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Editor

Major Daniel P. Shaver

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200



REPLY TO
ATTENTION OF

19 January 1993

DAJA-SC (600-50d)

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Ethics Counselors and the Army Standards of Conduct
Program - POLICY MEMORANDUM 93-1

1. The Army Standards of Conduct program found in AR 600-50 is undergoing change. Effective 3 February 1993, that regulation will be replaced by several Office of Government Ethics regulations in Title 5, Code of Federal Regulations, and by DoD Regulation 5500.7-R, the *DoD Joint Ethics Regulation*. These will help implement and apply the proscriptions and requirements of over 23 statutes and one Executive Order. It is obvious that this area of our practice is complex and fraught with the potential for error. In fact, in several recent cases, standards of conduct advice has been incomplete or inaccurate.
2. Appointment of an Ethics Counselor cannot be "another duty as assigned" for the new lieutenant or junior captain in your office. Rendering standards of conduct advice requires maturity, experience, judgment, and interpersonal skills. Often the issues involve the potential for criminal sanctions for seemingly innocuous conduct, or such personal and emotional matters as family investments, spousal employment, and even the employee's own future employment and career development. The employee seeking advice may be reluctant to divulge the information needed for sound advice; the ethics counselor must be capable of dealing with that problem and of anticipating unstated issues.
3. Therefore, it is vital that you exercise personal oversight of the Standards of Conduct program in your command or organization, and that you ensure that training, counseling, and opinion writing are complete, accurate, and well thought out. You are encouraged to involve junior lawyers in standards of conduct practice and even to appoint them as Assistant Ethics Counselors. However, the Ethics Counselor position must be reserved for an attorney with the requisite qualifications. Only in this way can we avoid potential embarrassment for the Army or its personnel.


JOHN L. FUGH
Major General, USA
The Judge Advocate General



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
901 NORTH STUART STREET
ARLINGTON, VA 22203-1837



REPLY TO
ATTENTION OF

JALS-IP (27-60a)

14 December 1992

MEMORANDUM FOR Staff and Command Judge Advocates and Command
Counsel

SUBJECT: Copyright Ownership Determination Procedures

1. Reference 17 U.S.C. §§ 101, 105 (1988); Dep't of Army, Reg. 27-60, Legal Services: Patents, Inventions, and Copyrights (15 May 1974) [hereinafter AR 27-60].
2. This memorandum clarifies responsibilities and procedures for determining copyright ownership in situations in which the Army may have an interest in the subject work.
3. Any questions as to the Army's interest in a claimed copyrightable work that cannot be resolved readily by applying AR 27-60, supra, para. 4-8 (to be amended by AR 27-60, para. 4-3), should be referred in writing to the Intellectual Property Law Division, ATTN: JALS-IP, 901 North Stuart Street, Suite 400, Arlington, VA 22203-1837, for resolution.
4. In addition to a detailed description of the facts, a copy of the employee's job description and a statement by the supervisor should be provided, if applicable. An attorney in the Intellectual Property Law Division will determine the nature of the Army's interest in the subject work and whether the work is copyrightable. This determination will be reassessed if the putative author submits a written request to the Intellectual Property Counsel of the Army within forty-five days of the date of the Intellectual Property Law Division's action.
5. Any questions concerning this subject should be directed to the Intellectual Property Law Division, Office of The Judge Advocate General, DSN 226-8111 or commercial (703) 696-8111.

"ROBERT E. MURRAY"
ROBERT E. MURRAY
Major General, USA
The Assistant Judge
Advocate General

1992 CONTRACT LAW DEVELOPMENTS—THE YEAR IN REVIEW

Major Anthony M. Helm; Lieutenant Colonel John T. Jones, Jr.;
Lieutenant Colonel Harry L. Dorsey; Major Michael A. Killham;
Major Bobby D. Melvin, Jr.; Major Michael K. Cameron; Major Steven N. Tomanelli

I. Foreword

In a year during which astronomers believed they had caught a glimpse of the "Big Bang" and Billy Ray's "achy-breaky" broke, acquisition law developments were less resounding. Lawmakers appear to have taken a "wait-and-see" approach to reform as the Defense Advisory Panel on Streamlining and Codifying Acquisition Law (Section 800 Committee) formulated its recommendations. The President's government-wide moratorium on new administrative directives also caused a dearth of regulatory action.

What are some of the notable legislative changes we have captured in this article? Congress seems to have terminated *Overall Roofing* for convenience by expanding the Claims Court's jurisdiction to include nonmonetary claims. Likewise, the Claims Court now has a new moniker—the Court of Federal Claims. The furor over claims certification also may subside as a result of legislation that "clarified" and made this requirement nonjurisdictional.

The authors also have related what they perceive to be "trends" in the acquisition arena. For example, the completion of General Accounting Office (GAO) protest decisions has changed somewhat. Contractors are employing this forum's enhanced discovery procedures cannily to shed new light on errant agency ways, with particular emphasis on the source selection practices. On the other hand, significant "house cleaning" has occurred at the General Services Administration Board of Contract Appeals (GSBCA), and it continues to afford substantial deference to agency actions.

The following is a selection from the body of last year's legislation, regulation, and case law that the authors feel is of general interest and import to the contract law practitioner.

II. Legislation

A. National Defense Authorization Act for Fiscal Year 1993

1. *Introduction.*—On October 23, 1992, President Bush signed the National Defense Authorization Act (1993 Authori-

zation Act) for 1993.¹ Just as practitioners were becoming comfortable with the existing acquisition and funding rules, Congress tweaked the system again. Some changes are effective already, while others will become effective after agencies draft implementing regulations. This section highlights the more notable changes and also recaps significant provisions that Congress includes regularly in Department of Defense (DOD) authorization acts.

2. *M1 Abrams Upgrade.*—Although the DOD did not request funds to continue the M1 tank modification program,² Congress authorized the DOD to use revenue generated from the sale of its current inventory of tanks or infantry fighting vehicles under the Arms Export Control Act.³ This authority applies to any funds received from sales occurring on or after October 1, 1989.

3. *Humanitarian Assistance.*—Congress has authorized the use of humanitarian assistance funds to transport humanitarian relief to the people of Afghanistan and Cambodia and "for other humanitarian purposes worldwide."⁴ This authorization is in addition to assistance provided in conjunction with military operations.⁵

4. *Environmental Provisions.*—

(a) *Congress Extends Reimbursement Requirement For Hazardous Waste Contractors.*—Congress has extended for one year the reimbursement requirement under 10 U.S.C. § 2708.⁶ This statute requires contractors and subcontractors performing hazardous waste treatment or disposal services for the DOD to reimburse the government for any damages caused by contractor or subcontractor negligence or breach of contract.⁷

(b) *Congress Continues Expenditure Limits for Environmental Restoration Funds.*—Congress extended the prohibition on the use of Defense Environmental Restoration Funds during FY 1993 to pay environmental fines or penalties unless the fine or penalty arises from an act or omission relating to the DOD environmental restoration program.⁸

¹Pub. L. No. 102-484, 106 Stat. 2315 (1992).

²Congress initiated the M1 tank modification program in fiscal year 1991. See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 142, 104 Stat. 1485, 1503 (1990).

³National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 114, 106 Stat. 2315, 2333 (1992) (amending 22 U.S.C. § 2761 (1988)).

⁴*Id.* § 304, 106 Stat. at 2361 (to be codified at 10 U.S.C. § 2551).

⁵See 10 U.S.C. § 401.

⁶National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 321, 106 Stat. at 2365 (amending 10 U.S.C. § 2708(b)(1) 1988)).

⁷See DEP'T OF DEFENSE, DEFENSE ACQUISITION CIRCULAR 91-2, 57 Fed. Reg. 14,996 (1992) (interim rule effective Feb. 3, 1992) [hereinafter DAC]; DAC 91-4; 57 Fed. Reg. 53,596 (1992) (final rule effective Oct. 30, 1992) (adding DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT, subpt. 223.70, 252.223-7005 (1 Apr. 1984) (Hazardous Waste Liability and Indemnification) [hereinafter DFARS]).

⁸National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 322, 106 Stat. 2315, 2365 (1992).

(c) *Indemnification of Transferees of Closing Facilities.*—Congress has directed the Secretary of Defense to indemnify state or political subdivisions that receive closed DOD facilities from claims arising out of the release or threatened release of contaminants as a result of DOD activities at the facilities.⁹ Transferees seeking indemnification must notify the DOD within two years after a claim accrues. In addition, the transferee must cooperate fully with the DOD in handling the claim. Congress has authorized the Secretary of Defense to settle or defend any covered claim for personal injury or property damage.¹⁰

(d) *DOD to Study Indemnification of Contractors Performing Environmental Restoration.*—The Senate version of the 1993 Authorization Act directed the DOD to issue regulations to ensure that DOD contracts for environmental restoration provided for risk sharing and full indemnification of DOD environmental response contractors. This includes indemnification for all liability founded upon federal, state, or local law, as well as liability arising out of work performed pursuant to the Defense Environmental Restoration Program.¹¹ In the 1993 Authorization Act, however, Congress directed the Secretary of Defense, in consultation with the Department of Justice (DOJ), the Environmental Protection Agency (EPA), and the Office of Management and Budget, to review and report on indemnification issues to Congress by May 15, 1993.¹²

(e) *Elimination of Class I Ozone-Depleting Substances.*—Congress has prohibited the DOD from entering into any contract that requires the use of Class I ozone-depleting substances.¹³ The senior acquisition official for the procurement may waive the prohibition if that official determines that no suitable substitute is available. The prohibition applies to all contracts awarded after June 1, 1993. Additionally, under certain circumstances, the DOD must review existing contracts to determine whether they require the use of Class I ozone-depleting substances and whether they may be modified to replace the prohibited substance with an economically feasible substitute.

5. *Defense Business Operations Fund Extended.*—Congress previously had established the Defense Business Operations Fund (DBOF), which authorized the Secretary of Defense to manage the performance of working capital funds and industrial, commercial, and support-type activities through the operation of this revolving fund.¹⁴ Congress intended that the DBOF would reduce duplicitous costs and improve the efficiency of support operations. The 1993 Authorization Act extends, through April 15, 1994, the Secretary's authority to manage the DBOF.¹⁵ Also, the act requires separate accounting, reporting, and auditing of each fund or activity in the DBOF.

6. *Congress Sets DBOF Milestones.*—Congress has established DOD milestones for implementing the DBOF. The milestones require substantial development of DOD policies governing the DBOF operation, development of performance measures and corresponding performance goals for each of the DBOF business areas, selection of a standard cost accounting system, and field testing of the standard accounting system selected for the DBOF. Moreover, Congress has directed the Comptroller General to monitor and evaluate the DOD's progress in achieving these milestones and to report findings and recommendations for appropriate legislative action.¹⁶

7. *Capital Asset Subaccount.*—As part of its charges for goods or services, each fund or activity within the DBOF must include an amount for depreciation of its capital assets.¹⁷ The DBOF must credit these depreciation charges to a separate capital asset subaccount, which the DBOF may use only for the acquisition or development of capital assets. Congress has authorized the DOD to contract for DBOF capital assets in advance of the availability of funds in the subaccount to the extent provided for in the appropriations acts.

8. *Lawmakers Restrict DBOF Obligations.*—Congress has limited the DOD's authority to incur obligations against the DBOF to sixty-five percent of the sales generated by the DBOF during FY 1993.¹⁸ Obligations for fuel, subsistence

⁹*Id.* § 330, 106 Stat. at 2371.

¹⁰When he signed the act on 23 October, President Bush noted that section 330 "should not be understood to detract from the Attorney General's plenary litigating authority. Accordingly, to the extent provided under current law, the Secretary of Defense will 'settle or defend' claims in litigation through attorneys provided by the Department of Justice." 9 Gov't Cont. Rep. (CCH) ¶ 99,589 (Nov. 4, 1992).

¹¹H.R. REP. No. 966, 102d Cong., 2d Sess. 686 (1992).

¹²National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 332, 106 Stat. 2315, 2373 (1992).

¹³*Id.* § 326, 106 Stat. at 2368.

¹⁴See 1991 Contract Law Developments—The Year in Review, ARMY LAW., Feb. 1992, at 84-85.

¹⁵National Defense Authorization Act for Fiscal Years 1993, Pub. L. No. 102-484, § 341, 106 Stat. 2315, 2374 (1992).

¹⁶*Id.*

¹⁷*Id.* § 342, 106 Stat. at 2376. "Capital asset" under this section means the following assets that have a development or acquisition cost of \$15,000 or more: (1) a minor construction project funded under 10 U.S.C. § 2805(c)(1); (2) automatic data processing equipment; (3) software; (4) other equipment; and (5) other capital improvements.

¹⁸*Id.* § 342, 106 Stat. at 2376. See *infra* note 71 and accompanying text for different rates of expenditure in this act.

and commissary items, retail operations, repair of equipment, and the cost of operations are excluded from this restriction. The Secretary of Defense may waive the limitation if he determines that a waiver is essential to national security.

9. *Congress Mandates Nonappropriated Fund Instrumentality Fund Controls.*—Congress has directed the DOD to issue regulations governing the management and use of nonappropriated funds.¹⁹ This section also provides that DOD civilians are subject to the same penalties as are applicable to the misuse of appropriated funds,²⁰ and that violations by military personnel are punishable under Uniform Code of Military Justice article 92.²¹

10. *Release of Commissary Sales Information.*—Congress has authorized the Secretary of Defense to sell certain commissary sales data on a competitive basis.²² Additionally, the Secretary of Defense may authorize release of the information under the Freedom of Information Act (FOIA).²³

11. *Authority to Accept Honoraria.*—Notwithstanding the prohibition on the acceptance of honoraria,²⁴ Congress has authorized faculty and students of certain military schools to accept honoraria for appearances, speeches, or articles.²⁵ Honoraria may not exceed \$2000 in value.

12. *Transportation of Donated Military Artifacts.*—Congress has authorized the service secretaries to demilitarize, prepare, and transport authorized, donated items to war veterans' associations if the secretary determines that the work involved can be accomplished incident to training without additional budgetary requirements.²⁶

13. *Issue of Uniforms Without Charge.*—Congress has afforded the DOD a limited exception²⁷ to the requirement that every government employee must "present himself for duty properly attired according to the requirements of his [or her] position."²⁸ Under this exception, the DOD may issue military uniforms without charge to a member of the armed

forces who (1) is repatriated after being held as a prisoner of war; (2) is being treated at or released from a medical treatment facility as a consequence of being injured during military hostilities; (3) has unique uniform requirements; or (4) would benefit significantly from a morale and welfare standpoint if such a gratuitous issue also would be advantageous to the service concerned.

14. *Incidental Expenses of Volunteers.*—Congress has authorized the Secretary of Defense to establish a program to commemorate the fiftieth anniversary of World War II.²⁹ The provisions permit the DOD to use appropriated funds to reimburse certain volunteer workers for their incidental expenses relating to the program.³⁰ The DOD must treat these volunteers as employees for work-related injury compensation under Title 5, United States Code.

15. *Competitive Prototyping.*—Congress has directed the DOD to use a competitive prototyping acquisition strategy, under limited circumstances, on all major systems development.³¹ The Under Secretary of Defense for Acquisition may waive the requirement after comparing the total program cost of the acquisition strategy, with and without competitive prototyping, if competitive prototyping is not practicable.

16. *Energy-Efficient Electric Equipment.*—Congress has directed the service secretaries and the heads of defense agencies to provide preferences for the procurement of certain energy-efficient electrical and refrigeration equipment for DOD contracts.³² Those provisions become effective February 20, 1993, and apply to electric lamps, ballasts, motors, and refrigeration equipment.

17. *Small Disadvantaged Business Goals Extended.*—Congress has extended through FY 2000 the five-percent goal for the award of DOD contracts and subcontracts to small disadvantaged businesses (SDBs), historically black colleges and universities, and minority universities and institutions.³³ Congress has authorized the DOD to establish procedures to

¹⁹*Id.* § 362, 106 Stat. at 2379 (to be codified at 10 U.S.C. § 2490a).

²⁰*See* 31 U.S.C. § 1349.

²¹ 10 U.S.C. § 892.

²²National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 364, 106 Stat. 2315, 2381 (1992) (amending 10 U.S.C. § 2487).

²³ 5 U.S.C. § 552.

²⁴*See generally* Ethics in Government Act of 1978, Pub. L. No. 95-521, § 210, 92 Stat. 1824, 1850 (1978).

²⁵National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 542, 106 Stat. 2315, 2413 (1992).

²⁶*Id.* § 373, 106 Stat. at 2385 (amending 10 U.S.C. § 2572(d)(2) (1988)).

²⁷*Id.* § 377, 106 Stat. at 2386 (to be codified at 10 U.S.C. § 775).

²⁸Purchase of Down-Filled Parkas, B-213993, 63 Comp. Gen. 245 (1984).

²⁹National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 378, 106 Stat. 2315, 2387 (1992).

³⁰This is an exception to 31 U.S.C. § 1342, which generally prohibits government personnel from accepting voluntary services.

³¹National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 821, 106 Stat. 2315, 2459 (1992).

³²*Id.* § 384, 106 Stat. at 2392 (adding 10 U.S.C. § 2410c).

³³*Id.* § 801, 106 Stat. at 2442 (to be codified at 10 U.S.C. § 2323).

review claims that a certain industry is bearing a disproportionate share of SDB set-asides and, if necessary, to limit the use of set-asides in that particular industry.

18. *Certificate of Competency Program.*—Congress has eliminated the requirement to forward nonresponsibility determinations routinely to the Small Business Administration (SBA).³⁴ Under the new procedure, DOD solicitations must advise small businesses of their rights to seek SBA reviews. Additionally, if the contracting officer finds a small business nonresponsible, that officer must notify the business in writing and advise the firm that the business may request SBA review. The concern then has fourteen days to notify the contracting officer of its intent to seek a certificate of competency (COC). If it fails to provide timely notice, the contracting officer may award to another contractor. Upon timely notice, the contracting officer must forward all pertinent information to the SBA. These rules apply to solicitations issued after February 20, 1993.

19. *Employment of Certain Convicted Felons.*—Congress has directed the DOJ to establish a point of contact, within that department, to maintain a list of persons convicted of defense-contract felonies.³⁵ The list must be accessible to defense contractors, and Congress has tasked the Secretary of Defense to prescribe procedures for obtaining this information.

20. *Limitation on Typewriters.*—Congress has repealed 10 U.S.C. § 2507(c), which prohibited the acquisition of manual typewriters or components from Warsaw Pact countries.³⁶ The collapse of the Warsaw Pact has made the provision obsolete.

21. *Fraudulent Use of "Made in America" Labels.*—Congress has directed the Secretary of Defense to consider for debarment persons who have been convicted of fraudulently affixing a label bearing a "Made in America" inscription.³⁷ If the Secretary decides not to debar the person, he must report his decision to Congress.

22. *Contract Performance Outside the United States.*—The Authorization Act requires any firm that bids on or performs a

DOD contract that exceeds \$10 million to notify the DOD of its intention to perform outside the United States or Canada any part of the contract that exceeds \$500,000 that could be performed in the United States or Canada.³⁸ The requirement includes first tier subcontractors. These provisions, which take effect on January 22, 1993, do not apply to contracts for commercial items, certain minerals, utilities, subsistence, or military construction.

23. *Commander in Chief Initiative Fund.*—Congress has amended the Commander in Chief (CINC) Initiative Fund³⁹ to enable the Chairman of the Joint Chiefs of Staff to propose activities involving countries not assigned to the responsibility of a combatant commander for funding through the CINC's initiative fund.⁴⁰ Additionally, Congress has increased, from \$500,000 to \$2 million, the amount of CINC initiative funds that may be used to provide military education and training to military and related civilian personnel of foreign countries.

24. *Counterdrug Activities.*—To assist the DOD in its role as the government's lead agency for detecting and monitoring the transit of illegal drugs into the United States, Congress has given the DOD additional authority to support its efforts.

(a) *Additional Support Authorized.*—Congress has extended DOD authority to support federal and local counterdrug activities through FY 1994.⁴¹ The conference report specifies that the DOD should not limit its support only to critical, emergent, or unanticipated requirements; rather, support should be consistent with the priorities of the National Drug Control Strategy.⁴² Congress also urged the Secretary of Defense to use the Defense Language Institute's Foreign Language Center to provide linguist services and associated training.

(b) *Maintenance and Operation of Equipment.*—Congress has authorized DOD personnel to assist law enforcement officials in the operation and maintenance of equipment for detecting, monitoring, and communicating land traffic movement of illegal drugs into the United States.⁴³ The Act imposes a geographical limitation of twenty-five miles outside the United States.

³⁴*Id.* § 804, 106 Stat. at 2447.

³⁵*Id.* § 815, 106 Stat. at 2454. (amending 10 U.S.C. § 2408 (1988) (prohibiting prime contractors and first tier subcontractors from employing, or using as consultants, individuals convicted of defense-related felonies)).

³⁶*Id.* § 831, 106 Stat. at 2460.

³⁷*Id.* § 834, 106 Stat. at 2461.

³⁸*Id.* § 840, 106 Stat. 2315, 2466 (1992) (to be codified at 10 U.S.C. § 2410g).

³⁹10 U.S.C. § 166a.

⁴⁰National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 934, 106 Stat. 2315, 2477 (1992).

⁴¹*Id.* § 1041, 106 Stat. at 2491 (amending the National Defense Authorization Act for Fiscal Year 1991, § 1004, Pub. L. No. 101-510, 104 Stat. 1485, 1629 (1990)).

⁴²H.R. REP. No. 966, 102d Cong., 2d Sess. 754 (1992).

⁴³National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1042, 106 Stat. 2315, 2492 (1992) (amending 10 U.S.C. § 374(b) (1988)).

(c) *Detection and Monitoring Systems Plan.*—Congress has directed the Secretary of Defense to establish requirements for counterdrug systems to support its counterdrug mission.⁴⁴ In addition, the DOD must identify and evaluate existing and proposed systems and report to Congress its requirements and the results of its evaluation no later than April 23, 1993.

(d) *DOD Outreach Program.*—Congress has authorized the DOD to conduct a pilot outreach program to reduce the demand for illegal drugs.⁴⁵ The outreach activities are to focus on youths, particularly those from the inner-city. Congress has authorized the use of DOD drug interdiction and counterdrug activities funds for this program.

25. *Civil-Military Cooperative Action Program.*—The 1993 Authorization Act directs the Secretary of Defense to establish a civil-military cooperative action program to use the skills, capabilities, and resources of the armed forces to help civilian activities meet critical domestic needs.⁴⁶ Any project under the program must be consistent with the military mission of the unit involved; fill a need that currently is not being met; and be undertaken with personnel, resources, and facilities that exist for legitimate military purposes.

Congress also has authorized the National Guard Bureau to establish a youth opportunities pilot program to determine whether the "life skills and employment potential" of high-school dropouts can be improved significantly through military-based training.⁴⁷

B. *Military Construction Authorization Act for Fiscal Year 1993*

1. *Reductions in Unspecified Military Construction Funding.*—Last year, Congress increased the threshold for unspecified minor construction projects from \$1 million to \$1.5 million.⁴⁸ This year, Congress reduced significantly the funding available for the services to carry out unspecified military construction projects. The Military Construction Authorization Act for Fiscal Year 1993 (1993 Construction

Act) authorizes unspecified minor military construction project expenditures totalling \$3.8 million for the Army,⁴⁹ \$5 million for the Navy,⁵⁰ and \$7 million for the Air Force.⁵¹

2. *Energy Conservation Construction Projects.*—In 1990, Congress directed the DOD to develop a comprehensive plan to identify and accomplish energy conservation measures to achieve cost-effective energy savings at military facilities.⁵² Congress had limited the selection of energy conservation measures under the plan to those with a positive net present value over a period of ten years or less. The 1993 Authorization Act eliminates that restriction.⁵³ In addition, the act authorizes the Secretary of Defense to permit military installations to accept financial incentives, goods, or services generally available from utilities, and to enter into agreements with electric and gas utilities to design and implement incentive programs. The act also limits the government's potential cost of utility financing.

3. *Storage of Hazardous Materials.*—The 1993 Authorization Act carves out another exception to the ban on using military installations to store or dispose of non-DOD toxic or hazardous materials.⁵⁴ Congress has authorized the service secretaries to waive the prohibition if such material is required or generated by a private party in connection with the authorized and compatible use of a DOD industrial facility.

C. *Department of Defense Appropriations Act, 1993*

1. *Introduction.*—On October 6, 1992, President Bush signed the Department of Defense Appropriations Act for Fiscal Year 1993 (1993 Appropriations Act).⁵⁵ Compared to last year, Congress has reduced this year's new budgetary authority by \$17.4 billion. This represents the eighth consecutive yearly decline in defense spending, as measured in constant dollars.⁵⁶

2. *Environmental Restoration.*—The 1993 Appropriations Act requires the DOD to indemnify state governments and local subdivisions against any claims, and to hold them harmless for any costs, resulting from the transfer of DOD

⁴⁴*Id.* § 1043, 106 Stat. at 2492.

⁴⁵*Id.* § 1045, 106 Stat. at 2494.

⁴⁶*Id.* § 1081, 106 Stat. at 2514.

⁴⁷*Id.* § 1091, 106 Stat. at 2519.

⁴⁸Military Construction Authorization Act for Fiscal Year 1992, Pub. L. No. 102-190, § 2807, 105 Stat. 1290, 1540 (1991) (amending 10 U.S.C. § 2805 (1988)).

⁴⁹National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 2105, 106 Stat. 2315, 2588 (1992).

⁵⁰*Id.* § 2204, 106 Stat. at 2592.

⁵¹*Id.* § 2304, 106 Stat. at 2596.

⁵²National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 2851(a), 104 Stat. 1485, 1803 (1990) (codified at 10 U.S.C. § 2865).

⁵³National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 2801, 106 Stat. 2315, 2604 (1992).

⁵⁴*Id.* § 2852, 106 Stat. at 2625.

⁵⁵Pub. L. No. 102-396, 106 Stat. 1876 (1992).

⁵⁶H.R. REP. NO. 627, 102d Cong., 2d Sess. 4 (1992).

property to these entities.⁵⁷ These protections are triggered if claims are predicated on releases of "hazardous substances" as a result of DOD activities, or the activities of others, during the period of time when the property was under DOD control. The term "hazardous substance" includes all hazardous waste, substances, or toxic material regulated under any environmental law.⁵⁸ Because the provision is so broad and potential liability is so great, the Deputy Secretary of Defense must approve any transfer of real property to state and local governments.⁵⁹

3. *Humanitarian Assistance.*—Congress has directed the DOD to notify the Committees on Appropriations and Armed Services of both houses fifteen days before shipping humanitarian relief to countries not previously approved by Congress.⁶⁰ The provisions also authorize the DOD to use funds appropriated for humanitarian assistance for emergency transportation of United States and foreign nationals or for humanitarian relief personnel in conjunction with relief operations.

4. *Real Property Maintenance.*—In fiscal year (FY) 1992, Congress established and funded the Real Property Maintenance (RPM) Defense Account to finance the backlog of maintenance and repair projects.⁶¹ The 1993 Appropriations Act provides \$1.5 billion for the RPM Defense Account to finance the backlog of maintenance and repair projects, minor construction projects, and major repair of real property.⁶² The DOD Comptroller has taken the position that the RPM Defense Account is the sole fund source for major repair projects in excess of \$15,000 and minor construction projects between \$15,000 and \$300,000.⁶³

5. *Limitation on A-76 Cost Study Periods.*—Congress extended for another year the time limitation for the completion of commercial activities cost comparison studies.⁶⁴ Studies for multifunction activities are limited to forty-eight months and single function activity studies are limited to twenty-four months. Although Congress has imposed a DOD

moratorium on awarding service contracts that result from an A-76 cost comparison study,⁶⁵ this moratorium does not eliminate the requirement to conduct A-76 studies.

6. *Most Efficient and Cost-Effective Organization Analysis and Certification on Contracting Activity Functions.*—Congress has forbidden the DOD from using appropriated funds to convert to contractor performance a DOD activity or function performed by more than ten defense civilian employees until the DOD has completed the "most efficient and cost-effective organization" analysis and provided Congress the analysis certification.⁶⁶ Limited exceptions to this proscription exist.

7. *Congress Continues to Limit Obligation Rates.*—Once again, Congress has restricted the DOD rate of obligation during the last two months of the fiscal year to twenty percent of its total annual appropriation.⁶⁷

8. *Equipment Modification.*—The 1993 Appropriations Act prohibits the use of FY 1993 funds to modify any aircraft, weapon, ship, or other item of equipment that the DOD plans to retire or otherwise dispose of within five years after completion of the modification.⁶⁸ Congress has excepted safety modifications from the prohibition.

9. *Unsolicited Proposals.*—Congress has prohibited the DOD from entering into a noncompetitive contract for studies, analyses, or consulting services on the basis of an unsolicited proposal unless (1) only one source is fully qualified to perform the proposed work; (2) the purpose of the contract is to explore an unsolicited proposal that offers significant scientific or technological promise, and was submitted in confidence; or (3) the purpose of the contract is to take advantage of unique and significant industrial accomplishment or to ensure that a new product or idea is given financial support.⁶⁹ The prohibition does not apply to contracts under \$25,000 for the improvement of equipment that is in develop-

⁵⁷ Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, 106 Stat. 1876, 1883 (1992).

⁵⁸ This language is much broader than that in section 330 of the Defense Authorization Act. See *supra* note 9 and accompanying text.

⁵⁹ See Memorandum, Deputy Secretary of Defense, subject: Transfer or Lease of Department of Defense Real Property to State or Political Subdivisions of States (6 Oct. 1992).

⁶⁰ Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, 106 Stat. 1876, 1884 (1992).

⁶¹ Department of Defense Appropriations Act for 1992, Pub. L. No. 102-172, 105 Stat. 1150, 1159 (1991).

⁶² Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, 106 Stat. 1876, 1885 (1992).

⁶³ See Memorandum, Deputy Comptroller for Program and Budget, Dep't of Defense, subject: Real Property Maintenance, Defense Account (24 Nov. 1992).

⁶⁴ Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9065, 106 Stat. 1876, 1917 (1992).

⁶⁵ See *infra* note 626 and accompanying text.

⁶⁶ Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9026, 106 Stat. 1876, 1906 (1992).

⁶⁷ *Id.* § 9004, 106 Stat. at 1900.

⁶⁸ *Id.* § 9034, 106 Stat. at 1908.

⁶⁹ *Id.* § 9050, 106 Stat. at 1914.

ment or production. Also excepted are contracts that a civilian official of the DOD, who is confirmed by the Senate, determines to be in the interest of national defense.

10. *Secondary Arab Boycott of Israel.*—Congress has prohibited the DOD from entering into a contract with a foreign offeror unless the offeror certifies that it does not support a secondary Arab boycott of Israel.⁷⁰ The limitation does not apply to purchases below the small purchase threshold; to purchases of consumable supplies, provisions, or services to support the United States or allied forces in a foreign country; or when the Secretary of Defense waives the restriction in the interest of national security.

11. *Congress Lowers Stock Fund Limitation.*—Last year, Congress limited the DOD's authority to incur obligations against stock funds to eighty percent of total FY 1992 stock fund sales.⁷¹ This year, the Appropriations Act limits DOD obligation authority to seventy percent of total stock fund sales in FY 1993.⁷² Specifically excluded from this limitation are fuel, subsistence, commissary items, retail operations, the cost of operations, and repair of spare parts.

12. *Congress Nixes Support to Tailhook Association.*—The Defense Department may not use FY 1993 funds to support the Tailhook Association in any manner.⁷³ This does not prohibit the Secretary of the Navy from investigating, or consulting with, the Tailhook Association.

D. Military Construction Appropriations Act, 1993

1. *Introduction.*—President Bush signed the Military Construction Appropriations Act, 1993 (1993 MCA Act) on October 5, 1992.⁷⁴ The 1993 MCA Act appropriates budgetary authority for specified military construction projects, unspecified minor military construction projects, and the military family housing program.

2. *Cost-Plus-Fixed-Fee Contracts.*—Once again, Congress has prohibited the use of funds appropriated under the 1993 MCA Act for certain cost-plus-fixed-fee construction con-

tracts.⁷⁵ This restriction applies to contracts estimated to exceed \$25,000 for work to be performed anywhere in the United States, except Alaska. The Secretary of Defense may waive this restriction.

3. *Reprogramming.*—"Reprogramming" is the use of funds in an appropriation account for purposes other than those contemplated when Congress enacted the appropriation.⁷⁶ Congress expressed concern that the DOD is using the emergency construction authority⁷⁷ on reprogramming requests indiscriminately. Congress also noted that some requirements were known during the budget preparation process, but funds were not requested.⁷⁸ Congress expects the Office of the Secretary of Defense to review reprogramming requests carefully to ensure that they meet statutory requirements.⁷⁹

4. *Family Housing.*—The Defense Department may not use FY 1993 MCA funds to acquire land, provide site preparation, or install utilities for any family housing, except housing for which Congress has made funds available in the 1993 MCA Act.⁸⁰

5. *Relocation of Activities.*—The Defense Department may not use funds appropriated for minor construction to transfer or relocate any activity from one base or installation to another, without prior notification to the Committee on Appropriations.⁸¹

6. *Exercise-Related Construction.*—Congress again directed the Secretary of Defense to give prior notice to Congress of the plans and scope of any proposed military exercises involving United States personnel if the Secretary anticipates that expenditures for construction, either temporary or permanent, will exceed \$100,000.⁸²

E. Defense Production Act Amendments of 1992

Congress has reauthorized the Defense Production Act⁸³ through FY 1995.⁸⁴ The amendments authorize the President to develop or expand United States sources for critical components, critical technology items, and industrial resources

⁷⁰*Id.* § 9069, 106 Stat. at 1917.

⁷¹National Defense Authorization Act for Fiscal Years 1992 and 1993, § 311, 105 Stat. 1290, 1335 (1991).

⁷²Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9086, 106 Stat. 1876, 1920 (1992).

⁷³*Id.* § 9121, 106 Stat. at 1931.

⁷⁴Pub. L. No. 102-380, 106 Stat. 1366 (1992).

⁷⁵*Id.* § 101, 106 Stat. at 1369.

⁷⁶DEP'T OF DEFENSE, MANUAL 7110-1-M, BUDGET GUIDANCE MANUAL, ch. 113 (May 1990).

⁷⁷10 U.S.C. § 2803.

⁷⁸H.R. REP. NO. 888, 102d Cong., 2d Sess. 5 (1992).

⁷⁹See 10 U.S.C. § 2214.

⁸⁰Military Construction Appropriations Act, 1993, Pub. L. No. 102-380, § 106, 106 Stat. 1366, 1370 (1992) (restriction applies to prior-year military construction appropriation acts).

⁸¹*Id.* § 107, 106 Stat. at 1370.

⁸²*Id.* § 113, 106 Stat. at 1371.

⁸³50 U.S.C. app. §§ 2061-2170.

⁸⁴The Defense Production Act Amendments of 1992, Pub. L. No. 102-558, 106 Stat. 4198. This act had lapsed on March 1, 1992.

essential to execute national security strategy.⁸⁵ The law also requires the President to establish a data collection system for defense contractor and subcontractor operations.⁸⁶ The 1992 changes also make the fraudulent use of "Made in America" labels a basis for suspension or debarment from any federal contract award.⁸⁷

III. Contract Formation

A. Competition

1. Restrictions on Competition.—

(a) *Requote Provisions Precluded Full and Open Competition.*—In a solicitation for a multiple award, Federal Supply Schedule (FSS) contract, the General Services Administration (GSA) included a "requote" clause, which provided that only vendors on the schedule contract could compete for requirements that exceeded the maximum order limitation.⁸⁸ The protestor asserted that this provision unduly restricted competition. The GAO agreed, despite GSA's argument that the multiple award schedule contract satisfied the requirements of the Competition in Contracting Act (CCA). The GAO also rejected GSA's unsupported assertions that it would accrue administrative savings under the "requote" scheme.

(b) *Soliciting the Incumbent.*—In *Kimber Guard & Patrol, Inc.*,⁸⁹ the GAO sustained a protest in which the agency failed to solicit the incumbent, even though the agency publicized in the *Commerce Business Daily (CBD)* and awarded the contract for a price lower than the incumbent's contract price.

Sometimes identification of an incumbent is difficult. In *Professional Ambulance, Inc.*,⁹⁰ the GAO found that a contractor performing under a series of short-term purchase orders the identical services required in a request for proposals (RFP) was an incumbent contractor. Although failure to provide the contractor a copy of the RFP was unintentional, the GAO required resolicitation.

(c) *Federal Trade Commission Drops Bomb on Merger of Ammunition Contractors.*—In *Federal Trade Commission v. Alliant Techsystems, Inc.*,⁹¹ the district court granted the Federal Trade Commission's (FTC) request for a preliminary

injunction barring Alliant Techsystems from merging with Olin Corporation's ordnance division.⁹² The FTC asserted that a merger would eliminate competition in the domestic market for tank ammunition and result in higher prices for the taxpayer. The Army did not object to the merger. One representative testified that the agency could no longer buy enough ammunition to keep two manufacturers in business and that the agency intended to award a five-year contract to only one of the contractors. Ruling that the merged entity would monopolize the domestic market, however, the court enjoined the merger, pending the outcome of an FTC adjudication on the merits. This decision emphasizes the applicability of antitrust laws to defense contractors and the military departments.

(d) *Nondevelopmental Items Include Those That May Not Be Available Until Contract Award.*—The DOD must procure supplies on a nondevelopmental item (NDI) basis to the maximum extent practicable.⁹³ In an Air Force procurement for lightweight global positioning receivers, Motorola protested when the agency limited competition to only those firms that offered NDIs.⁹⁴ Motorola argued primarily that an NDI procurement was improper unless the NDI existed in the marketplace when the agency decided to procure the item. The GAO, however, interpreted the statute more broadly. It opined that if a company is developing an item for commercial use, the item may be an NDI if it is either available in the commercial marketplace or being produced at the time of award.

(e) *Agency Must Evaluate Alternate Products if Solicited.*—In *Helitune, Inc.*,⁹⁵ the government decided to acquire an aircraft component on a sole source basis. After notifying small businesses in the *CBD* that they could supply information to demonstrate their abilities to provide the item, the agency failed to evaluate the information submitted by the protestor in response. The GAO opined that the government's failure to evaluate in a timely manner the acceptability of the protestor's alternate item denied it a reasonable opportunity to qualify as a source and to compete for award.

2. Other Than Full and Open Competition.—

(a) *Justification and Approval Must Support Agency Action.*—In *Sperry Marine, Inc.*,⁹⁶ the Navy was only partially

⁸⁵*Id.* § 107.

⁸⁶*Id.* § 135.

⁸⁷*Id.* § 202.

⁸⁸*Komatsu Dresser Co.*, B-246121, Feb. 19, 1992, 71 Comp. Gen. 261, 92-1 CPD ¶ 202.

⁸⁹B-248920, Oct. 1, 1992, 92-2 CPD ¶ 220.

⁹⁰B-248474, Sept. 1, 1992, 92-2 CPD ¶ 145.

⁹¹No. 92-2499-LFO (D.D.C. Nov. 18, 1992).

⁹²Olin and Alliant are the only United States producers of 120-millimeter tank ammunition.

⁹³10 U.S.C. § 2325.

⁹⁴*Motorola, Inc.*, B-247913.2, Oct. 13, 1992, 92-2 CPD ¶ 240.

⁹⁵B-243617.2, Mar. 16, 1992, 92-1 ¶ 285.

⁹⁶B-245654, Jan. 27, 1992, 92-1 CPD ¶ 111.

successful in purchasing navigational radar systems on a sole source basis from Raytheon. The Navy intended initially to purchase fifty units for training at its electronics school. The justification and approval (J&A) for this acquisition asserted that the Navy needed equipment identical to that already identified for use at the school. The GAO agreed that the requirement to ensure continuity and efficiency in instruction justified the sole source buy. The Navy then amended the solicitation to purchase additional systems for use in ship construction and overhaul. The J&A for the new requirement, however, contained only conclusory statements that the agency would not recover through competition the costs of acquiring the systems under a separate contract. The GAO opined that these statements provided an insufficient basis for limiting competition.

(b) *Agencies Must Seek Maximum Competition Practicable.*—In *Olympic Marine Services, Inc.*,⁹⁷ the protestor argued successfully that the agency had failed to obtain the maximum competition practicable when it solicited only a limited number of offerors under the unusual and compelling urgency exception.⁹⁸ The GAO found that the agency should have known that the contractor was a potential source because the contractor had performed similar work recently and had asked the agency to send it any solicitations for ship repair work in the area.

In *K-Whit Tools, Inc.*,⁹⁹ the GAO ruled that it was improper for the agency not to request an offer from one of two identified sources when the agency's J&A offered no explanation for the omission. The GAO emphasized that lack of advance planning does not justify use of the unusual and compelling urgency exception to full and open competition. Moreover, under this exception, an agency must request offers from as many sources as practicable.

(c) *Sole source Purchase Was Proper to Protect Industrial Mobilization Base.*—As the DOD continues to scale back its acquisitions, agencies may consider sole source purchases to maintain the industrial mobilization base.¹⁰⁰ In *Magnavox Electronic Systems Co.; Ferranti Technologies, Inc.*,¹⁰¹ the protestors challenged one such acquisition for fuzes. In denying the protest, the GAO recognized that decisions con-

cerning mobilization base producers involve complex judgments that must be left to the discretion of the military agencies. Accordingly, it will question these decisions only if the record establishes convincingly that the agency abused its discretion.

(d) *Foreign Military Sales Require Justification and Approval.*—In *Kollman, a Division of Sequa Corp. v. United States*,¹⁰² the contracting officer attempted to execute a sole source contract based on the request of a foreign military sales (FMS) customer without processing a J&A. The Claims Court granted the protest, stating that agencies must comply with the requirement for written J&As for all sole source procurements.

(3) *Restrictive Specifications.*—

(a) *Restrictive Specification Puts Brakes on Acquisition.*—In *Spokane Metal Products*,¹⁰³ the specifications for a special purpose vehicle included a requirement for mechanical brakes. When the agency received just one bid—the protestor's—for the vehicle, the agency discovered that only the protestor made a brake meeting the dimensions specified in the solicitation. It was proper, therefore, for the agency to cancel the unduly restrictive solicitation and resolicit.

(b) *Agency Must Identify Latest Revision of Specifications.*—Solicitations may not contain general identification references such as “the issue in effect on the date of the solicitation.”¹⁰⁴ In *Alpha Q., Inc.*,¹⁰⁵ the RFP required offerors to meet the “latest revision” of the original manufacturer's equipment. Because the RFP did not identify the latest revision, the GAO easily found the specifications defective.¹⁰⁶

(c) *Unambiguous Specifications Bind The Agency.*—In *Puerto Rico Marine Management, Inc.*,¹⁰⁷ the protestor alleged that the government's specifications, which called for vessels with both port and starboard ramps, unduly restricted competition. The government argued that the protestor should have known that the use of the conjunction “and” was an error because the agency always required only one side ramp. The GAO disagreed, finding that the unambiguous language of the specifications overstated the agency's minimum needs.

⁹⁷B-246143, Feb. 19, 1992, 92-1 CPD ¶ 205.

⁹⁸See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 6.302-2 (1 Apr. 1984) [hereinafter FAR].

⁹⁹B-247081, Apr. 22, 1992, 92-1 CPD ¶ 382.

¹⁰⁰See 10 U.S.C. § 2304(c)(3); FAR 6.302-3.

¹⁰¹B-247316.2, May 28, 1992, 92-1 CPD ¶ 475.

¹⁰²25 Cl. Ct. 500, 11 FPD ¶ 37 (1992).

¹⁰³B-247603, Feb. 25, 1992, 92-1 CPD ¶ 228.

¹⁰⁴FAR 10.008(b).

¹⁰⁵B-248706, Sept. 18, 1992, 92-2 CPD ¶ 189.

¹⁰⁶Accord Pulse Elecs., Inc., B-244764, Nov. 18, 1991, 91-2 CPD ¶ 468.

¹⁰⁷B-247975.5, Oct. 23, 1992, 72 Comp. Gen. _____, 92-2 CPD ¶ 275.

(d) *Specifications for Bird Control Netting Were Reasonable.*—The GAO, in *Dixon Pest Control, Inc.*,¹⁰⁸ considered whether specifications for bird control netting exceeded the agency's minimum needs and unduly restricted competition. The request for quotations (RFQ) called for black, polyethylene netting with a thirty-micron net diameter and an eighty-pound tensile strength to be installed under a loading dock to prevent bird infestation. The protestor alleged that the industry standard is seven- to ten-pound tensile strength and that a thirty-micron diameter was unrelated to the agency's needs. Additionally, the protestor contended that the polyethylene specification was unreasonable because other materials were adequate and that the black matte color was arbitrary. The GAO rejected these assertions, finding that the agency had relied reasonably on past performance, cost, and aesthetic concerns in formulating its requirement.¹⁰⁹

(e) *System Design Was Too Restrictive.*—In *Moore Heating & Plumbing, Inc.*,¹¹⁰ the Air Force issued a solicitation for the replacement of part of an underground heat distribution system. The specifications called for an above-ground system, which the agency believed had a lower life-cycle cost than other direct-buried designs. The protestor alleged that the agency should have allowed it to offer a direct-buried system. In granting the protest, the GAO found that the agency's life-cycle analysis, which was based on only one type of buried system, did not justify adequately the restriction on competition.

(f) *Agency May Not Ignore Changing Technology.*—In a solicitation for mainframe computers, an agency requirement that computers be "field proven" unduly restricted competition because it ignored the rapidly changing nature of computer technology. In *Amdahl Corp.*,¹¹¹ the GSBICA opined that "any mainframe that is currently reliable is highly likely to become outdated within four years," which was the length of the contract. As written, the solicitation allowed the agency to negotiate a sole source contract for its future computer needs.

(4) "Scope" Determinations.—

(a) *Vendors Claim Services Exceeded Scope of Federal Telecommunications System Contract.*—In *Wiltel, Inc. v. General Services Administration*,¹¹² the GSA modified the Federal Telecommunications System (FTS) contract to add a service called "T-3" which enhanced data and voice transmis-

sion significantly. The GSBICA held that the change was outside the scope of the contract and that the agency should have obtained the additional services competitively. In reaching its decision, the board focused on factors adopted by the GAO in *Neil R. Gross & Co.*¹¹³ Initially, the GSBICA focused on how the change affected the type of service and the contract price. It also considered whether competitors would have expected the change to be within-scope. The board found that T-3 was a substantially different service; that it was a new and severable service, not a mere improvement to the existing service; and that the GSA had rejected offers of T-3 service during the original competition. The GSBICA also noted that the parties had based the price of the changed work on the separate T-3 service, instead of on the difference between the T-3 and the original service.

In *MCI Telecommunications Corp. v. General Services Administration*,¹¹⁴ the GSBICA reached a different conclusion on a modification to add multipoint transmission service to the FTS contract. Under the contract as awarded, American Telephone & Telegraph (AT&T) provided dedicated service connecting only two points. The change allowed dedicated connections between more than two points. Following the reasoning in *Wiltel Inc.*, the board found that this service did not change the nature of the contract significantly. The service allowed for no increase in transmission speed, and AT&T would use existing system capabilities to provide enhanced service. The GSBICA also concluded that the price was related to contract prices and that offerors knew that addition of this service was likely.

(b) *Increase in Service Estimates Did Not Trigger Cardinal Change.*—In *Caltech Service Corp.*,¹¹⁵ the protestor claimed that increasing the tonnage on a cargo containerization contract was a cardinal change. The agency modified the contract when it consolidated supply depot activity in the area. This consolidation shifted the cargo services that Caltech Services had been performing to another site. Caltech Services claimed that the modification was improper because it involved requirements for cargo destined for Air Force activities and the original contract was for Army cargo. Caltech Services also asserted that the change increased contract costs significantly. The GAO denied the protest. It found that the type of service and the unit prices remained unchanged, and that with the additional tonnage, the overall estimated quantities were within the contract maximum.¹¹⁶

¹⁰⁸B-248725, Aug. 27, 1992, 92-2 CPD ¶ 132.

¹⁰⁹*Accord Residential Refuse Removal, Inc.*, B-247198, May 11, 1992, 92-1 CPD ¶ 435.

¹¹⁰B-247417, June 2, 1992, 92-1 CPD ¶ 483.

¹¹¹GSBICA No. 11998-P (Oct. 30, 1992), ___ BCA ¶ ___, 1992 BPD ¶ ___.

¹¹²GSBICA No. 11857-P (Aug. 4, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 201.

¹¹³B-237434, Feb. 23, 1990, 90-1 CPD ¶ 212.

¹¹⁴GSBICA No. 11963-P (Oct. 9, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 287.

¹¹⁵B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94.

¹¹⁶*See* *Saratoga Indus., Inc.*, B-247141, Apr. 27, 1992, 92-1 CPD ¶ 397 (change was within scope when nature and purpose of contract not altered); *Hewlett Packard Co.*, B-245293, Dec. 23, 1991, 91-2 CPD ¶ 576 (modification based on engineering change proposal was within scope).

B. Types of Contracts

1. Requirements Contracts.—

(a) Gross Disparity in Orders Shifts Burden of Proof.—

In *Viktoria Fit Internationale Spedition*,¹¹⁷ the government understated substantially its need for some items on a requirements contract solicitation and actually ordered in excess of the estimates. The “stark disparity” between the government’s nominal estimates on six of ten line items, as well as its actual ordering pattern, was prima facie evidence of the lack of due care in preparing the estimates. Accordingly, the Armed Services Board of Contract Appeals (ASBCA) held that the burden of showing the reasonableness of the estimates shifted from the contractor to the government.

