

system will be implemented through a partnership with CourtLink Corp. (CourtLink). Attorneys are required to have an "E-File Subscriber Agreement" on file with CourtLink to use the system. The D.C. Superior Court, the GAO, and the COFC are also experimenting with e-filings. The advantages are time and cost savings.⁹⁵⁰ It is just a matter of when, not if, the BCA nearest you jumps on the e-filing bandwagon.

SPECIAL TOPICS

Alternative Dispute Resolution

ADR—Not Just an "Alternative" Anymore?

Almost two years ago, the Air Force began some systematic changes designed to increase the use of alternative dispute resolution (ADR) procedures as the preferred method for resolving contract disputes.⁹⁵¹ Building on the success she saw in the use of ADR, Mrs. Darleen Druyen, Principal Deputy Assistant Secretary of the Air Force (Acquisition and Management), expanded the role of ADR through seven new proposals.⁹⁵² One of these proposals, to include timely identification and resolution of items in controversy in contractor past performance evaluations, drew some resistance from the National Defense Industrial Association (NDIA). The NDIA argues that considering ADR participation as a past performance evaluation factor may not be legally enforceable because it is "unnecessarily coercive and perhaps counterproductive."⁹⁵³

In a less controversial step intended to increase the use of ADR, the DLA issued a final rule that establishes ADR as the initial dispute resolution method under DLA contracts.⁹⁵⁴ The rule adds a new solicitation provision which states that parties will agree to negotiate to resolve disputes that arise under the

contract, and if unassisted negotiation is unsuccessful, the parties will use ADR techniques to attempt to resolve the issue.⁹⁵⁵ Further, the provision requires the parties to discuss use of ADR before either party determines that ADR is inappropriate. Documentation rejecting ADR must be signed by an official authorized to bind the contractor, or by the contracting officer (if the government is rejecting ADR), and must be approved at a level above the contracting officer after consulting with the ADR specialist and legal counsel.⁹⁵⁶ The provision does allow the offeror to opt out of the clause, but there is no guidance on how the DLA will evaluate an offeror's decision to opt out of the clause.

The COFC also announced a new pilot ADR program.⁹⁵⁷ Under the court's new program, all cases (with the exception of bid protest cases) assigned to Chief Judge Baskir, Judge Nancy Firestone, Judge Bohdan Futey, or Judge James Turner will be simultaneously assigned to one of four ADR judges.⁹⁵⁸ For each case in the pilot program, the COFC will issue an order requiring early neutral evaluation after the parties file their joint preliminary status report, and again at the end of discovery. The goal of the pilot program is to explore whether early neutral evaluation by a settlement judge will help effect settlement. Additionally, parties may ask the trial judge to allow ADR whenever the parties believe it will be beneficial. All information and documents submitted to an ADR judge will be kept confidential and will not be included in the official court file, nor disclosed to anyone not participating in the ADR process.⁹⁵⁹

Binding Arbitration at FAA

The DOJ concurred with the FAA's Office of Dispute Resolution for Acquisition (ODRA) plan to allow parties to use binding arbitration in bid protests and contract disputes.⁹⁶⁰ The

950. *D.C. Contract Appeals Board to Allow E-Filings of Pleadings, Post Decisions on Web*, BNA FED. CONT. REP. (Sept. 18, 2001).

951. Joe Diamond, Air Force program executive officer for weapons, Remarks to the Air Force Alternative Dispute Resolution Conference, San Antonio, Texas (Apr. 17, 2001) (transcript on file with author).

952. *Id.* The seven initiatives are: (1) amending past performance guidance to include tracking the timely identification and resolution of issues in controversy, (2) requiring program managers to identify and report on issues pending more than twelve months to determine if ADR can speed up the resolution, (3) creating a pilot program for funding settlements less than \$10 million, (4) increasing access to the judgment fund and flexibility in reimbursement of the fund, (5) challenging industry to develop joint training in negotiation skills and ADR, (6) establishing a recognition program for ADR excellence, and (7) promoting more uniform use of ADR within the DOD. *Id.*

953. *See NDIA Weighs in Against Air Force's Plan to Use ADR Participation in Past Performance Evaluations*, 43 GOV'T CONTRACTOR 21, ¶ 224(d) (June 6, 2001).

954. DLA Acquisition Directive: Alternative Dispute Resolution, 66 Fed. Reg. 27,474 (May 17, 2001).

955. *Id.* (adding provision 5452.233-9001 to the DLA FAR Supplement).

956. *Id.*

957. *See COFC Kicks Off ADR Pilot Program*, 43 GOV'T CONTRACTOR 14, ¶ 149 (Apr. 11, 2001).

958. The ADR judges are Senior Judge Thomas Lydon, Senior Judge Wilkes Robinson, Senior Judge Moody Tidwell, and Judge Christine Miller. United States Court of Federal Claims, *Notice of ADR Pilot Program*, available at <http://www.contracts.ogc.doc.gov/fedcl/docs/adr.html> (last visited Oct. 12, 2001).

959. *Id.*

FAA guidance stresses that the decision to arbitrate must be voluntary, and sets out an informal process for holding a binding arbitration in an ODR proceeding.⁹⁶¹ The FAA's program for binding arbitration is the first program specifically intended for acquisition-related disputes to receive DOJ concurrence.⁹⁶²

First Things First, Confidentiality Rules Key to Successful ADR

Confidentiality of ADR proceedings is a key component of a successful ADR program. In late 2000, the DOJ issued guidance to agencies on the nature and limits of confidentiality in federal ADR programs.⁹⁶³

While the DOJ guidance acknowledges a significant issue regarding the relationship between the ADR Act confidentiality guarantees⁹⁶⁴ and other laws or regulations that authorize access to certain types of information,⁹⁶⁵ it does not give agencies specific guidance on how to handle such problems.

Foreign Purchases

Black Berets: A Controversial Birthday Gift

The FY 2001 procurement that holds the dubious honor for the most congressional scrutiny and notoriety is that which has been characterized as "symbolic of our commitment to trans-

form this magnificent Army into a new force—a strategically responsive force for the 21st century."⁹⁶⁶ In light of the stir this procurement caused Congress and American small business interests, the ordeal may have left some longing for a more deliberative, methodical procurement process.⁹⁶⁷

Congress Blows Its Lid

The controversy began with the Chief of Staff's decision to have all Active, National Guard, and Reserve Army personnel begin wearing the new black berets as part of their standard headgear on 14 June 2001, the Army's first birthday in the new millennium.⁹⁶⁸ The purchasing agency, the DLA, took several actions to meet the deadlines. After amending a contract with the current domestic supplier of berets, the DLA awarded contracts to two foreign suppliers, and then made competitive awards to four additional foreign suppliers.⁹⁶⁹ The first three contract actions, all non-competitive procurements, were justified based on an "unusual and compelling urgency," i.e., to meet the Chief of Staff's deadline.⁹⁷⁰ In addition, the DLA neglected to seek a review of these actions from the Small and Disadvantaged Business Utilization Office to determine the feasibility of small business participation.⁹⁷¹

The noncompetitive contracts were not the only problem. The "Berry Amendment"⁹⁷² restricts the DOD's expenditure of funds on clothing to purchases from domestic firms.⁹⁷³ A

960. See *FAA's ODR to Offer Binding Arbitration*, 43 GOV'T CONTRACTOR 31, ¶ 326(d) (Aug. 22, 2001) [hereinafter *FAA's ODR to Offer Binding Arbitration*]. The Administrative Dispute Resolution Act of 1996 requires agencies to issue guidance on binding arbitration in consultation with the Attorney General. See 5 U.S.C. § 575(c) (2000).

961. See Office of Dispute Resolution for Acquisition, *Proposed Guidance for the Use of Binding Arbitration Under the Administrative Dispute Resolution Act of 1996* (May 2001), available at <http://www.faa.gov/agc/guidnce.htm>.

962. See *FAA's ODR to Offer Binding Arbitration*, *supra* note 960.

963. See Federal Alternative Dispute Resolution Council, *Confidentiality in Federal Alternative Dispute Resolution Programs*, 65 Fed. Reg. 83,085 (Dec. 29, 2000). This document was created by a subcommittee of the Federal ADR Steering Committee, and approved by the Federal ADR Council. See *id.*

964. See, e.g., 5 U.S.C. § 574(a) (2000) (providing, in general, that neutrals and parties may not voluntarily disclose or be compelled to disclose dispute resolution communications).

965. The ADRA anticipates that some dispute resolution communications may be subject to disclosure under other statutory schemes. For example, disclosure under the FOIA is a circumstance where disclosure is not prohibited by the ADRA. 5 U.S.C. § 574(a)(2), (b)(3). Likewise, there are some other statutes, such as the Clean Air Act, which require certain records, reports or information obtained from regulated entities be made available to the public. 42 U.S.C. § 7414(c) (2000).

966. General Eric K. Shineski, Army Chief of Staff, Address at the Association of the U.S. Army Annual Convention (October 17, 2000). A small excerpt of the address, as well as other beret-related information, appears in pdf form at <http://www.dtic.mil/soldiers/HotTopics/HTApril2001.htm>.

967. See, e.g., Rowan Scarborough, *Army Gives China the Order for Berets*, WASH. TIMES, Mar. 9, 2001, at 1.

968. See GAO REPORT 01-695T, *supra* note 116.

969. The six foreign suppliers were from Canada, Romania, South Africa, Sri Lanka, India and China. The Chinese supplier, Kangol, LTD, was actually a United Kingdom contractor. Kangol's participation caused the most controversy in light of the prolonged standoff between the United States and China over a downed Navy surveillance plane. *Id.* at 1-2 and app. I.

970. *Id.*

971. *Id.* One of the non-competitive awards was at a price fourteen percent higher than the domestic source. The price on the single largest noncompetitive contract was twenty-five higher than the average competitive price. *Id.*

Classified Contracting

waiver is possible “if it is determined that a satisfactory quality and sufficient quantity . . . cannot be acquired as and when needed at U.S. market prices.”⁹⁷⁴ Eventually, the DLA approved waivers⁹⁷⁵ for all of the foreign companies, citing the 14 June 2001 deadline as the “emergency” for the waivers.⁹⁷⁶

Complaints by legislators and contractors about the DLA’s reliance on foreign suppliers caused an internal review by the DLA’s Philadelphia Defense Supply Center.⁹⁷⁷ On 2 May 2001, the House Small Business Committee (HSBC) held a hearing to determine whether the Army had violated the Berry Amendment. The Army announced at the hearing that it would not outfit any of its 3 million troops with berets from foreign sources, particularly from Chinese manufacturers contracting with the British company Kangol, Ltd.⁹⁷⁸ The Chinese-made berets will be characterized as surplus property, a result described by one commentator as “replacing one symbolic gesture with another.”⁹⁷⁹

The Hat Is on the Other Foot—Small Businesses Are Invited to the Beret Ball

There is hope that the latest beret-related procurement news will be far more palatable to Congress and the American public. The DLA agreed to two small business set-aside contracts worth \$50 million to supply 3.9 million berets to the Army. The contracts will include options to extend production by another 7 million berets over three years. The solicitation will be open until 9 October 2001.⁹⁸⁰ At least for the time being, the set-asides should curtail any further angst among concerned leaders, businesses, and citizens.

*Back in Black: The Army Issues Newly Revised Secure Environment Contracting Guidance*⁹⁸¹

In an attempt to administer classified contracting within the Department of the Army better, the Secretary of the Army issued a revised regulation covering classified contracting actions.⁹⁸² The regulation uses the term “Secure Environment Contracting” or “SEC.”⁹⁸³ Secure Environment Contracting procedures are required to support special access programs,⁹⁸⁴ sensitive compartmented programs,⁹⁸⁵ contracting when using intelligence contingency funds, top secret contracting actions, simplified purchase methods,⁹⁸⁶ and other approved contracting actions related to classified requirements.⁹⁸⁷ The previous version of the regulation contained classified information. The revised regulation removes all classified material,⁹⁸⁸ making it a more useful and readily available reference tool.

The regulation provides in-depth guidance on the “nuts and bolts” of SEC actions. The regulation also includes guidance on contract administration support,⁹⁸⁹ criminal investigative support,⁹⁹⁰ and security support.⁹⁹¹ The rest, of course, is classified!⁹⁹²

May the Best Courier Win!

In *Special Operations Group, Inc.*,⁹⁹³ the GAO reviewed an award by the DOS to provide personnel to safeguard classified material while that material is in-transit to diplomatic missions. Special Operations Group, Inc. (SOGI), protested the award of a contract to Triumph Technologies, Inc. (Triumph), arguing that Triumph’s proposal failed to comply with the solicitation

972. See 10 U.S.C. § 2241 (2000). See DFARS, *supra* note 361, § 225.7002-1.

973. See GAO REPORT 01-695T, *supra* note 116, at 3.

974. *Id.*

975. The Deputy Commander of the DLA’s Defense Supply Center-Philadelphia approved the first two waivers on 1 November 2000 and 7 December 2000. The DLA’s Senior Procurement Executive approved a third waiver on 13 February 2001. *Id.* On 1 May 2001, the Deputy Secretary of Defense cancelled any redelegation of this authority previously granted by service secretaries. As a result, only the service secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority. See Memorandum, Deputy Secretary of Defense, to the Under Secretary of Defense for Acquisition, Technology, and Logistics, and Secretaries of the Army, Navy and Air Force, subject: The Berry Amendment (May 1, 2001) (on file with author).

976. See GAO REPORT 01-695T, *supra* note 116, at 3. See generally 43 GOV’T CONTRACTOR 15, ¶ 158 (opining that the emergency was more a by-product of an “arbitrarily selected” deadline rather than a true emergency).

977. See GAO REPORT 01-695T, *supra* note 116, at 1.

978. 43 GOV’T CONTRACTOR 18, ¶ 191.

979. *Id.* The author, Associate Professor Steven L. Schooner, George Washington University Law School, further describes the Army’s response to congressional pressure as “the worst possible result.” *Id.*

980. See *DLA Reserves Army Beret Contracts for Small Business*, BNA FED. CONT. REP. (Aug. 21, 2001).

981. AC-DC, *Back in Black*, on BACK IN BLACK (1980). Classified activities are commonly referred to as “black” or “black operations.” Unclassified activities are referred to as “white operations.” See generally JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 53, 470 (15 Oct. 2001).

requirements, and that the agency failed to make its source-selection decision on the basis of the criteria specified in the solicitation.⁹⁹⁴ The GAO agreed with SOGI and sustained the protest on both grounds.⁹⁹⁵

The DOS issued an RFP for a competitive set-aside for SDBs under the SBA's section 8(a) program. The RFP identified the position of project manager as the only "key personnel" for this solicitation. The RFP required the offerors to submit the resumé of the proposed project manager, if currently employed by the offeror, or a signed copy of a letter of intent if the proposed project manager was not currently employed by the offeror. The RFP also set forth two evaluation criteria: experience and past performance, with experience being more important. Technical merit was identified as more important than cost.⁹⁹⁶

The DOS received six offers that were evaluated on the basis of ten evaluation criteria. The evaluator used an acceptable/unacceptable evaluation scheme and the DOS reduced the competitive range to four proposals.⁹⁹⁷ After discussions, the DOS requested final revised proposals. Again, these proposals were evaluated acceptable/unacceptable against ten evaluation criteria. The contracting officer then awarded on the basis of "lowest price, technically acceptable offer."⁹⁹⁸

SOGI protested the award on the basis that the DOS awarded to Triumph despite the fact that Triumph's proposal failed to comply with the solicitation requirements, and that the DOS failed to make its selection on the basis of the criteria specified in the solicitation. The GAO determined that Triumph had failed to submit a signed copy of a letter of intent from the proposed project manager.⁹⁹⁹ Under the RFP as issued, the DOS could not award to Triumph.¹⁰⁰⁰

982. U.S. DEP'T OF ARMY, REG. 715-30, SECURE ENVIRONMENT CONTRACTING (undated draft) [hereinafter AR 715-30], available at http://acqnet.saalt.army.mil/library/AR_715-30_Draft_Revised.pdf. Although technically still in draft form, the Deputy Assistant Secretary of the Army (Procurement) notified Army contracting activities in the Web site notice that accompanied the release of AR 715-30 that the draft publication "should be treated as interim guidance" and that the draft version will be used on upcoming field surveillance visits. Army Acquisition Web Site, AR 715-30 **DRAFT** Secure Environment Contracting, Hotlist (May 8, 2001), at <http://acqnet.saalt.army.mil/hotlist/default.htm>. The announcement also stated that the required reporting requirements found in the draft regulation should be followed. See *id.*

983. AR 715-30, *supra* note 982, glossary, sec. II (undated draft).

984. *Id.* paras. 3-12 to -13. See also U.S. DEP'T OF ARMY, REG. 380-381, SPECIAL ACCESS PROGRAMS (SAPs) (12 Oct. 1998). Special Access Programs are security programs established under the provisions of EO 12,958 and are required to employ extraordinary security measures to protect extremely sensitive information. *Id.* para. 3-1. Special Access Programs are categorized into one of three types: Acquisition, Intelligence, or Operations and Support. *Id.* para. 3-2. The compromise of a SAP would result in grave damage to national security. *Id.* para. 3-3.

985. AR 715-30, *supra* note 982, para. 3-14 to -15.

986. *Id.* para. 3-18 to -21.

987. *Id.* para. 3-16 to -17.

988. *Id.* at Summary of Changes (inside front cover).

989. *Id.* para. 3-22.

990. *Id.* para. 3-24.

991. *Id.* para. 3-23.

992. While typical contract law advisors may spend most, if not all, of their careers without seeing a classified contract action, certain situations, such as deployment contracting, carry a significantly increased chance of dealing with classified contracts. We suspect that the events of 11 September 2001 will result in a significant increase in classified contracting actions.

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

994. *Id.* at 1.

995. *Id.* at 1, 6.

996. *Id.* at 2.

997. *Id.* at 2-3.

998. *Id.* at 3.

999. *Id.* at 4-5. The proposed project manager was never employed by Triumph and had not even completed an employment application until the day before the awardee was to begin performance. *Id.* at 4 n.7.

The RFP specifically stated that “technical merit was more important than cost or price.”¹⁰⁰¹ The DOS, however, evaluated the proposals on the basis of the lowest price, technically acceptable proposal.¹⁰⁰² The DOS failed to evaluate the proposals in concert with the stated evaluation criteria. Because its actions converted the procurement from a “best-value” to a lowest cost, technically acceptable award basis, SOGI was entitled to a meaningful opportunity to compete.¹⁰⁰³ The GAO sustained the protest, recommending that the DOS reopen negotiations and reimburse SOGI’s costs incurred in pursuing the protest.

Competitive Sourcing

General Accounting Office

This year the GAO decided several cases directly relating to the competitive sourcing process. These cases again highlight the importance of following proper procedures when completing a cost comparison study under *OMB Circular A-76*.

Imaging Systems Technology (IST) protested the Air Force’s cancellation of an RFP for logistics support of the Programmable Indicator Data Processor (PIDP) air traffic control and landing system, claiming that the Air Force had failed to conduct a realistic or fair comparison of in-house and contractor performance.¹⁰⁰⁴ After issuing an RFP in June 1999, the Air Force decided that rather than use a contract to perform the

PIDP support function, the work would be assigned to government employees as “other duties as assigned.” Before the amendment canceling the RFP was issued, however, the Air Force received two proposals. IST protested the cancellation, citing 10 U.S.C. § 2462, which requires agencies to perform realistic and fair cost comparisons to determine whether the private sector, or government employees, can provide a service at a lower cost. The GAO agreed with IST, finding that the Air Force had failed to determine realistically either the cost of the in-house performance¹⁰⁰⁵ or the cost of contractor performance.¹⁰⁰⁶ The GAO sustained the protest, finding that the cancellation of the solicitation lacked a reasonable basis because of the Air Force’s failure to comply with 10 U.S.C. § 2462.¹⁰⁰⁷

In another case, the GAO held that a protestor did not need to pursue an agency appeal to an *OMB Circular A-76* cost comparison study before protesting to the GAO.¹⁰⁰⁸ BAE Systems (BAE) was the only private-sector offeror in a cost-comparison study for logistics support. The initial cost comparison determined that BAE’s offer was the lower priced, and conditional award was made to BAE. Subsequently, several administrative appeals challenged several aspects of the government’s technical performance plan (TPP).¹⁰⁰⁹ BAE did not participate in any of the appeals. As a result of the appeal decisions, a new cost comparison was performed, which resulted in a decision to keep the functions in-house. BAE protested after a debriefing.¹⁰¹⁰

1000. *Id.* The project manager was the only “key personnel” identified in the RFP. Due to the nature of the project manager’s responsibilities, and the essential nature of the position, Triumph’s failure to comply with the provision rendered its proposal technically unacceptable. *Id.* at 5.

