

Transformation has also hit the AFFARS. Available on-line, the new AFFARS now has embedded hyperlinks within each section, as well as an information library feature.²³⁶³ The embedded hyperlinks provide the practitioner easy access to source and related documents “such as the FAR, DFARS, AFFARS, statutes, regulations, instructions, forms, etc.”²³⁶⁴ And the “library toolbar” located at the top of each AFFARS part provides five information categories with hyperlinks to corresponding information.²³⁶⁵

In a seemingly contradictory effort to “locate all policy, guidance, and procedures in one place while maintaining a streamlined AFFARS,”²³⁶⁶ the Air Force has also incorporated information from various existing Air Force guides into “Mandatory Procedures (MP)” or “Information Guidance (IG).”²³⁶⁷ Imbedded as hyperlinks within relevant AFFARS text, the MP “must be followed and carry the same weight as the AFFARS or an [Air Force Instruction],” while the IG simply provide “help” to contracting professionals.²³⁶⁸

Major Kevin Huyser.

FISCAL LAW

Purpose

Something Cooking in the Kitchen: Comptroller General Approves Use of Appropriated Funds for Kitchen Appliances

Those following GAO appropriations decisions may be aware that until very recently, the GAO generally viewed workplace food storage and preparation equipment as a “personal expense.” Specifically, under the “necessary expense”²³⁶⁹ analysis, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment only when the purchase was “reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees.”²³⁷⁰ This situation generally arose only when no commercial eating facilities were available in the location,²³⁷¹ or when employees worked extended hours and restaurants were not open during much of this time.²³⁷²

On 25 June 2004, the GAO revisited this issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment reasonably related to the efficient performance of agency activities. Thus appropriated funds could be spent for these items.²³⁷³

The decision responded to a request from U.S. Pacific Command (USPACOM) concerning the use of appropriated funds to purchase refrigerators, microwave ovens, and commercial coffee makers for central kitchen areas in its new command building.²³⁷⁴ The new facility had twenty “interdivision kitchen areas” complete with sinks, cupboards, and storage cabinets. In the interests of fire safety, USPACOM directed that building personnel could not have personal coffee makers in their workspaces. Accordingly, USPACOM installed commercial grade coffee makers into the existing plumbing

²³⁶³ AFFARS Transformation—New Features (Feb. 2004), at <http://farsite.hill.af.mil/vfaffara.htm>.

²³⁶⁴ *Id.*

²³⁶⁵ *Id.* The categories include: laws/regulations/policies; informational guidance; training; community advice; and suggestion box. *Id.*

²³⁶⁶ Air Force Acquisition Circular (AFAC) 2004-0205 (5 Feb. 2004), available at <http://farsite.hill.af.mil/vfaffara.htm>.

²³⁶⁷ *Id.*

²³⁶⁸ AFFARS Transformation, *supra* note 2363.

²³⁶⁹ Under the necessary expense rule, an expenditure is permissible only if it is “reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function” Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987).

²³⁷⁰ Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230, at 1 (June 26, 1997).

²³⁷¹ *Id.* at 2 (determining that commercial facilities were not proximately available when the nearest eating establishment was a 15-minute commute from the federal workplace).

²³⁷² See Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked twenty-four hours a day, seven days a week and restaurants were not open during much of this time).

²³⁷³ Use of Appropriated Funds to Purchase Kitchen Appliances, Comp. Gen. B-302993, June 25, 2004.

²³⁷⁴ *Id.* at 1.

in the kitchen areas at a cost of \$12,210.95.²³⁷⁵

Supporting its decision, the GAO observed that these items reasonably related to workplace safety in that, as a result of fire safety measures, employees were not allowed to have coffee makers in their workspace areas.²³⁷⁶ However, the opinion went beyond the issue of safety. The GAO noted that providing such equipment resulted in benefits for the agency, “including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment.”²³⁷⁷ Further, the GAO observed that purchasing such equipment “is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies.”²³⁷⁸

Samplings Do Not a Full Buffet Make

Moving on from food preparation and storage equipment to food itself, the GAO recently determined that appropriated funds were not available to pay for “samplings” of food provided in support of an ethnic observance when the samplings amounted to a full buffet lunch.²³⁷⁹

The Army COE requested the GAO provide a decision regarding the purchase of food for a Black History Month program.²³⁸⁰ The program’s flyer characterized the food as a “sampling.” Nevertheless, the program was scheduled from 11:30 a.m. to 1:30 p.m., and the food provided included, among other offerings, smothered chicken, fried fish, pan-chopped barbeque, cabbage, string beans, corn bread and rolls, potato salad, peach cobbler, and pecan pie. The total cost for the food came to \$399.12. Needless to say, the COE’s certifying officer denied the request for reimbursement.²³⁸¹

In its decision, the GAO first cited the time-honored rule that appropriated funds are not available to purchase food for government employees.²³⁸² Turning to an established exception, the GAO observed that agencies may use appropriated funds to pay for samples of ethnic food “prepared and served as an integral part of a celebration intended to promote EEO objectives by increasing employee appreciation for the cultural heritage of ethnic groups.”²³⁸³ However, in this case, the COE’s program went beyond a “sampling” and constituted a full meal. Specifically, the GAO observed the food was consumed during lunch time and was provided in an amount more consistent with a “meal” than a “sampling.”²³⁸⁴ Because appropriated funds are generally not available to purchase food for government employees, by offering more than a sampling of food, the COE moved beyond the exception and into the general prohibition. Thus the COE could not fund costs associated with the program with appropriated funds.²³⁸⁵

The GAO’s decision does not offer much meat (pun intended) as to where to draw the line between a “sampling” and a “meal.” However, the GAO cited several factors, to include: (1) when the food was offered (i.e., during lunch time); (2) the amount of food offered; and (3) whether the food offered “represented all of the various courses that would constitute a full meal, ranging from breads and vegetables to meats and deserts.”²³⁸⁶ Additionally, the GAO noted the CEO did not have a standard operating procedure for cultural awareness programs, and lacked evidence that the COE’s EEO Director made a written determination that “the program will advance EEO objectives and make the audience aware of the cultural or ethnic history being celebrated.”²³⁸⁷

²³⁷⁵ *Id.* at 2.

²³⁷⁶ *Id.* at 5.

²³⁷⁷ *Id.*

²³⁷⁸ *Id.*

²³⁷⁹ U.S. Army Corps of Engineers, North Atlantic Division—Food for a Cultural Awareness Program, B-301184, 2004 U.S. Comp. Gen. LEXIS 202 (Jan. 15, 2004).

²³⁸⁰ *Id.* at *1.

²³⁸¹ *Id.* at *2.

²³⁸² *Id.* at *3.

²³⁸³ *Id.* at *4.

²³⁸⁴ *Id.* at *13-14.

²³⁸⁵ *Id.* at *15.

²³⁸⁶ *Id.* at *14.

²³⁸⁷ *Id.* at *10.

The GAO's opinion obviously does not impact food provided by program participants in their personal capacity, which is how many agencies conduct their Special Emphasis programs.

Scope of Professional Credentials Statute: Does This Have Anything to do With Your Job?

As with food, the GAO has traditionally looked at professional credentialing as personal expenses under the "necessary expense" rule. The GAO reasoned that employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered personal expenses rather than "necessary expenses" of the government.²³⁸⁸ The one exception to this rule was when the license was primarily for the benefit of the government and not to qualify the employee for his position.²³⁸⁹

Section 1112 of the National Defense Authorization Act for FY 2002²³⁹⁰ changed the rule for civilian competitive service employees by permitting government agencies to reimburse civilian employees for costs associated with professional accreditation, state-imposed professional licenses, professional certification, and the costs of any examinations required to obtain such credentials.²³⁹¹

Recently, the Department of Agriculture Risk Management Agency asked the GAO to examine the scope of this recent statutory change.²³⁹² Specifically, a Risk Management Agency employee asked the agency to pay for her Certified Public Accountant (CPA) license, as well as membership in the California Society of Certified Public Accountants (CalCPA). Although the employee's position required her to be a licensed CPA, membership in the CalCPA was not a condition of employment. Accordingly, the Risk Management Agency certifying officer determined that the agency had the authority to pay for the CPA license, but was uncertain as to whether the statute applied to the CalCPA membership fee.²³⁹³

Turning to the statute's plain wording, the GAO observed that "credential" as well as "certification" suggest that "these terms would include only those items that are official documentation of professional authority . . ." ²³⁹⁴ Thus, the GAO concluded the plain meaning of the statute "suggests that professional credentials would include only those items that are required for an individual to be licensed or otherwise certified to practice a particular profession." ²³⁹⁵ Thus, the statute permits an agency to pay for certain costs associated with licensing, but not for memberships in professional associations where membership is not a prerequisite for the employee to obtain qualification.²³⁹⁶

What Do You Mean I'm Not Getting Paid?

A recent GAO decision demonstrates the extent to which Congress's "power of the purse" can be both harsh and pervasive. In *Department of Health and Human Services—Chief Actuary's Communications with Congress*²³⁹⁷ the GAO determined that appropriated funds were not available to pay the salary of a federal official who prohibited a subordinate from releasing information requested by Congress.²³⁹⁸

²³⁸⁸ See A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (determining that an employee's fee for admission to Court of Appeals not payable).

²³⁸⁹ National Security Agency—Request for Advance Decision, Comp. Gen. B-257895, (Oct. 28, 1994) (unpub.) (finding payable fees for drivers' licenses for scientists and engineers to perform security testing at remote sites).

²³⁹⁰ Pub. L. No. 107-107, 115 Stat. 1654 (2001) (codified at 5 U.S.C.S. § 5757 (LEXIS 2004)).

²³⁹¹ *Id.* This provision applies to civilian competitive service employees only. It does not affect uniformed military personnel, for whom professional credentialing remains a "personal expense."

²³⁹² Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (Aug. 20, 2004).

²³⁹³ *Id.* at *2.

²³⁹⁴ *Id.* at *7.

²³⁹⁵ *Id.* at *8-9.

²³⁹⁶ *Id.* at *13-14. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to Major Command (MACOM) Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. See <http://www.asmc certification.com/documents/Army-Reimbursement-Policy-20030620.pdf> (last visited 12 Nov. 2004). See also <http://www.hq.usace.army.mil/cehr/d/traindevelop/USACE-credentials-policy-aug03.pdf> (providing Army Corps of Engineers implementing guidance) (last visited 11 Nov. 2004).

