

## CONTRACT FORMATION

### Authority

#### *Barterers Beware*

In *Catel, Inc.*,<sup>1</sup> the Armed Services Board of Contract Appeals (ASBCA) provided a thorough discussion of the concepts of express, implied, and implied-in-fact contracts, as well as the authority of government officials to bind the government. Catel, the contractor, verbally agreed with an employee of the government to “store its [skiff] at the Fire Training Center . . . in return for government use of the [skiff].”<sup>2</sup> The government employee used the skiff over a period of about two years. Catel ultimately submitted a claim for over seventy thousand dollars, an amount including the government’s use of the skiff for four hundred fifty-eight days, repair and replacement costs, and markups for overhead and profit.

The government employee that entered into the agreement with Catel was not a warranted contracting officer, and had not yet been appointed as an alternate contracting officer’s representative.<sup>3</sup> The verbal agreement, including Catel’s agreement “to allow [the government] to use the equipment with the expectation of future work,” formed the basis for Catel’s argument that a contract existed.

The ASBCA has jurisdiction to hear such an argument only if there is an express contract *or* an implied-in-fact contract. Since there was no express contract, Catel had to prove that there was an implied-in-fact contract.<sup>4</sup> For an implied-in-fact contract to arise, government representatives without actual express authority must have implied actual authority that permits them to legally bind the government. That authority “must be an integral part of the duties assigned to the Government employee who created the obligation.”<sup>5</sup> The ASBCA held that “Catel failed to prove the requisite elements of an implied-in-fact contract. It failed to prove that [the employee] had express or implied actual authority to enter into the storage/use arrangement with respect to government use of the skiff.”<sup>6</sup>

Of course, another way to bind the government in a situation in which a government employee without authority creates an obligation is for the contracting officer to ratify the action, either expressly or by implication.<sup>7</sup> There was no express ratification, but Catel argued that “government representatives with contracting authority had actual or constructive knowledge of [the employee’s] actions.”<sup>8</sup> Catel produced no evidence, however, that the contracting officer had actual or

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<sup>1</sup> ASBCA No. 54627, 05-1 BCA ¶ 32,966.

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

<sup>3</sup> The employee was subsequently appointed as such two years later. *Id.*

<sup>4</sup> The ASBCA used a string of cases to describe the burden of proof with respect to such a contract:

An implied-in-fact contract with the government requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) “actual authority” on the part of the government’s representative to bind the government in contract. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). Thus, the requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. An implied-in-fact contract is one founded upon a meeting of the minds and “is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923). *William M. Hamlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). *See City of El Centro v. United States*, 922 F.3d 816, 820-21 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991); *United Pac. Ins. Co.*, ASBCA No. 53051, 03-2 BCA ¶ 32,267 at 159,623-24, *aff’d*, 380 F.3d 1352 (Fed. Cir. 2004); *Balboa Sys. Co.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715 at 118,702. *See also* FAR 1.602-3, Ratification of Unauthorized Commitments.

*Id.* at 163,298.

<sup>5</sup> *Id.* (citing *MTD Transcribing Service*, ASBCA No. 53104, 01-1 BCA ¶ 31,304 at 154,540, citing *H. Landau & Co. v. United States*, 886 F.2d 322 (Fed. Cir. 1989)).

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

<sup>7</sup> Contracting officers can expressly ratify an obligation of an employee by issuing a written determination. In the absence of a written document, a contractor can prove ratification by proving that the contracting officer had actual or even constructive knowledge of the obligation. “Constructive knowledge may be imputed to the government representative with contracting authority, if the government representative knew or should have known of the unauthorized action.” *Id.* (citing *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,508; *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119, 717-18; *see Balboa Sys.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715, at 118, 702 (implied-in-fact contract may result from verbal representations ratified by word or action by someone having authority to bind the government)).

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

constructive knowledge and, therefore, the ASBCA held that Catel “failed to prove a government representative with authority to bind the government had . . . expressly or by implication ratified [the employee’s] actions.”<sup>9</sup>

In addition to the implied-in-fact and ratification theories put forth by Catel, the ASBCA considered *sua sponte* the alternative theory of “institutional ratification,” which may give rise to a contract where a government agency accepts benefits followed by a promise of payment by the agency, or approval of payment by a senior agency official with authority to obtain reimbursement for the one providing those benefits.<sup>10</sup> In *Catel*, when the contracting officer discovered that a government employee was using the skiff, “he took immediate action to return the skiff to Catel and to initiate an investigation of the matter. Furthermore, Catel did not show that a senior agency official with authority to approve of payment who was aware of the skiff matter promised to seek reimbursement for Catel for government use of the skiff.”<sup>11</sup> Consequently, the ASBCA did not find any institutional ratification.

Major Jennifer C. Santiago

## Competition

### *Can You Use the “Urgent and Compelling” Exception Two Consecutive Times for the Same Need?*

It appears that you can get a second bite of the apple. In *Filtration Development Co. v. United States*,<sup>12</sup> the plaintiffs for the second time protested the Army’s use of the “unusual and compelling urgency exception” to the Competition in Contracting Act (CICA) in a procurement of inlet barrier filters (IBF) for UH-60 Blackhawk helicopters.<sup>13</sup> Filtration believed the Army had violated the court’s previous order and sought a preliminary injunction, attorneys fees, and costs.<sup>14</sup> Filtration did not get its injunction, but did receive money for attorney fees and expenses under the Equal Access to Judgment Act (EAJA).<sup>15</sup>

In Filtration’s previous protest, the court held that the Army was justified in using the unusual and compelling urgency exception, but only for the exact number of kits required for helicopters deploying to Iraq in the immediate future.<sup>16</sup> However, the court was “unwilling to condone an indefinite extension of the ‘unusual and compelling urgency’ exception.”<sup>17</sup>

The Army used the same reasoning in September 2004, after the first protest had been decided, to sole-source an additional two hundred inlet kits.<sup>18</sup> While the court had previously limited the scope of the previous Justification and Approval (J&A) document to the specific number of kits needed for helicopters affected by upcoming deployments, the court did not prevent the use of another J&A that detailed the urgent and compelling rationale for more kits based upon a separate

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

<sup>10</sup> *Id.* at 163,299 (citing *Janowsky v. United States*, 133 F.3d 888, 891 (Fed. Cir. 1998) (institutional ratification occurred where the government received benefits and senior agency officials were aware of the unauthorized agreement by a government representative and allowed performance to continue); *City of El Centro v. United States*, 922 F.3d 816, 821 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991) (institutional ratification argument rejected because no proof of direct benefits and no promise by an official empowered to bind the government to pay for benefits); *MTD Transcribing Serv., ASBCA 51304*, 01-1 BCA ¶ 31,304, at 154,541 (institutional ratification rejected because there was no promise to pay for services and the agency did not receive benefits); *see Thai Hai, ASBCA 53375*, 02-2 BCA ¶ 31,971, at 157,922.

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

<sup>12</sup> 63 Fed. Cl. 418 (2004).

<sup>13</sup> *Id.* For requirements of the unusual and compelling urgency exception of CICA, *see* 10 U.S.C.S. § 2304(c)(2) (LEXIS 2005). In the earlier protest, Filtration protested the Government’s use of the unusual and compelling urgency exception in procuring engine IBFs for UH-60 Blackhawk helicopters to be deployed to Iraq in conjunction with a troop rotation beginning in March 2004. *Filtration Dev. Co. v. United States*, 60 Fed. Cl. 371 (2004). The filter systems reduced the damage to the helicopter engines caused by sand and other debris being ingested into the engines. *Id.* at 373. In Filtration’s initial protest, the court held that since “the Army failed to limit the procurement to the number of IBF kits necessary to satisfy the current emergency and had extended the exception’s application beyond the minimum time duration,” the protest should be upheld. *Filtration Dev. Co. v. United States*, 63 Fed. Cl. 612, 615 (2005) (explaining the holding of the earlier case, *Filtration Dev. Co.*, 60 Fed. Cl. 371 (2004)). In the earlier case, the COFC also found that the Army had violated Organizational Conflict of Interest regulations in the procurement and that the Contracting Officer had “usurped the authority of the chief of contracting office in concluding that the mitigation plans adequately addressed the conflict.” *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Filtration Dev. Co. v. United States*, 63 Fed. Cl. 612 (2005). The Equal Access to Judgment Act provides that a prevailing party against the government may be awarded costs and fees for any civil action brought by or against the United States. 28 U.S.C.S. § 2412 (LEXIS 2005).

<sup>16</sup> *Filtration Dev. Co.*, 60 Fed. Cl. at 383.

<sup>17</sup> *Id.*

<sup>18</sup> *Filtration Dev. Co. v. United States*, 63 Fed. Cl. 418, 420 (2004).

and independent justification.<sup>19</sup> Since troop mobilizations to Iraq continued, more Blackhawk helicopters were being dispatched to the region,<sup>20</sup> which the Army needed to outfit with inlet kits.

The court reasoned that the September 2004 J&A addressed this increased need and the depletion of the kits previously bought under the last exception.<sup>21</sup> The inlet kits for the soon-to-be deployed helicopters, therefore, represented a new requirement that was addressed by a new J&A. The court, therefore, ruled that the Army did comply with its previous order and Filtration was not entitled to an injunction or relief.<sup>22</sup>

#### *No Special Circumstances Either*

To make the case even more intriguing, Filtration applied to have the Army pay its costs under EAJA.<sup>23</sup> Filtration's application for EAJA fees asked the court to recognize the "special factors" involved in its protests and a corresponding increased hourly rate for the counsel who worked on its case.<sup>24</sup> The government disputed that Filtration was entitled to any EAJA protection since the judgment in the case did not alter the relationship between the parties.<sup>25</sup> The court disagreed, reminding the government that if the plaintiffs succeed on a significant issue in the litigation, the plaintiff is entitled to EAJA fees.<sup>26</sup>

Rather than argue that the area of government contract law constituted a special factor, which the courts had already determined was insufficient,<sup>27</sup> Filtration argued that, given the context in which the bid protest occurred, special factors attached.<sup>28</sup> According to Filtration, the circumstances that set its bid protest apart from others were the backdrop of the war in Iraq.<sup>29</sup> According to the plaintiff, with litigation issues involving questions of national security and jurisdiction, the number of attorneys who could have successfully litigated the case was limited.<sup>30</sup> While the court recognized Filtration's entitlement to EAJA, it was not swayed by their argument. The court stated that military conflict does not change counsel's interpretation of a "straightforward FAR regulation."<sup>31</sup> The court awarded Filtration EAJA fees at the normal rate of \$125 per attorney hour.

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<sup>19</sup> *Id.* at 422.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 28 U.S.C. § 2412 (LEXIS 2005). The act allows a prevailing party who meets the net worth and total employee limitation to be paid fees and other expenses. Fees and expenses include:

[T]he reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.).

*Id.*

<sup>24</sup> *Filtration Dev. Co. v. United States*, 63 Fed. Cl. 612 (2004). Section 2412(d)(2)(A)(ii) of Title 28, United States Code, allows the court to increase the normal cap on EAJA attorney fees of \$125 when "the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412 (2000).

<sup>25</sup> *Filtration Dev. Co.*, 63 Fed. Cl. at 617.

<sup>26</sup> *Id.*; see also *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978).

<sup>27</sup> See *Esprit Corp. v. United States*, 15 Cl. Ct. 491, 494 (1988); *Prowest Diversified v. United States*, 40 Fed. Cl. 879, 889 (1998); *California Marine Cleaning*, 43 Fed. Cl. 724, 732 (1999).

<sup>28</sup> *Filtration Dev. Co.*, 63 Fed. Cl. at 624.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

In 2004, the Secretary of the Air Force issued guidance to assist field agencies in producing quality justifications for non-competitive contracts.<sup>32</sup> Within the last year, the Department of the Air Force expressed concerns that justifications for non-competitive contracts under 41 U.S.C. § 253(c)(1), an exception to the requirements of full and open competition under the CICA, were not meeting the standards of Federal Acquisition Regulation (FAR) 6.303.<sup>33</sup> In order to rectify the problem, the Honorable Charlie E. Williams, Jr., Deputy Assistant Secretary for Contracting, Office of the Assistant Secretary of the Air Force for Acquisition, sent out a short, but extremely helpful review of the standards.<sup>34</sup> Whether the wake-up call is answered, or the “snooze button” is pressed again, only time will tell.

The Williams memorandum, however, is something that all practioners in the field should review and take to heart. It serves to remind all practioners of the obligations to utilize fair and open competition.<sup>35</sup> Where competition is not attainable, or is excusable under one of the exceptions, there is an obligation to annotate the reasoning.<sup>36</sup> For example, it must be documented that substantial duplication of costs would occur; and the amount of the duplicated costs is not likely to be recovered through competition, or that the delays in fulfilling the agency needs are unacceptable.<sup>37</sup> The contracting officer is responsible for articulating the basis for the exception. The contracting officer can only make that decision after determining the length of the anticipated delay, and describing exactly what is being delayed.<sup>38</sup> This memorandum is a good reminder for all contracting officers, not just those in the Air Force.

*If a Conflict Exists, the Government Accountability Office (GAO) Will Presume That the Protestor Was Prejudiced, Unless the Record Establishes the Absence of Prejudice!*

The Comptroller General also was in a remindful mood this past year, stressing the importance of evaluating all proposals fairly and in an unbiased manner.<sup>39</sup> In one case, the former Air Force Principal Deputy Assistant Secretary for Acquisition, Ms. Darlene Druyun, acknowledged that Boeing’s employment of her son-in-law and her interest in working for Boeing influenced her decisions in matters affecting the awardee of a contract, Boeing.<sup>40</sup> Three protestors used her statements to file agency-level protests with the Air Force to challenge the award of the C-130 AMP contract to Boeing.<sup>41</sup> Instead of acting on the protests, the Air Force advised the protestors that “[t]he Air Force is of the opinion that the protests . . . are more appropriately considered by the Government Accountability Office.”<sup>42</sup> The protestors claimed that Ms. Druyun improperly manipulated certain program requirements and related evaluation factors in a manner that favored Boeing.<sup>43</sup> This enabled Boeing to win the competition to perform system design and development work under the program.<sup>44</sup> The Air Force

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<sup>32</sup> Memorandum, Charlie W. Williams, Jr., Deputy Assistant Secretary (Contracting) Assistant Secretary (Acquisition), Department of the Air Force, to AlmaJCOM/FOA/DRU, subject: Justifications for Non-Competitive Contracts Under Exception 1 to the Competition in Contracting Act (CICA) (18 Oct. 2004) [hereinafter J&A Memo]; see also *Air Force Reminds Contracting Officers to Justify Use of CICA Exception in Awarding Non-Competitive Contracts*, 82 BNA FED. CONT. DAILY 434 (Oct 26, 2004).

<sup>33</sup> “A contracting officer shall not commence negotiations for a sole source contract, commence negotiations for a contract resulting from an unsolicited proposal, or award any other contract” without first providing for full and open competition in writing, certifying the justifications accuracy and completeness, and obtaining the required approval. U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 6.303 (July 2005) [hereinafter FAR].

<sup>34</sup> J&A Memo, *supra* note 32.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see also FAR, *supra* note 33, at 6-303.

<sup>37</sup> J&A Memo, *supra* note 32; see also FAR, *supra* note 33, at 6.302-1.

<sup>38</sup> J&A Memo, *supra* note 32.

<sup>39</sup> Lockheed Martin Aeronautics Co., Comp. Gen., B-295401, Feb. 24, 2005, 2005 CPD ¶41.

<sup>40</sup> *Id.* at 3; see Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 159-160 [hereinafter *2004 Year in Review*]. Specifically, Ms. Druyun admitted she contacted a senior Boeing official in 2002 about her daughter’s continued employment at Boeing after her daughter feared that she would be terminated by Boeing for performance issues. Ms. Druyun contacted the senior official with whom she was negotiating the lease of one hundred Boeing KC 767A tanker aircraft in order to prevent adverse action against her daughter. In negotiations concerning the KC 767A Ms Druyun “agreed to a higher price for the aircraft than she believed was appropriate” and “was influenced by her daughter’s and son-in-law’s relationship with Boeing.” *Lockheed Martin Aeronautics Corp.*, 2005 CPD ¶ 41, at 4 n.4.

<sup>41</sup> *Lockheed Martin Aeronautics Corp.*, 2005 CPD ¶ 41, at 6.

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

<sup>43</sup> *Id.*

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

claimed that, even given Ms. Druyun's statement, there was no evidence that she had influenced the Source Selection Evaluation Team.<sup>45</sup> According to the Air Force, Ms. Druyun did not play a significant role in the decision to change the technical requirements.<sup>46</sup>

When an organizational conflict exists, the GAO will "presume that the protestor was prejudiced, unless the record establishes the absence of prejudice" to any offeror.<sup>47</sup> Since the Air Force could not establish that Ms. Druyun had no significant involvement in the procurement, the GAO sustained the protest.<sup>48</sup> As the GAO stated, when a record establishes that a procurement official had a bias towards one of the offerors, and was a significant participant in the agency's activities that "culminated in the decisions forming the basis of the protest," the need to maintain the integrity of the process requires GAO to sustain the protest.<sup>49</sup> The GAO requires "compelling evidence that the protester was not prejudiced."<sup>50</sup> The GAO rejected the Air Force's assertion that there was no evidence that Ms. Druyun influenced the Source Selection Evaluation Team, and that they conducted the evaluation process properly.<sup>51</sup> Even though the GAO sustained the protest, in the long run, the Air Force concluded that competing factors precluded recompetition. The GAO did recommend, however, that the government reimburse Lockheed Martin's costs of filing the protest and their attorneys' fees.<sup>52</sup>

### *On-Line Auctions for Federal Procurement, What's Next?*

Move over eBay, the government is running on-line auctions as well. The only difference is that the Department of Housing and Urban Development (HUD) is holding reverse auctions—the low bid is the winner rather than eBay type auctions in which the high bidder is the awardee.<sup>53</sup> MTB Group challenged the procedure as being prohibited under the provisions of the Office of Federal Procurement Policy Act (OFPP),<sup>54</sup> but the GAO did not agree.<sup>55</sup> Under the auction system, the HUD published notices for inspection of properties on a webpage using the simplified acquisition procedures of FAR part 13.<sup>56</sup> The low bid would appear on the webpage for all to view, until a new, lower bid was received.<sup>57</sup> MTB Group protested on the ground that it was improper to disclose a vendor's prices during the auction.<sup>58</sup>

In a case of first impression, the GAO concluded the HUD's decision to reveal participants' prices during a reverse auction was proper.<sup>59</sup> The GAO disagreed with MTB Group's contention that its pricing information was confidential and that, by releasing the price information, the government was releasing its labor, overhead, and profit rates.<sup>60</sup> Instead, the

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<sup>45</sup> *Id.* at 7.

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

<sup>47</sup> *Id.*; see also *The Jones/Hill Joint Venture*, Comp. Gen. Dec. B-288392.2, 2001 CPD ¶ 178.

<sup>48</sup> *Lockheed Martin Aeronautics Corp.*, 2005 CPD ¶ 41, at 14-15.

<sup>49</sup> *Id.* at 7.

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

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *Id.* at 15.

<sup>53</sup> *MTB Group, Inc.*, Comp. Gen. Dec. B-295463, Feb. 23, 2005, 2005 CPD ¶ 40. Under the program, the agency notifies potential participants of upcoming auctions, and the start and close times. If a company chooses to participate they submit their quotations to the online auction website. During the auction the property in question is displayed and the current lowest quotation, as well as the remaining time. The webpage does not display the name of the vendor or the any other identifying information. At the end of the auction competing vendors are able to view all quotations submitted, to include the winning quote. *Id.* at 2.

<sup>54</sup> 41 U.S.C.S. § 423(a) (LEXIS 2005). While the OFPP prohibits government officials, and those acting on behalf of the government, from knowingly disclosing contractor quotations or proposal information before award, the prohibition is not absolute. The act does not restrict the disclosure of information to any person or class of persons "authorized in accordance with applicable agency regulations or procedures, to receive the information" and it does not restrict a contractor from disclosing its own quote or proposal information or the recipient from receiving that information. *MTB Group*, 2005 CPD ¶ 40, at 3, quoting 41 U.S.C.S. § 423(a).

<sup>55</sup> *MTB Group*, 2005 CPD ¶ 40, at 2.

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

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 4 n.4.

GAO equated the release of price information in the reverse auction scenario to a sealed bid, where awardee price information is released at bid opening.<sup>61</sup>

As the GAO pointed out, the restrictions on government officials disclosing contractor quotations or proposal information before award are not absolute.<sup>62</sup> The OFPP does not prohibit “disclosure of information to . . . any person or class of persons authorized in accordance with applicable agency regulations or procedures, to receive the information.”<sup>63</sup> The GAO also reminded the protester that the OFPP does not restrict contractors from disclosing their own quote or proposal information.<sup>64</sup> The underlying purpose of the act is to prevent people in the government from disclosing sensitive procurement information in exchange for gratuities or future employment.<sup>65</sup> The HUD’s release of participants’ prices was not done in exchange for gratuities or future employment, and therefore, the reverse auction did not violate the underlying intent of the OFPP.<sup>66</sup> Since all vendors disclose their price as a condition of competing and the OFPP does not “restrict a contractor from disclosing its own quote or proposal information or the recipient from receiving that information,” the reverse auction survived this challenge.<sup>67</sup>

### *Acquisition Strategy Mimics Court-Martial Panel Deliberations*

One may be thinking that the pressure has finally gotten to the professors in the Contract and Fiscal Law Department. What does acquisition strategy have to do with court-martial panel deliberations? Nothing really, but a new method for competition sounds a lot like the instructions a military judge gives panel members when they adjourn for deliberations on sentencing.<sup>68</sup> The methodology is called cascading set-asides, and it has some businesses displeased.<sup>69</sup>

Created in 1999, agencies attempted to satisfy their need to quickly award contracts while still meeting the Small Business Administration’s goals of increasing small business participation in the government procurement process.<sup>70</sup> Industry groups are unhappy with the procedure, claiming it is not fair that big companies’ bids might never get opened.<sup>71</sup> Others see the process as an opportunity for big companies to win awards on contracts they had previously been prevented from bidding on at all.<sup>72</sup> This may be the beginning of a new wave of government procurement in the future, so stay tuned.

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<sup>61</sup> *Id.*

<sup>62</sup> See 41 U.S.C.S. § 423(h)(1) (LEXIS 2005); *MTB Group*, 2005 CPD ¶ 40, at 3.

<sup>63</sup> *MTB Group*, 2005 CPD ¶ 40, at 3 (quoting 41 U.S.C.S. § 423(h)(1)).

<sup>64</sup> *MTB Group*, 2005 CPD ¶ 40, at 3.

<sup>65</sup> *Id.* (referring to Senator Glenn’s summary of the purpose of the act found in the committee report. 134 Cong. Rec. 32156 (Oct. 20, 1988)).

<sup>66</sup> *MTB Group*, 2005 CPD ¶ 40, at 4. The GAO stated that “nothing in the Act itself or the Act’s legislative history—and we find nothing- to support” the assertion that act did not envision disclosures to competing vendors, but only to people within the government. *Id.*

<sup>67</sup> *Id.* at 3; see also 41 U.S.C.S. § 423(h)(1) (LEXIS 2005).

<sup>68</sup> See U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK 60 (15 Sept. 2002). The judge’s instructions to a court-martial panel when determining an appropriate sentence state that members should vote on proposed sentences starting with the lightest sentence to the most severe sentence. Once the two-thirds of the panel members votes to adjudge a sentence no other proposed sentences are voted upon (except for capital cases in which a unanimous vote is required to adjudge the death penalty). *Id.* at 72-73.

<sup>69</sup> See GOVEXEC.com, New Acquisition Strategy Alarms Industry, June 28, 2005, [http://www.govexec.com/story\\_page.cfm?articleid=31619](http://www.govexec.com/story_page.cfm?articleid=31619). Cascading set-aside procurements invite bids from all companies. Submitted bids are then opened in order of “legal precedence” going from small, disadvantaged businesses all the way up to big companies. When the agency has “enough proposals for a competition among small businesses or other preferred firms, it makes an award and never opens the remaining envelopes.” *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

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

VSE Corporation successfully protested the Department of Homeland Security's sole-source award of a contract for storage, maintenance, and disposition services for personal property seized by various federal agents.<sup>73</sup> The Customs Service issued a request for proposals (RFP) for a follow-on procurement to a prior contract that included a four-month transition period, a base year, and nine one-year options.<sup>74</sup> The protester and two other firms responded to the RFP, and the agency awarded the contract to Day and Zimmerman, one of the other firms, on 23 April 2002.<sup>75</sup> After the incumbent protested, the agency took corrective action by terminating the award, revising the statement of work, and recompeting.<sup>76</sup> The Customs Service entered into two sole-source extensions with the incumbent to fulfill their requirement while the services were recompeted.<sup>77</sup> These extensions, with the option years, extended the incumbent's contract through 1 April 2005.<sup>78</sup> In 2003, the agency, now called the Customs Border Protection (CBP),<sup>79</sup> issued a new RFP with revised workload estimates.<sup>80</sup>

On 20 December 2004, the CBP decided to cancel its RFP because the revisions represented significant changes from what it originally requested, and questions continued to arise concerning bundling of services.<sup>81</sup> Three days later, the CBP posted a notice of its intent to sole-source its requirements to the incumbent for six months with three option periods.<sup>82</sup> The agency notice, filed on FedBizOpps stated "[i]t is intended that award will be made under the authority of 41 U.S.C. [§] 253(c)(1)."<sup>83</sup> On 1 April 2005, the agency awarded a sole-source contract to the incumbent, but the award was not supported by a J&A.<sup>84</sup>

VSE protested the RFP's cancellation as arbitrary, capricious, and unreasonable since the agency previously addressed significant changes in amendments.<sup>85</sup> VSE also claimed the cancellation was a pretext for the agency to rid itself of the burdensome procurement process, and to preserve the sole-source contract it already had with the incumbent.<sup>86</sup> After receiving the agency's report, VSE also attacked the cancellation as a result of a lack of advanced planning.<sup>87</sup>

While the GAO denied VSE's protest of the cancellation of the RFP on 11 April 2005, determining that the agency had established a reasonable basis for the cancellation, the GAO decided to resolve the propriety of the proposed sole-source contract to the incumbent since the agency's report had not addressed that issue.<sup>88</sup>

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<sup>73</sup> VSE Corp., Comp. Gen. B-290452.3; B-290452.4; B-290452.5, May 23, 2005, 2005 CPD ¶ 103.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.* at 3.

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

<sup>77</sup> *Id.* at 3.

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

<sup>79</sup> During that time frame, the Department of Homeland Security absorbed the Customs Service, the Department of Treasury, and other functions from the Department of Agriculture, the Immigration and Naturalization Service, and the Border Patrol, and created the Customs Border Protection (CBP) with these elements.

<sup>80</sup> *VSE Corp.*, 2005 CPD ¶ 103, at 3.

<sup>81</sup> *Id.*

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

<sup>83</sup> *Id.* 41 U.S.C. § 253(c)(1) states that agency may use other than competitive procedures only when "the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency . . ." 41 U.S.C.S. § 253(c)(1) (LEXIS 2005).

<sup>84</sup> *VSE Corp.*, 2005 CPD ¶ 103, at 4-5.

<sup>85</sup> *Id.* at 4. Johnson Controls joined the protest in March following a conference call between VSE and CBP in which Johnson Controls was permitted to participate. Johnson Controls' protest was ultimately dismissed as untimely since it failed to protest the cancellation within ten days of notice on FedBizOpps. *Id.*

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

<sup>87</sup> *Id.* at 5. VSE alleged the agency records demonstrate that CBP was aware in early June 2004 that the RFP likely would be cancelled, the agency should have made plans for acquiring the services from another source, besides EG&G (the incumbent). The CBP argued that because "any change in contractor required a 4-month lead time there was insufficient time to conduct a competition." *Id.* at 7.

<sup>88</sup> *Id.* at 4.

The GAO found the sole-source bridge contract to the incumbent improper because the award, based upon 41 U.S.C. § 253(c)(1), was not supported by a written J&A.<sup>89</sup> As the GAO noted, the only exception to the requirement for a written J&A before award is the unusual and compelling urgency exception that allows the J&A to be written after award.<sup>90</sup> The CBP argued, unsuccessfully, that due to the four-month transition period, there was insufficient time to solicit competition.<sup>91</sup> The GAO determined that CBP's predicament was caused by a lack of advanced planning and a failure to consider its requirements for the bridge contract with any other firm but the incumbent.<sup>92</sup> Clearly, the GAO's unwillingness to adopt CBP's reasoning for the sole-source contract was affected by the incumbent's contract expiration four years earlier and the subsequent contract extension on a sole-source basis since that time.<sup>93</sup>

### *Bumbling Bundling?*

American College of Physicians Services and COLA<sup>94</sup> protested the terms of a RFP that the Navy issued to procure professional accreditation services and proficiency testing for its medical laboratories.<sup>95</sup> The protesters unsuccessfully argued that the solicitation unduly restricted competition by bundling both the accreditation services and the laboratory proficiency testing.<sup>96</sup>

The GAO applied a reasonable basis standard for the agency's contention that bundling was necessary.<sup>97</sup> The Navy claimed that one of its reasons for combining the services was to avoid the administrative burden of managing both contracts for agency contracting personnel.<sup>98</sup> The GAO determined that if the bundling requirements restrict competition, as it appeared to do in this case, then there is no legal basis to bundle the services solely due to administrative convenience.<sup>99</sup>

The GAO did, however, believe the Navy's bundling of these services was reasonable on two other grounds, in part due to the absence of a definitive showing of unreasonableness by the protester.<sup>100</sup> The GAO determined that the logistical problems of the Navy acting as a "go-between" to coordinate accreditation organization and proficiency testing in its management of laboratories was "a reasonable basis" to bundle this contract.<sup>101</sup> The GAO also determined that having the services provided by a single contractor would most likely afford the Navy access to an immediate review and monitoring of testing results that are needed to continue a laboratory's accredited status.<sup>102</sup> Given the logical connection between the proficiency testing and the laboratory's eligibility for accreditation, the GAO denied the challenge to the solicitation.<sup>103</sup>

### *You Have to Dance with the One That Brought You*

My late grandfather was full of idioms and one of his favorites was, "You have to dance with the one that brought you." That idiom applies to the next competition case, although the caveat would be you also can't change the tune midway

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<sup>89</sup> *Id.* at 6-7. The only exception to the requirement to publish a J&A is when the agency uses noncompetitive procedures because its need for the property or service is so unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals. See 41 U.S.C.S. § 253(c)(2), (f)(2) (LEXIS 2005).

<sup>90</sup> *VSE Corp.*, 2005 CPD ¶ 103, at 7; see also 41 U.S.C.S § 25(c)(2), f(2) (listing specific exceptions to the full and open competition requirements under an urgent and compelling need).

<sup>91</sup> *VSE Corp.*, 2005 CPD ¶ 103, at 7.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 9.

<sup>94</sup> See *Am. Coll. of Physician Servs.*; COLA, Comp. Gen. B-294881, B-294881.2, Jan 3, 2005, 2005 CPD ¶ 1, at 1 n.1.

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

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.* at 4; see also *Aalco Forwarding*, Comp. Gen. B-277241.12, B277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175.

<sup>98</sup> *Am. Coll. of Physician Servs.*, 2005 CPD ¶ 1, at 4.

<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.* at 4.

