

FOREWORD

The tragic events of 11 September 2001 overshadowed all other happenings during the past year. At one level, contract and fiscal law developments seem inconsequential in the face of the enormity of the terrorist attack and its aftermath. But surely those who died would want us to continue in their footsteps and, in our own small way, contribute to the new and continuing missions of the federal government. Our thoughts and prayers are with the victims and their families. Those thoughts and prayers go out as well to the men and women, from all agencies, on the front lines of Operations Noble Eagle and Enduring Freedom.

These recent events underscore the importance of contracting to the accomplishment of our missions. We must always remember that everything we do supports the soldier, sailor, airman, marine, and coast guardsman serving on the front line, whether that be deep in Afghanistan or in New York Harbor. Those who go into harm's way are the customers, and we should never forget that.

The past year in government contracting was relatively quiet, especially on the legislative front. While Congress imposed some new rules regarding service contracts, especially with respect to task orders under multiple award contracts, there were no major legislative changes this year.

Issues continue to develop, however, that could foreshadow some interesting and busy years to come. Outsourcing has become one of the centerpieces of the new Administration's efforts to streamline government. Issues relating to the conduct of outsourcing and, in particular, the standing of government employees and their unions to challenge outsourcing decisions in the federal courts and at the General Accounting Office (GAO), continue to garner congressional attention. We continue to believe that the inherent tension between the quest for contract efficiency (leading to contract bundling) and the need to provide opportunities for small business will result in legislation in the near future. Electronic commerce, implementation of the Section 508 requirements for access to information technology, management of service contracts and of the gov-

ernment's acquisition workforce all promise to keep us busy in the years ahead. Of course, the ongoing war against terrorism will present a myriad of challenges for acquisition and fiscal law attorneys throughout government and industry.

As usual, the courts, boards, and the GAO were busy issuing guidance touching on all aspects of our practice. In particular, it appears to us that the Court of Federal Claims (COFC) and the Court of Appeals for the Federal Circuit (CAFC) issued more procurement-related decisions this year than in years past. (Based solely on a feel, not on any empirical evidence!) In addition, there was a significant amount of rule-making activity covering the entire spectrum of contracting issues.

As always, this article is our¹ attempt to look back on the past year and pick the most important, most relevant, and (sometimes) the most entertaining, cases and developments of the past year. While we cannot possibly cover every decision or rule issued, we have attempted to address those with the most relevance to most practitioners. We hope that we have hit the mark and that you find this article both useful and enjoyable.

CONTRACT FORMATION

Authority

Too Bad, So Sad!

A basic rule of government contracting is that only an agent with actual authority may bind the government to a contract.² During this past year, three plaintiffs learned the hard way that apparent authority is a non-existent concept in public contracting.

In *Doe v. United States*,³ the Drug Enforcement Agency (DEA) agreed to pay a confidential informant for his assistance in three criminal investigations.⁴ The informant claimed that the DEA owed him more than \$600,000 under this agreement.⁵ Although the DEA had signed two written agreements with the informant,⁶ and although a DEA agent had recommended an

1. The Contract and Fiscal Law Department would like to take this opportunity to thank our contributing authors from outside the Department: Colonel Jonathan Kosarin; Lieutenant Colonel Steven Tomanelli (U.S. Air Force); Ms. Margaret Patterson; and Major Timothy Tuckey. Their willingness to take time out of their hectic schedules to help the Department is appreciated more than they can know. Thanks to their efforts, this article is more comprehensive, timely, and relevant than we could make it on our own. Thanks for the help!

2. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). See also Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 1 [hereinafter *2000 Year in Review*]. Moreover, potential contractors bear the responsibility of verifying the actual authority of the government agents with whom they negotiate. *Id.*

3. 48 Fed. Cl. 495 (2000).

4. *Id.* at 497.

5. *Id.* The informant's efforts led to the DEA's seizure of seventy-six pounds of amphetamine, \$1.2 million in illicit cash, three vehicles valued at \$35,650, and 1534 pounds of marijuana. *Id.* at 499.

6. *Id.* at 498.

award for the informant of 12.5% of the total property seized, the DEA refused to pay him.⁷

The COFC granted summary judgment for the government, holding that the DEA agents did not have actual authority to bind the government to a contract.⁸ The court reasoned that the *DEA Agent's Manual* explicitly stated that agents may only recommend an informant for an award, and that the language of the written agreement itself made the granting of such awards purely discretionary.⁹ The court went on to find that the DEA agents also lacked implied actual authority to bind the government.¹⁰ The court concluded by finding that no one with actual authority had ratified the agents' agreement with the informant.¹¹

Another unfortunate DEA informant met a similar fate in *Toranzo-Claure v. United States*.¹² In *Toranzo*, the informant sought \$75,000 for assistance he provided the DEA and the Bureau of Alcohol, Tobacco, and Firearms (ATF). Although the informant had no written agreement with the government,¹³ the DEA and the ATF had already paid the informant \$71,890 for his undercover work in the United States and in Bolivia.¹⁴

Granting the government's motion for summary judgment, the court simply found that the government agents lacked actual authority to bind the government because its three witnesses stated so.¹⁵ Though the court found no implied contract

between the informant and the agencies, it never addressed the issue of implied actual authority.¹⁶

Though not an informant, a government contractor named Donald Brown also learned the hard way that only those with actual authority may bind the government to a contract. In *Starflight Boats v. United States*,¹⁷ the Air Force awarded Mr. Brown's company, Starflight Boats, a contract to make and install runway edge markers. Shortly after performance began, the government's contracting officer's representative (COR) asked Mr. Brown to conspire with him to defraud the Air Force and then split any profits resulting from the fraud. Mr. Brown refused and reported the COR to the Air Force's Deputy of Contracting. According to Mr. Brown, the Deputy of Contracting then asked Brown to cooperate in a criminal investigation of the COR, and promised to reimburse Brown for all costs incurred in his cooperation.¹⁸ After the government successfully prosecuted the COR, Mr. Brown filed a claim with the Air Force for \$224,390 in performance delay costs. The Air Force rejected the claim.¹⁹

In adjudicating the government's motion for summary judgment, the COFC first noted that no statute or regulation gave the Deputy of Contracting actual authority to bind the Air Force to this agreement.²⁰ The court briefly added that the Deputy of Contracting also lacked implied actual authority.²¹ Granting the summary judgment motion, the court emphasized that "even if plaintiff believed that [the Deputy of Contracting] had authority

7. *Id.*

8. *Id.* at 501-02.

9. *Id.* at 502, 505.

10. *Id.* at 502. Government agents may have implied actual authority to enter a contract if their questionable acts, orders, or commitments are an integral or inherent part of the agent's assigned duties. *H. Landau & Co.*, 886 F.2d 322, 324 (Fed. Cir. 1989); *Confidential Informant v. United States*, 46 Fed. Cl. 1, 7 (2000).

11. *Doe*, 48 Fed. Cl. at 504. Those within the government with actual contracting authority may ratify the unauthorized commitments of other government agents. *GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602-3* (June 1997) [hereinafter FAR]; *Henke v. United States*, 43 Fed. Cl. 15, 26 (1999).

12. 48 Fed. Cl. 581 (2001).

13. *Id.* at 583.

14. *Id.* at 582.

15. *Id.* at 583.

16. *Id.* at 584.

17. 48 Fed. Cl. 592, *appeal dismissed by* No. 01-5072, 2001 U.S. App. LEXIS 13224 (Fed. Cir. May 30, 2001).

18. *Id.* at 594.

19. *Id.* at 595.

20. *Id.* at 598.

21. *Id.* at 599. Though the court raised the issue of whether the Deputy of Contracting's agreement with Mr. Brown was an "integral part of his duties," the court never analyzed this issue. *See id.*

to bind the government in contract, plaintiff bore the burden of confirming through the government the exact reach of [the Deputy of Contracting's] authority."²²

The holdings of these three cases seem to indicate that crime does not pay, or, more precisely, helping the government fight crime does not pay. One may wonder whether it is good public policy to ask for assistance in criminal investigations, promise reimbursement for that assistance, and then deny such reimbursement after the successful investigation is complete. Last year,²³ we wrote about *Confidential Informant v. United States*,²⁴ in which the COFC refused to grant the government's summary judgment motion, holding that the Federal Bureau of Investigation (FBI) and Internal Revenue Service (IRS) agents may have possessed implied actual authority to bind the government to rewards promised to a confidential informant. Unfortunately for that confidential informant, after a fact-finding hearing, the court held that the informant could not prove that the government agents possessed implied actual authority.²⁵ The lesson learned for those who seek reward for helping agencies catch criminals is to always ascertain the actual authority of those in the government who promise that "the check is in the mail."

Spies Like Us

In a case that reads more like "a plot for a made-for-TV movie than a typical contract dispute,"²⁶ the CAFC denied recovery to a plaintiff who claimed that a clandestine Central Intelligence Agency (CIA) agent borrowed \$8 million from him. According to the complaint, a British solicitor had approached the plaintiff and stated that he worked for the CIA

and needed money to help fund covert projects in Europe.²⁷ For undisclosed reasons, the CIA could not directly fund these projects, code-named "Ultima" and "Bluebook."²⁸ As consideration for the \$8 million loan, the alleged CIA agent issued a promissory note to the plaintiff for \$35 million.²⁹ "Perhaps unsurprisingly, neither [the solicitor, his boss], nor the CIA paid the note when it became due."³⁰ Interestingly, the plaintiff won a \$35 million judgment in the British courts, but could not collect on it.³¹ The plaintiff then sued in the COFC, where the court eventually granted the government's motion for summary judgment based on the argument that the alleged CIA agent lacked actual authority to bind the government to this agreement.³²

On appeal, the CAFC agreed with the COFC that the plaintiff had not made even a prima facie showing of actual authority. Nonetheless, the court remanded the case, finding that the government's restrictions on plaintiff's discovery may have unreasonably denied the plaintiff an opportunity to establish his prima facie case.³³ The COFC therefore has the case again, though "the likelihood that plaintiffs can cobble together enough evidence to persuade the trial court that Savage (the alleged CIA agent) had actual authority to enter into this contract on behalf of the United States seems quite remote."³⁴

Competition

When Congress passed the Competition in Contracting Act (CICA)³⁵ in 1984, it presumed that competition yielded cost savings and promoted innovation.³⁶ A growing trend seems to value efficiency over competition.³⁷ Soon after Senate confirmation, Angela Styles, the Administrator of the Office of Pro-

22. *Id.*

23. *2000 Year in Review*, *supra* note 2, at 2.

24. 46 Fed. Cl. 1 (2000).

25. No. 98-796 T, 2000 U.S. Claims LEXIS 141 (July 25, 2000).

26. *Monarch Assurance v. United States*, 244 F.3d 1356, 1358 (Fed. Cir. 2001).

27. *Id.* The plaintiff lived on the Isle of Man. *Id.*

28. *Id.* One wonders whether the alleged CIA agent was really a solicitor, as no right-thinking legal professional would ever code-name an operation "Bluebook."

29. *Id.* The only guarantor on the promissory note was an individual whom the solicitor worked for. The note made no mention of the CIA or the United States government. *See id.*

30. *Id.*

31. *See id.*

32. *Id.* at 1361. Apparently, the COFC never addressed the issue of the intellectual capacity of a plaintiff who would agree to loan a putative CIA agent \$8 million.

33. *Id.* at 1362.

34. *Id.* at 1364-65.

35. The Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in various sections of 10 U.S.C., 31 U.S.C. and 41 U.S.C.).

curement Policy (OFPP), discussed this tension when asked about the challenges she anticipated as the OFPP Administrator:

The challenge for this administration and OFPP will be to balance the obvious benefits of increased efficiencies with the maintenance of fundamental concepts of competition, due process, and transparency While [the 1990's procurement] reforms brought much needed efficiency, I am concerned that OFPP has not examined whether the "efficient procurement model" may have compromised competition, fairness, integrity and transparency.³⁸

During the past year, the battle between competition and efficiency has been played out in various contexts.

Competition in Postal Purchasing: A Far Cry from the FAR

The CICA requires "with limited exceptions" that contracting officers "promote and provide for full and open competition in . . . awarding Government contracts."³⁹ Awarding a sole-source contract absent one of seven statutory exceptions is a violation of the CICA.⁴⁰ The CICA, however, does not apply to the U.S. Postal Service (USPS),⁴¹ and the USPS appears to have no specific mandate to compete its transportation contracts. In *Emery Worldwide Airlines, Inc. v. United States*,⁴² the CAFC subjected the USPS's \$6.36 billion sole-source award of a transportation contract to an arbitrary and capricious standard of review.⁴³ Finding that the contract between the USPS and Federal Express (FedEx) "was rational, and statutory and procedural violations, if any, did not prejudice [the plaintiff], Emery," the CAFC affirmed the Court of Federal Claims' (COFC) decision⁴⁴ to dismiss Emery's complaint and order judgment for the United States.⁴⁵

The USPS procurement passed CAFC's three-pronged rationality determination. The court determined that the USPS's "decision to contract out its priority, express, and first-class mail on a sole-source basis" was rational,⁴⁶ the agency's

36. See, e.g., *ATA Defense Indus. v. United States*, 38 Fed. Cl. 489, 499 (1997), discussing the CICA's legislative history:

The CICA was enacted in part because of congressional concern that federal agencies were paying too high a price in their procurement of products and services. Congress was concerned that these agencies too often resorted to sole source procurements and did not take advantage of the lower prices that may result when a procurement is subject to full and open competition.

Id. See generally H.R. CONF. REP. NO. 98-861, at 1421 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, 2109 (legislative history of the Competition in Contracting Act).

37. This trend is evidenced, for example, in the increased use of simplified acquisitions (including micro-purchases using the government IMPAC card), multiple-award task and delivery order contracts, and multiple award schedules. See generally Steven Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001). Discussing the tension between efficiency and other goals of the procurement system, Professor Schooner asserts:

Surely, the Government saves agency resources (for example, time, energy, and money) when fewer competitors vie for specific contracts. Yet, in a less crowded market, it is more difficult to ensure that competitive pressure guarantees that the government receives the best value, in terms of price, quality, and contractual terms and conditions.

Id. at 710.

38. Gregory A. Smith, *Procurement Lawyer Talks with Angela B. Styles, Administrator, Office of Federal Procurement Policy, Office of Management and Budget*, 36 PROCUREMENT LAW. 4 at 1 (Summer 2001).

39. FAR, *supra* note 11, § 6.101(a) (referencing the CICA's competition requirements at 10 U.S.C. § 2304 and 41 U.S.C. § 253). "Full and open competition" means that "all responsible sources are permitted to compete." *Id.* § 6.003. Full and open competitive procedures include sealed bidding, competitive proposals, and two-step sealed bidding. *Id.* § 6.102.

40. See 41 U.S.C. § 253(c) (2000); 10 U.S.C. § 2304(c) (2000).

41. The USPS is exempt from all federal procurement laws not specifically enumerated in 39 U.S.C. § 410(a). *United States v. Elec. Data Sys. Fed. Corp.*, 857 F.2d 1444, 1446 (Fed. Cir. 1988). Because the CICA is not specifically enumerated in 39 U.S.C. § 410(a), the CICA does not apply to the USPS and therefore the USPS is not subject to the CICA's competition requirements. *Emery Worldwide Airlines, Inc. v. United States*, No. 01-5075, 2001 U.S. App. LEXIS 19420, at *20 n.7 (Fed. Cir. Aug. 31, 2001).

42. 2001 U.S. App. LEXIS 19420.

43. *Id.* at *36.

44. *Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211 (2001).

45. *Emery Worldwide*, 2001 U.S. App. LEXIS 19420, at *47-48.

requirements had a rational basis,⁴⁷ and the “decision to select FedEx as the sole-source awardee was rational.”⁴⁸

The CAFC also examined the procurement against the applicable statutes in title 39 of the U.S. Code (U.S.C.) and the *Postal Services Purchasing Manual*. Emery did not cite any specific statutory mandate for “competition.” Instead, it alleged that the sole-source award violated section 101(f) of title 39, which provides: “In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service.”⁴⁹ The court rejected Emery’s claims that this provision prohibited awarding a transportation contract to a single provider or, alternatively, that the provision required competition before awarding the contract. The CAFC held:

Fair and equitable distribution is not tantamount to “equal” distribution or distribution to multiple providers. Fairness and equity can be met by an award to a single entity. Further, fair and equitable distribution does not necessitate a competitive bidding procurement process; this statutory provision can be met by a non-competitive, sole-source contract that is based on rational requirements⁵⁰

The court’s analysis highlights the difference in competition requirements between the USPS’s statutory and regulatory acquisition scheme and the requirements of the CICA. Because Congress “endeavored to provide the USPS freedom to act in a business-like manner,”⁵¹ the Postal Service, like a commercial business, need not formally compete its transportation contracts. Rather, “in selecting modes of transportation, [USPS] procurement contract decisions” need only be “fair and equitable.”⁵²

*Alphabet Soup: District Court OKs DOL’s Software Buy from GTSI Using the NIH’s ECSP IDIQ GWAC Proving FASA Trumps CICA*⁵³

In *Corel Corp. v. United States*,⁵⁴ the District Court for the District of Columbia looked at the relationship between the CICA’s competition requirements and certain streamlined procedures in the Federal Acquisition Streamlining Act of 1994 (FASA).⁵⁵ In *Corel*, after conducting assessments and evaluations,⁵⁶ the Department of Labor (DOL) decided to standardize its software applications by purchasing Microsoft Office software produced by Microsoft Corp.⁵⁷ The DOL did not use full and open competitive procedures, but instead obtained quotes from several authorized Microsoft resellers.⁵⁸ Based on these quotes, the DOL intended to purchase the software from Government Technologies Services, Inc. (GTSI), a multiple award/delivery order contractor authorized to sell brand name computer products to federal government agencies through the “Electronic Computer Store Program,”⁵⁹ an indefinite delivery/

46. *Id.* at *40.

47. *Id.* at *41-42.

48. *Id.* at *42-43.

49. *Id.* at *44 (citing 39 U.S.C. § 101(f) (2000)).

50. *Id.* at *46-47.

51. *Id.* at *46 (citing H.R. Rep. No. 91-1104, at 5 (1970)).

52. *Id.* at *46.

53. Translation: District court okays Department of Labor’s software buy from Government Technologies Services, Inc., using the National Institute of Health’s Electronic Computer Store Program, indefinite delivery, indefinite quantity government-wide agency contract proving the Federal Acquisition Streamlining Act trumps the Competition in Contracting Act.

54. *Corel Corp. v. United States*, No. 99-3348 (D.D.C., Mem. Op. & Order filed Sept. 17, 2001), at <http://www.dcd.uscourts.gov/99-3348.pdf>.

55. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3409 (codified in various sections of 10 U.S.C. and 41 U.S.C.).

56. Around April 1998, the DOL created a Management Review Council and retained Abacus Technology Corp. (Abacus) to assess the DOL’s “existing information technology infrastructure” and to recommend improvements. *Corel Corp.*, No. 99-3348, at 2. Over the next year, Abacus collected and analyzed information and issued several reports, leading to the selection of Microsoft Office. *Id.* at 2-5.

57. *Id.* at 5.

58. *Id.* at 6.

59. Now in its second iteration, the Electronic Computer Store II (ECS II) can be accessed at <http://nitaac.nih.gov> (ECS II icon).

indefinite quantity (IDIQ) government-wide agency contract (GWAC).⁶⁰ In July 1999, the DOL placed a \$350,000 delivery order with GTSI.⁶¹ In response, Corel Corp. (Corel) protested the sole-source delivery order to the GAO.⁶² The GAO denied the protest.⁶³

At the district court, Corel expanded the scope of its complaint and challenged not only the delivery order itself, but also the “overarching administrative decision to standardize to Microsoft Office in the first place.”⁶⁴ The district court observed that the preliminary decision to standardize using Microsoft Office was not a “procurement” subject to the CICA’s competition requirements.⁶⁵ Further, even if the CICA applied to this decision, “CICA specifies that its open competition requirements do not apply ‘in the case of procurement procedures expressly authorized by statute.’”⁶⁶ The FASA is one such statute that falls under this “savings clause.”⁶⁷ The FASA explicitly exempts “orders placed against task order and delivery order contracts entered into pursuant to subpart 16.5” from the CICA’s full and open competition requirement.⁶⁸ Thus, the

court concluded that the “DOL was under no duty to hold a full and open competition.”⁶⁹

GAO Sustains Two Protests of Sole-Source Procurements

In *Signals & Systems, Inc.*,⁷⁰ the Army justified a sole-source procurement of engine electrical start systems (EESS) based on an unusual and compelling urgency. The protestor, Signals and Systems, Inc. (SSI), mounted a three-pronged challenge to the Army’s use of this exception to CICA’s full and open competition requirement. First, SSI asserted that the Army did not have an unusual and compelling urgency. Second, even if the Army had such an urgency, it purchased more units than necessary to meet its urgent requirements. Finally, any urgency resulted from the Army’s lack of advanced procurement planning. SSI prevailed on the latter two allegations.⁷¹

60. *Corel Corp.*, No. 99-3348, at 6-7.

61. *Id.* at 7. The agreement between the DOL and GTSI gave the DOL the right to place \$2.8 million of delivery orders with GTSI over three years. *Id.* The “entire standardization process is expected to cost DOL \$22.4 million over three years.” *Id.*

62. *Id.* at 7. See *Corel Corp.*, Comp. Gen. B-283862, Nov. 19, 1999, 99-2 CPD ¶ 90.

63. The GAO refused to consider an allegation that the DOL improperly purchased computer software on a sole-source basis. Because the contractual vehicle was a delivery order under an ID/IQ contract, the GAO found itself “without authority to consider protests connected to the issuance of delivery orders, regardless of the issuing agency’s underlying determinations or conduct.” *Corel Corp.*, 99-2 CPD ¶ 90 at 2.

64. *Corel Corp.*, No. 99-3348, at 17. Corel sought declaratory and injunctive relief to enjoin the DOL “from implementing its decision to standardize its software applications exclusively to software manufactured by Microsoft Corporation.” *Id.* at 1.

65. *Id.* at 21.

66. *Id.* at 22 (citing 41 U.S.C. § 253(a)(1) (2000)).

67. *Id.* at 12. In a different context, the Court of Appeals for the Fourth Circuit also discussed the CICA’s exception for “procurement procedures otherwise expressly authorized by statute.” *NISH v. Cohen*, 247 F.3d 197, 204 (4th Cir. 2001) (citing 10 U.S.C. § 2302(3)(A)). In *NISH v. Cohen*, the Fourth Circuit held that the Randolph-Sheppard Act, 20 U.S.C. § 107 (2000), is such a “procurement procedure.” 247 F. 3d at 204. This article discusses this case in more detail, *infra* notes 1562-68 and accompanying text.

68. *Corel Corp.*, No. 99-3348, at 24.

69. *Id.* at 30. The court also rejected Corel’s claim under the Administrative Procedures Act (APA), 15 U.S.C. §§500-596 (2000). The court noted that the FASA “contains a non-reviewability clause which bars bid protests connected to orders placed under task or delivery order contracts except for a protest on the ground that the order increases the scope, period or maximum value of the contract.” *Corel Corp.*, No. 99-3348, at 13. Therefore, “FASA’s bar against bid protests would appear to preclude” APA review. *Id.* at 32. In any case, the DOL’s decision to standardize using Microsoft Office was not arbitrary or capricious. *Id.* at 33.

70. B-288107, 2001 U.S. Comp. Gen. LEXIS 149 (Sept. 21, 2001).

71. *Id.* at *2.

The Army's High Mobility Multi-Wheeled Vehicle (HMMWV) contains a "remote control switch that heats the engine's glow plugs . . . before the driver can start the engine."⁷² In 1997, the Army decided to replace the initial remote control switch system with the EESS⁷³ and began designing the EESS' specifications.⁷⁴ Before the EESS could be fielded, however, the Army replaced the initial system with an interim system, designated "type-10."⁷⁵ For safety purposes, the "type-10" was soon replaced with the "version 14-0A."⁷⁶ Meanwhile, the specifications for the EESS were finally approved in December 2000.⁷⁷

In March 2001, the Army issued a safety message requiring the replacement of all remaining type-10 systems.⁷⁸ The message required "deadlining"⁷⁹ all vehicles containing the type-10 system sixty days after the date of the message. At the time the Army issued the safety message (and up until the time of the protest) the Army did not know how many HMMWVs contained type-10 systems.⁸⁰

As a result of the safety message requiring deadlining, the Army awarded KDS Controls, Inc. (KDS), a sole-source contract for EESSs.⁸¹ The Army argued that the safety message's requirement to replace all type-10 systems or deadline

HMMWVs within sixty days caused the "unusual and compelling urgency."⁸²

The GAO addressed SSI's three allegations. First, the GAO held that "military mission readiness and personal safety are important considerations" in justifying an unusual and compelling urgency exception to full and open competition.⁸³ According to the GAO, it "is beyond cavil that an agency need not risk injury to personnel or property in order to conduct a competitive acquisition."⁸⁴ Therefore, the safety message's requirements "resulted in a tangible urgency requirement."⁸⁵ The Army, however, did not fare as well with SSI's final two allegations.

The GAO held that the "urgency justification cannot support the procurement of more than the minimum quantity needed to satisfy the immediate urgent requirement."⁸⁶ Because the Army did not know how many type-10s needed to be replaced, the Army also could not know what "minimum quantity" of EESSs it needed. Therefore, the GAO sustained SSI's protest that the Army purchased more units than were necessary.⁸⁷ As a remedy, the GAO recommended that the Army "promptly undertake a review to determine the number of EESS units needed to satisfy its immediate urgent requirement . . . and not acquire more than that number."⁸⁸

72. *Id.* at *3. From the beginning of the HMMWV's fielding in the 1980s, the Army encountered problems with the initial remote control switch system. *Id.* at *4.

73. *Id.* at *4.

74. *Id.* at *8. The Army, along with its HMMWV prime contractor, AM General Corp. (AM General), began designing the EESS. *Id.* at *9.

75. *Id.* at *4-5.

76. *Id.* at *6. In April 2000, the Army acquired 22,360 EESS units through a sole-source procurement from KDS Control, Inc. This procurement was also premised on an unusual and compelling urgency, but was not challenged. *Id.* at *10. The Army fielded about 3000 of these EESS units. *Id.* at *26 n.17.

77. *Id.* at *10. The Army and AM General first developed design specifications in 1998. *Id.* at *8.

78. *Id.* at *11-12. Also in March 2001, the Army issued a request for proposals for the EESS. *Id.* at *10.

79. A "deadlined" vehicle cannot be used. *Id.* at *12.

80. *Id.* at *12-13. Some type-10s may have been replaced by the version 14A, but not returned to the U.S. Army Tank Automotive and Armaments Command. Some type-10s may have been replaced by the first procurement of EESS's and some type-10's may have been taken out and replaced by the older protective control box systems. The "Army has no way of knowing if a type-10 unit was replaced and if so, with what it was replaced." *Id.* at *25.

81. *Id.* at *14. The Army initially ordered 30,137 EESSs. As a result of the protest, the Army downsized its requirement and, at the GAO hearing, announced that it had decided to cap the procurement at 13,941, "the number of suspected [type-10] units in the field. *Id.* at *16-17.

82. *Id.* at *16.

83. *Id.* at *21-22.

84. *Id.* at *22.

85. *Id.* at *23.

86. *Id.* at *19.

87. *Id.* at *27.

88. *Id.* at *33.

Finally, the GAO agreed that the Army “failed to engage in reasonable advanced procurement planning.”⁸⁹ The Army, according to the GAO, “lacked any sense of urgency to finalize a performance specification for the EESS that would allow the agency to conduct a competitive procurement.”⁹⁰ Finding “substantial similarity between” the draft performance specifications and the final approved specification, the GAO concluded that “the Army failed to timely and diligently prepare the performance specification and that this resulted in the noncompetitive procurement of the EESS units.”⁹¹ In sum, the GAO found that the Army’s lack of planning “created its urgent requirements.”⁹²

The GAO sustained another protest of a sole-source award in *Lockheed Martin Systems Integration—Owego*.⁹³ The protestor, Lockheed Martin Systems (Lockheed), designed and maintained an avionics support system, consisting of hardware and software, for two helicopter models used by the 160th Special Operations Aviation Regiment, Airborne (SOAR). Rockwell Collins, Inc. (Rockwell), designed and maintained a different system for three other models operated by the SOAR.⁹⁴ The SOAR aircraft are variants of the Army’s Chinook and Blackhawk helicopters.⁹⁵ The Common Avionics Architecture System (CAAS) initiative was designed to standardize avionics software for all SOAR-operated helicopters. In addition, there was “interest” in using the SOAR requirement to field “a common cockpit architecture” for all Army Chinook and Blackhawk helicopters.⁹⁶ Thus, the CAAS program came to represent two different scopes of work to differ-

ent government contract personnel—one to standardize SOAR models and another to standardize all Army Chinook and Blackhawk models.