(b) ... or Maybe It Doesn't!—The Federal Circuit reached the opposite conclusion in *Medart, Inc. v. Austin*,¹¹⁸ in which the government’s ordering pattern on a requirements contract was significantly less than its estimates. The *Federal Acquisition Regulation (FAR)* provides that the contractor bears the risk of variations between the estimate and the actual ordering pattern of the government.¹¹⁹ The court rejected Medart’s argument that a significant variation between the estimated quantity and the actual orders shifts the burden of proving the reasonableness of the estimates to the government.

2. Indefinite Quantity/Indefinite Delivery Contracts.—The government failed to order the minimum quantity during the base year of an indefinite delivery/indefinite quantity (IDIQ) contract that included two option years. In the first option year, the government ordered more than the minimum quantity for the option period and then discontinued the contract. During the life of the contract, the government ordered more than the minimum for the base year and the option year combined. In *RGI, Inc.*,¹²⁰ the ASBCA held that, absent a specific contract term permitting cumulative treatment of orders, the government could not set off its breach of the contract during the base year by its orders in excess of the minimum quantity in the first option year.

3. Options.—

(a) To Whom the Notice of Exercise Goes Is Important.—In *Western States Management Services, Inc.*,¹²¹ the contracting officer gave timely written notice of an option

exercise to the contractor’s on-site contract manager.¹²² The ASBCA invalidated the option exercise, holding that the contracting officer must notify an individual who is authorized to accept notice. Although the decision does not require the agency to notify a corporate officer, in this case, notice to the person responsible for the daily supervision of the work was insufficient.

(b) Incremental Funding Is Acceptable.—The government may exercise an option subject to the availability of funds and incrementally fund performance as funds become available. In *United Food Services, Inc.*,¹²³ the appellant objected to the exercise of the fourth option under a contract and to the funding of performance in three increments. It argued that once the government exercised the option, it was required to fund the entire year’s performance. The ASBCA held that the government exercised the option only once and for the entire one year option period. It distinguished the option exercise from the funding of the contract. The contract provided for contingencies in funding, and incremental funding of performance had no bearing on the option exercise.

(c) Agency May Decide Not to Evaluate Options any Time Before Award.—In *Foley Co.*,¹²⁴ the otherwise low bidder was displaced when the agency decided not to evaluate options. The GAO found the agency’s determination reasonable because the bids, with the options included, exceeded the funds available for the project and the agency no longer needed the option work. The GAO also stated that an agency may, at any time before award, determine whether evaluation of options is not in the best interest of the government.

(d) Failure to Consider Market Conditions Before Option Exercise Was an Abuse of Discretion.—In an option contract, the contracting officer must determine that the exercise of an option is the most advantageous method of fulfilling the agency’s needs.¹²⁵ This determination is within the contracting officer’s discretion. In *AAA Engineering & Drafting, Inc.*,¹²⁶ a contracting officer abused his discretion when he failed to consider significant decreases in the cost of local warehouse space and changes in the original contract, which would have resulted in lower prices under a new solicitation. The agency argued that GAO precedent did not

¹¹⁷ ASBCA No. 39703, 92-2 BCA ¶ 24,968.

¹¹⁸ 967 F.2d 579, 11 FPD ¶ 82 (Fed. Cir. 1992).

¹¹⁹ See FAR 16.503.

¹²⁰ ASBCA No. 38772, 92-2 BCA ¶ 24,839.

¹²¹ ASBCA No. 37490, 92-2 BCA ¶ 24,921.

¹²² In addition to this timely written notice, the government notified the appellant’s vice president telephonically several days before the option exercise date and mailed him a written notice, which the vice president received one day after the exercise date.

¹²³ ASBCA No. 43711 (Sept. 28, 1992), ___ BCA ¶ ___.

¹²⁴ B-245536, Jan. 9, 1992, 71 Comp. Gen. 148, 92-1 CPD ¶ 47.

¹²⁵ See FAR 17.207(c)(3).

¹²⁶ B-236034.2, Mar. 26, 1992, 92-1 CPD ¶ 307.

require it to test the marketplace and that merely comparing prices and estimating quantities from the original competition was sufficient.¹²⁷ The GAO agreed with the agency's interpretation of the cases but found that, in this case, the agency had concluded unreasonably that a new solicitation would not generate lower contract prices.

4. *Limitation of Funds Clause Controls Limitation-of-Costs Clause.*—In *Hydrothermal Energy Corp. v. United States*,¹²⁸ the parties disputed whether the limitation-of-cost or limitation-of-funds clauses established the ceiling on the government's liability. The court held that the limitation-of-funds clause operates automatically in lieu of the limitation-of-cost clause, if the government allots funds to the contract. In this case, the government allotted funds to the contract. Accordingly, this was the limit on the government's liability. This decision turns on the specific language of a non-FAR limitation-of-funds clause.¹²⁹ The decision highlights the problems inherent in putting two overlapping clauses in the same contract. The contracting officer should choose either the limitation-of-funds or the limitation-of-cost clause for the contract, but not both.

5. *Board Uses Christian Doctrine to Prevent Cost-Plus-Percentage-of-Cost Contract.*—In *General Engineering & Machine Works*,¹³⁰ the contract did not contain the required time and materials payments clause that mandated segregation of material handling charges from hourly rates.¹³¹ As a result, the government paid a fifteen-percent materials handling charge and also reimbursed the contractor at its hourly rate. Neither party was aware of a problem until a post-performance audit. The ASBCA, citing *G.L. Christian & Associates v. United States*,¹³² incorporated the correct clause by operation of law. The board reasoned that a strong public policy inured against double billing the government and that the contract, as written, violated the statutory prohibition on cost-plus-percentage-of-cost contracts.¹³³

C. Sealed Bidding

1. Mistake in Bids.—

(a) *Authority to Make Mistake in Bid Determinations.—Defense Acquisition Circular (Determinations.—Defense*

*Acquisition Circular (DAC) 91-3*¹³⁴ removes the Army, Navy, and Air Force lists of officials who may be delegated authority to make mistake in bid determinations under FAR 14.406-3(a), (b), and (d). This change permits the service secretaries to delegate authority within their respective departments.

(b) *Erroneous Bid Allows Rejection Without Consideration of Bidder's Responsibility.*—In *Atlantic Services, Inc.*,¹³⁵ the contracting officer sought bid verification from Atlantic Services because its bid was forty percent lower than that of the next low bidder and seventy percent lower than the government estimate. In the process, Atlantic Services found that it had misunderstood a solicitation requirement for operational testing and asked permission to correct its bid. The Navy refused to allow correction but invited Atlantic Services to withdraw its bid. Atlantic Services declined and asserted that it could perform the contract at the uncorrected bid price, but the Navy rejected the bid as "unreasonably low." Atlantic Services protested, arguing that the rejection of its bid was tantamount to a finding that it was nonresponsible.¹³⁶ The GAO disagreed, noting that rejection of a low bid as erroneous is not a matter of responsibility because rejection relates to the validity of the contract itself, and is not an assessment of a firm's ability to perform.

(c) *Agency May Not Waive Erroneous Bid if Waiver Would Prejudice Other Bidders.*—The *Atlantic Services* decision also addressed the issue of waiver of mistaken bids. Atlantic Services sought a waiver of its mistake and indicated that it would stand by its original bid. Atlantic Services, however, offered no probative evidence showing that its bid would have been low had it priced the item correctly in its original bid. The GAO found that accepting the mistaken bid could prejudice other bidders because, as corrected, Atlantic Services' bid might not have been low.

(d) *No Duty to Inquire into Unreasonably High Bid.*—In *Lake Union Drydock Co. v. Department of Commerce*,¹³⁷ the GSBICA noted that a contracting officer's duty to seek verification of a possible mistake in bid¹³⁸ normally applies to a bid "which appears unrealistically low not where . . . it may appear to be unreasonably high."

¹²⁷ See, e.g., *Syncor Indus. Corp.*, B-224023.3, Oct. 15, 1987, 87-2 CPD ¶ 360.

¹²⁸ 26 Cl. Ct. 7, 11 FPD ¶ 51 (1992), *compl. dismissed*, 26 Cl. Ct. 1091, 11 FPD ¶ 143 (1992).

¹²⁹ The Department of Energy awarded this contract in 1978. The opinion, while quoting the pertinent contract clauses, does not cite their sources. The quoted language differs from Armed Services Procurement Regulation 7-402.2 (limitation of funds clause) [hereinafter DAR/ASPR] and FAR 52.232-22.

¹³⁰ ASBCA No. 38788, 92-3 BCA ¶ 25,055.

¹³¹ See DAR/ASPR 7-901.6. Instead, the contract included DAR/ASPR 7-103.7 (Payments), a firm-fixed-price clause that did not require segregation of material handling costs from hourly rates.

¹³² 160 Ct. Cl. 1, 312 F.2d 418, *reh'g denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

¹³³ See 10 U.S.C. § 2306(a).

¹³⁴ 57 Fed. Reg. 42,626 (1992) (effective Sept. 15, 1992).

¹³⁵ B-245763, Jan. 30, 1992, 92-1 CPD ¶ 125.

¹³⁶ Atlantic Services, a small business, contended that the Navy should have referred the matter to the SBA under the COC process. See FAR 19.601; DFARS 219.602.

¹³⁷ GSBICA No. 10394-COM (July 23, 1992), ___ BCA ¶ ____.

¹³⁸ FAR 14.406-1.

2. Rejection of Bids.—

(a) *Bid Guarantee Effectively Reduced Bid Acceptance Period.*—In *Imperial Maintenance, Inc.*,¹³⁹ the Navy issued a solicitation requiring bidders to submit bid guarantees equal to twenty percent of the bid price and with a minimum bid acceptance period of sixty days. Initially, the solicitation set bid opening for December 16, but an amendment extended bid opening to December 20. Imperial Maintenance's bid guarantee was dated December 16 and was effective by its terms for sixty days. The Navy rejected Imperial Maintenance's bid as nonresponsive because the bid guarantee covered only fifty-six days of the required sixty-day bid acceptance period. Imperial Maintenance protested, contending that the discrepancy was only a minor informality. The GAO disagreed, finding that the deviation could not be corrected or waived because a bidder offering a shorter bid acceptance period would be exposed to fewer marketplace risks and fluctuations than its competitors and thereby might gain an unfair competitive advantage.

(b) *Facsimile Acknowledgement Renders Bid Nonresponsive.*—Although use of facsimile (fax) machines to conduct business has become routine, offerors on federal acquisitions must obtain authorization to fax offers to an agency.¹⁴⁰ On the bid opening date in *Recreonics Corp.*,¹⁴¹ the protestor learned that the government had amended the solicitation. *Recreonics* called the contracting specialist to apprise the agency that it had not received the amendment, and the specialist orally advised *Recreonics* to acknowledge the amendment by fax. The solicitation, however, did not authorize fax submissions. Although *Recreonics* was the apparent low bidder, the agency rejected its bid for failing to acknowledge the amendment. The GAO found that the contractor's reliance on the oral advice was misplaced.¹⁴² It noted further that a prospective offeror normally bears the risk of not receiving an amendment unless the agency failed to comply with FAR requirements.

(c) *Hand-Delivered Facsimile of Bid Modification Is Not a Facsimile Submission.*—Prior to bid opening in *International Shelter Systems, Inc.*,¹⁴³ the low bidder faxed a signed bid modification to its local agent, who photocopied the docu-

ment and hand-delivered it to the Navy. The solicitation incorporated FAR 52.214-5,¹⁴⁴ and did not authorize fax bids, modifications, or withdrawals. *International Shelter Systems* protested, arguing that the government should have rejected the modification because it was a prohibited fax submission. The Comptroller General disagreed and opined that personal delivery of a fax bid document by a nongovernment party is not a fax submission.

(d) *Bidder Offers Bogus Argument for Exemption From Integrity Certification Requirement.*—In *Hein-Werner Corp.*,¹⁴⁵ the Comptroller General held that the bidder's ignorance regarding the identity of the contracting officer did not relieve it from the responsibility to submit a certificate of procurement integrity with its bid. The certification requires only that a bidder reveal possible or actual violations of the Office of Federal Procurement Policy Act¹⁴⁶ to the best of the bidder's knowledge and belief. That the contractor did not know the contracting officer was irrelevant.

3. *Inaccurate Estimates May Cause Unbalanced Bids.*—The Department of Veterans' Affairs (VA) issued a solicitation for oxygen and related services for one of its medical centers. The solicitation contemplated a requirements contract for estimated quantities of liquid and gaseous oxygen for one year, plus four option years. The solicitation requested unit and total prices for each item for the base and option years. The incumbent contractor was the low bidder. In *Duramed Homecare*,¹⁴⁷ the second low bidder protested the award of the contract to the incumbent because the incumbent's bid contained nominal prices for some items and inflated prices for others. The incumbent contractor's bid also indicated that the government estimate for gaseous oxygen was significantly understated, while its estimate for liquid oxygen was overstated. These facts were available only to incumbent. The Comptroller General agreed, finding that the estimated usages copied from a prior solicitation were unrealistic and resulted in a substantial distortion of the apparent savings offered by the incumbent.

4. *Discarded Envelope Precludes Government Defense.*—In *Lytos International Inc.*,¹⁴⁸ the protestor mailed its bid by

¹³⁹B-247371, May 22, 1992, 92-1 CPD ¶ 464.

¹⁴⁰See FAR 52.214-5 (Submission of Bids).

¹⁴¹B-246339, Mar. 2, 1992, 92-1 CPD ¶ 249.

¹⁴²The solicitation incorporated FAR 52.214-3 (Amendments to Invitations for Bids), which permits bidders to acknowledge amendments by fax only if the solicitation authorizes fax bids. The solicitation also included FAR 52.214-6 (Explanation to Prospective Bidders), which makes oral explanations given prior to contract award nonbinding.

¹⁴³B-245466, Jan. 8, 1992, 71 Comp. Gen. 143, 92-1 CPD ¶ 38.

¹⁴⁴See *supra* note 140 and accompanying text.

¹⁴⁵B-247459, June 2, 1992, 71 Comp. Gen. _____, 92-1 CPD ¶ 484.

¹⁴⁶41 U.S.C. § 423.

¹⁴⁷B-245766, Jan. 30, 1992, 71 Comp. Gen. 193; 92-1 CPD ¶ 126.

¹⁴⁸B-246419, Mar. 6, 1992, 92-1 CPD ¶ 265.

United States Postal Service Express Mail in the afternoon of September 25, and the bid arrived at the installation mail room the following morning. Mail room personnel normally made one delivery in the morning and one in the afternoon. On September 26, however, the mail room made only one delivery to the contracting office, and the bid did not reach the contracting activity until one hour after bid opening on September 27. The contracting officer rejected the bid as late, and Lyttos International contended that the agency should have accepted the bid under the two-day Express Mail or government mishandling exceptions to the late bid rule. The government argued that the protestor could not establish an Express Mail exception because it could not produce the portion of the bid envelope that had the "bull's eye" postmark on it. Because the contracting officer had discarded the pertinent piece of the envelope, the GAO considered other evidence, including the retained portion of the envelope, and held that the contracting officer should have accepted the bid under the Express Mail exception. In addition, the GAO also found government mishandling because the installation was conducting only one daily mail delivery because of a shortage of available drivers.

D. Negotiated Acquisitions

In 1992, no significant changes in the statutes and regulations governing negotiated acquisitions occurred. Nevertheless, a number of notable protest decisions were reported. Successful protests generally were based on obvious violations of the basic rules of competitive negotiations. A review of these decisions will identify areas in which agencies have made errors repeatedly.

1. *Evaluation Criteria.*—The GAO took issue with the Air Force evaluation scheme set forth in the *Air Force FAR Supplement*.¹⁴⁹ In *H.J. Group Ventures, Inc.*,¹⁵⁰ the contracting agency listed several "general assessment criteria," including performance risk, but did not identify their relative importances. After evaluation, the Air Force selected another, higher priced offeror for award based on its lower performance risk. The GAO held that the award decision was inconsistent with the announced evaluation scheme. It recommended that the agency change its criteria and seek revised proposals or select the protestor for award.

When an agency states the relative importance of evaluation factors, it must do so accurately. In *Health Services Interna-*

tional, Inc.,¹⁵¹ the GAO determined that an evaluation was defective because the agency weighted six factors equally, but the solicitation listed the factors in descending order of importance. In *Isratex, Inc. v. United States*,¹⁵² the agency rejected proposals that failed to comply with some parts of the specification, yet it considered proposals that failed to comply with other provisions of the specification. The Claims Court held that the agency should have disclosed the relative importance of compliance with different parts of the specification.

The agency has broad discretion to establish those aspects of past performance that it considers significant in selecting a contractor. In *RMS Industries*,¹⁵³ the agency considered timely delivery, conformity with specifications, good workmanship, cooperative behavior, and commitment to customer satisfaction as elements of past performance. Despite the challenge by RMS Industries, the GAO upheld the disclosed subfactors as reasonable, with the understanding that the agency would evaluate reports of past performance based on fact—not rumor and hearsay. If acquiring activities adopt this broad definition of past performance, they may reduce the likelihood of selecting marginal contractors.

In *Aviation Constructors, Inc.*,¹⁵⁴ the agency evaluated offerors' past experiences on military airport construction contracts. The protestor challenged the evaluation, alleging that the agency had afforded insufficient weight to commercial airport construction experience. The GAO ruled that the protestor had adequate notice of the agency's emphasis on government contract experience which, admittedly, the protestor lacked; therefore, the evaluation using the disclosed factors was proper.

2. *Amending Solicitations.*—When an agency changes its requirements significantly, it must amend the solicitation and allow offerors to propose on the revised requirements.¹⁵⁵ In *United Telephone Co. of the Northwest*,¹⁵⁶ the GAO found that the agency failed to amend a solicitation to incorporate changed requirements. The protestor had challenged the award unsuccessfully before the GSCBA and the Federal Circuit—a process that took over two years. After losing on jurisdictional grounds,¹⁵⁷ the protestor then asked the GAO to review the agency decision to proceed with award after the agency had changed its requirements substantially. The

¹⁴⁹ See DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP., apps. AA, BB (1 Jan. 1992).

¹⁵⁰ B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203.

¹⁵¹ B-247433, June 5, 1992, 92-1 CPD ¶ 493.

¹⁵² 25 Cl. Ct. 223, 11 FPD ¶ 16 (1992).

¹⁵³ B-247229, May 19, 1992, 92-1 CPD ¶ 451.

¹⁵⁴ B-244794, Nov. 12, 1991, 91-2 CPD ¶ 448.

¹⁵⁵ See FAR 15.606(a).

¹⁵⁶ B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374.

¹⁵⁷ See *U.S. West Communications Servs., Inc. v. United States*, 940 F.2d 622, 10 FPD ¶ 92 (Fed. Cir. 1991).

protestor convinced the GAO that the changed requirements would have a significant impact on its technical and cost proposal. The GAO, therefore, recommended that the agency amend the solicitation and seek revised proposals.

In *Labat-Anderson, Inc.*,¹⁵⁸ the agency failed to amend the solicitation when one offeror proposed a desirable but nonconforming solution to the solicitation requirement. Moreover, the agency failed to inform other offerors of its willingness to consider alternative approaches. As a result, the GAO directed the agency to amend the solicitation and seek revised proposals.

In *Fort Biscuit Co.*,¹⁵⁹ the agency amended the RFP shortly before best and final offers (BAFOs) were due and extended the due date. It did not, however, issue the amendment until after the BAFO due date. In considering Fort Biscuit's protest, the GAO held that an agency may amend a solicitation after the closing date, even though FAR 15.410(a) contemplates amending before the closing date. The GAO also concluded that an agency may extend the closing date for reasons other than those listed in FAR 15.402-3, including to enhance competition.

3. Award Without Discussions.—Acquisition laws applicable to defense and civilian agencies continue to diverge on the standard for award on initial proposals. Consequently, the GAO continues to grant protests when civilian agencies award on proposals that do not result in the lowest overall cost to the government. In *Wellands Research Associates, Inc.*,¹⁶⁰ the agency awarded to the firm that submitted the highest rated proposal after concluding that a lower cost proposal was technically unacceptable, due solely to the contractor's omission of a photograph and line drawing of a plant from its initial proposal. The agency evaluated other photographs and drawings in the proposal and concluded that the proposer had acceptable technical skills. The omission easily was corrected in discussions; therefore, the civilian agency was foreclosed from awarding on initial proposals. The GAO disagreed with the agency's contention that the imminent expiration of annual appropriations did not justify foregoing discussions.

Defense agencies have experienced some difficulty adapting to new procedures that permit award without discussions. In *BDM International, Inc.*,¹⁶¹ the agency incorporated by reference FAR 52.215-16, Contract Award, without its proper

alternate subparagraph. As incorporated, the provision informed offerors that the agency might award on initial proposals. The agency later amended the solicitation to incorporate by reference the same contract award provision with the prescribed alternate subparagraph.¹⁶² After an initial evaluation, the agency selected BDM International for award. A competitor, however, challenged the decision, alleging that the agency had failed to include the provision, as amended, in full text. In response to this assertion, the agency opened negotiations and requested BAFOs. The awardee then protested to the GAO, alleging that the agency should not have reopened because failing to include the provision in full text was not prejudicial error. The GAO agreed and also concluded that the initial provision eliminated any prejudice because it informed offerors that the agency might award without discussions.

Similarly, in *Warren Pumps, Inc.*,¹⁶³ the agency erroneously included the same contract award provision without its alternate version. Following award on initial proposals, a protest ensued. The GAO, however, dismissed this challenge as untimely, because this defect was apparent on the face of the solicitation. The GAO concluded again that award without discussions did not prejudice the protestor because the incorporated provision warned offerors that the agency might award on that basis.

4. Evaluations.—

(a) *Evaluation Personnel.*—Protestors often allege conflict of interest and bias on the part of individual agency evaluators. In *GE Government Services, Inc. v. United States*,¹⁶⁴ the outgoing incumbent alleged that the source selection authority (SSA) was biased against it and challenged his selection. The most compelling evidence was testimony regarding a drunken attempt by the SSA to initiate a social relationship with one of the incumbent's employees. Purportedly, when the employee rejected the advances vigorously, the SSA commented that the incumbent had been performing the contract too long. The agency, however, had not afforded the SSA ultimate decision-making authority. The contracting officer and the competition advocate thoroughly reviewed the comprehensive report of the thirty-person evaluation board and reached the conclusion recommended by the SSA. This thorough, independent review attenuated any possible harm from bias.

¹⁵⁸B-246071, Feb. 18, 1992, 71 Comp. Gen. 252, 92-1 CPD ¶ 193.

¹⁵⁹B-247319, May 12, 1992, 71 Comp. Gen. 392, 92-1 CPD ¶ 440.

¹⁶⁰B-246342, Mar. 2, 1992, 71 Comp. Gen. 289, 92-1 CPD ¶ 251; *accord* *Schreiner, Legge & Co.*, B-244680, Nov. 6, 1991, 91-2 CPD ¶ 432.

¹⁶¹B-246136.2, Apr. 22, 1992, 71 Comp. Gen. 363, 92-1 CPD ¶ 377.

¹⁶²See FAR 52.215-16 (Contract Award, Alternate III). The DOD, Coast Guard, and National Aeronautics and Space Administration (NASA) must use Alternate II or III. Alternate II advises that the activity intends to hold discussions; Alternate III indicates that the activity intends to award without discussions.

¹⁶³B-248145.2, Sept. 18, 1992, 92-2 CPD ¶ 187.

¹⁶⁴788 F. Supp. 581 (D.D.C. 1992).

(b) *Technical Evaluations.*—The GAO affords agency evaluations great deference and will not object if the agency's review of a proposal is reasonable and consistent with the stated evaluation factors. Interestingly, however, agencies continue to run afoul of this rather relaxed standard. In *Trijicon, Inc.*,¹⁶⁵ the Army reevaluated proposals after a successful protest.¹⁶⁶ Technical evaluators concluded that Trijicon's approach exhibited the same level of performance in a key parameter as that of two other successful proposals. The evaluators, however, rated Trijicon's proposal lower in the related factor than it did the other proposals. If the evaluators had been consistent, Trijicon would have received one of the multiple awards. The only support for the lower rating was argument of counsel and a memorandum prepared at direction of counsel, which did not contradict the evaluators' conclusions. The GAO directed the Army to reconsider award to Trijicon, noting that it believed that the agency's desire to affirm its original, erroneous decision motivated the subsequent flawed evaluation.

In *Labat-Anderson, Inc.*,¹⁶⁷ the agency's evaluators decided to evaluate BAFOs using factors other than those set forth in the solicitation. The agency attempted to defend the decision by alleging that the result would have been the same if the evaluators had applied the original factors. The GAO sustained the protest, holding that the reasonable possibility of prejudice was sufficient given the clear statutory violation.

In *NITCO*,¹⁶⁸ the agency solicitation contained a "brand name or equal" specification. The RFP permitted offerors to modify standard products to meet the specified salient characteristics. The evaluators—none of whom had the technical skills to evaluate product modifications—concluded that NITCO's proposed modified product was unacceptable. The evaluators reached this conclusion without analyzing the proposed modifications, and recommended a competitive range consisting of only the brand-name product. Applying the strict scrutiny accorded one-proposal competitive ranges, the GAO sustained the protest.

(c) *Cost Evaluations.*—The GAO has questioned repeatedly the reasonableness of agency evaluations of probable cost. This is likely a result of greater accessibility to cost evaluation materials under protective orders.

The GAO most often finds cost evaluations unreasonable when the agency adjusts proposed costs mechanically. To ensure reasonableness, agencies must consider each offeror's proposal independently, based on that contractor's particular circumstances, approach, personnel, and other known unique factors. In *United International Engineering, Inc.*,¹⁶⁹ the agency increased to the level of the agency estimate all proposed labor rates that were below the estimate, yet left higher rates untouched. In *Bendix Field Engineering Corp.*,¹⁷⁰ the agency raised the incumbent's proposed labor rates to the government estimate, notwithstanding the incumbent's collective bargaining agreement (CBA) that contained lower rates. In *Health Services International, Inc.*,¹⁷¹ the agency averaged the proposed labor rates without considering the mix of high- and low-cost labor required for performance. The GAO found each of these adjustments unreasonable because they were not logically related to the likely cost.

The GAO also has focused on simple math errors. In *Science Applications International Corp.*,¹⁷² the agency noted that Science Applications International's (SAIC) subcontractor pricing and man-hour estimates were unrealistic. When the agency calculated SAIC's probable cost, however, it used the unrealistic data mistakenly. The source selection turned on probable cost because SAIC's proposal was technically equal to its competitor. Ultimately, the GAO recalculated the probable cost using the agency's figures and recommended award to the original protestor or, alternatively, modification of the SAIC contract to require SAIC to perform at its proposed cost.

The GAO expects an agency to evaluate the estimated costs. In *Lockheed, IMS*,¹⁷³ the agency failed to include the estimated costs of its IDIQ contract line item because it did not know what it would order. As a result, approximately forty percent of the total costs were not evaluated. This was unreasonable and inconsistent with the stated evaluation criteria.

Agencies, however, have substantial discretion to make significant adjustments to proposed costs, as long as the adjustments are reasonable and consistent. In *Purvis Systems, Inc.*,¹⁷⁴ the protestor initially proposed certain personnel assigned to a business unit with a high overhead rate. In its

¹⁶⁵B-244546.3, June 22, 1992, 92-1 CPD ¶ 537.

¹⁶⁶See *Trijicon, Inc.*, B-244546, Oct. 25, 1991, 71 Comp. Gen. 41, 91-2 CPD ¶ 375.

¹⁶⁷B-246071, Feb. 18, 1992, 71 Comp. Gen. 252, 92-1 CPD ¶ 193.

¹⁶⁸B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212.

¹⁶⁹B-245448.3, Jan. 29, 1992, 71 Comp. Gen. 177, 92-1 CPD ¶ 122.

¹⁷⁰B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227.

¹⁷¹B-247433, June 5, 1992, 92-1 CPD ¶ 493.

¹⁷²B-247036.2, Aug. 4, 1992, 71 Comp. Gen. ____, 92-2 CPD ¶ 73, *modifying PRC, Inc.*, B-247036, Apr. 27, 1992, 92-1 CPD ¶ 396.

¹⁷³B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180.

¹⁷⁴B-245761, Jan. 31, 1992, 71 Comp. Gen. 203, 92-1 CPD ¶ 132.

BAFO, Purvis Systems proposed the same personnel, but indicated that it would reassign them to a business unit with a low overhead rate. The agency's use of the higher rate was reasonable because it desired the experience of the original organization and no justification for the transfer existed. In *AmerInd, Inc.*,¹⁷⁵ the agency properly increased labor rates that were not related to proposed personnel, and used a current, higher general and administrative cost (G&A) rate, rather than the lower historical average. Use of a higher overhead rate than that initially proposed also was proper because the protestor offered no explanation for the lower BAFO rate. In these two decisions, the agency had a reasonable basis for its adjustments.

(d) *Evaluation of Key Personnel.*—Significant protest action arose on the evaluation of proposed key personnel. Issues often surface when a contractor proposes to change its key personnel. Some personnel changes are inevitable, and solicitations should permit substitution after appropriate notice. In *Professional Safety Consultants, Inc.*,¹⁷⁶ the protestor claimed that the agency acted improperly by accepting a proposal that designated certain key personnel and then allowing substitution of other personnel after award. The GAO, however, deemed the personnel switch necessary and unobjectionable because one employee had quit and another had become ill.

Contractors should not misrepresent the availability of key personnel. In *CBIS Federal, Inc.*,¹⁷⁷ the contractor knew when it submitted its BAFO that two key personnel initially proposed would not perform on the contract. It did not propose substitute personnel and, consequently, retained a favorable technical rating. The GAO sustained a protest based on the contractor's failure to note the unavailability of the personnel. Similarly, in *RGI, Inc. v. Department of the Navy*,¹⁷⁸ a protestor certified improperly in its BAFO that all key personnel remained available when it knew that two or more employees were unavailable. The GSBCA held that the improper certification eliminated the protestor from consideration for award.

Agencies should apply solicitation provisions relating to key personnel reasonably and evenly. In *PSI International, Inc. v. Department of Energy*,¹⁷⁹ the agency interpreted solicitation provisions as allowing the awardee to substitute in

a wholesale manner proposed personnel with unidentified new hires. This was an unreasonable interpretation of the RFP. In *Advanced Data Concepts, Inc. v. Department of Energy*,¹⁸⁰ the awardee did not identify any key personnel as required by the solicitation, but the awardee indicated its intent to hire the incumbent's personnel. The GSBCA stated the agency should have evaluated the proposal as unacceptable under the solicitation provisions. In a third Department of Energy protest,¹⁸¹ the agency awarded the contract to an offeror who had not submitted required commitment letters from key personnel. After receiving a protest, the agency solicited letters of intent from the awardee, which the agency back-dated and represented as having been obtained with the proposal. The GAO recommended award to the protestor.

(e) *Scoring and Documentation.*—Last year, contractors successfully challenged agency proposal scoring systems that were inconsistent with disclosed evaluation factors. Protestor success was more likely in cases in which the agency had not justified its evaluation with contemporaneous notes and memoranda.

In *Lithos Restoration, Ltd.*,¹⁸² the agency informed offerors that the technical factors, set forth in descending order of importance, were more important than cost. The agency, however, scored the most important technical factor as either acceptable or unacceptable. It then selected the awardee, applying the remaining technical factors and price. The GAO found that the agency's method was flawed, observing that failure to consider the most important evaluation factor when selecting from among the acceptable proposals was inconsistent with the disclosed scheme. It denied the protest, however, because it found that the agency's practice did not affect the relative ranking of the proposals. In *Dewberry & Davis*,¹⁸³ the contracting officer interpreted the FAR as requiring award to the low cost, technically acceptable proposal, even though the solicitation stated that technical factors were more important than cost. The GAO sustained the protest, finding that the contracting officer improperly awarded to the low-cost, low-technical offeror after documenting its misinterpretation.

In *Centel Federal Systems, Inc. v. Department of the Navy*,¹⁸⁴ the agency developed a very complicated point-scoring scheme. Unfortunately, the scheme did not conform

¹⁷⁵B-248324, Aug. 6, 1992, 92-2 CPD ¶ 85.

¹⁷⁶B-247331, Apr. 29, 1992, 92-1 CPD ¶ 404.

¹⁷⁷B-245844.2, Mar. 27, 1992, 71 Comp. Gen. 319, 92-1 CPD ¶ 308.

¹⁷⁸GSBCA No. 11752-P (June 2, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 156.

¹⁷⁹GSBCA No. 11521-P, 92-2 BCA ¶ 24,941, 1992 BPD ¶ 35.

¹⁸⁰GSBCA No. 11707-P, 92-3 BCA ¶ 25,037, 1992 BPD ¶ 106.

¹⁸¹Essex Corp., B-246536.3, June 25, 1992, 92-2 CPD ¶ 170.

¹⁸²B-247003.2, Apr. 22, 1992, 71 Comp. Gen. 367, 92-1 CPD ¶ 379.

¹⁸³B-247116, May 5, 1992, 92-1 CPD ¶ 421.

¹⁸⁴GSBCA No. 12011-P (Nov. 16, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___.

to the evaluation factors and relative weights disclosed in the solicitation. The agency gave criteria that it described as being equal in importance with other factors. Nevertheless, the agency gave these criteria five times as much weight as the other factors. Additionally, criteria characterized as slightly more important actually were weighted forty percent more, and the agency multiplied scores instead of adding them. In making the cost-technical tradeoff, the agency failed to consider several evaluation factors and applied questionable formulae when comparing point scores with costs. The result was an irrational scoring system that differed materially from the approach disclosed in the solicitation. The board summarized the agency's performance as having "done all the hard things well, but . . . [having] failed in interpreting some relatively simple rules."

In *American Systems Corp.*,¹⁸⁵ an agency was successful in defending a scoring system designed to force differences between proposals. The point-scoring scheme assigned ratings of 10, 4, 2, and 0. The GAO upheld this system because the contracting officer clearly understood both the relative merit of the proposals and what the points represented.

Agencies have not defended protests successfully when they lacked documentation to support source selection decisions. In *Son's Quality Food Co.*,¹⁸⁶ the evaluators substantially downgraded a proposal in important technical factors, yet made few substantive comments on their evaluation worksheets. Some comments that the evaluators made were unrelated to the solicitation requirements. The GAO found that the agency lacked sufficient support for its assertion that it had reviewed the protestor's proposal reasonably. In *Northwest EnviroServices, Inc.*,¹⁸⁷ the evaluation record included very little evidence that the awardee had any relevant prior experience with hazardous waste disposal or environmental management, or that it had an existing transport and disposal capability as required in the solicitation. Conversely, the record included evidence that the awardee proposed a technical approach that violated several environmental laws. Because no credible evidence supported a determination that the awardee was acceptable, the GAO sustained the protest.

The GAO will give contemporaneous documentation more weight than recent statements or testimony. In *Securigard, Inc.*,¹⁸⁸ the contractor claimed that the agency's low evalua-

tion of its past performance was inaccurate. While reviewing the contractor's proposal, an evaluator had called a point of contact listed in the proposal. The reference offered negative comments about the contractor, which the evaluator noted in a record of the conversation. Nine months later, however, the same reference did not remember the conversation and offered glowing remarks about the protestor. The GAO found that the notes, as well as testimony based on the notes, were more credible than the later assertions of the reference.

5. Discussions.—

(a) *Meaningful Discussions*—In *Columbia Research Corp.*,¹⁸⁹ the agency failed to mention areas of the contractor's proposal that the evaluators had downgraded substantially. As a result, the agency failed to meet the statutory requirement for meaningful discussions. The GAO ruled that no danger of "technical leveling" would arise by mentioning a problem area one time. In *RGI, Inc.*,¹⁹⁰ the agency did not discuss "weaknesses" with the protestor but did discuss "deficiencies" with other offerors. No rational distinction existed between the types of problems exhibited by the protestor's proposal and those found in the other proposals. The GAO ruled that the agency's failure to afford the protestor an opportunity to remedy its deficient proposal was prejudicial when a competitor was able to improve its score significantly after discussions. In *Management Systems Designers, Inc.*,¹⁹¹ the agency failed to tell one offeror to bring certain key personnel to discussions, although the offeror had asked specifically whom it should bring. The agency then downgraded the offeror substantially for not bringing the personnel to discussions. The GAO found that this was prejudicial error.

(b) *Leveling and Auctions*—In two cases, the GSBICA balanced the need to discuss deficiencies with the policy against engaging in auctions or technical leveling. In *Orkand Corp.*,¹⁹² the agency failed to discuss a poor response to a sample task with the protestor. The GSBICA agreed that to do so would constitute leveling. In *Odetics, Inc.*,¹⁹³ the agency failed to identify a deficiency in an offeror's initial proposal. When reviewing the BAFOs, however, the agency noted the defect and requested a second round of BAFOs to afford the offeror an opportunity to address it. The GSBICA sustained Odetics' challenge to the agency's decision to reopen dis-

¹⁸⁵B-247923.2, Sept. 8, 1992, 92-2 CPD ¶ 158.

¹⁸⁶B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424; accord *Arco Management of Washington, D.C., Inc.*, B-248653, Sept. 11, 1992, 92-2 CPD ¶ 173 (points without explanation cannot support finding of reasonable evaluation).

¹⁸⁷B-247380.2, July 22, 1992, 71 Comp. Gen. ____, 92-2 CPD ¶ 38.

¹⁸⁸B-248584, Sept. 4, 1992, 92-2 CPD ¶ 156.

¹⁸⁹B-247631, June 22, 1992, 92-1 CPD ¶ 539.

¹⁹⁰GSBICA No. 11348-P, 92-1 BCA ¶ 24,554, 1991 BPD ¶ 286.

¹⁹¹B-244383.4, Dec. 6, 1991, 91-2 CPD ¶ 518.

¹⁹²GSBICA No. 11405-P, 92-1 BCA ¶ 24,624, 1991 BPD ¶ 320.

¹⁹³GSBICA No. 11506-P, 92-1 BCA ¶ 24,738, 1992 BPD ¶ 5.

cussions. The board ruled that failure to discuss the deficiency before BAFOs was not prejudicial because even if the offeror had cured the deficiency, it would not have been competitive for award. As a result, the agency's request for a second round of BAFOs to cure the perceived error constituted an illegal auction. These cases seem to demonstrate that the GSBCA is more sensitive to claims of auctioning and leveling than other protest forums.

The GAO approved the agency actions to prevent leveling in *System Planning Corp.*¹⁹⁴ In that case, the agency implemented a protest decision¹⁹⁵ by allowing offerors to revise only their prices. Initially, the GAO observed that offerors normally may revise any aspect of their proposals in BAFOs. Given the reasonable concern that leveling and transfusion may have resulted from the earlier protest, however, the agency's limitation was a reasonable means of remedying its error.

(c) *Discussions or Clarifications*—Several protestors challenged post-BAFO contacts between the agency and other offerors. In *Hawaii International Movers, Inc.*,¹⁹⁶ a contractor challenged a post-BAFO request to the apparent awardee for unit prices that were surplus to the lump sum price that the apparent awardee submitted with its BAFO. The agency responded by reopening discussions, and the apparent awardee protested. The GAO found the agency action objectionable because the contact with the apparent awardee did not constitute discussions. The GAO noted that the unit prices did not change the proposal and that the agency did not need the prices to evaluate the acceptability of proposals. In *HFS, Inc.*,¹⁹⁷ however, the awardee submitted a table of prices to the government after the BAFO due date. According to the GAO, the submission constituted impermissible discussions because the parties would use the table to price change orders during performance. *Hawaii International Movers* is distinguishable because, in that case, no such additional purpose for the prices existed. In *Unitor Ships Services, Inc.*,¹⁹⁸ an offeror informed the agency after award that the agency had evaluated its proposal incorrectly. After rereading the proposal, the agency agreed, terminated the first award, and awarded to the offeror. *Unitor Ship Services*, the initial awardee, protested, alleging improper post-BAFO discus-

sions. The GAO disagreed and upheld the agency action because the original misevaluated BAFO had only one reasonable interpretation.

In a decision concerning award on initial proposals—*Mobile Telesystems, Inc.*¹⁹⁹—the agency allowed an offeror to submit a required product approval ten days after the date set for receipt of initial proposals, although the offeror had promised to submit the approval with its original proposal. The GAO approved the agency's actions and found that the solicitation did not require offerors to obtain approvals before proposing and that the offeror's late submission confirmed its earlier promise.

6. Award Decisions.—

(a) *Source Selections*.—In two protest decisions, the reviewing authorities rebuffed challenges to common agency source selection practices. In *Computer Sciences Corp. v. Department of the Army*,²⁰⁰ the GSBCA ruled that higher echelon evaluation groups may exercise their own judgments and are not bound by the evaluations of subordinate evaluation committees or groups. In *Latecoere International, Inc.*,²⁰¹ the GAO held that the SSA need not write the source selection memorandum personally. Another individual familiar with the reasons for the decision may memorialize them.

(b) *Award to Noncompliant Proposals*.—In *TELOS Field Engineering*,²⁰² the GSBCA deviated from the general rule that an agency may not award to a noncompliant proposal. Although an RFP provision established a compulsory requirement clearly, none of the offerors treated the provision as mandatory.

E. Small Purchase Procedures.

1. *Legislative Action: Congress Fails to Increase Small Purchase Threshold*.—The Senate chose not to pass a bill that would have increased the small purchase threshold from \$25,000 to \$50,000.²⁰³ As passed by the House, the bill would have increased substantially the number of federal acquisitions that are "reserved" for small businesses. Congress, however, may introduce a similar bill during the next session.²⁰⁴

¹⁹⁴B-244697.4, June 15, 1992, 92-1 CPD ¶ 516.

¹⁹⁵See *Cavalier Computing*, B-244697.2, Nov. 12, 1991, 71 Comp. Gen. 71, 91-2 CPD ¶ 446 (agency erred by failing to require offeror to submit requisite audited financial statement).

¹⁹⁶B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67.

¹⁹⁷B-248204.2, Sept. 18, 1992, 92-2 CPD ¶ 188.

¹⁹⁸B-245642, Jan. 27, 1992, 92-1 CPD ¶ 110.

¹⁹⁹B-245146, Dec. 18, 1991, 91-2 CPD ¶ 560.

²⁰⁰GSBCA No. 11497-P, 92-1 BCA ¶ 24,703, 1992 BPD ¶ 6.

²⁰¹B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ 70.

²⁰²GSBCA No. 11516-P, 92-1 BCA ¶ 24,676, 1991 BPD ¶ 355.

²⁰³H.R. 3161, 102d Cong., 2d Sess. (1992).

²⁰⁴See 58 Fed. Cont. Rep. (BNA) 447 (Oct. 19, 1992).

2. *Regulatory Change: The DOD Increases Small Purchase Threshold for Contingency Operations.*—In November, the DOD issued a final change to the *Defense Federal Acquisition Supplement (DFARS)* that increased the small purchase threshold, from \$25,000 to \$100,000, for any contract to be awarded and performed, or for any purchase to be made, outside the United States in support of a contingency operation declared by the Secretary of Defense.²⁰⁵ This change also included instructions for reporting small purchase awards over \$25,000.²⁰⁶

4. *General Small Purchase Procedures.*—

(a) *Large Business Price Justifies Agency Withdrawal of Set-Aside.*—In *U.S. Constructors, Inc.*,²⁰⁷ the quotes of two small businesses exceeded the courtesy bid of a large business by seventeen percent and thirty-eight percent, respectively. Based upon the price disparity, the government cancelled the procurement and resolicited on an unrestricted basis. One of the small businesses protested. The Comptroller General ruled that despite the lack of a valid government estimate, the agency properly relied upon the nonresponsive large business bid to determine that the prices offered by the two small firms were unreasonable.

(b) *Revision of Quotations Before Issuance of Purchase Order Was Proper.*—Unlike an invitation for bids (IFB) or RFP, an RFQ does not seek offers that can be accepted by the government. Therefore, the government normally may consider revisions to a quotation submitted under small purchase procedures any time before the government issues the purchase order. Accordingly, the government properly sought additional information from a potential contractor when it submitted a quotation in response to an RFQ that did not appear to satisfy the requirements set forth in the RFQ.²⁰⁸

(c) *Agency Modifies and Terminates Purchase Order After Contractor Failed to Perform.*—In *University Systems, Inc. v. Department of Commerce*,²⁰⁹ the government acted properly when it modified a purchase order to incorporate a termination for default clause by reference because the clause specified one of several methods already available to the government to cancel the order. Later, relying upon the incorporated clause, the government canceled the order, despite the contractor's repeated attempts to accept the order by perform-

ance. The GSBICA sustained the government's actions, stating that the procedures available to terminate an order applied whether the contractor had accepted the order in writing or by performance.

(d) *Defense Logistics Agency Secure in Using Small Purchase Procedures for Lock Buy.*—The Defense Logistics Agency (DLA) used small purchase procedures properly when, in six separate purchases, it bought 1890 security locks, costing \$131,387.²¹⁰ Despite a protest that the agency had split its requirements to avoid competition, the GAO found that the agency merely had made separate "emergency filler buys" to satisfy immediate shortages until the agency could proceed with fully competitive awards. The GAO concluded that making separate purchases for "emergency" reasons was proper, notwithstanding the \$25,000 small purchase threshold.

(e) *Response to Earlier Solicitation Did Not Justify Unrestricted Negotiation of Blanket Purchase Agreements.*—In *American Imaging Services, Inc.*,²¹¹ the Air Force issued an unrestricted solicitation for maintenance services. Two small businesses—one of which was technically unacceptable—and two large businesses responded. After award, the agency terminated the contract when it determined that agency requirements had decreased substantially. In a new acquisition for the reduced services, the agency planned to negotiate blanket purchase agreements (BPAs) on an unrestricted basis. The protestor contended that small purchase procedures required the agency to reserve the acquisition exclusively for small businesses.²¹² The agency argued that an unrestricted acquisition was appropriate because only one responsible small business had responded to the original solicitation. The GAO, however, found that the agency acted unreasonably by relying on an acquisition dissimilar in size and scope as its sole basis for determining that it would not receive quotes from at least two responsible small businesses.

4. *Competition in Small Purchase Procedures.*—

(a) *Brand Name Purchase Description's Comport with Small Purchase Procedures.*—Several decisions last year clarified the rules for brand name solicitations under small purchase procedures. In the first case,²¹³ the GAO denied a protestor's assertion that agencies must use military or federal specifications in a small purchase procurement. In another,

²⁰⁵DAC 91-4, 57 Fed. Reg. 53,596 (1992) (effective Oct. 30, 1992) (adding DFARS 213.000, 213.101, to implement 10 U.S.C. § 2302(7)).

²⁰⁶*Id.* (amending DFARS 204.670-2, 253.204-71).

²⁰⁷B-248329, Aug. 19, 1992, 92-2 CPD ¶ 112. The bids were \$309,485; \$363,890; and \$428,414 for replacement of a service elevator. The undisclosed government estimate was \$266,000.

²⁰⁸Data Vault Corp., B-248664, Sept. 10, 1992, 92-2 CPD ¶ 166.

²⁰⁹GSBICA No. 10896-COM, 92-3 BCA ¶ 25,182.

²¹⁰Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 72 Comp. Gen. _____, 92-2 CPD ¶ 259.

²¹¹B-246124.2, Feb. 13, 1992, 71 Comp. Gen. 249, 92-1 CPD ¶ 188.

²¹²See FAR 13.105(a) (generally requiring set-asides for small purchases); FAR 13.204(c) (BPAs are subject to small purchase procedures).

²¹³RMS Indus., B-247394, May 19, 1992, 92-1 CPD ¶ 452.

Mas-Hamilton Group, Inc.,²¹⁴ the GAO stated that the agency's use of a manufacturer's part number and national stock number are sufficient descriptions to allow others to identify the agency's needs. Nothing requires the agency to draft a special narrative description or to identify the salient characteristics of the brand name item. In both decisions, the agency permitted the submission of alternate products, and the GAO found that this method met the requirement for the agency to obtain competition to the maximum extent practicable.

(b) *Lost Quotation Did Not Entitle Protestor to Relief.*—The government satisfies its duty to obtain competition to the maximum extent practicable under small purchase procedures when it obtains quotations from other firms. In *RMS Industries*,²¹⁵ the GAO opined that the government had complied with the statutory competition requirement even though it lost one vendor's quotation. The GAO noted that occasional losses because of negligence are not actionable if the agency has taken reasonable measures to safeguard all submissions.

F. Disappointed Bidders' Remedies

1. General Accounting Office Decisions.—

(a) *Protest Settlements.*—Agencies may agree to monetary settlements of protests, but authority to do so is limited. In *Payment Under Settlement Agreement Between the Army and Storage Technology Corp.*,²¹⁶ the Comptroller General ruled that an agency may not pay proposal costs and attorney fees to settle a protest when the agency had not violated any regulation or statute. The opinion also cautioned that settling a protest to avoid operational delays resulting from the automatic stay provisions of the CCA is improper.²¹⁷

(b) *Some Acquisitions Are Not Subject to GAO Protest Jurisdiction.*—Spot movement acquisitions²¹⁸ are excepted from GAO bid protest review because agencies generally

employ their own informal procedures to accomplish these one-time, usually low-cost shipments.²¹⁹ In *Diplomatic Supply, Ltd.*,²²⁰ the GAO found that the State Department transported vehicles to various European embassies using informal spot movement procedures. Accordingly, the GAO dismissed the protest by a disappointed offeror.

In *RJP Ltd.*,²²¹ the GSA argued that its acquisition of a \$20 million building site was analogous to a spot movement acquisition because it did not issue a formal solicitation. The GAO disagreed, noting the high dollar value and typical FAR contract procedures that the agency used.

The GAO jurisdiction extends only to acquisitions of federal agencies.²²² Federal agencies include wholly-owned government corporations.²²³ In *Cablelink*,²²⁴ the GAO dismissed a protest against a Federal Deposit Insurance Corporation (FDIC) acquisition because the FDIC is a mixed-ownership corporation.