²³⁹⁷ B-302911, 2004 U.S. Comp. Gen. LEXIS 2004 (Sept. 7, 2004).

²³⁹⁸ *Id.* at *1.

Pursuant to a provision contained in the Consolidated Appropriations Acts for FY 2003 and FY 2004, appropriated funds may not be used to pay the salary of a federal official who prohibits another federal employee from communicating with Congress.²³⁹⁹ In the present case, several members of Congress requested that Richard Foster, the Chief Actuary for the Centers for Medicare & Medicaid Services (CMS), provide cost estimates for various Medicare bills then under debate. According to a U.S. Department of Health and Human Services (HHS) Inspector General report, Thomas Scully, the former CMS Administrator, told Foster there would be “adverse consequences” if Foster released the information to Congress.²⁴⁰⁰

The question before the GAO was whether the acts prohibited the CMS from using appropriated funds to pay the salary of Mr. Scully. Upon examination, the GAO noted this case would raise Constitutional concerns if applying the provisions involved privileged information or directed the agency as to how it should communicate its official positions to Congress.²⁴⁰¹ However, in this case Congress simply asked Foster for cost estimates and other technical assistance. Thus, to the GAO, the Constitution did not prohibit the application of the provisions in this instant. Turning to the acts, the GAO concluded that Scully’s actions clearly fell within the prohibitions specified in the provisions. Thus the appropriated funds, which were otherwise available to pay Scully’s salary, were now unavailable for this purpose.²⁴⁰²

Publicity, Propaganda or Information: You Decide

Several decisions arose this year involving the elusive line of demarcation between permissible information activities and impermissible publicity and propaganda programs. In a decision involving the HHS,²⁴⁰³ several senators and representatives²⁴⁰⁴ requested the GAO determine the legality of the HHS’s use of appropriated funds to produce and distribute a flyer, as well as print and television advertisements, concerning the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).²⁴⁰⁵ Specifically, the GAO was asked by the Senators and Representatives whether the HHS’s use of appropriated funds constituted a violation of the “publicity or propaganda” prohibitions in the Consolidated Appropriations Acts for FY 2003 and FY 2004.²⁴⁰⁶

On examining the material in question, the GAO concluded the HHS materials had “notable omissions and other weaknesses.”²⁴⁰⁷ However, the GAO concluded the HHS’s use of appropriated funds to produce and disseminate the materials did not violate the publicity or propaganda prohibitions in the appropriations acts.²⁴⁰⁸ Specifically, the GAO noted that HHS had explicit authority to inform Medicare beneficiaries about changes to Medicare resulting from the MMA. Thus, the GAO concluded the HHS should be afforded considerable deference, despite apparent problems with the material.²⁴⁰⁹

²³⁹⁹ Pub. L. No. 108-7, div. J, tit. V, 620, 117 Stat. 11, 468 (2003); Pub. L. No. 108-199, div. F, tit. VI, 618, 188 Stat. 3, 354 (2004). The provisions are identical in both acts, and read:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who . . . prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.

Pub. L. No. 108-199, div. F, tit. VI, 618, 188 Stat. 3, 354 (2004); Pub. L. No. 108-7, div. J, tit. V, 620, 117 Stat. 11, 468 (2003).

²⁴⁰⁰ Department of Health and Human Services—Chief Actuary’s Communications with Congress, 2004 U.S. Comp. Gen. LEXIS 183, at *4-5.

²⁴⁰¹ *Id.* at *27-28.

²⁴⁰² *Id.* at *31.

²⁴⁰³ Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504 (Mar.10, 2004).

²⁴⁰⁴ *Id.* at *1. The requesters included: Senators Lautenberg, Kennedy, Kerry, and Corzine, as well as Representatives Schakowsky, Pallone, Stark, Rangel, and Davis. *Id.*

²⁴⁰⁵ Pub. L. No. 108-173, 117 Stat. 2066 (2003).

²⁴⁰⁶ Pub. L. No. 108-7, div. J, tit. VI, § 626, 117 Stat. 11, 470 (2003); Pub. L. No. 108-199, div. F, tit. VI, § 624, 118 Stat. 3 (2004) (stating that “No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress.”).

²⁴⁰⁷ Medicare Prescription Drug, Improvement, and Modernization Act of 2003—Use of Appropriated Funds for Flyer and Print and Television Advertisements, B-302504, 2004 U.S. Comp. Gen. LEXIS 57, at *4-5 (Mar. 10, 2004) (noting, for example, that though the material failed to inform participants they may be charged an annual fee to participate in the program, and that savings from the discount cards could vary across covered drugs, the materials were not so partisan as to be unlawful in light of prior decisions and opinions).

²⁴⁰⁸ *Id.*

²⁴⁰⁹ *Id.* In its decision, the GAO noted it did not examine or express a view on the overall economy, efficiency, or effectiveness of the print and television advertisements. The GAO did question, however, “the prudence and appropriateness” of HHS’s decision to communicate with Members of Congress and

Two months later, the GAO took a considerably less deferential look at the HHS's informational practices.²⁴¹⁰ This time members of Congress asked the GAO to examine video news releases (VNRs) prepared by the CMS, an agency of HHS. The VNRs consisted of prepackaged news reports and anchor scripts containing, among other scenes, footage of President Bush with members of Congress signing the MMA into law, and clips showing seniors engaged in various leisure and health-related activities.²⁴¹¹ The VNRs did not include statements noting that it had been prepared by CMS. Rather, they appeared tailored for use by television stations and other media as plug-in footage for their MMA coverage.²⁴¹²

For the GAO, the VNRs amounted to impermissible publicity and propaganda. The GAO observed that “[w]hile Congress authorized HHS to conduct a wide-range of informational activities, CMS was given no authority to produce and disseminate unattributed news stories.”²⁴¹³ The GAO reasoned “the publicity or propaganda restriction helps to mark the boundary between an agency making information available to the public and agencies creating news reports unbeknownst to the receiving audience.”²⁴¹⁴ In this case, the VNRs appeared to be independent news stories when they clearly was not. Therefore, the GAO concluded the HHS misused appropriated funds, violating the publicity or propaganda prohibition, and the Antideficiency Act.²⁴¹⁵

In another decision, the GAO found no legal objection with the Forest Service using appropriated funds to produce a brochure and film promoting the government's tree thinning policy on federal lands.²⁴¹⁶ As with the first HHS opinion, the GAO noted the Forest Service's material did not provide a balanced picture of the positive and negative aspects of the agency's policies.²⁴¹⁷ Nevertheless, the GAO observed the Forest Service clearly articulated its rationale, which was to “better inform the public about the very complicated issue of fire management and protection from catastrophic wildfire.”²⁴¹⁸ Given that the material was not self-aggrandizing, did not constitute covert propaganda, and was not clearly partisan in nature, “the Forest Service was authorized to disseminate such materials under its information dissemination authority and in defense of its policies.”²⁴¹⁹

Finally, examining a somewhat low-tech information campaign, the GAO determined the Air Force could use appropriated funds to paint decals of units assigned at Grissom Air Force Base on a water tower located just outside the base.²⁴²⁰ In its request for an advance decision, the Air Force noted that as a result of a base realignment, many local community residents were unaware the base was still open. To increase the base's “footprint,” the base commander wished to paint unit decals on a near by water-tower, owned by a local utility company. The commander noted the project would contribute to recruiting and “inform the public that there is a military presence in Indiana.”²⁴²¹ Upon examination, the GAO found no legal objection to the proposed expenditure. Specifically, the GAO noted that agencies may use appropriated funds to convey information to the public about their authorized activities.²⁴²²

Phones, Coins, ORFs, and Other Recent Fiscal Changes

Moving from miscellaneous receipts to miscellaneous topics, several recent developments warrant brief mention.

congressional staff by placing an advertisement in the *Roll Call*, a newspaper directed primarily at Members of Congress and congressional staffers. To the GAO, “there are any number of more effective vehicles to communicate with Members of Congress, and at less cost, than advertising in a newspaper.” *Id.*

²⁴¹⁰ Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004).

²⁴¹¹ *Id.* at *11-12.

²⁴¹² *Id.* at *18-19.

²⁴¹³ *Id.* at *29-30.

²⁴¹⁴ *Id.*

²⁴¹⁵ *Id.* at *34 (referencing 31 U.S.C.S. § 1341(a) (LEXIS 2004)).

²⁴¹⁶ Forest Service—Sierra Nevada Forest Plan Amendment Brochure and Video Materials, B-302992, 2004 U.S. Comp. Gen. LEXIS 188 (Sept. 10, 2004).

²⁴¹⁷ *Id.* at *31-32.

²⁴¹⁸ *Id.* at *22-23.

²⁴¹⁹ *Id.* at *18-20.

²⁴²⁰ Department of the Air Force—Purchase of Decals for Installation on Public Utility Water Tower, B-301367, 2003 U.S. Comp. Gen. LEXIS 230 (Oct. 23, 2003).

²⁴²¹ *Id.* at *2.

²⁴²² *Id.* at *6.

First, regarding government cellular telephones, on 13 May 2004, the Air Force issued Interim Change (IC) 2004-1 to Air Force Instruction (AFI) 33-111, *Telephone Systems Management*.²⁴²³ Pursuant to paragraph 25.5 of the IC, the same rules that govern the use of other communications equipment apply to the use of Air Force cell phones. Thus short, infrequent personal calls on Air Force cellular telephones are authorized to the extent they would be authorized from a desk-top phone. Alternatively, the IC does not authorize excessive personal calls, or calls that would violate Air Force communications policy (i.e., obscene/harassing calls, calls for commercial gain, or calls that generate additional fees).²⁴²⁴

Not to be outdone, on 1 June 2004 the Army updated its policy concerning the personal use of cellular phones.²⁴²⁵ Pursuant to paragraph 6-4.w.(1) of Army Regulation 25-1, “official use of [cellular phones] will be limited to requirements that cannot be satisfied by other available telecommunication methods” (i.e., “wired” telephones).²⁴²⁶ However, “authorized personal use of cellular phones is subject to the same restrictions and prohibitions that apply to other communication systems.”²⁴²⁷ Translation: personal cellular phone use on government cellular phones is now subject to the same rules as regular phones.