After study, the agency decided that a full and open competition for the CAAS would not be reasonable, “because it would result in substantial duplication of costs.”⁹⁷ The agency approached Rockwell and Lockheed and conducted several meetings with each “to discover the approximate cost and schedule involved in having either firm meet the CAAS requirement.”⁹⁸ After the initial meetings, Lockheed developed an approach, designated the “first approach,”⁹⁹ for standardizing the systems of SOAR-operated helicopters by replacing both hardware and software.¹⁰⁰ At a later meeting, however, the agency informed Lockheed that it wanted a software-only solution that could be extended to other Army models.¹⁰¹ As a result, Lockheed developed a more costly and complex “second approach.”¹⁰² The agency subsequently asked Lockheed for cost and schedule information for its second approach.¹⁰³

Relying on the costly second approach figures, the agency concluded that Lockheed “was not a viable source for the requirement.”¹⁰⁴ The agency executed a “Justification and Approval” (J&A) for “a sole-source contract to Rockwell on grounds Rockwell was the only source capable of meeting the agency’s requirements.”¹⁰⁵

The GAO found that while including the other Army models may have been “desirable,” it was “not necessary to meet

89. *Id.* at *27-28.

90. *Id.* at *31. “It took the Army about two years to prepare the performance specification. A comparison of the draft performance specifications with the final approved specification shows substantial similarity between the documents.” *Id.*

91. *Id.* at *32.

92. *Id.* at *33.

93. B-287190.2, B-287190.3, 2001 U.S. Comp. Gen. LEXIS 103 (May 25, 2001).

94. *Id.* at *3-4.

95. *Id.* at *2.

96. *Id.* at *5.

97. *Id.* at *8.

98. *Id.*

99. In the published, redacted version of the GAO decision, “first approach” and “second approach” were used in brackets to identify Lockheed’s two proprietary approaches. *Id.* at *10.

100. *Id.*

101. *Id.* at *12.

102. *Id.* at *12-13.

103. *Id.* at *13.

104. *Id.*

SOAR's requirements."¹⁰⁶ Therefore, the agency misled Lockheed concerning its actual requirements.¹⁰⁷ The GAO held that when an agency relies on the CICA exception that only one source can satisfy the agency's needs, the agency must give other sources "notice of its intentions, and an opportunity to respond to the agency's requirements."¹⁰⁸ The agency must "adequately apprise" prospective sources of its needs so that those sources have a "meaningful opportunity to demonstrate their ability" to satisfy the agency's needs.¹⁰⁹ The GAO concluded that the agency's "misleading guidance . . . clearly prejudiced Lockheed."¹¹⁰ Therefore, "the agency's sole-source determination was unreasonable."¹¹¹

AFARS Change

The recently revised Army Federal Acquisition Regulation Supplement (AFARS)¹¹² imposes a new requirement on the exercise of certain options. Part 5106.303-1(e) provides, "[P]rior to exercising options included in a previously approved J&A, these options must be individually rejustified and approved in writing at the same level as the original J&A."¹¹³ Current market research must justify exercise of the option. In addition, when an "unusual and compelling urgency" requires immediate exercise of a sole-source option, the contracting officer must submit the rejustification no later than fifteen days

after the government exercises the option.¹¹⁴ These requirements are not waivable.¹¹⁵

Competition: It Works

Government Accounting Office testimony¹¹⁶ concerning the Army's purchase of black berets suggests that competition does, or at least sometimes can, result in lower prices for the government.

On 17 October 2000, the Army's Chief of Staff announced that all Army soldiers would be issued a black beret for wear on 14 June 2001. To procure five million berets in under eight months, the Defense Logistics Agency (DLA) non-competitively increased the existing supplier's production from 10,000 to 100,000 berets per month and non-competitively awarded contracts to two foreign sources.¹¹⁷ The Army justified avoiding "full and open competition" based on an "unusual and compelling urgency."¹¹⁸ The Army asserted that it "will be seriously injured if this action is not approved. The Army Chief of Staff has approved a uniform change for the entire Army and this action is imperative in order for this Command to support the service by the introduction date."¹¹⁹ In December 2000, the Army competitively awarded contracts for a million berets to four more foreign sources. In February 2001, the Army exer-

105. *Id.* at *13-14.

106. *Id.* at *23.

107. *Id.* at *20.

108. *Id.* at *28 (citing the CICA exception at 10 U.S.C. § 2304(f) (2000)).

109. *Id.* at *28-29.

110. *Id.* at *30.

111. *Id.* The agency also sought to justify the sole-source award on schedule concerns. *Id.* at *30. The agency adopted an Army-wide schedule, more stringent than the SOAR required. By adopting the Army schedule, the agency may have been able to obtain some funding from an Army-wide appropriation, thus, saving SOAR funds. Lockheed may not have been able to meet the more stringent schedule. The GAO rejected the expedited schedule as a valid rationale for a sole-source procurement, because there would be "no actual savings to the government as a whole." *Id.* at *32. Further, the "CICA specifically proscribes using sole-source contracting methods where they are justified based on concerns related to the amount of funds available to the contracting agency or activity." *Id.* (citing 10 U.S.C. § 2304(f)(5)(A) (2000)). See also FAR, *supra* note 11, § 6.301(c).

112. U.S. DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. (Oct. 2001) [hereinafter AFARS], available at http://acqnet.saalt.army.mil/library/AFAR/AFARS_OCTOBER_2001.pdf.

113. *Id.* § 5106.303-1(e).

114. *Id.*

115. *Id.*

116. GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: PURCHASE OF ARMY BLACK BERETS, REPORT No. GAO-01-695T (statement of David E. Cooper, Director, Acquisition and Sourcing Management) (May 2, 2001) [hereinafter GAO REPORT 01-695T].

117. *Id.* at 2. The Buy American Act implications of the beret procurement are discussed *infra* notes 966-80 and accompanying text.

118. GAO REPORT 01-695T, *supra* note 116, at 2-3.

119. *Id.* at 3.

cised options with these four sources for an additional million berets.¹²⁰

The beret price from one of the initial non-competitive awardees was fourteen percent higher than the price from the existing supplier. As the GAO testimony observes, “when competition was introduced into the process at a later date, prices declined. Specifically, the price on the single largest noncompetitive contract was 27 percent higher than the average competitive price.”¹²¹ This result should not surprise us. Competition is designed to yield cost-savings.

Collaterally Competition

Many issues discussed throughout the *Year in Review* have “competition” implications. This sub-section directs the reader’s attention to several of those issues.

Publicizing contract actions is an important component of increasing competition.¹²² The explosion of electronic commerce is bringing about major changes in publicizing contracts, as the *Commerce Business Daily (CBD)* is being phased out in favor of FedBizOpps.gov. The new rules, as well as two recent cases concerning electronic contract publicizing, are discussed in our section on electronic commerce.¹²³

Although orders placed against multiple award schedules (MAS) are not subject to “full and open competition,” certain competition requirements apply. Those competition requirements are discussed in our section entitled Multiple Award Schedules.¹²⁴

Competition must be conducted on an equal basis. In *Systems Management, Inc.*,¹²⁵ the Air Force “overstated its minimum needs in requiring” a Federal Aviation Administration (FAA) certified weather observation system and then “either waived or relaxed this requirement” by awarding to a vendor whose system was not FAA-certified.¹²⁶ Our section on negotiated procurements discusses this CICA violation.¹²⁷

Contract Types

The Final Chapter in the Saga of AT&T v. United States?

In last year’s *Year in Review*,¹²⁸ we noted that the CAFC had held in *American Telephone & Telegraph Co.* that the improper use of a fixed-price contract for development work did not render the contract void and that the court further remanded the case to the COFC to determine what remedy was available to the contractor, American Telephone & Telegraph Co. (AT&T).¹²⁹ This past year, the COFC held that AT&T’s contract with the Navy was enforceable as written and it dismissed AT&T’s claim “for failure to state a claim on which relief can be granted.”¹³⁰

This time around, the COFC’s decision and rationale was essentially the same as that used in *Northrop Grumman Corp. v. United States*.¹³¹ In each of these cases, the court rejected the contractor’s claims that the Navy’s failure to comply with Defense Appropriations Act provisions which prohibited the DOD from entering into certain fixed-price contracts for major systems¹³² entitled the contractor to relief. The COFC, citing language used by the CAFC in *AT&T*, specifically held that reformation was inappropriate because the statute did not create an enforceable interest for the contractor.¹³³

120. *Id.*

121. *Id.*

122. See FAR, *supra* note 11, § 5.002.

123. See *infra* notes 381-439 and accompanying text (Electronic Commerce).

124. See *infra* notes 462-92 and accompanying text (Multiple Award Schedules).

125. Comp. Gen. B-287032.4, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85.

126. *Id.* at 8.

127. See *infra* notes 259-355 and accompanying text (Negotiated Acquisitions).

128. See *2000 Year in Review*, *supra* note 2, at 6.

129. *American Tel. & Tel. Co. v. United States*, 177 F.3d 1368 (Fed. Cir. 1999).

130. *American Tel. & Tel. Co. v. United States*, 48 Fed. Cl. 156, 161 (2000).

131. 47 Fed. Cl. 20 (2000) (analyzing the issue of reformation for the first time after the CAFC’s *AT&T* ruling).

132. See, e.g., Defense Appropriations Act of 1987, Pub. L. No. 100-202, § 8118, 101 Stat. 1329-84 (1986) (prohibiting such contracts in excess of \$10 million unless the Secretary makes a written determination that “program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties”).

Don't Distribute the Wealth When You Have a Requirements Contract

In *T&M Distributors, Inc.*,¹³⁴ the Armed Services Board of Contract Appeals (ASBCA) partially sustained the appeal of a contractor who operated an auto parts store on behalf of the government under a requirements contract at Fort Carson, Colorado. The contract required the contractor to supply and stock auto parts and required selected organizations at Fort Carson to purchase all their requirements through the contractor. One exception carved out of the contract was for parts that the contractor could not deliver within certain designated time frames set forth in the contract.¹³⁵ Almost immediately after performance commenced, the contractor noticed it was not receiving the expected volume of part requisitions. The contractor eventually learned that several International Merchant Purchase Authorization Card (IMPAC) holders within one of the larger organizations on post were buying auto parts from other vendors.¹³⁶

A few months after performance was completed, T&M Distributors, Inc. (T&M), filed a claim for nearly \$1.2 million, its profit margin on its estimated volume of diverted sales from its requirements contract.¹³⁷ The contractor derived this diverted sales amount by comparing the monthly sales volume under the prior contract with the actual sales volume it experienced and presuming that diverted sales accounted for the difference. The only evidence of diverted sales were IMPAC statements and receipts that the cardholders still had in their possession and which the contractor had obtained under a Freedom of Information Act (FOIA) request.¹³⁸ T&M had asked the board to extrapolate the proportion of sales “known” to have been diverted by this one organization over the remaining organizations required to use the contract.¹³⁹

The board rejected this assertion, however, because the government offered evidence that these other organizations experienced a change in the quantity and age of vehicles which accounted for a sizeable amount of the diminution in part requisitions.¹⁴⁰ The government also attempted to demonstrate that the “known” IMPAC purchases were only made when the contractor could not make timely delivery. The board rejected this argument for all except three IMPAC purchases because the government had no supporting evidence.¹⁴¹ The clear message from the board is that the government needs to document clearly that it is acting under an exception when making purchases outside a requirements contract.¹⁴²

Estimate, Who Needs an Estimate?

In one of the more controversial government contract decisions coming out of the CAFC this past year, the court overturned a General Services Administration Board of Contract Appeals (GSBCA) decision which held that an IDIQ contractor was entitled to lost business damages resulting from a defective government estimate.¹⁴³ In that case, the General Services Administration (GSA) awarded Travel Centre an IDIQ contract to provide travel management services for federal agencies in Maine, New Hampshire, and Vermont. Section A of the solicitation and the cover page of the solicitation advised bidders: “This is an indefinite-delivery, indefinite-quantity contract with guaranteed revenue minimum of \$100. This differs significantly from a requirements contract.” The solicitation also stated, however, that bidders “shall base their offers on [the previous fiscal year’s travel service] figures” which were roughly \$2.5 million for the year.¹⁴⁴ Before Travel Centre’s submission of its final bid to the GSA, the incumbent contractor notified the GSA that certain DOD organizations as well as the Maine Air National Guard—which accounted for over half the prior year’s service volume—would no longer use the GSA-contracted

133. *AT&T*, 48 Fed. Cl. at 156, 158-60 (holding that the DOD’s failure to comply with the statute merely amounted to “governmental non-compliance with internal review and reporting procedures”).

134. ASBCA No. 51279, 01-2 BCA ¶ 31,442.

135. *Id.* at 155,268.

136. *Id.* at 155,271-72.

137. *Id.* at 155,272.

138. *Id.* The furnished IMPAC statements showed that the government employees had made outside purchases in the amount of \$328,569. *Id.*

139. *Id.* at 155,280-81.

140. *Id.*

141. *Id.* at 155,276-77.

142. *Id.* The board indicated that this could have been done in this case by attaching a copy of the unfilled requisition to the IMPAC receipt/statement. *Id.*

143. *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001), *rev’g* *Travel Centre v. Gen. Servs. Admin.*, GSBCA No. 14057, 98-1 BCA ¶ 29,536.

144. *Id.* at 1317.

travel services. This information was never provided to any of the other bidders.¹⁴⁵

The contract required Travel Centre to operate an office in the geographic region of operation. Travel Centre initially opened an office in Portsmouth, New Hampshire, to comply with this requirement, but upon realizing a much smaller revenue stream than anticipated and learning that many agencies had elected to not take part in the contract, it elected to close this office and provide the services from another office it maintained in Danvers, Massachusetts. The government terminated the contract for default based in large part on Travel Centre's failure to keep an office open within the serviced geographic region.¹⁴⁶ Previously, Travel Centre had argued and the GSBCA had determined that "by inducing Travel Centre to base its proposal on quantities that GSA knew or should have known were overstated, GSA breached its duty to deal with Travel Centre fairly and in good faith."¹⁴⁷

The CAFC reversed, holding that "when an IDIQ contract . . . indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government's legal obligation under the contract."¹⁴⁸ This focus on the government's purchase obligation ignores the fact that the government has a general duty to deal in good faith¹⁴⁹ which still might have been breached by failing to advise bidders that certain agencies that had taken part in the contract in the past would now be opting out.

Contractor Gets 'Delta' Between Guaranteed Minimum and Ordered Amount in Breached IDIQ Contract

In *Delta Construction International, Inc.*,¹⁵⁰ the ASBCA has, for the first time, endorsed the view that a contractor may receive more than just anticipated profits when the government breaches an IDIQ contract.¹⁵¹ In *Delta*, the contractor was awarded an IDIQ contract to replace rotten lumber in various

Army buildings in Panama. The contract included a base period of nine months and two option periods of one year each. The contract stated that the estimated value for each of these periods was roughly \$157,000, \$110,000, and \$77,000, respectively. The guaranteed minimum was \$200,000, but it was not broken down by period of performance. The contract also required Delta Construction International, Inc. (Delta), to maintain a capability to perform a daily rate of work of \$3000.¹⁵²

The government exercised the first option. Subsequently, Delta submitted a claim seeking to recover for idle labor and anticipatory profits because the government had only ordered slightly more than \$38,000 in work during the base period. In response, the contracting officer rejected Delta's claim because he stated it was "premature to project that the Government will not order the guaranteed minimum" and that "should the Government fail to order the guaranteed minimum, Delta . . . is not entitled to an adjustment on the basis of actual costs; the entitlement is the difference between the actual dollar volume ordered and the guaranteed minimum of \$200,000."¹⁵³ Thereafter, the government elected not to exercise the second option and ultimately ended up ordering about \$86,000 worth of work during the base and first option period.¹⁵⁴

Delta consequently submitted a claim following completion of the contract for roughly \$114,000 citing the contracting officer's initial claim rejection. This time the contracting officer denied the claim, except for \$11,216 that he felt was reasonable for profit and general and administrative expenses on the unordered minimum quantity.¹⁵⁵ The ASBCA agreed that this measure of damages would be sufficient under IDIQ contracts in which there was no capability requirement, but it specifically held that the minimum guarantee served as the government's return consideration for the contractor's promise to maintain a minimum capability level. Consequently, Delta was entitled to the difference between the guaranteed minimum quantity and the actual orders placed.¹⁵⁶

145. *Id.* at 1318.

146. *Id.* The default termination was later converted to a convenience termination. *Id.*

147. *Travel Centre v. Gen. Servs. Admin.*, GSBCA No. 14057, 98-1 BCA ¶ 29,536 at 146,431.

148. *Travel Centre*, 236 F.3d 1316, 1319.

149. *See, e.g., Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283 (Fed. Cir. 2000).

150. ASBCA No. 52162, 01-1 BCA ¶ 31,195, *modified on other grounds*, 01-1 BCA ¶ 31,242.

151. The first and, until *Delta* was decided, only other decision supporting this contention was *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988).

152. *Delta Constr. Int'l, Inc.*, 01-1 BCA ¶ 31,195 at 154,025.

153. *Id.* at 154,025-26.

154. *Id.*

155. *Id.*

In Search of a Partial Requirements Contract

The Federal Acquisition Regulation (FAR) does not either expressly authorize or prohibit the use of a partial, or non-exclusive, requirements contract. Two recent decisions, however, support such a notion.¹⁵⁷ In *Ace-Federal Reporters, Inc. v. Barram*,¹⁵⁸ the CAFC overturned a GSBCA opinion¹⁵⁹ holding that the MAS contracts covering court transcription services were not enforceable. The board had found the MAS contracts to be unenforceable because they: (1) did not require the contractor to provide a set level of services (and hence were not a definite-quantity contract), (2) did not establish a guaranteed minimum amount of services (and hence were not an IDIQ contract), and (3) did not grant any individual contractor exclusive rights to provide the transcription services to the government (and hence were not a requirements contract).¹⁶⁰ The CAFC reversed, finding that in return for the “contractors’ promises regarding price, availability, delivery, and quantity,” the government promised “that it would purchase only from the contractors on the schedule.”¹⁶¹ Consequently, even though the contracts did not “fit neatly into a recognized category,” they were still valid and enforceable because there was both consideration and mutuality of obligation.¹⁶²

The second of these decisions involved a license rather than a contract.¹⁶³ In that appeal, the licensor was one of thirty-one firms that agreed to provide a value-added network (VAN)¹⁶⁴ at no cost to the government. The intent behind the DOD’s establishment of the VANs was to promote electronic commerce with the “tens of thousands of firms interested in conducting

business with the Government.”¹⁶⁵ The license agreement provided that in return for providing the VAN at no cost, the government would “require all contractors desiring to electronically conduct business to only do so [through] a participating, fully tested EDI [electronic digital imaging] VAN Provider.”¹⁶⁶ The license agreement permitted VAN providers to charge a transaction fee to the firms who used the VAN to conduct electronic commerce.¹⁶⁷

One of the providers, GAP Instrument Corp. (GAP), set up a VAN and complied with all the license terms, only to be stuck without much business when the DOD failed to require all small purchases to be conducted via the VAN.¹⁶⁸ Before the board, the government argued that GAP had not demonstrated damage because there was no requirement to use any specific VAN provider. The board rejected this contention, relying on the CAFC’s decision in *Ace-Federal Reporters*.¹⁶⁹

These two opinions clearly signify the government will not be able to evade its obligations merely because it enters into a non-exclusive requirements contract.

Proposed Restrictions on MACs/GWACs

On 23 August 2001, the FAR Council announced a proposed rule to strengthen the regulations dealing with task and delivery orders placed under either a Government-Wide Acquisition Contract (GWAC) or a Multi-agency Acquisition Contract (MAC).¹⁷⁰ One of the more critical proposed changes to the

156. *Id.* at 154,028.

157. *See Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000); *GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358.

158. 226 F.3d 1329 (2000).

159. *Ace-Federal Reporters, Inc. v. Gen. Servs. Admin.*, GSBCA Nos. 13298, 13507-13511, 99-1 BCA ¶ 30,139.

160. *Id.* at 149,107-10.

161. *Ace-Federal Reporters, Inc.*, 226 F.3d at 1332.

162. *Id.*

163. *See GAP Instrument Corp.*, ASBCA No. 51658, 01-1 BCA ¶ 31,358.

164. These VANs were gateways through which suppliers and vendors would electronically submit bids and offers on government requirements. *Id.* at 154,860.

165. *Id.*

166. *Id.* at 154,861.

167. *Id.* at 154,863-64.

168. *Id.* The board noted that the growth in the number of purchase card-holders as well as the ease with which such transactions could be completed and the growth of purchases from the internet created lower-cost alternatives to the VANs. *Id.*

169. *Id.* at 154,867 (citing *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000)). The board did not address quantum, merely entitlement. *Id.*

170. Federal Acquisition Regulation; Task-Order and Delivery-Order Contracts; Proposed Rule, 66 Fed. Reg. 44,518 (Aug. 23, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 8, 16, and 17).

Sealed Bidding

FAR is to amend FAR 16.505 to both place greater restrictions on the use of such ordering procedures and to require agencies to appoint a task-and-delivery-order ombudsman.¹⁷¹ Curiously absent from the proposed amendments is any limitation on the ability to award a MAC or a GWAC.¹⁷² Without further restrictions, we will continue to see agencies awarding MACs and GWACs for supplies or services in which they have no particular expertise and for which they have not been delegated any authority.¹⁷³

Restrictions on Service Contracting Within the Army

The AFARS, dated October 2001, now requires all service contracts to be performance based and fixed-price.¹⁷⁴ Previous editions of the AFARS contained no such restriction and it is unclear when this revision went into effect. The provision appears to implement FAR 37.000, which requires “the use of performance-based contracting to the maximum extent practicable.”¹⁷⁵ The AFARS provision permits Principal Assistants Responsible for Contracting and Heads of the Contracting Activities (HCAs) to waive these restrictions on a one-time basis for contracts worth up to \$1 million and \$10 million, respectively.¹⁷⁶

Although neither the GAO nor the COFC broke new ground in this field, these two fora issued a variety of sealed-bid decisions. Two areas received particular attention: responsiveness of bids that did not acknowledge solicitation amendments, and responsiveness of bids containing flawed bid bonds.

Material or Not Material, That Is the Question

Three GAO decisions addressed the responsiveness¹⁷⁷ of bids that did not acknowledge solicitation amendments.¹⁷⁸

In *Christolow Fire Protection Systems*,¹⁷⁹ the government amended an invitation for bid (IFB) for inspection, maintenance, and repair of fire protection systems. The initial IFB contained conflicting requirements regarding contractor response times to agency service calls. The bid schedule required a fourteen-day response to a routine call. Section C (description/specifications) of the IFB required a seven-day response. Amendment 0001 corrected this ambiguity and required a seven-day response to routine calls. In addition, the amendment increased the number of emergency and routine service calls from ten each to twenty-four each per year. The bid schedule’s estimated service call quantity, not the actual number of calls, determined payment under the contract.

171. *Id.* at 44,520.

172. The proposed rule would amend FAR section 2.101 to add definitions for both a MAC and a GWAC. *Id.* Both definitions imply that in order for an agency to award these sorts of contracts, it must have some sort of statutory authorization to do so. Nowhere in the FAR, however, does it expressly state that an agency is forbidden from awarding a GWAC or a MAC unless it has been delegated the authority to do so. See FAR, *supra* note 11.

173. See Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Great Concept, Poor Implementation*, 12 NASH & CIBINIC REP. 30 (1998) (noting that aside from the GSA’s granted authority to issue Multiple Award Schedule contracts, the only authority to issue GWACs and MACs stems from the Clinger-Cohen Act and must specifically be delegated to the agency by the Office of Management and Budget).

174. AFARS, *supra* note 112. The latest version of the Code of Federal Regulations, revised on 1 October 2001, does not contain this provision. See 48 C.F.R. pt. 5137 (LEXIS 2001).

175. Unlike the FAR, which recognizes that certain types of services—such as architect-engineering, research and development, and transportation—are unique and will require different guidance and policies, the AFARS policy applies to all service contracts. Compare FAR, *supra* note 11, § 37.000, with AFARS, *supra* note 112, pt. 5137.1.

176. AFARS, *supra* note 112, pt. 5137.1. The regulation also permits the Deputy Assistant Secretary of the Army for Procurement to grant such waivers on contracts over \$10 million. *Id.* The regulation does not define what a “one-time deviation” is, nor how it differs from an “individual deviation” which is defined in the FAR. See FAR, *supra* note 11, § 1.403.

177. FAR section 14.301(a) provides: “To be considered for award, a bid must comply in all material respects with the invitation for bids. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.” FAR, *supra* note 11, § 14.301(a).

178. The well-settled rule is:

A bidder’s failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government’s acceptance of the bid would not legally obligate the bidder to meet the government’s needs as identified in the amendment. An amendment is material however, only if it would have more than a trivial impact on the price, quantity, quality, delivery or the relative standing of the bidders.

Jackson Enters., Comp. Gen. B-286688, Feb. 5, 2001, 2001 CPD ¶ 25 (citations omitted).

179. Comp. Gen. B-286585, Jan. 12, 2001, 2001 CPD ¶ 13.

Because the protestor had not acknowledged Amendment 0001, the agency rejected the bid as nonresponsive.¹⁸⁰

The GAO observed that the ambiguities in the solicitation presented the potential for litigation.¹⁸¹ A contractor who did not acknowledge the amendment “could have argued it was entitled to a price increase” based on the increased number of service calls required in the amended schedule and could have argued that “it had 14 days to respond to routine service calls.”¹⁸² Because amendments “clarifying matters that could otherwise engender disputes during contract performance are generally material and must be acknowledged,” the GAO agreed with the agency that the protestor’s bid was nonresponsive.¹⁸³

Lumus Construction, Inc.,¹⁸⁴ provides a useful discussion about amendments that are not material. In *Lumus*, the Navy issued an amendment responding to bidders’ questions concerning an IFB for replacement of a heating system.¹⁸⁵ One response explained that a symbol on a drawing represented a differential pressure switch. Another response, clarifying a drawing, stated that seventy-five feet of trench piping was required for a portion of the work.¹⁸⁶

The GAO found that the responses did not make the amendment material for two reasons. First, neither response changed the IFB’s requirements. They merely clarified aspects of the

IFB.¹⁸⁷ Where an “amendment does not impose any legal obligations on the bidder different from those imposed by the original solicitation,” the amendment is not material.¹⁸⁸ Second, even if the responses imposed new requirements, the changes would have “at most, a negligible effect on the bidder’s overall price.”¹⁸⁹ The agency therefore correctly waived the awardee’s failure to acknowledge the amendment.¹⁹⁰

*Jackson Enterprises*¹⁹¹ also examined an amendment responding to contractor questions. The protestor in *Jackson Enterprises* failed to acknowledge an amendment that clarified items in a requirements contract solicitation for cleaning water treatment chambers, oil/water separators, and holding tanks.¹⁹² As a preliminary matter, the GAO disagreed with the agency’s assertion that “all responses to bidder questions may be presumed” material.¹⁹³ Instead, the GAO examined each question and response. As in *Lumus Construction*,¹⁹⁴ GAO again found that these responses were not material.¹⁹⁵ In response to a question regarding inspection methods, the government stated that “inspection is 100%.”¹⁹⁶ Because the answer did not affect the “contractor’s underlying obligation to perform” the contract’s requirements, the answer was not material.¹⁹⁷ Another answer increased the number of tanks and number of cleanings required.¹⁹⁸ Unlike the changed requirements in *Christolow Fire Protection Systems*,¹⁹⁹ this change was not material because “prices were requested on a per cleaning basis” and

180. *Id.* at 1-3.

181. *Id.* at 4.

182. *Id.* at 3-4.

183. *Id.* at 4.

184. Comp. Gen. B-287480, June 25, 2001, 2001 CPD ¶ 108.

185. *Id.* at 1.

186. *Id.* at 2.

187. *Id.* at 2-3.

188. *Id.* at 2.

189. *Id.* at 3. The total additional costs, \$2044, would have been less than one percent of the total bid price, \$269,500. *Id.*

190. *Id.* at 3-4.

191. Comp. Gen. B-286688, Feb. 5, 2001, 2001 CPD ¶ 25.

192. *Id.* at 1.