(c) *Interested Parties.*—In *Northwest EnviroService, Inc.*,²²⁵ the GAO found that the protestor was an interested party, even though it was the highest priced of three offerors and the agency had rated all proposals technically equal. In denying the agency's motion that the protestor was not in line for award because it was the high bidder, the GAO emphasized the need to examine the substance of the protest. In this case, the protestor challenged the agency's "equal" technical evaluation. If successful, the protestor could be technically superior to other offerors and, despite having the highest price, it might offer the best value to the agency.²²⁶ In *Watkins Security Agency, Inc.*,²²⁷ price was the determinative factor in the award of a small business set-aside contract with three technically equal offerors. Watkins, who offered the highest price, protested the agency's refusal to terminate the low priced offeror's contract after the SBA ruled that the

²¹⁴B-249049, Oct. 20, 1992, 72 Comp. Gen. ____ 92-2 CPD ¶ 259.

²¹⁵B-247074, Mar. 18, 1992, 92-1 CPD ¶ 290.

²¹⁶B-233417, Mar. 31, 1992, 71 Comp. Gen. 340, 92-1 CPD ¶ 337.

²¹⁷31 U.S.C. § 3553(c), (d); FAR 33.104(b), (c).

²¹⁸A spot movement acquisition is a one-time shipment of a commodity on a bill of lading, requiring special equipment or services not otherwise provided by tariff or special rate tender.

²¹⁹Cf. *Moody Bros. of Jacksonville, Inc.*, B-238844, June 12, 1990, 69 Comp. Gen. 524, 90-1 CPD ¶ 550 (spot movements are exempt from GAO jurisdiction because the acquisition statutes and regulations do not apply and because agencies use bills of lading without formal solicitation or negotiation and without FAR or DFARS provisions).

²²⁰B-249493, Sept. 16, 1992, 92-2 CPD ¶ 182.

²²¹B-246678, Mar. 27, 1992, 71 Comp. Gen. 333, 92-1 CPD ¶ 310.

²²²See 31 U.S.C. § 3551; 4 C.F.R. § 21.1(a).

²²³See 4 C.F.R. § 21.0(c).

²²⁴B-250066, Aug. 28, 1992, 92-2 CPD ¶ 135.

²²⁵B-247380.2, July 22, 1992, 71 Comp. Gen. ____ 92-2 CPD ¶ 38.

²²⁶*Accord Rome Research Corp.*, B-245797.4, Sept. 22, 1992, 92-2 CPD ¶ 194.

²²⁷B-248309, Aug. 14, 1992, 92-2 CPD ¶ 108.

awardee was not a small business. The GAO found that the protestor was not an interested party because, even if its protest was meritorious, the next lowest priced offeror would be in line for award, not the protestor.²²⁸

(d) *Timeliness.*—In *Ernest A. Cost—Reconsideration*,²²⁹ the protestor received a notice proposing it for debarment. The notice advised the protestor that, pending the debarment action, it could not receive awards under any solicitations on which it previously had submitted offers. The GAO opined that receipt of the notice letter triggered the ten-day protest filing period and affirmed its dismissal of protests filed twenty days after the protestor received the letter.²³⁰

Protestors also have ten working days within which to file comments on the agency report.²³¹ In *Piedmont Systems, Inc.*,²³² the GAO dismissed the protest when it received the comments on the eleventh day after the protestor received the agency report. The agency supported its motion to dismiss with a copy of the agency's office sign-in log that showed the date on which the protestor's counsel obtained the agency report.

A protestor's requests for declarations of entitlement to protest costs must be filed within ten working days of the date the agency notifies the protestor of the agency's intent to take corrective action. In *Moon Engineering Co.—Request for Declaration of Entitlement to Costs*,²³³ the protestor did not meet this suspense, but asserted that the agency had agreed to waive the ten-day period. The GAO dismissed the protestor's claim, stating that even if the protestor was correct, agencies do not have the authority to waive the GAO timeliness requirements.²³⁴

(e) *Protective.*—The GAO apparently can grant protective orders freely under its new bid protest regulations.²³⁵ It is

cautious, however, in deciding to whom it will grant access under these orders. In-house counsel are treated differently under the protective orders than are retained counsel. Although in-house counsel may not be competitive decision-makers, the GAO often finds that they are so involved in the decision-making process that the risk of inadvertent disclosure is too great.²³⁶ In *Atlantic Research Corp.*,²³⁷ the protestor's general counsel applied for access to information under a protective order. The GAO denied the request even though the counsel was not involved in competitive decision-making on government contracts. The GAO found an unacceptable risk of inadvertent disclosure because of the general counsel's involvement in mergers and acquisitions and commercial contracts.

(f) *Recovery of Protest Costs.*—Recovery of protest costs was an important issue this year at both the GAO and GSCBA, with the two forums establishing divergent positions concerning the scope of entitlement.²³⁸ The Justice Department previously had challenged the constitutionality of the CCA provision²³⁹ that authorizes the GAO to assess protest costs against agencies.²⁴⁰ In November, the district court dismissed that suit, finding that the case was not "ripe" for decision.²⁴¹ The issue still exists, however, in a case pending before the Court of Federal Claims. In *441 4th Street Ltd. Partnership v. United States*,²⁴² the plaintiff seeks to enforce a GAO decision granting it protest costs. The GSA has refused to pay the costs, asserting that the CCA provision violates the separation of powers doctrine. Recently, the GAO sought to intervene.²⁴³ The court did not allow intervention, but granted the GAO leave to file an amicus brief.

As the following cases demonstrate, an agency can minimize its liability for protest costs by (1) taking timely corrective action in the face of a clearly meritorious protest, and (2) thoroughly reviewing protest cost claims with a view to making specific objections to improper or excessive costs.

²²⁸ Accord *U.S. Defense Sys., Inc.*, B-248928, Sept. 30, 1992, 92-2 CPD ¶ 219.

²²⁹ B-248069.2, May 4, 1992, 92-1 CPD ¶ 416.

²³⁰ But cf. *Universal Technologies, Inc.*, B-248808.2, Sept. 28, 1992, 92-2 CPD ¶ 212 (preaward notice of proposed award to apparent successful, small business awardee does not trigger 10-day filing period).

²³¹ 4 C.F.R. § 21.3(j).

²³² B-249801, Oct. 28, 1992, 92-2 CPD ¶ 305.

²³³ B-247053.6, Aug. 27, 1992, 92-2 CPD ¶ 129.

²³⁴ Accord *Jonathan Corp.*, B-247053.7, May 15, 1992, 92-1 CPD ¶ 446.

²³⁵ 4 C.F.R. § 21.3(d).

²³⁶ *Dataproducts New England, Inc.*, B-246149.3, Feb. 26, 1992, 92-1 CPD ¶ 231.

²³⁷ B-247650, June 26, 1992, 92-1 CPD ¶ 543.

²³⁸ See *infra* note 307 and accompanying text.

²³⁹ 31 U.S.C. § 3554(c)(1).

²⁴⁰ 1991 *Contract Law Developments—The Year in Review*, *supra* note 14, at 24.

²⁴¹ *United States v. Instruments, S.A., Inc.*, No. 91-1574-LFO (D.D.C. Nov. 13, 1992).

²⁴² No. 91-1692-C (Cl. Ct. Dec. 16, 1991).

²⁴³ *441 4th Street Ltd. Partnership v. United States*, 26 Cl. Ct. 1233, 11 FPD ¶ 126 (1992).

The GAO may grant a protestor reasonable protest costs, even if the agency takes corrective action in response to a protest.²⁴⁴ In practice, however, the GAO awards costs only if the agency delays corrective action unreasonably in the face of a clearly meritorious protest.²⁴⁵ In *Purdy Corp.—Claim for Costs*,²⁴⁶ the protestor was not entitled to protest costs when the agency took corrective action within ten days after the protest was filed.²⁴⁷ The GAO also stated that delay in agency-level processes occurring before a protest is not a basis for entitlement to costs.

In *Pevar Co.—Claim for Costs*,²⁴⁸ contrary to the GSBICA position,²⁴⁹ the GAO ruled that protestors are entitled to reimbursement at the actual rates of compensation, plus reasonable overhead and fringe benefits, for employee time spent preparing proposals and pursuing GAO protests.

In *Armour of America—Claim for Costs*,²⁵⁰ the GAO refused to adopt a mandatory ceiling on allowable protest costs based upon the dollar value of the acquisition. The GAO reasoned that no necessary correlation existed between the dollar value of an acquisition and the complexity of the issues involved in a bid protest. The GAO did, however, affirm its policy of examining the reasonableness of attorneys' fees when the agency identifies specific claimed hours as excessive and articulates a reasoned analysis as to why payment should be disallowed. In its analysis of the claim, the GAO disallowed excessive attorney hours attributable to the attorney's unfamiliarity with bid protests.

In *Diverco, Inc.—Claim for Costs*,²⁵¹ the GAO identified several examples of unallowable protest costs. These include costs of filing and pursuing an agency-level protest, costs incurred in seeking congressional assistance during an acquisition, and costs incurred in seeking relief in another forum, such as injunctive relief in district court. The costs of review-

ing a FOIA response, after the denial of an agency-level protest and in preparation of a GAO protest, are recoverable.

(g) *GAO Will Not Review Agency Decision to Override Performance Suspension.*—In *Banknote Corp. of America, Inc.*,²⁵² the GAO reaffirmed that it would not review an agency's determination to proceed with an acquisition while a protest is pending. The agency's only obligation is to inform the GAO that it is proceeding.²⁵³

(h) *The GAO Expects Complete Agency Report With Protest—Not On Reconsideration.*—In a decision granting the agency's request for reconsideration and denying a protest,²⁵⁴ the GAO was critical of the agency's failure to include "all relevant documents" in its original protest report. The GAO stated that a complete report requires a "sufficiently comprehensive overview of the procurement so that the basic facts and circumstances of the procurement will be apparent." Initially, the agency had provided information relevant only to the technical evaluation and cost-technical tradeoff issues raised in the protest. Accordingly, the GAO concluded that the agency had based its award on initial proposals. In sustaining the protest,²⁵⁵ the GAO recommended that the agency reopen the competition, hold discussions, and request BAFOs. On reconsideration, the GAO accepted additional evidence and was satisfied that the agency actually had, followed those procedures originally although the agency protest report did not so indicate.

2. *Claims Court Decisions: Standard of Review for Injunctive Relief.*—The Claims Court may grant injunctive relief if the government breaches its implied duty to consider bids fairly and honestly.²⁵⁶ To obtain a temporary injunction, the protestor must show a strong likelihood of success on the merits.²⁵⁷ In *Isratex, Inc. v. United States*,²⁵⁸ the court rejected the government's argument that the protestor must demon-

²⁴⁴ 4 C.F.R. § 21.6(e).

²⁴⁵ See, e.g., *R.J. Sanders, Inc.—Claim for Costs*, B-245388.2, Apr. 14, 1992, 92-1 CPD ¶ 362; *Datavault Corp.—Request for Declaration of Entitlement to Costs*, B-245991.3, May 29, 1992, 92-1 CPD ¶ 476.

²⁴⁶ B-249067.2, Aug. 13, 1992, 92-2 CPD ¶ 105.

²⁴⁷ *Accord Propulsion Controls Eng'g—Request for Declaration of Entitlement to Costs*, B-244619.2, Mar. 25, 1992, 92-1 CPD ¶ 306 (corrective action four days after agency report was due precludes award of costs); *David Weisberg—Request for Declaration of Entitlement to Costs*, B-246041.2, Aug. 10, 1992, 71 Comp. Gen. _____, 92-2 CPD ¶ 91 (corrective action taken 2½ months after protestor commented on agency report, but before GAO decision, unreasonable); *Carl Zeiss, Inc.—Request for Declaration of Entitlement to Costs*, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 (corrective action 62 days after protest filed unreasonable).

²⁴⁸ B-242353.3, Sept. 1, 1992, 92-2 CPD ¶ 144.

²⁴⁹ See *infra* note 307 and accompanying text.

²⁵⁰ B-237690.2, Mar. 4, 1992, 71 Comp. Gen. 293, 92-1 CPD ¶ 257.

²⁵¹ B-240639.5, May 21, 1992, 92-1 CPD ¶ 460.

²⁵² B-245528, Jan. 13, 1992, 92-1 CPD ¶ 53.

²⁵³ See 31 U.S.C. § 3553(d)(2); FAR 33.104.

²⁵⁴ Federal Bureau of Investigation—Recons., B-245551.2, June 11, 1992, 92-1 CPD ¶ 507.

²⁵⁵ Mid-Atl. Indus., Inc., B-245551, Jan. 16, 1992, 92-1 CPD ¶ 80.

²⁵⁶ 28 U.S.C. § 1491(a)(3).

²⁵⁷ See *Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 10 FPD ¶ 42 (1991).

²⁵⁸ 25 Cl. Ct. 223, 11 FPD ¶ 16 (1992).

strate by clear and convincing evidence that no rational basis existed for the government's position, or that a clear and prejudicial violation of the acquisition regulations had occurred. The court held that to obtain a permanent injunction, a protestor need only show by a preponderance of evidence that the challenged action is irrational, unreasonable, or violates an acquisition statute or regulation.

(a) *Claims Court Conducts De Novo Review.*—In a suit to recover proposal preparation costs, the Claims Court rejected an agency contention that the court was bound to uphold an earlier GAO decision against the plaintiff on the same issues unless the decision was arbitrary or capricious.²⁵⁹ Citing the advisory nature of GAO opinions, the court asserted that it would review de novo an agency decision to discontinue negotiations with the plaintiff.

(b) *Bid Extension Does Not Create Implied-in-Fact Contract.*—In *Skytech Aero, Inc. v. United States*,²⁶⁰ an offeror argued that an implied-in-fact contract arose when offerors complied with an agency request to extend their bid acceptance periods. The court, however, was unwilling to make the leap of logic necessary to transform the government's bid extension request into an offer to pay costs associated with an extended bid.

(c) *Revival of Offers.*—In *Rice Services, Ltd. v. United States*,²⁶¹ the Claims Court rejected a protestor's contention that the contracting officer could not revive proposals after the original proposal acceptance period had expired. The court followed persuasive GAO opinions that allow the revival of offers when the integrity of the acquisition is not thereby impaired.

3. Federal Court Decisions.—

(a) *Prototype Development May Be Recoverable Bid Preparation.*—The Claims Court previously had held that bid preparation costs do not include the cost of prototype development.²⁶² The Federal Circuit, however, reversed that decision in *Coflexip & Services, Inc. v. United States*.²⁶³ On appeal, the court found that contractor costs incurred pursuant to an

ongoing negotiation, and in support of a revised proposal, can be proposal preparation costs. The court refused to limit proposal preparation costs to those arising from solicitation requirements. The court remanded the case after finding that a factual dispute existed over whether the prototype was required during negotiations.

(b) *Decision to Lift Competition in Contracting Act Stay Reviewable.*—In *Northern Management Services, Inc. v. United States*,²⁶⁴ the plaintiff sought to enjoin an agency from overriding the automatic stay of contract performance triggered by a GAO protest.²⁶⁵ The agency argued that the override decision was nonreviewable under the Administrative Procedures Act²⁶⁶ because it was an action committed to agency discretion by law. The court disagreed and opined that the "urgent and compelling circumstances" finding, as required by the CCA provision,²⁶⁷ circumscribed the agency's discretion. The court, however, limited its review to a determination of whether the agency had complied with applicable statutes and regulations and whether it had a rational basis for its decision. Applying this standard, the court found that the override decision was reasonable and rational.

(c) *District Court Finds Preaward Jurisdiction.*—In *North Shore Strapping Co. v. United States*,²⁶⁸ following the views of the First and Third Circuit Courts of Appeals, the court assumed preaward jurisdiction over a bid protest. Although this case represents the first instance in which a court in that circuit has assumed jurisdiction over a preaward protest, the court stated that it was following what it believed to be the view of the Sixth Circuit.²⁶⁹

(d) *GAO Decisions Are Persuasive.*—Agency counsel should continue to use Comptroller General opinions to support their protest litigation positions before federal courts. In reviewing a decision concerning bid responsiveness, the First Circuit faced an issue of first impression in its jurisdiction.²⁷⁰ Finding no controlling case law or regulations on point, the court followed Comptroller General opinions that had addressed the responsiveness issue consistently.²⁷¹

²⁵⁹Health Sys. Mktg. & Dev. Corp. v. United States, 26 Cl. Ct. 1322, 11 FPD ¶ 130 (1992).

²⁶⁰26 Cl. Ct. 251, 11 FPD ¶ 70 (1992).

²⁶¹25 Cl. Ct. 366, 11 FPD ¶ 30 (1992).

²⁶²1991 Contract Law Developments—The Year in Review, *supra* note 14, at 28 (discussing Coflexip & Servs., Inc. v. United States, 23 Cl. Ct. 67, 10 FPD ¶ 55 (1991)).

²⁶³961 F.2d 951, 11 FPD ¶ 46 (Fed. Cir. 1992); *see infra* note 700 and accompanying text (discussing cost principles related to this case).

²⁶⁴No. 92-2104, (D.D.C. Sept. 30, 1992).

²⁶⁵*See* 31 U.S.C. § 3553(c); FAR 33.104(b).

²⁶⁶5 U.S.C. § 701(a)(2).

²⁶⁷31 U.S.C. § 3553(c) (head of procuring activity may lift stay only upon finding urgent and compelling circumstances that significantly affect the interests of the United States).

²⁶⁸788 F. Supp. 344 (N.D. Ohio 1992).

²⁶⁹*Cf.* Diebold v. United States, 947 F.2d 787 (6th Cir. 1991).

²⁷⁰Professional Bldg. Concepts, Inc. v. City of Central Falls, 974 F.2d 1 (1st Cir. 1992).

²⁷¹*Accord* Rice Servs., Ltd. v. United States, 25 Cl. Ct. 366, 11 FPD ¶ 30 (1992).

4. *GSBCA Decisions.*—Last year at the GSBCA—in addition to the usual protests against agency procurement actions—substantial attorneys' fee litigation ensued. These cases involved issues of fee entitlement and quantum, as well as matters relating to who ultimately should pay the fees. The reason for this is apparent—attorneys' fees have exceeded \$1 million to individual protestors in certain acquisitions involving multiple protests. These fee cases, in turn, have prompted more litigation over whether agencies must reimburse the judgment fund for these costs. The decisions that follow highlight these and other procedural disputes brought before the GSBCA during the past year.

(a) *Eligible Protestors.*—Interested parties who protest initially at the GAO may not file a subsequent protest at the GSBCA.²⁷² In *American Telephone & Telegraph Co.*,²⁷³ the protestor initially filed at the GAO, alleging an improper evaluation. When the agency agreed to reevaluate the proposals, AT&T withdrew its protest. Unsatisfied with the results of the reevaluation, AT&T protested to the GSBCA. The board dismissed the action and distinguished its prior decisions²⁷⁴ involving protestors that withdrew their GAO protests unconditionally. In this case, dismissal was appropriate because AT&T fully intended to pursue its protest at the GAO if the agency's corrective action was unsatisfactory.

Not every communication to GAO, however, is a protest. Before filing its protest at the GSBCA in *Electronic Systems & Associates, Inc. v. Department of the Air Force*,²⁷⁵ the protestor sent the GAO a letter calling for an investigation of the acquisition. The GAO treated the letter as a protest. When the contractor protested later to the GSBCA, the board concluded that the letter merely requested that the GAO exercise its investigatory powers,²⁷⁶ not its bid protest jurisdiction.²⁷⁷ Because the letter to the GAO was not a protest, the board assumed jurisdiction.

The GSBCA also extended the Federal Circuit decision in *United States v. International Business Machines Corp.*²⁷⁸ to negotiated acquisitions. In *Computer Maintenance Corp. v. Department of the Army*,²⁷⁹ the board held that a protestor on

a negotiated acquisition was not an interested party to protest the evaluation of the apparently successful offeror. Although the solicitation contemplated a best value award, several offerors were rated technically equal, and the agency awarded to the low priced proposal. Because the protestor failed to challenge one of the offerors who had proposed a lower price than the protestor, the protestor was not in line for award.

In *CODAR Technology, Inc. v. Department of the Army*,²⁸⁰ the protestor challenged a modification to a "laptop" computer contract. One allegation was that the agency awarded the original contract without a Delegation of Procurement Authority (DPA). The board held that the protestor was not an interested party to raise this issue because it had not submitted a proposal in response to the original solicitation.

Finally, in *RGI, Inc. v. Department of the Navy*,²⁸¹ the contractor certified falsely the availability of key personnel. As a result, the board found that the contractor was ineligible for award and, therefore, not an interested party for filing a protest.

(b) *Timeliness of Protests.*—In what may have been an artful attempt to minimize postage fees, a protestor included an agency protest in its sealed initial proposal. The agency discovered the protest when it opened the proposal after the due date. The agency denied the putative protest, and the protestor filed with the GSBCA. In its decision,²⁸² the board held that the protest alleging restrictive specifications was untimely because the agency could not have learned of it until after the proposal due date.

(c) *Subject Matter for Protests.*—In addition to the decisions discussing the applicability of the Brooks Act, the GSBCA addressed other limitations on the subject matter of protests. In *Teradata Corp. v. Department of the Air Force*,²⁸³ the board refused to consider a protest alleging that the specifications were not restrictive enough. The board considered GAO precedent and concluded that the use of less restrictive specifications was consistent with the statutory goals of maximizing competition.

²⁷² See 40 U.S.C. § 759(f)(1).

²⁷³ GSBCA No. 11569-P, 92-1 BCA ¶ 24,675, 1991 BPD ¶ 347.

²⁷⁴ See, e.g., *Syscon Corp.*, GSBCA No. 10890-P, 91-1 BCA ¶ 23,496, 1990 BPD ¶ 391.

²⁷⁵ GSBCA No. 11883-P, 93-1 BCA ¶ 25,278, 1992 BPD ¶ 187.

²⁷⁶ See 31 U.S.C. §§ 712(1), 717(b).

²⁷⁷ See 31 U.S.C. §§ 3551-56.

²⁷⁸ 892 F.2d 1006, 8 FPD ¶ 166 (Fed. Cir. 1989).

²⁷⁹ GSBCA No. 11718-P, 92-2 BCA ¶ 24,893, 1992 BPD ¶ 85.

²⁸⁰ GSBCA No. 11817-P, 93-1 BCA ¶ 25,254, 1992 BPD ¶ 177.

²⁸¹ GSBCA No. 11752-P (June 2, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 156.

²⁸² *Trimble Navigation, Ltd. v. Department of Transp.*, GSBCA No. 11653-P, 92-1 BCA ¶ 24,761, 1992 BPD ¶ 36.

²⁸³ GSBCA No. 11642-P, 92-2 BCA ¶ 24,895, 1992 BPD ¶ 74.

In *Electronic Data Systems Corp.*,²⁸⁴ the board refused to review an agency's cancellation of a solicitation after Congress prohibited the use of appropriated funds for the agency's requirement. The board held that the protestor actually was challenging a legislative action—not the actions of a contracting officer. Accordingly, the board dismissed the protest for lack of jurisdiction.

In *Level 6 Systems, Inc.*,²⁸⁵ the GSBICA concluded that its jurisdiction extended to a contracting officer's decision to terminate a contract for convenience based on errors in the original award. It then denied the protest on the merits, holding that the agency terminated the contract validly based on changed requirements.

This past year, the board declined to interpret broadly the Federal Circuit's statement in *Data General Corp. v. United States*²⁸⁶ that the GSBICA may not substitute its judgment for an agency's determination of its needs. In *RMTC Systems, Inc. v. Nuclear Regulatory Commission*,²⁸⁷ the board distinguished *Data General* as a postaward protest, not a challenge to unduly restrictive specifications.

In *Amdahl Corp. v. Department of Health and Human Services*,²⁸⁸ the GSBICA elaborated on this distinction. It held that its role was not to determine needs, but to consider whether a challenged specification was reasonably related to the agency's needs. In this case, the board accepted the agency's needs as a given, but disagreed that the agency's specifications described those needs. Instead, the board embraced a broad statement of the agency's need—that is, reliability—and evaluated the reasonableness of the specification against this requirement. Agencies apparently will have to obtain clarification of the *Data General* decision from the Federal Circuit.

(d) *Scope of Review.*—The GSBICA continues to show deference to many agency decisions. The board exhibits its

deference in many ways. In *Integrated Systems Group, Inc. v. Department of the Air Force*,²⁸⁹ the board presumed that the government performed tests properly and, finding no evidence to the contrary, denied a protest challenging the rejection of unacceptable bid samples.

The board also required a protestor to demonstrate that an agency error caused prejudice. In *Orkand Corp.*,²⁹⁰ the agency failed to disclose a deficiency to the protestor during discussions. The board observed, however, that even if the protestor had earned a perfect score in the related evaluation area, it would not have received the award. Accordingly, the agency's omission did not prejudice the protestor.

*Andersen Consulting v. United States*²⁹¹ affirmed the GSBICA's denial of relief for de minimis errors. The Federal Circuit described these errors as "so insignificant when considered against the solicitation as a whole that they can safely be ignored and the main purpose of the contemplated contract will not be affected if they are."

In reviewing many agency actions, the GSBICA applies an abuse of discretion standard, rather than its former de novo review. This past year, the board applied this abuse of discretion standard in several cases.²⁹² The board actually has ruled that a protestor must show that an agency action is "clearly erroneous—an abuse of discretion demonstrating a 'gross disparity or unfairness' . . ." ²⁹³ Finally, in *MCI Telecommunications Corp. v. General Services Administration*,²⁹⁴ the board stated that it would not second guess agency business decisions and would only review acquisitions for violations of statute, regulation, or the DPA.

(e) *Suspensions of the Delegation of Procurement Authority.*—A good example of an agency successfully opposing a suspension of its DPA is *Advanced Data Concepts, Inc. v. Department of Energy*.²⁹⁵ The agency demonstrated that award and continued performance was urgent and compelling

²⁸⁴ GSBICA No. 11593-P, 92-1 BCA ¶ 24,616, 1991 BPD ¶ 333.

²⁸⁵ GSBICA No. 11410-P, 92-1 BCA ¶ 24,527, 1991 BPD ¶ 279.

²⁸⁶ See 915 F.2d 1544, 1552, 9 FPD ¶ 141 (Fed. Cir. 1990) (stating that "the board has neither the authority nor the expertise to second-guess the agency").

²⁸⁷ GSBICA No. 11734-P, 92-3 BCA ¶ 25,113, 1992 BPD ¶ 92.

²⁸⁸ GSBICA No. 11998-P (Oct. 30, 1992), ___ BCA ¶ ___, 1992 BPD ¶ ___.

²⁸⁹ GSBICA No. 11602-P, 92-1 BCA ¶ 24,762, 1992 BPD ¶ 34.

²⁹⁰ GSBICA No. 11405-P, 92-1 BCA ¶ 24,624, 1991 BPD ¶ 320.

²⁹¹ 959 F.2d 929, 11 FPD ¶ 38 (Fed. Cir. 1992).

²⁹² See *Integrated Sys. Group, Inc. v. Office of Personnel Management*, GSBICA No. 12002-P (Nov. 17, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___ (deciding multiple award schedule order would result in lower cost than competitive solicitation); *Valix Fed. Partnership I v. Department of the Army*, GSBICA No. 12005-P (Nov. 10, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___ (reserving contract for 8(a) firm); *CBIS Fed. Inc. v. Department of the Interior*, GSBICA No. 12092-P (Nov. 6, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___ (evaluating resumes of proposed personnel); *Valix Fed. Partnership I v. Department of the Air Force*, GSBICA No. 12038-P (Oct. 30, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___ (canceling solicitation); *Lockheed Missiles & Space Co., Inc. v. Department of Treasury*, GSBICA No. 11776-P (June 2, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 155 (determining best value).

²⁹³ *CBIS Fed. Inc. v. Department of the Interior*, GSBICA No. 12092-P (Nov. 6, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___.

²⁹⁴ GSBICA No. 11963-P (Oct. 9, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___.

²⁹⁵ GSBICA No. 11707-P, 92-2 BCA ¶ 24,846, 1992 BPD ¶ 55.

because the agency lacked the in-house capability to operate its computer systems, and continued operation of them was critical to the agency operations and its management of other contracts.

(f) *Remedies.*—In *Planning Research Corp. v. United States*,²⁹⁶ the Federal Circuit further clarified the limited scope of the GSBICA's remedial powers. In an earlier decision,²⁹⁷ the GSBICA had ordered the agency to terminate the Planning Research Corporation contract at no cost to the government based on the contractor's "bait and switch" tactics. On appeal, the court reversed that portion of the decision purporting to decide the rights of the government and Planning Research under the contract. The court cited *United States v. Amdahl Corp.*²⁹⁸ as limiting the authority of the GSBICA to settle the rights of a terminated contractor.

Clearly, the most controversial issue relating to the board's remedial powers is whether it can direct the agency to reimburse the permanent indefinite judgment fund. In one case, the GSBICA held that it lacked authority to direct an agency to reimburse the fund.²⁹⁹ In another, a strong dissent implied that a majority of all GSBICA judges held the opinion that the board lacked authority to direct reimbursement.³⁰⁰ Conversely, in several decisions last year, the board directed reimbursement of the judgment fund.³⁰¹ The division within the board on this issue was noted critically in a Senate report, discussed below.

The board, however, may have resolved its differences on this matter. In *Sysorex Information Systems, Inc. v. Department of the Treasury*,³⁰² the full board declined explicitly to order the agency to reimburse the judgment fund. In a footnote, the board stated that five of nine judges had concluded that the GSBICA lacked the authority to direct reimbursement.³⁰³ Consequently, a majority of the board likely

will not order an agency to reimburse the judgment fund for costs and fees associated with a successful protest.³⁰⁴

(g) *Attorneys' Fees and Protest Costs.*—The board has issued several decisions defining the types of fees and costs that it will award to a prevailing party. These decisions have tended to reduce the size of awards to prevailing parties.

In *Sysorex Information Systems, Inc. v. Department of the Treasury*,³⁰⁵ the board held that it could not award costs associated with a protestor's successful appeal to the Federal Circuit. The board relied on *Grubka v. Department of the Treasury*,³⁰⁶ in which the Federal Circuit held that fee awards associated with appeals must come from the appellate tribunal, not the forum below. The court also opined that a fee authorization provision similar to the one found in the Brooks Act did not authorize the court or the administrative forum—the MSPB—to grant costs for a judicial appeal. Following the *Grubka* decision, the board construed the Brooks Act fee granting provisions strictly and denied the protestor's request for costs.

The board held in *Sterling Federal Systems, Inc. v. National Aeronautics and Space Administration*,³⁰⁷ that it lacked authority to award expert witness fees to a successful protestor. It followed *West Virginia University Hospitals, Inc. v. Casey*,³⁰⁸ in which the Supreme Court held that "attorney fees" did not include the costs of expert witnesses. Applying the Supreme Court's definition of attorneys' fees, and finding no separate statutory authority to award special fees for expert witnesses, the board reversed its long-standing position of awarding the full costs of expert witnesses.³⁰⁹

In *Sterling Federal Systems*, the GSBICA also limited recovery of salaries paid to in-house personnel who had participated in the protest. It held that a prevailing party may

²⁹⁶971 F.2d 736, 11 FPD ¶ 100 (Fed. Cir. 1992).

²⁹⁷Electronic Data Sys. Fed. Corp., GSBICA No. 9869-P, 89-2 BCA ¶ 21,655, 1989 BPD ¶ 69.

²⁹⁸786 F.2d 387, 5 FPD ¶ 23 (Fed. Cir. 1986).

²⁹⁹Government Technology Servs., Inc. v. Department of the Navy, GSBICA No. 11174-C(10991-P), 92-2 BCA ¶ 24,898, 1992 BPD ¶ 76.

³⁰⁰See *Insyst Corp. v. General Servs. Admin.*, GSBICA No. 10093-C-R(9946-P), 92-2 BCA ¶ 24,892, 1992 BPD ¶ 71.

³⁰¹*Id.*; see also *Newman Group v. National Aeronautics and Space Admin.*, GSBICA No. 11878-C(11849-P) (Aug. 5, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 203; *C3, Inc. v. Agency for Int'l Dev.*, GSBICA No. 10796-C(10647-P) (June 24, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 169.

³⁰²GSBICA No. 107811-C(10642-P)-REIN (Sept. 8, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 235.

³⁰³See *id.*, 1992 BPD ¶ 235, at n.3. One judge, who declined to order reimbursement, noted that agencies had ignored similar orders uniformly in the past and that no danger of "Fed Mail" was present in the instant case.

³⁰⁴See *supra* note 216 and accompanying text (explaining the GAO's treatment of protest settlements).

³⁰⁵GSBICA No. 107811-C(10642-P)-REIN (Sept. 8, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 235.

³⁰⁶924 F.2d 1039 (Fed. Cir. 1991) (concluding that under "American Rule," judges must construe strictly the fee shifting statutes); accord *Phillips v. General Servs. Admin.*, 924 F.2d 1577 (Fed. Cir. 1991).

³⁰⁷GSBICA No. 10000-C(9835-P), 92-3 BCA ¶ 25,118, 1992 BPD ¶ 141.

³⁰⁸111 S. Ct. 1138 (1991).

³⁰⁹Witnesses before the GSBICA are entitled to \$40 per day, plus per diem and travel costs. 28 U.S.C. § 1821(b).

recover only for company employees or officials who testify before the board.³¹⁰ The board reserved judgment on whether it would order reimbursement of a protestor for the cost of in-house attorneys.

In *Electronic Data Systems Corp. v. Department of the Air Force*,³¹¹ the board considered costs associated with in-house legal counsel and excepted them from the general rule espoused in *Sterling Federal*. The board concluded that no reason existed to distinguish between outside and in-house counsel.

In a few decisions, agencies have persuaded the board to reduce attorneys' fees awards. In *Horizon Data Corp. v. Department of the Navy*,³¹² two protestors sought attorneys' fees for a successful protest. One protestor's attorney sought recovery of an amount double that of the other protestor, but failed to show that the extra hours were reasonable or necessary or that they resulted in better representation. Accordingly, the board limited the fees to those paid the coprotector. In *C3, Inc. v. Agency for International Development*,³¹³ the protestor prevailed on a minor issue, then sought attorneys' fees for the full range of its multi-allegation protest. The board awarded C3 only a small percentage of its total fees and costs.

Unfortunately, the trend at the GSBICA is to allow ever larger awards of attorneys' fees—now well over \$1 million to some individual protestors.³¹⁴ Because large acquisitions often have multiple protestors and multiple protests, agencies could face attorneys' fees and costs approaching several million dollars.

(h) *Management Issues.*—In October 1992, the Senate Committee on Governmental Affairs issued a management report on the GSBICA.³¹⁵ The report details a number of questionable GSBICA management practices. Since the departure of the GSBICA's former chairman in September 1992, the acting chairman has made a number of changes responsive to

the issues raised in the report. Anticipate additional changes during the coming year.

G. Small Business Program Developments

1. Small Business Administration Actions.—

(a) *Nonmanufacturer Rule Waivers.*—The SBA exercised its waiver authority in 1992 and determined that no small business manufacturers or processors in the federal market for a number of products existed. It waived the nonmanufacturer rule for four-wheel utility trucks, wheeled tractors, and nuclear batteries;³¹⁶ xerographic paper;³¹⁷ and pneumatic aircraft tires.³¹⁸ The SBA terminated waivers for methanol, acetone, nitric acid, and titanium;³¹⁹ and electric motors.³²⁰

(b) *SBA Revises Computer Service Size Standard.*—In an interim final rule, the SBA made uniform the size standard applicable to the Computer Services industry group. The size standard is now \$14.5 million. The SBA also solicited further comments to determine whether a standard based on numbers of employees would be preferable to the current standard.³²¹

2. Changes to Defense Federal Acquisition Regulation Supplement Part 219, Small Business and Small Disadvantaged Business Concerns.—

(a) *Organizations Employing the Severely Disabled.*—The Defense Acquisition Regulation Council (DAR Council) has implemented two changes that benefit nonprofit organizations approved by the Committee for Purchase from the Blind and Other Severely Handicapped. Defense contractors may count subcontracts with these organizations toward SDB subcontracting goals.³²² Additionally, nonprofit organizations that employ the severely disabled may participate as protege firms under the DOD Pilot Mentor-Protege Program.³²³

(b) *Pilot Mentor-Protege Program Revisions.*—In addition to establishing the eligibility of committee-approved organizations to participate as protege firms, the DFARS now

³¹⁰GSBCA No. 10000-C(9835-P), 92-3 BCA ¶ 25,118, 1992 BPD ¶ 141; see 28 U.S.C. § 1821(b).

³¹¹GSBCA No. 11710-C(11616-P) (Sept. 17, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 258.

³¹²GSBCA No. 11018-C(10831-P), 92-2 BCA ¶ 24,852, 1992 BPD ¶ 49.

³¹³GSBCA No. 10796-C(10647-P) (June 24, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 169.

³¹⁴See, e.g., *International Business Machs. Corp. v. Department of Treasury*, GSBICA No. 11605-C(11359-P) (Aug. 21, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 220.

³¹⁵S. REP. No. 112, 102d Cong., 2d Sess. (1992).

³¹⁶57 Fed. Reg. 6290 (1992) (effective Feb. 24, 1992) (SBA also waived rule for various chemical compounds).

³¹⁷57 Fed. Reg. 14,638 (1992) (effective Apr. 22, 1992).

³¹⁸57 Fed. Reg. 20,962 (1992) (effective May 18, 1992).

³¹⁹57 Fed. Reg. 18,396 (1992) (effective July 29, 1992).

³²⁰57 Fed. Reg. 27,677 (1992) (effective Sept. 21, 1992).

³²¹57 Fed. Reg. 27,906 (1992) (effective July 23, 1992).

³²²See DFARS 219.703(a), (b); see also National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 808, 106 Stat. 2315, 2449 (adding 10 U.S.C. § 2410d).

³²³57 Fed. Reg. 47,270 (effective Oct. 5, 1992, amending DFARS 219.7100), published as final rule in DAC 91-4, 57 Fed. Reg. 53,596 (1992).

authorizes contractors to obtain subcontracting plan goal credit for developmental assistance costs reimbursed as indirect expenses. Mentor firms also may obtain profit on developmental assistance costs incurred.³²⁴

(c) *Bond Waiver for 8(a) Contractors.*—The DFARS provides that a contracting official at a level above the contracting officer shall consider waiving performance and payment bond requirement for 8(a) contractors that are unable to obtain bonding. The DFARS requires waiver only if a contractor has received fewer than five such waivers while a participant in the 8(a) program and is otherwise responsible. Contracting activities shall not waive bonding if the SBA has done so already; if the acquisition is in excess of \$3 million; or if the contracting officer expects to use competitive 8(a) procedures.³²⁵

3. Section 8(a) Contracting Cases.—

(a) *GSBCA Panels Disagree on Application of Competition Thresholds.*—*Electronic Systems & Associates v. Department of the Air Force*³²⁶ involved an IDIQ service contract with an estimated value of \$10 million and a guaranteed minimum of \$50,000. In part, the protestor argued that award on a sole source basis was improper because by statute, agencies must compete nonmanufacturing contracts with an anticipated award price in excess of \$3 million, including options.³²⁷ In dicta, the board agreed. It opined that an SBA regulation³²⁸ requiring application of the thresholds to the minimum value of an IDIQ contract is contrary to law and invalid.³²⁹

(b) *Agency Must Afford Sole Source Offer "Fair Consideration."*—*In Corporate Systems Resources, Inc. v. Tennessee Valley Authority*,³³⁰ Tennessee Valley Authority (TVA) requested a proposal from an 8(a) contractor for the maintenance of optical scanning equipment and the provision of other hardware and software. After receiving the proposal, however, TVA declined to negotiate with the contractor because the proposal failed to "add value" to the contract. The contractor had proposed prices for another company's equipment that exceeded by ten percent the GSA schedule

prices for the same equipment. Likewise, the contractor itself would not provide maintenance, integration services, or training on the new equipment. The GSBCA found no support for the contractor's assertion that TVA should have conducted discussions. The board also ruled that TVA had considered the proposal fairly and had exercised its discretion properly to seek a more favorable contract with another contractor.

4. *Small Disadvantaged Business Issues: Offeror Was Not Entitled to Small Disadvantaged Business Evaluation Preference.*—*Sonicraft, Inc. v. Defense Information Systems Agency*³³¹ involved a requirement for telecommunication services for which the protestor, an SDB, planned to team with Sprint Communications Co. (Sprint). Although the proposal indicated that Sonicraft would be responsible for overall contract management, Sprint clearly was to perform a substantial portion of the services. Nevertheless, the agency afforded Sonicraft the SDB evaluation preference. In its protest, Sonicraft argued that the agency failed to weigh its management proposal fairly. The GSBCA denied the protest, finding that the evaluation was proper. It also found that the agency had applied the SDB preference erroneously because fifty percent of personnel costs on the contract would not go to Sonicraft employees.³³² Without the evaluation preference, Sonicraft was not in line for award, regardless of whether the review of Sonicraft's proposal was reasonable.

5. *Set-Aside Procedures: Agency Should Have Consulted SBA Before Issuing Unrestricted Solicitation.*—*In Neil R. Gross and Co.*,³³³ an agency issued a solicitation for court reporting services on an unrestricted basis. It did so after learning from a large business that small business prices were unreasonable. Although the agency knew that other activities had awarded similar contracts to small firms, the agency doubted that it could obtain the services from these firms at a fair market price. The GAO sustained the protest, finding that the agency should have coordinated its decision to withdraw the set-aside with the SBA.³³⁴ Additionally, the contracting officer failed to perform an independent market survey and relied unreasonably on the assertions of a large business concerning small business prices.³³⁵

³²⁴ 57 Fed. Reg. 47,270 (effective Oct. 5, 1992) (amending DFARS 219.7102(d) & 219.7104(b)), republished in DAC 91-4, 57 Fed. Reg. 53,596 (1992).

³²⁵ 57 Fed. Reg. 38,286 (1992) (effective Aug. 14, 1992), republished in DAC 91-4, 57 Fed. Reg. 53,596 (1992).

³²⁶ GSBCA No. 11883-P, 93-1 BCA ¶ 25,278, 1992 BPD ¶ 187.

³²⁷ 15 U.S.C. § 637(a)(1)(D)(i).

³²⁸ See 13 C.F.R. § 124.311(a)(2) (1992).

³²⁹ But see *Electronic Sys. & Assocs. v. Department of the Air Force*, GSBCA No. 11291-P, 91-3 BCA ¶ 24,254, 1991 BPD ¶ 175 (another panel of GSBCA held competition not mandated because guaranteed minimum purchase was below threshold).

³³⁰ GSBCA No. 11938-P (Sept. 25, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 267.

³³¹ GSBCA No. 11750-P (May 15, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 182.

³³² See DFARS 252.219-7006 (Notice of Evaluation Preference for Small Disadvantaged Business Concerns).

³³³ B-249114, Oct. 22, 1992, 72 Comp. Gen. ___, 92-2 CPD ¶ 269.

³³⁴ See FAR 19.506 (requiring written notice to the agency small business specialist and procurement center representative, if assigned).

³³⁵ Compare *U.S. Constructors, Inc.*, B-248329, Aug. 19, 1992, 92-1 CPD ¶ 112 (agency properly withdrew set-aside when prices of the only two competitors were unreasonable).

6. *Small Business Responsibility Determinations.*—

(a) *District of Columbia Circuit: Certificate of Competency Process Does Not Apply to 8(a) Acquisitions.*—Last year we reported that the Claims Court had ruled that the COC process applies to noncompetitive 8(a) acquisitions.³³⁶ In *DAE Corp. v. Engeleiter*,³³⁷ the District of Columbia Circuit concluded differently. The court noted distinct differences between the program that mandates the COC process and that which governs 8(a) contracting.³³⁸ For example, the sole purpose of the COC process is to protect small firms from arbitrary nonresponsibility determinations issued by contracting officers. The COC process would be unnecessary under a sole source 8(a) acquisition because the SBA determines responsibility in such instances.³³⁹ Additionally, the 8(a) regulations provide specifically that the COC process is unavailable to contractors under a sole source or competitive 8(a) acquisition.³⁴⁰

(b) *Agency May Not Abdicate Duty to Conduct Responsibility Determination.*—In *Action Service Corp. v. Garrett*,³⁴¹ a district court found that an agency violated the FAR by failing to determine the responsibility of a contractor before awarding a competitive 8(a) contract to it. The agency relied on *DAE Corp. v. Engeleiter*, in which the appeals court stated that the SBA renders responsibility determinations in 8(a) acquisitions. The *Garrett* court, however, distinguished *DAE Corp.* as a case holding only that the COC process did not apply to sole source 8(a) contracts. In addition to noting procedural reasons for requiring contracting officer determinations in competitive acquisitions, the court found that SBA regulations require compliance with the FAR in such cases.³⁴² Accordingly, the court concluded that the agency should have rendered a determination under FAR subpart 9.1.

(c) *GAO Accepts Agency Rationale for Excluding Small Firm Without Consulting SBA.*—A solicitation for repairs to a

drydock advised that the agency could reject proposals that were unsatisfactory in any of several categories, one of which was “facilities.” After learning that one small firm lacked adequate facilities, the agency excluded it from competition without referring the matter to the SBA. In an initial protest, the GAO found that the agency should have followed the COC process because rejection of the proposal for inadequate facilities was tantamount to a finding of nonresponsibility.³⁴³ On reconsideration,³⁴⁴ the GAO reversed its decision when the agency showed that lack of an adequate facility also rendered the contractor’s proposal unacceptable in categories unrelated to its responsibility.³⁴⁵

H. *Domestic Preference Issues*

1. *Regulatory Changes.*—

(a) *Designated Countries under the Trade Agreements Act.*—The Federal Acquisition Regulation Council (FAR Council) recently published a federal acquisition circular (FAC) that designates additional countries under the Trade Agreements Act (TAA). *FAC 90-14* added Greece, Liechtenstein, and Spain to the list of designated countries in FAR 25.401.³⁴⁶

(b) *Qualifying Country Revisions.*—Austria and Finland have been added to the list of qualifying countries at DFARS 219.872-1(b).³⁴⁷ These are countries for which the contracting officer may, on a case-by-case basis, obtain a public interest exemption from the application of the Buy American Act (BAA) and Balance of Payments Program. In an earlier change to the DFARS, the regulation specified approval authorities for such waivers.³⁴⁸

(c) *Secondary Arab Boycott Certification.*—The DFARS has added a final rule that prohibits the award of a contract to foreign persons, companies, and entities unless they certify that they do not comply with the Secondary Arab Boycott of Israel.³⁴⁹ The certification requirement does not apply to

³³⁶1991 *Contract Law Developments—The Year in Review*, *supra* note 14, at 34; see *Celtech, Inc. v. United States*, 24 Cl. Ct. 269, 10 FPD ¶ 116 (1991), *vacated*, 25 Cl. Ct. 368 (1992).

³³⁷958 F.2d 436 (D.C. Cir. 1992).

³³⁸*Compare* 13 C.F.R. pt. 125 (procurement assistance for small businesses, generally) with 13 C.F.R. pt. 124 (minority small business procedures). See 15 U.S.C. § 637(a), (b).

³³⁹See 13 C.F.R. § 124.308(e)(1)(ii).

³⁴⁰See 13 C.F.R. § 124.313(c).

³⁴¹797 F. Supp. 82 (D.P.R. 1992).

³⁴²See 13 C.F.R. § 124.311(f)(3).

³⁴³*Detyens Shipyards, Inc.*, B-244918, Dec. 3, 1991, 71 Comp. Gen. 101, 91-2 CPD ¶ 500.

³⁴⁴*Department of the Navy—Recons.*, B-244918.3, July 6, 1992, 92-2 CPD ¶ 199.

³⁴⁵See *Federal Support Corp.*, B-245573, Jan. 16, 1992, 71 Comp. Gen. 152, 92-1 CPD ¶ 81 (finding improper rejection of small business proposal based on lack of specified minimum number of years experience without referring matter to SBA).

³⁴⁶57 Fed. Reg. 48,470 (1992) (effective Oct. 23, 1992).

³⁴⁷DAC 91-4, 57 Fed. Reg. 53,596 (1992) (effective Oct. 30, 1992).

³⁴⁸See DAC 91-3, 57 Fed. Reg. 42,626 (1992) (effective Aug. 31, 1992) (amending DFARS 225.872-4).

³⁴⁹See 57 Fed. Reg. 29,041 (1992) (interim rule effective June 24, 1992); DAC 91-3, 57 Fed. Reg. 42,626 (1992) (adding interim DFARS 225.770, 252.225-7031); DAC 91-4, 57 Fed. Reg. 53,596 (1992) (final DFARS publication).

purchases below the small purchase threshold; to contracts for consumables or services for support of United States or allied forces overseas; or to contracts for equipment, data, or services for intelligence or classified purposes in the interest of national security.

2. Challenges to Domestic Content.—

(a) *Calculation of Component Costs.*—In *General Kinetics, Inc., Cryptek Secure Communications Division*,³⁵⁰ the protestor claimed that the contracting officer should have added indirect expenses incurred to the cost of a foreign component in the awardee's fax machine. If added, this expense would have caused the cost of the foreign component to exceed the cost of the domestic components. The GAO rejected the protestor's position that the Cost Accounting Standards (CAS) and FAR part 31 govern the calculation of component costs under the BAA. It noted that contractors may not treat their own indirect expenses attributable to previously manufactured components as costs of that component, regardless of CAS procedures. Instead, contractors must treat these expenses as costs of manufacturing the end product.³⁵¹

In *Lyntronics, Inc.*,³⁵² the AGO held that an agency should have included a distributor's markup in the cost of a foreign component. The awardee's battery consisted of cells manufactured in Hong Kong and shipped to Duracell, Inc. in the United States. Duracell then tested and packaged the cells and sold them to the awardee. The GAO found that the markup was "a necessary expense of acquiring the foreign component" and includable as a cost of the foreign component.

