

CONTRACT LAW DEVELOPMENTS OF 1997

THE YEAR IN REVIEW

FOREWORD

For those of you who peruse this article, keep in mind that it is an important component of the School's annual Contract Law Symposium. And, as in past years, the article's review of significant developments reflects this year's Symposium theme: "Procurement Reform: How far can we go?" The frenetic pace of activity and change in the field of government procurements over the past few years has been astounding. If you pick up a copy of our Year-In-Review article published in 1993, the authors commented on the "wait and see" attitude of legislators and the "dearth of regulatory action" in acquisition law. Compare that now with the developments and changes we are experiencing everyday, some of which are highlighted in this year's review.

In fact, over the last year, practitioners have been hard pressed to keep on top of all the changes and new developments in government acquisitions—particularly with the Department of Defense. With the "fall of the wall," our agencies must capitalize on our victory in the Cold War and transform our operations to meet the even more dynamic challenges of the twenty-first century. Consequently, nothing is sacred, everything is subject to scrutiny, and, of course, debate—a lot of debate.

Against this backdrop, we present to you our review of this year's appropriations and authorization acts, regulatory changes, and case law—all with an eye towards passing on to you survival tips, lessons learned, and a "heads-up" on recent trends and developments. We at the Contract Law Department hope you will find our latest effort a worthy addition to your professional library.

CONTRACT FORMATION

Authority

*No Contract, No Quantum Meruit Remedy for AT&T*¹

Two years ago, we reported on the Court of Federal Claims decision regarding a Navy contract with AT&T.² The fixed price contract was for the development of a system called the

Reduced Diameter Array (RDA). The RDA would replace the existing sonar that tracks Soviet submarines. The contract contained two efforts, one for the development of a prototype and the second for production of three RDA systems. The Navy exercised both options, despite AT&T's requests to the contrary. AT&T claimed that it spent \$60 million more on contract performance than the contract's fixed price.

After the Navy denied AT&T's claim for these additional costs, AT&T sued in the Court of Federal Claims. It successfully argued that the pertinent annual appropriations act forbade a fixed price contract for the development of a major system or subsystem in excess of \$10 million without written secretarial level approval.³ AT&T also argued that the lack of such approval rendered the contract void, entitling AT&T to recovery on a quantum meruit basis. On appeal, the Court of Appeals for the Federal Circuit affirmed the finding that the contract was void, but rejected quantum meruit as the appropriate basis for a remedy. In doing so, the court noted that quantum meruit is a remedy for contracts implied-in-law. Such a remedy exceeds the court's jurisdiction. The Court of Appeals for the Federal Circuit remanded the case and directed judgment for the Navy. Although the Navy scored a victory, it may yet pay a higher price for the RDA system. The court noted that AT&T might seek to replevy the goods or sue for the government's wrongful use of its equipment.

Telecommunications Company Disconnected

Between 1975 and 1992, Contel of California, Inc. spent more than \$700,000 installing an outside cable plant to serve the telecommunications needs of the China Lake Naval Weapons Center.⁴ Contel provided telecommunications services for the Navy pursuant to a communication service agreement (CSA). When the Navy began using a government communications network, Contel sought its "unrecovered investment" in addition to termination costs. Initially, Contel maintained that its entitlement arose from the CSA. Unfortunately for Contel, the CSA did not provide for the requested remedy. The CSA specifically required supplemental agreements prior to installation of such equipment.⁵

1. *American Tel. & Tel. v. United States*, 124 F.3d 1471 (Fed. Cir. 1997).

2. See Major Timothy J. Pendolino et al., *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 21 [hereinafter *1995 Year in Review*]; see also *American Tel. & Tel. Co. v. United States*, 32 Fed. Cl. 672 (1995).

3. The Secretary of the Navy had to determine that the risk had been sufficiently reduced to allow for realistic pricing. *American Tel. & Tel.*, 32 Fed. Cl. at 2.

4. *Contel of California, Inc. v. United States*, 37 Fed. Cl. 68 (1996).

Lacking an express contract upon which to base its claim, Contel concocted a theory based on an implied-in-fact contract and sought recovery on a quantum meruit basis.⁶ This approach failed for several reasons. First, Contel claimed that a Navy commander had ratified its actions. The court, however, determined that the Navy commander lacked implied actual authority because negotiation of CSAs was not integral to his duties.⁷ Second, it was clear that the parties had not contemplated that the Navy would pay any termination costs related to this equipment. Third, the parties had made no agreement that the Navy would pay Contel's "unrecovered investment," and Contel acknowledged that the Navy made no such assurances.⁸ In the final analysis, Contel tried unsuccessfully to construct a contract only after its business decision resulted in losses rather than profits. The Court of Federal Claims' recent opinion allowing termination for convenience settlements in cable television franchise agreements at closing military installations may have fueled Contel's decision to pursue such a weak case.⁹

*Partnership Agreements Are Contracts if They Meet All
Applicable Regulatory Mandates*

Two years ago, we discussed two seemingly conflicting opinions by the Court of Federal Claims.¹⁰ The cases left unsettled the question of whether medical partnership agreements

(MPAs)¹¹ are contracts under the Tucker Act.¹² This year the Court of Appeals for the Federal Circuit answered the question in the affirmative.

In *Trauma Service Group v. United States*,¹³ the Court of Appeals for the Federal Circuit found that, contrary to the opinion of the Court of Federal Claims, a memorandum of agreement "can also be a contract . . ." ¹⁴ Nevertheless, the Federal Circuit affirmed the dismissal of Trauma Service Group's (TSG's) complaint, which sought recovery of an employee's salary.¹⁵ The court noted that TSG could not cite a clause in the memorandum of agreement which supported its demand for recovery. Also, it failed to identify anyone with the requisite authority to bind the government to a contract implied-in-fact. The medical treatment facility commander lacked such authority because the statute authorized only the Secretary of Defense to enter into such agreements. Although implementing regulations gave medical treatment facility commanders the authority to negotiate these partnership agreements, this authority was subject to the final approval of the Surgeon General of the Army and the Director of the Office of Civilian Health and Medical Program of the Uniformed Services.¹⁶

On the same day, the Federal Circuit reversed the Court of Federal Claims in another case involving CHAMPUS partnership agreements. In *Total Medical Management, Inc. v. United*

5. Certain master CSAs required "that the parties execute supplemental CSAs before particular equipment (including outside cable plant) could be installed at the Weapons Center. The governing agreement and each supplemental CSA were to comprise a separate contract governing the ordered equipment." *Id.* at 73.

6. Quantum meruit means "as much as he deserved" and describes a measure of liability for an implied-in-law contract. It describes an equitable doctrine relied upon to prevent unjust enrichment. BLACK'S LAW DICTIONARY 1243 (6th ed. 1991).

7. In fact, master CSAs delegated authority in these matters to specific individuals, none of whom made any such agreement with Contel. *Contel*, 37 Fed. Cl. at 73.

8. The plaintiff cited *United States v. Amdahl*, 786 F.2d 387 (Fed. Cir. 1986), as the basis for its quantum meruit claim. The Court of Federal Claims rejected this theory of recovery, pointing out that recovery under *Amdahl* is limited to situations in which reliance is based on an express contract which is subsequently determined to be invalid. *Contel*, 37 Fed. Cl. at 68. Here there was no express contract providing the plaintiff with the remedy it sought.

9. Department of Defense Cable Television Franchise Agreements, 36 Fed. Cl. 171 (1996). This case also involved a Federal Communications Commission (FCC) regulated service—cable television. The Army obtained cable service for installation residents through franchise agreements which were created and executed outside of the federal acquisition regulation (FAR). When base closures left cable companies facing tremendous losses, Congress requested an advisory opinion from the Court of Federal Claims on the applicability of the FAR. Rejecting the DOD's assertion that the cable franchises functioned only as easements, the court held that the agreements were subject to the FAR. *Id.* at 181. See also Major Kathryn R. Sommerkamp et al., *Contract Law Developments of 1996—The Year in Review*, ARMY LAW., Jan. 1997, at 17, 28 [hereinafter *1996 Year in Review*] (espousing that this was a surprising result, considering the genesis of the franchise agreements, but one which admittedly created a termination settlement remedy for the cable companies).

10. See *1995 Year in Review*, *supra* note 2, at 17.

11. Congress authorized the Secretary of Defense to enter into agreements with civilian health care providers. 10 U.S.C. § 1096 (1994). Under these agreements, civilian health care providers treat patients in military facilities. This arrangement allows the government to avoid facility charges which would otherwise be billed to the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).

12. 28 U.S.C.A § 1491 (West 1997).

13. 104 F.3d 1321 (Fed. Cir. 1997).

14. *Id.* at 1326 (emphasis added). The Court of Appeals for the Federal Circuit rejected the Court of Federal Claims opinion, which denied contractual status to memoranda of agreement, stating that such agreements "can" be contracts. The Court of Appeals for the Federal Circuit left unanswered the question of whether this agreement was a contract.

15. *Id.* TSG alleged that the government forced its x-ray technician to work full-time on non-CHAMPUS patient services by threatening to terminate of the memorandum of agreement.

States,¹⁷ the Federal Circuit found that a memorandum of agreement that exceeded the regulatory authority for medical partnership agreements by agreeing to pay a rate higher than the CHAMPUS allowable charge¹⁸ was void ab initio. The court dismissed the contractor's complaint for failure to state a claim.

*Jilted by the Prime? Subcontractor Often Left
Standing at the Altar*

When a government contractor fails to pay its subcontractors or employees, the subcontractors must generally seek their remedy from the prime contractor. Subcontractors lack privity of contract with the government. They can, however, overcome this significant hurdle by showing the existence of an implied-in-fact contract with the government or by establishing that they are a third-party beneficiary of the prime contract.¹⁹

Two interesting but unsuccessful attempts to recover under an implied-in-fact contract theory were *National Micrographics Systems, Inc. v. United States*²⁰ and *Appeal of Francis J. Wolzein*.²¹ In *National Micrographics Systems*, the prime contractor furnished equipment to the government under a time and materials contract for engineering and technical support services. The contract stated that the title to contractor-furnished property would vest in the government upon delivery.²² The plaintiff, National Micrographics Systems, Inc., (NMS) delivered a computer system to the National Security Agency (NSA) pursuant to a subcontract with the prime. The NSA paid the prime, but its check was "intercepted" by the IRS for delinquent taxes. After unsuccessful attempts to recover from the prime contractor, NMS turned to the NSA, which now had possession of the computer system for which it had never been paid. NMS

demanded that the government pay for or return its equipment. It cited as authority its delivery ticket that, by standard language, purported to reserve title in the vendor to ensure payment. The delivery ticket also allowed for repossession by the vendor.

The Court of Federal Claims dismissed NMS's claim.²³ Even if a person with authority for the government signed the delivery ticket, there would be no contract. There was no consideration for such an agreement, because the contract with the prime contractor already entitled the government to the property.

In *Appeal of Francis J. Wolzein*, Telemarc was the original awardee of the contract. During performance, Telemarc ceased paying its employees several weeks prior to being terminated for default. The government awarded the replacement contract to Francis Wolzein, a former employee of Telemarc. The replacement contract was later terminated for convenience. In Wolzein's termination settlement proposal, he tried to recover his unpaid wages under the original contract. The Corps of Engineers Board of Contract Appeals denied his appeal, finding that the government employee who allegedly encouraged Wolzein's continued work and who promised eventual payment of his wages lacked authority to contract. That individual was neither a contracting officer nor a contracting officer's representative. There was also no evidence of ratification by a person with authority. Finally, the board noted that the government received no benefit from Wolzein's uncompensated work.²⁴

By contrast, in *D & H Distributing Co. v. United States*,²⁵ a subcontractor recovered from the government the cost of goods the subcontractor supplied in accordance with the terms of its

16. See 32 C.F.R. § 199.1 (1996).

17. 104 F.3d 1314 (Fed. Cir. 1997).

18. See 32 C.F.R. § 199.14(g)(1).

19. See generally JOHN CIBINIC, JR. AND RALPH C. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS 1253 (3d ed. 1995).

20. 38 Fed. Cl. 46 (1997).

21. ENG BCA No. 6278, 97-1 BCA ¶ 28,674.

22. The contract contained FAR 52.245-5(c)(2), which states that "title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon the vendor's delivery of such property." *National Micrographics*, 38 Fed. Cl. at 48. See also GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.245-5(c)(2) (Apr. 1, 1984) [hereinafter FAR].

23. The plaintiff's 5th Amendment takings claim was dismissed as well. *National Micrographics*, 38 Fed. Cl. at 51-54.

24. The board stated:

The Board recognizes some decisions by Boards and Courts which seem to stretch finding the existence of an implied-in-fact contract when the government has received and accepted a benefit from the unauthorized acts of agents despite the fact that unjust enrichment is usually an issue under the implied-in-law contracts which are inapplicable to the government; but even here, Appellant has not shown a benefit received by Respondent from its work as an employee of Telemarc There was no unjust enrichment of the Government.

Wolzein, 97-1 BCA ¶ 28,674 at 143,242

25. 102 F.3d 542 (Fed. Cir. 1996).

Competition

Central Contractor Registration (CCR)

contract with Computer Integrated Management Corporation (CIM). CIM was the awardee of a contract for computer disks. Before D&H would extend credit to CIM, however, it wrote to the NSA seeking a joint payment arrangement with CIM. The NSA agreed to this arrangement, but, rather than executing a joint payment agreement supplied by D&H, the NSA modified its prime contract with CIM. The NSA then proceeded to make payment directly to CIM, and CIM made only partial payment to D&H. The Federal Circuit found no implied-in-fact contract between the NSA and D&H but concluded that D&H was a third party beneficiary. Accordingly, D&H could proceed against the NSA. The Federal Circuit rejected the NSA's argument that allowing recovery by D&H would violate the statutory assignment of claims prohibition.²⁶

Trusting Cynthia's Interpretation of Contractor's Tax Liability

The Army Corps of Engineers awarded a contract to Foley Company for the construction of a sewage project at Fort Knox, Kentucky.²⁷ During bid preparation, one of Foley's secretaries sought clarification regarding the contractor's liability for state taxes. After winning the award, Foley alleged that its secretary received erroneous information from an Army Corps of Engineers employee, whom Foley could identify only as "Cynthia." Foley alleged that this misinformation resulted in a mutual mistake that entitled it to reformation of the contract and reimbursement of over \$290,000. The Court of Federal Claims, however, held that the contract placed the risk of mistake on the contractor. The invitation for bids (IFB) stated that the contract price should include applicable state taxes. The IFB also required written requests for clarification. The court emphasized the unfairness to other bidders that would result if the Corps allowed Foley to submit such questions through informal channels, while denying others access to the same information. Finally, the court reasoned that Foley could not rely on the interpretation of an employee without verifying her authority and identifying her by more than her first name.

On 10 February 1997, the Director for Defense Procurement, Office of the Undersecretary of Defense, Ms. Eleanor R. Spector, issued a memorandum concerning the implementation of the CCR.²⁸ The purpose of the CCR is to allow contractors to provide basic business information, capabilities, and financial information on a one time basis to the government.²⁹ The Department of Defense (DOD) intends to use the CCR to comply with the Debt Collection Improvement Act of 1996 (DCIA).³⁰ The DCIA requires federal agencies to have the taxpayer identification number of every government contractor and to pay every contractor electronically.

Ms. Spector initially announced that contractors must register for the CCR for contract awards resulting from solicitations issued after 30 September 1997.³¹ On 11 June 1997, Ms. Spector and Dr. John Hamre, former Under Secretary of Defense (Comptroller),³² issued a joint letter which extends the deadline for contractor registration to 31 March 1998.³³ The CCR applies to all solicitations and awards, except for purchases made: by commercial purchase card, by contracting officers located outside the United States, for classified contracts, and by contracting officers in support of contingency or emergency operations. Ms. Spector intends for the CCR to provide worldwide visibility of sources to government buyers and finance officers, thereby streamlining contract awards and payments.

Restrictive Specifications

Cyber Specs Are Sufficient. In NuWestern USA Constructors, Inc.,³⁴ the Army Corps of Engineers issued a request for proposals (RFP) for the design and construction of a warehouse. It issued the solicitation exclusively in a CD-ROM format. The Commerce Business Daily (CBD) synopsis stated that the Corps would issue the solicitation in electronic format only. The Corps planned to issue any amendments on floppy disks, CDs, or the Internet. The synopsis also advised potential offer-

26. See 31 U.S.C.A. § 3727 (West 1997); 41 U.S.C.A. § 15 (West 1997).

27. *Foley Company v. United States*, 36 Fed. Cl. 788 (1996).

28. Memorandum, Director, Defense Procurement, CP/CDF, subject: Central Contractor Registration (Feb. 10, 1997) [hereinafter Spector Memorandum].

29. *Id.* at para. 1.

30. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-81 (1996). See 31 U.S.C.A. § 3302 (1997).

31. Spector Memorandum, *supra* note 28, para. 3.

32. Dr. Hamre is now the Deputy Secretary of Defense.

33. Joint Memorandum, Under Secretary of Defense and Director, Defense Procurement, subject: Central Contractor Registration (June 11, 1997) (this letter can be accessed at <<http://www.acq.osd.mil/ec/policy.htm>>).

34. B-275514, Feb. 27, 1997, 97-1 CPD ¶ 90.

ors to check the Corps' Internet address daily for changes. Finally, the solicitation required offerors to submit their proposals in hard copy format.

NuWestern protested. It argued that the use of the electronic format limits competition. According to NuWestern, only firms that possess the technology required to print the plans and specifications from the CD-ROM or that have the financial resources to pay a third party for the printing can compete. NuWestern further alleged that by failing to provide complete paper copies, the Corps shifted the responsibility for the completeness and accuracy of the solicitation from the government to potential offerors.

The General Accounting Office (GAO) found that the financial burden of paying to have hard copies printed was no greater than the reasonable fee the law permits an agency to charge for solicitation documents under more traditional procedures.³⁵ The GAO also noted that the agency's responsibility for providing complete and accurate solicitations was the same, regardless of the format.³⁶ The GAO highlighted recent legislative initiatives³⁷ that signaled Congress' intent that agencies use electronic acquisition methods. Finally, the GAO cited specific cases which support the principle that the use of electronic commerce does not conflict with full and open competition.³⁸

Security for Ronald Reagan! (The Building).³⁹ The General Services Administration (GSA) determined that the Ronald Reagan Federal Office Building requires approximately 350,000 security guard hours per year. This easily qualifies as one of the largest security guard service requirements in the industry.⁴⁰ The GSA established a minimum "experience requirement" that required offerors to have completed two

security guard contracts of at least 175,000 hours each within the last five years.⁴¹ Integrity International Security Services, Inc. (Integrity) protested, arguing that the minimum experience requirement was unduly restrictive of competition.

A contracting agency may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs.⁴² The GSA argued that agencies have discretion to use restrictive provisions where the solicitation requirement relates to safety concerns. The agency, however, must establish that the challenged restriction is necessary to insure the highest level of reliability and effectiveness.⁴³ In view of the size and unique character of the Ronald Reagan Building and the threat posed to government buildings in the aftermath of the bombing of the Murrah Federal Building in Oklahoma City, the GAO held that the GSA was reasonable in giving enhanced attention to the security requirements. The GAO found the precautions reasonable, despite the fact that the "GSA did not articulate the basis for the restriction as clearly as we would have preferred."⁴⁴

Mossberg Gives the INS Both Barrels! In *Mossberg Corp.*,⁴⁵ the Immigration and Naturalization Service (INS) was seeking to procure approximately 5000 shotguns. Mossberg challenged the specification concerning the placement of the safety switch on the shotguns.⁴⁶ The RFP called for a "crossbolt" type safety. Mossberg designed its shotguns with a "top-of-the-receiver" type safety switch.

Mossberg claimed that the requirement for a "crossbolt" type safety switch was unduly restrictive because both types of safety effectively render the weapon inoperable when engaged.⁴⁷ The INS specified the crossbolt type safety pursuant

35. FAR, *supra* note 22, at 5.102(a)(6).

36. *NuWestern*, 97-1 CPD ¶ 90 at 4.

37. Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 426 (1994).

38. See *Latins Am., Inc.*, B-247674, June 15, 1992, 92-1 CPD ¶ 519; *Spectronics Corp.*, B-260924, July 27, 1995, 95-2 CPD ¶ 47; *Arcy Mfg. Co., Inc.*, B-261538, Aug. 14, 1995, 95-2 CPD ¶ 283.

39. *In re Integrity Int'l Sec. Serv., Inc.*, B-276012, May 1, 1997, 97-1 CPD ¶ 157.

40. This office building is the second largest federal office building in the country.

41. *Integrity Int'l*, 97-1 CPD ¶ 157 at 2.

42. 41 U.S.C. § 253a(a)(2)(B) (1994).

43. *Integrity Int'l*, 97-1 CPD ¶ 157 at 3, *citing* Harry Feuerberg & Steven Steinbaum, B-261333, Sept. 12, 1995, 95-2 CPD ¶ 109.

44. *Id.* at 3 (Integrity argued that because it had successfully performed one comparable 175,000-hour project it possessed the necessary large contract experience to compete.).

45. B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189.

46. The safety is a mechanism installed in the receiver of the weapon that prevents the gun from firing when the safety is engaged.

47. *Mossberg*, 96-2 CPD ¶ 189 at 3.

to its weapons standardization policy.⁴⁸ The INS maintained that it needs all of its shotguns to have crossbolt safeties. The INS claimed that, if it introduced weapons into the arsenal with a different type of safety, it would increase the risk of accident or death because it increases the potential for agents to become confused as to which safety disengagement procedures to use.⁴⁹

The GAO confirmed that an agency does not have to show any actual damage or injury under a prior contract before imposing a requirement that reduces risks to life or property. It noted, however, that the requirement must be reasonable in light of the perceived risk. Mossberg presented expert testimony that concluded there is little difficulty or cost associated with training individuals in the use of more than one type of shotgun. The GAO also noted that the INS intended to acquire as many as 5000 new shotguns during the procurement. This doubled their present arsenal. Accordingly, it was clear that the weapons purchased in the instant buy would be setting the new agency standard. As such, the GAO concluded that properly trained users would not become confused regarding the operation of the safety. The GAO sustained the protest.

Contract Types

Regulatory and Statutory Changes

Fixed-Price Award Fee Contracts. On 16 May 1997, the Federal Acquisition Regulatory Council issued a final rule amending the Federal Acquisition Regulation (FAR) to allow the use of performance incentives in fixed-price contracts.⁵⁰ The rule added a new contract type called a “fixed-price award fee” contract.⁵¹ Under this contract type, the government pays the contractor a fixed price plus an award fee. Having a fixed-price

award fee contract is not without precedent. The Defense Federal Acquisition Regulation Supplement (DFARS) already allows the use of performance incentives in fixed-price contracts.⁵²

The new rule does not state whether a base fee is applicable in fixed-price award fee contracts.⁵³ The DFARS provision, however, specifically disallows a base fee when using an award fee incentive in contract types other than cost-plus-award-fee contracts.⁵⁴

Cost-Plus-Fixed Fee Limitation Exception. On 8 January 1997, the Defense Acquisition Regulations (DAR) Council issued a DFARS final rule. It added an exception to the restriction on the use of cost-plus-fixed-fee contracts for military construction.⁵⁵ The final rule amends DFARS 216.306, which restricts the use of cost-plus-fixed fee contracts for military construction.⁵⁶ The new rule specifies that the prohibition does not apply to contracts for environmental restoration at an installation set for realignment or closure, as long as the agency funds the contract with Base Realignment and Closure (BRAC) funds.

Proposed DFARS Rule—Streamlining the Architect-Engineer Selection Process. On 29 July 1997, the DAR Council issued a proposed rule that would amend the DFARS⁵⁷ to streamline the process for selection of firms for architect-engineer contracts.⁵⁸ Specifically, the proposed rule would: (1) eliminate the requirements for formal constitutions and minimum sizes for pre-selection boards; (2) eliminate special approval requirements for selection of firms for contracts exceeding \$500,000; and (3) change the criteria for inclusion of firms on a pre-selection list

48. *Id.* at 4. All the shotguns in the agency’s arsenal had crossbolt safeties.

49. *Id.* at 4.

50. 62 Fed. Reg. 12,690 (1997).

51. FAR, *supra* note 22, at 16.404. The previous FAR 16.404 and FAR 16.405 have been redesignated as FAR 16.405 and 16.406 respectively. The fixed-price award fee contract type allows the government to recognize and to reward contractors who exceed minimum standards in terms of quality, timeliness, technical ingenuity, and effective management. *Id.*

52. U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 216.470 (Apr. 1, 1991) [hereinafter DFARS].

53. FAR, *supra* note 22, at 16.305; DFARS, *supra* note 52, at 216.404-2(c). In cost-plus award fee contracts, the fee pool consists of base fee and minimum fee. The base fee is commonly called a minimum fee, because the contractor is always entitled to a base fee. In DOD contracts, the base fee is limited to three percent of the estimated cost in cost-plus award fee contracts. *Id.*

54. DFARS, *supra* note 52, at 216.470(2).

55. 62 Fed. Reg. 1058 (1997). Generally, DOD agencies may not use cost-plus fixed fee contracts for construction contracts over \$25,000 without approval from the Secretary of Defense or his delegate. DFARS, *supra* note 52, at 216.306.

56. 1997 Military Construction Appropriations Act, Pub. L. No. 104-196, § 101, 110 Stat. 2385 (1996).

57. DFARS, *supra* note 52, at 236.602.

58. 62 Fed. Reg. 40,497 (1997).

from “the maximum practicable number of qualified firms” to “the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board.”⁵⁹

Exercising Options

Stop! Don't Add Those Clauses. In *Varo, Inc.*,⁶⁰ the Air Force awarded Varo a fixed-price contract for modular power supply units for the AIM-9 missile launcher. The contract required Varo to submit twelve first articles and to produce 1,661 production units. It also contained two option periods for an additional 1,673 units each. The contract allowed the Air Force to exercise the first option period anytime within ninety days of the approval of the first article. On 16 May 1989, the contracting officer exercised the first option within the ninety day window. The modification which exercised the first option added eight FAR and DFARS clauses⁶¹ that were not included in the original contract. Two days later, Varo informed the contracting officer that the exercise of the option was untimely and invalid.⁶²

The Air Force claimed that adding the eight clauses did not invalidate the option because statute or regulation required the inclusion of the clauses. The Air Force also contended that Varo failed to prove that it suffered increased performance costs as a result of the inclusion. Unfortunately for the Air Force, the board did not agree.

The board concluded that the exercise of the option constituted a constructive change to the original contract. The board found that the contractor was entitled to an equitable adjustment, because the Air Force added substantial duties by adding clauses that it did not originally include in the contract. The board held that “[t]he inclusion in the exercise of an option of a provision(s) departing from the original contract provisions, makes such option exercise invalid.”⁶³

ASBCA Decision Overturned. On 4 March 1997, the Court of Appeals for the Federal Circuit held that Lockheed Martin IR Imaging Systems, Inc. (Lockheed) was entitled to a price adjustment for the partial exercise of a 100 percent option.⁶⁴ The Federal Circuit’s decision reversed the ASBCA in *Loral Infrared & Imaging Systems, Inc.*,⁶⁵ which held that the government was only required to purchase up to the 100 percent option quantity.

On 20 September 1991, the government awarded a fixed-price contract for 779 detector cooler assemblies. The contract included a line item for a 100 percent option. Section M-2, Evaluation of Options, however, advised the bidders that they may offer different option prices for varying option quantities. Lockheed submitted one price for the entire 100 percent option; it did not state different prices for varying quantities for the option. Lockheed relied on the representations of the contract line item that the option was for 100 percent of the base year quantity. After contract award, the Army issued an addendum to the contract which stated that the Army may purchase less than the 100 percent option quantity at the price the contractor had listed for 100 percent option quantity.⁶⁶ When the Army ordered less than the 100 percent option quantity, Lockheed protested.

The board agreed with the Army’s position that Section M-2 notified Lockheed that this was not a 100 percent option contract. Lockheed argued that Section M-2 did not require the bidders to offer lesser quantities than the 100 percent option. It contended that Section M-2 permitted, but did not require, bidders to offer lesser quantities and different prices.⁶⁷ Two years later, the Federal Circuit reversed the board and held that the partial exercise of the option was a constructive change to the contract. The court found that the board erred in its interpretation of the contract and concluded that the contract was not ambiguous and that Lockheed’s interpretation was reasonable.⁶⁸

59. *Id.* See also DFARS, *supra* note 52, at 236.602-2, 236.602-4.

60. ASBCA Nos. 47945, 47946, 96-1 BCA ¶ 28,161.

61. FAR, *supra* note 22, at 52.223-6 (Drug Free Workplace), 52.232-8 (Discounts for Prompt Payment), 52.232-25 (Prompt Payment), 52.232-28 (Electronic Funds Transfer Payment Method), 52.223-5 (Certification Regarding a Drug Free Workplace); DFARS, *supra* note 52, at 252.223-7500 (Drug Free Work Force), 252.225-7027 (Restriction on Contracting with Toshiba Corporation or Kongsberg Valpenfabrikk), 252.225-7026 (Notice on Restriction on Contracting with Toshiba Corp., or Kongsberg Vapenfabrikk-Offer[or]’s Representation).

62. Despite its claim, the contractor performed the required work under the first option.

63. *Varo*, 96-1 BCA ¶ 28,161 at 140,564.

64. *Lockheed Martin IR Imaging Systems, Inc. v. Togo D. West, Jr.*, 108 F.3d 319 (Fed. Cir. 1997). With a 100% option, the government has the option to purchase double the total quantity of items or services specified in the base year contract.

65. ASBCA No. 45744, 95-2 BCA ¶ 27,803. The board denied the contractor’s claim and held that the contractor was required to submit a price for the entire option quantity; however, the Board also held that the government was not required to purchase the entire option quantity. *Id.*

66. *Id.* at 77,421.

67. *Lockheed*, 108 F.3d at 322.

Indefinite Delivery Contracts

Board Defines Measure of Damages—Twice! In *AJT & Associates, Inc.*,⁶⁹ the Army awarded an indefinite quantity contract for architect-engineering services. The contract required the Army to order a minimum of \$15,000 in services. The maximum quantity of services the Army could order was \$750,000. At the end of the contract period, the Army had not ordered any work under the contract. AJT submitted a claim for \$15,000 for the guaranteed minimum quantity of services. The contracting officer awarded the contractor \$1500 as lost profits and denied the rest of the claim.

AJT appealed to the board. It argued that it was entitled to the entire amount of the guaranteed minimum quantity.⁷⁰ The board disagreed. It held that AJT was only entitled to its actual damages. The board found that AJT had not presented evidence of actual damage resulting from the Army's failure to order the guaranteed minimum quantity. Additionally, AJT failed to prove that its profit on the minimum order would have exceeded the \$1500 the contracting officer awarded as lost profits.

In *AFTT, Inc.*,⁷¹ the Army awarded an indefinite quantity contract for painting and maintenance services. The contract required the Army to order at least \$10,000 worth of services.⁷² Again, the Army failed to issue any task orders. AFTT submitted a claim for \$48,473 for its overhead and profit, plus an additional \$6653 for payment and performance bond premiums.

On 13 June 1997, the board held that AFTT is only entitled to recover the profits it would have earned on the required minimum amount of work, plus overhead costs actually incurred. The board reasoned that AFTT "is entitled only to be put in as

good a position as it would have been had [the government] performed the contract by ordering the minimum work required."⁷³

"Nominal" Quantities Do Not Apply to Individual Orders. The FAR requires that the minimum guaranteed quantity in an Indefinite Delivery Indefinite Quantity (IDIQ) contract be more than a nominal quantity.⁷⁴ In *C.W. Over and Sons, Inc.*,⁷⁵ the NSA solicited for an IDIQ contract for a variety of construction, renovation, and repair services. The solicitation stated that the NSA would order a minimum guaranteed quantity of \$800,000 in services. The contractor, however, alleged that the NSA violated FAR 16.504(a)(2) by including a provision in the solicitation that the minimum value for any individual delivery order is \$0.01.⁷⁶

The GAO disagreed with the contractor. It noted that the \$800,000 in minimum guaranteed services was more than adequate to meet the requirements of FAR 16.504(a)(2). The GAO held that FAR 16.504(a)(2) only requires that the guaranteed minimum quantity be more than a nominal quantity. The GAO concluded that individual delivery orders issued under an IDIQ contract do not require a minimum amount (more than a nominal amount) in order to be binding.⁷⁷

Board Has To Tell Contractor That an IDIQ Contract is Not a Requirements Contract. In *PCA Microsystems, Inc.*,⁷⁸ the Veterans Administration (VA) awarded an IDIQ contract for video display terminals (VDTs). The contract provisions required the VA to purchase a guaranteed minimum quantity of 6210 terminals.⁷⁹ The contract also contained an option provision which allowed the VA to purchase an additional 33,000 terminals. The contract also provided for maintenance services for all terminals offered by PCA after the warranty period

68. *Id.* at 323.

69. ASBCA No. 50240, 97-1 BCA ¶ 28,823.

70. AJT based this argument on *Maxima Corp. v. U.S.*, 847 F.2d 1549 (Fed. Cir. 1988). Here, the government had already paid the contractor the entire sum of the unordered minimum guaranteed quantity. The court merely held that the contractor was entitled to retain this amount. The board noted that the holding in *Maxima* does not automatically entitle the contractor to the full dollar value of the minimum guaranteed quantity. *Id.*

71. PSBCA No. 3717, 97-2 BCA ¶ 29,057.

72. *Id.* at 144,623.

73. *Id.* at 144,624.

74. FAR, *supra* note 22, 16.504(a)(2) (providing that "[t]o ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order").

75. B-274365, Dec. 6, 1996, 96-2 CPD ¶ 223.

76. *Id.* at 3.

77. *Id.* (citing *Sunbelt Properties, Inc.*, B-249307, Oct. 30, 1992, 92-2 CPD ¶ 309; *International Creative and Training, Ltd.*, B-245379, Jan. 6, 1992, 92-1 CPD ¶ 26.)

78. VABCA No. 4549, 97-1 BCA ¶ 28,718.

expired. This contract provision required the VA to purchase the guaranteed minimum maintenance services for 6210 terminals.

The VA purchased 16,742 terminals from PCA, but it only purchased maintenance services for 6210 terminals. PCA claimed that the VA must issue task orders for maintenance services on all terminals the VA purchased. PCA claimed that the portion of the contract dealing with maintenance services was a requirements contract. Therefore, when the VA ordered the additional 10,532 terminals, it was obligated to purchase maintenance services for all additional quantities above the guaranteed minimum quantity.⁸⁰

The board determined that the VA procured both the terminals and the maintenance services as an IDIQ contract. It stated that the contract terms referred to both the terminals and the maintenance services as an IDIQ contract. The board specifically noted that the contract did not contain any "Requirements" clause. The board denied PCA's claim and held that the VA did not have to purchase the maintenance services above the guaranteed minimum quantity stated in the contract.

Combination Fixed-Price/Indefinite Quantity Contract. Following the precedent it set in *ANC Group*⁸¹ in 1994, the Armed Services Board of Contract Appeals (ASBCA) held that the Navy met its obligation to purchase the minimum guaranteed quantity under a combination fixed-price/indefinite quantity contract where the contract specified that the fixed-price portion of the contract is the minimum guaranteed quantity.⁸²

The Navy awarded a combination fixed-price/indefinite quantity contract to Mac's Cleaning and Repair Services (Mac) for janitorial services at the naval air station in Kingsville, Texas. In this contract, the Navy specifically stated that the guaranteed minimum quantity is the fixed-price portion of the contract.⁸³ When the Navy did not order the maximum esti-

mated quantity under the indefinite quantity portion of the contract, Mac defaulted. Mac stated that it could not pay its employees.⁸⁴ Mac argued that the Navy failed to state a guaranteed minimum quantity on the indefinite-quantity portion of the contract. Considering this, Mac claimed that it was entitled to the full amount of the fixed-price portion of the contract and the full price for the entire indefinite-quantity contract based on FAR 52.216-22.⁸⁵

The board dismissed the appeal. The board held that the government is only required to state and to purchase the guaranteed minimum quantity in an indefinite quantity contract. In a combination fixed-price/indefinite quantity contract, the government may specify the fixed-priced portion of the contract as the guaranteed minimum quantity.⁸⁶

GAO Upholds FASA Preference for Multiple Awards. On 11 June 1996, the Army issued a request for proposals (RFP) for computer-simulated training at the Command and General Staff College's (CGSC) Tactical Commander's Development Course.⁸⁷ It provided for both a firm-fixed-price contract and a requirements contract. The solicitation included a phase-in period, base year, and three one-year option periods for the requirements portion. The total cost of all estimated government requirements, including options, exceeded \$10 million. The contracting officer contemplated making one award under the requirements contract.

The solicitation also required the contractor to provide various services for the computer simulation exercises conducted by the U.S. Army Training and Doctrine Command at different facilities throughout the United States.⁸⁸ It also required that contractor personnel make recommendations for upgrading the computer hardware.⁸⁹

Nations, Inc. protested. It claimed that the solicitation involved "advisory and assistance services" that required multiple awards under an IDIQ type contract, because the contract

79. *Id.* at 3.

80. *Id.* at 23-24.

81. ASBCA No. 47065, 94-3 BCA ¶ 27,086.

82. Mac's Cleaning and Repair Serv., ASBCA No. 49652, 97-1 BCA ¶ 28,748.

83. *Id.* at 143,481.

84. *Id.* at 143,483.

85. The government is required to state a guaranteed minimum quantity in an indefinite quantity contract. FAR, *supra* note 22, at 52.216-22.

86. Mac's Cleaning and Repair Serv., 97-1 BCA ¶ 28,748 at 143,483. The board stated that, in a combination fixed-price/indefinite quantity contract, the government is only obligated to pay the contractor based on each delivery/task order.

87. Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170.

88. *Id.* at 1. These services generally called for technical advice and assistance during the preparation, simulation, and evaluation phases of the exercises.

89. *Id.* at 2.

price exceeded \$10 million and the contract term exceeded three years.⁹⁰ Nations alleged that the Army failed to make a written determination that the services “are so unique or highly specialized that it is not practicable to award more than one contract.”⁹¹

The key issue was whether the technical services required under the RFP were contracted advisory and assistance services that fell under the statutory and regulatory definitions. The GAO held that the professional technical services in support of the computer simulation training fell within the new statutory definitions of advisory and assistance services.⁹² The GAO recommended that the Army either amend the solicitation to procure these services under a multiple award, indefinite delivery/indefinite quantity type of contract or execute the necessary written determination that the services are so unique or of such a highly specialized nature that it is impractical to make multiple awards.⁹³

Office of Federal Procurement Policy (OFPP) Issues Guidance on Multiple Award Task and Delivery Order Contracting. In July 1997, the OFPP issued its interim “Best Practices” guide for multiple award task and delivery order contracting. The OFPP issued this publication to provide additional guidance for contracting officers, above and beyond what the FAR currently provides. The guide is useful because of its practical tips on how to structure and to conduct multiple award contracts. It also tells the contracting officer how to issue task and delivery orders for multiple award contracts. Copies are available through the Executive Office of the President’s Publications Office by calling (202) 395-7332, or by accessing the Acquisition Reform Network at www.arnet.gov.⁹⁴

Contracts in Perpetuity. In 1972, the Air Force awarded its utilities contract to the City of Tacoma.⁹⁵ Under the contract, Tacoma would provide electrical services to McChord Air Force Base until the Air Force terminated the contract.⁹⁶ Tacoma sought to terminate the contract by claiming that the contract was ambiguous and that it did not provide for an ending date to the contract—an invalid perpetuity. Tacoma, however, failed to provide the Court of Federal Claims with any evidence of ambiguity. The court stated that “the fact that the parties agree that the contract is for an indefinite term indicates that the contract is not ambiguous.”⁹⁷ Further, the court concluded that “[w]hile indefinite term contracts may be disfavored by the courts, they are not *per se* ambiguous.”⁹⁸ As to the validity of a contract in perpetuity, the court adopted the holding in *Consumer’s Ice Co. v. United States*⁹⁹ and ruled that indefinite term contracts are valid and enforceable.¹⁰⁰ In *Consumer’s Ice*, the court held that it will neither invalidate nor declare the contract unenforceable merely because a contract is for an indefinite term.

Cost Reimbursement Contracts

On 31 July 1987, NASA awarded a cost-plus-fixed-fee contract to Grumman Space Station Integration Division (Grumman) for program management, integration, and support to NASA.¹⁰¹ In 1992, the parties bilaterally modified the contract to establish a separate award fee pool aside from the basic award fee pool.¹⁰² On 23 November 1993, NASA terminated the contract for convenience. After the termination, Grumman submitted a claim for unpaid award fees which remained in the separate award fee pool.

90. *Id.* See FAR, *supra* note 22, at 16.503(d)(1). This provision provides that unless the contracting officer or the head of the agency (designated officer) makes a written determination pursuant to 16.503(d)(2), “no solicitation for a requirements contract for advisory and assistance services in excess of three years and \$10,000,000 (including all options) may be issued . . .” *Id.*

91. FAR, *supra* note 22, at 16.503(d)(1), 16.503(d)(2).

92. *Nations*, 96-2 CPD ¶170 at 5.

93. *Id.* at 6. Although FAR 16.503(d)(1) requires the government to make this determination prior to issuing the solicitation, a recent Court of Federal Claims case held that the government’s failure to make a determination prior to award was “harmless error” that did not warrant voiding the solicitation. *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345 (1997).

94. OFFICE OF FEDERAL PROCUREMENT POLICY, BEST PRACTICES FOR MULTIPLE AWARD TASK AND DELIVERY ORDER CONTRACTING (interim ed. 1997).

95. *City of Tacoma v. United States*, No. 95-697C, 1997 WL 602734, at *1 (Fed. Cl. Sept. 24, 1997).

96. *Id.* at *3.

97. *Id.* at *8.

98. *Id.*

99. 475 F.2d 1161 (1973).

100. *City of Tacoma*, 1997 WL 602734, at *9.

101. Grumman Space Station Integration Div., ASBCA No. 48719, 97-1 BCA ¶28,843.

On 3 March 1997, the board ruled that Grumman is not entitled to the unpaid award fee when the government terminates a cost-plus-award-fee contract for convenience. The board held that fees are not payable for work or events that are part of the terminated portion of the contract. Payment is allowed for the award fee only to the extent that work has been performed.¹⁰³

Sealed Bidding

Responsiveness

Bid Signed by One Partner in Joint Venture is Responsive. Who has the authority to bind a joint venture? That was the question presented in *PCI/RCI v. United States*.¹⁰⁴ A joint venture, PCI/RCI, submitted to the GSA a bid for a courthouse modernization project. The bid, bid bond, and procurement integrity certificate were all signed by Mr. James Roers, who was identified in the signature blocks as either a partner or managing partner. PCI/RCI's bid was the low bid. The contracting officer subsequently requested information about how the joint venture intended to perform the contract, particularly how the joint venture partners would divide their responsibilities under the contract. In response, PCI/RCI submitted documents, including a North Dakota contractor's license, a fictitious partnership name certificate, a joint bonding agreement, and PCI's by-laws. The contracting officer became concerned, because the joint bonding agreement designated PCI as the "sponsoring joint venturer" and designated its president as the individual authorized to sign the contract. The contracting officer rejected the bid as nonresponsive because only one joint venture partner had signed it.¹⁰⁵ The Court of Federal Claims issued a permanent injunction requiring the GSA to treat the bid as a responsive bid and forbidding award to any other entity. In so doing, the court applied the common law of joint ventures, noting the absence of a procurement regulation addressing this issue.

Contract Cannot be Awarded to Successor in Interest. When the government awards a contract, it is entitled to expect that the same bidder/awardee will perform the contract. To allow otherwise would deprive the government of its ability to

enforce the contract against the same bidding entity and would allow contractors to engage in speculative trading of government contract rights. Two anti-assignment statutes forbid this practice.¹⁰⁶ Exceptions to the prohibition "are allowed only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of a merger, corporate reorganization, or the sale of an entire portion of a business embraced by the bid or proposal."¹⁰⁷

In *Premier Security*,¹⁰⁸ the protestor challenged the award to a successor in interest. The question presented to the GAO was whether the sale of the awardee's business was equivalent to an improper sale of the bid. Although the proposed awardee had sold its entire business, the protestor alleged that the business itself was of such negligible value that the transaction would not fall within the exceptions to the anti-assignment prohibition. The sale of the "business," it argued, was really a sale of the bid, because the bid was the only real asset changing hands. The GAO sustained the protest, finding that the proposed awardee's net worth prior to the sale was a mere \$3362. The proposed awardee's unproven assertion that its intangible assets were worth over \$100,000 lacked merit.

Pre-Bid Assertions Do Not Qualify an Otherwise Responsive Bid. The Navy found itself in a quandary due to the low bidder's pre-bid assertion that it could not meet the IFB's performance schedule.¹⁰⁹ In particular, the Ryan Company asserted that it would take more time to bring materials to the site than the time allowed by the IFB for completion of the entire project. In its letter, Ryan stated that it would proceed with its bid but would assume that the time allowed for construction was exclusive of the time necessary for delivery of materials to the site. Ryan's interpretation was erroneous. Nevertheless, Ryan's bid was regular on its face.

The Navy rejected Ryan's bid as nonresponsive, and Ryan protested. Complicating the situation was the lack of a Navy response to Ryan's letter challenging the completion date. Rather than opening the correspondence, the Navy had placed the letter in the bid box until bid opening. As such, there was no opportunity to clarify this issue prior to bid opening. In sus-

102. *Id.* The government hoped that the restructuring would provide an additional incentive to the contractor to provide better service.

103. *Id.* at 143,882-83.

104. 36 Fed. Cl. 761 (1996).

105. The FAR requires the signature of each joint venture partner on the contract. FAR, *supra* note 22, at 4.102. It does not, however, create a similar requirement for bid signatures. The contracting officer reasoned that the same signatures must therefore appear on the bid, because the bid later "metamorphoses" into the contract. *PCI/RCI*, 36 Fed. Cl. at 769.

106. *See* 41 U.S.C.A. § 15 (West 1997); 31 U.S.C.A. § 3727 (West 1997).

107. *Premier Security*, B-275908.2, 1997 U.S. Comp. Gen. LEXIS 238, at *8 (July 14, 1997) (citing *J.I. Case, Co.*, B-239178, Aug. 6, 1990, 90-2 CPD ¶ 108 at 3).