193. *Id.* at 3.

194. *See supra* notes 184-90 and accompanying text.

195. *Jackson Enters.*, 2001 CPD ¶ 25 at 6.

196. *Id.* at 3.

197. *Id.* at 4.

therefore the changes would not impact bidders' pricing schemes.²⁰⁰

Variations on a Theme: Responsiveness of Bids with Flawed Bid Guarantees

This past year, the GAO had three occasions and the COFC one occasion to examine how missing or flawed bid bonds affected bid responsiveness.²⁰¹

In *Interstate Rock Products, Inc. v. United States*,²⁰² the COFC seconded a long line of GAO decisions²⁰³ holding that "the penal sum [of a bid bond] is a material term of the contract (the bid bond) and therefore its omission is a material defect rendering the bid nonresponsive."²⁰⁴ In *Interstate*, the bidder had obtained an adequate bid bond, but portions of it were illegible. The legible version, submitted by Interstate Rock Products, Inc. (Interstate), had a blank space where the penal sum should have been inserted.²⁰⁵ Interstate argued that the agency should declare the bid responsive because "omission of the

penal sum was a clerical error" and "it had previously executed a proper bid bond."²⁰⁶ The relevant FAR section, however, provides that "noncompliance with a solicitation requirement for a bid guarantee requires rejection of the bid."²⁰⁷ Further, "the government's determination as to whether a bid is responsive must be based solely upon the bid documents as they appear at the time of the opening."²⁰⁸ Thus, the court held that omission of the penal sum "is a material defect for the reason that it would provide the surety and the contractor with a defense to enforcement."²⁰⁹ The COFC denied Interstate's plea for relief.²¹⁰

Questions concerning a bid bond's enforceability also served as the basis for the GAO's decision in *Schrepfer Industries, Inc.*²¹¹ In *Schrepfer*, the protestor's bid bond was accompanied by a photocopy of the power of attorney "appointing an attorney-in-fact with authority to bind the surety."²¹² The agency could not determine, without referring to the original power of attorney, if the submitted power of attorney had been altered. Therefore, the bid documents "did not establish unequivocally at the time of bid opening that the bond would be

198. *Id.* at 5.

199. *See supra* notes 179-83 and accompanying text.

200. *Jackson Enters.*, 2001 CPD ¶ 25 at 5-6. The GAO sustained the protest and recommended that the agency terminate the contract to the awardee and award to the protestor if the agency determined the protestor was otherwise eligible for award. *Id.* at *13. The GAO applied the same materiality analysis to a Government Printing Office (GPO) case. Although the GPO is not subject to the FAR, "the FAR and the GPOPPR [GPO Printing Procurement Regulation], in this instance, contain similar guidance." *John D. Lucas Printing Co.*, Comp. Gen. B-285730, Sept. 20, 2000, 2000 CPD ¶ 154 at 3 n.1 (holding that an amendment correcting a patent ambiguity in the solicitation and imposing an additional material requirement is material and a bid must acknowledge the amendment to be responsive).

201. Generally, a

bid bond is a form of guarantee designed to protect the government's interest in the event of default; that is, if a bidder fails to honor its bid in any respect, the bid bond secures a surety's liability for all reprocurement costs. A required bid bond is a material condition of an IFB with which there must be compliance at the time of bid opening; when a bidder submits a defective bid bond, the bid itself is rendered defective and must be rejected as nonresponsive. . . . If the agency cannot determine definitely from the documents submitted with the bid that the surety would be bound, the bid is nonresponsive and must be rejected.

Schrepfer Indus., Comp. Gen. B-286825, Feb. 12, 2001, 2001 CPD ¶ 23 at 2.

202. 2001 U.S. Claims LEXIS 176 (Sept. 17, 2001).

203. *See, e.g.*, *Kennedy Elec. Co.*, Comp. Gen. B-239687, May 24, 1990, 90-1 CPD ¶ 499; *R.D. Constr.*, B-232714, 1988 U.S. Comp. Gen. LEXIS 1376 (Oct. 12, 1988); *M/V Constructor Co.*, Comp. Gen. B-232572, Sept. 20, 1988, 88-2 CPD ¶ 272; *F&F Pizano*, Comp. Gen. B-219591, July 25, 1985, 85-2 CPD ¶ 88; *Allen County Builders Supply*, Comp. Gen. B-216647, May 7, 1985, 85-1 CPD ¶ 507.

204. *Interstate Rock Prods.*, 2001 U.S. Claims LEXIS 176, at *60.

205. *Id.* at *6.

206. *Id.* at *37-38.

207. FAR, *supra* note 11, § 28.101-4(a). The FAR provision includes nine exceptions to the general rule, none of which applied to Interstate. *See id.* § 28.101-4(a), (c).

208. *Interstate Rock Prods.*, 2001 U.S. Claims LEXIS 176, at *36.

209. *Id.* at *39.

210. *Id.*

211. Comp. Gen. B-286825, Feb. 12, 2001, 2001 CPD ¶ 23.

212. *Id.* at 2.

enforceable against the surety.”²¹³ Therefore, the agency properly found the bond unacceptable and the bid nonresponsive.²¹⁴

The next bid bond decision highlights one of the exceptions to the FAR’s general requirement to reject bids with noncompliant bid guarantees.²¹⁵ In *South Atlantic Construction Co.*,²¹⁶ the penal sum of the awardee’s bid bond, \$600,000, fell short of the required twenty percent of the contract price.²¹⁷ According to FAR section 28.101-4(c)(2), noncompliance with a bid guarantee requirement “shall be waived” when “the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer.”²¹⁸ Because the awardee’s bid was \$213,182.27 lower than the protester’s bid, the \$600,000 penal sum was acceptable and the bid was responsive.²¹⁹

Evaluating Prices of Bids with Options

In a sealed bid containing option items, the government evaluates bid prices by adding the total price of the options to the price of the basic requirement, unless such an evaluation is

not in “the government’s best interests.”²²⁰ In *Kruger Construction Inc.*,²²¹ the IFB contained a basic requirement for construction and two alternate option items for additional work. The options were alternative, because the government could exercise one, but not both options.²²² The government added both option prices to the basic price and determined that Danco Contractors, Inc. (Danco), was the lowest priced bidder.²²³ Kruger Construction Inc.’s (Kruger) bid, however, would have been lowest²²⁴ “if either option item . . . were considered, but not both.”²²⁵ Because the government could not *exercise* both options, the GAO found that the agency “could not reasonably determine that it was in the government’s best interests to *evaluate* both of these alternative options to determine the total evaluated price.”²²⁶ The GAO recommended award to Kruger.²²⁷

TNT Industrial Contractors, Inc.,²²⁸ also concerned evaluating bid prices involving options in a construction contract. In *TNT*, the two disputed options, if exercised, would have reduced the work scope and hence the price.²²⁹ One option reduced the amount of paving on the project. The other option provided for installing a salvaged water treatment tank, rather

213. *Id.* at 3.

214. *Id.*

215. Noncompliance with a solicitation’s bid guarantee requirement “shall be waived,” if “the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next higher acceptable offer.” FAR, *supra* note 11, § 28.101-4(c).

216. Comp. Gen. B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63.

217. *Id.* at 3. The awardee’s bid actually contained inconsistent bid bond provisions. One provision indicated the penal sum was twenty percent of the bid amount. Another section provides that the penal sum is “not to exceed \$600,000.” *Id.* The GAO resolved the controversy in the awardee’s favor using the lower, \$600,000 figure. *Id.*

218. FAR, *supra* note 11, § 28.101-4(c)(2).

219. *S. Atlantic Constr.*, 2001 CPD ¶ 63 at 3. The third GAO decision concerning bid bonds held that an agency solicitation can require a bid bond, even if a bond is not otherwise required by statute or regulation. See *Lawson’s Enters., Inc.*, Comp. Gen. B-286708, Jan. 31, 2001, 2001 CPD ¶ 36. The Miller Act, 40 U.S.C. §§ 270a, 270d-1 (2000), and the FAR, *supra* note 11, § 52.228-15, only mandate payment and performance bonds for construction contracts that exceed \$100,000. Nonetheless, because bid guarantees are creatures of procurement regulations and are “not mandated by statute,” an agency may require bid guarantees on contracts below the statutory minimums. *Lawson’s Enters.*, 2001 CPD ¶ 36 at 2. If an agency requires a bond for a contract under \$100,000, failure to provide the bond renders the bid nonresponsive. *Id.* *Lawson* is discussed in greater depth, *infra* notes 1149-1162 and accompanying text.

220. FAR, *supra* note 11, § 17.206. FAR section 17.206(b) provides: “The contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer.” *Id.*

221. Comp. Gen. B-286960, Mar. 15, 2001, 2001 CPD ¶ 43.

222. *Id.* at 1-2. The IFB actually contained five option items. Items four and five were mutually exclusive. Item four called for “demolition of building 103.” Item five required “same as Option Item No. 4 except include crushing building rubble.” *Id.* at 1-2. The two were mutually exclusive because “Building 103 could not be demolished twice.” *Id.* at 2 n.1.

223. *Id.* at 3. Because Kruger was a small disadvantaged business (SDB) and Danco was not, the agency added ten percent to Danco’s price, pursuant to FAR section 52.219-23, Notice of Price Evaluation Adjustment for SDB Concerns. *Id.* at 2-3. Danco was still the low bidder. *Id.* at 3.

224. Kruger would have been the lowest bidder after the SDB adjustment. *Id.* at 3.

225. *Id.* at 4.

226. *Id.* at 5 (emphasis added).

227. *Id.* (“if the agency otherwise concludes the bid price is fair and reasonable and that the firm is responsible”).

than installing a new one. These “deductive options” were “intended to be exercised to scale back the project in the event that funds were not available.”²³⁰ At bid opening, the contracting officer determined that sufficient funds were available.²³¹ Therefore, the contracting officer decided that constructing a “fully modern water treatment plant”²³² and thus excluding the deductive options was in the government’s best interests.²³³

If the contracting officer had added (or in reality subtracted) the prices for the two deductive options, TNT would have been the low bidder.²³⁴ Instead, the contracting officer awarded to All Cities Enterprises, the low bidder when considering only the base amount.²³⁵ The agency “made a ‘best interests’ determination” to exclude the option prices and obtained appropriate approval.²³⁶ The GAO found that the agency reasonably awarded a contract for the maximum amount of work. Further, “once the agency decided to award a contract for the maximum amount of work, it was required to evaluate prices for that scope of work, which meant that it was prohibited from considering” the two deductive options.²³⁷ The Comptroller General denied TNT’s protest.²³⁸

If That’s What We Wanted to Evaluate, That’s What We Would Have Said

In *Hunot Fire Retardant Co.*,²³⁹ the Department of Agriculture awarded a contract for long-term fire retardant. The solicitation included a standard clause from the agency procurement regulation concerning evaluating offers. The clause required the government to “apply the Offeror’s proposed fixed prices/rates to the estimated quantities” and “add other direct costs if applicable.”²⁴⁰ The protestor argued that the agency should have added handling and clean up costs to the apparent low bidder’s offer as “other direct costs.”²⁴¹ The Comptroller General disagreed, finding that if an agency intends to consider any price-related factor other than bid price, the agency must expressly state so in the solicitation.²⁴² The solicitation’s general language, “other direct costs,” did not put prospective bidders on notice that the government would consider any price-related factors. Therefore the agency was correct in not adding handling or clean-up costs as “other direct costs.”²⁴³

228. B-288331, 2001 U.S. Comp. Gen. LEXIS 146 (Sept. 25, 2001).

229. *Id.* at *2. The IFB included two contract line item numbers adding work and two reducing work. *Id.*

230. *Id.*

231. *Id.* at *4.

232. *Id.* at *5.

233. *Id.* at *4.

234. *Id.*

235. *Id.* at *6-7.

236. *Id.* at *7. FAR section 17.206(b) provides: “[T]he contracting officer need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interests of the Government and this determination is approved at a level above the contracting officer.” FAR, *supra* note 11, § 17.206(b).

237. *TNT Indus.*, 2001 U.S. Comp. Gen. LEXIS 146, at *6-7.

238. *Id.* at *8.

239. Comp. Gen. B-286679.2, May 21, 2001, 2001 CPD ¶ 94.

240. *Id.* at 1-2.

241. *Id.* at 2.

242. *Id.* at 2. FAR § 14.201-5 provides: “The contracting officer shall . . . [i]dentify the price-related factors other than bid price that will be considered in evaluating bids and awarding the contract.” FAR, *supra* note 11, § 14.201-5(c).

243. *Hunot Fire Retardant*, 2001 CPD ¶ 94 at 2-3.

A Blank Space Does Not Equal Zero

In *New Shawmut Timber Co.*,²⁴⁴ the protestor omitted a price for one of seven line items in a contract for sale of timber from the Forest Service and then argued that the missing bid was equivalent to a bid of zero. The GAO disagreed, finding that the blank line item “rendered the bid equivocal regarding whether New Shawmut intended to obligate itself to perform that element of the requirement.”²⁴⁵ Therefore, the bid was non-responsive.²⁴⁶

In the World of Mistakes, What’s Good for the Goose Is Good for the Gander

In *Aquila Fitness Consulting Systems, Ltd.*,²⁴⁷ the DOL rejected a protestor’s bid after refusing to allow the protestor to correct an alleged mistake.²⁴⁸ After award, the agency discovered that the awardee, FMF Corporation (FMF), had made the same mistake. This time, the agency “reform[ed]” the contract and increased the contract price to remedy the mistake.²⁴⁹ The GAO found that the DOL also should have rejected FMF’s bid.²⁵⁰

The *Aquila* IFB advised bidders that five full-time positions were required to assist in operating a Wellness Program at the Mine Safety and Health Administration Academy.²⁵¹ Soon after bid opening, the contracting officer requested that the four lowest bidders, including Aquila Fitness Consulting Systems,

Ltd. (Aquila), and FMF, verify their bids. Aquila’s apparently low bid provided for three full-time positions and two part-time positions.²⁵² Soon after the agency advised Aquila of the discrepancy between its bid and the IFB, Aquila submitted an amended, corrected bid. The amended bid increased the contract price, but was still the low bid.²⁵³ The DOL did not accept Aquila’s amended bid. The GAO held that the agency properly rejected Aquila’s request to amend its bid, because correcting a claimed mistake is not permitted “where the alleged mistake is based on an incorrect premise which a bidder discovers after bid opening.”²⁵⁴ The GAO agreed that the bid should have been rejected.²⁵⁵

Although the contracting officer reviewed FMF’s worksheets before award, he “overlooked” the same mistake in FMF’s bid.²⁵⁶ The GAO found that the contracting officer “did not exercise reasonable care in his examination of FMF’s worksheets.”²⁵⁷ The Comptroller General concluded that “while Aquila’s bid was properly rejected for containing a mistake . . . the agency also should have rejected FMF’s bid for the same reason.”²⁵⁸

Negotiated Acquisitions

Proposal Reformatting Found Reasonable

In *Integrated Technology Works, Inc.*,²⁵⁹ the GAO found unobjectionable the Navy’s decision to reformat a proposal that

244. Comp. Gen. B-286881, Feb. 26, 2001, 2001 CPD ¶ 42.

245. *Id.* at 2.

246. *See id.*

247. Comp. Gen. B-286488, Jan. 17, 2001, 2001 CPD ¶ 4.

248. *Id.* Aquila based its bid on three full-time positions and two part-time positions, while the solicitation required five full-time positions. *Id.* at 1-2.

249. *Id.* at 3.

250. *Id.* at 4.

251. *Id.* at 1.

252. *Id.* at 2.

253. *Id.* at 2-3.

254. *Id.* at 3.

255. *Id.* In rejecting the bid, the agency stated that the bid was nonresponsive, “since there was nothing on the face of its bid which took exception to any of the IFB requirements.” *Id.* But, according to the GAO, rejection was proper because “the bid could not be corrected as requested and evidenced an obvious yet uncorrectable error.” *Id.*

256. *Id.* at 4.

257. *Id.*

258. *Id.*

259. B-286769.5, 2001 U.S. Comp. Gen. LEXIS 128 (Aug. 10, 2001).

was submitted in the wrong type size. The request for proposal (RFP) instructed offerors to submit proposals in “type not smaller than 12 pitch.”²⁶⁰ Integrated Technology Works, Inc. (ITW), submitted a proposal that the Navy found was not typed in twelve-pitch type as required by the RFP. Rather than reject the proposal, the agency retyped the proposal in twelve-point font, and determined that the proposal information relating to two of the subfactors fell outside the thirty-page limit. ITW protested this action, claiming that the original font used was equivalent to the required twelve-pitch type. The Navy agreed that twelve-pitch type is not equivalent to twelve-point type and agreed to take corrective action on the protest by reformatting ITW’s entire proposal in twelve-pitch type and reevaluating any previously unevaluated information.²⁶¹

Although the reformatting resulted in some of the information falling within the page limitation, some of it was still not evaluated, as it fell outside the thirty-page limit. As a result, the rating for one subfactor remained unacceptable, leading the Navy to find the award to ITW too risky. The Navy, therefore, reaffirmed the original award.²⁶² The GAO found the Navy’s approach reasonable, as it was consistent with the requirements set forth in the RFP, and denied the protest.²⁶³

Late Is Late!

An offer received was late, and the contracting officer appropriately rejected a proposal received two days after the date established in the solicitation as the date for receipt of proposals.²⁶⁴ The protestor claimed that the agency was responsible for confusion on the due date because it typed the due date in small print, which became distorted when faxed.²⁶⁵ The GAO noted that, while certain circumstances allow for receipt of a late proposal, this did not fit any of the exceptions. The GAO

believed that if the contractor was unsure of the due date, the burden to verify the date fell to the contractor.²⁶⁶

Euros Are “Local Currency” in Greece

The State Department unreasonably rejected an offer that was priced in euros, the GAO held in *Consortium Argenbright Security-Katrantzios Security*.²⁶⁷ The RFP provided for submission of offers in “U.S. dollars or local currency.”²⁶⁸ The consortium Argenbright Security-Katrantzios Security priced its offer in euros, rather than Greek drachmas or U.S. dollars. The agency maintained that it intended “local currency” to mean Greek drachmas only, and evidenced that intention by notifying offerors in the RFP that it would pay foreign firms in “Greek Drachmae.”²⁶⁹ The GAO found that nothing in the RFP prohibited pricing an offer in euros, and found the rejection of the consortium’s bid for that reason improper.²⁷⁰

\$0 Is a Compliant Offer

A pricing scheme that proposes \$0 for an individual service fee is compliant, so long as the offeror commits to providing the required service, the GAO held in *SatoTravel*.²⁷¹ SatoTravel protested the award of a contract for travel services to an offeror who included a service fee of \$0, claiming that the proposal did not conform to the terms of the solicitation because it did not propose a service fee for the base year, and offered a “discount fee” for subsequent years. SatoTravel interpreted the term “service fee” in the RFP to require a positive fee amount. The GAO disagreed, however, highlighting the premise “that an offeror may elect not to charge for a certain item . . . if it indicates a commitment to furnish the item in question.”²⁷²

260. *Id.* at *2.

261. *Id.* at *3-4.

262. *Id.* at *4-5.

263. *Id.* at *7-9.

264. Centro Mgmt. Inc., Comp. Gen. B-287107, Mar. 9, 2001, 2001 CPD ¶ 52.

265. Instead of the normal eleven- or twelve-point type, the date was typed in six-point type on the solicitation form. *Id.* at 2.

266. *Id.* at 2 n.2.

267. B-288126, B-288126.2, 2001 U.S. Comp. Gen. LEXIS 153 (Sept. 26, 2001).

268. *Id.* at *2.

269. The agency argued that by pricing its offer in euros, the consortium was taking exception to the payment clause. *Id.* at *2.

270. *Id.* at *3.

271. Comp. Gen. B-287655, July 5, 2001, 2001 CPD ¶ 111.

272. *Id.* (citing Integrated Protection Sys., Inc., Comp. Gen. B-229985, Jan. 29, 1988, 88-1 CPD ¶ 92 at 2).

“Flexible” Delivery Schedule, However, Is Not Compliant

In contrast to a \$0 offer being compliant, an offer which proposed a “flexible” delivery schedule as an alternate method of meeting the delivery schedule articulated in the RFP was a non-conforming offer, and ineligible for award. In *Farmland National Beef*,²⁷³ the successful offeror took exception to portions of the Defense Commissary Agency (DECA) solicitation concerning the delivery schedule. When the contracting officer attempted to clarify that the offeror was planning to meet the delivery schedule set out in the RFP, the offeror confirmed that he was proposing a “flexible delivery schedule” which meant that “the shipment may deliver Tues[day] instead of Mon[day].”²⁷⁴ The GAO noted that the delivery schedule was an integral part of the contract, because it “represent[ed] when the commissaries need the product.”²⁷⁵ Even with this explicit alteration to the delivery schedule, the contracting officer awarded to the non-compliant offeror. The GAO found that such an award was improper.²⁷⁶

Say What You Want, and Then Stick to It!

The GAO sustained protests in two cases where the government awarded contracts to offerors that complied with what the government needed, but did not meet the minimum standards set out in the RFPs.²⁷⁷

In *Systems Management, Inc.*,²⁷⁸ the Air Force issued an RFP for a fixed-base weather observation system. The RFP set out a requirement that systems must have been “evaluated and certified by the FAA or similar foreign agency prior to submission of proposal.”²⁷⁹ The Source Selection Authority concluded that the offer submitted by Coastal Environmental Systems

(Coastal) “effectively leveraged the latest commercial information technology,” and this “significant technical merit” was worth the associated \$5.1 million price premium.²⁸⁰ Systems Management, Inc., and Qualimetrics, Inc., protested, claiming that the system proposed by Coastal was not certified by the FAA, and did not meet the minimum technical requirements of the RFP. The Air Force argued that the term “certified” really meant “operational” and that the purpose of the requirement was to ensure the vendor had experience and a proven technology.²⁸¹

The GAO did not find the term “certified” ambiguous, and found a reasonable reading of the requirement would lead to the belief that a certification from an independent organization was required. The GAO recognized that the Air Force had overstated its minimum requirements, and then inappropriately relaxed the requirements in the RFP. The GAO recommended that the Air Force amend the RFP to represent its actual needs and then resolicit.²⁸²

In *Cortland Memorial Hospital*,²⁸³ the Department of Veteran’s Affairs (DVA) issued a solicitation for a community-based outpatient clinic that expressed a “preference” for “self-contained” facilities that provided service to DVA patients in one location. The RFP described “self-contained” as a facility that devoted space and services exclusively to DVA patients. The contracting officer, however, apparently decided that the preferences were not as important as the solicitation indicated, and in fact, considered one offeror’s proposed dual locations as a significant advantage.²⁸⁴

The GAO found it “clearly improper” for the agency to treat two sites as preferable, given the specific preference for a single site articulated in the RFP. Although the agency argued any

273. Comp. Gen. B-286607, B-286607.2, Jan. 24, 2001, 2001 CPD ¶ 31.

274. *Id.* at 6.

275. *Id.* at 5 (quoting from contracting officer’s testimony at the GAO hearing on this case).

276. *Id.* at 11. The GAO recommended that the agency reconsider its need and determine what the actual needs were. If the agency changed its delivery requirement, the GAO recommended amending the solicitation and reopening negotiations. If the agency decided not to change the delivery schedule, the GAO recommended that it terminate the improper award. *Id.*

277. See *Sys. Mgmt., Inc.*, Comp. Gen. B-287032.4, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85; *Cortland Mem’l Hosp.*, Comp. Gen. B-286890, Mar. 5, 2001, 2001 CPD ¶ 48.

278. Comp. Gen. B-287032.4, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85.

279. *Id.* at 2 (citing the Technical Requirements Document section of the RFP).

280. *Id.* at 3.

281. *Id.* at 11.

282. *Id.*

283. Comp. Gen. B-286890, Mar. 5, 2001, 2001 CPD ¶ 48.

284. *Id.* at 8.

error in this area was immaterial, the GAO found it possible that other offerors would have proposed lower-priced solutions if the solicitation had not stated a single-site preference. The GAO recommended that the agency reevaluate its needs and amend the solicitation if the stated preferences did not meet its actual needs.²⁸⁵

Failure to Include Stated Minimum Requirement Constitutes Improper Waiver

In *Universal Yacht Services, Inc.*,²⁸⁶ the Navy's Military Sealift Command awarded a contract for a personnel transfer vessel to conduct open ocean transfers of passengers and cargo between sea-borne submarines and the shore. The RFP requirements included a minimum transit speed of "9 knots in moderate weather @ 80% rated horsepower," which required that a vessel could travel at nine nautical miles per hour at eighty percent of the engine's maximum horsepower.²⁸⁷ This requirement reflected the Navy's need for a reasonable transfer time between submarines and shore facilities, and ensured adequate reserve horsepower for emergencies. After discussions, the successful offeror submitted a final proposal without any reference to the "@ 80% rated horsepower" requirement of the RFP. The contract also had no reference to the requirement. Universal Yacht protested, claiming that the award improperly waived the minimum transit speed requirement. The GAO agreed, finding that award on the basis of the non-conforming proposal was an improper waiver of the stated minimum requirement.²⁸⁸

Don't Reject Me—COFC Holds Failure to Meet Minimum Requirements Does Not Require Rejection

Although agencies may not award to a non-compliant proposal, the fact that a proposal is non-compliant does not require

automatic rejection of that proposal, the COFC held in *Man-Tech Telecommunications & Information Systems Corp.*²⁸⁹ In this case, the Army solicited for a contract to provide operational, program management, design, engineering, and prototype development services at various continental United States (CONUS) and overseas locations. The solicitation established educational and experiential requirements for key personnel, and stated the requirements were the "minimum acceptable personnel qualifications."²⁹⁰

ManTech Systems argued that the personnel requirements were "mandatory minimum" requirements, and that the failure to meet the requirements for two of the key personnel should have rendered the successful offeror's proposal technically unacceptable. The government and intervenors disagreed, arguing that the evaluation scheme was not designed to eliminate from consideration any proposal that did not meet the requirement, but rather to assign them an adjectival rating that reflected such a deficiency.²⁹¹

The court found that "mandatory minimum requirements" are "essentially pass/fail in nature" and must be clearly identified as such to "put offerors on notice" that failure to comply will lead to rejection of the proposal.²⁹² In this case, the court found that the personnel requirements were not mandatory minimum requirements, and the Army's consideration of the offer was appropriate.²⁹³

Oral Presentations Not All Oral—Some Record Required

To evaluate proposals adequately when oral presentations are used, agencies must prepare some record of the oral presentation. In *Checchi & Co. Consulting*,²⁹⁴ a solicitation for technical assistance and training to the government of El Salvador included a provision for oral presentations/discussions with

285. *Id.*

286. Comp. Gen. B-287071, B-287071.2, Apr. 4, 2001, 2001 CPD ¶ 74.

287. *Id.* at 2.

288. *Id.* at 5. The GAO recommended that the agency reopen discussions, request another proposal from each of the firms, and make a new source selection decision. *Id.*

289. 49 Fed. Cl. 57 (2001).

290. *Id.* at 66. The RFP provided: "All resumés submitted in response to this RFP shall be in the following prescribed format. Any resumé submitted that does not contain the required information in the format specified will be rejected. Offerors with rejected resumés will be considered as not fulfilling RFP requirements for the position(s) in question." *Id.*

291. *Id.* at 67. The Evaluation Plan stated that an offeror would receive a rating of "excellent" if all the key personnel exceeded the minimum requirements, and a rating of "unacceptable" if the vast majority did not. *Id.*

292. *Id.* (citing *Israetex, Inc. v. United States* 25 Cl. Ct. 223, 229 (1992); *Cubic Def. Sys., Inc. v. United States*, 45 Fed. Cl. 450, 460 (1999)).

293. The court found that instead of being a basis for exclusion, the lack of resumés provided a basis for discussion with the offeror designed to cure this deficiency. *ManTech Telecomms.*, 49 Fed. Cl. at 72.