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

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

<sup>103</sup> *Id.* at 4-5.

through the dance. In *Poly-Pacific Technology*, the Air Force contracted with U.S. Technology Corporation (UST) for the lease and recycling of acrylic plastic media.<sup>104</sup> The acrylic plastic media was used as an abrasive in the removal of coatings from aircraft, components, and equipment.<sup>105</sup> Once used, the acrylic is no longer suitable for its intended purpose, the acrylic must then be disposed of in accordance with the Environmental Protection Agency's (EPA's) regulations on "solid waste."<sup>106</sup> The EPA does, however, allow for an exception. According to EPA regulations, the leftover acrylic may be excluded from the definition of solid waste if it is recycled according to the EPA's criteria.<sup>107</sup> U.S. Technology Corporation's contract called for the contractor to retain ownership of the acrylic material and ensure the material is recycled consistent with the EPA regulations.<sup>108</sup>

After the Air Force awarded the contract to UST, the agency learned of an alleged improper disposal of the acrylic remainder (known as spent blast media (SBM)) by UST's subcontractor.<sup>109</sup> The Air Force modified the contract to allow itself to either return the leftover acrylic to UST for recycling or order disposal of the remainder in lieu of recycling.<sup>110</sup> Under the modification, UST could dispose of the SBM, or the SBM could be sent to a third party. The modification, however, held the contractor responsible for the additional costs of disposal.<sup>111</sup> Poly-Pacific protested the modification as an improper relaxing of the performance requirements and outside the scope of the original work anticipated by the RFP.<sup>112</sup> The result, according to Poly-Pacific, was an improper sole-source contract.<sup>113</sup>

Normally, the GAO will not review contract modifications because such reviews are beyond the scope of the GAO's bid protest function.<sup>114</sup> The GAO will, however, review modifications when a protest alleges that a contract modification changes the scope of work of the original contract, because the out-of-scope work would be subject to the CICA competition requirements, absent a justification for sole-source.<sup>115</sup> The GAO standard is whether "there is a material difference between the modified contract and the contract that was originally awarded."<sup>116</sup> The GAO looked at whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different, and whether the modification relaxed a contractor's performance more than what is reasonably anticipated under the original solicitation.<sup>117</sup>

Here, the GAO determined the modification did change the requirements of the original contract since the modification suspended UST's requirement to recycle the SBM and effectively only required UST to lease the acrylic plastic media to the Air Force with a reimbursement requirement to the government for disposal.<sup>118</sup> The original requirement required the awardee to lease the acrylic plastic media to the Air Force and recycle the SBM in accordance with the EPA regulations.<sup>119</sup> In order to do that offerors were required to propose technical solutions and pricing for both the lease and recycling portion of the contract.<sup>120</sup> Therefore, the GAO sustained the protest.<sup>121</sup>

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<sup>104</sup> Poly-Pac. Tech., Comp. Gen. B-296029, Jun 1, 2005, 2005 CPD ¶ 105.

<sup>105</sup> *Id.* at 1.

<sup>106</sup> *Id.* at 2; see 40 C.F.R. § 264.1(2005); see also Resource Conservation and Recovery Act, 42 U.S.C.S. § §6901-6939e (LEXIS 2005).

<sup>107</sup> *Poly-Pac. Tech.*, 2005 CPD ¶ 105 at 2; see 40 C.F.R. § 264.1.

<sup>108</sup> *Poly-Pac. Tech.*, 2005 CPD ¶ 105, at 2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 3.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* 4 C.F.R. § 21.5(a) (2005); Sprint Comm. Co., Comp. Gen. B-278407, B-278407.2, Feb. 13, 1998, 98-1 CPD ¶ 60.

<sup>115</sup> *Poly-Pac. Tech.*, 2005 CPD ¶ 105, at 3.

<sup>116</sup> *Id.* at 4; see Marvin J. Perry & Assoc., Comp. Gen. B-277684, B-277685, Nov. 4, 1997, 97-2 CPD ¶ 128; Avtron Mfg., Inc., Comp. Gen. B-229972, May 16 1988, 88 CPD ¶ 458.

<sup>117</sup> *Poly-Pac. Tech.*, 2005 CPD ¶ 105, at 4. The factors looked at include the magnitude of the change in relation to the overall effort, performance period, and costs between the original contract and the modification. *Id.*

<sup>118</sup> *Id.* at 5.

<sup>119</sup> *Id.*

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

<sup>121</sup> *Id.* at 6.

*Contracting Officers Have a Long Leash When Determining Organizational Conflict of Interest*

The contracting officer is afforded wide discretion in determining whether or not a firm has an organization conflict of interest (OCI) and, absent some showing of unreasonableness, the GAO will not overturn the determination.<sup>122</sup> In *Lucent Technology World Services, Inc.*,<sup>123</sup> the Army excluded the protestor from competing for radio devices based upon a determination of organization conflict of interest.<sup>124</sup> In denying the protest, the GAO found no basis to question the contracting officer's determination that Lucent was prevented from submitting a proposal because Lucent prepared the technical specifications used in the solicitation.<sup>125</sup> The GAO based its decision on the contracting officer's broad discretion in performing his or her duties to identify and address conflicts of interest.<sup>126</sup>

Lucent protested its exclusion from competition for the production of the Army's Advanced First Responder's Network in Iraq—the Terrestrial Trunked Radio (TETRA) device.<sup>127</sup> Under a task order from an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract that it held with the Army, Lucent developed a solicitation for procurement of the TETRA devices.<sup>128</sup> The Army issued a revised RFP basing its specifications on Lucent's specifications.<sup>129</sup> Lucent categorized its submission to the Army as a collaboration, and not a "complete specification" for "non-developmental items" under FAR 9.505-2(a)(1),<sup>130</sup> which would prohibit their participation.<sup>131</sup> Lucent argued that this FAR subsection applied only to complete specifications. The GAO found no supervision or control by the Army that would make the OCI bar inapplicable.<sup>132</sup>

Since the FAR doesn't define "complete specification," and the GAO found no reason to question the contracting officer's determination, the protest was denied.<sup>133</sup> The GAO made clear that its decision is based primarily on the contracting officer's broad discretion.<sup>134</sup> By denying this protest, the GAO reminds us all that the OCI determination should be made as early as possible and that the contracting officer "must exercise 'common sense, good judgment, and sound discretion'" in determining whether there was OCI.<sup>135</sup>

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<sup>122</sup> *Lucent Tech. World Servs. Inc.*, Comp. Gen. B-295462, Mar 2, 2005, 2005 CPD ¶ 55.

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

<sup>124</sup> *Id.* Organizational conflict of interest occurs where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract might otherwise be impaired, or a person has an unfair competitive advantage. *See also* FAR, *supra* note 33, at 9-501.

<sup>125</sup> *Lucent*, 2005 CPD ¶ 105, at 5.

<sup>126</sup> *Id.*; *see also* FAR, *supra* note 33, at 9.505.

<sup>127</sup> *Lucent*, 2005 CPD ¶ 105, at 5. Part of the proposal contained specifications in Schedule D. *Id.*

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

<sup>129</sup> *Id.* The Army's revised specifications were based upon specifications Lucent drafted that were located in its schedule D. *Id.*

<sup>130</sup> FAR 9.505-2(a)(1) states:

If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontract to, for a reasonable period of time including, at least, the duration of the initial production. This rule shall not apply to –

Contractors that furnish at Government request specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specification, regardless of source, provided this assistance is supervised and controlled by Government representative.

FAR, *supra* note 33, at 9.505-2(a)(1).

<sup>131</sup> *Lucent*, 2005 CPD ¶ 105, at 5.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 6.

<sup>134</sup> *Id.* at 4.

<sup>135</sup> *Id.*

The theoretical possibility that an awardee will act in bad faith is not enough to establish an organizational conflict of interest (OCI).<sup>136</sup> In a protest of the Defense Logistics Agency's Defense Reutilization and Marketing Service (DRMS) sale of scrap materials, the GAO denied the protest, finding no OCI where a subsidiary company performed a related surplus property contract.<sup>137</sup> Government Scrap Sales (GSS) alleged that the current contractor's status as the commercial venture (CV) contractor for the sale of surplus property creates a "potential OCI" if the contract is awarded to a subsidiary of the current CV.<sup>138</sup> GSS rested its argument on hypothetical examples to show the economic incentive that the CV and its subsidiary would have to convert surplus property into scrap and send property to the scrap venture (SV).<sup>139</sup> GSS hypothesized that the CV could abandon property that it is obligated to purchase under its useable surplus contract by refusing acceptance or challenging the government's determination of whether the property is useable or not.<sup>140</sup> The DRMS would then use its sole authority to designate property status (useable or scrap) as scrap property, thereby sending property that should be sold to the CV to the SV.<sup>141</sup>

The GAO did not see (and GSS did not proffer) how the facts in the case fit into one of the three broadly characterized OCI situations: impaired objectivity, unequal access to information, or biased ground rules.<sup>142</sup> The GAO explained that "the mere existence of a prior or current contractual relationship between the agency and the contractor does not create an unfair competitive advantage," and that the agency is not "required to compensate for each competitive advantage inherently gleaned by a competitor's prior or current contracts."<sup>143</sup>

### *A Shallow Victory*

KEI Pearson prevailed in its protest against the General Services Administration (GSA) contract for phase II of the Navy Knowledge Online (NVO) system, but its victory was hollow.<sup>144</sup> The Request for Quotations (RFQ) called for a combination fixed price and time-and-materials task order for a base year and four option years.<sup>145</sup> Under the RFQ, all items or services acquired by the offerors had to be purchased off the GSA schedule or through a vendor listed on the GSA schedule.<sup>146</sup> The awardee, CSC, had a line item in its proposal that stated it was a "Non-Schedule" item, but the corresponding note stated that while the item was available from a number of resellers under the GSA schedule, CSC had an "alliance agreement" with the producer that allowed CSC to buy the item at "a significant savings."<sup>147</sup>

KEI Pearson protested the award to CSC on the grounds that the GSA could not properly issue the task order because the non-schedule item in CSC's proposal<sup>148</sup> violated the rules governing the use of the Federal Supply Schedule (FSS) and the terms of the RFQ.<sup>149</sup> The GAO agreed.<sup>150</sup> The GSA claimed all its costs were evaluated in accordance with

<sup>136</sup> Gov't Scrap Sales, Comp. Gen. B-295585, Mar. 11, 2005, 2005 CPD ¶ 60.

<sup>137</sup> *Id.* The commercial venture is the surplus property contract whereby a company purchases the useable commercial property from DRMS and sells it at, presumably, a higher price to others. *Id.* at 60-61. Under both the CV contract, which purchased the useable surplus commercial property, and the scrap venture, where the excess scrap from DRMS is sold the awardee is required to set up a separate entity known as the purchaser. *Id.* n.2.

<sup>138</sup> *Id.* at 2

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 3.

<sup>141</sup> *Id.*

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

<sup>143</sup> *Id.* at 5.

<sup>144</sup> KEI Pearson, Inc., Comp. Gen. B-294226.4, Jan. 10, 2005, 2005 CPD ¶ 12. The NVO system is a web based system to provide the Navy with internet access to training and professional development, using commercial off the shelf items. *Id.*

<sup>145</sup> *Id.* at 4.

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

<sup>147</sup> *Id.* The note went on to state that if required, CSC would buy the item via the Government authorized source. The "alliance agreement" is not defined in the case however, it appears to be a separate private agreement between the producer and CSC that avoids the middle man listed as a GSA vendor. *Id.*

<sup>148</sup> *Id.* at 5.

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

<sup>150</sup> *Id.*

the GSA schedule and that the reference to the alliance agreement represented notification that the awardee could get the item at a cheaper rate via the alliance agreement versus the schedule.<sup>151</sup> The GAO did not buy the argument and sustained the protest.<sup>152</sup>

The GAO went on to hold that the GSA's position "is not supported by the language in CSC's (quotation)," and the GSA's evaluation of the quotation was not in accordance with the rules governing the RFQ.<sup>153</sup> Unfortunately for KEI Pearson, the GSA determined that urgent and compelling circumstances did not permit the task order to be suspended pending a decision on protest, and the awardee had already substantially performed the requirement.<sup>154</sup> The GAO did recommend that the GSA reimburse KEI Pearson for the costs and attorneys fees in filing the protest.<sup>155</sup>

*Government Cannot Circumvent CICA By Modifying a Contract to Allow for Modifications That Were Not Originally Within the Scope of the Contract.*

In an Air Force case involving custodial services at Hickman Air Force Base in Hawaii, the Court of Federal Claims (COFC) found that the Air Force improperly modified its contract outside the original scope, thereby violating CICA. In *Cardinal Maintenance Service, Inc.*,<sup>156</sup> the Air Force issued a RFP for custodial services at Hickman.<sup>157</sup> The contract attempted to combine custodial services for ninety-two buildings.<sup>158</sup>

The solicitation also provided that the Air Force had the right to expand or contract the quantity and type of custodial services to be provided by the awardee. The solicitation also contained an "Additions/Deletions" section that required the contractor to "provide costs for adding or deleting services."<sup>159</sup> Furthermore, the solicitation stated negotiations on the prices of these additions or deletions "may be held prior to or immediately after award" with the intent to incorporate them into the contract.<sup>160</sup> The RFP also provided estimates for workloads of various categories of custodial services anticipated.<sup>161</sup> After a best value evaluation, the Air Force awarded the contract to Navales in February 2003.<sup>162</sup>

The Air Force modified the contract eight times after initial award.<sup>163</sup> After the first two additions and deletions, the parties agreed to eliminate the 'add and delete' cost sheet from the contract.<sup>164</sup> Instead, the parties would negotiate the price for future modifications.<sup>165</sup> The total contract price after these modifications was almost eighty percent higher than the original contract price.<sup>166</sup> Cardinal protested the modification of Navales' contract, alleging the Air Force violated the CICA by not obtaining full and open competition for the increased services.<sup>167</sup> Furthermore, Cardinal alleged that the deletion of the 'add and delete' list was tantamount to a cardinal change to the original contract.<sup>168</sup>

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<sup>151</sup> *Id.* at 6.

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

<sup>153</sup> *Id.* at 6-9.

<sup>154</sup> *Id.* at 9.

<sup>155</sup> *Id.*

<sup>156</sup> 63 Fed. Cl. 98 (2004).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

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

<sup>161</sup> *Id.* The RFP included special requirements for the Child Development Center as well. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 7.

<sup>164</sup> *Id.*

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

<sup>166</sup> *Id.* at 10.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 12.

Applying the standards of the Administrative Procedure Act, the court could only overturn an agency's action if it finds that the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>169</sup> Here, the court issued an injunction, finding the "government does not have an unlimited right to modify the contract by eliminating the changes clause."<sup>170</sup> The court gave the Air Force nine months to complete a new procurement for custodial work at Hickam AFB.<sup>171</sup>

Lieutenant Colonel Ralph J. Tremaglio, III

## Contract Types

### *Additional Contract Types for Commercial Services*

The FAR Councils proposed amending the FAR to expressly authorize the use of time-and-materials and labor-hour contracts for certain categories of commercial services under specified conditions.<sup>172</sup> After extensive public comments, to include coordination between the GAO and the OFPP, the proposed rule contains some changes from the Councils' advance notice.<sup>173</sup> Changes include the following: a shift from a planned list of applicable services to a broad grant of authority to the contracting officer to make a determination and finding that no other contract type would be suitable; an emphasis that requirements should be structured to maximize the use of fixed price contracts; the authority for the government to pay contractors for reperformance without profit; and a requirement for contractors to substantiate subcontractor hours upon the contracting officer's request.

### *Defense Federal Acquisition Regulations Supplement (DFARS) Transformation of Contract Types*

As part of a broad overall effort, the Department of Defense (DOD) issued an interim rule streamlining Part 216, Types of Contracts, of the DFARS and adding language to the new Procedures, Guidance, and Information (PGI) resource of discretionary guidance.<sup>174</sup> The interim rule deletes text on Economic Price Adjustment clauses and moves text to the PGI; increases the standard maximum ordering period under basic ordering agreements from three to five years; deletes an obsolete exception for cost-plus-fixed fees for environmental restoration; deletes unnecessary text on considering design stability in selecting contract types; and moves general guidance on the selection of contract type to the new PGI.<sup>175</sup>

### *Air Force Highlights Need to Review Undefinitized Contractual Actions (UCAs)*

As a reaction to a DOD Inspector General report, discussed in last year's *Year in Review*,<sup>176</sup> the Air Force issued a memorandum that stressed the need to improve the documentation of UCAs to ensure they are properly justified, to include detailed acquisition planning.<sup>177</sup> The Air Force also issued a Mandatory Procedure that requires UCA approval authorities to track UCAs with reporting requirements if any UCAs fail to meet required definitization dates.<sup>178</sup>

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<sup>169</sup> *Id.* at 13; *see also* 5 U.S.C.S. § 706(2)(A) (LEXIS 2005).

<sup>170</sup> *Id.* at 21. During the hearing the government admitted that the changes in the contract were dramatic. The contracting officer stated "[h]ad the price sheet been used it would have resulted in extremely excessive costs bordering changes outside the scope of the contract," and that the changes were "considerable." *Id.* at 21 & 24.

<sup>171</sup> *Id.* at 29.

<sup>172</sup> Federal Acquisition Regulation; Additional Contract Types, 70 Fed. Reg. 56,318 (proposed Sept. 26, 2005) (to be codified at 48 C.F.R. pts. 2, 10, 12, 16, 44, and 52). The proposed rule implements section 1432 of the National Defense Authorization Act for Fiscal Year 2004. *Id.* The advance notice of the proposed rule was discussed in last year's *Year in Review*. *See 2004 Year in Review, supra*, note 40, at 54.

<sup>173</sup> Federal Acquisition Regulation; Additional Contract Types, 69 Fed. Reg. 56,316 (proposed Sept. 20, 2004).

<sup>174</sup> Defense Federal Acquisition Regulation Supplement; Types of Contracts, 70 Fed. Reg. 54,694 (Sept. 16, 2005) (to be codified at 48 C.F.R. pt. 216).

<sup>175</sup> *Id.*

<sup>176</sup> *See 2004 Year in Review, supra* note 40, at 17-18.

<sup>177</sup> Memorandum, Associate Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Management and Documentation of Undefinitized Contract Actions (13 June 2005).

<sup>178</sup> Mandatory Procedure; Definitization Schedule, MP 5317.7404-3 (Aug. 2005). This Mandatory Procedure does not apply to UCAs that invoke the exceptions at DFARS 217.740-5 (b). *Id.*

*Aloha, Petroleum Marketing Monthly (PMM)-Based Economic Price Adjustment (EPA) Clause!*

The Court of Appeals for the Federal Circuit (CAFC), in *Tesoro Hawaii Corporation v. United States*,<sup>179</sup> resolved a lengthy and broad litigation battle<sup>180</sup> over a Department of Energy EPA clause by ruling that the FAR allowed the use of market-based references to determine adjustments to established prices.<sup>181</sup> The Defense Energy Support Center tailored an EPA clause that was tied to price adjustments from the PMM, a Department of Energy publication that published the average sales figures for specified fuels.<sup>182</sup>

The argument, which was based on a reading of FAR § 15.203 (a),<sup>183</sup> centered on whether the term “established prices” meant only “contractor’s established prices,” as the appellants alleged.<sup>184</sup> The court agreed with the government that a plain meaning reading of the regulation demonstrated that the clause encompassed both catalog prices and industry-based prices.<sup>185</sup> The court declined to rule on the other outstanding issues: the legality of the individual and class deviations attempted by the government to rescue the EPA clause, and the question of whether waiver was an issue because the contracts were fully performed before suit was brought by the contractors.<sup>186</sup>

*Turn Out the Lights; the Requirements Contract is Over*

The Department of Agriculture Board of Contract Appeals (AGBCA), in *American Bank Note Company (ABN)*,<sup>187</sup> ruled that the burden is on the contractor to prove entitlement once the maximum requirement under the contract has been satisfied.<sup>188</sup> The Food and Nutrition Service of the Department of Agriculture (FNS) entered into a five-year requirements contract with ABN for the storage, distribution, and ordering services of FNS food coupons for the food stamp program.<sup>189</sup> The FNS anticipated that paper coupons would be phased out and that this would be the last contract necessary.<sup>190</sup> In the last contract year, the FNS issued contract modifications that liquidated the remaining boxes.<sup>191</sup>

The AGBCA agreed with the government that the contractor must provide evidence of its costs in order to obtain entitlement.<sup>192</sup> Since the requirements under the contract had been fulfilled, any excess work was properly classified as an additive change that placed the burden of proof on ABN, and not on the government.<sup>193</sup>

*Indefinite Delivery/Indefinite Quantity (ID/IQ) Contracts  
And the Magic Number is . . . ?*

The GAO, in *CW Government Travel*,<sup>194</sup> held that \$2500 would be sufficient consideration as a non-nominal minimum for an ID/IQ contract for travel agent services.<sup>195</sup> The Army issued a RFP for commercial travel office services

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<sup>179</sup> 405 F.3d 1339 (Fed. Cir. 2005).

<sup>180</sup> See *2004 Year in Review*, *supra* note 40, at 19-20. The first case dates back to 1992; overall ten cases have been filed in the COFC. *Tesoro*, 405 F.3d at 1346.

<sup>181</sup> *Id.* at 1348.

<sup>182</sup> *Id.* at 1341.

<sup>183</sup> FAR, *supra* note 33, at 15.203.

<sup>184</sup> *Tesoro*, 405 F.3d at 1344.

<sup>185</sup> *Id.* at 1347.

<sup>186</sup> *Id.* at 1349.

<sup>187</sup> AGBCA No. 2004-146-1, 05-1 BCA ¶ 32,867.

<sup>188</sup> *Id.* at 162,875.

<sup>189</sup> *Id.* at 162,865.

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

<sup>191</sup> *Id.* at 162,871.

<sup>192</sup> *Id.* at 162,876.

<sup>193</sup> *Id.* at 162,877. The contractor’s theory was more applicable to a deductive change. *Id.*

<sup>194</sup> Comp. Gen. B-295530, Mar. 7, 2005, 2005 CPD ¶ 59.

<sup>195</sup> *Id.* at 3.

under the prototype automated Defense Travel System program.<sup>196</sup> The intent was to consolidate and standardize travel services within the DOD under a single procuring activity.<sup>197</sup> The RFP specified a \$2500 guaranteed minimum with a \$15 million minimum order and \$150 million maximum order.<sup>198</sup>

The general rule is that there is no “magic number” for adequate consideration in these types of contracts, but it is necessary to examine the acquisition as a whole.<sup>199</sup> The GAO reviewed data from an existing contract and agreed with the government that the guaranteed minimum potentially represented several hundred transactions.<sup>200</sup> The protestor requested reconsideration in a follow-up case,<sup>201</sup> based on a discovery that the Army would pay a “consolation prize” of \$2,500 if an awardee did not receive a task order by the end of base period. The Army, however, clarified its intent and declared that it would order at least the \$2,500 minimum from each awardee; the GAO subsequently denied the request for reconsideration.<sup>202</sup>

### *The Sum of All Task Orders*

The GAO commented on the proper evaluation of ID/IQ contracts in *HMR Tech, LLC*.<sup>203</sup> The Coast Guard issued a RFP for project and acquisition management services for the Coast Guard’s Acquisition Directorate. The RFP contemplated the award of an ID/IQ contract with fixed-price task orders. Offerors were required to insert on-site and off-site labor hourly rates for the twenty-three labor categories listed in the RFP.<sup>204</sup> The RFP also required the offeror to provide a technical proposal for two sample tasks to assist the agency in determining if the offeror understood the requirements.<sup>205</sup>

HMR Tech filed a protest arguing that the Coast Guard failed to evaluate the proposals properly since the Coast Guard failed to consider the protestor’s more favorable sample task pricing.<sup>206</sup> The GAO noted that, while the RFP failed to specify what information the agency would use to assess cost, an agency, in evaluating ID/IQ contracts, may use either the total cost based on labor estimates or a comparison among the offeror’s sample task pricing methodologies.<sup>207</sup> In this case, the Coast Guard chose to use the total evaluated cost by multiplying the proposed labor rates by the government’s labor hour estimate.<sup>208</sup> Even though the Coast Guard asked for offerors to submit data for both evaluation techniques, it was permissible for the Coast Guard to use only one for the final evaluation.<sup>209</sup>

The GAO also rejected a challenge to making an award based on price when price is valued less than the technical evaluation factors. The GAO stated the general rule that “when proposals are essentially technically equal, price becomes the determining factor in making the award. . . .”<sup>210</sup>

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<sup>196</sup> The base ordering period is two years, with three one-year options. Task orders will be competed among contract awardees. *Id.* at 1.

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

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

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

<sup>200</sup> This estimate is based on transaction fees between \$5 and \$16. *Id.* at 3.

<sup>201</sup> *CW Gov’t Travel, Inc.—Reconsideration*, Comp. Gen. B-295530.2; B-295530.3; B-295530.4, July 25, 2005, 2005 CPD ¶ 139.

<sup>202</sup> *Id.* at 9.

<sup>203</sup> Comp. Gen. B-295968; B-295968.2; May 19, 2005, 2005 CPD ¶ 101.

<sup>204</sup> *Id.* at 1.

<sup>205</sup> *Id.* at 2.

<sup>206</sup> *Id.* at 5.

<sup>207</sup> *Id.* at 6-7.

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

<sup>209</sup> *Id.* at 7.

<sup>210</sup> *Id.* at 8.

## Options

### *A Constructive Appeal*

The GSA Board of Contract Appeals (GSBCA) rejected a “constructive” option exercise argument in *Integral Systems, Inc. v. Dep’t of Commerce*.<sup>211</sup> The Department of Commerce awarded a contract for the Geostationary Operation Environmental Satellite Backup Acquisition, Command, and Control Station, which included two option years of station on-call support. The base year of on-call support under the contract was scheduled to end on 8 December 2001.<sup>212</sup> On 12 September 2002, nine months after the scheduled end of the contract, the government notified Integral that it would not exercise the last two options. However, the government previously had requested work from the contractor between February and July 2002—within what would have been the first option year.<sup>213</sup>

The GSBCA agreed with the government, holding that since the Department of Commerce did not exercise the option according to its terms (i.e. written notice six days before the contract expired), the government did not extend the contract.<sup>214</sup> The GSBCA deferred ruling on remuneration for the work after the end of the contract until the Department of Commerce addressed all of Integral’s arguments.<sup>215</sup>

### *Optional Lack of Advanced Planning?*

The GAO denied a challenge to an option exercise that occurred after a decision not to exercise the contract in the future in *Antmarin, Inc.*<sup>216</sup> The Navy awarded a requirements contract for husbanding services throughout ports in the Mediterranean for one base year (1 April 1999 to 31 March 2000) plus nine one-year options. The dispute revolves around Option Years Six and Seven.<sup>217</sup> On 15 March 2000, the Navy issued notice of a decision not to exercise Option Year Seven. The following week, the Navy formally exercised Option Year Six; the protestors challenged the exercise of Option Year Six in light of the decision not to continue the contract after that year.<sup>218</sup>

The GAO noted that contracting officers, under the FAR, can take into account other factors<sup>219</sup> other than the required FAR findings for the exercise of an option,<sup>220</sup> and had broad discretion in this determination.<sup>221</sup> The GAO approved of the contracting officer’s analysis, which included an informal price analysis between the awardee and the offerors in the original competition, a comparison of the average rate of inflation in various countries with the percentage rate increase of the contract, and analysis of the costs of resoliciting a new contract for those services.<sup>222</sup> The GAO dismissed the offeror’s argument that the option exercise should be nullified due to a “lack of advance planning” in light of the decision not to exercise Option Year Seven, holding that the principle is only viable against contracts awarded using noncompetitive procedures.<sup>223</sup>

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<sup>211</sup> GSBCA No. 16321-COM, 05-1 BCA ¶ 32,984.

<sup>212</sup> *Id.* at 163,471.

<sup>213</sup> *Id.* at 163,472.

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

<sup>215</sup> *Id.* at 163,473.

<sup>216</sup> B-296317, 2005 U.S. Comp. Gen. LEXIS 150 (July 26, 2005). Husbanding services include trash and sewage removal, refueling arrangements, force protection for ships, transportation for ship members as well as the provision of fresh food and water. *Id.* at \*3.

<sup>217</sup> *Id.* at \*6. The contract was awarded to MLS-Multinational Logistic Services, Ltd., which changed its name to MLS, Ltd. MLS, Ltd. consisted of fourteen Navy husbanding contractors; the protest was filed by three contractors who appear to be excluded from the operation of the company. *Id.* at \*4 n.3.

<sup>218</sup> *Id.* at \*6-7.

<sup>219</sup> See FAR, *supra* note 33, at 17.207 (c)(3) and (e).

<sup>220</sup> *Id.* § 17.207(d).

<sup>221</sup> *Antmarin*, 2005 U.S. Comp. Gen. LEXIS 150, at \*8.

<sup>222</sup> *Id.* at \*8-11.

<sup>223</sup> *Id.* at \*22. The GAO also noted that the fact that the requirements were decreasing was a distinguishing factor which defeated option exercises in earlier cases. *Id.* at \*22-23.

### *File under “Nice Try”*

In a follow-up entitlement case from last year’s *Year in Review*,<sup>224</sup> the Department of Energy Board of Contract Appeals (Energy BCA) rejected the government’s argument that a contractor could be paid the contract option price following an improper option exercise.<sup>225</sup> The Energy BCA held that the Nuclear Regulatory Commission must pay NVT Technologies its costs, plus a reasonable profit, since the invalid option exercise resulted in additional work outside the original contract.<sup>226</sup> The Energy BCA theorized that the government’s argument would result in the contractor not receiving any damages or recovery as a result of the improper action.<sup>227</sup>

In another “Nice Try” case, the ASBCA ruled that an improper option exercise could not remedy the government’s failure to order the guaranteed minimum in an ID/IQ contract.<sup>228</sup> The Navy awarded a contract to Petchem, Inc. to provide and operate a Personnel Travel Vessel within the Port Canaveral, Florida area.<sup>229</sup> The contract had two option periods: one could extend the contract six months with thirty days notice; the other required an additional preliminary sixty days notice in order to extend the contract beyond that to a maximum of sixty months.<sup>230</sup> The Navy exercised the former option clause to extend the contract six months, but failed to provide the preliminary written notice needed to extend the contract further.<sup>231</sup>

The Navy only ordered twenty-nine out of the guarantee minimum amount of forty movements for the six month option period,<sup>232</sup> but issued unilateral modifications for six more months and ordered fifty-one more movements.<sup>233</sup> The contracting officer denied Petchem’s claim for the unordered movements during the option period.<sup>234</sup> The ASBCA found that the option exercise was invalid and that Petchem was entitled to damages for the breach of the minimum guarantee for the six-month option period.<sup>235</sup>

### *Intro to Contract Types*

The COFC, in a nice summary of the basics of contract types under the FAR, granted summary judgment in rejecting a contractor’s attempt to get paid for state income tax payments<sup>236</sup> under a fixed price contract in *Information Systems & Networks Corporation (ISN) v. United States*.<sup>237</sup> The COFC held that even though cost principles may be used to analyze the fixed price that will be negotiated, the goal in a fixed price contract is to “reach a ‘fair and reasonable’ price based on the universe of costs.”<sup>238</sup> Ultimately, in a fixed price contract, the contractor bears the risk that the agreed upon price may be less than actual expenses, which would result in a loss contract. The COFC concluded that it would be improper “to retroactively distribute the burden of a known cost that was already implicitly factored” in the negotiated fixed price.<sup>239</sup>

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<sup>224</sup> See 2004 *Year in Review*, *supra* note 40, at 21.

<sup>225</sup> NVT Tech., EBCA No. C-0401372, 05-1 BCA ¶ 32,823.

<sup>226</sup> *Id.* at 162,415.

<sup>227</sup> *Id.*

<sup>228</sup> Petchem, Inc., ASBCA No. 53792, 05-1 BCA ¶ 32,870.

<sup>229</sup> *Id.* at 162,899.

<sup>230</sup> *Id.* at 162,899-90.

<sup>231</sup> *Id.* at 162,900.

<sup>232</sup> An amendment to the solicitation stated that the guaranteed minimum would be “per period.” *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 162,901.

<sup>236</sup> See *infra* section titled Taxation p. 142 for a discussion of the taxation issue in the case.

<sup>237</sup> 64 Fed. Cl. 599 (2005).

<sup>238</sup> *Id.* at 607.

<sup>239</sup> *Id.*

The court also rejected an attempt to obtain lost profits from an allegedly lower estimate for the fee in cost-reimbursement contracts.<sup>240</sup> The COFC found that the prohibition against cost-plus-percentage-of-costs<sup>241</sup> contracts clearly prohibited ISN's claim and ISN assumed the risk in the adequacy of its fees and profits in negotiating the fixed fee or profit margin in its cost reimbursement contracts.<sup>242</sup>

### *The Legacy of AT & T*

In *Gould, Inc. v. United States*,<sup>243</sup> the COFC rejected an attempt to void a contract based on a violation of statutory and regulatory directives concerning the use of multiyear contracts.<sup>244</sup> In a convoluted case dating back to 1988, the contract involved a U.S. Navy procurement of radios for the Marine Corps.<sup>245</sup> A design problem resulted in a certified claim of equitable reformation of the contract.<sup>246</sup> The ground for the relief alleged that the Navy violated procurement regulations by failing to obtain the required written findings by the Head of the Contracting Activity of the existence of a stable design prior to pursuing a multiyear contract.<sup>247</sup>

In granting summary judgment to the government, the COFC reviewed the relevant statute and its legislative history and ruled that there was no private cause of action for a violation of "internal operating provisions for the management of funds within the agency."<sup>248</sup> The COFC concluded that the holding of *American Telephone & Telegraph Company v. United States*<sup>249</sup> "clearly prevented contractors from relying upon statutes aimed primarily at governmental functions and enforced through Congressional oversight."<sup>250</sup>

The COFC rejected a similar argument in *Short Brothers, PLC v. United States*<sup>251</sup> involving the same statutory requirement discussed above. In that case, the court held that the provisions are merely internal government directives that do not supply a private cause of action.<sup>252</sup> The contractor argued that the government violated implied duties to exercise good faith, fair dealing, and cooperation during contract formation.<sup>253</sup> The court, reviewing case law, distinguished these duties as applying only to implied-in-fact contracts.<sup>254</sup> The COFC also rejected an attempt to expand the law concerning negligent estimates for requirements contracts to a more general rule imposing good faith on the contracting officer's choice of contract.<sup>255</sup>

The COFC also followed *American Telephone & Telegraph Company* in *Northrop Grumman Corporation v. United States*,<sup>256</sup> which dealt with the same, now obsolete, requirement for a written determination from the Under Secretary of Defense for Acquisition before awarding a fixed-price contract for high-value research and development procurements in excess of \$10 million.<sup>257</sup> Northrop Grumman, which initially attempted to obtain a cost-reimbursement for the contract for

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<sup>240</sup> *Id.* at 607-08.