(b) *Nationality of Manufacturer Not Crucial.*—An unsuccessful offeror claimed in *Military Optic, Inc.*³⁵³ that the contracting officer should have applied the BAA differential against the awardee's end item because a Japanese-owned company manufactured it. The GAO held that the nationality of the manufacturer was irrelevant because the end product would be manufactured in the United States and would consist of over fifty percent qualifying country components.

3. Trade Agreements Act Versus Buy American Act: Trade Agreements Act Does Not Apply to Acquisitions Indispensable

to National Defense.—In *Puerto Rico Marine Management, Inc.*,³⁵⁴ the Maritime Administration (MarAd) issued a solicitation for ships to be used in the Ready Reserve Force. The protestor complained that the solicitation was defective because it did not include a BAA preference for United States vessels.³⁵⁵ The MarAd contended that the TAA, and not the BAA, applied because the estimated cost of the contract exceeded the TAA threshold.³⁵⁶ The GAO, however, determined that the MarAd was acquiring the ships to bolster military sealift capability; therefore, the acquisition was "indispensable to national defense or national security." Consequently, the TAA was inapplicable, and the agency should have incorporated BAA clauses.³⁵⁷

4. *Evaluation of Qualifying Country Products: Memorandum of Understanding Did Not Relieve Agency of Responsibility to Verify Product Test Results.*—A solicitation for tank track assemblies limited offers to products on a qualified products list (QPL). To be eligible for the QPL, the specifications required that the assemblies perform within certain tolerances as tested on government-approved machines. In *Goodyear Tire & Rubber Co.*,³⁵⁸ the protestor claimed that the awardee had not tested its qualifying country product on an approved machine and that the product did not meet applicable standards. The agency argued that a memorandum of understanding (MOU) between the United States and the qualifying country mandated acceptance of test results certified by the qualifying country's ministry of defense.³⁵⁹ The GAO sustained the protest, opining that neither the MOU nor the DFARS permit acceptance of qualifying country test results without proper verification.

5. *Buy American Act—Construction Materials: Each Article Brought to Site Must Comply with Buy American Act.*—*S.J. Amoroso Construction Co. v. United States*³⁶⁰ involved a construction contract in which S. J. Amoroso Construction (Amoroso) was to provide and erect steel beams. The beams consisted of various steel components that Amoroso's subcontractor planned to assemble and bring to the site for final installation. When the agency advised that each beam brought to the site had to consist of over fifty percent domestic components,³⁶¹ the contractor discovered that one-third of the beams were foreign. Amoroso reordered domestic

³⁵⁰B-243078.2, Jan. 22, 1992, 92-1 CPD ¶ 95.

³⁵¹See *Military Optic, Inc.*, B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78 (direct and indirect costs allocable to purchased component and assembly of end product are not component costs).

³⁵²B-247431, June 8, 1992, 92-1 CPD ¶ 498.

³⁵³B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78.

³⁵⁴B-247975.5, Oct. 23, 1992, 72 Comp. Gen. ____, 92-2 CPD ¶ 275.

³⁵⁵See FAR 25.105; FAR 52.225-3 (Buy American Act—Supplies).

³⁵⁶See DAC 91-3, 57 Fed. Reg. 42,626 (1992) (effective Jan. 1, 1992, the TAA threshold is \$176,000).

³⁵⁷See FAR 25.403(d)(2) (exempting from TAA all civilian agency acquisitions indispensable to national defense).

³⁵⁸B-247363.6, Oct. 23, 1992, 92-2 CPD ¶ 315.

³⁵⁹See DFARS 225.872-3(f)(1).

³⁶⁰26 Cl. Ct. 759, 11 FPD ¶ 84 (1992).

³⁶¹See 41 U.S.C. § 10b; FAR 52.225-5 (Buy American Act—Construction Materials). "Construction material" means an article, material, or supply brought to the construction site for incorporation into the project. *Id.*

beams and claimed for the difference in cost. On appeal, Amoroso argued that the agency should have calculated the domestic costs of the steel based on the overall cost of steel necessary to complete the structure. The court, however, concluded that the agency correctly required application of the domestic component test to each piece of steel brought to the site.

I. Labor Standards Developments

1. Regulatory and Administrative Topics.—

(a) *Systems Integrator Provisions.*—The Department of Labor (DOL) has issued long-awaited regulations³⁶² that include automatic data processing systems integrators within the definition of “manufacturer or regular dealer” under the Walsh-Healey Public Contracts Act.³⁶³

(b) *President Prescribes “Open Bidding” on Federal Construction Projects.*—On October 23, President Bush issued an executive order (EO) prohibiting procedures, agreements, or practices that deny federal construction contracting opportunities to organizations and employees that are not affiliated with a union.³⁶⁴ Specifically, the EO prohibits executive agencies from (1) requiring that offerors, contractors, or their subcontractors enter into or adhere to labor agreements; (2) discriminating against these entities for refusing to enter into a labor agreement; and (3) mandating that an entity require an employee, as a condition of employment, to join a union or pay dues that exceed that employee’s share of union costs related to collective bargaining, contract administration, or grievance adjustment. The EO does not affect contracts awarded before November 23, 1992. Unless duly exempted,³⁶⁵ if a contracting officer knows that a contractor has violated the EO, the contracting officer must take appropriate action, including debarment, suspension, termination for default, or withholding of payments. The FAR now includes guidance on “open bidding.”³⁶⁶

In a related development, the President issued an order requiring contractors to post “Beck” notices informing their employees that they cannot be required to join a union or maintain their union affiliations as a condition of continued employment.³⁶⁷

2. *Resolution of Labor Disputes.*—In *American Maintenance Co.*,³⁶⁸ the ASBCA denied the government’s motion to dismiss for lack of jurisdiction and determined that a claim for reimbursement of fringe benefits did not arise under the contract’s labor standards provisions. The board distinguished disputes involving classification of workers, wage determinations, and violations of labor standards statutes as matters properly within the DOL’s exclusive jurisdiction.³⁶⁹

In the bid protest context, the GSBICA³⁷⁰ held that it lacked jurisdiction to consider the protestor’s allegation that the awardee was not a “manufacturer or regular dealer” for purposes of the Walsh-Healey Public Contracts Act.³⁷¹

3. *Fair Labor Standards Act: Contractor Practice Altered “Exempt” Status of Its Employees.*—The Supreme Court declined to review an appeals court decision in *Martin v. Malcolm Pirnie, Inc.*³⁷² The lower court in this case held that a contractor’s employees lost their exempt statuses³⁷³ under the Fair Labor Standards Act because of the contractor’s policy of deducting pay from its employees when they worked less than eight hours in a day. The court found that the employees were entitled to overtime pay for hours worked in excess of forty hours in a week and, as a result, the contractor was liable for \$2 million in unpaid overtime wages. Service contractors with similar policies may be subject to withholding of payments and termination for default under the Service Contract Act clause.³⁷⁴ The Senate introduced a bill in September that would allow employers to deduct pay for

³⁶² 57 Fed. Reg. 31,566 (1992) (effective August 17, 1992), codified at 41 C.F.R. § 50-201.101(a)(2)(xii)(A).

³⁶³ 41 U.S.C. §§ 35-45.

³⁶⁴ Exec. Order No. 12,818, 57 Fed. Reg. 48,713 (1992) (effective Nov. 23, 1992). This EO is intended to increase competition in federal construction contracts and to reduce construction costs by providing greater opportunities to nonunionized organizations.

³⁶⁵ See *id.* § 4 (providing that the agency head may exempt a project from the EO upon finding that exemption is necessary “to avert an imminent threat to public health or safety or to serve the national security”).

³⁶⁶ See FAC 90-15, 57 Fed. Reg. 55,471 (1992) (effective Nov. 23, 1992) (adding FAR subpt. 22.5).

³⁶⁷ Exec. Order No. 12,800, 57 Fed. Reg. 12,985 (1992) (effective May 13, 1992). The notices derive their name from the Supreme Court decision in *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988).

³⁶⁸ ASBCA No. 42011, 92-2 BCA ¶ 24,806.

³⁶⁹ For other recent cases addressing jurisdiction issues, see *United Int’l Investigative Servs. v. United States*, 26 Cl. Ct. 892, 11 FPD ¶ 95 (1992); *Petroleum Tank Servs., Inc.*, ASBCA No. 43137, 92-1 BCA ¶ 24,682; and *Western States Constr. Co.*, ASBCA No. 42860, 92-1 BCA ¶ 24,683.

³⁷⁰ *Denro, Inc. and Westinghouse Elec. Corp. v. Department of Transp.*, GSBICA No. 11736-P (May 29, 1992), ___ BCA ___, 1992 BPD ¶ 196; see Mark Turulski, B-245592, Jan. 14, 1992, 92-1 CPD ¶ 65.

³⁷¹ 41 U.S.C. §§ 35-45.

³⁷² 949 F.2d 611 (2d Cir. 1991), cert. denied, 113 S. Ct. 298 (1992).

³⁷³ As a general rule, executives, administrative employees, professionals, and outside salesmen are exempt from the Fair Labor Standards Act minimum wage and overtime requirements. See 29 U.S.C. §§ 201-219; 29 C.F.R. § 541.

³⁷⁴ See FAR 52.222-41 (Service Contract Act of 1965, as amended).

partial-day absences without affecting the employee's exempt status.³⁷⁵ If enacted in its present form, the bill would apply retroactively, making withholding actions and employee reimbursements unnecessary.

4. The Davis-Bacon Act.—

(a) *Court Upholds Department of Labor "Site of the Work" Interpretation.*—In *Ball, Ball, and Brosamer, Inc. v. Martin*,³⁷⁶ the court found that gravel pits were "on the site of the work" and that the prime contractor was liable to gravel pit employees for back wages under the Davis-Bacon Act (DBA).³⁷⁷ The court relied on the Labor Department's definition of "site of the work,"³⁷⁸ and found that gravel pits, which were located over two miles from the project and which were dedicated almost exclusively to the federal project, were at the "site of the work." The court rejected the argument that the DOL regulation definition impermissibly expanded DBA coverage by broadening the definition of the "site of the work." The court also distinguished an earlier decision³⁷⁹ in which the appeals court invalidated a DOL regulation requiring DBA coverage for workers engaged in "transporting of materials and supplies"³⁸⁰ to and from the project. The court ultimately rejected the appellant's challenge, finding that the regulation was a reasonable attempt to clarify an otherwise undefined statutory provision.

(b) *Court Reviews New "Helper" Classification.*—In *Building and Construction Trades Department, AFL-CIO v. Martin*,³⁸¹ the Court of Appeals for the District of Columbia upheld, in part, DOL provisions regulating the employment of "helpers" on federal construction projects. The court found that the DOL formula for determining whether the use of

helpers is a "prevailing" practice was a proper exercise of the DOL's discretion. It also found, however, that the DOL's two-helpers-to-three-journeymen ratio³⁸² was arbitrary and capricious. By its decision, the court upheld a district court injunction prohibiting the DOL from using the ratio to limit the use of helpers. The DOL has removed this provision from its regulations.³⁸³

5. Service Contract Act.—

(a) *Board Applies Christian Doctrine to Service Contract Clauses.*—In *Miller's Moving Co.*,³⁸⁴ the ASBCA approved the withholding of unpaid Service Contract Act (SCA)³⁸⁵ wages even though the contract did not include the applicable labor standards clauses³⁸⁶ or wage rate determinations. The board read these provisions into the contract under the *Christian doctrine*³⁸⁷ and held that the appellant was charged with knowledge of the requirements of the SCA.

(b) *Court Rules That Workers' Compensation and Unemployment Insurance Are Fringe Benefits.*—In *Aleman Food Services, Inc. v. United States*,³⁸⁸ a food service contractor paid for workers' compensation and unemployment insurance under a CBA. When the state increased rates for this coverage, the agency denied Aleman Food Services' request for an adjustment.³⁸⁹ The agency argued that the compensation and insurance plans were not fringe benefits under the DOL regulation.³⁹⁰ The Claims Court, however, disagreed and found that the regulation excludes these policies from the definition of fringe benefits only if the coverage is required by state law. In this case, state law did not require the policies; therefore, they were fringe benefits recoverable under the contract.

³⁷⁵S. 3233, 102d Cong., 2d Sess. (1992). The House introduced a virtually identical bill on June 18, 1992. See H.R. 5443, 102d Cong., 2d Sess. (1992).

³⁷⁶800 F. Supp. 967 (D.D.C. 1992).

³⁷⁷40 U.S.C. § 276a.

³⁷⁸See 29 C.F.R. § 5.2(1)(2) (providing in part that borrow pits reasonably close to the site and dedicated almost exclusively to performance of the contract are part of the site).

³⁷⁹*Building and Constr. Trades Dep't, AFL-CIO v. Department of Labor*, 932 F.2d 985 (D.C. Cir. 1991).

³⁸⁰See 29 C.F.R. § 5.2(j).

³⁸¹961 F.2d 269 (D.C. Cir. 1992).

³⁸²See 29 C.F.R. § 5.5(a)(4)(iv).

³⁸³57 Fed. Reg. 28,776 (1992) (effective June 26, 1992) (amending 29 C.F.R. § 5.5, by removing subsection (a)(4)(iv)). Absent this ratio, no regulatory limit exists on the number of helpers a contractor may employ, provided the workers qualify as "helpers" under the DOL definition.

³⁸⁴ASBCA No. 43114, 92-1 BCA ¶ 24,707.

³⁸⁵41 U.S.C. §§ 351-357.

³⁸⁶See FAR 52.222-41 (Service Contract Act of 1965, as amended).

³⁸⁷See *G.L. Christian and Assocs. v. United States*, 160 Ct. Cl. 1, 312 F.2d 418 (1963), *reh'g denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

³⁸⁸25 Cl. Ct. 201, 11 FPD ¶ 32 (1992).

³⁸⁹See FAR 52.222-44 (Fair Labor Standards Act and Service Contract Act—Price Adjustment) (providing adjustments for wage and fringe benefit increases applicable to the contract by operation of law).

³⁹⁰See 29 C.F.R. §§ 4.162, 4.170-4.176.

(c) *The "Successor Contractor" Rule.*—In *Vigilantes, Inc. v. Department of Labor*,³⁹¹ the court of appeals held that exemptions from the SCA "successor contractor" rule³⁹² are not self-executing. A successor contractor, therefore, may not pay its employees less than the wages and fringe benefits that the predecessor contractor paid under a CBA, without obtaining a ruling from the DOL that the original parties to the CBA did not negotiate in good faith.³⁹³

IV. Contract Performance

A. Contract Interpretation

1. *General: Contractor Misconstrues Asbestos Abatement Specification.*—The specifications in a contract for the removal of tile containing nonfriable asbestos required the contractor to limit the spread of airborne fibers. The specifications also required the contractor to cover walls and ceilings in the work area with plastic sheeting to "prevent water or other damage." Initially, the contractor covered only a small portion of the walls, and only when ordered by the government did the contractor cover the walls and ceilings completely. On appeal,³⁹⁴ the contractor contended, in part, that the contract required total coverage only in areas containing friable asbestos. Because the tiles were nonfriable, extensive sheeting was unnecessary. The ASBCA dismissed this argument, pointing out that the specification stated clearly that the sheeting was for the protection of the walls and ceilings, and was not an asbestos abatement method.

2. *Preward Statements: Reliance on Oral Statements Puts Contractors at Risk.*—Before submitting its proposal, a contractor called the contracting officer and asked whether materials for the contract were exempt from state tax. The contracting officer said that they were, and the contractor relied on this advice. When it found later that it was responsible for the taxes, the contractor unsuccessfully sought reimbursement. In *Turner Construction Co. v. General Services Administration*,³⁹⁵ the GSBCA held that the contractor was liable under the contract for applicable taxes and could not rely on preaward oral statements to the contrary.³⁹⁶ The board also rejected the contractor's estoppel argument because the contracting officer lacked authority to give legal advice.

In *Dollar Roofing*,³⁹⁷ the contractor argued that a roof repair contract did not require removal and reinstallation of existing gravel stops and gutters. It based its position on a method of demolition observed during performance of a predecessor contract and on a comment by an inspector at the site that the method was acceptable. The ASBCA found that reliance on the inspector's oral statement was misplaced, particularly because the manner in which the contractor removed the old roof did not comport with the contract requirements.³⁹⁸ The "job walk" during which the contractor spoke with the inspector was an informal visit, and the contracting officer had not authorized the inspector to clarify or explain contract requirements. The board held that the government's order to comply with the contract specifications was not an order to perform additional work.

3. Custom or Trade Usage.—

(a) *Court Declines to Put Wraps on Contractor's Argument.*—The plumbing specifications in *Western States Construction Co. v. United States*,³⁹⁹ required the contractor to wrap "metallic pipe" with special protective tape. When the contractor notified the government that it would use factory-coated cast iron soil pipe (CISP) without wrapping it, the government ordered compliance with the taping specification. The government's position was that the plain meaning of "metallic pipe" included CISP. In response, the contractor claimed that in trade usage, pipe fitters normally do not wrap CISP; therefore, it did not consider the requirement to wrap metallic pipe a requirement to tape the CISP. The government moved for summary judgment, arguing that the contractor could not use industry standards to contradict an unambiguous requirement. The court denied the motion, however, ruling that evidence of trade usage or industry standard was proper to establish that the contract language was ambiguous.

(b) *Industry Practice Trumps Ambiguous Boilerplate Language.*—During a steam generator repair contract, the government required the contractor to provide boiler operators during certain generator test phases. The contractor had not anticipated this requirement and claimed additional costs, which the contracting officer denied. On appeal,⁴⁰⁰ the contractor argued that it reasonably relied on the industry practice

³⁹¹ 968 F.2d 1412 (1st Cir. 1992).

³⁹² See 41 U.S.C. § 353(c); see also 29 C.F.R. § 4.4(c); FAR 52.222-41(f) (Service Contract Act of 1965, as amended) (requiring a successor contractor to pay its employees not less than the predecessor contractor paid under a CBA).

³⁹³ See 29 C.F.R. § 4.6(d)(2).

³⁹⁴ *Sauer, Inc.*, ASBCA No. 43563, 92-3 BCA ¶ 25,021.

³⁹⁵ GSBCA No. 11361, 92-3 BCA ¶ 25,115.

³⁹⁶ Cf. FAR 52.229-3 (Federal, State, and Local Taxes); FAR 52.215-14 (Explanation to Prospective Offerors) (addressing reliance on oral explanations).

³⁹⁷ ASBCA No. 36461, 92-1 BCA ¶ 24,695.

³⁹⁸ Cf. FAR 52.214-6 (Explanation to Prospective Bidders); FAR 52.236-3 (Site Investigation and Conditions Affecting Work) (government not responsible for representations not included in the contract).

³⁹⁹ 26 Cl. Ct. 818, 11 FPD ¶ 96 (1992).

⁴⁰⁰ *Riley Stoker Corp.*, ASBCA No. 37019, 92-3 BCA ¶ 25,143.

that the boiler owner provides boiler operators because the specifications contained only general language requiring the provision of services, labor, and material necessary to complete the project. The board agreed, holding that because the contract was silent on the use of boiler operators, it would interpret the contract as a boiler trade contractor would have interpreted it.

4. *Course of Dealing.*—

(a) *Reliance on Information About Prior Contracts Was Unreasonable.*—In *Western States Construction Co.*,⁴⁰¹ the contract permitted the use of polyvinyl chloride (PVC) conduit “only where specifically indicated.” The contractor attempted to run PVC conduit through concrete walls, but the government ordered it to use metal conduit because the drawings did not specify PVC conduit for walls. On appeal, the contractor argued that PVC conduit should have been acceptable because its subcontractor had bid knowing that contractors had used PVC conduit in concrete walls on past projects at the installation. The ASBCA, however, ruled that because the subcontractor had not been a party to those contracts, it had to show that the government considered the use of PVC conduit on other contracts proper “in the first instance.” The board found the subcontractor’s limited knowledge of the prior contracts insufficient to show reasonable reliance on a course of dealing.

(b) *Requirement Enforceable Despite Past Dealings.*—A guard services contract required the contractor to provide evidence that each of its guards had been trained and certified properly. The contractor, however, did not propose costs for training incumbent guards, because on its prior contracts that imposed these same conditions, the agency had enforced the requirement only for new hires. Nevertheless, the agency demanded strict compliance and denied the contractor’s claim for the cost of training incumbent personnel. On appeal,⁴⁰² the GSBICA found that a course of dealing had existed between the parties, but denied relief. In its proposal for this acquisition, the contractor indicated that it would comply fully with the training specifications and did not manifest a belief that the agency would exempt its incumbent guards. Likewise, the agency’s actions during negotiations indicated that it was not acquiescing in prior waivers.

B. *Contract Changes*

1. *Additional Work Caused by Another Contractor: Boards Reach Different Conclusions on Excessive Wax and Weeds.*—In *Marty’s Maid and Janitorial Service v. General Services Administration*,⁴⁰³ the contractor claimed the costs of

additional work necessary to strip and wax floors. The substantial wax build-up encountered by the contractor resulted from the previous contractor’s failure to strip the floors as required. The agency argued that the contractor should have observed the condition during a site visit, but the contractor offered un rebutted evidence that only stripping the floor would disclose the degree of wax-buildup. The GSBICA found that the contractor was entitled to an equitable adjustment under the changes clause for the extra work.

In another case involving grounds maintenance, the contracting officer reduced payments when the contractor failed to meet performance standards for weed control. On appeal,⁴⁰⁴ the contractor showed that the weeds appeared because the previous contractor had not applied herbicide. The ASBCA, however, found that the weed abatement requirement was unconditional and unaffected by the previous contractor’s performance. The board also noted that the contractor was partially to blame because it waited twenty days into the initial contract period to apply herbicide.

2. *Specification Issues.*—

(a) *Fowl Recipe Lacks Spice.*—In *International Foods Retort Co.*,⁴⁰⁵ the government purchased chicken ala king packaged as combat rations. During first article testing, tasters rejected the chicken as bland. The contractor added more salt, but inspectors rejected several more submittals, and International Foods Retort missed two delivery dates. The agency terminated these two installments for default. On appeal, the contractor showed that rejection of the first article was improper because the contract specification failed to include salt. The ASBCA rejected the government’s argument that the chicken recipe was performance-oriented. The recipe was a design specification warranted by the agency because it called for a sauce “formulated” of certain ingredients in specified percentages by weight.

(b) *Requiring Strict Compliance with Contract Drawings Was Unreasonable.*—The contract in *Blake Construction Co. v. United States*⁴⁰⁶ required the installation of an electrical feeder system in a hospital addition project. The contractor began trenching operations to bury the system underground, but the government insisted on overhead installation as depicted in the contract drawings. On appeal, the Claims Court held that the government had changed the contract constructively by prohibiting the contractor from locating the system underground. The court found that the contract did not direct overhead placement and that the drawings and specifications did not establish the sole method of routing the conduit.

⁴⁰¹ ASBCA No. 37611, 92-1 BCA ¶ 24,418.

⁴⁰² *General Sec. Servs. Corp. v. General Servs. Admin.*, GSBICA No. 11381, 92-2 BCA ¶ 24,897.

⁴⁰³ GSBICA No. 10614, 93-1 BCA ¶ 25,284.

⁴⁰⁴ *Maintenance Eng’rs*, ASBCA No. 43217, 92-2 BCA ¶ 24,959.

⁴⁰⁵ ASBCA No. 34954, 92-2 BCA ¶ 24,994.

⁴⁰⁶ 25 Cl. Ct. 177, 11 FPD ¶ 12 (1992).

Additionally, the court determined that for safety, feasibility, and cost reasons, the contractor's mode of installation would have been reasonable and consistent with the contract terms.

(c) *Board Finds Contract Commercially Impossible But Denies Recovery.*—In *SMC Information Systems, Inc. v. General Services Administration*,⁴⁰⁷ the GSA issued a task order for the development of a software program for the Air Force. The fixed-price of the order was \$145,000. During performance, the parties negotiated several no-cost extensions, and SMC Information Systems assured the government repeatedly that it would complete the contract. Following completion, SMC Information Systems submitted a \$500,000 claim based in part on "the Government's misrepresentation concerning the required work." On appeal, the GSBCA found that the government had not changed the task order requirements and that SMC Information Systems significantly increased costs were a result of its inability to perform at the task order price. Although the drastic increase indicated that the parties had negotiated a commercially impossible task, SMC Information Systems could not recover because the government was unaware of the contractor's difficulties until after SMC Information Systems had performed.

(d) *Specified Roofing Material Was Inadequate for Roof Type.*—The roofing contract in *Q.R. Systems North, Inc.*⁴⁰⁸ required the contractor to use an elastic sheet material and produce a roof that would meet a specified uplift pressure rating. The contractor installed the material properly, but gale force winds tore the sheeting off. The contractor refused to make warranty repairs, and the government assessed costs. On appeal, the ASBCA found that the government had established an illusory standard of performance for the roof system. The uplift pressure rating was unachievable because it applied only to systems in which the material was installed on a rigid steel roof. The hangar roof decking was aluminum. The board also found that use of the prescribed sheeting was inappropriate under the circumstances because, even in mild winds, the aluminum decking flexed, causing the roofing material to deteriorate.

3. *Interference with Contract: Safety Requirement Imposed After Contract Award Was Sovereign Act.*—During performance of a sewer repair contract, the contracting officer required compliance with an Occupational Safety and Health

Administration (OSHA) regulation enacted after contract award. As a result, the contractor excavated more dirt and disturbed a larger surface area than planned, but the contracting officer refused to increase the contract price. In *Hills Materials Co.*,⁴⁰⁹ the contractor argued that adoption of the rule was not a sovereign act that would bar an equitable adjustment because OSHA standards do not have general and public application. The contractor so concluded because the OSHA statute exempts nuclear activities from its coverage and the OSHA regulations do not apply in states that have adopted their own safety programs. The ASBCA, however, found that the OSHA statute⁴¹⁰ applies to every worker and that state regulations must be approved by the OSHA.⁴¹¹

4. *Superior Knowledge.*—

(a) *Contractor Could Have Discovered Extraneous Data.*—In a dispute over the conditions at a borrow area used during a beach restoration project, the contractor alleged that the government had withheld core samples from an area outside the borrow area. The contractor claimed that it would have used those samples to estimate dredging costs within the borrow area. The Claims Court rejected this superior knowledge claim, finding that the contractor failed to show how borings outside the borrow area were vital to performance. The court also noted that the contract drawings indicated that such borings were available, but that the contractor failed to review the information.⁴¹²

(b) *Government Has No Duty to Disclose Erroneous Report.*—In the *Sauer, Inc.* controversy involving an asbestos removal contract,⁴¹³ Sauer argued that the government improperly withheld a report that mistakenly indicated that the tiles were in a friable state. Sauer asserted that knowledge of this report would have prompted it to bid higher. The ASBCA opined that this position lacked "even a glimmer of merit." The subcontractor knew that the tiles were nonfriable, and the specifications were not misleading. Moreover, the government has a duty to avoid dispensing erroneous information. The board also found that the friability of the tiles was not vital information because the disputed contract requirement was unrelated to the nature of the removed material.

5. *Value Engineering Change Proposals: Board Defines Limits of Constructive Acceptance Principle.*—The contract in *M. Bianchi of California*⁴¹⁴ involved the manufacture of

⁴⁰⁷ GSBCA No. 9371 (Oct. 7, 1992), ___ BCA ¶ ____.

⁴⁰⁸ ASBCA No. 39618, 92-2 BCA ¶ 24,793.

⁴⁰⁹ ASBCA No. 42410, 92-1 BCA ¶ 24,636, *rev'd sub nom.* *Hills Materials Co. v. Rice*, No. 92-1257 (Fed. Cir. Dec. 29, 1992). The ASBCA also held that the contract required compliance with all regulations, even those enacted after award. See FAR 52.236-7 (Permits and Responsibilities).

⁴¹⁰ 29 U.S.C. § 651(b).

⁴¹¹ See 19 C.F.R. pt. 1926. For a recent case in which the Claims Court found that an enactment had a limited and specific application in a nonacquisition setting, see *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 11 FPD ¶ 118 (1992).

⁴¹² *Hydromar Corp. of Del. & E. Seaboard v. United States*, 25 Cl. Ct. 555 (1992), *aff'd*, No. 92-5081 (Fed. Cir. Oct. 15, 1992).

⁴¹³ See *supra* note 394 and accompanying text.

⁴¹⁴ ASBCA No. 37029 (July 31, 1992), ___ BCA ¶ ____.

pantsuit coats. During production, M. Bianchi of California (M. Bianchi) proposed a method of packing coats that would reduce shipping costs and storage space, but the agency rejected it. Later, another contractor submitted a value engineering change proposal (VECP) substantially similar to the one presented by M. Bianchi. The agency accepted this VECP and modified its specifications accordingly. M. Bianchi claimed royalties from its VECP after discovering the change. It argued that the agency had constructively accepted its VECP by adopting a virtually identical proposal. The board found, however, that the agency had not rejected the VECP in bad faith and held that constructive acceptance applies only if an agency implements the proposal in the same contract.⁴¹⁵

C. Other Remedy Granting Clauses

1. Differing Site Conditions Clause.—

(a) *Board Rejects Flow of Contractor's Arguments.*—In *Kora and Williams Corp. v. General Services Administration*,⁴¹⁶ a construction site at Washington Technical Institute flooded. On one occasion, the water flowed in through inactive storm sewers after a heavy rain. Flooding also occurred when pipes in an adjacent building burst, sending water through floor drains into an uncapped sewer. The GSBICA denied the contractor's category I claim, finding that the contract did not represent that the government would drain or cap the storm sewers. Likewise, the illustration of the storm drains on the demolition plan was not an indication that the drains were incapable of carrying water. The board also found that the contractor's category II claim lacked merit because the drawings depicted the sewers and the contractor should have expected storm drains in an urban area.

(b) *Government's "No-Notice" Defense to Obvious Differing Site Condition Insufficient.*—The contract in *Engineering Technology Consultants, S.A.*⁴¹⁷ required the installation of exterior doors. This entailed cutting a channel in concrete below the doors to embed a door-closing device. At the first door, the contractor encountered unusually thick reinforcement bars and notified the government inspector. In a letter to the contracting officer, it also advised that it would request an adjustment once all door "activity" was complete. In a second letter, the contractor implied that a similar condition might exist with other doors. When it encountered the condition with other doors, the contractor informed the inspector, but did not notify the contracting officer. The contracting officer

later denied claims relating to all but the first door, asserting that the contractor had failed to give timely notice of the condition. The ASBCA found the contractor's letters sufficient notice of the condition and also imputed the inspector's knowledge of the condition to the contracting officer.⁴¹⁸

(c) *Flammable Paint Sparks Controversy.*—While welding material to the underside of a metal roof, a contractor experienced flare ups, which are flames and smoke generated when a welding torch ignites a painted surface. The contractor argued that the flammability of the paint was an "unknown condition." The contractor based its assertion on its belief that the roof had a factory finish and that factory-finished metal roof coatings are nonflammable. On appeal, the ASBCA found that the contractor had concluded unreasonably that the roof was factory finished.⁴¹⁹ Additionally, the contractor failed to establish that factory-finished surfaces necessarily are nonflammable. The board also noted that the contractor knew that flare ups had occurred under similar circumstances on another project in the area. Accordingly, even if the condition at the contractor's site was "unknown," it was not "unusual" because it did not differ from conditions that ordinarily were encountered.⁴²⁰

2. *Liquidated Damages Clause: Contractors Challenge Reasonableness of Damages.*—In *Fred A. Arnold, Inc. v. United States*,⁴²¹ the Federal Circuit determined that a construction contract's liquidated damages (LDs) clause was enforceable because the rate prescribed by the clause represented "a fair and reasonable estimation of the damages the government would incur in the event of delay." The contract was for the construction of bachelor enlisted quarters and the government based the rate on DOD tables indicating the average cost of housing military personnel off base. The contractor argued that the government should not have used the tables because they did not pertain specifically to the local area of contract performance. The court rejected this argument and held that requiring such specificity would defeat the "primary purpose of liquidated damages[, which] is to eliminate the need for proving damages."

In *P&D Contractors, Inc. v. United States*,⁴²² the Navy assessed LDs when P&D Contractors failed to renovate an enlisted club on time. The Navy had based its \$100-per-day LDs figure on a regulation that specifies damages for military

⁴¹⁵See John J. Kirilin v. United States, 827 F.2d 1538, 6 FPD ¶ 109 (Fed. Cir. 1987).

⁴¹⁶GSBICA No. 9270, 92-2 BCA ¶ 24,785.

⁴¹⁷ASBCA No. 43376, 92-3 BCA ¶ 25,100.

⁴¹⁸Cf. Lamar Constr. Co., ASBCA No. 39593, 92-2 BCA ¶ 24,813 (denying excess surface preparation claim when contractor primed and painted areas before notifying government of the conditions).

⁴¹⁹Engineering Technology Consultants, S.A., ASBCA No. 44912 (Oct. 30, 1992), ___ BCA ¶ ___.

⁴²⁰See FAR 52.236-2 (Differing Site Conditions) (to be compensable, Category II site condition must be unknown and unusual).

⁴²¹No. 92-5008, 11 FPD ¶ 129 (Fed. Cir. Sept. 28, 1992) (not citable as precedent per FED. CIR. R. 47), *aff g in part* 18 Cl. Ct. 1 (1989), *on recons.* 24 Cl. Ct. 6 (1991), *aff g in part* Fred A. Arnold, ASBCA No. 21661, 86-1 BCA ¶ 18,701.

⁴²²25 Cl. Ct. 237 (1992), 11 FPD ¶ 23.

housing projects. P&D Contractors argued that the assessment was invalid because, by using the housing project provisions as a guide, the Navy's damage estimate was unreasonable. The Claims Court, however, found the difference in project types irrelevant. While the agency regulation did not specify LDs for general construction projects such as the club renovation, the LDs were reasonable because the agency had based them on a regulation. The court also held that P&D Contractors should have challenged the reasonableness of the damages at contract award.

By contrast, in *D.E.W., Inc.*,⁴²³ the ASBCA rejected an assessment for LDs because the agency erred in projecting "user impact costs" on an aircraft hangar instead of a fuel cell shop. Although the agency discovered this error and reduced the damages, it failed to establish the reasonableness of the reduced rate.

Likewise, in *JEM Development Corp.*,⁴²⁴ the ASBCA ruled that an assessment amounting to forty percent of the contract price was an unenforceable penalty. The contract required JEM Development to remove and dispose of transformers containing polychlorinated biphenyls and to install new units. The agency anticipated costs of \$100 per day for the salaries of various engineering personnel and \$47 daily for contracting personnel. The ASBCA found that the agency concluded improperly that delay costs would be so great, particularly because the contractor performed most of the work off site. As a result, it concluded that the daily rate was unreasonable and that the damages assessed were disproportionate to actual costs incurred by the agency.

3. Suspension of Work Clause.—

(a) *Contractor Delay on Previous Contract Delayed Second Contract.*—The contract in *Triax-Pacific v. Stone*⁴²⁵ involved family housing improvements that the contractor was to perform in phases. Delay by Triax-Pacific on a previous contract prevented the government from issuing a timely notice to proceed to Phase II of the follow-on contract. Triax-Pacific sought damages on the second contract, but the board rejected the claim. The Federal Circuit affirmed, holding that the contractor could not recover under the suspension of work clause⁴²⁶ because the government was not the sole cause of the delay. According to the court, the board properly determined that the contractor's delay on the previous contract caused the subsequent delay.

(b) *Secret Service Order Does Not Entitle Contractor to Delay Damages.*—During construction of a station for the Washington Metropolitan Area Transit Authority (WMATA), the Secret Service informed the WMATA engineer that the President would be visiting the area and that the contractor would have to stop work. The engineer notified the contractor, who stopped work as instructed and later claimed an adjustment for shutting down. In *Mergentime Corp.*,⁴²⁷ the Corps of Engineers Board of Contract Appeals (ENG BCA) held that the delay was not the fault of WMATA and that WMATA had acted only as a conduit for federal officials. Moreover, the contractor could not recover costs under the suspension of work clause⁴²⁸ because the contracting officer had not ordered the work stoppage.

4. General Risk and Responsibility Allocation Clauses.—

(a) *Contractor Was Responsible for Costs of Bulldozer Accident.*—*Potashnick Construction, Inc.*⁴²⁹ involved the building of a seepage-control wall adjacent to a levee. While the contractor was making emergency repairs to the levee, its bulldozer slid into the trench with the driver on board. The contractor later claimed the costs of retrieving the bulldozer and settling a workers' compensation claim with its employee. The ENG BCA held that under the permits and responsibilities clause,⁴³⁰ the contractor assumed the risk of damage to its equipment and injury to its employees. Moreover, the risk did not shift to the government because the government had not directed a specific method of performance, nor did it know that an accident was likely to occur.

(b) *Contractor Could Not Equivocate on Requirement to Obtain Permits and Licenses.*—The protestor in *Bishop Contractors, Inc.*,⁴³¹ noted in its bid that its contract price excluded the cost of all fees and permits needed for a building reconstruction project. The agency rejected the bid as nonresponsive because the disclaimer indicated that the contractor did not intend to be bound by the terms of the permits and responsibilities clause. The GAO agreed, opining that even if the cost of the fees and permits was minimal, the contractor could not alter future obligations under the contract unilaterally.

(c) *Board Strictly Construes Contractor's Liability.*—Westinghouse Elevator Company installed an escalator for the WMATA. Before acceptance, vandals pushed a reel of cable down the stairs, causing substantial damage to the system. The contractor repaired the system and submitted a claim for

⁴²³ ASBCA No. 38392, 92-2 BCA ¶ 24,840.

⁴²⁴ ASBCA No. 42645, 92-1 BCA ¶ 24,428.

⁴²⁵ 958 F.2d 351, 11 FPD ¶ 33 (Fed. Cir. 1992).

⁴²⁶ FAR 52.212-12. The clause allows recovery for government-caused delays, but bars recovery for delays attributable to "any other cause."

⁴²⁷ ENG BCA No. 5765, 92-2 BCA ¶ 25,007.

⁴²⁸ See FAR 52.212-12(a).

⁴²⁹ ENG BCA No. 5551, 92-2 BCA ¶ 24,985.

⁴³⁰ FAR 52.236-7.

⁴³¹ B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

the costs which the WMATA denied because the contractor was responsible for unaccepted work under the contract. Westinghouse argued on appeal⁴³² that it was not responsible because another contractor had control of the reel and because a special clause limited the breadth of the more general permits and responsibilities clause. It also contended that the WMATA had failed to apportion the damages among the several contractors at the site. The ENG BCA, however, denied relief because neither the WMATA, nor a contractor acting for the WMATA, had caused the damage. One judge dissented.

(d) *Contractor Not Liable for Fuel Spill.*—The contractor in *Morrison-Knudsen & Harbert*⁴³³ was responsible for fuels management at a Navy facility. After the contractor received fuel at the facility, employees of the pipeline company discovered a spill near the fuel filter separator. The contracting officer directed the contractor to take remedial action, but denied the contractor's subsequent claim for cleanup costs. On appeal, the ASBCA found that the contractor was liable under the contract only for damage that it caused. In this case, the Navy failed to show fault on the part of the contractor. The board noted particularly that the contractor did not have exclusive control over the fuel filter separator and that a spill could have occurred only if both the pipeline company and the contractor had opened separate valves. The board concluded that, without proof to the contrary, the pipeline workers were just as likely to have caused the spill.

(e) *Board Follows Bailment Law When Contract Was Silent on Risk of Loss.*—In *Manufactured Housing Services, Inc.*,⁴³⁴ the Navy leased trailers from the appellant. A hurricane destroyed a number of them, and the Navy denied the lessor's claim for damages. In part, the lessor argued that the Navy assumed the risk of loss when it accepted the trailers because the contracting officer had checked the "F.O.B. Destination" blocks on the order forms.⁴³⁵ The board rejected this position because F.O.B. delivery terms apply to supply contracts, but not leases. The board also refused to apply a clause⁴³⁶ that allocates liability to the government when it accepts goods because the clause "presupposes the passing of title," and title did not pass in the lease agreements. Ultimately, however, the board applied the law of bailment and found the Navy liable for the damage because it had failed to secure the trailers properly.

D. Authority to Contract

1. Contracting Officer Responsibilities.—

(a) *Qualifications Expanded for Selection as Contracting Officer.*—Beginning October 1, 1993, DOD contracting officers must possess qualifications in addition to those required in the past to award or administer contracts above the small purchase threshold.⁴³⁷ Contracting officers must complete all contracting courses required for the applicable grade, level, or position; have at least two years experience in a contracting position, and have completed certain educational requirements or passed an examination demonstrating the requisite skills, knowledge, or abilities.

(b) *Contracting Officers Are Encouraged to Rely on Legal Advisors.*—The FAR requires contracting officers to "request and consider" the advice of specialists, as appropriate,⁴³⁸ but it also requires contracting officers to exercise independent judgment when making decisions. Notably, in *General Kinetics, Inc., Cryptek Secure Communications Division*,⁴³⁹ the GAO recognized the value and wisdom of a contracting officer's reliance upon legal counsel for advice concerning the BAA. The GAO commended the contracting officer, noting that her actions "reflect[ed] reasoned logic and sound judgment" and that awarding the contract after considering and accepting the advice was an "appropriate exercise of her own independent judgment."

(c) *Contracting Officer Must Resolve Conflicts Created by the Government.*—Although contractors are generally responsible for resolving problems that arise during performance, contracting officers share responsibility for resolving problems created by the government. In *Callison Construction Co.*,⁴⁴⁰ the contracting officer was obligated to suggest a solution to the problem of seeding grass during the winter months when the contract specifically banned winter planting. The problem arose when the government issued notice to proceed in November, and the contract required completion within sixty days, but prohibited planting during the winter. Under those circumstances, the contracting officer lacked authority to assess liquidated damages without first offering a solution to the contractor's dilemma.

2. *Implied-In-Fact Contract: Government Held to Contract with Successor Contractor.*—According to the Claims Court in *United International Investigative Services v. United*

⁴³²Westinghouse Elevator Co., a Div. of Westinghouse Elec. Corp., ENG BCA No. 5579 (Sept. 30, 1992), ___ BCA ¶ ____.

⁴³³ASBCA No. 43683, 92-2 BCA ¶ 24,989.

⁴³⁴ASBCA No. 41269, 92-3 BCA ¶ 25,159.

⁴³⁵See FAR 52.247-34(b) (contractor is responsible for loss or damage to goods until the government receives them).

⁴³⁶See FAR 52.246-16 (Responsibility for Supplies).

⁴³⁷See 10 U.S.C. § 1724; DAC 91-2, 57 Fed. Reg. 14,990 (1992) (effective Apr. 16, 1992) (amending DFARS 201.603-2).

⁴³⁸See FAR 1.602-2(c).

⁴³⁹B-243078.2, Jan. 22, 1992, 92-1 CPD ¶ 95; cf. Purvis Sys. Inc., B-245761, Jan. 31, 1992, 71 Comp. Gen. 203, 92-1 CPD ¶ 132 (contracting officer not bound by audit agency recommendations because they are only advisory).

⁴⁴⁰AGBCA No. 88-309-1, 92-3 BCA ¶ 25,071.

States,⁴⁴¹ actual mental assent is not a necessary element of an implied-in-fact contract. In this case, the successor to a service contract sought reimbursement of costs paid to service employees for increased wages. The agency argued that a meeting of the minds never occurred between the government and the successor contractor because at all times, the agency believed that it was dealing with the original contractor. The court disagreed, holding that the agency's misapprehension rendered the contract only voidable and that the continued dealings of the parties created an implied-in-fact contract between the agency and the successor contractor.

3. Ratification.—

(a) *Contracting Officer Ratifies Unauthorized Commitment by Failure to Act.*—In *HFS, Inc.*,⁴⁴² the ASBCA held that a contracting officer ratified by implication the acts of persons who lacked contracting authority because the contracting officer knowingly permitted a contractor to perform without directing it to stop. The contract involved the maintenance of hardware and the use of software on minicomputer systems located throughout the world. Throughout the multi-year contract, the contracting officer allowed government employees to issue delivery orders and allowed the contractor to perform them. The contractor often performed work before receiving delivery orders, relying upon eventual receipt of delivery orders from the government's technical representative. The government was liable on a quantum meruit basis because the contracting officer knew of the contractor's performance, but did not warn the contractor to cease accepting orders from unauthorized persons.

(b) *Withholding Property Ratified Unauthorized Commitment.*—In *T.W. Cole*,⁴⁴³ the contracting officer ratified an unauthorized commitment by refusing to return desks that a postal-facilities lessor had purchased at the direction of a government employee who lacked contracting authority. The government's continued exercise of control over the items constituted a ratification of the unauthorized direction to procure the desks and entitled the contractor to reimbursement for the cost.

4. Contracting Officer Representative Authority.—

(a) *Contracting Officer Representative Could Not Order Continued Performance.*—Although he ordered a contractor repeatedly to continue performance despite the applicability of the limitation of cost clause,⁴⁴⁴ the contracting officer representative (COR) in *HTC Industries, Inc.*⁴⁴⁵ lacked authority to

bind the government. Throughout performance of the contract, the COR and the contractor had dealt directly with one another without significant involvement by the contracting officer. After contract costs exceeded available funding, the COR directed the contractor to continue performance while the COR attempted to fund the overrun. Although the contractor complied, the contracting officer later denied its claim for work performed after the overrun. On appeal, the ASBCA also rejected the claim because the COR lacked the authority to contract on behalf of the government. Additionally, the contractor failed to establish that the government should be estopped from denying liability.

(b) *Contracting Officer Representative Had Authority to Order Suspension.*—The ASBCA in *Farr Bros., Inc.*,⁴⁴⁶ found valid a COR's request that a contractor postpone excavation work for a week before a change-of-command ceremony. The government argued that the contractor was not entitled to a contract extension for the delay because the COR lacked authority to order the work stoppage. The board, however, noted that the contracting officer had delegated full authority to the COR, except for certain actions which did not include suspensions of work.

E. Pricing of Adjustments

In this area, reviewing authorities have demonstrated a growing preference for actual cost data and have rejected calculations based on the less precise "total cost" and "jury verdict" methods. Similarly, the Federal Circuit has held that use of the *Eichleay* formula to calculate extended overhead is inappropriate when actual overhead costs are readily determinable. Finally, in pricing quantity overruns under the variation in estimated quantity clause, two Claims Court judges have issued conflicting opinions on whether such pricing should be based on actual costs or the contract's per-unit price.

1. General Methods of Proof.—

(a) *Proving Actual Costs.*—In *Hydrothermal Energy Corp. v. United States*,⁴⁴⁷ the parties used several different methods for calculating actual costs, some of which the court accepted and some of which it rejected. In determining the general adequacy of the plaintiff's accounting records, the court suggested that a less stringent standard may apply to small businesses. Although the Claims Court rejected the plaintiff's argument that its records were adequate because they were typical of a small business, the court based its

⁴⁴¹ 26 Cl. Ct. 892, 11 FPD ¶ 95 (1992).

⁴⁴² ASBCA No. 43748, 92-3 BCA ¶ 25,198.

⁴⁴³ PSBCA No. 3076, 92-3 BCA ¶ 25,091.

⁴⁴⁴ FAR 52.232-20.

⁴⁴⁵ ASBCA No. 40562 (Oct. 30, 1992), ___ BCA ¶ ___; see also *Crow & Sutton Assocs., Inc.*, ASBCA No. 44392 (Oct. 8, 1992), ___ BCA ¶ ___ (contract provisions limited COR authority to direct changes).

⁴⁴⁶ ASBCA No. 42658, 92-2 BCA ¶ 24,991.

⁴⁴⁷ 26 Cl. Ct. 1091, 11 FPD ¶ 51 (1992).

rejection on the inadequacy of the plaintiff's records as compared to other small businesses. The court, however, refused to accept the government's argument that the plaintiff's labor accounting system was inadequate because the government was aware of the system and never objected to it. The court also found persuasive the fact that the Defense Contract Auditing Agency (DCAA) conducted a detailed performance audit and did not object to the plaintiff's labor accounting system. Finally, in assessing direct costs incurred during a stop-work period, the court allowed only those expenses substantiated by invoices and proof of payment. It refused to allow costs based only on a cancelled check because such a check does not reveal whether costs are allocable to a contract or are reasonable.

(b) *The "Total Cost" Method of Pricing Adjustments.*—In *Dawco Construction Co.*,⁴⁴⁸ the ASBCA rejected the appellant's attempt to use the "total cost" method⁴⁴⁹ to price an adjustment arising from a differing site condition. The board found that the appellant could have ascertained the extent of the differing site condition "readily" and also could have calculated its actual additional costs. Because the appellant failed to take these steps, and because the "total cost" method is not the preferred method of calculating adjustments, the board denied the appeal.⁴⁵⁰

(c) *The "Jury Verdict" Method of Pricing Adjustments.*—The ASBCA, in *Service Engineering Co.*,⁴⁵¹ applied the "jury verdict"⁴⁵² method to calculate equitable adjustments for labor hours because it determined that the evidence adduced during the eighty-seven day hearing was sufficient—even absent contemporaneous records—to approximate the appellant's damages reasonably. The government argued that the appellant should not recover because the firm had failed to maintain separate accounts for labor costs arising from various changes. The government pointed out that in awarding to the appellant, the government had relied on the contractor's statement in its BAFO that the firm could track the hours each worker spent on each project. The board rejected this argu-

ment, concluding that merely because the appellant had the capability to track these costs did not mean that the contract required it to do so. If the government had desired detailed accounting, it should have incorporated an appropriate clause.⁴⁵³

2. *Pricing Deductive Changes: Board Bases Adjustment on Past Practice.*—In pricing a deductive change, the ASBCA will consider the past actions of the parties to determine an appropriate adjustment. In *Morrison-Knudsen Services, Inc. & Harbert International, Inc., A Joint Venture*,⁴⁵⁴ the government deleted services that employed a warehouse worker earning \$8.21 per hour and priced the deductive change based on this figure. The appellant contended that the government should have used a lower rate. The board rejected the appellant's contention because it found that under a prior modification that added these services, the parties priced an additive change at \$8.21 per hour. The board concluded that because the parties apparently had agreed that this rate was reasonable for added services, the same rate should be used when the government deleted services.