294. B-285777, 2000 U.S. Comp. Gen. LEXIS 223 (Oct. 10, 2000).

those offerors “determined to have a reasonable chance for award.”²⁹⁵ Before the oral presentation/discussion, the agency provided each of the offerors a list of the strengths and weaknesses of their proposal to assist in preparation for the oral presentations. The oral presentations addressed the technical approach with each offeror. The only record the agency kept of the oral presentation/discussions was the individual evaluators’ score sheets and the presentation materials.²⁹⁶

The GAO stressed that although there is no particular method of recording oral presentation required by the FAR, “the fundamental principle of government accountability dictates that an agency maintain a record adequate to permit meaningful review.”²⁹⁷ Without such documentation, the agency could not establish a reasonable basis for downgrading Checchi’s proposal.²⁹⁸

Discussions About Price Not Always Required

“Meaningful discussions”²⁹⁹ do not necessarily have to include price, even when award is based on price, the GAO held in *SOS Interpreting, Ltd.*³⁰⁰ The RFP for translation and technical support services contemplated that price would play an increasingly important role in the source selection decision, as proposals were considered technically equal. During the evaluation process, the agency analyzed all proposed prices and found they were all competitive and comparable. SOS argued that the contracting officer had a duty to advise SOS that its price was too high during discussions. The GAO disagreed, citing the well-established rule that an agency is not required to discuss price when the agency does not consider price to be a significant weakness.³⁰¹

Give It to Me Straight—Agencies Must Identify Deficiencies During Discussions

In two cases this year the GAO reminded us that when an agency finds a proposal unacceptable, the reason for that finding should be revealed to the offeror during discussions for the discussions to be meaningful.

In the first case, *SWR, Inc.*,³⁰² the Library of Congress (Library) awarded a contract for the repair of talking book machines. After discussions and receipt of revised proposals, the Library conducted on-site visits of the offerors’ facilities. As part of the site visit, the Library asked to review SWR, Inc.’s (SWR) quality control documents and equipment tracking logs, which SWR provided to the site-visit team. At the conclusion of the site-visit, the evaluators concluded that SWR’s revised proposal was inadequate because the documentation provided at the site-visit did not specifically address past-performance of component-level repair, which was one of the Library’s concerns.³⁰³

SWR complained of the finding, stating that the Library failed to identify its concern about component-level repair experience at the site visit or during discussions, and therefore the evaluation was unreasonable. The GAO agreed, finding that the record established that the sole basis for the agency’s decision not to award to SWR was the lack of documentation provided by SWR regarding component-level repair experience. The GAO found unsupported and unreasonable the agency’s determination that SWR’s proposal was technically unacceptable.³⁰⁴

In a similar case, *Bank of America*,³⁰⁵ the GAO sustained a protest due to the lack of meaningful discussions where an agency clearly recognized the offeror had likely misunderstood the RFP’s modified requirements, yet did not raise the issue

295. *Id.* at *5.

296. *Id.* at *13.

297. *Id.* (quoting *J&J Maint., Inc.*, Comp. Gen. B-284708.2, B-284708.3, June 5, 2000, 2000 CPD ¶ 106 at 3; *Delta Int’l, Inc.*, Comp. Gen. B-284364.2, May 11, 2000, 2000 CPD ¶ 78 at 4).

298. Although the agency produced declarations of one of the evaluators recalling portions of Checchi’s oral presentation, the GAO reiterated the long-held position that it will accord greater weight to contemporaneous documentation than to the parties “later explanations, arguments, and testimony.” *Id.* at *24.

299. See FAR, *supra* note 11, § 15.306(d)(3) (“The contracting officer shall . . . discuss . . . significant weaknesses, deficiencies, and other aspects of its proposal . . . that could . . . enhance materially the proposal’s potential for award.”).

300. Comp. Gen. B-287477.2, May 16, 2001, 2001 CPD ¶ 84.

301. *Id.* at 3 (citing *Nat’l Projects, Inc.*, Comp. Gen. B-283887, Jan. 19, 2000, 2000 CPD ¶ 16 at 5; *KBM Group, Inc.*, Comp. Gen. B-281919, B-281919.2, May 3, 1999, 99-1 CPD ¶ 118 at 8-9). The GAO had also cited these cases in an earlier 2001 decision regarding the same issue. See *Cherokee Info. Svs.*, Comp. Gen. B-287270, Apr. 12, 2001, 2001 CPD ¶ 77 at 5.

302. Comp. Gen. B-286161.2, Jan. 24, 2001, 2001 CPD ¶ 32.

303. *Id.*

304. *Id.*

during discussions. In this case, the agency placed a page limitation on the offers, which it later modified through an amendment that prescribed double-sided pages and submission of technical proposals on compact disks.³⁰⁶ Bank of America followed the original page limitation, submitting a 100-page proposal with a 50-page attachment. The other offeror submitted a proposal twice as large, following what they believed were the modified limits.³⁰⁷

The evaluators noted several areas in Bank of America's proposal that lacked sufficient detail, yet the agency failed to raise the repeatedly-expressed concerns regarding the level of detail. The evaluators also failed to determine whether Bank of America misunderstood the agency's interpretation that the RFP allowed for 200 pages of technical proposal with 100 pages of attachments if submitted on compact discs. The GAO found it unreasonable for the agency not to raise the concerns regarding the lack of detail and the potential page limit misunderstanding with Bank of America, finding that the agency did not hold meaningful discussions.³⁰⁸

What's Done Is Done—Reopening Discussions with Only One Offeror Improper

It is not a new rule—if an agency conducts discussions, it must hold discussions with all offerors in the competitive range.³⁰⁹ In *International Resources Group*,³¹⁰ however, the agency improperly reopened discussions with just one offeror after receipt of final proposals, leading the GAO to sustain the protest.³¹¹

The Agency for International Development solicited for technical assistance and training to improve natural resource management in the Central Asian Republics of Kazakhstan,

Kyrgyzstan, Turkmenistan, and Uzbekistan. The agency originally received seven proposals, finding three in the competitive range. The agency conducted discussions with each of the three and asked for final revised proposals. After receiving the final proposals, the contracting officer proceeded to engage in a series of communications with only one of the offerors, furnishing the offeror with a detailed list of technical and cost comments regarding its proposal and requesting a new response.³¹²

While this communication with only one offeror was underway, the contracting officer notified International Resources Group (IRG) that it was no longer in the competitive range. IRG protested, arguing that it was improper for the agency to engage in further discussions with only one of the offerors. The GAO agreed, finding that the communications between the agency and the offeror were discussions because the offeror was given an opportunity to, and did, revise its proposal.³¹³

“Best Value” Selection Requires Comparative Analysis of Proposals

In *Satellite Services, Inc.*,³¹⁴ the GAO reminded agencies that a “best value” selection must be made on the basis of a meaningful evaluation of proposals. In this case, the Navy solicited for multi-function support services, and anticipated a best-value award with four technical factors, which, when combined, were about equal to price.³¹⁵ Because the price was largely driven by the labor costs associated with the number of full-time equivalent (FTE) positions, the costs of the various proposals differed significantly, based on the dramatically different staffing levels proposed by the offerors. The agency performed a price evaluation on each offer, checking for mathematical errors in the extended prices and accuracy in the offerors' computations of labor rates, fringe benefits, and mate-

305. B-287608, B-287608.2, 2001 U.S. Comp. Gen. LEXIS 127 (July 26, 2001).

306. The RFP stated that the technical proposal could not exceed 100 double-sided pages. The exhibits or attachments to the technical proposal were limited to fifty pages double-sided. The RFP also stated that “each 8 ½ by 11 page fold-out will be counted as one page.” *Id.* at *4. The RFP further acknowledged, however, that the compact disk versions of the technical proposals would not print double-sided and instead would print as 200 pages with a possible 100 pages of attachments and exhibits. *Id.* at *7.

307. *Id.*

308. The GAO recommended that the agency clarify the page limitation, conduct meaningful discussions, and evaluate the proposals in accordance with the stated requirements. *Id.* at *26.

309. FAR, *supra* note 11, § 15.306(d)(1).

310. Comp. Gen. B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

311. *Id.*

312. *Id.*

313. *Id.*

314. B-286508, B-286508.2, 2001 U.S. Comp. Gen. LEXIS 13 (Jan. 18, 2001).

315. *Id.* at *4. The four technical factors were: (1) past performance, (2) experience, (3) methods and procedures, and (4) corporate resources and management. *Id.*

rial costs. The price evaluation team did not evaluate the adequacy of the proposed number of FTEs. The agency awarded to NVT Technologies (NVT). Satellite Services, Inc. (Satellite), protested, claiming that the Navy did not meaningfully evaluate the different staffing levels.³¹⁶

The GAO found two significant errors in the source selection. First, by simply accepting NVT's staffing levels as adequate based on NVT's use of a naval preventive maintenance manual's estimate of workloads, the Navy failed to evaluate NVT's approach to the work requirements.³¹⁷ Second, the source-selection authority simply adopted an evaluator's judgment about which proposal offered the best value without discussing his evaluation or questioning the basis for his judgment. This led to a failure to create a legally adequate cost-technical tradeoff between NVT and Satellite.³¹⁸ Based on the lack of an adequate cost-technical tradeoff, the GAO found that the record did not support the award to NVT and sustained the protest.³¹⁹

"Fair and Reasonable" Is Not the Same as "Best Value"

In *Beacon Auto Parts*,³²⁰ the GAO partially sustained a protest, finding that a determination that prices are fair and reasonable does not constitute a cost-technical tradeoff. In this case, the agency contemplated a cost-technical tradeoff, with non-cost factors³²¹ significantly more important than price. Beacon complained that the contracting officer made award based solely on Nash Auto and Body Shop's (Nash) higher rating, with no regard to Nash's \$48,000 higher price. The GAO was not persuaded by the agency's argument "made in the face of a bid protest" that the agency had considered whether Nash's proposal was worth the additional cost, in light of the price negotiation memorandum which stated only that "Nash's Auto & Body Shop's proposal is considered the best value to the Government based on past performance and technical capability. Prices are considered fair and reasonable."³²²

"Best Value" Is Not the Same as Lowest-Price, Technically Acceptable

In *Special Operations Group, Inc.*,³²³ the GAO found that it was inappropriate for a contracting officer to ignore the solicitation's basis for selection without notifying offerors of the change. The solicitation contemplated a cost-technical tradeoff between technical merit and cost, and advised offerors that technical merit was "more important than price." After receiving proposals and conducting discussions, however, the evaluation was based on essentially a pass/fail scheme and award was made on the basis of what the agency perceived to be the lowest priced-technically acceptable proposal. The GAO found it "improper to induce an offeror to prepare and submit a proposal emphasizing technical excellence, then evaluate proposals only for technical acceptability and make the source selection decision on the basis of technical acceptability and lowest cost."³²⁴

Contemporaneous Source Selection Decision Documentation Vital; Post-Protest Tradeoff Inadequate

In *Wackenhut Services, Inc.*,³²⁵ the protestor successfully challenged an award decision where the agency failed to identify any aspects of the successful proposal that merited the price premium. The protestor argued that instead of a comparison of the benefits and costs, the award decision was based solely on overall point scores. Wackenhut Services, Inc., further challenged the agency's attempt to perform a post-protest tradeoff analysis, arguing such a tradeoff inappropriately relied on statements not available at the time of the source selection decision. The GAO agreed with the protestor, finding that "where there is inadequate supporting documentation for a source selection decision, there is no basis . . . to conclude that the agency had a reasonable basis for the decision."³²⁶ The GAO again emphasized the weight it will give contemporaneous documentation as contrasted with "post-protest explanations," stressing such explanations must be "credible and consistent with the contemporaneous record."³²⁷

316. *Id.* at *5-10.

317. *Id.* at *14.

318. *Id.* at *19.

319. *Id.* at *23-24.

320. B-287483, 2001 U.S. Comp. Gen. LEXIS 111 (June 13, 2001).

321. The non-cost factors were technical capability and past performance. *Id.* at *3.

322. *Id.* at *14.

323. Comp. Gen. B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73.

324. *Id.* at 5 (citing Hattal & Assoc., Comp. Gen. B-243357, B-243357.2, July 25, 1991, 91-2 CPD ¶ 90 at 7-9).

325. Comp. Gen. B-286037, B-286037.2, Nov. 14, 2001, 2001 CPD ¶ 114.

How Much and What Type of Information Is Needed to Evaluate Past Performance?

Agencies often request that offerors submit a lot of different past performance data in response to government solicitations. Issues have arisen concerning how much and what type of information agencies should consider when evaluating past performance. In *OSI Collection Services, Inc. (OSI I)*,³²⁸ the Department of Education issued a request for proposals for private collection services for delinquent loans. Past performance was the most important evaluation factor, and offerors were required to submit relevant past performance information. The agency advised offerors that it would consider the following past performance information: “information obtained when checking references for all offerors; and, [f]or those companies with a current contract, the Department will use performance data we have on hand such as the CPCS [Competitive Performance and Continuous Surveillance]³²⁹ scores.”³³⁰

The source evaluation board (SEB) considered three elements in evaluating offerors’ past performance. First, it looked at the numerical scores given in the Dun and Bradstreet (D&B) past performance evaluation.³³¹ Second, it reviewed the subjective comments provided by offerors’ past performance references, and especially considered the numerical scores given by those references.³³² Third, for incumbent contractors, like OSI Services, Inc. (OSI), the evaluators considered the CPCS scores over the life of the current contract.³³³ The total past performance evaluation placed OSI at the “average or below” level, based primarily on the CPCS scores. Though OSI’s customers were extremely satisfied with its performance, the agency found the CPCS scores were “the most relevant indicator of

success.”³³⁴ OSI protested the agency’s past performance evaluation, claiming that the agency improperly limited its consideration of performance data under the current contract to CPCS scores and that reliance on those scores alone was unreasonable.³³⁵

The GAO agreed that the agency’s near total reliance on the CPCS scores was unreasonable. The evaluation documents for each offeror had nearly identical comments concerning the CPCS portion of the evaluation.³³⁶ Those narratives lacked comments concerning the actual quality of the offerors’ past performance. The GAO found that the

contemporaneous evaluation documentation shows that the CPCS aspect of the agency’s past performance evaluation contained virtually no analysis of the individual offerors’ past performance, and that the agency limited its consideration of the performance data on hand to ranking the incumbents based upon the arithmetic total of each firm’s seven periodic CPCS scores To the extent the agency performed any qualitative analysis, it is not documented.³³⁷

The agency’s reliance on the cumulative CPCS scores was contrary to the solicitation’s commitment to consider all data on hand. The GAO was concerned with the agency’s “overly mechanical application” of the cumulative CPCS scores in its past performance evaluations, noting that “[p]oint scores can . . . only be aids in decision-making, and they must be used in a defensible way.”³³⁸ While the GAO recognized that “reducing

326. *Id.* at 5.

327. *Id.* (citing *Jason Assocs. Corp.*, Comp. Gen. B-278689, Mar. 2, 1998, 98-2 CPD ¶ 67 at 6; *ITT Fed. Servs. Int’l Corp.*, Comp. Gen. B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6).

328. Comp. Gen. B-286597.2, Jan. 17, 2001, 2001 CPD ¶ 18.

329. The CPCS evaluation was performed every four months and measured “the relative performance of each contractor on all accounts transferred under various performance indicators and was used to determine bonus payments and transfer of new accounts.” *Id.* at 2. Under this methodology, the contractor performing best under a particular indicator received the highest number of points for that indicator. The remaining contractors received points in relation to their standing relative to the leading contractor. Each contractor’s CPCS score is the sum of its scores for all performance indicators for the particular period. *Id.*

330. *Id.*

331. *Id.* D&B scores were on a one (satisfactory) to five (unsatisfactory) basis. *Id.*

332. *Id.* References gave numerical scores on a scale of one (extremely satisfied) to four (never satisfied). *Id.*

333. *Id.* This involved the arithmetic total of seven periodic CPCS scores available at that time. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 3.

337. *Id.* at 5.

338. *Id.* at 6.

past performance to a single score might result in a more streamlined evaluation,” the “use of such a technique is no substitute for the reasoned judgment of evaluators in examining and comparing the actual past performance of offerors.”³³⁹ The GAO recommended that the agency “reevaluate the proposals with respect to past performance, giving appropriate consideration and weight to the past performance data in its possession.”³⁴⁰

As recommended by the GAO, the agency conducted a reevaluation of all proposals. The reevaluation again resulted in OSI not receiving the award. OSI filed another protest, alleging improper evaluation of its past performance.³⁴¹ In its review of the reevaluation, the GAO found that the agency SEB had reviewed each offeror’s CPCS scores and rankings “in the context of particularized facts about the contractor’s performance in order to determine the underlying significance of the CPCS results.”³⁴² The SEB had also considered the specific ratings and comments in the D&B past performance evaluations, the contractor reference surveys, and the past performance of key personnel, analyzed all of this past performance information, developed an overall assessment of each offeror’s past performance, and assigned a past performance score. The Source Selection Authority’s decision memorandum included a detailed narrative justification supporting the SEB’s past performance rankings.³⁴³

In denying the protest, the GAO found that the agency gave careful consideration to the OSI I decision and how best to implement the GAO’s recommendations. The SEB effectively considered all available information, performed a detailed evaluation of each offeror and fully supported its analysis with detailed narratives and a full explanation of its evaluation methodology.³⁴⁴

Is Telephonic Completion of a “Written” Questionnaire Sufficient?

When an agency says it will obtain past performance information through a specific medium, may the agency use a different method to gather the information? In *FC Construction Co.*,³⁴⁵ the Air Force issued an RFP for base custodial services at Goodfellow Air Force Base. The RFP stated that “the agency’s review of each offeror’s past and present performance would be conducted using *written questionnaires*.”³⁴⁶ FC Construction Co. (FC) submitted references for American Building Management (ABM), a firm that would perform the work under any contract awarded to FC. Because FC had submitted no references for itself, the Air Force initially concluded FC had no past performance, assigned FC a neutral rating, and tentatively recommended award to another offeror who received an exceptional past performance rating.³⁴⁷

After reviewing this initial decision, the Air Force directed the contracting officer to reopen the evaluation, contact ABM’s references, and assign a past performance rating based on those references. The contract administrator called all six references and reached two of them. She advised the two references that they would be allowed to answer the past performance questionnaire telephonically. The contract administrator read each of the references all of the questionnaire’s twenty-six questions, recorded their answers and assigned a rating. After again reviewing all evaluations, the Air Force awarded the contract to another offeror.³⁴⁸

FC protested the award, alleging that the Air Force decided to “poll” the references telephonically instead of having them return written questionnaires, and failed to contact all listed references.³⁴⁹ Moreover, FC alleged the Air Force either erroneously or intentionally misrepresented the references’ responses. The Air Force contended that “any different treatment between FC and other offerors was due in large measure to problems that were created by FC, or requests made by its references.”³⁵⁰

339. *Id.* at 7.

340. *Id.*

341. OSI Collection Servs., Inc., Comp. Gen. B-286597.3, June 12, 2001, 2001 CPD ¶ 103.

342. *Id.* at 3.

343. *Id.*

344. *Id.* at 4-5.

345. Comp. Gen. B-287059, Apr. 10, 2001, 2001 CPD ¶ 76.

346. *Id.* at 1 (emphasis added).

347. *Id.* at 2.

348. *Id.* at 3.

349. *Id.* at 3.

The GAO found that the telephonic polling was used at the specific request of the two references. One of the references did not have a working facsimile machine and requested the telephonic interview after repeated failed attempts to fax the questionnaire to it. The other reference was “headed out the door” and asked for a telephonic interview.³⁵¹ The GAO found nothing unreasonable or improper about conducting telephone interviews under these factual circumstances. In following a long line of cases, the GAO also held that there is no requirement that agencies contact all past performance references in their review of past performance.³⁵²

The GAO next addressed FC’s allegations that the Air Force misrepresented the references’ responses. As part of its agency report, the Air Force included a statement from the contract administrator explaining how she conducted the telephone interviews and included the past performance questionnaires completed by the contract administrator containing the references’ responses.³⁵³ The responses ranged from “exceptional” to “very good” to “satisfactory,” and the Air Force concluded that ABM’s past performance rating was “satisfactory.”³⁵⁴

FC claimed that both references advised it that virtually all of their responses to the questions described ABM’s past performance as “exceptional.” One reference produced an affidavit to that effect and the other reference offered to give testimony on the matter. As there was a direct conflict in the evidence, the GAO offered to convene a hearing to obtain testimony from the contract administrator and representative from the two references. The GAO offered to convene the hearings by teleconference at a location convenient to the references. For unknown reasons, the two references declined to give testi-

mony. In supporting the Air Force’s “satisfactory” past performance grade, the GAO found it unlikely that the contract administrator “erred in transcribing all 26 of the reference’s responses” and noted that there was no evidence of bad faith in recording the responses.³⁵⁵

Simplified Acquisitions

Threshold Raised Overseas for Operation Enduring Freedom

On 9 October 2001, the Under Secretary of Defense (Acquisition, Technology, and Logistics) formally declared that Operation Enduring Freedom meets the statutory definition of “contingency operation”³⁵⁶ for purposes of government contracting.³⁵⁷ The next day, the Army formally raised the simplified acquisition threshold for Enduring Freedom from \$100,000 to \$200,000 in accordance with FAR 2.101.³⁵⁸ Contracting personnel should note, however, that this threshold increase only applies to procurements made outside the United States in “direct support” of Enduring Freedom.³⁵⁹

New Charge Limits

Last year,³⁶⁰ we wrote about the DOD’s proposal to raise the purchase card purchase limit to \$200,000 for contingency, humanitarian, or peacekeeping operations. This proposal became a final rule on 1 November 2001.³⁶¹ Army practitioners should note that the AFARS currently retains the \$2500 limitation.³⁶²

350. *Id.* at 4.

351. *Id.*

352. *Id.* (citing Advanced Data Concepts, Inc., Comp. Gen. B-277801.4, June 1, 1998, 98-1 CPD ¶ 145 at 10; Dragon Servs., Inc, Comp. Gen. B-255354, Feb. 25, 1994, 94-1 CPD ¶ 151 at 8).

353. *Id.* at 5. The administrator stated she “read both references all 26 questions, as well as the definitions for the adjectival ratings to use in responding to the questions.” *Id.*

354. The numbers for the responses were redacted from the decision. *See id.*

355. *Id.* at 6. The GAO’s holding was also bolstered by the Air Force’s serious concerns about FC’s performance on two ongoing contracts. *See id.*

356. 10 U.S.C. § 101(a)(13)(B) (2000).

357. Memorandum, Under Secretary of Defense (Acquisition and Technology), to Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Directors of Defense Agencies, subject: Authorization to Utilize Contingency Operations Contracting Procedures (9 Oct. 2001).

358. Memorandum, Acting Deputy Assistant Secretary of the Army (Procurement), to Army Major Commands, Army Program Executive Officers, and Army Principal Assistants Responsible for Contracting, subject: Simplified Acquisition Threshold Increase in Support of Operation Enduring Freedom (10 Oct. 2001).

359. *Id.*

360. *2000 Year in Review*, *supra* note 2, at 26.

361. Overseas Use of the Purchase Card in Contingency, Humanitarian, or Peacekeeping Operations, 66 Fed. Reg. 55,123 (Nov. 1, 2001) (to be codified at 48 C.F.R. pt. 213) (amending the Defense Federal Acquisition Regulation Supplement; U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 213.301(2) (Apr. 1, 1984) [hereinafter DFARS]).

FAR part 8 requires federal agencies to buy supplies and services from certain government supply sources.³⁶³ Despite language which reads that “agencies shall satisfy requirements . . . through the sources and publications listed below,”³⁶⁴ some in the DOD are apparently ignoring these required sources when making simplified acquisitions. On 7 June 2001, Deidre Lee, Director of Defense Procurement, issued a memorandum emphasizing the importance of buying from required sources.³⁶⁵ Specifically addressing purchases from the Committee for Purchase from People Who Are Blind or Severely Disabled,³⁶⁶ Ms. Lee wrote, “Military Departments and Defense Agencies must purchase listed items from JWOD [Javits-Wagner-O’day] sources unless the appropriate central JWOD agency specifically authorizes an exception in accordance with FAR 8.706.”³⁶⁷ Clearing up misperceptions common among some procurement personnel, Ms. Lee further stated, “Items on the list must be obtained from JWOD sources even when using the Governmentwide commercial purchase card or if the procurement is at or below the micro-purchase threshold.”³⁶⁸ Hopefully, Ms. Lee’s memo will reinforce the mandatory nature of the required source list in FAR part 8, even when using the purchase card and when buying small-value items.

Under FAR 13.106-1(a)(2), contracting officers need not disclose in a solicitation the “relative importance assigned to each evaluation factor” in a simplified acquisition.³⁶⁹ Despite this language in the FAR, the GAO recently held that “basic fairness” sometimes requires an agency to disclose relative weights in a simplified acquisition solicitation.³⁷⁰

In *Finlen Complex, Inc.*,³⁷¹ the Military Entrance Processing Station in Butte, Montana, issued an RFP for meals, lodging, and transportation services for its military recruits.³⁷² Although the RFP detailed the role of past performance in the award process, it was otherwise “silent on the relative weight of the non-price evaluation factors.”³⁷³ Despite the RFP’s attention to past performance, the agency eventually only assigned a five percent importance rating to this factor.³⁷⁴ *Finlen Complex, Inc.* (Finlen), protested the award to a competitor, arguing that, considering the RFP’s focus on past performance, the agency should have disclosed its relative weight or assigned it a lesser weight.³⁷⁵

Agreeing with Finlen, the GAO first acknowledged that FAR 12.602(a) and 13.106-1(a)(2) do not, “on their face,” require a contracting officer to disclose relative weights in a simplified acquisition solicitation.³⁷⁶ The GAO found, however, that this solicitation looked a lot like a FAR part 15 nego-

362. The AFARS limits most card purchases to \$2500. AFARS, *supra* note 112, § 5113.270.

363. FAR, *supra* note 11, pt. 8.

364. *Id.* at 8.001(a).

365. Memorandum, Director, Defense Procurement, to Assistant Secretary of the Army (Acquisition, Logistics, and Technology), Assistant Secretary of the Navy (Research, Development and Acquisition), Assistant Secretary of the Air Force (Acquisition), and Directors, Defense Agencies, subject: Application of Javits-Wagner-O’Day Act (7 June 2001) [hereinafter Lee Memorandum].

366. FAR, *supra* note 11, pt. 8.7, also known as “JWOD” after the requirement’s congressional sponsors.

367. Lee Memorandum, *supra* note 365. Ms. Lee went on to say, “Exceptions may be authorized when no JWOD source can meet the required delivery schedule or produce the required quantities economically.” *Id.* Other required sources also have waiver provisions. See U.S. Dep’t of Justice, *Waiver Request Procedures*, UNICOR Marketplace, at <http://www.unicor.gov/customer/waiverform/htm> (last visited Dec. 21, 2001); Memorandum, Chief Operating Officer, Federal Prison Industries (FPI), to DOD Procurement Personnel, subject: Raising the Threshold for FPI Waiver Exceptions (24 Jan. 2000) (blanket DOD waiver for FPI purchases of \$250 or less that require delivery within ten days).

368. Lee Memorandum, *supra* note 365.

369. FAR, *supra* note 11, § 13.106-1(a)(2).

370. See *Finlen Complex, Inc.*, B-288280, 2001 U.S. Comp. Gen. LEXIS 152 (Oct. 10, 2001).

371. *Id.*

372. *Id.* at *2.

373. *Id.* at *3.

374. *Id.* at *11.

375. *Id.* at *9.

376. *Id.* at *22.

tiated procurement despite its simplified acquisition label.³⁷⁷ Because part 15 requires the contracting officer to disclose the relative weights of evaluation factors,³⁷⁸ the GAO reasoned that “withholding the relative weight of evaluation factors denied the offerors one of the basic tools used to develop the written, detailed proposals called for in the solicitation.”³⁷⁹ The GAO went on to say:

While there are certainly circumstances in which agencies need not disclose the relative weight of evaluation factors when conducting a simplified acquisition, this procurement, in our view, is not one of them. Given these circumstances, we believe that *fairness* dictated that the Army disclose the relative weight of its evaluation criteria to offerors.³⁸⁰

For procurement officials, the lesson learned is “play fair” when conducting a simplified acquisition that looks like a negotiated procurement.

Electronic Commerce

The Explosion Continues

Electronic commerce continues to be an exploding area. The Comptroller General predicted that “e-government” efforts

will account for forty percent of all federal capital investments by 2004.³⁸¹ The FAR Council announced that, beginning 1 January 2001, the GSA will only publish the FAR on-line and will no longer publish a paper copy.³⁸² The FAR Council also proposed amendments to the FAR to “clarify and encourage the use of electronic signatures in Federal procurement.”³⁸³ The GSA’s Web site for surplus auctions³⁸⁴ registered more than 19,000 bidders and sold more than \$1.5 million in merchandise during its first two months of operation.³⁸⁵ “Pay.gov” netted \$1 billion in on-line collections for federal agencies.³⁸⁶ The Navy began a program in San Diego that allows sailors to arrange Permanent Change of Station moves on-line without visiting a transportation office.³⁸⁷ The Department of Justice (DOJ) issued *Legal Considerations in Designing and Implementing Electronic Processes: A Guide for Federal Agencies*.³⁸⁸ Finally, the DOD swore in a new Chief Information Officer, Mr. John P. Stenbit. Mr. Stenbit will also be the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence.³⁸⁹

Reverse Auctions

Perhaps the fastest growing use of electronic commerce is reverse auctions.³⁹⁰ The Federal Deposit Insurance Corporation sold \$7 million in loans and \$5 million in bad debt to the private sector in a reverse auction.³⁹¹ The Air Force Personnel Center³⁹² used a thirty-minute reverse auction to buy \$1.13 million worth

377. *Id.* at *21.