1001. *Id.* at 5. The RFP also stated that the contracting officer would award on the basis of a “trade-off between technical merit and cost or price.” *Id.*

1002. *Id.*

1003. *Id.* at 6-7. Based on the hearing record, the GAO also questioned whether the RFP actually reflected the DOS’s true needs. *Id.* at 6.

1004. Imaging Sys. Tech., Comp. Gen. B-283817.3, Dec. 19, 2000, 2001 CPD ¶ 2.

1005. The Air Force changed its position regarding calculating the cost of in-house performance during the course of the protest. Additionally, the one-page cost-comparison form itself included two different calculations of the in-house costs. On the one hand, the Air Force treated the salaries of the government employees as “sunk-costs,” because the government would have to pay those salaries regardless of the additional workload, and calculated a cost of zero. On the other hand, the cost-comparison identified the cost of the employees’ salaries, suggesting this figure represented the true cost of in-house performance. The GAO noted that in a cost comparison, the fact that current staff may be able to absorb the workload does not justify treating the work as cost-free. *Id.* at 7.

1006. *Id.* The Air Force calculated the cost of contractor performance by averaging the fixed and cost-reimbursement costs paid to the contractor each year over the lifespan of the previous contract, instead of using the two proposals submitted in response to the RFP. The Air Force conceded that the proposed prices were less than previous contract costs, leading the GAO to comment it was “essentially undisputed that the Air Force’s estimate of the cost of contractor performance was unrealistically and unfairly high because it failed to take into account IST’s proposed prices.” *Id.*

1007. *Id.*

1008. BAE Sys., Comp. Gen. B-287189, B-287189.2, May 14, 2001, 2001 CPD ¶ 86.

1009. The initial TPP (the document that lays out how the “most efficient organization” (MEO) will meet the performance standard of the solicitation) did not comply with the performance work statement (PWS), so the source selection evaluation board sent it back for revision. The revised TPP was also deficient and the source selection authority (SSA) directed specific additions to the number of full-time equivalent positions necessary to complete the work to the standard of the PWS. *Id.* at 6. The Administrative Appeals Board found no support for the SSA’s decision to add nine FTEs to the in-house offer, because the decision seemed to be based solely on BAE’s proposed staffing. *Id.* at 10.

1010. *Id.* at 17.

The threshold issue was whether BAE could protest to the GAO without first exhausting the administrative appeal process.¹⁰¹¹ The Army argued that *OMB Circular A-76, Revised Supplemental Handbook (RSH)*, as revised by Transmittal Memorandum 22,¹⁰¹² required all interested parties to review tentative cost comparison decisions and appeal any potential errors to the agency appeal board.¹⁰¹³ The GAO declined to dismiss the protest, finding that the *RSH* did not apply to this cost comparison because Transmittal Memorandum 22 specifically applied only to cost comparisons where the in-house offer remained sealed on 8 September 2000.¹⁰¹⁴

The GAO next turned to the merits of BAE's protest, finding that the record did not adequately show that the in-house offer complied with the performance work statement (PWS). Additionally, BAE's offer established a shorter customer service time than required by the PWS. The GAO sustained the protest, finding that the record did not address whether the agency had considered if BAE's performance level established a performance level the in-house offer should have been required to meet.¹⁰¹⁵

In *Jones/Hill Joint Venture—Costs*,¹⁰¹⁶ the GAO re-emphasized a 2000 ruling dealing with the comparison of the performance levels offered by the in-house offeror and the private-sector offeror when best value competitions are used to select the private-sector offeror. In September 2000, Jones/Hill Joint Venture (Jones/Hill) challenged the adequacy of the Navy's comparison of the level of performance between Jones/Hill and the in-house offer in a cost-comparison study for base operating services. Additionally, Jones/Hill complained that the agency prejudiced Jones/Hill when it informed only the in-house team of interservice support agreements that affected the overall transportation services and related costs. The Navy requested ADR in an attempt to resolve the protest. The GAO attorney

agreed and conducted an ADR conference, at which time he informed the Navy of his view of the Navy's significant litigation risk posed by the protest. The Navy notified the GAO that it intended to take corrective action in response to the protest, which rendered the protest academic. Therefore, the GAO dismissed Jones/Hill's protest in November 2000.¹⁰¹⁷

In response to Jones/Hill's request for costs, the GAO first found that Jones/Hill's initial protest was clearly meritorious. The GAO discussed the requirement for agencies to consider strengths identified by the best-value competition during the comparison with the in-house offer.¹⁰¹⁸ The GAO attorney had noted during the ADR conference that the record did not reasonably support the Navy's determination that the revised "most efficient organization" (MEO) offered the same level of performance and performance quality as Jones/Hill's proposal. After discussing the merit of the protest, the GAO found that the agency had unduly delayed taking corrective action, given that the agency waited until after the agency report and supplemental comments by both sides were filed and an ADR conference had taken place to take corrective action.¹⁰¹⁹

The GAO decided issues involving a different kind of delay in *Lackland 21st Century Services Consolidated—Protest and Costs*.¹⁰²⁰ In this case, the protestor claimed the Air Force unreasonably delayed awarding a contract, thereby entitling the protestor to reinstatement of its earlier protest and costs. Lackland 21st Century Services Consolidated (L-21) initially protested the Air Force's selection of the MEO to perform base operations support services at Lackland Air Force Base. The Air Force did not file an agency report on the merits, instead submitting a letter which acknowledged that an internal review had led to selection of L-21 to perform the services. The Air Force's actions rendered the protest academic, and GAO dismissed it in December 2000.¹⁰²¹

1011. The GAO had adopted a policy that, when there is a relatively speedy appeal process for the review of a cost-comparison decision, the GAO will not consider a protest on an issue that was not first appealed to the agency. *Id.* (citing Professional Servs. Unified, Inc., Comp. Gen. B-257360.2, July 21, 1994, 94-2 CPD ¶ 39 at 3).

1012. 65 Fed. Reg. 54,568 (Sept. 8, 2000).

1013. *BAE Sys.*, 2001 CPD ¶ 86 at 10.

1014. *Id.* The GAO did not address the apparent deviation from the prior exhaustion of appeals rule, *see supra* note 1011, with regards to the second cost comparison, which, even under the rules applicable to this cost comparison, allowed BAE to appeal items that would reverse the tentative decision.

1015. *BAE Sys.*, 2001 CPD ¶ 86 at 15. The GAO cited this case in another A-76 protest, decided in July 2001. In *DynCorp Technical Services*, Comp. Gen. B-284833.3, B-284833.4, July 17, 2001, 2001 CPD ¶ 112, the GAO sustained a protest on the basis that the in-house offer did not offer a level of performance comparable to that of the selected private-sector proposal. When the private-sector proposal offers performance levels above that required by the PWS, the agency must reasonably determine that the additional performance is of no value to the agency (and so advise offerors) or ensure that the in-house cost estimate is based upon a comparable level of performance. *Id.* at 12.

1016. Comp. Gen. B-286194.3, Mar. 27, 2001, 2001 CPD ¶ 62.

1017. *Id.* at 7.

1018. The GAO articulated this requirement in *Rice Servs., Ltd.*, Comp. Gen. B-284997, June 29, 2000, 2000 CPD ¶ 113 at 11.

1019. *Jones/Hill Joint Venture—Costs*, 2001 CPD ¶ 62 at 13.

1020. B-285938.6, 2001 U.S. Comp. Gen. LEXIS 108 (July 13, 2001).

Subsequently, the government employees' union filed a motion with the U. S. District Court for the Western District of Texas for a TRO to enjoin the Air Force from awarding the contract.¹⁰²² The Air Force told the court it would not award the contract during the ongoing litigation without five-business-days notice. While the TRO motion was pending, the Deputy Secretary of the DOD requested that the DOD Inspector General (IG) review this cost-comparison study, followed one day later by a congressional request for an IG review.¹⁰²³ Based on the TRO granted by the district court and the IG review, the Air Force decided not to award the contract until the IG completed the review.¹⁰²⁴ The GAO reviewed the Air Force's decision to await the conclusion of the IG review, and found no undue delay.¹⁰²⁵

A successful protestor was denied costs in *Rice Services Ltd.—Costs*.¹⁰²⁶ Rice Services successfully protested a cost competition for food services at the Naval Academy.¹⁰²⁷ When Rice Services submitted its protest costs, however, the Navy refused to pay the costs of the administrative appeal, bringing the parties back to the GAO for a decision. Rice Services argued that the GAO's policy of exhausting administrative appeals before filing with the GAO¹⁰²⁸ should entitle Rice Services to the costs of pursuing a successful protest through the

administrative appeal process. The GAO disagreed, citing the limited authority in the CICA¹⁰²⁹ to recommend payment of costs to only those incurred in filing and pursuing protests filed with the GAO.¹⁰³⁰

Court of Federal Claims

The COFC tackled the issue of whether a source-selection authority must use best value procedures to determine the winner of an *OMB Circular A-76* cost comparison study.¹⁰³¹ Rust Constructors (Rust) challenged the Army COE's decision to keep a grounds maintenance and repair contract at Fort Riley, Kansas, in-house after a cost comparison study.¹⁰³²

Rust argued that the COE failed to use "best value" procedures, as contemplated by the RFP, when making the comparison of its proposal and the MEO proposal. The court disagreed with Rust, finding that *OMB Circular A-76* does not contemplate a best value analysis between the private sector offer and the MEO offer. In fact, *OMB Circular A-76* requires a "comparison of the cost of contracting and the cost of in-house performance."¹⁰³³

1021. *Id.* at *2-3.

1022. *Id.* at *4. For a more detailed discussion of the topic of federal government employee standing to challenge cost comparison decisions, see *infra* notes 1040-57 and accompanying text.

1023. *Lackland 21st Century Servs.*, 2001 U.S. Comp. Gen. LEXIS 108, at *4-5. Several members of the Congressional delegation from Texas requested the review. Part of L-21's protest was based on complaints that both the DOD IG and the Air Force were improperly influenced by the Texas congressional delegation. *See id.* at *10. The GAO refused to comment on these allegations, noting that their bid protest jurisdiction is "limited to review of whether agencies' procurement actions complied with procurement statutes and regulations." *Id.*

1024. *Id.* at *5. The Under Secretary of the Air Force urged the DOD IG to complete the study within 30 days because of potential complications related to a reduction in force at Lackland. Nevertheless, the IG did not complete the review until 14 May 2001. *Id.* at *6.

1025. *Id.* at *11-12. In fact, the GAO viewed the decision as reasonable in light of "the complexities of the issues presented by the cost review; the need to consider the varied input received; and our recognition of the disruption that may follow a decision to contract out base operations support at this facility—thus abolishing the positions of federal employees who currently perform these functions." *Id.* at *12. In August 2001, the Air Force decided to cancel the cost comparison study at Lackland and start over. *See* Jason Peckenpaugh, *Air Force Cancels A-76 Competition, Decides to Start Over*, GovExec.com (Aug. 29, 2001). Additionally, the Air Force suspended competitions at Randolph and Sheppard Air Force Bases in Texas and Keesler Air Force Base in Mississippi until the Air Force could convene a panel to review competitions in the Air Education and Training Command (AETC). *See* Jason Peckenpaugh, *Air Force Freezes A-76 Competitions at Three Bases*, GovExec.com (Sept. 5, 2001). Ultimately, the Air Force froze all studies in AETC pending review of the command's cost comparison processes. *See Competitions at Air Force Bases on Hold*, 43 GOV'T CONTRACTOR 33, ¶ 348(b) (Sept. 12, 2001).

1026. Comp. Gen. B-284997.2, May 18, 2001, 2001 CPD ¶ 88.

1027. *See* Rice Servs., Ltd., Comp. Gen. B-284997, June 29, 2000, 2000 CPD ¶ 113.

1028. *See supra* note 1011 (discussing GAO policy).

1029. *See* 31 U.S.C. § 3554(c) (2000).

1030. *Rice Servs.*, 2001 CPD ¶ 88 at 2.

1031. *Rust Constructors Inc. v. United States*, 49 Fed. Cl. 490 (2001).

1032. *Id.* at 491. Rust was the only offeror to submit a proposal. After receiving Rust's proposal, the government held price negotiations with Rust, accepting Rust's revised cost proposal as the "best value" to the government. *Id.* at 492. Rust's proposal exceeded the MEO's cost by over \$21 million. *Id.* Rust first filed an appeal with the U.S. Army Forces Command Administrative Appeals Board, which ultimately found that errors in the cost comparison were not of sufficient magnitude to change the initial cost comparison decision. *Id.* at 493.

Rust attempted to supplement the administrative record with two affidavits that critiqued the COE's solicitation and administrative record.¹⁰³⁴ The court denied the use of the affidavits, finding that it would be unfair to include these affidavits, which had not been provided to the agency level review board during the administrative appeal, without cause, which was absent here.¹⁰³⁵

Failure to Correct Deficiencies Leads to Request for Congressional Investigation

In an unusual and normally unnecessary move, the GAO requested a congressional investigation into the Army's apparent lack of action in response to a bid protest recommendation.¹⁰³⁶ In February 2000, the GAO sustained a protest arising from an *OMB Circular A-76* cost-comparison study at Aberdeen Proving Grounds in Maryland.¹⁰³⁷ Although the Army told the GAO in July 2000 that it intended to follow the GAO's recommendation, the Army took no further action to remedy the situation. The GAO is required by law to report agencies' failure to fully implement bid protest recommendations.¹⁰³⁸ The GAO General Counsel had not before made such a report to Congress.¹⁰³⁹

Government Employees Do Not Have Standing to Challenge OMB Circular A-76—the Final Word?

The CAFC ended discussion of whether government employees have standing to challenge *OMB Circular A-76*

decisions with a resounding “no!,” and more importantly, established the standard for determining standing in bid protest cases before the COFC.¹⁰⁴⁰ This case began with an American Federation of Government Employees (AFGE) challenge at the COFC to a cost-comparison study at the DLA. The COFC determined that the AFGE did not have standing because its interests do not come within the zone of interest protected by either the Federal Activities Inventory Reform Act (FAIR) or 10 U.S.C. § 2462.¹⁰⁴¹ The CAFC affirmed the decision of the COFC, but on a different ground.¹⁰⁴²

This question of standing to challenge an executive agency cost-comparison decision was a case of first impression for the CAFC, and arises because although 28 U.S.C. § 1491(b) confers standing on “an interested party objecting to a solicitation by a Federal agency,” the statute does not define “interested party.”¹⁰⁴³ The union argued that the term should be construed using an ordinary dictionary definition, and that federal employees are interested parties because they stand to lose their jobs if their positions are contracted out as a result of the cost-comparison study. Alternatively, the union argued, the court should use the APA standard, and find that the federal employees fall within the “zone of interest” protected by *OMB Circular A-76* and the FAIR Act.¹⁰⁴⁴ The government, on the other hand, argued that the court should use the CICA jurisdictional standard.¹⁰⁴⁵ The CAFC sided with the government, and, using the CICA standard, found that because neither the union nor the federal employees were actual or prospective bidders or offerors, they did not have standing to challenge the cost-comparison study or resulting decision to award a contract for the services.¹⁰⁴⁶

1033. *Id.* at 494 (citing FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES ¶ 5(a) (Aug. 4, 1983, Revised 1999)).

1034. *Id.* at 496-97. One affidavit was from a Rust employee, and the other from an “expert in government contracts.” *Id.* at 497.

1035. *Id.* at 497.

1036. *See Army Too Slow to Implement Recommendation in Aberdeen A-76 Protest, GAO Tells Lawmakers*, 43 GOV'T CONTRACTOR 24, ¶ 252 (June 27, 2001) [hereinafter *Army Too Slow*].

1037. *See Aberdeen Tech. Servs., Comp. Gen. B-283727.2*, Feb. 22, 2000, 2000 CPD ¶ 46. *See also Aberdeen Tech. Servs.—Modification of Recommendation*, B-283727.3, 2001 U.S. Comp. Gen. LEXIS 132 (Aug. 22, 2001) (modifying initial recommendation to include reimbursement of proposal preparation costs).

1038. *See* 31 U.S.C. § 3554 (e)(1) (2000).

1039. *See Army Too Slow*, *supra* note 1036 (quoting Daniel I. Gordon, GAO Associate General Counsel for Procurement Law, who was “not aware of any other case in which GAO has concluded that an agency's delay was a reportable failure to follow a bid protest recommendation”).

1040. *Am. Fed'n Gov't Employees, Local 1482 v. United States*, 2001 U.S. App. LEXIS 16595 (Fed. Cir. July 23, 2001).

1041. *See Am. Fed'n Gov't Employees, v. United States*, 46 Fed. Cl. 586 (2000).

1042. *See Am. Fed'n Gov't Employees*, 2001 U.S. App. LEXIS 16595, at *2.

1043. *Id.* at *7 (quoting 28 U.S.C. § 1491(b)).

1044. *Id.* at *7.

1045. *Id.* at *13. The CICA grants bid protest jurisdiction to interested parties, which it defines as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.” 31 U.S.C. § 3551(2) (2000).

Federal employees and their union did not have any better luck with the standing issue in district court.¹⁰⁴⁷ The AFGE Local in San Antonio, Texas, challenged the decision to award a contract to L-21 for base operations support services at Lackland Air Force Base, Texas.¹⁰⁴⁸ The union argued that agency outsourcing regulations created standing for federal employees.¹⁰⁴⁹ The court disagreed, reminding the union that standing is created by statute, not regulation, and also rejecting the union's contention that because *OMB Circular A-76* cites the Budget and Accounting Act (BAA) of 1921¹⁰⁵⁰ and the Office of Federal Procurement Policy Act (OFPPA) of 1979¹⁰⁵¹ as authority for its policies and procedures, the BAA or OFPPA created standing for federal employees to challenge cost-comparison studies. The court reiterated the well-established holding that the interests of federal employees in maintaining their federal employment is "marginally related to or inconsistent with" the purpose of the statutes.¹⁰⁵² The court further stated that the "zone of interest" of the Budget and Accounting Act and OFPPA was obtaining the best and most efficient possible value for the government.¹⁰⁵³ Finally, the court rejected the union's argument that the National Defense Authorization Act (NDAA) of 2000¹⁰⁵⁴ created prudential standing for employees in this case, finding that although the employees may be within the zone of interest of this statute, there was no allegation the

government had violated any requirements of the NDAA related to the cost comparison study.¹⁰⁵⁵

In spite of the court losses relating to standing to challenge cost-comparison studies, federal employees may have hope in the form of pending legislation, which would give them appeal rights in conjunction with *OMB Circular A-76*. Texas Representative Charlie Gonzalez introduced a bill on 19 June 2001¹⁰⁵⁶ to remedy what he called an "unjust advantage" that private contractors have over federal employees whose lives are impacted by the cost comparison.¹⁰⁵⁷

New Administration—New Approaches to FAIR Act and Outsourcing

Early in the new administration's tenure, the OMB announced changes relating to the FAIR Act lists and their use in competitive sourcing decisions. Sean O'Keefe, Deputy Director of the OMB, gave the first notice of the administration's new focus in a 9 March memo highlighting reform initiatives. For FY 2002, agencies must compete not less than five percent of the full-time equivalent positions listed on the FAIR Act inventories.¹⁰⁵⁸

1046. *Am. Fed'n Gov't Employees*, 2001 U.S. App. LEXIS 16595, at *21-23. More important than the actual decision was the holding that the standing requirement of the CICA was consistent with the legislative history of 28 U.S.C. § 1491(b)(1), which indicated that Congress intended to extend the COFC's jurisdiction to include post-award bid protest cases. Furthermore, the court stated that the fact that Congress used the same term in § 1491(b)(1) as it did in the CICA suggested that Congress intended that the same standing requirement for cases brought under the CICA apply to cases brought under § 1491(b)(1). *Id.* at *11.

