follows with the clarifying additional language in bold type:

(2) Electronic form means any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail, and scanned documents are not acceptable electronic forms for submission of payment requests. *However, scanned documents are acceptable when they are part of a submission of payment request made using one of the electronic forms provided for in paragraph (b) of this clause.*²¹⁹⁸

As a reminder of the three primary means of transmitting electronic forms, DFARS section 232.7003 remains unchanged (except for updated web sites) from the initial interim rule and provides:

(1) Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA). Information regarding WAWF-RA is available on the Internet at <https://wawf.eb.mil>.

(2) Web Invoicing System (WInS). Information regarding WInS is available on the Internet at <https://ecweb.dfas.mil>.

(3) American National Standards Institute (ANSI) X.12 electronic data interchange (EDI) formats.

(i) Information regarding EDI formats is available on the Internet at <https://www.X12.org>.

(ii) EDI implementation guides are available on the Internet at <http://www.dfas.mil/ecedi>.²¹⁹⁹

Required Registration in the Central Contractor Registration (CCR)

To move further along the road toward paper-less contracting (officially referred to as “e-business applications”), the FAR Councils issued a final rule requiring contractors to register in the web-based CCR “to eliminate the need to maintain paper-based sources of contractor information.”²²⁰⁰ Contractors must register in the CCR database prior to contract

²¹⁹¹ 2003 Year in Review, *supra* note 29, at 162.

²¹⁹² Pub. L. No. 106-398, 114 Stat. 1654.

²¹⁹³ Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 8450 (Feb. 21, 2003). The DOD was unable to meet the deadline because the “automated payment systems were limited to certain types of payment requests. *Id.* at 8454.

²¹⁹⁴ Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 69,628 (Dec. 15, 2003) (codified at 48 C.F.R. pts. 232 and 252).

²¹⁹⁵ 68 Fed. Reg. at 8455 (listing the interim DFARS at 232.7002(a)(6)).

²¹⁹⁶ 68 Fed. Reg. at 69,630 (listing the final revision of DFARS at 232.7002(a)(6)).

²¹⁹⁷ *Id.* at 69,629.

²¹⁹⁸ *Id.* at 69,630 (listing DFARS section 252.232-7003(a)(2)) (emphasis added).

²¹⁹⁹ DFARS, *supra* note 227, at 252.232-7003(b)(1-3).

²²⁰⁰ Federal Acquisition Regulation; Central Contractor Registration, 68 Fed. Reg. 56,669, 56,671 (Oct. 1, 2003).

award, to include basic agreements, basic ordering agreements, or blanket purchase agreements. Additionally, the rule directs contracting officers to modify existing contracts that extend beyond 31 December 2003 to require CCR registration before the same date.²²⁰¹ By establishing the CCR as the “common source of vendor data for the Government,”²²⁰² the CCR will also benefit other systems, such as the aforementioned methods of electronically submitting payment requests, with increased integration opportunities for electronic invoice submission and payment by electronic fund transfer.²²⁰³

“We are all Gentlemen here, no Need to Withhold 5%, Mr. KO, You’ll get your Release in Due Time.”

The DOD issued a final rule adding DFARS sections 232.111(b) and 252.232-7006, Alternate A that should clarify whether to withhold payments under time-and-materials and labor-hour contracts.²²⁰⁴ Generally, FAR section 52.232-7(a)(2) requires the contracting officer to withhold five percent of the amounts due under the aforementioned contracts, up to a total maximum of \$50,000 unless the contract provides otherwise.²²⁰⁵ These retained funds are disbursed as a final payment when the contractor provides “a release discharging the Government . . . from all liabilities, obligations, and claims arising out of or under [the] contract.”²²⁰⁶ Accordingly, the new DFARS provision and clause specify that, normally, there is no need to withhold contractor payments when the contractor has a record of timely release submission.²²⁰⁷ However, the administrative contracting officer (ACO) may use DFARS section 252.232-7006, Alternate A, by issuing a unilateral modification to withhold five percent of payment amounts due, up to a maximum of \$50,000 if the ACO believes it is necessary to protect the Government’s interest.²²⁰⁸

As mentioned in the response to comments to the final rule, the Defense Acquisition Regulations (DAR) Council is also working with the Civilian Agency Acquisition Council to revise the FAR to allow optional withholding for time-and-materials and labor-hour contracts.²²⁰⁹ Not surprisingly, the FAR Council issued a proposed rule on 25 May 2004 to remove the requirement for five percent withholding under the aforementioned contract types.²²¹⁰ The proposed rule would “add FAR [section] 32.111(a)(7)(iii) to permit contracting officers to use their judgment regarding whether to withhold payments under time-and-materials and labor-hour contracts so that the withhold would be applied only when necessary to protect the Government’s interests.”²²¹¹ The FAR Council is considering the revision “because the current withholding provisions are administratively burdensome and may . . . result in the withholding of amounts that exceed reasonable amounts needed to protect the Government’s interests.”²²¹² Additionally, the FAR Councils noted that a contractor has an incentive to provide a release as a condition for the final payment.²²¹³

Lieutenant Colonel Karl Kuhn.

²²⁰¹ *Id.* at 56,669.

²²⁰² *Id.* at 56,672 (citing FAR section 4.1100(b)).

²²⁰³ See FAR, *supra* note 20, at 32.1110(a).

²²⁰⁴ Defense Federal Acquisition Regulation Supplement; Payment Withholding, 68 Fed. Reg. 69,631 (Dec. 15, 2003) (codified at 48 C.F.R. pts. 232 and 252).

²²⁰⁵ FAR, *supra* note 20, at 52.232-7(a)(2).

²²⁰⁶ *Id.* at 52.232-7(f).

²²⁰⁷ 68 Fed. Reg. at 69,631.

²²⁰⁸ *Id.* at 69,632.

²²⁰⁹ See *id.* at 69,631 (DOD Response to Comment 3).

²²¹⁰ Federal Acquisition Regulation; Payment Withholding, 69 Fed. Reg. 29,838 (proposed May 25, 2004) (to be codified at 48 C.F.R. pts. 14, 32, and 52).

²²¹¹ *Id.* at 29,838.