3. *Variation in Estimated Quantity Clause: Claims Court Judges at Odds Over Recovery for Variation in Estimated Quantity.*—Two Claims Court judges applied different methods for calculating adjustments for quantity overruns under the variation in estimated quantity (VEQ) clause.⁴⁵⁵ In *Burnett Construction Co. v. United States*,⁴⁵⁶ the court held that the contractor was entitled to recover for quantities over the VEQ clause's maximum, based on the actual per-unit cost, plus a reasonable profit. The court rejected the government's argument that recovery should be based on the contract's per-unit price, minus any per-unit savings realized because of economies of scale.

In *Foley Co. v. United States*,⁴⁵⁷ however, the Claims Court used the precise pricing method rejected by the court in *Burnett*. In *Foley*, the court observed that the VEQ clause permits adjustments only to the extent that an increase or

⁴⁴⁸ ASBCA No. 42120, 92-2 BCA ¶ 24,915.

⁴⁴⁹ A claimant may use the "total cost" method only if it demonstrates the following: (1) the impracticality of proving actual costs; (2) the reasonableness of its bid; (3) the reasonableness of its actual costs; and (4) its lack of responsibility for the extra costs. *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861, 10 FPD ¶ 48 (Fed. Cir. 1991).

⁴⁵⁰ See also *Hydrothermal Energy Corp. v. United States*, 26 Cl. Ct. 1091, 11 FPD ¶ 51 (1992); *Batteast Constr. Co.*, ASBCA No. 35818, 92-1 BCA ¶ 24,697.

⁴⁵¹ ASBCA No. 40274 (Oct. 13, 1992), ___ BCA ¶ ____.

⁴⁵² To use the "jury verdict" method of calculation, the Federal Circuit requires a preliminary determination of the following: (1) clear proof of injury exists; (2) no more reliable method for computing damages is available; and (3) the evidence is sufficient for a court to make a fair and reasonable approximation of the damages. *Dawco Constr., v. United States*, 930 F.2d 872, 10 FPD ¶ 40 (Fed. Cir. 1991); see also *American Line Builders, Inc. v. United States*, 26 Cl. Ct. 1155, 11 FPD ¶ 122 (1992) (jury verdict method is appropriate in complex cases in which proof of exact amount of damages would be unduly burdensome).

⁴⁵³ See, e.g., FAR 52.243-6 (Change Order Accounting). For another case in which the ASBCA rejected the "jury verdict method," see *Dawco Constr. Inc.*, ASBCA No. 42120, 92-2 BCA ¶ 24,915 (prerequisite for using method was absent because a more reliable method for computing damages was available).

⁴⁵⁴ ASBCA No. 41390, 92-3 BCA ¶ 25,050.

⁴⁵⁵ FAR 52.212-11.

⁴⁵⁶ 26 Cl. Ct. 296, 11 FPD ¶ 65 (1992).

⁴⁵⁷ 26 Cl. Ct. 936, 11 FPD ¶ 105 (1992).

decrease in per-unit costs "due solely" to the variation above or below the contractual limits. The court reasoned that this language requires that pricing be based only on the contract's per unit price with adjustments for changes in cost "due solely" to such variation. Consequently, the court rejected the contractor's argument that pricing should be based on its actual per unit cost, plus a reasonable profit.⁴⁵⁸

4. *Pricing Unabsorbed Overhead: Judges Restrict Use of Eichleay Formula.*—In *C.B.C. Enterprises v. United States*,⁴⁵⁹ the Federal Circuit limited the applicability of the *Eichleay*⁴⁶⁰ formula to cases in which the government-caused suspension, disruption, or delay of performance is "sudden, sporadic and of uncertain duration." In *C.B.C. Enterprises*, the appellant argued that using the *Eichleay* formula was proper to calculate extended home office overhead during a twenty-four day extension occasioned by a unilateral modification. No suspension, disruption, or delay of contract performance occurred during this period, however, and the contractor experienced no reduction of direct costs to which it could allocate overhead expenses. The court concluded that the contractor could not resort to the *Eichleay* formula because the extension period was certain and the contractor did not suspend performance.⁴⁶¹

Even if the expected duration of a delay is uncertain, judges will not permit pricing under *Eichleay* unless the contractor proves that it incurred unabsorbed overhead during the delay. In *Interstate General Government Contractors, Inc.*,⁴⁶² the ASBCA held that a contractor may recover under *Eichleay* only if it had been in a standby status during a delay and had been unable to undertake other work. Because the appellant performed other work during the delay, it experienced no significant reduction in its direct costs, thereby obviating the need for applying *Eichleay*.⁴⁶³ Finally, the ASBCA held in *Do-Well Machine Shop, Inc.*⁴⁶⁴ that the *Eichleay* formula

applies only to construction contracts. The board observed further that it uses other formulas in manufacturing contracts.

5. *Calculating Profit: Contemplation of Parties Controlled Quantum.*—The *FAR* lists several factors to be considered when determining profit under a termination for convenience settlement.⁴⁶⁵ A judge, however, may base a profit determination on only one of these factors if a contractor fails to present evidence in support of the other factors. In *Bos'n Towing and Salvage Co.*,⁴⁶⁶ the ASBCA determined profit solely on the amount contemplated by the parties at the time of award. In its initial proposal, the appellant estimated a monthly profit of \$793.08. In its settlement proposal, however, it sought \$31,500, even though the government terminated the contract after only two months. The board found no evidence to reconcile this disparity and awarded two months profit at \$793.08 per month.

6. *Breach of Contract Damages.*—In *Big Chief Drilling Co. v. United States*,⁴⁶⁷ the court determined that defective design specifications constituted a breach of contract and awarded the contractor consequential damages of fifteen percent profit on allowable costs incurred to overcome the effect of the breach. The court held that the contractor's incurring personnel and equipment costs to overcome defective specifications was foreseeable and that the contractor therefore was not limited to an equitable adjustment.⁴⁶⁸ The court concluded that "when a change is necessitated by defective specifications [the government] must pay 'the entire resulting damage without any deduction for time to make changes.'"⁴⁶⁹

F. Inspection, Acceptance, and Warranties

1. *Inspection: Government Orders Contractor to Prepare New Inspection Plan.*—In *David B. Lilly Co.*,⁴⁷⁰ the ASBCA held that a government inspector could order a contractor to

⁴⁵⁸One panel of the ASBCA adopted the *Foley* method of pricing overruns. See *Clement-Miarri Cos.*, ASBCA No. 38170, 92-3 BCA ¶ 25,192.

⁴⁵⁹978 F.2d 669, 11 FPD ¶ 140 (Fed. Cir. 1992), *reh'g denied*, ___ F.2d ___ (Fed. Cir. Dec. 1, 1992).

⁴⁶⁰*Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recons.*, 61-1 BCA ¶ 2894.

⁴⁶¹See also *Community Heating and Plumbing Co.*, ASBCA No. 40151, 92-2 BCA ¶ 24,870 (holding *Eichleay* formula inapplicable to performance extensions caused solely by additional work).

⁴⁶²ASBCA No. 43369, 92-2 BCA ¶ 24,956.

⁴⁶³See *Webb Mechanical Enter.*, ASBCA No. 41345 (Oct. 8, 1992), ___ BCA ¶ ___; *Wickham Contracting Co.*, GSBICA No. 8675, 92-3 BCA ¶ 25,040; *Charles G. Williams Constr., Inc.*, ASBCA No. 42592, 92-1 BCA ¶ 25,104.

⁴⁶⁴ASBCA No. 35867, 92-2 BCA ¶ 24,843.

⁴⁶⁵See *FAR* 49.202. Factors include contractor efficiency, degree of risk assumed by contractor, complexity of work involved, and rate of profit anticipated by parties.

⁴⁶⁶ASBCA No. 41357, 92-2 BCA ¶ 24,864.

⁴⁶⁷No. 118-86C, 11 FPD ¶ 127 (Cl. Ct. Sept. 25, 1992).

⁴⁶⁸Under an equitable adjustment, a judge will apply the profit or loss rate that existed when the basis for the adjustment arose. By contrast, the court in *Big Chief Drilling* awarded the plaintiff profit that it could have earned if it had not been required to overcome the defective specifications. *Id.*

⁴⁶⁹*Id.* at 42 (quoting *Luria Bros. & Co. v. United States*, 177 Ct. Cl. 676, 690, 369 F.2d 701 (1966)); *cf. Industrial Indem. Co.*, 26 Cl. Ct. 443, 11 FPD ¶ 93 (1992) (board refused to award consequential damages for reasonable value of contractor's business because insolvency was not a foreseeable consequence of alleged wrongful termination).

⁴⁷⁰ASBCA No. 34678, 92-2 BCA ¶ 24,973.

produce and submit a new inspection plan. During production of bomb suspension lugs, the contractor submitted nonconforming products repeatedly.⁴⁷¹ After finding several deficiencies, the government inspector ordered the contractor to develop an inspection plan that would eliminate systemic shortcomings in the contractor's inspection process. The contractor complied and claimed additional costs relating to the effort. On appeal, the board denied the contractor's claim, citing the contractor's obligation to maintain an inspection system that would assure that all supplies and services submitted to the government conformed to contract requirements.

2. Acceptance.—

(a) *Strict Compliance on Dam Construction Project Spawned Economic Waste.*—The Court of Appeals for the Federal Circuit applied the doctrine of economic waste to prevent the government from requiring strict compliance in a construction contract. In *Granite Construction Co. v. United States*,⁴⁷² the court awarded damages to the contractor for work required to satisfy demands for strict compliance with the specifications, after the government refused to consider the contractor's suggestions for correcting defective performance at a relatively low cost. The contractor had incurred costs exceeding \$400,000 to remove and replace waterstop material that had cost Granite Construction only \$5000.

In *Armada/Hoffler Construction Co.*,⁴⁷³ the government rejected defectively installed concrete modules in an airport control tower. Following *Granite Construction*, the Department of Transportation Board of Contract Appeals (DOT BCA) awarded the costs of replacing the modules and delay costs that resulted from the government's rejection.

(b) *Government Entitled to Final Product, Not Compliant In-Process Components.*—The government inspector properly rejected line block final assemblies because they did not meet contract specifications in *Ace Precision Industries, Inc.*,⁴⁷⁴ even though the component parts, considered individually, may have satisfied dimensional requirements. Rejecting the claim in its entirety, the ASBCA concluded that the appellant's "generalized, conclusory, unsupported opinion type testimony and argument" deserved little weight and ignored specific references to the component parts in the assembly drawing. Furthermore, the appellant's interpretation would have rendered the disputed parts "useless, inexplicable, inop-

erative, void, insignificant, meaningless, or superfluous" with relationship to each other and to the final assembly.

3. Warranty.—

(a) *Government Disclaimer Avoids Warranty for Additional Work.*—In *Service Engineering Co.*,⁴⁷⁵ provisions in a ship repair contract that made the contractor responsible for interferences not shown on guidance plans did not constitute unconscionable disclaimers. The ASBCA found several reasons to justify its holding. First, the contract apportioned responsibility for interferences clearly. Second, the government had explained at a bidder's conference that the contractor was responsible for unidentified interferences. Third, the government had not represented that interferences shown on the plans were all inclusive. Finally, resolving the interferences was necessary to satisfy the specifications and to perform customary work under this type of contract. Under these circumstances, when the contractor experienced no unfair surprise, the government permissibly shifted the cost of resolving unidentified interferences to the contractor.

(b) *Statements Are Not Warranties if Not Part of the Bargain.*—The Claims Court refused to treat statements made by senior defense procurement officials as government warranties in *Solar Turbines, Inc. v. United States*.⁴⁷⁶ Government officials made certain disputed statements after the parties had completed negotiations and agreed to a \$55 million cap on payments. Relying on the Uniform Commercial Code, the court held that "an affirmation of fact can create a warranty only where the affirmation is 'part of the basis of the bargain.'"⁴⁷⁷ Because the bargain preceded the statements, the statements created no warranty.

G. Terminations for Default.

1. Grounds for Termination.—

(a) *Failure to Provide Conforming Goods.*—In *Mega Construction Co., Inc. v. United States*,⁴⁷⁸ the contracting officer properly terminated a contractor that refused to replace a cracked concrete foundation slab. After termination, the government discovered numerous other deficiencies that, the court noted, "provided ample evidence" of nonconforming work supporting the default decision.

Before terminating a contractor for failing to perform, the government must ensure that the contract required the specific work. In *Sterling Millwrights, Inc. v. United States*,⁴⁷⁹ the

⁴⁷¹ Each contract included either DAR 7-103.5(a) (Inspection), or FAR 52.246-2 (Inspection of Supplies—Fixed Price), and various other standard specifications.

⁴⁷² 962 F.2d 998, 11 FPD ¶ 42 (Fed. Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3287 (U.S. Sept. 28, 1992) (No. 92-545).

⁴⁷³ DOT BCA No. 2437 (Sept. 21, 1992), ___ BCA ¶ ____.

⁴⁷⁴ ASBCA No. 40307 (Dec. 3, 1992), ___ BCA ¶ ____.

⁴⁷⁵ ASBCA No. 40272, 92-3 BCA ¶ 25,106.

⁴⁷⁶ 26 Cl. Ct. 1249, 11 FPD ¶ 128 (1992). According to the contractor, DOD officials had promised to install the Rankine Cycle Energy Recovery (RACER) system on all Navy ships if Solar Turbines perfected the RACER system.

⁴⁷⁷ See U.C.C. § 2-313(1)(a).

⁴⁷⁸ 25 Cl. Ct. 735, 11 FPD ¶ 52 (1992).

⁴⁷⁹ 26 Cl. Ct. 49, 11 FPD ¶ 58 (1992).

government alleged that the contractor failed to conduct a highly technical survey of the construction area. After reviewing the specifications, the court called this allegation "nothing more than contrived nonsense."

To justify the drastic sanction of a default termination, the contractor's performance failure must be a material breach of a contract requirement.⁴⁸⁰ The materiality determination depends upon the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties.

(b) *Failure to Perform in a Timely Manner.*—In *T.C. & Sarah C. Bell*,⁴⁸¹ the government's termination for untimely performance was improper. Contrary to the government's position, the ENG BCA determined that the park attendant services contract was for continuing services—not periodic services. Accordingly, the contractor had not failed to meet a specific delivery date. Instead, a recurring pattern of deficient performance arose, for which the government should have issued a cure notice before termination.

(c) *Abandonment Requires Unequivocal Statement by Contractor.*—Identifying whether action or inaction by a contractor constitutes abandonment is difficult. In *International Foods Retort Co.*,⁴⁸² the contractor's statement that it had ceased production of beef stew and had conditioned further production on reinstatement of a terminated portion of the contract constituted abandonment. In *Ortec Systems, Inc.*,⁴⁸³ the contractor's silence constituted abandonment. The contractor's work force had left the site, no one answered at the home office telephone, and the telephone number for the foreman was a motel at which the foreman was not staying. Consequently, termination was proper.

This was not the case, however, in *Western States Management Services, Inc.*⁴⁸⁴ When the contractor arrived to begin work on its contract, it discovered more work than it had expected. The contractor's vice president left the site, stating that he had no intention of performing the contract at a loss and, later that same day, requested to withdraw its bid. Three days later, the contracting officer terminated the contract, asserting that the contractor had abandoned performance. The ASBCA found the termination improper because the con-

tractor had not manifested an unequivocal intent not to perform the contract.

(d) *False Certification Justifies Termination.*—In *"K" Services*,⁴⁸⁵ the ASBCA upheld a termination for default based upon a contractor's false certification that her business partner was not debarred. Despite the contractor's assertion that she was unaware of the debarment, the board found that she knew or should have known that her business associate—that is, her brother—had been debarred.

(e) *Termination for Failure to Make Progress.*—In *California Dredging Co.*,⁴⁸⁶ the contracting officer terminated a dredging contract when the contractor's dredge sank while being towed. Although the contractor had not performed any work and only eleven weeks of the twenty-six week performance period remained, the ENG BCA refused to grant summary judgment for the Government. The board reasoned that, before terminating the contract, the contracting officer should have determined clearly whether the contractor could have completed the work by the contract completion date.

2. Contractor Excuses.—

(a) *Defective Specifications.*—A contractor's failure to perform is excused when the specifications are so defective that no contractor could have built the subject product.⁴⁸⁷ The contractor however, has the burden of proving defective specifications. In *MM-Wave Technology, Inc.*,⁴⁸⁸ the contractor failed to meet its burden when the procurement contractor performed satisfactorily under the same specifications.

(b) *Improper Actions of the Government.*—In *Sterling Millwrights, Inc. v. United States*,⁴⁸⁹ the government's default termination of a contractor for its failure to deliver a chrome-plating facility within the time originally specified in the contract was improper because the government failed to meet its contractual obligations. Specifically, the government failed to review critical-path shop drawings in a timely manner, did not allow timely equitable adjustments for delay in the review, and failed to issue progress payments rightfully earned by the contractor. Despite the Federal Circuit's findings that the government effectively breached its contractual obligations, the contractor's remedy was governed by the termination for convenience clause of the contract.⁴⁹⁰

⁴⁸⁰ *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 11 FPD ¶ 106 (Fed. Cir. 1992).

⁴⁸¹ ENG BCA No. 5872, 92-3 BCA ¶ 25,076.

⁴⁸² ASBCA No. 34954, 92-2 BCA ¶ 24,994.

⁴⁸³ ASBCA No. 43467, 92-2 BCA ¶ 24,859.

⁴⁸⁴ ASBCA No. 40212, 92-1 BCA ¶ 24,714.

⁴⁸⁵ ASBCA No. 41791, 92-1 BCA ¶ 24,568.

⁴⁸⁶ ENG BCA No. 5532, 92-1 BCA ¶ 24,475.

⁴⁸⁷ *DCX, Inc.*, ASBCA No. 37669, 92-3 BCA ¶ 25,125.

⁴⁸⁸ ASBCA No. 41606, 93-1 BCA ¶ 25,272.

⁴⁸⁹ 26 Cl. Ct. 49, 11 FPD ¶ 58 (1992).

⁴⁹⁰ *Accord Darwin Constr. Co. v. United States*, 811 F.2d 593, 6 FPD ¶ 19 (Fed. Cir. 1987).

(c) *Personal Problems*.—After performing in Alaska for one month, the sole proprietor in *C. Howdy Smith*⁴⁹¹ subcontracted his maintenance contract and moved to Mexico. Subsequently, the subcontractor quit, finding the work too difficult. Because of health problems, however, the contractor could not return to Alaska, and the government terminated the contract for default. In upholding the termination, the ASBCA noted that it empathized with the contractor, but the contractor's medical problems did not excuse nonperformance.

The Postal Service contractor in *Triple B. Trucking*⁴⁹² failed to perform its contract after being arrested for driving with a suspended license. The contractor argued that the default was excusable. The Postal Service Board of Contract Appeals (PSBCA) disagreed and sustained the termination, finding that the reason for the arrest was a matter within the contractor's control and was a result of its negligence.

(d) *Quality of Raisins Was Beyond Contractor's Control*.—In *Pyramid Packing, Inc.*,⁴⁹³ a raisin contractor's failure to meet the delivery schedule was excusable. The contract required the processing of raisins purchased from a specific reserve pool of raisins managed by the government. Although government regulations required that the raisins meet minimum standards, the raisins the contractor received did not. The contractor incurred additional time reinspecting and replacing poor quality raisins and missed its shipping deadlines as a result. Because the government managed the availability, quality, and the delivery of raisins to the contractor, the Department of Agriculture Board of Contract Appeals found that the contractor acted reasonably by assuming that the raisins it received would meet minimum standards.

(e) *Existence of a Protest*.—A contractor's decision to refrain from ordering material necessary for timely contract performance pending a post award protest did not excuse its failure to perform in a timely manner.⁴⁹⁴ The contracting officer did not order the contractor to stop work, and the contractor did not ask whether it should withhold performance in light of the protest. The ASBCA also held that the

government was not obligated to inform the contractor of the protestor's identity or the likelihood of the protest's success.

3. *Waiver of Delivery Schedule*.—

(a) *Contractor Bound by Its Own Unreasonable Schedule*.—Although a new completion schedule in *Tampa Brass & Aluminum Corp.*⁴⁹⁵ was unreasonable, the government terminated the contract properly because the contractor—not the government—proposed the new schedule. The ASBCA stated that no matter how ill-considered the new schedule was, the government was not obliged to question it.

(b) *Continued Performance Was Reasonable Absent a Show-Cause Letter*.—If the government is considering termination for nondelivery, it must issue a show-cause notice "if practicable."⁴⁹⁶ In *Enginetics Corp.*,⁴⁹⁷ the contractor argued that decision to continue performance after missing the delivery date was reasonable because the government had remained silent after the "breach." The ASBCA refused to grant the government's motion for summary judgment. It ruled that the unexplained failure to issue a show-cause letter, which would have advised Enginetics that the government considered untimely delivery a breach, was an important factor in considering whether the government had waived its delivery schedule.

4. *Contracting Officer's Discretion*.—Courts and boards review default termination decisions routinely for abuse of discretion,⁴⁹⁸ and judges often focus on whether the contracting officer considered FAR-prescribed factors⁴⁹⁹ before issuing a termination. In *National Medical Staffing, Inc.*,⁵⁰⁰ the contractor asserted that the contracting officer abused her discretion by failing to consider applicable regulatory factors. The contractor also argued that the contracting officer should have obtained technical assistance during her review of the contractor's personnel qualifications before recommending termination to another contracting officer. Although the ASBCA found the termination decision reasonable, it did so only after reviewing the contracting officer's actions in light of each factor. In *S.T. Research Corp.*,⁵⁰¹ the contracting

⁴⁹¹ AGBCA No. 90-154-1, 92-2 BCA ¶ 24,884.

⁴⁹² PSBCA No. 2939, 92-1 BCA ¶ 24,506.

⁴⁹³ AGBCA No. 86-128-1, 92-2 BCA ¶ 24,831.

⁴⁹⁴ *Engineering Metals, Inc.*, ASBCA No. 37525, 92-3 BCA ¶ 25,164.

⁴⁹⁵ ASBCA No. 41314, 92-2 BCA ¶ 24,865.

⁴⁹⁶ See FAR 49.402-3(e)(1).

⁴⁹⁷ ASBCA No. 40834, 92-2 BCA ¶ 24,965.

⁴⁹⁸ See, e.g., *Darwin Constr. Co. v. United States*, 811 F.2d 593, 6 FPD ¶ 19 (Fed. Cir. 1987); *Lafayette Coal Co.*, ASBCA No. 32174, 89-3 BCA ¶ 21,963.

⁴⁹⁹ See FAR 49.402-3(f) (factors include availability of supplies or services from other sources; the government's need for defaulted supplies or services; effect of termination for default on contractor's ability to liquidate progress payments; and effect of termination on contractor's ability to perform other government contracts). Failure to consider all factors, however, is not a per se abuse of discretion. See *Camel Mfg. Co.*, ASBCA No. 41231 (Sept. 30, 1992), ___ BCA ¶ ___.

⁵⁰⁰ ASBCA No. 40391, 92-2 BCA ¶ 24,837.

⁵⁰¹ ASBCA No. 39600, 92-2 BCA ¶ 24,838.

officer did not consider all of the FAR-prescribed factors. The ASBCA found an abuse of discretion when the contracting officer failed to consider factors such as the contractor's ability to perform, the urgency of the needed units, and the likelihood that a replacement contractor could complete the contract.

5. Government Posttermination Remedies.—

(a) *Government Must Make Reasonable Effort to Mitigate Reprocurement Costs.*—In *Luther Benjamin Construction Co.*,⁵⁰² the appellant argued that the government failed to mitigate costs when it restricted competition⁵⁰³ for a reprocurement contract to local contractors and negotiated with only one contractor for the work. Although the agency received only one offer, the ASBCA found the government's actions reasonable.

(b) *Common-Law Damages Must Be Foreseeable.*—In *ERG Consultants, Inc.*,⁵⁰⁴ although the government did not make a reasonable attempt to mitigate reprocurement costs, the Department of Veterans' Affairs Board of Contract Appeals (VABCA) considered whether the government could recover these costs as common-law damages. Ultimately, the board denied recovery. It found that the reprocurement contractor's refusal to use any portion of the original contractor's work and the government's alleged need to reprocure a completely new design were not foreseeable, direct, and natural consequences of the original contractor's breach.

H. Terminations for Convenience.

1. Termination Decision.—

(a) *Reliance on Advice of Counsel Was Reasonable.*—Absent bad faith or clear abuse of discretion, the contracting officer's decision to terminate a contract for the convenience of the government is conclusive.⁵⁰⁵ Nevertheless, contractors continue to contest these terminations. In *Modern Systems Technology Corp. v. United States*,⁵⁰⁶ for example, the contractor asserted unsuccessfully that the contracting officer abused his discretion by seeking legal advice concerning issues of contract interpretation.

(b) *Contracting Officer Need Not Discuss Termination With Contractor.*—In *Melvin R. Kessler*,⁵⁰⁷ the contractor

challenged the contracting officer's authority to make a convenience termination decision without first affording the contractor an opportunity to be heard. In denying the appeal, the PSBCA pointed out that neither the statute nor the contract required a predecisional hearing. A contractor may obtain procedural protection against an arbitrary termination decision by appealing to a board or court.

2. Termination for Convenience Recovery.—

(a) *Recovery Under the Termination for Convenience Clause Was Fair.*—In *J.W. Cook & Sons, Inc.*,⁵⁰⁸ the contractor argued that limiting its recovery to costs under the termination clause was unfair. The ASBCA was unsympathetic, however, noting that termination for convenience is a risk that is reasonably foreseeable whenever a contractor signs a government contract. The board stated that it could not fashion equitable or extracontractual relief on any grounds. The board defined "fairness" as "the realization of the benefit of each party's bargain through the reasonable interpretation of that contractual instrument and the related regulations, with due regard to all relevant circumstances."

(b) *The Contractor Also Must Be Fair.*—In a convenience termination settlement, the contractor must make reasonable efforts to terminate and otherwise reduce the costs of its subcontracts.⁵⁰⁹ In *Bos'n Towing and Salvage Co.*,⁵¹⁰ the ASBCA disallowed costs for terminating the charter of two tug vessels. The board did not consider the settlement an arm's-length transaction because of the close affiliation between Bos'n Towing and the charter company.

(c) *Recovery Under the Termination Clause Versus the Changes Clause.*—The boards generally accept the parties' contemporaneous treatment of deleted work as either a deductive change or a partial termination for convenience.⁵¹¹ In *Griffin Services, Inc.*,⁵¹² the GSBICA accepted the characterization of deleted work as a partial termination for convenience, but then directed recovery based on the changes clause. The board believed reducing the contract price by the amount bid for the building was inequitable.

In a similar vein, the ASBCA allowed recovery even though a contractor submitted its termination settlement proposal on

⁵⁰²ASBCA No. 40401 (June 29, 1992), ___ BCA ¶ ___.

⁵⁰³See FAR 6.302-2 (unusual and compelling urgency).

⁵⁰⁴VABCA No. 3223, 92-2 BCA ¶ 24,905.

⁵⁰⁵*Salsbury Indus. v. United States*, 905 F.2d 1518 9 FPD ¶ 86 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 671 (1991).

⁵⁰⁶24 Cl. Ct. 699, 11 FPD ¶ 1 (1992), aff'd without op., No. 92-5037 (Fed. Cir. Oct. 27, 1992).

⁵⁰⁷PSBCA No. 2820, 92-2 BCA ¶ 24,857, aff'd on recons., 92-3 BCA ¶ 25,092.

⁵⁰⁸ASBCA No. 39691, 92-3 BCA ¶ 25,053.

⁵⁰⁹See *General Elec. Co.*, ASBCA No. 24111, 82-1 BCA ¶ 15,725.

⁵¹⁰ASBCA No. 41357, 92-2 BCA ¶ 24,864.

⁵¹¹See, e.g., *Dollar Roofing*, ASBCA No. 36461, 92-1 BCA ¶ 24,695.

⁵¹²GSBICA No. 11022, 92-3 BCA ¶ 25,181.

the wrong form.⁵¹³ The board found that the contractor's first article costs were recoverable under the termination for convenience clause. The board found the issue of whether the contractor requested payment as an equitable adjustment or as part of a termination for convenience recovery as irrelevant.

3. *Decision to Deny More Time to Submit Settlement Proposal May Be Appealable.*—In *Cedar Construction*,⁵¹⁴ the contractor appealed to the ASBCA when the contracting officer denied the contractor's request for additional time to submit its convenience termination settlement proposal. The board dismissed the appeal because the contractor's request was not a claim over which the board had jurisdiction. The dismissal, however, was without prejudice to the submission of a proper claim to the contracting officer.⁵¹⁵

I. Contract Disputes Act Litigation.

1. Jurisdiction.—

(a) *Lawmakers Give Court New Jurisdiction, Name.*—The Federal Courts Administration Act (FCAA)⁵¹⁶ amended 28 U.S.C. § 1491(a)(1) by adding the language "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of the Act" in a subparagraph that refers to the court's jurisdiction. The new language appears to grant jurisdiction over nonmonetary issues to the COFC.⁵¹⁷ The FCAA also changed the name of the United States Claims Court to the United States Court of Federal Claims (COFC).⁵¹⁸

(b) *Court of Federal Claims Lacks Jurisdiction When Related Suits Are Pending Elsewhere.*—The Court of Appeals for the Federal Circuit has ruled that a party may not pursue simultaneous dual litigation⁵¹⁹ against the United States in both the COFC and another court. In *UNR Industries, Inc. v. United States*,⁵²⁰ the court, acting en banc, affirmed a lower court decision divesting the court of jurisdiction because, at

the time the plaintiff filed its action in the Claims Court, it had a similar action pending in a federal district court. Based on *UNR Industries*, (1) the COFC has no jurisdiction if the same claim is pending in another court when a complaint is filed in the COFC; (2) the COFC is divested of jurisdiction if the same claim is filed in another court after a complaint is filed in the COFC; and (3) ordinary rules of res judicata apply if the same claim has been disposed of finally by another court before a complaint is filed in the COFC.

(c) *Time Limit on Shipbuilding Claims Is Nonjurisdictional.*—The statutory eighteen-month limitation on shipbuilding claims is not a jurisdictional bar to de novo judicial review, according to the COFC.⁵²¹ Unlike the limitations imposed by the Tucker Act⁵²² and the Contract Disputes Act (CDA),⁵²³ which are jurisdictional, the limitations imposed by 10 U.S.C. § 2405 do not act as a jurisdictional bar on the court, but only as an administrative limitation on the secretary of the military agency.

(d) *Court Axes Untimely Timber Claims.*—In *Stone Forest Industries, Inc. v. United States*,⁵²⁴ the contractor had only sixty days to appeal an adverse contracting officer's decision. Although the timber cutting contractor did not delay unreasonably in filing its appeals, and although the late filing did not prejudice the government, the contract provision limiting the period of appeal to sixty days governed. The provision, agreed to by the parties, took precedence over the statutory one-year appeal period. Because the parties waived freely their rights to the statute of limitations set forth in the CDA.

2. Certification.—

(a) *Congress Permits the Department of Defense to Amend Certification Requirement.*—The 1993 Authorization Act adds a new section that authorizes the DOD to issue new regulations regarding the certification of contract claims, requests for equitable adjustment to contract terms, and requests for relief under Public Law 85-804⁵²⁵ that exceed

⁵¹³ Aero Components Co., ASBCA No. 42620, 92-1 BCA ¶ 24,565.

⁵¹⁴ ASBCA No. 42178, 92-2 BCA ¶ 24,896.

⁵¹⁵ The one-year period for submitting a settlement proposal had run. See, e.g., FAR 52.249-2 (Termination for Convenience of the Government (Fixed-Price)). Presumably, the contracting officer would deny the claim as submitted untimely, at which time the contractor could appeal.

⁵¹⁶ Federal Courts Administration Act of 1992, tit. IX, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

⁵¹⁷ In an order by the judge in *L. Addison & Assocs. Inc. v. United States*, No. 91-1388C (Fed. Cl. Nov. 30, 1992), the parties were required to brief whether this legislation "merely added a remedy" for cases already within the court's subject matter jurisdiction under the Tucker Act, or instead "substantially extend[ed] the] court's subject matter jurisdiction to hear previously noncognizable nonmonetary claims." See 58 Fed. Cont. Rep. (BNA) 664 (Dec. 14, 1992).

⁵¹⁸ Federal Courts Administration Act of 1992, tit. IX, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

⁵¹⁹ See 28 U.S.C. § 1500 (Claims Court lacks jurisdiction over claims against the United States that are pending in another court).

⁵²⁰ 962 F.2d 1013, 11 FPD ¶ 61 (Fed. Cir. 1992), cert. granted sub. nom. *Keene Corp. v. United States*, 113 S. Ct. 373 (1992) (interpreting 28 U.S.C. § 1500).

⁵²¹ *Bath Iron Works Corp. v. United States*, 27 Fed. Cl. 114, ___ FPD ¶ ___ (1992).

⁵²² 28 U.S.C. § 2501 (six-year limitation).

⁵²³ 41 U.S.C. § 609(a)(3) (one-year limitation).

⁵²⁴ 26 Cl. Ct. 410, 11 FPD ¶ 80 (1992).

⁵²⁵ 50 U.S.C. §§ 1431-1435.

\$100,000.⁵²⁶ The act requires the DOD to issue regulations that (1) prohibit payment unless the contractor provides, with its claim or request, the certification required by the CDA,⁵²⁷ and (2) require that the certifying individual be authorized to bind the contractor and have "knowledge of the basis of the claim or request, knowledge of the accuracy and completeness of the supporting data, and knowledge of the claim or request."

(b) *Congress Addresses Certification Debacle.*—With the passage of the FCAA,⁵²⁸ Congress and the President have eliminated the source of a great deal of litigation on certification of contract claims. Title IX provides that certifications "may be executed by any person duly authorized to bind the contractor with respect to the claim," and has eliminated certification as a jurisdictional prerequisite.⁵²⁹

(c) *Six-Month Delay Between Claim and Proper Certification Satisfies Contract Dispute Act Requirement.*—The ASBCA did not require a contractor to submit its claim and the associated certification concurrently in *RG&B Contractors, Inc.*⁵³⁰ The contractor submitted its certification six months after it submitted its claim, but before the contracting officer issued a final decision. Despite the delay, submission of the proper certification satisfied the requirements of the CDA because the date of certification preceded issuance of the contracting officer's final decision.

(d) *Board Accepts Contractor's "Good Faith" Certification at Face Value.*—The ASBCA has declined to inquire into the validity of a contractor's certification that its subcontractor's claim was made in "good faith."⁵³¹ Absent any compelling evidence that the contractor's certifying official failed to act in good faith, the board refused to explore the official's subjective state of mind at the time of certification.

(e) *Contractor Loses Interest After Failing to Certify Government Claim.*—While a contractor need not certify a government claim, it must certify a request for interest on money deducted by the government. In *General Motors*

Corp.,⁵³² the ASBCA dismissed the contractor's claim for interest while allowing the contractor to pursue the corresponding government claim, after it used an improper certifying official to certify the government claim.

(f) *Certification Language Problems.*—Contractors continue to use incorrect language when attempting to certify claims exceeding \$50,000. For example, they have certified that "the amount claimed is made in good faith"⁵³³ and have failed to state that the amount requested accurately reflected the contract adjustment for which the government was liable.⁵³⁴ In these cases and others, the courts and boards have dismissed the appeals for lack of proper certification.

(g) *Boards Split on Claims Certification Language.*—In *P.J. Dick, Inc. v. General Services Administration*,⁵³⁵ the GSBICA declined to follow the ASBCA and ruled that a certification stating that a claim was accurate and complete—while neglecting to state the words "to the best of my knowledge and belief"—was in "substantial compliance" with the requirements of the CDA. The board recognized that its decision differed from those of the ASBCA, but concluded that the appellant's certification was more complete and unequivocal than the language required by the CDA and was, therefore, sufficient.

(h) *Site of Primary Contract Activity.*—The site of "primary contract activity" is not necessarily where the major portion of work under a contract is performed, according to the ASBCA. Although a subcontractor may perform the major portion of the work under a contract at its facility, the site of primary contract activity, and therefore the situs of the proper certifying official, is based on the site of primary contract activity of the prime contractor, not of the subcontractor.⁵³⁶

(i) *Contractor Loses Appeal, Challenges Own Certification, and Wins!*—After losing on the merits, the contractor in *Universal Canvas, Inc. v. Stone*⁵³⁷ challenged its own certifica-

⁵²⁶National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 813, 106 Stat. 2315, 2452 (1992) (adding 10 U.S.C. § 2410e, and repealing 10 U.S.C. § 2410, upon issuance of implementing regulations).

⁵²⁷See 41 U.S.C. § 605(c)(1).

⁵²⁸Federal Courts Administration Act of 1992, tit. IX, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

⁵²⁹*Id.* § 907, 106 Stat. at ____ (amending 41 U.S.C. § 605(c)).

⁵³⁰ASBCA No. 43997, 92-3 BCA ¶ 25,152; see also *Davey Compressor Co.*, ASBCA No. 43893, 92-3 BCA ¶ 25,096 (contractor may submit claim and certification separately under certain circumstances). *But cf. Avison Lumber Co. v. United States*, 975 F.2d 869, 11 FPD ¶ 92 (Fed. Cir. 1992) (no jurisdiction because contractor could not combine initial certified claim with subsequent additional uncertified claim) (not citable as precedent per FED. CIR. R. 47.8).

⁵³¹*Blount Constr. Group of Blount, Inc.*, ASBCA No. 38998, 92-3 BCA ¶ 25,163.

⁵³²ASBCA No. 35634, 92-3 BCA ¶ 25,149.

⁵³³See, e.g., *Ingersoll-Rand Co. v. United States*, 24 Cl. Ct. 692, 10 FPD ¶ 154 (1991); *Spartan Bldg. Corp.*, ASBCA No. 43849 (Oct. 26, 1992), ____ BCA ¶ ____; *LaBarge Elecs.*, ASBCA No. 44401 (Dec. 2, 1992), ____ BCA ¶ ____ (certifying "supporting data with respect to the amount in controversy").

⁵³⁴*Universal Consol. Servs.*, ASBCA No. 43482, 92-3 BCA ¶ 25,134.

⁵³⁵GSBICA No. 11847 (Sept. 15, 1992), ____ BCA ¶ ____ *Contra Holmes & Narver Servs., Inc./Morrison-Knudsen Co., Inc., J.V.*, ASBCA No. 36246, 91-1 BCA ¶ 23,402, *aff'd*, 937 F.2d 622 (Fed. Cir. 1992) (omission of "and belief").

⁵³⁶*Hughes Aircraft Co.*, ASBCA No. 31313 (Aug. 31, 1992), ____ BCA ¶ ____.

⁵³⁷975 F.2d 847, 11 FPD ¶ 121 (Fed. Cir. 1992).

tion, and won. The contractor had lost its appeal before the ASBCA, then failed to persuade the board on reconsideration to dismiss the appeal for lack of certification. It next appealed to the Federal Circuit before which it argued that the wrong official had certified its CDA claim and that the court must dismiss its appeal for lack of jurisdiction. The Federal Circuit agreed, holding that litigating an appeal before an agency board did not confer jurisdiction and that lack of jurisdiction at any stage required dismissal.

3. Definition of a Claim.—

(a) *Cost Proposals for Change Orders Were Not Claims.*—Cost proposals for change orders did not entitle the contractor to interest on principal amounts due in *Essex Electro Engineers, Inc. v. United States*.⁵³⁸ According to the court, the FAR is consistent with the CDA in requiring that a “claim” consist of a written demand or assertion, that the money be sought as a matter of right, and that the writing set forth a sum certain. Contractor submissions that did not seek a sum certain as a matter of right were not “claims.”

(b) *Claims Procedure Not a Game of “Simple Simon Says.”*—The “claims procedure is not to be converted into a game of ‘Simple Simon Says’ where magic words are necessary, and arcane procedure governs over basic substance,” said the ASBCA in *Defense Systems Corp.*⁵³⁹ Accordingly, the board denied the government’s motion to dismiss an appeal in which, according to the government, the contracting officers lacked sufficient information to make meaningful decisions. The contracting officers actually had made final decisions without requesting additional information, thereby indicating that they had sufficient information to decide whether to pay the contractor’s claim.

(c) *“Common Sense” Test Reveals Claim.*—A contractor has submitted a CDA claim even if it has not specifically requested a contracting officer’s final decision, if its request for additional compensation and the surrounding circumstances clarify that the contractor was requesting a final decision. In *Transamerica Insurance Corp., Inc. ex rel. Stroup Sheet Metal Works v. United States*,⁵⁴⁰ the contractor did not specifically request a final decision and expressed a willingness to continue settlement discussions. The government and the Claims Court concluded that the contractor had submitted no claim. The contractor, however, had certified its subcontractor’s claim and had requested subsequently that the gov-

ernment issue a final decision. Applying “common sense,” the Federal Circuit overruled the lower court and held that the contractor’s submissions constituted a claim.

(d) *Letter After Final Decision Constitutes Claim.*—Characterizing it as a deemed denial, the ASBCA assumed jurisdiction over an appeal in which a contractor submitted its first letter evidencing the existence of a matter in dispute following the contracting officer’s issuance of a final decision in the case.⁵⁴¹ While admitting that “technically” the contracting officer had not entered a final decision, the board nevertheless retained jurisdiction “in the interest of an expeditious resolution of the dispute.”

(e) *Clarifying Letter Amends Claim.*—In *Service Engineering Co.*,⁵⁴² the contractor submitted to the contracting officer a letter clarifying its earlier, properly certified claim. The ASBCA accepted this letter as an amendment to the claim, even though the contractor submitted it after the contracting officer’s final decision, but more than three months before commencement of the hearing. Despite the lack of a final decision on the amended claim, the board assumed jurisdiction, finding “no difference with respect to the essential nature of the operating facts” between the two submissions.

4. Matters in Dispute.—

(a) *Parties Must Dispute Underlying Issues and Quantum Before Submission of Claim.*—Although the parties disagreed on the underlying issues of a delay, a contractor’s request for an equitable adjustment was not a CDA claim because no dispute over quantum existed before the contractor submitted its request. Applying *Dawco Construction, Inc. v. United States*,⁵⁴³ the ASBCA, in *Reflectone, Inc.*,⁵⁴⁴ held that the request was not a CDA claim because it did not relate to a matter in dispute at the time of submission.⁵⁴⁵ The contractor first had mentioned the amount of the claim in its request for an equitable adjustment; therefore, the amount was not in dispute at the time of submission. Although the contractor certified its request and demanded a sum certain, the board dismissed the appeal for lack of jurisdiction because no claim actually existed.

(b) *Equivocal Request for Adjustment Nets Dismissal for Lack of Jurisdiction.*—In *Boeing Co. v. United States*,⁵⁴⁶ the contractor’s request for an “aggregate net payment” pursuant

⁵³⁸ 960 F.2d 1576, 11 FPD ¶ 50 (Fed. Cir. 1992), cert. denied, 113 S. Ct. 408 (1992).

⁵³⁹ ASBCA No. 44131, 92-3 BCA ¶ 25,439.

⁵⁴⁰ 973 F.2d 1572, 11 FPD ¶ 117 (Fed. Cir. 1992).

⁵⁴¹ Conference Communications, Inc., ASBCA No. 44295 (Oct. 30, 1992), ___ BCA ¶ ____.

⁵⁴² ASBCA No. 40273, 92-3 BCA ¶ 25,122.

⁵⁴³ 930 F.2d 872, 10 FPD ¶ 40 (Fed. Cir. 1991).

⁵⁴⁴ Reflectone, Inc., ASBCA No. 43081 (Oct. 19, 1992), ___ BCA ¶ ____.

⁵⁴⁵ See FAR 33.201 (defining “claim” and requiring it to relate to matters in dispute). The CDA does not define “claim.”

⁵⁴⁶ 26 Cl. Ct. 872, 11 FPD ¶ 115 (1992).

to a partially terminated contract was not a sum certain then due. It therefore was not a "claim" subject to the jurisdiction of the court. Boeing Company submitted a request for payment totaling approximately \$140 million, less certain indeterminate costs. To quantify the actual amount in dispute, the contractor would have had to "reach a negotiated agreement with the government on the value of the nonterminated work, or to complete the remaining portions of the work." Although sympathetic to the contractor's dilemma, the court lacked jurisdiction because the contractor failed to state with certainty an amount in dispute.

5. *Final Decisions.*—

(a) *Failure to Issue a Final Decision.*—In *Boeing Co. v. United States*,⁵⁴⁷ the court held that the contracting officer's promise to issue a decision—or, by a certain date, to set a date to issue a decision—did not obligate the contracting officer to issue a final decision by a firm date. Therefore, the contractor could treat the contracting officer's response as a deemed denial of the claim. Similarly, a contracting officer's letter to the contractor saying that it should not expect a final decision "prior to" June 30, failed to establish a firm date, resulting in a deemed denial.⁵⁴⁸

(b) *Fraud Counterclaims Require No Final Decision.*—Although the CDA states "All claims by the Government against a contractor . . . shall be the subject of a decision by the contracting officer,"⁵⁴⁹ the Claims Court has held that a contracting officer's final decision is not a prerequisite to its assuming jurisdiction over a counterclaim involving fraud.⁵⁵⁰ The BMY Corporation, which manufactured self-propelled howitzers containing latent defects, submitted a claim against the government, requesting an equitable adjustment. The government counterclaimed, alleging fraud. The court held that when the government claimed breach of contract, and the alleged breach involved fraud, the court had jurisdiction despite the lack of a contracting officer's final decision on the matter.

(c) *Defense Acquisition Regulation Council to Delete Overall Roofing Note in Final Decisions.*—The DAR Council intends to amend DFARS 233.211 by deleting the "note" that

advises contractors to consider the *Overall Roofing & Construction* case⁵⁵¹ before selecting an appellate forum.⁵⁵² This amendment implements, in part, one section of the FCAA that apparently expands the jurisdiction of the COFC to include nonmonetary claims.⁵⁵³

6. *Discovery: Board Excuses Inadvertent Destruction of Government Documents.*—In *Dalmo Victor Division of General Instrument Corp.*,⁵⁵⁴ the ASBCA refused to dismiss a government claim, although the government had destroyed documents that might have established the impact of the contractor's alleged violations of the CAS. In refusing to grant sanctions that would have resulted in dismissal of the government's claim, the board emphasized that the government had not acted in bad faith, nor had it intended to frustrate discovery.

7. *Equal Access to Justice Act*⁵⁵⁵—

(a) *Unsubstantiated Affidavit Establishes Equal Access to Justice Act Eligibility.*—A contractor's affidavit, which contained only unsubstantiated representations on the contractor's net worth and number of employees, established the contractor's eligibility for attorneys' fees under the EAJA.⁵⁵⁶ Although a contractor must establish eligibility under the EAJA, the contractor met its burden when the government failed to contradict the information contained in the contractor's affidavit.

(b) *Contractor "Prevails" by Reducing Reprourement Costs.*—In *JR & Associates*,⁵⁵⁷ the contractor failed to persuade the ASBCA to convert a termination for default to a termination for convenience, but nevertheless was entitled to attorneys' fees and costs under the EAJA. Although the board ruled against the contractor on the conversion issue, it did reduce excess reprourement costs from \$10,000 to under \$250. This result was tantamount to a complete vindication of the contractor's position. Accordingly, the contractor was the prevailing party as envisioned by the EAJA.

(c) *Contractors Need Not Employ Local Attorneys.*—The EAJA does not "discriminate" against contractors that select counsel on the basis of factors other than geographic

⁵⁴⁷ 26 Cl. Ct. 257, 11 FPD ¶ 73 (1992).

⁵⁴⁸ *Orbas & Assocs. v. United States*, 26 Cl. Ct. 647, 11 FPD ¶ 94 (1992).

⁵⁴⁹ 41 U.S.C. § 605(a).

⁵⁵⁰ See *BMY-Combat Sys. Div. of Harsco Corp. v. United States*, 26 Cl. Ct. 846, 11 FPD ¶ 99 (1992).

⁵⁵¹ See *Overall Roofing & Constr., Inc. v. United States*, 929 F.2d 687, 10 FPD ¶ 39 (1991).

⁵⁵² See *Army DAR Council Member's Report* (Nov. 20, 1992) (citing FAR Case 92-301 and DAR Case 91-043).

⁵⁵³ *Federal Courts Administration Act of 1992*, tit. IX, Pub. L. No. 102-572, § 907, 106 Stat. 4506 (1992).

⁵⁵⁴ ASBCA No. 39718, 92-3 BCA ¶ 25,176.

⁵⁵⁵ U.S.C. § 504.

⁵⁵⁶ *Infotec Dev. Inc.*, ASBCA No. 31809, 92-2 BCA ¶ 24,817.