1047. *See Am. Fed'n of Gov't Employees, Local 1367 v. United States*, 2001 U.S. Dist. LEXIS 4044 (Fed. Cir. Mar. 6, 2001). For a discussion of the *OMB Circular A-76* decision related to these facts, see *supra* notes 1020-25 and accompanying text.

1048. *Local 1367*, 2001 U.S. Dist. LEXIS 4044 at *2.

1049. *Id.* at *28. Specifically, the union cited U.S. AIR FORCE, INSTR. 38-203, COMMERCIAL ACTIVITIES PROGRAM ch. 18 (1 Aug. 2000).

1050. 31 U.S.C. § 101 (2000).

1051. 41 U.S.C. §§ 401-424 (2000).

1052. *Local 1367*, 2001 U.S. Dist. LEXIS 4044, at *30-31.

1053. *Id.* at *31.

1054. The union cited two statutes, 10 U.S.C. §§ 2467 and 2470. *Id.* at *21. Section 2467(b)(1)(A) requires that the DOD consult with civilian employees at least monthly during the development and preparation of the PWS and the MEO. 10 U.S.C. § 2467(b)(1)(A) (2000).

1055. *Local 1367*, 2001 U.S. Dist. LEXIS 4044, at *40-41.

1056. H.R. 2227, 107th Cong. (2001).

1057. Tanya N. Ballard, *Legislation Would Give A-76 Appeal Rights to Federal Employees*, GovExec.com (June 25, 2001). Although much has been written about the negative impacts of cost-comparison studies on federal employees, the GAO found that it was difficult to draw universal conclusions regarding the effects of A-76 studies. The GAO analyzed three completed A-76 studies and made some interesting observations, including that about half of the civilian government employees remained in federal service following the studies; a small number were subject to involuntary separation; employees who left government service and applied with the successful private offeror were hired; and although pay and benefit amounts differed with the geographical areas, the types of benefits appeared to be similar to those offered to government employees. *See GENERAL ACCOUNTING OFFICE, DOD COMPETITIVE SOURCING: EFFECTS OF A-76 STUDIES ON FEDERAL EMPLOYEES' EMPLOYMENT, PAY, AND BENEFITS VARY*, REPORT NO. GAO-01-388 (Mar. 16, 2001).

1058. *See Memorandum, Deputy Director, Office of Management and Budget, to Heads and Acting Heads of Departments and Agencies, subject: Performance Goals and Management Initiatives for the FY 2002 Budget* (9 Mar. 2001) [hereinafter Performance Goals Memo].

Commercial Activities Panel Forms to Study Future Changes to A-76 Process

Section 832 of the Floyd D. Spence NDAA for FY 2001 directed the Comptroller General to convene a panel of experts to study federal outsourcing policy and report to Congress by 1 May 2002, with recommendations for legislative and policy changes.¹⁰⁵⁹ The panel, called the Commercial Activities Panel, began meeting in May 2001. Panel membership includes a wide spectrum of organizations affected by outsourcing policy, including representatives from federal employee labor unions, government contractors, the DOD and the OMB, as well as four at-large members.¹⁰⁶⁰

OMB Moves to Open ISSAs to A-76

The OMB published a significant change to the *OMB Circular A-76, RSH*, expanding public-private competitions for inter-service support agreements (ISSAs).¹⁰⁶¹ Since 1 October 1997, new ISSAs have been subject to public-private competition, but renewals of pre-existing ISSAs were exempt from study. The change requires agencies to re-compete all existing ISSAs every three to five years. The new provision retains the requirement

to subject all new or expanded work to competition under *OMB Circular A-76*. The new competition requirement does not apply to reimbursable agreements within a single agency, but only to those agreements between one department or executive agency and another non-mission agency.¹⁰⁶² The new provision would not affect ISSAs within the DOD.¹⁰⁶³

Congressional Reaction to Administration's Attempts to Expand A-76: TRAC

The Truthfulness, Responsibility, and Accountability in Contracting Act (TRAC) has once again surfaced in the 107th Congress, in both the House and the Senate.¹⁰⁶⁴ Opposition to the TRAC came from several sectors, including a group of twelve retired senior military officers, who claimed the legislation would cause "irreparable harm" to national security.¹⁰⁶⁵

Conflict of Interest Rules: Whose Interest Creates a Conflict?

Although the *RSH* Transmittal Memorandum 22¹⁰⁶⁶ set out guidelines stating that government employees who hold jobs that are the subject of cost-comparison studies should not par-

1059. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 832, 114 Stat. 1654.

1060. See Jason Peckenpaugh, *GAO Names Members of Outsourcing Panel*, GovExec.com (Apr. 17, 2001).

1061. Office of Management and Budget, *Performance of Commercial Activities*, 66 Fed. Reg. 34,962 (July 2, 2001). The change revises part 1, chapter 2 by replacing paragraphs 5 and 5a with a new paragraph 5 as follows:

5. Reimbursable support service providers within the Federal Government are providing a large and an increasing amount of commercial work to Federal program activities (customers) under reimbursable service agreements and without the benefits of recurring competitions. These ISSAs are not competing with the private sector or with other public offerors who might be able to provide higher levels of service at less cost. Therefore, not later than October 1, 2001, each customer agency shall establish a recurring schedule for all work performed for it on a reimbursable basis by another agency for competition. ISSAs shall be re-competed every 3-5 years or as otherwise permitted by related procurement regulations for comparable types of commercial work (see Competition-in-Contracting Act (CICA) and the Federal Acquisition Regulations). These competitions shall permit offers from the private sector, the current reimbursable service provider and other public offerors as appropriate. In addition, all new or expanded work required by a customer agency shall be submitted to competition, as provided in this Chapter.

Id.

1062. *Id.* For example, an ISSA between the Environmental Protection Agency and the Department of Commerce or between the Office of Personnel Management and the Department of Housing and Urban Development for the provision of background investigation services would be subject to the new provision. *Id.*

1063. *Id.*

1064. See H.R. 721, 107th Cong. (2001); S. 1152, 107th Cong. (2001). The House version requires a "temporary" suspension of all decisions to privatize, contract out, or conduct a cost-comparison study of any function performed by the agency. The bill does not specify an end date for the temporary suspension of such decisions. Rather, the bill requires agencies to design comprehensive reporting systems to track the costs of service contracting. The bill further requires agencies to submit an approximate number of positions held by contractor personnel to cost-comparison study. See H.R. 721. The Senate version imposes a certification requirement before agencies can enter into a service contract. Each agency must certify to the OMB that the agency is making substantial progress toward meeting the requirements of the bill. The requirements are similar to the House version and include the cost-tracking system requirement. See S. 1152. Both bills also require consultation or bargaining with the federal employee labor unions during public-private competitions, and a new public-private competition if the actual cost of contracting out or privatization exceeds the anticipated costs or substantially fails to meet quality control standards. Additionally, both bills include a waiver provision to allow OMB to exempt certain contracts from the contracting out prohibition. Unlike the House version, the Senate version exempts contracts with values less than \$1 million. See H.R. 721; S. 1152.

1065. See Jason Peckenpaugh, *Retired Officers Say Outsourcing Bill Threatens National Security*, GovExec.com (July 10, 2001). The group of senior military officers included Navy Admiral William Crowe, Admiral David Jeremiah, Army General John Shalikashvili, Air Force General Michael Carns and Marine Corps General Cal Mundy, Jr. *Id.*

1066. Issuance of OMB Circular A-76 Transmittal Memorandum No. 22, 65 Fed. Reg. 54,568-70 (Sept. 8, 2000).

ticipate as members of a Source Selection Team, there was no such guidance on how far removed an interest may be to still cause an undesirable conflict of interest. In *IT Facility Services—Joint Venture*,¹⁰⁶⁷ IT Facility Services (IT Facility) challenged award of a public works and logistics services contract to Johnson Controls World Services, Inc. (JCWSI), arguing that the proposal evaluation was tainted by an organizational conflict of interest (OCI) arising from evaluators who were employees of the area under study. IT Facility also objected to an evaluator whose spouse held a position under study.¹⁰⁶⁸

IT Facility argued that an employee's relationship with colleagues and subordinates whose positions are under study will impair his objectivity, and therefore no employee working in an area under study should be allowed to serve on a source selection board, even if the individual's position is not under study.¹⁰⁶⁹ The GAO agreed with the Army that such a concern is "too speculative and remote to establish a significant organizational conflict of interest."¹⁰⁷⁰ The concern about the individual whose spouse's position was under study was justified, however, according to the GAO. The GAO found there was at least an appearance of a conflict of interest that tainted the employee's evaluation. The GAO did not sustain the protest, however, because the employee's evaluation was consistent with other evaluations, and even with her evaluation removed IT Facility's proposal received the same overall evaluation.¹⁰⁷¹

IT Facility further alleged that a contractor that assisted the Army in the creation of the MEO had an improper OCI that tainted the procurement. Although the contractor participated in both the creation of the MEO and assisted with the proposal evaluation, the GAO found a sufficient "firewall" between the two discreet sets of employees performing these tasks.¹⁰⁷²

OCI Rules Apply to Subcontractors, Too!

Johnson Control World Services, Inc. (JCWSI), protested the award of an installation support services contract to IT Corp. (IT), alleging that one of IT's subcontractors, Innovative Logistics Techniques, Inc. (INNOLOG), had an improper conflict of interest.¹⁰⁷³ INNOLOG had a contract to provide integrated sustainment maintenance (ISM) services, and established and maintained the database containing detailed work order information relating to maintenance activities provided at the installation where the ISM would be performed.¹⁰⁷⁴

The Army argued that there was no impermissible conflict of interest, and that although INNOLOG did possess work-order information, it was no different than information that an incumbent might possess.¹⁰⁷⁵ The GAO disagreed, finding that INNOLOG's responsibilities were significantly different from an incumbent-support contractor, and included providing analysis of how the work should be performed. The GAO believed that because the INNOLOG analysts were "embedded" in the agency, INNOLOG possessed information that no other offeror had access to, and was involved in the management of support activities for the installation in question.¹⁰⁷⁶ Because the Army had not taken any steps to minimize this conflict of interest, the GAO recommended that the Army review the IT team's apparent OCI, consider whether it could be minimized or avoided, and take appropriate corrective measures.¹⁰⁷⁷

The Army heeded the GAO's recommendation, but not without another protest from JCWSI.¹⁰⁷⁸ In response to the earlier protest, the Army terminated IT's contract, and required IT to terminate its teaming relationship with INNOLOG. The Army further provided the database information previously available only to IT to both IT and JCWSI and provided agency personnel familiar with the database to assist with using the database and interpreting the contents. Finally, the Army

1067. Comp. Gen. B-285841, Oct. 17, 2000, 2000 CPD ¶ 177.

1068. *Id.* at 10.

1069. *Id.* at 11.

1070. *Id.* at 12.

1071. *Id.* at 13.

1072. *Id.* at 14.

1073. Johnson Controls World Servs., Inc., Comp. Gen. B-286714.2, Feb. 13, 2001, 2001 CPD ¶ 20.

1074. *Id.* at 2.

1075. *Id.* at 5.

1076. *Id.* at 6.

1077. *Id.* at 13.

1078. See Johnson Controls World Servs. Inc., B-286714.3, 2001 U.S. Comp. Gen. LEXIS 129 (Aug. 20, 2001).

allowed the offerors to submit proposal revisions in those areas dealing with the database information.¹⁰⁷⁹

The JCWSI argued that the corrective action was insufficient to overcome the competitive advantage created by IT's OCI.¹⁰⁸⁰ The GAO found JCWSI's argument unconvincing, especially since IT had terminated its relationship with INNOLOG. The GAO found that JCWSI's final argument, that IT's prior actions reflected a lack of integrity that should make them non-responsible, premature, as the Army has not yet identified the apparent successful offeror.¹⁰⁸¹

Construction Contracting

Contractor Required to Do What the Contract Says!

The COFC had the chance to delve into the world of contract interpretation,¹⁰⁸² as applied to construction contracts, in *Linda Newman Construction Co. v. United States*.¹⁰⁸³ This case involved changes to a contract for the construction of an addition to a Veteran's Administration (VA) hospital.¹⁰⁸⁴ During the course of the contract, the parties executed nineteen modifications, each of which extended the delivery date. Each modification also increased the contract price.¹⁰⁸⁵ Upon contract completion, the plaintiff, Linda Newman Construction Co. (Newman), filed a claim alleging it was due an additional \$321,157 for costs incurred as a result of the change orders.¹⁰⁸⁶ The court characterized these claimed costs as "delay overhead costs."¹⁰⁸⁷ The contract contained a changes clause that limited overhead and profit recovery on changed work to a maximum

of ten percent.¹⁰⁸⁸ Each of the contract modifications for changed work contained the following reservation clause:

This change represents full and complete compensation for all direct costs and time required to perform the work set forth herein, plus the overhead and profit as provided for in the Changes clause of this contract. The contractor hereby reserves its right to submit a request for equitable adjustment for all costs resulting from the impact of this change on unchanged contract work.¹⁰⁸⁹

Newman argued that the phrase "all costs resulting from the impact of this change on unchanged contract work" modified the changes clause by allowing recovery of overhead and profit related to the impact of changes on unchanged work.¹⁰⁹⁰ The government countered that the reservation clause entitled Newman to seek only the direct costs associated with such an impact on unchanged work. Siding with the government, the court stated that it could not "discern what 'full and complete compensation for overhead and profit' could mean other than full and complete compensation for profit and overhead."¹⁰⁹¹ The court went on to note that Newman's "argument would require the court to find that the reservation clause relied on the Changes clause in one sentence and ignored it in the next."¹⁰⁹² Finally, the court pointed out that such a result would violate the long-standing rule that "[c]ontract interpretations that make parts of the contract 'useless, inexplicable, inoperative, void, insignificant, meaningless, [or] superfluous' are disfavored."¹⁰⁹³

1079. *Id.* at *3-4.

1080. *Id.* at *5.

1081. *Id.* at *10.

1082. For a discussion of another CAFC decision concerning contract interpretation, *Program & Constr. Mgmt. Group v. United States*, 246 F.3d 1363 (Fed. Cir. 2001), see *supra* notes 723-29 and accompanying text.

1083. 48 Fed. Cl. 231 (2000).

1084. *Id.* at 231. The court noted that, over the course of the contract, the VA issued 244 change orders. *Id.* at 232.

1085. *Id.* at 232.

1086. *Id.* at 233.

1087. *Id.* at 236.

1088. *Id.* at 233.

1089. *Id.* at 234.

1090. *Id.*

1091. *Id.*

1092. *Id.*

1093. *Id.* (quoting *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

In addition to this contract interpretation analysis, the court also relied on extrinsic evidence to support its holding. In this case, the record surrounding the negotiation of the reservation clause clearly showed that the government had rejected Newman's attempt to craft the clause so that it would cover delay overhead costs. The government specifically noted at the time that such delay overhead costs were included in the ten percent maximum limitation set forth in the changes clause of the contract.¹⁰⁹⁴

Government Cannot Disclaim Responsibility for Design Defects

In *Edsall Constr. Co.*,¹⁰⁹⁵ the ASBCA considered whether the government may shift the responsibility for defective design specifications to a contractor through the use of a disclaimer in the contract. Answering this question with a resounding "no," the board sustained the appeal.¹⁰⁹⁶

The case involved a contract for the construction of two aircraft hangars. Edsall Construction Co. (Edsall) was the general contractor. Uni-Systems, Inc. (USI), was a subcontractor responsible for fabricating and installing the hangar doors at issue in this appeal. The doors were large, steel canopy doors weighing 21,000 pounds each.¹⁰⁹⁷ The contract contained written specifications that generally described the doors, but also contained fairly detailed drawings depicting the design of the doors. The board found that the written specifications for the door were performance specifications while the drawings were design specifications.¹⁰⁹⁸

The drawings for the doors depicted three cables and pick points supporting the doors.¹⁰⁹⁹ One of the door drawings also contained the following note:

Canopy door details, arrangements, loads, attachments, supports, brackets, hardware,

etc. must be verified by the contractor prior to bidding. Any conditions that require changes from the plans must be communicated to the architect for his approval prior to bidding and all costs of those changes must be included in the bid price.¹¹⁰⁰

Testimony at the hearing established that USI believed that the government's three-cable design would be "very challenging" but that there was nothing obviously wrong with the design.¹¹⁰¹ USI did not conduct a full professional engineering analysis of the design.¹¹⁰² After contract award, however, USI determined that the government's design was dangerously defective and proposed a four-cable design that it believed would solve the problem.¹¹⁰³ Ultimately, the government accepted USI's design change, USI built the doors using the four-cable design, and submitted a claim in the amount of \$70,288.26 for the extra costs incurred in building the doors to this design. The contracting officer denied the claim on the basis that USI had not communicated the need for a design change before bidding as required by the drawing note quoted above.¹¹⁰⁴

On appeal, the government argued that the door design features were annotated by disclaimers, and that the drawing note quoted above shifted responsibility for discovering design defects to the contractor. The board categorically rejected this argument, holding that, because the drawings constituted design specifications, the government was responsible for defects in those specifications. Rejecting the government's argument that the disclaimers and notes on the drawing shifted this responsibility to the contractor, the board stated: "[I]t is settled that a contractor is not obligated to inspect the Government's specifications and drawings to ascertain their accuracy and ferret out hidden ambiguities and errors in the documents."¹¹⁰⁵ Putting the final nail in the government's coffin for this case, the board went on to state:

1094. *Newman*, 48 Fed. Cl. at 234.

1095. ASBCA No. 51787, 01-2 BCA ¶ 31,425.

1096. *Id.* at 155,176.

1097. *Id.*

1098. *Id.* at 155,177.

1099. *Id.* "Pick points" are support brackets to which the cables used to raise and lower the door are attached. While the door is being raised or lowered, the entire weight of the door is supported by the cables. *Id.*

1100. *Id.*

1101. *Id.*

1102. *Id.*

1103. *Id.* at 155,178.

1104. *Id.* at 155,179.

“Governmental disclaimers of responsibility for the accuracy of specifications which it authors are viewed with disdain by the courts.” . . . In this case, while appellant might be required to verify if the door weighs 21,000 pounds, it had no obligation to ferret out if the Government’s three-pick point design would provide the proper load distribution.¹¹⁰⁶

Differing Site Conditions

As usual, contractor claims based on alleged differing site conditions encountered at the construction site continued to constitute a large portion of the construction-related litigation before the courts and boards this year. Contractors continued to develop creative theories to support their claims while the courts and boards continued to apply the relatively clear language of the differing site conditions (DSC) clauses to deny most of those claims. The cases discussed below represent a small sampling of the many decisions involving DSCs issued this year and are intended to provide a refresher for practitioners working in the area.

Wind and Waves Not a DSC

Facing a creative contractor argument, the ASBCA rejected a claim that high seas adversely affected a dike repair project. *Luhr Brothers, Inc.*,¹¹⁰⁷ involved a dispute over the repair of a dike on the lower portion of the Mississippi River where the river enters the Gulf of Mexico. Luhr Brothers, Inc. (Luhr), appealed a contracting officer’s denial of a claim it sponsored on behalf of its subcontractor, Cross Construction, Inc. (Cross). Cross experienced significant delays caused by unusually high seas and bad weather. Although the government granted time extensions under the Default clause of the contract for most of

the delay Cross experienced, Cross contended that a significant portion of the delay was due to a Type II DSC.¹¹⁰⁸ Cross argued that a change in channel conditions had resulted in a situation where an incoming saltwater wedge mixed with the outgoing fresh water from the Mississippi in such a way as to create higher-than-usual waves which Cross referred to as “rollers.”¹¹⁰⁹ According to Cross, these unique circumstances resulted in a condition heretofore unknown to the scientific community and constituted a Type II DSC.¹¹¹⁰ Ultimately, this case came down to a battle between Cross’ expert and three government experts.