378. FAR, *supra* note 11, § 15.304(d).

379. *Finlen Complex, Inc.*, 2001 Comp. Gen. LEXIS at *23.

380. *Id.* (citations omitted; emphasis added).

381. Joshua Dean, *E-Gov Efforts Growing, but Lack Vision, Says GAO Chief*, GovExec.com (July 12, 2001), at <http://www.govexec.com/dailyfed/0701/071201j1.htm>.

382. *FAR Paper Copy*, WEST GROUP BRIEFING PAPERS, Jan. 2001, at 7. The electronic FAR is available at <http://www.arnet.gov/far/>.

383. Federal Acquisition Regulation; Electronic Signatures, 65 Fed. Reg. 65,698 (Nov. 1, 2000) (to be codified at 48 C.F.R. pts. 2, 4). The proposed rule specifies that a “signature” includes “an electronic signature.” *Id.* (amending FAR, *supra* note 11, § 2.101). The Civilian Agency Acquisition Council is currently considering the language of the final rule. U.S. Dep’t of Defense, *Open DFARS Cases*, Defense Acquisition Reg. Directorate, at <http://www.acq.osd.mil/dp/dars/opencases/OpenFar.doc> (last modified Jan. 16, 2002) [hereinafter *Open DFARS Cases*].

384. U.S. General Servs. Admin., *GSA Auctions*, at <http://www.GSAAuctions.gov> (last visited Jan. 16, 2002).

385. *GSA Auction Site Sells \$1.5 Million in Two Months*, FEDTECHNOLOGY.COM EMAIL NEWSLETTER (Apr. 10, 2001) (on file with author).

386. Pay.gov, run by the Treasury Department’s Financial Management Service, allows debtors to pay money owed to agencies for fees, fines, sales, leases, loans, and certain taxes. It debuted in October 2000. Kellie Lunney, *Pay.gov Collects \$1 Billion for Federal Agencies*, GovExec.com (May 21, 2001), at <http://www.govexec.com/dailyfed/0801/081301m1.htm>; *Pay.gov Nets \$1 Billion for Agencies*, 43 GOV’T CONTRACTOR 31, at ¶ 326 (Aug. 22, 2001). The Treasury Department is also proposing to streamline the conversion of customer checks into electronic budget entries through use of the “Automated Clearing House” check processing system. Federal Government Participation in the Automated Clearing House, 66 Fed. Reg. 18,888 (Apr. 12, 2001) (to be codified at 31 C.F.R. pt. 210).

387. *Navy Expands Program to Allow Moves to be Arranged Online*, FEDTECHNOLOGY.COM EMAIL NEWSLETTER (July 24, 2001) (on file with author).

388. U.S. Dep’t of Justice, *Legal Considerations in Designing and Implementing Electronic Processes: A Guide for Federal Agencies* (November 2000), at <http://www.cybercrime.gov/eprocess.htm>.

389. *Stenbit Sworn in as DOD’s New Chief Information Officer*, FEDTECHNOLOGY.COM EMAIL NEWSLETTER (Aug. 14, 2001) (on file with author).

of computers, saving \$930,000 in the process.³⁹³ The Coast Guard used a reverse auction to buy Falcon Jet aircraft parts.³⁹⁴

Because of this fast-pace growth in reverse auctions, the FAR Council is considering the need for FAR guidance on reverse auction techniques. On 31 October 2000, the FAR Council asked for public comments about whether the FAR should include guidance on reverse auctions.³⁹⁵ To date, the Council has not yet decided whether such guidance is needed.

Considering the burgeoning nature of reverse auctions, it was no surprise there was finally a reported case in this area. In *Pacific Island Movers*,³⁹⁶ the Navy solicited contract bids for packing and crating services on Guam.³⁹⁷ The RFP provided for a reverse auction after submission of proposals. In the RFP, the Navy notified potential offerors that they could only make price revisions during the auction. The RFP also notified offerors that submission of a proposal implied consent to participate in the auction and to reveal the offeror's prices.³⁹⁸ The RFP "promised to provide during the auction a real-time software analysis showing the offers' relative position in the competition."³⁹⁹ Moreover, the RFP "also provided that the reverse auction would be conducted for 60 minutes, but that offers sub-

mitted within 5 minutes before the expiration of the auction would extend the auction for an additional 15 minutes."⁴⁰⁰

Two contractors, Pacific Island Movers (Pacific) and Dewitt Transportation Services of Guam (Dewitt), responded to the RFP. Though scheduled for sixty minutes, the reverse auction took two days because of the provision extending the auction for fifteen minutes for offers submitted in the last five minutes of the auction.⁴⁰¹ On the auction's second day, the Navy amended the RFP to close the auction that afternoon, regardless of the "last five minutes" rule. At the end of the auction, the Navy found that Pacific had submitted the lowest-priced proposal.⁴⁰²

The following week, Dewitt protested to the GAO, challenging the reverse auction.⁴⁰³ Specifically, "Dewitt complained that, because of a malfunction, offerors did not have access to promised real-time analysis showing the offerors' relative position in the competition."⁴⁰⁴ Dewitt also complained that the amendment ending the five-minute rule arbitrarily ended the auction, not allowing fair competition as contemplated in the RFP.⁴⁰⁵

390. In reverse auctions, "contractors compete in real time over the Internet as they bid for government contracts." *2000 Year in Review*, *supra* note 2, at 28. See Scott M. McCaleb, *Reverse Auctions: Much Ado About Nothing or the Wave of the Future?*, *PROCUREMENT LAW ADVISOR*, Sept. 2000, at 1; Thomas F. Burke, *Online Reverse Auctions*, *WEST GROUP BRIEFING PAPERS*, Oct. 2000, at 1; see also Bob Tiedeman, *Breaking the Acquisition Paradigm: CECOM Acquisition Center Pilots Army's E-Auctions*, *ARMY A.L. & T.*, Jan.-Feb. 2001, at 26.

391. Tanya N. Ballard, *FDIC Profits from Online Auction*, *GovExec.com* (Nov. 22, 2000), at <http://www.govexec.com/dailyfed/1100/112200t1.htm>.

392. Located on Randolph Air Force Base in San Antonio, Texas.

393. U.S. Dep't of Air Force, *Online Auction Saves AFPC Nearly \$1 Million*, *Air Force Link* (Feb. 1, 2001), at http://www.af.mil/news/Feb2001/n20010201_0144.shtml.

394. *Coast Guard Uses Online Reverse Auction for Best-Value Procurement*, 42 *GOV'T CONTRACTOR* 6, ¶ 466 (Nov. 22, 2000).

395. Federal Acquisition Regulation; Reverse Auctioning, 65 *Fed. Reg.* 65,232 (Oct. 31, 2000). Interestingly, the FAR Council did not propose rules on reverse auctions, but rather sought comments on whether any rules are needed to begin with. See *id.*

396. B-287643.2, 2001 U.S. Comp. Gen. LEXIS 110 (July 19, 2001).

397. *Id.* at *2.

398. *Id.* at *3. The identity of the offerors, however, was to remain anonymous. *Id.*

399. *Id.*

400. *Id.* at *3-4.

401. *Id.* at 4. One of the morals of this story is not to include such a provision in the RFP.

402. *Id.*

403. *Id.*

404. *Id.* at *4-5.

405. *Id.* at *5.

In response to Dewitt's protest, the Navy canceled the results of the reverse auction and asked Dewitt and Pacific to submit revised proposals using "traditional negotiated competition."⁴⁰⁶ Pacific then protested the Navy's action, arguing that it "was entitled to award based on the reverse auction."⁴⁰⁷

The GAO disagreed, finding that an "agency has broad discretion in a negotiated procurement to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition."⁴⁰⁸ The GAO found that Dewitt's protest had raised "colorable challenges to the conduct of the reverse auction."⁴⁰⁹ Specifically, the GAO found that "the undisputed software malfunctions and the arbitrary cut-off of the bidding . . . called into question the fairness of the competition."⁴¹⁰ Answering Pacific's complaint that asking for revised price proposals was unfair because their proposed prices had already been disclosed, the GAO stated:

Under the unique circumstances of a reverse auction, we fail to see how the disclosure of the offerors' prices was unfair. Pacific and Dewitt expressly agreed to the disclosure of their proposed prices by participating in the reverse auction. Because both Pacific's and Dewitt's prices were disclosed through the reverse auction, the firms were in an equal competitive position at the time revised price proposals were requested⁴¹¹

This decision teaches several lessons. First, an agency should meticulously plan a reverse auction. It should conduct a dry-run to prevent any kind of software malfunction. It should think through the RFP, specifically avoiding clauses that could indefinitely extend the auction. Second, the GAO and courts may likely find that bidders forfeit their right to secret

price disclosure when agreeing to participate in a reverse auction.⁴¹² Finally, the GAO and courts may likely give agencies broad discretion in canceling the results of a reverse auction if the agency finds it is fair to do so.

Better Use the Portal!

Effective 1 October 2001, all agencies must use a single electronic portal to publicize government-wide procurements greater than \$25,000.⁴¹³ Designated "FedBizOpps.gov," the Web site is "the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public."⁴¹⁴ From 1 October 2001 until 1 January 2002, agencies must post their solicitations on FedBizOpps.gov and in the *CBD*. Beginning 1 January 2002, agencies need no longer post solicitations in the *CBD* and may rely solely on the Web site.⁴¹⁵

And Make Sure You Check the Portal!

Just as agencies must use FedBizOpps.gov to publicize solicitations, so must potential contractors check the Web site if they want to compete for government contracts. In two separate decisions, the GAO imposed an affirmative duty on contractors to check the Internet for solicitation information posted by the government.⁴¹⁶

In *Performance Construction, Inc.*,⁴¹⁷ the Navy issued a RFP for the renovation of family housing facilities at a base in Washington.⁴¹⁸ The Navy issued the RFP on the Internet and advised potential offerors that the solicitation, amendments, plans, and

406. *Id.*

407. *Id.* at *6.

408. *Id.* (citation omitted).

409. *Id.* at *7.

410. *Id.*

411. *Pacific Island Movers*, 2001 U.S. Comp. Gen. LEXIS 110, at *9.

412. As in this case, agencies should clearly state this in the RFP.

413. Electronic Commerce in Federal Procurement, 66 Fed. Reg. 27,407 (May 16, 2001) (to be codified at 48 C.F.R. pts. 2, 4-7, 9, 12-14, 19, 22, 34-36); see Major John Siemietkowski, *Open Sesame! FedBizOpps.gov Named Sole Procurement Entry Point*, ARMY LAW., Aug. 2001, at 19; see also *2000 Year in Review*, *supra* note 2, at 28.

414. Electronic Commerce in Federal Procurement, 66 Fed. Reg. 27,409 (May 16, 2001) (to be codified at 48 C.F.R. § 2.101).

415. *Id.* at 47,408.

416. See *Performance Construction, Inc.*, Comp. Gen. B-286192, Oct. 30, 2000, 2000 CPD ¶ 180; *Wilcox Industries Corp.*, Comp. Gen. B-287392, Apr. 12, 2001, 2001 CPD ¶ 61.

417. Comp. Gen. B-286192, Oct. 30, 2000, 2000 CPD ¶ 180.

specifications would be available only on the Internet.⁴¹⁹ The RFP also cautioned that “it was the offeror’s responsibility to check the website daily for amendments or other notices.”⁴²⁰ Performance Construction, Inc. (Performance), submitted its proposal late, and the Navy rejected it.⁴²¹

Performance protested to the GAO, claiming that the solicitation Web site was inaccessible on the proposal closing date, thus thwarting Performance’s ability to obtain an amendment, modify its proposal, and submit that proposal on time. Performance argued that the Navy should have extended its closing date after learning that Performance was having trouble accessing the site.⁴²² The Navy, in turn, provided evidence that the web site was accessible during the period in question.⁴²³

The GAO, relying largely on the Navy’s technical evidence, rejected Performance’s argument.⁴²⁴ Stating that “[p]rospective offerors have an affirmative duty to make every reasonable effort to obtain solicitation materials,” the GAO criticized Performance for not registering with the solicitation’s Web site so it would receive e-mail notices of amendments.⁴²⁵ The GAO further criticized Performance for not checking the Web site for notice of amendments.⁴²⁶ In effect, the GAO found that an Internet solicitation, including its amendments, was sufficient to make the procurement opportunity available to all potential offerors.

The GAO reached a similar conclusion in *Wilcox Industries*.⁴²⁷ In *Wilcox*, the Army’s Communications-Electronic Command (CECOM) posted a solicitation for “aiming lights” on the on-line version of the *CBD* (CBDNet).⁴²⁸ The RFP announced that the solicitation and all related documents would be available on a special Web site.⁴²⁹ Wilcox Industries (Wilcox) apparently never accessed that Web site, never downloaded the solicitation, and never submitted a proposal in response to the RFP.⁴³⁰ Wilcox then protested that CECOM should have posted the solicitation in the paper copy of the *CBD*.⁴³¹

As in *Performance Construction*, the GAO disagreed with the protestor. Reasoning that “prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents,” the GAO found that CECOM used reasonable methods to disseminate the necessary solicitation information.⁴³² The GAO criticized Wilcox for never checking the Web site to “keep current on the status of the procurement.”⁴³³ The GAO also rejected Wilcox’s argument that CECOM should have notified Wilcox of the RFP because it was allegedly on a bidder’s list. The GAO reasoned that, even if Wilcox was on a bidder’s list, that did not excuse the contractor from availing itself “of every opportunity to obtain the solicitation.”⁴³⁴ Like in *Performance Construction*, the bottom line for the losing protestor was: *Check the solicitation Web site!*

418. *Id.* at 1.

419. *Id.* at 1-2.

420. *Id.* at 2.

421. *Id.* The Navy received seven other timely proposals. *Id.*

422. *Id.* Performance also contended that it had told the Navy’s contract specialist that it could not access the site. *Id.*

423. *Id.* at 3.

424. *Id.*

425. *Id.* (citation omitted).

426. *Id.*

427. Comp. Gen. B-287392, Apr. 12, 2001, 2001 CPD ¶ 61.

428. *Id.* at 1-2.

429. *Id.* at 2.

430. *Id.* at 3. At least Performance Construction claimed that it had tried to access the agency Web site; Wilcox never even tried.

431. *Id.* at 1.

432. *Id.* at 3.

433. *Id.*

434. *Id.* at 4.

On 1 May 2001, Senator Lieberman introduced the E-Government Act of 2001 in the Senate.⁴³⁵ On 11 July 2001, Representative Turner introduced the same bill in the House of Representatives.⁴³⁶ The bill would create a Chief Information Officer within the Office of Management and Budget (OMB).⁴³⁷ The bill also attempts to enhance citizen access to government information and services by requiring agency use of Internet-based information technology in a wide variety of areas.⁴³⁸ Legislators are currently considering the bill in their respective chamber committees.⁴³⁹

Commercial Items

No More Identity Crisis

Last year,⁴⁴⁰ we wrote about the FAR Council's proposal to expand the definition of "commercial item."⁴⁴¹ On 22 October 2001, the FAR Council published its final rule implementing the new definition.⁴⁴² The final rule defines a commercial item as "[a]ny item . . . that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes."⁴⁴³ "Purposes other than governmental purposes" means "those that are not unique to a government."⁴⁴⁴ The new definition also

clarifies that services ancillary to a commercial item, such as installation, maintenance, repair, training, and other support services, are considered a commercial service, regardless of whether the service is provided by the same vendor or at the same time as the item, if the service is provided contemporaneously to the general public under similar terms and conditions.⁴⁴⁵

Are You My Type?

Along with clarifying the definition of a "commercial item," the FAR Council is also trying to clarify what contract types are authorized for commercial item acquisitions. On 29 December 2000, the FAR Council published a proposed rule that specifies what contract types agencies may use when buying commercial items.⁴⁴⁶ Adding a new section to FAR part 12.207, the proposed rule requires agencies to use, "to the maximum extent practicable, firm-fixed price contracts or fixed-priced contracts with economic price adjustment for the acquisition of commercial items."⁴⁴⁷ The proposed rule continues, "These contract types may be used in conjunction with an award fee incentive and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost."⁴⁴⁸ Regarding indefinite-delivery contracts, agencies may use them "when the task or delivery orders are issued under one of the authorized contract types in [FAR 12.207-1(a)]."⁴⁴⁹ The proposed

435. S. 803, 107th Cong. (2001).

436. H.R. 2458, 107th Cong. (2001).

437. S. 803, 107th Cong., § 101 (2001).

438. *Id.* §§ 201-220.

439. See U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:s.00803> (last visited Oct. 15, 2001).

440. *2000 Year in Review*, *supra* note 2, at 27-28.

441. Acquisition of Commercial Items, 65 Fed. Reg. 52,284 (Aug. 28, 2000) (to be codified at 48 C.F.R. pts. 2, 12, 46, 52) (amending FAR, *supra* note 11, § 2.101).

442. Acquisition of Commercial Items, 66 Fed. Reg. 53,477 (Oct. 22, 2001) (to be codified at 48 C.F.R. pts. 2, 12, 46, 52) (amending FAR, *supra* note 11, at §§ 2.101, 12.102).

443. *Id.* at *17 (italics indicating amended portion).

444. *Id.* at *18.

445. *Id.* at *16.

446. Federal Acquisition Regulation; Contract Types for Commercial Item Acquisitions, 65 Fed. Reg. 83,292 (Dec. 29, 2000) (to be codified at 48 C.F.R. pts. 12 and 16).

447. *Id.*

448. *Id.*

449. *Id.*

rule also prohibits “cost-type contracts or contracts with incentives based on cost.”⁴⁵⁰

The proposed rule also addresses commercial *services* “available on a time-and-material or labor-hour basis.”⁴⁵¹ When acquiring these type of commercial services, the government may use an “indefinite-delivery contract with established fixed hourly rates that permit negotiating orders (including any required material)” or “[s]equential contract actions that acquire the requirement in modular components.”⁴⁵²

The DOD has approved this draft rule for publication as a final rule, but has not yet sent it to OMB’s Office of Information and Regulatory Affairs.⁴⁵³

Help Is on the Way!

For those still confused about the role of commercial item acquisitions in the DOD’s procurement program, the DOD has published a *Commercial Item Handbook*. Published in November 2001, readers may view the draft document on the Internet.⁴⁵⁴

GAO Criticizes the Test Program

Under the Commercial Item Test Program, the government may use simplified acquisition procedures to buy commercial items not exceeding \$5 million.⁴⁵⁵ Congress did extend it, as discussed in the Legislation Appendix to this article. In a report issued on 20 April 2001, the GAO criticized the effec-

tiveness of the test program, stating that it may not be as effective as it could be.⁴⁵⁶ In preparing its report, the GAO reviewed twelve commercial item contracts that used the test program.⁴⁵⁷ Broadly speaking, the GAO’s major concern was that agencies did not track the alleged efficiencies gained under the test program. Specifically, the report notes that agencies had not quantitatively measured “the extent to which (1) time required to award contracts was reduced, (2) administrative costs were reduced, (3) prices reflected the best value, (4) small business participation was promoted, or (5) delivery of products and services was improved.”⁴⁵⁸ The GAO also expressed a concern “about whether federal agencies were determining that prices paid were fair and reasonable for contracts awarded on a sole-source basis.”⁴⁵⁹ The GAO’s conclusion urged Congress to extend the test program until 2005. The GAO also recommended that the Administrator of the OFPP develop a method for demonstrating the efficiencies of the test program during the extended period.⁴⁶⁰

Multiple Award Schedules

Not normally the subject of policy memoranda and reported decisions, the GSA’s MAS program⁴⁶¹ received much attention during the past year.

Competition Among MAS Vendors?

Because orders placed against a MAS contract satisfy full and open competition,⁴⁶² “ordering agencies need not seek further competition, synopsize the requirement, make a separate

450. *Id.*

451. *Id.*

452. *Id.*

453. *See Open DFARS Cases, supra* note 383.

454. Office of the Deputy Under Secretary of Defense for Acquisition Reform, *Commercial Item Handbook* (November 2001), at <http://www.acq.osd.mil/ar/doc/cihandbook.pdf>.

455. FAR, *supra* note 11, § 13.500(a). Normally, the simplified acquisition limit is \$100,000. *Id.* § 2.101.

456. GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: BENEFITS OF SIMPLIFIED ACQUISITION TEST PROCEDURES NOT CLEARLY DEMONSTRATED, REPORT NO. GAO-01-517 (Apr. 20, 2001).

457. *Id.* at 2.

458. *Id.* at 6.

459. *Id.*

460. *Id.*

461. FAR, *supra* note 11, pt. 8.4. The MAS is also called the Federal Supply Schedule (FSS). GENERAL ACCOUNTING OFFICE, REPORT TO CHAIRMAN AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON READINESS AND MANAGEMENT SUPPORT, COMMITTEE ON ARMED SERVICES, U.S. SENATE, CONTRACT MANAGEMENT: NOT FOLLOWING PROCEDURES UNDERMINES BEST PRICING UNDER GSA’S SCHEDULE, REPORT NO. GAO-01-125, at 3 (Nov. 28, 2000) [hereinafter GAO MAS REPORT].

462. FAR, *supra* note 11, § 8.404(a).

determination of fair and reasonable pricing, or consider small business programs” when buying off a schedule contract.⁴⁶³ Although this language seemingly eliminates the need for further competition, the FAR nonetheless requires some minimal competition among MAS vendors depending on the dollar value of the acquisition. Centered on “maximum order thresholds” (based on bulk buying), such minimal competition requires the government to compare catalogs and pricelists among schedule vendors, and sometimes negotiate price reductions with those vendors.⁴⁶⁴

According to the GAO, many DOD procurement officials are not aware of this requirement for minimal competition among MAS vendors. In a report released on 20 November 2000, the GAO stated that “[m]ost DOD contracting officers . . . did not follow GSA’s established procedures intended to ensure fair and reasonable prices when using the Federal Supply Schedule [FSS].”⁴⁶⁵ The report shows that seventeen out of twenty-two orders that the GAO examined “were placed without seeking competitive quotes from multiple contractors.”⁴⁶⁶ Complaining that contracting officers often limited their comparison to competing labor rates, the GAO explained that

[r]elying on labor rates alone does not offer an agency a good basis for deciding which contractor is the most competitive since it does not reflect the full cost of the order or even critical aspects of the service being provided, such as the number of hours and mix of labor skill categories needed to complete the work.⁴⁶⁷

The GAO stated, however, that the “key reason that established procedures were not followed is that many contracting officers

were not even aware of GSA’s requirement to seek competitive quotes.”⁴⁶⁸ The GAO warned that failure to follow the competitive quotes requirement will cause the DOD to undermine significantly “its ability to ensure that it is getting the best . . . services at the best prices.”⁴⁶⁹

To help correct these problems, the GAO recommended that the Administrator of the OFPP begin the process of revising the FAR to clarify the requirement to seek competitive quotes when buying off a MAS contract.⁴⁷⁰ This recommendation, and indeed the entire report in general, should prompt DOD procurement officials to remember that minimal competition requirements exist even when buying off a schedule contract. Alternatively, the OFPP could ease some this confusion by eliminating these competition requirements. If the GSA “has already determined the prices of items under schedule contracts to be fair and reasonable,”⁴⁷¹ then ordering offices should not have to conduct further competition. Such further competition seems to contradict the schedule’s intent of creating a “simplified process”⁴⁷² for obtaining commercial goods and services.

Give Credit Where Credit Is Due

The federal government encourages its agencies to award contracts to small, disadvantaged businesses.⁴⁷³ According to a memo released by the OFPP on 2 October 2000, agencies may count MAS orders with 8(a) vendors against their 8(a) procurement goals.⁴⁷⁴ Agencies may only count MAS orders against their 8(a) goals, however, if the vendor is designated as an 8(a) vendor on the schedule.⁴⁷⁵ This program is a bonus for agencies because it allows them to satisfy the requirement to buy off the schedule,⁴⁷⁶ while at the same time satisfying the small business requirement.⁴⁷⁷

463. *Id.*

464. *Id.* § 8.404(b)(1)-(3).

465. GAO MAS REPORT, *supra* note 461, at 4. Although the GAO report focused on information technology, the GAO conclusions apply to all MAS acquisitions. *See id.*

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.* at 10.

471. FAR, *supra* note 11, § 8.404(a).

472. *Id.* § 8.401(a).

473. 15 U.S.C. § 637(a) (2000); FAR, *supra* note 11, pt. 19.8.

474. Memorandum, Deputy Administrator (Acting) Office of Federal Procurement Policy and Acting Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, Small Business Administration, to Agency Senior Procurement Executives and the Deputy Under Secretary of Defense (Acquisition Reform), subject: 8(a) Credit for Multiple Award Schedule (MAS) Orders (2 Oct. 2000) (citing Memorandum of Understanding, U.S. Small Business Administration and the General Services Administration, subject: Multiple Award Schedule Program (7 June 2000)).

Should the MAS Program Expand Its Customer Base?

The MAS program is designed for use by federal agencies.⁴⁷⁸ This past summer, however, Congressman Tom Davis of Virginia expressed an interest in opening up schedule contracts for technology products and services to state and local governments.⁴⁷⁹ Congressman Davis believes that state and local governments ought to take advantage of the same “cooperative purchasing” that federal agencies enjoy.⁴⁸⁰ Congress has not yet introduced any follow-on legislation.

*A Negotiated-Procedures MAS Acquisition
May Grant COFC Jurisdiction*

Although negotiation-type procedures will not necessarily turn a MAS acquisition into a negotiated procurement,⁴⁸¹ use of such procedures may grant protest jurisdiction to the COFC. In *Labat-Anderson v. United States*,⁴⁸² the Immigration and Naturalization Service (INS) conducted “a competitive source selection process aimed at selecting a single offeror already holding a GSA FSS contract.”⁴⁸³ The losing bidder filed a GAO protest of the INS award to its competitor, and then appealed an adverse GAO decision to the COFC.⁴⁸⁴ The awardee moved to dismiss the losing bidder’s appeal, arguing that the court lacked jurisdiction because the Tucker Act⁴⁸⁵ and the FASA⁴⁸⁶ barred jurisdiction over an FSS dispute such as this one.⁴⁸⁷ The court disagreed, holding that using negotiation procedures in a con-

tract award to a MAS vendor may grant an unsuccessful bidder jurisdiction to challenge the award.⁴⁸⁸

I Didn’t Really Mean That Protest . . .

As *Labat* demonstrates, the government must not inadvertently turn a MAS buy into a full-blown negotiated procurement. What happens, though, when the government *wants* to turn a MAS buy into a negotiated procurement, and a MAS vendor resists such a move? In *In re Cox & Associates*,⁴⁸⁹ Cox & Associates (Cox) protested the Air Force’s solicitation among MAS vendors for the acquisition of a budget information system. As a result of Cox’s protest, the Air Force determined that the product it sought was too complicated for a MAS solicitation. It therefore decided to resolicit the requirement as a full and open competition under FAR part 15. Cox protested again because such a procurement would likely take much more time than a MAS procurement.⁴⁹⁰

The GAO denied the protest, stating that agencies have broad discretion to determine the best contracting device for meeting their procurement needs.⁴⁹¹ In words that must have had Cox kicking itself, the GAO added, “Given the scope and complexity of the services being acquired, we are unable to say that the agency acted unreasonably in concluding that more formal acquisition procedures should be used to ensure that the Air Force receives best value in obtaining these services.”⁴⁹²

475. *Id.* at 2.

476. *See* FAR, *supra* note 11, § 8.001(a)(1)(vi).

477. *See* 15 U.S.C. § 637(a) (2000).

478. FAR, *supra* note 11, § 8.401(a).

479. Shane Harris, *Lawmaker Seeks to Open GSA Schedules to States, Localities*, GovExec.com (July 25, 2001), at <http://www.govexec.com/dailyfed/0701/072501h1.htm>.