²²¹² *Id.*

²²¹³ *Id.*

Performance-Based Service Acquisitions

*What's in a Name? That Which We Call (Performance-Based Service Contracting) by Any Other Word Would Smell as Sweet.*²²¹⁴

Last year's *Year in Review*²²¹⁵ discussed an Office of Federal Procurement Policy (OFPP) interagency working group report that recommended several changes in performance-based service contracting (PBSC) to make PBSC more flexible and increase agency use of such methods.²²¹⁶ One of the group's recommendations proposed use of the term "performance-based service acquisitions (PBSA)" vice PBSC "to provide common terminology throughout the government."²²¹⁷ On 21 July 2004, the FAR Councils proposed to amend the FAR by replacing the referenced terms "performance-based contracting (PBC) and performance-based service contracting (PBSC)" with "performance-based acquisition (PBA) and performance-based service acquisition (PBSA)."²²¹⁸

More significantly, to "make PBA more flexible, thus increasing agency use of PBA methods on service contracts and task orders,"²²¹⁹ the FAR Councils proposed several FAR modifications that relax the description and discussion of required elements of PBSA.²²²⁰ For example, the proposed language simply requires that PBSA contracts or orders include a performance work statement (PWS) and measurable performance standards, which may be objective or subjective.²²²¹ Fee reductions or price decreases for non-performance would no longer be required, as the proposed modifications simply permit performance incentives, which "may be of any type, including positive, negative, monetary or non-monetary."²²²² And the requirement for quality assurance surveillance plans (QASP) would be eased with direction that QASPs should be tailored to the complexity of the acquisition and should "utilize commercial practices to the maximum extent practicable."²²²³

The proposed modifications also add definitions for "performance work statement" and "statement of objectives (SOO)" to FAR part 2.²²²⁴ While PBSA contracts and task orders must include a PWS, under the rule change, the PWS "may be prepared by the Government or result from a SOO prepared by the Government where the offeror proposes the PWS."²²²⁵ Additionally, the FAR Councils' proposal amends the order of preference for requirements documents at FAR section 11.101 to read "Performance or function-related documents."²²²⁶

To give meaning to the proposed name change and other PBSA developments, practitioners may wish to use a

²²¹⁴ WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act II, sc. ii.

²²¹⁵ *2003 Year in Review*, *supra* note 29, at 166-68.

²²¹⁶ FEDERAL OFFICE OF MANAGEMENT AND BUDGET, *Office of Federal Procurement Policy, Performance-Based Service Acquisition: Contracting for the Future* (July 2003) [hereinafter *Contracting for the Future*].

²²¹⁷ *Id.* at 5.

²²¹⁸ Department of Defense, General Services Administration, National Aeronautics and Space Administration, Federal Acquisition Regulation; Performance-Based Service Acquisition; Proposed Rule, 69 Fed. Reg. 43,712 (July 21, 2004) (to be codified at 48 C.F.R. pts. 2, 7, 11, 16, 37, and 39). The Air Force lexicon for PBSC has also officially changed to PBSA. See U.S. DEP'T OF AIR FORCE, INSTR. 63-124, PERFORMANCE-BASED SERVICE ACQUISITIONS (9 Feb. 2004) (revising numerous provisions concerning PBSA including the overview to identify what an acquisition must include to be considered "performance-based").

²²¹⁹ 63 Fed. Reg. 43,712.

²²²⁰ *Id.* Most of the Councils' proposed changes are based on the recommendations and suggested language of the OFPP's interagency working group report. See *Contracting for the Future*, *supra* note 2216.

²²²¹ 63 Fed. Reg. at 43,714. Currently the FAR states PBSA contracts and orders include the following attributes:

1. describes requirements in terms of required results rather than methods;
2. uses measurable performance standards;
3. uses quality assurance surveillance plans;
4. identifies positive and negative incentives when appropriate.

See FAR, *supra* note 20, at 37.601.

²²²² 63 Fed. Reg. 43,714.

²²²³ *Id.*

²²²⁴ *Id.* at 43,713.

²²²⁵ *Id.*

²²²⁶ *Id.*

PSBA training module now available on-line at the Defense Acquisition University's Continuous Learning Center.²²²⁷ For good basic information on PBSA, *The Seven Steps to Performance-Based Service Acquisition* remains available on-line.²²²⁸

PBSA Odds and Ends

Last year's *Year in Review* noted section 1431 of the National Defense Authorization Act for FY 2004,²²²⁹ which expanded government-wide the authority to treat certain PBSA up to \$25 million as "commercial item" acquisitions and thus use the streamlined acquisition procedures under FAR part 12.²²³⁰ To qualify for "commercial item" treatment under section 1431, the contract or task order must set forth specifically each task and define the task in measurable, mission-related terms, identify specific end products or output, contain firm-fixed prices for the tasks or outcomes, and be awarded to a contractor that provides similar services to the general public under conditions similar to those offered the federal government.²²³¹

On 18 June 2004, the FAR Councils issued an interim rule amending the FAR to implement the section 1431 authority.²²³² The interim rule amends FAR section 12.102 by adding a paragraph (g), which authorizes a contracting officer to use FAR part 12 for any performance-based acquisition that does not meet the FAR's definition of "commercial item," as long as the contract or task order satisfies the section 1431 criteria.²²³³ As partial satisfaction of the various section 1431 requirements for "commercial item" treatment, the interim rule requires the contracts or task orders to meet the definition of "performance-based contracting"²²³⁴ at FAR section 2.201.²²³⁵ Additionally, the interim rule adds a cross reference to FAR section 12.102(g) in FAR section 37.601 "to ensure consistency with the overarching policy in FAR [section] 37.601 that applies to performance-based contracting for services."²²³⁶ Finally, to satisfy section 1341's data tracking and reporting requirements,²²³⁷ the interim rule amends FAR section 4.601 to require data collection by using the Federal Procurement Data System—Next Generation.²²³⁸

The *2003 Year in Review* also reported on the DAR Council's interim rule adding DFARS section 237.170, Approval of Contracts and Task Orders for Services, as well as the Army and Air Force policy guidance on review structure and processes for service acquisitions.²²³⁹ This past year the Army revised the AFARS, implementing approval requirement thresholds for service contracts and task orders and guidance on the management and oversight of service acquisitions.²²⁴⁰ The Air Force issued additional interim guidance to resource advisors, instructing that acquisitions for services about the simplified acquisition threshold must be performance-based unless approval of a Services Designated Official (SDO) is

²²²⁷ See <http://clc.dau.mil>. To access the training module, first select the "Learning Center," then the "Course Information & Access" link, then select the PBSA course from the listing. Recall the DOD's requirement that all DOD personnel who prepare service contract PWS must receive training in PBSA by 30 September 2005. See *2003 Year in Review*, *supra* note 29, at 168 (discussing the Acting Under Secretary of Defense's (Acquisition, Technology, and Logistics) goals for PBSA contract awards and training).

²²²⁸ See <http://www.arnet.gov/Library/OFPP/BestPractices/pbsc/>.

²²²⁹ Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003).

²²³⁰ *2003 Year in Review*, *supra* note 29, at 165-66, 218. Section 821(b) of the Floyd D. Spence National Defense Authorization Act for FY 2001 previously granted only the DOD this authority. Pub. L. No. 106-398, § 821, 114 Stat. 1654, 1654A-217 (2000). On 25 June 2004, the DOD amended the DFARS to remove sections 212.102 and 237.601, as the authority granted by section 821(b) expired on 30 October 2003. Department of Defense, Defense Federal Acquisition Regulation Supplement, Use of FAR Part 12 for Performance-Based Contracting For Services, Final Rule, 69 Fed. Reg. 35,532 (June 25, 2004) (to be codified at 48 C.F.R. pts. 212 and 237). The new government-wide authority remains available through 24 November 2013. National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003).

²²³¹ Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003).