Moving from phones to coins, on 11 February 2004, the Army Chief of Staff issued a policy memorandum establishing policies for the procurement and presentation of coins by the Headquarters, Department of the Army (HQDA), its field operating agencies, and Joint Department of Defense agencies administratively supported by the HQDA.²⁴²⁸ The memorandum establishes, *inter alia*, that “[o]nly principle officials holding the rank of brigadier general . . . or Senior Executive Service (SES) civilians . . . , the Sergeant Major of the Army, and commanders or directors of field operating agencies . . .” may purchase coins with appropriated funds.²⁴²⁹ Coin procurement authority, however, may be delegated no lower than the GS-15 or O-6 level.²⁴³⁰ It also establishes that the Administrative Assistant to the Secretary of the Army must approve any coin acquisitions in excess of \$5,000 in any one fiscal year. Finally, the memorandum clarifies who may receive coins, and explicitly notes that contractor personnel shall not receive coins purchased with appropriated funds.²⁴³¹

On 12 March 2004, the Army updated its representation fund regulation.²⁴³² The change resulted, in part, from recent changes to the DOD directive covering official representation funds (ORFs).²⁴³³ The new regulation transfers pronyency for the regulation from the General Counsel of the Army to the Administrative Assistant to the Secretary of the Army,²⁴³⁴ increases the level of expenditure for any one event to \$20,000 per event,²⁴³⁵ and changes the dollar amount authorized for gifts to \$285 per gift.²⁴³⁶ The regulation also prohibits the use of representational funds to purchase gifts or mementos for DOD personnel.²⁴³⁷

Finally, on 10 August 2004, the Army updated its motor vehicle regulation.²⁴³⁸ Among the changes is a new policy regarding the procurement and use of sport utility vehicles (SUVs). In sum, the regulation states that SUVs will not be acquired or purchased to enhance the comfort or prestige of the individual, and Army activities will use the smallest, most

²⁴²³ U.S. DEP’T. OF AIR FORCE, INT. CHANGE 2004-1, INSTR. 33-111, TELEPHONE SYSTEMS MANAGEMENT (13 May 2004).

²⁴²⁴ *Id.* at 18.

²⁴²⁵ U.S. DEP’T OF ARMY, REG. 25-1, ARMY KNOWLEDGE MANAGEMENT AND INFORMATION TECHNOLOGY MANAGEMENT (1 June 2004).

²⁴²⁶ *Id.* at 44.

²⁴²⁷ *Id.*

²⁴²⁸ Memorandum, Headquarters, Department of the Army, to Headquarters Department of the Army and its Field Operating Agencies, subject: Procurement and Presentation of Coins by Headquarters Department of the Army Principle Officials (11 Feb. 2004).

²⁴²⁹ *Id.* at 2.

²⁴³⁰ *Id.*

²⁴³¹ *Id.*

²⁴³² U.S. DEP’T OF ARMY, REG. 37-47, REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY (12 Mar. 2004) [hereinafter AR 37-47].

²⁴³³ U.S. DEP’T OF DEF., DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (17 Feb. 2004) [hereinafter DOD DIR. 7250.13].

²⁴³⁴ AR 37-47, *supra* note 2432, at 1.

²⁴³⁵ *Id.* at 4.

²⁴³⁶ *Id.*

²⁴³⁷ *Id.* at 6; *but cf.* DOD DIR. 7250.13, *supra* note 2433, at 12 (permitting the use of representational funds up to \$40 to purchase gifts or mementos for specified DOD personnel).

²⁴³⁸ U.S. DEP’T. OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES (10 Aug. 2004).

fuel efficient vehicle capable of meeting the agency needs.²⁴³⁹

Major James Dorn.

A Purpose Extra—Building Strong and Ready Families

Last year's *Year in Review* reported on a new authority to use appropriated funds for a chaplain-led military support program.²⁴⁴⁰ The program, Building Strong and Ready Families (BSRF), authorizes appropriated funds for the "costs of transportation, food, lodging, child care, supplies, fees, and training materials for members of the armed forces and their family members while participating in" the program.²⁴⁴¹ This year, the Office of the Chief of Chaplains, issued a training Memorandum of Instruction (MOI) outlining the responsibilities and policies for the BSRF. Building Strong and Ready Families is a commander's training program, led by brigade chaplains to support family readiness.²⁴⁴² The MOI provides for up to thirty couples per iteration of the program.²⁴⁴³ Coordinating instructions and a format for funding requests are also outlined in the MOI.²⁴⁴⁴

Major Bobbi Davis.

Time

A Bona Fide Stitch in Time Saves \$500,000 for the Library of Congress.

On 17 May 2004, the Comptroller General released an opinion concerning a 30 September transfer of FY 2003 funds from the Library of Congress (Library) to the Office of the Architect of the Capitol (Architect).²⁴⁴⁵ The Comptroller General held that because the Library had a bona fide need in September 2003 when it entered into an interagency agreement with the Architect, FY 2003 funds were available in future years to cover costs in accordance with the terms of the interagency agreement.²⁴⁴⁶

Under the statutory division of labor under 2 U.S.C. section 141 (c), the Architect is responsible for the architectural, structural, and mechanical work of the Library building and grounds, while the Library has responsibility over furnishing, equipping, and maintaining the interior of the buildings.²⁴⁴⁷ The statutory authority also grants the Library and the Architect authority to enter into agreements with each other and transfer funds between them with the approval of the House and Senate Appropriations Committees and the Joint Committee on the Library.²⁴⁴⁸

On 30 July 2003, the Library requested approval from the appropriate committees to transfer \$500,000 to redesign and renovate a loading dock at the Library's Madison Building. After receiving approval, the Library entered into an interagency agreement on 26 September 2003. The Library transferred the funds electronically on 29 September 2003 and obligated them on 30 September 2003.²⁴⁴⁹ The project was estimated to start in May 2004.²⁴⁵⁰

²⁴³⁹ *Id.* at 6.

²⁴⁴⁰ 2003 *Year in Review*, *supra* note 29, at 211.

²⁴⁴¹ 10 U.S.C. § 1789 (LEXIS 2004). The statute defines immediate family member as "the member's spouse and any child (as defined in 10 U.S.C. § 1072(6)) of the member who is described in subparagraph (D) of 10 U.S.C. § 1072(2). See 10 U.S.C. §§ 1072 (6) and 1072(2) (LEXIS 2004).

²⁴⁴² Memorandum, Office of the Chief of Chaplains, U.S. Army, to Commanders, subject: FY 2004-05 Building Strong and Ready Families Training MOI (17 Feb. 2004). Brigade Chaplains serve as the lead action officer in cooperation with the Community Health Nurse and Army Family Team building for education, risk assessment, counseling, and to target intervention strategies. The fund is centrally managed by the Office of the Chief of Chaplains. *Id.*

²⁴⁴³ The program encompasses three phases and four components. The components are: (1) the marriage education and skill building sessions using the Prevention and Relationship Enhancement Program, (2) Standardized Health Promotion and Disease prevention sessions for Phase I and Phase II, (3) Army Family Team Building Level One, and (4) surveys for couples for Phase I and Phase III. *Id.*

²⁴⁴⁴ *Id.*

²⁴⁴⁵ Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capitol, B-302760, 2004 U.S. Comp. Gen. LEXIS 105 (May 17, 2004).

²⁴⁴⁶ *Id.* at *2.

²⁴⁴⁷ *Id.* at *4.

²⁴⁴⁸ *Id.* at *6.

²⁴⁴⁹ *Id.* at *9.

²⁴⁵⁰ *Id.* at *10.

The Comptroller General first noted that questions arise whenever funds are transferred from a one-year appropriation, in this case, the Library's "Salaries and Expenses," to one that is available for more than one year, such as the Architect's "Library Building and Grounds" fund, which includes one-year, three-year, and no-year funds.²⁴⁵¹ The Comptroller then stated that although the relevant statute granted transfer authority and defined the purposes for which it could be used, it did not alter the general time constraints imposed by fiscal law. Therefore, the transfer would only be lawful if the incurred obligation was a FY 2003 bona fide need of the Library.²⁴⁵²

The Comptroller General's analysis focused on the nature of the interagency transaction in question. Because this type of transaction allowed the Library to advance the funds to the Architect for a nonseverable task, the renovation of the loading dock, the obligated funds could be used in future years as long as they were limited to cover the work ordered in the agreement.²⁴⁵³ The Comptroller General was careful to distinguish this specific interagency transaction authority from a general Economy Act transaction, under which an agency is required to deobligate funds to the extent the performing agency has not performed.²⁴⁵⁴

The Comptroller General concluded that because the Library first identified the need to renovate the dock as early as 1996, hired a design firm in February 2002, and formally requested transfer authority in July 2003, the Library had a bona fide need from 1996 that extended into subsequent fiscal years. The Comptroller General cited the rule that, from a bona fide need perspective, so long as the agency has identified a prior legitimate need that continues to exist, the appropriation current at the time the agency acts upon that need is available for the agency to use to satisfy that need, even though here the Library would not benefit from the renovation until after the fiscal year during which it obligated the funds.²⁴⁵⁵

Final Rule on Multiyear Contracting Authority

The DOD adopted as final, without change, an interim rule amending DFARS subpart 217.1 to implement Section 820 of the National Defense Authorization Act for FY 2003.²⁴⁵⁶ Section 820 restricts the use of multiyear contracts for supplies to only those for complete and usable end items, and restricts the use of advanced procurement to only those long-lead items necessary to meet a planned delivery schedule for complete major end items.²⁴⁵⁷ This additional restriction continues a trend of increased Congressional scrutiny in this area of contracting.

DOD IG Report on Closed Appropriations

On 15 September 2003, the DOD IG issued a report reviewing the Defense Finance Accounting Service's (DFAS) control over closed appropriations.²⁴⁵⁸ The IG found that DFAS did not have effective control over the adjustments of closed appropriations.²⁴⁵⁹ The IG reviewed thirty-seven adjustments and found that twenty-one were unsupported.²⁴⁶⁰ Recommendations included implementing standard operating procedures and restricting approval of adjustments to senior managers at central accounting sites.²⁴⁶¹

Major Andrew Kantner.

²⁴⁵¹ *Id.* at *11.

²⁴⁵² *Id.* at *13 (discussing 2 U.S.C. § 141 (c)).

²⁴⁵³ *Id.* at *17.

²⁴⁵⁴ *Id.* at *18.

²⁴⁵⁵ *Id.* at *21.

²⁴⁵⁶ Defense Federal Acquisition Regulation Supplement; Multiyear Contracting Authority Revisions, 69 Fed. Reg. 13,478 (Mar. 23, 2004) (to be codified at 48 C.F.R. pt. 217).