480. *Id.* The idea is that state and local governments could also benefit from the efficiencies and bulk discounts currently available to federal agencies. *See id.*

481. *Ellsworth Assocs., Inc. v. United States*, 45 Fed. Cl. 388, 391 (1999); *see 2000 Year in Review*, *supra* note 2, at 26.

482. No. 01-350C, 2001 U.S. Claims LEXIS 139 (July 27, 2001). For further discussion of this case, see *infra* notes 646-49 and accompanying text.

483. *Labat-Anderson*, 2001 U.S. Claims LEXIS 139, at *15.

484. *Id.* at *10-11.

485. 28 U.S.C. § 1491(b) (2000).

486. 41 U.S.C. § 253j(d) (2000).

487. *Labat-Anderson*, 2001 U.S. Claims LEXIS 139, at *13.

488. *Id.* at *15.

489. Comp. Gen. B-287272.2, B-287272.3, June 7, 2001, 2001 CPD ¶ 102.

490. *Id.* at 2-4.

491. *Id.*

Small Business

Adarand: *Maybe Gone, but Not Forgotten*

On 10 August 2001, the Office of the Solicitor General (OSG) filed a brief with the Supreme Court, arguing that the Department of Transportation's (DOT) disadvantaged business enterprise program is constitutional under the "strict scrutiny" standard.⁴⁹³ The brief signals the beginning of the end for what has been a long-standing dispute challenging the constitutionality of provisions of DOT's Disadvantaged Business Enterprise (DBE) Program. Oral argument was heard on 31 October 2001. To provide context for a discussion of the OSG brief, a review of *Adarand's* history is necessary.

The dispute began with the Federal Highway Administration's (FHWA) use of a subcontracting compensation clause (SCC) in federal contracting to implement the DBE provisions of the Small Business Act.⁴⁹⁴ The SCC provided a financial advantage to prime contractors that hired subcontractors who qualify as DBEs.⁴⁹⁵ At the time of the award of the prime contract for a highway construction project in Colorado, use of the SCC was mandatory in federal contracts.⁴⁹⁶ Federal law also required that SCCs impose an obligation on contractors to presume individuals of certain races or ethnic backgrounds were socially and economically disadvantaged and were therefore qualified as DBEs.⁴⁹⁷

The prime contractor awarded the subcontract for the guard-rail portion of the contract to a DBE, Gonzalez Construction Company. Adarand Constructors (Adarand), a non-DBE subcontractor at that time, filed suit claiming that the presumption that certain groups were socially and economically disadvantaged discriminates on the basis of race in violation of the equal protection component of the Fifth Amendment's Due Process Clause.⁴⁹⁸ The district court did not focus specifically on the SCC. Nonetheless, applying an intermediate standard of review, it granted the government's motion for summary judgment and upheld the constitutional challenge to the "DBE program as administered by the [Central Federal Lands Highway Division] within Colorado."⁴⁹⁹ The Court of Appeals for the Tenth Circuit affirmed.⁵⁰⁰

In 1995, the Supreme Court, in *Adarand Constructors, Inc. v. Pena (Adarand I)*,⁵⁰¹ set aside the Tenth Circuit's decision and directed the lower courts to apply a "strict scrutiny" standard when evaluating federal statutes that use race-based classifications.⁵⁰² In effect, the Supreme Court elevated Fifth Amendment equal protection scrutiny of federal race-based legislation to the same level as Fourteenth Amendment equal protection state race-based legislation.⁵⁰³

On remand, the district court held that even though the government had shown a compelling interest in ending discrimination in federal highway construction contracts, the SCC was not

492. *Id.* at 3.

493. Brief for Respondent, *Adarand Constructors, Inc. v. Mineta*, No. 00-730, 2000 U.S. Brief 730 (S. Ct. Aug. 10, 2001) (LEXIS, Fed-U.S., S. Ct. Cases & Materials, S. Ct. Briefs) [hereinafter 2000 U.S. Brief 730].

494. 15 U.S.C. § 631 (2000). The programs dealing primarily with assisting small disadvantaged business are commonly referred to as "Section 8" programs. The Small Business Act specifically authorized federal agencies to provide incentives to contractors to encourage subcontracting with small business concerns owned and controlled by socially and economically disadvantaged individuals. *Id.* § 637(d)(4)(E). See also FAR, *supra* note 11, § 19.000.

495. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 209 (1995) [hereinafter *Adarand I*]. The pertinent provisions of the SCC are:

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Id.

496. *Id.* at 205.

497. *Id.* (referring to the provisions in 15 U.S.C. § 637(d)(2)-(3)).

498. *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992).

499. *Id.* at 244-45.

500. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1539 (10th Cir. 1994) (holding the SCC program constitutional "because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small Disadvantaged Business Enterprises").

501. 515 U.S. 200 (1995).

502. *Id.* at 227. See generally Major Timothy J. Pendolino et al., *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 36 (discussing *Adarand I* decision).

narrowly tailored to meet this compelling interest.⁵⁰⁴ Adarand's self-certification as a DBE provided a distraction on the issues of "mootness" and "standing," for both the Tenth Circuit⁵⁰⁵ and the Supreme Court.⁵⁰⁶ Eventually, however, the case returned to the Tenth Circuit for a decision regarding the constitutionality of the DBE program.

In September 2000, the Tenth Circuit reversed the district court's decision, holding that the current SCC and DBE programs were constitutional under the strict scrutiny standard.⁵⁰⁷ On 26 March 2001, the Supreme Court granted certiorari, and on 13 April 2001, limited the grant to the following two questions:

1. Whether the court of appeals misapplied the strict scrutiny standard in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination; and
2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.⁵⁰⁸

The OSG's brief begins by questioning Adarand's standing in the dispute because it "alleges no specific injury from DOT's

current regulations."⁵⁰⁹ The OSG observes that this may be so because the DOT does not use any race-conscious criteria or factors in federal procurement decisions in any jurisdiction in which Adarand conducts business. The OSG also argues that Adarand should be barred from challenging certain provisions of the Small Business Act program because it did not do so earlier.⁵¹⁰

The OSG posits that the "compelling interest" promoted by the DOT's DBE program is "assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."⁵¹¹ The allegation that the Government relied on insufficient and unreliable data to justify the need for the DBE program is rebutted by the OSG's observation that Congress authorized the DBE program only after race-neutral efforts to improve access to capital and ease bonding requirements had proven inadequate.⁵¹²

Notwithstanding constitutional concerns with DOT's original DBE program, the OSG argues that the DOT's February 1999 DBE revisions⁵¹³ are designed to address some of the concerns mentioned in the Supreme Court's *Adarand I* decision. The OSG notes that the revisions target individuals who have suffered discrimination, regardless of race, because it uses the same race neutral definitions of "socially disadvantaged" and "economically disadvantaged" as the SBA.⁵¹⁴

503. The Court overruled its earlier decision in *Metro Broad. v. Fed'l Communications Comm'n*, 497 U.S. 547 (1990) (applying an intermediate standard of scrutiny to two race-based policies of the Federal Communications Commission).

504. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997). See generally Major David A. Wallace et al., *Contract Law Developments of 1997—The Year in Review*, ARMY LAW., Jan. 1998, at 41-42 (discussing the district court's application of the strict scrutiny standard).

505. See *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292, 1295 (10th Cir. 1999) (vacating the district court's decision because Adarand could no longer "assert a cognizable constitutional injury" because Adarand now held DBE status and was entitled to the benefits being challenged). See generally Major Mary E. Harney et al., *Contract and Fiscal Law Developments of 1999—The Year in Review*, ARMY LAW., Jan. 2000 [hereinafter *1999 Year in Review*], at 39-40 (discussing the Tenth Circuit's holding).

506. See *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) (reversing the Tenth Circuit's decision and returning the case to the Tenth Circuit). See generally *2000 Year in Review*, *supra* note 2, at 30 n.301 (discussing the Supreme Court's conclusion that the Tenth Circuit had confused "mootness" with "standing").

507. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (noting that several changes made to the SCC and DBE since the suit was first filed made those provisions sufficiently narrowly tailored). See generally *2000 Year in Review*, *supra* note 2, at 30 (discussing the Tenth Circuit's decision).

508. 2000 U.S. Brief 730, *supra* note 493, at *I. The focus is on the DBE and not the SCC program because the DOT has discontinued the SCC program. *Id.* at *20 n.3.

509. *Id.* at *17.

510. *Id.* at *21-22 (specifically referring to the [federal] government-wide "goal setting" and "goal achievement mechanisms" implemented under the Small Business Act as provisions that Adarand should be barred from challenging.) See 15 U.S.C. § 637 (d)(4)-(6) (2000). The Supreme Court ultimately agreed with the OSG on these points, and on 27 November 2001, dismissed the writ of certiorari as improvidently granted. See *Adarand Constructors, Inc. v. Mineta*, 122 S. Ct. 511 (2001).

511. 2000 U.S. Brief 730, *supra* note 486, at *24 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O' Connor, J., plurality)). *Croson* involved a determination that thirty of all city contracting work should go to minority-owned businesses. The Court held that the single standard of review for racial classifications under the Fourteenth Amendment's Equal Protection Clause should be "strict scrutiny." *Croson*, 488 U.S. at 493-94. The Court concluded that the city had no "strong basis in evidence for its conclusion that remedial action was necessary" and that the program was not "narrowly tailored to remedy the effects of prior discrimination." *Id.* at 500, 508.

512. 2000 U.S. Brief 730, *supra* note 493, at *24-32 (citing numerous studies and testimony before Congress).

513. See 49 C.F.R. § 26 (2000) (current DOT regulations implementing the DBE program).

The OSG highlights provisions preventing a penalty for failure to meet annual goals, the prohibition against inflexible quotas, and the waiver provisions as factors that make flexibility the “hallmark of the DBE program.”⁵¹⁵ The OSG concludes that the DBE program is “designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible.”⁵¹⁶

Predicting how the Court would have decided the latest *Adarand* case, *Adarand Constructors, Inc. v. Mineta (Adarand III)*,⁵¹⁷ is nearly impossible because the Court admitted that the decision in *Adarand I* to heighten scrutiny “alters the playing field in some respects.”⁵¹⁸ On the other hand, the concurring and dissenting opinions of *Adarand I* may provide some insight into how the Court will react to the current DBE regulations and their application to federal and state highway projects.⁵¹⁹ The decision does little to dismiss previous concerns about decreasing SDB participation.⁵²⁰ With no Supreme Court decision expected anytime soon, we leave you with the familiar national pastime lament: “Wait till next year!”⁵²¹

Post Adarand I Regulations—Are We Narrowly Tailored Yet?

Two years after responding to *Adarand I* with a revamped DBE program, the DOT has issued a Notice of Proposed Rule-making (NPRM) with more changes.⁵²² The proposed rules would no longer require DBE applicants to submit tax returns to prove that their net worth does not exceed the DBE personal net worth cap of \$750,000.⁵²³ Furthermore, the DOT proposes adding provisions making it more likely that prime contractors will timely pay retainage to subcontractors.⁵²⁴ The NPRM also requested comment on the provision of the DBE program that allows a firm to remain certified as a DBE if it meets the size standard for one or more of its activities, but exceeds the size standard for another type of work.⁵²⁵

Another change is to the provision regarding proof of ethnicity for DBE applicants. Under the NPRM, DBE applicants must “obtain a signed, notarized statement of group membership from all persons who claim to own and control a firm applying for DBE certification and whose ownership and control are relied upon for a DBE certification.”⁵²⁶ The NPRM is clear that even in situations where additional documentation is needed because of a doubtful self-certification, “care should be

514. See 15 U.S.C. § 637(a)(5) (defining “socially disadvantaged” as those individuals “subjected to racial or ethnic prejudice or cultural bias because of [their] identity as a member of a group without regard to individual qualities”). See also 15 U.S.C. § 637(a)(6)(A) (defining “economically disadvantaged” individuals as those who have an impaired “ability to compete in the free enterprise system . . . due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged”).

515. 2000 U.S. Brief 730, *supra* note 493, at *45 (citing 49 C.F.R. §§ 26.47, 26.43, 26.15).

516. *Id.* at *50.

517. 2000 U.S. Brief 730, *supra* note 493.

518. *Adarand I*, 515 U.S. at 237 (adding that “we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced”). *Id.*

519. *Adarand I* was a 5-4 decision. Three members of the majority (O’Connor, J., (who wrote the opinion); Rehnquist, C.J.; and Kennedy, J.) seem to agree that the federal government may have a compelling interest to enact race-based legislation although it is unclear how narrowly tailored the legislation has to be to remedy current and lingering effects of racial discrimination. Justices Scalia and Thomas, both of whom concurred in part and concurred in the judgment, held to their views that the government can never have a compelling interest to mandate race-based classifications. The four dissenters (Stevens, J.; Souter, J.; Ginsberg, J.; and Breyer, J.) all would have reaffirmed the intermediate scrutiny standard of review for federal affirmative action measures.

520. See generally Matthew Weinstock, *Agencies Get Low Grades for Small Business Contracting*, GOV’T EXECUTIVE MAG., Sept. 7, 2001 (discussing Representative Nydia Velaquez’ (D-NY) concern with a decrease in contract dollars awarded to SDBs and Women Owned Small Businesses (WOSBs)).

521. The author, an admitted fanatic New York baseball fan, finds the lament apropos because it is most closely associated with the plight of the Brooklyn Dodgers, who several times throughout the 1940s and 1950s were stifled in their attempt to reach and win the World Series. It was the Dodgers who ended a discriminatory practice in our national pastime by breaking the racial barrier in Major League Baseball with the signing of Jackie Robinson, an African-American.

522. Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs; Memorandum of Understanding With the Small Business Administration; Uniform Forms and Other Revisions, 66 Fed. Reg. 23,308 (May 8, 2001) (amending 49 C.F.R. pt. 26 (1999)).

523. *Id.* at 23,210-11 (allowing instead for a notarized statement from a CPA who has reviewed the applicant’s financial records).

524. *Id.* at 23,211. Subcontractors have complained that “they may finish all their work months or years before the end of the project the prime contractor is working, but the prime contractor does not pay them fully until after the recipient [agency] has paid retainage to them at the end of the project.” *Id.* See also FAR, *supra* note 11, § 32.103 (describing “retainage” as allowing the withholding of no more than ten percent of a progress payment in a construction contract “[w]hen satisfactory progress has not been achieved by a contractor during any period for which a progress payment is to be made”).

525. *Id.* (citing the rule at 49 C.F.R. § 26.65(a)).

526. *Id.* (referring to “groups” benefiting from the rebuttable presumption of social and economic disadvantage as outlined in 49 C.F.R. § 26.67(a)).

taken to ensure that particular ethnic group members are not forced to meet a higher level of proof than members of other groups.”⁵²⁷

Another Fifth Amendment Case:

CAFC Remands to District Court with Instructions to Walk the “Adarand” Walk

Adarand does not stand alone as the major Fifth Amendment challenge to the federal government’s Small Disadvantaged Business (SDB) program. In *Rothe Development Corp. v. U.S. Department of Defense*,⁵²⁸ the CAFC vacated a district court decision in a suit challenging the constitutionality of section 1207 (the 1207 program) of the National Defense Authorization Act (NDAA) of 1987.⁵²⁹ The 1207 program provision at issue authorizes the DOD to raise the bids of non-SDBs by ten percent (for evaluation purposes) to attain the five percent contracting goal.⁵³⁰

Rothe Development Corp. (Rothe) was the low bidder on a DOD contract to operate and maintain the network control center and the switchboard operations functions at Columbus Air Force Base in Mississippi. Under the statutory preference authorized by the 1207 program, the DOD increased all non-SDB bids by ten percent. All of the parties agreed that as a result of the price evaluation, the contract was awarded to International Computer and Telecommunication (ICT), a Korean-American owned business.⁵³¹

Rothe alleged that the application of the 1207 program violated its right to equal protection under the Fifth Amendment. The DOD responded that the preference satisfies the strict scrutiny standard established in *Adarand I*.⁵³² The district court agreed with the DOD, concluding “that a thorough examination

of the statutory scheme at issue and its application . . . reveals no illegitimate purpose, no racial prejudice, and no racial stereotyping. Rather . . . [it] is designed to address a societal ill that has been identified by Congress on the basis of extensive evidence, and the program is narrowly tailored to that purpose.”⁵³³

The CAFC disagreed with two elements of the district court’s analysis. First, it took issue with the district court’s willingness to temper strict scrutiny analysis by giving Congress deference “in articulating a compelling purpose . . . [and in showing] that its action is narrowly tailored to that purpose.”⁵³⁴ The CAFC rejected the notion of “lesser scrutiny,” and ordered the district court to “undertake the same type of detailed, skeptical, non-deferential analysis taken by the *Croson* Court, but specifically to account for the factual differences between this program and that at issue in *Croson*.”⁵³⁵

The CAFC also disagreed with the district court’s “cursory analysis of the evidence before Congress at the time of the [1992] reauthorization of the 1207 program,” in which it merely listed, but did not discuss pre-reauthorization studies.⁵³⁶ The CAFC noted that the district court instead relied mostly on post-reauthorization evidence, specifically a 1998 *Benchmark Study* published by the Department of Commerce (DOC).⁵³⁷ The CAFC concluded that the district court should have relied on pre-reauthorization evidence, stating “that the quantum of evidence that is ultimately necessary to uphold racial classifications must have actually been before the legislature at the time of enactment [of the 1207 program].”⁵³⁸

The CAFC set out several factors the district court must consider on remand.⁵³⁹ The lower court’s first step in the “compelling interest” analysis is to determine if the 1207 program is “remedial” in nature. If it is remedial, it must then determine if

527. *Id.* at 23,212.

528. 2001 U.S. App. LEXIS 18751 (Aug. 20, 2001). The district court granted defendant DOD’s motion for summary judgment and dismissed the case. *See Rothe Dev. Corp. v. U.S. Dep’t of Defense*, 49 F. Supp. 2d 937, 954 (W.D. Tex. 1999). The appeal was transferred to the CAFC from the Court of Appeals for the Fifth Circuit. *See Rothe Dev. Corp. v. U.S. Dep’t of Defense*, 194 F.3d 622 (5th Cir. 1999) (denying the government’s motion to dismiss the appeal, but granting the government’s motion for alternative relief by transferring the appeal to CAFC).

529. Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1986) (codified at 10 U.S.C. § 2323 (2000)).

530. *See FAR*, *supra* note 11, pt. 19.11. The district court explained the statutory scheme as follows:

Section 1207 of the NDAA (the 1207 Program) sets a statutory goal for DOD of 5 percent participation by socially and economically disadvantaged businesses. *See* 10 U.S.C. § 2323. The 1207 Program points to section 8(d) of the Small Business Act in order to define socially and economically disadvantaged businesses. *See* 10 U.S.C. § 2323 (a)(1)(A) and 15 U.S.C. § 637(d).

Rothe, 49 F. Supp. 2d at 941.

531. *Id.* (noting that “[t]he parties agree that Rothe lost the bid for the contract *only* as a result of the application of an [price] evaluation preference” (emphasis added)).

532. *Id.*

533. *Id.* at 948-49.

534. *Rothe*, 2001 U.S. App. LEXIS 18751, at *27 (quoting *Rothe*, 49 F. Supp. 2d at 949).

535. *Id.* at *31-32. For a brief discussion on *Croson*, see *supra* note 511.

the remedy is designed “to correct present discrimination or only to counter the lingering effects of past discrimination.”⁵⁴⁰ If the court determines that the 1207 program is designed to correct the lingering effects of past discrimination, it must then “make an assessment . . . whether the effects of past discrimination have attenuated over time, or if in determining the constitutionality of the 1207 program as applied, whether the lingering effects are still present or were present in 1998 when the 1207 program was applied to Rothe’s and ICT’s bids.”⁵⁴¹ The CAFC also required the lower court to show “that Congress had before it some evidence of discrimination against Asian-Pacific Americans in general,” although it did not require a showing of discrimination against sub-groups of racial classes, in this case Korean-Americans.⁵⁴²

The CAFC instructed the lower court to abandon its lesser scrutiny standard of review and to reassess “whether the 1207 program is narrowly tailored, both as reauthorized and as applied, under a non-deferential version of strict scrutiny.”⁵⁴³ First, it should investigate the efforts and results of race-neutral alternatives before the reauthorization of the 1207 program in

1992.⁵⁴⁴ Second, the lower court must determine if there was any “pre-authorization evidence linking the numerical [five percent minority participation] goal with the appropriate [industry] pool.”⁵⁴⁵ Finally, the lower court “must strictly scrutinize whether the 1207 program was overinclusive by determining whether each of the five minority groups presumptively included in the 1207 program suffered from the lingering effects of discrimination so as to justify inclusion in a racial preference program extending to the defense industry.”⁵⁴⁶

Although the controversy continues, the price evaluation adjustment in DOD contracts is on a respite.⁵⁴⁷ *Rothe*, however, likely will follow *Adarand* to the Supreme Court regardless of the decisions by the district court and the CAFC or the reinstatement of the price evaluation adjustment. It is a high-profile case that challenges the DOD’s ability to implement measures designed to encourage SDBs to compete for contracts. *Adarand III* may leave unanswered, or unclear, matters regarding the type and extent of evidence of racial discrimination needed to justify race-based classifications challenged under

536. *Id.* at *32. Explaining the reauthorization process, the CAFC stated:

The 1207 program was initially enacted as a three-year pilot program. In 1989, Congress extended the program from 1990 until 1993, with the hope that the “additional three years would provide the DOD, and the defense industry, with the opportunity to vigorously pursue the program’s fundamental objective: to expand the participation of small disadvantaged business concerns . . . in the defense marketplace.” . . . Despite the continuation of the program beyond its initial period of authorization, in the first five years of the program, the DOD did not meet the goal of increasing participation of SDBs to five percent of its total dollar amount allocated for contracts and subcontracts. As a result, in 1992, Congress *reauthorized* the program for seven more years, through fiscal year 2000. . . . In every year since the 1992 *reauthorization*, the DOD has met the five percent goal.

Id. at *6-7 (emphasis added).

537. *Id.* at *32. The *Benchmark Study* is an economic analysis of the federal government’s contracts with SDBs in 100 markets. Based on its results, the DOC determined “that a price evaluation adjustment of ten percent [should] be employed” in fifty-nine different industries. See *Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement*, 63 Fed. Reg. 35,714 [hereinafter *Benchmark Study*]. See also FAR, *supra* note 11, § 19.201(a). The solicitation at issue in *Rothe* involved one of those industries (“Business Services”) selected for a price adjustment. See *Benchmark Study, supra* at 35,716.

538. *Rothe*, 2001 U.S. App. LEXIS 18751, at *50.

539. *Id.* at *53-66.

540. *Id.* at *54.

541. *Id.* at *54-55.

542. *Id.* at *57-58.

543. *Id.* at *60.

544. *Id.* at *61.

545. *Id.* at *63. It is noteworthy that the CAFC opined that the evidentiary record as presented by the district court might be insufficient even if the 1207 program was evaluated “under the more lenient standard of rational basis scrutiny.” *Id.* at *40 n.17.

546. *Id.* at *63-64. The five groups are: Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent-Asian Americans. See 13 C.F.R. § 124.105(c)(1)(i) (1998). Effective 11 October 2000, SDB applicants from each group must submit a narrative statement of purported economic disadvantage. See FAR, *supra* note 11, § 19.703.

547. For the second consecutive year, the price evaluation adjustment for SDBs has been suspended for DOD procurements because the DOD exceeded its five percent goal for contract awards to SDBs. See 10 U.S.C. § 2323(e)(3)(B)(ii) (2000). The suspension applies to all solicitations from 24 February 2001 to 23 February 2002. See Memorandum, Deidre A. Lee, Director of Defense Procurement, to Directors of Defense Agencies et al., subject: Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (Jan. 25, 2001) (on file with author).

Fifth Amendment equal protection grounds.⁵⁴⁸ That void may very well be left for *Rothe* to fill.

Contract Bundling—Protecting the Big Bullies or Just Good Business?

The interim rule implementing the bundling provisions of the Small Business Authorization Act became final on 26 July 2000.⁵⁴⁹ The final rule clearly attempts to strike a balance between fiscal responsibility and encouraging small business participation. Yet concern persists over recent studies concluding that bundling causes more harm than benefit.

One such study released by the Small Business Administration (SBA) in November 2000 concluded that over the previous ten years, small businesses were awarded only nine percent of bundled contract dollars, whereas small firms received about twenty-three percent of unbundled contract dollars.⁵⁵⁰ The study showed the following comparisons during fiscal year 1999: large contractors received 67% of all prime contract dollars and small businesses received 18.7% of all total prime contract dollars,⁵⁵¹ large contractors received 74% of all bundled prime contract dollars and small businesses received 15.7% of

all bundled prime contracts dollars.⁵⁵² Another more recent study (the LMI study) focused on DOD procurements and concluded that the DOD should implement measures that would track the benefits of bundling, mitigate its adverse effects, and encourage contracts that maximize competition to counter bundling's long-term effects.⁵⁵³

Congress has not been reluctant to voice concerns from both sides of the aisle over bundling or to take the DOD to task over its willingness to consolidate contracts. Senator Kit Bond, the ranking Republican on the Senate Small Business Committee, described the LMI study as offering "little comfort for small contractors who have felt that the small business community is being denied a fair slice of the pie."⁵⁵⁴ Another vocal opponent to bundling, Representative Nydia Vasquez, Democrat of New York, has introduced for the second consecutive year the Small Business Contract Equity Act,⁵⁵⁵ a bill designed to prohibit bundling if agencies fail to meet small business participation goals. If a testy exchange between a member of the House Small Business Committee and the Director of Defense Procurement, Deidre Lee, is any indication, Representative Vasquez will not be alone in urging the bill's reintroduction during the next Congress.⁵⁵⁶

548. *Rothe* poses an evidentiary challenge that may not be uncommon among financially successful SDBs. *Rothe*, a non-SDB, is a Texas corporation. ICT, a SDB with annual revenues of about \$13 million, is a Maryland Corporation. The solicitation was offered from Oklahoma and the contract was to be performed in Mississippi. The district court has already characterized requiring findings of discrimination to a specific geographic region as unworkable, at least under these circumstances. *Rothe*, 49 F. Supp. 2d n.7.

549. See *2000 Year in Review*, *supra* note 2, at 31, for a discussion of the final rule.

550. U.S. SMALL BUSINESS ADMINISTRATION, THE IMPACT OF CONTRACT BUNDLING ON SMALL BUSINESS: FY 1992-FY 1999 (Sept. 12, 2000) [hereinafter SBA CONTRACT BUNDLING STUDY], available at <http://www.sba.gov/advo/research/rs203tot.pdf>. The study, commissioned by the SBA, was conducted by Eagle Eye Publishers. See *id.*

551. The 18.7% figure fails to meet President Clinton's 23% small business contracting goal set out in Executive Order 13,170. See 65 Fed. Reg. 60,828 (2000).

552. See SBA CONTRACT BUNDLING STUDY, *supra* note 550.

553. The study was conducted by a federally-funded research and development center, LMI, which "conceded that its six-month study on contract consolidation and the narrower universe of contracts qualifying as 'bundled' under the Small Business Reauthorization Act offered no definitive answers on the overall effect of those practices on small business participation in DOD work." The study also did "[not] reveal the true savings and benefits to DOD from consolidation." See 43 GOV'T CONTRACTOR 18, ¶ 189 (May 9, 2001).

554. *Id.* Senator Bond also sponsored a bill designed to increase the independence of the SBA's Office of Advocacy. See Independent Office of Advocacy Act, S. 395, 107th Cong. (2001). The bill comes on the heels of a GAO report revealing that the government failed to meet its goal of awarding five percent of all federal contracts to WOSBs. See 43 GOV'T CONTRACTOR 10, ¶ 109 (Mar. 14, 2001). See also GENERAL ACCOUNTING OFFICE, FEDERAL PROCUREMENT: TRENDS AND CHALLENGES IN CONTRACTING WITH WOMEN-OWNED SMALL BUSINESS, REPORT NO. GAO-01-346 (Feb. 16, 2001). See also SBA CONTRACT BUNDLING STUDY, *supra* note 550 (concluding that only six of twenty-three federal agencies that award more than \$100 million in prime contracts met the Government goal of providing five percent of prime contract dollars to WOSBs).

555. H.R. 1324, 107th Cong. (2001). See *2000 Year in Review*, *supra* note 2, at 32-33, for a discussion of related legislation offered by Representative Vasquez in the 106th Congress. This year's bill, like last year's, was never enacted. The last action related to House Bill 1324 appears to be on 17 April 2001, when the bill was referred to the House Subcommittee on Technology and Procurement Policy. For a status update, see U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, at <http://thomas.loc.gov/bss/d107query.html> (last visited Oct. 15, 2001).