⁵⁵⁷ ASBCA No. 41377, 92-3 BCA ¶ 25,121.

location. Consequently, although a contractor incurred additional costs by using a nonlocal attorney, it was entitled to reimbursement for expenses that counsel ordinarily charged to its clients such as postage, express mail, travel, meals, and long distance phone calls.⁵⁵⁸

8. *Collateral Estoppel: Failure to Litigate Facts at Board Barred Collateral False Claims Act Suit.*—In *United States v. TDC Management Corp.*,⁵⁵⁹ the district court held that unchallenged findings of fact entered by a board of contract appeals⁵⁶⁰ estopped the government from collaterally contesting whether a contractor's claim was truthful. In this case, the contractor had appealed a denial of termination for convenience costs to the DOT BCA. During this same period, the government conducted a criminal investigation into alleged fraudulent statements by TDC Management, and its president, concerning progress payment reports. After filing a civil action against TDC Management under the False Claims Act⁵⁶¹ (FCA), the government moved to suspend the board proceeding. The board denied the motion and entered a decision in favor of TDC Management, allowing it costs claimed under the contract. The contractor then moved for summary judgment in the civil case on a collateral estoppel theory. Citing *Ingalls Shipbuilding, Inc. v. United States*,⁵⁶² the court held that the government had a full and fair opportunity to litigate the veracity of the contractor's evidence before the board. Although the board lacked authority to consider fraud claims, the court stated that the board could determine whether the evidence submitted in support of the claims was factually accurate. Accordingly, the court granted TDC Management's motion for summary judgment.

V. Special Topics

A. Fraud

1. *Filing Date Determines Which False Claims Act Penalty Applies.*—Congress amended the FCA in 1986 to increase the potential penalty.⁵⁶³ In *United States v. Stocker*,⁵⁶⁴ the court held that in cases in which the government files its FCA suit

after the 1986 amendments, the increased liability applies retroactively to FCA violations that occurred before the amendments.

2. *Nonsettling Codefendant Entitled to Setoff of Settlement Amount.*—In *United States v. Zan Machine Co.*,⁵⁶⁵ the district court adopted a civil rule that credits a nonsettling defendant with amounts paid in settlement by a codefendant. In an FCA suit against a prime contractor and its subcontractor, the subcontractor settled before trial for \$30,000. At trial, a jury awarded actual damages against the prime contractor in the amount of \$26,363, which doubled automatically under the statute. The court then held that the contractor was entitled to a credit of the subcontractor's settlement amount against the actual damages judgment.⁵⁶⁶

3. *Stay of Proceedings During Criminal Investigation.*—In *Holk Development, Inc.*,⁵⁶⁷ the ASBCA ruled on a motion to stay the board's proceedings during a pending criminal investigation. In support of its motion, the government submitted a letter from an Assistant United States Attorney (AUSA), asserting that the government needed a stay to avoid prejudice to an ongoing criminal investigation that began with the indictment of a government employee. The AUSA further averred that a commonality of facts, witnesses, and issues existed between the administrative hearing and the criminal investigation. Citing *E-Systems, Inc.*,⁵⁶⁸ the ASBCA stated "A protracted stay of the civil case requires not only a showing of need in terms of protecting the criminal litigation but also a balanced finding that such need overrides the injury to the parties being stayed." The board found that, because the government had withheld approximately \$300,000 under other contracts with the contractor, a stay might prolong the contractor's financial hardship. The board also noted that the government had failed to produce any facts concerning the scope of the investigation or the relationship between the administrative hearing and the criminal investigation.

4. *Undue Delay Bars Agency from Avoiding Contract.*—Generally, the government may avoid any contract tainted by fraud, kickbacks, conflicts of interest, or bribery.⁵⁶⁹ In *Godley*

⁵⁵⁸S.T. Research Corp., ASBCA No. 39600, 92-3 BCA ¶ 25,160.

⁵⁵⁹No. 89-1533 (D.D.C. Aug. 17, 1992).

⁵⁶⁰See *TDC Management Corp.*, DOT BCA No. 1802, 90-1 BCA ¶ 22,627.

⁵⁶¹31 U.S.C. § 3729.

⁵⁶²21 Cl. Ct. 117, 9 FPD ¶ 113 (1990).

⁵⁶³The minimum penalty would increase from \$2000, to a minimum of \$5000; the maximum penalty would be increased by triple damages instead of double damages if certain conditions were met.

⁵⁶⁴798 F. Supp. 531 (E.D. Wis. 1992).

⁵⁶⁵No. 90-1609 (E.D.N.Y., Oct. 13, 1992).

⁵⁶⁶Contractors are not entitled to a credit for penalties paid by codefendants. In this case, however, the subcontractor's settlement agreement did not apportion the money between damages and penalties. Therefore, the contractor was entitled to offset the entire \$30,000.

⁵⁶⁷ASBCA No. 43047 (Aug. 14, 1992), ___ BCA ¶ ___.

⁵⁶⁸ASBCA No. 32033, 88-2 BCA ¶ 20,753.

⁵⁶⁹See, e.g., *K&R Eng'g Co. v. United States*, 222 Ct. Cl. 340, 616 F.2d 469 (1980) (holding that rule applies even in the absence of criminal conviction or showing that wrongdoing affected contract adversely).

v. *United States*,⁵⁷⁰ the government contracted for the construction and lease of a postal facility. Before taking possession of the facility, the government discovered that the contract was tainted by fraud. Instead of voiding the contract, the government took possession of the facility, but refused to pay the agreed rent. When the contractor sued for the lease payments, the government argued that the contract was void because of fraud. The Claims Court disagreed, holding that the government could not avoid the contract because it had not done so in a timely manner. The government took possession with full knowledge of the fraud and occupied the facility for six months before indicating that it would not honor the lease. According to the court, the government unduly delayed voiding the contract, and its actions were inconsistent with contract avoidance.

5. *Material Purchased with Progress Payments Was Not Government Property.*—In *United States v. Hartec Enterprises*,⁵⁷¹ the government contracted for wire mesh panels. During performance, Hartec Enterprises sold as scrap a number of unusable panels that it had financed with progress payments. Later, Hartec was convicted of larceny⁵⁷² on the theory that he had converted government property by using progress payments to purchase materials for panels and then selling the panels to nongovernment buyers. The court reversed the conviction, however, holding that Hartec had not committed larceny because title to the property had not vested in the government, although the terms of the contract provided otherwise.⁵⁷³

6. *Constitutionality of Qui Tam Provisions.*—In *United States ex rel. Burch v. Piqua Engineering, Inc.*,⁵⁷⁴ the court upheld the constitutionality of the FCA *qui tam* provisions. In its opinion, the court rejected arguments that the provisions violate the constitutional case or controversy requirement, the Appointments Clause, and the separation-of-powers doctrine. The court found that the case or controversy requirement was satisfied because of the potential impact of the suit on the relator's employment status. As to the Appointments Clause issue, the court found that a relator is not an officer of the United States merely because he may obtain a share of the government's recovery. Finally, the court noted that the *qui tam* provisions do not violate the separation-of-powers doc-

trine because the Justice Department retains substantial control over all *qui tam* litigation.

7. *"Public Disclosure" Under the False Claims Act.*—In *United States ex rel. Doe v. John Doe Corp.*,⁵⁷⁵ the court held that disclosure of fraud allegations by federal investigators during the questioning of "innocent employees" of the suspect company constituted a "public disclosure" sufficient to bar a *qui tam* action by an attorney of one of the employees engaged in the fraud.⁵⁷⁶ According to the court, "disclosure" did not mean disclosure to the public at large.

8. *"Original Source" Decisions.*—The court in *Wang v. FMC Corp.*⁵⁷⁷ addressed the issue of who is an "original source." In this case, the court held that, to be an original source, a relator must have direct and independent knowledge of alleged fraud, and also must have "had a hand" in disclosing allegations of fraud to the public domain. Mr. Wang knew about alleged fraudulent conduct concerning Bradley Fighting Vehicle transmissions made by FMC, but he waited four years before "disclosing" the fraud in his suit. By that time, however, others had disclosed the problems to the Army. As a result, the court found that Mr. Wang was not an original source but instead had only republished the information. In barring Mr. Wang's suit, the court noted that "a whistleblower sounds the alarm; he does not echo it."

Likewise, in *United States ex rel. Precision Co. v. Koch Industries, Inc.*,⁵⁷⁸ the court held that a firm was not an original source of information that its majority shareholder had disclosed publicly in earlier legal actions. Precision actually did not exist as a corporate entity until several years after the filing of the earlier actions. The court stated that one of the purposes of the FCA *qui tam* provisions was to encourage private citizens with first-hand knowledge to expose incidents of fraud, while preventing litigation by opportunists seeking to capitalize on public information.

B. *Debarment and Suspension*

1. *Regulatory Changes.*—

(a) *Reduced Payments for Fraudulent Requests.*—In 1990, Congress had enacted statutory procedures for suspending progress, advance, and partial payments upon substantial evidence that the payment request was fraudulent.⁵⁷⁹ The

⁵⁷⁰26 Cl. Ct. 1075, 11 FPD ¶ 109 (1992).

⁵⁷¹967 F.2d 130 (5th Cir. 1992).

⁵⁷²18 U.S.C. § 641.

⁵⁷³See FAR 52.232-16(d)(1) (Progress Payments). The court followed *Marine Midland Bank v. United States*, 231 Cl. Ct. 496, 687 F.2d 395 (1982), cert. denied, 460 U.S. 1037 (1983) (bankruptcy case holding that title vesting provisions of progress payments clause create only a security interest).

⁵⁷⁴803 F. Supp. 115 (S.D. Ohio 1992), 38 Cont. Cas. Fed. (CCH) ¶ 76,400.

⁵⁷⁵960 F.2d 318 (2d Cir. 1992).

⁵⁷⁶31 U.S.C. § 3730(e)(4)(A) provides that courts do not have jurisdiction over *qui tam* actions based upon public disclosure of fraud allegations in judicial or administrative proceedings, reports, audits, or investigations, or from the news media, unless the Attorney General brings the action or the person bringing the action is the original source. This provision bars actions based upon information already in the government's possession when an action is filed.

⁵⁷⁷975 F.2d 1412 (9th Cir. 1992).

⁵⁷⁸971 F.2d 548 (10th Cir. 1992).

⁵⁷⁹See 1990 *Contract Law Developments—The Year in Review*, Army Law., Feb. 1991, at 5.

statute⁵⁸⁰ required the DOD to establish procedures to ensure that a contractor obtains notice of a proposed reduction or suspension and an opportunity to respond.⁵⁸¹ The DFARS now includes provisions that permit DOD agencies to reduce or suspend payments to a contractor when the agency head or his delegate⁵⁸² finds "substantial evidence"⁵⁸³ that the contractor's request for advance, partial, or progress payments was fraudulent.⁵⁸⁴ Any reduction or suspension, however, must be reasonably commensurate with the anticipated loss to the government resulting from the fraud. Before approving a reduction or suspension, the determining official must consider several factors, including the effect upon an ongoing investigation, the government's anticipated loss, the contractor's overall financial condition, and the contractor's essentiality to the national defense. The new provision also requires the determining official to afford contractors notice and an opportunity to respond.

(b) *Air Force General Counsel Designated Suspension and Debarment Official.*—The Air Force has shifted its suspension and debarment authority from the Deputy Assistant Secretary for Acquisition to its General Counsel.⁵⁸⁵ In October 1991, the Navy reassigned its suspension and debarment authority from the Assistant Secretary for Shipbuilding and Logistics to its General Counsel.⁵⁸⁶ The suspension and debarment authority for all services now rests within their respective legal offices.

(c) *Department of Defense Proposes Uniform Debarment and Suspension Procedures.*—The DAR Council has proposed uniform suspension and debarment procedures for DOD debarring officials.⁵⁸⁷ The DAR Council apparently has patterned its version after Army and DLA procedures. Under the proposed rules, an agency must provide a contractor with a copy of the new procedures at the time of its suspension or proposed debarment. The proposed rules are intended to ensure that DOD agencies apply suspension and debarment practices uniformly.

2. *Agency Suspends Individual Bid Signatory for Contractor Misconduct.*—The Army suspended a contractor for

obtaining government contracts through bribery. The Army then imputed the suspended contractor's misconduct to an authorized signatory of the suspended contractor.⁵⁸⁸ The GAO, in *TS Generalbau GmbH*,⁵⁸⁹ upheld the suspension of the authorized signatory, despite the individual's contention that he lacked knowledge of the suspended contractor's misconduct. According to the GAO, the government reasonably concluded that the signatory, who was empowered to bind the suspended contractor under the contract, had access to information from which the government could infer misconduct. The Army, however, subsequently lifted the signatory's suspension when he persuaded the suspension official that he had no reason to know of the suspended contractor's misconduct.

3. *Unartful Plea Agreement Prevents Debarment.*—In *United States v. Gezen*,⁵⁹⁰ a defense contractor pleaded guilty to the unlawful importation of military hardware into the United States. The plea agreement provided that Mr. Gezen would not lose his import and export licenses and that he would not be subject to any regulatory sanctions as a result of the conviction. Later, the DLA proposed Mr. Gezen for immediate debarment as a result of his guilty plea. In response, Mr. Gezen moved to enforce the terms of the plea agreement, arguing that the agreement prohibited "the government" from revoking his licenses and from imposing any other sanction under the Code of Federal Regulations. The Fourth Circuit agreed. The court held that although the plea agreement had been between Mr. Gezen and the United States attorney, in consultation with the Commerce and State Departments, the agreement precluded the entire federal government from imposing any regulatory sanctions on the contractor, including debarment.

4. *Selective Debarment Rubs Court the Wrong Way.*—In *Kisser v. Kemp*⁵⁹¹ the Department of Housing and Urban Development (HUD) suspended sixteen officers of a company. After these officers resigned from the company, HUD lifted all suspensions, except for Mr. Kisser's. More than two years after the suspension, HUD initiated debarment proceedings against Mr. Kisser, but not against the other fifteen officers.

⁵⁸⁰ See National Defense Authorization Act for Fiscal Years 1991 and 1992, Pub. L. No. 101-510, § 836, 104 Stat. 1485, 1615 (amending 10 U.S.C. § 2307 (1988)).

⁵⁸¹ See 10 U.S.C. § 2307(e)(5).

⁵⁸² See *id.* § 2307(e) (providing only limited delegation authority).

⁵⁸³ "Substantial evidence" means information sufficient to support a reasonable belief that a particular act or omission has occurred. DFARS 232.173-2(b).

⁵⁸⁴ DAC 91-3, 57 Fed. Reg. 42,632 (1992) (effective Aug. 31, 1992) (amending DFARS 232.173).

⁵⁸⁵ Memorandum, Secretary of the Air Force, to General Counsel, subject: Delegation of Debarment and Suspension Authority (20 Nov. 1992).

⁵⁸⁶ DAC 91-1, 56 Fed. Reg. 67,212 (1991) (effective Dec. 31, 1991).

⁵⁸⁷ 57 Fed. Reg. 54,035 (1992) (proposing to amend DFARS pt. 209, and add DFARS app. H).

⁵⁸⁸ See FAR 9.406-5(b), 9.407-5 (providing that scope of a contractor's suspension may include any individual associated with contractor who participates in, knew of, or had reason to know of, suspended contractor's misconduct).

⁵⁸⁹ B-246034, Feb. 14, 1992, 92-1 CPD ¶ 189.

⁵⁹⁰ 952 F.2d 397 (4th Cir. 1992), reprinted in full, 1992 U.S. App. LEXIS 44.

⁵⁹¹ 786 F. Supp. 38 (D.D.C. 1992).

In reviewing the agency's action, the court followed *Caiola v. Carroll*⁵⁹² and noted that when "several officers in a suspended corporation are all facially susceptible to debarment, the agency must provide a reasoned explanation for its decision to debar only certain of them. Failure to do so constitutes unreasonable, arbitrary, and capricious action on the part of the agency." Because HUD offered no explanation for its selective debarment, the court found a likelihood that "HUD proceeded against Mr. Kissler simply because he had rubbed someone at the agency the wrong way." Accordingly, the court vacated the debarment.

C. Conflicts of Interest

1. *Office of Government Ethics Issues New Regulations.*— Approximately three years after President Bush signed EO 12674,⁵⁹³ the Office of Government Ethics (OGE) issued final rules on "Standards of Ethical Conduct for Employees of the Executive Branch."⁵⁹⁴ The rules establish standards relating to the receipts of gifts, the use of official position and time, and the use of government property and nonpublic information. In addition, the rules establish standards for dealing with employees whose financial interests conflict with their official duties. Other features include a de minimis exception that will allow employees to accept unsolicited gifts having an aggregate market value of twenty dollars or less per occasion, and no more than fifty dollars from any single source in a calendar year.⁵⁹⁵ The rules also permit government employees to accept, on a nonrecurring basis, food and refreshments offered during luncheon or dinner meetings if the market value of these goods does not exceed the above limitations.⁵⁹⁶ Each executive branch agency must maintain an ethics training program consisting of initial ethics orientation and annual ethics training.⁵⁹⁷

2. *Department of Defense Issues Acquisition-Related Ethics Videotape.*—To assist ethics counselors with standards of conduct training, the DOD is issuing a series of ethics train-

ing videotapes. Its second videotape, *Acquisition Alerts: DoD Ethics Issue Two*, focuses on the acquisition work force. The video raises issues that should heighten awareness in the acquisition community to some of the legal, regulatory, and ethical pitfalls that persons who manage government contracts, or who have contacts with contractors, often face during the acquisition process. The video consists of a series of vignettes pertaining to various issues of integrity, honesty, and fairness in the acquisition process. Copies of the videotape and an instructor's guide are available from major commands.

3. *Agencies to Notify Office of Government Ethics of Conflict of Interest Statute Violations.*— Agencies must report to the Attorney General any information concerning a violation of Title 18 of the United States Code involving government employees.⁵⁹⁸ Agencies also must notify the OGE when they refer a violation to the Justice Department.⁵⁹⁹ Army ethics counselors must forward notice through their major commands to the Army Standards of Conduct Office.⁶⁰⁰

4. *Apparent Conflict Does Not Disqualify Bidder if No Actual Impropriety Found.*—Normally, the government may preclude an offeror from receiving a contract award if the offeror apparently obtained an unfair competitive advantage.⁶⁰¹ In *FHC Options, Inc.*,⁶⁰² however, the GAO held that a contracting agency could not disqualify a firm for an apparent conflict of interest after the agency had conducted an internal investigation and the evidence indicated that no wrongdoing occurred.

The Claims Court reached a similar result in *Joseph L. DeClerk and Associates, Inc. v. United States*.⁶⁰³ The court held that occasional social contacts between procurement officials and employees of the incumbent contractor were insufficient to sustain a protest when no evidence indicated that the contacts affected the procurement adversely.

⁵⁹²851 F.2d 395 (D.C. Cir. 1988).

⁵⁹³This EO directed the Office of Government Ethics to establish a single, comprehensive, and clear set of executive branch standards of conduct that would be objective, reasonable, and enforceable.

⁵⁹⁴57 Fed. Reg. 35,006 (1992) (effective Feb. 3, 1993) (to be codified at 5 C.F.R. pt. 2635).

⁵⁹⁵5 C.F.R. § 2635.204(a). Under this exception, Army plant representatives assigned to duty at a facility operated by an Army contractor may accept the contractor's gift of a magazine subscription worth \$20. Procurement officials should be aware that the \$10 limitation under the procurement integrity provisions still applies to them. See 41 U.S.C. § 423.

⁵⁹⁶5 C.F.R. § 2635.202(c).

⁵⁹⁷57 Fed. Reg. 11,886 (1992) (revising 5 C.F.R. pt. 2638).

⁵⁹⁸See 28 U.S.C. § 535. This includes possible violations of the following statutes: 18 U.S.C. § 203 (compensation to government employees in matters affecting government); *id.* § 205 (prosecuting or assisting in prosecution of claim against government); *id.* §§ 207, 208 (acts affecting personal financial interest, including postemployment restrictions); *id.* § 209 (compensation for government service from sources other than government).

⁵⁹⁹See 5 C.F.R. § 2638.603. Agencies should use *Office of Gov't Ethics Form 202*, Notification of Conflicts of Interest Referral (Jan. 1992).

⁶⁰⁰See THE ETHICS COUNSELOR, Apr. 1992, at 2.

⁶⁰¹See *Compliance Corp. v. United States*, 22 Cl. Ct. 193, 9 FPD ¶ 169 (1990), *aff'd*, 960 F.2d 157, 11 FPD ¶ 39 (Fed. Cir. 1992).

⁶⁰²B-246793.3, Apr. 14, 1992, 92-1 CPD ¶ 366.

⁶⁰³26 Cl. Ct. 35, 11 FPD ¶ 53 (1992).

Compare these two cases with the GAO's decision in *Childers Service Center*,⁶⁰⁴ which upheld the termination of a contract based on conflicts of interest. In *Childers Service Center*, a government employee with access to procurement-sensitive information discussed the procurement with her spouse. At the time of these discussions, the spouse was seeking employment with Childers Service Center, which he later obtained. Further, the evidence indicated that the government employee and her spouse concealed material facts. This acquisition was tainted with actual wrongdoing not present in the other two protests, leading to a contrary result.

5. *GAO Bid Protest Authority Does Not Include Resolution of Postemployment Conflicts of Interest Issues.*—In *Central Texas College*,⁶⁰⁵ a school protested the Army's award of a contract for the development, administration, and management of job assistance centers. The protestor argued that the Army should have excluded the awardee, Resource Consultants, Inc. (RCI), from competition because one of RCI's employees, Mr. Jenkins, had violated the procurement integrity restrictions as a result of his duties with the Army and his later work with RCI in preparing its proposal.⁶⁰⁶ Specifically, Central Texas College asserted that, before Mr. Jenkins' retirement from the Army and his subsequent employment with RCI, he had supervised the personnel responsible for the current solicitation and an earlier, related solicitation. The Comptroller General refused to hear the protest, however, ruling that its jurisdiction did not extend to the interpretation or enforcement of postemployment restrictions. The Comptroller General noted that the procuring agency and the DOJ are responsible for enforcement and that GAO merely determines whether any action by a former government employee may have afforded an awardee an unfair competitive advantage. The Comptroller General found that although Mr. Jenkins was familiar with the work involved, he was not privy to the contents of any proposals or any other inside information that would have allowed RCI an undue advantage.

6. *Federal Circuit Excludes Bidder for Industrial Espionage.*—In a nonprecedential decision,⁶⁰⁷ the Federal Circuit found that "[a] bidder who may have formulated its proposal using proprietary information from a competitor compromises the system of full and open competition." In *Compliance Corp. v. United States*,⁶⁰⁸ the Navy disqualified Compliance after an investigation revealed that the firm had engaged in industrial espionage. Compliance argued that the Navy could

not exclude it from competition because the alleged misconduct had not involved a government conflict of interest. The court was unconvinced. It found that, under these circumstances, the agency properly barred Compliance from the competition because disregarding the allegations of misconduct would have been contrary to the Navy's mandate of ensuring full, fair, and open competition under the CCA. The court also opined that the mere appearance of impropriety was sufficient cause for disqualification.

D. Board Orders Resolicitation to Cure Organizational Conflicts of Interests Problems.

The Air Force solicited offers for systems engineering, installation, and integration (SEII) of its local area networks (LAN). Under the solicitation, the contractor would provide the design, integration, installation, testing, warranty, maintenance, and system administration necessary to ensure interoperability of government-furnished equipment in a LAN environment. The solicitation contained a sample task that required offerors to propose design and engineering solutions and to explain their analyses. The task was based on an actual LAN installed by Electronics Data Systems Corp. (EDS) under the Air Force's Unified Local Area Network Architecture (ULANA) requirements contract. The solicitation also permitted vendors under the ULANA contract to compete and offer products from the ULANA contract to satisfy the SEII requirements. The Air Force awarded the LAN SEII contract to EDS. Other vendors subsequently protested that EDS had obtained an unfair competitive advantage because it was the contractor for the ULANA requirement. In *Network Solution, Inc. v. Department of the Air Force*,⁶⁰⁹ the GSBICA agreed, finding that the Air Force's "action in basing the sample task on a task EDS performed . . . enabled EDS but no other offeror to be familiar with at least some aspect of the problem offerors were to solve in their proposals"⁶¹⁰ and thereby allowed EDS an advantage not afforded to others. The board also noted that EDS's competitors did not receive, as promised by the government, information that EDS possessed concerning other government contracts. As a result, the board directed the Air Force to terminate the EDS contract and to resolicit to neutralize the organizational conflict of interest.

E. Contracting for Information Resources.

Relatively few changes have arisen in the area of acquisition of information resources over the past year. Most new developments, however, have concentrated on bid protest procedures.

⁶⁰⁴B-246210, June 17, 1992, 92-1 CPD ¶ 524.

⁶⁰⁵B-245233.4, Jan. 29, 1992, 71 Comp. Gen. 164, 92-1 CPD ¶ 121.

⁶⁰⁶See 41 U.S.C. § 423(a), (b), (f) (prohibiting a procurement official, during the conduct of a federal procurement, from engaging in employment discussions with any competing contractor and prohibiting a procurement official from participating on behalf of a contractor in negotiations leading to a contract for such procurement or in performance of such contract, within two years of the last date that the official was involved personally and substantially in the procurement action).

⁶⁰⁷*Compliance Corp. v. United States*, 960 F.2d 157, 11 FPD ¶ 39 (Fed. Cir. 1992) (not citable as precedent per Fed. Cir. R. 47.8).

⁶⁰⁸22 Cl. Ct. 193, 9 FPD ¶ 169 (1990).

⁶⁰⁹GSBICA No. 11498-P, May 18, 1992, 92-3 BCA ¶ 25,083, 1992 BPD ¶ 131.

⁶¹⁰*Id.* at 125,045.

1. *Acquisitions Subject to the Brooks Act.*—In 1991, the GSBCA adopted the guidance stated in *Federal Information Resources Management Regulation (FIRMR) Bulletin A-1*, as an aid in determining which acquisitions are covered by the Brooks Act.⁶¹¹ The GSBCA has continued to follow the guidance in *FIRMR Bulletin A-1* but has applied it less broadly than in previous decisions. The key question concerns the threshold inquiry in *FIRMR Bulletin A-1*. Specifically, when are automatic data processing equipment (ADPE) or ADPE services considered contract deliverables? In *CSC Credit Services, Inc. v. Department of Veterans Affairs*,⁶¹² the GSBCA applied a test of “primary deliverable” to a debt collection service enunciated in a solicitation. The board concluded that none of the primary deliverables were ADPE or ADPE services, and, after considering other questions in *FIRMR Bulletin A-1*, dismissed the protest. By focusing on the “primary deliverables,” the board left open the possibility that “secondary deliverables” would not be acquisitions subject to the Brooks Act.

In *Best Power Technology Sales Corp.*,⁶¹³ the GSBCA held that acquisitions of uninterruptable power supplies (UPS) are covered by the Brooks Act. The board held the UPS acquisitions proposed by Best Power Technology Sales were “ancillary equipment” designed for exclusive use with ADPE. This decision contrasts with the decision in *Liebert Corp.*⁶¹⁴ In that case, the board held that the UPS acquisitions were neither for ancillary equipment, nor for ADPE. The critical distinction between *Best Power* and *Liebert* is that Best Power’s equipment exchanged information with the supported computer while the equipment in *Liebert* did not.

In *Franklin Brass Manufacturing Co. v. General Services Administration*,⁶¹⁵ the GSBCA dismissed a protest against a solicitation for toilet paper holders. In a telephonic conference, the protestor’s representative admitted reluctantly that the acquisition did not involve ADPE and requested dismissal of the protest.

2. *Warner Amendment Acquisitions.*—*Integrated Systems Group, Inc. v. Department of the Air Force*⁶¹⁶ addressed the issue of whether ordering from a GSA multiple award schedule waived the Warner Amendment.⁶¹⁷ The GSBCA said that it did not; therefore, defense agencies may order equipment and services covered by the Warner Amendment from GSA schedules without subjecting themselves to the bid protest jurisdiction of the GSBCA.

In *Lockheed/MDB v. Department of the Navy*,⁶¹⁸ the GSBCA examined whether the acquisition of computer disk drives for an antisubmarine warfare operations computer system involved command and control of military forces. Reviewing the intended use of the drives—not the commercial nature of the items—the board found that the drives and the system represented the “quintessential nature of command and control of military forces—providing automated systems to move troops where they are needed to fulfill military missions.” The board also concluded that the drives were critical to the direct fulfillment of a military mission, applying the test of “related in an intimate and crucial fashion to important military missions.”

3. *Covered Agencies.*—Given the broad definition of “federal agency,”⁶¹⁹ few federal entities are not covered by the Brooks Act. One decision finding an agency not covered is *U.S. Sprint Communications Co., Limited Partnership*.⁶²⁰ In that decision, the GSBCA held that individual Federal Reserve banks are not federal agencies because they actually are privately owned entities of their member banks.

4. *Schedule Contracts.*—In *Federal Support Group, Inc. v. Department of the Army*,⁶²¹ the GSBCA noted, but did not express an opinion on, the conflict between the CBD publication threshold stated in the *FIRMR* and the threshold in the *FAR*.⁶²² In response to a board request, the GSA opined that the *FIRMR* threshold of \$50,000 is the appropriate standard because it implements the general authority provided in 40

⁶¹¹ See ST Sys. Corp., GSBCA No. 11207-P, 91-3 BCA ¶ 24,201, 1991 BPD ¶ 154. General Servs. Admin., *FIRMR Bulletin A-1*, subject: *FIRMR Applicability* (31 Jan. 1991), provides guidance to agencies concerning which acquisitions are subject to the *FIRMR* and 40 U.S.C. § 759 (Brooks Act). Attachment D to the bulletin contains a methodology for analyzing the *FIRMR* and Brooks Act applicability.

⁶¹² GSBCA No. 11414-C, 92-2 BCA ¶ 24,778, 1992 BPD ¶ 47.

⁶¹³ GSBCA No. 11400-P, 92-1 BCA ¶ 24,625, 1991 BPD ¶ 318.

⁶¹⁴ GSBCA No. 11300-P, 91-3 BCA ¶ 24,330, 1991 BPD ¶ 196.

⁶¹⁵ GSBCA No. 11690-P, 92-2 BCA ¶ 24,771, 1992 BPD ¶ 42.

⁶¹⁶ GSBCA No. 11955-P (Aug. 18, 1992), ___ BCA ¶ ___, 1992 BPD ¶ 216.

⁶¹⁷ 10 U.S.C. § 2315 (exempting from the Brooks Act DOD acquisitions of ADPE for intelligence, cryptologic, command and control, and mission-critical applications).

⁶¹⁸ GSBCA No. 12097-P (Nov. 13, 1992), ___ BCA ¶ ___, ___ BPD ¶ ___.

⁶¹⁹ See 40 U.S.C. § 742(b).

⁶²⁰ GSBCA No. 11490-P, 92-1 BCA ¶ 24,622, 1991 BPD ¶ 330.

⁶²¹ GSBCA No. 11797-P, 92-3 BCA ¶ 25,079, 1992 BPD ¶ 129.

⁶²² Compare Fed. Info. Resource Management Reg. 201-39.501-2 (\$50,000) with FAR 5.101(a)(1) (\$25,000).

U.S.C. § 759. The FAR provision implements two separate statutory provisions requiring publication of orders in excess of the statutory threshold.⁶²³ Until a protestor raises the divergent regulatory provisions and obtains a decision on the merits, agencies must choose which threshold to apply to orders for ADPE under GSA multiple award schedule contracts.

In *Integrated Systems Group, Inc.*,⁶²⁴ the agency synopsisized its intent to issue an order under a nonmandatory multiple award schedule contract. In response to the synopsis, a schedule contractor reduced its schedule price. After factoring together the administrative costs of competing the requirement and the prices tendered in response to the CBD notice, the agency concluded reasonably that the schedule contract afforded the lowest overall cost. The GSBICA held that award at the reduced schedule price was proper and that the agency was not required to inform other vendors of the reduced schedule price or allow them to modify their responses.

5. *Conflicts Between the Defense Federal Acquisition Regulation Supplement and the Federal Information Resources Management Regulation.*—*Defense Acquisition Circular 91-3*⁶²⁵ amended the DFARS to clarify the relationship between the FIRMR and DFARS part 239. Part 239.001(3) of the DFARS provides that the FIRMR takes precedence over DFARS part 239 for acquisitions subject to the Brooks Act. Although not stated expressly, the FIRMR presumably does not take precedence over provisions based on statute.

F. Contracting for Services

1. *Moratorium on Service Contracts.*—Congress has prohibited the DOD from awarding any contract for the performance of a commercial activity in which the contract results from a cost comparison study conducted by the DOD under OMB Circular A-76.⁶²⁶ The prohibition, however, does not apply to contracts awarded before FY 1993, or to the renewal of those contracts. This prohibition expires September 30, 1993.

2. *Inherently Governmental Functions.*—The Office of Federal Procurement Policy (OFPP) issued *Policy Letter 92-*

1,⁶²⁷ defining inherently governmental functions. It classifies these functions as either the discretionary exercise of governmental authority, or as monetary transactions. Appendix A to the letter gives discrete examples of inherently governmental functions, including several duties related to contracting. Agencies should consider this policy letter in reviewing scopes of work and task orders under existing contracts.

3. *Federally Funded Research and Development Centers.*—The GAO has explained the role of Federally Funded Research and Development Centers (FFRDCs) in performing government functions.⁶²⁸ It details their statutory bases and current controls on their use, including *OFPP Policy Letter 89-1*.⁶²⁹ The GAO enforced the restrictions contained in *OFPP Policy Letter 89-1* in *Energy Compression Research Corp.*⁶³⁰ in which an FFRDC teamed with a commercial company to propose on an agency research project. The teaming arrangement resulted in the FFRDC competing improperly with commercial organizations.

G. Government Information Practices

1. Release of Source Selection Material.—

(a) *Court Tailors Release Determination Carefully.*—In *Brownstein, Zeidman, and Schomer v. Department of the Air Force*,⁶³¹ an unsuccessful offeror sought release under the FOIA⁶³² of a variety of source selection documents. The government asserted the deliberative process exemption⁶³³ for withholding the information. The court ordered the release of the proposal evaluation guide because it contained only standards for evaluating the proposals, not the evaluations themselves. It also released a portion of the source selection evaluation board report that detailed components offered by each vendor. The court, however, did agree with the agency that portions of the source selection documents containing predecisional analyses or recommendations were exempt from release.⁶³⁴

(b) *Court Frees Agency from Vaughn Index Requirement.*—In *MCI Communications Corp. v. General Services Administration*,⁶³⁵ the court accepted a generic description of source selection documents accompanied by affidavits describ-

⁶²³ See 15 U.S.C. § 637(e)(1); 41 U.S.C. § 416(a)(1)(A).

⁶²⁴ GSBICA No. 11494-P, 92-1 BCA ¶ 24,621, 1991 BPD ¶ 335.

⁶²⁵ 57 Fed. Reg. 42,626 (1992) (effective Aug. 31, 1992).

⁶²⁶ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 312, 106 Stat. 2315, 2365 (1992).

⁶²⁷ Office of Fed. Procurement Policy, *Policy Letter 92-1*, subject: *Inherently Governmental Functions* (23 Sept. 1992).

⁶²⁸ See Committee on Governmental Affairs, B-244564, 71 Comp. Gen. 155 (1992).

⁶²⁹ See 49 Fed. Reg. 14,462 (1984) (implemented by FAR 35.017).

⁶³⁰ B-243650.2, Nov. 18, 1991, 91-2 CPD ¶ 466.

⁶³¹ 781 F. Supp. 31 (D.D.C. 1991) (opinion and order dated Dec. 20, 1991).

⁶³² 5 U.S.C. § 552.

⁶³³ *Id.* § 552(b)(5).

⁶³⁴ The court also released modified unit prices contained in the contract, rejecting the argument that disclosure would cause the awardee competitive harm. The court found too speculative the argument that these data would permit other contractors to calculate the awardee's profit margin and underbid it on future contracts.

⁶³⁵ No. 89-0746 (HHG) (D.D.C. Mar. 25, 1992).

ing their contents in lieu of a detailed *Vaughn v. Rosen*⁶³⁶ index. Departing from the decision in *Brownstein, Zeidman, and Schomer*, the court allowed the government to withhold the source selection plan because it contained "the methodology for predecisional fact gathering."⁶³⁷ Additionally, the court denied cross-motions for summary judgment based upon the confidential business information exemption,⁶³⁸ finding that this exemption always will engender disputes over material facts.

2. *Reverse Freedom of Information Act Suit: Decision to Release Pricing Data Was Reasonable.*—In *General Dynamics Corp. v. Department of the Air Force*,⁶³⁹ the court rejected the plaintiff's attempt to block the release of its option pricing formula contained in an Air Force contract. After considering the objections to the release of the formula to a competitor, the government determined that the information was not confidential business information and was, therefore, releasable. The court held that the agency had considered the plaintiff's arguments carefully and that the decision to release the pricing formula was reasonable. During the course of litigation, the court also denied the plaintiff's attempt to supplement the administrative record because the record was not so inadequate as to frustrate judicial review.

3. *Jurisdiction to Review Freedom of Information Act Requests: Board Refuses to Rule on Freedom of Information Act Claim.*—In *Siska Construction Co.*,⁶⁴⁰ the appellant alleged a wide range of discovery abuses by government counsel. Among these abuses was the allegation that counsel failed to comply with the appellant's FOIA request. The VABCA refused to grant the appellant's motion to dismiss based on the alleged FOIA violation, holding that it lacked jurisdiction to consider this argument.

H. Intellectual Property Developments

Few intellectual property developments have occurred over the past year. Two advisory committees studied intellectual property issues before recommending changes in the intellectual property statutes and regulations to reconcile widely diverging interests. Pending review of these recommendations, Congress and the DOD made no significant statutory or regulatory changes.

1. *Patents.*—In *de Graffenried v. United States*,⁶⁴¹ an agency contracted for a product that infringed on de Graf-

fenried's patent before expiration of the patent term. The contractor, however, did not deliver the infringing devices until after the patent expired. The court held that merely contracting for an infringing device does not create liability. Furthermore, the manufacturer had not brought the devices to the stage of operable assembly before expiration of the patent term. Accordingly, the government was not liable for infringement.

*Siemens Aktiengesellschaft v. United States*⁶⁴² examined whether a classified proposal to the government triggered the on-sale bar under 37 U.S.C. § 102(b).⁶⁴³ The government defended against Siemens Aktiengesellschaft's (Siemens) claim for infringement, alleging the patent was invalid because the claimed invention was offered for sale to the government more than one year before Siemens filed for patent protection. The alleged sale was a classified proposal to perform research and development that mentioned the invention as one possible method of performance. The government relied on a Federal Circuit case as dispositive of the issue.⁶⁴⁴ The Claims Court, however, distinguished that decision by observing that, unlike the transaction under review in the instant case, the sale reviewed by the Federal Circuit was publicly available. The court also noted that the classified proposal did not describe the invention with any degree of specificity. Therefore, the classified proposal was not a public sale barring issuance of a valid patent.

2. *Technical Data Rights, Trade Secrets, and Proprietary Data.*—In *Sentel Corp.*,⁶⁴⁵ the agency inadvertently disclosed "proprietary information" provided by a prospective 8(a) contractor that had sought a sole source contract. After concluding that Sentel's submission was technically unacceptable, the agency inadvertently included the information in a solicitation for the same requirement. Sentel protested the disclosure immediately and sought a directed sole source award. The GAO noted that it previously had recommended such a remedy in appropriate cases. In the protested solicitation, however, substantial doubt had arisen over the proprietary nature of the information, the disclosure was inadvertent, and the agency made no use of the disclosed material. The GAO suggested that Sentel seek compensation in the Claims Court if it was damaged by the wrongful disclosure.

In two other GAO protests, offerors submitted "proprietary information" to the government. In *Service and Sales, Inc.*,⁶⁴⁶ the offeror submitted engineering drawings marked with a

⁶³⁶484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

⁶³⁷See *Ginsburg, Feldman, & Bress v. Federal Energy Admin.*, 591 F.2d 717, 733 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979).

⁶³⁸See 5 U.S.C. § 552(b)(4).

⁶³⁹No. 88-3272 (HHG), (D.D.C. Mar. 24, 1992).

⁶⁴⁰VABCA No. 3470, 92-3 BCA ¶ 25,150.

⁶⁴¹25 Cl. Ct. 209, 11 FPD ¶ 15 (1992).

⁶⁴²26 Cl. Ct. 980, 11 FPD ¶ 110 (1992).

⁶⁴³An inventor may not receive a patent for an invention that is sold or offered for sale more than one year before the inventor files for a patent.

⁶⁴⁴*RCA Corp. v. Data Gen. Corp.*, 887 F.2d 1056 (Fed. Cir. 1989).

⁶⁴⁵B-244991, Dec. 6, 1991, 91-2 CPD ¶ 519.

⁶⁴⁶B-247673, June 29, 1992, 92-1 CPD ¶ 545.

competitor's restrictive legends to demonstrate that its offered product was equivalent to the specified brand name. Absent any evidence that it properly could use and disclose the drawings, the agency correctly rejected the offer. The GAO, however, did recommend that the agency loan the protestor an acceptable part for reverse engineering. In *Concept Automation, Inc. v. General Accounting Office*,⁶⁴⁷ the protestor marked its sealed bid on a GAO computer acquisition with a restrictive legend, which the contracting officer ignored. The GSBICA, citing GAO precedent, held that the agency properly rejected the sealed bid as nonresponsive.

The government also may possess proprietary information. In *Technology Applications and Service Co.*,⁶⁴⁸ the agency did not disclose historical cost data for government personnel performing the solicited function. The GAO concluded that the government's position was proper because it was not required to provide data giving the private sector a competitive advantage over the government activity.

I. International Acquisitions

1. *Recoupment of Nonrecurring Costs*.—In June 1992, the defense industry attained a long-sought goal when the President directed the DOD to refrain from recouping nonrecurring costs associated with the sales of products developed with DOD assistance.⁶⁴⁹ Recoupment of nonrecurring costs for major defense equipment is required by statute.⁶⁵⁰ The DOD, however, had extended recoupment to all sales. It implemented the President's order with an interim rule effective June 26, 1992.⁶⁵¹ The Under Secretary of Defense (Acquisition) abolished recoupment under previously awarded contracts by exercising his authority under Public Law 85-804.⁶⁵² As a result, only statutory recoupment on sales of major defense equipment remains in effect for government contractors.

2. *Claims on International Armaments Programs*.—Congress has provided the DOD temporary authority to include noncontract claims in the cost sharing provisions for international armaments programs.⁶⁵³ Accordingly, participating countries will share the costs associated with these claims

under the same arrangements applicable to the sharing of other program costs. In the conference report,⁶⁵⁴ the conferees included an example of a routine tort claim, although the authority is not limited to such claims. Congress intends to review the DOD's experience under this authority for two years before deciding whether to extend the authorization or make it permanent.

3. *Host Nation Support*.—Congress expanded the scope of cooperative logistic support under 10 U.S.C. §§ 2341-50.⁶⁵⁵ The changes relax the geographic restrictions applicable to acquisition of mutual support. Therefore, DOD may now acquire logistic support from a North Atlantic Treaty Organization member-nation or organization to support the armed forces anywhere outside the United States. The DOD also may exceed the annual ceiling on expenditures for logistic support whenever the United States Armed Forces are engaged in hostilities. Congress also added Kuwait to the list of countries from whom the DOD may accept cash contributions for maintaining United States forces in the host country.⁶⁵⁶

J. Bankruptcy

1. *Nonresponsibility Determination Based on Earlier Bankruptcy Was Reasonable*.—Five months before the agency issued the solicitation in *Harvard Interiors Manufacturing Co.*,⁶⁵⁷ the protestor filed for protection under the Bankruptcy Code.⁶⁵⁸ Although Harvard Interiors Manufacturing (Harvard) was the low offeror, the contracting officer found it nonresponsible based on a negative financial preaward survey. In its protest, Harvard asserted that its financial status before filing for bankruptcy was irrelevant to its present responsibility. The firm argued that the agency should have given substantial weight to Harvard's unconfirmed⁶⁵⁹ reorganization plan and unaudited projected financial statements in determining its present financial capability. The GAO, however, found that the reorganization plan and unaudited financial statements, by themselves, did not resolve reasonable concerns about Harvard's financial ability. Accordingly, the agency's nonresponsibility determination was a reasonable exercise of its business judgment.

⁶⁴⁷GSBICA No. 11688-P, 92-2 BCA ¶ 24,937, 1992 BPD ¶ 95.

⁶⁴⁸B-246216, Feb. 25, 1992, 92-1 CPD ¶ 225.

⁶⁴⁹57 Fed. Cont. Rep. (BNA) 941 (June 22, 1992).

⁶⁵⁰22 U.S.C. § 2761(e)(1)(c).

⁶⁵¹See 57 Fed. Reg. 29,619 (1992).

⁶⁵²58 Fed. Cont. Rep. (BNA) 496 (Oct. 26, 1992).

⁶⁵³National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, § 843, 106 Stat. 2315, 2468 (1992).

⁶⁵⁴H. REP. NO. 996, 102d Cong., 2d Sess. 733 (1992).

⁶⁵⁵National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484, § 1312, 106 Stat. 2315, 2547 (1992).

⁶⁵⁶*Id.* § 1305, 106 Stat. at 2546. The provisions governing acceptance of burden-sharing contributions is set forth in the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, § 1045, 105 Stat. 1290, 1465 (1991). This authority expires at the end of FY 1993.

⁶⁵⁷B-247400, May 1, 1992, 92-1 CPD ¶ 413.

⁶⁵⁸The protestor filed its petition under chapter 11 of the Bankruptcy Code. See 11 U.S.C. §§ 1101-1174.

⁶⁵⁹Reorganization plans must be approved by creditors and the bankruptcy court. *Id.* § 1141.

After losing at the GAO, the contractor sought review of the agency's action in district court. In *Harvard Interiors Manufacturing Co. v. United States*,⁶⁶⁰ the court upheld the nonresponsibility determination. While the contracting officer's determination might have been more sophisticated, the contractor failed to prove that the decision lacked a rational basis. Accordingly, the court refused to substitute its judgment for that of the contracting officer.⁶⁶¹

2. *Supreme Court Denies Certiorari in Inslaw*.—The Court denied certiorari in Inslaw's long-running dispute with the DOJ concerning computer software rights. The Court let stand the ruling that the automatic stay provisions of the Bankruptcy Code do not apply to property in the possession of the government under a contract claim of entitlement asserted prior to the bankruptcy petition.⁶⁶²

3. *Debtor's Continued Performance Does Not Imply Assumption of Contract*.—In *In re University Medical Center*,⁶⁶³ a debtor continued to perform a contract after filing for bankruptcy but did not assume or reject the contract formally in accordance with the Bankruptcy Code.⁶⁶⁴ The government argued that continued performance operated as constructive or implied assumption of the executory portion of the contract and obviated the need for court approval. In rejecting this position, the court held that assumption required the express approval of the bankruptcy court. If the government had doubted the debtor's intention, it could have moved to require assumption or rejection of the contract.⁶⁶⁵ In this case, the government failed to ensure that the debtor assumed or rejected the contract formally; therefore, the government could not assert terms of the contract that would have allowed it to recover prepetition overpayments. Absent an assumed contract, the government became a general, unsecured creditor. The court's opinion also includes a good discussion of the distinctions between setoffs under the Bankruptcy Code and the common-law doctrine of recoupment.

4. *Default Termination Void Unless Contractor Receives Notice Before Filing for Bankruptcy*.—The ASBCA voided a termination for default mailed to a contractor the same day the contractor filed a bankruptcy petition. In *Communications Technology Applications, Inc.*,⁶⁶⁶ the board held that the automatic stay provisions of the Bankruptcy Code nullified the termination for default.⁶⁶⁷ When a contracting officer learns of a bankruptcy filing is of no legal significance.⁶⁶⁸ A default termination is an adverse action subject to the automatic stay. It is void and not merely voidable, unless the contractor clearly received the termination before the contractor files a bankruptcy petition. In a collateral matter, the board dismissed a termination for convenience action⁶⁶⁹ because the termination for default, upon which the convenience termination claim was predicated, was void.⁶⁷⁰

5. *Equal Access to Justice Act Attorneys' Fees*.—

(a) *Prevailing Party's Attorney Left Penniless*.—A contractor prevailed in litigation against the Army at the ASBCA and applied for attorneys' fees under the EAJA.⁶⁷¹ The contractor recovered, but because it had filed for bankruptcy, the government paid the EAJA award directly to the contractor's trustee in bankruptcy. The trustee, however, did not pay the contractor's ASBCA litigation attorney because the attorney was an unsecured creditor. The attorney, on his own behalf, then unsuccessfully sued for the fees in the Claims Court. On appeal, the Federal Circuit, in *FDL Technologies, Inc. v. United States*,⁶⁷² held that the EAJA requires payment to the prevailing party and rejected the argument that the act required payment directly to FDL Technology's attorney.

(b) *Legal Representative Is Not an Attorney*.—In *ERG Consultants, Inc.*,⁶⁷³ appellant's trustee in bankruptcy appointed ERG Consultants' president, a nonattorney, as its legal representative to pursue the appeal on behalf of the debtor. The board found no legal distinction between a *pro se* appellant and this trustee, who was appointed as "legal representative."

⁶⁶⁰798 F. Supp. 565 (E.D. Mo. 1992).

⁶⁶¹In dicta, the court noted that the plaintiff was not seeking review of the GAO decision. The court considered the Comptroller General decision as expert testimony. *Id.* at 570.

⁶⁶²*United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 913 (1992).

⁶⁶³*University Medical Ctr. v. Sullivan (In re University Medical Ctr.)*, 973 F.2d 1065 (Bankr. 3d Cir. 1992).

⁶⁶⁴*See* 11 U.S.C. § 365(a).

⁶⁶⁵*See id.* § 365(d)(2).

⁶⁶⁶ASBCA No. 41573, 92-3 BCA ¶ 25,211.

⁶⁶⁷11 U.S.C. § 362.