²⁴⁵⁷ Pub. L. No. 107-314, 116 Stat. 2458 (2003).

²⁴⁵⁸ OFFICE OF THE INSPECTOR GENERAL OF THE DEP'T OF DEFENSE, D-2003-133, CONTROLS OVER DOD CLOSED APPROPRIATIONS (15 Sept. 2003).

²⁴⁵⁹ *Id.*

²⁴⁶⁰ *Id.* at 9.

²⁴⁶¹ *Id.* at 15-16.

Antideficiency Act

Upon Further Review

Last year's *Year in Review*²⁴⁶² discussed *E.I. DuPont De Nemours v. United States*,²⁴⁶³ in which the COFC held that "regardless of how shocking or disappointing the outcome,"²⁴⁶⁴ the broad indemnification and reimbursement provisions in a 1940 contract between the Army and E.I. DuPont De Nemours (DuPont) were unenforceable because they violated the Antideficiency Act (ADA).²⁴⁶⁵ On appeal, the CAFC agreed with the lower court that the government had agreed contractually to indemnify DuPont for the costs at issue, however, ruled the COFC erred in concluding the ADA barred recovery.²⁴⁶⁶

As a quick recap of the facts, on 28 November 1940, DuPont entered into a contract to build and operate a chemical production facility in Morgantown, West Virginia.²⁴⁶⁷ Under the terms of the cost-plus-fixed-fee (CPFF) contract, the government included broadly worded indemnification and reimbursement clauses.²⁴⁶⁸ When World War II concluded, the government terminated for convenience the contract and entered a "Termination Supplement" agreement, which included an "Unknown Claims Clause" and "Preservation of Indemnity Clause."²⁴⁶⁹ In the 1980s, the Environmental Protection Agency, pursuant to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),²⁴⁷⁰ notified DuPont that it was considering listing the ordnance facility on its priorities list for environmental clean-up.²⁴⁷¹ Eventually, DuPont paid approximately \$1.3 million in attorney and consultant fees for a remedial investigation and feasibility study of the environmental issues related to the site.²⁴⁷² DuPont filed a claim pursuant to the CDA and later filed suit contending that under the contract's indemnification and reimbursement clauses, the government was ultimately responsible for the CERCLA costs DuPont incurred.²⁴⁷³ The COFC ruled that though the Termination Supplement included the Unknown Claims Clause and Preservation of Indemnity Clause and that the indemnification clause in the original contract was "drafted broadly enough to be properly interpreted to place the risk of unknown liabilities on the government, including liability for costs incurred pursuant to CERCLA," the ADA barred recovery.²⁴⁷⁴

On appeal, the CAFC did not question the lower court's conclusion that express open-ended indemnification provisions violate the ADA's prohibition against contracting in excess or in advance of an available appropriation.²⁴⁷⁵ The appellate court focused instead on the ADA's exception to the general prohibition, which states "unless such contract or obligation is authorized by law."²⁴⁷⁶ Here, DuPont argued the Contract Settlement Act of 1944 (CSA)²⁴⁷⁷ "exempt[ed] the Preservation of Indemnity Clause (and, therefore, the Indemnification Clause) from the reach of the ADA."²⁴⁷⁸

A prime objective of the CSA, observed the court, was to "assur[e] prime contractors and subcontractors, small and

²⁴⁶² 2003 *Year in Review*, *supra* note 29, at 186.

²⁴⁶³ 54 Fed. Cl. 361 (2002).

²⁴⁶⁴ *Id.* at 372.

²⁴⁶⁵ *Id.* See 31 U.S.C.S. §§ 1341(a), 1512(1), and 1523(b) (LEXIS 2004).

²⁴⁶⁶ *E.I. DuPont De Nemours v. United States*, 365 F.3d 1367 (2004).

²⁴⁶⁷ *Id.* at 1369.

²⁴⁶⁸ *Id.* at 1369-70.

²⁴⁶⁹ *Id.* at 1370-71.

²⁴⁷⁰ See 42 U.S.C.S. §§ 9601-75.

²⁴⁷¹ *Du Pont*, 365 F.3d at 1371.

²⁴⁷² *Id.*

²⁴⁷³ *Id.*

²⁴⁷⁴ *Id.* (quoting *E.I. Du Pont De Nemours v. United States*, 54 Fed. Cl. 361, 365, 367).

²⁴⁷⁵ *Id.* at 1374.

²⁴⁷⁶ *Id.* The ADA language in effect at the time the parties entered into the indemnification agreement provided in relevant part:

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

31 U.S.C. § 665 (1940).

²⁴⁷⁷ 41 U.S.C. § 101-25 (2000).

²⁴⁷⁸ *Du Pont*, 365 F.3d at 1374.

large, speedy and equitable final settlement of claims under terminated war contracts.”²⁴⁷⁹ Moreover, the CSA specifically provided: “Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this chapter . . . to indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement.”²⁴⁸⁰

While agreeing the CSA exempted certain contract actions from the ADA’s general prohibition, the government argued the CSA did not exempt the Termination Supplement’s Preservation of Indemnity Clause.²⁴⁸¹ Noting that the CSA’s indemnification authority was limited to “termination claims,” the government contended the provision covered only compensation for work performed under a terminated contract, citing as examples “claims by direct employees or vendors.”²⁴⁸² As such, the government contended, the CSA’s indemnification authority “does not extend to an indemnification commitment broad enough to encompass DuPont’s CERCLA liability.”²⁴⁸³

Although acknowledging the CSA’s language “is not a model of clarity,”²⁴⁸⁴ the court noted the Act authorizes indemnification “against . . . any claims by any person in connection with such termination claims or settlements.”²⁴⁸⁵ The court attached particular significance to the phrase “or settlement,” arguing that “by distinguishing between ‘termination claims,’ on the one hand, and a ‘settlement,’ on the other, the language of the statute makes clear that Congress intended to provide contracting agencies the flexibility to negotiate concerning two classes of third-party claims. . . .”²⁴⁸⁶ The court further explained:

To the extent a contractor came into termination negotiations having already had one or more third-party claims asserted against it, the contracting agency had the authority to “agree to assume” those existing “termination claims.” The language of [the CSA] indicates that Congress was cognizant, however, that contractors undergoing termination would also be concerned about potential future (i.e., unknown, unasserted) third-party claims they might face. Accordingly, Congress gave contracting agencies the power to resolve, as between the government and the contractor, those unknown, unasserted third-party claims as well, by agreeing to “indemnify the war contractor . . . against any claims by any person in connection with such . . . settlement.”²⁴⁸⁷

In addition to the statutory authority found in the CSA, the CAFC noted that the War Department issued contemporaneous regulatory guidance interpreting the statute to give such indemnification authority.²⁴⁸⁸

Notably, the CAFC did not alter the long-standing rule among courts and the GAO that the ADA generally prohibits open-ended indemnification clauses.²⁴⁸⁹ Here, the CAFC found the CSA satisfied the ADA’s “unless otherwise authorized by law” exception and authorized the government to include the Preservation of Indemnity Clause in the Termination Supplement, and that clause ratified and preserved the broad and indefinitely enduring indemnity the government granted in the original 1940 contract with DuPont.²⁴⁹⁰

In a separate but similar case involving a reimbursement claim for CERCLA costs arising out of a World War II-era contract, which included an indemnification provision, the CAFC again overturned the lower court and found in the contractor’s favor.²⁴⁹¹ Previously the COFC had dismissed the complaint because the plaintiff failed to first exhaust the

²⁴⁷⁹ *Id.* at 1375 (quoting 41 U.S.C. § 101).

²⁴⁸⁰ *Id.* (quoting 41 U.S.C. § 120(a)).

²⁴⁸¹ *Id.* at 1375.

²⁴⁸² *Id.* at 1377.

²⁴⁸³ *Id.*

²⁴⁸⁴ *Id.* at 1377 n.16.

²⁴⁸⁵ *Id.* (quoting 41 U.S.C. § 120(a)(3)).

²⁴⁸⁶ *Id.*

²⁴⁸⁷ *Id.* at 1377-78.

²⁴⁸⁸ *Id.* at 1378.

²⁴⁸⁹ See *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), *Union Pacific R.R. Corp. v. United States*, 52 Fed. Cl. 730 (2002), *Jarvis v. United States*, 45 Fed. Cl. 19 (1999), *United States Park Police Indemnification Agreement*, 1991 Comp. Gen. 1070 (1991), *Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361, 83-1 CPD ¶ 501.

²⁴⁹⁰ *Du Pont*, 365 F.3d at 1380.

²⁴⁹¹ *Ford Motor Co. v. United States*, 378 F.3d 1314 (2004).

contract's Disputes Clause procedures prior to bringing suit.²⁴⁹² The court further stated that even if the plaintiff had properly initiated its suit under the CSA, the contract's reimbursement provisions for "unknown claims" were not intended to be unlimited.²⁴⁹³ Based on the CSA's provisions, the COFC found the contract's "unknown" claims clause covered only claims "where liability accrued during the contract performance period and costs [were] in temporal proximity to contract termination"²⁴⁹⁴ Because the CERLCA did not exist until a number of years later, the liability and costs associated with its application "lack[ed] the temporal proximity to contract performance required for recovery as a Contract Settlement Act of 1944 claim"²⁴⁹⁵ In a footnote, the COFC further reasoned that even if it were to interpret the contract's "unknown claims" clause to mean unlimited liability, doing so "would raise serious issues as to its viability in view of the Anti-Deficiency Act"²⁴⁹⁶

On appeal, the CAFC, relying upon its earlier *DuPont* decision, overturned the lower court and ruled Ford's termination agreement preserved the original contract's indemnification clause, which was sufficiently broad to cover the CERCLA claim at issue.²⁴⁹⁷ Though the government did not "press the Anti-Deficiency Act" argument, the CAFC noted that *DuPont* resolved the issue, holding "the Anti-Deficiency Act does not bar recovery under the CSA of environmental cleanup costs arising from performance during World War II."²⁴⁹⁸

Judge Schall wrote an interesting dissent. Although agreeing the CSA applied to the claim and that Ford timely filed the claim, Judge Schall did not agree with the majority's interpretation of Ford's World War II contract.²⁴⁹⁹ Judge Schall distinguished *DuPont* by contrasting the indemnification provisions in the two separate war contracts. In *DuPont*, the indemnification provision covered claims against "any loss, expense (including expense of litigation), or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever"²⁵⁰⁰ In *Ford*, by contrast, the indemnification clause only applied to claims against "loss or destruction of or damage to property"—language Judge Schall believed was "insufficient to transfer the financial responsibility for Ford's CERCLA costs to the United States."²⁵⁰¹

DOD Rule Change for Processing ADA Investigations

On 19 November 2003, the DOD Comptroller issued new guidance on the processing of ADA violation cases.²⁵⁰² "[T]o ensure that an ADA violation has occurred before any administrative or disciplinary action is taken," the military departments and agencies are now required to submit a preliminary summary report of violation to the DOD Comptroller and to DFAS, after counsel coordination.²⁵⁰³ The DOD Comptroller will forward the preliminary report to the DOD General Counsel's office for a final determination regarding whether there has been a violation. If the DOD-level review determines there is no violation, the Comptroller will return the report to the service to close the case. If the DOD-level review determines a violation occurred, the service will process the case for administrative/disciplinary action in accordance with the DOD Financial Management Regulation (FMR), Volume 14, Chapter 9 "Disciplinary Action."²⁵⁰⁴

Major Kevin Huyser.