²²³² General Services Administration et al., Federal Acquisition Regulation; Incentives for Use of Performance-Based Contracting for Services, Interim Rule with Request for Comments, 69 Fed. Reg. 34,226 (June 18, 2004) (to be codified at 48 C.F.R. pts. 2, 4, 12, 37, and 52).

²²³³ *Id.* at 34,227.

²²³⁴ The interim rule uses the term "performance-based contracting" vice "performance-based acquisition," as the name change from PBSC to PBSA is still just a proposal. See *supra* notes 2217 to 2218 and accompanying text.

²²³⁵ 69 Fed. Reg. 34,226.

²²³⁶ *Id.*

²²³⁷ National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, § 1431, 117 Stat. 1392, 1671 (2003). See also *2003 Year in Review*, *supra* note 29, at 165-66 (discussing a GAO report that cited the DOD's lack of a reporting system or other tracking mechanism to collect data on the section 821(b) authority).

²²³⁸ 69 Fed. Reg. 34,226-27.

²²³⁹ *2003 Year in Review*, *supra* note 29, at 164-65 (noting the interim rule implements section 8011(b) of the National Defense Authorization Act for FY 2002, Pub. L. No. 107-107, § 8011(b), 115 Stat. 1012, 1175 (2001)).

²²⁴⁰ U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REGULATION SUPPLEMENT (2004) subpts. 5137.170 and 5137.5 (AFARS Revision No. 10, Apr. 30, 2004).

Procurement Fraud

False Claims Act: No Blockbusters, But Quite a Few Interesting Developments

As in recent years, FY 2004 witnessed a considerable number of developments on the False Claims Act (FCA)²²⁴² front. The Fourth Circuit Court of Appeals, affirmed a district court holding that a contractor's certification of no organizational conflict of interest (OCI) was both false and material under the FCA. In *United States ex rel. Edwin P. Harrison v. Westinghouse Savannah River Company*,²²⁴³ appellant Westinghouse submitted a no-OCI certification to the Department of Energy (DOE), even though a subcontractor employee was intimately involved in preparing procurement sensitive documents for the DOE.²²⁴⁴ At the district court, a jury determined the no-OCI certification was false, and that appellant knew it was false when appellant made it. In addition, the court determined the no-OCI certification was material under the FCA.²²⁴⁵ The appellate court agreed, holding the no-OCI certification was material because DOE would have disqualified the subcontractor (and thus the contractor) had DOE known of the conflict of interest.²²⁴⁶

Turning to the D.C. Circuit, the court recently determined that Amtrak was not the "government" under the FCA. Thus a supplier of defective rail cars did not violate the FCA by delivering and subsequently billing Amtrak for those cars. In *United States ex rel. Edward L. Totten v. Bombardier Corp. and Envirovac, Inc.*,²²⁴⁷ the court's majority concluded that Amtrak's receipt of federal funds did not create liability under the FCA. Rather, the majority reasoned for liability to arise under the Act, the contractor would have to have requested the government pay or approve the payment of the invoices.²²⁴⁸ In response to the majority's reasoning, Judge Garland wrote a spirited dissent.²²⁴⁹ After thoroughly examining the FCA's legislative history, Judge Garland concluded the majority's interpretation of the FCA "significantly restricts the reach of the False Claims Act in a manner that Congress did not intend, withdrawing False Claims Act protection with respect to a broad swath of false claims inflicting injury on the federal fisc."²²⁵⁰

The Ninth Circuit determined a state contractor who knowingly submitted false claims to the Federal Emergency Management Agency was not shielded from liability under the FCA. In *United States ex rel. Ali v. Mann, Johnson & Mendenhall*,²²⁵¹ the district court determined a construction management firm, which was a contractor for California State University, was an agent of the university for the purpose of FCA liability. Thus, under the Supreme Court's holding in *Vermont Department of Natural Resources v. United States ex rel. Stevens (Stevens)*,²²⁵² the contractor was immune from liability under the FCA because it was acting as an agent of the state within the scope of its official duties.²²⁵³ On appeal, the

²²⁴¹ Memorandum, Associate Deputy Secretary of the Air Force (Contracting) and Assistant Secretary of the Air Force (Acquisition), to ALMAJCOM-FOA-DRU (Contracting & Comptrollers), subject: Interim Procurement Guidance for Resource Advisors Requesting the Acquisition of Services (10 Mar. 2004), available at <http://www.safaq.hq.af.mil/contracting/affairs/5337/library-5337.html>.

²²⁴² 31 U.S.C.S. §§ 3729-33 (LEXIS 2004). The FCA is often considered the primary civil remedy available for combating procurement fraud. It imposes liability on any "person" who "knowingly presents or causes to be presented," a false or fraudulent claim, or conspires to defraud the government by having a false or fraudulent claim allowed or paid. The act allows for treble damages, in addition to civil penalties in the amount of five to ten thousand dollars per claim. The FCA also allows an individual to bring suit under the *qui tam* provisions of the FCA in the name of the United States. *Id.*

²²⁴³ 352 F.3d 908 (4th Cir. 2004).

²²⁴⁴ *Id.* at 911.

²²⁴⁵ *Id.* at 911-12.

²²⁴⁶ *Id.* at 917.

²²⁴⁷ 380 F.3d 488 (D.C. Cir. 2004).

²²⁴⁸ *Id.* at 491-92. The majority concluded the government "failed to connect the dots" in that for a claim to be actionable under the FCA, the claim "must be presented to an officer or employee of the United States Government." Thus, for the majority, the source of the funds was not the focus of the analysis, but rather whether the claim is presented to the government. *Id.* at 493.

²²⁴⁹ *Id.* at 503. To quote Judge Garland: "the court's interpretation is not just inconsistent, but irreconcilable, with the legislative history of the [FCA] The court marches on nonetheless, surrounding itself on all sides with 'canons' of statutory construction, which serve here as 'cannons' of statutory destruction." *Id.*

²²⁵⁰ *Id.* at 515-16.

²²⁵¹ 355 F.3d 1140 (9th Cir. 2004).

²²⁵² 529 U.S. 765 (2000). In *Stevens* the Court decided that states are not "persons" amenable to suit under the FCA. The Court based that decision, in part, on the "longstanding interpretive presumption" that a "person" does not include the "sovereign" (i.e., a sovereign state). *Id.* at 786-88.

²²⁵³ *Ali*, 355 F.3d at 1144.