108. *Id.*

109. *The Ryan Company*, B-275304, Feb. 6, 1997, 97-1 CPD ¶ 62.

taining Ryan's protest, the GAO noted that, in determining responsiveness, the contracting officer may consider only documents contained in the bid and those incorporated by reference. The GAO suggested that the Navy might explore the issue raised by Ryan's letter as one related to responsibility.

Acknowledging Amendments—Harder Than You Think? Mere acknowledgment of a material amendment without an affirmative indication of the bidder's intent to be bound may render a bid nonresponsive. Recent cases illustrate the frustrating result of an unintentional ambiguity¹¹⁰ caused by amendment of the solicitation.

In *Sundt Corp.*,¹¹¹ the bidder acknowledged and returned an amendment with its bid, which changed the minimum bid acceptance period from 90 days to 120 days. Unfortunately, the bidder stated a ninety-day bid acceptance period on the Standard Form 1442.¹¹² The agency properly rejected the bid.

Bidding on a superseded bid schedule was the downfall of 3W American Enterprises, Inc. (3W). It argued unsuccessfully that it used the original schedule to "'be safe' because it was confused by all the amendments, sublines, and options."¹¹³ In calculating its total price, 3W used the unamended quantities. The contractor argued that the contracting officer should ignore its total bid price in favor of a new total to be calculated by multiplying its unit prices by the amended schedule quantities. The GAO denied the protest. Although 3W's argument seems a bit absurd, the Navy certainly could have done a better job. During the course of the procurement, it issued seven amendments, one of which substituted an entirely new twenty-five page bid schedule. Of the fourteen bids received, the five low bids had to be rejected, along with 3W's bid.¹¹⁴

In *J. Calderera & Co., Inc.*¹¹⁵ (Calderera) the IFB included a "Variations in Estimated Quantities" clause. The agency amended the estimated quantities for certain items. Calderera acknowledged the amendment, but included in its bid a page from the original IFB. That page showed the original estimated quantities. This rendered its bid nonresponsive and its protest unsuccessful.

Mistake in Claim Does Not Affect Sufficiency of the Evidence of Original Mistake. It is common for disgruntled protestors to object to corrections of mistakes made by low bidders. The sufficiency of the evidence of mistake is a frequent point of contention. Still, PCL Constructors Canada, Inc.¹¹⁶ made a unique and somewhat compelling argument against allowing its competitor, Axor Engineering Construction Group, Inc. (Axor), to correct its low bid. The protestor found an apparent mistake in Axor's mistake claim. Axor requested an upward correction of its bid in an amount smaller than the amount of the alleged mistake! PCL insisted that the discrepancy between the amount of correction requested by Axor and the amount of the alleged mistake generated doubt as to the bid actually intended

Axor's request for correction stemmed from a quotation which it received from a potential subcontractor at the last minute and quickly incorporated into its bid. The \$9 million quotation was for miscellaneous metals work. The lowest quote Axor had previously obtained for that work was for \$12.5 million. According to Axor, it had deducted \$4 million from the \$12.5 million quotation during its original calculations, because it considered the quotation too high. When the more reasonable quotation arrived at the last minute, Axor entered the figure onto its spreadsheet, but forgot to undo the \$4 million adjustment. So why, asked PCL, did Axor seek only a \$3.75 million upward correction?

The GAO dismissed the protest with only a brief discussion. PCL had no standing to challenge the apparent discrepancy in Axor's mistake claim. Resolution of mistake issues is the responsibility of the contracting parties. Perhaps Axor decided not to ask for the additional money because to do so would have strengthened the protestor's argument of the uncertainty of Axor's intended bid.

Some Kind of Transcription Error. In *Brazos Roofing, Inc.*,¹¹⁷ the protester argued that the Navy should not have allowed the correction of the bid submitted by States Roofing. Correction of the bid allowed States Roofing to displace Brazos as the low

110. Such situations are bad for the government as well as the bidder. It appears that the bidder sincerely intends to comply with the requirements of the amendment and that the ambiguity is a result of the complicated and sometimes confusing process of reconciling the original solicitation and its amendments. The government has little choice but to reject these bids and, in doing so, loses the benefit of getting the best price.

111. B-274203, Nov. 5, 1996, 96-2 CPD ¶ 171.

112. It seems quite likely that the bidder made the notation on the SF 1442 prior to the amendment and that the failure to correct it was the result of an oversight.

113. 3W Am. Enter., Inc., B-274410.2, Dec. 27, 1996, 96-2 CPD ¶ 242 at 3.

114. Although the facts are not entirely clear, it appears that the five low bidders were also rejected because they were non-responsive. It is difficult to imagine that the agency received the best possible price for these services.

115. B-276201, 1997 U.S. Comp. Gen. LEXIS 197 (May 21, 1997).

116. *In re PCL Constructors Canada, Inc.—Reconsideration*, B-274697, Dec. 24, 1996, 96-2 CPD ¶ 239, *recon. denied* B-274697.2, May 13, 1997, 97-1 CPD ¶ 176.

bidder. The IFB included a fifteen page bid schedule. Bidders were to insert unit prices for numerous contract line items, multiply their unit prices by the estimated quantities, and add the figures together for a base year total (which was inserted on page sixteen). Two additional pages of the bid schedule allowed bidders to bid on two option years by performing calculations based on a percentage of price increase or decrease for the option years. The percentage of increase or decrease was applied to the base year's total.

After bid opening, States Roofing alleged a mistake in its bid. It had inserted a different figure as its base year total for the calculation of the option year prices than the total used for its base year bid. The Navy considered this an obvious clerical error under FAR 14-407-2(a)¹¹⁸ and allowed correction of the bid to conform the figure used in calculating the option years to that of the grand total for the base year. The GAO upheld the Navy's decision that "only the page 16 figure could reasonably be considered States Roofing's intended base year price, and, therefore, the figure States Roofing used to calculate its first year option price on page 17 logically can only be viewed as simply reflecting *some kind of transcription error*."¹¹⁹ The GAO based its conclusion on the fact that the base year total represented an error free calculation of over 150 unit prices.¹²⁰

Stuck with Figures Too Good to Be True. R.P. Richards Construction Company submitted the apparent low bid on an Army Corps of Engineers construction contract.¹²¹ In fact, its bid was low by over \$1.5 million dollars. After bid opening, Richards sought an upwards correction in the amount of \$646,336. Rich-

ards alleged two "clerical" errors in its bid calculation. First, it sought relief from its misreading of a subcontractor's quotation for structural steel work. The quotation arrived only thirty minutes before bid opening. In spite of the apparent low nature of this quotation (the other quote in its possession was nearly double this one) and a price quoted as "F.O.B. job site,"¹²² Richards assumed that the last minute subcontractor's quote included delivery and erection of the steel. Richards subsequently learned that the quotation was for materials only.

Richards' second alleged mistake was its decision to calculate its bid using its own estimate of \$2000 for certain specifications rather than the \$91,760 submitted by a potential subcontractor. The GAO deemed both mistakes uncorrectable errors in judgment. The GAO refused to allow Richards the opportunity to recalculate its bid, thereby transforming it into something other than what it intended prior to bid opening.

Responsibility

Call It What You Will. The GSA sought to award a contract for roof replacement and related work.¹²³ The IFB required bidders to have a certain level of experience. Also, the IFB stated that bids must include a copy of the roofing manufacturer's warranty and a statement from the roofing manufacturer indicating that the bidder was an approved applicator. The IFB warned that failure to include these documents could result in rejection of a bid. The absence of these documents in the low bid prompted a protest which alleged that the bid was nonresponsive. The protester also complained that the low bidder got

117. B-275319, Feb. 7, 1997, 97-1 CPD ¶ 66.

118. The FAR provides:

Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are:

- (1) Obvious misplacement of a decimal point;
- (2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);
- (3) Obvious reversal of the price f.o.b. destination and the price f.o.b. origin; and
- (4) Obvious mistake in designation of unit.

FAR, *supra* note 22, at 14.407-2(a).

119. *Brazos Roofing*, 97-1 CPD ¶ 66 (emphasis added).

120. In the author's opinion, the GAO incorrectly deemed this error a clerical mistake under FAR 14.407-2(a). It seems unreasonable to consider this error apparent on the face of the bid. The base year total that appeared in the bid was \$1,169,780. The figure used as the base year total in calculating the option year prices was \$1,274,430. This does not appear to be a classic transcription error, such as the mistaken reversal of digits. Furthermore, the GAO seems to assume that the accuracy of the calculations bolsters the base year total's reliability as the intended price. With the advent of computer spreadsheets, bidders can easily plug in different figures and achieve instant totals. Bidders may have numerous versions of the spreadsheet all with different totals, but all accurately calculated. Who can say that States Roofing had not intended the higher base year price and mistakenly entered onto the bidding schedules the figures from a rejected version of a computer spreadsheet? Under the circumstances, the GAO's reliance on the accuracy of the figures seems misplaced.

121. R.P. Richards Constr. Co., B-274859.2, Jan. 22, 1997, 97-1 CPD ¶ 39.

122. *Id.* at 3.

123. Beta Constr. Co., B-274511, Dec. 13, 1996, 96-2 CPD ¶ 230.

“two bites” at the proverbial apple. It could elect whether to be bound by its bid by deciding whether to produce the required documentation. The GAO denied the protest, finding that the missing materials related to matters of responsibility, regardless of the characterization in the IFB. The potential for a bidder to avoid award by its failure to cooperate during the responsibility determination is always present and does not call for rejection of the bid.

“Hey Loser, Now That I’ve Won, Tell Me How to Perform This Contract!” Could any losing contractor resist protesting when employees of the proposed awardee phoned the losing contractor to seek assistance in understanding the contract’s performance requirements and to inquire about the possibility of subcontracting the work which they admittedly did not know how to perform? Sonic Dry Clean, Inc. could not.¹²⁴ The Army issued an IFB for diesel air filter cleaning services. James T. Moller was the low bidder and won the award following an affirmative responsibility determination. In its protest, Sonic alleged that Moller’s employees admitted that they did not know how to perform the required air filter cleaning services. Finding no bad faith on the part of the Army, the GAO refused to review the agency’s affirmative responsibility determination.

Late Bids

GAO S-T-R-E-T-C-H-I-N-G the Late Bid Rules. The GAO stretched the late bid rules and allowed consideration of bids that were misdelivered due to conflicting information given out by the government. In *AABLE Tank Services, Inc.*,¹²⁵ the Army issued an IFB for the removal and installation of underground storage tanks in Savana, Illinois. Standard operating procedure would have required the submission of bids to Letterkenny Army Depot, Pennsylvania, but the IFB gave a Savanna, Illinois, address. When bidders called for information, the contract specialist advised delivery of the bids to Letterkenny Army Depot in accordance with normal agency procedures. The GAO refused to require rejection of the bids delivered to Letterkenny. The integrity of the process would not be harmed, and the lateness was caused by the agency’s “affirmative misdirection.”¹²⁶

Similarly, in *Palomar Grading & Paving, Inc.*,¹²⁷ the Navy expected bids to be sent to Yuma, Arizona, but the IFB included an address that mistakenly contained a Tempe, Arizona zip code. Weststar, Inc. gave its bid to the United Parcel Service (UPS) the day before bid opening. UPS promised delivery by 10:30 the following morning, well before the 2:00 p.m. bid opening time. Nevertheless, the bid arrived late, because UPS sent the package to Yuma by way of Tempe. The GAO upheld the Navy’s decision to accept the bid, citing the “fundamental principle” that “a bidder who has done all it could and should to fulfill its responsibility should not suffer if the bid did not arrive as required because the government failed in its own responsibility, and if that is otherwise consistent with the integrity of the competitive system.”¹²⁸ The UPS records clearly showed that the bid was out of the bidder’s control and that the bid was misdirected due to the erroneous zip code.

Facsimile Follies. Recent protests regarding bids sent by facsimile reveal high tech nuances to the late bid rules. Must the agency consider a bid transmitted if it arrived at the agency’s machine five seconds before bid opening but was recorded, initialed, sealed, and delivered to the bid opening room approximately three minutes after bid opening had been announced? According to the GAO, the bidder not only confused arrival at the agency with arrival at the bid opening room, but also failed to allow sufficient time for the agency to deliver the bid to its intended destination.¹²⁹ The protest was denied.

The GAO had more sympathy for Brazos Roofing, Inc., which tried its best to send its bid to the Army Corps of Engineers in response to an urgent procurement for the repair of hurricane damage at Seymour Johnson Air Force Base, North Carolina.¹³⁰ Brazos began attempting to transmit its bid hours before bid opening. When its facsimile machine would not transmit, Brazos tried to phone the Air Force point of contact, who was apparently away from the phone. The Air Force’s machine was out of paper. Finally, Brazos reached an office secretary, who provided another number. Brazos began re-sending its transmission to both machines, and the agency received the bid at the alternate machine. The other machine, however, jammed after several pages of Brazos’ bid had been transmitted. Although Brazos’ bid arrived at the agency before bid opening, the agency discovered it sometime thereafter. The Corps of Engineers maintained that the IFB put Brazos on notice that it bore the risk of an inoperable machine. Through

124. Sonic Dry Clean, Inc., B-275929, Apr. 21, 1997, 97-1 CPD ¶ 145.

125. B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180.

126. *Id.* at 3.

127. B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16.

128. *Id.* at 3.

129. Roy McGinnis & Co., B-275988, Apr. 28, 1997, 97-1 CPD ¶ 156.

130. Brazos Roofing, Inc., B-275113, Jan. 23, 1997, 97-1 CPD ¶ 43.

a somewhat tortured reading of the clause, the GAO determined it inapplicable to Brazos because Brazos had not *chosen* to transmit its bid, but had been forced to do so by the urgency of the situation and the agency's very late amendment of the IFB.

Cancellation of the IFB

Neither Rain, Nor Snow, Nor Sleet, Nor Hurricane Will Stop Bid Opening at Fort Bragg. The FAR allows postponement of bid opening in the event of an emergency that interrupts normal operations.¹³¹ But is there relief for a would-be bidder who seeks postponement of bid opening because a hurricane prevented delivery of its bid by normal commercial carrier? This was the question presented in *Educational Planning & Advice, Inc.*¹³²

Bid opening was set for 1400¹³³ at Fort Bragg, North Carolina. A hurricane hit the area the day prior, closing the Fayetteville Airport and prompting the governor to declare a state of emergency. In fact, the governor ordered North Carolina businesses to shut down at noon on the day of bid opening. Fort Bragg officials nevertheless remained at work, refusing to scratch bid opening in spite of the bidder's request. The GAO found no abuse of discretion by the combat-ready Fort Bragg officials. The GAO also noted that adequate competition was achieved. All the way—Airborne!

We See Your Bids and You're Confused! The GAO repeatedly upheld cancellation of an IFB where bid prices convinced the agency that the bidders did not understand the specifications. In *Grot, Inc.*,¹³⁴ the Army Corps of Engineers sought bids on fire alarms and smoke detectors for buildings at Arnold Air

Force Base. Even the low bidder exceeded the government estimate, and it subsequently withdrew after alleging a mistake in its bid. The remaining bids all exceeded the "awardable range,"¹³⁵ leading the Army Corps of Engineers to conclude that its specifications required clarification. The GAO denied Grot's protest that the agency lacked a compelling reason to cancel the solicitation. Grot's post-bid opening assertion that the specifications were clear was undermined by its preaward letter to the agency, in which it characterized its understanding of the specifications as a "very wild guess."¹³⁶

The GAO also upheld cancellation of the IFB in *Neals Janitorial Service*.¹³⁷ In reviewing bids for a fixed-price service contract, the contracting officer noticed that all of the bids had widely varying line item prices. Some bids were well above and others were well below the government estimate. This led the contracting officer to scrutinize the solicitation and to conclude that bidders had been unable to determine the actual workload. The GAO upheld cancellation.

Can the government cancel its IFB when it determines that its estimate is deficient? The GAO said "yes" in *News Printing, Inc.*¹³⁸ In reviewing the reasonableness of the contracting officer's decision, the GAO noted "the government's obligation to use due care in determining estimated quantity needs and . . . the possibility of government liability for the knowing use of an inaccurate estimate."¹³⁹

Negotiated Acquisitions

*The FAR Council Finally Finalizes Part 15*¹⁴⁰

FAR Part 15, Contracting by Negotiation, has been in the spotlight lately as a result of the FAR Council's rewrite effort.¹⁴¹ The Government Printing Office published the final

131. "A bid opening may be postponed even after the time scheduled for bid opening . . . when emergency or unanticipated events interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical." FAR, *supra* note 22, at 14.402-3(a)(2).

132. B-274513, Nov. 5, 1996, 96-2 CPD ¶ 173.

133. 2 p.m. for the "militarily" challenged.

134. B-276979.2, 1997 U.S. Comp. Gen. LEXIS 283 (Aug. 14, 1997).

135. *Id.* at *2.

136. *Id.* at *7.

137. B-276625, 1997 U.S. Comp. Gen. LEXIS 243 (July 3, 1997).

138. *News Printing, Inc.*, B-274773.2, Feb. 11, 1997, 97-1 CPD ¶ 68.

139. *Id.* at 2.

140. *See 1996 Year in Review, supra* note 9, at 35-37. According to the case summary in the final rules, the goals of this rewrite were "to infuse innovative techniques into the source selection process, [to] simplify the process, and [to] facilitate the acquisition of best value. The rewrite emphasizes the need for contracting officers to use effective and efficient acquisition methods and eliminates regulations that impose unnecessary burdens on industry and on Government contracting officers." Part 15 Rewrite, Contracting by Negotiation and Competitive Range Determination, Final Rule, 62 Fed. Reg. 51,224 (1997) (commonly known as the Final Rules).

141. FAR Case 95-029.

rules, designated as FAC 97-02, in the *Federal Register* on 30 September 1997.¹⁴² The final rules are effective for all solicitations issued on or after 10 October 1997. Agencies can delay implementing the final rules until 1 January 1998, at which time they become mandatory.

The Long-Suffering Past: A Quick History of the Rewrite. The initial proposed rules, issued in September 1996,¹⁴³ caused a considerable stir within both industry and certain government offices, including the GAO and the SBA.¹⁴⁴ The first proposed rules did not address the existing rules on make or buy, price negotiation, or profit.¹⁴⁵ The FAR Council designated this as “Phase 2” of the rewrite effort and deliberately withheld these sections for later release. The second rewrite, which addressed all of FAR Part 15, was issued in May 1997.¹⁴⁶ The final rules mirror the second round of proposed rules.

The Short, Tortured Present. Although the committee revised and reorganized much of FAR Part 15, two of the most controversial changes involve: (1) communications between the government and offerors and (2) establishment of the competitive range.

The first rewrite deleted the existing term “clarification”¹⁴⁷ and redefined the term “discussion” to include only “communication[s] after establishment of the competitive range between the contracting officer and an offeror in the competitive range.”¹⁴⁸ The proposed rule¹⁴⁹ would have permitted selective pre-competitive range communications with only some of the offerors, regardless of whether the agency intended to award with or without discussions.

As a result of a considerable outcry that the proposed rules would result in unfair communications, the second round of proposed rules withdrew the ability to conduct these selective communications for award without discussions.¹⁵⁰ Except for “clarifications” (i.e., tendering an explanation or defense) regarding adverse past performance information, the final rules for award without discussion recreate the same minor clarifications limitation that exists under the current regulations.¹⁵¹ With respect to awards made with discussions, selective communications are permitted *before establishment of the competitive range* in order to: (1) enhance government understanding of proposals; (2) address issues that must be explored to determine whether a proposal should be placed in the competitive range, including perceived deficiencies, weaknesses, errors, omissions, or mistakes; and (3) obtain information relating to relevant past performance.¹⁵² These provisions on award with discussions remain essentially unchanged in the final rules. With the increasing attention given to reducing process in government procurements, the net effect of the final rules is ironic. A more streamlined approach (i.e., award on initial proposals) is discouraged because the regulations afford it less flexibility.

The impetus for reworking the competitive range provisions in FAR 15.609 was largely the result of the Clinger-Cohen Act of 1996.¹⁵³ This statute authorizes the contracting officer to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with the solicitation’s criteria. In the FAR Council’s first attempt to implement this rather ambiguous standard, contracting officers would have had the ability to limit the competitive range both when the solicitation was issued¹⁵⁴ and after evaluation of offers

142. 62 Fed. Reg. at 51,224 (Final Rules).

143. 61 Fed. Reg. 48,380 (1996) (commonly known as the First Rewrite).

144. The interagency committee actually tasked with drafting the rewrite received 1541 comments from 100 respondents. 61 Fed. Reg. at 51,225 (Final Rules).

145. See FAR, *supra* note 22, subpts. 15.5, 15.7, 15.8, 15.9.

146. 62 Fed. Reg. 26,639 (1997) (commonly known as the Second Rewrite).

147. See FAR, *supra* note 22, at 15.601. The regulation defines a clarification as: “communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal.” *Id.*

148. 61 Fed. Reg. at 48,380 (First Rewrite, proposed FAR 15.401).

149. *Id.* (proposed FAR 15.407(b)).

150. 62 Fed. Reg. at 26,639 (Second Rewrite, proposed FAR 15.406(a)); 62 Fed. Reg. at 51,224 (Final Rules, FAR 15.306(a)).

151. See FAR, *supra* note 22, at 15.607.

152. 62 Fed. Reg. at 26,639 (Second Rewrite, proposed FAR 15.406(b)); 62 Fed. Reg. at 51,224 (Final Rules, FAR 15.306(b)).

153. On 30 September 1996, President Clinton signed the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996). This act, in section 808, redesignated Divisions D and E of the National Defense Authorization Act of 1996 (Pub. L. 104-106, 110 Stat. 186 (1996)) as the Clinger-Cohen Act.

154. “In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted.” 61 Fed. Reg. at 48,380 (First Rewrite, proposed FAR 15.406(b)).

received.¹⁵⁵ In the latter case, the competitive range could be limited “to the greatest number that will permit an efficient competition among the most highly rated proposals.”¹⁵⁶

Best Value—It’s Not Just a Buzz Word Anymore! The FAR Part 15 final rules also define “best value,”¹⁵⁷ a term often seen but never previously defined in the FAR. Best value is now defined as any acquisition that obtains the greatest overall benefit in response to the requirement. In a departure from its current usage,¹⁵⁸ “best value” now specifically includes lowest priced technically acceptable source selections.¹⁵⁹ The term “trade-off approach” is now given to what has traditionally been considered a best value procurement. However, lowest priced technically acceptable evaluations now must include past performance as a non-cost factor in determining acceptability. What impact this mandatory evaluation criteria will have on the use of this latter source selection approach (given the certificate of competency process for small businesses) remains to be seen. Where small businesses are likely to compete, a hybrid between a trade-off approach and a lowest priced technically acceptable source selection now seems the only meaningful alternative to a pure trade-off approach. Contracting officers who desire the “GO/NO GO” approach of a lowest priced technically acceptable source selection will segregate and evaluate nonresponsibility factors on a best value basis.

Just Don’t Go There—Proposed Multi-Step Techniques Deleted From Final Rules. The second rewrite also included new procedures called multi-step source selection techniques. These procedures would have authorized the contracting officer to solicit and to consider initial responses from offerors that did not constitute complete proposals.¹⁶⁰ Contracting officers could have then set a competitive range on the basis of the initial responses. Successive steps, or phases, called for more increasingly detailed proposals, with the ability to conduct additional

competitive range determinations at each step of the process. In the last step, the agency would receive full proposals from the remaining offerors.

The proposed rule implied that a multi-step source selection technique is appropriate only where the submission of full proposals at the beginning of a source selection would be unduly burdensome both for offerors to prepare and for the government to evaluate. It is not likely, however, that anyone would have readily embraced this new technique. Each successive down-select evaluation would have created new windows of protest. The execution of these successive mini-competitive range determinations would cumulatively expend significant government resources as well.

Proposal Evaluations— Past Performance

Past performance evaluations continue to frustrate both agencies and contractors as they grapple to understand the many issues involved in this critical and increasingly emphasized criterion. There were numerous challenges to the adequacy of agency evaluations and subsequent discussions with offerors. A number of protests centered on whether agencies must provide offerors the opportunity to discuss adverse past performance information.¹⁶¹

Aggressive Schedule for Mandatory Use of Past Performance Information Suspended. On 18 December 1996, Dr. Steve Kelman, the former Policy Administrator, Office of Federal Procurement Policy (OFPP), suspended the mandatory requirement to use past performance information in source selection contracts below \$1 million while the OFPP reviewed both the threshold and the type of data to be collected. The requirement to collect past performance data was suspended as well.¹⁶² The OFPP apparently believed that a one-size-fits-all approach was

155. The First Rewrite stated:

After evaluating offers, the contracting officer may determine that the number of proposals . . . exceed the number at which an efficient competition can be conducted. Provided that the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Id.

156. *Id.* (First Rewrite, proposed FAR 15.406).

157. 62 Fed. Reg. at 51,224 (Final Rules, FAR 2.101).

158. Best value, as commonly understood today, is now defined as a “tradeoff process.”

159. 62 Fed. Reg. at 51,224 (Final Rules, FAR 15.101-2).

160. 62 Fed. Reg. at 26,639 (Second Rewrite, proposed FAR 15.102). In the first round, these were known as “multiphase acquisition techniques.”

161. See FAR, *supra* note 22, at 15.610(c)(6).

162. On 20 December 1996, the Director of Defense Procurement, Ms. Eleanor Spector granted authorization to deviate from the relevant regulatory provisions, FAR 15.605(b)(ii) and FAR 42.1502.

not consistent with the DOD's requirements for goods and services. The leading alternative under consideration is tailoring the collection and evaluation of performance based upon business areas rather than merely contract dollar amounts.¹⁶³

The DOD's Past Performance Council is studying two recommended approaches to collect and to maintain past performance data. The first involves a standard data format and a centralized approach, with Defense Contract Management Command responsible for maintaining the database. Under the second proposed approach, each buying activity would establish its own tailored collection system based on overall DOD guidelines.

Ignorance of Past Performance Evaluations Doesn't Cut It. The VA needed a replacement phone system for one of its medical centers.¹⁶⁴ In evaluating the protester's past performance, the contracting officer identified two past performance references directly applicable to the RFP, but only used one reference for evaluation. The second reference was for the installation of a similar telephone system in another VA medical center. The contracting officer did not consider this previous contract because the reference evaluation form was not completed and returned. The protester argued that the VA could not reasonably ignore past performance on the second contract.

The GAO had no difficulty in finding that "some information is just too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and to consider, the information."¹⁶⁵ The contracting officer not only had first-hand knowledge of the protester's past performance on the ignored work, but described that work as "exemplary" in a letter to the SBA that was written barely four months before the award decision.

GAO Allows Agency to Ignore Past Performance Evaluations. In reviewing the protester's past performance in a solicitation for court reporter services, the National Mediation Board (NMB) only considered one of seven contracts referenced by the protester.¹⁶⁶ The sole contract considered was a prior contract with the NMB. The protester received a low past performance rating on that contract. The NMB based its award

decision on the lowest overall price and past performance. The GAO concluded that this was permissible in the absence of any evidence that contacting the other six references would have made a difference in the award determination. The GAO found neither an implication in the solicitation that the NMB would review every reference nor a legal requirement that every reference be checked. Moreover, the GAO implies that this in-house past performance experience should significantly outweigh any other past performance information collected, referring to the staff attorney's critique as "the only meaningful discriminator available."¹⁶⁷

Past Performance Evaluations Do Not Require You to Turn Over Every Stone. Solicitations often require offerors to submit numerous past performance references, but seldom advise offerors as to how deeply the agency will delve into that record. *IGIT, Inc.*¹⁶⁸ involved a Fort Leonard Wood, Missouri laundry and dry cleaning solicitation that endured three separate protests. In one of the earlier protests, IGIT alleged, among other matters,¹⁶⁹ that Fort Leonard Wood's evaluators and contracting personnel were biased against it. The Army settled that protest by agreeing to have personnel from Fort Knox, Kentucky perform the past performance evaluation. The Army invited offerors to submit new past performance packages, including any additional information offerors elected to submit.

After award, IGIT complained that the Army contacted its creditors and suppliers, in addition to its prior customers, and that the evaluators failed to contact fifty references who would have given favorable responses. IGIT also alleged that the Army deviated from the solicitation's evaluation criteria by looking into its financial history instead of just reviewing financial statements. Furthermore, IGIT felt that it was treated unfairly because the awardee did not receive as extensive a review.

The Army conceded that it had conducted a more detailed investigation of IGIT's past performance, but declared that a more extensive review was necessary because of IGIT's significant adverse financial information.¹⁷⁰ In denying the protest, the GAO found nothing unreasonable in the Army's evaluation or the slight deviation from the evaluation criteria. The GAO stated that there is no requirement to contact every reference, or

163. Although a formal definition is still forthcoming, these business areas apparently are akin to standard industry categories, as used in FAR Part 19, Small Business Programs.

164. *International Bus. Sys., Inc.*, B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114. See also *Safeguard Maintenance Corp.*, B-260983.3, Oct. 13, 1996, 96-2 CPD ¶ 116 (contracting officer erroneously ignored personally known past performance information merely because it was not referenced by the offeror in its proposal).

165. *International Bus. Sys.*, 97-1 CPD ¶ 114, at 5.

166. *Neal R. Gross & Co., Inc.*, B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30.

167. *Id.* at 3.

168. B-275299.2, June 23, 1997, 97-2 CPD ¶ 7.

169. *Id.* IGIT also alleged that the Army failed to conduct meaningful discussions concerning past performance.

to contact the same number of references for each offeror. It was reasonable for evaluators to perform a more detailed review to resolve or to confirm their concerns, particularly where a significant portion of the investigation focused on the review of like contracts on the same installation.¹⁷¹

Yet Certain Stones Must Be Uncovered. Agencies must beware of automatically “visiting the sins” of one affiliated company on another affiliate in the past performance arena. In *ST Aerospace Engines Pte, Ltd.*,¹⁷² the Coast Guard issued an RFP for the overhaul and repair of aircraft engine components, with past performance being the most important evaluation criteria. The Coast Guard queried past customers for data concerning quality deficiency problems and on-time delivery statistics. ST Aerospace lost the competition primarily because of its past performance on a contract for overhauled propellers. ST Aerospace alleged that any consideration of poor performance was improper because the work performed on the other contract was done by a distant affiliate of its parent holding company.

The GAO stated that, in determining the relevancy of attributing the past performance of affiliates, the agency must also consider “the nature and extent of the relationship between the two in particular, whether the work force, management, facilities or other resources of one may affect the contract performance of the other.”¹⁷³ The GAO found that it is inappropriate to consider an affiliate’s track record where that record has no bearing on the likelihood of the offeror’s successful performance. Here, the GAO found that the Coast Guard neither inquired into the relationship between ST Aerospace and the other affiliate nor offered ST Aerospace the opportunity to respond to the affiliation issue during discussions. The GAO deemed this a failure to conduct meaningful discussions, making any downgrade in ST Aerospace’s past performance score improper.

Competitive Range Determinations

Elimination From Competitive Range Based Upon Past Performance Does Not Trigger a COC Review. Where a solicitation calls for a best value determination rather than a pass/fail evaluation, elimination from the competitive range for an unaccept-

able past performance rating does not trigger the need for referral to the SBA. In *T. Head & Co., Inc.*,¹⁷⁴ the protester had been found guilty of thirty-nine counts of false claims by inflating time records and labor costs under a previous government contract. In addition, the State Department noted a history of cost overruns and a poor risk rating from Dun & Bradstreet. The procurement was for mail processing and handling services for the Department of State’s Diplomatic Pouch and Mail Division. The contracting officer informed offerors that the State Department would award the contract on a best value basis, with price equal to the two technical factors.¹⁷⁵ The State Department concluded that, with the unacceptable past performance rating, the overall rating was too low for the firm to have a reasonable chance of award. Eight other competitors made the competitive range.

COC Still Required If Concerns Are Not Addressed By Past Performance Factors. In *Hughes Georgia, Inc.*,¹⁷⁶ the protester alleged that the Army improperly referred the issue of the awardee’s responsibility to the SBA. In a procurement for night sights, the U.S. Army Missile Command (MICOM) included only two evaluation criteria: price and past performance risk. The MICOM evaluated two offerors, including Hughes Georgia, as low risk on past performance, because they had successfully executed contracts of comparable dollar value for the same or similar requirements. The awardee (the lowest-priced offeror) had never conducted similar contracts. The contracting officer, apparently concerned with the lowest-priced offeror’s lack of relevant experience, ordered a pre-award survey. The result was a “no award recommendation” for lack of technical expertise and the necessary equipment to perform the contract. Given that the lowest-priced offeror was a small business, the contracting officer referred the matter for consideration under the certificate of competency procedures. In light of the SBA’s finding that the awardee was responsible, the agency set aside its “no award recommendation” and awarded the contract to the lowest-priced offeror.

Noting that the RFP neither required previous night sight manufacturing experience nor provided for the evaluation of such experience, the GAO denied the protest. The RFP did not include technical evaluation factors. Therefore, the contracting officer correctly initiated Certificate of Competency proce-

170. *Id.* at 5. IGIT had numerous problems meeting its payrolls and received an IRS tax levy for not paying employee payroll taxes. In addition, the protester had failed to pay its utility bills. It ultimately filed a Chapter 7 bankruptcy petition.

171. *Id.* Here, IGIT was the incumbent contractor.

172. B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161.

173. *Id.* at 3.

174. B-275783, Mar. 27, 1997, 97-1 CPD ¶ 169.

175. *Id.* The two technical factors were technical approach and corporate experience/past performance.

176. B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151.

dures,¹⁷⁷ as technical competence had to be evaluated as a traditional responsibility matter. The GAO also noted that, to the extent that the protester was arguing that the evaluation scheme should have included additional evaluation criteria, its challenge was untimely.

Conducting Discussions

In evaluating past performance, agencies are now required to give offerors an opportunity to address negative ratings where the offeror has not previously had an opportunity to comment.¹⁷⁸ The GAO upheld the requirement in *American Combustion Industries, Inc.*¹⁷⁹ That case involved a Commerce Department contract for the construction of a large boiler room as an addition to an existing building.

The RFP required offerors to provide references on past construction projects. Under the evaluation scheme, eighty percent of the technical rating centered on the offerors' past performance. During discussions with American Combustion, the Commerce Department asked about one unfavorable report concerning past performance and personnel problems, but not a second similar report. The evaluators subsequently deducted points from American Combustion's past performance rating due to the undisclosed report. The Commerce Department argued unsuccessfully that the requirement to discuss adverse past performance information was inapplicable until it created a past performance reporting network. The GAO found that the FAR Council would have clearly stated that the requirement was to be held in abeyance if it so intended.¹⁸⁰

A Real Rarity—Mutual Mistake Regarding Taxes Found in a Negotiated Procurement

*Black River Limited Partnership*¹⁸¹ involved a dispute over a price increase for high temperature water (HTW) supplied to Fort Drum, New York, under a contract that took advantage of third party contracting and financing.¹⁸² The Army considered such a financial arrangement preferable to contracting for the construction of a HTW facility. Funding was unavailable, and

the Army had an urgent need for heating capability to accommodate the expansion of Fort Drum.

During negotiations, it became apparent that the availability of investment capital would be adversely affected by proposed changes to the tax law. The proposed changes were expected to eliminate certain tax benefits. Among these were the elimination of the investment tax credit and changes in the property depreciation schedules. In response to concerns raised by the eventual awardee, the Army included a clause which provided for an adjustment in the contract price in the event of post award changes to the state or federal tax codes.¹⁸³ This clause allowed the contractor to preserve its after tax rate of return on investment. The contract also included a clause indicating that the Army could award only after Secretary of Defense approval and notification of Congress. The same clause clarified the time of award as the time of the contractor's receipt of notice to proceed.

The Secretary of Defense eventually approved the contract, and the contracting officer issued a notice to proceed. Both parties apparently overlooked the fact that changes to the tax laws had occurred prior to award. The parties eventually negotiated a bilateral modification that increased the contract price by forty-eight percent, but the enormous price increase was unpopular with Army officials. The Army attempted to negotiate an additional modification, which would have allowed the Army to make a lump sum discounted payment in lieu of the payment of increased charges over the life of the contract. Black River refused. Finally, the government rescinded the modification. On appeal, the board determined that the contract should be reformed based on the mutual mistake of the contracting parties. This rare finding of mutual mistake would have been a significant victory for the contractor, but for the fact that the board also found that the government was entitled to a price adjustment due to contractor violations of the Truth in Negotiations Act.¹⁸⁴

Simplified Acquisitions

No Harm No Foul!

177. FAR, *supra* note 22, subpt. 19.6 (Certificates of Competency).

178. *Id.* at 15.610(c)(6).

179. B-275057.2, Mar. 5, 1997, 97-1 CPD ¶ 105.

180. *Id.* The GAO also sustained an objection to the protester's personnel evaluation. *Id.* The agency suspected that the protester intended to proffer a substitute project manager after award. This suspicion had an adverse impact on the protester's evaluation. Yet, this issue was not raised during discussions, giving American Combustion Industries no opportunity to either correct this misperception or otherwise address the agency's concerns.

181. ASBCA Nos. 46790, 47020, 97-2 BCA ¶ 29,077.

182. *Id.* at 144,709. This had been approved by Congress.

183. *Id.* at 144,711. The increase was to be made to subsequent billing period rates.

184. Pub.L. No. 87-653, 100 Stat. 1783 (1986).

In *Forestry, Surveys & Data*,¹⁸⁵ the GAO concluded that the Forest Service considered undisclosed evaluation factors in reaching its award decision. Although this was improper, the GAO denied the protest because the protester was not harmed by the government's error.¹⁸⁶

Using simplified acquisition procedures, the Forest Service issued an RFQ for timber stand examination services.¹⁸⁷ The RFQ stated that the Forest Service would award to the "responsible quoter whose quotation is most advantageous to the government, cost or price and other factors considered."¹⁸⁸ The RFQ did not specifically identify any *nonprice* evaluation factors, but it did require completion of an experience questionnaire.

Forestry, Surveys & Data (FSD) submitted the lowest quote, but the government did not issue any purchase orders to FSD because of FSD's lack of experience. While FSD did not allege that it was unaware that experience would be considered in the evaluation, it argued that some of the questions related to undisclosed evaluation subfactors.¹⁸⁹ The FAR requires agencies to list subfactors when they are significant and will be considered in the evaluation of offers.¹⁹⁰ However, in this case, the GAO concluded that FSD's experience was so inferior to the rest of the field that the method for evaluating past experience was irrelevant; FSD had no reasonable chance of winning. "Since the awardees' quotations reasonably were found more advantageous to the government than FS&D's based on the experience evaluation, the agency's improper consideration of undisclosed factors did not competitively prejudice FS&D, and therefore does not provide a basis for disturbing the awards."¹⁹¹

*When Late Is Not Late? The Story of Safety Storage, Inc.*¹⁹²

185. B-276802.3, Aug. 13, 1997, 97-2 CPD ¶ 46.

186. *Id.* at 2.

187. This is a process by which sections of woodland are evaluated for maturity, health, and quality of growth. This evaluation is then used to determine proper land use.

188. *Forestry, Surveys & Data*, 97-2 CPD ¶ 46 at 1.

189. *Id.* The protester objected to the Forest Service evaluating the offers based on specific prior experience performing work in the Three Rivers Ranger District and on the proximity of a firm's location to the worksite.

190. FAR, *supra* note 22, at 15.605(d)(1).

191. *Forestry, Surveys & Data*, 97-2 CPD ¶ 46 at 2. Arguably, it is intellectually dishonest for the Comptroller General to find the Forest Service's evaluation procedures improper, and then using a "lack of prejudice" standard to avoid a harsh result. The implication is that agencies must explicitly identify formal evaluation factors in a simplified acquisition. This implies a degree of formality that is not required. FAR, *supra* note 22, at 5.605(d)(1).

192. B-275076, Jan. 21, 1997, 97-1 CPD ¶ 32.

193. *Id.* at 3, citing A&B Trash Serv., B-250322, Jan. 22, 1993, 93-1 CPD ¶ 53.

194. B-276820, 1997 WL 419223 (Comp. Gen. July 28, 1997).

195. *Id.* at 1. One order was for \$600.00; the other was for \$309.00.

The Army issued an RFQ to procure six steel prefabricated storage sheds for Fort McClellan, Alabama. The solicitation was styled a "brand name or equal" acquisition and had a requirement for a ten-year structural warranty on the steel sheds. Eight firms submitted quotations, including Safety Storage, Inc. and LAMCO Industries, the apparent low bidder. Five days after the closing date, the Army requested a copy of LAMCO's structural warranty. Ten days later, LAMCO was awarded the contract. Safety Storage filed its protest one week later.

Safety Storage contended that the Army improperly permitted LAMCO to submit evidence of its compliance with the RFQ's structural warranty requirements after the closing date. The GAO denied the protest, explaining that RFQs do not seek a binding offer from a potential competitor, merely information. The court added that agencies generally may seek and consider revisions to a quotation any time prior to the government's issuance of a purchase order. Moreover, when an RFQ does not contain a late quotations provision but merely requests quotations by a certain date, that date is not considered to be a firm closing deadline.¹⁹³

Navy Does It by the Book

In *Michael Ritschard*,¹⁹⁴ the Navy's Regional Contracting Center in Singapore issued two purchase orders for computer services. In each instance, the contracting officer contacted only two out of five potential sources. The contracting officer then awarded to the lower of the two.¹⁹⁵ The Navy never contacted Michael Ritschard for either purchase order. Subsequently, Ritschard protested to the GAO and contended that he was wrongfully excluded from the competition.

The GAO found that the Navy did it right. That is, the Navy can obtain services on micro-purchases without obtaining competitive quotations.¹⁹⁶ The GAO specifically noted that Ritschard had informed the Navy that he wanted to be placed on the source list a week before the purchase orders were issued. Moreover, the Navy would consider Ritschard as a possible source for future micro-purchases.¹⁹⁷

Bid Protests

In the past year and a half, there have been a large number of changes in the area of protest litigation. With an effective date of 8 August 1996, the GAO revised its bid protest rules to comport with the statutory changes contained in the Clinger-Cohen Act. Additionally, with the enactment of the Administrative Dispute Resolution Act of 1996, Congress amended the Tucker Act to expand the jurisdiction of federal courts to cover both pre-award and post-award protests.¹⁹⁸ What follows is a brief survey of case law that reflects the impact of these changes.

GAO Bid Protests¹⁹⁹

Protest Timing Triggered by GAO Web Page. The computer age continues to infiltrate almost everything we do these days.²⁰⁰ Recently, a protester's ability to "surf the net" caused it to miss a protest filing deadline. The GAO protest rules require a party to seek reconsideration of a GAO decision within ten days from the date on which the requesting party knew or should have known of the basis for the request.²⁰¹ Case

law demonstrates that, as with all time limits, the GAO strictly enforces this rule.

In *Speedy Food Service, Inc.—Reconsideration*,²⁰² the protester learned from the GAO homepage that its protest was denied.²⁰³ The opinion discloses that, after reading the decision on the Internet, the protester immediately contacted the GAO to voice its concern that the information covered by the protest's protective order may have been inappropriately released. Some six days later, the protester received a copy of the decision by mail. The protester filed for reconsideration approximately one week later, more than ten days after its initial call to the GAO. Since the facts clearly demonstrated that the protester knew of the protest decision from the GAO home page, the reconsideration request was dismissed as untimely.²⁰⁴

Protest Following Permissive Debriefing Untimely. In an effort to keep everyone out of the courtroom as much as possible, recent statutory and regulatory revisions encourage agencies to conduct pre-award and post-award debriefings with unsuccessful offerors. The theory is that if the agency informs the disappointed vendor as to the reasons for not receiving award, fewer protests will be filed to "fish for information" on agency determinations. Consequently, the FAR requires agencies to debrief disappointed offerors upon receipt of a timely request.²⁰⁵ As a recent GAO decision confirms, however, this rule applies only to procurements conducted on the basis of competitive proposals (i.e., negotiated procurements).²⁰⁶

196. *Id.*, citing 41 U.S.C. § 428(d) (1994) ("[A] purchase not greater than \$2500 may be made without obtaining competitive quotations, if the contracting officer determines that the price for the purchase is reasonable.).

197. For simplified acquisition purchases exceeding the micro-purchase threshold, FAR 13.106-2(a)(4) requires that, "if practical," two sources not included in the previous solicitation should be requested to furnish quotations or offers. "[B]ids shall be solicited from prospective suppliers who have been added to the solicitations mailing list since the last solicitation." FAR, *supra* note 22, at 14.205-4(b) (Sealed Bidding).

198. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).

199. **PRACTICE TIP:** If your Westlaw or Lexis budget is tight, you can obtain and search GAO protest decisions from the Government Printing Office web site. Government Printing Office Homepage, <http://www.gpo.gov/gao/index.html> (visited 18 Nov. 1997). This free database contains Comptroller General decisions from October 1995 forward, and it includes GAO bid protest and appropriation decisions.

200. For many favorite Internet addresses within the procurement and fiscal law communities, see the appendix to this article.

201. 4 C.F.R. § 21.14(b) (1997); GAO Bid Protest Regulations, § 21.14(b) (1996).

202. B-274406.2, Jan. 3, 1997, 97-1 CPD ¶ 5.

203. See Comptroller General Homepage, <http://www.gao.gov> (visited Nov. 18, 1997). The GAO home page includes bid protest decisions and appropriations decisions issued by the Comptroller General within the past 60 days.

204. *Speedy Food Serv.*, 97-1 CPD ¶ 5, at 2.

205. FAR, *supra* note 22, at 15.1005-06. In essence, the offeror must request a debrief within three days of learning of the agency action (e.g., exclusion from the competitive range or contract award). With respect to postaward debriefings, the agency, "to the maximum extent practicable," should conduct the debrief within five days of receiving the offeror's request. *Id.* at 15.1006(a). As to preaward debriefings, however, the FAR gives the agency the discretion to postpone the debrief to the time it conducts postaward debriefs. *Id.* at 15.1005(b).

206. *Id.* at 15.1002.