²⁴⁹² Ford Motor Co. v. United States, 56 Fed. Cl. 85, 96 (2003).

²⁴⁹³ *Id.* at 97.

²⁴⁹⁴ *Id.* at 98.

²⁴⁹⁵ *Id.*

²⁴⁹⁶ *Id.* (referencing Hercules, Inc. v. United States, 516 U.S. 417 (1996); California-Pacific Utils. Co. v. United States, 194 Ct. Cl. 701, 715; 719-21 (1971)).

²⁴⁹⁷ Ford Motor Co. v. United States, 378 F.3d 1314, 1319-20 (2004).

²⁴⁹⁸ *Id.* at 1320.

²⁴⁹⁹ *Id.*

²⁵⁰⁰ *Id.* at 1323 (quoting E.I. Du Pont De Nemours v. United States, 365 F.3d 1367, 1372 (2004)).

²⁵⁰¹ *Id.* at 1322.

²⁵⁰² Memorandum, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management and Comptroller) et al., subject: Processing of Antideficiency Act (ADA) Violation Cases (19 Nov. 2003).

²⁵⁰³ *Id.*

²⁵⁰⁴ *Id.* The memorandum informs the new policy will be published in the DOD FMR, Volume 14, however, to date there has been no update. See <http://www.dod.mil/comptroller/fmr/> (last visited 15 Nov. 2004).

Construction Funding

*Combat and Contingency Related Construction: "Upon this Point, a Page of History is Worth a Volume of Logic"*²⁵⁰⁵

Over the course of the last eighteen months, *The Army Lawyer* has followed the trials and tribulations of the DOD's use of Operations and Maintenance (O&M) funds for combat and contingency related construction.²⁵⁰⁶ To understand the latest developments, it is necessary to briefly examine how the DOD has arrived at this present state.

On 22 February 2000, the Army issued a policy memorandum stating that the Army's use of O&M funds in excess of the \$750,000 construction funding threshold²⁵⁰⁷ was proper when erecting structures or facilities in direct support of combat or contingency operations.²⁵⁰⁸ This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this policy was that O&M funds were the primary funding source supporting contingency or combat operations. Therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper. On 27 February 2003, the DOD issued a memorandum that, in effect, adopted the Army's policy at the DOD level.²⁵⁰⁹

On 16 April 2003, the President signed the Emergency Wartime Supplemental Appropriations Act for FY 2003 (EWSAA).²⁵¹⁰ Unfortunately for the DOD, buried in the act's conference report was harsh language stating the conferees' legal objections to the DOD's 27 February 2003 policy memorandum.²⁵¹¹ The conference report had the practical effect of invalidating the policy articulated in both the DOD's 27 February 2003 memorandum, as well as the Army's 22 February 2000 memorandum.

The EWSAA created considerable consternation for those in DOD seeking legal authority to fund construction projects in support of operations in Iraq and Afghanistan. However, on 6 November 2003 the President signed the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004.²⁵¹² Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 2004 where the Secretary of Defense determined:

The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism; (2) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence; (3) the United States has no intention of using the construction after the operational requirements have been satisfied; and, (4) the level of construction is the minimum necessary to meet the temporary operational requirements.²⁵¹³

Pursuant to the act, Congress limited the temporary funding authority to \$150 million for FY 2004.²⁵¹⁴ However, with the passage of the Military Construction Appropriations Act for FY 2004 Congress increased this amount to \$200 million.²⁵¹⁵

Turning to the latest developments, on 1 April 2004, the Deputy Secretary of Defense issued implementing guidance

²⁵⁰⁵ Words of Justice Oliver Wendell Holmes, Jr., *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

²⁵⁰⁶ See Major James M. Dorn, *So How Are We Supposed to Pay For This? The Frustrating and as of Yet Unresolved Saga of Combat and Contingency Related O&M Funded Construction*, *ARMY LAW.*, Sept. 2003, at 35; *2003 Year in Review*, *supra* note 29, at 190.

²⁵⁰⁷ 10 U.S.C.S. § 2805(c)(1) (LEXIS 2004). Under this statute, the Secretary of a military department may use O&M funds to finance unspecified minor military construction projects only if the complete project costs \$750,000 or less, or \$1.5 million or less if the project is intended solely to "correct a deficiency that threatens life, health, or safety." *Id.*

²⁵⁰⁸ Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (on file with author).

²⁵⁰⁹ See Memorandum, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management & Comptroller) et al., subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) (on file with author).

²⁵¹⁰ Pub. L. No. 108-11, 117 Stat. 539 (2003).

²⁵¹¹ *Id.* § 1901.

²⁵¹² Pub. L. No. 108-106, 117 Stat. 1209 (2003).

²⁵¹³ *Id.* § 1301(a).

²⁵¹⁴ *Id.* § 1301(b).

²⁵¹⁵ Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the Authorization Act increased the amount of O&M funds the DOD could spend on contingency and combat related construction in FY 2004 to \$200 million, and adopted, unchanged, the determination requirements of the Emergency Supplemental Appropriation for FY 2004.

for this new temporary, statutory authority.²⁵¹⁶ Pursuant to this guidance, Military Departments or Defense Agencies must submit candidate construction projects exceeding \$750,000 to the Under Secretary of Defense (Comptroller). The request will include a project description and estimated cost, as well as a Service Secretary or Agency Director certification that the project meets the conditions stated in Section 2808 of the National Defense Authorization Act for FY 2004.²⁵¹⁷ The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and then notify the Military Department or Defense Agency when to proceed with the construction project.²⁵¹⁸

And fortunately for the DOD, Congress has extended the life of the temporary authority for one more year. Section 2810 of the Ronald W. Reagan National Defense Authorization Act for 2005²⁵¹⁹ extends the funding authority to use O&M funds for such projects into FY 2005, limited to \$200 million for the fiscal year.²⁵²⁰ So for the time being at least, the temporary statutory authority continues.

GAO: Our Bases are Falling Apart (Tell us Something We Don't Already Know!)

On 24 February 2004, the GAO issued a report detailing the challenges facing the DOD in managing its construction and repair programs.²⁵²¹ Of note, the GAO cited a recent Office of the Secretary of Defense estimate that it would cost as much as \$164 billion "to improve facilities to a level that would meet the department's goals."²⁵²² The report noted that the process of "prioritizing and resourcing projects provides an important means of improving whole categories of facilities."²⁵²³ However, the GAO also observed the process can result in deferring projects that do not fall within an emphasized category, but nevertheless are important to the DOD's mission.²⁵²⁴

The report also recommended that Congress consider the advantages and disadvantages of increasing current funding thresholds for unspecified minor military construction (UMMC) projects. This, the GAO concluded, would give the DOD more flexibility in funding such construction projects.²⁵²⁵ Some in Congress apparently listened to the GAO, as the Senate considered increasing the funding threshold for UMMC projects from \$1.5 million to \$2.5 million.²⁵²⁶ However, draft legislation which would have made this change did not make it into the final version of the National Defense Authorization Act for FY 2005 as signed by the President. So for the time being, the UMMC funding threshold remains unchanged.²⁵²⁷

Major James Dorn.

²⁵¹⁶ See Memorandum, Deputy Secretary of Defense, to Secretary of the Army, et al., subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004).

²⁵¹⁷ *Id.*

²⁵¹⁸ *Id.*

²⁵¹⁹ Pub. L. No. 108-767, 118 Stat. 1811, 2128 (2004).

²⁵²⁰ *Id.* § 2810. This section of the Authorization Act was economical in its use of language. The Act amended section 2808 of the Military Construction Authorization Act for FY 2004 by simply striking "2004" and inserting "2005" where appropriate. *Id.* (amending Pub. L. No. 108-136, div. B, 117 Stat. 1392, 1723). Also of note, the authority to carry out construction under the act shall commence only after the Secretary of Defense submits to congress the quarterly reports required under the Military Construction Authorization Act for FY 2004. *Id.*

²⁵²¹ GOV. ACCT. OFF., REP. NO. GAO-04-288, *Defense Infrastructure: Long-term Challenges in Managing the Military Construction Program* (Feb. 24, 2004).

²⁵²² *Id.* at 1.

²⁵²³ *Id.* at 5.

²⁵²⁴ *Id.*

²⁵²⁵ *Id.* at 2-3.

²⁵²⁶ See Ronald W. Reagan National Defense Authorization Act for FY 2005, H.R. 4200 ENR (Engrossed Amendment as Agreed to by Senate), 108th Cong., § 2801(2004), available at <http://thomas.loc.gov/cgi-bin/query /C?c108:/temp/~c108ZnQxxZ> (last visited 13 Nov. 2004). In addition to increasing the UMMC funding threshold to \$2.5 million, the proposed legislation would have increased the funding threshold for construction projects intended to correct a deficiency that is life-threatening, health-threatening, or safety threatening from \$3 million to \$4 million. *Id.*

²⁵²⁷ Of note, section 2801 of the final act increases the threshold for approval of repair projects below the Service Secretary level, per 10 U.S.C. § 2811(b), from \$5 million to \$7.5 million. Nevertheless, the act also decreases the threshold for Congressional notification for repair projects from \$10 million to \$7.5 million. See Ronald W. Reagan National Defense Authorization Act for 2005 Pub. L. No. 108-767, § 2801, 118 Stat. 1811, 2119 (2004). Given the degree of control the various Services exercise over such projects, this author is skeptical this legislative change will streamline the approval process.