⁶⁶⁸The record is silent on whether the government mailed the termination before or after the contractor filed its petition. The record states clearly that the contractor received the termination two days after it filed its petition.

⁶⁶⁹The bankruptcy court ruled that an appeal from the contracting officer's refusal to issue a decision converting the default termination to a termination for convenience is not subject to the automatic stay. The bankruptcy court authorized the trustee to pursue this appeal at the ASBCA.

⁶⁷⁰In this case, the termination for default was a nullity. Accordingly, the ASBCA dismissed the appeal seeking conversion of the default to a convenience termination without prejudice. *Cf. Aerosonic Corp.*, ASBCA No. 42696, 91-3 BCA ¶ 24,214 (appeal of a termination for convenience claim is premature before the validity of the termination for default is litigated).

⁶⁷¹5 U.S.C. § 504.

⁶⁷²967 F.2d 1578, 11 FPD ¶ 83 (Fed. Cir. 1992).

⁶⁷³VABCA No. 3346E (Sept. 8, 1992), ___ BCA ¶ ____.

Because a *pro se* litigant's expenses are not recoverable under the EAJA, the VABCA refused to award attorneys' fees to the appellant, notwithstanding that ERG Consultants was a prevailing party.

6. *Qui Tam Attorney Fees: Relator's Action for Fees Not Barred.*—The government intervened in an Act⁶⁷⁴ *qui tam* action and then settled it with the contractor. A bankruptcy court, in which the contractor had filed previously, approved the settlement. The relator then commenced an action in the district court to quantify its fees and expenses. The contractor objected arguing that the Bankruptcy Code's automatic stay provision prohibited the entry of a money judgment against the debtor. In *United States ex. rel. Marcus v. NBI, Inc.*,⁶⁷⁵ the court held that the automatic stay did not bar governmental police or regulatory actions⁶⁷⁶ and that by extension, the relator's action was a part of the government's enforcement power. The relator, therefore, could proceed with his action to the entry of judgment.

7. *Update of 1991 Year In Review Cases.*—

(a) *Government Contractor Defense Limited to Military Contracts*—In 1991, we reported⁶⁷⁷ a bankruptcy court had extended the government contractor defense to a nonmilitary contract.⁶⁷⁸ This year, the district court reversed the bankruptcy court, holding that the government contractor defense, as set forth in *Boyle v. United Technologies Corp.*,⁶⁷⁹ is limited to military contracts.⁶⁸⁰

(b) *Government Has Unsecured Interest in Overfunded Pension.*—In 1991, a bankruptcy court ruled that the sale of a subsidiary by a prime contractor was the closing of a segment that triggered a refund to the government of excess payments to a defined pension plan.⁶⁸¹ In *In re Bicoastal Corp.*,⁶⁸² the bankruptcy court recently ruled that whether created by the FAR or the CSA, the government's interest in those overpayments is that of a general, unsecured creditor. Even if considered a statutory lien, such an interest is subordinate to the interests of a good faith purchaser for value.

⁶⁷⁴31 U.S.C. § 3129.

⁶⁷⁵142 B.R. 1 (D.D.C. 1992).

⁶⁷⁶See 11 U.S.C. § 362(b)(4); *In re Commonwealth Cos.*, 913 F.2d 518 (8th Cir. 1990) (automatic stay does not bar FCA cause of action, but does stay enforcement of money judgment that would give the government an advantage over other claimants in bankruptcy proceeding).

⁶⁷⁷1991 *Contract Law Developments—The Year in Review*, *supra* note 14, at 61.

⁶⁷⁸*In re Chateaugay Corp.*, 132 B.R. 818 (Bankr. S.D.N.Y. 1991).

⁶⁷⁹487 U.S. 500 (1988).

⁶⁸⁰See *In re Chateaugay Corp.*, No. 92-CIV-130 (Bankr. S.D.N.Y., Oct. 15, 1992).

⁶⁸¹*In re Bicoastal Corp.*, 124 B.R. 593 (Bankr. M.D. Fla. 1991).

⁶⁸²136 B.R. 290 (Bankr. M.D. Fla. 1992).

⁶⁸³57 Fed. Reg. 14,148 (1992) (effective Apr. 17, 1992) (codified at 48 C.F.R. ch. 99); see FAC 90-12, 57 Fed. Reg. 43,495 (1992) (incorporating recodification into FAR).

⁶⁸⁴See 48 C.F.R. § 9903.201-1(b)(2).

⁶⁸⁵26 Cl. Ct. 662, 11 FPD ¶ 111 (1992).

⁶⁸⁶See *Hercules Inc. v. United States*, 22 Cl. Ct. 301, 10 FPD ¶ 7 (1991).

⁶⁸⁷ASBCA No. 31359, 92-1 BCA ¶ 24,698, as modified, 92-2 BCA ¶ 24,922.

K. *Cost Accounting and Cost Principles.*

Cost issues are assuming increasing importance for two reasons. First, as agencies terminate more contracts for convenience because of budget constraints, they must consider cost issues raised in settlement proposals. Second, fraud allegations often involve cost disputes, and agency attorneys must apply cost accounting and cost principles when resolving these problems.

1. *Cost Accounting Standards.*—

(a) *Cost Accounting Standards Recodification.*—The Cost Accounting Standards Board has reissued the CAS.⁶⁸³ The most significant change included in the recodification is an increase in the threshold for a CAS-covered contract from \$100,000 to \$500,000.⁶⁸⁴

(b) *Consistency.*—In *Hercules, Inc. v. United States*,⁶⁸⁵ the Claims Court considered a contractor's method of allocating to government contracts state taxes on the gain realized from the sale of a commercial subsidiary. The Claims Court had ruled previously that the taxes were both allowable and allocable, but deferred ruling on the contractor's allocation method.⁶⁸⁶ Hercules employed a direct allocation method for state income taxes chargeable to its government-owned-contractor-operated (GOCO) facilities, but it allocated all other state taxes indirectly to its non-GOCO contracts. The court held that the dual allocation method violated CAS 402, Consistency in Allocation of Costs Incurred for Similar Purposes. The court, however, declined to rule that the contractor's indirect allocation method was improper under CAS 403, Allocation of Home Office Expenses.

(c) *Burdening Unallowable Costs.*—Two cases this year discussed the proper allocation of costs associated with unallowable costs under CAS 403, CAS 405, CAS 410, and CAS 418. The first case, *General Dynamics Corp.*,⁶⁸⁷ examined the treatment of costs associated with General Dynamics' corporate aircraft. The aircraft had both fixed costs of ownership and variable costs of operation. The gov-

ernment alleged that when the variable costs of operation were unallowable, CAS 405 required disallowance of a proportional share of the fixed costs. The ASBCA disagreed, holding that CAS 405.40(e) only required disallowance of the variable costs of flight operations when the purpose of the flight was unallowable. The board also rejected the government's argument that when a flight carries several passengers, the contractor must allocate the costs of the flight to individual passengers under CAS 418, Allocation of Direct and Indirect Costs. The board held that the contractor could allocate to the G&A pool the full costs of the flight when transportation of one of the passengers was allowable.

The second decision, *Martin Marietta Corp.*,⁶⁸⁸ considered whether the contractor must include an unallowable compensation cost—specifically, a tax gross-up—in its allocation base under CAS 410 and whether the government could disallow a proportionate share of indirect costs along with the unallowable cost. The applicable cost principle⁶⁸⁹ required the latter action, but the contractor argued that the action conflicted with CAS 410. The ASBCA ruled that CAS 410 required the contractor to include the unallowable costs in its allocation base. Nevertheless, it did not take the second step of allocating indirect costs to the unallowable costs. Instead, the board noted that the contractor treated contracts as final cost objectives and that CAS 410 required allocation of indirect costs to final cost objectives. Accordingly, CAS 410 conflicted with the cost principles and was controlling.⁶⁹⁰

(d) *Changes to Cost Accounting Practices.*—In another *Martin Marietta Corp.* case,⁶⁹¹ the government alleged that a corporate reorganization was a change in cost accounting practices entitling the government to an adjustment in contract prices. The reorganization resulted in an increase in indirect costs allocable to a Federal Aviation Administration cost-reimbursement contract and a decrease in indirect costs on predominantly DOD fixed-price contracts negotiated before the reorganization. The ASBCA held that a corporate reorganization was not a per se change in practices entitling the government to an adjustment. Nevertheless, it did not foreclose attacking the reorganization based on cost reasonableness or other grounds.

2. Cost Principles.—

(a) *Indirect Cost Penalties.*—Congress has revised the penalty provisions applicable to contractors that include unallowable costs in indirect cost proposals.⁶⁹² The Secretary

of Defense now may penalize a contractor only for including indirect costs that are expressly unallowable under the cost principles. The lawmakers also deleted the \$10,000 “additional penalty” that the Secretary of Defense could assess for each proposal that included those costs. Likewise, a penalty that corresponded to the total of unallowable indirect costs in a proposal has been limited to unallowable indirect costs allocated to covered contracts for which the contractor submitted its proposal. Congress also has authorized the Secretary of Defense to waive penalties when the contractor withdraws its proposal before audit, when the amounts are insignificant, or when inclusion was inadvertent and the contractor had an adequate system of internal controls.

(b) *Advertising, Selling, and Lobbying Costs.*—In two cases, the government contested the allocation of direct selling costs as indirect costs. In *Daedalus Enterprises*,⁶⁹³ the government challenged the contractor's allocation of direct selling expenses for foreign sales as G&A expenses. The ASBCA upheld the allocation method, both because it was consistent with the allocation of costs of domestic selling, and because foreign sales benefited the government by reducing indirect cost rates.

This decision is contrary to an earlier Claims Court decision, *KMS Fusion, Inc. v. United States*.⁶⁹⁴ In that case, the court held that a contractor was required to allocate direct selling costs as direct costs of the resulting sales, not as indirect costs partially allocable to its government contracts. The court rejected the “benefit from lower indirect cost rate” theory relied on by the ASBCA in *Daedalus Enterprises*. The benefit to the contractor from allocating direct selling costs indirectly is that it recovers for unsuccessful sales efforts, as well as successful ones. Contract auditors are certain to continue challenging these costs until the Federal Circuit resolves this split between the forums.

KMS Fusion also considered the allowability of lobbying-type costs.⁶⁹⁵ The cost principles applicable to the *KMS Fusion* contract did not address lobbying and legislative liaison activities. Applying the general tests of reasonableness and allocability, the court found that the costs of a District of Columbia office and government affairs consultants were reasonably necessary to the overall operation of the business.

A third decision, *General Dynamics Corp.*,⁶⁹⁶ addressed launching and rollout ceremonies as public relations expenses.

⁶⁸⁸ ASBCA No. 35895, 92-3 BCA ¶ 25,094.

⁶⁸⁹ DAR § 15-201.6.

⁶⁹⁰ *Accord* General Elec. Co., Aerospace Group v. United States, 929 F.2d 679, 10 FPD ¶ 38 (Fed. Cir. 1991).

⁶⁹¹ ASBCA No. 38920, 92-3 BCA ¶ 25,175.

⁶⁹² Pub. L. 102-484, § 818, 106 Stat. 2315, 2457 (1992) (amending 10 U.S.C § 2324 (1988)); see 58 Fed. Cont. Rep. (BNA) 540 (Nov. 9, 1992).

⁶⁹³ ASBCA No. 43602 (May 18, 1992), ___ BCA ¶ ____.

⁶⁹⁴ 24 Cl. Ct. 582, 10 FPD ¶ 144 (1991).

⁶⁹⁵ Only the specific cost principles, which did not apply to the older *KMS Fusion* contract, foreclose reimbursement of lobbying costs. See FAR 31.205-22; FAR 31.205-50.

⁶⁹⁶ ASBCA No. 31359, 92-1 BCA ¶ 24,698, modified, 92-2 BCA ¶ 24,922.

In this case, the contractor sought reimbursement for aircraft flights transporting guests to launching and rollout ceremonies. The government challenged those costs as unallowable entertainment. The ASBCA concluded that launchings and rollouts were characterized more properly as unallowable advertising and public relations costs. Accordingly, the flight costs were unallowable as costs directly associated with unallowable costs.

(c) *Independent Research and Development, Bid and Proposal, and Precontract Costs.*—In *FAC 90-13*,⁶⁹⁷ the FAR Council implemented the statutory revisions relating to independent research and development, as well as those covering bid and proposal (B&P) costs, that were passed in 1991.⁶⁹⁸ The drafters of the revised cost principle⁶⁹⁹ took great care to make it consistent with CAS 420.

In *Coflexip & Services, Inc. v. United States*,⁷⁰⁰ the Federal Circuit reversed the Claims Court, opening the door for a possible recovery on remand of prototype development expenses as proposal preparation costs in a Claims Court protest. The appeals court applied the cost principles to determine whether proposal preparation costs were recoverable under the agency's implied-in-fact agreement to consider offers fairly and honestly. It held that the proposal preparation costs were allocable directly to the proposal in question. In so doing, the court raised the possibility that all B&P costs must be allocated directly to individual proposals.

In *Kollsman, a Division of Sequa Corp. v. United States*,⁷⁰¹ the contractor sought recovery of precontract costs for an FMS requirement that the foreign government had cancelled before award. The contractor alleged an implied-in-fact contract to pay the precontract costs. Before cancellation and termination of negotiations, Kollsman ordered materials and began production to meet the anticipated schedule. The government was aware of these efforts, but did not inform Kollsman clearly and repeatedly that Kollsman would incur these precontract costs at its own risk. The court ruled that summary judgment for the Government was inappropriate, but noted that Kollsman's burden at trial would be substantial.

(d) *Corporate Aircraft.*—In *General Dynamics Corp.*,⁷⁰² the ASBCA also analyzed the allowability of corporate aircraft costs under the cost principles.⁷⁰³ The board rejected the

government's argument that contractors must prove that corporate aircraft are indispensable to their business operations. Instead, the board found that the aircraft in question were necessary and that costs in excess of commercial transportation were offset by the advantages gained by using the aircraft. It did, however, require General Dynamics to document the purpose of individual flights for which it claimed costs. While the government has the burden of proving unreasonableness, the contractor must support its claim with sufficient evidence to allow the government to make an informed decision.

(e) *Severance Pay.*—In *E.I. DuPont de Nemours and Co. v. United States*,⁷⁰⁴ a Department of Energy management and operating (M&O) contractor, in accordance with a well-established practice, made severance payments to all of its employees upon expiration of its contract. The agency advised Du Pont that the severance costs were unreasonable because all of the employees were hired immediately by the successor contractor. The Energy Board disagreed, citing Du Pont's normal procedure and the peculiar nature of the subject M&O contract.

In *R&B Bewachungs GmbH*,⁷⁰⁵ the government avoided reimbursement of severance pay as a termination cost because the reason for the dismissals was loss of other contracts, not the termination. Therefore, the severance pay was not allocable to the terminated contract.

(f) *Professional Services.*—A number of cases this year addressed recovery of legal fees as a cost. In *Bos'n Towing and Salvage Co.*,⁷⁰⁶ the contractor sought recovery of legal fees associated with a postaward protest and the incorporation of the business as part of a convenience termination. The ASBCA announced the general rule that reasonable legal expenses are an allowable cost unless expressly barred as a matter of policy. The board emphasized, however, that the contractor must produce evidence to support the allowability of such expenses. The board then allowed legal fees incurred to defend a postaward protest, but disallowed unsupported fees and those fees relating to the incorporation.

In *MBI Business Centers, Inc.*,⁷⁰⁷ the GSBCA reached a different conclusion concerning the allowability of legal fees incurred in connection with a postaward protest. The GSBCA

⁶⁹⁷ 57 Fed. Reg. 44,265 (1992) (effective Sept. 24, 1992) (amending FAR 31.205-18).

⁶⁹⁸ See 1991 *Contract Law Developments—The Year in Review*, *supra* note 14, at 66.

⁶⁹⁹ See FAR 31.205-18.

⁷⁰⁰ 961 F.2d 951, 11 FPD ¶ 46 (Fed. Cir. 1992).

⁷⁰¹ 25 Cl. Ct. 500, 11 FPD ¶ 37 (1992).

⁷⁰² ASBCA No. 31359, 92-1 BCA ¶ 24,698, *modified*, 92-2 BCA ¶ 24,922.

⁷⁰³ See FAR 31.205-46(e).

⁷⁰⁴ 24 Cl. Ct. 635, 10 FPD ¶ 146 (1991).

⁷⁰⁵ ASBCA No. 42214, 92-3 BCA ¶ 25,105.

⁷⁰⁶ ASBCA No. 41357, 92-2 BCA ¶ 24,864; *accord* *J.W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053.

⁷⁰⁷ GSBCA No. 11030, 91-3 BCA ¶ 25,240.

distinguished the ASBCA decisions based on the type of contract at issue.⁷⁰⁸ The ASBCA's position, however, is both controlling for DOD and better reasoned.⁷⁰⁹

In *General Dynamics Corp., Pomona Division*,⁷¹⁰ the contractor attempted to reopen fixed-price contracts to recover the costs of defending criminal allegations. General Dynamics previously had segregated and excluded these costs from proposals on certain fixed-price work. The ASBCA refused to allow recovery under the fixed-price contracts, holding that General Dynamics should have negotiated in advance to do so.

(g) *Leases and Subcontracts*.—In *Bos'n Towing and Salvage Co.*,⁷¹¹ the government challenged a prime contractor's termination settlement with a subcontractor. The subcontractor was affiliated with the prime contractor and, in the settlement, the prime contractor paid costs that it was not obligated to pay under the subcontract. The board reviewed the settlement for reasonableness but disallowed most of the costs because the prime contractor presented insufficient evidence.

The contractor in *Talley Defense Systems, Inc.*⁷¹² also engaged in a questioned transaction with an affiliated business. The appellant exercised an option to purchase property that it was leasing. It then sold the property to an affiliated business and arranged to lease the property at a much higher rental payment. The board limited the contractor to the costs of ownership because the two companies were under common control and the transaction was actually a sale and leaseback.

In *Qualex International*,⁷¹³ the contractor sought recovery of the continuing costs of leasing a building after a termination for convenience. It did not recover the full costs of continuing the lease after termination because it assumed the longer lease period at its own risk. It did, however, recover

some excess lease costs because the contract benefited from lower periodic lease payments under the longer term of the lease.

L. Defective Pricing.

1. *Authority to Demand Cost or Pricing Data Limited*.—Contracting officers frequently require certified cost or pricing data in procurements that otherwise are exempt under the Truth In Negotiations Act (TINA).⁷¹⁴ This practice often frustrates defense contractors and confuses government contracting officials. Part of the confusion stems from the contracting officer's use of partial cost or pricing data to determine price reasonableness.⁷¹⁵ In May 1992, the Director, Defense Procurement issued a memorandum prohibiting contracting officers from requiring cost or pricing data from contractors for acquisitions exempt under the TINA.⁷¹⁶ The memorandum also directs contracting officers to use price analysis techniques, instead of certified cost or pricing data, to determine price reasonableness. The DFARS also has clarified that when partial cost or pricing data are required for price analysis, the data shall not be certified.⁷¹⁷

2. *Contracting Officer's Truth in Negotiations Act Exemption Binds Agency*.—In *Honeywell Federal Systems, Inc.*,⁷¹⁸ the ASBCA held that the contracting officer's decision to grant a TINA exemption bound the government, even though subsequent contracting officers and the DOD Inspector General believed the exemption was granted erroneously.⁷¹⁹ The board determined that the contracting officer's exemptions were "reasoned independent decisions" supported by evidence in the record. Additionally, the board declined to review the "correctness" of the decisions, having found no fraud, bad faith, or collusion.

3. *Labor Hour Report Was "Judgment," Not "Fact."*—The controversy over whether information is "fact" or "judgment" continued this year in *Litton Systems, Inc.*⁷²⁰ Litton Systems

⁷⁰⁸ See, e.g., *Jana, Inc.*, ASBCA No. 32447, 88-2 BCA ¶ 20,651.

⁷⁰⁹ Note that costs associated with prosecuting and defending claims and appeals against the federal government are unallowable. See FAR 31.205-47(f)(1); *Reinhold Constr., Inc.*, ASBCA No. 33312, 92-3 BCA ¶ 25,031.

⁷¹⁰ ASBCA No. 39500, 92-1 BCA ¶ 24,657.

⁷¹¹ ASBCA No. 41357, 92-2 BCA ¶ 24,864.

⁷¹² ASBCA No. 39878 (Oct. 23, 1992), ___ BCA ¶ ___.

⁷¹³ ASBCA No. 41962 (Oct. 21, 1992), ___ BCA ¶ ___.

⁷¹⁴ 10 U.S.C. § 2306a(a), (b); see FAR 15.804-3(h).

⁷¹⁵ See FAR 15.804-3(h).

⁷¹⁶ Memorandum, Director, Defense Procurement, DP/CPF, subject: Certified Cost or Pricing Data (29 May 1992).

⁷¹⁷ DAC 91-4, 57 Fed. Reg. 53,596 (1992) (effective Oct. 30, 1992). The provisions of DAC 91-4 removed DFARS 215.804-8(a), which required FAR 52.215-22 (Price Reduction for Defective Cost or Pricing Data) when obtaining partial cost or pricing data. Use of this clause was inconsistent with DFARS 215.804-1(a), which provides that partial or limited data shall not be certified.

⁷¹⁸ ASBCA No. 39974, 92-2 BCA ¶ 24,966.

⁷¹⁹ Procurement officials may not waive the statutory requirement to furnish cost or pricing data. See *M-R-S Mfg. Co. v. United States*, 203 Ct. Cl. 551, 409 F.2d 835 (1974). The contracting officer, however, may grant an exemption based on the commerciality of a contractor's product. See FAR 15.804-3(b), 15.804-3(c).

⁷²⁰ ASBCA No. 36509, 92-2 BCA ¶ 24,842.

maintained a computer-generated estimated standard labor hours (ESHL) report on which it based its estimated manufacturing costs. During negotiations on a spare parts acquisition, however, Litton Systems failed to provide this information to the government. Litton Systems argued successfully that the TINA did not require it to disclose the ESHL report because the report was not data. In analyzing the report, the ASBCA found that the standard labor hours for each component originated from numerous different estimates and judgments rendered by Litton Systems' industrial and test engineers. The board also found that no two engineers estimated the same time for a particular task. The board concluded that no verifiable or auditable facts were disclosed by the report and found the ESHL reports to be pure judgment.

4. *Government Fails to Show Nondisclosure.*—If cost or pricing data exists, the contractor must disclose it to the government, but the government has the burden of proving nondisclosure.⁷²¹ In *General Dynamics Corp.*,⁷²² the ASBCA denied the government's \$7 million defective pricing claim because the government failed to prove that the contractor never provided the data.

5. *Complicated Defective Pricing Cases Not Ripe for Summary Judgment.*—In *McDonnell Douglas Helicopter Co.*,⁷²³ the contractor moved for summary judgment because price reductions that it had made during negotiations exceeded the defective pricing claim.⁷²⁴ The ASBCA denied the motion, noting that it would assess motions for summary judgment cautiously in defective pricing cases because the issues are often very complex. In this case, neither party knew what impact disclosure of the data would have had on the negotiations. While acknowledging the "what if" nature of the disputed issue, the board concluded that further inquiry was necessary.

The ASBCA followed this reasoning in *Grumman Aerospace Corp.*,⁷²⁵ in which over a strong dissent, the board denied the contractor's summary judgment motion. Once again, the board indicated that a hearing was necessary because of the complex nature of the claim.

6. *Defective Pricing Claim Is Not an Affirmative Defense.*—In *Computer Network Systems, Inc.*,⁷²⁶ the GSBICA refused to

allow the government to assert a defective pricing claim as an affirmative defense to a contractor's claim for a price adjustment. The GSBICA stated that defective pricing is a government claim, requiring a separate contracting officer's final decision and subsequent contractor appeal. The board also noted that the government had been aware of the defective pricing claim for two years, but waited until shortly before the hearing to raise it as a defense.

M. Environmental Law.

As a result of several decisions and the enactment of the Federal Facilities Compliance Act (FFCA),⁷²⁷ environmental laws and regulations will have an increased impact on the federal acquisition process. The question of who must bear the costs of compliance has generated considerable controversy, which is likely to continue in the future.

1. *Allowability of Environmental Costs.*—On October 14, 1992, the DOD and the DCAA issued audit guidance that treats most environmental costs as normal business expenses. These costs, therefore, generally will be allowable under the applicable FAR cost principles and the CAS.⁷²⁸ The guidance pertains to compliance costs, clean-up costs, and costs directly associated with compliance and cleanup, such as legal costs. Cleanup costs, however, are not allowable if they result from the contractor's failure to exercise due care. Further, if a contractor incurs costs to improve its property or restore its property to its "acquisition condition," the contractor must capitalize the costs and may not charge them fully to the accounting period in which they were incurred.

The DCAA guidance addresses the same expenses covered in a draft environmental cost principle issued in August.⁷²⁹ The draft cost principle, like the DCAA guidance, distinguishes between compliance costs and cleanup costs. Compliance costs are allowable unless they result from "a violation of law, regulation, or a compliance agreement." Cleanup costs, however, are unallowable unless the contractor demonstrates the following: (1) its performance of a government contract contributed to the conditions requiring cleanup; (2) it was conducting its business prudently and in accordance with rules and regulations in effect during contract performance; (3) it acted promptly to minimize the damage and costs associated with correction; and (4) it is pursuing available remedies

⁷²¹ See, e.g., *Texas Instruments, Inc.*, ASBCA No. 23678, 87-3 BCA ¶ 20,195.

⁷²² ASBCA No. 32660 (Aug. 24, 1992), ___ BCA ¶ ____.

⁷²³ ASBCA No. 41378, 92-1 BCA ¶ 24,655.

⁷²⁴ See, e.g., *Grumman Aerospace Corp.*, ASBCA No. 35188, 90-2 BCA ¶ 22,842 (holding contractor not liable for overstated costs eliminated during price negotiations).

⁷²⁵ ASBCA No. 35185, 92-3 BCA ¶ 25,059.

⁷²⁶ GSBICA No. 11368, 93-1 BCA ¶ 25,260.

⁷²⁷ Pub. L. No. 102-386, 106 Stat. 1505 (1992).

⁷²⁸ See DCAA Memorandum for Regional Directors, subject: Audit Guidance on Allowability of Environmental Costs (14 Oct. 1992), reprinted at 58 Fed. Cont. Rep. (BNA) 500 (Oct. 26, 1992). Of significance is the impact of Cost Accounting Standard No. 403, which prohibits allocating the costs of correcting contamination caused in prior years as direct costs of current cost objectives.

⁷²⁹ See generally 58 Fed. Cont. Rep. (BNA) 184 (Aug. 17, 1992) (discussing draft of FAR 31.205-9).

against other responsible parties diligently. Although the DOD General Counsel has opined that the cost principle will have little impact on allowability,⁷³⁰ the private bar is skeptical.⁷³¹ Pending final publication, use the DCAA guidance and existing cost principles to determine allowability of environmental costs.

2. *Environmentally Related Evaluation Factors.*—The OFPP has directed federal agencies to give preferences to products and services that promote environmental conservation and energy efficiency.⁷³² The OFPP advised agencies to apply the preference when two products or services are equal in performance characteristics and price. If an agency establishes "utilization of recovered materials" as an evaluation factor, each offeror will be required to certify the percentage of recovered materials it intends to use during performance. Finally, contracting activities must ensure that their programs encourage contractors to use recovered materials and energy-efficient performance methods to the maximum practical extent.

3. *Liability for Environmental Noncompliance.*—

(a) *Waiver of Sovereign Immunity.*—The Supreme Court, in *Department of Energy v. Ohio*,⁷³³ held that Congress did not waive sovereign immunity from liability for civil fines imposed by a state for past violations of the Clean Water Act⁷³⁴ and the Resource Conservation and Recovery Act (RCRA).⁷³⁵

On October 6, however, President Bush signed the FFCA,⁷³⁶ which waives sovereign immunity unequivocally and allows states and the EPA to enforce RCRA hazardous waste provisions at federal facilities. The FFCA subjects federal agencies to "punitive," as well as "coercive," fines. To encourage agency compliance, the FFCA requires a polluting contracting activity to pay penalties from its own appropriations, rather than from the permanent indefinite judgment fund.

In a related context, a district court found that the Comprehensive Environmental Response, Compensation, and Liability

Act (CERCLA)⁷³⁷ waives sovereign immunity. In *FMC Corp. v. United States*,⁷³⁸ the court determined that the government was liable under the CERCLA as an "operator" of a contractor's rayon producing facility. The FMC Corporation, the present owner of the site, sought indemnification from the government for a portion of its cleanup costs based on the government's extensive involvement in the activities of the rayon supply contractor during World War II. The court rejected the government's contentions that sovereign immunity barred the action and, alternatively, that the government was not liable because it did not control operations at the facility directly. As noted, the court ruled that CERCLA waived sovereign immunity. It also held that the government was an "operator" of the facility because it had monitored operations closely, provided personnel, and furnished government property.

(b) *Contractor Liability for Environmental Damage.*—A recent change to the DFARS will lessen the impact on the government of the FFCA and the *FMC Corp.* decision.⁷³⁹ Under the DFARS, DOD contractors and their subcontractors performing hazardous waste treatment or disposal services must reimburse the government for damages caused by their acts of negligence or breaches of contract. The amendment does not apply if generation of hazardous waste is merely incidental to the performance of a contract. Finally, the Secretary of Defense may waive the reimbursement obligation if the Secretary finds only one responsible offeror, no offeror is willing to agree to the implementing DFARS clause, or failure to award a hazardous waste removal contract would place a federal facility in violation of the law.

(c) *Government Contractor Defense Unavailable to Response Action Contractors.*—*Amtreco, Inc. v. O.H. Materials, Inc.*⁷⁴⁰ an environmental cleanup contractor moved for dismissal of a tort action, relying on the government contractor⁷⁴¹ and government agent defenses.⁷⁴² The court ruled, however, that neither defense applied. The court found the government contractor defense inapplicable to service con-

⁷³⁰ See 1156 Gov't Cont. Rep. (CCH) pp. 6-7 (Nov. 18, 1992) (reported comments of DOD Deputy General Counsel).

⁷³¹ See 58 Fed. Cont. Rep. (BNA) 184 (Aug. 17, 1992).

⁷³² Office of Fed. Procurement Policy, Policy Letter 92-4, 57 Fed. Reg. 53,362 (1992). In November 1992, the DAR Council tasked its Environmental Committee to draft a FAR rule to implement the OFPP guidance. See DAR Case No. 92-054.

⁷³³ 112 S. Ct. 1627 (1992) (holding that neither statute waived sovereign immunity unequivocally for "punitive fines," but that statutes did waive immunity for fines imposed by a state court to enforce agency compliance with its order).

⁷³⁴ 33 U.S.C. §§ 1251-1387.

⁷³⁵ 42 U.S.C. §§ 6901-6991i.

⁷³⁶ Pub. L. No. 102-386, 106 Stat. 1505 (1992).

⁷³⁷ 42 U.S.C. §§ 9601-9675.

⁷³⁸ 786 F. Supp. 471 (E.D. Pa. 1992).

⁷³⁹ See DAC 91-2, 57 Fed. Reg. 14,988 (1992) (effective Feb. 3, 1992) (adding DFARS subpt. 223.70; 252.223-7005 (Hazardous Waste Liability and Indemnification)) DAC 91-4, 57 Fed. Reg. 53,596 (1992) (publishing final rule). These provisions implement 10 U.S.C. § 2708.

⁷⁴⁰ 802 F. Supp. 443 (M.D. Ga. 1992).

⁷⁴¹ See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (excusing contractor from liability for design defects in military equipment when equipment complied with "reasonably precise" specifications approved by government, and when contractor warns government about the dangers of which the contractor is aware).

⁷⁴² See *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940).

tracts. It also ruled that the government agent defense was unavailable because, under CERCLA,⁷⁴³ response action contractors are independent contractors, not agents of the government. In addition, under the *Amtreco* rationale, the government contractor defense apparently would be unavailable for environmental contamination that occurs during the performance of construction and supply contracts.⁷⁴⁴

In a related development, recent DCAA guidance⁷⁴⁵ emphasizes that contractor payments to third parties in actions based on tort or trespass are unallowable costs because they are unreasonable in nature. This direction is inconsistent with FAR 52.228-7, Insurance—Liability to Third Persons, which generally obligates the government to reimburse a contractor for liability to third parties arising from the performance of a government cost-type contract.⁷⁴⁶

N. Payment and Collection.

1. *Debt Collection Act Does Not Apply to Agency Claim for Judgment Interest.*—In *Joan G. Morningstar*,⁷⁴⁷ the appellant objected to the government's attempt to collect interest owed the government based on an earlier board decision. The appellant argued that the government was not entitled to interest because the government had not complied with the Debt Collection Act (DCA).⁷⁴⁸ The ASBCA rejected this argument. It ruled that the earlier board proceeding had provided the appellant with safeguards similar to those afforded by the DCA and that no need arose to "duplicate" the DCA procedures.

2. The Prompt Payment Act.—

(a) *Prompt Payment Act*⁷⁴⁹ *Applies to Contracts Performed by Foreign Contractors Outside the United States.*—In *Held & Francke Bauaktiengesellschaft mbH*,⁷⁵⁰ the agency delayed payment on an undisputed invoice for five months but did not

pay Prompt Payment Act (PPA) interest. The agency relied on a FAR provision⁷⁵¹ that excludes from the PPA contracts awarded to foreign vendors for work performed outside the United States. The ASBCA, however, sustained the interest claim, finding that Congress had enacted the PPA to encourage the government to pay its debts in a timely manner. The board noted that neither the statute, nor its legislative history, suggests a geographical limitation on PPA coverage. The board also found persuasive an OMB conclusion that the FAR exclusionary provision discriminates unjustly against foreign contractors.⁷⁵² Accordingly, the board ruled that the provision was inconsistent with the intent and purpose of PPA and therefore did not bind the appellant.

(b) *Request for Economic Price Adjustment Is Not an "Invoice" for Prompt Payment Act Purposes.*—In *Onan Corp.*,⁷⁵³ the ASBCA denied the appellant's claim for interest from the date of its request for an economic price adjustment because the request was not an invoice. The board found that the parties intended that the contractor would not submit an "invoice" until the government had reviewed the request for economic price adjustment and the parties had negotiated an agreement establishing the amount. According to the board, a key distinction between the invoice and the request for an economic price adjustment was the fact that the government was not obligated to make a price adjustment automatically.

(c) *Prompt Payment Act and Contract Disputes Act Apply to Transportation Agreements.*—In *In re Frontier Airlines, Inc.*,⁷⁵⁴ the district court affirmed a bankruptcy court decision that the PPA⁷⁵⁵ and CDA⁷⁵⁶ apply payment delays and disputes arising from government bills of lading, government travel requests, and payment for travel by government credit card.⁷⁵⁷ The court rejected the agency argument that these transactions were transportation agreements governed

⁷⁴³ See 42 U.S.C. §§ 6901-6991i.

⁷⁴⁴ These costs also are "unallowable" under recent DCAA audit policy if they result from contractor negligence. See 58 Fed. Cont. Rep. (BNA) 500 (Oct. 26, 1992).

⁷⁴⁵ See *supra* note 728 and accompanying text.

⁷⁴⁶ The government will not indemnify a contractor for liability arising from the willful misconduct or the lack of good faith of the contractor's managerial personnel. FAR 52.228-7(e)(3). Further, a contractor may not recover if the injury-causing act is remote in time from contract performance. See *Global Assocs.*, NASA BCA No. 187-1, 90-1 BCA ¶ 22,294.

⁷⁴⁷ ASBCA 41820 (Nov. 12, 1992), ___ BCA ¶ ___, *aff g*, *modifying, and supplementing* *Joan G. [sic] Morningstar*, ASBCA No. 41820, 92-3 BCA ¶ 25,120.

⁷⁴⁸ 31 U.S.C. § 3716.

⁷⁴⁹ *Id.* §§ 3901-3907.

⁷⁵⁰ ASBCA No. 42463, 92-1 BCA ¶ 24,712; see *Hettich and Co. GmbH*, ASBCA No. 38781 (Sept. 11, 1992), ___ BCA ¶ ___ (applying Prompt Payment Act overseas).

⁷⁵¹ See FAR 32.901.

⁷⁵² See 54 Fed. Reg. 52,700 (1989) (OMB comments related to its revision of Office of Management and Budget, OMB Circular No. A-125, subject: Prompt Payment (21 Dec. 1989)).

⁷⁵³ ASBCA No. 41925 (Oct. 30, 1992), ___ BCA ¶ ___.

⁷⁵⁴ *United States v. Frontier Airlines, Inc. (In re Frontier Airlines)*, No. 90-K-16801 (Bankr. D. Colo. Oct. 26, 1992).

⁷⁵⁵ 31 U.S.C. §§ 3901-3906.

⁷⁵⁶ 41 U.S.C. §§ 601-613.

⁷⁵⁷ The court commented that this was a case of first impression for a district or circuit court. Compare *Stapp Towing Co.*, ASBCA No. 41584, 92-3 BCA ¶ 25,190 (CDA governs agreement for bulk fuel transportation under a government bill of lading) with *Burlington Air Express, Inc.*, ASBCA No. 39168, 90-2 BCA ¶ 22,708 (CDA freight forwarder claim not subject to CDA).

exclusively by the Transportation Act⁷⁵⁸ or, alternatively, that Frontier Airlines had not submitted a claim to a contracting officer. The court held that the PPA and CDA form a unified, statutory structure for resolving payment disputes arising from express or implied contracts with the government⁷⁵⁹ and that the CDA was not designed to impede the resolution of these disputes. The court held that Frontier Airlines satisfied the CDA's claim submission requirements by making written demands on government counsel in the bankruptcy proceeding.

3. *Government Liability to Sureties: Agency Could Have Taken Measures to Collect Erroneous Disbursement.*—In *Indiana Lumbermen's Mutual Ins. Co.*,⁷⁶⁰ the VABCA found that the government was liable to a performance surety even though the government had paid a contractor before receiving the surety's request to withhold further payments. In this case, the government disbursed a check to the contractor shortly before the surety requested withholding. The board found that after receiving the surety's request, the government should have used all possible means to stop payment to the contractor. The board concluded that the disbursed funds were available to the government until someone sought payment on the check.

4. *Progress Payments: Disaster Justifies Reduced Progress Payment.*—The government may be excused from its obligation to make a full progress payment when a natural disaster reduces the percentage of project completion. In *Greenhut Construction Co.*,⁷⁶¹ the contractor submitted a progress payment invoice representing correctly that the construction project was ninety-eight percent complete as of September 20, 1989. On September 21, 1989, a hurricane caused extensive damage, and the government reduced the progress payment due by the estimated price of previously completed work that was damaged by the hurricane. The ASBCA approved the reduced disbursement because under the contract, the appellant was entitled to payment only for work that it completed satisfactorily.

5. *Accord and Satisfaction: Board Finds Federal Acquisition Regulation General Release Watertight.*—A release operates as an accord and satisfaction and bars claims based on events predating the release, even if the release does not

refer specifically to the type of claim raised. In *Valcon II, Inc. v. United States*,⁷⁶² the contractor argued that a release, patterned after one incorporated in the FAR,⁷⁶³ did not bar a delay claim because the release did not specify delay claims. The contractor also argued that the release was ineffectual because its reference to "any and all liability" implied that it barred only monetary claims. The court rejected this argument, holding that the release barred all claims arising from events that led to the release agreement.⁷⁶⁴

O. Government-Furnished Property

1. *Congress Allows Commercial Use of Government-Owned-Contractor-Operated Facilities.*—The Armament Retooling and Manufacturing Support Act of 1992⁷⁶⁵ (ARMSA) changes several well-established procedures pertaining to the administration of government-owned property in the possession of contractors. The ARMSA encourages the use of GOCO ammunition manufacturing facilities by non-defense commercial firms "to the maximum extent practicable." This is in contrast to the existing policy, which discourages commercial use of government-furnished property.⁷⁶⁶ The ARMSA is intended to promote prosperity in areas affected by reductions in DOD spending, maintain a skilled work force, and provide an industrial mobilization capability for national security purposes. Under the ARMSA the government may award contracts authorizing GOCO contractors to use government facilities to further the act's purposes and to enter into multi-year subcontracts with other firms for these purposes.

2. *Change Will Reduce Plant Equipment Recordkeeping.*—The Civilian Agency Acquisition Council and the DAR Council have proposed a change to the FAR that will permit contractors to maintain a "summary record" of government-furnished plant equipment costing less than \$5000 per unit.⁷⁶⁷ A "summary record," under the proposed definition, is a single record accounting for multiple items of equipment. The contracting officer could require a separate record for each item, if necessary, for effective control and maintenance.

3. *No Reimbursement for Inventory and Maintenance of Government-Furnished Material.*—In *Conference Communications, Inc.*,⁷⁶⁸ the appellant sought reimbursement for

⁷⁵⁸ See generally 49 U.S.C. §§ 10701-10786.

⁷⁵⁹ This conclusion is supported by the regulations that implement the Transportation Act that reference the CDA. 41 C.F.R. § 101-41.604-2(b)(6) (transportation agreement claims concerning interest are resolved under CDA).

⁷⁶⁰ VABCA No. 3197, 92-3 BCA ¶ 25,065.

⁷⁶¹ ASBCA No. 41777 (Aug. 27, 1992), ___ BCA ¶ ____.

⁷⁶² 26 Cl. Ct. 393, 11 FPD ¶ 86 (1992).

⁷⁶³ See FAR 43.204(c)(2).

⁷⁶⁴ *Accord A & A Insulation Contractors, Inc. v. United States*, 26 Cl. Ct. 371, 11 FPD ¶ 81 (1992); cf. *Tempo, Inc.*, ASBCA No. 37589, 92-3 BCA ¶ 25,058 (bilateral modification did not bar delay claim because contractor excluded delay costs from the modification expressly).

⁷⁶⁵ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 191-195, 106 Stat. 2315, 2347-49 (1992).

⁷⁶⁶ See FAR 45.102(f), 45.401, 45.407; see also FAR 52.245-9 (Use and Charges).

⁷⁶⁷ 57 Fed. Reg. 40,891 (1992) (proposing to amend FAR 45.505-5).

⁷⁶⁸ ASBCA No. 44295 (Oct. 30, 1992), ___ BCA ¶ ____.

inventorying government-furnished spare parts and for storage costs incurred after the government demanded return of the property. The ASBCA observed that the contractor reasonably would have included in its contract price the costs associated with returning the spare parts to the government upon completion of the contract. Absent evidence to the contrary, it concluded that this price would have included inventory costs. The board also denied the storage claim. It found that withholding the property after the government demanded its return was unjustified and "operate[d] as a bar to the recovery of costs incurred after that date."

4. *Board Awards Cost of Overcoming Defective Government-Furnished Equipment.*—In *Western States Management Services, Corp.*,⁷⁶⁹ the government furnished defective floor waxing equipment, and the contractor claimed the costs of purchasing new equipment and reimbursement of payments withheld for substandard performance. The ASBCA ruled that the contractor was entitled to the withheld amounts, to the extent that the defective equipment caused substandard performance. The board also found that the contractor could recover costs of purchasing equipment that would enable it to meet the contract specifications. The board reached this conclusion even though the contractor had not obtained formal approval to buy the equipment, as required by the contract. The board treated the government's failure to provide suitable government-furnished equipment as a constructive change and awarded the full purchase price of the replacement equipment.

P. Taxation

1. *Agency Immune from Kentucky 911 Phone Fee.*—The Comptroller General concluded that a service fee imposed on federal agencies for 911 emergency telephone service (911 service) was impermissible because it was a direct tax on the federal government.⁷⁷⁰ Kentucky state law permits local governments to collect fees for 911 service from telephone service customers. In this case the local government authorized the local telephone carrier to collect the fees and remit them to the state tax authority. This scheme created a "vendee fee,"⁷⁷¹ the direct burden of which fell on the federal government. Unless expressly authorized by Congress, federal agencies are immune from paying direct vendee fees.

2. *Court Upholds State Ad Valorem Tax.*—The Ninth Circuit upheld a California *ad valorem* property tax on a

government contractor in *United States v. San Diego*.⁷⁷² The contractor maintained and operated a federally owned research laboratory under several cost-reimbursement contracts. The state imposed a tax on possessory interests in real property, including that owned by the government.⁷⁷³ At issue was the imposition of the tax on a government-owned device used by a contractor. The court held that the contractor's use of the device to perform its government contracts was a taxable possessory interest in real property. The court emphasized that this tax focused on the use of the device, not its underlying value.⁷⁷⁴ It ruled that federal immunity may not be implied simply from the tax's effect on the United States. "[T]o the extent that the state can isolate a private person's interest in property owned by the government, it may tax that interest."⁷⁷⁵

3. *State Sales and Use Tax Invalidated.*—A cost-reimbursement contract required a contractor to purchase materials for contract performance, title to which passed to the government upon arrival at the plant. The contractor paid for the materials with its own funds and was later reimbursed by the government. Missouri imposed its state sales and use tax on the contractor. In *United States v. Benton*,⁷⁷⁶ the Eighth Circuit considered the validity of this retail sales tax. The state law defines a retail sale as a transfer for use or consumption and not for resale. The court found that the contractor purchased the materials from its suppliers for resale to the government, although the contractor actually used the material to perform the contract. Accordingly, the court held that the contractor's purchases were exempt from the terms of the tax law because they were transfers for resale.

4. *Wyoming Tax on Fuel Purchaser Invalidated.*—In *United States v. Kabeiseman*,⁷⁷⁷ the court invalidated Wyoming's tax on purchasers of diesel fuel. The state taxed a contractor operating a government facility under a cost-reimbursement contract. Under this contract, a government agency purchased fuel directly from suppliers. The contractor then ordered the fuel when stocks were low, received and stored it in government tanks, and used it to perform the contract. The contractor paid the supplier from a special bank account using government funds. The court held that the state tax was inapplicable to the contractor because it was not the purchaser of the fuel.

⁷⁶⁹ ASBCA No. 40546, 92-1 BCA ¶ 24,753.

⁷⁷⁰ 9-1-1 Emergency Tel. Serv. Fee—Commonwealth of Ky., B-246517, 71 Comp. Gen. 358 (1992).

⁷⁷¹ See 9-1-1 Emergency No. Fee, B-215735, 64 Comp. Gen. 655 (1985).

⁷⁷² 965 F.2d 691 (9th Cir. 1992).

⁷⁷³ Under state law, a possessory interest includes the right of a private party to use government-owned land or improvements to the land.

⁷⁷⁴ In 1991, the Ninth Circuit invalidated a Nevada *ad valorem* property tax on a government contractor because the tax made no distinction between ownership of the property and its use by the contractor. *United States v. Nye County*, 938 F.2d 1040 (9th Cir. 1991), cert. denied, 112 S. Ct. 1292 (1992).

⁷⁷⁵ *Id.* at 694-95 (quoting *United States v. Fresno*, 429 U.S. 452, 462 (1977)).

⁷⁷⁶ 975 F.2d 511 (8th Cir. 1992).

⁷⁷⁷ 970 F.2d 739 (10th Cir. 1992).

5. *Statutory Pass-Through Tax Invalidated.*—Delaware imposes a tax on electric companies and, by statute, companies must adjust their rates so that the tax passes through to consumers. In *United States v. Delaware*,⁷⁷⁸ the court held that Dover Air Force Base was exempt from the tax, which the statute nominally imposes on the electric company. The court held that the pass-through requirement imposed the tax burden directly on the United States.

VI. Fiscal Law

A. Purpose

1. *Informal Nod to Agency Expenditure Did Not Broaden Purpose of Appropriation.*—In June 1990, the chairmen of several congressional subcommittees and the House and Senate Appropriations Committees advised the United States Information Agency (USIA) that they did not object to a proposed reprogramming of appropriations.⁷⁷⁹ The USIA subsequently reprogrammed \$4.6 million of its radio construction appropriations to fund exhibits at the 1992 expositions commemorating Columbus's voyage to America. The Comptroller General objected, finding that the USIA normally funded expositions from its salaries and expenses appropriation. The Comptroller General found no evidence in the radio construction appropriation, or the accompanying congressional committee reports, of any relationship between the purpose of the construction appropriation and the expositions. Accordingly, the reprogramming violated the purpose statute.⁷⁸⁰ The Comptroller General warned further that informal congressional approval of an unauthorized action does not eliminate the violation.

2. "Necessary and Incident Expense" Decisions.—

(a) *DOL-Funded Research Project Must Relate to Job Training Mission.*—The DOL used its Employment and Training Administration (ETA) appropriation to fund three international research projects.⁷⁸¹ On review, the Comptroller General found that only two of the projects related to the purpose of the appropriation.⁷⁸² In this case, the agency's appropriation was provided to carry out the Job Training Partnership Act⁷⁸³ and DOL officials believed the interna-

tional research projects could help solve domestic employment problems. The Comptroller General agreed that projects concerning drug and alcohol abuse and job training for disadvantaged youths were reasonably related to the purpose of the ETA appropriation. Conversely, a project to provide developing countries with access to instructional training materials was not related to the object of the appropriation and violated the purpose statute.

(b) *Meals May Be Authorized.*—One of the most frequently asked purpose questions is whether activities may use appropriated funds to pay for meals and refreshments at official functions. In *Coast Guard—Meals at Training Conference*,⁷⁸⁴ the answer was "yes." The Coast Guard sponsored a training conference and contracted with a local hotel for facilities, including meals and refreshments. The certifying officer questioned whether payment for the meals and refreshments under the contract was proper. The GAO identified three conditions that must have existed for these costs to be proper: (1) the meals were incidental to the meeting; (2) attendance at the meals was necessary to full participation in the meeting; and (3) the employees and members were not free to eat elsewhere without being absent from the essential business of the meeting. The GAO further noted that the agency is limited only by the exercise of sound management practice in these situations.