At issue in *Fumigadora Popular, S.A.*²⁰⁷ was a *sealed bid* procurement. The contracting officer informed the protester by letter that its bid was rejected for its unreasonably low pricing. The protester then requested a debriefing, which was conducted approximately two weeks later. The protester filed its protest four days after the debrief, almost three weeks after receiving the agency's rejection letter.²⁰⁸ In dismissing the protest as untimely, the GAO pointed out that the protester learned of the basis for protest when it received the contracting officer's letter of rejection. Although it may have questioned the reasons for the rejection of its bid, the protester was on notice of any grounds for protest when it received the contracting officer's letter of rejection. The GAO further noted that since this was a sealed bid procurement, the time rules with respect to competitive proposals and mandatory debriefings did not apply.²⁰⁹

Protesters Seeking Information Must Move Quickly. Over the past year, the GAO has underscored time and again the importance of protesters taking the "most expeditious approach"²¹⁰ available to obtain information that will serve as the basis for its protest. In *Automated Medical Products Corp.*,²¹¹ the protester sought information for its protest by submitting a request under the Freedom of Information Act (FOIA)²¹² rather than through a debrief. Four months following award, the agency responded to the FOIA request, and the protester promptly filed its protest with the GAO. In response to the government's motion to dismiss, the protester contended that "it had no reason to request a debriefing because there was nothing it could expect to learn from a debriefing since award was based on low price."²¹³ The GAO disagreed; a protester may not simply wait for the agency to provide information which provides a basis for the protest. The GAO observed that the protester could have requested the very information it obtained under its FOIA request during the debrief with the agency. Given the pro-

tester's failure to utilize the most expeditious approach for obtaining information, the GAO dismissed the protest as untimely.

The GAO also dismissed a protest as untimely when the protester requested a delay in debriefing for its own convenience. In *Pentec Environmental, Inc.*,²¹⁴ the protester requested a one-month delay from the agency's offered debriefing date so that the protester could obtain and review information from a FOIA request and so that an employee of the protester could "attend an unrelated business conference and take a vacation."²¹⁵ However commendable the protester's California-like approach to life may be,²¹⁶ the GAO was not understanding. Again, the GAO pointed out that the protester's failure to utilize the most expeditious approach to obtain information was inconsistent with the comptroller's "goal of resolving protests expeditiously and without unduly disrupting or delaying the agency's procurement process."²¹⁷

In *Geo-Centers, Inc.*,²¹⁸ the GAO concluded that the protester diligently sought the information necessary to support its protest even though the protest was filed nearly three months after contract award. At issue was an Army services contract which was awarded on 30 October. According to the GAO, the protester timely requested a debrief, which was initially set for 12 November. Due to a scheduling conflict with Army technicians, however, the contracting officer rescheduled the debrief to 26 November. During the debrief, the protester specifically requested information about the point scores assigned to the proposals and independent government cost estimate. The Army declined to provide such information at the debrief. Consequently, the protester filed a FOIA request for the same information and (you guessed it) the Army released the information to the protester.

207. B-276676, Apr. 21, 1997, 97-1 CPD ¶ 151.

208. *Id.* at 2.

209. *Id.* at 3.

210. *See, e.g., Pentec Envtl. Inc.*, B-276874.2, June 2, 1997, 97-1 CPD ¶ 199 at 3.

211. B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52.

212. 5 U.S.C. § 552 (1994).

213. *Automated Med. Prods.*, 97-1 CPD ¶ 52 at 3.

214. *Pentec Envtl.*, 97-1 CPD ¶ 199.

215. *Id.* at 3.

216. *See, e.g., Go West, Young Man, But There's No Big Rush*, TAMPA TRIB., Aug. 24, 1997, at 5 (stating that a study by a social psychologist proves that "California was easily overall the slowest region in the country"). *But see* Jennifer Bryd and Carrie Spector, *Mountain Retreat: Practicing Law Is Different in the Lake Tahoe Area, Where Everybody Knows Your Name*, CAL. LAW., Oct. 1995, at 49 (noting the growing immigration of attorneys from the "demanding pace" of California to Lake Tahoe, Nevada, where attorneys view law practice as a "side life," useful for paying the rent and buying a pair of new skis).

217. *Pentec Envtl.*, 97-1 CPD ¶ 199 at 3.

218. B-276033, May 5, 1997, 97-1 CPD ¶ 182.

Upon review of the material, the protester learned for the first time that the Army had incorrectly calculated the cost estimate. The protester filed its protest on 24 January, three months after contract award, two months after the debrief, *but* only eight days after it received the FOIA material.

The GAO concluded that the protester “at each step in the process—at no point allowing more than ten days to pass before making its next request” had diligently sought from the Army information necessary to support its protest.²¹⁹ Since the protest was based on information that the protester had timely requested during the debrief but did not receive until months later, and since the protester filed its protest within ten days of receiving that information, the GAO found the protest to be timely.

It remains to be seen how far an agency can argue that the protester failed to “utilize the most expeditious approach to obtain information.” Indeed, taking the GAO’s repeated admonitions to heart, it would seem that the “ten-day clock” would be triggered by the date offered for debrief and *not* the date the debrief was conducted, if the delay in debriefing is attributable to a request by the protester. As an example, counsel may want to consider whether a protest filed thirteen days after the date offered for a debrief, but within ten days of the actual conduct of the debrief, is timely or not.

*GAO Tells Protester “Hasta La Vista, Baby.”*²²⁰ Whatever its practice may have been in the past with respect to supplemental protests, the GAO has let it be known that it will make every effort to issue a decision within 100 calendar days of the filing of the initial protest. In *California Environmental Engineering*,²²¹ the protester challenged its exclusion from the competitive range and the subsequent award of an automotive emissions testing contract issued by the Environmental Protection Agency (EPA). After receiving the report the EPA submitted in response to the original protest, the protester supplemented its protest with additional allegations regarding the EPA’s evaluation of proposals. In order to keep the protest on track with the 100-day mandate, the GAO invoked an accelerated timetable that required the protester to comment on the

supplemental agency report within five calendar days of receipt, that is, no later than 5:30 p.m. on the fifth day. The protester, however, filed its comments by facsimile at 6:10 p.m. on the fifth day. Since the protester’s response was untimely, the supplemental protest was dismissed.

“Pay Me Now or Pay Me Later”—Pre-award Debriefings. Both federal statute and the FAR allow agencies to delay providing mandatory pre-award debriefs if such delay is “in the best interests of the government.”²²² As a consequence, the agency may very well find itself in the position of providing two sets of debriefs following contract award. One set of debriefs will be provided to one group of offerors and will address pre-award actions taken by the agency, such as competitive range determinations. The other set of debriefs, which may well involve a whole different group of disappointed offerors, will center on the award determination. The GAO let it be known early on that it was not terribly enamored with challenges to postponements of otherwise properly requested pre-award debriefings.

In *Global Engineering & Construction*,²²³ the protester promptly requested a pre-award debrief from the Army Corps of Engineers regarding its exclusion from the competitive range. The Corps denied the request, stating that postponement of the debrief was “in the best interests of the government.”²²⁴ Although agreeing with the protester that delaying debriefs runs counter “to the aim of much of the recent procurement reform effort to . . . promot[e] . . . the early exchange of information,” the GAO stated that it would not interfere with the agency’s determination that such a delay was in the government’s best interest. Given this state of affairs, the GAO further pointed out that offerors who receive their debriefs after the agency has awarded the contract (which may be weeks or months after the initial request for a debrief) still retain the right to file a protest to challenge pre-award events, such as competitive range determinations. Additionally, such a protester may still stay performance of the contract if the protest is timely filed.

The protester in *Siebe Environmental Controls*²²⁵ was frustrated by the government’s decision to delay the pre-award

219. *Id.* at 5.

220. Apologies to Mr. Arnold Schwarzenegger, star of the movie *Terminator 2—Judgment Day*.

221. B-274807, B-274807.2, Jan. 3, 1997, 97-1 CPD ¶ 99.

222. See 10 U.S.C. § 2305(b) (1994); FAR, *supra* note 22, at 15.1005(b) (allowing the contracting officer to delay a debrief if “providing a preaward debrief is not in the best interest of the Government”). Apparently, the argument for such a delay is that the debrief may impede the overall timeliness of the procurement process through award.

223. B-275999.3, Feb. 19, 1997, 97-1 CPD ¶ 77.

224. The Corps added that the diversion of agency resources to conduct such a debrief “would not best serve our customers’ needs or be a wise expenditure of U.S. tax dollars.” *Id.* at 3, n. 1.

225. B-275999.2, Feb. 12, 1997, 97-1 CPD ¶ 70

debrief regarding Siebe's exclusion from the competitive range until after award. In an attempt to force a debrief, Siebe filed a protest which was really an attempt to secure information regarding the agency's exclusion determination.²²⁶ Although acknowledging the "difficult position" of the protester, the GAO dismissed the protest because Siebe was unable to specifically explain how the agency's determination violated the law. Given the discretion afforded the agency for the scheduling of debriefs, the GAO concluded that the protester must try to obtain factual information through a FOIA request or a debrief—which in this case would occur after award.²²⁷

"Pay Me Now or Pay Me Later"—Navy Balks at Paying Costs Associated with a CICA Override. Those who defend their agencies against GAO protests are well aware of the automatic CICA stay and the thresholds for overriding the stay.²²⁸ In fact, while planning the acquisition milestones, it behooves the agency and legal counsel to carefully craft the agency's response in the event of a protest. Is the acquisition of such a sensitive nature that override of the CICA stay is based upon either "urgent and compelling" circumstances or, in the case of post-award protests, "in the best interest of the government?"²²⁹

*Department of the Navy—Modification of Remedy*²³⁰ highlights the impact an override decision can have on an acquisition. If a protest is sustained, the GAO will generally take into account the impact that the recommended remedy will have on the agency. In those instances, however, where the agency overrides a protest based upon the government's "best interests," the GAO shall make its recommendation "without regard to any cost or disruption from terminating, re-competing, or re-awarding the contract."²³¹

At issue in *Department of the Navy* was the procurement of a multi-million dollar ship-handling simulator, which required the contractor to construct a test facility and to provide simulation services to the Navy. Following receipt of initial proposals, the Navy excluded DynaLantic Corporation from the competitive range. DynaLantic timely requested a debrief regarding its exclusion, but the Navy delayed debriefing the contractor until after contract award. Following the post-award debrief, DynaLantic filed its protest early enough to merit the automatic CICA stay. Relying on the "best interest" of the government,²³² however, the Navy elected to override the stay and directed the awardee to commence construction of the test facility. The GAO subsequently sustained the protest and recommended that the Navy reinstate DynaLantic's proposal, re-conduct the evaluation process (to include discussions and the submission of BAFOs), and make award anew.²³³

The Navy balked at the GAO's recommendation and pointed out that the contract did not give it title to the test facility, which was near completion. In light of this, the Navy stated that "it may not be able to afford" the costs associated with making contract award to a contractor other than the original awardee.²³⁴ In response, the GAO pointed out that because the Navy relied upon the government's "best interest," the GAO was required by statute to craft a remedy without consideration of the attendant costs. Further, the GAO took exception to the Navy's statements, pointing out that "there is no basis in the record for concluding that this procurement involves unusually high termination or reprocurement costs."²³⁵

Air Force Objects to Admission of Awardee's In-House Counsel to Protective Order. It is the responsibility of government counsel to carefully review all applications for admission to a

226. The GAO had earlier dismissed Siebe's protest, which was made "upon information and belief" allegations, but which failed to provide any valid factual basis for protest. *Id.* at 2.

227. *Id.* at 3.

228. See 31 U.S.C. § 3553 (1994); FAR, *supra* note 22, at 33.104.

229. See FAR, *supra* note 22, at 33.104.

230. B-274944.4, July 15, 1997, 97-2 CPD ¶ 16.

231. 4 C.F.R. § 21.8(c) (1997).

232. 31 U.S.C. § 3553(d); FAR, *supra* note 22, at 33.104(c).

233. See DynaLantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.

234. *Dep't of the Navy*, 97-2 CPD ¶ 16.

235. *Id.* In fact, the GAO appeared to be a little exasperated with the Navy's failure to provide it little more than argument. The GAO stated:

[T]he Navy has made no attempt to quantify the costs involved or to show that the necessary funds are not available. Nor is there any reason to believe that, if termination of . . . [the] contract is appropriate . . . the Navy and . . . [awardee] could not enter into good faith negotiations to resolve the issues relating to use of the facility.

Id. n. 3. See also DynaLantic Corp., B-274994.5, Aug. 25, 1997, 13 CGEN ¶ 110,059 (DynaLantic's protest of the Navy's implementation of the GAO's recommendations denied).

protective order.²³⁶ The protest of *Robbins-Gioia, Inc.*²³⁷ highlights the principle that this responsibility applies to applications from the protester as well as the awardee. In *Robbins-Gioia*, the Air Force challenged the application of awardee's in-house counsel, contending that "too much is at stake to admit in-house counsel who directly report to persons who engage in competitive decision-making."²³⁸ The GAO balanced the Air Force's objections with the type and sensitivity of the material being protected, the in-house counsel's need for the information to represent her client adequately, and the risk of inadvertent disclosure of confidential information. Reviewing the specific circumstances before it, the GAO observed that the attorney was not involved in the competitive decision-making process of her firm; she did not prepare or approve proposals for government business. Furthermore, the corporate attorney stated that she would review protected material only at the law offices of the out-of-house counsel. Under these circumstances, the GAO concluded that admission of the in-house attorney was appropriate.

GAO Asserts Protest Jurisdiction Over a "Swap." In this day and age of acquisition reform and streamlining, agencies are constantly thinking outside of the proverbial procurement box. Consequently, the GAO will undoubtedly continue to confront innovative acquisition methods and the unique issues accompanying them for the foreseeable future. In *Assets Recovery System, Inc.*,²³⁹ the GAO addressed a protest which concerned the exchange or sale of government-owned aircraft and parts for new aircraft and cash. The Army wanted to exchange its inventory of aged aircraft and components in return for newer aircraft.

236. See 4 C.F.R. § 21.4(c).

237. B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222.

238. *Id.* at 9.

239. B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67.

240. *Id.* at 3.

241. The GAO also noted that, under its regulations, it could consider protests involving the sale of items or services only if the agency agreed to such a review. *Id.* at 3-4. See also *Resource Recovery Int'l Group, Inc.*, B-265880, Dec. 19, 1995, 95-2 CPD ¶ 277; 4 C.F.R. § 21.13(a).

242. Kudos to Mr. Gene Autry and his faithful wonder horse, Champion, who made the song "Don't Fence Me In" famous. Mr. Autry celebrated his 90th birthday this past October. Gary Dretzka, *Riding High: Star-Studded Gala Helps Autry Celebrate His 90th*, CHI. TRIB., Oct. 2, 1997, at 2 (the song reflected the "economic war" between the cattle barons and the small business sheep herders, which served as grist for many a Hollywood cowboy-western movie). But see William Safire, *When Cattle Lie Down with Sheep, It's More Than Just Weed Control*, FRESNO BEE, Aug. 3, 1997, at B7 (ranchers graze sheep and goats to chew up noxious European weed that otherwise sicken cattle and horses).

243. See, e.g., *Fifeco*, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (holding that the sale of property by the FHA is not a procurement of property or services); *Columbia Communications Corp.*, B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services).

244. See, e.g., *Maritime Global Bank Group*, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (holding that a Navy agreement with a bank to provide on-base banking services was not a "procurement").

245. B-275963, Apr. 23, 1997, 97-1 CPD ¶ 148.

246. *Id.* at 4-5.

Before addressing the merits of the ensuing post-award protest, the GAO first discussed whether it could properly hear the case. The GAO noted that, since the solicitation called for the actual exchange of property, "property is necessarily being acquired by the government."²⁴⁰ Observing that it is authorized to review protests regarding any and all government acquisitions of property or services, the GAO concluded that it could properly consider the protest.²⁴¹

*Don't Fence Me In.*²⁴² Not all agency transactions merit review by the GAO. For example, under its protest rules, the GAO will generally decline to review offers to sell or to lease government property.²⁴³ Additionally, the GAO will examine concession contracts only when they result in a benefit to the government or otherwise support the agency's mission requirements.²⁴⁴ In *Meyers Cos.*,²⁴⁵ the Army sought to lease land at the Sunflower Army Ammunition Plant (SAAP) near DeSoto, Kansas. The Army would allow the successful high bidder the privilege of grazing their animals on the leased parcels of land. As a condition to lease the land, the offeror had to agree to fence each of the parcels so that the herds of animals would be segregated from each other. Challenging this requirement, the protester asserted that the procurement of the fence work provided the GAO the necessary jurisdictional basis. The GAO disagreed, finding that the fence work was for the benefit of the bidders, not the Army. Since the fences neither benefited the Army nor supported the Army's principal mission at SAAP, the GAO dismissed the protest.²⁴⁶

What Settlement Agreement? GAO Declines to Consider Protest of Settlement Agreement. Okay, the protester scored one on you. Following contract award, the protester correctly

points out a conflict of interest regarding your source selection process. It seems that a member of your evaluation board worked part-time for a subsidiary of the awardee. (ouch!) In response, your office resolves the dispute by agreeing to perform a new evaluation and source selection—with an entirely new evaluation board. The GAO then dismisses the associated protest as academic. Subsequently, and upon further reflection, you and the other “Boys from Brazil” at your office conclude that repaneling an entirely new board is “nice” but not necessary. Consequently, you decide to conduct the reevaluation with the same board members less the member with the ties to the awardee.²⁴⁷ Surprisingly, the panel affirms its earlier source selection decision, and award is again made to the same offeror. Quicker than you can say “tain’t fair,” the same protester protests your office’s failure to abide by the terms of the settlement agreement.

Such were the facts in *American Marketing Associations, Inc.—Reconsideration*.²⁴⁸ In denying the protester’s request for reconsideration, the GAO pointed out that, although the agency failed to abide by the terms of the settlement agreement, the protester could not identify any defect in the underlying source selection decision. Given the fact that the award decision was otherwise proper, the GAO declined to meddle in a “dust-up” surrounding the enforceability of a settlement agreement.

The Fifteen Percent Solution. In *JAFIT Enterprises, Inc.—Claim for Costs*,²⁴⁹ the GAO determined that the protester was entitled to recover only \$3537.82 out of a claim for \$34,513.46. The protester had previously prevailed in challenging the Navy’s non-competitive award of a contract to Goodwill Industries. In its claim, the protester sought the costs associated with its initial agency-level protest as well as the costs associated with pursuing the GAO protest. Citing well-established case law, the GAO quickly denied that portion of the claim as it related to the agency protest.²⁵⁰ The GAO observed that the protester claimed more than “[seven] man-weeks of time

expended in pursuing this relatively simple and straightforward protest.”²⁵¹ The GAO further noted that the protester should have incurred most of its work effort while pursuing its agency protest. As a result, the GAO concluded that the protester should have expended far less effort on its GAO protest than otherwise might generally be expected. Against this background, the GAO allowed the protester fifteen percent of the man-hours claimed and nominal reproduction costs.²⁵²

Despite Agency Corrective Action, GAO Denies Protester Costs Where Protest Is Not “Clearly Meritorious.” At issue in *Spar Applied Systems—Declaration of Entitlement*²⁵³ was a dispute over an allegedly ambiguous RFP. Interestingly, the issue was resolved during a GAO-sponsored ADR session held at the GAO’s hearing room in lieu of a “formal hearing/conference.”²⁵⁴ The agency agreed to amend the RFP to the satisfaction of the protester. The GAO, however, denied the protester’s subsequent request for compensation of costs associated with pursuing the protest. Specifically, the GAO pointed out that “as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question.”²⁵⁵

The Post-award CICA Stay: Does the Sovereign Acts Doctrine Apply to NAF Contracts? In *F2M, Inc.*,²⁵⁶ the Army Corps of Engineers, on behalf of a non-appropriated fund instrumentality (NAFI), contracted for the design and construction of a guest house at Fort Lewis, Washington. Unfortunately, the award decision was almost immediately protested to the GAO, which caused the contracting officer to delay issuing the notice to proceed pending the outcome of the protest. Although the GAO denied the protest, commencement of the work was delayed by five months. F2M filed a claim for costs associated with this “unreasonable delay,” which ultimately resulted in an appeal to the board.

247. That person, no doubt, was sent to your agency’s Procurement Integrity Reeducation Camp.

248. B-274454.4, May 14, 1997, 97-1 CPD ¶ 183.

249. B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125.

250. *Id.* (citing *Data Based Decisions, Inc.—Claim for Costs*, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538; *E&R, Inc.—Claim for Costs*, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264).

251. *Id.* at 3.

252. *Id.* at 3-4.

253. B-276030.2, Sept. 12, 1997, 13 CGEN ¶ 110,060.

254. The GAO initially convened the formal protest hearing, but, at the suggestion of the GAO hearing official, the parties agreed to attempt first to resolve their differences via alternative dispute resolution techniques. *Id.* at 121,883.

255. *Id.* (citing *J.F. Taylor, Inc.—Entitlement to Costs*, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; *Baxter Healthcare Corp.—Entitlement to Costs*, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; *GVC Cos.—Entitlement to Costs*, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 4).

256. ASBCA No. 49719, 97-1 BCA ¶ 28,982.

In a series of cross-motions for summary judgment, the Army pointed out that since this was a NAF contract, the “Protest After Award” clause was not included in the contract. The Army further contended that it was not otherwise required to incorporate the clause into the contract. The board agreed, finding that neither the FAR, the applicable NAF regulation, nor the *Christian Doctrine* required inclusion of the clause.

The Army also argued that F2M’s delay claim was without merit since the contracting officer’s actions were made pursuant to the CICA stay requirements. On this issue, however, the board disagreed with the Army. The board observed that although the GAO may consider NAF contracts issued by a federal agency as falling within its bid protest jurisdiction, the GAO’s interpretation of CICA is not binding on the board when the agency asserts the sovereign act defense. Thus, the board concluded that where the government acts as an agent of a NAFI, the CICA stay requirements do not allow the agency to assert the sovereign acts defense as protection from liability under the contract.

*Bid Protests in the Federal Courts*²⁵⁷

Effective 31 December 1996, the Administrative Dispute Resolution Act of 1996²⁵⁸ provides federal courts with jurisdiction to hear both pre-award and post-award bid protests. Since then, many folks have closely watched developing case law to see how the courts map out their new jurisdictional authority.

*What Does the Administrative Record Consist Of? Cubic Applications, Inc. v. United States*²⁵⁹ was the first bid protest handled by the Court of Federal Claims under its new authority. The case was an “appeal” of an earlier GAO protest.²⁶⁰ At issue was an Army procurement for battle simulation exercise training services in Europe.²⁶¹ As both sides advanced towards a hearing on the merits, one of the first questions the court had to address was the content of the administrative record. The Army asserted that inclusion of the entire agency report developed during the GAO protest was appropriate and, indeed, required by statute.²⁶² The protester disagreed, arguing that the GAO report contained “*post hoc* rationalizations,” such as the contracting officer’s statement of facts, the agency legal memorandum, declarations or affidavits of witnesses, and the protester’s rebuttal, and that such rationalizations deserved little evidentiary weight.²⁶³

After reviewing statutory guidance regarding the composition of the administrative record, the court adopted the standards laid out by the Court of Appeals for the D.C. Circuit in *Esch v. Yeutter*.²⁶⁴ The court concluded that clearly all information the agency relied upon in awarding the contract must be part of the record. The more problematic question centered on post-decisional materials that “would not otherwise be considered in a review under the Administrative Procedures Act.”²⁶⁵ Although the court agreed with the Army that, by statute, it had “no choice” but to include the entire GAO agency report as part of the administrative record, the court did “have a choice about

257. The Department of Commerce’s Contract Law Division sponsors an outstanding home page which covers virtually all hot button topics and case law in government procurement law. Particularly attractive is the homepage’s collection of significant federal court procurement decisions, which provide practitioners with the earliest access to Court of Federal Claim decisions. The internet address is: <http://www.ogc.doc.gov/OGC/CLD.HTML>.

258. Pub. L. No. 104-320, 110 Stat. 3870, 3874-75 (1996) (amending 28 U.S.C. § 1491(b) (1994)).

259. 37 Fed. Cl. 339 (1997).

260. If dissatisfied with the GAO recommendation, a party may seek relief in the federal courts. 28 U.S.C. § 1491(b) (1994). Although not technically an “appeal” of the GAO recommendation, the process ultimately results in a judicial decision that is binding on the parties. *Id.*

261. *Cubic Applications*, 37 Fed. Cl. at 341.

262. *Id.* at 343. *See* 31 U.S.C. § 3556 (1994).

263. *Cubic Applications*, 37 Fed. Cl. at 342-44.

264. *Id.* at 342 (citing *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989)). The court concluded that review of an agency decision under the Administrative Procedures Act generally prevents consideration of material or information that was not before the agency at the time of its decision or protested action. Citing the *Esch* exceptions, however, the court held that it could consider “extra-record” evidence under the following circumstances:

- (1) when agency action is not adequately explained in the record before the court;
- (2) when the agency failed to consider factors which are relevant to its final decision;
- (3) when an agency considered evidence which it failed to include in the record;
- (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
- (5) in cases where evidence arising after the agency action shows whether the decision was correct or not;
- (6) in cases where agencies are sued for a failure to take action;
- (7) in cases arising under the National Environmental Policy Act; and
- (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Id. (citing *Esch*, 876 F.2d at 991). The Court of Federal Claims has applied this laundry list of exceptions in subsequent protests. *See, e.g.*, *ATA Defense Indus., Inc. v. United States*, No. 97-382C, 1997 WL 359959 (Fed. Cl. June 27, 1997); *Graphicdata, LLC v. United States*, 37 Fed. Cl. 771, 779 (1997).

265. *Cubic Applications*, 37 Fed. Cl. at 342. *See also* 5 U.S.C. § 706(2) (1994).

the degree of relevance to assign” to the contents in the report.²⁶⁶ As a result, with respect to witness statements and legal memoranda developed during the GAO protest, the court concluded that, although the documentation was a part of the administrative record, “none of . . . [it would] have evidentiary weight.”²⁶⁷

The Administrative Record Is Not an “Immutable Boundary.” Along similar lines, the court in *Graphicdata LLC v. United States*²⁶⁸ concluded that the administrative record was not an “immutable boundary that defines the scope of the case,” but that it could supplement the record when necessary.²⁶⁹ The *Graphicdata* court specifically concluded that the protester could introduce evidence to better allow the court to decide whether the agency acted improperly. Under this philosophy, the agency could certainly provide the court with materials it had relied upon but which were not in the administrative record. Echoing the approach used in *Cubic Applications*, the presiding judge in *Graphicdata* concluded that the courts must adopt “a flexible approach both in putting together the evidence that will be considered and in discovery.”²⁷⁰

Discovery Limited by Previous GAO Litigation. The *Cubic Applications* court also concluded that since its review of agency procurement decisions was prescribed by the Administrative Procedures Act, the scope of discovery is far more limited than in a *de novo* proceeding.²⁷¹ Consequently, the court commented that discovery would be permitted to the extent necessary to allow an adequate understanding of the agency’s conduct, but that discovery “normally would not be likely to lead to relevant evidence given the truncated nature of the court’s review.”²⁷²

The protester wanted to depose five Army officials, all of whom were stationed in Germany. Noting that the protester had the opportunity to depose the same individuals during the prior GAO protest and chose not to do so, the court denied the dis-

covery request as to four of the five officials. The court, however, allowed the protester to depose the contracting officer regarding a count in the complaint that was not an issue before the GAO.²⁷³

Absent a Showing of Bad Faith, Protestor’s Ability to Depose Procurement Official Limited. In a protest which challenged exclusion from the competitive range, a protester sought to depose eleven procurement officials who were members of the source selection evaluation board, the teams that comprised the board, the source selection authority (SSA), and the contracting officer.²⁷⁴ Based on the protester’s request, the trial judge concluded that the protester wanted to delve into the mental processes of the procurement officials regarding the substance of their evaluations. The court found, however, that the administrative record contained contemporaneous explanations of the conclusions of these officials. Moreover, the trial judge held that, in light of this available information and absent a showing of bad faith on the part of these officials, depositions of these individuals were improper. The court allowed the protester to depose the SSA and the contracting officer, but it limited the scope of the depositions to little more than clarifying the administrative record and a declaration made by the contracting officer in response to one of the protester’s allegations. In closing, the court emphasized that it was not establishing a set of generalized rules applicable to all protests, because to do so would open a Pandora’s box of frivolous lawsuits.

Court of Federal Claims Follows GAO Interpretation of “Interested Party” Requirement. In *CC Distributors, Inc. v. United States*,²⁷⁵ the Air Force challenged the interested party status of the protester. At issue was a base operations service contract at Tyndall AFB, Florida. The protester was the incumbent contractor that operated the base engineering supply store, one of the many activities covered by the solicitation. Despite two separate Commerce Business Daily (CBD) notices and the issuance of two RFPs, the protester elected not to submit an offer.

266. *Cubic Applications*, 37 Fed. Cl. at 343-44.

267. *Id.* at 344.

268. 37 Fed. Cl. 771 (1997).

269. *Id.* at 780.

270. *Id.*

271. *Cubic Applications*, 37 Fed. Cl. at 339.

272. *Id.* at 344 (citing *CACI Field Servs., Inc. v. United States*, 12 Cl. Ct. 680, 684 (1987)).

273. Citing 10 U.S.C. § 2304b, the protester alleged that the contract at issue essentially sought “advisory and assistance services,” which required the Army to make multiple awards absent a written determination to the contrary. According to the protester, the Army’s failure to make such a determination rendered the contract void ab initio. *Id.* at 349.

274. *Aero Corp., S.A. v. United States*, 38 Fed. Cl. 408 (1997).

275. No. 97-517C, 1997 WL 543131 (Fed. Cl. Sept. 2, 1997).

Following contract award, the protester was unable to work out a subcontract with the awardee to continue working at the supply store. As a result, almost two months after contract award, the protester challenged the entire procurement as improperly “bundling” too many base activities under one contract. Noting that it is “within the discretion of . . . [the] court to rely on principles analogous to those recognized by the GAO,” the court dismissed the protest as untimely.²⁷⁶ Specifically, the court found that the protester’s failure to respond to the CBD notices and the RFP by submitting an offer barred it from protesting the bundling or “any other issue . . . at this late date.”²⁷⁷

Temporary Restraining Order and Injunctive Relief Hearings. When a protester files its complaint, it may seek injunctive relief to stop further activity under the procurement. For the protester to prevail, the Court of Federal Claims requires the protester to establish the following:

- (1) protester will suffer a specific irreparable injury if defendant’s performance is not enjoined;
- (2) the harm to protester in not granting the requested relief outweighs any potential harm to the defendant in granting such relief;
- (3) granting the requested relief serves the public interest; and
- (4) protester is likely to succeed on the merits of its claim.²⁷⁸

Over the past year, the Court of Federal Claims has addressed various protest scenarios using this traditional four-element test. This test may be of use to government counsel in future litigation.

Protestor Not Entitled to TRO Where Air Force Agrees to Delay Contract Award. In *Aero Corp., S.A. v. United States*,²⁷⁹ the Air Force issued a solicitation either to privatize depot maintenance operations at Kelly Air Force Base, Texas or to transfer those functions to another government activity. The protester challenged the Air Force’s decision to eliminate the protester’s offer from the competitive range and requested the Court of Federal

Claims to enjoin the Air Force from further evaluating any of the remaining proposals until the court rendered a decision on the merits of the protest. The Air Force replied that such a draconian order was unnecessary since it would refrain from making contract award pending the court’s final decision on the protest. The Air Force would properly evaluate the protester’s proposal if so ordered, but the delay otherwise associated with an injunction would have a negative impact on military readiness.²⁸⁰ The protester disagreed and argued that such an arrangement would allow the remaining offerors the opportunity to submit two BAFOs, while the protester would only be allowed to submit one BAFO. The protester contended that it would be at a severe competitive disadvantage under such conditions and would suffer irreparable harm.

The Court of Federal Claims disagreed with the protester. The court found that the protester’s argument of irreparable harm was speculative and that injunctive relief was not available “to prevent injuries neither extant nor presently threatened, but only merely ‘feared.’”²⁸¹ Given the Air Force’s obvious willingness to review the protester’s offer, if necessary, and the impact on national security interests, the court denied the protester injunctive relief.²⁸²

No “Irreparable Harm” Where Protester Could Perform Most of Contract Work. At issue in *CINCOM Systems, Inc.*²⁸³ was a contract for commercial off-the-shelf software that supported the management of repair parts and components at DOD maintenance depots. In response to the protester’s request for injunctive relief, the agency pointed out that the protester could readily be substituted for the awardee should the protester prevail and that work on the contract was still in the very early stages. In denying the request for the TRO, the court also noted the expedited schedule for resolving the protest. Given that the protester would still be able to profit substantially from the contract if it prevailed, the court concluded that the protester would not suffer irreparable harm.²⁸⁴

Alternative Dispute Resolution (ADR)

276. *Id.* at *11.

277. *Id.*

278. *Aero Corp.*, 38 Fed. Cl. at 240. *See also* *We Care, Inc. v. Ultra-Mark, Int’l Corp.*, 930 F.2d 1567 (Fed. Cir. 1991); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983); *Cincom Sys., Inc. v. United States*, 37 Fed. Cl. 266 (1997); *Magnavox Elec. Sys., Co. v. United States*, 26 Cl. Ct. 1373, 1378 (1992).

279. *Aero Corp.*, 38 Fed. Cl. at 237.

280. *Id.* at 241. To describe the national security implications of any “needless delay,” the Air Force submitted the declaration of Major General James S. Childress.

281. *Id.*, citing *Exxon Corp. v. FTC*, 589 F.2d 582, 594 (D.C. Cir. 1978).

282. *Id.* at 242-43.

283. *Cincom Sys.*, 37 Fed. Cl. at 266.

284. The court further questioned whether the plaintiff had established that it was “likely” to prevail on the merits of the protest. *Id.* at 268-69.

*Boards Work Together to Promote ADR*²⁸⁵

Ten of the boards of contract appeals²⁸⁶ agreed to a sharing arrangement whereby they would serve as party neutrals for disputes from other agencies. The only board that did not enter the arrangement was the General Services Board of Contract Appeals. The procedures for the sharing arrangement are straightforward. If a party wants to use ADR, it would approach the board that would normally handle the dispute. If the party wants to use a neutral from another board, it should make that desire known. The chair of the board that would normally hear the dispute would then obtain a neutral from another board through the sharing arrangement. An obvious advantage to the sharing arrangement is that it expands the pool of neutrals from which parties draw upon to resolve their disputes.²⁸⁷

*Navy Issues New Policy Guidance on ADR*²⁸⁸

The Navy issued a comprehensive policy on the use of ADR.²⁸⁹ The policy states that ADR mechanisms “shall be used as an alternative to litigation or formal administrative procedures to the maximum extent practicable.”²⁹⁰ The new policy recognizes that “[t]he goal is to resolve disputes and conflicts at the earliest stage feasible, by the fastest and least expensive method possible and at the lowest possible organizational level prior to litigation.”

The new policy directs senior commanders to: (1) promulgate ADR guidance for their organizations; (2) coordinate local ADR instructions through consultations with the ADR Group;

(3) train personnel on ADR techniques and procedures; and (4) report the use of ADR in their organization yearly. Finally, commanders of all activities must assess existing methods of dispute resolution and adopt the use of ADR techniques, where feasible.

Army Policy and Procedure Guide for ADR

The Office of the Chief Trial Attorney, U. S. Army Legal Services Agency, compiled a comprehensive guide, titled *ADR Policy and Procedure Guide*. The guide is a reference tool that provides suggestions on how to analyze a particular dispute for its ADR potential. Although the guide was developed primarily for use by members of the Army Contract Appeals Division (CAD), others outside of CAD are welcome, and encouraged, to use it whenever they are considering ADR as a tool for dispute resolution.

Small Business

Adarand Introduction: Each Branch Struggles With the Implementation of the Landmark Case

On 12 June 1995, the United States Supreme Court handed down its historic case, *Adarand Constructors, Inc. v. Peña*.²⁹¹ In a five to-four decision, the Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a strict scrutiny standard.²⁹² Many legal commentators believe that *Adarand* was the most significant

285. *ADR: Boards of Contract Appeals Agree To Sharing Arrangement To Promote Use of ADR*, 67 FED. CONT. REP. 15 (BNA) (1997).

286. The participating boards include the Armed Services Board of Contract Appeals, the Department of Agriculture Board of Contract Appeals, the Department of Energy Board of Contract Appeals, the Corps of Engineers Board of Contract Appeals, the Department of Interior Board of Contract Appeals, the Department of Housing and Urban Development Board of Contract Appeals, the Department of Labor Board of Contract Appeals, the Post Service Board of Contract Appeals, the Department of Transportation Board of Contract Appeals, and the Department of Veterans Affairs Board of Contract Appeals. *Id.*

287. *Id.* Historically, there have been concerns about smaller boards of contract appeals handling ADR matters. The reason is that when a board member on a smaller board serves as a neutral and fails to resolve the dispute, the party then resorts to traditional dispute resolution techniques. The board member who participated in the ADR may not participate in the appeal. Depending on the workload or other constraints on the remaining judges on the board, this may make it very difficult for the board to process the appeal.

288. *ADR: Navy Issues New Policy Requiring Use of ADR to Maximum Extent Practicable*, 67 FED. CONT. REP. 3 (BNA) (1997).

289. *Id.* The guidance is contained in Secretary of the Navy Instruction 5800.

290. *Id.* The policy recognizes that the parties can use ADR to resolve either the entire dispute or a discrete segment of the dispute.

291. 115 S. Ct. 2097 (1995). The underlying facts of *Adarand* are undisputed. In 1989, the Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (Mountain Gravel). Mountain Gravel then solicited bids for the guardrail work under the contract. Adarand Constructors, Inc., a Colorado-based highway construction contractor, submitted the low bid for the work. Gonzales Construction Company (Gonzales) also submitted a bid for the project. The prime contract between Mountain Gravel and CFLHD granted Mountain Gravel additional compensation if it retained subcontractors for the project who were small businesses controlled by “socially and economically” disadvantaged individuals. Gonzales was certified as such a business; Adarand was not. Despite Adarand’s low bid, Mountain Gravel awarded the subcontract to Gonzales. The chief estimator of Mountain Gravel submitted an affidavit to the court stating that it would have had to accept Adarand’s bid had it not been for additional payment it received by hiring Gonzales instead.

292. *Id.* at 2113. To survive the strict scrutiny standard, the classification must be tested by two prongs. First, there must be a compelling government interest for the racial or ethnic classifications. That is, what are the government’s reasons for using a racial or ethnic classification? Second, in addition to advancing a compelling government goal or interest, any governmental use of race must be narrowly tailored. *Id.*

decision to address a social issue since *Brown v. Board of Education*.²⁹³ This past year, each of the branches of government struggled, to varying degrees, with the implementation of the Court's opinion.

Judicial Decisions Interpreting Adarand

Adarand on Remand. In June 1997, on remand from the Supreme Court, the United States District Court for the District of Colorado granted summary judgment in favor of Adarand Constructors, Inc.²⁹⁴ In his seventy-one page decision on remand, Judge John L. Kane, Jr. provided an in-depth discussion of the application of the strict scrutiny test. Judge Kane eventually concluded that the subcontracting compensation clause program was not sufficiently narrowly tailored to pass the strict scrutiny test.²⁹⁵

Although the ultimate disposition of the case did not turn on the compelling interest prong, Judge Kane discussed in dicta the application of the compelling interest prong. Judge Kane concluded that the government satisfied the compelling interest prong.²⁹⁶ The court, however, did not come to the same conclusion in regard to the government's attempt to satisfy the second prong, that of a narrowly tailored program. Finding the subcontractor compensation clause to be a "bonus," Judge Kane explained that:

To the extent that [a subcontracting compensation clause] payment acts as a gratuity for a prime contractor who engages a [disadvantaged business], it cannot be said to be narrowly tailored to the government's interest of eliminating discriminatory barriers Where subcontracting to a DBE [disadvantaged business enterprise] does not cause an

increase in costs, the prime contractor receives additional payment because of a choice based only on race.²⁹⁷

The court further disclosed that it found "it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such a program is both under inclusive and over inclusive."²⁹⁸ As an example of its extensive analysis, the court further distinguished the disputed program (which lacked individualized inquiries) from the 8(a) program (which mandates inquiry into each participant's economic disadvantage). Consequently, the court found the challenged affirmative action programs unconstitutional.

*Dynalantic Corp. v. Department of Defense*²⁹⁹—SBA's 8(a) Program Under Siege. In *Dynalantic*, the plaintiff was a non-minority owned small business.³⁰⁰ It sought an injunction against the Navy to prevent it from awarding a contract under the SBA's 8(a) program. Dynalantic contended that the 8(a) program violated the Fifth Amendment to the United States Constitution in so far as it was a race-based program that excluded Dynalantic from competing for a procurement.³⁰¹

The court rejected Dynalantic's argument. The court held that it lacked standing to challenge the constitutionality of the 8(a) program.³⁰² The court noted that Dynalantic failed to meet the "injury-in-fact" requirement regarding the SBA's alleged discrimination in administering the 8(a) program.

Dynalantic then appealed to the Court of Appeals for the D.C. Circuit, where it received a divided, yet more favorable, welcome.³⁰³ After enjoining the procurement pending appeal, the court reversed the district court in a two-to-one decision. The appellate court took a far broader approach to standing than the court below.

293. 347 U.S. 483 (1954). See William T. Coleman, *Adarand and its Aftermath, How the Supreme Court Overestimated Precedent and Underestimated the Impact of Its Decision*, 31 PROCUREMENT LAW. 12 (1996).

294. *Adarand Constructors, Inc. v. Pena*, Civ. A. No. 90-K-1413, 1997 WL 295363 (D. Colo. June 2, 1997).

295. *Id.* at *16. Judge Kane noted that, in applying the strict scrutiny test, the initial inquiry is whether the interest propounded by the government as its reason for injecting the consideration of race is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the governmental actor is concerned. He further noted that the compelling interest inquiry is the linchpin of constitutionality under the strict scrutiny analysis. That is, the narrowly tailoring requirement merits review only when the governmental action under judicial review is shown to be supported by such a compelling interest. *Id.*

296. *Id.* Judge Kane explained that "nothing in [*Adarand*] or any other Supreme Court decision persuades me that in subjecting a statutory or regulatory scheme created by Congress to strict scrutiny, one is to ignore Congress' ability to legislate nationwide to address nationwide problems thus placing it on the same constitutional plane as a city council." *Id.* at *20. Nonetheless, Judge Kane reasoned that "Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications." *Id.* After extensive analysis, the court attributed significantly more weight to the government's record "than to that brushed aside in *Crosby*." *Id.* at *45 (citation omitted). The court concluded that "Congress has a strong basis in evidence for enacting the challenged statutes, which thus serves a 'compelling governmental interest.'" *Id.* at *25.

297. *Id.* at *28.

298. *Id.* at *29.

299. 894 F. Supp. 995 (D.D.C. 1995).

300. *Id.* at 995-96.

By the time the case reached the appellate court, the Navy had canceled the procurement and removed it from the 8(a) program.³⁰⁴ The government argued that since Dynalantic could compete for the procurement, the issue challenged below was moot. The court of appeals disagreed. The court granted Dynalantic's request to allow it to amend its pleadings to raise a general challenge to the 8(a) program.³⁰⁵ The court raised the question, "whether future use of the 8(a) program will impact" on Dynalantic.

The court specifically noted that absent a government declaration that it would "decide never again to set aside a simulator contract under the 8(a) [program] . . . Dynalantic's injury looms close enough to support its standing to pursue the case."³⁰⁶ The majority concluded that: "Dynalantic's injury—its ability to compete on equal footing with 8(a) participants—is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program."³⁰⁷

Background. For the past two years, the government has struggled to develop a regulatory scheme that both supports affirmative action and survives strict scrutiny. Against this backdrop, the Department of Justice outlined six key factors that encompass the narrow tailoring prong of strict scrutiny.³⁰⁸

The regulatory scheme subsequently developed is a three prong effort to bring federal acquisition rules on affirmative action in line with the strict scrutiny requirements of *Adarand*.³⁰⁹ The first prong is proposed changes to the FAR to authorize SDB procurement mechanisms when SDB participation falls below certain benchmarks. The second prong involves the SBA's proposed rules that govern the certification requirements and eligibility criteria for the 8(a) program. The final prong will be the Commerce Department's establishment of the actual benchmarks.

301. *Id.* The court provided a brief overview of the 8(a) program. It stated:

Under the 8(a) program, the SBA may award government procurement contracts to "socially and economically disadvantaged small business concerns." 15 U.S.C. § 637(a). A small business concern seeking admission to the 8(a) program must be certified by the SBA as being at least 51 percent owned and controlled by one or more individuals that satisfy the criteria for social and economic disadvantage status. 15 U.S.C. § 637(4)(A). A business that is certified for entry into the 8(a) program may participate in the program for a maximum period of nine years. 15 U.S.C. § 636(j)(10); 13 C.F.R. § 124.110(a). However, a participant in the 8(a) program may be graduated from the program before the expiration of the nine years if the business substantially achieves its business plan. 13 C.F.R. § 124.208(a). Further, any individual will be deemed ineligible for continued participation in the program if that individual's personal net worth exceeds \$750,000.

Id.

302. The doctrine of standing serves to "identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149 (1989). In order to meet the jurisdictional requirements for standing, a plaintiff must establish: (1) an "injury-in-fact," which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct; and (3) that it is likely, as opposed to speculative, "that injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

303. *Dynalantic Corp. v. Department of Defense*, No. 96-5260, 1997 U.S. App. LEXIS 13622 (D.C. Cir. June 10, 1997).

304. *Id.* at 7. An affidavit from the government explained that it had removed the procurement from the 8(a) program because of delays which were caused by the protracted litigation and which led to operational and safety concerns.

305. *Id.* at 9.

306. *Id.* at 20. The court specifically noted, among other things, that: the number of qualified 8(a) firms registered with the procuring center had more than doubled between 1993 and 1995; the procuring center sets aside every contract for which qualified 8(a) firms are available; and, because the sole source 8(a) procurements are not preceded by public notice, "Dynalantic learns about their award only after the fact." *Id.*

307. *Id.* at 22.

308. 61 Fed. Reg. 26,042 (1996). The factors are:

(1) whether the government considered race neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the program and whether it is flexible; (3) whether race is relied upon as the sole [or as one] factor . . . in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities; (5) whether the duration of the program is limited and . . . subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries.