Ninth Circuit disagreed. For the circuit court, the fact that the contractor's employees were working on behalf of the university did not cause them to become government officials for immunity purposes under *Stevens*.²²⁵⁴ Applying an "arm-of-the-state" test for sovereign immunity,²²⁵⁵ the court observed that a judgment against the contractor would not be satisfied from public funds, but with contractor funds. To the court, this was more dispositive than whether the contractor performed a central government function. Accordingly, the court concluded the facts weighed against granting the contractor sovereign immunity for its actions on behalf of the state university.²²⁵⁶

In *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*,²²⁵⁷ a divided Fourth Circuit concluded that retaliation claims are subject to the FCA's six-year statute of limitations, rather than a state's three-year limitations period for wrongful discharge actions.²²⁵⁸ In holding as such, the Fourth Circuit rejected the Ninth's Circuit's interpretation that the FCA's statute of limitations does not apply to retaliation claims under the Act,²²⁵⁹ and adopted the Seventh Circuit's more expansive interpretation of the FCA.²²⁶⁰

Finally, a case from the D.C. District Court established that a contractor did not violate the FCA where it intentionally submitted a low bid on a contract intending to make up the loss on change orders. In *United States ex rel. Bettis v. Odebrecht Contractors of California*,²²⁶¹ the relator alleged a construction contractor violated the FCA by intentionally submitting a low bid, intending to later seek false modifications during the course of performance.²²⁶² Upon examination, the court concluded the relator's theory was "premised on a legally-flawed application of the fraud-in-the-inducement theory."²²⁶³ To the court, the contractor's submission of a deflated bid, in and of itself, could not suffice to impose liability under the FCA. "Such a proposition completely ignores the reality of government contracting where it is common for a contract that was bid at one price to ultimately cost far more."²²⁶⁴

The Sad Saga of Darleen Druyun

On 1 October 2004, former Air Force procurement official Darleen Druyun was sentenced by a federal judge to nine months in prison after admitting she extracted personal favors from Boeing, and give the contractor preferential treatment in connection with at least four major Air Force procurements.²²⁶⁵

On 20 April 2004, Druyun plead guilty to one felony count of conspiracy in connection with her discussions with

²²⁵⁴ *Id.* at 1145.

²²⁵⁵ The "arm-of-the-state" test for sovereign immunity has been applied by the Ninth Circuit in a number of settings. As applied in the present case, the court examined: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity. The court determined the most important factor was whether a money judgment would be satisfied out of state funds, because "a plaintiff who successfully sued an arm of the state would have a judgment with the same effect as if it were rendered against the State." *Id.* at 1147 (citing *Mitchell v. Los Angeles Comty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988)).

²²⁵⁶ *Id.* See also *United States ex rel. Adrian v. Regents of the Univ. of California*, 363 F.3d 398 (5th Cir. 2004) (holding the Board of Regents of the University of California, in managing the Lawrence Livermore National Laboratory, is a state entity and thus not amendable to suit under the FCA).

²²⁵⁷ 367 F.3d 245 (4th Cir. 2004).

²²⁵⁸ *Id.* at 247.

²²⁵⁹ *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1997).

²²⁶⁰ *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

²²⁶¹ 297 F. Supp. 2d 272 (D.D.C. 2004).

²²⁶² *Id.* at 273.

²²⁶³ *Id.* at 279.

²²⁶⁴ *Id.* at 281. Other FCA cases of interest decided this year include *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370 (5th Cir. 2004) (ruling a nurse's allegation that defendant sought reimbursement for medically unnecessary procedures was sufficient to state a claim under the FCA); *Fanslow v. Chicago Mfg. Center, Inc.* 2004 U.S. App. LEXIS 19510 (holding an information technology employee was not required to allege illegality in order to put employer on notice he was filing a whistleblower complaint); *Brooks v. United States*, 2004 U.S. App. LEXIS 19037 (finding the proceeds of a qui tam suit are taxable income); *Kennard v. Comstock Res. Inc.*, 363 F.3d 1039 (10th Cir. 2004) (determining the relators qualified as an original source where substance of allegations was based on Indian tribe's investigation into oil and gas leases); *United States ex rel. Barron v. Deloitte & Touche*, 381 F.3d 438 (5th Cir. 2004) (ruling that the defendant insurance company was not entitled to Eleventh Amendment immunity under FCA).

²²⁶⁵ *Procurement Integrity: Ex-USAF Official Druyun Admits Boeing Offers Of Job Influenced Her, Draws 9 Months in Jail*, BNA FED. CONT. DAILY (Oct. 4, 2004) [hereinafter *Druyun Draws 9 Months in Jail*]. In addition to nine months in prison, the court sentenced Druyun to seven months of community confinement, 150 hours of community service, and a fine of \$5,000. *Id.*

Boeing concerning potential employment with the contractor.²²⁶⁶ At that time, Druyun insisted those discussions did not influence her dealings with Boeing. As part of her plea agreement, Druyun was required to provide “full, complete and truthful cooperation to the government.” However, after Druyun entered the plea agreement she failed a polygraph test and ultimately admitted she had not been truthful in her prior statements.²²⁶⁷

After failing the polygraph, Druyun admitted she provided “favours” to Boeing, and as a result of her “loss of objectivity, took actions which harmed the United States.”²²⁶⁸ Specifically, in negotiations with Boeing concerning a lease agreement for one-hundred Boeing KC 767A tanker aircraft, Druyun admitted she agreed to a higher price for the aircraft than she believed was appropriate. She did so as a “parting gift to Boeing” because of her “desire to ingratiate herself with Boeing,” her future employer. She also wished to garner favor for her daughter and son-in-law, who were both then employed by Boeing.²²⁶⁹ The DOD has since put the deal on hold.²²⁷⁰

In addition to Druyun’s admissions concerning the tanker deal, she also admitted to showing favoritism to Boeing in negotiations concerning the restructuring of the NATO AWACS program, where she admitted settling for an amount which was lower than appropriate. She stated the agreement “was influenced by her daughter’s and son-in-law’s relationship with Boeing,” as well as her own employment negotiations.²²⁷¹ Druyun also admitted she was not objective in a four billion dollar deal with Boeing to upgrade the avionics of C-130 aircraft,²²⁷² and in a negotiated settlement with Boeing involving C-17 aircraft.²²⁷³

In response to questions regarding her original plea, Druyun’s attorney stated “the human condition got in the way of getting to the truth.”²²⁷⁴

The COFC Giveth, the COFC Taketh Away

Two recent COFC cases involving, respectively, waiver and forfeiture warrant mention. In *Aptus Co. v. United States*,²²⁷⁵ the COFC held the government waived its right to assert fraud as an affirmative defense in a contract termination case because it failed to terminate the contract when it first became aware of the alleged fraud.²²⁷⁶ The case involved an Army COE contract to design and install a several high-voltage electrical devices. Pursuant to the contract, Aptus, a sole proprietorship, was required to perform portions of the work “with either a Graduate Mechanical Engineer with two (2) years of experience, or a person possessing at least five (5) years of related experience.”²²⁷⁷ Aptus failed to secure an engineer with the required level of experience. However, the COE was apparently aware of this fact and never objected to this deficiency during contract performance.²²⁷⁸ Aptus also failed to make satisfactory progress, and approximately ten months into the contract, the COE issued Aptus a show cause notice, followed by termination of the contract.²²⁷⁹

The COE defended the termination before the COFC by arguing, inter alia, that Aptus’ failure to provide an

²²⁶⁶ Supplemental Statement of Facts, The Defendant’s Post Plea Admissions, U.S. v. Darleen A. Druyun, U.S. District Court for the Eastern District of Virginia, Criminal No. 04-150-A, at <http://www.govexec.com/pdfs/druyunpostpleaadmission.pdf> (last visited 12 Nov. 2004) [hereinafter Supplemental Statement of Facts].