Intragovernmental Acquisitions

Best Interest of the Government

The Economy Act statute requires agency orders to be in the best interest of the government.²⁵²⁸ Generally, as long as the agency rationally substantiates utilizing another agency to acquire a good or service, the agency satisfies the statutory requirement.²⁵²⁹ In *Vertol Systems Co.*, Vertol protested the U.S. Joint Forces Command (JFCOM) and the Air Force Special Operations Command (AFSOC) decision to procure aircraft from another agency.²⁵³⁰ The GAO denied Vertol's protest because the determinations and findings (D&F) provided a rational basis for the agency's decision to procure aircraft from another agency.²⁵³¹

In Vertol, the Joint National Training Center, JFCOM and the AFSOC (the agencies) acquired foreign threat systems aircraft under the Economy Act from the Army's Threat Systems Management Office (TSMO).²⁵³² The JFCOM needed the foreign aircraft to represent enemy aircraft in a joint training exercise.²⁵³³ Military instructions and regulations required airworthiness certifications to ensure the safety of the aircraft personnel and employees on the ground during the exercise.²⁵³⁴ The JFCOM determined only TSMO could provide the aircraft with the required airworthiness certification.²⁵³⁵ The AFSOC also executed a D&F concluding that only authorized aircraft with Federal Aviation Administration (FAA) airworthiness certificates or military equivalent certification met the safety requirements.²⁵³⁶ Because Vertol's aircraft did not meet the certification requirements, the AFSOC concluded TSMO was the only source capable of meeting the agency's needs.²⁵³⁷ Vertol protested, alleging the agencies improperly procured the aircraft from TSMO in violation of the Competition in Contracting Act²⁵³⁸ and the Small Business Act.²⁵³⁹

The GAO denied Vertol's arguments because the certification requirement "reasonably reflect[ed] the agency's needs."²⁵⁴⁰ The JFCOM also provided a reasonable explanation for determining Vertol unable to obtain the certifications in time to participate in the exercise.²⁵⁴¹ However, GAO's analysis did not include an assessment of whether the agency met the statutory requirements of the Economy Act.²⁵⁴² Only a footnote highlighting the economic savings the agency reaped using TSMO seemed to address the agency's decision to procure from the TSMO.²⁵⁴³ The GAO simply concluded Vertol failed to "furnish a basis for objecting to the agencies proceeding under the Economy Act" and denied the protest.²⁵⁴⁴

²⁵²⁸ 31 U.S.C. S. § 1535 (LEXIS 2004).

²⁵²⁹ *Id.*

²⁵³⁰ Comp. Gen. B-293644.6, B-93644.7, B-293644.8, B-293644.9, B-293644.10, July 29, 2004, 2004, 2004 CPD ¶ 173. Vertol also challenged the AFSOC acquisition of aircraft under the United States Special Operations Command's existing ID/IQ contract. The GAO denied the challenge because Vertol failed to establish itself as an interested party. *Id.* at 8.

²⁵³¹ *Id.* at 7.

²⁵³² *Id.* at 1.

²⁵³³ *Id.* at 2.

²⁵³⁴ *Id.* The JFCOM D&F stated there were no commercial vendors that could provide the aircraft with the required certification. *Id.*

²⁵³⁵ *Id.*

²⁵³⁶ *Id.* at 3. The AFSOC D&F included a request for a Russian Mi-8 transport helicopter, flight crew, support and maintenance crew and instructor pilot to support the training of pilots and troops. *Id.*

²⁵³⁷ *Id.* The AFSOC knew Vertol owned a helicopter with only an experimental FAA airworthiness certificate. *Id.* at 2.

²⁵³⁸ See 10 U.S.C. § 2304(a)(1)(A) (2000).

²⁵³⁹ See 10 U.S.C. § 644(a). Vertol also protested the agency's requirement for offerors to acquire an airworthiness certification before award considering the agency's use of aircraft with experimental FAA airworthiness certificates in the past. *Vertol Systems Company, Inc.*, 2004 CPD ¶ 173, at 3. The GAO determined the agency provided a reasonable basis for requiring certification before award given the time required to obtain certification. *Id.* at 4. The services admitted to not complying with the airworthiness certification requirements in the past, but the GAO stated "an agency's acceptance of an approach as acceptable under a prior procurement does not require the agency to find the same approach acceptable under the present procurement." *Id.* at 6.

²⁵⁴⁰ *Vertol Sys. Co., Inc.*, 2004 CPD ¶ 173, at 3.

²⁵⁴¹ *Id.* at 4. The JFCOM documented a two to four month process for a military airworthiness assessment and two to eight month process for necessary modifications. Vertol provided no evidence that the agency estimates were unreasonable. *Id.*

²⁵⁴² *Id.* at 7.

²⁵⁴³ *Id.* at 3.

²⁵⁴⁴ *Id.* at 7.

Under What Authority

On 14 June 2004, the GAO outlined Economy Act requirements in its attempt to assist the Air Force Office of Scientific Research (AFOSR) with a debt owed to the Department of Energy (DOE).²⁵⁴⁵ On 25 September 1998, the AFOSR signed an interagency agreement with the DOE for government-wide online research and education information services for colleges, universities, and other grantee organizations.²⁵⁴⁶ The agreement indicated the DOE took the leadership role in developing and implementing the online service through a cooperative agreement with Federal Information Exchange, Inc. (FIE).²⁵⁴⁷ The agreement also contained evidence of a previous agreement between the AFOSR and the DOE, however, a copy of that agreement was not provided to the GAO.²⁵⁴⁸ Based on the programs past success, the AFOSR decided to continue its participation with the online service known as FEDIX, and agreed to transfer \$131,000 to the DOE for services rendered from 1 September 1998 to 31 August 1999.²⁵⁴⁹ The DOE could not provide any information documenting a financial obligation incurred on behalf of the AFOSR, and the AFOSR could not provide any evidence that it transferred funds due to DOE.²⁵⁵⁰ The DOE did not request payment until 3 June 2003.²⁵⁵¹ The AFOSR asked the GAO whether FY 1999 funds could be used to pay the money owed to the DOE. Because the GAO had no details about the transaction, the GAO issued a general opinion about the interagency agreement.

The GAO first attempted to determine under what authority the AFOSR and the DOE entered into the agreement.²⁵⁵² Recognizing that if other specific authority existed for the agreement the Economy Act would not apply, the GAO assumed the parties entered into an interagency agreement.²⁵⁵³ The GAO next tackled the issue of what year funds the AFOSR should use to pay the debt.²⁵⁵⁴ The parties signed the agreement in FY 1998 but the services rendered covered FY 1998 and FY 1999.²⁵⁵⁵ In addition, the GAO indicated “the situation is further complicated because we do not know the relationship between the DOE and the FIE.”²⁵⁵⁶ If the DOE entered into a contract with FIE for the full cost of the AFOSR services on 25 September 1998, the AFOSR could use FY 1998 funds to reimburse the DOE.²⁵⁵⁷ On the other hand, if the DOE entered into a contract one or after 1 October 1998 but before 30 September 1999, the AFOSR could use FY 1999 funds to reimburse the DOE.²⁵⁵⁸ Another alternative involved the possibility of a DOE contract with FIE covering multiple years whereby charges would accrue to AFOSR as services were rendered.²⁵⁵⁹ Whatever the relationship between the DOE and the FIE, the AFOSR may only utilize FY 1999 funds to utilize because the account for FY 1998 funds would close on 30 September 2003.²⁵⁶⁰

The GAO review of the availability of funds issue concluded with the possibility of using FY 1999 funds or current funds to meet AFOSR’s obligation.²⁵⁶¹ The FY 1998 funds expired on 30 September 1998 and closed on 30 September 2003.²⁵⁶² While the FY 1999 funds expired on 30 September 1999, the FY 1999 funds remained available to pay the debt until 30 September 2004.²⁵⁶³ The final option for the AFOSR involved using current funds to pay the obligation under the agreement.²⁵⁶⁴ The GAO failed to provide a definite answer to the question, but the AFOSR received a thorough review of

²⁵⁴⁵ Major Jess Wood, Chief, Financial Management Division, Air Force Office of Scientific Research, B-301561 (June 4, 2004), *available at* www.gao.gov.

²⁵⁴⁶ *Id.* at 1.

²⁵⁴⁷ *Id.* The online information service, FEDIX, makes information about the government’s research, development, and education programs readily available at no cost to colleges, universities, and grantee organizations. *Id.*

²⁵⁴⁸ *Id.* at 2.

²⁵⁴⁹ *Id.*

²⁵⁵⁰ The DOE failed to provide paperwork to establish a financial obligation incurred on behalf of the AFSOR. *Id.*

²⁵⁵¹ *Id.*

²⁵⁵² *Id.*

²⁵⁵³ *Id.*

²⁵⁵⁴ *Id.* at 3.

²⁵⁵⁵ *Id.*

²⁵⁵⁶ *Id.*

²⁵⁵⁷ *Id.*

²⁵⁵⁸ *Id.* at 4.

²⁵⁵⁹ *Id.*

²⁵⁶⁰ *Id.*

²⁵⁶¹ *Id.*

²⁵⁶² *Id.*

²⁵⁶³ *Id.* at 5.