<sup>241</sup> 10 U.S.C.S. § 2306 (LEXIS 2005).

<sup>242</sup> *Info. Sys. Networks Corp.*, 64 Fed. Cl. at 608.

<sup>243</sup> 66 Fed. Cl. 253 (2005).

<sup>244</sup> *Id.* at 267.

<sup>245</sup> *Id.* at 255.

<sup>246</sup> *Id.* at 256-57.

<sup>247</sup> 10 U.S.C.S. § 2306b (a) (1)—(6) (LEXIS 2005).

<sup>248</sup> *Gould, Inc.*, 64 Fed. Cl. at 259 (quoting *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1452 (Fed. Cir. 1997)).

<sup>249</sup> 177 F.3d 1368 (Fed. Cir. 1999).

<sup>250</sup> *Gould, Inc.*, 64 Fed. Cl. at 267.

<sup>251</sup> 65 Fed. Cl. 695 (2005).

<sup>252</sup> *Id.* at 764.

<sup>253</sup> *Id.* at 765.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 767.

<sup>256</sup> 63 Fed. Cl. 38 (2005).

<sup>257</sup> Department of Defense Appropriations Act, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1329-84 (1987).

the full-scale development and initial production of a cruise missile, the Tri-Service Stand-Off Attack Missile,<sup>258</sup> attempted to distinguish *AT&T* through implied-in-fact case law, but the COFC ultimately held that the requirement in question was purely a procurement policy matter in which Congress chose not to create a private cause of action for contractors.<sup>259</sup>

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## Sealed Bidding

### *Invitation for Ambiguity*

In *Dynamic Corporation*,<sup>260</sup> the GAO examined a contracting officer's decision to cancel an IFB after bid opening and reaffirmed that where there are inadequate or ambiguous specifications, an agency's decision to cancel a solicitation is proper. Here, an IFB was issued for construction services, to include modernizing a building and demolishing and removing certain parts of a building. The demolition portion of the IFB included clean-up of hazardous materials. In the IFB, the bidders were told that they must provide a lump-sum bid that was to include the "hazardous materials services," and "were advised to base their prices for these services on the estimated quantities in the IFB, as verified by the bidders using the drawings and specifications provided, and by conducting building inspections."<sup>261</sup> In addition, the bidders were to segregate the hazardous materials services and provide unit prices. "[T]hese prices were to be used to adjust the lump sum price (either up or down), if the actual amount of hazardous materials encountered during performance was either 20 percent higher or 20 percent lower than the IFB estimates."<sup>262</sup>

Based on the language in the IFB, bidders inquired about whether the unit price was actually required. The agency issued an amendment to answer the question, which read, in part, "[i]f the contractor deems applicable, he can present different rates based on pipe size, thickness, composition, location, accessibility, or any other factor that the contractor feels is relevant."<sup>263</sup> This explanation led some bidders to assume that the unit price was not required and others to assume that it was required. Three bidders did not enter unit prices. Based on this and other ambiguities in the IFB, the contracting officer cancelled the IFB.<sup>264</sup>

Basing its analysis on the FAR, section 14.404-1(a)(1), the GAO first explained the general rule that "[b]ecause of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting officer must have a compelling reason to cancel an IFB after bid opening."<sup>265</sup> The GAO further stated, however, that if an IFB is ambiguous or inadequate, bidders will not be able to compete "on an equal basis."<sup>266</sup> Therefore, the GAO held that an ambiguous or inadequate solicitation "provides the agency with a compelling reason to cancel the IFB."<sup>267</sup>

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<sup>258</sup> *Northrop Grumman Corp.*, 63 Fed. Cl. at 39.

<sup>259</sup> *Id.* at 49.

<sup>260</sup> Comp. Gen. B-296366, June 29, 2005, 2005 CPD ¶ 125.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 2.

<sup>263</sup> *Id.*

<sup>264</sup> One of the types of ambiguities in the IFB was the "substantially overstated" quantities of work, while the other was an ambiguous request for bidders to submit certain pricing information "which prevented bidders from preparing their bids on a common basis." *Id.* at 3.

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

<sup>266</sup> *Cf.* *Rand & Jones Enter. Co., Inc.*, Comp. Gen. B-296483, Aug. 4, 2005, 2005 U.S. Comp. Gen. LEXIS 136. In this case, the GAO sustained a protest based on the cancellation of a request for proposals after disclosure of the offerors' prices where "the RFP provided only for a price competition and did not contain technical evaluation factors, [where] the agency intends to issue an invitation for bids for the same requirement, and [where] there is no basis to find the government or the integrity of the procurement system would be prejudiced if the RFP were not cancelled." *Id.*

<sup>267</sup> *Dynamic Corp.*, Comp. Gen. B-296366, June 29, 2005, 2005 CPD ¶ 125, at 4. (citing *Neals Janitorial Serv.*, B-276625, July 3, 1997, 97-2 CPD ¶ 6, at 5).

## Negotiated Acquisitions

### *DFARS Transformation*

As part of the DFARS transformation, the DOD proposed amending changes that would delete unnecessary text, and relocate guidance on source selection to the new PGI.<sup>268</sup> Most of the language that would remain in the DFARS deals with the evaluation of small businesses.<sup>269</sup> A source selection plan would still be mandatory for high-dollar value acquisitions.<sup>270</sup>

### *Air Force Memo on Communications with Industry*

The Air Force Chief of Staff and Acting Secretary issued a joint memorandum stating that communications must be strictly controlled through the Source Selection Authority (SSA) once the source selection begins (i.e. the release of the RFP).<sup>271</sup> The memorandum highlighted that while interaction with industry should be encouraged, all interactions with potential offerors should be recorded and all efforts should be made to keep a fair competitive advantage for all offerors.<sup>272</sup>

### *Air Force Memo on Cost/Price Risk Ratings*

The Assistant Secretary of the Air Force (Acquisition) issued a memorandum that cautioned against “overly optimistic or unrealistic cost proposals.”<sup>273</sup> The memorandum contained guidance that cost risk ratings should be given to evaluate offeror’s cost proposals in light of the government probable cost estimates.<sup>274</sup> The Air Force subsequently made cost realism risk assessments mandatory for Acquisition Category programs whose source selection plans are approved after 1 March 2005.<sup>275</sup>

### *Fixing the Unbroken RFP*

Echoing a protest in last year’s *Year in Review*,<sup>276</sup> the GAO sustained a protest concerning an agency’s attempt to fix an error by canceling a RFP, holding that an agency can take such an action only if there is a prior showing of prejudice against either the government or the integrity of the performance system.<sup>277</sup> In *Rand & Jones Enterprises Company*, the Department of Veterans Affairs (VA) issued a RFP for the expansion of a medical center in Northport, New York.<sup>278</sup> The VA indicated it would award based on the best value; however, the RFP did not identify technical or non-price related evaluation factors.<sup>279</sup> After amending the RFP, the VA received four revised proposals, publicly opened them, and disclosed all four prices in violation of the rule that only the awardee’s price may be released, and only after award.<sup>280</sup>

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<sup>268</sup> Defense Federal Acquisition Regulation Supplement; Contracting by Negotiation, 70 Fed. Reg. 14,624 (Mar. 23, 2005) (to be codified at 48 C.F.R. pt. 215).

<sup>269</sup> *Id.* at 14,625.

<sup>270</sup> *Id.*

<sup>271</sup> Memorandum, Chief of Staff, Air Force and Acting Secretary of the Air Force, to ALMAJCOM-FOA/CC, subject: Communication Throughout the Source Selection Process (6 June 2005).

<sup>272</sup> *Id.*

<sup>273</sup> Memorandum, Assistant Secretary of the Air Force (Acquisition), to SEE DISTRIBUTION, subject: Assessment of Cost/Price Risk Ratings in Source Selections (3 Jan. 2005).

<sup>274</sup> *Id.*

<sup>275</sup> Mandatory Procedure; Source Selection, MP 5315.3 (Feb. 9, 2005).

<sup>276</sup> See 2004 *Year in Review*, *supra* note 40, at 26-27.

<sup>277</sup> *Rand & Jones Enter. Co.*, Comp. Gen. B-296483, Aug. 4, 2005, 2005 CPD ¶ 142, at 4.

<sup>278</sup> *Id.* at 1.

<sup>279</sup> *Id.* at 2.

<sup>280</sup> See FAR, *supra* note 33, at 3.104-3(a) and 3.104-4.

Following an unresolved Section 8(a) protest,<sup>281</sup> the contracting officer decided to cancel the RFP due to the failure to identify technical evaluation factors and informed the four offerors that the agency would issue an IFB instead.<sup>282</sup> Rand & Jones, which had the lowest bid and would have received the contract if the RFP had been conducted as a lowest price, technically-acceptable procurement, protested the decision to cancel the RFP. The GAO agreed with Rand & Jones, holding that the VA failed to argue either a reasonable basis to cancel the RFP or a reasonable possibility that a decision not to cancel would be prejudicial to the government or the integrity of the procurement system.<sup>283</sup> Without such a reason, the potential winning offeror would be the prejudiced one, and the decision to cancel the RFP could not stand.<sup>284</sup>

In a GSA case, the GAO also sustained a protest against a decision to cancel a solicitation for offers (SFO) in *Greenleaf Construction, Inc.*<sup>285</sup> The GSA issued a small-business set-aside SFO requesting bids<sup>286</sup> for construction and asbestos work.<sup>287</sup> The GSA requested that interested firms submit discounts from listed line item estimates and explained that the GSA would compute the lowest total evaluated bid price through a formula.<sup>288</sup> Although Greenleaf bid the largest discounts, the GSA awarded the contract to another company and Greenleaf subsequently filed a protest.<sup>289</sup> Prior to the due date for the agency report, GSA indicated that it would take corrective action and resolicit offers based on alleged confusion in the SFO concerning whether the award would be made on “percentages” or “price.” The GAO agreed with Greenleaf, holding that the GSA failed to show a “reasonable basis” for the cancellation and was unable to show why the different methodologies mattered.<sup>290</sup> Under the GAO’s analysis of either methodology, Greenleaf was the lowest-price offeror and should have received the contract award.<sup>291</sup>

In an example of an appropriate decision to cancel a RFP, one can look at *VSE Corporation*.<sup>292</sup> This case dealt with a RFP from the Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security (DHS) for the storage, maintenance, and disposition services to handle personal property seized by various federal agencies.<sup>293</sup> In a troubled procurement,<sup>294</sup> the CBP cancelled the RFP, approximately five years after it was first issued, over concerns about improper bundling and the expansion of the contract due to the CBP’s increased workload as a result of the DHS reorganization.

The GAO found that the agency had a reasonable basis to cancel the RFP, to include the reduced scope of work and the removal of a requirement for the contractor to provide a storage facility.<sup>295</sup> The GAO also found that it was reasonable to assume that other contractors may be interested in the RFP given the passage of time since the original solicitation.

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<sup>281</sup> Arrow, which submitted the second lowest price, protested the fact that Rand & Jones graduated from the Section 8(a) program and would not be eligible for a Section 8(a) award. Unfortunately, the procurement was not set aside for small business concerns. *Rand & Jones*, 2005 CPD ¶ 142, at 2-3.

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

<sup>283</sup> *Id.* at 3-4. The decision to cancel a RFP has a lower threshold than canceling an IFB, which requires the agency to demonstrate a “compelling reason.” See FAR, *supra* note 33, at 4.404-1(a)(1).

<sup>284</sup> *Rand & Jones*, 2005 CPD ¶ 142, at 4.

<sup>285</sup> Comp. Gen. B-294338, Oct. 26, 2004, 2004 CPD ¶ 216. The GSA defines SFO as, “(an) invitation for bids in sealed bidding or request for proposals in negotiations.” U.S. GEN. SVS. ADMIN., GEN. SVS. ADMIN. ACQUISITION MANUAL subpart 570.102 (July 2004).

<sup>286</sup> The GAO noted that the GSA used the terms “bidder” and “offeror” interchangeably in the SFO and uses SFOs for both sealed bid and negotiated procurements. *Greenleaf Constr. Inc.*, 2004 CPD ¶ 216, at 2 n. 1. The GAO ultimately used the negotiated acquisition standard for its conclusion. *Id.* at 5.

<sup>287</sup> *Id.* at 2.

<sup>288</sup> *Id.* at 2-3. The formula was proportion of the work multiplied by the distribution of the work and by the sum of the percentages bid for each of the three years. *Id.* at 3.

<sup>289</sup> *Id.* at 4.

<sup>290</sup> *Id.* at 5.

<sup>291</sup> The GSA submitted flawed analyses to demonstrate that the awardee would have the lowest-price under one of the two methodologies. The GAO reviewed the data, found errors, and determined that the GSA would pay over \$225 million more for the awardee. *Id.* at 5.

<sup>292</sup> Comp. Gen. B-290452.2; Apr. 11, 2005, 2005 CPD ¶ 111.

<sup>293</sup> *Id.* at 1. The RFP contemplated the award of a cost-plus-award-fee contract for a 4-month transition period, a base period and nine 1-year options. *Id.* at 2.

<sup>294</sup> A protest after the initial award resulted in a corrective action revising the statement of work and reopening the competition. The CBP also issued several amendments, one of which incorporated the use of a government-owned, contractor-operated facility. *Id.* at 3-4.

<sup>295</sup> *Id.* at 6.

Therefore, it was not reasonable merely to amend the RFP given the substantial difference from the needs of the CBP at this time compared with the original requirements.<sup>296</sup>

### *Cooperativa II—The Revised Sequel*

The GAO provided guidance on an agency's attempt to limit the scope of revised proposals in *Cooperativa Muratori Riuniti*.<sup>297</sup> After a successful GAO protest by CMR,<sup>298</sup> the Department of the Navy implemented corrective action by amending the RFP for the construction of two facilities in Aviano AFB, Italy, and requesting revised proposals for reevaluation of the factors that the GAO found were evaluated improperly.<sup>299</sup> The GAO did not address one technical evaluation factor, "schedule," and the Navy notified the offerors that changes to that factor would not be accepted.<sup>300</sup> Since the time periods for exercise of options were being changed, price proposal revisions were being allowed, even though this factor was not in dispute.<sup>301</sup>

*Cooperativa Muratori Riuniti* first argued that the Navy should have implemented the corrective action strictly in accordance with the GAO's recommendation.<sup>302</sup> The GAO disagreed, stating that the parameters of a corrective action are within agency's discretion.<sup>303</sup> The GAO's sole criterion for corrective actions is that it must remedy the identified procurement impropriety.<sup>304</sup>

*Cooperativa Muratori Riuniti* then challenged the limitation of revised proposals.<sup>305</sup> The GAO first stated the general rule that an agency may limit revisions to revised proposals.<sup>306</sup> In this case, however, the GAO sustained the protest because the Navy failed to argue that the competitive process would be impaired by allowing offerors to completely revise their proposals.<sup>307</sup> The GAO found that in order to limit revised proposals following an amended RFP, the agency must argue that the amendment could not reasonably have any effect on other aspects of the proposal, or that revisions would have a detrimental impact on the competitive process.<sup>308</sup> The GAO agreed with *Cooperativa Muratori Riuniti* that changing the exercise of options may affect schedules, or at the very least, schedule-related matters, such as subcontractor availability.<sup>309</sup> In addition, since the Navy allowed price revisions, offerors should be allowed to revise technical aspects that may affect price.<sup>310</sup>

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<sup>296</sup> *Id.* at 7.

<sup>297</sup> Comp. Gen. B-294980.5, 2005 U.S. Comp. Gen. LEXIS 132 (July 27, 2005).

<sup>298</sup> *Cooperativa Muratori Riuniti*, B-294980, B-294980.5, Jan 21, 2005, 2005 CPD ¶ 21.

<sup>299</sup> The RFP was a "best value" procurement which four equally weighted factors: price; and three technical evaluation factors, organizational experience, organizational past performance, and schedule. *Cooperativa Muratori Riuniti's* original protest dealt with the first two technical factors. *Id.* 2005 U.S. Comp. Gen. LEXIS 132, at \*3.

<sup>300</sup> *Id.* at \*5.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at \*8.

<sup>303</sup> *Id.* at \*10.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at \*14.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at \*15-16.

<sup>308</sup> *Id.* at \*15.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at \*17. *Cooperativa Muratori Riuniti* also challenged that the Navy conducted discussions solely with another offeror. The GAO found an absence of prejudice since CMR obtained a debriefing and then submitted a protest. The GAO also noted that the offeror did not change its proposal following the discussion. *Id.* at \*18. The GAO also dismissed an alleged problem in the solicitation since it was not raised in the original protest. *Id.* at \*19.

## *Memorandum of Understanding (MOU) Options*

In *Northrop Grumman Information Technology*,<sup>311</sup> the GAO found that an agency must amend a solicitation if a change in circumstances materially affects the potential for an option exercise.<sup>312</sup> The Department of the Treasury issued a RFP to replace its telecommunications network. The RFP contemplated a best-value award of a predominantly fixed-price contract with a base period of three years with seven option years.<sup>313</sup>

The Department of Treasury decided to award the contract, without discussions, to AT&T. The day before award, the Department of Treasury signed a MOU<sup>314</sup> with various government agencies agreeing to conduct, at the end of the base period of the Department of Treasury contract, a “best value” analysis with the GSA to decide whether the Department of Treasury would transition to GSA’s new network.<sup>315</sup> Northrop Grumman and others protested the failure to amend the solicitation after the decision was made to sign the MOU.<sup>316</sup>

The GAO sustained the protest, stating the general rule that when an agency’s requirements change, the agency must issue an amendment to notify offerors of the changed requirements and afford them an opportunity to respond.<sup>317</sup> The GAO felt that the terms of the MOU made it less likely that the Department of Treasury would exercise the options under the contract.<sup>318</sup> First, the MOU took the decision out of the hands of the Department of Treasury’s contracting officer. Second, in an apparent concession to the GSA, the MOU’s best value analysis did not take into account transition costs, which the Treasury felt was the most important factor in its RFP.<sup>319</sup> The GAO felt that offerors should know of this development, in order to adjust their proposed prices accordingly.<sup>320</sup>

### *Discussions*

#### *Discussions Equals More Creative Information*

The GAO clarified its definition of meaningful discussions in *Creative Information Technology, Inc.*<sup>321</sup> The Army issued a RFP for information management and technology support services to the Information Management Support Center.<sup>322</sup> The solicitation sought performance-based solutions to the requirements laid out in the Performance Work Statement.<sup>323</sup> The RFP divided the requirement into six lots; Lot V, the lot under protest, dealt with “strategic analysis” and was set aside for Section 8(a) small businesses.<sup>324</sup>

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<sup>311</sup> Comp. Gen. B-295526, Mar. 16, 2005, 2005 CPD ¶ 45.

<sup>312</sup> *Id.* at 20.

<sup>313</sup> The RFP contained the following evaluation factors: price, transition, technical approach, operations and management, past performance, and small business participation. The non-price factors were approximately equal to price. Transition was the most important factor; technical approach was equal to operations in management; past performance and small business participation were equal in weight and less important. *Id.* at 3-4.

<sup>314</sup> Parties to the MOU include the Chief Information Officer for the Treasury, the Commissioner of the General Services Administration’s Federal Technology Service, the Administrator of the Office of Management and Budget’s (OMB) Office of Federal Procurement Policy, and the Administrator of OMB’s Office of Electronic Government. *Id.* at 5. The MOU stated that the decision to exercise the option would be a joint decision between the GSA and the Treasury. In the event of a dispute, the OMB would make the final decision. In addition, the “best value” focus would be according the government’s interest and not just the Treasury’s. *Id.* at 10.

<sup>315</sup> The GSA’s network would be called the FTS-Network telecommunications services contract. *Id.* at 5.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 13.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 11-12.

<sup>320</sup> *Id.* at 20. The GAO also sustained the protest on the grounds that the Treasury failed to conduct a reasonable price evaluation on AT&T’s proposal. *Id.* at 14-19.

<sup>321</sup> Comp. Gen. B-293073.10, Mar. 16, 2005, 2005 CPD ¶ 110.

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 2.

<sup>324</sup> The RFP contemplated multiple awards of ID/IQ contracts for a base period of one year, plus four one-year options. *Id.* “Strategic analysis” was divided into “plans and policy,” “technology assessment,” “hardware/software testing,” “research, analysis and recommendations,” “information resource management,” and “technical writing.” *Id.*

The Army asked offerors to estimate hours for full-time-equivalent (FTE) employees assuming all tasks were awarded to the offeror.<sup>325</sup> Creative Information Technology's total price in its initial proposal was around \$110 million, or about eight times the Army's unreleased independent government cost estimate (IGCE).<sup>326</sup> The Army included Creative Information Technology in its competitive range and informed the company during discussions that its price was overstated. Creative Information Technology's revised price was around \$89 million.<sup>327</sup> Creative Information Technology submitted a protest after the Army failed to select it for award.<sup>328</sup> After a corrective action,<sup>329</sup> Creative Information Technology resubmitted a protest to the GAO.

The general rule is that discussions must be meaningful, which means that agencies must inform offerors of "weaknesses, excesses or deficiencies in its proposal, the correction of which would be necessary for the offeror to have a reasonable chance (of award)."<sup>330</sup> The GAO also noted that an agency does not have to tell offerors of a high price, unless the belief is that the price is unreasonable.<sup>331</sup> The GAO felt that it was unreasonable to expect that Creative Information Technology could have understood the magnitude of the price disparity based on the Army's discussions.<sup>332</sup> The key to the GAO was that the fundamental problem was not pricing, but an underlying cause: a failure to understand the staffing levels required by the Army.<sup>333</sup> The GAO recommended that the Army reopen discussions and conduct a new source selection decision.<sup>334</sup>

### *A Red FLAG*

In *Front Line Apparel Group (FLAG)*,<sup>335</sup> the GAO sustained a protest by clarifying the limits of a second round of discussions through the "disparate treatment" test.<sup>336</sup> The Defense Logistics Agency issued a RFP for Army combat uniforms that contemplated multiple ID/IQ contracts.<sup>337</sup> The Army established a competitive range, conducted discussions, reduced the competitive range, and requested final proposal revisions (FPRs).<sup>338</sup> Prior to the last request, the Army issued two discussion letters reopening discussions.<sup>339</sup>

Although the GAO stated the general rule that it is permissible for agencies to conduct additional discussions relating to previously-discussed issues with a limited number of offerors where the agency had remaining concerns, the GAO sustained the protest because of disparate treatment.<sup>340</sup> In this case, the GAO seemed to focus on the fact that the Army had finished evaluations and reduced the competitive range prior to the request for FPRs (i.e. there were no "remaining concerns").<sup>341</sup> Following the additional discussions, the agency upgraded the overall rating of one offeror who did not submit

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<sup>325</sup> *Id.* at 3. Other assumptions included 2,080 hours per staff year for each employee; twelve hours a day, five days a week; 7,000 customers for the base period; and five percent increase in customers for each of the option year. *Id.*

<sup>326</sup> *Id.* at 4. Creative Information Technology's estimate was based on thirty-seven FTEs per year across eleven labor categories; the Army's IGCE estimated around \$13 million with seven FTEs.

<sup>327</sup> *Id.* at 5.

<sup>328</sup> The source selection official concluded that CITI's total price was "unreasonably high." *Id.*

<sup>329</sup> The Army inadvertently used CITI's price from its initial proposal for the award decision. After reviewing CITI's revised proposal price, the Army again chose not to select CITI for award. *Id.* at 6.

<sup>330</sup> *Id.* at 6-7.

<sup>331</sup> *Id.* at 7.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 8.

<sup>334</sup> *Id.* at 9.

<sup>335</sup> Comp. Gen. B-295989, June 1, 2005, 2005 CPD ¶ 116.

<sup>336</sup> *Id.* at 4.

<sup>337</sup> The protest involved Contract Line Item Numbers (CLINs) 0011 and 0012 (trousers), which were set aside for small businesses. *Id.* at 1.

<sup>338</sup> *Id.* at 2.

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

<sup>340</sup> *Id.* at 4.

<sup>341</sup> *Id.*

a timely reply and clarified its source selection decision by distinguishing another offeror's proposal from FLAG's.<sup>342</sup> Because FLAG, unlike the other offerors, did not receive a second "bite at the apple," the GAO sustained its protest.<sup>343</sup>

### *The Riddle of the Spherix*

In *Spherix, Inc.*,<sup>344</sup> the GAO stressed that for discussions to be meaningful, an agency must discuss any aspect of an offeror's proposal that will be classified as a "significant weakness."<sup>345</sup> *Spherix* involved a competition between incumbents for a consolidated reservations system for all federal parks, recreation facilities, and activities.<sup>346</sup> The Forest Service ultimately awarded the contract to ReserveAmerica, citing ReserveAmerica's superior non-price advantages over Spherix's substantially lower price.<sup>347</sup>

The GAO sustained Spherix's protest, finding that the Forest Service failed to conduct meaningful discussions with Spherix concerning areas that were judged to be significant weaknesses in the source selection document.<sup>348</sup> The GAO found that the agency failed to adequately justify its evaluation in the source selection documents.<sup>349</sup> The GAO noted that the Forest Service gave credit to the awardee for providing greater detail in its proposed staffing that went beyond the requirements of the RFP.<sup>350</sup> The GAO also took umbrage with the Forest Service's attempts to "dollarize" proposed strengths in two areas, noting that while not required, if an agency attempted to quantify strengths, it must compare offerors equally.<sup>351</sup>

### *And the HITS Keep Coming!*

The GAO provided more guidance on discussions in the context of a corrective action in *Lockheed Martin Simulation, Training & Support*.<sup>352</sup> In a troubled acquisition by the HUD,<sup>353</sup> the GAO examined an amended RFP for the HUD Information Technology Solution (HITS) for all the agency's information technology requirements.<sup>354</sup> Lockheed Martin protested the award to Electronic Data Systems (EDS) arguing that the HUD failed to adequately discuss Lockheed Martin's weaknesses,<sup>355</sup> challenging the agency's communications with EDS, and alleging that EDS improperly revised its proposal following those communications.<sup>356</sup>

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

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

<sup>344</sup> Comp. Gen. B-294572; B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3.

<sup>345</sup> *Id.* at 14-15.

<sup>346</sup> Spherix was the incumbent for the National Park Reservation Service while ReserveAmerica was the incumbent for the National Recreation Reservation Service. *Id.* at 2.

<sup>347</sup> *Id.* at 8.

<sup>348</sup> Significant weakness areas included the marketing approach, which was not discussed with the protestor; the quality control plan, not discussed because the "plan was simply weak;" and transition period staffing which were judged to be lacking in detail and therefore not discussed. *Id.* at 14.

<sup>349</sup> *Id.* at 13.

<sup>350</sup> *Id.* at 9. Both offerors addressed staffing in their proposals; but ReserveAmerica received credit for identifying the number of dedicated staff. The agency did not address this area with Spherix during discussions. *Id.* at 10.

<sup>351</sup> *Id.* The Forest Service used estimated costs of Staffing for ReserveAmerica and projected Spherix's staffing using historical data from its incumbency in the smaller system. The GAO felt that it was improper to use that data for the larger consolidated requirement. *Id.* at 10. The Forest Service also quantified ReserveAmerica's marketing plan strength. The GAO noted that the source selection document failed to take into account Spherix's plan in its proposal, relying on an incorrect briefing slide, which skewed the attempt to compare the two. *Id.* at 12.

<sup>352</sup> Comp. Gen. B-292836.80, Nov. 24, 2004, 2005 CPD ¶ 27.

<sup>353</sup> See 2004 Year in Review, *supra* note 40, at 35. The GAO also conducted ADR involving two pre-closing protests which resulted in the HUD amending the RFP. *Lockheed Martin Simulation, Training & Support*, 2005 CPD ¶ 27, at 2.

<sup>354</sup> HITS is a follow-on contract for the HUD Integrated Information Processing Service (HIIPS). *Lockheed Martin* was the incumbent for the HIIPS. While the first protest was pending, the agency proceeding with the award to Electronic Data System. Following litigation in the COFC, the HUD split the requirements between the two. *Lockheed Martin Simulation, Training & Support*, 2005 CPD ¶ 27, at 2.

<sup>355</sup> *Id.* at 11.

<sup>356</sup> *Id.* at 8.

The HUD allowed limited revisions to final proposals and did not conduct discussions with either offeror.<sup>357</sup> The GAO focused on six weaknesses of Lockheed Martin's original proposal that the source selection document stated were important in the best value analysis of the award decision.<sup>358</sup> Unfortunately for the agency, those weaknesses were not identified in the technical evaluation report, and were not the subject of previous discussions.<sup>359</sup> Given those facts, the GAO sustained the protest holding the agency must discuss any weaknesses that were determining factors for the best value award absent a "clear showing by the agency that (the weaknesses) were not significant."<sup>360</sup>

The GAO sustained another aspect of the proposal in a heavily redacted section<sup>361</sup> holding that EDS improperly revised its proposal following HUD's communications regarding its proposal.<sup>362</sup> Interestingly, the GAO sustained the protest despite a finding that the HUD failed to understand that EDS had changed its proposal.<sup>363</sup> It seems that the best approach would be to err on the side of caution and conduct discussions in lengthy procurements, particularly when there are several amendments to the RFP.<sup>364</sup>

#### *Corrective Actions*

#### *Incorrective Action*

In *Gulf Copper Ship Repair, Inc.*,<sup>365</sup> the GAO nullified a corrective action that resolved one issue with an awardee while ignoring another known problem with the protestor.<sup>366</sup> The Navy issued a RFP for two cost-plus-incentive-fee contracts over a five-year period for material, services, and facilities to perform maintenance and repairs on fourteen mine countermeasures and coastal minehunter class ships.<sup>367</sup> After the Navy awarded the contract to Anteon and another company, Gulf Copper submitted a protest, disputing the Navy's evaluation process based on Gulf Copper's erroneous assumption that it must use current forward pricing rate agreement rates in preparing its cost proposal; and challenging Anteon's past performance rating, based on the history of Anteon's corporate predecessor.<sup>368</sup>

The Navy informed the GAO that it would take corrective action.<sup>369</sup> The Navy conducted a thorough review of the Anteon's prior history, to include requesting and receiving six pages of data regarding the old contract.<sup>370</sup> Upon review, the Navy upheld the previous past performance rating and awarded the contract again to the two original awardees.<sup>371</sup>

The GAO sustained Gulf Copper's protest calling the Navy's action an improper discussion.<sup>372</sup> The GAO found that when the Navy decided to conduct discussions with Anteon about its past performance during the corrective action, it should

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<sup>357</sup> *Id.* at 4.

<sup>358</sup> *Id.* at 10-11.

<sup>359</sup> *Id.* at 10.

<sup>360</sup> *Id.* at 11.

<sup>361</sup> [Deleted]. *Id.* at 9.

<sup>362</sup> *Id.* at 8.

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

<sup>364</sup> The GAO also criticized the agency's attempt to argue that a two-year old communication from the initial RFP which placed the responsibility on the offeror to make its proposal "responsive, clear and accurate" *Id.* at 11.

<sup>365</sup> Comp. Gen. B-293706.5, Sept. 10, 2004, 2005 CPD ¶ 108.

<sup>366</sup> *Id.* at 8-9.

<sup>367</sup> *Id.* at 1.

<sup>368</sup> *Id.* at 4. Gulf Copper also made an OCI complaint which also was investigated in the Navy's corrective action. *Id.* at 5.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 6.