Id.

309. *Affirmative Action: SBA Set to Propose Rule on Affirmative Action Role, Changes to 8(a) Program*, 68 FED. CONT. REP. 1 (BNA) (1997).

Eligibility: An Expanded SDB Definition. Eligibility requirements, although addressed in the proposed FAR Subpart 19.3, will fall under the proposed rules published by the SBA.³¹⁰ Under the new regulatory scheme, businesses must demonstrate their eligibility for small disadvantaged business status by either producing a certification from an SBA approved organization or obtaining a determination from the SBA.

The criteria used to determine a business' disadvantaged status are: (1) social and economic disadvantage³¹¹ and (2) ownership and control of the business. Certain specified minority groups would retain a presumption of social and economic disadvantage. Offerors lacking the presumption could request a determination by the SBA that they are socially and economically disadvantaged.³¹² Contracting activities will be able to verify the SDB status of non-presumed firms through the SBA on-line central registry of firms holding such an SBA determination.

Another key change in the proposed rules is the use of the preponderance of the evidence standard for determining social and economic disadvantage for individuals who do not qualify for a presumption of disadvantage.³¹³ In distinguishing the preponderance standard from the clear and convincing standard (the previous standard), the Justice Department suggests that “[t]here is significant legal support for the use of the preponderance of the evidence [standard] when an agency is determining what is essentially a question of civil law” and notes that the Supreme Court has found that the preponderance of the evi-

dence standard is appropriate in civil litigation involving discrimination.³¹⁴ Under the new scheme, any offeror, contracting officer, or the SBA could challenge an individual firm's SDB eligibility. Even a party who is ineligible to protest—due to a lack of either timeliness or standing—can, in effect, protest an SDB's eligibility, if the party persuades the contracting officer to adopt protest grounds.³¹⁵

Procurement Mechanisms: Preferences, Etc. The proposed FAR rules employ three mechanisms to benefit SDBs. The three mechanisms would include (1) a price evaluation adjustment or preference up to ten percent; (2) a source selection evaluation factor or subfactor for planned SDB participation in the contract, primarily at the subcontract level; and (3) monetary incentives for subcontracting with SDBs.³¹⁶

The proposed regulations reserve the right to employ more aggressive or, arguably, innovative tools. The proposed rule notes that the Commerce Department “is not limited to the SDB procurement mechanism identified,” where it finds: (1) “substantial and persuasive evidence” that there is “persistent and significant” underutilization of SDBs in certain industries “attributable to past or present discrimination” and (2) that the three available mechanisms are incapable of alleviating the problem.³¹⁷

The proposed regulations identify four types of acquisitions in which price adjustments shall not be used: (1) acquisitions at or below the simplified acquisition threshold; (2) contracts

310. Small Business Size Regulations, 8(a) Business Development/Small Disadvantaged Business Status Determinations, Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, Proposed Rule, 62 Fed. Reg. 43,583 (1997). See generally, Peter Behr, *SBA Program to Accept More White Women: Minority Firms Have Been Getting Most Aid*, WASH. POST, Aug. 13, 1997, at A1; *Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences in Contract Actions*, 67 FED. CONT. REP. 547 (BNA) (1997).

311. Such status may or may not be presumed.

312. 62 Fed. Reg. at 25,788. The proposed regulations do not alter the criteria for determining a contractor's status as a small business. See, e.g., FAR, *supra* note 22, at 19.301. Some commentators lamented that the proposed rules gave no consideration to women-owned firms “despite the fact that many women entrepreneurs had endured the effects of discrimination similar to those suffered by minorities.” 62 Fed. Reg. at 25,652-53. The Justice Department explained that neither section 7102 of the FASA nor 10 U.S.C. § 2323 authorizes affirmative action for women, and, as a result, the proposed rules are limited to implementing affirmative action for designated minority groups. *Id.* Moreover, *Adarand* applied the strict scrutiny standard to race-based actions, while gender-based actions remain scrutinized by a lesser standard of review. The Justice Department asserts, however, that the lowering of the standard of proof for non-minority firms as SDBs would create opportunities for women-owned firms not owned by minorities. 62 Fed. Reg. at 25,652-53.

313. 62 Fed. Reg. at 43,587. The preface to the recently proposed SBA regulations explains:

[R]edesignated Sec. 124.103(c) (present Sec. 124.105(c)) would be amended to require an individual who is not a member of a designated socially disadvantaged group to establish his or her social disadvantage by a preponderance of the evidence presented in the 8(a) BD application. This is a change from the current regulation which requires that an individual who is not a member of a designated group establish his or her social disadvantage on the basis of clear and convincing evidence.

Id.

314. *Id.* at 25,649, citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55, 261 (1989) (preponderance standard), referencing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389-90 (1983) (clear and convincing evidence standard should be limited to civil questions in which “particularly important individual interests or rights are at stake such as ‘termination of parental rights, involuntary civil commitment, and deportation’”).

315. *Id.* at 25,788.

316. The price evaluation adjustment language is applied to sealed bid procurements. The evaluation factor language is applied to negotiated procurements. The proposed clause, 52.219-23, instructs evaluators to add a factor (to be determined) to the price of all offers except SDBs (that have not waived the adjustment) or other successful offers (over the dollar threshold) of eligible products under the Trade Agreement Act. *Id.* See FAR, *supra* note 22, at 25.402.

awarded under the 8(a) program; (3) acquisitions that are set aside for small business; or (4) acquisitions for long distance telecommunication services. Similar exemptions apply to the use of the evaluation factor for SDB participation. The mechanisms are not to be used for contracts awarded under the 8(a) program or acquisitions that are set aside for small business. Moreover, the evaluation factor mechanism is not to be used in (a) lowest cost, technically acceptable, negotiated procurements or (b) contract actions that will be performed outside the United States.³¹⁸

Individual agencies are responsible for ensuring that the use of particular mechanisms do not cause specific industries “to bear a disproportionate share of the contracts awarded by a contracting activity of the agency to achieve its goal for SDB concerns.”³¹⁹ If an agency identifies such a disproportionate share, the agency can seek a determination from the Commerce Department which will permit the contracting activity to limit the use of the specific SDB mechanism.³²⁰

Benchmarking: The Centerpiece of the New Rules. The proponents of the rules intend to create a flexible system in which race-neutral alternatives should be used to the maximum extent possible. Race should become a factor “only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination.”³²¹

317. 62 Fed. Reg. at 25,788.

318. *Id.* at 25,790.

319. *Id.* at 25,788.

320. *Id.*

321. 61 Fed. Reg. 26,049 (1996).

322. *Id.*

323. 62 Fed. Reg. at 25,787. The Department of Justice noted that the Commerce Department’s “recommendation” will “rely primarily on Census data to determine the capacity and availability of minority owned firms.” *Id.* at 25,650 (1997). The recommendation to the OFPP as to how to use the available procurement mechanism will depend upon the benchmarks derived by the Commerce Department. The Justice Department explains:

[A] statistical calculation representing the effect that discrimination has had on suppressing minority business development and capacity would be made, and that calculation would be factored into benchmarks Regardless of the outcome of that statistical effort, the effects of discrimination will be considered when utilization exceeds the benchmark and it is necessary to determine whether race-conscious measures in a particular SIC code should be curtailed or eliminated. Before race-conscious action is decreased, consideration will be given to the effects discrimination has had on minority business development in that industrial area, and the need to consider race to address those effects.

Id. at 25,650-51 (1997).

324. *Id.* at 25,652. According to the Justice Department:

Achievement of a benchmark in a particular SIC code does not automatically mean that race-conscious programs . . . will be eliminated in that SIC code. The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in [a] SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, [the OFPP] may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of action.

Id.

The keystone for the future of the program, therefore, are the benchmarks. “Application of the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination.”³²² The proposed general policy statement on benchmarks directs that:

The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanism, and their effective dates for new solicitations for the upcoming year.³²³

In anticipation of the new benchmarking system, SDBs remain concerned that the proposed affirmative action measures can be curtailed or eliminated based upon the success of SDBs in obtaining government work within certain industries.³²⁴ In fact, the Justice Department has articulated what some SDB’s fear: “When Commerce concludes that the use of race-conscious measures is not justified in a particular industry

(or region), the use of the bidding credit and the evaluation credit will cease.”³²⁵ Finally, the Justice Department has stated that a compelling interest warranting race-conscious efforts in federal procurement remains.³²⁶ The Justice Department explains that the Urban Institute concluded that “minority-owned businesses receive far fewer government contract dollars than would be expected based on their availability.”³²⁷ So long as race-conscious means are needed to afford minority firms a fair opportunity to compete for federal contracts,³²⁸ the Department of Justice conclusion appears valid.

Movement to Increase Small Business Contracting Goal From Twenty Percent to Twenty-Three Percent

On 5 June 1997, H.R. 1824 was introduced to amend the Small Business Act to increase the annual government-wide goal from the current twenty percent to twenty-five percent for procurement contracts awarded to small businesses concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women.³²⁹ The legislation would give small businesses the chance to garner an additional \$7.6 billion in federal contracts.³³⁰

Aida Alvarez, head of the Small Business Administration, proposed that President Clinton issue an executive order to increase the current statutory goal to twenty-five percent over the next three years.³³¹ The proposed increase was not without opposition. Dr. Stephen Kelman, Chief of Procurement Policy, Office of Federal Procurement Policy, noted some serious concerns about raising the limit to twenty-five percent. In a memorandum leaked to the press, Kelman was quoted as saying,

We believe there are very serious concerns about the practicality of the suggestion [to raise the goal to twenty-five percent], as well as political risks for the administration. First, the goal is highly unlikely to be met, creating a political embarrassment for the administration. At the same time, efforts undertaken to try to reach the goal could produce bad contracting strategies that would be costly to taxpayers.³³²

Labor Standards

Walsh-Healey Public Contractors³³³ No Longer Required to Be Either a Manufacturer or a Dealer

On 22 August 1997, the DOD, the GSA, and NASA issued a final rule which eliminates the “manufacturer” and “regular dealer” requirements,³³⁴ in conformity with new Department of Labor regulations. The interim rule, published on 20 December 1996,³³⁵ was adopted as a final rule without change, thereby eliminating one of the more mundane administrative burdens that contracting officers bear.

“Helper” Provisions Prove to Be of No Help

For the foreseeable future, you should continue to apply helper classifications only where there is “a separate and distinct class of worker that prevails in an area, the duties of which can be differentiated from the duties of journey-level workers.”³³⁶ In *Associated Builders and Contractors v. Herman*,³³⁷ the U.S. District Court for the District of Columbia upheld the Labor Department’s decision to indefinitely suspend the

325. 61 Fed. Reg. at 26,047.

326. For a more extensive analysis of the compelling interest, see the Department of Justice’s Appendix—*The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,042, 26,050 (1996).

327. 62 Fed. Reg. at 25,653.

328. *Id.*

329. H.R. 1824, 105th Cong. § 1 (1997).

330. *Small Business: Rep. Wynn Offers Bill to Increase Small Business Contracting Goal to 25 percent*, 67 FED. CONT. REP. 23 (BNA) (1997). Representative Albert Wynn (D-Md) noted that even though small businesses created 75 percent of all new jobs in 1996, they received only 20 percent of federal contract opportunities, while large businesses received 65 percent.

331. Stephen Barr, *Small Firms Want More U.S. Contracts*, WASH. POST, Aug. 6, 1997, at A17.

332. *Id.*

333. 41 U.S.C. §§ 35-45 (1994).

334. Federal Acquisition Circular 97-1, Item II—FASA and the Walsh-Healey Public Contracts Act (FAR Case 96-601); 62 Fed. Reg. 44,802 (1997).

335. 61 Fed. Reg. 67,409 (1996).

336. The suspended revised rules are at 29 C.F.R. § 5.2(n)(4). Helpers were defined as semi-skilled workers, as opposed to skilled journeymen mechanics, who work under the direction of, and assist, a journeyman.

revised Davis-Bacon Act “helper” rules. Those revised rules, which were originally published in 1982 but never implemented due to successive judicial and legislative challenges,³³⁸ would have allowed contractors to use more lower-paid workers on federal construction projects. The court held that while the Labor Department may have an obligation to determine the changes needed in the required rules, the Labor Department did not have an obligation to return to the status quo before the suspension. On 30 December 1996, the Labor Department issued the final rule, indefinitely postponing the changes.³³⁹

*New Executive Memorandum on Project
Labor Agreements*

In the face of considerable Congressional opposition to a proposed executive order that would encourage the use of project labor agreements, the administration agreed instead to issue an executive memorandum that will expire when President Clinton leaves office. Project labor agreements, negotiated at the beginning of large construction projects, are agreements between the owner or construction manager and the unions which represent all of the workers who will be employed. The agreements cover wages, working conditions, work rules, and dispute resolution procedures. The administration offered its compromise after the nomination of Alexis Hermann as Secretary of Labor was held up in the Senate. In addition, both the House and Senate introduced bills that would counteract the proposed order.³⁴⁰ The 5 June 1997 memorandum allows, but does not require, federal agencies to use project labor agreements on federal projects valued at more than \$5 million.

*Changes Clause, Rather Than Price Adjustment Clause,
Governs Service Contract Act Wage Revisions During a
Contract's Base Year*

In *Lockheed Support Systems v. United States*,³⁴¹ a case involving a Postal Service contract for automation support services, the Court of Federal Claims determined that contractors are entitled to recover indirect costs for base year modifications incorporating new Service Contract Act (SCA) wages. The court determined that base year modified wage determinations

do not fall within the “Fair Labor Standards Act and Service Contract Act—Price Adjustments Clause,” which limits compensation due to wage changes.³⁴²

The court disagreed with the Postal Service’s interpretation of the price adjustments clause. The court held that the clause is only applicable to the exercise of option years and the determinations made necessary by multi-year contracting. The court then found that the new wage provisions were governed by the contract’s changes clause³⁴³ and, therefore, were not subject to any special recovery limits.

Bonds and Sureties

Change in Bonds Review Responsibility

As of 1 October 1997, the Army Contract Appeals Division (CAD) will no longer review bonds and sureties. The past practice was to forward certain bonds and sureties to CAD for review. AFARS Part 28 will be amended to delete the requirement for CAD review. The new requirement is for local legal review.

Remedy of Quantum Meruit Available Against Surety

Amwest, as surety, contracted with AKM Associates, Inc. to provide the required bonds for an IDIQ with the Air Force Academy for roofing repairs. The contract was for a one-year period with options. The guaranteed work was for a minimum of \$200,000 to a maximum of \$9 million. As with any IDIQ contract, as the contracting officer places delivery orders, the value of the contract rises. During the first year of the contract, the contracting officer placed several delivery orders, and the value of the contract exceeded \$1,000,000. At the end of the year, the contracting officer exercised the option. Soon thereafter, the Academy experienced delivery problems with AKM. AKM also fell behind in its payments to its subcontractors. The Academy issued a cure notice and granted a time extension to aid AKM in completing the work. The Academy eventually terminated the contract for default, and the unpaid subcontractors filed suit against AKM and the surety.

337. No. Civ. A 96-1490, 1997 WL 525268 (D.D.C. July 23, 1997).

338. *Id.* at *1-4. The district court’s decision meticulously outlines the long, tortured history of these proposed helper rules. See 1996 Year in Review, *supra* note 9, at 58.

339. 61 Fed. Reg. at 40,366.

340. See OPEN COMPETITION ACT OF 1997, S. 606 and H.R. 1378 (1997).

341. 36 Fed. Cl. 424 (1996).

342. FAR, *supra* note 22, at 52.222-44. Where applicable, this clause precludes the contractor from recovering general and administrative costs (G&A), overhead, and profit.

343. *Id.* at 52.243-2 (Changes-Cost-Reimbursement).

Amwest argued that its liability was limited to \$100,000, the stated sum of the Miller Act payment bond. The subcontractors' argument was that the prime and the surety were liable for all unpaid material and labor supplied. The central question the district court decided was the quantum of the surety's liability.³⁴⁴

The court stated that the Miller Act³⁴⁵ protects subcontractors through the use of a payment bond. The Miller Act provides an alternative to the civilian remedy of a mechanics' lien that cannot be used against a federal construction project. The Miller Act requires payment bonds for any construction contract greater than \$100,000.³⁴⁶ The government bases the penal amounts of these bonds on the contract price.³⁴⁷ The government bases the amount of the IDIQ contract price on the guaranteed minimum, which was \$200,000 in this case. The Miller Act required the payment bond to be fifty percent (\$100,000). The court ruled that although the penal amount of the payment bond was \$100,000, the prime and surety's liability was not confined to that amount. This was due to the nature and amount of work being indefinite upon entering an IDIQ contract. The amount of liability for the surety and the prime increases as the delivery orders on the contract increase. This contract increased to an amount in excess of \$1,000,000; therefore, the liability of the surety increased to forty percent of the contract price.

CONTRACT PERFORMANCE

Contract Interpretation

Squeaky Contractor Gets No Grease (or Oil!)

In *American Construction Services, Inc.*,³⁴⁸ the Navy awarded a fixed-price construction contract to American Construction Services (ACS) for the demolition and removal of all facilities at an old tank farm. The contract required ACS to remove the old steel storage tanks and piping. The contract also required ACS to remove, to store safely, and to dispose properly of all residual fuel from the lines.³⁴⁹ The contract contained the following language concerning title to the materials being demolished and removed at the tank farm:

[E]xcept where specified in other sections, all materials and equipment removed and not reused, shall become the property of the Contractor and shall be removed from government property. Title to materials resulting from demolition, and materials and equipment to be removed, is vesting in the Contractor upon approval by the Contracting Officer of the Contractor's demolition and removal procedures, and authorization by the Contracting Officer to begin demolition.³⁵⁰

ACS discovered that the storage tanks had not been pumped out! They contained almost 100,000 gallons of valuable fuel oil. ACS and the Navy discussed the oversight. The Navy informed the contractor that the government was in the process of pumping the fuel oil out of the tanks and reminded ACS that it was the contractor's responsibility to remove and to dispose of any residual product from the lines. Approximately six months later, ACS filed a claim with the contracting officer for \$126,000, which constitutes the value of the fuel oil that the government pumped out of the tanks. ACS based its claim on the language in the clause quoted above. It interpreted the clause to say that, once the contracting officer issued the order to proceed, all materials removed from the facility that were not expressly reserved to the government became the property of the contractor. ACS also claimed that it took the value of the fuel oil into consideration when it computed its bid price.

The board found ACS's interpretation of the pertinent contract provisions unreasonable. It pointed out that ACS's pre-dispute, contemporaneous conduct was inconsistent with its claimed interpretation. ACS was surprised to find the oil still in the tanks. The pre-dispute correspondence showed that ACS's main concern was that the delay in emptying the tanks would not interfere with its cleaning efforts. The board granted the Navy's summary judgment motion.

How Many Contracting Officers Does It Take to Change a Light Bulb?

In *Johnson Controls World Services, Inc.*,³⁵¹ the Navy awarded a Base Operating Services Contract (BOSC) at a sub-

344. United States *ex rel.* B & M Roofing of Colorado, Inc. v. AKM Assoc. Inc., 961 F. Supp. 1441 (D. Colo. 1997).

345. 40 U.S.C. §§ 270a-270f (1994).

346. TLC Serv., Inc. B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.

347. If the contract price is not more than \$1 million, the penal sum must be 50 percent of the contract price; if it is more than \$1 million but not more than \$5 million, the bond must equal 40 percent of the contract price; if it is more than \$5 million, the bond must equal \$2.5 million.

348. ASBCA No.49,180, 97-2 BCA ¶ 28,984.

349. *Id.* at 144,336.

350. *Id.*

marine base. It was a firm-fixed-price, lump-sum contract. The award price for the phase-in and base periods was \$35,241,241.00. The contract also provided for special orders called "Silver Bullet" work. This was a procedure for ordering discretionary work that could not be projected in advance. The contract contained a discrete number of "bullets" that were priced at \$250.00 per work order.

The Navy had a BOSC in place at the base since 1977. When the Navy issued the RFP for this contract in 1991, the RFP had no specific reference to the requirement for replacing light bulbs (described as "relamping"). The contracting officer had been considering where in the specifications to include the "relamping" requirement. During the course of drafting the solicitation, the Navy had inadvertently left the requirement out completely. While preparing its proposal, Johnson realized that the relamping requirement was absent. During the appeal, Johnson claimed it simply believed the Navy had a reason for the omission, and it never sought clarification of the issue.

It was only after award that Johnson questioned the contracting officer about how the Navy planned to order relamping. The contracting specialist was "shocked" to learn that the specifications did not address the requirement. After considering the problem, the Navy determined that the responsibility for changing light bulbs should reasonably be considered part of the "routine recurring maintenance." Johnson disagreed and claimed the work would have to be ordered on a discretionary basis through the "Silver Bullet" process. The contracting officer informed Johnson of the Navy's intent to enforce its interpretation. Johnson notified the contracting officer that it considered the Navy's decision as a change to the work and was performing under protest. A claim for \$34,003.00, which covered five months of relamping, soon followed. On appeal, the board concluded that even if Johnson's interpretation was reasonable, the missing requirement created a "patent ambiguity" and obligated Johnson to seek clarification.

Contract Changes

Formal Changes

Safety-Kleen Goes "Green" . . . But Not the Army! In *Safety-Kleen Corp.*,³⁵² the Army issued a solicitation for parts cleaner recycling services. United States Army Forces Command (FORSCOM) installations require these services for degreasing, cleaning, and maintaining equipment. The solicitation primarily anticipated the offering of hazardous solvent-based cleaning systems. However, the specifications allowed for the

submission of an "equivalent application" that could meet the required benchmark cleaning performance. One of the competitors, ChemFree, Inc., offered an equivalent application which used non-hazardous solvents for most of the cleaning requirements. ChemFree had subcontractors in place to perform those functions which still required traditional solvent-based technology. The Army certified ChemFree's submission as an equivalent application and awarded it the contract.

The contracting office received several complaints that ChemFree's product was an inadequate replacement process for many of the requirements. For example, ChemFree's product was not approved for use in aviation maintenance procedures. As a result, the contracting officer issued a change order, directing ChemFree to use the traditional solvent technology for aviation maintenance requirements. This change required ChemFree to replace eighty-four (out of the 1050 provided to FORSCOM facilities) of its bioremediation technology cleaners with solvent-based technology circulating parts cleaners.

Safety-Kleen protested, arguing that the change was out-of-scope. It reasoned that since ChemFree's original proposal did not offer to provide *any* solvent-based *circulating parts* cleaners, its low bid price was not based on having to provide that technology. Therefore, the change altered the essential nature of the contract and would have significantly affected the competition.

The GAO denied the protest, pointing out that "the actual change here involves substituting a small quantity of one type of equipment for another type of equipment, and slightly expanding the role of the in-place subcontractors."³⁵³ The GAO concluded that the change was minimal when viewed in the context of the overall contract.

Three Strikes and You're Out, Master Security! In *Master Security, Inc.*,³⁵⁴ the GSA awarded a contract to Knight Protective Services (KPS) for armed and unarmed security guard services at GSA facilities located in Baltimore City and Baltimore County, Maryland. The contract was awarded on 19 June 1995, just two months after the catastrophic bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Not surprisingly, soon after contract award, the demand for security services increased greatly.

The protest concerned three modifications issued by the GSA. The first modification occurred during the base contract year and added sixteen new Baltimore City/County sites to the nine original contract locations. The second modification

351. ASBCA No. 46,692, 97-1 BCA ¶ 28,629.

352. B-274176.2, Nov. 25, 1996, 96-2 CPD ¶ 200.

353. *Id.* at 4.

354. B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21.

occurred shortly before the beginning of the first option year. It required basic security services at five contract sites *outside* of the solicitation's identified Baltimore City/County geographical area. The third modification involved three delivery orders which required the performance of "substantially different" security guard services at the Health Care Financing Administration facility in Woodlawn, Maryland.³⁵⁵

Master Security Inc. (MSI) argued that, by almost tripling the number of work sites described in the original solicitation, the first modification was beyond the scope of the contract. The GAO denied the protest of the sixteen additional Baltimore City/County contract sites, explaining that the very language of the contract should have put potential offerors on notice that this type of change was a possibility. The contract was for a five-year period and clearly established Baltimore County and the City of Baltimore as the geographic scope of the requirement. The expressed time and space of the solicitation was sufficiently broad to accommodate the increased service requirement. Furthermore, the RFP informed potential offerors that the estimated sites and work hours enumerated in the RFP were for evaluation purposes and represented the government's best estimates of the total quantity of service required.³⁵⁶ Finally, the statement of work reserved to the agency the unilateral right, within the general scope of the contract, to order services in excess of those stated estimates.³⁵⁷ Based on the plain language of the solicitation, offerors should have reasonably anticipated the kind of modification represented by the first change order.³⁵⁸

The GAO also upheld the second modification as an in-scope change. The GAO recognized that the GSA had properly competed the additional requirements using the simplified acquisition procedures available in FAR Part 13. KPS was only one of three vendors the GSA had solicited for the contracts, and, "[a]lthough the orders were issued as modifications to Knight's existing contract, the record shows that the agency

properly competed the requirements and properly selected Knight for award in accordance with the FAR small purchase procedures."³⁵⁹

The GAO declined to set aside the third modification. The GSA properly characterized the three protested delivery orders to KPS as critical "interim purchases"³⁶⁰ designed to meet a short term need, pending the agency's proceeding with a full and open competition. Completing the "hat trick"³⁶¹ for the agency, the GAO concluded that the record supported the GSA's claim that they were only awaiting a DOL wage determination before proceeding with a fully competitive procurement for the Woodlawn site.³⁶² Therefore, the use of small purchase procedures as an interim means to meet the agency's critical requirement was proper.³⁶³

Constructive Changes

A Tale of Three Buses. In *Green's Multi-Services, Inc.*,³⁶⁴ Green contracted to provide shuttle bus and van transportation services between various facilities of the Department of Energy (DOE) in the Washington, D.C. area. The specifications required that the vehicles hold at least thirty passengers each. Several days after award, Green conducted a live demonstration test. However, instead of providing three thirty-passenger buses,³⁶⁵ Green used three forty-seven-passenger buses. Seventeen months into performance, Green filed a claim for the costs associated with providing forty-seven-passenger buses in place of thirty-passenger buses.

Green claimed that, between award and the live demonstration, the DOE amended the contract to increase the bus capacity requirement from thirty-passenger to forty-seven-passenger for scheduled service. The "verbal constructive change order"³⁶⁶ was allegedly issued during the course of a telephone conference call initiated by the DOE. Green contended that its presi-

355. *Id.* at 6.

356. *Id.* This information appeared in both a disclaimer which introduced the statement of work and the published minutes of a pre-bid conference.

357. *Id.* at 3.

358. *Id.* at 2, *citing* Marine Logistics Corp., B-218150, May 30, 1985, 85-1 CPD ¶ 614.

359. *Id.* at 5.

360. *Id.* at 6.

361. "Hat trick" is an ice hockey term which denotes three goals by one player in a single game.

362. *Master Security, Inc.*, 97-1 CPD ¶ 21 at 6.

363. *Id.* at 6, *citing* Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 92-2 CPD ¶ 259.

364. EBCA No. C-9611207, 97-1 BCA ¶ 28,649.

365. *Id.* at 2. The contract required a minimum of three buses for the regular service.

366. *Id.*

dent was informed by the contracting officer that the DOE wanted forty-seven-passenger vans. Green further contended that when it protested the change, the DOE threatened to terminate the contract for default. Fearful of the consequences of a default termination, Green complied.

The board reiterated the requirements for proving a constructive change. It explained that appellant must show that: (1) a change occurred, (2) the change was not voluntarily done but was as a result of government direction, and (3) the contractor relied on the direction and incurred extra costs.³⁶⁷ The board concluded that Green failed to sustain its burden of proof as to any of the required elements. In the first place, Green never proved it actually planned to use thirty-passenger buses to perform the contract. The contract required the buses to hold thirty passengers at a *minimum*. The record showed that Green's had no thirty-passenger buses in its fleet and that it never ordered any after being awarded the contract!³⁶⁸

Green also failed to establish that the alleged change resulted from the DOE's direction. Green never objected to the alleged change. As for the third element of the constructive change analysis, an increase in cost or time of performance, if Green's always planned to use forty-seven-passenger buses, the use of such buses could not have resulted in extra cost. In dismissing the protest the board stated:

Having found that the three elements required for a constructive change are not present, Appellant's contention that Respondent should have recognized that its bid was based on the use of 30-passenger buses and not 47-passenger buses is immaterial. While the government has a duty of fair-dealing towards a contractor, the premise underlying Appellant's argument—that the government is somehow a guarantor against any adverse consequences stemming from a contractor's business judgment—is erroneous.³⁶⁹

*When Is a Change Not a Change? Graphicdata, LLC. v. United States*³⁷⁰ involved a contract for the printing of patents for the Patent and Trademark Office (PTO). Graphicdata, LLC had performed the contract for the Government Printing Office (GPO) for over a decade. In this instance, however, News Printing Company, Inc. was the low bidder, with a bid of \$2,173,605.00. Since 1995, the PTO had been using 8mm magnetic tapes to provide the patents to the printing contractor. The GPO supplied the tapes as GFP to the performing contractor. These tapes were prepared from electronic files for the PTO under a different contract.

Soon after award, the GPO and News Printing discussed the possibility that the electronic files themselves might be useful to News Printing in performing the contract. The contracting officer modified the contract by adding the electronic file to the list of GFP. Before News Printing signed and/or accepted the modification, Graphicdata filed for a temporary restraining order and a motion for preliminary injunction, seeking to enjoin the GPO from acquiring printing services from any vendor other than Graphicdata. On that same day, News Printing filed a motion to intervene, and the motion was granted.

The Court of Federal Claims heard conflicting expert testimony concerning whether providing the electronic file would allow a significant advantage to the performing contractor. Graphicdata claimed that had the electronic file been provided as GFP in the original solicitation, Graphicdata would have "lowered its bid significantly."³⁷¹ The court denied Graphicdata's application for a TRO and found that Graphicdata had not established a substantial likelihood of success on the merits.³⁷² Subsequently, the agency and News Printing filed a joint motion for summary judgment. They argued that Graphicdata's cause of action was moot since News Printing had never signed the modification which included the electronic file as GFP, never accepted the modification, did not use the electronic file to print patents, and returned the electronic file to the GPO.³⁷³

Graphicdata asked the court to view the contract as if it had been modified and to determine whether the hypothetical modification prejudices Graphicdata. The court refused to extend its jurisdiction that far, holding that "the court cannot rewrite a

367. *Id.* at 5, *citing* Dan G. Trawick, III, ASBCA No. 36260, 90-3 BCA ¶ 23,222.

368. *Id.* at 5. Two months before the alleged telephone conference occurred, Green advised the DOE that Airport Connection would be the vendor supplying them the buses for contract performance. The record showed that Airport Connection had only 47-passenger buses in its inventory; there were no 30-passenger buses available. *Id.*

369. *Id.* at 3. Green claimed that when the agency saw the hourly rate it was bidding for the buses, it was on notice that it intended to use 30-passenger buses, since the rate for 47-passenger buses was routinely 26 percent higher. Even if that had been the case, the Government had already required Appellant to verify its bid twice before award.

370. 37 Fed. Cl. 771 (1997).

371. *Id.* at 775.

372. *Id.* at 778.

373. *Id.* at 782.

solicitation to include a modification not agreed to by the parties to the original contract.”³⁷⁴ The court determined that since News Printing never made use of the electronic files, the attempted modification did not change how News Printing performed the contract. Therefore, regardless of how the provision of the electronic file might have made for a better original procurement, the “plaintiff had a full and fair opportunity to compete for the same contract that News Printing is currently performing.”³⁷⁵ In granting the joint motion for summary judgment,³⁷⁶ the court said: “[t]he court endorses a bright-line test rule that a modification must be effective, i.e., signed by both the awardee and the contracting officer, before a cause of action lies for breach of the duty of fair dealing by materially modifying a contract after award.”³⁷⁷

Value Engineering Change Proposals (VECPs)

*A Claim Too Far*³⁷⁸

Last year, it appeared that M. Bianchi of California had triumphed in its long running dispute with the Air Force concerning two disputed VECPs. The VECPs suggested improvements in the packing and shipping of women’s pantsuit uniform coats.³⁷⁹ Bianchi convinced the Federal Circuit³⁸⁰ and, on

remand, the board³⁸¹ that the Air Force “constructively accepted” Bianchi’s VECPs. Bianchi was awarded royalties for all work performed during the contract’s designated three-year VECP sharing period, beginning with the first delivery of items which incorporated the VECP.³⁸²

Dissatisfied with the above results, Bianchi filed another appeal and claimed to have newly-discovered, compelling evidence which would prove that Bianchi’s original contract also qualified for an alternative royalty period authorized by Defense Acquisition Circular (DAC) 76-26.³⁸³ The ASBCA denied the claim. The board pointed out that Bianchi’s contract was awarded on 7 November 1979, and the DAC was not effective until 15 December 1980. The board applied the normal rule that new regulations are to be applied prospectively unless there is a clear mandate that the change should be retroactive. Stay tuned next year for the continuing saga of Bianchi and its expanding pants suits.

*Dunn’s Bridge Was Never Done!*³⁸⁴

NASA awarded Dunn Construction Co., Inc. a contract to construct a test stand for the Advanced Solid Rocket Motor (ASRM) at the Stennis Space Center. The contract required a ten ton hoist bridge crane for moving heavy support equipment around the test stand. The contract incorporated by reference

374. *Id.*

375. *Id.* at 783.

376. *Id.* However, the court also warned:

The court does not rule out the possibility that, in the future, a case may arise wherein justice requires creating an exception to the actual modification requirement. Given the fact that the proposal and subsequent rejection of the modification did not prejudice plaintiff, the court does not believe the convenient timing both of the proposed modification and NPC’s rejection of it justifies fashioning an exception that blurs the lines between agency discretion and judicial review.

Id.

377. *Id.* at 784.

378. Appeal of M. Bianchi of California, ASBCA No. 37029, 97-1 BCA ¶ 28,767.

379. *See 1996 Year in Review, supra* note 9, at 109.

380. *M. Bianchi of California v. Perry*, 31 F.3d 1163 (Fed. Cir. 1994).

381. *M. Bianchi of California*, ASBCA Nos. 37029, 37071, 96-2 BCA ¶ 28,410.

382. *Id.* at 141,862.

383. The present rule at FAR 48.001 defines “Sharing Period,” as:

the period beginning with acceptance of the first unit incorporating the VECP and ending at the later of: (a) 3 years after the first unit affected by the VECP is accepted or, (b) the last scheduled delivery date of an item affected by the VECP under the instant contract delivery schedule in effect at the time the VECP is accepted.

FAR, *supra* note 22, at 48.001. FAR 48.102(g) expands the coverage in the case of “low-rate-initial-production” contracts. In those cases, the future sharing shall be on scheduled deliveries equal in number to the quantity required over the highest 36 consecutive months of planned production, based on planning or production documentation at the time the VECP is accepted. *Id.* at 48.102(g).

384. *Dunn Constr. Co., Inc.*, ASBCA No. 48145, 97-2 BCA ¶ 29,103.

the “Value Engineering–Construction” clause.³⁸⁵ Dunn submitted a VECP for a revised bridge crane. The NASA Configuration Control Board and NASA’s system safety engineer reviewed and approved the VECP. The contracting officer asked Dunn to submit a price proposal for the VECP, and Dunn responded with shop drawings and a point-by-point review of the proposed crane. Rather than proceed with the VECP, however, NASA unilaterally changed the contract by completely deleting the requirement for the bridge crane. When Dunn provided NASA with its price proposal, which reflected the cost reduction due to the reduced requirements, it adjusted the figure to capture its share of the VECP contract savings. It alleged that the price reduction was based on the estimated cost of the revised bridge crane as proposed in its VECP rather than on its original bridge crane estimate. Dunn’s price proposal also included a credit for the purported instant contract savings associated with the VECP.

NASA unilaterally modified the contract by reducing the price by an amount which failed to account for the VECP benefits. This modification included a reduction of \$231,082 for deleting the procurement and installation of the bridge crane. Dunn submitted a claim for \$74,598.75 in instant contract savings associated with the VECP. The claim was denied by the contracting officer’s final decision, and Dunn appealed. The board denied the appeal stating:

[I]t is undisputed that the bridge crane was never delivered and installed on the project. The Value Engineering Clause in the contract provided that the contractor could share in any “instant contract savings realized from accepted VECPs.” Thus, not only must the VECP be accepted, but the instant contract savings must also be realized [I]t does not matter whether the VECP was accepted, rejected, or not acted upon. The bridge crane was deleted from the contract before it was

delivered and installed. Therefore, no instant contract savings were realized.

Pricing of Adjustments

In *Satellite Electric Co. v. Dalton*,³⁸⁶ the Navy awarded Satellite a contract to set up a power supply system.³⁸⁷ The Navy required Satellite to stop performance twice during the performance period of the contract. The stoppage was due to the Navy’s inability to provide two items that the contract required.³⁸⁸ The suspension periods were 82 days and 146 days respectively, and the Navy required Satellite to remain on “standby”³⁸⁹ during the suspension periods. During those periods, Satellite bid on new contracts,³⁹⁰ but it obtained only two contracts.

At trial, the board denied the contractor’s claim for *Eichleay* damages. It held that Satellite proved the first two prongs of the *Eichleay* formula: (1) a government-imposed delay; and (2) the contractor was on standby during the delay.³⁹¹ The board, however, found that the government carried its burden of rebutting the prima facie case by showing that “the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay.”³⁹²

On appeal, Satellite argued that the board applied the wrong standard. According to Satellite, the language in *Mech-Con Corp. v. West*³⁹³ that the government was required to present evidence or argument “showing that the contractor was able to take on other work during the delay” required the government either to establish that the contractor actually took on replacement work or, at least, to *prove* rather than merely to *show* its ability to do so. Satellite further argued that the board erred in not requiring the government to establish that the additional work Satellite sought was intended to replace the work that was suspended.

385. FAR, *supra* note 22, at 52.248-3.

386. 105 F.3d 1418 (Fed. Cir. 1997).

387. *Id.* at 1420.

388. *Id.* The two items were batteries and an induction coil.

389. *Id.* Standby status means that the firm must be available to resume work promptly upon the government’s instruction. Note that both suspension periods occurred after Satellite had completed approximately 97 percent of the contract.

390. *Id.* Satellite bid on approximately 30 projects during the first period, and on 19 during the second suspension period.

391. Appeal of Satellite Elec. Co., ASBCA No. 46935, 95-2 BCA ¶ 27,883, at 139,084-85 (citing *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688).

392. *Id.* The Board decided that the evidence “does not show an inability to take on additional work for any reason attributable to the government.” *Id.* Moreover, the Board stated “[t]here must be impairment of a contractor’s ability to take on other work that is attributable to the government-caused delay to be reimbursed for the period of delay under the *Eichleay* formula.” *Id.*

393. 61 F.3d 883 (Fed. Cir. 1995).

The court did not accept Satellite's arguments. It declined to impose the added burdens upon the Navy that Satellite proposed. In affirming the board's decision, the court held that:

Requiring the government to prove the actual acquisition of additional work would be inconsistent with the assumption on which the *Eichleay* formula rests: that where the government delays performance and requires the contractor to stand by indefinitely, the contractor is unable to develop other work against which the unabsorbed home office overhead otherwise chargeable against the suspended contract may be charged. If the government shows that the contractor was able to handle other work—whether or not it actually did so, which may have depended on circumstances other than the delay—it refutes the underlying fact on which *Eichleay* damages are based.³⁹⁴

Inspection, Acceptance, and Warranties

Direct Shipment from Subcontractor to Government Does Not Create Implied-in-Fact Contract

In *National Micrographics Systems, Inc. v. United States*,³⁹⁵ the Court of Federal Claims addressed a novel claim in the never ending saga by subcontractors to obtain legal remedies from the government rather than the prime contractor. In this instance, the subcontractor sued for breach of implied-in-fact contract and for unconstitutional taking after the government refused to pay for or return a computer system delivered directly to the agency pursuant to their subcontract with the prime contractor. After first finding the claim cognizable under the subject matter jurisdiction of the Tucker Act,³⁹⁶ the court addressed the delivery ticket which accompanied the computer

system. This standard form bore the subcontractor's logo, a "received by" signature line which was signed by a government employee, and language that purported to create a security interest in the property delivered.³⁹⁷ The Court of Federal Claims held that no implied-in-fact contract was created with the sub-contractor through mere delivery, in spite of the language on the delivery ticket.

Construction Contractor Cannot Cement Its Rights to Specifications

In a contract for a foot bridge in the Six Rivers National Forest, California, the Forest Service waived the mix design requirements for the concrete footings.³⁹⁸ Subsequently, the government discovered evidence that the pre-mixed concrete used became wet while stored at the site. The Forest Service neither tested the concrete strength of the footings, nor did they require the contractor to remove and replace them. They merely informed the contractor that, to be accepted, all subsequent concrete pourings must comply with the original contractual standard. The contractor argued that approval of the pre-mixed concrete was not just for the footings, but for all concrete to be used in the construction.³⁹⁹ The board rejected the contractor's argument, noting that the Forest Service received no consideration for the initial approval of the nonconforming pre-mixed concrete. Moreover, the board ruled out detrimental reliance, noting that the contractor ordered the pre-mixed concrete two months in advance of the government's approval.⁴⁰⁰

Pavement Contractor Road Weary After Unsuccessful Action to Obtain Reimbursement for Warranty Work

At issue in *Valco Construction Co.*⁴⁰¹ was a pavement contract at Luke Air Force Base, Arizona. The board held that the government properly ordered a contractor to perform warranty work on pavement with substantial defects because the contrac-

394. *Id.* at 1422-23. The court noted:

To require the government to prove that the contractor actually obtained additional work would be inconsistent with two elements of the *Mech-Con* standard that this requirement is intended to implement, namely, that the "showing" of the government may be made by "rebuttal evidence or argument" and that the government need show only that the contractor was "able" to take on other work. Moreover, in this court's original formulation of the *Eichleay* requirements, under which the contractor was required to show all three elements, the third element was phrased in terms of the contractor's inability to take on additional work, not in terms of whether it had done so.

Id.

395. 38 Fed. Cl. 46 (1997).

396. 28 U.S.C. § 1491 (1994).

397. *National Micrographics*, 38 Fed. Cl. at 50.

398. *Tri-West Contractors, Inc.*, AGBCA No. 95-200-1, 97-1 BCA ¶ 28,662.

399. *Id.* at 143,172.

400. *Id.* at 143,173. The appellant's president admitted that he was aware that if the mix design, or certifications in lieu thereof, were not approved, "his goose would be cooked." *Id.*

tor had warranted that its work conformed to contract requirements and would be free of any defect in material or workmanship for a period of one year.⁴⁰² Although the Air Force took early possession of completed sections of the work, the government had the right to do so without such possession being deemed acceptance of the completed work, let alone a waiver of its warranty rights.⁴⁰³ Moreover, the board noted that whether the government provided a punch list of work items remaining to be performed or corrected “did not relieve Valco of its responsibility of complying with the terms of the contract.”⁴⁰⁴

Termination for Default

Federal Circuit “REACTs” to Termination Decision

In *PLB Grain Storage Corporation v. Glickman*,⁴⁰⁵ the Federal Circuit addressed a contracting officer’s decision to terminate a contract for default. In the case, PLB Grain Storage Corporation (PLB) entered into a uniform grain storage agreement (UGSA) and an extended grain storage agreement (EGSA) with the Commodity Credit Corporation (CCC). The agreement required PLB to have a facility available to store at least 13.5 million bushels of CCC grain for \$10,020.78 per day.⁴⁰⁶

In the early 1980s, a number of state and federal agencies inspected PLB’s facilities. The inspections showed that the quality and quantity of grain stored at PLB facilities was deficient. On 13 August 1984, the CCC ceased all payments to PLB under the UGSA and EGSA and removed PLB from CCC’s list of approved warehouses. On 14 December 1984, CCC terminated PLB for default.⁴⁰⁷ PLB filed numerous claims

and challenged the propriety of the termination at the Agriculture Board of Contract Appeals (AGBCA). The AGBCA upheld the government’s termination for default, and PLB appealed the decision to Court of Appeals for the Federal Circuit.

PLB argued that the CCC’s termination for default was improper because government officials, known as the “REACT committee,” (not the contracting officer) allegedly made the decision to terminate the contract for default. PLB contended that such an arrangement undermines the contracting officer’s exercise of independent, personal judgment on the termination decision. The court noted that there was “substantial evidence” to support the conclusion that the contracting officer did make the decision to terminate the contract for default. Even though the REACT committee instructed the contracting officer to terminate the contract for default, the contracting officer reviewed, agreed with, and made revisions to the termination order. Accordingly, the court held that the contracting officer exercised independent, personal judgment.⁴⁰⁸

Chemical Suit Maker Burned Badly in T4D

In *Amertex Enterprises, Ltd v. United States*,⁴⁰⁹ Amertex Enterprises, Ltd. (Amertex) entered into a contract for the production of chemical suits. The contract specified the production of 2,415,885 chemical suits. In describing the procurement, the Court of Federal Claims said, “From its inception, this procurement was plagued by poor decisions, mistakes, and miscommunication that delayed and disrupted Amertex’s performance of its obligations.”⁴¹⁰

On 7 December 1988, the parties met to discuss Amertex’s financial condition. At the meeting, Amertex submitted a cer-

401. Valco Constr. Co., ASBCA Nos. 47909, 48313, 97-1 BCA ¶ 28,743.

402. *Id.* at 143,168. The work was warranted under FAR 52.246-21(b).

403. FAR, *supra* note 22, 52.236-11.

404. *Valco Constr. Co.*, 97-1 BCA ¶ 28,743, at 143,469.

405. No. 95-1169, 1997 WL 242179 (Fed. Cir. May 12, 1997).

406. *Id.* The agreement ran from May 1980 until December 1986. The contract did not condition CCC’s obligation to pay PLB upon actual storage of the grain. The contract did, however, obligate PLB to ensure the quantity and quality of any grain that was stored.

407. *Id.* The CCC provided PLB a cure notice. After PLB failed to cure the deficiencies outlined in the cure notice, CCC terminated the contract for default. Moreover, the contracting officer determined that PLB owed the government approximately \$3.6 million in damages, which reflected the balance between the value of the storage and the money owed to PLB as a result of CCC’s decision to withhold payments to PLB.