The board found the government’s experts to have the more credible position and, therefore, that Cross had failed to establish the existence of a DSC. Because the government had granted time extensions for the periods of unusually severe weather—all that it was required to do under the terms of the contract—the board denied the appeal.¹¹¹¹ Those readers interested in hydraulics—estuarine, riverine, and coastal hydrodynamics—and related fields will find this case a must read.

No DSC Without the Clause in the Contract

Continuing the nautical theme, in *Marine Industries Northwest, Inc.*,¹¹¹² the ASBCA considered a contractor’s claim that mill scale¹¹¹³ on a Navy vessel was a DSC. The twist in this case is that the fixed-price contract at issue did not contain a DSC clause of any type. Marine Industries Northwest, Inc. (MINI), received a Navy contract to repaint a barge. In preparing its bid, MINI and its painting subcontractor assumed that there would be no mill scale on a Naval vessel currently in service and did not include the costs of removing mill scale in their bids.¹¹¹⁴ Of course, the subcontractor ultimately encountered mill scale during contract performance. MINI filed a claim in the amount of \$166,580.32 for the extra costs allegedly incurred in removing the mill scale. MINI’s claim was based on a Type II DSC argument and a superior knowledge argument. The cognizant con-

1105. *Id.* at 155,180 (citing *Blount Bros. Constr. Co. v. United States*, 171 Ct. Cl. 478, 496 (1965); *Fed. Contracting, Inc.*, ASBCA No. 48280, 95-2 BCA ¶ 27,792).

1106. *Edsall*, 01-2 BCA ¶ 31,425 at 155,181 (quoting *Bromley Contracting Co.*, ASBCA Nos. 14884 et al., 72-1 BCA ¶ 9252 at 42,902).

1107. ASBCA No. 52887, 01-2 BCA ¶ 31,443.

1108. *Id.* at 155,284. A Type II DSC involves “unknown conditions at the site, of an unusual nature, which differ materially from those encountered and generally recognized as inhering in work of the character provided for in the contract.” FAR, *supra* note 11, § 52.236-2(a)(2). A Type I DSC involves a site condition that differs materially from that depicted in the contract. *Id.* § 52.236-2(a)(1).

1109. *Luhr Bros.*, 01-2 BCA ¶ 31,443 at 155,289.

1110. *Id.*

1111. *Id.* at 155,292.

1112. ASBCA No. 51942, 01-1 BCA ¶ 31,201.

1113. “Mill scale” is “[a] black scale of magnetic oxide of iron formed on iron and steel when heated for rolling, forging, or other processing.” *Id.* at 154,042 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961)).

1114. *Marine Indus. Northwest, Inc.*, 01-1 BCA ¶ 31,201 at 154,042.

tracting officer denied the claim, and MINI appealed to the ASBCA.¹¹¹⁵

The board rejected the Type II DSC argument solely on the basis that there was no DSC clause in the contract. The board reasoned that, in a fixed-price contract, in the absence of a DSC clause or some other clause shifting risk to the government, MINI bore the cost risk of encountering mill scale. Finding that MINI had not met its burden of proving that the government was aware of the presence of mill scale on the vessel, the board also rejected MINI's superior knowledge argument and denied the appeal.¹¹¹⁶

You Really Need to Do That Site Inspection!

The authors have included the final two cases in this area simply to reemphasize the importance of a contractor's failure to conduct a reasonable site inspection in the analysis of a DSC claim. In *Sagebrush Consultants, L.L.C.*,¹¹¹⁷ and *American Construction & Energy, Inc.*,¹¹¹⁸ the IBCA and the ASBCA, respectively, each considered DSC claims from contractors that had failed to take advantage of offered site inspections before bidding on their respective contracts. *Sagebrush* involved an Interior Department contract to inventory archeological sites, while *American* involved an Air Force contract to replace plumbing fixtures. In *Sagebrush*, the contractor argued that the density of archeological sites was much higher than expected and that this condition constituted a Type II DSC.¹¹¹⁹ In *American*, the contractor claimed that replacement of the fixtures

unexpectedly required it to demolish and replace large portions of the walls covering the pipes leading to the fixtures.¹¹²⁰ In both cases, the boards denied the claims, holding that a reasonable site inspection (which the government made available to both contractors before submittal of bids) would have put the contractors on notice of the potential existence of these conditions.¹¹²¹

Bonds, Sureties, and Insurance

*Hunting Blue Foxes: Insurance Co. of the West v. United States*¹¹²²

The CAFC was called upon to determine whether the Supreme Court's decision in *Blue Fox*¹¹²³ barred a subrogee from bringing suit against the United States under the Tucker Act¹¹²⁴ after the subrogee stepped in and completed the contract work.¹¹²⁵

Insurance Company of the West (ICW) provided performance and payment bonds for P.C.E., Ltd. (PCE), on a contract awarded by the Air Force.¹¹²⁶ After beginning performance, PCE notified the Air Force that it was financially unable to meet its obligations under the contract and that ICW would be responsible for assuming control and assuring completion of the contract. PCE "voluntarily and irrevocably" directed that all contract funds remaining due be paid to ICW.¹¹²⁷ Shortly thereafter, ICW confirmed this in writing to the contracting officer.¹¹²⁸

1115. *Id.* at 154,043.

1116. *Id.*

1117. IBCA No. 4182E-2000, 01-1 BCA ¶ 31,159.

1118. ASBCA Nos. 52031, 52032, 01-1 BCA ¶ 31,202.

1119. *Sagebrush Consultants*, 01-1 BCA ¶ 31,159 at 153,913.

1120. *American Constr.*, 01-1 BCA ¶ 31,202 at 154,048.

1121. In *Sagebrush*, the IBCA found that the site inspection would have put the contractor on notice of geological features that should have put the contractor's archeologists on notice of the potential for a higher-than-expected density of sites. *Sagebrush Consultants*, 01-1 BCA ¶ 31,159 at 153,914. In *American*, the ASBCA noted that the site visit included areas where the government actually had removed portions of the walls so that the potential bidders could see the pipes leading to the fixtures and determine what work would be required. *American Constr.*, 01-1 BCA ¶ 31,202 at 154,048.

1122. 243 F.3d 1367 (2001).

1123. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999). In *Blue Fox*, the Supreme Court held that a subcontractor could not pursue its equitable lien because of sovereign immunity. *Id.* at 265. See 1999 Year in Review, *supra* note 505, at 72. See also Major Jody Hehr & Major David Wallace, *The Supreme Court "Outfoxes" the Ninth Circuit*, ARMY LAW., Aug. 1999, at 47. For an analysis of the prior history of *Blue Fox*, see Major Stuart Risch, *Recent Decision: Blue Fox, Inc. v. The United States Small Business Administration and the Department of the Army*, ARMY LAW., Nov. 1997, at 53.

1124. 28 U.S.C. § 1491 (2000).

1125. *Insur. Co. of the West*, 243 F.3d at 1369.

1126. *Id.* The contract required the replacement of automatic doors in the commissary at Hickham AFB. *Id.*

1127. *Id.*

About seven weeks later, the Air Force issued a unilateral modification changing the remittance address for payments to PCE at ICW's address.¹¹²⁹ ICW financed the completion of the contract to the tune of \$354,744.34. Instead of sending the payments on the contract to ICW, the Air Force continued to make payments directly to PCE. When ICW inquired about the payments, the government informed ICW that payments had been made to PCE and that they should settle the issue between themselves. ICW then filed suit, claiming entitlement to \$174,000 in wrongfully disbursed funds. The government moved for summary judgment on the grounds of sovereign immunity.¹¹³⁰

Although the law was well settled¹¹³¹ that a surety can recover from the United States payments made to a contractor after a surety had notified the government of the contractor's default, the government argued that *Blue Fox* had effectively overruled the existing case law.¹¹³² At a pretrial hearing, the COFC ruled that it was bound by *Balboa Insurance Co. v. United States*,¹¹³³ because *Blue Fox* had not directly overruled the *Balboa* case law. The case reached the CAFC on interlocutory appeal.¹¹³⁴

The Miller Act requires prime contractors to post performance bonds on all federal construction contracts.¹¹³⁵ When those contractors run into trouble, sureties have traditionally relied on the doctrine of equitable subrogation, rather than privity of contract, to assert their claims against the government.¹¹³⁶ ICW asserted that the Tucker Act's waiver of sovereign immu-

nity gives the COFC jurisdiction over claims against the United States "founded . . . on express or implied contract."¹¹³⁷ The CAFC framed the issue in this case as "whether the government's consent to suit based on a contract includes consent to suit on a contract brought by a subrogee."¹¹³⁸

The CAFC noted there is case law construing a similar waiver provision under the Federal Tort Claims Act (FTCA).¹¹³⁹ Neither party cited that case, *United States v. Aetna Casualty & Surety, Co.*,¹¹⁴⁰ in their arguments. Relying on the rationale in *Aetna*, the CAFC found that the decision stood for a broader principle, that "waivers of sovereign immunity applicable to the original claimant are to be construed as extending to those who receive assignments, . . . where the statutory waiver of sovereign immunity is not expressly limited to claims asserted by the original claimant."¹¹⁴¹ The CAFC concluded "that the Tucker Act must be read to waive sovereign immunity for assignees as well as those holding the original claim."¹¹⁴²

*"I Think That I Would Rather Be a Tree;"
Forests Are Not "Government Installations"
Under FAR Part 28*

At issue in *SHABA Contracting*¹¹⁴³ was a Forest Service (FS) IFB for forestry work in the national forest lands in the Buffalo Ranger District, Arkansas. The IFB did not include clauses requiring the contractor to obtain coverage for workers' compensation and other specified insurance.¹¹⁴⁴ The protestor,

1128. *Id.*

1129. *Id.* ICW did not execute a takeover agreement, nor was the contract with PCE terminated. *Id.*

1130. *Id.*

1131. See *Perlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962); *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1161-63 (Fed. Cir. 1985) (both cases holding that the government waived its sovereign immunity from equitable subrogation claims by sureties).

1132. *Insur. Co. of the West*, 243 F.3d at 1369-70.

1133. 775 F.2d 1158.

1134. *Insur. Co. of the West*, 243 F.3d at 1370.

1135. 40 U.S.C. § 270a(a)-(d) (2000). Performance bonds generally give the surety the option of taking over and completing performance or of assuming liability for the government's costs in completing the contract in excess of the contract price. A third alternative, where the surety provides funds to the contractor to complete the contract, is the option ICW chose in this case. See *Insur. Co. of the West*, 243 F.3d at 1369-70.

1136. *Insur. Co. of the West*, 243 F.3d at 1370.

1137. *Id.* at 1372 (citing 28 U.S.C. § 1491(a)(1) (2000)).

1138. *Id.* at 1372.

1139. 28 U.S.C. § 2671 (2000).

1140. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). The CAFC found that in *Aetna*, the Supreme Court had directly held that the FTCA's waiver of sovereign immunity included suits by subrogees. *Insur. Co. of the West*, 243 F.3d at 1373.

1141. *Insur. Co. of the West*, 243 F.3d at 1373.

1142. *Id.* at 1375.

SHABA Contracting (SHABA), protested the solicitation, arguing that the FS was required by regulation to include the clauses requiring insurance and that the FS routinely included these clauses in similar solicitations in the past.¹¹⁴⁵

The GAO reviewed the regulatory provisions in question, both of which require offerors to provide insurance “for work on a Government installation.”¹¹⁴⁶ The GAO determined that the subject acquisition regulations do not define “Government installation.”¹¹⁴⁷ The FS argued that a national forest should not be considered a “Government installation.” The GAO agreed. Because the term was not defined in the regulation, the GAO determined that if the FAR intended to apply to forestlands and similar lands, the term “Government-owned property” should have been used.¹¹⁴⁸

*Can the Contracting Officer Require Bid Guarantees
for Bids Under \$100,000?
Yes He Can!*

The FWS issued an IFB for the award of a fixed-price contract to repair a residence in the E.B. Forsythe National Wildlife Refuge in New Jersey. The IFB required the contractor to fur-

nish all labor, materials, and equipment, including the furnishing and installation of framing, windows, doors, cabinets, a bathroom, and a heating, ventilating, and air conditioning system.¹¹⁴⁹ In the IFB, the FWS included a Standard Form (SF) 1442¹¹⁵⁰ that noted a “bid bond, 20%” was required, and block 13.B of the SF 1442 specified that “an offer guarantee . . . is . . . required.”¹¹⁵¹ The bid guarantee clause¹¹⁵² was also incorporated by reference in the IFB, specifying that the failure to provide a proper bid guarantee could result in rejection of the bid.¹¹⁵³

Lawson’s Enterprises, Inc. (Lawson), submitted a bid of \$96,740.¹¹⁵⁴ Recognizing its bid was under the Miller Act¹¹⁵⁵ threshold, Lawson did not submit a bid guarantee. Because Lawson did not submit a bid guarantee, the FWS awarded the contract to the next lowest bidder at a cost of \$130,500, after determining that Lawson’s bid was non-responsive.¹¹⁵⁶

Lawson protested the award, arguing that the solicitation did not require a bid guarantee for bids under \$100,000.¹¹⁵⁷ Lawson’s argument was based on three prongs. First, the Miller Act only requires payment and performance bonds for construction contracts greater than \$100,000.¹¹⁵⁸ Second, the IFB incorporated by reference FAR 52.228-15, which requires performance

1143. Comp. Gen. B-287474, July 2, 2001, 2001 CPD ¶ 109.

1144. *Id.* at 1-2. The clauses in contention were FAR, *supra* note 11, § 52.228-5, Insurance—Work on a Government Installation, and Agriculture Acquisition Regulation § 452.228-71, Insurance Coverage. *SHABA*, 2001 CPD ¶ 109 at 2. The Forest Service is an agency within the Department of Agriculture.

1145. *SHABA*, 2001 CPD ¶ 109 at 1-3. *SHABA* also protested on two other grounds: first, that the FS’s provisions for site viewing were inadequate and, second, that the failure to include the insurance provisions would result in the FS awarding to a vendor who uses “nonimmigrant aliens.” *Id.* at 3-4. The GAO saw no merit in either assertion. *Id.*

1146. FAR *supra* note 11, § 28.310. The FAR makes the inclusion of the clause mandatory unless only a small amount of work is required, or all of the work will be performed outside the United States, its possessions, or Puerto Rico. *Id.*

1147. *SHABA*, 2001 CPD ¶ 109 at 2.

1148. *Id.* The GAO noted that the DOD has a regulatory definition for “Government installation,” as a “facility having fixed boundaries and owned or controlled by the government.” *Id.* (citing 32 C.F.R. § 842.74 (2001)). The cited C.F.R. section pertains to Air Force “non-scope” claims authority. See 32 C.F.R. § 842.74 (2001). The Army version is found at 32 C.F.R. section 536.90: “a Government installation is a facility having fixed boundaries owned or controlled by the Government.” *Id.* § 536.90 (2001). The Navy has a similar, though slightly more expansive, provision: “Government installation. Any federal facility having fixed boundaries and owned or controlled by the U.S. Government. It includes both military bases and nonmilitary installations.” *Id.* § 750.63(c). Because only in rare instances would a military facility not have a fixed boundary, contracting officers would be cautioned to read FAR section 28.310 expansively. The DFARS does not specifically address this issue.

1149. Lawson’s Enters., Inc., Comp. Gen., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36 at 1.

1150. Standard Form 1442: Solicitation, Offer, and Award (Construction, Alteration, or Repair) (Rev. Apr. 1995). See FAR, *supra* note 11, §§ 53.301-1442.

1151. *Lawson’s Enters., Inc.*, 2001 CPD ¶ 36 at 2.

1152. FAR, *supra* note 11, § 52.228-1.

1153. *Lawson’s Enters., Inc.*, 2001 CPD ¶ 36 at 2.

1154. *Id.* at 1.

1155. 40 U.S.C. §§ 270a to d-1 (2000).

1156. *Lawson’s Enters., Inc.*, 2001 CPD ¶ 36 at 1.

1157. *Id.* at 2.

and payment bonds, unless the resulting contract is less than \$100,000,¹¹⁵⁹ and third, that FAR 52.228-15 prohibits contracting officers from requiring bid guarantees unless a performance or payment bond is also required.¹¹⁶⁰

The GAO rejected all three arguments advanced by Lawson.¹¹⁶¹ The GAO determined that bid guarantees are promulgated under procurement regulations, and not mandated by statute. In cases where the bid is less than the Miller Act threshold of \$100,000, an agency may still condition acceptance on the requirement that bid guarantees be furnished at the time of bid opening. Where the IFB requires all bids to include a bid guarantee, any bid failing to include the required guarantee must be rejected as non-responsive.¹¹⁶²

No Way to Inoculate Yourself from the Epidemics in the Insurance Marketplace

In *Novavax, Inc.*,¹¹⁶³ the intricacies of the medical research and development (R&D) insurance marketplace created an illness the offeror could not survive. The Centers for Disease Control and Prevention (CDC) issued an RFP for the development and stockpiling of smallpox vaccine as part of the nation's

biological weapons defense preparations.¹¹⁶⁴ The RFP required the successful offeror to develop a vaccine, conduct clinical trials, obtain licensure of the vaccine, and produce and stockpile at least 40 million units of the vaccine.¹¹⁶⁵

The RFP stated that the award would be made to the best-integrated proposal; that is, based on technical, business, and past performance, the proposal that offered the highest technical merit at the best overall value to the government. The RFP also included a pass/fail requirement that each proposal demonstrate the offeror "has the capability to provide indemnification/liability" coverage as required in the RFP.¹¹⁶⁶

Four proposals were received, and Novavax, Inc.'s (Novavax), proposal was the highest rated of the two proposals found technically acceptable.¹¹⁶⁷ After reviewing the proposals, the CDC determined that the language in the RFP was not specific enough to put offerors on notice of the CDC's requirements, and an amendment was issued.¹¹⁶⁸

The contracting officer established the competitive range, consisting of the Novavax and OraVax offers. The CDC conducted discussion with both offerors and requested final proposal revision (FPR).¹¹⁶⁹ During the discussions, Novavax

1158. *Id.* See 40 U.S.C. §§ 270a to d-1.

1159. See FAR, *supra* note 11, § 52.228-1.

1160. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 1-2. See FAR, *supra* note 11, § 28.101.

1161. *Lawson's Enters., Inc.*, 2001 CPD ¶ 36 at 1-2.

1162. *Id.* at 2.

1163. Comp. Gen. B-286167, B-286167.2, Dec. 4, 2000, 2000 CPD ¶ 202.

1164. *Id.* at 2. "[S]mallpox was officially declared eradicated in 1980. In recent years, however, concern has grown that large-scale biological weapons research and production involving smallpox might still exist in many countries." *Id.* The civilian population is extremely vulnerable to smallpox and could expect thirty-percent fatalities in any exposure. *Id.*

1165. *Id.*

1166. *Id.* at 3. The RFP required that "the contractor shall indemnify or shall obtain insurance to indemnify, defend and hold harmless the government from any claims and cost resulting from acts, omissions, and mishandling of the vaccine." *Id.* (quoting RFP section H. 14).

1167. *Id.* Novavax received a score of 83.50 and OraVax, Inc., received a score of 76.50, out of a possible 100. The two other proposals did not meet the technical requirements. *Id.*

1168. *Id.* Amendment 5 revised section H. 14, adding the following specific requirements to the existing language:

The indemnification/insurance coverage obtained shall include 1) clinical trials—adults; 2) clinical trials—pediatrics; 3) use in at risk laboratories; 4) use in [immuno]-compromised individuals and [pregnant] women; and 5) use in emergency [situations]. A non-cancelable policy for the 20-year life of the contract shall be obtained by the Contractor prior to initiation of the clinical trials.