<sup>372</sup> *Id.* at 7.

have discussed Gulf Copper's apparent misunderstanding of the RFP requirements.<sup>373</sup> The GAO went further to state that the Navy's corrective action would have been considered improper even if classified as a "clarification."<sup>374</sup>

#### *Corrective Action*

In *Consolidated Engineering Services, Inc.*,<sup>375</sup> the GAO upheld a corrective action that limited changes offerors could make to their proposals. The National Archives and Records Administration (NARA) issued a RFP to provide all program management, engineering, and services required to operate and maintain the archives in Washington, D.C., and College Park, Maryland.<sup>376</sup> After the award of the contract, Consolidated Engineers submitted a protest.<sup>377</sup> Following a GAO alternative dispute resolution session, the agency undertook corrective action regarding the issue highlighted in the session—reevaluating its past performance evaluations.<sup>378</sup> Subsequent to this action, Consolidated Engineers requested the agency reopen discussions concerning various issues raised in NARA's debriefing with the contractor.<sup>379</sup> In response, the contracting officer reopened limited discussions on only two areas, key personnel and key subcontractor information, and accepted changes only on those limited issues. The contracting officer did not allow price revisions of proposals.<sup>380</sup>

The GAO disagreed with Consolidated Engineer's argument that NARA's corrective action went beyond the GAO's recommendation, and therefore, NARA should allow all offerors to submit unlimited revised proposals.<sup>381</sup> The general rule is that the contours of a corrective action are within the discretion of the contracting officer.<sup>382</sup> Reviewing the corrective action, the GAO agreed that the agency's decision to request additional information in disputed areas was reasonable, even though those areas were not in the scope of the issues highlighted in the ADR session.<sup>383</sup> The GAO noted, with approval, NARA's concern with allowing new price proposals after the awardee's price was revealed following the original award of the contract.<sup>384</sup>

#### *Price Proposal Is Not Quite Right*

In another corrective action case, *Resource Consultants, Inc.*,<sup>385</sup> the GAO sustained a protest against an offeror whose revised price proposal effectively altered its technical proposal in violation of the agency's guidelines for the corrective action.<sup>386</sup> The Army, in LOT 1 of the same RFP as the *Creative Information Technology* case,<sup>387</sup> contemplated a single-award ID/IQ contract for desktop support services for a base period of two years, plus five one-year options.<sup>388</sup> Offerors were required to submit five discrete components of price for the expected work.<sup>389</sup> The Army initially awarded the

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<sup>373</sup> *Id.* at 8-9.

<sup>374</sup> *Id.* at 9. "Clarifications" are limited exchanges, between the Government and offerors that may occur when award without discussions is contemplated. See FAR, *supra* note 33, at 15.306 (a).

<sup>375</sup> Comp. Gen. B-293864.2; Oct. 25, 2004, 2004 CPD ¶ 214.

<sup>376</sup> *Id.* at 2. The RFP contemplated the award of a fixed-price contract, with four option years. *Id.*

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

<sup>378</sup> *Id.* at 2.

<sup>379</sup> *Id.* Consolidated Engineering Services requested allowing the submission of revised proposals to address facility changes, upcoming collective bargaining agreements, a revised Department of Labor wage determination and matters raised in its debriefing. *Id.*

<sup>380</sup> *Id.* at 3. The contracting officer made this decision based on the length of time which had passed since the submission of the proposals. *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 4.

<sup>384</sup> *Id.*

<sup>385</sup> Comp. Gen. B-293073.3, et. al, June 2, 2004, 2005 CPD ¶ 131.

<sup>386</sup> *Id.* at 11.

<sup>387</sup> See *supra* notes 321-334 and accompanying text.

<sup>388</sup> *Resource Consultants*, 2005 CPD ¶ 131, at 2.

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

contract to Resource Consultants; however, after an agency-level and GAO protest, the Army took corrective action by lowering the expected users for the contract,<sup>390</sup> and requesting only revised price proposals.<sup>391</sup>

Following corrective action, the Army awarded the contract to Titan, which although rated the same as Resource Consultants, submitted a lower price in its revised proposal.<sup>392</sup> In its review of Resource Consultants's protest, the GAO focused on Titan's shift from using a greater proportion of higher-priced labor categories to proposing more lower-priced categories.<sup>393</sup> Titan also changed its off-site prices by reducing the expected staffing for off-site work.<sup>394</sup> Ultimately, although no offerors were allowed to submit revised technical proposals, the price proposals materially altered Titan's approach.<sup>395</sup> Therefore, the GAO sustained the protest since offerors were not allowed to compete on a common basis.<sup>396</sup>

## Evaluations

### *The Value of More Betterments*

The GAO sustained a protest due to the Source Selection Authority's (SSA's) failure to evaluate proposals in accordance with the RFP evaluation factors in *ProTech Corporation*.<sup>397</sup> The U.S. Army Corps of Engineers (COE) issued a RFP for the award of a fixed-price contract for construction services of sixty-two new military family housing units.<sup>398</sup> The RFP stated that award would be made on a "best value" basis with the following evaluation factors: project management plan, experience, past performance, betterments, and price. Project management was the most important factor and was given twice the weight as the other factors. The other technical factors were equal in importance to each other and price was equal to the other technical factors combined.<sup>399</sup> Betterments was a non-mandatory CLIN that became part of the contract once offered: the RFP stated that, "[m]ore betterments will be considered more favorably than fewer betterments."<sup>400</sup> The COE awarded the contract to Atherton who proposed a higher price but did not offer any betterments. ProTech, a small business, offered a lower price and six betterments.<sup>401</sup> ProTech protested the award on various grounds, to include the SSA's evaluation.

The GAO sustained the protest based on the SSA's failure to follow the dictates of the RFP.<sup>402</sup> Although ProTech received a higher rating in betterments, the SSA discounted the rating, declaring that betterments was, "the fourth, and least most important factor."<sup>403</sup> The SSA also incorrectly stated in the source selection decision that the evaluation factors were listed in descending order of importance.<sup>404</sup> The GAO felt that the SSA's failure to apply the correct weights to the evaluation factors required a new source selection decision.<sup>405</sup>

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<sup>390</sup> The estimate went down from 10,000 to 7,000 users. *Id.* at 6.

<sup>391</sup> *Id.* at 3.

<sup>392</sup> *Id.* at 5.

<sup>393</sup> *Id.* at 9.

<sup>394</sup> *Id.* at 10.

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

<sup>396</sup> *Id.* at 7. RCI also alleged a procurement integrity violation that the GAO declined to evaluate without evidence. *Id.* at 11.

<sup>397</sup> Comp. Gen. B-294818, 2004 U.S. Comp. Gen. LEXIS 293 (Dec. 30, 2004).

<sup>398</sup> *Id.* at \*1-2.

<sup>399</sup> *Id.* at \*4. The RFP also contained a ten-percent price evaluation preference in favor of Historically Underutilized Business (HUB) Zone small businesses. *Id.*

<sup>400</sup> *Id.* It does not appear that "betterment" was a defined term in the RFP. It appears that the term meant additions to the proposal outside the scope of the RFP which improved the quality of the proposal and which would result in a higher evaluation. *Id.*

<sup>401</sup> *Id.* at \*5.

<sup>402</sup> The GAO denied the protest on other grounds finding the agency's evaluation of ProTech's offer was reasonable and consistent with the RFP. *Id.* at \*16.

<sup>403</sup> *Id.* at \*8.

<sup>404</sup> *Id.* The SSA's also valued Atherton's offer of no betterments to equal sixty-three percent of ProTech's six betterments. *Id.*

<sup>405</sup> *Id.* at \*18.

*The Non-Binding Price Is Not Right!*

In *CW Government Travel, Inc.*,<sup>406</sup> the GAO rejected the Army's non-binding price evaluation scheme stating that the statutory requirement to evaluate price in every RFP requires some attempt to reasonably evaluate cost to the government.<sup>407</sup> The Army issued a RFP<sup>408</sup> for commercial travel officer services for the Defense Travel System program.<sup>409</sup> In an innovative approach, the RFP required offerors to respond to two sample tasks. Offerors would only complete pricing for the sample tasks; the government would use the pricing for evaluative purposes, but any proposed pricing would not be binding.<sup>410</sup>

CW Government Travel challenged this framework, stating that the failure to require binding fees would preclude a meaningful evaluation of cost.<sup>411</sup> The Army argued that it would still conduct a price realism analysis for all proposals.<sup>412</sup> The Army also argued that since price was the least important factor, competition would not be hindered.<sup>413</sup> The GAO disagreed, finding that agencies' evaluation schemes must provide some reasonable basis for evaluating or comparing the relative costs of offerors' proposals.<sup>414</sup>

*Apples to Apples*

In *Liquidity Services, Inc.*,<sup>415</sup> the GAO disapproved of the GSA's attempt to compare two close offerors by using a price evaluation scheme that effectively eliminated an unsuccessful offeror's price advantage.<sup>416</sup> The GSA issued a RFP for the sale of federal surplus property contemplating the award of a fixed price ID/IQ contract.<sup>417</sup> The GSA indicated that it would use an "integrated assessment" of price proposals using "standard financial and business analytical techniques and methodologies."<sup>418</sup> In a close competition, the GSA awarded the contract to Maximus, Inc., and Liquidity submitted a protest challenging the price evaluation technique.<sup>419</sup>

The GAO sustained the protest, focusing on the GSA's complicated analysis comparing the two different approaches in two areas: transportation and warehousing costs (both areas in which Liquidity had a decisive price advantage).<sup>420</sup> In the transportation area, the GSA excluded Liquidity's fixed price for hauls greater than two hundred miles under the assumption that the majority of the work would be short trips.<sup>421</sup> In the warehousing area, the GSA reduced

<sup>406</sup> Comp. Gen. B-295530.2; B-295530.3; B-295530.4, July 25, 2005, 2005 CPD ¶ 139.

<sup>407</sup> *Id.* at 6.

<sup>408</sup> The Army would issue multiple awards of ID/IQ contracts. The base ordering period would be for two years, with three one-year options. The RFP contemplates a "best value" procurement based on the following factors, in decreasing order of importance: performance risk, technical, small business participation, and price. Non-price factors would be "significantly more important than price." *Id.* at 2.

<sup>409</sup> See *infra* section titled Contract Types p. 17 for a discussion of the reconsideration request of an earlier protest dealing with the guaranteed minimum amount for the ID/IQ contract.

<sup>410</sup> *CW*, 2005 CPD ¶139, at 2-3.

<sup>411</sup> *Id.* at 4.

<sup>412</sup> *Id.* at 5.

<sup>413</sup> *Id.* at 6.

<sup>414</sup> *Id.* CW also challenged the proposed sample tasks arguing that the tasks were not broad enough to permit evaluation of all factors. The GAO found that the scheme reasonably related to the agency's needs. *Id.* at 6-7. In addition, the GAO dismissed an arguments that the RFP was vague stating that the requirement is only to provide sufficient information for offerors to compete intelligently and on equal terms. *Id.* at 7-8. The GAO also approved the agency's cautionary clarification that offerors must factor in risk of currency valuation into their price proposals. *Id.* at 8.

<sup>415</sup> Comp. Gen. B-294053, Aug. 18, 2004, 2005 CPD ¶ 130.

<sup>416</sup> *Id.* at 8.

<sup>417</sup> *Id.* at 1-2. The award would be made on a "best value" basis with the following factors: Technical Approach (forty-five percent), Related Experience (twenty percent), Past Performance (ten percent), and Price (twenty-five). *Id.*

<sup>418</sup> The GSA would evaluate spreadsheets which projected gross proceeds, net proceeds, and direct costs based on offeror's expectation on performance. *Id.* at 3 n.3.

<sup>419</sup> The GAO noted that Liquidity raised a number of other issues but that the RFP was unclear in those areas and the GSA should address those issues in its corrective action. *Id.* at 9.

<sup>420</sup> *Id.* at 6-7.

<sup>421</sup> *Id.* at 7.

Maximus's warehouse discount rate since it offered additional services not offered by Liquidity.<sup>422</sup> After making both adjustments, Maximus offered more favorable pricing.<sup>423</sup>

The GAO highlighted that the agency did not make similar types of adjustment in the other parts of its price analysis.<sup>424</sup> The GAO also found fault in the transportation assumption since the RFP did not have any guidance that would support the agency's exclusion of long-haul trips.<sup>425</sup> Since Liquidity would have had a clear advantage without the adjustment, and the GSA failed to articulate a reasonable rationale for the changes, the GAO felt that the evaluation was unreasonable.<sup>426</sup>

### *Sending Out a SOS*

In *SOS Interpreting, LTD.*,<sup>427</sup> the GAO sustained a protest against a source selection decision that failed to adequately support the agency's rationale in accordance with the terms of the RFP.<sup>428</sup> The Drug Enforcement Administration (DEA) issued a RFP for various translation, transcription, interception, and monitoring support services.<sup>429</sup> The solicitation stated that the DEA would award the contract on a "best value" basis with the combined weight of the technical evaluation factors more important than price.<sup>430</sup> The SSA awarded the contract to McNeil Technologies, Inc., although the Technical Evaluation Panel (TEP) gave SOS Interpreting the highest rating of all the offerors in the competitive range.<sup>431</sup>

Although the GAO acknowledged the general rule that a source selection official can reasonably disagree with evaluators' recommendations, the GAO felt that, in this case, the SSA failed to adequately state her rationale in the decision document.<sup>432</sup> The GAO found that the SSA converted the "best value" RFP to a Lowest Price Technically Acceptable procurement through her declaration that all proposals were technically equal and that she would award the contract to the lowest-price offeror.<sup>433</sup> The primary fault of the SSA's decision was her failure to document two clear advantages to SOS Interpreting's proposal.<sup>434</sup>

The GAO also addressed other aspects of SOS's protest. First, SOS Interpreting attacked the DEA's evaluation of risk as an unstated evaluation factor.<sup>435</sup> In response, the GAO noted the general rule that the consideration of risk is inherent in technical evaluations.<sup>436</sup> Second, McNeil Technologies failed to follow the proposal instructions regarding accounting for Service Contract Act increases in its proposed price.<sup>437</sup> The GAO felt that the DEA should address this issue with McNeil Technologies in order to treat all offerors the same.<sup>438</sup>

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<sup>422</sup> *Id.*

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

<sup>424</sup> *Id.* at 8.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 9.

<sup>427</sup> Comp. Gen. B-293026, et. al, Jan. 20, 2004, 2005 CPD ¶ 26.

<sup>428</sup> *Id.* at 9.

<sup>429</sup> *Id.* at 2.

<sup>430</sup> *Id.* The RFP anticipated award of a fixed-price, ID/IQ contract for a base year with four one-year options for translation, transcription, interpreting, interception, and monitoring support services. The technical factors, listed in descending order of importance, were: management plan, quality control plan, and transition plan. *Id.*

<sup>431</sup> *Id.* at 6.

<sup>432</sup> *Id.* at 7.

<sup>433</sup> *Id.* at 9.

<sup>434</sup> SOS received higher ratings under two evaluation factors: quality control plan and transition plan. The GAO discounted the SSA's opinion that TEP rated SOS improperly as conclusory. *Id.* at 8-9.

<sup>435</sup> *Id.* at 10.

<sup>436</sup> *Id.* The GAO did recommend reevaluation of the risk factors since it appeared that the SSA used a LPTA approach to the award. *Id.*

<sup>437</sup> *Id.* at 11.

<sup>438</sup> *Id.* at 12. The GAO also upheld a past performance evaluation and noted with concern the source selection document's reference to SOS's agency-level protest. *Id.* at 10-11.

*A Soapy Evaluation Results in a Leaky Award*

In *Cooley/Engineered Membranes; GTA Containers, Inc.*,<sup>439</sup> the GAO sustained a protest based on an offeror's failure to propose an alternative test that met the RFP requirements.<sup>440</sup> The Air Force issued a RFP for two sizes of collapsible fuel containment bladders for storing aircraft fuels.<sup>441</sup> The RFP included a table listing approved tests for determining the bonding the seams and fittings of the bladder for proscribed strengths.<sup>442</sup>

The Air Force awarded the contract to MPC Containment System even though MPC used an "alternative pressurized soap bubble" test to its specialized fitting method.<sup>443</sup> After expert testimony, the GAO found that the alternative test would not meet the requirements of the RFP to measure the strength of the tanks.<sup>444</sup> Since the offeror's proposal did not meet the RFP requirements, the Air Force could not reasonably find that MPC's proposal was technically acceptable.<sup>445</sup>

*Price Is Not Just a Color*

The GAO underscored the importance of the statutory requirement to consider price in a RFP, particularly in an ID/IQ contract, in *The MIL Corporation*.<sup>446</sup> The Department of Commerce issued a RFP for the award of government-wide acquisition contracts to provide information technology services.<sup>447</sup> The agency selected twenty-four Tier II proposals, all of which received a "blue" rating.<sup>448</sup> The MIL Corporation received a "red" under past performance, a "blue" for price, and "green" overall; and subsequently filed a protest.<sup>449</sup> The protest challenged the agency's overall evaluation of price arguing that the agency relied upon a "mechanical application of a color-coded scheme."<sup>450</sup>

The GAO agreed, finding that the agency failed to sufficiently document the price/technical tradeoff required by the FAR.<sup>451</sup> Essentially, the agency only focused on those proposals that received the highest rating, "blue," for technical factors.<sup>452</sup> The agency failed to document why it chose proposals that received "yellow" price ratings<sup>453</sup> over the MIL Corporation's offer, which received a "blue" price rating.<sup>454</sup> The GAO specifically referenced the source selection document that indicated that price played a lesser role due to the pricing that would occur at the task order level.<sup>455</sup> In response, the

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<sup>439</sup> Comp. Gen. B-294896.2, et. al, Jan. 21, 2005, 2005 CPD ¶ 22.

<sup>440</sup> *Id.* at 5.

<sup>441</sup> The RFP was a total small-business set-aside and contemplated a fixed price ID/IQ contract for one year with four option periods. The two sizes were 50,000 gallon and 210,000 gallon bladders. *Id.* at 2.

<sup>442</sup> *Id.* at 4.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 5. The tests in the RFP included "clamping samples in mechanical jaws and subjecting them to stress as measured in pounds/inch" in order to measure specified strength requirements. *Id.* at 4.

<sup>445</sup> *Id.* at 5.

<sup>446</sup> Comp. Gen. B-294836, Dec. 30, 2004, 2005 CPD ¶ 29.

<sup>447</sup> *Id.* at 1. The contracts were named the Commerce Information Technology Solutions Next Generation program. The RFP was issued as a total set-aside for small businesses and called for the award of multiple ID/IQ contracts. Small businesses were grouped into three tiers and those tiers competed among themselves. The protest involved Tier II. *Id.* at 2.

<sup>448</sup> The agency evaluated the proposals in the following manner: blue, green, yellow, or red. Price was rated depending on its differential will regard to the average price. *Id.* at 3 n.6.

<sup>449</sup> *Id.* at 7.

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

<sup>451</sup> *Id.* at 9-10.

<sup>452</sup> *Id.* at 3-4.

<sup>453</sup> "Yellow" for pricing meant between ten and twenty percent higher than the average. *Id.* at 3 n.6.

<sup>454</sup> *Id.* at 7.

<sup>455</sup> *Id.* at 9.

GAO stated there was no task order exception to the statutory requirement to consider price.<sup>456</sup> If the agency conducted a price/technical tradeoff, it could only do so with adequate justification in the source selection document.<sup>457</sup>

*One, Two, Five (Three, My Lord) . . . Three*

The GAO approved of an agency's use of fewer adjectival ratings than described in the solicitation in the evaluation of proposals in *Trajen, Inc.; Maytag Aircraft Corporation*.<sup>458</sup> The contract involved fuel receipt, storage, and issue services at the Government-Owned, Contractor Operated facilities at the Defense Fuel Support Point in Norfolk, Virginia; and aircraft refueling services for Naval Station Norfolk and the Naval Amphibious Base in Little Creek, Virginia.<sup>459</sup> The RFP provided that technical factors<sup>460</sup> would be evaluated under five ratings: exceptional, very good, satisfactory, marginal, or unsatisfactory.<sup>461</sup>

The technical evaluation team only used three ratings in evaluating proposals: exceptional, average, and marginal. In dismissing the protest on these grounds,<sup>462</sup> the GAO highlighted the general rule that evaluation ratings, however concocted, are "merely guides for intelligent decision-making in the procurement process."<sup>463</sup> In rejecting allegations of prejudicial impact, the GAO focused on the detailed numerical scoring of the operational capability subfactors and that the evaluation was not based solely on the three adjectives.<sup>464</sup> The GAO also noted the SSA's consideration of the narrative comments in the consensus evaluation to demonstrate the fairness of the source selection process.<sup>465</sup>

*The Value of Value-Added*

In *Coastal Maritime Stevedoring, LLC*,<sup>466</sup> the GAO rejected a price/technical tradeoff that focused only on the advantages in a proposal that would result in a cost savings to the government, while ignoring advantages that could not be quantified.<sup>467</sup> The U.S. Army Surface Deployment and Distribution Command issued a RFP for stevedore<sup>468</sup> and related terminal services at Blount Island Terminal in Jacksonville, Florida.<sup>469</sup> The RFP contemplated the award of a four-year fixed price requirements contract on a best-value basis in which non-price factors, when combined, were approximately equal in weight to price.<sup>470</sup> The SSA received an analysis from the program manager that identified specific strengths to Coastal's proposal which would result in a cost savings to the government.<sup>471</sup> The program manager, however, neglected to comment on other strengths of the proposal that did not affect the cost.<sup>472</sup> The SSA then selected a lower-rated, lower-price proposal.<sup>473</sup>

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<sup>456</sup> *Id.*

<sup>457</sup> *Id.*

<sup>458</sup> Comp. Gen. B-296334, et. al; 2005 U.S. Comp. Gen. LEXIS 154 (July 29, 2005).

<sup>459</sup> *Id.* at 2.

<sup>460</sup> The technical factors, in descending order of importance, were operational capability, past performance, price, and socioeconomic/subcontracting. Operational capability was divided into nine subfactors. *Id.* at \*4.

<sup>461</sup> *Id.* at \*3.

<sup>462</sup> The GAO also dismissed allegations of improper discussions made by both protestors. *Id.* at \*6-14.

<sup>463</sup> *Id.* at \*14.

<sup>464</sup> *Id.* at \*15.

<sup>465</sup> *Id.* at \*16.

<sup>466</sup> Comp. Gen. B-296627; 2005 U.S. Comp. Gen. LEXIS 180 (Sept. 22, 2004).

<sup>467</sup> *Id.* at \*15-16.

<sup>468</sup> Stevedore services include the discharge and loading of ships, rail cars, and trucks and the drayage, or moving, of containers between rail, truck, and ship staging areas. *Id.* at \*2.

<sup>469</sup> *Id.*

<sup>470</sup> *Id.* at \*2-3.

<sup>471</sup> *Id.* at \*15-17.

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

<sup>473</sup> *Id.* at \*4-5.

The GAO sustained the protest, holding that advantages in a technical proposal, e.g. performance risk, need not result in a cost benefit to be of value to the government.<sup>474</sup> The SSA's obligation in a tradeoff decision is to determine whether the advantages of a higher-price proposal are worth paying a price premium.<sup>475</sup> Since the SSA failed to take into account all of Coastal's strengths in the best value determination, the GAO held that the tradeoff determination was insufficiently documented.<sup>476</sup>

### *Key Personnel*

#### *Key Personnel at Sea in the GAO Find Safe Harbor in the District Court*

In *Patriot Contract Services—Advisory Opinion*,<sup>477</sup> the GAO advised the United States District Court for the Northern District of California<sup>478</sup> that an offeror must follow the terms of a RFP concerning key personnel and a failure to do so will result in a sustained protest in an admiralty case.<sup>479</sup> The Navy issued a RFP for the operation and maintenance of nine large, medium speed, roll-on/roll-off ships to move cargo worldwide.<sup>480</sup> The Navy selected American Overseas Marine Corporation (AMSEA) over Patriot Contract Services (PCS), the incumbent, on the basis of AMSEA's lower evaluated price.<sup>481</sup> After award, AMSEA placed employment advertisements for port engineers.<sup>482</sup> Patriot Contract Services challenged the award based on AMSEA's alleged misrepresentation of its agreements with the key personnel in its proposal.<sup>483</sup>

The GAO noted that the RFP specifically stated that letters of commitment of key personnel "must reflect mutually agreed position, salary, and benefits."<sup>484</sup> After contradictory testimony by AMSEA,<sup>485</sup> the GAO found that AMSEA had not discussed those factors with its prospective employees, rendering those discussions mere promises, rather than binding commitments as required by the RFP.<sup>486</sup> Based on this fact, the GAO found PCS's protest to be meritorious based on AMSEA's material misrepresentations in its proposal.<sup>487</sup>

The District Court, despite the GAO's advisory opinion, denied a request for preliminary judgment in *Patriot Contract Services v. United States*.<sup>488</sup> The District Court agreed that there were questions regarding AMSEA's conduct, but ultimately felt that the record was sufficiently ambiguous to reject the allegation of fraud.<sup>489</sup> One employee in question testified that he decided to retire subsequent to his contracts with AMSEA; the other employee testified that he left AMSEA

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<sup>474</sup> *Id.* at \*15-16.

<sup>475</sup> *Id.* at \*17-18.

<sup>476</sup> *Id.* at \*15-17.

<sup>477</sup> Comp. Gen. B-294777.3, May 11, 2005, 2005 CPD ¶ 97.

<sup>478</sup> Patriot Contract Services submitted a protest with the GAO and subsequently withdrew its protest and filed an action with the federal district court. The GAO used its traditional bid protest format to issue the advisory opinion. *Id.* at 1.

<sup>479</sup> *Id.* at 9.

<sup>480</sup> *Id.* at 1.

<sup>481</sup> Although PCS received higher evaluations in two subfactors, including key personnel, the source selection authority found the two offerors to be essentially equal. *Id.* at 4.

<sup>482</sup> *Id.* at 3.

<sup>483</sup> *Id.* at 4.

<sup>484</sup> *Id.* at 3.

<sup>485</sup> American Overseas Marine Corporation's president testified, and later its counsel later recanted, that the prospective employees withdrew after the Navy changed locations of work sites under the contract. *Id.* at 6-7.

<sup>486</sup> *Id.* at 9.

<sup>487</sup> *Id.* In a footnote, the GAO briefly dismissed other allegations upholding the agency's past performance evaluations, the evaluation of PCS's subfactors, and the agency's discussions with PCS. *Id.* at 5 n.5.

<sup>488</sup> 388 F. Supp. 2d 1010, 2005 U.S. Dist. LEXIS 37430 (2005).

<sup>489</sup> *Id.* at \*30. The District Court also noted that the standard for injunctive relief was different from the GAO's standard for a meritorious protest. *Id.* at \*31 n.13.

on mutually agreeable terms.<sup>490</sup> The District Court also agreed with AMSEA that there was no evidence of fraud in the absence of salary discussions prior to the submission of the letters of commitments since the salary for the same job should remain the same under a new contractor.<sup>491</sup> The District Court finally noted that it was reasonable to assume that changes in the key personnel could take place during the time period in question.<sup>492</sup> One year passed between the submission of the initial bid and the date that AMSEA started substituting personnel different from its proposal.<sup>493</sup>

### *An Incumbent's Venue*

Two cases demonstrate different techniques for evaluating the use of incumbents as key personnel in a proposal. In the first, *AHNTECH, Inc.*,<sup>494</sup> the GAO denied a protest in which the agency classified an offeror's intent to hire staffing from the incumbent workforce as a weakness. The U.S. Army Joint Contract Command-Iraq issued a RFP for the maintenance and operation of the Butler Range Complex.<sup>495</sup> The Army eliminated AHNTECH from the competition after its operation plan was evaluated as a "no-go."<sup>496</sup> AHNTECH's operation plan included a stated intent to hire eighty-five percent of the incumbent workforce without signed letters of intent from the employees.<sup>497</sup>

The GAO denied the protest stating that AHNTECH could have either provided evidence that it could hire the incumbent workforce or it could have submitted an alternative approach for staffing.<sup>498</sup> Since it failed to do either, the agency's interpretation of staffing as a weakness was reasonable.<sup>499</sup>

In a COFC case, *Orion International Technology v. United States*,<sup>500</sup> the court held that the government could rely on a company's assertion that it would hire an incumbent, even if that employee subsequently signed a no-compete agreement with the incumbent contractor.<sup>501</sup> The Army Contracting Agency issued a RFP for the management of the Center for Counter Measures at the White Missile Range, New Mexico.<sup>502</sup> The RFP indicated that the proposed site manager would attend an oral presentation of the proposal.<sup>503</sup> Offerors were required to submit a list of key personnel. The Army selected Fiore Industries for award.<sup>504</sup>

Orion filed a protest primarily because of Fiore's assertion that it would hire Mr. Harold Zucconi, an employee of Orion, the incumbent contractor.<sup>505</sup> Fiore inserted Mr. Zucconi's name into its proposal after it reached an oral agreement with Mr. Zucconi to hire him.<sup>506</sup> After this oral agreement, Mr. Zucconi signed a no-compete agreement with Orion.<sup>507</sup>

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<sup>490</sup> *Id.* at \*32.

<sup>491</sup> *Id.* at \*35.

<sup>492</sup> *Id.* at \*38.

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

<sup>494</sup> Comp. Gen. B-295973; May 11, 2005, 2005 CPD ¶ 89.

<sup>495</sup> The RFP contemplated the award of a fixed-price contract with two option years. *Id.* at 1-2.

<sup>496</sup> *Id.* at 2.

<sup>497</sup> *Id.* at 2. In the offeror's proposal, it asserted it would obtain similar results from its historical "85% retention rate of incumbent work forces." *Id.* at 3.

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* at 3-4.

<sup>500</sup> 66 Fed. Cl. 569 (2005).

<sup>501</sup> *Id.* at 576.

<sup>502</sup> *Id.* at 570.

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

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

<sup>505</sup> *Id.* at 572.

<sup>506</sup> *Id.* at 571-72. Mr. Zucconi had responded to a blind advertisement in a local newspaper. *Id.* at 571.

<sup>507</sup> *Id.* at 572. Mr. Zucconi initially submitted his resignation but was convinced by Orion to stay and sign the no-compete agreement. *Id.* The agreement bound Mr. Zucconi to only submit his resume with Orion. It also prohibited him from helping a competitor with its proposal. *Id.* at 575.

When Mr. Zucconi informed Fiore of the no-compete agreement, Mr. Zucconi again orally stated that he would work for Fiore if the company was selected for award.<sup>508</sup> Mr. Zucconi subsequently accepted a position for the government as the superintendent of various projects on White Sands, to include the contract in dispute in this case.<sup>509</sup>

Orion argued that Fiore made a material misrepresentation when it submitted Mr. Zucconi's name in its proposal, which would disqualify Fiore from the competition under the "bait and switch" line of key personnel cases.<sup>510</sup> The court held that as long as Fiore believed at the time that Mr. Zucconi would work for it, then the submission of his name with its proposal did not rise to the level of misrepresentation that could invalidate the award.<sup>511</sup> The court felt that since the RFP did not require letters of intent, or even a permanent list of key personnel, the government could accept Fiore's representations regarding Mr. Zucconi's employment.<sup>512</sup> This is especially true when the government did not consider reliance on incumbent personnel as a weakness, e.g. as in the *AHNTECH* discussed previously.<sup>513</sup>

### *What I Tell You Three Times Is True: University I*

The GAO stressed that the source selection official must disclose contrary recommendations, or *at a minimum* not knowingly mischaracterize that recommendation, in the source selection document or risk a sustained protest in *University Research Company*.<sup>514</sup> The Substance Abuse and Mental Health Services Administration (SAMHSA) of the Health and Human Services (HHS) issued a RFP for the operation of the SAMHSA Health Information Network.<sup>515</sup> The HHS Acquisition Regulation recommends that SSAs receive recommendations from project officers in addition to technical evaluation panels.<sup>516</sup>

During the GAO hearing, the source selection official testified that she knowingly misstated the project officers' recommendation in order to award the contract to her preferred offeror.<sup>517</sup> At the hearing, the source selection official for the first time disclosed an eight-hour debate between her and the project officers about their evaluation conclusions that ended with the project officers leaving in resignation concerning the SSA's ultimate decision.<sup>518</sup>

Although the GAO conceded the agency's point that there was no affirmative requirement for the source selection official to document any dissension by the project officers, the GAO held that the lack of any statement either discussing or distinguishing a contrary recommendation must lead to a sustained protest.<sup>519</sup> As the GAO states, the SSA's independence does not equate to "a grant of authority to ignore, without explanation, those who advise them on selection decisions."<sup>520</sup>

In a follow-up case, *University Research Co.*<sup>521</sup> the GAO reviewed another source selection official's reaward of the contract to IQ Solutions.<sup>522</sup> This time, the GAO found sufficient documentation contained in the source selection decision to justify the source selection's decision not to follow the advice of the project officers.<sup>523</sup>

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<sup>508</sup> *Id.* at 572.