408. *Id.* In a vacuum, the decision in this case does not add much to the established law in the area. However, in light of the fact that the Court of Appeals for the Federal Circuit will likely hear *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1995), a multi-billion dollar case that turned on a similar issue, it is instructive to see how the court handled the issue.

409. No. 96-5070, 1997 WL 73789 (Fed. Cir. Feb. 24, 1997).

410. *Id.* During the performance period of the contract, the government issued 42 modifications and eight amendments to the contract, resulting in over 100 changes to the contract specifications.

tified claim in the amount of \$33 million for alleged government-caused delay. Amertex also outlined its financial position. It stated that it had a current negative cash position of \$2.8 million, and it had a cash requirement of \$19.2 million beyond the funds in the contract to complete the work on the contract.

On 12 December 1988, the government issued Amertex a cure notice, stating that the company did not possess adequate financial resources to complete the contract. On 6 January 1989, the contracting officer terminated the contract for default. The basis for the termination was Amertex's failure to make progress so as to endanger performance. The Court of Federal Claims, citing *Hannon Electric Co. v. United States*,⁴¹¹ noted that the government bears the burden of proving that Amertex's conduct or condition actually endangers performance. Absolute impossibility of performance is not required before the government may declare a contract in default. Instead, the essence of the test is the "reasonable likelihood" that the contractor could perform the entire contract within the time remaining. According to the Court of Federal Claims, the same principle applies to funding.

In applying the reasonable likelihood test to the facts in the case, the Court of Federal Claims found that the government met its burden and was justified in declaring Amertex in default. Amertex had a \$19 million shortfall which grew worse with each passing month.

At the Federal Circuit, Amertex argued that the Court of Federal Claims' factual findings were in error.⁴¹² Amertex failed to persuade the Federal Circuit. The Federal Circuit held that, based on the underlying facts, the Court of Federal Claims reached the correct conclusion.

Air Force in "Hot Water" in Piping Contract

The Air Force entered into a contract with L&H Construction Co. to replace 5000 feet of an underground water heating piping system at McGuire Air Force Base, New Jersey.⁴¹³ Under the contract, a government engineer was responsible for the development of the specifications in the contract. Unfortu-

nately, he had no experience in heating system design.⁴¹⁴ Likewise, the contracting officer had no experience.⁴¹⁵

After contract award, the construction project never got off the ground. There were various delays that led to the contract being terminated for default. The critical delays involved the heating pipe submittal.⁴¹⁶ In preparing its submittals for the contract, U.S. Polycon, L&H's vendor for all prefabricated pipes under the contract, discovered certain ambiguities in the government's specifications and drawings. The board specifically found, in a separate opinion by Administrative Judge Kienlen, that in telling Polycon to go ahead with its pipe submittal, the government misled L&H and Polycon into the understanding that the pipe submittal would be acceptable. The government waited more than seventy days to reject the submittal.⁴¹⁷ In resolving this issue in favor of L&H, the board noted that when a contractor relies upon and acts upon misleading and evasive government conduct, the government is ultimately responsible for any delay that results.

The terminating contracting officer (TCO) at Headquarters, Military Airlift Command, Scott Air Force Base, Illinois ultimately made the decision to terminate the contract. The TCO based his decision on a formal recommendation made by the engineers at McGuire AFB. The recommendation was erroneous and did not disclose the fact that ambiguities existed with the government's drawings and specifications and that the government instructed Polycon to proceed notwithstanding the ambiguities.

The board held that a decision to terminate a contract for default based on materially erroneous information as to the contractor's culpability for delay are not reasonable. According to the board, to hold otherwise would encourage deception. The board converted the termination for default into a termination for convenience.

Rare Summary Judgment Against German Contractor

In *Hubsch Industrieanlagen Spezialbau, GmbH v. United States*,⁴¹⁸ Hubsch Industrieanlagen Spezialbau, GmbH (Hubsch) entered into a contract with the Army to construct a two-story medical and dental clinic facility at Rhein Main Air Force Base

411. 31 Fed. Cl. 135, 143 (1994), *aff'd*, 52 F.3d 343 (Fed. Cir. 1995).

412. *Amertex*, 1997 WL 73789, at *3.

413. L&H Constr. Co., Inc., ASBCA No. 43833, 97-1 BCA ¶ 143,546.

414. *Id.* The engineer prepared drawings for the new system based upon an old design from the 1960s.

415. *Id.* This contract was among her first group of contracts as a contracting officer at McGuire Air Force Base.

416. *L&H Constr.*, 97-1 BCA ¶ 143,546, 143,557. Nothing of consequence could be done until the pipe submittal was approved.

417. *Id.* Judge Kienlen noted that L&H could have sought a new subcontractor if the government had told L&H on 3 April 1991 (as opposed to 13 June 1991) that its submittal was unsatisfactory. Judge Kienlen amplified this position by stating that the government's misleading and evasive responses to Polycon and L&H caused the intervening delay.

in Frankfurt, Germany, and to demolish the existing clinic building.⁴¹⁹ Hubsch fell behind schedule on the contract. The Army notified Hubsch seven times that its progress and performance were unsatisfactory. On 16 June 1993, the Army advised Hubsch that it was considering terminating the contract for default due to Hubsch's inability to complete the contract in light of its admitted financial condition. The Army finally terminated the contract for default on 9 July 1993. In the contracting officer's final decision, he noted that the contract completion date was 2 January 1993 and that approximately ninety-two percent of the contract was complete at the time of the termination. The contracting officer also found that Hubsch was only accomplishing 0.2 percent of the remaining work per month, and that there was no significant progress over the last five months. At the time of termination, Hubsch's financial condition prevented it from paying its subcontractors, and Hubsch would not be able to complete the contract for another twelve months. The Court of Federal Claims granted summary judgment in favor of the Army.⁴²⁰

The Federal Circuit affirmed the trial court's decision. In doing so, the Federal Circuit noted that it was beyond dispute that Hubsch neither had been nor was proceeding diligently toward the completion date. Moreover, the Federal Circuit specifically noted that Hubsch affirmatively asserted that it could not complete the project without additional time and funds. According to the court, such anticipatory repudiation alone provides sufficient basis for the termination of the contract.⁴²¹

Judge Newman dissented on two grounds. First, he stated that there are too many material facts in dispute.⁴²² Second, he

contended that the theory of anticipatory repudiation applied by the Court of Federal Claims was improper. According to Judge Newman, a contractor's assertion that in order to complete its contractual obligations it needs more money due to delays and inadequacies in the specifications is not by itself an anticipatory repudiation of the contract. As such, it does not warrant the termination of the contract for default. Citing the same authority as the majority,⁴²³ Judge Newman highlighted that anticipatory repudiation requires that a contractor's communication be a distinct and unequivocal absolute refusal to perform the contract. A mere assertion that the party will be unable, or will refuse, to perform its contract does not suffice.⁴²⁴

Later Fraud Conviction Establishes Basis for Termination

On 6 June 1987, the Navy contracted with Ricmar Engineering, Inc. for 3399 arresting hookpoints for the F-14.⁴²⁵ On 12 March 1992, the contracting officer terminated the contract for default, because Ricmar abandoned contract performance, failed to deliver 812 arresting hookpoints, failed to respond to the Navy's cure notice, and failed to make progress toward completing the contract. Ricmar appealed to the board.

The Navy filed a summary judgment motion, contending that since Ricmar and its president and sole owner were convicted of violating 18 U.S.C. § 286, Conspiracy to Defraud the Government with Respect to Claims, Ricmar had breached the contract.⁴²⁶

418. No. 96-5119, 1997 WL 337557 (Fed. Cir. June 20, 1997).

419. *Id.* at *1. The contract consisted of three phases: building construction, site work, and demolition.

420. *Id.* The court concluded that the termination for default was proper. It noted that Hubsch argued that the government had waived the delivery schedule. However, the court noted that even if the Army had waived the delivery schedule that was specified in the contract, it re-established the delivery schedule in a subsequent cure notice. The court also ruled that the termination was proper because of Hubsch's failure to provide a schedule or evidence of financial ability to perform the contract, as required by a cure notice that it received from the contracting officer. *Id.* The court also held that the termination was proper because Hubsch had expressly notified the Army that it was unable to perform unless it received additional payments. *Id.* Finally, the court found that the contracting officer did not abuse his discretion by failing to consider all of the factors contained at FAR 49.402.3. *Id.*

421. *Id.* See *United States v. DeKonty Corp.*, 922 F.2d 826, 828 (Fed. Cir. 1991). In that case, the court stated that when one party absolutely refuses to perform its contract, and distinctly and unqualifiedly communicates that refusal to the other party, the other party can treat the refusal as a breach.

422. *Id.* Judge Newman noted that the parties do not agree on how much of the contract was actually completed. Moreover, he contends that it was not established on summary judgment that Hubsch would perform the remaining portion of the contract at a 0.2 percent rate. According to Judge Newman, "[s]uch speculative hyperbole of the contracting officer is an improper basis for summary judgment." *Id.*

423. *United States v. Dekonty Corp.*, 922 F.2d 826, 828 (Fed. Cir. 1991).

424. *Hubsch*, 1997 WL 337557 at *5. According to Judge Newman, Hubsch made efforts to resolve the problems in the contract. Moreover, it was relevant that the replacement contractor completed the work under the contract on terms and conditions that were refused to Hubsch.

425. *Appeals of Ricmar Eng'g*, ASBCA No. 44,260, 1997 WL 365025 (ASBCA June 23, 1997).

426. *Id.* 18 U.S.C. § 286 (1994) states:

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false or fictitious or fraudulent claim, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Ricmar argued that the Navy's motion must be defeated because there were errors in the contract specifications, superior knowledge on the part of the Navy, and a breach of the contract by the Navy prior to Ricmar's nonperformance and fraud. The board initially observed that it is well settled law that a default termination for reasons relating to performance deficiencies may be upheld on the basis of an adequate cause existing at the time of the termination, even if then unknown to the contracting officer.⁴²⁷ Moreover, in *Cosmos Engineering, Inc.*,⁴²⁸ the board specifically held that "[a] contractor which engages in fraud in its dealing with the government on a contract has committed a material breach justifying the termination of the entire contract for default."⁴²⁹ Here, the undisputed facts show that Ricmar and its president were convicted for conspiring fraudulently to submit a progress payment request. Accordingly, the board granted the Navy's motion for summary judgment.

Termination for Convenience

*Krygoski*⁴³⁰—One Year Later.

This past year, the government contracts community still felt the aftershocks following one of the most significant government contracts cases to come out of the Federal Circuit in

years—*Krygoski Construction Co., Inc. v. United States*.⁴³¹ Furthermore, the U.S. Supreme Court denied Krygoski's petition for certiorari. Additionally, the terminations subcommittee of the American Bar Association (ABA) Section on Public Contracts drafted proposed changes to the FAR that would require the government, when exercising its right to terminate a contract for convenience, to act consistently with those contractual good faith duties to which private parties are held.⁴³² The proposal provides that the government may not: (1) terminate a contract simply to obtain a more advantageous price or (2) act inconsistently with the justified expectations of the parties at the time they entered into the contract. At the ABA meeting in San Francisco this past summer, the subcommittee concluded that the draft proposal needed more work.⁴³³

The proposal embraces the *Torncello*⁴³⁴ "change in circumstances"⁴³⁵ test, but with a twist. Under the proposal, there is a difference between the elimination of the actual requirements or needs of the government and a mere change in the needs of the government. The draft proposal provides that a termination for convenience is appropriate when there is an elimination of the need but not appropriate when there is a mere change.⁴³⁶

Although the FAR Council is unlikely to adopt the proposal in its present form, the practitioner should recognize that the private bar is making efforts to change the long-standing regulatory termination for convenience scheme.

427. *Ricmar Eng'g*, 1997 WL 365025, at *5 (citing *Joseph Morton Co. Inc. v. United States*, 757 F.2d 1273 (Fed. Cir. 1985)).

428. ASBCA No. 23529, 84-2 BCA ¶ 17,268.

429. ASBCA No. 44,260, 1997 WL 365025, at *5.

430. *Krygoski Constr. Co., Inc. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997).

431. In *Krygoski*, the Air Force awarded the plaintiff a contract to demolish an abandoned Air Force missile site in Michigan. During a pre-demolition survey, the plaintiff identified additional areas not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal, the contracting officer decided to terminate the contract for convenience and to reprocure the requirement. The plaintiff sued in the Court of Federal Claims, alleging breach of contract. Relying on *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), the trial court found that the government improperly terminated Krygoski's contract. *Id.* The court also found that the government abused its discretion in terminating the contract under the standard found in *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (1976) (i.e., bad faith or an abuse of discretion). *Id.* The Court of Appeals for the Federal Circuit reversed and remanded, holding that the Court of Federal Claims incorrectly relied upon *dicta* in the plurality opinion in *Torncello*. *Id.* Specifically, the court concluded that the trial court improperly found the change of circumstances insufficient to justify termination for convenience. Although arguably the government's circumstances had changed to meet even the *Torncello* plurality standard, the court declined to reach that issue, because *Torncello* only applies when the government enters a contract with no intention of fulfilling its promises. *Id.*

432. *Termination for Convenience: ABA Section Drafting Proposed Changes in Wake of Krygoski*, 67 FED. CONT. REP. 20 (BNA) (1997).

433. *Terminations for Convenience: ABA Section Sends Proposed FAR Part 49 Language Back For More Work*, 68 FED. CONT. REP. 6 (BNA) (1997). Several members of the terminations subcommittee objected to the second test—the government may not act inconsistently with the justified expectations of the parties at the time of the contracting. Their concern was that the language "justified expectations" was confusing. Moreover, some members realized that it was highly unlikely that the FAR Council would adopt the recommendations, because they would limit the government's ability to exercise its right to terminate for convenience. *Id.*

434. *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982). *Torncello* stands for the proposition that when the government enters into a contract knowing full well that it will not honor the contract, it cannot avoid a breach claim by using the termination for convenience clause. In *Torncello*, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another contractor. When the contractor complained that the government was breaching the contract by satisfying its requirement from the cheaper source and ordering nothing from it, the government claimed its actions amounted to a constructive termination for convenience. The court held that the government could not avoid the consequences of breach by hiding behind the termination for convenience clause. *Id.*

435. *Id.* at 781. The *Torncello* court interpreted the termination for convenience clause to require some change in the circumstances of the bargain or in the expectations of the parties.

*Federal Circuit Addresses Constructive Termination in Contract International, Inc.*⁴³⁷

In *Contract International, Inc.*, the Air Force entered into a contract with Contract International, Inc. (CI) for the production of dairy products at a United States government-owned plant in Japan on 20 September 1989. The contract called for a one-year base performance period with four option years. On 26 September 1990, the incumbent contractor, Servrite International, Ltd. (Servrite) filed a bid protest challenging the award of the contract to CI. On 29 November 1989, the Air Force notified the GAO that it was sustaining Servrite's protest.⁴³⁸

The contracting officer informed CI that he would issue an amended request for proposals on or about 20 January 1990 and would award the resulting contract on or about 1 July 1990. CI challenged the contracting officer's decision in a protest it filed with the Air Force. The Air Force and the GAO denied the protest, and the Air Force awarded the new contract to Servrite.⁴³⁹ CI's contract ended on 30 September 1990, and the Air Force did not exercise its options. CI submitted a claim for an equitable adjustment, seeking to recover breach damages for improperly terminating the contract.⁴⁴⁰ The contracting officer denied the claim, and CI appealed to the board. The board sustained the appeal to the limited extent of the cost of repairing the machinery and costs from the Air Force's failure to make orders within the estimated volume requirements.

Contract International appealed to the Federal Circuit, arguing that the Air Force actions amounted to a constructive termination for convenience. According to CI, the Air Force repudiated its commitment to perform for at least one year when: (1) it told CI that it would issue an amended RFP, (2) it sought BAFOs, and (3) a new contract would begin in July 1990. CI argued that it found itself in a position in which it anticipated prompt termination of the contract. As such, CI

argued that a constructive termination for convenience occurred.

The Federal Circuit disagreed with CI's reasoning. First, the court restated the principle that "no decision has upheld retroactive application of a termination for convenience clause to a contract that had been fully performed."⁴⁴¹ In the instant case, CI completed contract performance. The court also noted that if it accepted CI's argument, it would mean that each time any uncertainty was injected in a contract, the government would be liable to the contractor under a theory of constructive termination for convenience.⁴⁴² In summary, the court held that uncertainty caused by anticipating that contract termination may occur sometime in the future does not constitute grounds sufficient to hold the government liable for a constructive termination for convenience.

Termination for Convenience Settlement Agreement Does Not Stop Off-Set by Army

In *Applied Companies v. United States*,⁴⁴³ the Army awarded Applied Companies a contract for 1000 air conditioners. On 12 July 1991, the Army terminated the contract for default. Applied appealed the termination for default to the board. On 29 March 1994, the board sustained Applied's appeal and converted the termination for default into a termination for convenience.

In February 1995, the Army and Applied entered into a termination for convenience settlement agreement. As part of the agreement, the Army agreed to pay Applied \$2.8 million. The Army only paid \$911,604 of the settlement amount. The Army offset the remaining \$1.9 million against erroneous overpayments previously made to Applied under another contract. Applied filed suit in the Court of Federal Claims and argued

436. *Termination for Convenience: ABA Section Drafting Proposed Changes in Wake of Krygoski*, 67 FED. CONT. REP. 20 (BNA) (1997). Arguably, where the government's needs have changed, the contractor has the expectation that the government will use the Changes clause of the contract, and not the Termination for Convenience clause.

437. *Contract Int'l, Inc. v. Widnall*, 106 F.3d 426 (Fed. Cir. 1997).

438. *Id.* The Air Force stated that in light of certain pre-award discussions between the Air Force and Servrite, it was unable to determine "whether award was made to the offeror whose proposal would have been most advantageous to the government." *Id.*

439. *Id.* On 7 June 1990, the Air Force notified CI that the amended request for proposals would be issued about 30 June 1990, with award being made on or about 1 October 1990.

440. *Id.* The contractor sought to recover the following damages: (1) cost for inventory which was lost due to the alleged early termination of the contract; (2) the costs arising as a result of the Air Force's failure to make orders within certain estimated volume requirements; (3) cost of repairing certain machinery; (4) non-recurring costs and depreciation; (5) costs relating to pay and fringe benefits for a plant manager; and (6) profit.

441. *Id.* at 3 (citing *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 (Fed. Cir. 1988)).

442. *Id.* The court further noted that the uncertainty resulted from the evaluation of Servrite and CI's original offer and the ensuing protests. The Air Force simply attempted to ensure that it followed proper acquisition procedures while Servrite and CI exercised their bid protest rights. All of these factors created the possibility that the Air Force would terminate CI's contract for convenience.

443. 37 Fed. Cl. 749 (1997).

that the Army's offset was a breach of the parties' termination for convenience settlement agreement.

The court granted the Army's summary judgment motion. Citing *United States v. Munsey Trust Co.*,⁴⁴⁴ the court initially noted that the government has the same right as every other creditor to apply a debtor's funds to extinguish its debts. The court added the caveat that the parties are free to provide in their settlement agreement that the amount of the settlement agreement shall not be subject to an offset of any other debt owed by one party to another.⁴⁴⁵ The settlement agreement provided that the government agreed to pay Applied (or its assignee) the sum of \$2.8 million. There was, however, no unequivocal provision that such amount was not subject to setoff. Accordingly, the court held that the Army could withhold the \$1.9 million from the settlement proceeds owed to Applied.

Constructive Termination for Convenience Limits Contractor's Recovery

In *Best Foam Fabricators, Inc., v. United States*,⁴⁴⁶ the Navy entered into a contract with Best Foam for foam fuel cells for its fleet of UH-1N/HH-1N helicopters. The Navy conducted the procurement pursuant to the Small Business Administration's (SBA's) 8(a) program. The Navy uses the foam fuel cells by inserting them into the fuel tanks of military aircraft to prevent or to minimize the effects of an explosion if the aircraft crashes or is subjected to gunfire. There was an urgent need for the foam fuel cells.⁴⁴⁷ The contract required Best Foam to follow the stringent inspection standards under MIL-I-45208.⁴⁴⁸

Following contract formation, the Navy failed to provide Best Foam with contractually required National Stock Numbers and shipping destinations. Additionally, the Navy failed to act on Best Foam's request that the Navy accept accelerated deliveries and drop MIL-I-45208 as a contract requirement. The

court found that the Navy repudiated its contractual obligations by not acknowledging the existence of a contract unless Best Foam submitted additional cost data and by stating that no contract existed because of Best Foam's request to drop MIL-I-45208.

The court initially noted that when one party to a contract fails to perform and improperly repudiates its obligations under the contract, they generally owe the other party breach damages. The court, however, determined that this case was appropriate for application of the constructive termination for convenience doctrine. Under this doctrine, if a contract includes a termination for convenience clause (as did this contract) and the contracting officer could have invoked the clause, a court will constructively invoke the clause to retroactively justify the government's actions, thereby avoiding a breach and limiting liability.⁴⁴⁹ The court found that since there was no evidence of bad faith or an abuse of discretion by the Navy, the contracting officer could have invoked the termination for convenience clause instead of improperly repudiating the contract.

Contract Disputes Act Litigation

Contract Disputes Act (CDA)⁴⁵⁰ Claims and Appeals

Parties Cannot "Contract Away" Their CDA Rights. *Burnside-Ott Aviation Training Center v. Dalton*⁴⁵¹ involved a dispute over a cost plus award fee contract. Burnside contended that the Navy improperly calculated its award fee by allegedly using a conversion chart that was not part of the contract. As part of its response, the Navy identified a clause in the contract which essentially exempted the award fee determination from review under the CDA.⁴⁵² The Federal Circuit noted that although parties to a contract may waive certain rights, this general rule does not apply to "a provision in a government contract that violates or conflicts with a federal statute."⁴⁵³ The

444. 322 U.S. 234 (1947).

445. *Applied Cos.*, 37 Fed. Cl. at 756.

446. No. 94-1036C, 1997 WL 409205 (Fed. Cl. July 18, 1997).

447. *Id.* at *2. The need was urgent because many of the helicopters in the fleet were flying either with older, lower quality foam inserts or without any inserts at all.

448. *Id.* This standard basically requires the contractor to have a detailed and thorough inspection system in place to ensure that all goods submitted to the government conform to the contract requirements. The clause makes the contractor responsible for performing all of the inspections and testing necessary to ensure compliance with the contract.

449. *Id.* In *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925), the Court outlined the theoretical underpinnings for the doctrine. The Court stated:

A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, recession, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.

College Point Boat Corp., 267 U.S. at 15-16.

450. Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994).

451. 107 F.3d 854 (Fed. Cir. 1997).

court further observed that if this were not the case, parties to any agency contract could contractually subvert legislative mandates that would otherwise apply. Since the CDA requires *de novo* review of disputes involving government contracts, the court concluded that the offending clause was void.⁴⁵⁴

Board Allows Contracting Officer Nine Months to Issue Final Decision. With respect to a CDA claim greater than \$100,000, the contracting officer can either issue a final decision within sixty days of receiving the claim or notify the contractor of a reasonable time when the final decision will be issued. Not surprisingly, what exactly is “reasonable” is determined by the size and complexity of the claim.⁴⁵⁵ At issue in *Defense Sys. Co.*⁴⁵⁶ was a \$72 million claim for alleged breach of contract by the government. Defense Systems Company, Inc. (DSC) submitted a comprehensive two volume “Claim for Breach,” which contained more than 162 pages of narrative and 49 exhibits. All of this was improperly certified with a “Certificate of Current Cost or Pricing.” Upon examination of the claim, the contracting officer notified DSC that it needed to correct the certificate,⁴⁵⁷ and he then set the projected date for issuance of the final decision for the following July, or nine months afterward. DSC took exception to this response and appealed, filing a ninety-seven page complaint. The Army fired back with a motion to dismiss the appeal as premature and supported the motion with an affidavit from the contracting officer which detailed the reasons for the extended time frame.⁴⁵⁸ Viewing the mass of information and dollar value of this claim, the board quickly concluded that the contracting officer’s position was eminently reasonable.⁴⁵⁹

Picture this. Back in March 1987, a German contractor files a claim for almost deutschemarks (DM) 130,000 for renovation work being done at Camp Pieri, Wiesbaden, Germany. Two months later, the Army replies that it is evaluating the claim and directs the contractor to perform additional work under the contract. The contractor subsequently increases its claim amount to more than DM 170,000. Unfortunately, the Army does not respond promptly. Indeed, after waiting two years, in February 1991, the contractor’s counsel again requests a final decision or, in the alternative, a meeting with Army contracting officials. The two parties subsequently met in June 1991, but the claim is not resolved.

Here’s the good part—for the next five years no further action is taken on the claim. Finally, in May 1996, the contractor appeals the “deemed denial” to the board. Even though little happened to the claim over the ensuing five years, the European landscape changed dramatically for the Army. The military has not seen an installation in Europe that it does not view as ripe for shutdown or dramatic downsizing. Facilities are closing, and people are retiring, transferring, or otherwise departing Europe. On top of all of that, files are being stored, destroyed, misplaced, and re-filed. All of the above actually happened to the claim here and the Army dutifully detailed this morass of events in its summary judgment motion, citing laches as the basis for disposing of this action.⁴⁶¹ Noting that the government’s “hands are not clean since it contributed to the . . . delay,” the board concluded that the Army had failed to prove that it was prejudiced by the late appeal and denied the motion.⁴⁶²

Army Leaves the Claims Window of

Federal Circuit Affirms Prospective Application of

452. *Id.* at 856. The clause provided that a fee-determining officer would unilaterally make the award fee decision; this decision was not subject to the Disputes Clause contained in the contract.

453. *Id.* at 858.

454. *Id.* at 859.

455. 41 U.S.C. § 605(c) (1994); FAR, *supra* note 22, at 33.211.

456. ASBCA No. 50534, 97-2 BCA ¶ 28,981.

457. A contracting officer has no obligation to render a final decision in response to a claim with a defective certification if the contracting officer informs the contractor of the defect within 60 days of receiving the claim. FAR, *supra* note 22, at 33.211(e).

458. The contracting officer noted, in part, that because of the “serious allegations” and “large amount of money” claimed, requiring a final decision any earlier “would seriously jeopardize the government’s ability to address each issue raised by DSC.” *Defense Sys. Co.*, 97-2 BCA ¶ 28,981 at 144,326.

459. The board also informed DSC that if the Army failed to issue its final decision by the established date, the contractor could view the failure as a “deemed denial” and resubmit its appeal. *Id.* at 144,326-27.

460. Anlagen und Sanierungstechnik GmbH, ASBCA No. 49869, 97-2 BCA ¶ 29,168.

461. In an affidavit accompanying its motion, the Army noted that: the regional contracting office responsible for administering the contract had closed in 1991; it could not locate former employees with first-hand knowledge of the claim; and, in all likelihood, the contract files relevant to the claim were destroyed. *Id.* at 145,034.

462. *Id.* at 145,034-35.

Six-Year Statute of Limitations

The Federal Acquisition Streamlining Act of 1994⁴⁶³ (FASA) established a six-year statute of limitations for CDA claims. The Office of Federal Procurement Policy (OFPP) implemented this new time frame and provided that the six-year period would not apply to contracts awarded before 1 October 1995.⁴⁶⁴ In reviewing an appeal involving a government defective pricing claim, the Federal Circuit affirmed the OFPP's implementation of this FASA provision and its prospective application to CDA contracts.⁴⁶⁵

ASBCA Declines to Sanction Navy for Loss of Documents

The appeal of *Hughes Aircraft Co.*⁴⁶⁶ centered on a government claim that Hughes had provided defective pricing information which caused the Navy to overpay the contractor almost \$258,000. Hughes claimed that it had provided the Navy with documentation which detailed its costs and which should have alerted the agency to the full extent of the repair costs, to include the alleged overpayment. During document discovery, the Navy notified Hughes that some of the documents requested by Hughes had been lost or destroyed. The Navy further stated that it had conducted numerous searches but could not locate the documents or explain their loss.

Contending that the documents lost by the Navy would exonerate Hughes, the contractor requested that the board sanction the agency and dismiss the appeal. The board has the "inherent power to impose sanctions for discovery abuses," but it noted that it examines the "reasonableness of a party's failure to comply voluntarily in the appeal process."⁴⁶⁷ In this instance, despite the fact that the lost documents were material to the dispute, the board could find no evidence of malfeasance on the part of the Navy. Consequently, the board ruled that it would, at most, "draw adverse inferences on a fact specific basis" as appropriate.⁴⁶⁸

Exercising Independent Judgment—Contracting Officers Must Separate the Wheat from the Chaff

To what extent can a contracting officer rely on the statements of others when rendering his final decision? Although the FAR encourages the contracting officer to seek guidance from others before issuing his final decision, he must ensure that, whatever the circumstances, he bases his actions on his independent, personal judgment.⁴⁶⁹

In *PLB Grain Storage Corp. v. Glickman*,⁴⁷⁰ the contractor argued that the contracting officer failed to exercise adequate independent judgment in issuing a termination for default in a grain storage contract with the Department of Agriculture. A panel of government officials instructed the contracting officer to terminate the contract. The contracting officer reviewed the panel's draft termination order, discussed the directive with panel members and others within the agency, and made a number of revisions to the proposed termination document. Only after taking these investigative actions did the contracting officer issue his final decision to terminate the contract.

In an opinion designated as non-precedential, the Federal Circuit concluded that even though the contracting officer "was not the primary decision maker and had little or no role in actually preparing the decision," the steps taken by the contracting officer to investigate and to review the panel's directive reflected the independent judgment necessary to render a "legally effective" final decision.⁴⁷¹

The board came to a similar conclusion in *Prism Construction Co.*⁴⁷² The appellant challenged the efficacy of a contracting officer's final decision six days into a projected fourteen day hearing—more than five years after the contracting officer made his determination. Prism contended that the contracting officer's failure to evaluate independently or to verify the facts underlying the dispute rendered the final decision fatally deficient.

463. Pub. L. No. 103-355, § 2351, 108 Stat. 3243, 3322 (1994) (amending 41 U.S.C. § 605).

464. See FAR, *supra* note 22, at 33.206.

465. See *Motorola, Inc. v. West*, No. 97-1098, 1997 WL 576502 (Fed. Cir. Sept. 18, 1997).

466. ASBCA No. 46321, 97-1 BCA ¶ 28,972.

467. *Id.* at 144,272.

468. *Id.* at 144,273. In fact, the board also observed that Hughes did not have a "system in place to record what data had been provided to the government during negotiations." *Id.* at 144,286.

469. In rendering a final decision, the FAR requires contracting officers to seek assistance from "legal and other advisors." FAR, *supra* note 22, at 33.211(a)(2).

470. 113 F.3d 1257 (Fed. Cir. 1997).

471. *Id.*

472. ASBCA No. 44682, 97-1 BCA ¶ 28,909.

The board found that the contracting officer reviewed the documents surrounding the contractor's claims and the ROICC's⁴⁷³ position on the claims. Although the contracting officer could not specifically recall what documents he had reviewed, he admitted that he did not attempt to verify independently any of the facts the ROICC and other officials provided him because these individuals had the necessary first-hand knowledge regarding the appellant's performance. The contracting officer also testified that he issued his final decision after reviewing the ROICC's documents and position on the claims, which the contracting officer found to be persuasive. The board concluded that there is "no requirement that a contracting officer independently investigate the facts of a claim," only that the contracting officer exercise his independent judgment in reviewing the facts prior to rendering his final decision. Under these circumstances, the contracting officer exercised the necessary independent judgment in deciding Prism's claims.⁴⁷⁴

*Engineers Board Finds REA for Unincurred Costs
Constitutes CDA Claim*

At issue in *J.S. Alberici Construction Co.*⁴⁷⁵ was a dispute involving a differing site conditions claim for more than \$6 million. The contract with the Army Corps of Engineers required the contractor to perform considerable construction work on the Melvin Price Locks and Dam project on the Upper Mississippi River. The contractor encountered rock obstructions which it contended were differing site conditions and increased the cost of contract performance. At the time the contractor submitted its request for equitable adjustment (REA), however, it had not yet incurred all of its costs. Hence, the final amount was certain to change. The Corps of Engineers and the contractor subsequently resolved the \$6 million claim, but the contractor later contended that it was entitled to almost \$880,000 in interest associated with its claim. The Corps argued that since the contractor had not yet incurred all of its costs at the time the REA

was submitted, there could be no "sum certain."⁴⁷⁶ Without a "sum certain," the Corps contended, there could be no CDA claim.

The Engineers Board rejected the Corps' position, pointing out that a "'sum certain' need not remain fixed throughout the claims process, so long as the information provided to the government is accurate to the extent possible, and provides adequate notice of a monetary claim against the government to permit adjudication."⁴⁷⁷ The board concluded that the legislative history behind the CDA supports the position that contractors should be encouraged to submit claims as early as possible. Given this backdrop, a contractor need not wait until it has incurred all claimed costs before filing its REA, thereby triggering the CDA interest clock.

*Federal Circuit Encourages Attorney Bragging Rights,
or Gaffny's Gaff Doesn't Pay Off After All*⁴⁷⁸

A couple of years ago, the board issued a controversial decision regarding the applicability of the Equal Access to Justice Act (EAJA).⁴⁷⁹ At issue was an appeal by Gaffny Corporation against the Navy.⁴⁸⁰ The firm was represented by its vice president, Mr. Michael Gaffny, who generally signed all submissions to the board as "Vice President" or "Attorney Pro Se." Indeed, Mr. Gaffny submitted his firm's post-hearing brief, with the *nom de plume* of "Attorney Pro Se." After granting the appeal, the board approved Mr. Gaffny's EAJA application for compensation of attorney fees.

The facts of the case reveal that at some point in time following his initial appeal to the board, Mr. Gaffny had entered the practice of law. Apparently, however, Mr. Gaffny did not think much of his achievement because, but for two minor submissions which were signed "Michael Gaffny, Esq.," the record contained no evidence that the appellant was represented by a licensed attorney.⁴⁸¹ In a nonprecedential opinion, the Federal Circuit observed that "the addition of three letters following his

473. Responsible Officer-In-Charge of Construction.

474. Judge Watkins dissented from the five-judge opinion, arguing that the contracting officer "merely paraphrased the ROICC's memorandum." *Prism Constr. Co.*, 97-1 BCA ¶ 28,909, at 144,125. The dissent would remand the appeal back to the contracting officer for a proper final decision which reflected the contracting officer's independent judgment on the claims. *Id.*

475. ENGBCA No. 6179, 97-1 BCA ¶ 28,639, *recon. denied*, ENGBCA No. 6179-R, 97-1 BCA ¶ 28,919.

476. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. *Essex Electro Eng'r, Inc. v. United States*, 22 Cl. Ct. 757, *aff'd* 960 F.2d 1576, (Fed. Cir.), *cert. denied*, 113 S. Ct. 408 (1992) (submission of cost proposals for work under consideration did not seek a sum certain as a matter of right); *but see* *Fairchild Indus.*, ASBCA No. 46197, 95-1 BCA ¶ 27,594 (claim for costs not yet incurred, but based upon estimates, deemed to be a sum certain). *See also* *East West Research, Inc.*, ASBCA No. 35401, 88-3 BCA ¶ 29,931 (request for future savings under VECP was a "sum certain").

477. *J.S. Alberici Constr. Co.*, 97-1 BCA ¶ 28,639, at 143,008 (citing *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)).

478. *Dalton v. Gaffny Corp.*, 108 F.3d 1391 (Fed. Cir. 1997) *rev'g* *Gaffny Corp.*, ASBCA No. 39740, 96-1 BCA ¶ 28,060. *See also* *1996 Year In Review*, *supra* note 9, at 81.

479. 5 U.S.C. § 504 (1994).

480. *Gaffny Corp.*, ASBCA No. 39740, 96-1 BCA ¶ 28,060.

signature did not provide adequate notice of . . . [Mr. Gaffny's] change in status." Consequently, the two letters signed by Mr. Gaffny represented little more than a "single evidentiary tile taken from a large, factual mosaic" that could not support the board's findings.⁴⁸² The lesson here: maybe lawyers have inflated opinions of themselves for a reason.

*Equal Access to Justice Act (EAJA)*⁴⁸³

ASBCA Takes a Dim View of Agency Counsel's Attitude. Following a favorable settlement of its appeals, Industrial Steel requested compensation of fees under the EAJA.⁴⁸⁴ Although conceding that the appellant was a "prevailing party," government counsel contended that the application for fees was untimely. Under the EAJA, the appellant must submit its request for compensation within thirty days of final disposition.⁴⁸⁵ Apparently, the appellant had submitted its EAJA request to agency counsel, not to the board. Asked why the request was not forwarded to the board, agency counsel argued that "[t]here should be no expectation of assistance from opposing trial counsel in any adversarial adjudication or proceeding."⁴⁸⁶ Noting that it had previously upheld as timely an EAJA request initially submitted to a contracting officer, the board extended this approach to cover otherwise timely submissions to agency counsel.⁴⁸⁷

EAJA Argument Flushed Away by Withdrawal of Settlement Offer. In *Bildon, Inc.*,⁴⁸⁸ the appellant partially prevailed in a dispute over bathroom floor tile work, a new lavatory, and the propriety of liquidated damages assessed by the government. Bildon initially submitted a claim for increased costs associated with the bathroom work. In reply, the contracting officer issued a final decision which offered "to settle" the claim and also to delete \$10,000 of liquidated damages the government was about to assess against the appellant. When the contractor appealed the final decision, the contracting officer withdrew his

"settlement offer" and supplemented his final decision by assessing more than \$12,000 in liquidated damages against Bildon. Although Bildon prevailed on part of its appeal, the amount it actually recovered was less than that offered in the contracting officer's original final decision. Given this result, the government argued that any compensation of fees under the EAJA was unreasonable. The board disagreed, noting that the contracting officer had rescinded his "offer" merely because the contractor appealed the initial final decision. Under such circumstances, the contracting officer did not make a "bona fide settlement offer," and the appellant's prosecution of the appeals was not only reasonable but appropriate.⁴⁸⁹

SPECIAL TOPICS

NAF Contracting

NAF Contracting Officer Warrants Subject to Lower Dollar Limitations

A 1995 change to Army Regulations raised the dollar limitations for NAF contracting officers from \$25,000 to \$100,000 for supplies, services, and construction.⁴⁹⁰ Unfortunately, the change has expired. For the time being, NAF contracting officers are subject to the lower limitations. The Community and Family Support Center (CFSC) is actively seeking to have this inadvertent regulatory lapse corrected.

Good for the Goose, but Not for the Gander

The GAO takes jurisdiction over protests of NAF contracts when the contracts are handled by appropriated fund contracting officers.⁴⁹¹ Protest jurisdiction in the GAO does not, however, subject the contract to other statutory provisions. When reviewing protests of NAF contracts, the GAO seeks to determine whether the agency acted reasonably.

481. *Dalton*, 108 F.3d at 1391.

482. *Id.*

483. 5 U.S.C. § 504.

484. *Industrial Steel, Inc.*, ASBCA Nos. 49632, 49633, 97-1 BCA ¶ 28,979.

485. 5 U.S.C. § 504(a)(2).

486. The board also noted that, given his "no expectation of assistance" attitude, agency counsel never informed appellant of its error and never intended to forward the claim. *Industrial Steel*, 97-1 BCA ¶ 28,979, at 144,322.

487. *Id.* (citing *Bristol Elecs. Corp.*, ASBCA No. 24792, 87-2 BCA ¶ 19,697) (otherwise timely submission of EAJA application to contracting officer valid).

488. ASBCA Nos. 46937, 47473, 97-2 BCA ¶ 29,101.

489. *Id.* at 144,835.

490. U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING (10 Sept. 1990) (IO1, 15 June 1995) [hereinafter AR 215-4].

491. *Gina Morena Enter.*, B-224235, Feb. 5, 1987, 66 Comp. Gen. 231, 87-1 CPD ¶ 121.

Government-Furnished Property

Not All Government Property Furnished to a Contractor is "Government Furnished Property"

In *F2M, Inc.*,⁴⁹² the board considered a request for an equitable adjustment due to a delay in issuance of the notice to proceed caused by a pending GAO protest. The board refused F2M's plea to read into the NAF contract the Protest After Award clause,⁴⁹³ which would have entitled it to an equitable adjustment. The board noted that the clause is required by regulation when a NAF contract will be handled by an appropriated fund contracting officer.⁴⁹⁴ The board found no statutory authority, however, for promulgation of the NAF contracting regulation. Nevertheless, the board refused to leave the contractor without a remedy for the delay caused by a GAO protest. Regardless of the GAO's assertion of jurisdiction pursuant to CICA, the board found the CICA stay provisions inapplicable for the government's assertion of the sovereign acts defense. The board articulated no cogent reason for failing to follow its own precedent, which deemed the CICA stay a sovereign act which barred contractor recovery in the absence of the Protest After Award Clause.⁴⁹⁵

The Buck Stops at the Board of Contract Appeals

In *Strand Hunt Construction, Inc. v. West*,⁴⁹⁶ the Court of Appeals for the Federal Circuit declined to take jurisdiction over an appeal of a claim against a NAFI. The Federal Circuit's appellate jurisdiction over boards of contract appeals claims arises from the Contract Disputes Act (CDA). The board's consideration of claims against NAFIs, however, stems from regulation, not from the CDA. In dismissing the appeal, the court followed its own precedent from *McDonald's Corp. v. United States*.⁴⁹⁷ The court rejected appellant's argument that its demand for an equitable adjustment was distinguishable from the issue in *McDonald's*, which involved the scope of the Tucker Act's waiver of sovereign immunity for suits against military exchanges. The court found *McDonald's* directly relevant for determining the scope of the CDA's application to contracts involving NAFIs. Furthermore, the court chided Strand Hunt for attempting to shift the burden of establishing subject matter jurisdiction to the government through a waiver of sovereign immunity.

When the government furnishes property to a contractor for the contractor's convenience and the contract does not identify the property as "Government Furnished Property," the government will not be liable under the GFP clauses.⁴⁹⁸ In *Hunter Manufacturing Co.*,⁴⁹⁹ the contract stated that the government would provide an engine to the contractor as GFP only if the government ordered items under a specified CLIN. Although the government never ordered any items under the specified CLIN, the contractor requested the engine "for demonstration purposes," and the government furnished the engine for the contractor's convenience. The contractor alleged that the government furnished the engine so late that it impacted the performance schedule, and the contractor submitted a claim for delay costs. The board denied the subsequent appeal because the government had no obligation to provide the engine as GFP. Accordingly, the government was not obligated to furnish the engine within any particular time or in a suitable condition.

Unauthorized Retention of GFP Creates Rental Liability

On 21 January 1993, a contracting officer directed a contractor to ship GFP test equipment to another contractor's facility. The contractor refused, contending that it needed the property to meet scheduled commitments on other contracts. After much discussion, the contractor finally shipped the property on 18 May 1995. The contracting officer issued a decision which assessed \$305,040 for the rental value of the GFP improperly retained. The contractor appealed, contending that the contracting officer's revocation of authority to use the GFP was improper because the contractor's use was not interfering with any of the contracting officer's contracts.

In *Astronautics Corp. of America*,⁵⁰⁰ the board granted the government's motion for summary judgment, noting that the

492. ASBCA No. 49719, 97-1 BCA ¶ 28,982.

493. See *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Cl. Ct. 1963).

494. See AR 215-4, *supra* note 490, para. 4-40a(2).

495. See, e.g., *Tempo, Inc.*, ASBCA Nos. 37589, 37681, 38576, 95-2 BCA ¶ 27,618; *Port Arthur Towing Co., Inc.*, ASBCA No. 37516, 90-2 BCA ¶ 22,857.

496. 111 F.3d 142 (Fed. Cir. 1997).

497. 926 F.2d 1126 (Fed. Cir. 1991); see also *Maitland Bros. v. Widnall*, No. 94-1107, 1994 U.S. App. LEXIS 33097 (Fed. Cir. Nov. 21, 1994) (nonprecedential opinion).

498. FAR, *supra* note 22, at 52.245-2, 52.245-5.

499. ASBCA No. 48693, 97-1 BCA ¶ 28,824.

500. ASBCA No. 48190, 97-1 BCA ¶ 28,978.

appellant cited no authority for the proposition that the contractor's use of the property must interfere with the government's use in order for the revocation to be effective. We are aware of no such authority.

When is GFP "Unsuitable"?

To recover under the GFP clauses, the contractor must establish that the government furnished the property as "GFP", the property was unsuitable for its intended purpose; and that unsuitability was the proximate cause of the contractor's injury.⁵⁰¹ In *E-Systems, Inc.*,⁵⁰² the government provided a variety of reference documents in the bidders' library, including a report stating that a particular power converter was "ideally suited" for systems similar to that which the awardee was to deliver. E-Systems used the specified converter but experienced integration and performance problems and submitted a claim for its increased costs. On appeal the board determined that the report, and not the recommended converter, was the GFP identified in the contract. It next determined that the intended use for the GFP report was as a reference document and that it was suitable for that purpose. In denying the claim, the board observed that contractors do "not have an unfettered right to rely on information furnished as GFP.

An Analysis of the Proposed FAR Part 45 Rewrite

On 2 June 1997, the rewrite of Part 45 of the FAR was issued as a proposed rule.⁵⁰³ The proposed rule eliminates many of the administratively burdensome provisions of the current rule and greatly streamlines the processes by which the government and its contractors transfer, account for, and dispose of government-furnished property (GFP). The most notable changes follow:

Definitions. Paragraph 45.001 of the proposed rule would consolidate the definitions currently included under four paragraphs, 45.101, 45.301, 45.501, and 45.601 and would simplify the entire FAR Part by eliminating twenty-six of the current definitions.⁵⁰⁴ The definitions remaining in the proposed rule do

not make substantive changes to their current counterparts and are comparatively unambiguous and concise.

Gratefully, the nearly incomprehensible definitions of "facilities" and "facilities contracts" would be eliminated, as would the associated facilities contracts clauses.⁵⁰⁵ The FAR Council reasoned that most facilities contracts are contracts for services and would more appropriately be addressed in Part 37, Service Contracting.⁵⁰⁶ Subpart 45.4, Property Management Contracts, is the only remaining section of Part 45 dealing specifically with contractor use of government-owned facilities. One criticism of the proposed rule, however, is that it does not clearly distinguish between bailments (e.g., when the contractor receives government property for storage, transport, or repair) and the furnishing of government property to facilitate performance of the contract (e.g., machine tools, equipment, material, etc.).