Id. at 3-4. Amendment 5 also added section B. 5 to the solicitation. This section added a required line item that was to "[reflect] the non-cancelable policy payment terms reached with the insurance providers for insurance which meets the requirements of [section] H. 14." *Id.* (quoting RFP section B. 5(1)). Section B. 5 also stated:

(2) Backup documentation shall include a written justification as to how the amount of coverage was determined.

(3) Proof of a guaranteed 20-year non-cancelable insurance policy from the insurance provider(s) shall be provided. This documentation shall clearly state the estimated cost of the coverage, the amount of the coverage, exactly what the coverage includes, and payment terms.

Id. (quoting RFP section B. 5(2)-(3)).

informed the CDC that insurance coverage was unavailable because a competitor had “locked up” the available insurance for this type of high-risk pharmaceutical project.¹¹⁷⁰

Upon receiving the FPRs, the CDC excluded Novavax from the competitive range for failing to submit either the required insurance or a risk assessment showing that the company had a basic understanding of the amounts and cost of coverage that would be required.¹¹⁷¹ Novavax protested the exclusion from the competitive range.¹¹⁷²

The GAO denied Novavax’s protest. First, Novavax knew that the insurance carriers would refuse to provide more than one quote well before the time for FPRs. Novavax was required to raise that issue before submitting its proposal and failure to do so rendered that ground untimely.¹¹⁷³

Second, the RFP required offerors to demonstrate their capability to indemnify the government, or alternatively, to obtain insurance to indemnify the government.¹¹⁷⁴ The GAO reasoned that before an offeror could demonstrate they had the capability to provide the required insurance, they must first determine how much insurance is necessary.¹¹⁷⁵ Thus, the GAO determined that a risk assessment was reasonably implied from the terms of the RFP and the contracting officer was correct to

exclude the Novavax proposal from the competitive range for failing to provide a risk assessment.¹¹⁷⁶

Cost and Cost Accounting Standards

Proposed Rule on Signing/Retention Bonuses

This past year, the FAR Council proposed¹¹⁷⁷ and then withdrew¹¹⁷⁸ a rule that would have explicitly made bonuses paid to recruit or retain employees with critical skills an allowable cost. The proposed rule would have amended FAR section 31.205-34, Recruitment Costs, by adding two subparagraphs which address signing bonuses and periodic retention bonuses, respectively. In the notice, the FAR Council specifically pointed out that it viewed the amendment to be a “clarification since the FAR currently does not disallow these type of expenses.”¹¹⁷⁹ In withdrawing the proposed rule, the Council stated that it was unnecessary because bonuses are already implicitly allowable so long as they are reasonable and allocable.¹¹⁸⁰ This rationale seems to be at odds with FAR section 31.204(c), which states that “[s]ection 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable.”¹¹⁸¹

1169. *Id.* at 4.

1170. *Id.* Novavax contended it was unable to secure proof of insurance because:

[I]nsurers generally form a consortium to provide the coverage capacity required for such projects and the consortium insurers will provide only one quotation on the project. That quotation is specific to the project and not dependent upon the pharmaceutical company that will perform the work, assuming that each relevant company is an established entity of sufficient reputation. Once one of the insurers issues a quotation to one company, none of the insurers will provide any information to any other company—the market “locks up.” When the contract for the project is awarded, the insurers open the market to the firm that wins the competition and make the quotation available to that firm.

Id. (quoting the affidavit of Novavax’s Vice President for Product Development).

1171. *Id.* at 5. The contracting officer accepted Novavax’s statements concerning the “lock-up” at face value. The proposal was still excluded from the competitive range, however, because it did not address the risk assessment needed to quantify the amounts of coverage and associated costs. *Id.*

1172. *Id.* The CDC, citing urgent and compelling circumstances, overrode the statutory stay and awarded the contract to OraVax for \$343.3 million. *Id.*

1173. *Id.* at 9-10. The CDC was able to develop the government estimate from publicly available information. The GAO concluded that Novavax could have estimated the necessary insurance using the same publicly available information. *Id.*

1174. *Id.* at 3-6.

1175. *Id.* at 7-8.

1176. *Id.* at 8. The RFP specifically required “written justification as to how the amount of coverage was determined.” *Id.*

1177. Federal Acquisition Regulation; Signing and Retention of High-Technology Workers, 65 Fed. Reg. 82,876 (Dec. 28, 2000) (to be codified at 48 C.F.R. pt. 31).

1178. Federal Acquisition Regulation; Signing and Retention of High-Technology Workers, 66 Fed. Reg. 40,838 (Aug. 3, 2001).

1179. 65 Fed. Reg. 82,876.

1180. 66 Fed. Reg. 40,838.

1181. FAR, *supra* note 11, 31.204(c). Similarly, if all costs that were not expressly made unallowable by the FAR were deemed to be implicitly allowable, then there would be no need for any of the other current FAR provisions expressly making certain costs allowable. *See, e.g., id.* §§ 31.205-12 (Economic Planning Costs); 31.205-28 (Other Business Expenses); 31.205-29 (Plant Protection Costs); 31.205-32 (Precontract Costs).

In last year's *Year in Review*,¹¹⁸² we covered the ASBCA's decision in *DynCorp*,¹¹⁸³ which held that legal expenses incurred in connection with a criminal investigation for alleged contractor wrongdoing were allowable expenses where the evidence only demonstrates wrongdoing on the part of an employee of the contractor rather than the contractor itself.¹¹⁸⁴ This past year, the Army twice tried unsuccessfully to make an end-run around this decision.¹¹⁸⁵

First, the Army argued that the statute allowing recovery of legal proceeding costs¹¹⁸⁶ required the costs to be indirect rather than direct as *DynCorp* claimed them.¹¹⁸⁷ The board summarily rejected this contention.¹¹⁸⁸

Subsequently, the Army argued that it had received no benefit from *DynCorp*'s legal representation during the criminal investigation. The legal costs were, therefore, not allocable to the contract.¹¹⁸⁹ The basis for this argument was that the FAR test for allocability states that a "cost is allocable if it" can be assigned or charged "on the basis of relative benefits received or other equitable relationship."¹¹⁹⁰ That section goes on to list the following situations in which a cost would be allocable: (a) if the cost were "incurred specifically for the contract," (b) if the cost "benefits both the contract and other work and can be distributed to them in reasonable proportion to the benefits received," or (c) the cost "is necessary to the overall operation of the business."¹¹⁹¹ Without discussing which of the three sit-

uations was applicable to *DynCorp*'s legal proceeding costs, the board stated the concept of benefit should be read very broadly and could be implied because Congress would not have enacted the Major Fraud Act¹¹⁹²—making these costs allowable where there was no conviction—unless it saw a benefit to the government.¹¹⁹³

Get Your PAWS Off Our Money!

In *Johnson Controls World Services, Inc.*,¹¹⁹⁴ the COFC held that the government's share of a pension fund surplus should include amounts attributable to employee contributions in addition to the contractor contributions.¹¹⁹⁵ Between 1953 and 30 September 1988, Pan American World Services (PAWS) and its predecessors performed operation and maintenance services for the Air Force at the Eastern Test Range (ETR) in Cape Canaveral, Florida, under several successive contracts.¹¹⁹⁶ The contractor had established a defined-benefit pension plan for its employees to which both it and its employees made contributions. The contractor charged the allocable portion of its contributions to the ETR contracts.¹¹⁹⁷ In 1991-92, PAWS closed out the pension plan attributable to the ETR contracts as a result of a corporate takeover. Because the pension was over-funded, the government claimed it was entitled to an adjustment based upon the entire excess contributions, including those attributable to PAWS employees.¹¹⁹⁸

1182. See 2000 *Year in Review*, *supra* note 2, at 66.

1183. ASBCA No. 49714, 00-2 BCA ¶ 30,986, *motion for reconsideration denied*, 00-2 BCA ¶ 31,087.

1184. *Id.* at 152,932.

1185. See *DynCorp*, ASBCA No. 49714, 01-2 BCA ¶ 31,433; *DynCorp*, ASBCA No. 53098, 01-2 BCA ¶ 31,476.

1186. 10 U.S.C. § 2324 (2000).

1187. *DynCorp*, 01-2 BCA ¶ 31,433 at 155,228.

1188. *Id.* The board did not discuss why the government felt such costs had to be indirect. The board did not merely hold that legal proceeding costs could be direct. In fact, it held that its reading of congressional intent was for *all* such costs to be treated as direct costs. *Id.* at 155,229 (emphasis added). This could pose a problem for any contractors who treat proceeding costs as indirect costs.

1189. *DynCorp*, 01-2 BCA ¶ 31,476 at 155,400.

1190. FAR, *supra* note 11, § 31.201-4.

1191. *Id.*

1192. Pub. L. No. 100-70, 102 Stat. 4636 (codified at 18 U.S.C. § 1031 (2001); 10 U.S.C. § 2324(e)(1)(O), (k) (2000)).

1193. *DynCorp*, 01-2 BCA ¶ 31,476 at 155,404-05.

1194. 48 Fed. Cl. 182 (2000).

1195. *Id.* at 187.

1196. *Id.* at 183. A corporate acquisition in 1989 resulted in JCWSI being the successor in interest to PAWS. *Id.*

1197. *Id.*

Two different contracts were at issue in this dispute. The first of these—a 1978 contract—contained a provision stating: “The difference between the market value of the assets and the actuarial liability for the segment will be considered as an adjustment to previously determined pension costs That portion of any excess applicable to this contract shall be . . . paid . . . as the Contracting Officer may direct.”¹¹⁹⁹ The court concluded that government refunds are not limited to amounts charged to it unless the contract so specified and further determined that the language quoted above indicated the government was entitled to a broadly calculated refund in this case.¹²⁰⁰ Interestingly, the court did not discuss FAR 52.216-7, Allowable Cost and Payment, which limits the credits and refunds to the amount the government has reimbursed the contractor.¹²⁰¹

Government Entitled to Share of Contractor Employee Pension Contributions

The COFC has given Teledyne, Inc. (Teledyne), a mixed victory in its challenge of the validity of the 1995 amendment to Cost Accounting Standard (CAS) 413 governing pension costs.¹²⁰² In 1995 and 1996, Teledyne sold the assets of two of its subsidiary divisions to other companies.¹²⁰³ The first of these asset sales preceded the 1995 amendment to CAS 413 and involved a division that had both cost-reimbursement and fixed-price contracts with the government at the time of the sale.¹²⁰⁴ The second sale occurred post-amendment to CAS 413

and involved a division that had only fixed-price contracts with the government.¹²⁰⁵ The defined benefit pension plans associated with these divisions ended as a result of these sales. At that time, the plans were over-funded, and the contracting officer asserted a claim for the government’s share of the excess funding which took into consideration the fixed-price contracts as well as the cost-reimbursement contracts with Teledyne.¹²⁰⁶ Directly at issue was over \$130 million.¹²⁰⁷

In 1995, CAS 413 was amended to address several issues the government repeatedly faced.¹²⁰⁸ One of the amendments expressly provided for recovery of excess pension assets under fixed-price contracts.¹²⁰⁹ Subsequently, there was considerable disagreement within the government concerning whether segment closings that occurred before the 1995 amendment should take into account fixed-price contracts when determining the government’s share of any excess pension assets. By the time *Teledyne* went to trial, the government had switched from its initial contention that the adjustments related to Teledyne’s pension plans should account for fixed-price contracts. This apparently was sparked by a claim filed by General Motors seeking an adjustment that used the government’s rationale against it. In the General Motors case, there had been a pre-amendment segment closing involving only fixed-price contracts and a pension deficit.¹²¹⁰

The government still maintained that it was entitled to an adjustment that included fixed-price contracts for post-amend-

1198. *Id.* at 185. Johnson Controls argued that any adjustment should not include amounts attributable to employee contributions because they were not a cost paid by the government. *Id.* at 186.

1199. *Id.* at 184. This provision was not found in the second, 1984 contract. The court, however, did not see this omission to be significant and felt the second contract somehow incorporated the terms of the prior contract. *Id.*

1200. *Id.* at 186-87.

1201. See FAR, *supra* note 11, § 52.216-7.

1202. *Teledyne, Inc. v. United States*, 50 Fed. Cl. 155 (2001).

1203. *Id.* at 157.

1204. *Id.* at 158.

1205. *Id.* at 159-60.

1206. *Id.* at 157-60.

1207. *Id.* at 159-60. There also are several other contractors facing this same issue. See, e.g., Martha A. Matthews, *GM Goes to Court of Federal Claims Seeking \$ 311M in Pension Plan Underpayments*, 73 BNA FED. CONT. REP. 137 (2000) [hereinafter *GM Goes to Court*]; Martha A. Matthews, *GE Sues in Court of Federal Claims for \$ 539M Pension Cost Adjustment Following \$ 950M Government Claim Under CAS 413 Segment-Closure Provisions*, 71 BNA FED. CONT. REP. 624 (1999). Both General Motors and General Electric participated as *amicus curiae* in *Teledyne*. 50 Fed. Cl. at 157.

1208. *Teledyne*, 48 Fed. Cl. at 166. The primary reason for the amendment was that CAS 413 was initially drafted at a time when the vast majority of pension plans were underfunded. By 1995, the vast majority of pension funds were overfunded, largely as a result in a change to the tax laws and better than historical results in the stock market. *Id.*

1209. See CAS 413.50(c)(12)(vii), found at 48 C.F.R. section 9904.413, which as amended reads as follows: “The full amount of the Government’s share of an adjustment is allocable, without limit, as a credit or charge during the cost accounting period in which the event occurred and contract prices/costs will be adjusted accordingly.” 48 C.F.R. § 9904.413 (2000). Prior versions of this standard contained no reference to price.

1210. *Teledyne*, 50 Fed. Cl. at 178-81. See *GM Goes to Court*, *supra* note 1207, for greater details on this claim.

ment pension adjustments. The COFC agreed, holding that although Teledyne had entered into its contract before the amendment, Teledyne was required to comply with not just the CAS in effect at the time of award, but also any modifications or amendments to the CAS by virtue of the CAS clause¹²¹¹ that had been incorporated into the contract.¹²¹² The court also held, however, that this very same clause entitled Teledyne to an equitable adjustment, because the 1995 amendment to CAS 413 required it to make a change to its cost accounting practices, increasing its costs.¹²¹³

COFC Imposes Herculean Burden on Contractors

The COFC's holding in *Hercules, Inc. v. United States*¹²¹⁴ highlights the incongruities between the cost principles found in the FAR and the CAS. In this case, the contractor operated the Radford Army Ammunition Plant (Radford) in Virginia. Between 1941 and the end of 1994, Hercules, Inc. (Hercules) operated the plant under a cost-reimbursement contract, but commencing in 1995 it began operating under a fixed-price contract. In 1987, Hercules sold its stock in another company and the income taxes assessed by Virginia for the year included \$6.9 million in capital gains from the stock sale. Hercules paid its tax assessment and allocated this cost to the Radford operating contract in proportion to the mix of fixed-price and cost-reimbursement contracts it had in 1987.¹²¹⁵ At the same time, it instituted litigation against Virginia seeking a refund of the taxes attributable to the stock sale. In 1995, Virginia entered

into a settlement agreement in which it paid Hercules \$10.5 million.¹²¹⁶

The government gave Hercules a demand letter for a refund of \$5,775,000 of that amount based upon the 1987 allocation factor used by Hercules to seek reimbursement of the taxes from the government. Hercules refused to pay because it contended CAS that 406 mandated that the refund to the government be calculated based upon the mix of fixed-price and cost-reimbursement contracts Hercules had in 1995 when it received the Virginia tax refund. Because Hercules had only fixed-price contracts by that time, Hercules concluded that the government was entitled to nothing.¹²¹⁷ The court disagreed with this contention, and, citing two FAR provisions dealing with refunds,¹²¹⁸ held that a tax refund is not a cost but rather a cost reduction. Consequently, Hercules had to reduce its 1987 costs and had to calculate this reduction using the proportion of cost-reimbursement contracts in effect in 1987. According to commentators, this case is fairly significant because many contractors treat tax refunds and credits in a manner similar to Hercules.¹²¹⁹

"You're Talking Turkey," CAFC Tells ASBCA

In *General Electric Co. v. Delaney*,¹²²⁰ the CAFC reversed a somewhat controversial February 2000 ASBCA decision regarding depreciation of assets purchased in foreign countries.¹²²¹ This case involved a foreign affiliate of General Elec-

1211. FAR, *supra* note 11, § 52.230-2.

1212. *Teledyne*, 50 Fed. Cl. at 163, 185-87.

1213. *Id.* See also FAR, *supra* note 11, § 52.230-2(a)(4). The *Teledyne* court also rejected the government's contention that its recovery should take into consideration amounts contributed by Teledyne's employees. 50 Fed. Cl. at 184-85. This result is completely opposite the holding in *Johnson Controls World Services, Inc. (JCWSI)*, 48 Fed. Cl. 182 (2000), discussed *supra* notes 1194-1201. The *Teledyne* court based its holding on language found in FAR, *supra* note 11, § 52.216-7, Allowable Cost and Payment, limiting government refunds and credits to amounts it has reimbursed the contractor. See 50 Fed. Cl. at 191. This clause was not addressed by the prior *JCWSI* court, see 48 Fed. Cl. 182, and the latter *Teledyne* decision did not address the earlier *JCWSI* decision, see 50 Fed. Cl. 155.

1214. 49 Fed. Cl. 80 (2001). For further discussion of this decision, see *infra* notes 1605-11 and accompanying text.

1215. *Hercules*, 49 Fed. Cl. at 82-84. Initially, the contracting officer disallowed that part of the income taxes due to the stock sale. In a prior decision, the Federal Claims Court held in favor of Hercules on the allowability of these taxes and granted it nearly \$4.9 million. *Id.* (citing *Hercules, Inc. v. United States*, 26 Cl. Ct. 662 (1992)).

1216. *Id.* at 85. Hercules accounted for this settlement as follows: \$5.25 million tax refund and \$5.25 million in interest. The agreement was silent concerning any break-down in amounts. *Id.* at 86.

1217. *Id.* at 86, 91-92. Cost Accounting Standard 406 specifically provides: "The same cost accounting period shall be used for accumulating costs in an indirect pool as for establishing its allocation base." *Id.* (quoting CAS 406). Thus, Hercules argued that because it treated the tax refund payment as a cost (a negative one) that it accumulated in its 1995 indirect cost pool. Because the payment was made in 1995, it was required to allocate that cost over its 1995 allocation base. It is also worth mentioning that Hercules had consistently treated tax refunds in a similar fashion in the past and had not adopted this method of accounting solely to cheat the government out of any refund. *Id.* at 90. Had Hercules had only cost-reimbursement contracts in 1995, the resultant allocation would have been greater than the 1987 allocation factor; it is unclear whether the government would have used a different line of reasoning in that case.

1218. *Id.* at 90-91 (noting that FAR section 31.205-41, Taxes, requires tax credits to be treated as a "cost reduction" and that FAR section 52.216-7, Allowable Cost and Payment, states: "The contractor shall pay to the Government any refunds . . . (including interest, if any) accruing to or received by the Contractor . . . to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed to [sic] the Government.").

1219. See Johnson & Robert S. Nichols, *Hercules II: A Controversial Decision in the Court of Federal Claims*, 75 BNA FED. CONT. REP. 513 (2001).