<sup>509</sup> *Id.*

<sup>510</sup> *Id.* at 573. To prove a "bait and switch," a protestor must demonstrate (1) a representation of reliance on certain personnel, (2) agency reliance, and (3) a foreseeable outcome that the individual would not work on the contract. *Id.* at 573 n.5.

<sup>511</sup> *Id.* at 574.

<sup>512</sup> *Id.* at 576.

<sup>513</sup> *Id.*

<sup>514</sup> Comp. Gen. B-294358, et. al, Oct. 28, 2004, 2005 CPD ¶ 217.

<sup>515</sup> The RFP was set-aside for small businesses and anticipated the award of a cost-plus-award-fee contract for a base period of one year with four one-year options. *Id.* at 2.

<sup>516</sup> *Id.* at 5.

<sup>517</sup> *Id.* at 6-7.

<sup>518</sup> *Id.* at 7.

<sup>519</sup> *Id.* at 10.

<sup>520</sup> *Id.* at 8. The GAO also noted that the source selection official also mischaracterized the project officers' evaluation of IQ's proposed costs. *Id.* at 9.

<sup>521</sup> Comp. Gen. B-294358.6, B-294358.7, 2005 U.S. Comp. Gen. LEXIS 73 (Apr. 20, 2005).

<sup>522</sup> *Id.* at \*12.

*What's the Cost of Normal in the COFC? University II*

In an ongoing saga, the COFC, in *University Research Company v. United States & IQ Solutions*,<sup>524</sup> granted a preliminary injunction, blocking the award of the SAMHSA clearinghouse.<sup>525</sup> The COFC held that the action was necessary due to an improper cost realism normalization of offeror's reproduction costs which the GAO had previously viewed as proper in *University Research Company*.<sup>526</sup>

In one area of the protest, the GAO upheld the agency's decision to normalize reproduction costs.<sup>527</sup> In its FPR, IQ Solutions lowered its overall proposed copying costs while significantly increasing its estimated cost per copying.<sup>528</sup> Based on this inconsistency, and a worry that the RFP was ambiguous regarding reproduction costs, the agency decided to replace all offerors' proposed costs with the government estimate for those costs.<sup>529</sup> The GAO felt that the agency reasonably determined that there should not be significant differences in copying costs.<sup>530</sup>

The COFC disagreed, holding that IQ Solution's apparent confusion may have justified additional clarifications by the agency, but the decision to normalize copying costs resulted in erasing URC's apparent cost advantage in this area.<sup>531</sup> The COFC reviewed the record and found no good reason why reproduction costs would be the same for all offerors.<sup>532</sup> The court also felt that it was arbitrary to use the government's estimate, when IQ Solution's marginal cost was one-third lower.<sup>533</sup> The COFC felt that the agency needed more time to evaluate the differences in the proposed copying costs and take the time to eliminate any confusion if necessary.<sup>534</sup> The court noted that "[t]he public interest is not well-served when contracting officials rush to save a few weeks and end up delaying contracts by many months."<sup>535</sup>

*What Time Is It in the COFC?*

The GAO found that a lack of posted instructions on a locked door on a Saturday met the government frustration rule in *Hospital Klean of Texas, Inc.*<sup>536</sup> The Army issued a RFP for hospital housekeeping services at Fort Polk, Louisiana.<sup>537</sup> Following requests from potential offerors, the Army extended the closing date for proposals from Friday, May 14, to 1 p.m., Saturday, May 15.<sup>538</sup> Although Saturday was not a work day, the Army's plan was that personnel would be present assisting with a move and would listen for any deliveries.<sup>539</sup> One proposal was delivered on that day.<sup>540</sup> Integrity Management Services, which was selected for award, utilized Federal Express to deliver their proposal on May 15. Federal Express, after

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<sup>523</sup> *Id.* at \*64. The GAO also considered a protest of the technical and past performance scores. Although there were problems, the GAO dismissed those changes as *de minimis*. *Id.* at \*63. University Research Co. ultimately obtained a preliminary judgment in the COFC based on one aspect of that technical evaluation. *University Research Co., LLC v. United States and IQ Solutions*, 65 Fed. Cl. 500 (2005).

<sup>524</sup> *University Research Co., LLC v. United States and IQ Solutions*, 65 Fed. Cl. at 500.

<sup>525</sup> *Id.* at 625.

<sup>526</sup> Comp. Gen. B-294358.6, B-294358.7, 2005 U.S. Comp. Gen. LEXIS 73 (Apr. 20, 2005).

<sup>527</sup> *Id.* at \*55.

<sup>528</sup> *Id.* at \*50.

<sup>529</sup> *Id.* at \*51.

<sup>530</sup> *Id.* at \*51.

<sup>531</sup> *University Research Co.*, 65 Fed. Cl. 500, 513 (2005).

<sup>532</sup> *Id.* at 511.

<sup>533</sup> *Id.* at 512.

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

<sup>535</sup> *Id.* at 515.

<sup>536</sup> Comp. Gen. B-295836; B-295836.2, 2005 U.S. Comp. Gen. LEXIS 183 (Apr. 18, 2005).

<sup>537</sup> *Id.* at \*2. The RFP contemplated the award of an ID/IQ, fixed unit-price contract for a base period with four option years. *Id.*

<sup>538</sup> *Id.*

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

<sup>540</sup> *Id.*

no one answered the locked door, left a note stating that it had attempted delivery.<sup>541</sup> Agency personnel found the note while leaving the building for the day.<sup>542</sup>

The GAO determined that the agency was the paramount cause for the late delivery.<sup>543</sup> The GAO determined that there was no reasonable expectation that Federal Express could redeliver the proposal since the government failed to post delivery instructions on the locked door.<sup>544</sup>

In *Hospital Klean of Texas, Inc. v. the United States*,<sup>545</sup> the COFC disagreed with the GAO's analysis, granting a Temporary Restraining Order blocking the award to Integrity.<sup>546</sup> The COFC, while recognizing the GAO's "longstanding expertise in procurement law," found that Integrity failed to do "all it could" to ensure timely delivery of the proposal.<sup>547</sup> The COFC also failed to find "affirmative misdirection" on the part of the agency sufficient to allow acceptance of the late proposal.<sup>548</sup> The COFC focused on the fault of the offeror and its agent, Federal Express.<sup>549</sup> First, Integrity failed to notify Federal Express of the 1 p.m. deadline.<sup>550</sup> Second, Federal Express failed to do anything other than knocking on a locked door once and did not attempt to redeliver its package.<sup>551</sup> Therefore, the government frustration rule did not apply and the Army could not accept the late proposal.<sup>552</sup>

#### *Dancing the Minutiae in the COFC*

In *Beta Analytics International, Inc. v. United States & Maden Tech Consulting, Inc.*,<sup>553</sup> the COFC granted the protestor's motion for judgment on the administrative record by examining, in detail, each evaluator's score sheets.<sup>554</sup> The Navy issued a RFP for intelligence support for the Defense Advanced Research Projects Agency.<sup>555</sup> Beta Analytics' score for the technical evaluation process was 84; Maden Tech received an 88.<sup>556</sup> The Navy awarded the contract to Maden Tech on a best value analysis since it received the highest score and had the lowest price.<sup>557</sup>

Although there was a source selection document, the COFC declined to rely on the summary memorandum, given the mechanical nature of the source selection plan.<sup>558</sup> The intent of the plan was to average the evaluator's scores and then award the contract to the best value based on the technical proposal scores, past performance, and the proposed price.<sup>559</sup> Because the source selection authority conducted no real analysis,<sup>560</sup> the COFC analyzed the scores at the individual

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<sup>541</sup> *Id.*

<sup>542</sup> *Id.* at \*3.

<sup>543</sup> *Id.* at \*8.

<sup>544</sup> *Id.* at \*8-9.

<sup>545</sup> 69 Fed. Cl. 618 (2005).

<sup>546</sup> *Id.* at 625.

<sup>547</sup> *Id.* at 623.

<sup>548</sup> *Id.*

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

<sup>550</sup> *Id.*

<sup>551</sup> *Id.* at 623-24.

<sup>552</sup> *Id.* at 624.

<sup>553</sup> 67 Fed. Cl. 384 (2005).

<sup>554</sup> *Id.* at 408.

<sup>555</sup> *Id.* at 386.

<sup>556</sup> *Id.* at 389.

<sup>557</sup> *Id.* at 392.

<sup>558</sup> *Id.* at 389.

<sup>559</sup> *Id.* at 396-97.

<sup>560</sup> The COFC characterized the summary narratives as "supplying a rationalization for the non-rational." *Id.* at 398.

evaluator level.<sup>561</sup> Since there were clear inconsistencies in areas of the evaluation,<sup>562</sup> the COFC ruled in favor of the protestor.

### *Your Strength Is Also Your Weakness*

The GAO sustained a protest due to an insufficient cost realism analysis in *Honeywell Technology Solutions, Inc.; Wyle Laboratory, Inc.*<sup>563</sup> The National Aeronautics and Space Administration (NASA) issued a RFP for the consolidation of test operations services at the John C. Stennis Space Center and the George C. Marshall Space Flight Center.<sup>564</sup> The RFP indicated that NASA would adjust the “Mission Suitability” scores for cost realism.<sup>565</sup> The NASA adjusted the cost of both Honeywell’s and Wyle’s proposals due to a failure to propose staffing equal to the agency’s independent government staffing estimate.<sup>566</sup> Both proposals were then downgraded due to the difference between the increased probable cost and the agency’s most probable cost analysis.<sup>567</sup>

The GAO found that the agency failed to have an adequate record in how it conducted its cost realism analysis.<sup>568</sup> The GAO also found an inconsistency in recognizing Honeywell’s staffing level as a strength while downgrading that staffing in its cost realism analysis as inadequate.<sup>569</sup> The GAO highlighted the agency’s thin record of how it came to that conclusion.<sup>570</sup> The GAO questioned why, in an attempted consolidation, the agency failed to integrate two separate staffing estimates for the two centers and appeared to use those separate estimates in a mechanical manner.<sup>571</sup>

### *OverArching Prices*

In *Arch Chemicals v. United States*,<sup>572</sup> the COFC found that there was no rational basis to exclude from the Defense Energy Support Center’s (DESC’s) price evaluation, the incumbent’s plant shutdown costs which would be triggered if the contract was awarded to another company.<sup>573</sup> The DESC issued a RFP for a requirements contract for all the federal government’s hydrazine requirements for ten years with two five-year options.<sup>574</sup>

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<sup>561</sup> *Id.*

<sup>562</sup> Maden Tech received full credit for key personnel even though they were not current employees. *Id.* at 402. Evaluators gave inconsistent ratings for “N/A” scores. *Id.* at 403-04. BAI received an inconsistent evaluation for staffing when one examined its scores for the subfactors. *Id.* at 406. The government had a second set of score sheets which were not used but its existence was not sufficiently explained by the agency. *Id.* at 407.

<sup>563</sup> Comp. Gen. B-292354; B-292388, Sept. 2, 2003, 2005 CPD ¶ 107.

<sup>564</sup> The RFP contemplated the award of a cost-plus-award-fee contract for a base period of two years with two two-year options. The RFP had a detailed performance work statement and contemplated an award to the best value under the following equally weighted factors: mission suitability, past performance and cost. *Id.* at 2.

<sup>565</sup> The RFP included a table detailing point deductions based on the percentage difference between proposed costs and the most probably costs calculated by the agency. *Id.* The mission suitability factor had four subfactors: technical performance; management; safety, health, and mission assurance; and small disadvantaged business participation. *Id.*

<sup>566</sup> *Id.* at 4-5.

<sup>567</sup> Honeywell’s proposal was reduced by 100 points due to a 13.5 percent difference; the agency adjusted the cost due to an increase of proposed staffing from 248 FTE positions to 291. Wyle’s proposal was reduced by 200 points due to a 21.5 percent difference; the agency adjusted the cost due to an increase of proposed staffing from 241 FTE positions to 291. Svedrup’s proposal, which was selected for award, received its proposed cost, after an adjustment of ten FTEs, was within 2.7 percent of the most probable cost. *Id.*

<sup>568</sup> *Id.* at 7.

<sup>569</sup> *Id.* at 9-10.

<sup>570</sup> The GAO noted that the contemporaneous documentation was two pages long, with one page addressing the rationale. *Id.* The agency also failed to justify its analysis in testimony to the GAO by members of the source evaluation board. *Id.* at 8-9.

<sup>571</sup> *Id.* at 11-12.

<sup>572</sup> 54 Fed. Cl. 389 (2005).

<sup>573</sup> *Id.* at 399.

<sup>574</sup> *Id.* at 382. Hydrazine is used as fuel for many defense programs, including satellites, rockets, and the Space Shuttle; the successful offeror would be the only hydrazine production facility in the U.S. *Id.*

If the contract was awarded to a company other than Arch Chemicals, the DESC would pay Arch \$8,513,000 in plant shutdown related costs.<sup>575</sup> In computing the price evaluation, the DESC decided to exclude those costs in order to foster competition.<sup>576</sup> The COFC rejected this argument, stating that “competition, like democracy is not an end but a means to the accomplishment of ends.”<sup>577</sup> Since it was not speculative that those costs would be paid by the government, the COFC felt that there was no rational basis not to include these costs in the evaluation for a new contract.<sup>578</sup>

### *Late Scot!*

In *Scot, Inc.*,<sup>579</sup> the GAO held that an agency can accept an expired offer without reopening negotiation, as long as acceptance does not provide an unfair competitive advantage.<sup>580</sup> The Navy issued a RFP contemplating award of an ID/IQ contract for oxygen mask, regulator, helmet, and communications test sets.<sup>581</sup> The RFP stated that each offeror was required to hold its offer firm for thirty calendar days from the due date for receipt of offerors.<sup>582</sup> The offers expired ten days prior to award; Scot protested the award arguing that it could have submitted a lower price due to “manufacturing process redesign efforts.”<sup>583</sup> The GAO focused on the fact that no changes were made to the winning proposal; and according to the GAO, as long as expired proposals remained unchanged, the Navy could award the contract.<sup>584</sup>

### *A Shred of Evidence*

The GAO held unobjectionable the agency’s actions in destroying individual evaluation sheets after the evaluators met to create a consensus rating in *Joint Management & Technology Services*.<sup>585</sup> The DOE issued a RFP for information technology and engineering support services for its National Energy Technology Laboratory.<sup>586</sup> Joint Management & Technology Services alleged that the consensus evaluation materials failed to provide detail enough to analyze the evaluator’s conclusions.<sup>587</sup> The GAO held that as long as the consensus materials support the agency’s judgments, there is no objection to destroying the initial ratings of individual evaluators.<sup>588</sup>

Joint Management & Technology Services also challenged a satisfactory rating of experience arguing that this was unreasonable since several entities in its joint venture were the incumbent contractors.<sup>589</sup> The GAO rejected this argument, stating that the burden is on the offeror to submit an adequately written proposal.<sup>590</sup> Joint Management & Technology

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<sup>575</sup> *Id.* at 399.

<sup>576</sup> *Id.* at 383.

<sup>577</sup> *Id.* at 400.

<sup>578</sup> *Id.* at 401. The COFC also rejected Arch’s challenge that the other offeror should be excluded because the small business teamed with a French government-owned company. *Id.* at 399.

<sup>579</sup> Comp. Gen. B-295569; B-295569.2, 2005 U.S. Comp. Gen. LEXIS 68 (Mar. 10, 2005).

<sup>580</sup> *Id.* at \*19-20.

<sup>581</sup> *Id.* at \*2-3.

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

<sup>583</sup> *Id.* at \*19.

<sup>584</sup> *Id.* The GAO also found reasonable the Navy’s downgrade of a warranty factor because the equipment would be stored beyond the warranty period; and evaluation of “similar” past performance even though the offerors reference contracts were vastly different in size. *Id.* at \*13-14. The GAO also rejected a challenge to the awardee’s price proposal as unbalanced since the Navy adequately evaluated the risk from the different pricing strategies. *Id.* at \*17-18.

<sup>585</sup> Comp. Gen. B-294229; B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208.

<sup>586</sup> *Id.* at 2. The RFP was issued as a competitive section 8(a) set-aside and contemplated award of a cost-plus-award-fee task order contract for a base period of three years, with two one-year options. *Id.*

<sup>587</sup> *Id.* at 3-4.

<sup>588</sup> *Id.* at 4.

<sup>589</sup> *Id.*

<sup>590</sup> *Id.* at 4-5.

Services failed to provide adequate evidence of its experience, especially since it was a newly formed joint venture with no experience of its own.<sup>591</sup>

Major Andrew S. Kantner

## Simplified Acquisitions—Final & Interim Rules

### *Buying from Federal Prison Industries*

On 11 April 2005, the Defense Acquisition Regulations Council passed an interim rule requiring agencies to perform market research and a comparability determination before buying a supply item from Federal Prison Industries (FPI);<sup>592</sup> giving agencies permission not to send a copy of a solicitation to FPI if the solicitation is available through FedBizOpps;<sup>593</sup> and, requiring agencies to buy from FPI when FPI's item of supply provides the best value to the government and this conclusion was reached as a result of FPI's response to a competitive solicitation.<sup>594</sup>

### *Increase in Threshold for Simplified Acquisition Procedures*

Section 822 of the Fiscal Year 2005 National Defense Authorization Act increased the micro-purchase and simplified acquisition threshold limits for purchases made outside the United States in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack.<sup>595</sup> For micro-purchases made outside the United States, the micro-purchase threshold is increased to \$25,000.<sup>596</sup> For simplified acquisition purchases made inside the United States, the simplified acquisition threshold is increased to one million dollars.<sup>597</sup> On 24 November 2004, Deirdre Lee<sup>598</sup> issued a memorandum announcing that these new threshold levels were effective immediately.<sup>599</sup>

### *Final Rule: Contractor Use of Government Supply Sources*

Department of Defense agencies are now authorized to allow contractors to use government supply sources.<sup>600</sup> In addition, authorizing agencies are required to consider requests from DOD supply sources not to honor purchases from contractors that are indebted to the DOD and have not paid their bills on time.<sup>601</sup>

Major Steven R. Patoir

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<sup>591</sup> *Id.* at 5. The GAO also rejected a challenge to JMITS's evaluation stating that even if the GAO agreed with JMITS, it would not have been in line for award and there was no prejudice to the offeror. *Id.* at 9.

<sup>592</sup> Federal Acquisition Regulation; Purchases from Federal Prison Industries—Requirement for Market Research, 70 Federal Register 18,954 (Apr. 11, 2005) (to be codified at 48 C.F.R. pts. 8 and 25).

<sup>593</sup> *Id.*

<sup>594</sup> *Id.*

<sup>595</sup> National Defense Authorization Act for FY 2005, Pub. L. No. 108-287, 118 Stat. 951 § 822 (2004).

<sup>596</sup> *Id.*

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

<sup>598</sup> On 24 November, 2004, Ms. Deidre Lee was the Director of Defense Procurement and Acquisition Policy.

<sup>599</sup> Memorandum, Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense, Acquisition, Technology and Logistics, to Assistant Secretary of the Army, Navy and Air Force and Directors of Defense Agencies, subject: Immediate Increase in the Dollar Threshold for Simplified Acquisition Procedures and in the Dollar Threshold for Senior Procurement Executive Approval of Justifications and Approvals (22 Nov. 2004).

<sup>600</sup> Defense Federal Acquisition Regulation Supplement, Contractor Use of Government Supply Sources, 69 Federal Register 67,858 (Nov. 22, 2004) (to be codified at 48 C.F.R. pts. 251 and 252).

<sup>601</sup> *Id.* DFARS PGI 251.102 has a sample authorization form for DOD agencies to use. *Id.*

## Government Purchase Card

### *Office of Management and Budget Issues New Guidance on Managing Government Charge Cards—Effective Fiscal Year 2006*

On 5 August 2005, the Office of Management and Budget (OMB) revised Circular No. A-123, Improving the Management of Government Charge Card Programs.<sup>602</sup> Effective Fiscal Year 2006, agencies and federal managers are required to take new measures to more effectively manage all government charge card accounts.<sup>603</sup> The objective of this guidance is to maximize the benefits to the Federal government when using government charge cards to pay for goods and services in support of official Federal missions.<sup>604</sup>

Below is a summary of each section of OMB Circular A-123.

#### *Charge Card—Management Plan*

Each agency is required to develop and maintain a written charge card management plan.<sup>605</sup> Internal plans will minimize fraud, misuse and delinquency. All management charge card plans will:

- Identify management officials and outline each person's duties;
- Establish formal procedures for appointing cardholders and card officials;
- Ensure each cardholder is credit worthy
- Develop agency training requirements
- Develop management control mechanisms to ensure appropriate charge card use and payment
- Establish appropriate authorization controls and ensure strategic sourcing practices are used
- Explain how reports will monitor card use and identify spending and payment practices
- Document and record retention requirements
- Collect charge cards from employees when they terminate employment or move to a different organization.<sup>606</sup>

#### *Charge Card—Training*

Every agency must train cardholders and charge card managers on their roles and responsibilities. Generic training requirements for all charge card programs and program participants include:

- Training prior to appointment;
- Refresher training at least every three years;

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<sup>602</sup> U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-123, MANAGEMENT'S RESPONSIBILITY FOR INTERNAL CONTROL (2004) [hereinafter OMB CIRCULAR A-123]. An electronic copy of *OMB Circular A-123* is available at: [www.omb.gov](http://www.omb.gov).

<sup>603</sup> OMB CIRCULAR A-123 requires agencies and federal managers to "take systemic and proactive measures to:

(1) develop and implement appropriate, cost-effective internal control for results-orientated management; (ii) assess the adequacy of internal control in Federal programs and operations; (iii) separately assess and document internal control over financial reporting consistent with the process defined in Appendix A; (iv) identify needed improvements; (v) take corrective actions; and (vi) report annually on internal control through management assurance statements.

*Id.*

<sup>604</sup> *Id.* at 2. Identified benefits of this program are:

reducing administrative costs and time for purchasing and paying for goods and services; 2) ensuring the most effective controls are in place to mitigate the risk of fraud, misuse, and delinquency; 3) improving financial, administrative and [other] benefits offered to the government by government charge card providers and other entities, including maximizing refunds where appropriate; 4) Using government charge card data to monitor policy compliance and inform management decision-making to drive a more cost effective card program; and 5) assure recovery of state and local taxes paid on fleet cards.

*Id.*

<sup>605</sup> *Id.*

<sup>606</sup> *Id.* at 4.

- Self-certification that each participant received the training, understands the regulations and procedures, and knows the consequences of inappropriate training;
- Management must retain all training certificates.<sup>607</sup>

More detailed guidance for the purchase card training program, travel card training program, fleet card program training, and the integrated card program is available at OMB Circular A-123, Chapter 3.<sup>608</sup>

### *Charge Card—Risk Management*

Risk management programs ensure that charge card programs operate efficiently and with integrity. Managers are required to implement risk management programs that eliminate payment delinquencies and charge card misuse, fraud, and waste.<sup>609</sup>

Regarding agency charge card payments, program managers must ensure that agency payments are timely made and accurate; monitor delinquency reports from vendors and ensure that delinquent accounts are paid quickly; and ensure that delinquency control procedures related to centrally billed accounts are incorporated into an agency's charge card management plan.<sup>610</sup>

Regarding charge card payments by individual account holders, charge card managers are required to monitor delinquent payment reports; ensure individuals pay delinquent bills promptly; advise the delinquent cardholders that disciplinary action<sup>611</sup> could result from their late payment; incorporate management control plans into individual accounts; and implement split disbursements and salary offset procedures.<sup>612</sup>

### *Charge Card—Performance Metrics and Data Requirements*

Metrics is the means of ensuring successful charge card control. Accordingly, management is required to compile metrics and other data and file quarterly reports. Examples of data required to be collected include the following: the number of cards issued; the number of active accounts; percentage of employees holding government charge cards; amount of money spend and the total refunds earned; number of cases referred to the Office of the Inspector General; and the number of administrative and disciplinary actions taken for card misuse.<sup>613</sup>

### *Charge Card—Credit Worthiness*

Prior to issuing a new charge card, agencies must perform a credit worthiness check of each new proposed card holder.<sup>614</sup> Agencies can request a credit report through the Office of Personnel Management (OPM) Center for Federal Investigative Services.<sup>615</sup> If a proposed cardholder scores a low credit worthiness rating, agencies are required to reevaluate the individual's credit worthiness rating every time a card is renewed.<sup>616</sup> Agencies are required to maintain these reports in

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<sup>607</sup> *Id.* at 6.

<sup>608</sup> *Id.*

<sup>609</sup> *Id.* at 9.

<sup>610</sup> *Id.* at 10.

<sup>611</sup> Possible disciplinary actions include suspending the employees account when the account is more than sixty-one days past due; canceling the charge card account; collection efforts; adverse reporting to credit bureaus; late fees; and, other disciplinary actions deemed necessary by the agency. *Id.* at 12.

<sup>612</sup> *Id.* at 11. Although mandatory, split disbursement and salary offset can be waived when the costs of doing so exceeds the benefit. See OMB CIRCULAR A-123, *supra* note 602, at 11, for due process requirements before offsetting an individual's salary.

<sup>613</sup> *Id.* at 14. There are also additional requirements regarding travel and purchase cards. *Id.* at 15.

<sup>614</sup> Current card holders, as of the effective date of OMB Circular A-123, are not required to undergo a credit worthiness check. The applicant's credit score will determine what management oversight responsibilities apply. *Id.* at 17-18.

<sup>615</sup> The telephone number for OPM's Center for Federal Investigative Services is 202-606-1042. Credit worthiness checks are performed on a reimbursable basis. *Id.* at 19.

<sup>616</sup> If an applicant is denied a government charge card due to a low credit score, agencies can re-evaluate the applicant's credit worthiness whenever the agency deems appropriate. *Id.*

accordance with the Privacy Act.<sup>617</sup> Finally, agencies are permitted to contract with their bank card holder to manage credit worthiness assessments.<sup>618</sup>

#### *Charge Card—Refund Management*

There are three categories of refunds. One category is payments received from vendors based on the total dollar amount spent during a specified time period. The second is payments received from vendors based on the timeliness or frequency of payments or both. The final category is payments received from the vendor to correct improper agency payments or adjustments to invoices.<sup>619</sup> Effective management of the charge card program will ensure the government obtains the best competitive deal from vendors, maximize the refunds the government receives and minimizes the interest rate the government pays.<sup>620</sup> To accomplish these goals, management is required to review its refund agreement each quarter, prior to the re-bid of the task order, and conduct an annual comparison of its refund agreement to other agencies' agreements.<sup>621</sup> Lastly, refunds have to be returned to the appropriation or account from which they were expended.<sup>622</sup>

#### *Charge Card—Strategic Sourcing*

Strategic sourcing is analyzing how the government spends its appropriations and ensures that agencies achieve discounts on its commonly purchased goods and services and that all discounts to charge cards are properly applied. This process is important because it helps ensure the federal government maximizes its potential savings on the billions of dollars it obligates each year.<sup>623</sup> To accomplish this requirement, charge card managers have to perform a thorough spending analysis; maintain a balanced spending program that considers socio-economic and prioritized spending objectives; implement agency performance measures that help achieve agency strategic sourcing goals; identify and establish key roles and responsibilities; articulate training and communication strategy; and develop internal control mechanisms to ensure compliance with strategic sourcing goals.<sup>624</sup>

#### *Charge Card—Requirements for Micro Purchases*

Section 508 of the Rehabilitation Act requires federal agencies to develop, procure, maintain, or use electronic and information technology that is accessible to federal employees with disabilities.<sup>625</sup> All micro-purchases are subject to §508 of the Rehabilitation Act, unless an exemption applies.<sup>626</sup> Failure to comply with §508 of the Rehabilitation Act could result in civil action against the agency.<sup>627</sup>

#### *Charge Card—Environmental Requirements*

Agencies have to ensure that their purchases comply with many environmental laws and regulations. See OMB Circular A-123, Chapter 10, Environmental Regulations, for further guidance.

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

<sup>618</sup> *Id.*

<sup>619</sup> *Id.* at 21.

<sup>620</sup> *Id.*

<sup>621</sup> *Id.* at 22.

<sup>622</sup> *Id.*

<sup>623</sup> *Id.* at 23. OMB's strategic sourcing memorandum is available at <http://www.whitehouse.gov/omb/>. *Id.*

<sup>624</sup> *Id.* at 24.

<sup>625</sup> 29 U.S.C.S. § 794(d) (LEXIS 2005).

<sup>626</sup> *Id.* The exceptions to §508 of the Rehabilitation Act include micro purchases made before 1 April 2005; for a national security system; acquired by a contractor that is incidental to a contract; is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or, would impose an undue burden on an agency. *Id.*

<sup>627</sup> See OMB CIRCULAR A-123, *supra* note 602, at 26. The webpage, [www.buyaccessible.gov](http://www.buyaccessible.gov), helps federal buyers ensure their purchases comply with §508 of the Rehabilitation Act. *Id.*

Since the federal government is not required to pay state and local government taxes, charge card program managers are required to recover any taxes paid. To ensure all taxes paid are returned, charge card managers must work closely with merchants and state and local authorities. Furthermore, card managers should ensure individual card holders know to provide lodging vendors with a tax exemption certificate.<sup>628</sup>

Major Steven R. Patoir

### Contractor Qualifications: Responsibility

#### *Two Buildings Considered One under Terms of Contract*

In *Vador Ventures, Inc.*,<sup>629</sup> the GAO examined an IFB that required contractors to have specific “experience qualifications for key personnel,” to include managing a building in excess of 800,000 square feet, and held that the contracting officer’s decision to award to a contractor that had managed two buildings that were each less than 800,000, but which combined satisfied the square footage requirements, was proper. The IFB-required qualifications included:

[T]he project manager and the alternate project managers... [must have at least four] years experience (within the past five years) ‘in managing the operation, maintenance and repair, custodial services, building alterations, customer relations requirements, and all other operational components of a building with at least 800,000 square feet of occupiable [sic] space.’ ...[and the] supervisory employees... [must have] at least [four] years of recent (within the past [five] years) experience ‘in directing personnel responsible for accomplishment of work in their respective program area in a building of at least 800,000 square feet of occupiable [sic] space.’<sup>630</sup>

The IFB required that this information be submitted “within 5 working days after notice to the apparent low bidder.”<sup>631</sup> The contracting officer received fourteen bids and subsequently requested that the apparent low bidder provide the required information. The apparent low bidder submitted the information and was awarded the contract. The second low bidder then filed the subject protest and “alleg[ed] that the experience requirements laid out in the solicitation constitute definitive responsibility criteria that the awardee failed to meet.”<sup>632</sup> Specifically, the protestor alleged that the awardee did not have any individuals with experience working in a 800,000 square-foot building, therefore failing to meet the specific qualifications set forth in the IFB.<sup>633</sup> In other words, the contracting officer’s determination that the awardee was responsible was improper.

The protestor argued that the specific qualifications set forth in the IFB constituted “specific and objective standards established by an agency as a precondition to award which are designed to measure a prospective contractor’s ability to perform the contract,” or “definitive criterion of responsibility.”<sup>634</sup> The agency argued that the information requirement was not a precondition to award because award could have been made any time after notification to the low bidder. Therefore, the information requirement was “a matter of contract administration,”<sup>635</sup> not one of responsibility. Before addressing the merits of the contracting officer’s responsibility determination, the GAO disagreed with the agency, and held that “the key personnel experience requirements possess all of the principal characteristics of a definitive responsibility criterion--they

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<sup>628</sup> *Id.* at 29.

<sup>629</sup> B-296394, B-296394.2, 2005 U.S. Comp. Gen. LEXIS 156 (Aug. 5, 2005).

<sup>630</sup> *Id.* at \*2-3.

<sup>631</sup> *Id.* at \*3 (quoting the terms of the IFB).

<sup>632</sup> *Id.* at \*3-4 (citations omitted).

<sup>633</sup> *Id.* at \*4.