Policy. The proposed rule, 45.201-1(a), would greatly simplify the criteria that contracting officers should use in determining whether to provide GFP. Unlike the current rule, in which the policies on providing GFP are scattered throughout Part 45,⁵⁰⁷ the proposed rule enumerates the nine common-sense criteria that a contracting officer must consider before authorizing contractor use of GFP.⁵⁰⁸ Examples include circumstances in which the government is the only source of the property, the government expects substantial cost savings by providing GFP, the property will be used as a model or standard, or the property must be provided to meet an unusual and compelling urgency.

Perhaps in response to thirty years of criticism concerning the willingness with which agencies furnish readily available commercial items to contractors as GFP, the proposed rule states that "[a]gencies shall not direct, require, or specify for contract performance the use of specific commercially available items or software."⁵⁰⁹ Compliance with this requirement alone would greatly reduce the needless administrative burdens associated with performing property management functions for millions of items of government-furnished office equipment, tools, and raw materials.

501. See Steven N. Tomaneli, *Rights and Obligations Concerning Government-Furnished Property*, PUB. CONT. L.J. 413 (Spring 1995).

502. ASBCA No. 46111, 97-1 BCA ¶ 28,975.

503. Federal Acquisition Regulation, Government Property, 62 Fed. Reg. 30,186 (1997).

504. *Id.* at 30,190.

505. See FAR, *supra* note 22, at 52.245-7 through 52.245-16.

506. 62 Fed. Reg. at 30,197.

507. See FAR, *supra* note 22, at 45.102, 45.302-1, 45.302-4, 45.303-1, 45.304, 45.306-1, 45.307-1, 45.308-1, 45.309, 45.310.

508. 62 Fed. Reg. at 30,192.

509. *Id.* at 30,191.

The proposed rule would also substantially restrict the availability of non-commercial GFP. For example, although an agency could furnish equipment to a contractor for repair or to support contingency contracting, it could not furnish equipment based only on the expectation of substantial cost savings.

Competitive Advantage. Under the proposed rule, agencies would still be required to eliminate, to the extent practicable, the competitive advantage created when less than all offerors have access to GFP.⁵¹⁰ As under the current rule, agencies would add a rental equivalent factor to the proposals of those offerors with access to GFP, but unlike the current rule, there is no alternative requirement to charge rent in those cases where using a rental equivalent factor is not practical.⁵¹¹ The proposed rules concerning competitive advantage would be placed in Part 15, which is more appropriate since the application of adjustment factors is directly related to the conduct of source selections.⁵¹² Although the Part 15 rewrite,⁵¹³ which predates the proposed Part 45 rewrite, does not include proposed rule 15.608 or an equivalent, one can assume that such a provision will eventually be incorporated.

Risk of Loss. The proposed rules generally maintain the current distinction between fixed-price contracts (under which the contractor is strictly liable for loss, damage, and destruction of GFP) and cost-reimbursement contracts (under which the government acts as self-insurer and the contractor is liable in very limited circumstances). However, the proposed rules would treat labor-hour contracts like fixed-price contracts for risk of loss purposes, rather than as cost-reimbursement contracts.⁵¹⁴ Thus, labor-hour contractors using GFP would be subjected to greater liability under the proposed rules.

Commercial Use of GFP.

The guidance addressing the circumstances in which a contracting officer could authorize commercial use of GFP would be greatly simplified under the proposed rule (45.202). The

proposed rule consolidates and streamlines the guidance that is currently scattered haphazardly throughout Part 45.⁵¹⁵ Agencies may authorize commercial use of GFP in exchange for an equitable rental.⁵¹⁶ Agencies would presumably have to transfer this rental income to the U.S. Treasury as miscellaneous receipts, unless the rentals are taken as offsets to payments due under a particular contract in which the contractor is also using the GFP for government purposes.

Property Management. Property accountability problems have been the focus of many studies and investigations since the mid-1960's. Most recently, in a December 1996 letter to the National Security Industrial Association, Major General Robert F. Drewes, Commander of the Defense Contract Management Command, expressed his concern over the widespread property management problems in which poor record keeping and misclassification are common. The proposed rules emphasize the contractor's role in ensuring accountability by encouraging contracting officers to develop evaluation factors that consider the property management systems of offerors in negotiated source selections.⁵¹⁷ The proposed rule would also encourage agencies to rely on the property control systems that the contractor uses for its own property, rather than imposing a government-specified system.⁵¹⁸ Property control procedures would also be streamlined by requiring an accounting for property with an acquisition cost less than \$1500 only upon contract completion or termination.⁵¹⁹ Since industry representatives estimate that eighty percent of GFP items have an acquisition cost of less than \$1500, this procedure would eliminate a significant amount of non-value added expense and paperwork.

Comments to the proposed rule were due on or before 1 August 1997. Given the fact that the proposed rule was prepared by a multi-agency panel which considered approximately 500 comments, one could be cautiously optimistic that the final rule will contain few substantial changes from the proposed rule.

510. *Id.* at 30,193.

511. *Id.* at 30,188.

512. *Id.*

513. 62 Fed. Reg. 51,224 (1997).

514. 62 Fed. Reg. at 30,192.

515. See FAR, *supra* note 22, at 45.302-1(b)(3), 45.402(c), 45.406(c), 45.407.

516. 62 Fed. Reg. at 30,194.

517. *Id.* (proposed rule 45.301-1).

518. *Id.*

519. On 20 July 1997, the Director of Defense Procurement, Ms. Eleanor Spector, extended an existing class deviation that authorizes the same streamlined property control procedures contemplated by the proposed rule. The extension will last until 14 July 1998. See Memorandum from Director of Defense Procurement, to DOD Agencies, subject: Extension of Class Deviation (20 July 1997).

Payment and Collection

Prompt Payment Rules

On 17 March 1997, the FAR Council published a final rule concerning prompt payment requirements.⁵²⁰ This final rule incorporated changes required by the Prompt Payment Act Amendments of 1988.⁵²¹ The Office of Management and Budget (OMB) implemented the statutory requirements by revising OMB Circular A-125.⁵²² The final rule amends the FAR to reflect the changes in the OMB circular. Although recently implemented by the final rule, the Prompt Payment Act Amendments required immediate procedure changes.

GAO Report Cites Failures of Government Payment Procedures

On 12 May 1997, the GAO issued a report⁵²³ which criticized the DOD's payment and collection procedures. The report states that three factors contributed significantly to the problems and increased costs in the DOD's payment and collection process. The first factor listed by the report is the nonintegrated computer systems used by the DOD. These computer systems require manual entry of data that is often erroneous or incomplete. The second factor is the multitude of documents that contractors are required to submit. These documents must be matched before contractors are paid. The final factor listed in the report is that payments made to the contractor require allocation among numerous accounting categories.

The GAO recommended that the DOD increase its use of the International Merchant Purchase Authorization Card (IMPAC) for small purchases and eliminate the requirement to match payments to invoices if other controls are in place. The GAO also recommended that the DOD further examine the best practices of organizations that have reengineered their contract payment process.⁵²⁴ These organizations have combined technical

improvements with streamlined processes to improve service and to reduce cost.

Help Requested from DOD to Streamline Progress Payment Process

On 1 May 1997, Eleanor Spector, Director of DOD Procurement, invited industry and government personnel to provide suggestions on how to simplify and to streamline the process of requesting and paying progress payments.⁵²⁵ Ms. Spector formed an interagency team to review and to rewrite the applicable FAR provisions.⁵²⁶ The rewrite team will consider simplifying the progress payment process. Also under consideration are changes to the progress payment provisions which are necessary to include before performance-based payments and commercial financing payments to subcontractors can be included as part of a contractor's request for progress payments.

In a 10 June 1997 letter, the Council of Defense and Space Industry Associations (CODSIA) responded to Ms. Spector's challenge.⁵²⁷ The CODSIA urged the government to eliminate the requirement for large businesses to pay their subcontractors before billing their progress payments request. The CODSIA stated that most large businesses pay their subcontractors within thirty days as is the accepted standard in the ordinary course of business. The CODSIA also criticized the DOD's lack of progress in implementing FASA's contract financing reforms, specifically in the area of commercial item financing and performance based payments. Finally, the CODSIA recommended the maximum progress payment be raised from seventy-five percent to at least eighty percent.

Defense Export Loan Guarantee Program

On 8 November 1996, the DOD issued guidance⁵²⁸ which implemented the Defense Export Loan Guarantee (DELG)⁵²⁹ program. Loan guarantees are available for the purchase or

520. 62 Fed. Reg. 12,705 (1997).

521. Pub. L. No. 100-497, 100 Stat. 2455 (1988).

522. 59 Fed. Reg. 23,776 (1994).

523. *Contract Management: Fixing DOD's Payment Problems is Imperative*, GAO/NSIAD-97-37 (1997).

524. *Id.* The report recommended visiting Electronic Data Systems, Boeing Co., ITT Automotive, and the University of California at Berkeley.

525. 62 Fed. Reg. 23,740 (1997).

526. FAR, *supra* note 22, subpt. 32.5 (Progress Payments Based on Costs); *id.* at 52.232-16 (Progress Payments).

527. *Progress Payments: Defense Group Urges Dropping Paid Cost Rule in Progress Payment Reform Initiative*, 67 FED. CONT. REP. 24 (BNA) (1997).

528. 61 Fed. Reg. 57,853 (1996).

529. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996).

lease of United States defense articles, services, or design and construction services. Eligible recipients are NATO members, major non-NATO allies, emerging Eastern Europe democracies, and Asia-Pacific Economic Cooperation countries. The program's purpose is to meet national security objectives by encouraging standardization and interoperability of defense systems with allied nations, thereby lowering purchase costs of defense items, preserving critical defense skills, and maintaining the industrial base.

*DCAA Audit Guidance Concerning
Submission of Interim Vouchers*

On 8 May 1997, the DCAA issued audit guidance⁵³⁰ allowing all Defense Finance and Accounting paying offices to accept interim vouchers submitted by contractors that have adequate billing cycle internal controls. These are contract financing payments and do not require receiving reports prior to payment. Even though there is no actual receipt and acceptance of any product or service, the certification of the contractor's billing system provides the basis for provisional acceptance of the contractor's interim vouchers for payment.

Defective Pricing

Regulatory Changes

Final FAR Rule—Truth in Negotiations Act Regulations Revisited. On 2 January 1997, the FAR Council issued a final rule⁵³¹ amending the FAR to implement the various changes to the Truth in Negotiations Act (TINA)⁵³² under the Clinger-Cohen Act of 1996.⁵³³ First, the new rule simplifies the process for obtaining a TINA exception for commercial items by eliminating the distinction between catalog or market-priced commercial items and all other items.⁵³⁴ Second, it eliminates the

subordination of the commercial item exception to the traditional exceptions of adequate price competition, catalog or market-priced commercial items, or prices set by law or regulation.⁵³⁵ Essentially, this means that a contracting officer shall not require the submission of cost or pricing data for the procurement of commercial items. So long as the item sought constitutes a "commercial item," a lack of information relating to price competition or catalog or market pricing shall have no bearing on the applicability of this exception. Third, the new rule eliminates the criteria established by FASA for the commercial item exception and deletes the authority to obtain cost or pricing data for commercial item acquisitions when the criteria is not met.⁵³⁶ Fourth, it eliminated the clause for the post-award audit of information submitted to support the pricing of commercial item contracts.⁵³⁷

Final DFARS Rule—Cost or Pricing Data. On 29 July 1997, the Director of Defense Procurement issued a final rule amending the DFARS to conform to the FAR pertaining to cost or pricing data requirements.⁵³⁸ The primary change occurred in DFARS 215.804-1. The final rule sets out the standards for the exceptions to submission of cost or pricing data. Additionally, the amendment removed DFARS 215.801, the definition of cost realism analysis.

Interim DFARS Rule—Certification of Requests for Equitable Adjustment. On 11 July 1997, the Director of Defense Procurement issued an interim rule requiring contractors to certify their requests for equitable adjustment exceeding the simplified acquisition threshold.⁵³⁹ The rule requires contractors to certify that its claims are made in good faith and are supported by accurate and complete data. Small businesses will likely suffer most from the impact of this rule, because the majority of the claims between \$100,000 and \$500,000⁵⁴⁰ come from small businesses.⁵⁴¹

530. DOD: DCAA Expands Program Allowing Direct Submission of Interim Vouchers by Eligible Contractors, 67 FED. CONT. REP. 22 (BNA) (1997).

531. 62 Fed. Reg. 257 (1997).

532. 10 U.S.C.A. § 2306a (West 1997); 41 U.S.C.A. § 254(d) (West 1997).

533. Pub. L. No. 104-106, 110 Stat. 186 (1996).

534. FAR, *supra* note 22, at 15.804-1.

535. *Id.* at 15.804-1(b)(3).

536. *Id.* at 15.804-2.

537. *Id.* at 15.106.

538. 62 Fed. Reg. 40,471 (1997).

539. *Id.* at 37,146 (1997).

540. FAR, *supra* note 22, at 15.8042(a)(1). This is the threshold for obtaining cost or pricing data.

541. Approximately 88 percent. 62 Fed. Reg. at 37,146.

Price Reduction for Defective Pricing Data Clause

Christian Doctrine Applied. In *University of California, San Francisco*,⁵⁴² the Veterans Affairs Board of Contract Appeals declared that the standard “Price Reduction for Defective Cost or Pricing Data” clause is a mandatory contract clause that expresses a significant or “deeply ingrained strand of public procurement policy.”⁵⁴³ Here, the VA awarded a services contract to the UCSF for anesthesiologist services. The contract required UCSF to provide the VA with certified cost or pricing data under FAR 15.804-4, but the contract did not include the “Price Reduction for Defective Cost or Pricing Data” clause.⁵⁴⁴ When the issue of defective cost or pricing data was identified by the VA Inspector General, the VA demanded repayment of \$169,400. The UCSF refused and stated that the recovery is prohibited because the contract did not incorporate the “Price Reduction for Defective Cost or Pricing Data” clause.⁵⁴⁵

The board disagreed with the UCSF’s arguments and applied the holding of *Christian & Associates v. United States*.⁵⁴⁶ In *Christian*, the court ruled that if a termination for convenience clause (mandatory clause) is omitted from the contract, it will be read into the contract by operation of law.⁵⁴⁷ Here, the board applied the same logic and found that the defective pricing clause is a mandatory clause required by the TINA.⁵⁴⁸ Similarly, the board found that the TINA, enacted almost thirty-five years ago, required the government to include the defective pricing clause into the contract. The board applied the *Chris-*

tian Doctrine and incorporated the defective pricing clause into the contract. The board concluded by holding that the “Price Reduction for Defective Cost or Pricing Data” clause is a mandatory clause under the TINA “that expresses a significant or deeply ingrained strand of public procurement policy.”⁵⁴⁹

Government Barred by Collateral Estoppel. In 1995, the board held that Lockheed Corp. (Lockheed) did not have to disclose labor planning information as cost or pricing data under the TINA.⁵⁵⁰ This decision provided a “number of benchmarks for determining when management decisions rise to the level of cost or pricing data.”⁵⁵¹

Two years later, the Air Force again claimed that Lockheed provided defective cost or pricing data in its C-130 aircraft contract.⁵⁵² *Lockheed II* involved the question of whether Lockheed’s internal plans for collective bargaining were cost or pricing data required to be disclosed under the TINA.⁵⁵³ When the board concluded that the issue presented in *Lockheed II* was identical to the issues presented in *Lockheed I*, the board ruled that the doctrine of collateral estoppel applied in *Lockheed II*.⁵⁵⁴ The issue presented in both cases dealt with the same alleged cost or pricing data—whether the labor planing information was cost or pricing data under TINA.⁵⁵⁵ The board concluded by stating that the application of this doctrine in *Lockheed II* precluded the Air Force from relitigating the same issue.⁵⁵⁶

542. VABCA No. 4661, 97-1 BCA ¶ 28,642.

543. *Id.* at 143,069

544. FAR, *supra* note 22, at 52.215-22.

545. *University of California, San Francisco*, 97-1 BCA ¶ 28,642 at 143,057.

546. 312 F.2d 418 (Ct. Cl. 1963), *reh’g. denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964).

547. *Id.* at 427.

548. 41 U.S.C.A. § 254(d) (West 1997); FAR, *supra* note 22, at 15.808(a).

549. *University of California, San Francisco*, 97-1 BCA ¶ 28,642 at 143,057.

550. Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722 (Lockheed I).

551. *See 1995 Year in Review*, *supra* note 2, at 64. In *Lockheed I*, the ASBCA identified “two principles for identifying management decisions that constitute pricing data. First, there must be a substantial relationship between the decision and the cost element at issue. Second, the decision must have been made at a level of management which had the authority to affect the relevant cost element.” *Id.*

552. Lockheed Corp., ASBCA No. 37944, 97-1 BCA ¶ 28,757 (Lockheed II).

553. *Id.* This was essentially the same issue that the board decided in favor of the contractor in *Lockheed I*.

554. The court applied four criteria to determine whether collateral estoppel is applicable: (1) the issue to be decided is identical to one decided in the first case; (2) the issue was actually litigated in the first case; (3) resolution of the issue was essential to a final judgment in the first case; and (4) the parties had a full and fair opportunity to litigate the issue in the first case. *See* Arkla, Inc. v. United States, 37 F.3d 621 (Fed. Cir. 1994).

555. 97-1 BCA ¶ 28,757 at 143,518.

556. *Id.* at 143,520-21.

Cost and Cost Accounting

Cost Principles

Environmental Cost Principle Now a Hazardous Waste. By memorandum dated 8 May 1997, Eleanor Spector, Director of Defense Procurement, recommended closing the FAR case regarding the feasibility of an environmental cost principle.⁵⁵⁷ The proposed cost principle governed the allowability of a contractor's cleanup and other related costs. According to Ms. Spector, the DOD will continue to evaluate the allowability of these costs in accordance with the existing FAR and DFARS cost principles.⁵⁵⁸

Local Government Lobbying Costs Are Now Unallowable. The FAR Council agreed to an interim rule to amend the FAR to make the cost of lobbying activities to influence local legislation allowable only under certain circumstances.⁵⁵⁹ If the lobbying activities directly reduce contract costs or avoid material impairment of the contractor's authority to perform the contract, they may be allowable.⁵⁶⁰

The FASA⁵⁶¹ added the costs of lobbying the legislative body of a political subdivision of a state to the list of unallowable costs.⁵⁶² Accordingly, FAR 31.205-22(b) was revised to make the costs associated with any attempt to influence local legislation unallowable.⁵⁶³ FAR 31.205-22(b) contains a list of activities exempted from the provisions at FAR 31.205-22(a).

Included in the exempted activities are lobbying activities to influence state legislation in order to directly reduce contract costs or to avoid material impairment of the contractor's authority to perform the contract. The interim rule amends FAR 31.205-22(b)(2) to treat lobbying activities to influence local legislation in a manner consistent with the treatment of lobbying activities to influence state legislation.

DFARS Supplement Restructuring Costs. The Director of Defense Procurement issued an interim DFARS rule⁵⁶⁴ on 6 December 1996 to implement provisions of the National Defense Authorization Act for Fiscal Year 1997⁵⁶⁵ concerning the reimbursement of external restructuring costs associated with a business combination.⁵⁶⁶ The Authorization Act restricted the DOD from using 1997 funds to reimburse these costs by a defense contractor unless certain conditions are met.⁵⁶⁷

Foreign Differential Pay. By interim rule⁵⁶⁸ dated 31 December 1996, the FAR Council amended FAR 31.205-6⁵⁶⁹ by deleting the prohibition on the calculation of foreign differential pay⁵⁷⁰ based directly on an employee's specific increase in income taxes resulting from assignment overseas. Currently, FAR 31.205-6 prohibits contractors from calculating any increased compensation for foreign overseas differential pay on the basis of any employee's specific increase in income taxes resulting from foreign assignment. This prohibition was

557. *Allowable Costs: Environmental Cost Principle Cleared for Issuance as a Proposed Rule*, 58 FED. CONT. REP. 7 (BNA) (1992).

558. *Environmental Cleanup: DOD Closes FAR Case on Allowability of Contractor Cleanup Costs*, 67 FED. CONT. REP. 19 (BNA) (1997).

559. FAR, *supra* note 22, at 31.205-22(b)(2).

560. 61 Fed. Reg. 67,424 (1996).

561. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

562. 10 U.S.C. § 2324(e)(1) (1994); 41 U.S.C. § 256 (1994).

563. 60 Fed. Reg. 42,659 (1995).

564. DFARS, *supra* note 52, at 231.205-70 (1996).

565. Pub. L. No. 104-208, § 8115, 110 Stat. 3009 (1996).

566. Business combinations occur when the assets or operations of two previously separate companies are combined, whether by merger, acquisition, or sale and purchase of assets. DFARS, *supra* note 52, at 231.205-70(b)(1).

567. *Id.* These conditions include either (1) the audited savings for the DOD resulting from the restructuring will be at least twice the cost or (2) the savings for the DOD will exceed the costs allowed and the Secretary of Defense determines that the business combination will result in the preservation of a critical capability that might otherwise be lost to the DOD. *Id.*

568. 61 Fed. Reg. 69,294 (1996).

569. FAR, *supra* note 22, at 31.205-6 (Compensation for Personal Services).

570. When personal services are performed in a foreign country, compensation may also include a cost differential. The cost differential may properly consider all expenses associated with foreign employment, such as housing; cost of living adjustments; transportation; bonuses; additional federal, state, local, or foreign income taxes resulting from foreign assignment; and other related expenses. *Id.* at 31.205-6.

intended to prevent a conflict with the FAR policy that federal income taxes are unallowable costs.⁵⁷¹ Conversely, FAR 31.205-6(e)(1) explicitly states that contractors may properly consider increased federal income taxes in the allowable foreign differential pay provided employees assigned overseas.

This interim rule was published without public comment.⁵⁷² The interim rule was necessary because FAR 31.205-6 imposes unnecessary administrative and accounting requirements, and it prohibits contractors from calculating differential pay on the basis of an employee's specific increase in income taxes resulting from overseas assignment. Instead, the contractor must employ an alternate, less accurate approach, that may result in an employee being under or over compensated.⁵⁷³

Automatic Data Processing Equipment Leasing Cost. On 31 December 1996, the FAR Council published an interim rule.⁵⁷⁴ It deletes the definition of automatic data processing equipment (ADPE) and the cost principle from the FAR.⁵⁷⁵ The FAR Council stated in the interim rule that the cost principle concerning ADPE leasing costs was implemented when ADPE was an emerging technology and was a substantial cost element on government contracts.⁵⁷⁶ The FAR Council went on to state that with these early computers, the hardware constituted a major expense which justified the detailed scrutiny under the cost principle. In today's technological environment, the continued application of FAR 31.205-2 is no longer appropriate and is an unnecessary accounting and administrative burden on contractors. FAR 31.205-36, Rental Costs, adequately protects the government's interests. The interim rule deletes FAR 31.205-2, the ADPE definition found at FAR 31.001, and all references to ADPE found in Part 31.

571. *Id.* at 31.205-41(b)(1).

572. If urgent and compelling reasons exist, the Secretary of Defense, in concert with the Administrator of General Services and the NASA Administrator, may publish an interim rule prior to comment by the public. 41 U.S.C.A. § 418b (West 1997).

573. *Id.* The interim rule reads "differential allowances for additional Federal, State, or local income taxes resulting from domestic assignments are unallowable." *Id.*

574. 61 Fed. Reg. 69,287 (1996).

575. FAR, *supra* note 22, at 31.205-2.

576. *Id.*

577. 62 Fed. Reg. 9,375 (1997).

578. DFARS, *supra* note 52, at 239.7300, 239.7301, 239.7303, 239.7304, 239.7305, Table 39-1.

579. *Id.*

580. 62 Fed. Reg. at 12,703.

581. *See* FAR, *supra* note 22, at 31.205-38(e)(2), 31.205-1.

582. 61 Fed. Reg. 31,800 (1996).

583. The final rule achieves a greater reduction in the administrative burden on contractors than that which would result from retaining the ceiling at the doubled rate.

584. 62 Fed. Reg. at 12,703.

On 3 March 1997, the Director of Defense Procurement issued an interim DFARS rule,⁵⁷⁷ amending the DFARS⁵⁷⁸ to remove any references to the obsolete FAR cost principle pertaining to ADPE leasing costs.⁵⁷⁹

Allowability of Foreign Selling Costs. A final rule⁵⁸⁰ amending the FAR⁵⁸¹ was published by the FAR Council on 17 March 1997. The final rule removes the ceiling on allowable foreign selling costs. The rule also revises FAR 31.205-1 by deleting any references to the ceiling limitation.

The proposed rule⁵⁸² was published on 20 June 1996. The proposed rule retained an allowability ceiling but increased the threshold from \$2.5 million to \$5 million. The final rule removes the ceiling on allowable foreign selling costs in lieu of the proposed rule's doubling of the present threshold.⁵⁸³ Additionally, the elimination of the ceiling promotes the government's policy of stimulating the export of U.S. products.⁵⁸⁴ FAR 31.205-38 now reads:

[T]he costs of broadly targeted and direct selling efforts and market planning other than long-range, that are incurred in connection with a significant effort to promote export sales of products normally sold to the U.S. government, including the costs of exhibiting and demonstrating such products, are allowable on contracts with the U.S. government provided the costs are allocable, reasonable, and otherwise allowable.⁵⁸⁵

Interest Paid on Tax Underpayment is Allowable Cost. The Federal Circuit held that interest on a contractor's state tax assessment was not "interest on borrowings" within the meaning of the Defense Acquisition Regulation (DAR),⁵⁸⁶ which disallows interest on borrowings.⁵⁸⁷

Lockheed timely filed its federal and state income taxes in 1973 and 1974 and paid its tax liability in full. In 1982, the IRS audited these returns and disallowed several deductions, resulting in greater liability. No additional taxes were due, because Lockheed had net operating losses that were carried over into those years. Unfortunately for Lockheed, the State of California did not allow those losses to be carried over and assessed additional state tax liability. Lockheed allocated the additional state tax and interest in accordance with its accounting practices. In 1982, two business segments were no longer in existence. In response, Lockheed included the amount that would have been allocated to those business segments in its residual expense pool. The contracting officer challenged the allowability of the interest on the additional state taxes, stating that it was an unallowable expense under DAR § 15-205.17. The contracting officer chose two contracts as test vehicles and issued a final decision disallowing the costs. Lockheed appealed to the board. The board upheld the contracting officer's decision, stating that the costs were unallowable because of DAR 15-205-17. The case was appealed to the Federal Circuit.

In reversing the board, the Federal Circuit ruled that interest on a defense contractor's state tax assessment was not interest on borrowings within the definition of DAR § 15-205-17. The contractor filed its tax returns in good faith, did not intend to underpay its taxes, and did not attempt to obtain capital or to finance its operations.

Cost Principle Rules Not Waived by Lack of Incorporation into the Contract. The board ruled⁵⁸⁸ that a contractor may not recover interest on borrowings, even though the contract did not incorporate FAR 31.205-20.⁵⁸⁹

585. *Id.*

586. U.S. DEP'T OF DEFENSE, DEFENSE ACQUISITION REG. § 15-205.17. The regulation disallows interest on borrowings, bond discounts, costs of financing and refinancing operations, professional fees paid in connection with preparing prospectuses, and costs of preparing and issuing stock rights; interest paid to raise capital also is unallowable. *Id.*

587. *Lockheed Corp. v. Widnall*, 113 F.3d 1225 (Fed. Cir. 1997).

588. *Superstaff, Inc.*, ASBCA No. 48062, 97-1 BCA ¶ 28,845.

589. Interest on borrowings is unallowable except for interest assessed by state or local taxing authorities under the conditions set forth in FAR 31.205-41. FAR, *supra* note 22, at 31.205-20. *See id.* at 31.205-41.

590. DFARS, *supra* note 52, at 252.243-7001.

591. ASBCA No. 45071, 94-1 BCA ¶ 26,312.

592. 62 Fed. Reg. 31,308 (1997).

593. Pub. L. No. 103-337, 108 Stat. 2663 (1994).

Superstaff was awarded a fixed price, indefinite quantity contract for shelf stocking and custodial work at the Walter Reed Commissary. It filed a claim with the contracting officer, asserting a demand for interest on borrowed money. The claim was denied, and the contractor appealed. The Army filed a motion for summary judgment which alleged that the cost principles were incorporated into the contract through the Pricing of Contract Modifications Clause.⁵⁹⁰ The board, citing its decision in *Tomahawk Construction Co.*,⁵⁹¹ stated that the clause does make standard cost principles applicable to equitable price adjustment. Considering the plain language of the contract provisions and case law, the board concluded that interest on borrowed money is not allowable under Superstaff's contract.

Cost Accounting Standards

Allocation of Contractor Restructuring Costs. On 6 June 1997, the Cost Accounting Standards (CAS) Board interpreted a final rule designed to address period cost assignment and allocability criteria for restructuring costs incurred under certain defense contracts.⁵⁹² The National Defense Authorization Act for Fiscal Year 1995⁵⁹³ restricted the DOD from reimbursing a contractor or subcontractor which decides to incur restructuring costs associated with a business combination, unless certain net savings provisions are met. Questions arose as to the methods to be used in measuring, assigning, and allocating such restructuring costs. The interpretation was designed to address those questions.

The CAS Board's interpretation clarifies whether restructuring costs are to be treated as an expense of the current period or as a deferred charge that is subsequently amortized over future periods.⁵⁹⁴ Restructuring costs are comprised of direct and indirect costs associated with contractor restructuring activities taken after a business combination if effected or after a decision is made to execute a significant restructuring event not related to a business combination. The costs of improvements of capital assets that result from restructuring activities shall be capi-

talized and depreciated. When a procuring agency imposes a net savings requirement for the payment of restructuring costs, the contractor shall submit data specifying the estimated restructuring costs by period, the estimated restructuring savings by period, and the cost accounting practices by which such costs shall be allocated to cost objectives.

Contractor restructuring costs may be accumulated as deferred costs and subsequently amortized over a period during which the benefits of restructuring are expected to accrue. However, a contractor proposal to expense restructuring costs for a specific event in a current period is also acceptable when the contracting officer agrees that such treatment will result in a more equitable assignment of costs. If a contractor incurs restructuring costs but does not have an established or disclosed cost accounting practice covering such costs, the deferral of such restructuring costs may be treated in the initial adoption of a cost accounting practice.

Applicability of Cost Accounting Standards Coverage. On 6 June 1997, the CAS Board issued a final rule revising the applicability criteria for application of CAS to negotiated federal contracts.⁵⁹⁵ The phrase “contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public” has been replaced with the phrase “contracts or subcontracts for the acquisition of commercial items.”⁵⁹⁶ As amended, firm fixed-price contracts and subcontracts as well as fixed-price contracts with economic price adjustment for the acquisition of commercial items will be exempt from CAS requirements. The board’s exemption for fixed-price with economic price adjustment does not include those contracts where adjustment is based on actual costs incurred.⁵⁹⁷

594. It also defines restructuring costs as costs that are incurred after an entity decides to make a significant nonrecurring change in its business operations or structure in order to reduce overall cost levels in future periods through: work force reductions; the elimination of selected operations, functions, or activities; or the combination of ongoing operations including plant relocation. 62 Fed. Reg. at 31,308.

595. *Id.* at 31,294.

596. *Id.*

597. FAR, *supra* note 22, at 16.203-1(b).

598. Hughes Aircraft Co. v. United States *ex rel.* Schumer. No. 95-1340, 1997 WL 321246 (U.S. June 16, 1997).

599. *Qui Tam Litigation: Unanimous Supreme Court Rules for Hughes, Says 1986 FCA Amendments Do Not Apply Retroactively*, 67 FED. CONT. REP. 24 (BNA) (1997). The amici brief on behalf of Hughes included such organizations and groups as the U.S. Chamber of Commerce, the National Security Industrial Association, the Electronic Industrial Association, and the Shipbuilders Council of America. Individual defense contractors supporting Hughes included Northrop Grumman Corp., Lockheed Martin Corp., and FMC Corp. A number of groups supported Schumer with amici briefs, including the federal government, Taxpayers Against Fraud, and the Project on Government Oversight.

600. 31 U.S.C.A. § 3729 (West 1997).

601. *Hughes Aircraft*, 1997 WL 321246, at *2. Northrop had a prime contract with the Air Force for the B-2 bomber.

602. *Id.* The contracts provided that both Northrop and Hughes were to receive their reasonable, allocable, and allowable costs plus a reasonable profit.

603. *Id.* The subcontract between Hughes and McDonnell-Douglas was a fixed-price contract.

604. *Id.*

Fraud

Qui Tam Developments

High Profile Decision Handed Down by Supreme Court. On 16 June 1997, the U.S. Supreme Court ruled for Hughes Aircraft Company, holding that the 1986 amendments to the False Claims Act do not apply retroactively to pre-1986 conduct.⁵⁹⁸ The case generated a great deal of interest in the procurement community,⁵⁹⁹ because it was the first time the Supreme Court decided to hear a *qui tam* case since the 1986 amendments to the False Claims Act.⁶⁰⁰

In late 1981, Northrop Corporation awarded Hughes Aircraft Company a subcontract to design and to develop a radar system for the B-2 bomber.⁶⁰¹ Both the prime and subcontracts were cost contracts.⁶⁰² Shortly after Northrop awarded Hughes the B-2 work, McDonnell-Douglas subcontracted with Hughes for the upgraded radar system for the F-15.⁶⁰³ Hughes used internal commonality agreements to allocate costs between the projects because the B-2 and F-15 work overlapped in significant respects.

The Air Force audited Hughes after Northrop raised concerns about Hughes’ practice of shifting costs from the fixed-price F-15 contract to the B-2 contract under its commonality agreements.⁶⁰⁴ In mid-1986, the Air Force concluded that Hughes improperly shifted certain developmental costs between the two programs. Moreover, based upon subsequent audits, the Air Force resolved that Hughes failed to adequately disclose its cost shifting practices in a cost accounting standards

report in 1984. Accordingly, the Air Force directed Northrop to withhold \$15.4 million from Hughes.⁶⁰⁵

On 20 January 1989, William J. Schumer commenced the action⁶⁰⁶ under the *qui tam* provisions of the False Claims Act.⁶⁰⁷ He alleged that Hughes knowingly mischarged Northrop, resulting in a \$50 million net overcharge.⁶⁰⁸ The Department of Justice neither intervened⁶⁰⁹ in the action nor moved to have it dismissed.⁶¹⁰

After the case worked its way through the lower courts, the Supreme Court granted certiorari. The Court initially decided to limit its review to three issues: (1) whether monetary damage to the government was a prerequisite for a *qui tam* action; (2) whether the disclosure on the alleged fraudulent conduct constituted “public disclosure” within the meaning of the jurisdictional provisions of the False Claims Act; and (3) whether the 1986 amendments to the False Claims Act, which relaxed the restrictions on *qui tam* lawsuits, apply retroactively to actions challenging pre-1986 contracts.⁶¹¹

In finding for Hughes, Justice Clarence Thomas, writing for a unanimous Court, held that the 1986 amendments to the False Claims Act do not apply retroactively to pre-1986 conduct.⁶¹² In reaching a conclusion, Thomas stated:

In sum, whether we consider the relevant conduct to be Hughes’ disclosure to the government or its submission of the allegedly false claim, disclosure of information about the claim to the government constituted a full defense to a *qui tam* action prior to 1986. If applied in this case, the legal effect of the 1986 amendments would be to deprive

Hughes of that defense. Given the absence of a clear statutory expression of congressional intent to apply the 1986 amendments to conduct completed before its enactment, we apply our presumption against retroactivity and hold that, under the relevant 1982 version of the FCA, the District Court was obliged to dismiss the action because it was “based on evidence or information the government had when the action was brought.”⁶¹³

The decision by the Court was somewhat disappointing because it provided the procurement community limited guidance on what *qui tam* suits can be filed under the False Claims Act. That is, the Court did not address the issue of whether there must be an injury to the “public fisc” to sustain a *qui tam* action, or exactly what “public disclosure” requires. The procurement community must wait for another day before the Supreme Court takes on those issues.

*Settlement Agreement in State Action Bars Later Qui Tam Suit*⁶¹⁴ Christopher Hall worked as an engineer for Teledyne Wah Chang, Albany from 1978 to 1991. Hall worked on tubeshells for nuclear fuel rods.⁶¹⁵ In order to prevent corrosion and leaking, Teledyne subjected the tubeshells to the “Beta Quench” process. The process involved heating the tubeshells to extremely high temperatures. A chemical reaction took place at the high temperature, resulting in improved corrosion resistance.⁶¹⁶

Hall alleged that Teledyne’s Beta Quench process was faulty because it did not heat the tubeshells to the necessary temperature for the chemical reaction. Hall initially informed Tele-

605. *Id.* The Air Force ultimately changed its mind on the internal commonality agreements. It concluded that the agreements actually benefited the Air Force by charging costs to the fixed-price contract that otherwise would have been absorbed solely by the cost-plus B-2 program. Therefore, the Air Force withdrew its finding of noncompliance and directed Northrop to pay Hughes the \$15.4 million it withheld. *Id.*

606. *Id.* at *3. Schumer was, at one time, the contracts manager for Hughes’ B-2 division.

607. 31 U.S.C.A. § 3730(b) (West 1997). Under the *qui tam* provisions, a private individual, known as a “relator,” is authorized to bring a claim on behalf of the United States against anyone who knowingly presents a false or fraudulent claim to the United States in violation of 31 U.S.C. § 3729.

608. *Hughes Aircraft*, 1997 WL 321246, at *3.

609. *Id.* The Department of Justice is entitled to intervene, pursuant to 31 U.S.C. § 3730(2).

610. *Id.* The Department of Justice is also entitled to seek dismissal, pursuant to 31 U.S.C. § 3730(c)(2)(A).

611. *Id.* at *4.

612. *Id.* at *1.

613. *Id.* at *7.

614. *United States ex. rel Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997).

615. *Id.* The tube shells were made of zircaloy and were the primary containment sheath for nuclear fuel rods in nuclear reactors.

616. *Id.* Teledyne sold the tube shells to other private firms in the nuclear industry as well as to the government. Teledyne certified that the tube shells had been heated to the necessary temperature for the enhanced chemical reaction.

dyne's management of his concerns.⁶¹⁷ He later filed a complaint with the Nuclear Regulatory Commission.⁶¹⁸ Shortly after Hall voiced his concerns to Teledyne, the company disciplined him for "alleged" performance deficiencies. Teledyne eventually fired him.

Hall filed suit against Teledyne in state court.⁶¹⁹ He alleged that Teledyne fired him for his whistleblowing.⁶²⁰ Hall and Teledyne settled the lawsuit for a sizable sum of money and entered into a broadly worded settlement agreement with a general mutual release.⁶²¹ In October 1994, Hall filed the instant *qui tam* action against Teledyne based on the same allegations that he made in the state action. The district court granted summary judgment for Teledyne on the ground that the release executed in the state action encompassed the *qui tam* action.⁶²²

In holding for Teledyne, the court distinguished a previous Ninth Circuit opinion, *United States ex rel. Green v. Northrop Corp.*⁶²³ In *Green*, shortly after the plaintiff told his employer that he found evidence of fraud on a government contract, the employer fired him.⁶²⁴ Green filed a wrongful discharge action in state court and subsequently entered into a settlement agreement and general release of all claims.⁶²⁵ At the time of the settlement agreement, the United States was unaware of Green's fraud allegations and the release.⁶²⁶

The Ninth Circuit distinguished the instant case from *Green* in that the government had full knowledge of Hall's charges and had investigated them before Hall and Teledyne had settled.⁶²⁷ Accordingly, the settlement does not affect the public interest in having information of fraudulent conduct, that the government could not otherwise obtain, brought forward.⁶²⁸

Federal Circuits Split on Government's Unlimited Right to Veto Qui Tam Settlements. In *Searcy v. Philips Electronics North America Corp.*,⁶²⁹ the Fifth Circuit addressed the issue of whether the False Claims Act gives the government the authority to veto a settlement agreement between the relator and the defendant after it declined to intervene in both the trial and appellate courts.⁶³⁰ The Ninth Circuit addressed the issue in *Killingsworth v. Northrop Corp.*⁶³¹ In that case, the government sought to intervene for purposes of appeal after the district court refused to block a settlement. The government argued that the relator was short-changing the government in settling its *qui tam* and wrongful termination suit at the same time in order to reduce the amount that would typically go to the government. The court in *Killingsworth* held that "the government's consent to dismissal is only required during the initial sixty-day (or extended) period in which the government may decide whether to [proceed with the action]."⁶³²

The Fifth Circuit disagreed with the Ninth Circuit's reasoning in *Killingsworth*.⁶³³ The Fifth Circuit contended that the

617. *Id.* Teledyne's management investigated Hall's allegations and concluded that his concerns lacked merit.

618. *Id.* The NRC also could not substantiate Hall's allegations.

619. *Id.*

620. *Id.* Although Hall did not allege a *qui tam* claim in the state action, he clearly asserted that Teledyne had defrauded its customers by falsely certifying that the Beta Quench process effectively increased the corrosion resistance of the tube shells.

621. *Id.* The release stated, in part, that "it includes, but is not limited to, all claims which were, or could have been, brought as claims or counterclaims in the above-referenced action. This Mutual Release of Claims also includes, but is not limited to, any other claims brought in any other type of action or proceeding." *Id.*

622. *Id.* In reaching its conclusion, the district court balanced the benefits of enforcing the settlement agreement against the potential harm to the public interest.

623. 59 F.3d 953 (9th Cir. 1995).

624. *Id.* at 956.

625. *Hall*, 104 F.3d at 233.

626. *Id.*

627. *Id.* at 230.

628. *Id.* at 233.

629. 117 F.3d 154 (5th Cir. 1997).

630. *Id.* at 155.

631. 25 F.3d 715 (9th Cir. 1994).

632. *Id.* at 723. In support of its position, the Ninth Circuit explained that the government was aware of the settlement and chose not to exercise its right to intervene for good cause in the trial proceeding.

633. *Searcy*, 117 F.3d at 159.

statutory language of 31 U.S.C. § 3730(b)(1) is clear when it provides that the court may not grant a voluntary dismissal in a *qui tam* suit unless the Attorney General consents to the dismissal. Accordingly, the Fifth Circuit held that the False Claims Act gave the government the power to veto settlement agreements even after it declined to intervene.⁶³⁴

Major Fraud Act: Federal Circuits Split on Application of \$1 Million Jurisdictional Threshold

In *United States v. Brooks*,⁶³⁵ the Fourth Circuit held that the \$1 million jurisdictional threshold of the Major Fraud Act⁶³⁶ is met when the value of a prime contract is \$1 million or more, regardless of the value of the tainted subcontract.⁶³⁷ The Fourth Circuit's holding in *Brooks* is contrary to the Second Circuit's decision in *United States v. Nadi*.⁶³⁸ In *Nadi*, the court specifically held that, for jurisdictional purposes under the Major Fraud Act, the value of the fraudulent contract must meet the \$1 million requirement.⁶³⁹ The conflict between the circuits creates a certain amount of ambiguity for the practitioner who must decide whether to pursue a particular contractor under the Major Fraud Act.

In *Brooks*, the Fourth Circuit supported its decision by noting that its reading of the Major Fraud Act recognizes that the measure of fraud "of this species" is not only the financial

losses on a particular subcontract but also the potential consequences to persons and property.⁶⁴⁰ The court specifically noted that "[i]n military contracts, in particular, fraud in the provision of small and inexpensive parts can have major effects, destroying or making inoperable multi-million dollar systems or equipment, injuring service people, and compromising military readiness."⁶⁴¹ Therefore, by having the statute cover even minor contractors whose actions could threaten major military operations, Congress empowered prosecutors to effectively fight procurement fraud.⁶⁴²

By contrast, in *Nadi*, the Second Circuit concluded that the focus should be on the specific contract that was tainted with fraud. The court stated:

Nonetheless, we find that a reasonable reading of the statute, in light of the legislative history, requires that we adopt the rule, argued for by the Defendants, whereby the value of the contract is determined by looking to the specific contract on which the fraud is based. So, for example, in a case where the value of a subcontract is less than \$1,000,000 but the prime contract is for \$1,000,000 or more, the subcontractor would escape liability under section 1031. We adopt this rule

634. *Id.* at 160. The Fifth Circuit concluded the case with the following language:

For more than 130 years, Congress has instructed courts to let the government stand on the sidelines and veto a voluntary settlement. It would take a serious conflict within the structure of the False Claims Act or a profound gap in the reasonableness of the provision for us to be able to justify ignoring this language.

Id.

635. 111 F.3d 365 (4th Cir. 1997).

636. 18 U.S.C.A. § 1031(a) (West 1997). The statute provides:

Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent (1) to defraud the United States, or (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is \$1,000,000 or more, shall, subject to the applicability of subsection (c), be fined not more than \$1,000,000, or imprisoned not more than 10 years or both.

Id.

637. *Brooks*, 111 F.3d at 368. The facts of the case are rather straightforward. Edwin, John, and Stephen Brooks operated B&D Electric Supply, Inc. The company sold electrical supplies to both military and civilian customers. B&D's fraud involved two subcontracts it held with firms that had entered into prime contracts with the U.S. Navy. The first subcontract was with Jonathan Corporation to supply 14 shipboard motor controls for a total price of \$51,544. The second subcontract was with Ingalls Shipbuilding, Inc. for six rotary switches for a total price of \$1470. The value of Ingalls Shipbuilding, Inc.'s prime contract with the Navy was \$5 million. B&D was convicted in the United States District Court for the Eastern District of Virginia for violating the Major Fraud Act.

638. 996 F.2d 548 (2d Cir. 1993).

639. *Id.* at 551.

640. *Brooks*, 111 F.3d at 369.

641. *Id.*

642. *Id.*

with reference to the language of the statute.⁶⁴³

For the practitioner, it is virtually impossible to reconcile the contrary positions taken by the Fourth and Second Circuits. In neither circuit was there a fact-dependent application of the Major Fraud Act. It boils down to a matter of statutory interpretation. The more expansive reading of the Major Fraud Act by the Fourth Circuit is more advantageous to the government.