²²⁶⁷ *Druyun Draws 9 Months in Jail*, *supra* note 2265.

²²⁶⁸ Supplemental Statement of Facts, *supra* note 2266, at 2.

²²⁶⁹ *Id.* at 2-3.

²²⁷⁰ *Druyun Draws 9 Months in Jail*, *supra* note 2265.

²²⁷¹ Supplemental Statement of Facts, *supra* note 2266, at 2.

²²⁷² *Id.* at 3.

²²⁷³ *Id.*

²²⁷⁴ *Druyun Draws 9 Months in Jail*, *supra* note 2265. The collateral damage from the Druyun case will most likely be felt for some time. On 7 October 2004, the President’s nominee for Commander, U.S. Pacific Command, Air Force General Gregory Martin, requested his name be withdrawn after questions arose concerning his part in the Boeing air-refueling tanker deal. See *U.S. General’s Pacific Nomination Withdrawn*, WASH. TIMES, Oct. 8, 2004, available at <http://washingtontimes.com/upi-breaking/20041007-040259-2360r.htm> (last visited 12 Nov. 2004).

²²⁷⁵ 61 Fed. Cl. 638 (2004).

²²⁷⁶ *Id.* at 649-50.

²²⁷⁷ *Id.* at 648-49.

²²⁷⁸ *Id.* at 649-50.

²²⁷⁹ *Id.* at 643.

engineer with the required level of experience constituted fraud. The COFC was not very responsive to this defense.²²⁸⁰ Observing the government “irrefutably knew about the alleged fraud,” the court held that “justifying the termination based on this principle would be unconscionable.” To the court, “holding to the contrary would represent a blatant violation of the principles of fundamental fairness.”²²⁸¹

In *American Heritage Bancorp v. United States (AHB)*,²²⁸² the government successfully argued that plaintiff’s claim should be forfeited under the Forfeiture of Fraudulent Claims statute.²²⁸³ The case is deserving of note because the fraud in question took place during contract formation, rather than as a “fraudulent claim.”²²⁸⁴

In *AHB*, plaintiff sued the government for an alleged breach of contract involving the purchase of a bank.²²⁸⁵ In a motion for summary judgment, the government argued as an affirmative defense that AHB’s suit should be forfeited under the Forfeiture of Fraudulent Claims statute because one of AHB’s directors fraudulently misstated his financial position in AHB’s application to the Federal Home Loan Bank of Boston, a government body responsible for approving AHB’s bank acquisition.²²⁸⁶

Upon examination, the court imputed the misconduct of the director to AHB.²²⁸⁷ More importantly, the court adopted an expansive reading of the Forfeiture of Fraudulent Claims statute, and concluded the statute applies to fraud during formation of a contract.²²⁸⁸ Citing earlier precedent, the COFC rejected the proposition that the statute’s scope is limited to only fraudulent claims. Specifically, under *O’Brien Gear & Machine Co. v. United States*,²²⁸⁹ the court observed that “Congress intended . . . that every suit brought in the Court of Claims should be subject to the forfeiture provided, on the commission of the specified fraud.”²²⁹⁰ Further, the court cited *Little v. United States*²²⁹¹ for the proposition that where “fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it.”²²⁹² Accordingly, the court concluded a “narrow reading does not represent the full extent of the force of § 2514.”²²⁹³ Thus, it was appropriate “to apply the forfeiture statute to situations outside the strict terms of the statute, as logic has dictated.”²²⁹⁴

Major Fraud Act: No Stretching the Statute of Limitations

In *United States v. Reitmeyer et al.*,²²⁹⁵ the Tenth Circuit held that for purposes of determining when the seven year statute of limitations for the Major Fraud Act²²⁹⁶ begins to toll, the defendants “executed” their alleged scheme to defraud and obtain money from the United States when they filed their claim for equitable adjustment. Thus, the statute of limitations

²²⁸⁰ *Id.* at 649-50.

²²⁸¹ *Id.* Once the court brushed the fraud issue to the side, the court observed the contractor failed to establish an excuse for his lack of progress and dismissed the complaint in its entirety. *Id.* at 664.

²²⁸² 61 Fed. Cl. 376 (2004).

²²⁸³ 28 U.S.C.S. § 2514 (LEXIS 2004). The Forfeiture of Fraudulent Claims statute provides:

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.

Id.

²²⁸⁴ *AHB*, 61 Fed. Cl. at 385-86.

²²⁸⁵ *Id.* at 377-78.

²²⁸⁶ *Id.* at 378-79.

²²⁸⁷ *Id.* at 394-95.

²²⁸⁸ *Id.* at 388-89.

²²⁸⁹ 591 F.2d 666 (Ct. Cl. 1979).

²²⁹⁰ *AHB*, 61 Fed. Cl. at 386 (citing *O’Brien*, 591 F.2d at 680).

²²⁹¹ 152 F. Supp. 84 (Ct. Cl. 1957).

²²⁹² *AHB*, 61 Fed. Cl. at 386 (citing *Little*, 152 F. Supp. at 87-88).

²²⁹³ *Id.*

²²⁹⁴ *Id.*

²²⁹⁵ 356 F.3d 1313 (10th Cir. 2004).

²²⁹⁶ 18 U.S.C.S. § 1031 (LEXIS 2004).

under the Act began running on the date the defendant's claim was filed.²²⁹⁷ The court rejected the government's contention that defendants' subsequent actions, including a meeting with the COE, were a necessary part of the scheme and a part of the "execution" for purposes of the statute of limitations.²²⁹⁸ The court also held that the "execution" of the scheme to defraud or obtain money was not a continuing offense for statute of limitations purposes.²²⁹⁹

You Want Me to Pay What? Cost Associated with Criminal Defense Not Recoverable

The CAFC recently held a contractor could not recover costs incurred in defending against a criminal investigation where one of its employees was convicted, even though the contractor itself was never charged with criminal misconduct. In *Brownlee v. DynCorp*,²³⁰⁰ the Army awarded DynCorp a cost-plus-award-fee contract for base support services at Fort Irwin, California in 1991.²³⁰¹ In 1992, the Army Criminal Investigation Division (CID) began investigating allegations of criminal activity by DynCorp and its employees relating to DynCorp's contract performance. In accordance with the law of Delaware (DynCorp's state of incorporation), and DynCorp's bylaws, DynCorp paid the costs of its defense and the defense of its employees.²³⁰² Ultimately, the government declined to prosecute the contractor, but charged a DynCorp employee in a single-count information.²³⁰³ The employee subsequently pled guilty to a charge of unauthorized access to a government computer.²³⁰⁴ No criminal or civil actions against DynCorp resulted from the investigations.²³⁰⁵

In 1996, DynCorp submitted a certified claim to the Army seeking reimbursement for costs it incurred in connection with the criminal investigation.²³⁰⁶ The Army denied the claim, and shortly thereafter DynCorp appealed the decision to the ASBCA.²³⁰⁷ In 2000, the ASBCA rendered an entitlement decision, holding that DynCorp could recover a portion of its defense costs.²³⁰⁸ On appeal the CAFC reversed, remanding the case back to the ASBCA for a determination as to whether the proceedings were separate, and if so, whether they involved the same contractor misconduct.²³⁰⁹

The CAFC observed that the Defense Procurement Improvement Act of 1985 (1985 Act)²³¹⁰ specifically barred the recovery of "costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded *nolo contendere* to a charge of fraud or similar proceeding (including filing of a false certification)."²³¹¹ However, after a lengthy examination of the act, the court found the act's language ambiguous as it related to the word "contractor" and "conviction." In the end, the court concluded the regulation disallowed costs incurred in the unsuccessful defense of criminal proceedings where an employee is convicted, even if the contractor is not.²³¹²

²²⁹⁷ *Reitmeyer*, 356 F.3d at 1318-19.