<sup>634</sup> *Id.* at \*5. The GAO explains that “[i]n most cases, responsibility is determined on the basis of what the FAR refers to as general standards of responsibility, such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance and of business integrity and ethics. FAR § 9.104-1.” *Id.*

<sup>635</sup> *Id.* at \*6-7.

concern the capability of the offeror, not a specific product, and they are objective standards established by the agency as a precondition to award.”<sup>636</sup>

The GAO then considered the protestor’s specific arguments on whether the awardee satisfied the responsibility criteria. The protestor argued that the awardee’s “key personnel failed to satisfy the definitive responsibility criteria because they did not have experience managing or supervising the operation of an 800,000 square foot building,”<sup>637</sup> which was based on the awardee’s management of two different buildings at two different addresses, neither of which satisfied the square foot requirement established in the IFB. As a result, the protestor argued, “the agency improperly waived [the definitive responsibility criteria].”<sup>638</sup>

The agency alleged, and the protestor did not challenge, that the two buildings shared many electrical, plumbing, and mechanical systems, such as a chiller to run the cooling system.<sup>639</sup> The GAO concluded that the contracting official’s determination that the awardee complied with the experience requirements set forth in the IFB was proper “[s]ince the combined occupiable [sic] square footage of the two buildings is 971,425 square feet, and the two buildings function as one building.”<sup>640</sup>

The GAO concluded that “generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria,” and that the standard for GAO review is whether “the contracting official reasonably could conclude that the criterion had been met.”<sup>641</sup> The GAO found “no basis to question the agency’s position that experience managing or supervising the operation of the [two buildings] was qualifying experience.”<sup>642</sup>

Major Jennifer C. Santiago

### Commercial Items—Final & Interim Rules

#### *Simplified Acquisition Procedures for Commercial Items Is Extended*

On 9 March 2005, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council agreed to extend the rule authorizing the use of simplified acquisition procedures to purchase commercial items to 1 January 2008.<sup>643</sup> Absent this action, the rule would have expired on 1 January 2006.<sup>644</sup> The Council also amended the FAR on 9 March 2005 to require the inclusion of FAR clause 52.244-6, Subcontracts for Commercial Items, in solicitations and contracts for non-commercial items.<sup>645</sup> Agencies are now required to include this subcontracting clause in contracts that are not for the acquisition of commercial items.<sup>646</sup>

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<sup>636</sup> *Id.* at \*9 (citing Specialty Marine, Inc., Comp. Gen. B-292052, May 19, 2003, 2003 CPD ¶ 106, at 3.)

<sup>637</sup> *Id.* at \*8-9.

<sup>638</sup> *Id.* at \*9.

<sup>639</sup> *Id.* Additionally,

the two buildings are serviced by a single, common feed that supplies high pressure steam, and by a single, common electrical feed. (Indeed, the two buildings are billed by the steam and electrical providers as if they were one building.) The heating and air conditioning of the two buildings are controlled by a single, common energy management control system. Furthermore, contracted commercial facilities management services for the two buildings have always been obtained under one contract, and the buildings have always been serviced as one.

*Id.*

<sup>640</sup> *Id.* at \*11.

<sup>641</sup> *Id.* at \*9 (citing Carter Chevrolet Agency, Inc., Comp. Gen. B-270962, B-270962.2, May 1, 1996, 96-1 CPD ¶ 210, at 4).

<sup>642</sup> *Id.* at \*10.

<sup>643</sup> Federal Acquisition Regulation; Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items, Test Program, 70 Fed. Reg. 11,762 (Mar. 9, 2005) (to be codified at 48 C.F.R. pts. 13).

<sup>644</sup> *Id.*

<sup>645</sup> Federal Acquisition Regulation; Extension of Authority for Use of Simplified Acquisition Procedures for Certain Commercial Items, Test Program, 70 Fed. Reg. 11,740 (Mar. 9, 2005) (to be codified at 48 C.F.R. pts. 13).

<sup>646</sup> *Id.*

On 11 February 2005, the GAO completed an audit of GSA Multiple Award Schedule (MAS) contract files and found:

nearly [sixty] percent of the [MAS] files lacked sufficient documentation to establish clearly [that] the prices were effectively negotiated. Specifically, the contract files did not establish that negotiated process were based on accurate, complete, and current vendor information; adequate price analyses; and reasonable price negotiations. GSA's efforts to ensure most favored customer pricing has been hampered by the significant decline in the number of pre-award and post-award audits of MAS contracts . . .<sup>647</sup>

Through its MAS contracts, the GSA seeks the best price of an offeror given to the vendor's most favored customers.<sup>648</sup> When this is not possible, however, regulations allow the GSA to award a contract greater than the most favored customer price if the price is fair and reasonable.<sup>649</sup>

After reviewing product and service contract files at four acquisition centers, the GAO determined that most of the files reviewed lacked sufficient documentation to establish that prices were effectively negotiated.<sup>650</sup> When negotiating price, GSA contract negotiators generally used checklists, invoices, sales histories, and pre-award audits as a guide to determine what was fair and reasonable. The contract negotiators thought that their negotiated prices were always at least equal to a vendor's most favored customer prices.<sup>651</sup> The GAO, however, found that most files did not contain adequate price negotiation documentation to support this assertion.<sup>652</sup> In contrast, the GAO concluded that most contract files did not contain sufficient pre-award and post-award audits of pricing information.<sup>653</sup>

Pre-award audits are used to determine if vendor-supplied processes are accurate, complete, and current before contract award.<sup>654</sup> To illustrate, the GAO pointed out that there were one hundred thirty pre-award audits in 1992, and only fourteen in 2003.<sup>655</sup> In addition, the GSA Inspector General (IG) also reports that the negotiated cost savings dropped an average of \$83 million per year from 1992 through 1997 and \$18 million per year from 1998 to 2004.<sup>656</sup> Post-award audits help the federal government recover funds when the government has been overcharged due to a vendor failing to provide accurate, complete, or current price information.<sup>657</sup> Despite past recoveries, the GSA stopped requiring post-award audits in 1997 because it anticipated it would perform more pre-award audits, thereby decreasing the need for post-award audits. Despite their best intentions, the GSA never did increase its pre-award audits.<sup>658</sup>

The GAO concluded the audit with four recommendations to the GSA.<sup>659</sup> First, conduct pre-award audits when the threshold is met for new contracts and contract extensions.<sup>660</sup> Second, develop guidance to help contracting officers know when post-award audits are needed.<sup>661</sup> Third, revise the GSA's Acquisition Quality Measurement and Improvement Program

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<sup>647</sup> U.S. GOV'T ACCOUNTABILITY OFF., No. GAO-05-229, CONTRACT MANAGEMENT, OPPORTUNITIES TO IMPROVE PRICING OF GSA MULTIPLE AWARD SCHEDULES CONTRACTS (Feb. 11, 2005). [hereinafter CONTRACT MANAGEMENT REPORT].

<sup>648</sup> *Id.* at 4.

<sup>649</sup> The complexity and circumstances of each acquisition determines the level of analysis used to determine if the final price is fair and reasonable. See FAR, *supra* note 33, at 15.404.

<sup>650</sup> CONTRACT MANAGEMENT REPORT, *supra* note 647, at 12.

<sup>651</sup> *Id.* at 13.

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

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

<sup>654</sup> *Id.* at 14.

<sup>655</sup> *Id.*

<sup>656</sup> *Id.* at 15.

<sup>657</sup> *Id.* at 17.

<sup>658</sup> *Id.*

<sup>659</sup> *Id.* at 23.

<sup>660</sup> *Id.*

<sup>661</sup> *Id.*

to better measure and report on the performance of pre-negotiation panels.<sup>662</sup> Fourth, revise the GSA contract management plans to better determine the underlying causes of contract pricing deficiencies and implement corrective actions.<sup>663</sup>  
Major Steven R. Patoir

### Multiple Award Schedules

#### *Proposed Rule: Contracting Officers Should Consider a Contractor's Past Performance before Issuing Task Orders in Excess of \$100,000*

On 21 June 2005, the FAR Council issued a proposed rule that requires contracting officers to evaluate a contractor's management of subcontracts (to include how the contractor manages its small-business subcontracting plans) and a contractor's past performance on FSS or a task-order contract or delivery-order contract that was awarded by another agency.<sup>664</sup> This rule would apply to any order that exceeds \$100,000, and to any delivery-order contract over \$100,000 when these evaluations would produce more useful past performance information for source selection than in the overall contract evaluation.<sup>665</sup>

As federal agencies continue to adjust to smaller workforces, it is interesting to see this proposal requiring agencies to evaluate a contractor's subcontracting performance in regards to small businesses. The question is will federal agencies eventually accomplish socio-economic objectives and contract administration matters through large prime contractors?

#### *GAO Sustains Three Protests Challenging an Agency's Decision to Order off the Federal Supply Schedule*

In *Armed Forces Merchandise Outlet, Inc. (AFMO)*,<sup>666</sup> the GAO sustained a protest because the agency ordered a product outside its FSS contract. The Army Materiel Command (AMC) wanted to purchase "Wick Away Sports Bras" and issued a RFQ advising potential vendors that, *inter alia*, the bras should not have a tag, the shell should consist of eighty-two percent nylon and eighteen-percent spandex, and that the entire garment will be lined with material consisting of eighty-four percent polyester and sixteen percent spandex.<sup>667</sup> The RFQ also advised vendors that the procurement was "limited to contractors possessing GSA contracts under schedule 078."<sup>668</sup>

The AMC received three quotes and issued its order with KP Sports.<sup>669</sup> AFMO, a competing vendor, protested the task order arguing that KP Sports Bra is outside KP Sports' FSS contract. In support of its position, AFMO pointed out that KP Sports' FSS contract lists a black sports bra constructed of sixty-three percent nylon, twenty-three percent polyester and fourteen percent lycra.<sup>670</sup> The AMC argued that the order was permissible because the KP Sports FSS contract was modified to include the ordered item.<sup>671</sup> The GAO disagreed with the AMC and sustained the protest. The GAO found that, despite AMC's assertions, the GSA Advantage webpage and KP Sport's modified contract still listed the "sports bra as having a fabric content of sixty-three percent nylon, twenty-three percent polyester, and fourteen percent lycra and not the polyester/spandex blend required by the RFQ."<sup>672</sup> The GAO advised AMC to terminate its order with KP Sports and directed AMC to pay AFMO's costs of pursuing this protest.<sup>673</sup>

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<sup>662</sup> *Id.*

<sup>663</sup> *Id.*

<sup>664</sup> Federal Acquisition Regulation; Past Performance Evaluation of Orders, 70 Fed. Reg. 35,601 (proposed June 21, 2005) (to be codified at 48 C.F.R. pt. 42).

<sup>665</sup> *Id.*

<sup>666</sup> Comp. Gen. B-292281, Oct. 12, 2004, 2004 CPD ¶ 218.

<sup>667</sup> *Id.* at 2.

<sup>668</sup> *Id.* The GSA schedule contract 078 offers Sports, Promotional, Outdoor, Recreation, Trophies and Sign equipment. *Id.*

<sup>669</sup> *Id.* at 5.

<sup>670</sup> *Id.* at 12.

<sup>671</sup> *Id.* at 13.

<sup>672</sup> *Id.* The Army Materiel Command explained that the KP Sports' GSA contract was not updated when it was modified. *Id.* at 14.

<sup>673</sup> *Id.* at 16.

In *American Systems Consulting, Inc.*,<sup>674</sup> the GAO put the public on notice to monitor labor categories and ensure that all labor ordered under a FSS contract is actually listed on the underlying FSS contract. Here, the Defense Information Technology Contracting Organization awarded a blanket purchase agreement (BPA) for systems applications and support to ManTech Advanced Systems International. The competition for this BPA was conducted using FAR part 8 procedures.

The RFQ sought quotations for software systems engineering support services and the development of new business systems applications for the Defense Commissary Agency.<sup>675</sup> American Systems Consulting, Inc. challenged the BPA award alleging that one of the services ordered, user support manager, was out of scope of ManTech's FSS contract.<sup>676</sup> Before resolving this scope issue, the GAO compared the user support manager's position as defined in the statement of work<sup>677</sup> against the user support manager labor category identified by ManTech.<sup>678</sup> The GAO made the following observations about ManTech's task manager position: the position does not include the help desk or systems support services identified in the statement of work; the position focuses on financial management activities; and the position does not include at least two years of help desk experience as required by the user support manager position and requires a bachelors degree in computer science and six years of relevant experience versus the RFQ's requirement of a master's degree in computer science with eight years of relevant experience.<sup>679</sup>

Based on the above comparisons, the GAO determined that the user support manager services were outside the scope of ManTech's FSS contract.<sup>680</sup> The GAO said "when concern arises that a vendor is offering services outside the scope of its FSS contract, the relevant inquiry is not whether the vendor is willing to provide the services that the agency [seeks], but whether those services are actually included in the vendor's FSS contract as reasonably interpreted."<sup>681</sup> The GAO also recommended that ASCI be awarded its protest costs to include attorney fees.<sup>682</sup>

In *Crestridge, Inc.*,<sup>683</sup> the GAO sustained a pro se protest when it determined that the record did not support the agency's determination that the awardee's quotation was technically superior to Crestridge's. Crestridge, under a GSA FSS

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<sup>674</sup> Comp. Gen. B-294644, Dec. 13, 2004, 2004 CPD ¶ 247.

<sup>675</sup> The total services ordered include project management; systems analysis; evaluations; design, development and testing; systems maintenance; software quality assurance; user help desk services; systems deployment support; software configuration management; maintenance of on-line documentations; user training; and, local support. *Id.*

<sup>676</sup> *Id.* at 2.

<sup>677</sup> The RFQ included the following:

*Help desk support* may also require "senior analysts and technical personnel with development and/or maintenance knowledge and experience on the systems applications, databases, data, interfaces, and system's environment" to resolve system problems.

....

The *user support manager*, which will oversee this function, is required to "provide leadership and management of the user support personnel," "create[] the User Support Plan which defines the policies and procedures for providing [24 hours a day, 7 days a week] support for [DCA's business] systems," "manage multiple time sensitive tasks involving end user support," and "be available to provide on-call support." Education and experience requirements for this position are a Master's degree in "Information Technology, Computer Science, Business" and 8 years of relevant experience, or a Bachelor's degree and 10 years of relevant work experience. "The two years of the relevant experience must be in managing a User Support (Help Desk) operation providing around the clock support for more than 100 end users.

*Id.* at 6. Emphasis added.

<sup>678</sup> ManTech's FSS contract describes the task manager position as:

Directs all financial management and administrative activities, such as budgeting, manpower and resource planning, and financial reporting. Performs complex evaluation of existing procedures, processes, techniques, model, and/or systems related to the management problems or contractual issues which would require a report and recommends solutions. Develops work breakdown structures, prepares charts, tables, graphs, and diagrams to assist in analyzing problems. Provides daily supervision and direction to staff. Defines and directs technical specifications and tasks to be performed by team members, defines target dates of tasks and subtasks. Provides guidance and assistance in coordinating output and ensuring the technical adequacy of the end product.

*Id.* at 7.

<sup>679</sup> *Id.* at 9.

<sup>680</sup> *Id.*

<sup>681</sup> *Id.* at 10.

<sup>682</sup> *Id.* at 12.

<sup>683</sup> Comp. Gen. B-295424, February 23, 2005, 2005 CPD ¶ 39. There are limited facts presented in this opinion because the protester filed pro se and the GAO had to protect select information covered by a protective order. *Id.* at 1.

contract, competed for a furniture moving and assembly services task order. After the Office of Personnel Management (OPM) announced the task order award to a competitor, Crestridge protested, claiming, *inter alia*, that OPM's technical evaluation was unreasonable because the evaluation and source selection decision were inconsistent with the stated evaluation criteria.<sup>684</sup>

The GAO agreed. It noted that the RFQ stated the task order would be awarded on a best value basis with the following three evaluation factors serving as the award criteria: technical; experience and past performance; and price.<sup>685</sup> After evaluating revised quotations from the awardee and Crestridge, the OPM concluded that the awardee's "technical approach better targeted specific OPM needs whereas Crestridge quotation was general in nature, lacked detail about the extent of the available labor pool to accomplish the required services, and did not include specifics about the OPM's needs."<sup>686</sup> This finding played a large part in OPM's decision to place the task order with the awardee.

The GAO determined that OPM's technical evaluation was unreasonable, explaining that the record did not support the OPM's conclusion. For example, the GAO noted that Crestridge submitted a more detailed quote and their quote was almost twice as long as the awardee's.<sup>687</sup> The GAO pointed out that Crestridge was sometimes penalized for not providing specific information while the awardee was not penalized for also failing to submit the required information.<sup>688</sup> Because OPM did not evaluate the quotes correctly, the GAO concluded that there was a reasonable possibility that Crestridge was prejudiced. Accordingly, the GAO recommended the agency reevaluate all quotations, hold discussions of necessary, and make a new source selection decision. Crestridge was also awarded its protest costs, to include reasonable attorney fees.<sup>689</sup>

Major Steven R. Patoir

## Socio-Economic Policies

### *Post-Adarand Price Preference Issues Continue*

The Supreme Court's decision in *Adarand*<sup>690</sup> requiring a strict scrutiny analysis for race-based initiatives in federal contracts is now nearly ten years old, but its impact on price preference provisions in government contracts still continues. The Contract and Fiscal Law Department has chronicled the post-*Adarand* developments in the *Year in Review* over the last several years and this year will be no different.<sup>691</sup>

The most significant post-*Adarand* case still bouncing around the court system this year was *Rothe Development Corporation v. U.S. Department of Defense*.<sup>692</sup> Rothe was an incumbent, woman-owned small business that submitted the low bid for a computer-related services contract with an Oklahoma Air Force base. Rothe lost the contract to another firm when a ten percent price adjustment was added to Rothe's bid in accordance with § 1207 of the National Defense Authorization Act of 1987<sup>693</sup> because the competing firm was a small disadvantaged business. Rothe brought suit against the Air Force alleging that the small disadvantaged business price preference was unconstitutional because it violated equal

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<sup>684</sup> Crestridge also argued that the government's price evaluation was improper because the government incorrectly estimated the overtime hours and applied the wrong hourly rate to weekend and evening work. In addition, Crestridge asserted that a negative past performance rating did not apply to this competition because the work underlying this rating was different than the contemplated order. The GAO disagreed with these allegations. It observed that OPM applied the same hourly rate analysis to the awardee and Crestridge. Therefore, the GAO concluded that the agency price evaluation was reasonable. The GAO also concluded that OPM evaluated the vendors past performance correctly because OPM focused on Crestridge's management weakness, not the type of work performed. *Id.* at 6.

<sup>685</sup> *Id.* at 2.

<sup>686</sup> *Id.* at 3.

<sup>687</sup> Crestridge provided more detail about their labor hours and the personnel proposed to perform the work. *Id.* at 8.

<sup>688</sup> Both Crestridge and the awardee failed to include details about the project schedule and proof that their employees are professionally trained. *Id.*

<sup>689</sup> *Id.* at 9.

<sup>690</sup> *Adarand Constr., Inc. v. Pena*, 515 U.S. 200 (1995).

<sup>691</sup> See Major Thomas C. Modeszto et al., *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan./Feb. 2003, at 38-41 [hereinafter *2002 Year in Review*]; Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2003—The Year in Review*, ARMY LAW., Jan. 2004, at 65 [hereinafter *2003 Year in Review*]; *2004 Year in Review*, *supra* note 40, at 67-68.

<sup>692</sup> 413 F. 3d 1327 (Fed. Cir. 2005).

<sup>693</sup> 10 U.S.C.S. § 232 (LEXIS 2005); see also FAR, *supra* note 33, at 19-1201. Note that this price preference has been serially suspended by DOD since 1998 (discussed *infra* at page 56). However, the contract in this case was entered prior to the price preference being suspended by the DOD.

protection.<sup>694</sup> The trial court granted summary judgment for the government finding that while the 1992 reauthorization of § 1207 was facially unconstitutional, the 2002 revised version of § 1207 (2002) withstood constitutional muster.<sup>695</sup>

Rothe appealed the district court's decision. The CAFC vacated the district court's decision and remanded the case back to the district court for further factual development on the issue of whether or not the revised authorization of the price preference is constitutional.<sup>696</sup> Stay tuned for further developments in this case over the next year.

In another case, very similar to *Adarand*, the U.S. Court of Appeals for the Ninth Circuit provided a thorough analysis of a race-based preference statute under the Supreme Court's strict scrutiny test and ultimately rejected appellant's constitutional challenges to the Transportation Equity Act for the 21<sup>st</sup> Century<sup>697</sup> which authorizes race- and sex-based preferences in the award of federally funded transportation contracts.<sup>698</sup> The court, however, sustained the appeal based on the state's application of the statute in this case.

In July 2000, Western States Paving Company submitted a bid for subcontracting work in Washington that was funded by federal transportation funds provided to the Washington State Department of Transportation.<sup>699</sup> Western did not receive the contract because of statutory and regulatory mandates for minority participation resulting in price preferences being given to minority subcontractors.<sup>700</sup>

The court stated that "Congress identified a compelling remedial interest when it enacted the [price preference statute] and the [disadvantaged business enterprise] program, and the implementation established by the [U.S. Department of Transportation] regulations is—on its face—a narrowly tailored means of achieving that of that objective."<sup>701</sup> For this reason, the court granted summary judgment for the federal government on Western's facial challenge of the statute.

Unfortunately for the state of Washington, the court went on to sustain Appellant's claim, holding that "as applied, the statute violated Western's equal protection rights because the record was "devoid of any evidence suggesting that minorities currently suffer - or have ever suffered—discrimination in the Washington transportation contracting community."<sup>702</sup> The court remanded the matter to the district court with instructions to enter summary judgment in favor of Western.<sup>703</sup>

### *Cascading Set-Asides Remain a Hot Issue*

Cascading set-aside procedures remained a hot topic for contractors this past year. Under these procedures, agencies solicit bids and open the bids in order of legal socio-economic preference priority.<sup>704</sup> If the agency finds satisfactory proposals from a class of offerors with a higher socio-economic preference, such as small businesses or small disadvantaged businesses, then the agency does not open the proposals from offerors with a lower socio-economic preference. On 12 July 2005, the Professional Services Council (PSC), a contractor trade association, wrote a letter to David Safavian, former Administrator of the Office of Federal Procurement Policy (OFPP), urging sharp reductions in the use of cascading procurements.<sup>705</sup>

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<sup>694</sup> See *2003 Year in Review*, *supra* note 691, at 65.

<sup>695</sup> *Rothe Dev. Corp. v. United States DOD*, 324 F. Supp. 2d 840 (W.D. Tex. 2004)

<sup>696</sup> *Rothe*, 413 F.3d at 1337.

<sup>697</sup> Pub. L. No. 105-178, 112 Stat. 151 (1998).

<sup>698</sup> *Western States Paving Co., Inc. v. Washington State Dep't of Transportation*, 407 F.3d 983 (9th Cir. 2005).

<sup>699</sup> *Id.* at 987.

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

<sup>701</sup> *Id.* at 1003.

<sup>702</sup> *Id.* at 1002.

<sup>703</sup> *Id.* at 1003.

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

<sup>705</sup> Kimberly Palmer, *Industry Group Complains About Contracting Method*, GOVEXEC.COM, (July 12, 2005), [http://www.govexec.com/story\\_page.cfm?articleid+31760](http://www.govexec.com/story_page.cfm?articleid+31760).

While the cascading set-aside process is designed for administrative convenience, the trade group complained that larger, or even small non-preferred potential contractors are wasting money on bid and proposal costs in situations in which the contracting officers are failing to do their required market research prior to publishing the solicitation.<sup>706</sup> The trade group encouraged OFPP to issue a policy sharply restricting the use of cascades or, in the alternative, reimbursing contractors the bid and proposal costs for any offers not opened.<sup>707</sup>

Industry leaders are not the only ones complaining about the process. Though the GAO has deemed the process acceptable in the past,<sup>708</sup> commentators have recently been questioning its legal basis, which may signify future changes.<sup>709</sup>

In a bid protest case at the COFC, *Greenleaf Construction Co. v. United States*, the court addressed cascading set-aside procedures in federal contracts.<sup>710</sup> *Greenleaf* involved a large contract entered into by the HUD for the procurement of management and marketing services for single family housing units.<sup>711</sup> The contracting officer designed the solicitation as a cascading set-aside where small businesses were the first tier set-aside priority. The protester, who was initially selected for award, was one of two small-business offerors that the contracting officer deemed to be in the competitive range.<sup>712</sup>

The other small business offeror, Chapman, however, filed a size protest with the SBA to make a determination on *Greenleaf's* eligibility as a small business.<sup>713</sup> The SBA found that *Greenleaf* was “other than a small business,” and therefore, ineligible for the set-aside award.<sup>714</sup> This exclusion left only one small business offeror, Chapman, in the competitive range. Based on these changed circumstances, the contracting officer decided to move to the next tier of offerors since the solicitation required two or more such offerors to maintain adequate price competition. Once into the unrestricted class of offerors, *Greenleaf* was again eligible for award and was, in fact, selected for award.<sup>715</sup>

Chapman protested the award decision to the GAO.<sup>716</sup> In light of the protest, the HUD reconsidered its decision based on the SBA recommendations. The contracting officer decided that adequate price competition had existed among small businesses, and further decided to award the contract to Chapman.<sup>717</sup> *Greenleaf* protested that decision to the court requesting declaratory and injunctive relief.<sup>718</sup>

The court analogized this situation to the rule of two in the typical small business set-asides.<sup>719</sup> When deciding whether or not to set a solicitation aside for small businesses, the contracting officer typically must make a prospective determination about whether or not two or more responsible small businesses *will* solicit bids.<sup>720</sup> The court in *Greenleaf* held that when cascading set-aside procedures are implemented, the determination whether or not reasonable competition can be obtained is made at the time of bid opening, not after the SBA rules on any potential requests for certificates of competency.<sup>721</sup> Since it appeared that there were two responsible small businesses at time of bid opening, the court held that

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<sup>706</sup> *Id.*

<sup>707</sup> *Id.*

<sup>708</sup> See *Carriage Abstract, Inc.*, Comp. Gen. B-290676, Aug. 15, 2002, 2002 CPD ¶ 148 (holding that the cascading set-aside provisions in the solicitation reasonably put large businesses on notice of the risks they were assuming by soliciting bids, and was therefore a permissible contract action); *Urban Group, Inc.*, Comp. Gen. B-281352, Jan. 28, 1999, 99-1 CPD ¶ 25 (holding that the GAO was aware of no statute or regulation that would prohibit this cascading set-aside approach and as such there was no basis to object to it).

<sup>709</sup> Vernon J. Edwards, *Cascading Set-Asides: A Legal and Fair Procedure?* 19 NASH & CIBINIC REPORT 8, ¶ 117 (2005).

<sup>710</sup> *Greenleaf Constr. Co. v. United States*, 67 Fed. Cl. 350 (2005).

<sup>711</sup> *Id.* at 351-52.

<sup>712</sup> *Id.* at 353.

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

<sup>714</sup> *Id.*

<sup>715</sup> *Id.* at 354.

<sup>716</sup> *Id.*

<sup>717</sup> *Id.* at 355.

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

<sup>719</sup> *Id.* at 360.

<sup>720</sup> *Id.*

<sup>721</sup> *Id.* at 361.

the contracting officer appropriately kept the award within tier-one small business offerors when awarding the contract to Chapman.<sup>722</sup>

Prior to making their findings, the court questioned and perhaps provided warnings about the use of the cascading set-aside contracting process. The court stated that “at the outset we note that the cascade procedure has developed without the discipline of regulatory guidance [and] . . . while the justifications for cascading may be legitimate, they cannot [be used in such a way as to] lead to a procurement that violates acquisition regulations.”<sup>723</sup> Interestingly, after raising these apparent concerns, the court noted that Greenleaf did not challenge the use of the cascading set-aside procedure at the time the solicitation was issued.<sup>724</sup> Perhaps in a future pre-bid opening protest of a solicitation, the court will view cascading set-aside procedures more harshly.

#### *Bundle Up? GAO Says No*

In a case that implicated the new contract bundling rules implemented in October 2003 that made the FAR bundling rules applicable to FSS schedule contracts,<sup>725</sup> the GAO sustained a protest by an unsuccessful offeror finding that the Army Tank and Automotive Command (TACOM) failed to conduct the proper bundling analysis required by FAR § 7.107; failed to provide bundling notice to the SBA as required by FAR § 19.202-1; and failed to notify the incumbent small business contractor of its intent to bundle the contract as required by FAR § 10.001.<sup>726</sup>

The TACOM decided to consolidate a large engineering and support services contract that had previously been awarded to small businesses into a much larger single BPA for five years under the GSA’s FSS for Professional Engineering Services.<sup>727</sup> The agency unsuccessfully argued, among other things, that the 2003 modification to the regulations covering the required analysis for bundling of contracts did not apply to this contract because the acquisition *planning* for this contract was completed prior to the implementation date for the new rules applicable to FSS contracts.<sup>728</sup>

The GAO recommended that the Army conduct an analysis in accordance with the FAR requirements to determine whether bundling was necessary and justified for these services, or whether these services should remain reserved for small business.<sup>729</sup> The GAO also recommended that the agency provide a complete copy of the analysis to the SBA and, if appropriate, to set aside the award for small businesses.<sup>730</sup>

#### *Small Businesses Garner Record Contracts*

In August 2005, the SBA proudly reported on the accomplishments of small businesses acquiring federal contracts: “U.S. small businesses reaped a record \$69.23 billion in federal prime contracts in FY 2004 surpassing the previous high by almost 6 percent. The contracts represented 23.09 percent of federal prime contract dollars and 43.7 percent of federal prime contracting actions in FY 2004.”<sup>731</sup>

The government also exceeded its statutory goal of awarding five percent of contracts to small disadvantaged businesses. Contracts to HUBZone contractors, woman-owned small businesses, and service-disabled veteran-owned small

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<sup>722</sup> *Id.*

<sup>723</sup> *Id.* at 356.

<sup>724</sup> *Id.* at 356, n.13.

<sup>725</sup> Federal Acquisition Regulation; Contract Bundling, 68 Fed. Reg. 60,000 (Oct. 20, 2003).

<sup>726</sup> Sigmatech, Inc., B-296401, Aug. 10, 2005, 2005 CPD ¶156.

<sup>727</sup> *Id.* at 2.

<sup>728</sup> *Id.* at 6.

<sup>729</sup> *Id.* at 8.

<sup>730</sup> *Id.* at 8. The GAO also recommended awarding the protester their legal fees for filing the protest. *Id.*

<sup>731</sup> Press Release, Small Business Administration, Small Business Garnered a Record \$69 Billion in Federal Contracts in FY 2004 (Aug. 25, 2005), available at <http://www.sba.gov/news/05-49-Record-small-Business-contracts.pdf>.

businesses all increased over the previous year, though these categories of contractors did not quite reach their statutory goals.<sup>732</sup>

### *Small and Disadvantaged Business Price Preferences Suspended for DOD and Civilian Agencies*

As a result of the DOD's success in again exceeding its statutory goal of awarding five percent of its contracts to small disadvantaged businesses (SDB), the DOD again suspended the use of price evaluation adjustments for SDBs in DOD procurements through 23 February 2006.<sup>733</sup> Title 10, subsection 2323(e) of the U.S. Code requires the DOD to suspend the price preference when the Secretary of Defense determines at the beginning of the fiscal year that the agency achieved its five percent goal for the previous year.<sup>734</sup> Because of the DOD's continued success in this area, the price preference has been suspended for DOD contracts annually since 1998.

While the suspension of the price preference within DOD is old news, civilian agencies also suspended the use of the price preference for SDBs this year for the first time since the price preferences were implemented.<sup>735</sup> The cause of the suspension was a lapse in statutory authorization when the Small Business Reauthorization and Manufacturing Assistance Act of 2004<sup>736</sup> chose not to authorize the price preference that it had authorized in each of the previous years since the implementation of the preference.<sup>737</sup>

Currently, only the Coast Guard and NASA are authorized and required to provide a price preference under FAR 19.11 because neither of these agencies are covered by either suspension.<sup>738</sup> The government-wide goal for contracting with SDBs at not less than five percent remains in effect.

### *When Is Market Research Enough? HUBZone Contractors Get a Boost*

The GAO sustained a protest by a small business contractor in a Historically Underutilized Business Zone (HUBZone) because the contracting specialist failed to perform sufficient market research to determine whether or not two responsible HUBZone small business concerns could compete for the contract as required by FAR 19.1305 and case law.<sup>739</sup>

The contract in this case was for aircraft cleaning and is of some significance because the contracting specialist did conduct some market research to include consideration of current and past contracts as well as extensive research on the SBA's Pro-Net web-based small business database system to search for potential HUBZone offerors.<sup>740</sup> Finding no HUBZone offerors, the contracting specialist decided to set-aside the protest for small businesses.<sup>741</sup> As it turned out, there were available HUBZone small business concerns (SBCs) in the area and one of them protested.

The GAO held that while the agency undertook efforts to determine whether two capable HUBZone firms would submit offers, "its efforts were insufficient under the circumstances" because after completing their research and acquisition plan, but prior to actually issuing the IFB, the agency was put on notice that a similar contract at a sister installation was being performed by a HUBZone SBC.<sup>742</sup>

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<sup>732</sup> *Id.*

<sup>733</sup> Memorandum, Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies, subject: Suspension of the Price Preference Evaluation Adjustment for Small Disadvantaged Businesses (24 Jan. 2005).