Debarment Does Not Trigger Double Jeopardy

In *United States v. Hatfield*,⁶⁴⁴ the Fourth Circuit faced the issue of whether a debarred government contractor may subsequently face criminal prosecution for the same fraudulent conduct that led to its debarment.⁶⁴⁵ In September 1990, Fred Hatfield, doing business as HVAC Construction Company, lied to the Army by stating that neither he nor his firm had ever been terminated for default. Hatfield also presented an inflated subcontractor invoice to the government. Finally, he falsely certified that his firm completed certain work in order to obtain payment from the government. As a result of this conduct, the Army debarred Hatfield and his company from all government contracting for twenty-six months.⁶⁴⁶

Hatfield argued that his debarment constituted punishment, thereby precluding a subsequent prosecution under the Double Jeopardy Clause of the Fifth Amendment.⁶⁴⁷ More specifically, Hatfield contended that the court must make a “particularized assessment” as required by *United States v. Halper*⁶⁴⁸ to deter-

mine whether a debarment is punishment. He believed that such an assessment would show that his losses sustained from the debarment were disproportionate to the harm caused to the government.⁶⁴⁹

The Fourth Circuit disagreed. It concluded that debarment is civil and remedial action and not punishment.⁶⁵⁰ As such, it does not trigger the Double Jeopardy Clause. The court distinguished *Halper*, finding that it did not apply to the instant facts.⁶⁵¹ Specifically, the court noted that the balancing test in *Halper*—weighing the government’s harm against the penalty’s size—was appropriate only where the penalty was for a fixed monetary amount.⁶⁵² As such, the court stated “when confronted with the in rem forfeiture sanction where the ‘nonpunitive purposes served’ were ‘virtually impossible to quantify,’ the *Halper* test is inapplicable.”⁶⁵³

The court had little difficulty concluding that a debarment was a civil proceeding. It noted that: (1) the Army’s own procedural rules state that it is not punishment, but only to protect the Army in its dealings with contractors; (2) the procedures are informal; (3) the standard of proof is a preponderance of evidence; and (4) the remedial purpose is tied to specific conduct that relates to the protection of the Army from fraud, neglect, and nonperformance, with the focus being on the “present responsibility” of the contractor.⁶⁵⁴

Finally, the court did not believe that debarment for twenty-six months was “unreasonable or excessive” enough to transform a civil remedy into a criminal sanction.⁶⁵⁵ In support of its conclusion, the court cited *United States v. Glymph*.⁶⁵⁶ In

643. *Nadi*, 996 F.2d at 551.

644. 108 F.3d 67 (4th Cir. 1997).

645. *Id.* at 68.

646. *Id.*

647. *Id.* The Double Jeopardy Clause provides, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

648. 490 U.S. 435 (1989). In *Halper*, the contractor received a civil penalty of \$130,000, which was 220 times greater than the government’s \$585 in damages. The Supreme Court held that while the civil penalty did not rise to the level of punishment solely because Congress provided for a remedy in excess of the government’s actual damages, its precedent did not “foreclose the possibility that in a particular case a civil penalty . . . may be so extreme and so divorced from the Government’s damages and expenses as to constitute punishment.” *Id.* at 442.

649. *Hatfield*, 108 F.3d at 68-69. Hatfield claimed that the debarment cost him and his company \$1.1 million in attorneys’ fees, lost profits, and out-of-pocket expenses.

650. *Id.* The court applied a two-part test to determine whether a debarment is civil or criminal: (1) whether the procedure was designed to be remedial and (2) whether the remedy provided, even if designated as civil, “is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty.” *Id.*

651. *Id.* at 70.

652. *Id.*

653. *Id.*

654. *Id.* at 69.

Glymph, the contractor was debarred for four years for knowingly supplying the government with nonconforming parts. The contractor argued that such a sanction was “overwhelmingly disproportionate.”⁶⁵⁷ The court in *Glymph* rejected the contractor’s argument, noting that the government paid more than \$40,000 for the non-conforming parts.⁶⁵⁸ In *Hatfield*, the government’s loss was between \$40,000 and \$60,000, not including losses by subcontractors. Accordingly, the Fourth Circuit concluded that the twenty-six month debarment was not “unreasonable or excessive” and did not transform an otherwise remedial sanction into a criminal penalty.⁶⁵⁹

Taxation

On the Road Again

Federal government travelers are still confused about whether they can be required to pay sales and other local taxes when traveling on official business. Such confusion stems, in part, from the Ninth Circuit’s decision in *California Credit Union League v. City of Anaheim*.⁶⁶⁰ The court in that case held that federal credit union employees could not be subject to a transitory occupancy tax because they were, for all practical purposes, the government. Unfortunately for federal travelers, the United States Supreme Court granted certiorari and remanded the case for further review.⁶⁶¹ The Supreme Court remanded the case because it had previously ruled that there was no federal jurisdiction in such a case and because the United States was not a party to the case.

As a result of this recent reversal, the rule regarding the taxation of federal travelers in the Ninth Circuit is once again the same as the rest of the country. The rule was summarized in a 1976 Comptroller General opinion.⁶⁶² Basically, government travelers are subject to local taxes when they are paying for hotel rooms themselves, even if they are being reimbursed. The theory is that the government traveler is contracting with the

innkeeper. As such, the legal incidence of the tax falls on the traveler. Although the government must reimburse the traveler, the tax is an indirect tax on the federal government. The opinion further states that while the federal government could establish a system whereby it directly contracts for all hotel rooms for employee travel, the cost of such a system would exceed any tax savings.

Each state determines whether or not it taxes federal travelers. Some states have decided to do so, while others have not. Accordingly, federal travelers should always ask about the possibility of being exempt from local taxes, but they must understand that they have no federal right to be exempt. If there is an exemption, it is by the grace of state legislation.

Where There’s a Will, There Just Might Be a Way

The Federal District Court of Nevada recently held that the taxation of a federal contractor’s “beneficial use” of federal property does not violate the Supremacy Clause.⁶⁶³ The court also held that the taxing authority could use the value of the property to establish the value of the beneficial use.

For more than a decade, Nye County, Nevada sought to tax property located within its borders that is owned by the United States, but is used and maintained by federal contractors. Nye County’s first attempt was against a defense contractor, Arcata Associates, Inc.⁶⁶⁴ Arcata paid \$127,414.03 in personal property taxes for 1983-84 and 1988-89 under protest. The United States reimbursed Arcata and then sued Nye County to recover the taxes. In *United States v. Nye County, Nevada*, the Ninth Circuit noted that historically when jurisdictions sought to impose a tax on the federal property itself, the tax failed.⁶⁶⁵ In contrast, when jurisdictions sought to impose a tax on “an isolated possessory interest or on a beneficial use of United States property,” the tax was allowed.⁶⁶⁶ The court noted that the Nevada statute under which Nye County sought to tax the prop-

655. *Id.* The court specifically noted that Hatfield’s conduct (lying on numerous occasions and falsely inflating a subcontractor’s invoices) raised serious questions about his honesty and dependability.

656. 96 F.3d 722 (4th Cir. 1996).

657. *Id.* at 725-26. Glymph argued that the debarment should not exceed three years because FAR 9.406-4 provides that debarments generally should not exceed three years.

658. *Id.*

659. *Hatfield*, 108 F.3d at 69.

660. 95 F.3d 30 (9th Cir. 1994).

661. *California Credit Union League v. City of Anaheim*, 117 S. Ct. 2429 (1997).

662. *In re Hotel-Motel Tax—Anchorage, Alaska*, B-172621, 55 Comp. Gen. 1278, (July 16, 1976).

663. *United States v. Nye County*, 957 F. Supp. 1172 (D. Nev. 1997).

664. *United States v. Nye County*, 938 F.2d 1040 (9th Cir. 1991), *cert. denied*, 530 U.S. 919 (1992).

erty in issue taxed the property as if it were owned by Arcata.⁶⁶⁷ Nye County lost the suit.

Following Nye County's loss in federal court, Nevada amended its statutes.⁶⁶⁸ It was under this amended statute that Nye County sought to tax tangible personal property owned by the federal government but used and maintained by several defense contractors. Since the revised statute sought to tax only the contractors' beneficial use of the property and not the property itself, the court held that Nye County could impose such a tax. The court further held that Nye County could use the value of the property as a basis for determining the value of the contractors' beneficial use of the property.

Superfund Taxes Are Income Taxes

In *Rockwell International Corp. v. Widnall*,⁶⁶⁹ the Federal Circuit held that federal environmental or "Superfund" taxes are federal income taxes.⁶⁷⁰ As such, they are not an allowable, reimbursable cost under the FAR.

Rockwell entered into a contract with the Air Force that contained a standard cost reimbursement clause.⁶⁷¹ Pursuant to this clause and FAR Part 31, federal income and excess profits taxes are not allowable. Rockwell argued that the environmental income tax or "Superfund" tax was an allowable cost.

The "Superfund" tax was passed in 1986 and was codified at 26 U.S.C. § 59A.⁶⁷² This section of the Internal Revenue Code imposes a tax on all corporate taxpayers whose modified alternative minimum taxable income exceeds \$2 million.⁶⁷³ After reviewing the legislative history of this tax, the court concluded that the "Superfund" tax is an income tax. As such, Rockwell is not entitled to reimbursement because the "Superfund" tax is not an allowable cost.⁶⁷⁴

Freedom of Information Act (FOIA)⁶⁷⁵

A proposed change⁶⁷⁶ to the FAR requires the disclosure of unit prices in post-award notices and debriefings. This requirement relieves agencies of the cumbersome process of giving

665. See *United States v. Colorado*, 627 F.2d 217 (10th Cir. 1980), *summarily aff'd. sub nom. Jefferson County v. United States*, 450 U.S. 901 (1981), *United States v. Hawkins County*, 859 F.2d 20 (6th Cir. 1988).

666. See *United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. County of Fresno*, 429 U.S. 452 (1977); *United States v. City of Detroit*, 355 U.S. 466 (1958).

667. Prior to a 1993 revision, a Nevada statute provided:

Personal Property exempt from taxation which is leased, loaned, or otherwise made available to and used by a natural person, association, or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property

NEV. REV. STAT. ANN. § 361.159 (Michie 1992).

668. The pertinent part of the statute now reads:

Except as otherwise provided in subsection 3, when personal property, or a portion of personal property, which for any reason is exempt from taxation is leased, loaned, or otherwise made available to and used by a natural person, association or corporation in connection with a business conducted for profit, the leasehold interest, possessory interest, beneficial interest, or beneficial use of any such lessee or user of the property is subject to taxation to the extent the:

(a) Portion of the property leased or used; and

(b) Percentage of time during the fiscal year that the property is leased to the lessee or used by the user, can be segregated and identified.

NEV. REV. STAT. ANN. § 361.159 (Michie 1997).

669. 109 F.3d 1579 (Fed. Cir. 1997).

670. See I.R.C. § 59A (1997) (imposing an additional tax on all corporations to help defray the government's cost of cleaning up environmentally damaged areas).

671. See FAR, *supra* note 22, at 52.216-7; 48 C.F.R. § 52.216-7 (1987).

672. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

673. The alternative minimum income tax is imposed on all individuals and corporations who otherwise might not have to pay taxes because they have taken advantage of a variety of allowances, deductions, and credits. See *generally* I.R.C. §§ 55-59.

674. *Rockwell International Corp. v. Widnall*, 109 F.3d 1579, 1583 (Fed. Cir. 1997).

675. 5 U.S.C.A. § 552 (1997), *as amended by* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

notice to the successful offeror before determining whether to disclose unit prices in response to a FOIA request.⁶⁷⁷

The proposed change will not violate the Trade Secrets Act (TSA).⁶⁷⁸ The TSA is a broadly worded criminal statute prohibiting disclosure of “practically any commercial or financial data collected by any federal employee from any source”⁶⁷⁹ unless otherwise “authorized by law.” Because the FAR itself will now expressly provide such authorization, the TSA will not be violated.⁶⁸⁰ Since disclosure of unit prices will now be mandatory in the post-award process, successful offerors cannot reasonably argue (and thus need not be afforded submitter notice) that their unit prices should later be withheld under FOIA since those cannot be considered “confidential.” This FAR change does not apply to unit prices of unsuccessful offerors. Those continue to be withheld, as well as all other items in an unsuccessful proposal, as required by 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b (m)(2).

Environmental Law

DFARS Final Rule: Environmental Restoration and Construction Contracts

On 8 January 1997, the Director of Defense Procurement issued a DFARS final rule which added an exception to the restriction on the use of cost-plus-fixed-fee contracts for military construction.⁶⁸¹ The exception applies to contracts for environmental restoration at installations that are being closed or realigned, where payments are made from a Base Realignment and Closure (BRAC) Account.

Prior to the final rule, DFARS 216.306⁶⁸² restricted the use of cost-plus-fixed fee contracts for military construction.⁶⁸³ The amendment lifts the prohibition for environmental restoration contracts at installations set for BRAC closure. The service secretaries are authorized to approve such contracts that are for environmental work not classified as construction.⁶⁸⁴ The Secretary of Defense or designee must approve contracts that are not for environmental work only or that are for environmental work classified as construction.

Comprehensive Guideline for Procurement of Products Containing Recovered Materials

On 7 November 1996, the Environmental Protection Agency (EPA) published a proposed rule which designated thirteen new items that are or can be made with recovered materials.⁶⁸⁵ These items include shower and restroom dividers, latex paint, parking stops, channelizers, delineators, flexible delineators, snow fencing, garden and soaker hoses, lawn and garden edging, printer ribbons, ink jet cartridges, plastic envelopes, and pallets. The proposed rule clarifies the EPA’s previous designation of floor tiles, structural fiberboard, and laminated paperboard as items that can be made with recovered materials.⁶⁸⁶

Within one year after publication of the guideline items, each procuring agency must develop an affirmative procurement program that will assure that these items will be purchased to the maximum extent practicable.⁶⁸⁷ The use of the guideline items must not jeopardize the intended end use of the item.⁶⁸⁸ The statutory requirement to purchase these items only

676. 62 Fed. Reg. 51,224 (1997).

677. The previous policy of the DOD was that unit prices should be disclosed except in unusual circumstances. Before an agency could make an independent determination in response to a FOIA request for confidential commercial information, the agency had to solicit the views of the submitter of that information as to whether disclosure would cause substantial competitive harm.

678. 18 U.S.C. § 1905 (1994).

679. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987).

680. A disclosure pursuant to an express provision in a properly promulgated and statutorily based agency regulation would be “authorized by law.” See *Chrysler v. Brown*, 441 U.S. 281, 295-316 (1979).

681. 62 Fed. Reg. 1058-1101 (1997).

682. Implementing § 101 of the 1997 Military Construction Appropriations Act, Pub. L. No. 104-196, 110 Stat. 2385 (1996).

683. Cost-plus-fixed-fee contracts are prohibited from use in construction contracts when the project: is funded by a military construction appropriation act; is estimated to exceed \$25,000; and will be performed within the United States, except Alaska. DFARS, *supra* note 52, at 216.306.

684. As defined in 10 U.S.C.A. § 2801 (West 1997).

685. 61 Fed. Reg. 57,748 (1996).

686. *Id.*

687. 42 U.S.C.A. § 6962(e) (West 1997).

688. *Id.* § 6962(d)(2).

applies to procurements over \$10,000 or where the purchased quantity, or of functionally equivalent items, procured in the fiscal year exceeds \$10,000.⁶⁸⁹ Under the Resource Conservation and Recovery Act (RCRA),⁶⁹⁰ there are exceptions to these requirements. These exceptions are: if the procuring contracting officer determines that the items meeting the statutory requirements are not reasonably available within a reasonable period of time, fail to meet the performance standards set forth in the specifications, or fail to meet the reasonable performance standards of the procuring agencies. The contracting officer also considers price, availability, and competition.

GAO Criticizes DOD Environmental Cleanup Cost Sharing Policies

GAO Criticizes DOD Environmental Cleanup Cost Sharing Policies at GOCO Plants. On 17 April 1997, the GAO released a report criticizing the DOD's policies and practices concerning sharing environmental cleanup costs at GOCO plants.⁶⁹¹ The report stated that the military's criteria for cost-sharing with contractors still varies widely. This is due to the DOD's failure to give the military services adequate guidance for making decisions as to when and whether to seek recovery of environmental cleanup costs at GOCO sites. Absent this guidance, the services have taken different approaches to cost sharing policies. The Air Force, Navy, and Army Corps of Engineers have guidance in place while the Army and DLA do not.

The GAO recommends that the Secretary of Defense issue necessary guidance to put standard cost sharing policies in place for the DOD. It also recommends that DOD increase its cost data analysis.⁶⁹²

GAO Criticizes Army Cleanup Efforts at Rocky Mountain Arsenal. In a report dated 23 January 1997,⁶⁹³ the GAO criticized the Army's internal accounting practices at Rocky Mountain Arsenal, Colorado.⁶⁹⁴ The report centers on a settlement agreement between the Army and Shell Oil Company. The agreement provided for shared environmental studies and cleanup activities. The GAO found that the Army paid Shell approximately \$3.1 million in claimed costs that lacked necessary documentation.

689. *Id.*

690. *Id.* § 6901.

691. *Environmental Cleanup at DOD: Better Cost-Sharing Guidance Needed at Government Owned, Contractor Operated Sites*, GAO/NSIAD-97-32 (1997).

692. *Id.*

693. *Environmental Cleanup: Inadequate Army Oversight of Rocky Mountain Arsenal Shared Costs*, GAO/NSIAD/AIMD-97-33 (1997).

694. The Arsenal was once a chemical weapons manufacturing facility.

695. Ensign-Bickford Co., B-274904.4, Feb. 12, 1997, 97-1 CPD ¶ 69.

Acceptable Proof of Environmental Compliance

The GAO found that a contractor provides acceptable proof of environmental compliance where its proposal addresses anticipated hazardous wastes and establishes that waste disposal would be handled by a reputable subcontractor.⁶⁹⁵

On 19 July 1996, the Army issued a solicitation for the production and delivery of blasting caps and fuses. The solicitation provided for award to the low-priced, technically acceptable offeror. The protester, Ensign-Bickford, submitted its proposal on 19 August 1996. STS also submitted a proposal which the Army initially found was unacceptable because it failed to provide proof of environmental compliance. During discussions, STS informed the Army that it used a subcontractor to dispose of all explosives and hazardous waste and that it did not have a formal waste management procedure document. STS provided information on its subcontractor, Laidlaw Environmental Services, and Laidlaw's capabilities and compliance with environmental regulations. The Army then awarded the contract to STS.

Ensign-Bickford argued that the Army should have rejected STS's proposal because it did not provide proof of environmental compliance as required by the RFP. The protester also argued that reliance upon a subcontractor is insufficient to demonstrate such compliance. Ensign-Bickford contended that waste management is a cradle-to-grave process, where a generator's responsibility for waste begins at the plant and not after delivery of the waste to a subcontractor to a disposal facility.

The Army advised the GAO that it did not anticipate the involvement of any hazardous products in addition to those being produced by other contracts STS was performing. The Army stated that STS's proposal and response to discussions properly identified the type of waste anticipated, the anticipated amount of waste, and a fully competent and licensed subcontractor to handle that waste. The Army also pointed out that since the protester processes its waste on-site, it needed the required licenses and permits. Therefore, the Army reasonably found the STS proposal acceptable even though it did not submit evidence of the required licenses, permits, or waste management plan.

On 27 December 1996, the Office of the Deputy Under Secretary of Defense for Environmental Security issued a proposed rule⁶⁹⁶ concerning the provision of technical assistance to local community members of restoration advisory boards (RABs) and technical review committees (TRCs).⁶⁹⁷ In 1994, Congress authorized the DOD to develop programs to facilitate public participation in environmental restoration by providing technical assistance to local communities.⁶⁹⁸ In 1996, Congress revised this authority. The proposed rule is in response to this revision.⁶⁹⁹

Under the rule, the DOD may obtain technical assistance from the private sector to help TRCs and RABs to understand better the scientific engineering issues underlying an installation's environmental restoration activities. TRCs and RABs may request this assistance only under certain circumstances. First, they must demonstrate that the federal, state, and local agencies responsible for overseeing environmental restoration at the installation do not have the technical expertise necessary for achieving the environmental restoration objective. Second, the technical assistance must be likely to contribute to the efficiency, effectiveness, or timeliness of the environmental restoration activities and must be likely to contribute to community acceptance of environmental restoration activities at the installation.⁷⁰⁰ Environmental restoration and base closure accounts will fund the program.⁷⁰¹

Ethics in Government Contracting

A new FAR Part 3 implemented the provisions of the Procurement Integrity Act, as amended in 1996 by the Clinger-Cohen Act.⁷⁰³ One of the most popular amendments may be the elimination of procurement integrity certifications. The new statute and its implementing regulation have also eliminated mandatory training and certification of training. Contracting officers, however, must still receive mandatory annual ethics training.⁷⁰⁴

One Year Employment Ban

The new rules create a one-year ban on accepting compensation⁷⁰⁵ from an awardee. The ban applies to individuals who served in enumerated procurement-related jobs⁷⁰⁶ and anyone who personally made enumerated procurement related decisions.⁷⁰⁷ The ban applies only if the procurement is in excess of \$10 million.⁷⁰⁸ If the ban results from the employee's contract formation related duty position (e.g. procuring contracting officer, source selection authority, member of a source selection board), the ban runs from contract award, unless the employee left the position prior to award, in which case the one-year period begins on the date of source selection.⁷⁰⁹ If the ban results from a contract administration related duty position (e.g., program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.⁷¹⁰ A former employee may work for a division or affiliate so long as it does not produce the same or similar product or services.⁷¹¹

696. 61 Fed. Reg. 68,184 (1996).

697. RABs and TRCs are established to review and to comment on DOD actions at military installations which are undertaking environmental restoration activities.

698. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

699. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-112, 110 Stat. 186 (1995) (codified at 10 U.S.C. § 2705(e) (1996)).

700. 10 U.S.C.A. § 2705 (West 1997).

701. 61 Fed. Reg. 68,184 (1996).

702. The proposed rule was discussed in *The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?*, ARMY LAW, Apr. 1996 at 10.

703. The new provisions have been codified at 41 U.S.C.A § 423 (1997).

704. See 5 C.F.R. § 2638.704 (1997).

705. "Compensation" means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual." FAR, *supra* note 22, at 3.104-3.

706. This includes those who "[s]erved, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of source selection evaluation board, or chief of a financial or technical evaluation team . . ." *Id.* at 3.104-4

707. Decisions which trigger the ban include the decision to award a contract, subcontract, modification, or task order or delivery order; the decision to establish overhead or other rates valued in excess of \$10 million; the decision to approve issuance of a payment or payments in excess of \$10 million; or the decision to pay or to settle a claim in excess of \$10 million. FAR, *supra* note 22, at 3.104-4.

The Gap

The new post-government employment restrictions apply to former officials only for services provided or decisions made on or after 1 January 1997.⁷¹² Officials who left government service before 1 January 1997 are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment.⁷¹³ There are likely to be a number of former government employees who remained in government service until 1 January 1997 but performed few or no procurement-related duties during 1997. These former employees will have no post-govern-

Protection of Information

Like its predecessor, the new Procurement Integrity Act contains restrictions on disclosing⁷¹⁵ or obtaining⁷¹⁶ procurement sensitive information. The new statute and implementing regulation introduce new terms. Replacing the old term “proprietary information” is the term “contractor bid or proposal information.”⁷¹⁷ Source selection information⁷¹⁸ continues to be protected.

708. *Id.* at 3.104-3. In excess of \$10,000,000” is defined as:

- (1) The value or estimated value of contract including options;
- (2) The total estimated value of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;
- (3) Any multiple award schedule contract unless the contracting officer documents a lower estimate;
- (4) The value of a delivery order, task order, or order under a Basic Ordering Agreement;
- (5) The amount paid or to be paid in a settlement of a claim; or
- (6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

Id.

709. *Id.* at 3.104-8(b)

710. *Id.* at 3.104-8(c).

711. *Id.* at 3.104-8(d)(2).

712. *Id.* at 3.104-2(c).

713. *Id.* at 3.104-2(d).

714. Officials and former agency officials may request an advisory opinion from an ethics counselor as to whether he would be precluded from accepting compensation from a particular contractor. *Id.* at 3.104-7(a).

715. *Id.* at 3.104-4(a)(2). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:

[A]ny person who—

- (i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a federal agency procurement; and
- (ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

Id.

716. “Person[s]” (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information. *Id.* at 3.104-4(b).

717. Contractor bid or proposal information includes cost or pricing data; indirect costs or labor rates; proprietary information marked in accordance with applicable law or regulation; information marked by the contractor as such in accordance with applicable law or regulation. *Id.* at 3.104-3. If the contracting officer disagrees with a contractor’s protective marking, he must give the contractor notice and an opportunity to respond prior to release of marked information. *Id.* at 3.104-5(d). *See also* CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 917 (1988); Chrysler Corp. v. Brown, 441 U.S. 281 (1979). These so-called reverse Freedom of Information Act (FOIA) cases also create a requirement for notice and an opportunity to respond before releasing such information in response to a FOIA request.

718. Contractor bid or proposal information is defined as any of the following: bid prices before bid opening; proposed costs or prices in negotiated procurement; source selection plans; technical evaluation plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations; rankings of bids, proposals, or competitors; reports and evaluations of source selection panels, boards, or advisory councils; and any other information marked as source selection information where release would jeopardize the integrity of the competition. FAR, *supra* note 22, at 3.104-3.

Reporting Employment Contacts

The new rules require officials who are “participating personally and substantially”⁷¹⁹ in an acquisition over the simplified acquisition threshold to report employment contacts with bidders or offerors.⁷²⁰ The regulatory definition of “personal and substantial participation” that triggers the reporting requirement requires involvement in certain pre-award activities, including drafting statements of work, evaluating proposals, and reviewing and approving award.⁷²¹ It is very similar to the definition of “procurement official” contained in the previous version of FAR Part 3. Reporting may be required even if contact is through an agent or intermediary.⁷²² In addition to reporting the contact, the agency official must either reject the employment or disqualify himself from the procurement. An employee who disqualifies himself must submit a disqualification notice to the HCA or designee, with copies to the contracting officer, source selection authority, and immediate supervisor.⁷²³

Practitioners may recall previous Procurement Integrity Act provisions which required the employee to request recusal and allowed the agency to deny the request. Now the employee not only has a right, but a duty, to disqualify himself from the procurement. What of the official whose job-hunting and concurrent disqualification substantially interferes with his official duties? If an official refuses to cease employment discussions, the agency may take administrative actions⁷²⁴ such as annual leave, leave without pay, or other “appropriate” administrative action.⁷²⁵

New Contract Clauses Threaten Loss of Fee or Profit

719. *Id.* at 3-104-4(c).

720. The reporting requirement applies to an official who “is participating.” The regulation provides no guidance as to when such participation ceases. In order to give reasonable meaning to this prohibition, participation should normally be presumed to continue until award. It might end sooner, however, if, for example, the employee had a significant change of duties or took an entirely different government job. Conspicuously absent from the statute or the new FAR provisions is a definition of the term “bidder or offeror.” Absent a definition, it is difficult to determine if contact with a prospective bidder or offeror would also trigger the reporting requirement. Again, it seems more reasonable to read the term broadly to include prospective bidders (as did the term “competing contractor” in the prior statute). The reporting requirement applies regardless of which party initiated the employment contact. *Id.*

721. *Id.* at 3.104-3.

722. *Id.* at 3.104-6(a)

723. *Id.* at 3.104-6(b).

724. *See* 5 C.F.R. § 2635.604(d) (1996); FAR, *supra* note 22, at 3.104-11(c).

725. Other “appropriate” action is not defined in the regulations. *But see* Smith v. Department of Interior, 6 M.S.P.R. 84 (1981) (upholding the removal of an employee for violation of conflict of interest regulations).

726. FAR, *supra* note 22, at 52.203-8.

727. *Id.* at 52.203-10.

728. *Id.* at 33.102(f).

729. 41 U.S.C.A. § 423 (West 1997).

A new contract clause advises contractors of the potential for cancellation or rescission of the contract and recovery of any penalty prescribed by law and the amount expended under the contract.⁷²⁶ Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations.⁷²⁷

Protesters Must Fire a Warning Shot

The new rules seek to ensure that competitors with knowledge of Procurement Integrity Act violations inform an agency promptly. In many instances, early notice will allow agencies to take corrective measures. The statute states, “[n]o person may file a protest, and the GAO may not consider a protest, alleging a [Procurement Integrity Act] violation unless the protester first reported the alleged violation to the agency within fourteen days of discovery of the possible violation.”⁷²⁸

This new provision has several significant weaknesses. The notice is required only for violations of the Procurement Integrity Act.⁷²⁹ Many protests are based on alleged violations of other statutes or on general allegations of an appearance of impropriety. Another issue regards the date of discovery of a possible violation. Contractors may argue that violations are not discovered until solid evidence has been obtained. Practitioners should also keep in mind that the statute specifically forbids the GAO from considering these issues absent timely notice to the agency. It does not, however, specifically address protests made to the agency, Court of Federal Claims, or district courts. Time will tell how other forums will deal with this issue.

*New Exemptions and Waivers Concerning
18 U.S.C. § 208*

The conflict of interest statute forbids a government employee's participation in an official capacity in any matter in which that person, a family member, a business associate, certain organizations, or a contractor or person with whom the government employee is negotiating for employment has a financial interest.⁷³⁰ On 18 December 1996, the Office of Government Ethics issued executive branch-wide blanket waivers, exempting those financial interests "too remote or inconsequential to warrant disqualification."⁷³¹ These waivers supersede those currently contained in the Joint Ethics Regulation (JER).⁷³²

Under the new blanket waivers, an employee may continue to participate in official matters if the financial interest stems from ownership in a "diversified mutual fund."⁷³³ Ownership of "sector funds," however, may create a conflict of interest.⁷³⁴ There are different rules for sector funds.⁷³⁵ The new regulation also creates an exemption for de minimis interests in securities (held by the employee, his spouse, or minor children) which are publicly traded or long-term federal government or municipal securities of an aggregate value of \$5000 or less.⁷³⁶ An employee whose interests grow to exceed \$5000 must disqualify himself or must divest the portion of his holdings that exceed the de minimis value.⁷³⁷

*No Conflict of Interest Created by Vested
Marital Property Rights*

The FAR prohibits contracting with a business concern "owned or substantially controlled by one or more government

employees."⁷³⁸ Does this prohibition preclude an award to a corporation owned, in part, by the spouse of a government employee? Not according to the GAO, which upheld the National Cancer Institute's (NCI) award of a contract for technical support services to a business owned by the wife of an NIH employee.⁷³⁹ The NCI is part of the NIH.

The protester, Cygnus Corporation, alleged a conflict of interest. Cygnus pointed out that the awardee's line of credit was secured by an indemnity deed of trust on the employee's house. Without this guarantee, Cygnus argued, the awardee would not be a responsible offeror. Not only did the NIH employee risk losing the roof over his head, but, under state property law, he stood to reap substantial financial gains from his wife's success. The protester estimated his potential gain to be in excess of \$100,000.

The GAO upheld the NIH's decision to allow the wife's business to compete. In making this determination, the GAO emphasized several factors. The NIH employee did not work for and was not known to employees of the NCI. His wife had been in business for many years, and there was no evidence of control of the corporation by the NIH employee. The GAO concluded that the assistance provided by putting up a security interest in his house as a guarantee did not create an impermissible conflict of interest.

Information Technology

Proposed FAR Rule—Modular Contracting

In compliance with Section 5202 of the Information Technology Management Reform Act,⁷⁴⁰ the FAR Council issued a proposed amendment to FAR Part 39.⁷⁴¹ The proposed rule cre-

730. 18 U.S.C.A. § 208 (West 1997); 5 C.F.R. § 2635.402 (1996).

731. See 61 Fed. Reg. 66,830 (1996) (amending 5 C.F.R. § 2640, effective 17 Jan. 1997).

732. U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, app. D (Aug. 30, 1993).

733. 5 C.F.R. § 2640.201(a) (1996). A "diversified" mutual fund "does not have a stated policy of concentrating in any industry, business, single country other than the United States, or bonds of a single state within the United States . . ." *Id.*

734. A "sector fund" is "a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single state within the United States. *Id.* § 2640.102(g).

735. *Id.* § 2640.201(b).

736. *Id.* § 2640.202(a). The aggregate amount includes the interests of a spouse and/or minor children.

737. *Id.* The regulations suggests that a conflict may be avoided by a standing order with one's broker to sell any excess over \$5000.

738. FAR, *supra* note 22, at 3.601(a).

739. Cygnus Corp., B-275957, Apr. 23, 1997, 97-1 CPD ¶ 202.

740. Pub. L. No. 104-106 § 5113, 110 Stat. 681-83 (1996).

741. 62 Fed. Reg. 14,756 (1997).

Construction Contracting

Design-Build Rules in Final Form

ates modular contracting⁷⁴² techniques in acquisitions of information technology. Modular contracting techniques allow agencies to procure major information technology acquisitions by dividing them into smaller, more manageable increments. Modular contracting allows agencies to balance the government's need for fast access to rapidly changing technology and incentivized contractor performance with stability in program management, contract performance, and risk management. The proposed rule directs agencies to use modular contracting to the maximum extent practicable for major information technology systems.

I Want Something "FAST"er!

To accommodate those agencies that require information technology resources faster than the blanket purchase agreements or federal supply schedule agreements can provide, the GSA has a new and faster "Federal Acquisition Services for Technology" (FAST) buying service.⁷⁴³ FAST is a rapid procurement, cost-reimbursable GSA buying service managed by GSA for use by other agencies. This program provides agencies with a quick, low-cost buying service for commercial off-the-shelf integrated information systems and network solutions that support an agency's mission.⁷⁴⁴

On 2 January 1997, the FAR Council issued a final rule⁷⁴⁵ amending the FAR⁷⁴⁶ to implement the construction design-build rules.⁷⁴⁷ The proposed rule was published on 7 August 1997.⁷⁴⁸ The FAR Council received seventy-seven comments. After reviewing the comments, the FAR Council revised the proposed rule to include examples of phase two evaluation factors.⁷⁴⁹

FAR 36.104 was also amended to state that unless the traditional acquisition approach of design-bid-build⁷⁵⁰ or design-build methods are used,⁷⁵¹ the contracting officer shall use the two phase selection procedures.⁷⁵² The two phase design-build selection procedures⁷⁵³ shall be used when the contracting officer determines it is appropriate.⁷⁵⁴ The contracting officer may issue one solicitation covering both phases or sequentially issue two solicitations. Proposals are evaluated in phase one to determine which offerors will submit proposals for phase two. One contract is awarded using competitive negotiations.⁷⁵⁵ Phase one of the solicitation shall include the scope of the work, the phase one evaluation factors,⁷⁵⁶ the phase two evaluation factors,⁷⁵⁷ and a statement of the maximum number of offerors that will be selected to submit phase two proposals.⁷⁵⁸

742. *Id.* Under modular contracting, agencies divide the purchase of an IT system into smaller "stand-alone" modules. Several modules or purchases are required to complete a system. In other words, the goal of modular contracting is to purchase smaller units that will function independently, yet allow for the creation of integrated systems through the execution of additional modules.

743. See *Information Technology: GSA Launches FAST Buying Service to Expedite Purchase of COTS Software, Equipment, Services*, 67 FED. CONT. REP.8 (BNA) (1997).

744. *Id.*

745. 62 Fed. Reg. at 271.

746. FAR, *supra* note 22, at 36.104, 36.301(b)(2), 36.303-1, 36.303-(a).

747. Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 4105, 110 Stat. 186 (1996).

748. 61 Fed. Reg. 41,212 (1996).

749. Examples include design concepts, management approach, key personnel, and proposed technical solutions. FAR, *supra* note 22, at 36.303-2.

750. This is defined as the traditional delivery method where design and construction are sequential and contracted for separately with two contracts and two contractors. *Id.* at 36.102. The Brooks Architect-Engineers Act established the design-bid-build rules. 41 U.S.C.A. § 541 (West 1997).

751. Design-build is defined as combining design and construction work in a single contract with a single contractor. FAR, *supra* note 22, at 36.102.

752. This is a selection method in which the agency selects a limited number of offerors (normally five or fewer) during phase one to submit detailed proposals for phase two. *Id.* at 36.102.

753. *Id.* at 36.303. Phase one shall include the scope of work, the phase one evaluation factors (including technical approach, specialized experience and technical competence, capability to perform, past performance, and other appropriate factors that are not cost- or price-related factors), phase two evaluation factors, and a statement of the maximum number of offerors that will be determined to be in the competitive range. *Id.* In phase two, the contracting officer shall determine the competitive ranges and then negotiate in accordance with the procedures found in FAR Part 15. *Id.*

754. *Id.* at 36.301. The phase two procedures apply where: 1) three or more offers are anticipated; 2) design work must be performed by offerors before developing price or cost proposals and; 3) the offerors will incur a substantial amount of expense in preparing offers. *Id.*

755. *Id.* at 36.303.

Differing Site Conditions

Third Parties After Contract Award Do Not Create a Differing Site Condition. On 10 March 1987, Olympus Corporation was awarded a fixed-price construction contract to pave the plant yards at the Stratford Army Engine Plant in Stratford, Connecticut. The contract included the standard differing site conditions clause. The government issued a notice to proceed on 18 April 1987. In May 1987, while clearing a trench in the plant yard, another government contractor operating the plant accidentally cut open an underground oil pipe. Oil escaped, contaminated the soil, and prevented Olympus from proceeding with its required paving. Shortly thereafter, Textron employees went on strike. These employees picketed the plant entrances and prevented Olympus employees from accessing the plant for two months. The contracting officer received timely notice of the contamination and the plant strike. Olympus requested an equitable adjustment and a sixty-nine day time extension. The contracting officer granted the time extension but only paid the contamination costs.

Olympus filed suit in the Court of Federal Claims, arguing the strike costs should be paid under the differing site conditions clause. The Court of Federal Claims granted the government's motion for summary judgment based on the fact that the differing site conditions clause did not provide the contractor with relief. Olympus appealed the decision to the Federal Circuit.⁷⁵⁹

In sustaining the summary judgment, the Federal Circuit held that the differing site conditions clause applies only to conditions existing at the time of contract award. Soil contamination and labor strikes occurring after the contract award are not differing site conditions. Olympus was not entitled to an equitable adjustment based on delay in completing its paving project caused by adverse physical conditions arising after contract performance began, because such delay was not caused by a differing site condition. The Federal Circuit further stated that interference by the government with the contractor's access

to the work site may breach the government's duty to cooperate. The court concluded that the government is not responsible for third party actions that delay the contractor's performance.

Contractor Entitled to Interest on Differing Site Condition Claim Even if Costs Not Yet Incurred. The Army Corps of Engineers Board of Contract Appeals ruled that a contractor may recover interest on its differing site condition costs from the time its claim was received by the contracting officer, although the contractor had not yet incurred these costs.⁷⁶⁰ The government argued that Congress did not intend for contractors to receive millions of dollars in interest before costs are incurred.⁷⁶¹ The board determined that the contractor is not unbridled in its interest submission. Had Congress felt it necessary to limit interest costs to costs already incurred, Congress could have done so. It did not. The board specifically found that Congress rejected that approach in favor of the more readily ascertainable date of claim submission.

The government further argued that it has no way to protect itself from incurring interest on unperformed work. The board disagreed and found that the government does specifically have control over the incurrence of cost through its approval of the changed work process. The contractor has to prove its costs for claims over \$100,000 due to the certification process, and the government controls what work it approves in a change of work modification. Accordingly, the government is protected against unbridled interest costs.⁷⁶²

Capacity to Perform Other Contracts Defeats Unabsorbed Overhead Costs Claim

The Air Force awarded AEC Corporation a contract for asbestos abatement and renovation on a building at Patrick Air Force Base, Florida. After beginning performance, AEC found materials it suspected contained asbestos but which were not identified as such in the specifications or drawings. AEC provided samples to a testing laboratory and ordered testing with-

756. *Id.* at 36.303-1. The phase one evaluation factors include technical approach (not detailed design or technical information), technical qualifications (such as specialized experience, technical competence, capability to perform and past performance of the offeror's team, including the architect-engineer and construction members), and other appropriate factors (excluding cost- or price-related factors, which are not permitted at this point).

757. Phase two of the solicitation shall be prepared in accordance with FAR Part 15 and shall include phase two evaluation factors. *Id.* at 36.303-2.

758. *Id.* at 36.303-1. The maximum number specified shall not exceed five unless the contracting officer determines, for that particular solicitation, that a greater number is in the government's interest and is consistent with the purposes and objectives of two phase design-build contracting.

759. *Olympus Corp. v. United States*, 98 F.3d 1314 (Fed. Cir. 1996).

760. *J.S. Alberici Constr. Co., ENGBCA No. 6179-R, 97-1 BCA ¶ 28,919.* The government requested that the board reconsider an earlier decision which granted summary judgment. Making the same arguments as in the earlier decision, the government asserted that the board erred in its interpretation of undisputed facts. Although the primary purpose of reconsideration is to allow a party the opportunity to present significant newly discovered evidence or evidence not readily available at the time of the original decision, the board decided to hear the case because of the government's strong interest in the outcome of the case.

761. *Brookfield Constr. Co., Inc. v. United States*, 661 F.2d 159 (Ct. Cl. 1981).

762. *Alberici*, 97-1 BCA ¶ 28,919.

out notifying the Air Force. Although the results were positive for asbestos, the contract did not require such testing. Upon notice to the Air Force, the Air Force issued a written suspension of work notice. The length of the suspension was unknown at the time. Ultimately, the suspension period lasted 305 days, which the board found to be unreasonable.⁷⁶³ After sending additional samples to a testing lab, AEC submitted the positive asbestos results to the Air Force. The Air Force issued another indefinite suspension of work notice which lasted thirty-two days. The board also found this suspension to be unreasonable. AEC then sought recovery of the unabsorbed overhead costs and recovery of increased overhead costs during the extended contract performance period.

The board found that the two Air Force ordered suspensions of work were the sole responsibility of the Air Force. AEC established a prima facie case of entitlement. These work suspensions were unreasonable in that they were of uncertain and unreasonable duration. However, the board denied AEC's claim for unabsorbed overhead costs because, although the Air Force unreasonably suspended the contract work, the contractor had the capacity to perform on other contracts. The contractor had submitted bids on five other government contracts during the suspension period.

No Substantial Completion when Punch List Not Finished

The GSA awarded a contract to Environmental Data Consultants, Inc. (EDC) for the replacement of underground fuel oil storage tanks at a federal office building in Brooklyn, New York. The GSBCA⁷⁶⁴ considered three claims arising from this contract. First, the GSA demanded a \$171,217 credit from EDC for work not performed due to contract deductive changes. Second, EDC sought \$918,341.41 for extra costs and materials not covered under the base contract. Third, the contract was terminated for default.

The contract required EDC to excavate soil from the job site and to construct a cofferdam.⁷⁶⁵ Once accomplished, EDC was to install three new oil storage tanks within the excavated area. EDC's excavation subcontractor, Soil Solutions, Inc., engaged Maybey Bridge, Inc. to supply materials to construct the cofferdam. Maybey Bridge could not build a cofferdam to the GSA's specifications. As a result, EDC requested and was granted the right to build a smaller cofferdam than specified. The government then established how much less to pay EDC for the reduced work.⁷⁶⁶ The board found that the government was entitled to the credit for the deleted work.

The contract required the work to be completed no later than 365 days after receipt of the notice to proceed. On that date, the GSA determined the project was substantially complete because the building was able to get oil through installed pipes from a single new storage tank. Although the GSA found the contract to be substantially complete, it gave EDC a punch list of items that needed to be completed.⁷⁶⁷ EDC proceeded to complete the punch list items and sent a letter stating that it had completed all the work. The contracting officer was unconvinced⁷⁶⁸ and issued a termination for default.

EDC claimed the termination for default was improper because the GSA found that the contract was substantially complete. The GSBCA determined that even if the contracting officer made this determination, the project was not in fact substantially complete. According to the board, when a construction contract is substantially complete is determined by whether the facility is "occupied" and used by the government for its intended purposes.⁷⁶⁹ The parties contracted for three oil tanks. One oil tank could not be used because it consistently had a high level of water in it.⁷⁷⁰ The project was not substantially complete because the power plant had only two-thirds of the oil storage capacity required by the contract. The board went further, stating that even if it had agreed that the project was substantially complete, there would still remain good cause for the default termination. A project can be suitable for its intended purpose, but not complete in the sense of providing the govern-

763. AEC Corp., ASBCA No. 45713, 97-1 BCA ¶ 28,973.

764. Environmental Data Consultants, Inc., GSBCA No. 13244, 96-2 BCA ¶ 28,614.

765. A cofferdam is a structure to keep the walls of the excavation from collapsing.

766. When the government deletes clearly required work from the contract, it is entitled to impose a deductive change, decreasing the contract price to reflect the reduced cost to perform the work. Plaza Maya Ltd, GSBCA No. 9086, 91-1 BCA ¶ 23,425. The government has the burden of proving the extent of the downward adjustment by establishing the reasonable cost the contractor would have incurred in performing the deleted work.

767. This included incomplete work regarding piping containment chambers and underground piping. The contract required EDC to install a piping containment chamber on top of each of the three oil storage tanks. The contract also required EDC to removed underground piping in its entirety insofar as such piping was connected to three old tanks that were to be removed from the site. *Environmental Data Consultants*, 96-2 BCA ¶ 28,6149, at 142,860.

768. EDC claimed that it had cut a hole in the pavement outside the power plant, removed the underground piping through the hole, and patched the pavement. It did not appear to the contracting officer that the asphalt patch was big enough to allow a person to work within it and bring up the old piping. In addition, the on-site inspector had not observed any pipe removal. *Id.* at 142,861.

769. Thermodyn Contractors, Inc. v. GSA, GSBCA No. 12510, 94-3 BCA ¶ 27,071.

770. If the tank were used as is, the water would destroy the system. *Environmental Data Consultants*, 96-2 BCA ¶ 28,6149, at 142,860.

ment with the benefits of its bargain.⁷⁷¹ When completion of the facility is unduly prolonged, or even when only the correction of punch list items is unduly prolonged, so as to indicate a lack of due diligence, or when effective progress of correction action ceases, a termination for default is legally justified.⁷⁷² This is true even if the government is using the facility. The correction of punch list items is a contractual obligation. The GSBCA found that despite opportunities over several months, EDC did not complete at least two significant punch list items, making the termination for default proper.