²²⁹⁸ *Id.* 1319-20.

²²⁹⁹ *Id.*

²³⁰⁰ 349 F.3d 1343 (Fed. Cir. 2003).

²³⁰¹ *Id.* at 1345.

²³⁰² *Id.* at 1345-46.

²³⁰³ *Id.* at 1346. The information alleged that Mr. Marcum input into a government accounting system "estimated hours, which represented the average time among all work centers using [the government accounting system] for performing a particular scheduled service," rather than the actual work hours his employees had expended. *Id.*

²³⁰⁴ See 18 U.S.C. § 1030(a)(3) (LEXIS 2004).

²³⁰⁵ *DynCorp*, 349 F.3d at 1346.

²³⁰⁶ *Id.* DynCorp excluded costs from its claim associated with the employee's defense. *Id.*

²³⁰⁷ *Id.* at 1346-47.

²³⁰⁸ See *DynCorp*, ASBCA No. 49714, 00-2 BCA ¶ 30,986, at 152,930. The board accepted the government's argument that FAR section 31.205-47(b) barred recovery of defense costs for a proceeding in which only the contractor's agent or employee, not the contractor itself, was convicted. However, the board also found that the FAR provision was "inconsistent" with 10 U.S.C. § 2324 and 41 U.S.C. § 256. Accordingly, the ASBCA held the provision was an unenforceable "mere nullity." *Id.*

²³⁰⁹ *DynCorp*, 349 F.3d at 1356.

²³¹⁰ Pub. L. No. 99-145, 99 Stat. 583, 682-704 (1985).

²³¹¹ *DynCorp*, 349 F.3d at 1349 (citing 1985 Act § 911(a), 99 Stat. at 683 (codified at 10 U.S.C. § 2324(e)(1)(C))).

²³¹² *Id.* at 1355. See also *Rumsfeld v. Gen. Dynamics*, 365 F.3d 1380 (Fed. Cir. 2004) (ruling that 10 U.S.C. § 2324k does not permit the apportionment of contractor costs associated with a proceeding among various claims where the proceeding is resolved through consent or compromise, and no such costs are allowable except as expressly provided by the settlement agreement).

On 21 October 2003 the Air Force updated Air Force Instruction 51-1101, *The Air Force Procurement Fraud Remedies Program*.²³¹³ The revision transfers overall responsibility for managing the Air Force Procurement Fraud Remedies Program from the Office of the Deputy Air Force General Counsel for Acquisition (SAF/GCQ) to the Deputy Air Force General Counsel for Contractor Responsibility (SAF/GCR).²³¹⁴ The revision also requires the Major Commands, Field Operating Units, and Direct Reporting Units designate at least one attorney as the “permanent” Acquisition Counsel at each location.²³¹⁵

Major James Dorn.

Taxation

Retain Interest on Tax Refunds? Nice try!

The Department of Energy (DOE) reimbursed Fluor Hanford, Inc. (FHI) for allowable costs of work performed under its contract, including Washington State business and occupation (B&O) taxes.²³¹⁶ Believing it might be eligible for a refund of B&O taxes previously paid, and with DOE’s concurrence, FHI applied for and received a refund, which included interest accrued under state law. FHI then promptly turned the entire amount, including interest, over to the Government.²³¹⁷

Disposition of the principal amount of the B&O taxes was not at issue; it was credited to DOE’s appropriations as a refund of an amount that had been previously paid out.²³¹⁸ However, the DOE asked the Comptroller General whether the interest may be credited to DOE’s appropriations, or whether DOE must deposit it into the general fund of the Treasury as “miscellaneous receipts” pursuant to 31 U.S.C. section 3302(b).²³¹⁹

The DOE argued that it should be allowed to retain the interest component of the state refund because it “merely ‘restores the appropriated funds to an amount adjusted for net present value.’”²³²⁰ The Comptroller General, however, was not persuaded, pointing out that Congress does not appropriate funds on a net present value basis, and that, had the DOE not previously reimbursed FHI for the B&O taxes, its appropriation would still only contain the unadjusted amount of the taxes, without interest.²³²¹ Allowing the DOE to retain the interest, the Comptroller General said, would constitute an illegal augmentation and violate the Miscellaneous Receipts Statute.²³²²

Ring-a-Ding-Ding

Two more Comptroller General decisions examining telephone 911 charges came calling since last year. The first case²³²³ addressed the emergency 911 telephone charge assessed by the state of Georgia under the Georgia Emergency Telephone Number “911” Service Act of 1977, as amended.²³²⁴ The Comptroller General found that the Georgia emergency 911 charge is a vendee tax that the state may not assess against the federal government under the U.S. Constitution unless

²³¹³ U.S. DEP’T OF AIR FORCE, INSTR. 51-1101, THE AIR FORCE PROCUREMENT FRAUD REMEDIES PROGRAM (21 Oct. 2003).

²³¹⁴ *Id.* at 1.

²³¹⁵ *Id.*

²³¹⁶ Department of Energy—Disposition of Interest Earned on State Tax Refund Obtained by Contractor, B-302366, 2004 U.S. Comp. Gen. LEXIS 163 (July 12, 2004).

²³¹⁷ *Id.* at *3-4.

²³¹⁸ *Id.* at *2 n.2.

²³¹⁹ *Id.* at *2. Specifically, the “Miscellaneous Receipts Statute” provides: “An official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any claim or charge.” 31 U.S.C.S. § 3302(b) (LEXIS 2004).

²³²⁰ *Distribution of Interest Earned*, at *13 (quoting Letter from Keith A. Klein, to David M. Walker, Dec. 11, 2003).

²³²¹ *Id.*

²³²² *Id.* at *15. For additional discussion of the opinion, see *infra* section titled Purpose.

²³²³ National Weather Service - Georgia 911 Charge, B-301126, 2003 U.S. Comp. Gen. LEXIS 231 (Oct. 22, 2003).