<sup>734</sup> *Id.*

<sup>735</sup> Memorandum, Chief Acquisition Officer, U.S. Small Business Administration, to Chief Acquisition Officers and Senior Procurement Executives, subject: Suspension of the Price Evaluation Adjustment for Small Disadvantaged Business at Civilian Agencies (22 Dec. 2004) [hereinafter Suspension Memo].

<sup>736</sup> Pub. L. No. 108-447, 118 Stat. 2809 (2004).

<sup>737</sup> Suspension Memo, *supra* note 735.

<sup>738</sup> *Id.*

<sup>739</sup> SWR Inc., Comp. Gen. B-294266, Oct. 6, 2004, 2004 CPD ¶ 219.

<sup>740</sup> *Id.* at 2.

<sup>741</sup> *Id.* at 3.

<sup>742</sup> *Id.* at 4.

*Executive Order Gives Service—Disabled Veteran Owned Contractors Boost, Too*

To strengthen and increase opportunities in federal contracting for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), President Bush signed an Executive Order requiring heads of agencies “to provide significantly more contracting opportunities” to SDVOSBs.<sup>743</sup> The Executive Order requires agencies to do more to implement the statutory three percent goal for SDVOSB contracts and demands that agencies more effectively implement the authority to reserve certain procurements for SDVOSBs to help attain that goal.<sup>744</sup>

The SBA and the FAR Councils<sup>745</sup> issued final regulations in May 2005 permitting contracting officers to restrict awards to SDVOSBs if there is a reasonable expectation that at least two SDVOSBs will submit bids at a fair market price.<sup>746</sup> Sole source awards are permitted if the contracting officer does not expect to get two SDVOSBs bids and the contract will not exceed \$3 million (or \$5 million for manufacturing contracts).<sup>747</sup> This new rule does not provide for any price preferences, but does give SDVOSBs similar preference status as Section 8(a) and HUBZone SBCs.<sup>748</sup>

*And How About a Little Something for the Hawaiians?*

The past year saw some high profile criticism of the FAR’s allowable preference for awarding sole-source contracts above the Small Business Administration’s Section 8(a) competition threshold<sup>749</sup> to Alaskan Native Corporations and Indian Tribes.<sup>750</sup> The critics of the rule protest that, although apparently legal, such a large number of high dollar value contracts are currently being awarded to Alaska Native Corporations that there is an unfair impediment to competition.<sup>751</sup> The criticism was not enough, however, to prevent Congress from extending the same benefit to Native Hawaiian Organizations. A DFARS interim rule expanding the identical preference for DOD 8(a) contracts with Native Hawaiian Organizations for at least FY 2004 and 2005.<sup>752</sup> The interim rule implements Section 8021 of the DOD Appropriations Act for FY 2004 and 2005.<sup>753</sup>

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**Randolph-Sheppard Act**

A military cafeteria contract at Fort Campbell, Kentucky, gave the CAFC the opportunity to revisit the issue of whether or not a disappointed bidder—a Randolph-Sheppard Act (RSA) contractor—is required to exhaust its administrative remedies prior to filing a bid protest action.<sup>754</sup>

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<sup>743</sup> Exec. Order No. 13360, 69 Fed. Reg. 62547 (Oct. 26, 2004).

<sup>744</sup> *Id.* This set-aside authority was provided for by § 308 of the Veterans Benefits Act of 2003 (Pub. L. No. 108-183) which authorized contracting officers and to set-aside procurements for SDVOSBs and to make sole source awards.

<sup>745</sup> The FAR Councils are the civilian and defense councils that oversee the Federal Acquisition Regulation.

<sup>746</sup> Government Contracting Programs, 70 Fed. Reg. 14523-14529 (Mar. 23, 2005).

<sup>747</sup> *Id.*

<sup>748</sup> See generally FAR, *supra* note 33, at 19.8 and 19.1306.

<sup>749</sup> The competition threshold for 8(a) contracts is \$3 million for most acquisitions, but \$5 million for manufacturing contracts. *Id.* at 19.805-1.

<sup>750</sup> See generally William K. Walker, Feature Comment: Alaska Native Participation in Government Contracts: Victims of Success, 47 THE GOVERNMENT CONTRACTOR 28, ¶ 322 (July 27, 2005); Kimberly Palmer, *The Alaskan Edge*, GOVERNMENT EXECUTIVE, July 15, 2005, available at [www.govexec.com/features/0705-15/0705-15s2.htm](http://www.govexec.com/features/0705-15/0705-15s2.htm).

<sup>751</sup> See generally William K. Walker, Feature Comment: Alaska Native Participation in Government Contracts: Victims of Success, 47 THE GOVERNMENT CONTRACTOR 28, ¶ 322 (July 27, 2005); Kimberly Palmer, *The Alaskan Edge*, GOVERNMENT EXECUTIVE, July 15, 2005, available at [www.govexec.com/features/0705-15/0705-15s2.htm](http://www.govexec.com/features/0705-15/0705-15s2.htm).

<sup>752</sup> Defense Federal Acquisition Regulation Supplement; Sole Source 8(a) Awards to Small Business Concerns Owned by Native Hawaiian Organizations, 70 Fed. Reg. 43072 (July 26, 2005).

<sup>753</sup> Pub. L. No. 108-87, 115 Stat. 1054 (2003); Pub. L. No. 108-287, 118 Stat. 951 (2004).

<sup>754</sup> *Kentucky v. United States*, 424 F.3d 1222 (Fed. Cir. 2005).

Fort Campbell issued a solicitation in October 2003 for cafeteria services at the military installation.<sup>755</sup> The solicitation indicated that the contract was subject to the RSA.<sup>756</sup> The Kentucky Department for the Blind (KDB), a state licensing agency under the RSA, submitted a bid, but the contracting officer determined that KDB's bid was outside the competitive range.<sup>757</sup> The KDB filed a protest with the COFC contending that its bid should have been included in the competitive range and, pursuant to DOD policy, it should have been awarded the contract.<sup>758</sup>

The COFC dismissed KDB's complaint for lack of subject matter jurisdiction.<sup>759</sup> The COFC found that because KDB's complaint had a "reasonable nexus" to the RSA, KDB was required to exhaust the administrative remedies provided in the RSA which include asking the State Secretary of Education to convene an arbitration panel to resolve the dispute.<sup>760</sup> KDB had not done so.

On appeal, KDB argued that its protest did not raise a claim under the RSA, and thus, arbitration would be inappropriate and unavailable.<sup>761</sup> Alternatively, KDB argued that even if its claim falls within the scope of the RSA, the RSA arbitration rules provide permissive, non-mandatory alternatives to filing a bid protest at the COFC.<sup>762</sup> The CAFC agreed with the COFC and held that KDB's complaint was premised on a violation of the RSA and, therefore, falls under the scope of the arbitration provisions of the Act.<sup>763</sup> Finally, the CAFC found that the discretionary term "may" in the statute "refers only to the initial discretion that the state licensing agency has in electing to challenge agency action in the first instance; if [they] "do so however, they must do so through the arbitration process."<sup>764</sup> The court affirmed the COFC's dismissal of the case on the basis that the COFC lacked jurisdiction over the complaint.

### Javits-Wagner O'Day (JWOD) Program Developments<sup>765</sup>

The regulations at chapter 51, title 41 of the Code of Federal Regulation (CFR), "Committee for Purchase From People Who Are Blind or Severely Disabled," provides the requirements, standards, and procedures for the JWOD Program.<sup>766</sup> The current regulations do not include governance standards for the affiliated nonprofit agencies working with the JWOD program. Responding to public criticism and a few reported instances of excessive compensation packages for nonprofit agencies involved with the JWOD Program, The Committee for the Purchase From People Who are Blind or Severely Disabled (the Committee) proposed new regulations for nonprofit agencies awarded government contracts under the authority of the JWOD Act.<sup>767</sup> The proposed regulations would have required nonprofit agencies wishing to qualify for

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<sup>755</sup> *Id.* at 1223.

<sup>756</sup> *Id.* Under the Randolph-Sheppard Act, 20 U.S.C. §§ 107, state licensing authorities under the State Departments of Education and representing the interest of blind vendors are permitted to submit bids on federal contracts on behalf of those vendors, and those bids are given special consideration. Pursuant to DOD Directive 1125.3, the DOD mandates that if the State licensing agency submits a proposal within the competitive range established by the contracting officer, then that contract must be awarded to the State licensee. U.S. DEPT. OF DEF., DIR. 1125.3, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (7 Apr. 1978).

<sup>757</sup> *Kentucky*, 424 F.3d. at 1224.

<sup>758</sup> *Id.*

<sup>759</sup> *Id.* (citing *Kentucky v. United States*, 62 Fed. Cl. 445 (2004)).

<sup>760</sup> *Id.*

<sup>761</sup> *Id.*

<sup>762</sup> *Id.* Section §107d-1(a) of title 20 of the U.S. Code states that "a vendor . . . may file a complaint with the Secretary. . . ." (emphasis added). 20 U.S.C.S. §107d-1(a) (LEXIS 2005).

<sup>763</sup> *Kentucky*, 424 F.3d. at 1227.

<sup>764</sup> *Id.* at 1228.

<sup>765</sup> Named for its enabling legislation, the Javits-Wagner-O'Day Act of 1971 (41 U.S.C.S. §§ 46-48c (LEXIS 2005)), the JWOD Program is a mandatory source of supply for Federal employees. The JWOD Program creates jobs and training opportunities for people who are blind or who have other severe disabilities. Its primary means of doing so is by requiring Government agencies to purchase selected products and services from nonprofit agencies employing such individuals. The JWOD Program is administered by the Committee for Purchase from People Who Are Blind or Severely Disabled. Two national, independent organizations, National Industries for the Blind (NIB) and NISH, have been designated by the Committee as central nonprofit agencies, and these organizations help State and private nonprofit agencies participate in the JWOD Program. 41 U.S.C.S. §§ 46-48c (LEXIS 2005).

<sup>766</sup> Governance Standards for Central Nonprofit Agencies and Nonprofit Agencies Participating in the Javits-Wagner-O'Day Program, 69 Fed. Reg. 65,395 (proposed Nov. 12, 2004).

<sup>767</sup> Neil Munro, *Critics Call for Overhaul of Program Aimed at Employing Disabled*, GOVEXEC.COM (Apr. 22, 2005), available at [www.govexec.com/dailyfed/0405/042205njl.htm](http://www.govexec.com/dailyfed/0405/042205njl.htm).

participation in the JWOD Program to comply with, and certify their compliance with, new Committee approved standards of conduct to include restrictions on the makeup of the Board of Directors; limitations on executive compensation; and a requirement that minutes of the Board of Director's meetings be published and made public.<sup>768</sup>

Unfortunately, in response to extensive public comments, the Committee determined that the best course of action would be to withdraw the proposed rule to allow for extensive study of the comments and a potential re-drafting of the proposed rule.<sup>769</sup> The Committee hopes to have a new proposed rule prepared by the end of the calendar year (2005).<sup>770</sup>

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### Foreign Purchases

The GAO recently issued a report analyzing the effect of international agreements on a variety of domestic preference laws,<sup>771</sup> particularly the Buy American Act.<sup>772</sup> The GAO found that the United States is party to "three multilateral trade agreements, four bilateral trade agreements, and three recently signed free-trade agreements that now await congressional approval. In addition, the DOD has signed twenty-one reciprocal defense procurement MOUs that remove barriers to procuring defense supplies."<sup>773</sup> The waiver of domestic preference statutes under these agreements and MOUs is "limited to procurements in excess of established dollar thresholds and to the categories of products and the federal entities covered by each agreement."<sup>774</sup> The seven trade agreements are authorized under the authority of the Trade Agreements Act and the Defense MOUs rely on the "public interest" exception to the Buy American Act.<sup>775</sup>

The GAO found that the effect of all these agreements is to result in the "waiver of the Buy American Act and DOD's Balance of Payments Program for certain products from forty-five countries."<sup>776</sup> The report was not intended to change or solve any particular problem, but Congress requested the GAO to determine the effect these agreements have on the applicability of U.S. domestic source restrictions to help "provide a better understanding of the relationship between domestic source preferences and these international agreements"<sup>777</sup> The GAO did not provide any recommendations in its report.

### *Berry Amendment*<sup>778</sup>—Final Rule

Following the beret saga and the negative publicity the Army received for it over the last few years, the DOD looked at ways to tighten up the Berry Amendment waiver authority.<sup>779</sup> To (hopefully) conclude this saga, the DOD issued a final rule establishing a policy for waiving the domestic source preference for the acquisition of items covered by the Berry Amendment.<sup>780</sup> Under the new rule, only the Undersecretary of Defense for Acquisition, Technology and Logistics, and the

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<sup>768</sup> 69 Fed. Reg. at 65,397-401.

<sup>769</sup> Governance Standards for Central Nonprofit Agencies and Nonprofit Agencies Participating in the Javits-Wagner-O'Day Program, 70 Fed. Reg. 38080 (July 1, 2005).

<sup>770</sup> *Id.*

<sup>771</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-188, INTERNATIONAL AGREEMENTS RESULTS IN WAIVERS OF SOME U.S. DOMESTIC SOURCE RESTRICTIONS (Jan. 2005).

<sup>772</sup> 41 U.S.C.S. §§ 10a-d (LEXIS 2005).

<sup>773</sup> *Id.* at 2.

<sup>774</sup> *Id.*

<sup>775</sup> *Id.* at 8-9.

<sup>776</sup> *Id.*

<sup>777</sup> *Id.* at 1.

<sup>778</sup> The Berry Amendment, codified at 10 U.S.C. § 2533a, requires that certain items such as clothing, hand-tools, tents, and certain metals be purchased from domestic suppliers only absent a waiver. 10 U.S.C.S. § 2533a (LEXIS 2005).

<sup>779</sup> See 2002 Year in Review, supra note 691, at 74.

<sup>780</sup> Defense Federal Acquisition Regulation Supplemental; Berry Amendment Memoranda, 70 Fed. Reg. 43,073 (July 26, 2005) (amending DFARS 225-7002-2(b)).

Secretaries of the military departments may make domestic non-availability determinations under the Berry Amendment.<sup>781</sup> The authorities are specifically made non-delegable under the new rule.<sup>782</sup>

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## Labor Standards

### *Employees Get Paid for Off-Duty "Overtime" Even If CBA Says Otherwise*

In *Bull v. United States*,<sup>783</sup> canine enforcement officers of the Customs Service sought to be paid for off-duty work that the Customs Service allegedly suffered or permitted them to perform. These tasks included laundering towels related to the dogs' training, constructing drug-concealing containers used as dog training aids, weapons training, and cleaning and maintaining their weapons while off-duty.<sup>784</sup> These types of "work" had apparently been performed by officers during off-duty time without pay for decades,<sup>785</sup> although the Customs Service did not explicitly direct the officers to perform these tasks in their off-duty time.

The "Overtime" section of the Collective Bargaining Agreement (CBA) applicable in this case specifically provided that "[e]mployees who are classified non-exempt under the Fair Labor Standards Act may not perform work outside normal working hours unless specifically ordered or authorized by the Employer to do so."<sup>786</sup> Another section of the CBA provided that "[w]hen assigned overtime, employees working such overtime will be compensated in accordance with applicable laws and regulations."<sup>787</sup> The CBA, the government argued, therefore permitted overtime pay only when a supervisor assigned overtime work to an employee, and not when the government merely "suffered or permitted" employees to perform work-related activities during off-duty hours.<sup>788</sup> The officers, and their union,<sup>789</sup> however, argued that the union could not, through the CBA, effectively waive employees' rights under the Fair Labor Standards Act (FLSA),<sup>790</sup> which requires payment of overtime wages for work in excess of forty hours per week.<sup>791</sup> Under OPM regulations implementing the FLSA, "hours of work" includes "[t]ime during which an employee is suffered or permitted to work[.]"<sup>792</sup>

Relying principally on the Supreme Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>793</sup> the COFC held that the CBA could not waive the substantive rights under the FLSA,<sup>794</sup> and that therefore the Customs Service was not shielded from paying overtime for off-duty work that the Customs Service "suffered or permitted" the employees to

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<sup>781</sup> 70 Fed. Reg. 43,073.

<sup>782</sup> *Id.*

<sup>783</sup> 65 Fed. Cl. 407 (2005).

<sup>784</sup> *Id.* at 408 n.1.

<sup>785</sup> *Id.* at 417.

<sup>786</sup> *Id.* at 409.

<sup>787</sup> *Id.*

<sup>788</sup> *Id.*

<sup>789</sup> The National Treasury Employees Union submitted an amicus curiae brief in this case. *Id.* at 408.

<sup>790</sup> Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201-219 (LEXIS 2005).

<sup>791</sup> *Bull*, 65 Fed. Cl. at 410.

<sup>792</sup> 5 C.F.R. § 551.401(a)(2) (2005). Although not specifically cited by the court, the "Definitions" section of the Fair Labor Standards Act specifies that the term "employ" includes "to suffer or permit to work." 29 U.S.C.S. § 203(g) (LEXIS 2005).

<sup>793</sup> 450 U.S. 728 (1981). In *Barrentine*, the Supreme Court stated:

This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would "nullify the purposes" of the statute and thwart the legislative policies it was designed to effectuate. Moreover, we have held that congressionally granted FLSA rights take precedence over conflicting provisions in a collectively bargained compensation arrangement.

*Id.* at 740-41 (citations omitted). The COFC also cited *Air Line Pilots Ass'n Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 485-86 (D.C. Cir.1999), *judgment reinstated*, 211 F. 3d 1312 (D.C. Cir. 2000) (en banc), as establishing that absent congressional authority, a union "may not prospectively waive statutory rights on behalf of employees." *Bull*, 65 Fed. Cl. at 414.

<sup>794</sup> *Bull*, 65 Fed. Cl. at 415.

perform.<sup>795</sup> The court went further, stating that even if FLSA rights could be waived by the union in a CBA, the language of this particular CBA did not provide a “clear and unmistakable” waiver of FLSA claims.<sup>796</sup>

Still, this doesn’t mean that employees can automatically get overtime pay for performing work-related tasks during off-duty hours on their own initiative. The employees still have burden of proving that the activities constitute “work,”<sup>797</sup> and that the claimed hours of work are compensable.<sup>798</sup> In subsequent proceedings at the end of the fiscal year,<sup>799</sup> the COFC meticulously examined each of the officers’ claims, applying extensive case law on each point, and found that some of the claimed tasks were compensable as “overtime.” For example, the use of the towels in training the drug-sniffing dogs, and the necessity for laundering the towels after each use, were demonstrated to be a crucial part of the training of the dogs mandated by Customs Service regulations.<sup>800</sup> Several of the field locations, however, did not have facilities for laundering the towels, and the supervisors had actual or constructive knowledge that the employees were laundering the towels during off-duty hours and did not forbid or discourage the practice.<sup>801</sup> Accordingly, the court found that this was compensable overtime work.<sup>802</sup> Some other tasks, such as off-duty weapons proficiency training, did not withstand the court’s detailed analysis and were not found to be compensable.<sup>803</sup> The court’s analysis in this case serves as a very good example of how to distinguish between compensable and non-compensable claims of overtime for off-duty work that an employee is “suffered or permitted” to perform.

#### *CBA’s Contingent Wage Increase Doesn’t Count, unless DOL Falls for It Too*

Recently, the Federal Circuit held that while a contingent wage increase under a new CBA renders it ineffective to compel a contract price adjustment, a Department of Labor (DOL) wage determination erroneously issued based upon that faulty CBA does apply to a contract made after the wage determination is issued, even if that wage determination is subsequently withdrawn after the contract is made. In *Guardian Moving & Storage Company v. Hayden*,<sup>804</sup> a contractor providing drayage services entered into a new CBA with its employees’ union a week before its contract was to be extended for two months by the government.<sup>805</sup> The new CBA provided for wage increases that would be effective on the first day of the contract extension “only if [DOL] issues a wage determination [effective on the first day of the contract extension] made applicable to [the extended contract] which adopts the provisions herein regarding wages and health and welfare benefits.”<sup>806</sup>

Twelve days after the contract was extended, the DOL issued a wage determination based upon the new CBA, incorporating the new wage rates and purporting to be effective on the first day of the two-month contract extension. A month later, the contract was extended for another two-month period. A week after that extension, the DOL withdrew its previously-issued wage determination on the grounds that it was erroneous because the new CBA on which it was based contained the contingency language, and was therefore not the result of “arms-length negotiation.”<sup>807</sup> The contractor then

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<sup>795</sup> *Id.* at 418.

<sup>796</sup> *Id.* at 416. The court’s reasoning on this point, however, was not necessarily compelling. Countering the Government’s argument that the CBA language (“Employees who are classified as non-exempt under the Fair Labor Standards Act may not perform work outside normal working hours unless specifically ordered or authorized by the Employer to do so”) is a waiver of the FLSA right to overtime pay for off-duty work that was not specifically ordered or authorized, the court noted that the subject of waiver is not specifically mentioned in that language. *Id.* The court also stated that its conclusion does not, as the Government argued, render the CBA language meaningless because that language “provides a basis upon which [the Government] could have ordered plaintiffs not to perform such work . . .” *Id.*

<sup>797</sup> “For an activity to constitute work, plaintiffs must prove that the activity was (1) undertaken for the benefit of the employer; (2) known or reasonably should have been known by the employer to have been performed; and (3) controlled or required by the employer.” *Bull v. United States*, 2005 U.S. Claims LEXIS 284 (2005), at \*17-18 (citations omitted).

<sup>798</sup> “For work to be compensable, the quantum of time claimed by plaintiffs must not be de minimus, and must be reasonable in relation to the principal activity.” *Id.* at \*18-19 (citations omitted).

<sup>799</sup> *Bull v. United States*, 2005 U.S. Claims LEXIS 284 (2005).

<sup>800</sup> *Id.* at \*64-70, 83-88.

<sup>801</sup> *Id.* at \*92-101.

<sup>802</sup> *Id.* at \*101-102.

<sup>803</sup> *Id.* at \*156.

<sup>804</sup> 421 F. 3d 1268 (2005).

<sup>805</sup> *Id.* at 1270.

<sup>806</sup> *Id.*

<sup>807</sup> *Id.* at 1270-71.

removed the contingency language and the DOL issued a new wage determination,<sup>808</sup> which again purported to be effective on the first day of the first contract extension.<sup>809</sup>

In its appeal, the contractor argued that it was entitled to a price adjustment for the first extension period because the newest wage determination purported to be effective on the first day of the first extension. The Federal Circuit rejected that argument, holding that “wage determinations issued by DOL are not retrospective, regardless of the effective date of the underlying CBA.”<sup>810</sup> This, the court noted, is clear from the language of DOL’s regulations, which states that wage determinations are applicable to contracts “entered into [after the issuance of the wage determination] and before such determination has been rendered obsolete by a withdrawal, modification, or supersedure.”<sup>811</sup>

The contractor also argued that it was nonetheless entitled to a price adjustment for the first extension period based upon section 4(c) of the Service Contract Act,<sup>812</sup> because once the erroneous wage determination was issued with an effective date of the first day of the extension, the contractor became legally bound by the CBA to pay the increased wages.<sup>813</sup> The Federal Circuit rejected that argument too, noting that section 4(c) applies only to CBA’s entered into “as a result of arm’s-length negotiations,”<sup>814</sup> and that the DOL had determined that the contingency clause in the new CBA equated to an absence of “arm’s-length negotiations.”<sup>815</sup> The Federal Circuit did agree, however, that the contractor is entitled to a price adjustment for the second contract extension, because at the time of that extension the erroneous DOL wage determination was in effect.<sup>816</sup> This is true even though that wage determination was in error and was subsequently withdrawn, because there was no authority to deem the withdrawal retroactive.<sup>817</sup>

### *Sometimes Labor-Related Disputes Can Be Heard at Boards of Contract Appeals*

In *Myers Investigative & Security Services, Inc.*,<sup>818</sup> the GSBICA decided that it had jurisdiction to entertain a dispute involving the assessment of liquidated damages against a contractor for violating the Service Contract Act<sup>819</sup> and the Contract

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<sup>808</sup> *Id.* at 1271.

<sup>809</sup> *Id.* at 1272.

<sup>810</sup> *Id.*

<sup>811</sup> *Id.* at 1272-73 (quoting 29 C.F.R. § 4.3(b) (2004)).

<sup>812</sup> McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C.S. §§ 351-358 (LEXIS 2005).

<sup>813</sup> *Guardian*, 421 F.3d at 1272.

<sup>814</sup> *Id.* at 1273. Specifically, Section 4(c) provides:

No contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm’s-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract . . . .

41 U.S.C.S. § 353(c) (LEXIS 2005).

<sup>815</sup> The court did not explain the DOL’s rationale in concluding that the contingency clause in the CBA equates to a lack of “arm’s-length negotiations.” However, the Armed Services Board of Contract Appeals, from which this case was appealed, noted that “DOL will not issue a wage determination specifying the wage rate in a CBA if a contingency in the CBA would limit a contractor’s obligations by requiring issuance of a wage determination to obtain contracting agency reimbursement because such an agreement reflects a lack of arm’s-length negotiations.” *Guardian Moving and Storage Company, Inc.*, ASBCA Nos. 54248, 54479, 04-2 BCA ¶ 32,753. The ASBCA quoted from a letter provided by DOL, dated 21 January 1992, which explained the policy rationale:

Prospective wage rate and fringe benefit increases negotiated in CBA’s [sic] that contain these contingencies essentially attempt to limit a contractor’s obligations to comply with the provisions of section 4 (c) [of the SCA] to those situations where the contractor is reimbursed by the contracting agency. As such, because this constitutes an apparent attempt to take advantage of the wage determination scheme provided in sections 2 (a) and 4 (c) of the [SCA], . . . [DOL] has concluded that these provisions typically do not reflect arm’s-length negotiations.

*Id.* at 161,980.

<sup>816</sup> *Guardian*, 421 F.3d at 1273.

<sup>817</sup> *Id.*

<sup>818</sup> GSBICA No. 16587-EPA, 05-2 BCA ¶ 32,983.

<sup>819</sup> McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C.S. §§ 351-358 (LEXIS 2005).

Work Hours and Safety Standards Act (CWHSSA).<sup>820</sup> In *Myers*, the EPA repeatedly refused to incorporate into the contract the wage rates set forth in an addendum to the CBA, despite the contractor's repeated requests.<sup>821</sup> As a result, the contractor was placed in a "precarious financial position" and ultimately discontinued paying those increased wages, reverting instead to the lower wage rates prescribed by the contract.<sup>822</sup>

The DOL found that EPA's failure to incorporate the wage rates violated FAR 22.1012-3(b), and instructed EPA to retroactively amend the contract to incorporate the wage rates reflected in the CBA addendum, which the EPA then did.<sup>823</sup> The contractor then resumed paying the employees the higher rates in accordance with the CBA addendum, and made full restitution to the employees of the back wages. Later, the DOL informed the EPA that although the contractor had made full restitution, the contractor owed liquidated damages of ten dollars per day for each employee who was underpaid during the course of performance of the contract.<sup>824</sup> The EPA assessed the liquidated damages,<sup>825</sup> and denied the contractor's request for relief.<sup>826</sup> The contractor appealed to the GSBCA.

Without getting to the merits, which were left for future resolution, the GSBCA considered the issue of whether the dispute was properly before the board. The EPA sought to dismiss the appeal for lack of jurisdiction, arguing that the dispute concerns labor standards and is therefore reserved exclusively for DOL resolution.<sup>827</sup> The board, however, agreed with the contractor that the dispute was not directed at the labor standards but was instead directed at the parties' "mutual contract rights and obligations."<sup>828</sup> The court explained that although the DOL has exclusive jurisdiction over labor standards issues, "the Court of Federal Claims and boards of contract appeals may still entertain a dispute that centers on the mutual contract rights and obligations of the parties even though matters reserved to and decided exclusively by the DOL are part of the 'factual predicate.'"<sup>829</sup> In this case, the contractor was not disputing the calculation of the liquidated damages, but was instead essentially arguing that by improperly refusing to incorporate the CBA addendum, the EPA had breached the contract and must therefore make the contractor whole—"either through an abatement of the liquidated damages assessment or, if that is not possible, by equitably adjusting the contract price to reflect this cost."<sup>830</sup> The board agreed with the contractor's argument that the labor standards issues "are simply part of the factual predicate of a matter that properly belongs at the Board,"<sup>831</sup> and denied EPA's motion to dismiss for lack of subject matter jurisdiction.<sup>832</sup>

#### *Increased Costs of Fringe Benefits under "Defined Benefit" Plan Is Not Compelled by Wage Determination*

If a successor contractor provides health insurance as fringe benefits consistent with the predecessor's CBA, and the cost to obtain that insurance increases, is the contractor entitled to a price adjustment due to those increased costs? "No," answered the ASBCA. In *Lear Siegler Services, Inc.*,<sup>833</sup> the wage determination applicable to the contract incorporated the wages and fringe benefits set forth in the previous contractor's CBA, which provided various health insurance benefits under a "defined-benefit" plan.<sup>834</sup> A "defined-benefit" plan sets forth a fixed set of benefits without specifying the employer's costs

<sup>820</sup> Contract Work Hours and Safety Standards Act, 40 U.S.C.S. §§ 327-333.

<sup>821</sup> *Myers*, 05-2 BCA ¶ 32,983 at 163,467.

<sup>822</sup> *Id.*

<sup>823</sup> *Id.* at 163,467-68.

<sup>824</sup> *Id.* at 163,468. Federal Acquisition Regulation section 22.302(a) provides that the "contracting officer must assess liquidated damages at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the [CWHSSA]." FAR, *supra* note 33, at 22.302(a).

<sup>825</sup> *Myers*, 05-2 BCA ¶ 32,983 at 163,468.

<sup>826</sup> *Id.* at 163,468-69. The FAR permits the head of the agency to reduce or waive liquidated damages of \$500 or less if the liquidated damages assessment was incorrect, or if the contractor inadvertently violated the CWHSSA, and to recommend that the Secretary of Labor reduce or waive liquidated damages over \$500. FAR, *supra* note 33, at 22.302(c).

<sup>827</sup> *Myers*, 05-2 BCA ¶ 32,983 at 163,469.

<sup>828</sup> *Id.* at 163,470.

<sup>829</sup> *Id.* at 163,469 (citing *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F. 2d 174 (Fed. Cir. 1993)).

<sup>830</sup> *Id.* at 163,470.

<sup>831</sup> *Id.*

<sup>832</sup> *Id.*

<sup>833</sup> ASBCA No. 54449, 05-1 BCA ¶ 32,937.

<sup>834</sup> *Id.* at 163,169.

to provide those benefits.<sup>835</sup> Over a year into the contract, after the start of the first option period, the contractor requested a price adjustment for increased costs in providing those health insurance benefits.<sup>836</sup> The contracting officer denied the request on the grounds that those increased costs were not compelled by a wage determination.<sup>837</sup>

The ASBCA agreed with the contracting officer. The board noted that the contractor's payment of increased wages or benefits would entitle him to a price adjustment under the contract's Price Adjustment clause<sup>838</sup> "to the extent that the increase is made to comply with the applicable wage determination."<sup>839</sup> However, the contractor was not required to provide the health insurance benefits, per se, in this case. Under the Service Contract Act and applicable DOL regulations, the contractor could instead satisfy its obligation to provide fringe benefits under a wage determination "by making equivalent or differential payments in cash."<sup>840</sup> The contractor's decision to provide the health insurance benefits, at an increased cost, rather than "equivalent" benefits under the CBA at no increased cost, resulted in increased costs that were not necessary to comply with the wage determination and therefore did not entitle the contractor to a price adjustment.<sup>841</sup>

The contractor argued that a price adjustment of that kind was made in a past contract it had with the Government for these services, and that therefore this prior course of dealing bears on the interpretation of the Price Adjustment clause.<sup>842</sup> The board rejected that argument, describing the clause as unambiguous,<sup>843</sup> and noting that the single prior instance of allowing a price adjustment in a past contract was insufficient to establish a relevant prior course of dealing that could modify the terms of the current contract,<sup>844</sup> particularly in the absence of any contemporaneous evidence that the parties understood the Price Adjustment clause to have that alternate meaning or that the contractor relied upon that understanding to its detriment.<sup>845</sup>

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<sup>835</sup> *Id.*

<sup>836</sup> *Id.* at 163,170.

<sup>837</sup> *Id.* at 163,170-71.

<sup>838</sup> The Price Adjustment clause provided, in relevant part:

(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period . . . .

(2) An increased or decreased wage determination otherwise applied to the contract by operation of law . . . .

FAR, *supra* note 33, at 52.222-43.

<sup>839</sup> *Lear Siegler Servs.*, 05-1 BCA ¶ 32,937 at 163,172.