556. See Jason Peckenpaugh, *Small Business Committee Blasts Pentagon for Contract Bundling*, GOV'T EXECUTIVE MAG., June 21, 2001 [hereinafter Peckenpaugh], available at <http://www.govexec.com/dailyfed/0601/062101p1.htm>. Noting that the Pentagon fell short of its small business procurement goals despite employing 19,000 procurement officials, Representative Donald Manzullo (R-IL) responded, "Maybe we should have an oversight hearing on what these people are doing." Ms. Lee responded that the Pentagon's acquisition Corps has been downsized from 30,000 to 19,000 since the mid-1990s. *Id.* Ms. Lee also cited several statistics that showed an increase of awards to small businesses in FY 2000, and outlined several DOD initiatives designed to increase small business participation. Although defending the DOD's pursuit of bundling, Ms. Lee "pledged" to block bundling contracts if they failed to provide substantial benefits and would ensure "small business participation in bundled contracts at the sub-contract level." See 43 GOV'T CONTRACTOR 24, ¶ 254 (June 27, 2001).

GAO Rejects SBA's Complaints of "Hey, Not So FAST!"

The most high-profile bundling case decided by the GAO this year upheld a \$7.4 billion solicitation for up to six IDIQ task order supply and support contracts.⁵⁵⁷ The contract package, known as the Flexible Acquisition Sustainment Tool (FAST), covered unplanned weapons maintenance requirements for all Air Force managed weapons systems.⁵⁵⁸ The solicitation advised all offerors, including small businesses, that they would be considered for one of the four unrestricted awards. After these selections, two previously unselected small businesses would be considered for award of up to two contracts reserved for small businesses. The SBA challenged the procurement as improperly bundled, first complaining to the contracting officer, and then to the HCA. Both rejected the SBA's request to unbundle the solicitation. The SBA filed its protest with the GAO, and Phoenix Scientific Corporation (Phoenix) intervened in the protest.⁵⁵⁹

The SBA and Phoenix argued that the solicitation "improperly bundled requirements in a manner that precluded maximum participation by small businesses," thereby violating the specific restrictions against bundling set forth in the Small Business Act.⁵⁶⁰ The GAO disagreed, stating that the restrictions against bundling under the Small Business Act are not absolute if "measurably substantial benefits" are derived from the consolidation.⁵⁶¹ The GAO concluded that the FAST procurement did not fall under the Small Business Act's bundling restrictions because the "requirements here cannot be termed 'unsuitable for award to a small-business concern' under the Small Business Act."⁵⁶² The GAO viewed it significant that the Air Force had reserved at least two of the six anticipated awards for small businesses, and would permit those awardees to compete for future task orders. The GAO also noted that at least fif-

teen percent of the total value of all task orders would be awarded to small business prime contractors. The record also showed that other small businesses did not consider the solicitation "unsuitable" for small businesses as witnessed by their expressed interest and proposals to the Air Force on the FAST solicitation.⁵⁶³

The GAO next turned its attention to the pertinent bundling provisions in the CICA. In contrast to the "measurably substantial benefits" standard for justifying bundling under the Small Business Act, the CICA permits restrictive provisions and conditions only to the extent necessary "to satisfy the needs of the agency."⁵⁶⁴ Under its CICA analysis, the GAO looked to both cost and non-cost benefits of the procurement. As for cost, the GAO found that although the agency met the threshold of saving at least ten percent of the cost of the requirements, these administrative savings would occur regardless of the contract vehicle. Other savings had more to do with its decision to solicit as a multiple-award contract than it did with its decision to bundle the contract.⁵⁶⁵

The GAO ultimately decided the non-cost benefits justified the bundling. Specifically, it recognized that the FAST program would improve aircraft and readiness despite more than fifty percent in staff reductions over the previous decade. The Air Force also explained that despite the reductions in personnel, there were increasing operational demands on an aging fleet of aircraft, and that the C-5 transport aircraft has more than 3000 parts with no known vendor. The GAO agreed that unforeseeable needs for these parts could be met quickly under the program.⁵⁶⁶

Although the GAO claimed that its decision would not preclude it from denying future challenges under the CICA bun-

557. Phoenix Scientific Corp., Comp. Gen. B-286817, Feb. 24, 2001, 2001 CPD ¶ 24.

558. *Id.* at 2. The Statement of Work (SOW) advises that the focus of FAST "is the sustainment of all Air Force managed weapon systems, support systems, sub-systems, and components. This requirement includes services, modifications, spares, and repairs. FAST does not include Military Construction (MILCON), Civil Engineering, or Base Operating Support. In addition, FAST will not be used for new development programs." *Id.* at 3.

559. *Id.* at 4. Phoenix's status as an interested party was challenged by the Air Force. The Air Force argued that before the solicitation, Phoenix had received only one Air Force contract and had never held a contract as either a prime or sub-contractor on any Air Force weapon system falling within the disputed solicitation's SOW. The GAO eventually concluded that Phoenix was an interested party based on Phoenix documents showing its intention to participate in future Air Force procurements. *Id.* at 4 n.3. Considering Phoenix' previous track record, its owner's remark at a House Small Business Committee hearing that his company has been "devastated" by the FAST program is curious. See Peckenpaugh, *supra* note 556.

560. *Phoenix Scientific*, 2001 CPD ¶ 24 at 7-8.

561. *Id.* at 6. See 15 U.S.C. § 644(e)(2)(B) (2000) (listing the benefits).

562. *Phoenix Scientific*, 2001 CPD ¶ 24 at 7.

563. *Id.* at 9. One of the participants in the GAO hearing was an actual small business offeror, who testified that the GAO should not conclude the solicitation unsuitable for small business. This offeror, Modern Technologies Corporation, was eventually selected as one of three small businesses to be prime contractors for the FAST program. See *Air Force Announces Six FAST Contractors, Including Three Small Businesses*, BNA FED. CONT. REP. (July 24, 2001).

564. See 10 U.S.C. § 2305(a)(1) (2000).

565. *Phoenix Scientific*, 2001 CPD ¶ 24 at 11.

566. *Id.* at 12.

dling restrictions, the scope of the decision appears to be very broad.⁵⁶⁷ The decision displeased members of Congress who have been fiercely opposed to bundling.⁵⁶⁸ Whether or not that opposition will coalesce into passable legislation is yet to be seen.

Honing the HUBZone: New Rules and New Tools

There are several notable changes in the HUBZone Program⁵⁶⁹ designed to ease eligibility rules and clarify the scope of the program.⁵⁷⁰ The new rules added a subparagraph which states that the HUBZone Program does not apply to state and local governments. State and local governments that use similar programs are, however, allowed to use the “[l]ist of qualified HUBZone [small business concerns]” to identify qualified businesses.⁵⁷¹ The definition of “principal office” was changed for businesses in service and construction “primary industr[ies]” because their employees are dispersed at numerous job sites.⁵⁷² Qualified businesses are now allowed to have affiliates, and “non-manufacturers” are no longer required to demonstrate that they would provide products manufactured by HUBZone-certified businesses.⁵⁷³ More rules are sure to follow, as the SBA has announced that it is changing rules

designed to “end the confusion over the order between [HUBZone businesses and SDBs].”⁵⁷⁴ In addition to the new rules, the SBA has revamped its electronic application process through the use of added help features and links.⁵⁷⁵ The SBA believes that the added features “will shorten its decision-making process [from thirty to twenty days]” and “further its goal of certifying 4,000 small businesses as HUBZone companies by the end of the year.”⁵⁷⁶

Labor Standards

Davis-Bacon Act

Supreme Court Upholds “Little Davis-Bacon Act” Provisions

Many states have passed prevailing wage laws applicable to state-financed construction projects that are very similar to the federal Davis-Bacon Act (DBA).⁵⁷⁷ In *Lujan v. G&G Fire Sprinklers, Inc.*,⁵⁷⁸ the Supreme Court upheld California’s prevailing wage statute against a constitutional due process challenge. G&G Fire Sprinklers, Inc. (G&G), was a subcontractor on three California public works projects. The California Division of Labor Standards Enforcement (DLSE) determined that

567. See, e.g., Jason Peckenpaugh, *Air Force Contract Bundling Effort Upheld*, GOV’T EXECUTIVE MAG., Feb. 26, 2001 (quoting J. Hatcher Graham, attorney for Phoenix, as stating, “This decision is an excellent roadmap for how to get around the bundling provisions of the [Small Business Act] and [CICA] rules. Every agency will start drafting their [acquisition proposals] based on the decision.”), available at <http://www.govexec.com/dailyfed/0201/022601p1.htm>.

568. See 43 GOV’T CONTRACTOR 7, ¶ 79 (Feb. 21, 2001) (noting that Representatives Nydia Vasquez (D-NY) and Albert Wynn (D-MD) sent a letter to the GAO, urging it to recommend that the Air Force cancel the solicitation and divide it into smaller ones so that companies such as Phoenix could compete).

569. See 15 U.S.C. § 657(a) (2000). See also FAR, *supra* note 11, pt. 19.13. The purpose of the HUBZone program is to provide federal contracting assistance for qualified small business concerns located in historically underused business zones in an effort to increase employment opportunities. See HUBZone Program, 66 Fed. Reg. 4643 (Jan. 18, 2001).

570. See HUBZone Program, 65 Fed. Reg. 58,963 (Oct. 3, 2000) (proposed amendments to 13 C.F.R. pt. 126). See also HUBZone Program, 66 Fed. Reg. 4643 (Jan. 18, 2001) (final rule amending 13 C.F.R. pt. 126). The final rule became effective on 20 February 2001. Although the proposed amendments included language that would specifically add the Departments of Commerce, Justice and State to the list of federal agencies subject to the HUBZone Act, the final rule excluded the language based on the comment that one provision already specifically lists the agencies subject to the Act and another provision “makes clear that after September 30, 2000, the HUBZone program applies to all federal agencies that hire one or more contracting officers.” *Id.* at 4644. Retaining the old provision would clarify which agencies were subjected to the Act prior to 30 September 2000. *Id.*

571. *Id.* at 4645 (amending 13 C.F.R. § 126.101(c) (2001)).

572. *Id.* (amending 13 C.F.R. § 126.103).

573. *Id.* (revising 13 C.F.R. §§ 126.204, 126.206; amending § 126.601).

574. See *SBA Changing Rules to Clarify Parity Between HUBZone, 8(a) Program*, BNA FED. CONT. REP. (Aug. 21, 2001). A recent GAO report makes it likely that there will be proposed changes to another one of the SBA’s programs designed to assist small businesses. The GAO report on the “Mentor/Protégé” Program concluded that the DOD lacks data to measure the success of the program and to determine if funds are needed to encourage major defense contractors to establish business relationships with SDBs. See GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: BENEFITS OF THE DOD MENTOR-PROTÉGÉ PROGRAM ARE NOT CONCLUSIVE, REPORT NO. GAO-01-767 (July 19, 2001).

575. See U.S. Small Business Administration, *Applying for HUBZone Certification*, HUBZone Empowerment Contracting Program, at https://eweb1.sba.gov/hubzone/internet/application/dsp_apps_home.cfm (last modified 19 Oct., 2001).

576. See 43 GOV’T CONTRACTOR 11, ¶ 119 (Mar. 21, 2001).

577. 40 U.S.C. §§ 276a to a-7 (2001).

578. 121 S. Ct. 1446 (2001).

G&G was not paying the prevailing wage required by California law to its employees working on these contracts and directed the relevant state agencies to withhold funds under all three contracts.⁵⁷⁹ G&G filed suit against the DLSE and other state agencies and officials alleging that withholding of these funds without a hearing violated the Due Process Clause of the Fourteenth Amendment.⁵⁸⁰

Reversing a decision by a divided panel of the Court of Appeals for the Ninth Circuit,⁵⁸¹ the Court held that the provisions of California law entitling a contractor such as G&G to file suit to recover unpaid funds provided sufficient due process.⁵⁸² Significant to the Court's decision was its determination that G&G did not have a "present entitlement" to the withheld funds but only a claim that the funds were due it under the contract.⁵⁸³ This case is important to federal practitioners because the withholding provisions of the Davis-Bacon Act are very similar to those in the California statute.⁵⁸⁴ Therefore, this decision should foreclose any similar constitutional challenges to the withholding of funds for Davis-Bacon Act violations under federal contracts.

Helpers at Last?

After nearly twenty years of trying, the DOL has once again published a final rule attempting to define the place of "helpers" under the DBA wage classification scheme.⁵⁸⁵ Following years of litigation and congressional action, the DOL essentially has codified its existing practice with respect to helpers. Under the final rule, wage determinations will include a distinct classification of "helper" when:

(i) The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;

(ii) The use of such helpers is an established prevailing practice in the area; and

(iii) The helper is not employed as a trainee in an informal training program. A "helper" classification will be added to wage determinations pursuant to § 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.⁵⁸⁶

Given the tortured history of this matter, it remains to be seen whether this final rule will survive intact.⁵⁸⁷

The DBA and Contract Options—FAR Coverage at Last!

On 9 December 1992, the DOL issued *All Agency Memorandum Number 157 (AAM 157)* requiring the incorporation of a DBA wage determination at the exercise of each option to extend the term of a construction contract, or a contract that includes substantial and segregable construction work.⁵⁸⁸ After a lengthy period of some controversy regarding the DOL's authority to issue *AAM 157*, the matter was resolved and the DOL published *AAM 157* in the *Federal Register* for public information.⁵⁸⁹ On 22 October 2001, the FAR Council published a final rule containing FAR provisions implementing *AAM 157*.⁵⁹⁰ Perhaps the most important feature of the final

579. *Id.* at 1448.

580. *Id.* at 1449.

581. *See* *G&G Fire Sprinklers, Inc. v. Bradshaw*, 204 F.3d 941 (9th Cir. 2000).

582. *Lujan*, 121 S. Ct. at 1450.

583. *Id.* at 1451.

584. *See* 40 U.S.C. § 276a (2001).

585. Procedures for Predetermination of Wage Rates; Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts, 65 Fed. Reg. 69,674 (Nov. 20, 2000) (to be codified at 29 C.F.R. pts. 1 and 5). The DOL first published a final rule attempting to deal with helpers in 1982. *See* Procedures for Predetermination of Wage Rates, 47 Fed. Reg. 23,644 (May 28, 1982). "Helpers" are defined as persons who "[h]elp [craft worker] by performing duties of lesser skill. Duties include using, supplying or holding materials or tools, and cleaning work area and equipment." 65 Fed. Reg. at 69,681.

586. *Id.* at 69,693.

587. For example, on 23 May 2001, Representative Charles W. Norwood (R-GA) introduced a bill (H.R. 1972) that would create a helper classification by statute. Representative Norwood's bill contains a much less restrictive definition of "helper" than that found in the DOL final rule. On 25 July 2001, the bill was referred to the Subcommittee on Workforce Protection of the House Committee on Education and the Workforce. To date, there has been no subsequent action on the bill in the House. *See* U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, at <http://thomas.loc.gov> (last visited Oct. 12, 2001).

588. *See* Guidance to All Government Contracting Agencies of the Federal Government and the District of Columbia Concerning Application of Davis-Bacon Wage Determinations to Contracts With Option Clauses, 63 Fed. Reg. 64,542 (Nov. 20, 1998).

589. *Id.*

rule is that it provides four alternative methods a contracting officer could use to adjust the contract price when exercising an option to extend the term of a construction contract:

1. No adjustment in contract price (because the option prices may include an amount to cover estimated increases);
2. Price adjustment based on a separately specified pricing method, such as application of a coefficient to⁵⁹¹ an annually published unit pricing book incorporated at option exercise;
3. A percentage price adjustment, based on a published economic indicator; and
4. A price adjustment based on a specific calculation to reflect the annual increase or decrease in wages and fringe benefits as a result of incorporation of the new wage determination.⁵⁹²

To accomplish these changes, the rule amends FAR 22.404-1 to clarify that both project and general wage determinations are effective for the life of a contract, unless the contracting

officer exercises an option to extend the term of the contract.⁵⁹³ Next, the rule adds a provision explaining when a wage determination potentially applicable to the option period will be effective.⁵⁹⁴ Finally, the rule adds three new solicitation provisions and contract clauses to the FAR that explain how the four price adjustment options quoted above are meant to work: “Davis-Bacon Act—Price Adjustment (None or Separately Specified Method),”⁵⁹⁵ “Davis-Bacon Act—Price Adjustment (Percentage Method),”⁵⁹⁶ and “Davis-Bacon Act—Price Adjustment (Actual Method).”⁵⁹⁷

The Service Contract Act

Successor Contractor Notification Provisions Spell Success for Contractor’s Price Adjustment Claim

A case from late last year once again highlights the importance of understanding and following the myriad of contract clauses that implement the Service Contract Act (SCA).⁵⁹⁸ This is particularly true in cases dealing with option exercises and the successor contractor provisions of section 4(c) of the SCA.⁵⁹⁹

The ASBCA wrestled with these issues in *Tecom, Inc.*⁶⁰⁰ In this case, Tecom, Inc. (Tecom), had a grounds maintenance

590. Application of the Davis-Bacon Act to Construction Contracts With Options to Extend the Term of the Contract, 66 Fed. Reg. 53,478 (Oct. 22, 2001) (to be codified at 48 C.F.R. pts. 1, 22, and 52).

591. As in the original rule; probably should be “from.”

592. 66 Fed. Reg. 53,479.

593. *Id.* at 53,480 (amending 48 C.F.R. § 22.404-1).

594. *Id.* (amending 48 C.F.R. § 22.404-6). The rule adds a new subparagraph (d) to FAR section 22.404-6 which reads as follows:

(d) The following applies when modifying a contract to exercise an option to extend the term of the contract:

(1) A modified wage determination is effective if—

(i) The contracting agency receives a written action from the Department of Labor prior to exercise of the option, or within 45 days after submission of a wage determination request (22.404-3(c)), whichever is later; or

(ii) The Department of Labor publishes notice of modifications to general wage determinations in the Federal Register before exercise of the option.

(2) If the contracting officer receives an effective modified wage determination either before or after execution of the contract modification to exercise the option, the contracting officer must modify the contract to incorporate the modified wage determination, and any changed wage rates, effective as of the date that the option to extend was effective.

Id.

595. *Id.* at 53,482 (adding 48 C.F.R. § 52.222-30).

596. *Id.* (adding 48 C.F.R. § 52.222-31).

597. *Id.* (adding 48 C.F.R. § 52.222-32).

598. 41 U.S.C. §§ 351-358 (2001).

599. *See id.* § 353(c).

support contract with the Air Force. Tecom entered into a successorship collective bargaining agreement (CBA) with its employees during the base year of the contract. Tecom did not notify the government of this fact.⁶⁰¹ Because the contracting officer was unaware that Tecom had a CBA with its employees, she failed to provide the notice of intent to exercise an option required by FAR 22.1010(a).⁶⁰² Nearly two months into the option year, Tecom and the union concluded a new CBA, forwarded that CBA to the contracting officer, and requested that the contracting officer incorporate into the contract, retroactive to option exercise, the rates in the new CBA.⁶⁰³ Because the contracting officer was unaware of the successorship agreement between Tecom and the union, she denied Tecom's request on the basis that it was not a successor contractor within the meaning of section 4(c) of the SCA.⁶⁰⁴

Ultimately, Tecom appealed the denial of its claim for \$155,755.51 to the ASBCA.⁶⁰⁵ The board granted Tecom's motion for summary judgment based on the contracting officer's failure to provide the mandatory notices regarding option exercise. Specifically, the board found that, in the absence of timely notice from the government, the deadlines in FAR 22.1012-3(b) do not apply.⁶⁰⁶ Therefore, Tecom was entitled to retroactive application of the new CBA. Interestingly, though the board noted Tecom's failure to follow the FAR requirements for contractor notice to the government in its findings of fact, that failure appears to have played no role in the board's decision.

Cleaning Up—Laundry Contractor Gets Price Adjustment!

In *Penn Enterprises, Inc.*,⁶⁰⁷ the ASBCA again found itself wrestling with application of the SCA price adjustment clauses. Penn Enterprises, Inc. (Penn), had a contract consisting of a base year and four option years with the Army for laundry and dry cleaning services. During the base year, the applicable wage determination was based on the collective bargaining agreement between the employees and Penn's predecessor on the contract.⁶⁰⁸ Also during the base year, Penn and the union representing the employees entered into a new CBA and Penn provided the proper notices to the contracting officer. The new CBA obligated Penn to pay employees for accrued sick leave on the first regularly scheduled payday after each anniversary date of the contract or termination of the contract.⁶⁰⁹ On the first payday following exercise of the first option, Penn paid its employees a little over \$20,000 for unused sick leave. When the government refused to pay this amount, Penn filed a claim. This appeal followed the contracting officer's final decision denying the claim.⁶¹⁰

In denying the claim, and in response to Penn's appeal, the government argued that the unused sick leave paid to the employees accrued during the base period. The government reasoned that, because the requirement to pay employees for unused sick leave did not arise until the new CBA became effective (the first option year), Penn was not entitled to a retroactive price adjustment.⁶¹¹ The board rejected this argument and sustained Penn's appeal. The board distinguished this case from those where the contractor seeks a price adjustment for cost increases required under a CBA that became effective during a period of performance (for example, the base year of a contract).⁶¹² The CBA at issue here did not change the amount

600. ASBCA No. 51591, 01-1 BCA ¶ 31,156.

601. *Id.* at 153,896. See FAR, *supra* note 11, § 22.1008-3, regarding the contractor's obligation to forward a copy of the CBA to the contracting officer.

602. *Id.* at 153,897. Federal Acquisition Regulation section 22.1010(a) requires the contracting officer to provide both the contractor and the employees' collective bargaining agent written notice of intent to exercise an option under the contract at least thirty days before the option exercise. FAR, *supra* note 11, § 22.1010(a).

603. *Tecom, Inc.*, 01-1 BCA ¶ 31,156 at 153,897.

604. See FAR, *supra* note 11, § 22.1012-2 to -3.

605. *Tecom, Inc.*, 01-1 BCA ¶ 31,156 at 153,898.

606. *Id.* at 153,902.

607. ASBCA No. 52234, 01-1 BCA ¶ 31,244.

608. *Id.* at 154,196.

609. This new CBA became effective for the first option period under the DOL regulations implementing the SCA. See 29 C.F.R. §§ 4.143, 4.145 (2001). The DOL issued a wage determination based on the CBA, which the contracting officer incorporated into Penn's contract by modification effective at the beginning of the option period. *Penn Enters., Inc.*, 01-1 BCA ¶ 31,244 at 154,196.

610. *Id.* at 154,197.

611. The government relied primarily on the provisions of FAR section 52.223-.243. *Id.*

612. See, e.g., *Ameriko, Inc.*, ASBCA No. 50356, 98-1 BCA ¶ 29,505.

of sick leave employees accrued, or require Penn to make payments during the base year. Instead, the board found the CBA required Penn to pay for accrued sick leave during the first option period. Because the CBA was effective for that option period, Penn was entitled to the price adjustment.⁶¹³

Successor Contractor Executive Order Revoked

On 20 October 1994, President Clinton issued Executive Order (EO) 12,933, *Nondisplacement of Qualified Workers Under Certain Contracts*.⁶¹⁴ The executive order required that all service contracts for “public buildings”⁶¹⁵ include a clause applying to a contractor that succeeds another contractor under a contract for the performance of similar services in the same building. Such a successor contractor was required to offer qualified employees of the predecessor contractor the right of first refusal for employment under the new contract.⁶¹⁶ The requirements of the executive order were incorporated into DOL regulations⁶¹⁷ and into the FAR.⁶¹⁸

On 17 February 2001, President Bush issued EO 13,204 revoking EO 12,933.⁶¹⁹ Executive Order 13,204 also required the Secretary of Labor, the FAR Council, and the heads of executive agencies to rescind “promptly” any orders, rules, regulations, guidelines or policies implementing or enforcing EO 12,933.⁶²⁰ Significantly, EO 13,204 also required the Secretary

of Labor to terminate immediately any investigations or other compliance actions based on EO 12,933.⁶²¹ Both the DOL⁶²² and the FAR Council⁶²³ have issued rules implementing EO 13,204.

Bid Protests

Jurisdiction

The Scanwell Sun Has Set—but the Temperature Remains the Same

In the absence of an extension by Congress and under the Administrative Dispute Resolution Act of 1996 (ADRA),⁶²⁴ district court jurisdiction over bid protests ended on 1 January 2001.⁶²⁵ Hence the long line of *Scanwell* cases marches into the sunset.⁶²⁶ It does not follow, however, that the standard of review applied in *Scanwell* and its progeny will no longer provide warm comfort to bid protestors.

On 3 January 2001, the CAFC reversed a COFC decision regarding a protestor’s dispute with a contracting officer’s affirmative responsibility determination.⁶²⁷ The CAFC’s decision to reverse in part and remand to the COFC for further findings regarding the contracting officer’s affirmative responsibility determination hinged on its conclusion that the ADRA requires

613. *Penn Enters., Inc.*, 2001-1 BCA ¶ 31,244 at 154,198.

614. Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (Oct. 24, 1994).

615. Because the definition of “public building” contained in the executive order excluded buildings on a military installation, the executive order had little effect on most military activities. *See id.*

616. Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (Oct. 24, 1994).

617. 29 C.F.R. pt. 9, 62 Fed. Reg. 28,176 (May 22, 1997).

618. Federal Acquisition Circular (FAC) 97-01, 62 Fed. Reg. 44,823 (Aug. 22, 1997) (interim rule); FAC 97-11, 64 Fed. Reg. 10,545 (Mar. 4, 1999) (final rule); FAC 97-15, 64 Fed. Reg. 72,450 (Dec. 27, 1999) (added clause to the commercial item clause list at FAR section 52.212-5).

619. Exec. Order No. 13,204, 66 Fed. Reg. 11,228 (Feb. 22, 2001).

620. *Id.*

621. *Id.*

622. *See Nondisplacement of Qualified Workers Under Certain Contracts; Rescission of Regulations Pursuant to Executive Order 13,204*, 66 Fed. Reg. 16,126 (Mar. 23, 2001) (removing 29 C.F.R. pt. 9).

623. *See Federal Acquisition Regulation; Executive Order 13,204, Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts*, 66 Fed. Reg. 27,416 (May 16, 2001) (removing FAR subpt. 22.12, § 52.222-50; amending FAR § 52.212-5).

624. 28 U.S.C. § 1491(b)(1) (2000).

625. *See 2000 Year in Review, supra* note 2, at 36-38 (discussing the end of bid protest jurisdiction in district courts). The ADRA granted concurrent jurisdiction of bid protests to COFC and district courts. *See* 28 U.S.C. § 1491(b).

626. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

627. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001). For further discussion of the court’s treatment of the affirmative responsibility determination, see *infra* notes 696-715.

courts to review an agency's award decision under the standards set forth in the Administrative Procedure Act (APA).⁶²⁸ The result was a more favorable standard of review for the protestor—from one requiring fraud or bad faith, to one requiring lack of rational basis or a procurement procedure involving a violation of a regulation or procedure.⁶²⁹

What Is a "Federal" Agency?

Another CAFC case, *Emery Worldwide Airlines, Inc. v. Federal Express Corp.*,⁶³⁰ not only thoroughly covered the history of bid protest jurisdiction, it also provided insight on when an agency would be considered a "federal" agency under the ADRA. The case involved an award by the USPS of a seven-year, \$6.36 billion dollar contract awarded to FedEx for air transportation network services.⁶³¹ The USPS negotiated the contract on a sole-source basis. Emery Worldwide Airlines, Inc., protested the award to the COFC, which granted the government's motion for summary judgment upholding the contract.⁶³²

On appeal, the government argued that it is not subject to COFC jurisdiction because the USPS was not a "federal agency" as specified by the ADRA.⁶³³ The CAFC observed that the USPS is statutorily defined as an "independent establish-

ment of the executive branch of the United States."⁶³⁴ Consequently, it concluded that the USPS is a federal agency unless "*context* shows that such term was intended to be used in a more limited sense."⁶³⁵ The court added that "[n]either the statutory text of the word 'context' nor the text of any related congressional act clearly indicates that 'agency' was not meant to include the USPS."⁶³⁶

Is There Anything You Won't Hear?