Federal Supply Schedules

A Bad Case of Mixing Apples and Oranges?— “Bundling” of Schedule and Non-Schedule Procurements Violates CICA

In a case that may well reverberate throughout the procurement community, the Court of Federal Claims ruled that “bundling” nonschedule products with schedule products under a multiple award schedule purchase order is illegal.⁷⁷³ The GSA and the GAO had previously condoned an authorized buyer’s acquisition of bundled items when they were “incidental” to the multiple award schedule purchase.⁷⁷⁴ In *ATA Defense Industries, Inc.*, the Court of Federal Claims held that this bundling practice was “fundamentally inconsistent with Congress’ unambiguous statutory mandate in the CICA.”⁷⁷⁵ It is significant that the Army, in issuing its purchase order contract for the upgrade of two target ranges at Fort Stewart, Georgia, had included non-schedule items amounting to thirty-five percent of the total contract value.

Contracting officers have increasingly turned to the federal supply schedule to meet their needs.⁷⁷⁶ In addition, agencies are turning more frequently to blanket purchase agreements, where the government enters into an agreement with an individual

contractor or a team of contractors for particular types of goods or services. These contracts have frequently included schedule as well as nonschedule items. This Court of Federal Claims decision may slow the recent explosion in these multiple award schedule trends.

New Regulatory Guidance on Ordering over Maximum Order

The FAR Council released the final rules for placing schedule orders above the maximum order threshold.⁷⁷⁷ The rules⁷⁷⁸ permit contracting officers to place orders in excess of the threshold after: (1) reviewing reasonably available information about multiple award schedule contracts using the “GSA Advantage!” on-line shopping service; (2) reviewing catalogs/pricelists of additional schedule contractors; (3) generally seeking price reductions from schedule contractors appearing to provide the best results; and (4) placing an order with the contractor that provides the best value and offers the lowest overall cost alternative.

In essence, contracting officers may exceed the threshold whenever it will yield the best value. In selecting an item, contracting officers can consider special features that are not provided by comparable vendors, trade-in and warranty considerations, maintenance availability, probable life compared to comparable items, past performance, and environmental/energy efficiency considerations.⁷⁷⁹

The new rules give contracting officers guidance in seeking price reductions. The rules provide that competition need not be a factor in placing an order against multiple award schedules. The GSA is presently eliminating maximum order limitations from its schedule contracts as quickly as it can. Should the issue arise, it will be interesting to see how the GAO handles these rules in light of *Komatsu Dresser Company*.⁷⁸⁰ This

771. R.M. Crum Constr. Co., VABCA No. 2143, 85-2 BCA ¶ 15,149.

772. Two State Constr. Co., DOTBCA No. 78-31, 81-1 BCA ¶ 15,149.

773. *ATA Defense Indus., Inc. v. U.S.*, 38 Fed. Cl. 489 (1997).

774. *See, e.g., Vion Corp.*, B-275063.2, B-275069.2, Feb. 4, 1997, 97-1 CPD ¶ 53. The GAO held:

[A]n agency may procure FSS and non-FSS items that are incidental to the FSS items under a single FSS procurement, so long as they meet the needs of the ordering agency and offer the lowest aggregate price, and if the cost of the non-FSS items is small compared to the total cost of the procurement.

Id.

775. *ATA Defense Indus.*, 38 Fed. Cl. at 489.

776. Given the dramatic reduction in the number of acquisition positions within federal agencies, streamlining procurements are particularly welcome.

777. 62 Fed. Reg. 44,802 (1997).

778. Amending FAR 8.404.

779. FAR, *supra* note 22, at 8.404(b)(2) (as amended).

1992 decision addressed a “Re-quote Arrangements” clause that provided for limited competitions only among schedule contractors for requirements exceeding the largest maximum order limitation available from any particular vendor. The Comptroller General found the clause inconsistent with the Competition in Contracting Act’s requirement for full and open competition. Regardless of the elimination of maximum order limitations, however, a broad challenge to BPAs under CICA appears inevitable, given the Court of Federal Claims analysis in *ATA Defense Industries*.

Foreign Acquisition Issues

In *Goddard Industries, Inc.*,⁷⁸¹ the GAO held that the Army properly purchased a foreign military sale⁷⁸² requirement under a sole source acquisition. The Army purchased M151 vehicle spare parts on behalf of the Republic of the Philippines. Goddard Industries, Inc., the protester, claimed that the Army violated the Competition in Contracting Act of 1984⁷⁸³ when the agency bought (reimbursed by the foreign country) the spare parts using a sole-source specified by the Philippines.⁷⁸⁴

FAR 6.302-4(b)(1) provides an exception⁷⁸⁵ to the requirement of “full and open” competition if a foreign government issues a written direction to the agency to purchase the requirement using a sole-source.⁷⁸⁶ Goddard claimed that this contract does not fall under this exception because the foreign country is not really reimbursing the United States. When the United States provides funds to a foreign country for an FMS purchase,

the funds are drawn from the United States Treasury and are transferred to the foreign country’s FMS account. After receiving the funds, the foreign country reimburses the United States. Therefore, Goddard claimed, the FMS purchase was improper because the military assistance program funds (MAP)⁷⁸⁷ do not actually belong to the Philippines.⁷⁸⁸ Goddard asserts that the Army should have used competitive procedures rather than a sole-source procurement.⁷⁸⁹

The GAO in *Goddard* stated that the MAP funds issue was litigated in *International Logistics Group, Ltd.*⁷⁹⁰ In *International*, the GAO determined that the federal statute allows the transfer of funds from the United States to a foreign country’s FMS trust account for the obligations arising from purchases made under the Arms Export Control Act.⁷⁹¹ The GAO concluded that after the transfer of funds into the FMS account, the Army may use sole source procurement.⁷⁹²

Commercial Activities/Service Contracting

A Right of First Refusal for Contractor Employees

An interim rule, published on 22 August 1997, creates a right of first refusal for employment with a successor contractor for certain contractor employees.⁷⁹³ The rule applies only to “building service contracts”⁷⁹⁴ and only to nonmanagerial and nonsupervisory employees. Examples of contracts to which the rule is applicable are contracts for custodial services; ground-keeping; inspection, maintenance, and repair of fixed equipment; laundry services; and food service.⁷⁹⁵

780. B-246121, Feb. 19, 1992, 92-1 CPD ¶ 202.

781. B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104.

782. In an FMS acquisition, the DOD acts as an agent for a foreign country and procures the requested services or supplies on a sole source basis. The foreign country later reimburses the United States. See Arms Export Control Act, 22 U.S.C. §§ 2751-99aa (1994).

783. 10 U.S.C. § 2304 (1994) (requiring federal agencies to use full and open competition to the maximum extent practicable).

784. *Goddard*, 97-1 CPD ¶ 104 at 1.

785. 22 U.S.C. § 2311(a)(3) (1994).

786. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(C)(4) (1994); FAR, *supra* note 22, at 6.302-4.

787. 22 U.S.C. § 2311(a)(3).

788. *Goddard*, 97-1 CPD ¶ 104 at 1.

789. *Id.* at 2.

790. B-214676, Sept. 18, 1984, 84-2 CPD ¶ 314.

791. B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104 at 2.

792. *Id.*

793. 62 Fed. Reg. 44,823 (1997).

794. A building service contract is “a contract for recurring services related to the maintenance of a public building.” FAR, *supra* note 22, at 22.1202.

In such contracts, the right of first refusal applies only to employees performing the covered services. The rule does not apply to contractors whose employees perform their services both in public buildings and in other buildings.⁷⁹⁶ Examples of such contracts include pest control and trash removal.

The rule applies to public buildings, but defines the term narrowly via a long list of exclusions. Significant exclusions are military installations other than the Pentagon, Postal Service buildings, VA hospitals, leased buildings, government housing, and U.S. owned buildings in foreign countries.

The predecessor contractor must provide the contracting officer with a list of its covered employees. The contracting officer must notify eligible employees of their potential employment rights⁷⁹⁷ and must furnish the list to the successor contractor.⁷⁹⁸ The successor contractor may not offer employment to anyone else until it has complied with the right of first refusal requirements.⁷⁹⁹ During the first three months of performance, a contractor which reduced the workforce numbers from that of the predecessor contractor must offer covered employees a right of first refusal to fill certain vacancies.⁸⁰⁰

Disputes related to the right of first refusal are not subject to the general disputes clause. Complaints, however, may be lodged with the contracting officer.⁸⁰¹ The contracting officer must forward unresolved disputes and supporting documents to

the Department of Labor (DOL) for resolution.⁸⁰² The DOL is authorized to enforce the requirement. Additionally, the DOL may order the contracting officer to withhold payments and subsequently to transfer them to the DOL for disbursement.⁸⁰³

A successor contractor may reduce staffing levels,⁸⁰⁴ offer employment in dissimilar positions with reduced pay and benefits,⁸⁰⁵ or decline to offer employment to those who “failed to perform suitably on the job.”⁸⁰⁶

Performance-Based Service Contracting

On 22 August 1997, the FAR Council published final rules on performance-based service contracting.⁸⁰⁷ The new rules encourage the use of performance-based contracting methods, encourage the use of performance incentives,⁸⁰⁸ and require the development and use of quality assurance surveillance plans.⁸⁰⁹

According to the FAR, contracting officers should use performance incentives, both positive and negative, to the maximum extent practicable. Additionally, those performance standards which relate to performance incentives “shall be capable of being measured objectively.”⁸¹⁰ The OFPP has placed several model performance-based statements of work on the Internet.⁸¹¹ Each contains provisions for the use of positive and negative performance incentives. Contracting officers and legal advisors who look to these model statements of work for

795. Day care services, non-recurring maintenance contracts, and concession contracts for other than food or laundry services are not covered. The rule applies to contracts which include recurring building services and other additional services or requirements, such as construction or supplies. *Id.* at 22.1203-1(b)(1).

796. *Id.* at 22.1203-2(b).

797. *Id.* at 22.1205(a).

798. *Id.* at 22.1204(a).

799. *Id.* at 52.222-50(b).

800. *Id.* at 22.1208(b).

801. *Id.* at 52.222-50(j), 22.1206.

802. *Id.* at 22.1206(b).

803. *Id.* at 22.1207(b).

804. *Id.* at 52.222-50(b).

805. *Id.* at 55.2222-50(c).

806. *Id.* at 55.222-50.

807. FAC 97-01, 62 Fed. Reg 44,813, (1997). *See also 1996 Year in Review, supra* note 9, at 11 (discussing the proposed rule).

808. FAR, *supra* note 22, at 37.602-4.

809. *Id.* at 37.602-2, 46.401.

810. *Id.* at 37-602-4.

811. These are available on the internet at <http://www.arnet.gov/>.

guidance are advised that the negative performance incentives in these model statements of work have already been criticized as unenforceable penalties.⁸¹² Contracting officers must also heed the mandate to use only objective performance criteria in the application of incentives.

Support Agreements Permitted Without a Cost Comparison

Beginning 1 October 1997, agencies must conduct a commercial activities program cost comparison before “[n]ew, expanded, or transferred work requirements”⁸¹³ can be performed by an Interservice Support Agreement.⁸¹⁴ An expansion is the modernization, replacement, upgrading, or enlargement of an in-house commercial activity or capability.⁸¹⁵ By definition, expansions require cost comparisons only when they involve an operating cost increase of thirty percent or more, a capital investment increase of thirty percent or more, or an increase of sixty-five or more full-time equivalent federal employees. A “new requirement” is defined as a “newly established need for a commercial product or service.”⁸¹⁶ This definition does not limit the size or scope of a new requirement as the trigger for a cost comparison. It would seem reasonable to read “new requirement” as equivalent to out-of-scope change.⁸¹⁷

Trimming the Fat from the Already Lean

A recent GAO report questions the accuracy of the DOD’s estimated cost savings from proposed outsourcing initiatives.⁸¹⁸ The report notes that the savings are based on a database, which tracked savings during only the first three years following commercial activities studies. These statistics fail to take into account subsequent changes due to inadequately drafted statements of work, cost increases from changes in federal wage

rates, costs of conducting commercial activities cost comparison studies, and mission creep. Additionally, the report suggests that downsizing may have already achieved efficiencies.

The GAO also notes that downsizing within the DOD has already resulted in civilian personnel cuts which may force outsourcing, regardless of cost effectiveness. In addition, many installations lack qualified personnel to perform the cost comparison studies required by OMB Circular A-76 and the Revised Supplemental Handbook. The use of contractor consultants may be invaluable, but it is at odds with Congress’ concern about what it considers an unjustified increase in the use of advisory and assistance services.

Cost Comparison for “Privatized”⁸¹⁹ Function?

The National Air Traffic Controllers Association has survived a motion to dismiss its challenge to the Department of Transportation’s “privatization” of numerous air traffic control towers.⁸²⁰ This may be a case to watch. The government never raised the argument that the cost comparison requirements under OMB Circular A-76 were inapplicable to privatization decisions. If the plaintiffs prevail, this could have a significant impact on other privatization projects, such as those currently underway in the Army to privatize base housing.

Happy Birthday!

The OPM took a unique and innovative approach to securing contractor performance of background investigations for security clearances.⁸²¹ It awarded a sole source contract to a company formed by approximately ninety percent of its own former employees.⁸²² The use of other than full and open competition was justified by the Director, OPM, as in the public interest.

812. See John Cibinc, *Performance-Based Service Contracting: Negative Incentives—Liquidated Damages or Penalties?*, 11 NASH & CIBINC REP. ¶ 40, Aug. 1997.

813. FEDERAL OFFICE OF MANAGEMENT AND BUDGET [OMB], CIR. A-76 PERFORMANCE OF COMMERCIAL ACTIVITIES; REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES, ch. 2, para. A.5.a (1996).

814. An Interservice Support Agreement is defined as “the provision of a commercial activity, in accordance with an interservice support agreement, on a reimbursable basis. This includes franchise funds, revolving funds, and working capital funds.” *Id.* app. 1.

815. *Id.*

816. *Id.*

817. This is an area which may come under close scrutiny. One industry group has a hotline “to gather information about contract opportunities for which federal agencies are competing against the private sector to provide commercially available services.” See *Public-Private Competition*, 68 FED. CONT. REP. 9 (BNA) (1997).

818. GEN. ACCOUNTING OFFICE, REPORT ON BASE OPERATIONS, CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, Report No. GAO/NSIAD-97-86 (1997).

819. The term privatization is currently used to describe the government’s complete divestiture of a function. The term outsourcing is commonly used to refer to the performance of a governmental function by a government contractor.

820. *National Air Traffic Controllers Ass’n. v. Pena*, 944 F. Supp. 1337 (N.D. Ohio 1996).

821. *Varicon Int’l v. Office of Personnel Management*, 934 F. Supp. 440 (D.D.C. 1996).

The District Court for the District of Columbia denied injunctive relief to contractors seeking to force competition. These were contractors who were providing the same services to other federal agencies and who wanted a chance to compete for this business.⁸²³ The court determined that the sole source award was not reviewable under the APA. The determination to forgo competition in the public interest is a matter committed to agency discretion.

The OPM justified its decision as the only feasible way to privatize this function. The determination and findings also cited the need for uninterrupted service, the uncertainty of achieving similar quality service from another contractor, and the benefit of placing employees whose jobs would be lost. The court found this explanation neither irrational nor arbitrary. The court also rejected the plaintiffs' argument that USIS was created in violation of the government Corporation Act.⁸²⁴

Perhaps this OPM innovation will become the model for other outsourcing efforts. It is interesting to note that the plaintiffs claimed that injunctive relief would prevent the government from paying higher prices as a result of the lack of competition. The OPM claimed that the privatization of this function will save the government \$20-25 million.⁸²⁵

Technical Data Rights and Patents

The Court of Federal Claims has finally denied Inslaw Inc.'s long-standing quest for recovery against the Justice Department.⁸²⁶ This decision hopefully closes out nearly fifteen years of litigation regarding the plaintiff's allegations that the Depart-

ment of Justice conspired to steal and to distribute copies of its proprietary software named PROMIS, the popular name for "Prosecutor's Management Information System."⁸²⁷ Among the wilder allegations was Inslaw's contention that former Attorney General Edwin Meese and other Department of Justice employees had conspired with marketplace competitors to steal PROMIS and financially undermine Inslaw. The Justice Department procured PROMIS in 1982 under a \$9.6 million cost-plus-basis contract with the Executive Office for United States Attorneys.

Reviewing the case under the dual criteria for congressional reference cases (i.e., the existence of a legal claim or one in equity), the Court of Federal Claims found that the plaintiffs failed to prove that Inslaw's claimed enhancements were proprietary, that the DOJ acted unjustifiably in respect to them, that the government had less than unlimited rights in enhanced PROMIS as delivered and installed, that the DOJ in any way frustrated or impeded proof of Inslaw's proprietary rights to the claimed enhancements, or that the DOJ administered the 1982 contract in bad faith.⁸²⁸ In other words, Inslaw's allegations were finally laid to rest—hopefully.

Commercial Item Acquisition

In *Access Logic, Inc.*,⁸²⁹ NASA issued a solicitation for a 360-degree rear projection screen display system. The system is used to simulate the outside view from an air traffic control tower.⁸³⁰ NASA issued the solicitation in the combined synopsis/solicitation commercial item format.⁸³¹ It advertised that award would be made to the lowest-priced technically accept-

822. The company, incorporated as US Investigations Service, is an employee stock ownership plan (ESOP). It is the first ESOP ever created from a former federal agency. Apparently, the Office of Personnel Management assisted in the formation of the company by contracting with a consulting company, ESOP Advisors, Inc., for a feasibility study and with American Capital Strategies for a business plan. See Ronald P. Sanders and James Thompson, *Live Long and Prosper*, 1997 NAT'L J. GOV'T EXECUTIVE, Apr. 1997.

823. Executive branch agencies which desire to perform this function in-house must seek a grant of authority from the Office of Personnel Management (OPM). The plaintiffs argued that injunctive relief was necessary to prevent the OPM from revoking these delegations in order to give more business to the newly formed company run by its former employees. This was part of the plaintiffs' attempt to show that they would suffer irreparable harm if the court failed to intervene. See *Varicon*, 934 F. Supp. at 447.

824. 31 U.S.C.A. § 9102 (West 1997).

825. Dierdre Shesgreen, *OPM Privatization*, LEGAL TIMES, Aug. 5, 1996, at 14.

826. *Inslaw v. United States*, No. 95-338X, 1997 WL 433804 (Fed. Cl. July 31, 1997).

827. The long tale of Inslaw innuendo began with allegations in bankruptcy court. Inslaw contended that the Department of Justice (DOJ) used an enhanced version of its software program without permission. The bankruptcy court agreed with Inslaw and awarded the corporation approximately \$6.8 million. *Id.* at *2. The DOJ appealed to the district court, which reduced the damages and upheld the bankruptcy court's decision. *Id.* The Court of Appeals for the D.C. Circuit reversed, however, and found that the bankruptcy court's automatic stay did not bar the DOJ from exercising control over software that had been installed before the bankruptcy petition was filed. *Id.* After the Supreme court denied certiorari, Inslaw sought relief through the congressional reference process under 28 U.S.C. § 1492. The matter was ultimately referred to the Court of Federal Claims.

828. *Id.*

829. B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36.

830. *Id.* at 1.

able proposal. NASA used a “brand name or equal” specification and included a projection display system requirements document, which constituted the agency’s salient characteristics. One of these characteristics was that the physical separation between the screens, referred to as mullions, be as small as possible so as to make it difficult to see the screen edge lines.⁸³²

The only reference in Access Logic’s (ALI’s) proposal concerning the mullions was a statement that “[t]he screens will be installed as close together as possible, with minimal vertical mullions.”⁸³³ NASA rejected ALI’s proposal because it determined that a “fusing” alternative proposed by ALI was not satisfactorily explained. ALI protested, arguing that its submission complied with all the terms and conditions of the solicitation.

The GAO determined that NASA’s analysis was reasonable. The GAO found that the flexibility afforded acquisitions of commercial items does not extend to awarding contracts based on hidden agendas. An agency may be flexible with regard to its evaluation criteria in a solicitation. However, it is obligated to award based only on that criteria expressly identified in the solicitation just as strictly as in non-commercial procurements.

FISCAL

Purpose

Money for Training—A Matter of Degree

Through the Army’s Funded Legal Education Program (FLEP), attorneys enjoy free tuition and books for law school. The GAO has also allowed an agency to pay the cost of a bar review course.⁸³⁴ Nevertheless, the fee for taking the bar examination is a personal expense.⁸³⁵ Such GAO decisions left the DOD On Site Inspection Agency (OSIA) wondering—if it could pay for college classes as part of an academic degree training program, could it pay the lower cost of College Level

Examination Program (CLEP) tests?⁸³⁶ The GAO said “yes.” The definition of training found in the Government Employee’s Training Act⁸³⁷ includes the “process . . . of placing or enrolling the employee in a planned, prepared, and coordinated program.” The GAO viewed CLEP testing as an “integral part” of that process. In its opinion, however, the GAO continued to draw the distinction between these college placement type tests and licensing examinations.

Eating the Profits

The Defense Reutilization and Marketing Service (DRMS) had a very good year in fiscal year 1994. Its deposits exceeded expenditures by \$17 million.⁸³⁸ This followed a year in which expenditures had exceeded deposits by almost \$92 million. The impressive turn around was due to the adoption of new commercial-type practices implemented after the DRMS became a DOD “Re-invention Laboratory.”⁸³⁹ This called for a celebration, so the DRMS granted awards to every employee and authorized a “[c]elebration day,” on which the government paid for lunch for each employee. Each DRMS location spent up to \$20.00 per person for the awards ceremonies. The DRMS reasoned that the free lunches were an appropriate incidental expense related to awards ceremonies. The GAO agreed! Refreshments at awards ceremonies represent an exception to the general rule that food is a personal expense.⁸⁴⁰ The GAO recognized that, although it had not previously approved refreshments of this magnitude, the DRMS had been neither arbitrary nor capricious.⁸⁴¹

Out in the Boondocks—Where the Government Buys the Refrigerators

In Central Intelligence Agency—Availability of Appropriations to Purchase Refrigerators for Placement in the Work-

831. FAR, *supra* note 22, pt. 12.603.

832. *Access Logic* 97-1 CPD ¶ 36, at 2.

833. *Id.* Mullions are the blank spaces between screens.

834. *See* Decision of the Comptroller General, B-187525, 1976 WL 9595 (Comp. Gen. Oct. 15, 1976).

835. *Id.*

836. *Payment of Fees for College Level Examination Program*, B-272280, 1997 U.S. Comp. Gen. LEXIS 188 (May 29, 1997).

837. 5 U.S.C.A. §§ 4101 (1997).

838. *Defense Reutilization and Mktg. Serv. Awards Ceremonies*, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997).

839. *Id.* at *2.

840. *See* Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, 1989 WL 241549 (Comp. Gen. Dec. 22, 1989) (holding that the cost of coffee and donuts is an unauthorized entertainment expense).

841. *Id.* The GAO compared this to the National Aeronautics and Space Administration’s expenditure of \$60,000 for a banquet at which President Nixon awarded the Medal of Freedom to the Apollo 11 astronauts. *See* Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (July 21, 1986).

place,⁸⁴² the GAO allowed the purchase of refrigerators, not as a matter of “personal convenience of individual employees,”⁸⁴³ but as a tool to enhance the agency’s performance of its mission. The CIA justified this expense based on the following. The cafeteria was open only for breakfast and lunch and could not accommodate all employees. The closest restaurants were ten to fifteen minutes away. Employees who ordered food from a delivery service had to pick it up at a visitor’s location, because deliveries were forbidden on the CIA compound. In its discussion of the issue, the GAO made it clear that such expenses were appropriate only where the agency determined a necessity based upon lack of alternative eating facilities.

Department of Justice Thumbs Its Nose at GAO

In November 1995, Attorney General Janet Reno signed an order advising the Department of Justice Accountable Officers to seek legal opinions concerning the legality of questionable obligations or claims from the general counsel’s office, rather than from the GAO.⁸⁴⁴ The order also stated that GAO opinions would not “absolve such officers from liability for the loss or improper payment of funds.”⁸⁴⁵ This order followed “long-standing” legal opinions that laws granting the Comptroller General the authority to relieve executive branch accountable officers from liability were unconstitutional.⁸⁴⁶

This year, the Department of Justice went a step further and advised the GSA that it could properly use a lump sum or general appropriation for the purchase of business cards for its

employees’ official use.⁸⁴⁷ In its opinion, the Department of Justice examined GAO precedent and found it “difficult to reconcile” the GAO’s purpose test with its numerous opinions forbidding the use of appropriated funds for the purchase of business cards. For the Army, however, the printing of business cards remains prohibited by regulation.⁸⁴⁸

Obligations

In *McDonnell Douglas Corp. v. United States*,⁸⁴⁹ the Court of Federal Claims limited McDonnell Douglas’ recovery of incurred costs to the amount obligated at the time of the termination for default.⁸⁵⁰ The Navy’s total amount of obligation⁸⁵¹ at the time of termination was \$3.5 billion. McDonnell Douglas claimed total incurred costs of \$4 billion. The Court of Federal Claims ruled in favor of the Navy and limited McDonnell Douglas’ recovery to \$3.5 million.⁸⁵²

In *McDonnell Douglas*, the Navy awarded a fixed-price incentive contract for the development of A-12 attack aircraft. The A-12 contract was incrementally funded.⁸⁵³ The primary issue involved the interpretation of the incremental funding clause in the contract. The incremental funding clause states, in part, that “[t]he government’s total obligation for payment (including termination settlement expenses) under this contract shall not exceed the total amount obligated at the time of termination.” However, McDonnell Douglas claimed \$4 billion in incurred costs. In its appeal, McDonnell Douglas claimed that

842. B-276601, June 26, 1997, 97-1 CPD ¶ 230.

843. *Id.* at 1.

844. U.S. DEP’T OF JUSTICE, ORDER DOJ 2110.39A, Nov. 15, 1995.

845. *Id.* Disbursing officials, certifying officials, and agency heads may request from the GAO an advance decision concerning the propriety of making a particular payment of appropriated funds. 31 U.S.C.A. § 1301(a) (West 1997). Most agencies consider GAO decisions to be binding precedent, although aggrieved individuals retain the right to judicial review. See generally 1 UNITED STATES GENERAL ACCOUNTING OFFICE, OFFICE OF GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 1, para. E.2.a. (2d ed. 1991).

846. Memorandum from Stephen R. Colgate, Assistant Attorney General for Administration, to John Koskenen, CFO Council Chair, subject: Policy of Interest to the CFO Council (Jan. 24, 1996) (copy on file with authors).

847. Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, to Emily C. Hewitt, General Counsel, General Services Administration, subject: Use of Appropriations to Purchase Employee Business Cards (Aug. 11, 1997) (copy on file with authors).

848. U.S. DEP’T OF ARMY, REG. 25-30, ARMY INTEGRATED PUBLISHING AND PRINTING PROGRAM, para. 1-11 (28 Feb. 1989).

849. 37 Fed. Cl. 295 (1997). This case concerns the Navy’s termination of the A-12 aircraft program.

850. See *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1996). This case involved the Navy’s attempt to replace the A-6 aircraft. In 1988, the Navy awarded a contract to McDonnell Douglas to develop the A-12 attack aircraft. McDonnell Douglas ran behind schedule and experienced cost overruns during its initial performance. Eventually, the Navy terminated the contract for default. Later, the termination for default was converted into a termination for convenience because the court found that the Navy abused its discretion in terminating the contract for default. *Id.*

851. DEFENSE FINANCE AND ACCOUNTING SERVICE, REG. 37-1, para. 9-1 [hereinafter DFAS REG. 37-1]. An obligation is any act that legally binds the government to make payment.

852. *McDonnell Douglas*, 37 Fed. Cl. at 297.

853. *Id.* at 299. Incremental funding is a one-year appropriation to a multi-year contract.

its fixed-price contract with the Navy was actually a series of cost-reimbursement contracts. McDonnell Douglas argued that, under the principles of cost reimbursement contracts, the Navy must provide reimbursement for all of its incurred costs which are allocable and allowable.⁸⁵⁴

The Court of Federal Claims disagreed. The court observed that cost reimbursement contracts generally limit the government's liability and do not require the government to pay incurred costs in excess of the total amount allotted to the contract.⁸⁵⁵ Furthermore, the court noted that the contractor is not obligated to continue performance beyond the total amount obligated to the contract.⁸⁵⁶

The court did not find McDonnell Douglas' arguments persuasive and held that the A-12 contract was a fixed-price contract. The court concluded that the incremental funding clause limits recovery of incurred costs to those obligated at the time of termination.⁸⁵⁷

Intragovernmental Acquisitions

DOD Issues New Project Order Regulations

The DOD issued new regulations for project orders in its latest version of Volume 11A of its financial management regulation, DOD 7000.14-R.⁸⁵⁸ Project orders are statutorily authorized transactions between military departments and DOD government-owned government-operated (GOGO) establishments for work related to military projects.⁸⁵⁹ The new regulation rescinds the guidance previously found in DOD Instruction 7220.1, "Regulations Governing the Use of Project Orders."

In order to issue a project order, the DOD GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Under previous guidance, only incidental subcontracting was permitted. Regardless of how narrowly or

expansively this requirement was interpreted by contracting officers in the past, the new regulation clearly and dramatically expands the amount of subcontracting permitted. The DOD 7000.14-R merely requires that the GOGO "incur costs of not less than fifty-one percent of the total costs attributable to rendering the work or services ordered."⁸⁶⁰

The new regulation also provides clearer guidance regarding the requirement that work begin in a "reasonable time" after the time of acceptance. Absent unusual circumstances, the regulation states that work should begin within ninety days.⁸⁶¹ This new DOD guidance should not cause any discomfort in Army circles, as our own regulations already define a reasonable amount of time as ninety days.⁸⁶²

GAO Refuses to Review Challenge to Agency Decision to Issue Project Orders

In *SRM Manufacturing Co.*,⁸⁶³ the GAO upheld its longstanding refusal to review agency decisions to execute work in-house, rather than contract out to the private sector, where no solicitation was issued for cost comparison purposes. The Defense Logistics Agency (DLA) issued a request for proposals for F-15 aircraft metal tube assemblies, citing a McDonnell Douglas Corporation part number as the approved item of supply. SRM submitted the only offer, and it was for an alternate ultimately approved as technically acceptable. The DLA, however, was not able to find SRM's offered price reasonable and canceled the solicitation. The DLA subsequently issued a request for quotations for the same items. In response, both McDonnell Douglas and SRM submitted quotes. McDonnell Douglas' quotation, however, did not meet the required delivery schedule and SRM's quotation still could not be determined fair and reasonable. Ultimately, the agency issued a project order to the Air Force.

SRM contended that the DLA should not have issued the project order without first performing a comparison between

854. FAR, *supra* note 22, subpt. 16.3.

855. *McDonnell Douglas*, 37 Fed. Cl. at 300. See also FAR, *supra* note 22, at 52.232-22.

856. *McDonnell Douglas*, 37 Fed. Cl. at 302.

857. *Id.* at 295.

858. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vol. 11A (Reimbursable Operations Policy and Procedures) (11 Mar. 97) [hereinafter DOD REG. 7000.14-R].

859. 41 U.S.C.A. § 23 (West 1997).

860. DOD REG. 7000.14-R, *supra* note 858, ch. 2 (project orders).

861. *Id.*

862. DFAS REG. 37-1, *supra* note 851, para. 12-8b(16).

863. B-277416, Aug. 4, 1997, 97-2 CPD ¶ 40.

in-house and contractor performance. The GAO reaffirmed its general rule that they will not normally review agency decisions to perform work in-house, as they regard such decisions as matters of executive branch policy.⁸⁶⁴ The GAO stated that they will only review such decisions where a competitive solicitation was issued for cost comparison purposes. The previous RFP issued by the DLA had no such purpose, and the GAO declined to expand its jurisdiction on that basis.

Liability of Accountable Officers

Who's Liable When the Boss Screws Up?

At issue in *Environmental Protection Agency*⁸⁶⁵ was the decision by an EPA regional administrator to pay for the travel and lodging expenses of 171 non-federal officials attending an EPA data management conference.⁸⁶⁶ Rather than acquiring the travel and related support services via contract, as he should have done, the administrator elected to fund the attendees' costs through a cooperative agreement awarded to the University of Kansas (KU).⁸⁶⁷ Upon review, the EPA's inspector general concluded that appropriated funds were improperly expended and that either the certifying officer responsible for the payment or KU, which provided the conference support services, was liable.

Although agreeing that the EPA should not have used appropriated funds, the GAO concluded that neither the certifying official nor KU should be held liable. The GAO found that the

certifying official had acted in good faith and had no reason to know that the administrator had elected to fund the travel costs using an improper funding instrument. The GAO further noted that the EPA received some value by the attendance of these "non-federal officials."⁸⁶⁸ In light of all of this, the GAO was "not willing to charge the certifying official with the responsibility of ensuring that agency officials are always correct in exercising their discretion in choosing funding instruments."⁸⁶⁹

GAO Grants Cashier Relief Due to Leadership's Pervasive "Sense of Laxity"

Where's Dilbert© when you need him?⁸⁷⁰ In *Sidney Kaplan*,⁸⁷¹ the State Department's Committee of Inquiry into Fiscal Irregularities audited the cash account of the Class B Cashier at the American Embassy in the Dominican Republic. The audit revealed an "unexplained loss" of \$15,835, which gives rise to a rebuttable presumption of negligence on the part of the accountable office responsible for the funds,⁸⁷² in this case the cashier. Interestingly, the investigative committee found a "pervasive laxity in the supervision and management of the cashier's office."⁸⁷³ The opinion reveals that the leadership at the embassy allowed unauthorized access to the cashier's office, failed to repair the safe's lock, did not ensure that alternate cashiers were adequately trained, and generally failed to ensure the cashier's operations were adequately staffed. The GAO found "most significant," however, the failure of "top-level officers of the embassy" to take corrective actions following repeated admonishments from a regional review center

864. See *Boulder Scientific Co.*, B-225644, Mar. 20, 1987, 87-1 CPD ¶ 323.

865. B-262110, Mar. 19, 1997, 97-1 CPD ¶ 131.

866. The "non-federal officials" were "certain state and Native American officials" who the EPA management identified as key to the success of the conference. *Id.* at 3.

867. Awards made under cooperative agreements lose their identity as federal funds. *Id.* at fn. 1. See 31 U.S.C.A. § 6305(l) (West 1997).

868. *Environmental Protection Agency*, 97-1 CPD ¶ 131 at 3. See 31 U.S.C.A. § 3528(b)(1)(B).

869. Instead, the Comptroller stated that a "certifying official's inquiry should be directed at assuring that correct administrative procedures are followed and the agency's payment is within statutory limits." *Id.* at 4. Similarly, the Comptroller concluded that KU was not "in a position to question the . . . Administrator's use of a cooperative agreement." *Id.* at 5.

870. See SCOTT ADAMS, *THE DILBERT PRINCIPLE* (1st ed. 1996). For example, Dilbert© provides cogent insight on "Pretending to Work" by suggesting that one should "Study Things."

Get a job that lets you "analyze" or "evaluate" something as opposed to actually "doing" something. When you evaluate something you get to criticize the work of others. If you "do" something, other people get to criticize *you*.

Often there are no clear performance standards for the job of analyzing something. You can take your time, savoring the mistakes of those people who were foolish enough to "do" something.

Id. at 118.

871. B-271896, 1997 WL 90626 (Comp. Gen. July 15, 1997).

872. See Mr. Anthony Dudley, B-235147, 1991 WL 202593 (Comp. Gen. Aug. 14, 1991).

873. *Sidney Kaplan*, 1997 WL 90626, at *2.

tasked to review embassy operations.⁸⁷⁴ As a consequence, the GAO found this “general lack of concern and the sense of laxity” and not any negligence by the cashier to be the “proximate cause” for the unexplained loss of funds.⁸⁷⁵

Nonappropriated Funds and Official Representation Funds

Liberated Money

Last year, Congress authorized a demonstration project in which agencies would give appropriated funds directly to NAFIs. The appropriated funds would take on the attributes of NAFs.⁸⁷⁶ This transformation of appropriated funds to NAFs is beneficial to MWR activities because NAF procurements are subject to a less rigorous regulatory scheme than procurements under the FAR.⁸⁷⁷

On 22 July 1997, the Assistant Secretary of Defense for Force Management and Policy signed a directive-type memorandum establishing the DOD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DOD MWR USA) Practice. This “practice” is “designed to facilitate the effective use of funds for the MWR program.”⁸⁷⁸ Like the demonstration project, it allows the direct transfer of appropriated funds to NAFIs.⁸⁷⁹ Military departments may implement the practice on 1 October 1997.⁸⁸⁰

The “practice” applies to the use of Operation and Maintenance Funds; Operation and Maintenance, Reserve Funds; and Research Development Test and Evaluation Funds (RDT&E) for those installations funded with RDT&E. NAFIs may use these transferred appropriated funds only for goods or services

for which appropriated fund support is authorized by DOD Instruction.⁸⁸¹ Each service must establish a memorandum of agreement describing the appropriated fund support that will be provided to the MWR program.⁸⁸²

NAFIs must keep an accounting of the funds. The transfer of funds from appropriated funds to NAFI does not extend the life of appropriated funds. If the NAFI will not obligate the funds for a bona fide current fiscal year need, the NAFI must return the funds for obligation elsewhere.⁸⁸³

The memorandum also allows the conversion of a vacant appropriated fund position to a NAF or contract position. The appropriated funds provided by the DOD MWR USA practice may be used to pay for the salary. Once converted to NAF, a position cannot be converted back to an appropriated fund position.

This new “practice” may seem reminiscent of reimbursements, which were a common practice in the 1980s and early 1990s. Agencies also used reimbursements to repay the salaries of NAF employees who performed appropriated fund missions due to inadequate staffing of general schedule employees.⁸⁸⁴ Some commands also used reimbursement as an expeditious method of spending money at the end of the fiscal year. Agencies used NAFs and NAF procurement methods to procure items needed in support of appropriated fund missions. The NAFI was then reimbursed for the purchase. This avoided the delay caused by following more cumbersome appropriated fund procurement procedures.⁸⁸⁵ Congress ended this practice in 1992.⁸⁸⁶ Since that time, except in the case of the demonstration program, appropriated fund support of NAFIs could only be provided in kind. The new practice should not result in sim-

874. *Id.* In light of all of the above, the State Department’s reviewing center also recommended that the embassy’s budget and fiscal officer be reprimanded and “that the previous Ambassador be reprimanded for assessing administrative penalties against . . . [the cashier] without adjudication and for his lack of oversight.” *Id.* fn. 2.

875. *Id.* at *3.

876. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 321, 110 Stat. 186, 251 (1996).

877. Nonappropriated funds contracts are not governed by the FAR. See U.S. DEP’T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION NONAPPROPRIATED FUND CONTRACTING (10 Sept. 90) [hereinafter AR 215-4].

878. Memorandum, Assistant Secretary of Defense, subject: DOD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DOD MWR USA) Practice (23 July 1997) [hereinafter DOD Memo].

879. The memorandum appears to conflict with Defense Finance and Accounting Service Regulation 37-1, which states: “Appropriated Fund reimbursement to Non-appropriated Funds (NAF) is no longer authorized. Effective FY 91, the *only authorized method to move appropriated funds to NAF is to establish a contract through the appropriated fund procurement office where the NAF performs services for the appropriated fund.*” DFAS REG. 37-1, *supra* note 851, para. 26-12f (emphasis added).

880. DOD Memo, *supra* note 877. The memorandum does not apply to installations which are involved in the demonstration program.

881. U.S. DEP’T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MILITARY MORALE, WELFARE, AND RECREATION, (MWR) (3 Nov. 1995).

882. DOD Memo, *supra*, note 877.

883. *Id.* This provision would seem to indicate that funds may be provided to the NAFI before the NAFI has procured the particular item or service.

884. *Funding Flexibility Returns, but Don’t Call It Reimbursement; Call It USA*, FEEDBACK (U.S. Army Community and Family Support Center), Aug. 1997, at 1 [hereinafter *Funding Flexibility Returns*].

ilar abuses, however, because payment must correspond to those items of authorized appropriated fund support of NAFIs.⁸⁸⁷

Party On!

The Department of Energy (DOE) receives an annual appropriation for "Departmental Administration," a portion of which is earmarked for official reception and representation expenses. Unlike the Army's Operation and Maintenance appropriation, from which the Army's Official Representation Funds are drawn,⁸⁸⁸ the DOE's appropriation is a no year appropriation. The issue in *Availability of Department of Energy Reception and Representation Funds*⁸⁸⁹ was whether the DOE's representation funds were available for only one year or whether they also remained available until expended. The GAO found the latter. The GAO pointed out, however, that the DOE could carry over only the lesser of the unused representation funds or the unobligated balance of "Departmental Administration" funds.

Construction Funding

By memorandum dated 2 July 1997, the DOD provided a new standardized definition of repair.⁸⁹⁰ The new definition is more expansive and enhances the services' ability to provide better facilities for DOD employees.⁸⁹¹ The new definition is as follows:

1. Repair means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.

2. When repairing a facility, the components of the facility may be repaired by replacement, and the replacement can be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental) may be included as repair.

3. Additions, new facilities, and functional conversions must be done as construction. Construction projects may be done concurrent with repair projects as long as the projects are complete and usable.⁸⁹²

885. See Luke Britt and Vince Crawley, *Dollar Shuffle Leaves MWR Fund Without Cash*, STARS AND STRIPES, July 14, 1992, at 1.

886. *Funding Flexibility Returns*, supra note 884.

887. Contractors may challenge this practice as a violation of the Competition in Contracting Act. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984). Although, the GAO will not consider a protest of a NAF procurement conducted by a NAF contracting officer, it will consider a protest involving a NAFI when the protester alleges that the agency is using the NAFI to avoid competition requirements. See Premier Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8. Although the Assistant Secretary of Defense for Force Management and Policy directed the new practice, it has no statutory basis.

888. In Fiscal Year 1997, for example, the Army's annual Operation & Maintenance appropriation contained the following language:

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and not to exceed \$11,437,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes; \$17,519,340,000 and, in addition, \$50,000,000 shall be derived by transfer from the National Defense Stockpile Transaction Fund: *Provided*, That during the current fiscal year and hereafter, funds appropriated under this paragraph may be made available to the Department of the Interior to support the Memorial Day and fourth of July ceremonies and activities in the National Capital Region: *Provided further*, That of the funds appropriated in this paragraph, not less than \$300,000,000 shall be made available only for conventional ammunition care and maintenance.

Department of Defense Appropriations Act, Title II, Operation and Maintenance, Pub. L. No. 104-208, 110 Stat. 3009-73 (1996) (emphasis added). The Army's official representation funds are drawn from the amount designated for "emergency and extraordinary expenses." Because funds for DOD activities come from an annual appropriation, these activities could not carry over official representation funds.

889. B-274576, 1997 U.S. Comp. Gen. LEXIS 13 (Jan. 13, 1997).

890. Memorandum, Office of the Secretary of Defense, Comptroller, subject: Definition for Repair and Maintenance (2 July 1997) [hereinafter Repair and Maintenance Memo].

891. Prior to the drafting of the new definition, each military service had its own definition of repair. The rules were not only haphazardly followed, but in many cases, the definitions were manipulated to meet a specific need. There was no consistency in how a project should be repaired. There was also a question as to whether repair allowed replacement up to the state of the art, with greater capacity, or up to the standards of a required code or regulation. Further, there was no consistency in whether a code or regulation included environmental, safety, or health codes.

In implementing the new definition, the Army provided the following guidance:

1. A facility must exist and be in a failed or failing condition in order to be considered for a repair project.
2. When repairing a facility you may now bring the facility (or component of the facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet a current standard when repairing a facility. Pursuant to the new definition, moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction.
3. Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.⁸⁹³

CONCLUSION

As this article goes to press, the pace of change in acquisition law continues to accelerate. Secretary of Defense Cohen

has just announced his Defense Reform Initiative. The “four pillars” of this initiative are reengineering, consolidating, competing, and eliminating excess infrastructure.⁸⁹⁴ Some have referred to this initiative as “long overdue,”⁸⁹⁵ and its proponents anticipate realizing savings of up to \$6 billion annually.⁸⁹⁶ In addition to significant cuts in personnel, the Initiative establishes other noteworthy goals. For example, by 1 July 1998, all DOD-wide regulations and instructions will be placed on CD-ROM or the Internet, or both. By 1 January 2000, all aspects of the contracting process will be conducted electronically. Additionally, the DOD initiatives to privatize activities such as housing and utilities will continue to march forward.⁸⁹⁷ With all of these changes, there are challenges, and with these challenges, there are opportunities. It will be interesting to see what the world of government contract law looks like on the eve of the new millenium.

Finally, as a current best-selling book puts it: “Don’t sweat the small stuff . . . and it’s all small stuff.”⁸⁹⁸ This is just another way of underscoring the importance of keeping things in perspective. Many of us are actively involved in or have close friends and loved ones participating in contingencies and deployments throughout the world. For those Soldiers, Sailors, Marines, and Airmen, our thoughts and prayers are always with you—as are our wishes for a safe return home. That being said, we extend to all of you our best wishes for a productive new year and join you in looking forward to the “opportunities” that are sure to arise between now and when we next meet.

892. Repair and Maintenance Memo, *supra* note 890.

893. Memorandum, U.S. Dep’t of the Army, Asst. Chief of Staff for Installation Mgmt., subject: New Definition of “Repair” (4 Aug. 1997).

894. U.S. DOD: *DoD News Briefing*, M2 COMMUNICATIONS, LTD., NOV. 11, 1997, 1997 WL 15143289.

895. Quoting Rep. Floyd Spence (R-SC), Chairman, House National Security Committee. *OSD Seeks to Trim Its Bulk through Competition and Cuts*, NAVY NEWS & UNDERSEA TECH., NOV. 17, 1997, 1997 WL 12981708.

896. *Id.*

897. Jack Weible, *30,000 Job Cuts and Base Closures Planned*, AIR FORCE TIMES, NOV. 24, 1997, at 9.

898. RICHARD CARLSON, *DON’T SWEAT THE SMALL STUFF . . . AND IT’S ALL SMALL STUFF* (1997).