(c) *Formal Attire.*—As a general rule, government employees are responsible for providing their own clothing for work, including formal attire.⁷⁸⁵ If an employee needs the clothing on an occasional basis to perform official duties, however, the agency may purchase the apparel with appropriated funds.⁷⁸⁶

(d) *Air Force May Purchase Belt Buckles as Awards.*—Defense agencies may use appropriated funds to purchase trophies or similar devices for winners of agency-related competitions.⁷⁸⁷ Accordingly, the Air Force could buy belt buckles for the winners of its annual "Peacekeeper Challenge" competition.⁷⁸⁸

⁷⁷⁸ 958 F.2d 555 (3d Cir. 1992).

⁷⁷⁹ Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.).

⁷⁸⁰ See 31 U.S.C. § 1301(a).

⁷⁸¹ U.S. Dep't of Labor—Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor, B-245541, May 21, 1992, 71 Comp. Gen. ____ (1992).

⁷⁸² When reviewing whether an expense is necessary, the Comptroller General determines if the expense falls within the agency's legitimate range of discretion, or if its relationship to an authorized purpose is so attenuated as to remove it from that range. See *Cash Prize Drawing by Nat'l Oceanic and Atmospheric Admin.*, B-242391, 70 Comp. Gen. 720 (1991).

⁷⁸³ 29 U.S.C. § 1732(a).

⁷⁸⁴ B-244473, Jan. 13, 1992 (unpub.).

⁷⁸⁵ See Ghassan Ghosn—Request for Recon., B-231542, 67 Comp. Gen. 592 (1988).

⁷⁸⁶ White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, July 6, 1992, 71 Comp. Gen. ____ (1992).

⁷⁸⁷ See 10 U.S.C. § 1125; DEP'T OF DEFENSE, DIRECTIVE 1348.19, AWARD OF TROPHIES AND SIMILAR DEVICES IN RECOGNITION OF ACCOMPLISHMENTS (12 May 1989).

⁷⁸⁸ Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992).

(e) *Use of Appropriated Funds for Employee's Private Legal Fees Was Improper.*—Normally, only the DOJ may reimburse a federal employee for private legal fees and related expenses.⁷⁸⁹ In an unpublished reply to a private attorney,⁷⁹⁰ the GAO concluded that the Forest Service decision to deny reimbursement of an employee's legal fees was reasonable. The employee had been involved in civil and criminal proceedings after committing acts of sexual misconduct with a female minor whom he had interviewed while investigating the cause of a forest fire. The agency and the DOJ had determined properly that the employee's acts were not within the scope of his employment and that representation would not be in the interest of the United States.

The GAO issued a similar opinion to a federal employee who sought reimbursement for legal fees incurred while under investigation by the agency's inspector general.⁷⁹¹ Although the agency did not act against the employee as a result of the investigation, the agency's appropriation was, nevertheless, unavailable to reimburse the employee. Because the agency had decided to investigate the employee, the agency clearly had no interest in providing legal counsel to him.

B. Time

1. *Incremental Funding: Comptroller General Objects to Incremental Funding of Nonseverable Service Contract.*—In *Incremental Funding of Multiyear Contracts*,⁷⁹² the Comptroller General prohibited the incremental funding of fixed-price, nonseverable service contracts that included the limitation of funds clause.⁷⁹³ The critical issue in determining severability is whether the entire undertaking is an immediate need of the agency. If it is, the services are nonseverable and the bona fide need rule⁷⁹⁴ requires funding of the entire effort with currently available appropriations.⁷⁹⁵ While use of the limitation of funds clause prevents an Antideficiency Act violation, it does not overcome the bona fide need rule's prohibition on funding a prior year's need with current funds.

2. *Government Obligated to Pay for Warranty Upon Acceptance.*—The government was obligated to pay for elevator warranty services, spanning five years, upon acceptance of the completed elevators—rather than upon performance of the maintenance services—because it had contracted for the warranty, and not for maintenance. In *B.F. Carvin Construction Co.*,⁷⁹⁶ the contractor agreed to furnish elevators to the government and to provide warranty services for five years. Following delivery and acceptance of the elevators, the government refused to pay for the warranty, arguing that it could not make payments in advance of the maintenance services. The VABCA disagreed. It reasoned that the government had purchased a *promise* that the elevator warranty services would be performed, and that it actually had not purchased elevator maintenance services. Accordingly, the agency's payment for the warranty would not constitute an advance payment for elevator maintenance services.

3. *Continuing Resolution Authority Statute Revives "Sunset" Agency.*—The enabling legislation for the Civil Rights Commission (Commission) contained a "sunset provision" terminating the Commission on September 30, 1991, unless Congress acted to reauthorize it.⁷⁹⁷ Although Congress passed a continuing resolution authority (CRA) statute appropriating funds for the Commission on September 30, 1991,⁷⁹⁸ the President did not sign a reauthorization bill for the Commission until November 26, 1991.⁷⁹⁹ In *Civil Rights Commission*,⁸⁰⁰ the Comptroller General ruled that Congress may revive or extend an act by taking any action that clearly manifests its intent to do so.⁸⁰¹ No constitutional or statutory provision requires that an authorization act precede an appropriation act.⁸⁰² By passing this CRA statute and specifically appropriating funds to the Commission, Congress clearly intended to reauthorize the Commission, notwithstanding the sunset provision in the enabling legislation.

⁷⁸⁹Cf. 28 U.S.C. § 516 (unless otherwise provided by law, DOJ is responsible for conducting litigation on behalf of the United States).

⁷⁹⁰Robert M. McRae, B-246294, Feb. 26, 1992 (unpub.).

⁷⁹¹Albert J. Beaudreault, B-245712, May 20, 1992 (unpub.).

⁷⁹²B-241415, June 8, 1992, 71 Comp. Gen. ____.

⁷⁹³FAR 52.232-22.

⁷⁹⁴See 31 U.S.C. § 1502.

⁷⁹⁵Congress may authorize incremental funding of a nonseverable service. Cf. Secretary of War, 2 Comp. Gen. 477 (1923) (authority may be implied); Corps of Eng'rs Continuing Contracts, B-187278, Mar. 28, 1977, 56 Comp. Gen. 437, 77-1 CPD ¶ 265 (authority must be express).

⁷⁹⁶VABCA No. 3224, 92-1 BCA ¶ 24,481.

⁷⁹⁷The United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301 (codified as 42 U.S.C. §§ 1975-1975f).

⁷⁹⁸Pub. L. No. 102-109, § 101(a), 105 Stat. 551 (1991).

⁷⁹⁹The United States Commission on Civil Rights Reauthorization Act of 1991, Pub. L. No. 102-167, 105 Stat. 1101 (1991).

⁸⁰⁰B-246541, 71 Comp. Gen. 378 (1992).

⁸⁰¹See *Kersten v. United States*, 161 F.2d 337 (10th Cir. 1947).

⁸⁰²See Railroad Rehabilitation and Improvement Fund, B-222323, 65 Comp. Gen. 524 (1986); Lite Indus., Inc., B-221031, Feb. 18, 1986, 65 Comp. Gen. 318, 86-1 CPD ¶ 169; Authority to Continue Domestic Food Programs under Continuing Resolution, B-176994, 55 Comp. Gen. 289 (1975).

C. "M" Accounts

1. Use of Current Funds for Overobligations.—

(a) *Current Funds Cannot Cover Overobligations in Expired Accounts.*—In *Honorable Andy Ireland*,⁸⁰³ the Comptroller General opined that Congress enacted the 1990 account closing procedures to bring the discipline of the Antideficiency Act⁸⁰⁴ and the bona fide need rule⁸⁰⁵ to the administration of expired accounts.⁸⁰⁶ The Comptroller General ruled that agencies may not use current funds to pay for overobligations in expired accounts.⁸⁰⁷ If an adjustment to an expired account causes an overobligation in the account, the agency must report it to Congress as an Antideficiency Act violation. Congress then either may make a deficiency appropriation or may authorize the agency to pay the deficiency out of current accounts. Until one of these two events occurs, the deficiency remains, and an agency may not obligate current funds for the adjustment.

(b) *Or Maybe They Can: Congress Amends Account Closing Transition Rules.*—The 1993 Authorization Act makes two changes to the transition rules that govern expired accounts.⁸⁰⁸ The DOD may not reobligate any sum in a merged account until it cancels an equal sum currently existing in a merged account. Additionally, if the Secretary of Defense proposes to reobligate more than \$10 million from a merged account for a single purpose, the Secretary must notify Congress and wait thirty days before incurring the obligation. These restrictions remain in effect until all of the audits and reports required by the National Defense Authorization Act for Fiscal Year 1991⁸⁰⁹ are complete.

2. *Use of Funds in "M" Accounts: Congress Requires Dollar-for-Dollar Setoff.*—Section 1004 of the 1993 Authorization Act permits the use of current appropriations for adjustments in expired, but not yet closed, accounts if the

obligation would have been properly chargeable to the expired account, except as to amount, and if the obligation is not otherwise chargeable to a current account.⁸¹⁰ Additionally, the section limits this authority to the lesser of one percent of the total current appropriation, or one percent of the total of the expired appropriation. If an agency uses this authority, it must notify Congress and wait thirty days before incurring the obligation. Moreover, an agency may not use this authority until the Secretary of Defense certifies to Congress that the DOD is complying with the Antideficiency Act⁸¹¹ and immediately reporting all violations of the act to the President and Congress.

D. Antideficiency Act

1. *Employee Detail Triggers Antideficiency Act Violation.*—In 1988, an employee of the Government Printing Office (GPO) began working for the Library of Congress on a nonreimbursable basis. In 1992, the Library of Congress inspector general requested an opinion concerning the propriety of the detail, and the GAO opined that the arrangement was prohibited by statute.⁸¹² The GAO also found that the detail violated the purpose statute⁸¹³ because Congress had not appropriated GPO funds to pay the salary of a GPO employee working for the Library of Congress. Because funds were not available for this purpose, the detail also violated the Antideficiency Act.⁸¹⁴

2. *Use of Agency Funds to Assist Developing Countries Probably Violated Antideficiency Act.*—As discussed above,⁸¹⁵ the GAO found that the use of DOL funds to disseminate American and European employment training materials to developing countries was improper because Congress had intended that the DOL use the funds to "prepare [United States] youth and unskilled adults for entry into the labor force."⁸¹⁶ In this case, the GAO also noted that because no

⁸⁰³B-245856.7, Aug. 11, 1992, 71 Comp. Gen. _____. The decision includes a lengthy enclosure that discusses, in depth, the interrelationship between the ADA and the new account closing rules.

⁸⁰⁴31 U.S.C. § 1341.

⁸⁰⁵*Id.* § 1502.

⁸⁰⁶Congress enacted the new account closing procedures in the National Defense Authorization Act for 1991, Pub. L. No. 101-510, §§ 1405-1406, 104 Stat. 1676 (1990) (codified as 31 U.S.C. §§ 1551-1557).

⁸⁰⁷An agency may use current funds to pay for adjustments in a closed account only if the obligation would have been properly chargeable, both as to purpose and amount, to the expired account. 31 U.S.C. § 1553(a). This was the law until Congress passed the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1004, 106 Stat. 2315, 2481 (1992); see *infra* note 810 and accompanying text.

⁸⁰⁸National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1003, 1004, 106 Stat. 2315, 2481 (1992).

⁸⁰⁹Pub. L. No. 101-510, § 1406, 104 Stat. 1680 (1990).

⁸¹⁰See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1004, 106 Stat. 2315, 2481 (1992). This provision undercuts substantially the Comptroller General's opinion in *Honorable Andy Ireland*, B-245856.7, Aug. 11, 1992, 71 Comp. Gen. _____.

⁸¹¹31 U.S.C. § 1341.

⁸¹²To Mr. John W. Rensbarger, B-247348, June 22, 1992 (unpub.); see 44 U.S.C. § 316 (prohibiting details of employees "to duties not pertaining to the work of public printing and binding").

⁸¹³31 U.S.C. § 1301(a).

⁸¹⁴See *id.* § 1341(a).

⁸¹⁵See *supra* text accompanying notes 781-783.

⁸¹⁶See Job Training Partnership Act, 29 U.S.C. § 1501.

other appropriation was apparently available within the DOL for this project, the department had obligated funds in excess of or in advance of an appropriation.⁸¹⁷

3. *Antideficiency Act Objection to Option Exercise Survives Summary Judgment Motion.*—In *Cessna Aircraft Co.*⁸¹⁸ the appellant sought to avoid performance under an option by asserting that the government's exercise of the option violated the Antideficiency Act.⁸¹⁹ The government moved to dismiss, asserting the criminal nature of the Antideficiency Act and the ASBCA's lack of jurisdiction over criminal matters. The board denied the motion, noting that the parties had not alleged a criminal violation of, or sought criminal sanctions under, the Antideficiency Act. Citing *New England Tank Industries of New Hampshire, Inc. v. United States*,⁸²⁰ the board found that it had jurisdiction to consider whether a contracting officer had authority to use funds cited in an option exercise.

E. Intragovernmental Acquisitions

1. *Army Acquisition Executive Mandates Action to Prevent Abuses.*—In late 1991, the DOD Inspector General uncovered widespread misuse of the Economy Act⁸²¹ by the military departments.⁸²² The report found primarily that activities had offloaded contracts to the TVA without proper review and approval by contracting officers.⁸²³ The DOD Inspector General also noted that DOD activities had placed many orders at the end of the fiscal year but had failed to recover—that is, deobligate—the expired funds as required by the act. In response, the Assistant Secretary of the Army (Research, Development, and Acquisition) directed that activities not issue orders to non-DOD agencies without legal review and contracting officer approval.⁸²⁴ The Army fund control regulation also has incorporated this requirement.⁸²⁵

2. *Comparison of Federal Supply Schedule Price to Agency Contract Price Met Economy Act "Value" Requirement.*—In *Dictaphone Corp.*⁸²⁶ the protestor claimed that the Navy had not complied fully with the Economy Act when ordering a digital dictation system under an Air Force requirements contract. The protestor argued that the contracting officer concluded unreasonably that ordering through the Air Force was as economical as contracting directly for the equipment.⁸²⁷ The GAO disagreed. It found that the protestor's FSS prices, which generally afford discount values, were significantly higher than the Air Force contract prices. If the contracting officer properly could have obtained the equipment at the schedule price without competition, surveying the market for prices lower than those available under the Air Force contract was unnecessary.

VII. Conclusion

Although 1992 has afforded government contracts practitioners some clear legislative and decisional guidance in specific areas, predicting the cumulative impact of the past year's developments would be difficult. A new executive administration is poised to grab the reins of government, and a Congress with many new faces is about to begin its work. In addition, the legal and contracts communities anxiously await the Defense Advisory Panel's recommendations on acquisition reform. Will 1993 be marked by a flurry of legislative and regulatory changes that offset or supplement the activities of the past year? Certainly, if such movement does occur, 1993 will be chock full of new developments.

⁸¹⁷ See 31 U.S.C. § 1341(a)(1)(A), (B).

⁸¹⁸ ASBCA No. 43196 (Oct. 20, 1992), ___ BCA ¶ ____.

⁸¹⁹ The appellant cited 31 U.S.C. § 1517(a)(1), (2); *id.* § 1341(a)(1)(A), (B); *id.* § 1342(a)(1)(A).

⁸²⁰ 861 F.2d 685, 7 FPD ¶ 155 (Fed. Cir. 1988).

⁸²¹ 31 U.S.C. § 1535.

⁸²² See Dep't of Defense, Dep't of Defense Inspector General Audit Report No. 92-069, Quick Reaction Report on DOD Procurements Through the Tennessee Valley Authority (Apr. 3, 1992).

⁸²³ See FAR subpt. 17.5; DFARS subpt. 217.5.

⁸²⁴ Message, Headquarters, Dep't of Army, SARD-PP, subject: Contract Offloading to Tennessee Valley Authority (TVA) (261100Z Dec 91).

⁸²⁵ See DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL, para. 12-r(4)(a) (30 Apr. 1991) (C2, 18 Feb. 1992).

⁸²⁶ B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380.

⁸²⁷ See 31 U.S.C. § 1535(a)(4) (head of agency, or delegee, must decide that agency cannot obtain goods "as conveniently or cheaply" by contract).

JAG CORPS POISED FOR NEW DEFENSE MISSIONS: HUMAN RIGHTS TRAINING IN PERU

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Defense Secretary Aspin has decided to restructure the policy-making apparatus of the Pentagon to direct more attention to new national security concerns such as human rights and to give the department a forceful voice on these issues.¹

assistance to the militaries of several emerging and struggling democracies. Recognizing that law is perhaps the most critical component of a military organization in a democratic state, the JAGC energetically is encouraging the spread of the Clinton Administration's emphasis on the promotion of democracy, human rights, and the rule of law.⁵

I. Introduction

The close of the Cold War caused United States strategy to change from containment to engagement.² The National Command Authority already has cited the dissolution of the Soviet Union as cause for the United States military to expand its traditional role of fighting wars, to new nontraditional roles promoting human rights and the rule of law throughout the world.³ Conceptually, the policy of engagement include activities that promote democratic values, free enterprise, and peaceful behavior between nations.

The new nontraditional military missions associated with engagement include peacekeeping operations, humanitarian interventions, disaster relief missions, counter-drug activities, and nation-building activities. The United States Armed Forces enter the post-Cold War era understanding that fostering democracies and encouraging military establishments subject to the rule of law are vital to United States national security interests.

The Judge Advocate General's Corps (JAGC) demonstrates its commitment to the policy of engagement by providing operational legal advice and support to United States military forces deployed on these new nontraditional missions.⁴ Additionally, Army judge advocates also have provided direct legal

A number of armies and defense ministries have turned to the JAGC to assist them in defining how the law can function properly in their military establishments, and further, how the military itself should fit into a more democratic form of government intent on promoting human rights. The JAGC is answering specific calls for assistance, serving as a forward-based resource capable of advising and responding to a variety of problems confronting many emerging and struggling democracies. This support ranges from supplying basic information on how the United States military adheres to the rule of law, to actually assisting host nation legal officers structure their own legal systems.

In assessing these calls for help, however, the primary concern for United States judge advocates rests with how, over the long term, the host nation's military can be encouraged to accept a reduced and more professional role appropriate to a democracy. Unfortunately, many of the militaries of non-democratic nations have been the chief abusers of human rights. To achieve this long-term goal successfully, two overall themes must be directed toward the host military and appropriate government officials:⁶

- (1) foster greater respect for, and an understanding of, the principle of civilian control of the military; and

¹Jeffrey Smith, *Defense Policy Post Restructured*, WASH. POST, Jan. 28, 1993, at A1.

²See generally DEP'T OF ARMY, TODAY'S CHALLENGE: TOMORROW'S ARMY II (Jan. 1993).

³Smith, *supra* note 1, at A4.

⁴See David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9; Operational Law Note, *Proceedings of the First Center for Law and Military Operations Symposium*, ARMY LAW., Dec. 1990, at 47. To support evolving missions associated with operational deployments better, the Judge Advocate General's Corps developed a new legal discipline in the late 1980s. Termed "operational law," a working definition is "[t]hat body of domestic, foreign, and international law that impacts specifically upon the military operations of U.S. forces in combat and peacetime engagements." INT'L. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422 A17 (May 1992).

⁵To understand the importance of law to a military organization in a democratic society, see RICHARD SIMPKIN, RACE TO THE SWIFT 320 (1985). Simpkin's book is about warfare in the 21st century, and he concludes that democracies must find "politico-legal devices" to confront the enemies that threaten today's society. Simpkin states, "Democratic governments rest on the rule of law, and must so rest," and therefore, military actions must conform with the law. *Id.*

⁶See The Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2347 (West Supp. 1992) (providing the authority for security assistance under the International Military Education and Training (IMET) Program). These two goals are taken from the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1991, tit. II, Pub. L. No. 101-513, 104 Stat. § 1997 (1991).

(2) improve military justice systems and procedures to comport with internationally recognized standards of human rights.

Recognizing that the militaries in many emerging and struggling democracies have a slim frame of reference for properly handling human rights issues, a major focus of the Army JAGC is to promote, strengthen, and assist the host nation's armed forces in institutionalizing human rights training. This concern for human rights mirrors the overall United States national security policy of peacetime engagement by maintaining contacts with allies and friendly governments to impart values and ideals associated with democratic principles.⁷

Requests for help are arriving from countries as diverse as the new republics of the former Soviet Union, to the longer standing, but troubled, democracies of Central and South America. One outstanding example of how Army judge advocates have been involved in the promotion of these vital interests is the current "train the trainer" initiative in Peru.

II. The Peruvian Human Rights Training Initiative

A major obstacle in imparting concepts relating to human rights and democratic principles is that many of these emerging and struggling democracies typically are faced with the social and economic turmoil traditionally associated with low intensity conflict⁸ (LIC) environments, ranging from economic chaos to actual armed insurgency. Consequently, the effectiveness of any assistance program must be measured against the realities associated with the specific LIC problems facing the host nation.

Nowhere in the world do the multiple forces of insurgency, terrorism, and drug trafficking threaten societal order more

than they do in Peru. In the confirmation hearings of Warren Christopher for Secretary of State, Peru was identified as a country vital to United States national security interests and in need of United States assistance. Nevertheless, Peru is a country bitterly engulfed, and almost overwhelmed, with internal threats.⁹

Taking office in 1990, during the middle of a major terrorist siege on his country—primarily sponsored by the Sendero Luminoso and the Movimiento Revolucionario Tupac Amaru¹⁰—Peruvian President Fujimori sought ways to gain and maintain legitimacy for his imperiled government. Working through the United States ambassador, Fujimori sought human rights training for various components of his government. Although initial contacts were made, the political and terrorist situation prevented any training from taking place. Actually, by April 1992, the terrorist offensive had gained such momentum that some analysts were predicting the fall of the government.

Fear and corruption were so great that Fujimori executed an "autocoup" by which he suspended the Constitution, disbanded Congress and most of the judiciary, and began extensive use of the military and the military courts to regain control of the country. Although the autocoup—with the subsequent arrest of Abimael Guzman, the founder and leader of the Sendero Luminoso—actually resulted in bettering the conditions in Peru, the international community's response to President Fujimori's actions was one of general disappointment. The United States Congress stopped virtually all financial and technical assistance until the political situation settled and a new Congress was seated in free elections.¹¹

On the home front, President Fujimori maintained the popular, though not unanimous, support of the Peruvian people. Because the terrorists targeted the general population, most Peruvians accepted any reasonable government action to halt

⁷This concern exceeds the minimally accepted standards for human rights established by customary international law. International law prohibits genocide, slavery, murder or "disappearance"; torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or any activity that demonstrates a consistent pattern of gross violations of internationally recognized human rights. The United States traditionally has promoted by treaty, declaration, and action the fullest possible range of meaningful human rights. These rights include freedom of religion, freedom of association, freedom of speech, and all of those principles indicative of a truly democratic society. See, e.g., THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS (1988).

⁸See DEP'TS OF ARMY & AIR FORCE, FIELD MANUAL 100-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT (Dec. 1989). The term "low intensity conflict" is defined as follows:

Political-military confrontation between contending states or groups below conventional war and above the routine, peaceful competition among states. It frequently involves protracted struggles of competing principles and ideologies. Low intensity conflict ranges from subversion to the use of armed forces. It is waged by a combination of means, employing political, economic, international, and military instruments.

Id.

⁹Coverage of Senate Confirmation Hearings (C-SPAN television broadcast, Jan. 18, 1993).

¹⁰See, e.g., Mary Speck, *Caught in Peru's Crossfire*, MIAMI HERALD (Int'l Edition), Dec. 8, 1992, at A1.

¹¹The government of Peru has had to make some extremely difficult decisions to receive United States aid. Like all countries, Peru is a recipient of United States assistance under the provisions of The Foreign Assistance Act of 1961, Pub. L. No. 187-195 (codified as 22 U.S.C. § 2151 (1988)). This act, however, prohibits United States security assistance to countries that "engage in a consistent pattern of gross violations of internationally recognized human rights." See 22 U.S.C. § 2304 (a)(2-3)(1988).

the killings.¹² President Fujimori had to find the proper balance between maintaining control, and not allowing his government forces to cross the line of excessive behavior.

Strong, swift retribution by government officials, whose families often had been the target of attack, was an understandable reaction, but one that caused extensive debate both in Peru and in the international community. While the government of Peru intensified a series of concrete initiatives to combat the terrorist threat, the Peruvian military acknowledged that the natural temptation for the soldiers to respond in kind to terrorist brutality had to be halted. The behavior not only was counterproductive to maintaining the full support of the people, but also the international image of the Peruvian military suffered. Foremost in Peru's fight for survival was maintaining the legitimacy of the Peruvian government, wherein true democracy would have a chance to endure. A major step in remedying the legitimacy issue was to inculcate human rights and law of armed conflict training into its armed forces.

As the situation in Peru stabilized, the Peruvian military sought United States military assistance in a human rights initiative for its armed forces. Working through the military assistance and advisory group in Lima, Peru, the Commander in Chief, United States Southern Command (SOUTHCOM) offered to provide assistance out of his initiative funds.¹³ In turn, the SOUTHCOM Staff Judge Advocate asked the International and Operational Law Division, Office of The Judge Advocate General (OTJAG), if it could conduct a human rights training mission in Peru. Ultimately, the International and Operational Law Division joined with the International Law Division at The Judge Advocate General's School (TJAGSA) to develop and execute a human rights plan consisting of five phases.

A. Phase I: Developing a Concept Plan

The first phase of the concept plan called for a site survey in Peru. In August of 1992, two United States Army judge advocates traveled to Lima, Peru, to discuss the overall human rights situation with their Peruvian counterparts. While the Peruvians expressed a desire to receive human rights instruction, little, if any, standardized methodology existed to teach human rights to its soldiers. No military legal facility designed and equipped to train Peruvian judge advocates and commanders in these specialized legal areas existed. In addition, the investigative process for soldiers accused of human rights abuses apparently was deficient.

Clearly, Peruvian soldiers in the field had to be given meaningful human rights training if they were expected to cope better with the abuses of terrorists, and if they were to be held accountable when violations occurred. Furthermore, this

training had to be institutionalized into the Peruvian military system so that human rights training would be a continuous requirement for all soldiers. The normal route of sending a United States mobile training team to Latin America—which usually involved a “one shot” course on a particular topic—would be inadequate to institutionalize the lessons necessary to achieve minimal international human rights standards. Cultural, language, and social barriers suggested that the best chance for success would be for Peruvian instructors to deliver the actual subject matter presentations.

After extensive meetings with representatives from each of the Peruvian services, including The Judge Advocate General of the Peruvian Army, a joint concept plan was formulated. This plan was designed to teach Peruvian judge advocates “how to teach” human rights and then to assist those same individuals in developing lesson plans that they could use to present human rights classes throughout the Peruvian military. In this manner, human rights training would be taught by Peruvian instructors and institutionalized into the Peruvian military. Simply put, the theme would be to “train the trainers.”

B. Phase II: Training at TJAGSA

Six Peruvian military judge advocates—two each from the Peruvian Army, Navy, and Air Force—traveled to TJAGSA, in Charlottesville, Virginia, for a two-week period in October and November of 1992. During these two weeks, the Peruvian judge advocates entered into an extensive working relationship with judge advocates from the United States Army, Air Force, and Navy. The purpose of this working relationship was twofold. First, the Peruvians were assisted in developing a comprehensive human rights training program of instruction that would be used to present a week-long human rights course for a broad based Peruvian audience. A Spanish language deskbook was developed, covering topics such as human rights, law of armed conflict, international law, and criminal investigations, and which contained key documents in these areas. The second purpose was to train the Peruvians how to teach these classes effectively. These officers would form the nucleus of a permanent pool of Peruvian instructors who then would teach human rights throughout their armed forces.

C. Phase III: Teaching the First Peruvian Class

The third phase of the plan took place from 15 through 19 December 1992. The Peruvian instructors used the human rights deskbook developed at TJAGSA during Phase II to provide a four-day human rights training course in Lima, Peru. The course was taught by the same Peruvian judge advocates who attended Phase II in Charlottesville, Virginia, assisted by two United States Army judge advocates and one Air Force judge advocate. Approximately fifty participants, consisting of field commanders and their judge advocates,

¹²In their efforts to coerce the populace into submission, the terrorists regularly bombed crowded places, destroyed power plants and public utilities, and publicly executed government officials. The Senderos's calling card is torture and mutilation of victims, accompanied with the slaughtering of dogs that are booby trapped and then hung on lamp posts throughout the local community.

¹³10 U.S.C. § 166(a) (1988).

attended this course.¹⁴ The goal of this training course was not only to provide human rights instruction to senior military commanders, but also to provide the Peruvian judge advocates their "baptism under fire" in presenting these materials to an audience of their peers.

Five Peruvian instructors led the course, which consisted of platform instruction and seminars. They presented the material and handled the logistics of the conference in an exceptional manner. The Peruvian instructors quickly took charge of the various seminars, divided the participants into five "joint" groups, and then led individual group discussions. Phase III was a complete success. The Peruvian instructors clearly demonstrated that they were fully capable and desirous of conducting subsequent human rights training.

All of the attendees actively participated in the course and seminars, engaged in the question and answer sessions, and, most notably, carried on animated discussions following the daily classes. The reporting and investigating requirements of alleged human rights abuses sparked particular interest. The overwhelming acceptance of the material presented by the instructors strongly indicated the Peruvians' genuine interest in human rights issues.

D. Phase IV: Tailoring the Human Rights Courses

Prompted by the success of the Phase III training course, the Peruvians wanted to develop separate one-day course outlines for presentation to three distinct groups in the Peruvian military—junior enlisted soldiers, noncommissioned and junior officers, and judge advocates. Accordingly, several Peruvian judge advocates spent the next two months designing this project. The extensive course deskbook used during Phase III served as the catalyst for developing a standardized set of materials tailored for each of the three target groups. In addition, this deskbook was sent to each of the military academies and service schools in Peru as a guide for revamping training at those institutions.

In February of 1993, two Peruvian judge advocates returned to TJAGSA and, relying on their work products and assistance from United States judge advocates, produced several programs of instruction—one for each of the target audiences. The course and pamphlet directed at the junior enlisted soldiers is noteworthy; because many enlisted soldiers in the Peruvian Army are not able to read, the pamphlet and instruction rely heavily on visual aids. This pamphlet entitled "The Ten Commandments of Human Rights," lays down easy to understand rules and guidelines for those soldiers most likely to encounter situations when human rights violations occur. The visual aids capture the essence of the main teaching points, and the back cover of the pamphlet contains a tear away card to be used as a "human rights ROE card."

The programs of instruction for the junior enlisted soldiers and officers contain common characteristics. The instruction

stresses adherence to the rule of law. Civilian control of the military, and the military's role in a democratic society are central themes to the instruction. The development of human rights and the relation of human rights concerns with the law of war are discussed thoroughly. Finally, the "bottom line" is explained—that is, the rights and responsibilities of individuals in a democratic society; the duties of soldiers, commanders, police and other government officials in relation to human rights; and the international, regional, and domestic minimally accepted human rights standards.

These three instruction programs give Peru the tools to institutionalize human rights training into the very fabric of its armed forces. What remains, is to implement the programs at the troop level.

E. Phase V: Human Rights Training in the Field

The final phase of the concept plan will take place in the Spring of 1993. Two United States Army judge advocates will accompany the Peruvian instructors as the instructors deliver one-day courses throughout Peru. This phase will culminate the plan, after which the Peruvian judge advocates will assume the full duties of delivering, improving, and continuing the human rights program.

The apparent success of the United States efforts in Peru must be tempered with the realization that human rights training can be effective only to the degree that it is inculcated into the psyche of the Peruvian military. At a minimum, the Peruvians must now have three standardized human rights training programs of instruction that are truly their own. The Peruvians now must continue the effort. The strategy to keep the United States' role as that of a "helper," and not as an overseer, has paid tremendous dividends. If the Peruvian military is successful, the success will be attributable to its commitment in continuing to teach human rights. Teaching and training must go hand-in-hand with investigating abuses and holding the responsible parties accountable.

III. Conclusion

The Peruvian human rights initiative is a model for the future. While the traditional concept of military might is absolutely necessary to ensure the protection of ideals related to human rights and the rule of law, the United States' strongest asset always has been the export of those ideals to the rest of the world. In the post-Cold War era, what better use of our military resources exists than promoting respect for human rights by uniformed soldiers, trained in the law, who demonstrate that a strong military can operate under civilian control?

While one never may know how many lives are saved by the efforts of the United States Army JAGC, the tremendous potential for good certainly exceeds the minimal costs. United States Army lawyers already are educated and trained in these

¹⁴All three armed services were represented, as well as senior police officials, representatives from the Attorney General's office, the Director of Human Rights, and many line officers assigned to the "emergency zones."

areas, judge advocates are deployed forward throughout the world, and by engaging receptive host nations with these concepts, their efforts will accrue synergistic effects that benefit other vital interests. Undoubtedly, alliances and personal contacts will be developed, democratic ideals and the rule of law will be promoted, and the subordination of the military to civilian control will be advanced.

The concept of training the trainer places the cost and the reward where it belongs—on the host country. If the initiative is successful, it is because the host nation takes the program on as its own and gives it sufficient resources to continue. If it fails, the United States should not be faulted for trying.¹⁵ The Peru initiative should be emulated for its simplicity, its focus, and its potential for impact throughout the world.

The post-Cold War era shines with a renewed hope for lasting peace and commitment to human rights; the central theme resting in the promise of a new world order based on the rule of law. One of those rare moments in history now exists when a window of opportunity has opened for the world to make substantial and lasting strides towards controlling aggressive warfare and significantly improving the condition of humanity.

The defense ministries of countries seeking assistance in creating a law-based military establishment look to the United States for two reasons. First, the United States military emerged from the Cold War as the foremost power in the world—a power that possesses the capability to influence change. Second, countries recognize that the United States Armed Forces have functioned superbly under a rule of law—whether in the realm of respecting the law of armed conflict¹⁶ or in providing a workable and fair system of law for soldiers.

In the larger picture, the end of the largest totalitarian system the world has ever known—the Soviet Union and the Warsaw Pact—offers a unique opportunity for mankind to advance the rule of law and respect for human rights. The world now looks to the United States to provide moral and political leadership, and the United States is stepping up to meet the challenge. As a part of that movement forward, we are using United States military attorneys as vehicles to achieve goals and programs that are fundamental to our national security—promotion of the rule of law and human rights throughout the world.

¹⁵"If you give a man a fish you feed him for a day; if you teach a man how to fish, you feed him for a lifetime." The United States cannot give fish, or human rights instruction, on a continued basis to every country in the world. The United States, however, can engage countries on a case-by-case basis for short periods of time, and share with them materials that have proven beneficial in the teaching of human rights, civilian control of the military, and the rule of law.

¹⁶See DIETRICH SCHINDLER & JIJI TOMAN, THE LAWS OF ARMED CONFLICT (1988). The law of armed conflict is drawn from several sources including international agreement, custom and practice, judicial decision, and general principles of law.

CLE NEWS

1. Resident Course Quotas

Attendance at resident (Continuing Legal Education) CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed through the Army Training Requirements and Resources System (ATRRS), the Armywide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel should request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1993

5-9 April: 4th Law for Legal NCO's (512-71D/E/20/30).

12-16 April: 117th Senior Officer Legal Orientation Course (5F-F1).

12-16 April: 15th Operational Law Seminar (5F-F47).

20-23 April: TJAG's Reserve Component Annual CLE Workshop (5F-F56).

26 April-7 May: 131st Contract Attorneys Course (5F-F10).

- 17-21 May: 36th Fiscal Law Course (5F-F12).
- 17 May-4 June: 36th Military Judges Course (5F-F33).
- 18-21 May: 93 USAREUR Operational Law CLE (5F-F47E).
- 24-28 May: 43d Federal Labor Relations Course (5F-F22).
- 7-11 June: 118th Senior Officer Legal Orientation Course (5F-F1).
- 7-11 June: 23d Staff Judge Advocate Course (5F-F52).
- 14-25 June: JA Officer Advanced Course, Phase II (5F-F58).
- 14-25 June: JA Triennial Training (5F-F57).
- 14-18 June: 4th Legal Administrators Course (7A-550A1).
- 14-16 July: 24th Methods of Instruction Course (5F-F70).
- 19 July-24 September: 131st Officer Basic Course (5-27-C20).
- 19-30 July: 132d Contract Attorneys Course (5F-F10).
- 2 August 93-13 May 94: 42d Graduate Course (5-27-C22).
- 2-6 August: 54th Law of War Workshop (5F-F42).
- 9-13 August: 17th Criminal Law New Developments Course (5F-F35).
- 16-20 August: 4th Senior Legal NCO Management Course (512-71D/E/40/50).
- 23-27 August: 119th Senior Officer Legal Orientation Course (5F-F1).
- 30 August-3 September: 16th Operational Law Seminar (5F-F47).
- 20-24 September: 10th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

May 1993

- 2-6: NCDA, Prosecuting Drug Cases, San Diego, CA.
- 3: GWU, Joint Ventures and Teaming Arrangements, Washington, D.C.
- 5-7: TLS, Resolving Commercial Disputes, New Orleans, LA.

- 6-7: ABA, Corporate Litigation, Coronado, CA.
- 9-13: NCDA, Trial Advocacy, Orlando, FL.
- 13: ABA, Hazardous Waste and Superfund 1993, Satellite Program
- 16-19: LRP, 14th National Institute on Legal Issues of Education, Miami, FL.
- 16-20: NCDA, Government Civil Practice, New Orleans, LA.
- 17-21: GWU, Government Contract Law, Seattle, WA.
- 18: MICLE, Guaranties, Letters of Credit, and Other Non-Real Estate, Grand Rapids, MI.
- 19-21: GWU, Patents, Technical Data and Computer Software, Washington, D.C.
- 20: ABA, Litigation Skills, Satellite Program
- 20: MICLE, Guaranties, Letters of Credit, and Other Non-Real Estate, Grand Rapids, MI.
- 20-22: ABA, Medical Malpractice, New Orleans, LA.
- 24-25: GWU, Mergers and Acquisitions for Government Contractors, Washington, D.C.
- 24-28: GWU, Formation of Government Contracts, Seattle, WA.
- 29-3 June: NCDA, The Executive Program: A Course For Prosecution Leadership, Houston, TX.

For further information on civilian courses, please contact the institution offering the course. The addresses are in the August 1992 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
**Alabama	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
*California	1 February annually
Colorado	Any time within three-year period
Delaware	31 July biennially
*Florida	Assigned month triennially
Georgia	31 January annually
Idaho	Triennially on anniversary of admission

<u>Jurisdiction</u>	<u>Reporting Month</u>
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
**Louisiana	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
**Mississippi	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Mexico	30 days after program
**North Carolina	28 February of succeeding years
North Dakota	31 July annually
*Ohio	31 January biennially
**Oklahoma	15 February annually
Oregon	Birthday annually—new admittees and reinstated members report after an initial one-year period; thereafter triennially
**Pennsylvania	Annually as assigned
**South Carolina	15 January annually
*Tennessee	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June biennially
*Wisconsin	20 January every other year
Wyoming	30 January annually

For addresses and detailed information, see the January 1993 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

CURRENT MATERIAL OF INTEREST

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are

unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A239203	Government Contract Law Deskbook Vol 1/ JA-505-1-91 (332 pgs).
AD A239204	Government Contract Law Deskbook, Vol 2/ JA-505-2-91 (276 pgs).
AD B144679	Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
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- AD A248421 Real Property Guide—Legal Assistance/JA-261-92 (308 pgs).
- AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).
- AD B164534 Notarial Guide/JA-268(92) (136 pgs).
- AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).
- AD A246325 Soldiers' and Sailors' Civil Relief Act/JA-260(92) (156 pgs).
- AD A244874 Legal Assistance Wills Guide/JA-262-91 (474 pgs).
- AD A244032 Family Law Guide/JA 263-91 (711 pgs).
- AD A241652 Office Administration Guide/JA 271-91 (222 pgs).
- AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
- AD A241255 Model Tax Assistance Guide/JA 275-91 (66 pgs).
- AD A246280 Consumer Law Guide/JA 265-92 (518 pgs).
- AD A245381 Tax Information Series/JA 269/92 (264 pgs).
- AD A256322 Legal Assistance: Deployment Guide/JA-272(92)

Administrative and Civil Law

- AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
- AD A255038 Defensive Federal Litigation/JA-200(92) (840 pgs).
- AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).
- AD A255064 Government Information Practices/JA-235(92) (326 pgs).
- AD A237433 AR 15-6 Investigations: Programmed Instruction/JA-281-91R (50 pgs).

Labor Law

- AD A256772 The Law of Federal Employment/JA-210(92) (402 pgs).

- AD A255838 The Law of Federal Labor-Management Relations/JA-211-92 (430 pgs).

Developments, Doctrine and Literature

- AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs.)

Criminal Law

- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).
- AD B135506 Criminal Law Deskbook Crimes and Defenses/JAGS-ADC-89-1 (205 pgs).
- AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).
- AD A251120 Criminal Law, Nonjudicial Punishment/JA-330(92) (40 pgs).
- AD A251717 Senior Officers Legal Orientation/JA 320(92) (249 pgs).
- AD A251821 Trial Counsel and Defense Counsel Handbook/JA 310(92) (452 pgs).
- AD A233621 United States Attorney Prosecutors/JA-338-91 (331 pgs).

Reserve Affairs

- AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(1) *Active Army.*

(a) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam. 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam. 25-33.

If your unit does not have a copy of DA Pam. 25-33, you may request one by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

d. Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. This office may be reached at (301) 671-4335.

e. Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

f. Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 10-5	Headquarters, Department of the Army	30 Nov 92
AR 10-87	Major Army Command in the Continental United States	30 Oct 92
AR 190-9	Absentee Deserter Apprehension Program and Surrender of Military Personnel to Civilian Law Enforcement Agencies	24 Jul 92
AR 420-90	Fire Protection	25 Sep 92
AR 600-63	Army Health Program, Interim Change 101	30 Nov 92
AR 690-950	Civilian Personnel Career Management, Interim Change 10530	30 Dec 92
DA Pam 5-20	Commercial Activities Study Guide	17 Nov 92
UPDATE 14	Officer Ranks Personnel, Interim Change 1	1 Nov 92

3. LAAWS Bulletin Board Service

a. Numerous publications produced by The Judge Advocate General's School (TJAGSA) are available through the LAAWS Bulletin Board System (LAAWS BBS). Users can sign on the LAAWS BBS by dialing commercial (703) 693-4143, or DSN 223-4143, with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 or ANSI terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions. It then will instruct them that they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

b. Questions concerning the LAAWS Bulletin Board Service should be directed to the OTJAG LAAWS Office at (703) 805-2922.

c. *Instructions for Downloading Files From the LAAWS Bulletin Board Service.*

(1) Log on the LAAWS BBS using ENABLE 2.15 and the communications parameters described above.

(2) If you never have downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to Download a file.

(d) When prompted to select a file name, enter [pkz 110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You then should press the F10 key, which will give you a top-line menu. From this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(g) The menu will then ask for a file name. Enter [c:\pkz110.exe].

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when the file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression and decompression utilities used by the LAAWS BBS.

(3) To download a file after logging on to the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, type F10. From the top-line menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol.

(e) When asked to enter a file name, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. When you hear a beep, file transfer is complete and the file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

d. *TJAGSA Publications Available Through the LAAWS BBS.*

The following is an updated list of TJAGSA publications available for downloading from the LAAWS BBS. (Note that the date a publication is "uploaded" is the month and year the file was made available on the BBS—the publication date is available within each publication.)

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1990_YIR.ZIP	January 1991	1990 Contract Law Year in Review in ASCII format. It originally was provided at the 1991 Government Contract Law Symposium at TJAGSA.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
1991_YIR.ZIP	January 1992	TJAGSA Contract Law 1991 Year in Review
505-1.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 1, May 1992
505-2.ZIP	June 1992	TJAGSA Contract Law Deskbook, vol. 2, May 1992
506.ZIP	November 1991	TJAGSA Fiscal Law Deskbook, November 1991
93CLASS.ASC	July 1992	FY 1993 TJAGSA class schedule (ASCII).
93CLASS.EN	July 1992	FY 1993 TJAGSA class schedule (ENABLE 2.15).
93CRS.ASC	July 1992	FY 1993 TJAGSA course schedule (ASCII).
93CRS.EN	July 1992	FY 1993 TJAGSA course schedule (ENABLE 2.15).
ALAW.ZIP	June 1990	<i>The Army Lawyer and Military Law Review Database (ENABLE 2.15). Updated through 1989 The Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.</i>
BBS-POL.ZIP	December 1992	Draft letters of LAAWS BBS operating procedures
CCLR.ZIP	September 1990	Contract Claims, Litigation & Remedies
DEPLOY.EXE	December 1992	Excerpts from the Legal Assistance Deployment Guide (JA 274)—These documents were created in WordPerfect 4.0 and zipped into an executable file. Once downloaded, copy them to hard drive and type "deploy."
FISCALBK.ZIP	November 1990	Fiscal Law Deskbook (Nov. 1990)
FSO_201.ZIP	October 1992	Update of FSO Automation Program. Download to hard disk, unzip to floppy disk, then enter A:\INSTALLA or B:\INSTALLB.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>	<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA200A.ZIP	August 1992	Defensive Federal Litigation, vol. 1	JA285.ZIP	March 1992	Senior Officers' Legal Orientation
JA200B.ZIP	August 1992	Defensive Federal Litigation, vol. 2	JA290.ZIP	March 1992	SJA Office Manager's Handbook
JA210.ZIP	October 1992	Law of Federal Employment	ND-BBS.ZIP	July 1992	TJAGSA Criminal Law New Developments Course Deskbook
JA211.ZIP	August 1992	Law of Federal Labor-Management Relations	JA301.ZIP	July 1992	Unauthorized Absence—Programmed Instruction, TJAGSA Criminal Law Division
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Text	JA310.ZIP	July 1992	Trial Counsel and Defense Counsel Handbook, TJAGSA Criminal Law Division
JA235-92.ZIP	August 1992	Government Information Practices (July 1992). Updates JA235.ZIP.	JA320.ZIP	July 1992	Senior Officers' Legal Orientation Criminal Law Text
JA235.ZIP	March 1992	Government Information Practices	JA330.ZIP	July 1992	Nonjudicial Punishment—Programmed Instruction, TJAGSA Criminal Law Division
JA241.ZIP	March 1992	Federal Tort Claims Act	JA337.ZIP	July 1992	Crimes and Defenses Handbook
JA260.ZIP	October 1992	Soldiers' and Sailors' Civil Relief Act Pamphlet	JA4221.ZIP	May 1992	Operational Law Handbook, vol. 1
JA261.ZIP	March 1992	Legal Assistance Real Property Guide	JA4222.ZIP	May 1992	Operational Law Handbook, vol.2
JA262.ZIP	March 1992	Legal Assistance Wills Guide	JA509.ZIP	October 1992	Contract Claims Litigation, and Remedies Deskbook (Sept. 1992).
JA267.ZIP	March 1992	Legal Assistance Office Directory	V1YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 1 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
JA268.ZIP	March 1992	Legal Assistance Notarial Guide	V2YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 2 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
JA269.ZIP	March 1992	Federal Tax Information Series	V3YIR91.ZIP	January 1992	1991 Contract Law Year in Review, vol. 3 (originally presented at TJAGSA's January 1992 Contract Law Symposium)
JA271.ZIP	March 1992	Legal Assistance Office Administration Guide			
JA272.ZIP	March 1992	Legal Assistance Deployment Guide			
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References			
JA275.ZIP	March 1992	Model Tax Assistance Program			
JA276.ZIP	March 1992	Preventive Law Series			
JA281.ZIP	November 1992	AR 15-6 Investigations			

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
YIR89.ZIP	January 1990	1989 Contract Law Year in Review

Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMAs) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5¹/₄-inch or 3¹/₂-inch blank, formatted diskette for each file. In addition, a request from an IMA must contain a statement that verifies that the IMA needs the requested publications for purposes related to the military practice of law. Questions or suggestions concerning the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. All other inquiries should be directed to the OTJAG LAAWS Office at (703) 805-2922.

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become

the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are DSN 934-7115, ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

b. The following material has been declared surplus by the Department of the Navy and can be requested from Ms. Carver of Ms. Roach, Navy OTJAG Law Library, (703) 325-9565 or DSN 221-9565. Most sets are about one year out of date.

- Alaska Statutes (Michie)
- Arizona Revised Statutes Annot. (West)
- Arkansas Code Annot. (Michie)
- Colorado Revised Statutes Annot. (Bradford)
- Delaware Code Annot. (Michie)
- Official Code of Georgia Annot. (Michie)
- Idaho Official Code (Michie)
- Burns Indiana Statutes Annot. (Michie)
- Iowa Code Annot. (West)
- Kansas Statutes Annot. (official—Kansas)
- Kentucky Revised Statutes Annot. (Michie)
- Louisiana Statutes Annot. (West)
- Annotated Laws of Massachusetts (Lawyers' Co-op)
- Michigan Statutes Annot. (Lawyers' Co-op)
- Minnesota Statutes Annot. (West)
- Vernon's Annot. Missouri Statutes (West)
- Montana Code Annot. (official—Montana)
- Revised Statutes of Nebraska (official—Nebraska)
- New Hampshire Revised Statutes Annot. (Equity)
- North Dakota Century Code Annot. (Michie)
- Page's Ohio Revised Code Annot. (Anderson)
- Oklahoma Statutes Annot. (West)
- Oregon Revised Statutes (official—Oregon)
- South Dakota Codified Laws (Michie)
- Utah Code Annot. (Michie)
- Vermont Statutes Annot. (Equity)
- West Virginia Code (Michie)
- Wisconsin Statutes Annot. (West)
- Wyoming Statutes Annot. (Michie)