²³²⁴ See GA. CODE ANN. §§ 46-5-120 to 139 (1992 & Supp. 2003).

expressly authorized by Congress.²³²⁵ Furthermore, the Comptroller General found that Georgia law in fact bars application of the 911 charge to federal entities.²³²⁶ Accordingly, the GAO ruled the National Weather Service was not to pay those portions of its telephone bill which assess the 911 charges.²³²⁷

The second GAO decision²³²⁸ involved a reconsideration of the District of Columbia's 911 emergency telephone surcharge. The GAO had advised in an earlier opinion²³²⁹ that the District's 911 emergency telephone surcharge was a vendee tax from which the federal government is constitutionally immune. Recognizing the enormous loss of revenue from federal agency telephones in the city, the District amended its statute to impose the legal incidence of the tax on the provider of the telephone service, rather than the user, and asked the Comptroller General whether those amendments cured the problems identified in the earlier opinion.²³³⁰ The Comptroller General held the changes did correct the defects, and that, under the amended statute, federal agencies may now pay service provider bills that include itemization of the amended District 911 surcharge.²³³¹

To date, the GAO has addressed the 911 telephone charges of twenty states and the District of Columbia. Other than the District of Columbia's surcharge, the GAO has only found Arizona's 911 telephone charge a vendor tax.²³³² Prudent contract attorneys should examine their agency's/installation's phone bills for 911 surcharges and check the underlying state statute. If it appears the charges include an inappropriate vendee tax, contact your agency tax advisor.²³³³

Another Case of Bad Tax Advice

In *AG Engineering, Inc.*,²³³⁴ the contractor sought reimbursement for amounts the state assessed for unpaid sales taxes, which AG Engineering had failed to include in its bid. The ASBCA declined to do so, finding that AG Engineering had been advised during negotiations that it was not exempt from sales tax and that such taxes should be included in its bid.²³³⁵ While AG Engineering claimed an SBA representative had advised it prior to award that the contract was tax exempt, the board found this allegation unsubstantiated. The board noted that the contract incorporated FAR section 52.229-4, Federal, State, and Local Taxes (Noncompetitive Contract), which states that "the contract price includes all applicable Federal, State, and local taxes and duties."²³³⁶

Ms. Margaret Patterson.

²³²⁵ *National Weather Serv.*, 2004 U.S. Comp. Gen. LEXIS 231, at *8-9.

²³²⁶ *Id.* at *8 (referencing GA. CODE ANN. §§ 46-5-134(a)(1) and (a)(2)(C)).

²³²⁷ *Id.* at *1.

²³²⁸ Reconsideration of District of Columbia 9-1-1 Emergency Telephone System Surcharge and Effect of New Amendments, B-302230, 2003 U.S. Comp. Gen. LEXIS 249 (Dec. 30, 2003).

²³²⁹ 911 Emergency Surcharge and Right-of-Way Charge, B-288161, 2002 U.S. Comp. Gen. LEXIS 262 (Apr. 8, 2002).

²³³⁰ *Reconsideration*, 2003 U.S. Comp. Gen. LEXIS 249, at *31.

²³³¹ *Id.* at *36-37.

²³³² B-238410, 1990 U.S. Comp. Gen. LEXIS 953 (Sept. 7, 1990). In contrast, the GAO has found the following states' 911 telephone surcharges to be vendee taxes, and thus not payable by the Federal Government: Alabama, B-300737 (June 27, 2003); Alaska, B-259029, 1995 U.S. Comp. Gen. LEXIS 371 (May 30, 1995); Colorado, B-247501, 1992 U.S. Comp. Gen. LEXIS 1175 (May 4, 1992); Florida, B-215735.2, 1987 U.S. Comp. Gen. LEXIS 1248 (May 20, 1987); Georgia, B-301126, 2003 U.S. Comp. Gen. LEXIS 231 (Oct. 22, 2003); Indiana, B-248363, 1992 U.S. Comp. Gen. LEXIS 536 (Apr. 17, 1992); Kentucky, B-246517, 1992 U.S. Comp. Gen. LEXIS 575 (Apr. 17, 1992); Maryland, B-215735, 1986 U.S. Comp. Gen. LEXIS 455 (Sept. 26, 1986); Michigan, B-254628, 1994 U.S. Comp. Gen. LEXIS 320 (Apr. 7, 1994); North Carolina, B-254712, 1994 U.S. Comp. Gen. LEXIS 312 (Feb. 14, 1994); Nebraska, B-249007, 1993 U.S. Comp. Gen. LEXIS 111 (Jan. 19, 1993); Pennsylvania, B-253695, 1993 U.S. Comp. Gen. LEXIS 869 (July 28, 1993); Rhode Island, B-239608, 1990 U.S. Comp. Gen. LEXIS 1372 (Dec. 14, 1990); Tennessee, B-230691, 1988 U.S. Comp. Gen. LEXIS 454 (May 12, 1988); Texas, B-215735, 1985 U.S. Comp. Gen. LEXIS 912 (July 1, 1985); Utah, B-283464 (Feb. 28, 2000); Washington, B-248777, 1992 U.S. Comp. Gen. LEXIS 835 (July 6, 1992); Wisconsin, B-248907, 1993 U.S. Comp. Gen. LEXIS 113 (Jan. 19, 1993); Wyoming, B-255092, 1994 U.S. Comp. Gen. LEXIS 313 (Feb. 14, 1994).

²³³³ Army personnel confronted with such an issue may contact the author, Ms. Patterson, at (703) 588-6753 or margaret.patterson@hqda.army.mil.

²³³⁴ ASBCA No. 53370, 2003 ASBCA LEXIS 121 (Dec. 10, 2003).

²³³⁵ *Id.* at *9.

²³³⁶ *Id.* at *7.

Auditing

DCAA to Audited Company Personnel: Search for your own Closet Skeletons

In June 2003, the GAO issued the 2003 Revision of the *Government Auditing Standards*, commonly referred to as the “Yellow Book.”²³³⁷ The GAO’s web site states that the Yellow Book contains audit standards for government organizations and activities as well as non-government activities receiving government assistance. These standards are referred to as generally accepted government auditing standards or GAGAS. The GAGAS pertain to the auditor’s professional qualifications, audit quality, and audit characteristics.²³³⁸

Recently the American Institute of Certified Public Accountants (AICPA) issued its Statement on Auditing Standards (SAS) No. 99 that “established standards, provided guidance, and increased the documentation requirements for auditors in fulfilling . . .” their responsibility in assuring that audited financial statements are free of material misstatement.²³³⁹ Subsequently, the Defense Contract Audit Agency (DCAA) issued audit guidance advising that “SAS 99 is written specifically for the audit of financial statements . . . [and] are not directly applicable to DCAA audits, . . .” which are considered attestations under the Yellow Book.²³⁴⁰ Although SAS 99 does not specifically cover DCAA audits, the DCAA Contract Audit Manual (DCAAM) was modified to include a requirement, similar to SAS 99 that DCAA auditors at major contractor locations inquire of top company officials on their views of fraud risk.²³⁴¹

Lieutenant Colonel Karl Kuhn.