Emery illustrates the scope of the COFC's bid protest jurisdiction over any federal agency, absent explicit congressional intent for an exemption.⁶³⁷ This attitude extends as well to the type of procurement. In cases decided a day apart, the COFC held that the ADRA granted jurisdiction over cases involving the award of a long-term lease of government-owned property⁶³⁸ and an award of a Blanket Purchase Agreement (BPA) issued under the FSS.⁶³⁹

In *Catholic University*,⁶⁴⁰ the plaintiff attempted to enjoin the Armed Forces Retirement Home from issuing a solicitation to lease a forty-nine-acre tract adjacent to its campus.⁶⁴¹ The government contended that the COFC's injunctive authority does not extend to suits involving the procurement process of the sale or lease of government-owned real property.⁶⁴² The COFC

628. See 5 U.S.C. § 706 (2000).

629. The latter standard of review is derived from the APA and is the same as that previously applied in the district courts under the *Scanwell* line of cases. See *Impresa*, 238 F.3d at 1331-32. The former standard of review was used in the COFC and its predecessor court under its grant of jurisdiction pursuant to the Tucker Act. See 28 U.S.C. § 1491(b)(1), (4) (2000). Consistent with the standard of review imposed by the APA, CAFC ordered that the contracting officer be deposed to place on the record "the basis for the contracting officer's responsibility determination." *Impresa*, 238 F.3d at 1339.

630. 2001 U.S. App. LEXIS 19420 (Aug. 31, 2001). For a discussion of the competition aspects of this case, see *supra* notes 39-52 and accompanying text.

631. *Id.* at *2.

632. *Emery Worldwide Airlines, Inc. v. United States*, 49 Fed. Cl. 211 (2001). See 43 GOV'T CONTRACTOR 12, ¶ 126 (Mar. 28, 2001) (discussing the COFC decision).

633. *Emery*, 2001 U.S. App. LEXIS 19420, at *21-22. In effect, the CAFC understood the practical effect of the government's theory to be that "no judicial body possesses jurisdiction to judicially review pre-award protests involving the USPS," a result they clearly were not willing to accept. *Id.* at *32.

634. *Id.* at *22 (citing 39 U.S.C. § 201 (1994)).

635. *Id.* at *23-24 (citing 28 U.S.C. § 451 (Supp. V 1999)) (emphasis added).

636. *Id.* at *25. The CAFC cited a Supreme Court case that stated Congress could have always used a more "spacious phrase, like 'evidence of Congressional intent' instead of 'context' if it had intended a broader interpretation." See *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). It also cited an earlier federal claims case involving the USPS that concluded "the context of the [Postal] Reorganization Act does not require a limited reading of the term 'independent establishment' for our jurisdictional purposes." See *Butz Eng'g Corp. v. United States*, 499 F.2d 619, 624 (Ct. Cl. 1974).

637. *Id.* at *30 (deferring to the plain text of the statute "unless overcome by a persuasive showing from the purpose or history of the court") (quoting *Lutheran Mut. Life Ins. Co. v. United States*, 602 F.2d 328, 331 (Ct. Cl. 1979)).

638. *Catholic Univ. of America v. United States*, 49 Fed. Cl. 795 (2001).

639. *Labat-Anderson, Inc. v. United States*, 50 Fed. Cl. 99 (2001). In both *Labat-Anderson* and *Catholic Univ.*, the COFC denied the plaintiff's request for an injunction.

640. 49 Fed. Cl. 795.

641. *Id.* at 797.

rejected the argument, concluding that the ADRA's amendment to the Tucker Act broadened the scope of jurisdiction to post-award challenges to government solicitations.⁶⁴³ The COFC observed that its predecessor, the United States Claims Court, exercised injunctive jurisdiction over pre-award claims relating to the government's disposition of its assets.⁶⁴⁴ Therefore, the COFC reasoned that post-award disputes regarding the solicitation of government assets were now within its jurisdiction under the ADRA.⁶⁴⁵

In *Labat-Anderson*,⁶⁴⁶ the COFC held that it exercised jurisdiction over an award of a BPA for "records management and forms processing services at the four INS Service Centers" because the transaction was a "procurement" under the Tucker Act. The court looked to outside sources to define the term "procurement" because the Tucker Act did not. It concluded that the phrase "all stages of the process of acquiring property and services" included this award because issuing BPAs was "one of the stages" in acquiring the services solicited by the Request for Quotations.⁶⁴⁷

The COFC has restrained its jurisdictional reach in cases that call for a review of the validity of government statutes and regulations, leaving those issues for the federal district courts.⁶⁴⁸ It also will not entertain a dispute based on a termination for convenience when it is presented as a bid protest action.⁶⁴⁹ Nonetheless, the government is on notice that the COFC will be generous in extending its warm embrace to con-

tractors and therefore should be prepared to defend all actions related to all types of solicitations.

Time's Not on Your Side

Fairness and common sense should remain a contracting officer's guide, even with the increasing use of electronic mail (e-mail) filings of protest documents.⁶⁵⁰ As one contracting officer found out the hard way, the GAO tolls time for "required debriefing" purposes when the protestor actually receives the bad news, not when it is transmitted or entered into a contractor's e-mail system.⁶⁵¹

In *International Resources Group*,⁶⁵² an offeror, International Resources Group (IRG), requested a debriefing six days after being excluded from the competitive range. The GAO decided that the debriefing was "required" even though it did not meet the FAR deadline.⁶⁵³ The agency sent out its notice of exclusion to IRG shortly before midnight on Friday, 1 September. The notice did not enter IRG's computer system until 12:15 a.m. the following day. Due to the Labor Day holiday weekend, IRG did not receive notice of its exclusion from the competitive range until Tuesday, 5 September. On Thursday, 7 September, it requested a pre-award briefing.⁶⁵⁴ The debriefing was offered and held on 12 October. The protest was filed on Monday, 23 October. The agency argued that IRG should have filed its protest no later than 11 September, i.e., within ten days of when it claimed IRG had knowledge of the basis for its pro-

642. *Id.* at 799.

643. *Id.* at 799-800.

644. *Id.* at 799.

645. *Id.* at 800. The COFC cited language from the ADRA's principal sponsor, Senator Cohen of Maine, and concluded, "It is apparent from the text of Senator Cohen's remarks that the amendment of § 1491 was not intended to narrow the court's injunctive authority but, rather, to expand that authority to embrace post-award challenges to government solicitations." *Id.* See also *Government of Harford County, Maryland*, B-283259, B-283359.3, Oct. 28, 1999, 99-2 CPD ¶ 81. In *Harford*, the GAO extended jurisdiction over an award that included the transfer of real property, because it was so intertwined with the procurement of services. See *2000 Year in Review*, *supra* note 2, at 40 (discussing *Harford*).

646. *Labat-Anderson*, 50 Fed. Cl. 99 (2001). For a discussion of the substantive claims involved in this case, see *supra* notes 482-88 and accompanying text.

647. *Id.* at 104. The court specifically cited the Office of Federal Procurement Policy Act, 41 U.S.C. § 403(2) (1994), and the Competition in Contracting Act, 10 U.S.C. § 2302(3)(A) (1994).

648. See, e.g., *Automated Communication Sys., Inc. v. United States*, No. 01-65C, 2001 U.S. Claims LEXIS 107 (June 22, 2001). For a discussion of the COFC's conclusion that the Randolph-Sheppard Act preference carries greater weight than the HUBZone preference in the military vending procurement process, see *infra* notes 1557-68 and accompanying text.

649. *Griffey's Landscape Maintenance L.L.C.*, No. 01-309C, 2001 U.S. Claims LEXIS 161 (Aug. 27, 2001).

650. See *2000 Year in Review*, *supra* note 2, at 39 (discussing a pilot program for the electronic filing of certain protest documents with the GAO).

651. See *Int'l Resources Group, Comp. Gen.* B-286663, Jan. 31, 2001, 2001 CPD ¶ 35.

652. *Id.*

653. A pre-award debriefing becomes "required" when the contractor requests a debriefing in writing within three days after receipt of notice of exclusion from competition. See FAR, *supra* note 11, § 15.505(a)(1).

654. *Int'l Resources Group*, 2001 CPD ¶ 35 at 5.

test. IRG argued that the “required” debriefing extended the date for a timely filing until 10 days after the debriefing.⁶⁵⁵ The GAO sided with the protestor, concluding that construing notification as having occurred when the notification enters the recipient computer system after business hours would under these circumstances reduce the time to request a debriefing from three days to one.⁶⁵⁶

How “Interested” Are You Really?

The sub-title refers to the requirement that a party be “interested” to have standing to file a protest.⁶⁵⁷ An “interested” party is defined as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”⁶⁵⁸ So how can a party be interested even though it did not actually submit a proposal because of its inability to meet one of the requirements? In *McRae Industries, Inc.*,⁶⁵⁹ a protestor alleged that it would have submitted a proposal but for tests that the contracting officer waived.⁶⁶⁰ After waiving the test requirements, the contracting officer awarded the contract to two awardees without modifying the RFP and resoliciting. The GAO held that the protestor was an interested party based on its assertion that it would have submitted a proposal under the relaxed requirements.⁶⁶¹

EAJA—Prevailing Party Claims COFC Finds Supreme Court’s View of “Catalyst Theory” Inapplicable to EAJA Claim

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*,⁶⁶² the Supreme Court rejected the “catalyst theory”⁶⁶³ of prevailing party claims under the Fair Housing Amendments Act (FHAA) of 1988⁶⁶⁴ and the Americans with Disabilities Act (ADA) of 1990.⁶⁶⁵ In *Buckhannon*, the plaintiff, who operated assisted living care homes, brought suit in federal court, alleging that West Virginia’s “self-preservation”⁶⁶⁶ requirements violate both the FHAA and the ADA. While the case was pending, the West Virginia legislature enacted two bills that eliminated the “self-preservation” requirements. The case was dismissed and the plaintiffs requested attorney’s fees as the “prevailing party” under the FHAA and the ADA.⁶⁶⁷ The *Buckhannon* Court rejected the theory that a party can be “prevailing” because of a defendant’s voluntary change in conduct. Instead, it held that entitlement to relief on the claims would have to be shown on the merits, either in the trial court or on appeal.⁶⁶⁸

Buckhannon set the stage for an Equal Access to Justice Act (EAJA) claim made by a protestor after the Navy cancelled its original IFB and resolicited under another IFB. The Navy took this corrective action after hearing the trial court’s remarks at a temporary restraining order (TRO) hearing in the case of *Brick-*

655. A protest to the GAO is timely if it is filed within ten days after the basis for the protest is known, unless the protest is filed within ten days after the offered date for the “required” debriefing. See 4 C.F.R. § 21.2(a)(2) (2001).

656. *Int’l Resources Group*, 2001 CPD ¶ 35 at 5. Notably, the agency’s contracting officer in *IRG* was based in Kazakhstan, a Central Asian nation in a time zone eleven hours ahead of IRG’s office in Washington, DC. Although the contracting officer did not attempt to use the time differential as an excuse for the late-night notification, it is highly unlikely GAO would have considered it in their decision given their overriding concern for an offeror’s or protestor’s right to request a pre-award debriefing after actually receiving knowledge of its exclusion from competition. The GAO did make clear, however, that they would have considered the message received on the first business day after it was sent and received in IRG’s system, even if it was not read until later. *Id.* at 5 n.7.

657. 31 U.S.C. § 3551(1) (2000); 4 C.F.R. § 21.1(a) (2000).

658. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a).

659. Comp. Gen. B-287609.2, July 20, 2001, 2001 CPD ¶ 127.

660. *Id.* The tests were for leakage and toe adhesion requirements of cold or wet boots with removable insulated booties. *Id.* at 2-3.

661. *Id.* at 3. The GAO ultimately denied the protest because although the tests were no longer required, the standard requirements were. Because *McRae* admittedly could not meet the requirements, it could not show the required “prejudice” in order to have the protest sustained. *Id.* at 5-6.

662. 121 S. Ct. 1835 (2001).

663. The Supreme Court described the “catalyst theory” as a situation when the plaintiff is a “prevailing party” for the purposes of obtaining attorney’s fees “because the lawsuit brought about a voluntary change in the defendant’s conduct.” *Id.* at 1837.

664. 42 U.S.C. § 3613(c)(2) (2000).

665. *Id.* § 12205.

666. *Buckhannon*, 121 S. Ct. at 1838. The “self-preservation” requirements forbid the boarding of residents who could not remove themselves from dangerous situations such as fire. *Id.*

667. *Id.*

668. *Id.* at 1840.

wood Contractors, Inc. v. United States (Brickwood II).⁶⁶⁹ Before the Supreme Court's decision in *Buckhannon*, the COFC had held in *Brickwood I* that plaintiff Brickwood was a "prevailing party" under the EAJA.⁶⁷⁰ The *Brickwood I* court discussed the term "prevailing party" under the "catalyst theory," in which it concluded that a party may be entitled to costs under the EAJA if the plaintiff's suit is a "causal, necessary, or substantial factor in obtaining the result plaintiff sought."⁶⁷¹ In other words, no findings on the merits were needed.

After *Buckhannon*, the Navy filed a motion of relief from judgment, alleging that the *Buckhannon* decision invalidated the *Brickwood I* finding that the plaintiff was a prevailing party. The COFC disagreed, noting that the *Buckhannon* Court specifically excluded the EAJA from the breadth of their holding. It then observed that the underlying issue in *Buckhannon* was resolved independently by the West Virginia legislature, with no discernible role played by the plaintiff's lawsuit.⁶⁷² This was in contrast to the facts in *Brickwood I*, in which the Navy took corrective action after hearing the trial court's serious reservations about the Navy's handling of the solicitation.⁶⁷³ It also compared the "prevailing party" language in the EAJA with that in the FHAA and ADA that the Supreme Court dealt with in *Buckhannon*. It concluded that in the latter statutes, broad discretion was left to the court to determine if a plaintiff was a "prevailing party."⁶⁷⁴ The EAJA, however, made clear that a "prevailing party" was entitled to "fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."⁶⁷⁵

Substantial Justification Negated by "11th Hour" Revelations

Even if the government's position in a bid protest is "substantially justified," it still may have to pay fees under the EAJA. In a Court of Appeals for the Eleventh Circuit decision,

Maritime Management, Inc. v. United States,⁶⁷⁶ the Navy was required to pay an unsuccessful protestor EAJA fees because it had acted in "bad faith" during the discovery process while the protest was being pursued at GAO. The Navy's lack of disclosure did not come to light until the protestor filed its federal suit. The Navy stated that the administrative record was complete, an assertion challenged by the protestor. The day before the discovery motion in the district court, the government produced seven additional documents. The district court ordered these documents into the administrative record. The documents did not help Maritime Management, Inc. (Management), though, as the district court ordered a rebidding of the contract, and not an award to Maritime as it requested.⁶⁷⁷

The district court did, however, grant Maritime's motion for attorneys' fees and costs under the EAJA. The order granting fees was based on the government's bad faith in failing to submit a complete administrative record. The Eleventh Circuit upheld the "bad faith" determination because the government had waited until the "eleventh hour" to produce the documents after consistently maintaining that the administrative record was complete. Because the district court based the EAJA award on the "bad faith" prong of the statute, substantial justification by the government to resist the suit was irrelevant.⁶⁷⁸

The *Maritime* court did agree with the government's contention that EAJA fees should not include costs incurred as part of the GAO protest, even though the GAO made its recommendation on an incomplete record.⁶⁷⁹ Of course, that does not mean that the HCA cannot authorize the payment of costs without a GAO recommendation. In *Inter-Con Security Systems, Inc.*,⁶⁸⁰ The GAO had dismissed a protest as academic after the Department of State (DOS) took corrective action. The DOS then inexplicably requested the GAO to make a recommendation that DOS pay the two protestors their protest costs.⁶⁸¹ The GAO was quick to oblige the DOS request, but mentioned in its rec-

669. 49 Fed. Cl. 738 (2001) [hereinafter *Brickwood II*].

670. See *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 148 (2001) [hereinafter *Brickwood I*].

671. *Brickwood I*, 49 Fed. Cl. at 154.

672. *Brickwood II*, 49 Fed. Cl. at 744.

673. *Id.* at 748-49.

674. *Id.* at 745.

675. *Id.* at 746.

676. 242 F.3d 1326 (11th Cir. 2001).

677. *Id.* at 1329-30.

678. *Id.* at 1330-33.

679. *Id.* at 1336 (reasoning that EAJA fees only apply to "civil actions," and not to GAO proceedings).

680. Comp. Gen. B-284534.7, B-284534.8, Mar. 14, 2001, 2001 CPD ¶ 54.

ommendation that HCAs have the discretion and authority to reimburse protestors under the FASA.⁶⁸²

Playing the Odds

Although the number of bid protests filed at the GAO declined for the twelfth year in a row, FY 2001 statistics may be an “early sign of a leveling off in the [declining] number of protests filed.”⁶⁸³ The total amount of bid protests fell six percent in FY 2001, from 1220 protests filed in FY 2000 to 1146 filed in FY 2001.⁶⁸⁴ The rate of decrease is about half of that in the previous two years.⁶⁸⁵ The decline changed the total number of merit decisions only slightly, from 306 in FY 2000 to 313 in FY 2001.⁶⁸⁶

The GAO protest-sustain rate increased slightly, from twenty-one percent in FY 1999 and FY 2000, to twenty-two percent in FY 2001.⁶⁸⁷ Protestors at the COFC have not experienced nearly the same success at the COFC. As of 5 September 2001, the COFC had not sustained any of the twenty-six post-award protests it decided during 2001.⁶⁸⁸ With odds like these, protests filed at the GAO may actually increase during FY 2002.

Contractor Qualifications: Responsibility

Never Mind: Contractor Responsibility Rules Go Final, Then Get Suspended and Proposed for Revocation

Eighteen months and 1800 comments after the initial proposed rule,⁶⁸⁹ the Clinton Administration’s controversial contractor responsibility rule became final on 20 December 2000, with an effective date of 19 January 2001.⁶⁹⁰ A mere twelve days after the rule became effective, the Civilian Agency Acquisition Council authorized civilian agencies to suspend the rule.⁶⁹¹ Less than three months later, on 3 April 2001, the FAR Council stayed the rule government-wide for 270 days and proposed the rule’s revocation.⁶⁹² On 27 December 2001, the FAR Council terminated the stay and revoked the 20 December 2000 rule.⁶⁹³ So today, the responsibility rules are the same as before the Council published the 20 December 2000 final rule.⁶⁹⁴ The rules are back to square one—where many believe the responsibility rules should stay.⁶⁹⁵

681. *Id.* at 3.

682. *Id.* at 4 (citing 41 U.S.C. § 253b(1) (Supp. IV 1998)). *See also* FAR, *supra* note 11, § 33.102(b).

683. *See GAO Protest Docket Down 6 Percent, Sustain Rate 22 Percent in FY 2001*, BNA FED. CONT. REP. (Oct. 16, 2001).

684. *Id.*

685. *Id.* In FY 1999, the rate of decline was eleven percent (1399 protests filed). In FY 2000, the rate of decline was thirteen percent (1220 protests filed). The GAO received more than 3300 protests at its peak in FY 1989. *Id.*

686. *Id.*

687. *Id.* In FY 1999, the GAO sustained seventy-four protests; in FY 2000, sixty-three protests; and in FY 2001, sixty-eight protests. *Id.*

688. *See Court of Federal Claims Still Has Not Sustained a Postaward Protest in 2001*, BNA FED. CONT. REP. (Oct. 2, 2001).

689. 64 Fed. Reg. 37,360 (1999). *See also 2000 Year in Review, supra* note 2, at 77; *1999 Year in Review, supra* note 505, at 18.

690. FAC 97-21, FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 Fed. Reg. 80,255 (Dec. 20, 2000). The new rule included the following revisions: FAR section 9.104-1(d) added language stating that a “satisfactory record of integrity and business ethics” included compliance with “tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws,” *id.* at 80,264; FAR section 52.209-5 required offerors to certify whether they had any criminal or administrative violations in these areas; FAR parts 14 and 15 included provisions requiring contracting officers to notify an offeror determined nonresponsible, FAR section 31.205-21 made unallowable costs incurred for activities that assisted, promoted or deterred unionization, and FAR section 31.205-47 made unallowable costs incurred in civil or administrative proceedings brought by a government where the contractor violated a law or regulation, *id.* at 80,625.

691. Letter 2001-1, Civilian Agency Acquisition Council, subject: Class Deviation from Federal Acquisition Circular 97-21, Final Rule, FAR Case 1999-010, Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings (31 Jan. 2001). The letter authorized class deviations from FAC 97-21. *Id.* Numerous civilian agencies issued class deviations. 43 GOV’T CONTRACTOR 6, ¶ 65 (Feb. 14, 2001). The General Services Administration first issued a class deviation followed soon thereafter by the National Aeronautics and Space Administration, the Environmental Protection Agency, and the Departments of Health and Human Services, Transportation, and Interior. *Id.*

692. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings—Revocation, 66 Fed. Reg. 17,758 (Apr. 3, 2001). The FAR Council issued two rules regarding the final rule announced on 20 December 2000. First, an interim rule published under FAR case 1999-010 stayed the final rule for 270 days. Second, a proposed rule, FAC Case 2001-014, would revoke the 20 December 2000 final rule. *Id.*

693. Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Cost, and Costs Relating to Legal and Other Proceedings, 66 Fed. Reg. 66,984 (Dec. 27, 2001).

*Federal Circuit Splits with GAO
Over Affirmative Responsibility Review Standard*

The CAFC's recent decision in *Impresa Costruzioni Geom. Domenico Garufi v. United States*⁶⁹⁶ gives new hope to unsuccessful offerors challenging a contracting officer's affirmative responsibility determination. Although the FAR requires a contracting officer to make an "affirmative determination of responsibility"⁶⁹⁷ before awarding a contract, a disappointed offeror challenging such a determination has previously found the contracting officer's determination nearly unassailable. The relevant GAO bid protest regulation provides:

Because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met.⁶⁹⁸

General Accounting Office opinions typically dispose of affirmative responsibility allegations with little analysis beyond recitation of the rule.⁶⁹⁹ Before *Impresa*, COFC decisions were equally inhospitable to a challenge regarding an affirmative responsibility determination.⁷⁰⁰

In *Impresa*, the CAFC stated the standard of review should be whether "there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis."⁷⁰¹ The appellant, *Impresa Costruzioni Geom. Domenico Garufi* (Garufi), an unsuccessful offeror, challenged award of a contract to Joint Venture Conserv (JVC). JVC was a joint venture composed of three companies. Carmelo La Mastra controlled two of the companies, while La Mastra's brother-in-law controlled the third company. Before issuance of the RFP, an Italian court found that La Mastra "had engaged in bid rigging and was involved in a Mafia organization."⁷⁰² As a result, the court placed all three companies under a "receivership run by a legal administrator."⁷⁰³ Later, La Mastra was indicted for his involvement in a "Mafia-type association" and for involvement in bid-rigging.⁷⁰⁴

JVC's proposal certified "that during the three-year period preceding its offer, neither it nor its principals had been convicted or had a civil judgment against them for certain offenses

694. Personnel should use the pre-FAC 97-21 FAR. Older versions of the FAR are posted electronically under "FAR (Archived) HTML" at <http://www.arnet.gov/far/>.

To be determined responsible, a prospective contractor must: (a) have adequate financial resources . . . ; (b) be able to comply with the . . . delivery or performance schedule; (c) have a satisfactory performance record . . . ; (d) have a satisfactory record of integrity and business ethics; (e) have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . . ; and (g) be otherwise qualified and eligible . . . under applicable laws and regulations.

FAR, *supra* note 11, § 9.104-1.

695. See 66 Fed. Reg. 17,758 (Apr. 3, 2001).

The two proposed rules were the most controversial ever published by the FAR Council. Adverse comments were made by individuals within the Government itself, as well as by the public. After publication of the final rule, the FAR council has continued to receive information that the rule is not in the best interests of industry or the Government.

Id.

696. 238 F.3d 1324 (Fed. Cir. 2001).

697. FAR, *supra* note 11, § 9.103(b).

698. 4 C.F.R. § 21.5(c) (2001). See generally Steven W. Feldman, *The Impresa Decision: Providing the Correct Standard of Review for Affirmative Responsibility Determinations*, 36 PROCUREMENT LAW. 2 (2001) [hereinafter Feldman] (arguing that the GAO regulation should be revised to mirror the *Impresa* court's standard).

699. See, e.g., *SatoTravel*, B-287655, 2001 Comp. Gen. LEXIS 101 (July 5, 2001) (citing and applying the rule with little additional analysis).

700. See, e.g., *Trilon Educ. Corp. v. United States*, 578 F.2d 1356 (Cl. Ct. 1978); *News Printing Co., Inc. v. United States*, 46 Fed. Cl. 740, 746 (2000) ("General responsibility determinations will not be overturned, absent allegations of fraud or bad faith."). See also Feldman, *supra* note 698, at 6 ("Before the recent Federal Circuit *Impresa* decision, Court of Claims decisions followed the GAO standard.").

701. *Impresa*, 238 F.3d at 1333.

702. *Id.* at 1327-28. The Italian court found that La Mastra "had been involved in intimidating a competitor into withdrawing from a bid for a Contract . . . and that 'probably in connection with that [same] bid the owner of another firm . . . was killed.'" *Id.* at 1328.

703. *Id.* at 1328.

704. *Id.*

including ‘commission of a fraud or criminal offense’ and were not presently indicted for such offenses.”⁷⁰⁵ The CAFC could not determine the relationship between La Mastra and his two companies during the receivership.⁷⁰⁶ Without explanation, the contracting officer signed a responsibility determination, noting that JVC had “a satisfactory record of performance, integrity, and business ethics.”⁷⁰⁷

Garufi’s protest in the COFC alleged that the contracting officer made an “arbitrary and capricious responsibility determination.”⁷⁰⁸ The COFC, finding no allegations of fraud or bad faith by the contracting officer, limited its review to the documentary record before the contracting officer. On this evidence, the COFC “held that the responsibility determination was not arbitrary or capricious.”⁷⁰⁹

The CAFC explicitly rejected the government’s argument that “‘absent allegations of fraud or bad faith’ by the contracting officer, the responsibility determination . . . is immune from judicial review,”⁷¹⁰ thereby distinguishing the federal standard of review from the GAO’s standard. The court then announced that “the traditional APA standard adopted by the *Scanwell*”⁷¹¹ line of cases allows for review of an agency’s responsibility determination if there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis.⁷¹²

Using the rational basis standard, the CAFC determined that it did “not know whether the contracting officer’s determination was valid . . . because the contracting officer’s reasoning supporting that determination is not apparent from the record,”⁷¹³ and ordered the contracting officer deposed to determine the basis for his responsibility determination. Specifically, to decide whether a rational basis for the responsibility

determination existed, the CAFC needed to know: “(1) whether the contracting officer, as required by 48 C.F.R. § 9.105-1(a), possessed or obtained information sufficient to decide the integrity and business ethics issue, including the issue of control, before making a determination of responsibility; and (2) on what basis he made the responsibility determination.”⁷¹⁴

The *Impresa* decision will likely result in greater scrutiny of affirmative responsibility challenges in federal court. Further, since the *Impresa* standard differs from the GAO standard, protestors may engage in “forum shopping . . . seeking the best possible treatment.”⁷¹⁵

CONTRACT PERFORMANCE

Contract Interpretation

Omitted Specifications Read into Contract

Demonstrating how truly burdensome the government contracting process can be, a recent COFC decision has held that a construction contractor is required to comply with architectural details that were included in contract drawings but not in the specifications. In *Centex Construction Co. v. United States*,⁷¹⁶ the contractor sought an adjustment for having to install channel bracing around metal door openings. Two of the contract drawings indicated the need to install this channel bracing, but the specifications made no mention of any bracing.⁷¹⁷ The government’s argument against giving the contractor an adjustment was simple: the contract, like most construction contracts, contained a FAR clause⁷¹⁸ that indicated “[a]nything mentioned in the specifications and not shown on the drawings, or shown on

705. *Id.* at 1329.

706. *Id.* at 1337 (“[N]either the Court nor the parties had sufficient knowledge of Italian law to understand all aspects of how the preventive sequestration affected the companies involved.”).

707. *Id.* at 1329.

708. *Id.*

709. *Id.* at 1330.

710. *Id.* at 1333.

711. *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970).

712. *Impresa*, 238 F.3d at 1330, 1333. For further discussion regarding jurisdiction under the *Scanwell* standard, see *supra* notes 624-29 and accompanying text.

713. *Id.* at 1337.

714. *Id.* at 1339.

715. Feldman, *supra* note 698, at 8.

716. 49 Fed. Cl. 790 (2001).

717. *Id.* at 791-92.

718. FAR, *supra* note 11, § 52.236-21 (Specifications and Drawings for Construction).