<sup>840</sup> Section 2 of the SCA provides that "[t]he obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary." 41 U.S.C. § 351(a)(2). Department of Labor regulations, in turn, provide:

Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective bargaining agreement . . . . [A] contractor may satisfy its fringe benefits obligations under any wage determination "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash" in accordance with the rules and regulations set forth in § 4.177 of this subpart. a

29 C.F.R. 4.163(j) (2005).

<sup>841</sup> *Lear Siegler Servs.*, 05-1 BCA ¶ 32,937 at 163,173.

<sup>842</sup> *Id.*

<sup>843</sup> *Id.* at 163,174.

<sup>844</sup> *Id.*

<sup>845</sup> *Id.* In finding that the contractor had not relied upon its own interpretation, the court noted that the contractor "at the time of submitting its second price adjustment proposal did not expect an adjustment for increased defined benefit costs, but rather requested permission to have such a proposal considered." *Id.*

*Davis-Bacon Act Temporarily Suspended for Hurricane Katrina Areas, Then Reinstated*

In response to the devastation caused by Hurricane Katrina during the last week of August 2005, President Bush on 8 September 2005 suspended the Davis-Bacon Act,<sup>846</sup> which requires federal contractors to pay construction workers the “prevailing wage rate” in the area, for the affected portions of Louisiana, Florida, Alabama, and Mississippi.<sup>847</sup> Following that controversial action,<sup>848</sup> a number of bills were introduced in Congress to either expand or overturn it.<sup>849</sup> The suspension of the Davis-Bacon Act lasted sixty days; on 3 November 2005, the President revoked the suspension “as to all contracts for which bids are opened or negotiations concluded on or after 8 November 2005.”<sup>850</sup>

The Davis-Bacon Act, and its temporary suspension, remains controversial. A recent Congressional Research Service (CRS) Report suggests that the issue of whether the suspension would actually help hold down reconstruction costs remains “an open question.”<sup>851</sup> Another recent CRS Report suggested that the suspension was technically improper because it was not preceded by a declaration of a national emergency pursuant to the National Emergencies Act.<sup>852</sup> The CRS Report referred to the President’s suspension of the Davis-Bacon Act as “[a]n anomaly in the activation of emergency powers,”<sup>853</sup> and noted that “[t]he propriety of the President’s action in this case may be ultimately determined in the courts.”<sup>854</sup> At least one Congressman has suggested that because the President’s suspension of the Act was not preceded by a proper declaration of a national emergency, contractors could potentially be held liable for failing to pay the prevailing wage rates in contracts awarded during the temporary suspension period.<sup>855</sup>

Major Michael L. Norris

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<sup>846</sup> Davis-Bacon Act, 40 U.S.C.S. §§ 3141-3144, 3146-3147 (LEXIS 2005). Formerly 40 U.S.C. §§ 276a—a-7, Davis-Bacon was recodified in 2002. *See* Pub. L. No. 107-217, § 1, 116 Stat. 1150 (2002).

<sup>847</sup> Proclamation No. 7924, 70 Fed. Reg. 54227 (Sept. 8, 2005).

<sup>848</sup> There were both supporters and opponents of the suspension. *See* CONG. RESEARCH SERV., LIBRARY OF CONG., THE DAVIS-BACON ACT: SUSPENSION (2005), available at [http://www.opencrs.com/rpts/RL33100\\_20050926.pdf](http://www.opencrs.com/rpts/RL33100_20050926.pdf).

<sup>849</sup> *See* CONG. RESEARCH SERV., LIBRARY OF CONG., DAVIS-BACON SUSPENSION AND ITS LEGISLATIVE AFTERMATH (2005), available at [http://opencrs.cdt.org/rpts/RS22288\\_20051003.pdf](http://opencrs.cdt.org/rpts/RS22288_20051003.pdf).

<sup>850</sup> Proclamation No. 7959, 70 Fed. Reg. 67,899 (Nov. 3, 2005).

<sup>851</sup> CONG. RESEARCH SERV., LIBRARY OF CONG., DAVIS-BACON SUSPENSION AND ITS LEGISLATIVE AFTERMATH 3 (2005), available at [http://opencrs.cdt.org/rpts/RS22288\\_20051003.pdf](http://opencrs.cdt.org/rpts/RS22288_20051003.pdf).

<sup>852</sup> CONG. RESEARCH SERV., LIBRARY OF CONG., NATIONAL EMERGENCY POWERS, 19 (updated Sept. 15, 2005), available at <http://www.fas.org/sgp/crs/nat-sec/98-505.pdf>.

<sup>853</sup> *Id.* at 18.

<sup>854</sup> *Id.* at 19.

<sup>855</sup> In a press release, Representative George Miller, ranking Democratic member of the House Education and the Workforce Committee, is quoted as saying:

President Bush was in such a hurry to cut workers’ wages that he did it even before declaring a national emergency. This may mean that the President’s wage proclamation was done illegally. Contractors in the Gulf Coast should be aware that the President’s proclamation may not protect them from liability if they choose to ignore the law and pay workers less than the prevailing wage.

Press Release, Comm. on Educ. & the Workforce, In Rush to Cut Wages, President Forgets to First Declare National Emergency (Sept. 16, 2005), available at [http://www.house.gov/apps/list/press/ed31\\_democrats/rel91605b.html](http://www.house.gov/apps/list/press/ed31_democrats/rel91605b.html). Interestingly, on October 10, 2005, Representative Miller introduced a joint resolution which states:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, pursuant to section 202 of the National Emergencies Act (50 U.S.C. 1622), the national emergency declared by the finding of the President on September 8, 2005, in Proclamation 7924 (70 Fed. Reg. 54227) is hereby terminated.*

H.R.J. Res. 69, 109th Cong. (2005).

## Bid Protests

### *Protest, Filed More Than Ten Days after Receiving Agency Level Protest Decision, Is Timely Filed at the GAO*

Defense Supply Center Richmond (DSCR) received quotes from two vendors to provide light plates for military aircraft. After reviewing the offers, the DSCR rejected Supreme Edgelight Devices, Inc.'s (Supreme's),<sup>856</sup> offer because Supreme's design drawings were revised. Immediately afterwards, the DSCR awarded a purchase order to Supreme's competitor, Dreco. Supreme filed an agency-level protest with the DSCR challenging this award.<sup>857</sup> After considering Supreme's agency protest, the DSCR denied the protest and did not award the purchase order to Supreme. Supreme then filed a protest with the GAO.<sup>858</sup>

The DSCR moved to dismiss Supreme's GAO protest arguing the protest was untimely because Supreme filed its protest with the GAO more than ten days after receiving actual or constructive knowledge of the adverse action resolving Supreme's agency-level protest.<sup>859</sup> The DSCR based its position on the fact that Supreme received the agency's adverse action on Saturday, 11 December 2004, and filed the protest with the GAO on Thursday, 23 December 2004.<sup>860</sup> The GAO did not agree.

The GAO noted that Supreme was not open for business on Saturday, 11 December 2004. The weekend clerk who received DSCR's response did not open the envelope.<sup>861</sup> The GAO then explained that a mechanical receipt of an agency's initial adverse action—during a weekend day that is not an ordinary business day—does not constitute actual or constructive notice. It analogizes DSCR's response to receiving an email during the weekend. The fact that the clerk who received the mail on Saturday, 11 December 2004, did not open DSCR's letter was the significant factor.<sup>862</sup>

### *International Marine Products: Further Clarification of Supreme Edgelight Devices, Inc.*

International Marine Products, Inc.<sup>863</sup> protested the Navy's award of a contract for an automation control system inspection, training, system services and repair.<sup>864</sup> Like *Supreme Edgelight Devices*,<sup>865</sup> the issue in *International Marine Products* involves how to determine when a protest is timely filed. Specifically, do you count weekend days if the protester receives an agency's adverse decision in its agency level protest on a Saturday?

Procedurally, the facts in *International Marine Products* are also very similar to *Supreme*. International Marine Products was not awarded the procurement and filed an agency-level protest.<sup>866</sup> Like Supreme, the company received the agency's adverse resolution of its protest on a Saturday.<sup>867</sup> International Marine Products then, within ten days of receiving the agency's decision, protested to the GAO.<sup>868</sup> Like Supreme, International Marine Products also calculated the ten-day period for filing a protest with GAO starting on the Monday immediately following the Saturday delivery. Finally, just like Supreme, the agency moved to dismiss International Marine Products' protest on timeliness grounds.<sup>869</sup>

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<sup>856</sup> Supreme Edgelight Devices, Inc., Comp. Gen. B-295574, March 4, 2005, 2005 CPD ¶ 58.

<sup>857</sup> *Id.* at 3.

<sup>858</sup> *Id.* at 4.

<sup>859</sup> *Id.*

<sup>860</sup> *Id.*

<sup>861</sup> *Id.*

<sup>862</sup> *Id.* at 6.

<sup>863</sup> International Marine Products, Inc., Comp. Gen. B-296127, June 13, 2005, 2005 CPD ¶ 119.

<sup>864</sup> *Id.* at 2.

<sup>865</sup> *Supreme Edgelight*, 2005 CPD ¶ 58.

<sup>866</sup> *International Marine Products, Inc.*, 2005 CPD ¶ 119, at 7.

<sup>867</sup> *Id.* at 7.

<sup>868</sup> *Id.* at 11.

<sup>869</sup> *Id.* at 7.

An interesting distinction between *Supreme* and *International Marine Products* is the status of the person who received the agency's opinion. In *Supreme*, a clerk without any management responsibilities received the agency's letter, but did not open it.<sup>870</sup> In *International Marine Products*, a vice-president received the Navy's denial of their protest.<sup>871</sup> He also did not open the letter. This vice-president, however, called another principal officer of the company on Saturday and advised him that a letter from the Navy arrived.<sup>872</sup>

The Navy argued for a dismissal of the protest on timeliness grounds and argued that International Marine Products had a duty to open the mail that contained the agency's decision.<sup>873</sup> The GAO did not agree and noted that "the time period for filing a protest [with GAO] commences with a protester's actual or constructive knowledge of initial adverse agency action" and agreed that "protesters have a duty to diligently pursue their bases of protest."<sup>874</sup> However, the GAO also explained that this duty to pursue its basis of protests does not extend to weekends or times outside of ordinary business hours. Accordingly, the GAO started the timeliness clock on the first business day after the Saturday notice of the agency's adverse decision.<sup>875</sup>

#### *Information Posted to a RFQ's Question & Answer Webpage Constitutes an Amendment*

In an effort to acquire language translation services, the GSA requested quotes from companies listed on its MAS program.<sup>876</sup> The RFQ stated that "the closing date/time for receipt of quotations was 12PM EST on 18 February 2005."<sup>877</sup> Six days after issuing this RFQ, the GSA clarified in the Questions and Answers section of its official webpage, that the official closing time for this RFQ was "12Noon EST, Friday, Feb 18, 2005."<sup>878</sup>

Linguistic Systems submitted its quote on Friday afternoon, 18 February 2005, and received an automated message that the RFQ was closed.<sup>879</sup> Linguistic Systems protested its exclusion, arguing that they interpreted the initial closing date/time of "12PM EST on February 18, 2005" to mean that the RFQ closed at midnight, 18 February 2005. Linguistics System also argued that the clarifying message posted in the "Questions and Answer" section did not constitute an amendment because this amendment was not made on the proper form and did not require an acknowledgement.<sup>880</sup>

The GAO concluded that the GSA issued a valid amendment and denied Linguistic Systems' protest. The GAO noted that information disseminated during a procurement that is in writing, signed by the contracting officer, and provided to all vendors is enough to constitute an amendment.<sup>881</sup> Accordingly, the GAO ruled that GSA amended this RFQ by clarifying exactly when the closing period for receiving quotes ends.<sup>882</sup>

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<sup>870</sup> *Supreme Edgelight*, 2005 CPD ¶ 58.

<sup>871</sup> *International Marine Products, Inc.*, 2005 CPD ¶ 119.

<sup>872</sup> *Id.* at 8.

<sup>873</sup> *Id.* at 9.

<sup>874</sup> *Id.* at 10.

<sup>875</sup> *Id.*

<sup>876</sup> *Linguistic Systems, Inc., Comp. Gen. B-296221*, June 1, 2005, 2005 CPD ¶ 104.

<sup>877</sup> The GSA issued the initial RFQ on February 9, 2005. *Id.*

<sup>878</sup> *Id.* at 2. In an unrelated case, the GAO dismissed a protest wherein the protester argued that the agency extended the time period for filing a bid protest because it allowed the protester to ask written questions after its debriefing. In *New SI, LLC*, the GAO stated a debriefing is presumed to be closed at the end of the debriefing session unless there is a clear indication from the agency that the debriefing would be extended to allow the protester time to ask more questions. B-295209, 2004 U.S. Comp. Gen. LEXIS 290 (Nov. 22, 2004). In that case, the contracting officer advised the protester that if the protester had any questions after the debriefing was finished, the company could submit written questions after the debriefing. *Id.*

<sup>879</sup> *Linguistic Systems*, 2005 CPD ¶ 104.

<sup>880</sup> *Id.* at 3.

<sup>881</sup> *Id.* Posting the message in the "Question and Answer" section amounted to providing notice to all vendors. *Id.*

<sup>882</sup> *Id.* at 4.

*Attorney Fees - Cap on \$150 Hourly Fee Is Waived Again*

During the last two years, the bid protest section of the Year in Review has tracked cases involving requests for reimbursement. Two years ago, the GAO in *Sodexo Management, Inc.*<sup>883</sup> permitted the Navy to pay attorney fees in excess of the \$150-per-hour statutory cap.<sup>884</sup> Last year, in *NVT Technologies*,<sup>885</sup> the GSBCE affirmed *Sodexo* when it rejected a stipulation between the parties agreeing to pay attorney fees exceeding the statutory authorized limit.

This year, the GAO ordered the Social Security Administration to reimburse CourtSmart the costs it incurred for pursuing its protest.<sup>886</sup> The only dispute between the SSA and CourtSmart was the amount of legal fees.

CourtSmart paid its legal counsel \$153,971 or \$475 per hour.<sup>887</sup> The agency objected to this amount, claiming that it lacked authority to break the \$150 per hour cap on attorney fees.<sup>888</sup> To support its claim, CourtSmart submitted a 2002 national billing survey that identified the ranges of hourly billing rates for partners and associates in the Washington, D.C. area.<sup>889</sup> CourtSmart also outlined that their counsel has “30 years of experience in federal procurement law in the Washington, D.C. area and has the expertise, reputation and ability commensurate with partners at the high end of the billing rate.”<sup>890</sup>

The GAO found that this higher fee was justified and reasonable. It noted that the \$475 per hour claim was documented<sup>891</sup> and that the SSA did not object to the reasonableness of the \$475 per hour fee or the expertise, reputation or ability of the attorney.<sup>892</sup>

*GAO Recommends the Army Pay Protester’s Costs*

In *Johnson Controls World Services, Inc.*,<sup>893</sup> the GAO recommended the Army reimburse Johnson Controls the reasonable costs of filing and pursuing its initial and supplemental protests.<sup>894</sup>

In this procurement action, the Army conducted an A-76 study to determine whether to outsource or retain the services in-house at Walter Reed Medical Hospital.<sup>895</sup> Initially, the Army determined that it would keep the services in-house.<sup>896</sup> On 30 March 2005, Johnson Controls protested this decision, alleging that the independent review office (IRO), which certified the most efficient organization (MEO), did not comply with the A-76 handbook and that the cost of in-house

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<sup>883</sup> Comp. Gen. B-289605.3, Aug. 6, 2003, CPD ¶ 136.

<sup>884</sup> 31 U.S.C.S. § 3554(c)(2)(B) (2000). The statute provides:

Attorney fees are capped at \$150 per hour unless the agency determines based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

<sup>885</sup> GSBCE No. 16196-C (10647), 2003 GSBCE LEXIS 210 (Oct. 24, 2003)

<sup>886</sup> CourtSmart Digital Systems, Inc., Comp. Gen. B-292995.7, Mar. 18, 2005, 2005 CPD ¶ 47.

<sup>887</sup> *Id.* at 4.

<sup>888</sup> *Id.* at 26.

<sup>889</sup> *Id.* at 4.

<sup>890</sup> *Id.* at 5.

<sup>891</sup> *Id.* at 6.

<sup>892</sup> *Id.* In an unrelated claim, the GAO permitted the Department of State to pay reasonable attorney fees above the \$150 hourly cap. In *Department of State*, the protester claimed attorney fees between \$196.89 and \$197.77 per hour. Comp. Gen. B-295352.5, 2005 U.S. Comp. Gen. LEXIS 147 (Aug. 18, 2005). In support of its claim, the protester submitted a detailed explanation of its rates calculation and a copy of the “All Urban Consumers” CPI for San Francisco-Oakland-San Jose, California. *Id.* at 4. GAO also observed that the State department did not object to these rates and said that the GAO “ha[s] declined to impose a requirement that a claimant do more than request an adjustment and present a basis upon which the adjustment should be calculated.” *Id.*

<sup>893</sup> B-295529.4, Aug. 19, 2005, U.S. Comp. Gen. LEXIS 152.

<sup>894</sup> *Id.* at 8.

<sup>895</sup> *Id.* at 2.

<sup>896</sup> *Id.*

services should have been adjusted upwards.<sup>897</sup> Specifically, Johnson Controls alleged that the MEO contained unrealistically low staff levels that could not realistically comply with the statement of work.<sup>898</sup> The Army filed its agency report on 2 May 2005.<sup>899</sup> The GAO conducted a hearing with many witnesses. Afterwards, the Army agreed to take corrective action by withdrawing the IRO's certification of the MEO. One day after the Army agreed to take this corrective action, Johnson Controls filed a request for reimbursement of its protests costs.<sup>900</sup>

In this case, the Army did not comply with numerous mandatory procedural requirements.<sup>901</sup> Specifically, the GAO commented on the following actions: 1) the Army did not respond to Johnson Controls' document requests at least five days before filing its agency report;<sup>902</sup> 2) these documents were produced on 20 May 2005 after the GAO held a hearing and directed the Army to produce these;<sup>903</sup> 3) during additional hearings on 8-9 June 2005, the Army conceded that some protest issues were accurate;<sup>904</sup> and 4) the Army Audit Agency withdrew its certification of the MEO on 15 June 2005.<sup>905</sup>

In deciding to award Johnson Controls its protest costs, the GAO noted that it took the Army more than seventy days after Johnson Controls filed its protest to produce all the materials related to the final MEO certification. The GAO determined that the Army "failed to investigate the substantive grounds of this protest, [the Army] failed to produce documents when required, [the Army] failed to take prompt corrective action in the face of a clearly meritorious protest, [and] frustrated the intent of the Competition in Contracting Act of 1984."<sup>906</sup>

Transparency and cooperation are significant teaching points in this case. Much deference is given to agencies, but when the courts or boards sense that agencies are not cooperating or working in an open and transparent manner, the agencies risk reputations and operating funds.

#### *GAO Awards Some Costs, Denies Others*

In *Security Consultants Group, Inc.*,<sup>907</sup> the GAO awarded Security some costs and denied others. Here, the DHS sought security guard services in Oklahoma. The DHS's initial award to Security was protested. Although the GAO dismissed this protest for failing to state a valid basis for protest, the DHS amended its RFP and allowed offerors to revise their technical and price proposals.<sup>908</sup>

Security protested DHS's corrective action because the DHS terminated Security's contract. Security argued that the corrective action was unnecessary because the initial defect in the RFQ did not prejudice any of the offerors, and Security was now prejudiced because its successful contract price was divulged.<sup>909</sup> The GAO sustained Security's protest and recommended that the DHS reinstate Security's contract.<sup>910</sup>

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<sup>897</sup> *Id.*

<sup>898</sup> *Id.* at 3.

<sup>899</sup> *Id.* at 4.

<sup>900</sup> *Id.* at 3.

<sup>901</sup> *Id.* at 4.

<sup>902</sup> *Id.*

<sup>903</sup> These reports revealed that, internally, the Army conflicted over the merits of the protest. Specifically, the Army Audit Agency (the IRO) agreed with many points raised in the protest. The MEO opposed the protest issues. *Id.* at 5.

<sup>904</sup> *Id.* The Army agrees that the MEO did not include work that was required by an amendment, and that the MEO contained inadequate staffing levels for maintaining the hospital's grounds; that the agency needed to perform a new analysis of contract line items and determine if the MEO's certification should be overturned by unauthorized changes in the MEO. *Id.*

<sup>905</sup> *Id.* at 6.

<sup>906</sup> *Id.* at 8.

<sup>907</sup> Comp. Gen. B-293344.6, Nov. 4, 2004, 2004 CPD ¶ 228.

<sup>908</sup> *Id.*

<sup>909</sup> *Id.* The initial RFQ erroneously advised offerors that the three evaluation factors (technical, price and past performance) would be weighed equally. The revised RFQ stated that past performance was weighted sixty-percent and the other two factors twenty-percent each. *Id.* at 2.

<sup>910</sup> *Id.*

Despite the GAO's recommendation, the DHS divided its contract into three separate solicitations, and modified each to more accurately reflect the DHS's needs.<sup>911</sup> Security protested this decision.<sup>912</sup> Security argued they should have been awarded the initial contract.<sup>913</sup> Because they still wanted the work, however, Security submitted proposals for all three solicitations.

The DHS cancelled these three solicitations just prior to the date its agency report on Security's protest was due.<sup>914</sup> The GAO then dismissed Security's protest as academic.<sup>915</sup> Security learned that the DHS intended to modify existing contracts, and divvy the work between Security and another contractor.<sup>916</sup> Security then protested the DHS's decision not to follow the GAO's recommendation to award the entire initial contract to Security.<sup>917</sup>

Security also pursued reimbursement of their proposal and protests costs.<sup>918</sup> Although they did not prevail on the request for reimbursement of costs for submitting the three proposals and for protesting the terms of these three solicitations, Security did prevail in its claim for costs incurred in challenging the DHS's decision not to follow GAO's recommendation.<sup>919</sup>

Regarding the preparation costs for submitting three proposals and protesting these solicitations, the GAO reasoned that the DHS took prompt corrective action by canceling the three solicitations before the agency report's due date.<sup>920</sup> Concerning Security's protest of DHS's decision not to follow the GAO recommendation of awarding the initial contract to Security, the GAO observed that the DHS did not, as required, submit a detailed statement of factual and legal grounds explaining why reversal or modification of GAO's recommendation was warranted.<sup>921</sup> Because the DHS did not take the necessary steps to modify or reverse a GAO recommendation, it appeared that the DHS did not act in the public interest as required by the CICA, and was therefore liable for Security's costs.<sup>922</sup>

#### *Watch Timelines When Reviewing Claims for Reimbursement of Protest Costs*

In *Keeton Corrections, Inc.*,<sup>923</sup> the GAO dismissed a request to recover protest costs because the protester submitted its request eighty-three days after the GAO sustained Keeton's protest.<sup>924</sup> After prevailing on one ground, Keeton asked the GAO to reconsider other grounds Keeton raised in the protest. The GAO denied Keeton's request for reconsideration nineteen-days later.<sup>925</sup>

Keeton argued that the sixty-day period for filing a claim for costs began when it received the GAO's denial of Keeton's request for reconsideration.<sup>926</sup> The agency, on the other hand, argued that the sixty-day period commenced when Keeton received GAO's initial opinion.<sup>927</sup>

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<sup>911</sup> *Id.*

<sup>912</sup> *Id.*

<sup>913</sup> *Id.*

<sup>914</sup> *Id.*

<sup>915</sup> *Id.*

<sup>916</sup> *Id.*

<sup>917</sup> *Id.*

<sup>918</sup> *Id.* at 3.

<sup>919</sup> *Id.* at 4.

<sup>920</sup> *Id.* at 3.

<sup>921</sup> *Id.* at 5.

<sup>922</sup> *Id.*

<sup>923</sup> Comp. Gen. B-293348.3, Oct. 25, 2004, 2004 CPD ¶ 213.

<sup>924</sup> *Id.* at 3.

<sup>925</sup> *Id.* at 2.

<sup>926</sup> *Id.*

<sup>927</sup> *Id.*

The GAO concurred with the agency.<sup>928</sup> In its opinion, the GAO noted that the bid protest regulations require that all claims for costs be submitted within sixty days after receiving the GAO's recommendation.<sup>929</sup> As the GAO explained, this rule exists to avoid "the piecemeal presentation of claims and to prevent unwarranted delays in resolving such claims."<sup>930</sup> In addition, the GAO clarified that there is no recognized exception to the sixty-day filing requirement because a request for reconsideration was filed.<sup>931</sup>

*Failure to Take Prompt Corrective Action Results in Protester Being Awarded Costs*

The GAO found the DEA responsible for protester's costs after the DEA failed to take prompt corrective action. In *Envirosolve, LLC*,<sup>932</sup> the DEA attempted to buy hazardous waste environmental cleanup services through BPAs.<sup>933</sup>

On 2 August 2004, Envirosolve protested the DEA's procurement action, arguing that the DEA did not evaluate Envirosolve's proposal or correctly establish a competitive range.<sup>934</sup> In response, the DEA promised to cancel the RFP and take corrective action.<sup>935</sup> The GAO then dismissed this protest as academic.<sup>936</sup>

On 12 October 2004, Envirosolve filed a second protest alleging that the DEA improperly used BPAs as a method for procuring the hazardous waste cleanup services.<sup>937</sup> Specifically, Envirosolve claimed that the DEA's use of BPAs "failed to comply with applicable competition requirements and that the agency intentionally and improperly excluded Envirosolve from competition."<sup>938</sup> On 5 January 2005, the DEA again promised corrective action stating:

[the DEA will] discontinue issuing purchase orders without adhering to applicable competition requirements . . . and will [establish] an acquisition strategy that will achieve the applicable competition requirements, perhaps through the competitive award of BPAs, or the establishment of multiple BPAs with qualified, responsible contractors and mini-competitions among BPA holders. The agency need to issue orders non-competitively will be done in accordance with the requirements of FAR § 13.106-1(b) and will not exceed a two-month window.<sup>939</sup>

The DEA also promised not to exclude Envirosolve from competing for the BPAs and purchase orders.<sup>940</sup> Due to this promised corrective action, on 6 January 2005, the GAO again dismissed Envirosolve's protest as academic.<sup>941</sup>

On 8 March 2005, Envirosolve filed its third protest and asked the GAO to reconsider its earlier dismissal.<sup>942</sup> Envirosolve claimed the DEA did not take the promised corrective action, was not competitively awarding BPAs and was continuing to issue purchase orders without the promised "mini-competitions."<sup>943</sup>

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<sup>928</sup> *Id.*

<sup>929</sup> *Id.*

<sup>930</sup> *Id.*

<sup>931</sup> *Id.* at 3. In an unrelated case, the GAO held that a delaying the receipt of publicly-releasable version of a document did not toll the sixty-day time period for filing a claim for costs. *SWR, Inc.*, Comp. Gen. B-294266.4, Apr. 22, 2005, 2005 CPD ¶ 94.

<sup>932</sup> Comp. Gen. B-294974.4, June 8, 2005, 2005 CPD ¶ 106.

<sup>933</sup> *Id.* at 1.

<sup>934</sup> *Id.* at 3.

<sup>935</sup> *Id.* at 2.

<sup>936</sup> *Id.* at 3.

<sup>937</sup> *Id.* at 4.

<sup>938</sup> *Id.*

<sup>939</sup> *Id.* at 5.

<sup>940</sup> *Id.*

<sup>941</sup> *Id.*

<sup>942</sup> *Id.*

<sup>943</sup> *Id.*

The GAO stressed that promising corrective action and not implementing the steps quickly "circumvents the goal of the bid protest system of effecting the economic and expeditious resolution of bid protests."<sup>944</sup> The opinion noted how long the agency promised corrective action, and acknowledged that the DEA's actions forced Envirosolve to file another protest and incur additional costs.<sup>945</sup> The GAO then awarded Envirosolve the reasonable costs of filing and pursuing its protest because the agency was defeating the goal of resolving protests economically and expeditiously.<sup>946</sup>

#### *Clarifying When Concession Contracts Are Within GAO's Bid Protest Jurisdiction*

When juxtaposing two concessionaire cases that the GAO decided this year, one gets a clear picture of when a concession contract falls under GAO's bid protest jurisdiction. In *White Sands, Inc.*,<sup>947</sup> the GAO issued a terse opinion dismissing the protest of a Department of the Interior's award of a concessionaire contract to a gift shop and snack bar.<sup>948</sup> The GAO determined that the protest did not involve a procurement for property or services, and therefore fell outside of the GAO's bid protest jurisdiction.<sup>949</sup> In its opinion, the GAO noted that in order for a concessionaire contract to fall within the meaning of the CICA, the goods or services must be more than a *de minimus* value to the government.<sup>950</sup> Here, the only services the concessionaire would be required to perform in connection with its snack and gift shop were "maintenance, repairs, housekeeping, grounds keeping, and weed and pest control *for the concessionaire itself.*"<sup>951</sup>

Realizing that the only services that a concessionaire is required to perform are maintaining its business operating area and that these upkeep services would not be needed if the concessionaire were not there, the GAO determined these services were of *de minimus* value to the government. Accordingly, the GAO dismissed the protest because it fell outside the meaning of CICA, and therefore outside the GAO's bid protest jurisdiction.<sup>952</sup>

In *Great South Bay Marina, Inc.*,<sup>953</sup> the GAO found a concessionaire contract to be more than a *de minimus* value to the government and concluded it had jurisdiction over the concessionaire contract protest. As part of this concessionaire contract, the concessionaire had to "invest not less than \$1,259,000 in building rehabilitation and improvements [at the Fire Island National Seashore] over the first [five] years of the contract."<sup>954</sup> Considering the value, nature, and time-frame of the required work, the GAO concluded that the awardee would be providing services that were more than a *de minimus* value to the government.<sup>955</sup> Because of this, the protest fell within the meaning of CICA and within GAO's bid protest jurisdiction.<sup>956</sup>

Great South Marina also provides a practice tip: an agency should always file an agency report whenever a protest is filed. Here, the Department of the Interior argued that the protest was not within the GAO bid protest jurisdiction, and refused to submit an agency report.<sup>957</sup> The GAO disagreed and decided the protest solely based on the documentation submitted by the protester.<sup>958</sup> Fortunately for the agency, the GAO denied the protest because the protester failed to meet the minimal burden of proof to demonstrate why its proposal represents the best value to the government.<sup>959</sup>

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<sup>944</sup> *Id.* at 7.

<sup>945</sup> *Id.*

<sup>946</sup> *Id.* at 9.

<sup>947</sup> Comp. Gen. B-295932, Mar. 18, 2005, 2005 CPD ¶ 62.

<sup>948</sup> *Id.* at 1.

<sup>949</sup> *Id.*

<sup>950</sup> *Id.* at 2.

<sup>951</sup> *Id.* Emphasis added.

<sup>952</sup> *Id.*

<sup>953</sup> Comp. Gen. B-296335, July 13, 2005, 2005 CPD ¶ 135.

<sup>954</sup> *Id.* at 4.

<sup>955</sup> *Id.* at 3.

<sup>956</sup> *Id.* at 4.

<sup>957</sup> *Id.*

<sup>958</sup> *Id.*

<sup>959</sup> *Id.* at 6.

2005: Bid Protests Filing with the GAO Decreases Slightly

Fiscal year 2005 was a busy year for bid protest filers. The following chart illustrates this point and the trends in the GAO's Bid Protest section during seven years.<sup>960</sup>

**Bid Protest Statistics for Fiscal Year 2005**

	FY 2005	FY 2004	FY 2003	FY 2002	FY 2001	FY 2000	FY 1999
Cases Filed	1,356 (down 9%)	1,485 (up 10%)	1,352 (up 12%)	1,204 (up 5%)	1,146 (down 6%)	1,220 (down 13%)	1,399 (down 11%)
Cases Closed	1,341	1,405	1,244	1,133	1,098	1,275	1,446
Merit (Sustain + Deny) Decisions	306	365 (80 days)	290 (79 days)	256 (79 days)	311 (79 days)	306 (86 days)	347 (88 days)
Number of Sustains	71	75	50	41	66	63	74
Sustain Rate	23%	21%	17%	16%	21%	21%	21%
ADR (cases used)	103	123	120	145	150	144	88
ADR Success Rate	91%	91%	92%	84%	84%	81%	92%
Hearings	TBD	9% (56 cases)	13% (74 cases)	5% (23 cases)	12% (63 cases)	9% (54 cases)	9% (53 cases)

Major Steven R. Patoir

<sup>960</sup> Email from Mr. Louis A. Chiarella, Government Accountability Office, Bid Protest Section, to Major Steven R. Patoir, Professor, The Judge Advocate General's School, U.S. Army (28 Oct. 2005) (on file with author).