Nonappropriated Fund Contracting

APF MOA's with NAFI's

Prior to 1996, appropriated fund entities had limited authority to enter into agreements with Nonappropriated Fund Instrumentalities (NAFI) for goods or services.²³⁴² In 1996, Congress added section 2482a to title 10 and generally authorized “interrelations between Government organizations that manage appropriated funds and those that manage nonappropriated funds.”²³⁴³ More specifically, the statute authorized a DOD agency or instrumentality that supports the operation of a DOD exchange or Morale, Welfare, and Recreation (MWR) system to enter into a contract or other agreement with another DOD element or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the exchange or MWR system.²³⁴⁴

This year, the Air Force Office of the General Counsel (AF OGC) issued a memorandum discussing how agencies may use the statute and implementing policies.²³⁴⁵ The AF OGC stressed the importance of using a memorandum of agreement (MOA) to document the parties understanding in writing.²³⁴⁶ While the AF OGC stated the authority operates like an Economy Act²³⁴⁷ transaction, no special determinations and findings are required.²³⁴⁸ The AF OGC also outlined statutes

²³³⁷ GEN. ACCT. OFF., REP. NO. GAO-03-673G, *Government Auditing Standards 2003 Revision* (June 2003).

²³³⁸ The Yellow Book is available at <http://www.gao.gov/govaud/ybk01.htm>.

²³³⁹ See Memorandum 04-PAS-003(R), Assistant Director Policy and Plans, Defense Contract Audit Agency, to Regional Directors, DCAA and Director, Field Detachment, DCAA, subject: Audit Guidance Regarding Statement on Auditing Standards (SAS) No. 99, Considerations of Fraud in a Financial Statement Audit (Jan. 8, 2004).

²³⁴⁰ *Id.*

²³⁴¹ U.S. DEP’T OF DEFENSE, DEFENSE CONTRACT AUDIT AGENCY, DCAAM 7640.1, DCAA CONTRACT AUDIT MANUAL para. 5-103 (July 2004).

²³⁴² The National Defense Authorization Act for FY 1996 created the Uniform Resource Demonstration and authorized the use of nonappropriated fund laws and regulations to spend appropriated funds authorized for Morale, Welfare, and Recreation (MWR) programs. See Pub. L. No. 104-106, § 335, 110 Stat. 186, 262 (1996).

²³⁴³ Memorandum, Office of the General Counsel, U.S. Air Force, to AF/ILV, subject: Use of Memoranda of Agreement (MOA) with Nonappropriated Fund Instrumentalities (NAFI) for Goods and Services (25 Mar. 2004) [hereinafter Use of NAFI’s MOA Memo]. See also 10 U.S.C.S. § 2482a.

²³⁴⁴ 10 U.S.C.S. § 2482a.

²³⁴⁵ Use of NAFI’s MOA Memo, *supra* note 2343. The memo referred to Air Force policies and *DOD Directive 4105.67* (the memo mistakenly identified the DOD source as *DOD Instruction 4105.67*). The Directive specifically authorizes DOD components to enter into contracts or agreements with NAFIs and indicates the FAR only applies when the DOD component uses a contract; not when using an agreement with the NAFI. U.S. DEP’T OF DEFENSE, DIR. 4105.67, NONAPPROPRIATED FUND (NAF) PROCUREMENT POLICY para. 4.10 (2 May 2001).

²³⁴⁶ Use of NAFI’s MOA Memo, *supra* note 2343.

²³⁴⁷ 31 U.S.C.S. § 1535.

²³⁴⁸ Use of MOA with NAFIs Memo, *supra* note 2343.

that do not apply when agencies use the authority.²³⁴⁹ The memorandum concluded that “the primary legal criterion for use of a NAF MOA is the ‘benefit’ to efficient management and operation of the Morale Welfare and Recreation system (or exchange system).”²³⁵⁰ Because the authority is based on statute, other services can rely on the memorandum for guidance.

NAFI Jurisdiction Again

Last year’s *Year in Review* reported on the continuing saga of the COFC and the CAFC’s lack of jurisdiction over claims involving NAFI funds.²³⁵¹ This year in *AINS Inc. v. United States*,²³⁵² the CAFC held it lacked jurisdiction over a U.S. Mint claim after applying a four part test it established to determine whether a government instrumentality is a NAFI.²³⁵³ In a possible turn of events, however, the ASBCA denied a government motion to dismiss for lack of jurisdiction in a case involving a NAFI claim, holding it is appropriate for the board to render declaratory relief in an appeal by a NAFI.²³⁵⁴

Major Bobbi Davis.

Miscellaneous

Transforming the DFARS

“Transformation” is a buzzword frequently heard and discussed within the DOD,²³⁵⁵ and the DFARS²³⁵⁶ is no longer exempt. The DOD’s DFARS Transformation initiative seeks to “dramatically change the purpose and content of the DFARS.”²³⁵⁷ Under the initiative, the DOD proposes trimming the DFARS to include only “requirements of law, DOD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DOD or a significant cost or administrative impact on contractors or offerors.”²³⁵⁸ While slimming the DFARS, the DOD will create a “DFARS companion resource” called the “Procedures, Guidance, and Information (PGI),” which will provide “mandatory and non-mandatory internal DOD procedures, non-monetary guidance, and supplemental information.”²³⁵⁹ As the PGI will not be published in the Code of Federal Regulations, thus avoiding the sometimes lengthy notice and comment review period, the DOD should be able to “more rapidly convey internal administrative and procedural information to the acquisition workforce.”²³⁶⁰ Under the proposal, the PGI will adopt DFARS numbering but the numerical designation will be preceded by the letters “PGI.”²³⁶¹ The Defense Acquisition Regulation Council will have oversight and implementation responsibility for the DFARS PGI, which will be available at <http://www.acq.osd.mil/dp/dars/dfars.html>.²³⁶²

²³⁴⁹ Statutes that are inapplicable include: the Small Business Act (15 U.S.C.S. § 631), the Javits-Wagner-O’Day Act (41 U.S.C.S. §§ 46-48c), and the *Office of Management and Budget (OMB) Circular A-76* (2003).

²³⁵⁰ Use of MOA with NAFI’s Memo, *supra* note 2343.

²³⁵¹ *2003 Year in Review*, *supra* note 29, at 179.

²³⁵² 365 F.3d 1333 (Fed. Cir. 2004).

²³⁵³ *Id.*

²³⁵⁴ ASBCA No. 54503, 04-1 BCA ¶ 32,606. For a more detailed discussion of the jurisdictional issues in these cases, see *supra* section titled Contract Disputes Act Litigation.

²³⁵⁵ See, e.g., Mahon Appgar & John M. Keene, *New Business with the New Military*, HARV. BUS. REV., Sept. 2004, at 45.

²³⁵⁶ See DFARS, *supra* note 227.

²³⁵⁷ Defense Federal Acquisition Regulation Supplement; Procedures, Guidance, and Information, 69 Fed. Reg. 8145 (proposed Feb. 23, 2004) (to be codified at 48 C.F.R. pts. 201 and 202). For additional information on the DFARS Transformation initiative, see <http://www.acq.osd.mil/dp/dars/transf.htm>.

²³⁵⁸ 69 Fed. Reg. 8145.

²³⁵⁹ *Id.*

²³⁶⁰ *Id.*

²³⁶¹ *Id.*

²³⁶² *Id.* at 8146.