²⁵⁶⁴ *Id.*

Revolving Funds

Depot Maintenance Improvements Needed

This year the GAO issued several reports recommending various improvements for depots. The GAO recommended the DOD implement a plan to mitigate the potential for exceeding the requirement that military departments and defense agencies use no more than fifty percent of annual depot maintenance funding for work performed by private-sector contractors.²⁵⁶⁵ As the GAO stated, “recurring weaknesses in DOD’s data gathering, reporting processes and financial systems prevented the GAO from determining with precision if the military services complied with the 50-50 requirement.”²⁵⁶⁶ The GAO recommended that the service secretaries submit a plan to the Office of the Secretary of Defense, if the 50-50 reporting data is within two percent of exceeding the fifty percent threshold.²⁵⁶⁷ The plan must outline actions the military departments will take to ensure compliance.²⁵⁶⁸ Other recommendations included requiring the military departments to use their audit agencies or an agreed upon alternative to ensure past errors in data collection are corrected, as well as training to ensure proper 50-50 data gathering and reporting.²⁵⁶⁹

In a related development, the GAO also issued a report recommending that the Army improve its ability to identify how much depot level maintenance takes place outside its five public depots.²⁵⁷⁰ A 2003 report identified limitations to the Army’s 50-50 reporting requirements and outlined twenty-nine recommendations.²⁵⁷¹ The GAO found, however, that the Army has not yet developed an action plan that identifies priorities, time frames, roles and responsibilities, evaluation criteria, and resources for managing the implementation of the recommendations.²⁵⁷² The DOD concurred with the GAO’s recommendation to develop an action plan to implement the 2003 recommendations.²⁵⁷³

In an Air Force depot maintenance report, Congress asked the GAO to determine why the price for in-house work for FYs 2000 and 2004 almost doubled.²⁵⁷⁴ Congress also requested the GAO determine the factors responsible for the increase and whether the Air Force has taken steps to improve efficiency and control costs.²⁵⁷⁵ The GAO found an increase in material costs accounted for about sixty-seven percent of the price increase, but due to the Air Forces’ inability to effectively and comprehensively analyze material cost increase, the GAO could not substantiate the Air Force’s other rationales for the remaining increase.²⁵⁷⁶ Despite the increased material prices, the Air Force did not pass the increase to their customers for the work performed in FYs 2000 to 2003.²⁵⁷⁷ The Air Force implemented changes to bring prices in line with operating costs, but the GAO still found the Air Force had failed to develop a methodology to analyze the reasons for the cost

²⁵⁶⁵ See GOVT. ACCT. OFF., REP. NO. GAO-04-871, *Depot Maintenance: DOD Needs Plan to Ensure Compliance with Public and Private Sector Funding Allocation* (Sept. 29 2004) [hereinafter REP. NO. GAO-04-871]. See also 10 U.S.C.S. § 2466 (LEXIS 2004).

²⁵⁶⁶ The DOD submits two reports annually to Congress on the division of depot maintenance funding between the public and private sectors. One report outlines the percentage of funds spent the two previous fiscal years, and the other outlines the current and four succeeding fiscal years. The GAO accesses compliance with the 50-50 requirement and submits a report to Congress. REP. NO. GAO-04-871, *supra* note 2565, at 1.

²⁵⁶⁷ *Id.* at 23.

²⁵⁶⁸ *Id.*

²⁵⁶⁹ The recommendation also suggested requiring management implement the level of attention needed to produce accurate and complete 50-50 reporting and that the Marine Corps compile a consolidated report on depot maintenance funding allocation between the public and private sectors for the command responsible for weapon systems management. *Id.*

²⁵⁷⁰ GOVT. ACCT. OFF., REP. NO. GAO-04-220, *Depot Maintenance: Army Needs Plan to Implement Depot Maintenance Report’s Recommendations* (Jan. 8, 2004) [hereinafter REP. NO. GAO-04-220].

²⁵⁷¹ GOVT. ACCT. OFF., REP. NO. GAO-03-1023, *Depot Maintenance: DOD’s 50-50 Reporting Should Be Streamlined* (Sept. 5, 2003).

²⁵⁷² REP. NO. GAO-04-220, *supra* note 2570, at 20.

²⁵⁷³ *Id.* at 27.

²⁵⁷⁴ GOVT. ACCT. OFF., REP. NO. GAO-04-498, *Air Force Depot Maintenance: Improved Pricing and Cost Reduction Practices Needed* (June 17, 2004).

²⁵⁷⁵ *Id.* at 2.

²⁵⁷⁶ *Id.* at 3.

²⁵⁷⁷ An Air Force official admitted to “artificially constraining prices to help ensure that the group’s customers would be able to get needed work done with the amount of funds provided to them through the budget process.” *Id.* The GAO found however that the cash balance of the AF working capital funds was \$1.3 billion higher than the maximum level allowed by DOD policy. *Id.*

increase.²⁵⁷⁸ In addition, the GAO also concluded the Air Force needed to utilize an established data repository to determine whether cost savings initiatives have been successful.²⁵⁷⁹ Other recommendations included setting prices to recover all estimated costs, controlling costs, and developing a methodology to analyze cost variances.²⁵⁸⁰

The Cost of Doing Business

A revolving fund is designed to function like a self-sustaining business. But what happens if a vendor to which the fund makes advance payments goes bankrupt without fulfilling placed orders? Does the revolving fund cover the loss or assign the loss to the agencies which placed orders with the vendor? The GAO answered this question for the Library of Congress (Library) after a subscription vendor filed for bankruptcy. In *Assignment of Losses Incurred by the Library of Congress FEDLINK Revolving Fund*,²⁵⁸¹ the GAO decided that the Library should use the administrative fees collected from all customers to cover the loss.²⁵⁸²

The Library of Congress FEDLINK, an intragovernmental revolving fund, is a “cooperative procurement, accounting, and training program designed to provide access to online databases, periodical subscriptions, books, and other library and information support services from commercial suppliers with which the Library has negotiated contracts.”²⁵⁸³ Federal agencies place orders for FEDLINK products and services and take advantage of volume discounts.²⁵⁸⁴ The Library has authority to collect advance payments from customers that it uses to pay subscription vendors.²⁵⁸⁵ In FY 2003, the Library learned a vendor failed to place subscription orders or make required payments to publishers.²⁵⁸⁶ The Library terminated the contract and the vendor subsequently filed for bankruptcy protection.²⁵⁸⁷ Determining that it would not be reimbursed for approximately \$500,000, the Library requested the GAO recommend “whether the subscribing federal agencies or the FEDLINK revolving fund should bear the loss associated with [the] bankruptcy.”²⁵⁸⁸ Reviewing the statutory authority and the legislative history of the Library’s revolving fund authority, the GAO decided the losses are a “legitimate business cost” and therefore the funds from administrative fees should be used to cover the loss.²⁵⁸⁹

While the statutory authority failed to directly address the issue, the legislative history indicated the purpose of the legislation was to allow “FEDLINK to operate as a private enterprise” and “to place the Library’s service program operations ‘on a more business-like foundation.’”²⁵⁹⁰ The GAO therefore decided to review how the private sector would deal with the issue and found generally, “the default of a subcontractor or supplier is a ‘risk allocated to the seller absent a specific provision to the contrary in the contract.’”²⁵⁹¹ An informal survey of other funds confirmed the practice that funds bear the cost resulting from contractor defaults.²⁵⁹² To cover the loss, the GAO concluded the Library should utilize the

²⁵⁷⁸ *Id.*

²⁵⁷⁹ *Id.* at 4.

²⁵⁸⁰ *Id.* at 27.

²⁵⁸¹ Comp. Gen. B-301714, Jan 30, 2004, available at www.gao.gov.

²⁵⁸² *Id.*

²⁵⁸³ *Id.*

²⁵⁸⁴ *Id.*

²⁵⁸⁵ *Id.* at 2. See 10 U.S.C.S. § 3324(d)(2) (LEXIS 2004).

²⁵⁸⁶ *Assignment of Losses*, Comp. Gen. B-301714, Jan 30, 2004. The vendor was RoweCom.

²⁵⁸⁷ *Id.*

²⁵⁸⁸ The Library filed a claim for \$3.5 million but determined it was unlikely to receive full reimbursement. *Id.*

²⁵⁸⁹ *Id.* at 3.

²⁵⁹⁰ *Id.*

²⁵⁹¹ *Id.*

²⁵⁹² *Id.*

administrative reserves Congress authorized for legitimate business costs.²⁵⁹³ The recommendation included adding a clause to contractor contracts to allocate the costs differently in the future.²⁵⁹⁴

Major Bobbi Davis.

Liability of Accountable Officers

Who Has Authority?

Beginning in 1941, Congress enacted a series of statutes establishing liability of and relief for accountable officers who were found to be without fault.²⁵⁹⁵ The statutes tasked the GAO with the responsibility for granting relief and also authorized accountable officers to request advance decisions from the GAO regarding the propriety of a certification or disbursement.²⁵⁹⁶ In some instances the GAO delegated this authority to the agency.²⁵⁹⁷ In 1995, however, Attorney General Janet Reno issued a memorandum and a draft order advising accountable officers to seek the advice of their component general counsel when in doubt about the legality of authorizing an obligation or disbursement.²⁵⁹⁸ The rationale for the advice stemmed from a 1991 DOJ Office of Legal Counsel (OLC) opinion which stated that the statutory authority granted to the GAO to relieve executive branch officials from liability is unconstitutional.²⁵⁹⁹ Because GAO is an agent of Congress, Congress “does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.”²⁶⁰⁰ Therefore, according to the DOJ, under current law “accountable officers receive no legal protection from Comptroller General decisions purporting to relieve them from liability.”²⁶⁰¹

On 28 January 2004, the DOJ OLC responded to a U.S. Department of Treasury request for assistance with implementing the OLC opinion.²⁶⁰² The OLC recommended the agency adopt an internal order based on the 1995 DOJ draft order.²⁶⁰³ The OLC response went further by stating that adoption of similar internal orders by all executive branch agencies “would significantly advance the President’s interest in maintaining the constitutional separation of powers against the legislative intrusions that the 1991 OLC opinion identifies.”²⁶⁰⁴ Obviously agencies did not adopt draft order provisions as a result of the 1991 legal opinion or the 1995 memorandum. Only time will tell if accountable officers will seek advance decisions and relief from agency general counsel based on the latest message traffic between the Treasury Department and the DOJ.

Major Bobbi Davis.

²⁵⁹³ *Id.* The fund consisted of two components, advance payments to cover the cost of the services provided and administrative fees to reimburse the Library for the cost associated with operating the program. The Library used the administrative fees to build a reserve to finance future improvements and replace outdated equipment. *Id.*

²⁵⁹⁴ *Id.* at 4. The agreement would include a cost-reimbursement provision by customer agencies if a contractor defaulted. *Id.*

²⁵⁹⁵ GOVT. ACCT. OFF., OGC-91-5, *Appropriations Laws-Vol-II 9-7* (2d ed. year) [hereinafter GOVT. ACCT. OFF., OGC-91-5].

²⁵⁹⁶ See General Accounting Office Act of 1996, Pub. L. No. 104-316, § 204, 110 Stat. 3826, 3845-46.