1220. 251 F.3d 976 (Fed. Cir. 2001).

tric (GE), Tusas Engine Industries, Inc. (Tusas), that GE had formed in Turkey to locally manufacture F-16 engines as part of a Foreign Military Sales agreement between the United States and Turkey. Thereafter, the Air Force awarded GE six different contracts for aircraft engine repair parts; GE subcontracted the work to Tusas. To calculate allowable depreciation on these contracts, Tusas began by recording the company assets, which had been purchased using U.S. dollars, in Turkish lira. In doing so, Tusas used the exchange rate in effect at the time it acquired the assets. It then took depreciation based upon this same exchange rate for the life of the asset. The contracting officer recalculated the depreciation by basing it on the current exchange rate in effect for each accounting period. Because Turkey was experiencing a period of tremendous inflation, the net result was that the contractor recovered significantly less depreciation using this current exchange rate rather than the historic exchange rate.¹²²²

GE argued that because neither the CAS nor the FAR cost principles expressly addressed the scenario of depreciation in foreign countries, it was free to calculate depreciation in accordance with generally accepted accounting principles.¹²²³ In contrast, the government argued that usage of historic exchange rates would violate FAR 31.205-11(e).¹²²⁴ The ASBCA agreed that neither the FAR nor the CAS expressly address this scenario¹²²⁵ and also noted that the burden of proof was on the government since this was a cost disallowance.¹²²⁶ The board ruled in favor of the government, however, because it saw depreciation of greater than the book value, when measured in Turkish

Lira, to violate the FAR.¹²²⁷ The CAFC's reversal this past year was based upon its belief that the ASBCA has misinterpreted the FAR by looking at the amount of depreciation versus the original book value solely in terms of Turkish Lira. This resulted in a "mischaracterization of the transaction" which controverted the purpose of depreciation—to allocate the entire cost of an asset over its useful life.¹²²⁸

More FAR/CAS Conflicts and Allegations of Retroactivity

This past year, on the same day, the ASBCA handed down two important decisions dealing with asset valuations following a business combination.¹²²⁹ Both cases held, by a two-to-one margin, that a contractor using the purchase method of accounting was limited to amortization, depreciation, and cost of money based upon the pre-business combination value of assets, even for combinations that occurred before the 1990 FAR revision that created this limitation.¹²³⁰ Both of these cases involved a merger of corporations or, in government contract parlance, a business combination, and in both cases the merger occurred before 1990.

In accordance with Accounting Principles Board¹²³¹ Opinion Number 16, which required an acquiring entity to record assets at their fair market value, the contractors hired independent appraisal firms to determine the respective fair market values and then recorded the assets at that value.¹²³² Thereafter, in 1990 the government published a new cost principle¹²³³ which

1221. Gen. Elec. Co., ASBCA No. 44646, 00-1 BCA ¶ 30,765.

1222. 251 F.3d 976, 977-78.

1223. Gen. Elec. Co., 00-1 BCA ¶ 30,765 at 151,943. In this regard, GE calculated its depreciation in accordance with Financial Accounting Standard 52. *Id.* at 151,933-34.

1224. *Id.* at 151,939. This provision prohibits allowable depreciation from exceeding book value of the asset. To illustrate the government's argument, Tusas obtained a power supply in 1987 at a cost of \$331,820, which converted to 201,588,654 Turkish Lira (TL). This asset had a life of ten years and was depreciated using a straight-line method of depreciation, meaning it could depreciate ten percent of the asset value, or 20,158,865 TL, each year. This would have been equivalent to \$33,182 per year based upon the exchange rate in effect when the asset was obtained. Throughout the life of this asset, the inflation rate in Turkey was very large, and by the tenth year the exchange rate was 86,457 TL to the dollar as opposed to 866 TL to the dollar when the asset was purchased. Under GE's method of calculation, in year ten it claimed depreciation of over 2 billion TL, ten times the original book value in TL. In terms of dollar values, the depreciation in year ten was only \$33,182, or ten percent, of the original book value. *Id.* at 151,936.

1225. *Id.* at 151,943.

1226. *Id.* at 151,941.

1227. *Id.* at 151,942.

1228. Gen. Elec. Co. v. Delaney, 251 F.3d 976, 980 (Fed. Cir. 2001).

1229. See BAE Sys. Info. & Elec. Sys. Integration, Inc., ASBCA No. 44832, 01-2 BCA ¶ 31,495; Kearfott Guidance & Navigation Corp., ASBCA No. 45536, 01-2 BCA ¶ 31,496 [hereinafter *Kearfott*].

1230. BAE, 01-2 BCA ¶ 31,495 at 155,522.

1231. The Accounting Principles Board is a predecessor to the Financial Accounting Standards Board.

1232. BAE, 01-2 BCA ¶ 31,495 at 155,512; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,553.

1233. See FAR, *supra* note 11, § 31.205-52, Asset Valuations Resulting From Business Combinations.

Deployment and Contingency Contracting

Special Authorities Invoked in the Wake of the 11 September Attacks

at that point stated “When the purchase method of accounting for a business combination is used, allowable amortization, cost of money and depreciation shall be limited to the total of the amounts that would have been allowed had the combination not taken place.”¹²³⁴ Subsequently, each of the parties in the two cases entered into new cost-reimbursement contracts. In both cases, when the contractor submitted its vouchers for payment, the government disallowed that part of the voucher related to the stepped-up asset values.¹²³⁵

One of the more noteworthy arguments raised in both of these appeals is that the new cost principle was an illegal retroactive regulation insofar as it was being applied to combinations that occurred before the effective date of the new cost principle.¹²³⁶ The board rejected this argument because it felt “it was not the date of the . . . business combination . . . that caused the regulation to apply to the disallowed costs here. Rather, it was [the contractor’s] use of the purchase method of accounting to account for income and expenses after its contract was awarded.”¹²³⁷

The board reasoned that even though the contractor had been using the purchase method of accounting since the date of the merger, when it entered the contract with the government and submitted its vouchers for payment, it could have elected a different method of accounting and the election to continue to use the purchase method of accounting at that time triggered the application of the cost principle. Another argument that was raised, but rejected, is that the new cost principle was invalid because it conflicted with CAS 404.¹²³⁸ In her dissenting opinion, Judge Thomas acknowledged the existence of a conflict because she believed the new cost principle “did not allow the use of the purchase method of accounting in the case of the sale of a business at a profit and CAS 404 did.”¹²³⁹

In response to the terrorist attacks on 11 September 11 2001, the U.S. government invoked a number of special authorities in the contracting arena to respond to the attacks and to facilitate the transition to a wartime posture. On 14 September, the President issued EO 13,223,¹²⁴⁰ declaring a national emergency.¹²⁴¹ The EO invoked or suspended a variety of authorities (about twenty-one separate authorities) under titles 10 and 14 of the U.S. Code, authorized the increase of the active-duty strength of the armed forces, and invoked the Feed and Forage Act.¹²⁴²

In addition to the actions taken by the President, a number of other officials issued guidance to the field in the aftermath of the 11 September attacks. Based on the President’s actions in invoking 10 U.S.C. § 12,302,¹²⁴³ and the exercise of that authority by the Secretaries of the military departments, the DOD determined that a “contingency operation”¹²⁴⁴ was underway. As a contingency operation, the DOD is authorized to use all contingency operation contracting provisions and procedures in the FAR and the DFARS. One of the most useful of these authorities is the increase in the simplified acquisition threshold¹²⁴⁵ from the normal \$100,000 level to \$200,000.¹²⁴⁶

The DOD procurement workforce is leaning forward in the foxhole to support the recovery efforts in New York, Virginia, and Pennsylvania, and in carrying forward the war against terrorism. While creativity is a necessary component of our warfighting effort, it is important to remember that authorities,¹²⁴⁷ procedures, and processes exist within the established frame-

1234. *BAE*, 01-2 BCA ¶ 31,495 at 155,522. This FAR provision was modified slightly in 1998, but the change would not have affected the outcome in this case.

1235. *Id.* at 155,512-13; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,554.

1236. *BAE*, 01-2 BCA ¶ 31,495 at 155,533-35; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,555. The plaintiffs also argued this amounted to a taking of property without just compensation in violation of the Fifth Amendment’s Due Process Clause, but the board ruled that it did not have jurisdiction over such a claim. *BAE*, 01-2 BCA ¶ 31,495 at 155,526-27; *Kearfott*, 01-2 BCA ¶ 31,496 at 155,556.

1237. *BAE*, 01-2 BCA ¶ 31,495 at 155,534-35.

1238. *Id.* at 155,535-42.

1239. *Id.* at 155,548. This is not entirely correct: the cost principle did actually permit the purchase method of accounting, but it limited the amount of allowed depreciation, cost of money, and amortization when the method was used.

1240. Exec. Order No. 13,223, Ordering the Ready Reserve of the Armed Forces To Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation, 66 Fed. Reg. 48,201 (Sept. 18, 2001).

1241. *Id.* The order furthers the President’s emergency proclamation. See *Proclamation No. 7463 of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

1242. Exec. Order No. 13,223, 66 Fed. Reg. 48,202. The Deputy Secretary of Defense invoked 41 U.S.C. § 11(a) (2000), commonly referred to as the Feed and Forage Act, on 16 September 2001. See Memorandum, Deputy Secretary of Defense, subject: Obligations in Excess of Appropriation Subsequent to Terrorist Attacks and Aircraft Crashes at the World Trade Center, the Pentagon, and in Pennsylvania (16 Sept. 2001).

1243. 10 U.S.C. § 12,302 (2000). Section 12,302 authorizes the President to recall involuntarily members of the Ready Reserve in times of national emergency. *Id.*

work that will allow us to execute any mission necessary to ensure the victory of a free people.¹²⁴⁸

Mo' Better Doctrine

Within military organizations, doctrine is the operational framework to accomplish the mission. Contracting officers, and their supporting legal counsel, must understand the doctrinal underpinnings of their clients to support better better the operational objectives of the commanders they serve. This year, like last year, there has been seen a flurry of doctrinal publications that impact the contingency contracting process.

Many of the key doctrinal references were reissued this year, changing the doctrinal focus from pre-Desert Storm cold-war operations to something more contemporary. The “capstone” doctrinal publications, *Unified Action Armed Forces*,¹²⁴⁹ and *Operations*,¹²⁵⁰ were both reissued this year, updating the basic doctrine for all military operations and units. In addition to the capstone operational publications, a number of new operational publications, including manuals on amphibious¹²⁵¹ and forced entry operations,¹²⁵² foreign humanitarian assistance,¹²⁵³ and civil-military operations,¹²⁵⁴ all contain guidance on the use of contingency contracting support in their respective areas. Specific logistical doctrine was also issued this year in the areas of health service support,¹²⁵⁵ civil engineering,¹²⁵⁶ common-user logistics,¹²⁵⁷ and support to multinational operations.¹²⁵⁸

1244. *Id.* § 101(a)(13).

The term “contingency operation” means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title [10 U.S.C. §§ 331 et seq.], or any other provision of law during a war or during a national emergency declared by the President or Congress.

Id.

1245. *Id.* § 2302(7). This section states:

(7) The term “simplified acquisition threshold” has the meaning provided that term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403), except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation or a humanitarian or peacekeeping operation, the term means an amount equal to two times the amount specified for that term in section 4 of such Act [41 U.S.C. § 403].

(8) The term “humanitarian or peacekeeping operation” means a military operation in support of the provision of humanitarian or foreign disaster assistance or in support of a peacekeeping operation under chapter VI or VII of the Charter of the United Nations. The term does not include routine training, force rotation, or stationing.

Id. See also 41 U.S.C. § 403 (2000), and FAR, *supra* note 11, § 2.101.

1246. See Memorandum, Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology), Acting Deputy Assistant Secretary of the Army (Procurement), subject: Simplified Acquisition Threshold Increase in Support of Operation Enduring Freedom (10 Oct. 2001).

1247. Other authorities that may be useful in the current situation are the Defense Production Act, 50 U.S.C. app. 2061 (2000), and Public Law 85-804 (codified at 50 U.S.C. §§ 1431-1435, implemented by EO 10,789 and FAR pt. 50). Public Law 85-804 authorizes the President to take extraordinary contract actions to facilitate national defense. FAR, *supra* note 11, § 50.101.

1248. For an example of the types of procedures that will likely be employed to support the recovery and combat efforts, see Memorandum, Office of the Assistant Secretary of the Air Force, Principle Deputy Assistant Secretary (Acquisition & Management), subject: Transition to a Wartime Footing (5 Oct. 2001) (listing undefinitized contract actions, urgent and compelling Justification and Authorizations, options for increased quantities, and accelerated delivery options as methods to be explored and utilized to support the war on terrorism), *available at* http://web2.deskbook.osd.mil/New_Pubs/Transitiontowar.doc.

1249. JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES (10 July 2001).

1250. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, OPERATIONS (10 Sept. 2001).

1251. JOINT CHIEFS OF STAFF, JOINT PUB. 3-02, JOINT DOCTRINE FOR AMPHIBIOUS OPERATIONS (19 Sept. 2001).

1252. JOINT CHIEFS OF STAFF, JOINT PUB. 3-18, JOINT DOCTRINE FOR FORCIBLE ENTRY OPERATIONS IV-4 (16 July 2001) (discussing contractor support to the logistics requirements for a forcible entry operation).

1253. JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.6, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR FOREIGN HUMANITARIAN ASSISTANCE IV-8 (15 Aug. 2001) (requirement to consider “critical support contracting”).

1254. JOINT CHIEFS OF STAFF, JOINT PUB. 3-02, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001).

The Army also issued newly revised doctrine for the operational force. Newly issued *Field Manual 1*¹²⁵⁹ and *Field Manual 3-0*¹²⁶⁰ provide the basic operational guidance for Army units. *Field Manual 3-0* devotes one of twelve chapters to combat service support including contracting.¹²⁶¹

Perhaps the most directly useful publication issued this year is the new *Contractor Support in the Theater of Operations, Deskbook Supplement*.¹²⁶² This supplement provides sample clause language for inclusion in contracts for contractor support in an operational theater.¹²⁶³ In addition to the sample contract language, the guide provides a short bibliography of contractor on the battlefield references, a checklist for contractor support considerations, and instructions for incorporating contractor deployment requirements into the Time-Phased Force Deployment Data (TPFDD).¹²⁶⁴

*Contracting Officers Still Have to Go to School, but Only the New Ones!*¹²⁶⁵

After much wailing and gnashing of teeth by the procurement community workforce, the Acting Under Secretary of Defense for Personnel and Readiness issued guidance on 21 March 2001 (Cragin memo) that soothes some of the concerns about contracting officer education requirements and career progression, at least for contracting officers who were on-duty before 1 October 2000.¹²⁶⁶ Section 808 of the FY 2001 NDAA¹²⁶⁷ requires all contracting personnel in the GS-1102 series or compatible military positions to have a bachelor's degree and at least twenty-four hours of business-related courses¹²⁶⁸ from an accredited institution of higher learning. After enactment, confusion reigned regarding who was actually covered by the provision. The Cragin memo states that the DOD views Section 808 as applying only to new entrants in the contracting field after 1 October 2000.¹²⁶⁹ While the interpretation minimizes the impact upon the existing contracting workforce, the interpretation jeopardizes recruitment and retention of enlisted contracting officers in both the Army and the Air Force.¹²⁷⁰ Both services rely heavily on enlisted contracting

1255. JOINT CHIEFS OF STAFF, JOINT PUB. 4-02, DOCTRINE FOR HEALTH SERVICE SUPPORT IN JOINT OPERATIONS (30 July 2001).

1256. JOINT CHIEFS OF STAFF, JOINT PUB. 4-04, JOINT DOCTRINE FOR CIVIL ENGINEER SUPPORT (27 Sept. 2001).

1257. JOINT CHIEFS OF STAFF, JOINT PUB. 4-07, JTTP (JOINT TACTICS, TECHNIQUES, AND PROCEDURES) FOR COMMON-USER LOGISTICS DURING JOINT OPERATIONS (11 June 2001).

1258. JOINT CHIEFS OF STAFF, JOINT TEST PUB. 4-08, JOINT DOCTRINE FOR LOGISTIC SUPPORT TO MULTINATIONAL OPERATIONS (15 May 2001).

1259. U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY (14 June 2001). *Field Manual 1* "establishes doctrine for employing land power in support of the national security strategy and the national military strategy." *Id.* preface.

1260. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (14 June 2001) [hereinafter FM 3-0]. *Field Manual 3-0* replaced *Field Manual 100-5, Operations* (14 June 1993). The Army has adopted the joint number system, aligning the corresponding Army field manuals with their respective joint publications.

1261. FM 3-0, *supra* note 1260, ch. 12.

1262. DEFENSE ACQUISITION DESKBOOK, CONTRACTOR SUPPORT IN THE THEATER OF OPERATIONS, Deskbook Supplement (28 Mar. 2001), available at <http://web1.deskbook.osd.mil/data/001QZDOC.DOC>.

1263. The deskbook supplement provides model clause language in twenty-three separate areas related to the activities of contractors in an operational deployment. *Id.*

1264. The TPFDD is the product of the formal planning process for the deployment of U.S. forces. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 439-40 (15 Oct. 2001).

1265. See *infra* Legislation Appendix A, notes 107-08 and accompanying text, for legislative exceptions to this requirement contained in this year's NDAA.

1266. Memorandum, Acting Under Secretary of Defense, Personnel and Readiness, Department of Defense, to Secretaries of the Military Departments et al., subject: Changes in Education Requirements for the Acquisition Workforce (21 Mar. 2001) [hereinafter Cragin Memo], available at <http://www.acq.osd.mil/ar/doc/section808-1102-032101.pdf>.

1267. The National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 808, 114 Stat. 1654, amending 10 U.S.C. § 1724. See also *2000 Year in Review*, *supra* note 2, at 116.

1268. Pub. L. No. 106-398, § 808. Such courses include: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, and organization and management. Cragin Memo, *supra* note 1266, at 1.

1269. Cragin Memo, *supra* note 1266, at 2. The "grandfather" provision only applies to contracting officers who were authorized to award or administer contracts above the simplified acquisition threshold on or before 30 September 2000. *Id.*

1270. At least for the Army, many of the enlisted contracting officers are limited to awarding contracts at or below the simplified acquisition threshold. See *id.*

officers to provide a significant portion of the contingency contracting capability.

T&G Aviation, Inc.

*When There Are Terrorists in Your Neighborhood,
How Ya Gonna Call Bin Laden Busters?*

Sometimes when U.S. forces are deployed to remote spots around the world, the most important question is not “who ya gonna call,” but how you are going to call them. The DOD took a step this year to solve the difficult questions of how to communicate securely from remote corners of the world and how to do so without lugging an entire signal platoon along for the ride. In December 2000, the Defense Information Systems Agency (DISA) awarded a twenty-four month, \$72 million contract to Iridium Satellite, L.L.C., to provide unlimited airtime for up to 20,000 government users.¹²⁷¹ The DISA used the national security exception to the CICA to make the award.¹²⁷²

Iridium Satellite, L.L.C. (Iridium Satellite), is the successor to Iridium, L.L.C., a once high-flying telecommunications company that went bankrupt and nearly ceased to function as a commercial entity.¹²⁷³ The DOD had invested over \$140 million in Iridium before its bankruptcy.¹²⁷⁴ The DOD contract provides a transfusion that kept the Iridium satellite system functioning, and provides the DOD with commercial mobile, cryptographically secure telephone services available anywhere in the world.¹²⁷⁵ The capability provided by the Iridium satellite network should prove invaluable in assisting the efforts of U.S. forces engaged in Operation Enduring Freedom.