²⁵⁹⁷ GOVT. ACCT. OFF., OGC-91-5, *supra* note 2595, at 9-7. The GAO delegated the authority to issue advance decisions to the Department of Defense (DOD) for military pay allowances, travel, transportation costs, survivor benefits and retired pay. The GAO delegated the authority to issue advance decisions to the Office of Personnel Management for civilian compensation and leave issue. The authority is delegated to the General Services Administration Board of Contract Appeals for civilian employee travel, transportation, and relocation allowances. See The General Accounting Act of 1996, Pub. L. No. 104-316, § 204, 110 Stat. 3826, 3845-46.

²⁵⁹⁸ Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (15 Nov. 1995).

²⁵⁹⁹ *Id.*

²⁶⁰⁰ *Id.*

²⁶⁰¹ *Id.*

²⁶⁰² Memorandum, U.S. Department of Justice, Office of the Assistant Attorney General, to U.S. Department of Treasury General Counsel, subject Response to Department of Treasury (28 Jan. 2004).

²⁶⁰³ *Id.*

²⁶⁰⁴ *Id.*

Operational and Contingency Funding

Update of the CERP—a New Paradigm for Humanitarian Assistance within Iraq and Afghanistan

As reported last year,²⁶⁰⁵ the Commander's Emergency Response Program (CERP) was initially created through Fragmentary Order 89 (FRAGO 89) as a Coalition Provisional Authority (CPA) "funded authority . . . for reconstruction assistance to the Iraqi people."²⁶⁰⁶ FRAGO 89 defined reconstruction assistance as "building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq."²⁶⁰⁷ Initially, the CPA funded the CERP with vested and seized Iraqi funds for "the benefit of the Iraqi people."²⁶⁰⁸ Subsequently, the Emergency Supplemental Appropriations Act for FY 2004 (ESAA) expanded the CERP's capabilities with \$180 million of appropriated funding.²⁶⁰⁹ Congress also allowed these appropriated funds to expand the CERP into Afghanistan.²⁶¹⁰

For FY 2005, Congress continued to fund the CERP for Iraq and Afghanistan with \$300 million of appropriated funds.²⁶¹¹ Congress also exempted the CERP from normal statutory fiscal and contracting controls by allowing the appropriated funds to "be used, notwithstanding any other provision of law."²⁶¹² However, to regulate this fairly liberal appropriation from Congress, the U.S. military commands within Iraq have provided controls and other procedures to ensure proper use of CERP funds.²⁶¹³ Multi-National Force—Iraq (MNF-I) is currently the military command over all U.S. and coalition forces within Iraq and has issued a series of orders concerning proper use and accountability of CERP funds. Fragmentary Order 087 (FRAGO 087) is the most recent primary order issued by MNF-I that regulates the CERP "to allow commanders to respond to urgent humanitarian relief and reconstruction assistance by executing programs that will assist the Iraqi people."²⁶¹⁴ Paragraph 3.B of FRAGO 087 continues to list fairly broad examples of projects, to include: "water and sanitation infrastructure; food production and distribution; agriculture; electrical power generation and distribution; healthcare; education; telecommunications; economic, financial, management improvements; transportation; rule of law and governance; irrigation; civic clean-up activities; civic support vehicles; [and] repair to civic or cultural facilities."²⁶¹⁵

To provide accountability for CERP funded projects, FRAGO 087 establishes certain controls. For example, FRAGO 087 provides:

Commanders are not authorized to deliberately over-pay for projects. Document every effort to verify the costs are reasonable. For projects over \$10,000, the brigade or division commander should ensure that three bids are obtained from vendors, and that an individual is identified to manage the project. If you are precluded from obtaining three quotes or bids based on compelling circumstances, this must be documented. Payments should be made based upon percent complete as opposed to a one-time lump sum payment.²⁶¹⁶

FRAGO 087 also directs that projects up to \$100,000 be documented and paid with a Standard Form 44 Purchase Order-Invoice-Voucher (SF 44) and those projects exceeding \$100,000 requires contracting by a warranted contracting officer.²⁶¹⁷

²⁶⁰⁵ 2003 Year in Review, *supra* note 29, at 195.

²⁶⁰⁶ COMBINED JOINT TASK FORCE—7, FRAGMENTARY ORDER 89 TO OPERATIONS ORDER 03-036, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (19 June 2003).

²⁶⁰⁷ *Id.* ¶ 3.B.4. This paragraph also lists examples of reconstruction assistance as: (1) financial management improvements, (2) restoration of the rule of law and governance initiatives, (3) day laborers for civic cleaning projects, and (4) purchase or repair of civic support vehicles. *Id.*

²⁶⁰⁸ Memorandum, Deputy Secretary of Defense, to Administrator of the Coalitional Provisional Authority, subject: Certain State- or Regime-Owned Property in Iraq (29 May 2003); *see also* 2003 Year in Review, *supra* note 29, at 195.

²⁶⁰⁹ Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for FY 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003).

²⁶¹⁰ *Id.*

²⁶¹¹ Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, § 9007, 117 Stat. 1054 (2004).

²⁶¹² *Id.*

²⁶¹³ *See, e.g.*, COMBINED JOINT TASK FORCE—7, FRAGMENTARY ORDER 1268 TO OPERATIONS ORDER 03-036, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (22 Dec. 2003).

²⁶¹⁴ MULTI-NATIONAL FORCE - IRAQ, FRAGMENTARY ORDER 087, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (29 June 2004). MNF-I subsequently issued Fragmentary Orders 318 and 845 that revised certain portions of FRAGO 087.

²⁶¹⁵ *Id.* ¶ 3.B.1.A—N.

²⁶¹⁶ *Id.* ¶ 3.C.3.

²⁶¹⁷ *Id.* ¶¶ 3.C.4. and 5.

There are also numerous other controls concerning project limits at certain command levels, fund obligation requirements, restrictions on reward payments or weapon buy-back programs, comingling of funds restrictions, and disallowance of projects for the benefit of individuals or private businesses.²⁶¹⁸ Finally, FRAGO 087 also includes detailed coordinating instructions for audits, internal reviews, payment and budget reconciliation, and project reporting requirements.²⁶¹⁹

FY 2005 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA) Policy and Program Guidance Issued

By joint message dated 25 February 2004, the Office of the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (SO/LIC) and the Defense Security Cooperation Agency (DSCA) provided “policy and program management direction for FY 2005 OHDACA planning and execution, including the humanitarian mine action program, and also addresses the O&M funded humanitarian civic assistance (HCA) program.”²⁶²⁰ Compared to the FY 2004 guidance,²⁶²¹ the recent FY 2005 guidance²⁶²² provides a much clearer distinction between OHDACA funded humanitarian assistance²⁶²³ and the O&M funded HCA program.²⁶²⁴ As a brief reminder from last year’s *Year in Review*, “[t]he funding for OHDACA activities is provided annually through the DOD Appropriations Act for programs provided under 10 U.S.C. §§ 401, 402, 404, 2547, and 2561 . . . [h]owever, humanitarian and civic assistance costs authorized under 10 U.S.C. § 401 (with the exception of demining activities) are not funded with the OHDACA appropriation but are funded with the general operation and maintenance appropriation.”²⁶²⁵

The FY 2005 guidance clearly sets out separate HCA guidance that primarily reiterates the 10 U.S.C. section 401 requirements and distinguishes it from other humanitarian assistance activities.²⁶²⁶ Additionally, the FY 2005 guidance provides a supplemental checklist (in addition to the general checklist) for HCA project submissions to the DOD. Generally, the supplemental checklist contains items necessary for compliance with 10 U.S.C. section 401 as follows:

- Project is provided in conjunction with military operation/exercise
- Promotes specific operational readiness skills of U.S. military forces participating in project
- Labor will be performed by U.S. military forces
- Project falls into one of the [10 U.S.C. §401 HCA activities].²⁶²⁷

The general checklist within the FY 2005 guidance provides points that have to be addressed for all OHDACA funded and O&M funded HCA projects. Selected general checklist requirements include whether the project supports the Global War on Terror (GWOT) objectives, contributes to DOD coalition building, strengthens the host nation’s security and stability, enhances DOD’s image and “ability to shape the regional security environment,” and whether appropriate partnering with host nation militaries is accomplished to further goals of interoperability and coalition-building.²⁶²⁸ In addition to the HCA supplemental checklist at paragraph 13, the FY 2005 guidance includes supplemental checklists for humanitarian assistance (HA) under 10 U.S.C. section 2561, foreign disaster relief under 10 U.S.C. section 404, and humanitarian mine action under 10 U.S.C. section 401.

Paragraph 9C of the FY 2004 guidance required that all projects “involve visible U.S. military participation to ensure that the projects are effective security cooperation tools” and that “DOD’s role must not be reduced simply to providing funding.”²⁶²⁹ The FY 2005 guidance provides similar military participation requirements but provides even

²⁶¹⁸ *Id.* ¶ 3.C.8.

²⁶¹⁹ *Id.* ¶¶ 3.D. and E.

²⁶²⁰ Message, 251658Z Feb 2004, Secretary of Defense, subject: Policy and Program Guidance for FY05 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities and Humanitarian and Civic Assistance (HCA) [hereinafter FY05 OHDACA and HCA Message].

²⁶²¹ Message, 100935Z Mar 2003, Secretary of Defense, subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) Activities [hereinafter FY04 OHDACA Message].

²⁶²² FY05 OHDACA and HCA Message, *supra* note 2620.

²⁶²³ *See, e.g.*, Department of Defense Appropriations Act for FY 2005, Pub. L. No. 108-287, tit. II, 117 Stat. 1054 (2004).

²⁶²⁴ *See, e.g., id.* § 8009.

²⁶²⁵ 2003 *Year in Review*, *supra* note 29, at 196 (citations omitted).

²⁶²⁶ FY05 OHDACA and HCA Message, *supra* note 2620, ¶ 8.

²⁶²⁷ *Id.* ¶ 13.

²⁶²⁸ *Id.* ¶ 9. Understanding the bulletized general checklist points at paragraph 9 requires an in-depth reading of the policy guidance throughout the message.

²⁶²⁹ FY04 OHDACA Message, *supra* note 2621, ¶ 9.C.

stronger emphasis as follows:

Participation of U.S. military forces: All HA projects . . . should maximize visible U.S. military participation to ensure that the projects are effective security cooperation tools. Active DOD participation improves the prospects for developing channels of influence and access, potentially provides operational readiness benefits, and generates unique training opportunities. DOD's role must not be reduced to simply providing resources or writing checks.²⁶³⁰

Lieutenant Colonel Karl Kuhn.

²⁶³⁰ FY05 OHDACA and HCA Message, *supra* note 2620, ¶ 4.C.