T&G Aviation, Inc. (T&G), held two contracts with the U.S. Agency for International Development (USAID) for aerial spraying in Morocco and Senegal in the mid-1980s.¹²⁷⁶ At that time, sub-Saharan Africa suffered from a locust infestation of near biblical proportions.¹²⁷⁷ The two contracts were separately awarded, separately administered, and generated from two separate organizations within USAID.¹²⁷⁸ At the completion of the Senegal contract, T&G decided to reposition its two DC-7 aircraft from Senegal to Morocco, rather than return them to the United States,¹²⁷⁹ in anticipation of additional spraying contracts that would be awarded by the USAID office in Morocco the following spring. After advising T&G officials that the repositions of aircraft to Morocco would be a good business decision, USAID officials asked T&G to carry some pumping equipment and some fifteen tons of insecticide from Senegal to Morocco.¹²⁸⁰

During the repositioning flight, the two T&G aircraft were attacked by surface to air missiles (SAMs) from the Polisario, a Western Sahara independence movement.¹²⁸¹ As a result of the attack, one aircraft crashed and the other was severely damaged. Five T&G employees were killed.¹²⁸²

T&G filed a claim for \$1,499,709 with the contracting officer of the Senegal contract, which was denied in a final decision issued on 17 November 1989.¹²⁸³ The claim was predicated on the theory that the USAID had breached: “(a) the implied warranty of design specification, (b) the duty to disclose superior knowledge, and (c) the implied duty of coopera-

1271. Press Release, Office of the Assistant Secretary of Defense (Public Affairs) Defense Department Announces Contract for Iridium Communications Services (Dec. 6, 2000) [hereinafter Iridium Press Release], available at http://www.defenselink.mil/news/Dec2000/b12062000_bt729-00.html. See also Gerry J. Gilmore, *DoD Gets ‘Global’ With Satellite-Phone System*, American Forces Press Service (Dec. 7, 2000), available at http://www.defenselink.mil/news/Dec2000/n12072000_200012072.html.

1272. 10 U.S.C. § 2304(c)(6) (2000). The DISA drew a protest in this acquisition because of their reliance on the national security exception. See *Globalstar LP & Gov’t Sys., L.L.C.*, Comp. Gen. B-286980 (protest withdrawn Jan. 30, 2001). After the protestor’s outside counsel gained limited access to the classified documentation supporting the National Security exemption, the protest was withdrawn. See Letter from Mr. James J. McCullough, Fried, Frank, Harris, Shriver & Jacobson, to Lieutenant General Harry D. Raduege, Jr., Director, Defense Information Systems Agency1 (Jan. 26, 2001) (on file with author).

1273. Paula Shaki Trimble, *DOD Takes Loss in Stride*, FED. COMPUTER WEEK, Mar. 27, 2000, available at <http://www.fcw.com/fcw/articles/2000/0327/news-dod-03-27-00.asp>.

1274. In April of 1999, the DISA issued a modification to an existing contract valued at up to \$219 million for Motorola for support, equipment, and airtime on the Iridium system. Press Release, Office of the Assistant Secretary of Defense (Public Affairs), Contracts (Apr. 1, 1999), available at http://www.defenselink.mil/news/Apr1999/c04011999_ct138-99.html.

1275. Iridium Press Release, *supra* note 1271. The primary users of the Iridium services are special operations forces (SOF) and combat search and rescue (CSAR). *Id.*

1276. T&G Aviation, Inc., ASBCA No. 40428, 01-1 BCA ¶ 31,147. The ASBCA hears cases arising under USAID contracts pursuant to the agency’s designation. 48 C.F.R. § 733.270-1 (2001).

1277. *Id.* at 153,839 (quoting USAID documents forecasting a “massive locust invasion of Morocco is imminent”).

1278. *T&G Aviation, Inc.*, 01-1 BCA ¶ 31,147 at 153,834-35.

1279. Both contracts provided for a demobilization flight to return the aircraft to the United States. *Id.* at 153,834.

1280. *Id.* at 153,838.

tion.”¹²⁸⁴ The board, while mindful of the loss of life and failure of the USAID leadership to inform T&G’s personnel of the very real danger to their aircraft, nevertheless held for the government.¹²⁸⁵

T&G argued that the provisions in both contracts “calling for the government representatives to designate specific areas to be sprayed constituted design specifications.”¹²⁸⁶ T&G argued that the government’s designation of specific spraying locations amounted to an implied warranty guaranteeing that those areas were safe and that the government was liable on that guarantee.¹²⁸⁷ The board found that while the government designated areas to be sprayed, T&G had complete authority to decide its manner of mobilization and demobilization, all matters of flight operations, and even whether a flight should take place at a particular location and the determination of cargoes and weather conditions.¹²⁸⁸ The board rejected T&G’s argument, finding that the fact that a USAID representative specified areas to be sprayed “is insufficient to render the specifications design type and to trigger its implied warranty.”¹²⁸⁹

The second theory T&G advanced, a duty to disclose superior knowledge, also met with failure at the board. While the board deplored the failure of USAID representatives to pass critical information to T&G during the performance of the Moroccan contract,¹²⁹⁰ the board nevertheless found for the

government on this issue as well. The board reasoned that while the government may have been morally obligated to provide such information, the failure to provide such information did not impact the performance on *this contract*, and could not form the basis for recovery.¹²⁹¹

The third basis, the government’s alleged failure to cooperate with T&G in the performance of the contract, also figuratively went down in flames. The board recounted the law as it relates to the duty to cooperate. Again, because the loss occurred during the transfer flight, and outside the performance of either contract, the board found that T&G failed to show that it sustained its damage as a result of the government’s failure to cooperate by providing information on the insurgent’s anti-aircraft capability and propensity.¹²⁹²

Environmental Contracting

Energy Policy on Front Burner for New Administration

President Bush issued three EOs signaling his administration’s energy policy. The first, EO 13,211,¹²⁹³ requires agencies to prepare a “Statement of Energy Effects” when undertaking agency actions that promulgate or lead to the promulgation of final rules or regulations that are likely to have a “significant

1281. *Id.* at 153,840. The conflict is still not settled. Since 1991, the United Nations Mission for the Referendum in Western Sahara (MINURSO) has been attempting to execute a referendum to determine the future of Western Sahara. MINURSO was established by Security Council Resolution 690 (1991) of 29 April 1991. The most current action by the U.N. is Resolution 1359 of 29 June 2001. Former Secretary of State James A. Baker, III, is the Personal Envoy of the Secretary General. See United Nations, *Western Sahara—MINURSO—Background, Current Peacekeeping Operations* (2001), at <http://www.un.org/Depts/DPKO/Missions/minurso/minursoB.htm>.

1282. *T&G Aviation, Inc.*, 01-1 BCA ¶ 31,147 at 153,840..

1283. *Id.* at 153,842. The claim was for loss and damage to the two aircraft, lost profits, legal fees and consultant costs, and General and Administrative (G&A) costs, and profit. *Id.* The costs associated with the death and injury to T&G’s personnel were covered under the FAR, *supra* note 11, § 52.228-4 (Workers’ Compensation and War-Hazard Insurance Overseas), and AIDAR 752.228-70, Alternate 71 (Insurance-Workers’ Compensation, Private Automobiles, Marine, and Air Cargo) clauses. *Id.* at 153,841. Unfortunately, T&G’s insurance did not include “war-risk” coverage and its property losses were uncompensated. *Id.* at 153,842.

1284. *Id.* at 153,845.

1285. *Id.* at 153,842.

1286. *Id.* at 153,845.

1287. *Id.*

1288. *Id.* at 153,845-46.

1289. *Id.* at 153,846.

1290. *Id.* at 153,842 (“[W]e find that AID’s Mr. Johnson unreasonably failed to communicate, or to have other AID officials communicate, to appellant information he had received regarding the berm, the Polisario, and its SAM capability during the performance of the Morocco Contract.”). The USAID representatives attended daily “country team meetings” at the U.S. embassy in Morocco. *Id.* at 153,837. During these meetings, officials from the U.S. Defense Attaché office in Morocco provided detailed intelligence on the capabilities, locations, and propensities of the Polisario, and the increased possibility of Polisario launched SAM attacks against aircraft in proximity to the disputed region. *Id.*

1291. *Id.* at 153,846-47 (emphasis added).

1292. *Id.* at 153,847.

1293. Exec. Order No. 13,211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 Fed. Reg. 28,355 (May 22, 2001).

adverse effect on the supply, distribution or use of energy.”¹²⁹⁴ This EO highlights the administration’s policy that, although the federal government can significantly affect energy supply and use, there is “too little information regarding the effects that governmental regulatory actions can have on energy.”¹²⁹⁵ The Statement of Energy Effects should provide more information and “hence improve the quality of agency decision-making.”¹²⁹⁶

The second executive order¹²⁹⁷ requires executive departments and agencies to take appropriate actions to expedite projects that will increase energy production, transmission, or conservation.¹²⁹⁸ Agencies are reminded that expediting actions must be “consistent with applicable law” and “maintain[] safety, public health, and environmental protections.”¹²⁹⁹ Finally, the order establishes an interagency task force to assist agencies with implementation of the executive order. The task force shall be chaired by the Chairman of the Council on Environmental Quality, and housed at the DOE.¹³⁰⁰

The final executive order¹³⁰¹ expects agencies to rid themselves of “the vampires”¹³⁰² and purchase commercially available, off-the-shelf products that use external standby power devices that use no more than one watt in the standby power-consuming mode. The order contemplates an exception when the life-cycle costs are not “cost-effective” or when the product’s utility and performance are compromised as a result of the one-watt standby requirement.¹³⁰³ The order also requires the DOE, in consultation with the DOD and the GSA, to compile a list of products subject to the power efficiency standards.¹³⁰⁴

Authority to Suspend Logging Contract Not Answered by Sovereign Acts Doctrine

In *Croman Corp. v. United States*,¹³⁰⁵ the COFC reversed a 1999 finding that the sovereign acts doctrine authorized the suspension of contract timber sales in a portion of the Klamath National Forest in California, holding instead that the contract addressed the issue of delays caused by government action.

In 1992, the FWS listed the marbled murrelet, a small bird found in Pacific coastal regions, as an endangered species under the ESA. The FWS prohibited felling under any timber sale contract in marbled murrelet habitat and also directed that any project that “may affect” the marbled murrelet “should be suspended and no irreversible or irretrievable commitment of resources” made without consultation with the FWS.¹³⁰⁶ The FS suspended Croman Corp. (Croman) timber operations in the area in question, the Clearview sale area, and requested FWS consultation. In 1995, the FS informed Croman that timber operations could resume, as no marbled murrelets had been detected on the site. In 1997, Croman filed a claim seeking damages of over \$4 million allegedly resulting from the FS’s “wrongful suspension” of the timber operations from September 1992 until August 1995.¹³⁰⁷ When the contracting officer denied the claim, Croman filed suit at the COFC.¹³⁰⁸

In the initial proceedings, the COFC held that the FS’s suspension of timber operations in response to the listing of the marbled murrelets under the ESA was a sovereign act, for which the government could not be held liable for breach of contract.¹³⁰⁹ The court later reopened the sovereign acts issue,

1294. *Id.* § 4(b), 66 Fed. Reg. 28,355-56.

1295. *Id.* § 1, 66 Fed. Reg. 28,355.

1296. *Id.*

1297. Exec. Order No. 13,212, Actions to Expedite Energy-Related Projects, 66 Fed. Reg. 28,357 (May 22, 2001).

1298. *Id.* § 1, 66 Fed. Reg. 28,355.

1299. *Id.* § 2, 66 Fed. Reg. 28,355.

1300. *Id.* § 3, 66 Fed. Reg. 28,355.

1301. Exec. Order No. 13,221, Energy Efficient Standby Power Devices, 66 Fed. Reg. 40,571 (Aug. 2, 2001).

1302. George W. Bush, Remarks by the President on Energy Efficiency (July 31, 2001), available at <http://www.whitehouse.gov/news/releases/2001/07/20010731-9.html>.

1303. Exec. Order No. 13,221, § 1, 66 Fed. Reg. 40,571.

1304. *Id.* The first list is due by 31 December 2001, and annually thereafter. *Id.*

1305. 49 Fed. Cl. 776 (2001)

1306. *Id.* at 780.

1307. *Id.* at 781.

1308. *Id.*

and withdrew that portion of the decision that held that the sovereign acts doctrine authorized the suspension of the timber operations in response to the marbled murrelets endangered-species listing.¹³¹⁰ The court did not, however, disturb the ruling that the suspension of timber operations was authorized. Instead of the sovereign acts doctrine, the court said that the contract specifically addressed the issue of delays caused by government action.¹³¹¹ After finding that the initial suspension of timber operations was not a breach of contract, the court looked at whether there was an unreasonable delay following the initial suspension. Because the contract contemplated delay, and fashioned a remedy for a delay, the court held that to obtain relief other than that provided for in the contract, Croman needed to show that the FS's actions violated the implied duty of cooperation¹³¹² or were otherwise unreasonable. The court found a genuine issue of material fact, however, regarding whether the FS's actions were unreasonable, and therefore denied the motion for summary judgment.¹³¹³

Success of Affirmative Procurement Programs "Largely Uncertain," Says GAO

Twenty-five years after the implementation of affirmative procurement programs under the Resource Conservation and Recovery Act of 1976, federal agencies are unable to track the programs' success, a recent GAO report found.¹³¹⁴ The GAO noted three areas that seem to be affecting fuller implementation. First, the GAO noted that the Environmental Protection Agency (EPA) and U.S. Department of Agriculture (USDA), the agencies responsible for managing programs to purchase environmentally preferable and biobased products, have been

slow to develop and implement the programs.¹³¹⁵ Second, the GAO found that agency reporting systems are generally not designed to track purchases of "green" products, especially those made through contracts (which account for at least ninety percent of procurement dollars).¹³¹⁶ The GAO reported on a White House task force that is currently working to streamline and improve data collection from federal purchase card users and contractors, beginning with a pilot project that will identify recycled-content product purchases made with federal purchase cards.¹³¹⁷ Finally, the GAO reported that agencies are not effectively educating procurement officials about the affirmative procurement program requirements.¹³¹⁸ The report recommends that the OMB and OFPP develop more specific guidance on fulfilling the affirmative procurement program review and monitoring requirements and that the EPA develop a process to provide procuring agencies with current information about the availability of recycled-content products, and how to more effectively promote such products.¹³¹⁹

Foreign Military Sales

Rocket Motors: I Think It's Gonna Be a Long, Long Time¹³²⁰ Before You Get Your Money!

Last year's *Year in Review*¹³²¹ discussed *Defense Systems Co.*,¹³²² where the ASBCA held that the government must inform prospective offerors of Foreign Military Sales (FMS) and Special Defense Acquisition Funds (SDAF)¹³²³ quantities included in an acquisition. Defense Systems Co. (DSC) was back again this year, in the hunt for further relief.¹³²⁴

1309. *Croman Corp. v. United States*, 44 Fed. Cl. 796, 807 (1999).

1310. *Croman Corp.*, 49 Fed. Cl. at 779.

1311. *Id.* at 782. The contract included a provision allowing for a contract term adjustment if timber operations were curtailed due to "acts of Government." *Id.* at 780. The clause allowed for a contract term adjustment to include additional days equal to the days lost. *Id.*

1312. The court cited two circumstances that violated the implied duty to cooperate when a party unreasonably causes delay or hindrance to contract performance, citing *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1542 (Fed. Cir. 1993), and when the original cause of a delay is not under a party's control, but the party's conduct exacerbates the delay, citing *Lewis-Nicholson*, 550 F.2d 26, 31 (Ct. Cl. 1973). *Croman Corp.*, 49 Fed. Cl. at 785.

1313. *Croman Corp.*, 49 Fed. Cl. at 789.

1314. GENERAL ACCOUNTING OFFICE, FEDERAL PROCUREMENT: BETTER GUIDANCE AND MONITORING NEEDED TO ASSESS PURCHASES OF ENVIRONMENTALLY FRIENDLY PRODUCTS, REPORT NO. GAO-01-430 (June 2001).

1315. *Id.* at 3. The GAO noted that the EPA's guidance on purchasing environmentally preferable products was issued five years later than the executive order required. Each agency studied indicated that purchasing environmentally preferable products would be easier if the EPA identified a list of such products, as it did for the recycled content products. Likewise, the USDA has not yet published a list of biobased products. *Id.*

1316. *Id.*

1317. *Id.* at 14.

1318. *Id.* at 15.

1319. *Id.* at 24.

1320. MUSIC BY ELTON JOHN, LYRICS BY BERNIE TAUPIN, *Rocket Man*, on HONKEY CHATEAU (Dick James Music, Ltd. 1972).

The case involved a production contract for HYDRA-70 Rockets.¹³²⁵ In the original decision,¹³²⁶ DSC successfully argued that it was entitled to an equitable adjustment for the rockets and components not properly attributed to FMS and SDAF requirements.¹³²⁷ On a motion for reconsideration,¹³²⁸ DSC now argued that the original decision failed to account for an additional 10,680 rocket motors that the government had failed to identify as FMS requirements.¹³²⁹ DSC also argued that it was entitled to “reformation of the systems contract,” and that the case should be remanded to the parties to establish the prices that would have been agreed to by the parties if the FMS/SDAF quantities were properly identified.¹³³⁰

While the board did not hesitate to modify the original decision to add the additional FMS requirements,¹³³¹ the board was less favorably disposed to reform the contract.¹³³² DSC contended that it was entitled to reformation because the government materially misrepresented the facts regarding FMS and SDAF quantities in the solicitation.¹³³³ The board reviewed the

standard for reformation, concluding that reformation is more broadly available for fraudulent misrepresentation than in cases of mistake. Reformation for mistake is only available when the parties, having reached an agreement, fail to express it correctly in writing.¹³³⁴

The board reviewed the factual basis for the failure to separately identify the FMS and SDAF requirements in the solicitation and subsequent modifications.¹³³⁵ Reformation is a powerful tool, but not one intended to revise the agreement to one that was not struck by the parties, or would not have been struck.¹³³⁶ The board had previously found that DSC intentionally underbid the contract by \$32 million below its estimated cost of performance to secure award. DSC then planned a very aggressive FMS and direct international sales campaign to make up contract losses.¹³³⁷ The board determined that “the Government was not privy to DSC’s complicated and risky bidding strategy.”¹³³⁸ The board refused to accept DSC’s reformation argument and rejected its attempt to reprice the entire

1321. *2000 Year in Review*, *supra* note 2, at 43-44 (defective specifications), 46-47 (speculative damages) and 81-82 (Foreign Military Sales). For the discussion relevant to this issue, *see id.* at 82 nn.915-21.

1322. ASBCA No. 50918, 00-2 BCA ¶ 30,991.

1323. The SDAF provides funds for the procurement of defense articles in anticipation of the sale or transfer to foreign governments. The SDAF provides a readily available source of selected material to meet urgent military requirements of FMS customers without diverting material earmarked or stockpiled for U.S. forces. *See* 22 U.S.C. § 2795(a) (2000).

1324. *See* Appeal of Def. Sys. Co., Inc., ASBCA No. 50918, 01-1 BCA ¶ 31,152.

1325. The HYDRA-70 rocket is the standard air-to-ground rocket for the U.S. military and much of the world. The rocket can carry a variety of anti-material and anti-personnel munitions, as well as suppression munitions, screening, illumination, and training warheads. DEP’T OF ARMY, WEAPON SYSTEMS 2000, at 181 (2000).

1326. Def. Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991.

1327. *Id.*

1328. *Appeal of Def. Sys. Co.*, 01-1 BCA ¶ 31,152.

1329. *Id.* at 153,878. The government did not object to repricing an additional 5004 rocket motors for Bahrain and an additional 5676 motors for the Philippines that were not previously identified as FMS requirements. *Id.*

1330. *Id.*

1331. *Id.* The board would have included these quantities in the original decision had they been properly identified during the initial litigation.

1332. *Id.* at 153,881.

1333. *Id.* at 153,878. DSC contended that reformation should put DSC “in the same position he would have been in had the misrepresentation not been made.” *Id.* at 153,879. Thus, DSC wants the board to remand the case to the parties to establish “the contract price(s) which would have been agreed to by the parties if the Government had properly represented in the solicitation the FMS/SDAF quantities which the Government intended to be included in the contract.” *Id.*

1334. *Id.* The board also foreshadowed the outcome. “Since the remedy of reformation is equitable, a court has the discretion to withhold it, even if it would otherwise be appropriate.” *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 166, cmt. A (1979)).

1335. The board had previously found that the procuring contracting officer failed to identify the FMS and SDAF requirements because: the requesting activity had not separately identified the requirements, no “ship to” addresses were provided, the procuring contracting officer had no experience buying this type of product, and the government believed the SDAF rockets were U.S. government purchases, not FMS purchases. Defense. Sys. Co., ASBCA No. 50918, 00-2 BCA ¶ 30,991, at 152,958-62.

1336. *Appeal of Def. Sys. Co.*, 01-1 BCA ¶ 31,152 at 153,880.

1337. *Def. Sys. Co.*, 00-2 BCA ¶ 30,991 at 152, 960.

systems contract.¹³³⁹ To do otherwise would have allowed DSC to recover, through reformation, remote and speculative damages, which, even if provable, are not recoverable as a matter of law.¹³⁴⁰

President Extends Certain Export Authorities and National Emergencies,¹³⁴¹ and Declares New Emergencies

Again this year,¹³⁴² the President moved to continue certain export control regulations¹³⁴³ and certain authorities under the Trading With the Enemy Act.¹³⁴⁴ The President terminated the emergency authority under EO 12,924, which had been continued since 1994.¹³⁴⁵

In other action, the President also continued emergencies with respect to Libya,¹³⁴⁶ Iraq,¹³⁴⁷ Iran,¹³⁴⁸ the National Union for the Total Independence of Angola (UNITA),¹³⁴⁹ Sudan,¹³⁵⁰ the Former Republic of Yugoslavia,¹³⁵¹ Weapons of Mass Destruction,¹³⁵² Cuba,¹³⁵³ Terrorists Who Threaten the Middle East Peace Process,¹³⁵⁴ and the Taliban.¹³⁵⁵

In response to the 11 September 2001 attacks on the United States, the President issued a general declaration of a national emergency.¹³⁵⁶ In addition, the President froze the assets of terrorists and those who support them,¹³⁵⁷ and lifted sanctions on India and Pakistan.¹³⁵⁸

1338. *Appeal of Def. Sys. Co.*, 01-1 BCA ¶ 31,152 at 153,880 (citing Finding 30, *Defense Sys. Co.*, 00-2 BCA ¶ 30,991 at 152,958).

1339. *Id.* at 153,880. “[T]he parties could not have reached a meeting of the minds with respect to a higher systems contract price based on the business risk that DSC undertook. Consequently, we conclude that DSC has failed to establish that the Government’s regulatory violations affected its overall systems contract price.” *Id.*

1340. *Id.*

1341. The declaration of a national emergency makes available a number of extraordinary authorities under a variety of statutes. 50 U.S.C. § 1621 (2000). Emergencies are terminated either by presidential proclamation or by congressional actions. *Id.* § 1622.

1342. The invocation or extension of a number of emergency authorities has become a yearly event. *See generally 2000 Year in Review, supra* note 2, at 79.

1343. Exec. Order No. 13,222, Continuation of Export Control Regulations, 66 Fed. Reg. 44,025 (Aug. 22, 2001).

1344. Continuation of the Exercise of Certain Authorities under the Trading with the Enemy Act, 66 Fed. Reg. 47,943 (Sept. 14, 2001).

1345. Exec. Order No. 13,206, Termination of Emergency Authority for Certain Export Controls, 66 Fed. Reg. 18,397 (Apr. 8, 2001). The President terminated the emergency due to the reauthorization and extension of the Export Administration Act of 1979 as amended by Public Law 106-508. *See also* Exec. Order No. 12,924, Continuation of Export Control Regulations, 59 Fed. Reg. 43,437 (Aug. 19, 1994); *2000 Year in Review, supra* note 2, at 79 (citing last year’s continuation action under EO 12,924).

1346. Continuation of the Libya Emergency, 66 Fed. Reg. 1251 (Jan. 4, 2001).

1347. Continuation of the Iraqi Emergency, 66 Fed. Reg. 40,105 (July 31, 2001).

1348. Continuation of the Iran Emergency, 66 Fed. Reg. 15,013 (Mar. 14, 2001).

1349. Continuation of Emergency With Respect to UNITA, 66 Fed. Reg. 1251 (Sept. 25, 2001).

1350. Continuation of Sudan Emergency, 65 Fed. Reg. 66,163 (Nov. 2, 2000).

1351. Continuation of Emergency with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro) the Bosnian Serbs, and Kosovo, 66 Fed. Reg. 29,007 (May 25, 2001).

1352. Continuation of Emergency Regarding Weapons of Mass Destruction, 66 Fed. Reg. 68,063 (Nov. 13, 2000).

1353. Continuation of the National Emergency Relating to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels, 66 Fed. Reg. 12,841 (Feb. 28, 2001).

1354. Continuation of Emergency Regarding Terrorists Who Threaten to Disrupt the Middle East Peace Process, 66 Fed. Reg. 7731 (Jan. 22, 2001).

1355. Continuation of Emergency with Respect to the Taliban, 66 Fed. Reg. 35,363 (July 3, 2001).

1356. Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

1357. Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

1358. India and Pakistan: Lifting of Sanctions, Removal of Indian and Pakistani Entities, and Revision in License Review Policy, 66 Fed. Reg. 50,090 (Oct. 1, 2001).

*Defense Trade Offsets.*¹³⁵⁹ *Lots of Smoke, Little Progress*

On 4 December 2000, President Clinton issued EO 13,177,¹³⁶⁰ establishing the National Commission on the Use of Offsets in Defense Trade and President's Council on the Use of Offsets in Commercial Trade. The Commission, composed of eleven members appointed by the President,¹³⁶¹ is responsible for reviewing and reporting on the current status of the use of offsets by foreign governments, the impact of these offsets on defense and non-defense industry in the United States, and the role of offsets on domestic industry stability, United States trade competitiveness, and national security.¹³⁶²

The Commission issued a preliminary report in February 2001. The preliminary report found that offsets account for \$3 billion per year in transactions with other nations, and that off-

sets are a significant factor in defense trade, thus impacting jobs, technology, and the ability to export defense goods to other countries.¹³⁶³ The final report, with recommendations, was due in October 2001.¹³⁶⁴

Freedom of Information Act

Evaluating the Competition for Competitor's Performance Evaluations

The Freedom of Information Act (FOIA)¹³⁶⁵ provides for the release upon request of government records¹³⁶⁶ to nearly any person,¹³⁶⁷ unless the record is exempt from release by one of the Act's enumerated exemptions.¹³⁶⁸ The third of these, FOIA Exemption 3 (Exemption 3),¹³⁶⁹ permits the withholding of

1359. The DOD *Security Assistance Management Manual (SAMM)* defines "offset" as:

An agreement, arrangement, or understanding between a US supplier and a non-US Purchaser under which the supplier agrees to purchase or acquire, or to promote the purchase or acquisition by other US persons of, goods or services produced, manufactured, grown, or extracted, in whole or in part, outside the US in consideration for purchases of defense articles or services from the supplier. A US person means an individual who is a national or permanent resident alien of the US and any corporation, business association, partnership, trust, or other judicial entity incorporated, or permanently residing, in the US.

U.S. DEP'T OF DEFENSE, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (SAMM) app. B (28 June 2001) (Glossary).

1360. Exec. Order No. 13,177, *National Commission on the Use of Offsets in Defense Trade and President's Council on the Use of Offsets in Commercial Trade*, 65 Fed. Reg. 76,558 (Dec. 6, 2000). The EO implements the requirements of the Defense Offsets Disclosure Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A (1999).

1361. Exec. Order No. 13,177, § 1, 65 Fed. Reg. 76,558.

The Commission membership includes: (a) representatives from the private sector, including one each from (i) a labor organization, (ii) a United States defense manufacturing company dependent on foreign sales, (iii) a United States company dependent on foreign sales that is not a defense manufacturer, and (iv) a United States company that specializes in international investment; (b) two members from academia with widely recognized expertise in international economics; and (c) five members from the executive branch, including a member from the: (i) Office of Management and Budget, (ii) Department of Commerce, (iii) Department of Defense, (iv) Department of State, and (v) Department of Labor. The member from the Office of Management and Budget will serve as Chairperson of the Commission and will appoint . . . the Executive Director of the Commission.

Id.

1362. *Id.* § 2, 65 Fed. Reg. 76,558. The Commission's report will include:

(a) an analysis of (i) the collateral impact of offsets on industry sectors that may be different than those of the contractor paying offsets, including estimates of contracts and jobs lost as well as an assessment of damage to industrial sectors; (ii) the role of offsets with respect to competitiveness of the United States defense industry in international trade and the potential damage to the ability of United States contractors to compete if offsets were prohibited or limited; and (iii) the impact on United States national security, and upon United States nonproliferation objectives, of the use of co-production, subcontracting, and technology transfer with foreign governments or companies, that results from fulfilling offset requirements, with particular emphasis on the question of dependency upon foreign nations for the supply of critical components or technology; (b) proposals for unilateral, bilateral, or multilateral measures aimed at reducing any detrimental effects of offsets; and (c) an identification of the appropriate executive branch agencies to be responsible for monitoring the use of offsets in international defense trade.

Id. § 3, 65 Fed. Reg. 76,558.

1363. PRESIDENTIAL OFFSETS COMMISSION, STATUS REPORT OF THE PRESIDENTIAL COMMISSION ON OFFSETS IN INTERNATIONAL TRADE (Jan. 18, 2001), available at <http://www.offsets.brtrc.net/statusreport/statusreport.pdf>. The GAO shared its observations on defense offsets with the commission in mid-December, 2000. See GENERAL ACCOUNTING OFFICE, DEFENSE TRADE: OBSERVATIONS ON ISSUES CONCERNING OFFSETS, REPORT NO. GAO-01-278T (Dec. 15, 2000).

1364. Press Release, Executive Office of the President, Presidential Commission on Offsets, Presidential Commission on "Offsets" in International Trade Issues Report (Feb. 15, 2001) (on file with author). The final report had not been issued as of the writing of this article.

1365. 5 U.S.C. § 552 (2000).

1366. The FOIA "mandates a policy of broad disclosure of government documents." *Church of Scientology v. Dep't of Army*, 611 F.2d 738, 741 (9th Cir. 1980).

information prohibited from disclosure under the provisions of other statutes. Which statutes' withholding provisions qualified for Exemption 3 protection has not been very clear. To assist practitioners, the DOD compiled a "list" of recognized Exemption 3 statutes, which has been through several iterations.¹³⁷⁰ For years, contracting officers safely believed that the Procurement Integrity Act (PIA)¹³⁷¹ was an Exemption 3 statute because it provided justification to withhold source selection information.¹³⁷²

The PIA's status as an Exemption 3 statute, however, was placed squarely in question in recent litigation involving the FAR's mandated post-performance contractor evaluations¹³⁷³ and the requirement to withhold these evaluations as source selection information.¹³⁷⁴ Entities vying for government contracts have long used the FOIA to obtain information related to a competitor's submissions.¹³⁷⁵ In a recently decided suit against the Army filed by Legal and Safety Employer Research, Inc. (LASER),¹³⁷⁶ the plaintiff was not a competitor, but a public-interest research firm that sought copies of a specific government contractor's construction performance evaluations. After reviewing LASER's request, the Army determined that

disclosure of the evaluations would "jeopardize the integrity" of the agency's procurements and ordered the retroactive labeling of the documents as "source selection information."¹³⁷⁷ In litigation, the Army's position was that it could not release the documents pursuant to a FOIA request because the PIA required the Army to withhold the data designated as source selection information. In essence, the Army asserted that the PIA was an Exemption 3 statute.¹³⁷⁸ Alternatively, the Army argued that FOIA Exemption 5 (Exemption 5) protected the post-performance evaluations from disclosure¹³⁷⁹ as inter-agency memoranda that would not be available by law to a party in litigation. The court did not agree on either count.¹³⁸⁰

The court held that memoranda or internal agency communications only qualify as Exemption 5 privileged "deliberative process" documents if they are both predecisional and deliberative.¹³⁸¹ Moreover, the document must be related to the government's policy- or decision-making process.¹³⁸² The *LASER* court added that these "evaluations are created at the completion" of the government construction project and "even if these evaluations are characterized as predecisional, the decision

1367. As a general rule, in responding to a request for records under the FOIA, agencies do not consider the status and purpose of a requestor except in deciding procedural matters such as fee issues. *Reporters Comm. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749 (1989).

1368. "When a request is made, an agency may withhold a document, or portion thereof, only if the material at issue falls within one of the nine statutory exemptions found in § 552(b)." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997). The nine exemptions permit, but do not require, an agency to withhold a requested record. 5 U.S.C. § 552(b) (2000).

1369. 5 U.S.C. § 552(b)(3).

1370. Memorandum, Department of Defense, Directorate of Freedom of Information and Security Review, subject: FOIA Exemption Three Statutes (13 Mar. 2001) (containing the DOD's most recent list, superceding the agency's earlier memorandum dated 16 February 2000, same subject), *available at* <http://www.defenselink.mil/pubs/foi/b3.pdf>.

1371. 41 U.S.C. § 423 (2000).

1372. The PIA still is listed on the DOD, Directorate of Freedom of Information and Security Review's list of Exemption 3 statutes. *See id.*

1373. Agencies are required to complete a written evaluation of the contractor's performance at the completion of all government contracts in excess of \$100,000 entered after 1 January 1998. FAR, *supra* note 11, § 42.1502(a). Agencies are required to consider a contractor's past performance in making an award determination; therefore, the post-performance evaluations required by the FAR are designed for agencies' use as source selection materials in the agencies' future procurements. *Id.* § 42.1501.

1374. The FAR requires agencies to maintain post-performance evaluations for three years and proscribes release outside the government to anyone besides the evaluated contractor. *Id.* § 42.1503(e). Like all other non-exempt documents compiled or created by the federal government, the FAR-mandated evaluations are subject to the disclosure provisions of the FOIA. *Id.* § 9.105-3(a) ("Except as provided in subpart 24.2, Freedom of Information Act, information . . . accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.").

1375. In addition, "[t]ypically, the submitter contends that the requested information falls within Exemption 4 of the FOIA." U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, JUSTICE DEPARTMENT GUIDE TO THE FREEDOM OF INFORMATION ACT 640-41 (2000) [hereinafter FOIA GUIDE].

1376. *Legal and Safety Employer Research, Inc. v. Dep't of Army*, No. 00-1748 slip op. (E.D. Cal. May 7, 2001) (unpublished).

1377. *Id.* at 5.

1378. The Army relied upon the Procurement Integrity Act provision that states government personnel "shall not, other than provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 423(a)(1) (2000).

1379. 5 U.S.C. § 552(b)(5) (2000).

1380. *Legal and Safety Employer Research*, No. 00-1748.

they precede is not a ‘policy decision,’ as required by Exemption 5.”¹³⁸³

To qualify as an Exemption 3 statute, a withholding statute must satisfy either prong of Exemption 3’s disjunctive test.¹³⁸⁴ The first prong permits no agency discretion in the decision to withhold. The Army could not meet this test, conceding that it had “discretion to determine what materials constitute ‘source selection information.’”¹³⁸⁵ Under the other prong, the statute “must limit agency discretion by prescribing guidelines for the exercise of discretion.”¹³⁸⁶ The court next examined the source selection “guidelines” within the PIA, noted that “Congress limited agency discretion to withhold” source selection information, and “then carefully identified documents that make up source selection information.”¹³⁸⁷ Consequently, the court held that it was “satisfied that section 423 [of the PIA] is a non-disclosure statute under Exemption 3.”¹³⁸⁸

In deciding against the Army, the court determined that the Army’s post-performance evaluations were not source selection information. Specifically, the court found that the post-performance evaluations neither fit into any of the congressionally-identified categories of source selection information,¹³⁸⁹ nor into the “case-by-case” catch-all category¹³⁹⁰ advocated by the Army. Instead, the court stated that because the FOIA’s overarching purpose is to disclose, the Act’s exemptions “must be narrowly construed.”¹³⁹¹ Accordingly, the court could not

extend the reach of Exemption 3 to include documents that were retroactively deemed to be source selection information through the exercise of the agency’s discretion.¹³⁹²

While it is questionable whether this case will have any lasting impact upon Army contracting, a few observations may be drawn. First, *LASER* was the first FOIA case to determine whether or not the PIA’s provisions served as a FOIA Exemption 3 statute. The *LASER* court was also the first court to consider post-contract evaluations under the FOIA. If for no other reasons than these, the *LASER* decision is noteworthy.

Second, the *LASER* decision is also remarkable because of the court’s arguably erroneous conclusions on both of the Army’s alternative positions.¹³⁹³ In deciding that the PIA qualified as a FOIA Exemption 3 statute, the court overlooked the PIA’s clear language that prohibits only those disclosures “other than as provided by law.”¹³⁹⁴ Because the FOIA provides an alternative basis for disclosure, reliance upon the PIA as a nondisclosure statute is improper. In deciding that the government’s post-contract evaluations failed to qualify for Exemption 5 protection, the court characterized the evaluations as post-decisional and the future procurement decisions as outside the scope of Exemption 5’s “policy decision” protection. The court’s very narrow perspective discounts the post-performance evaluations’ role as deliberative information in future high-value government contracts.¹³⁹⁵

1381. *Id.* at 10. Exemption 5’s “deliberative process” privilege may be used to withhold documents that are “both ‘antecedent to the adoption of agency policy’ and ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are formulated.’” *Id.* (citing *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988)).

1382. *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1 (D.D.C. 1995) (citing *Jordan v. Dep’t of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). “These twin requirements recognize that the underlying purpose of this privilege is to ‘protect[] the consultative recommendations, and deliberations, comprising part of a process by which governmental decisions and policies are formulated.’” *Id.* (quoting *Jordan*, 591 F.2d at 774).

1383. *Legal and Safety Employer Research*, No. 00-1748 at 12.

1384. Agencies may withhold records under Exemption 3 when

specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). Section 552b of title 5, cited within the text of Exemption 3, is better known as the Government in the Sunshine Act of 1976.

1385. *Legal and Safety Employer Research*, No. 00-1748 at 7.

1386. *Id.* at 8 (citing *Long v. IRS*, 742 F.2d 1173, 1178 (9th Cir. 1984)).

1387. *Id.*

1388. *Id.* at 9.

1389. 48 U.S.C. § 423(f)(1)(A)-(J) (2000).

1390. *Id.* § 423(f)(2)(J).

1391. *Legal and Safety Employer Research*, No. 00-1748 at 6 (citing *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1086 (9th Cir. 1997)).

1392. *See id.*

1393. *See supra* text accompanying notes 1378-80.

Finally, because the *LASER* decision is unpublished, the case is unlikely to merit attention outside of the DOJ and the procurement community. Nonetheless, the court clearly identified potential problems that may be the focus of future contract litigation. Consequently, contracting officials and FOIA practitioners can learn several valuable lessons from the decision. Despite the court's dicta suggestion that the PIA qualifies as a withholding statute under Exemption 3, contracting officers should not rely *solely* upon the PIA and Exemption 3 to withhold documents under the FOIA.¹³⁹⁶ Instead, the government should attempt to provide courts with multiple bases for withholding. Likewise, to withhold sensitive post-performance evaluations under Exemption 5, practitioners must be able to articulate a strong policy or decision-related basis for the exemption. Because the PIA authorizes the use of post-performance evaluations in the source selection process, it would behoove contracting officials to view and characterize these evaluations as both deliberative and, in light of the document's value in later acquisitions, predecisional.

Unless "Traded," Trade Secrets May Have a Long, Long Life

As a practical matter, secrets generally remain secrets until they are discovered or disclosed. This is also true under the FOIA. Despite the strong presumption that government-controlled records will be available to the public,¹³⁹⁷ Congress exempted trade secrets as a category of information that lawfully can be withheld from a requestor.¹³⁹⁸ This protection is separate and distinct from the cover afforded by the Trade Secrets Act,¹³⁹⁹ another congressionally established safeguard.¹⁴⁰⁰ Once data is determined to be a trade secret, the protection afforded by either the FOIA or the Trade Secrets Act is strong.

The most recent trade secret case combines the issue's infrequent judicial analysis with some extraordinary facts. In *Herick v. Garvey*,¹⁴⁰¹ the court seized upon a rare opportunity to consider how long the FOIA will protect a trade secret. At issue were the technical drawings of a commercially obsolete aircraft, the Fairchild F-45. The Fairchild Aircraft Corp. (Fairchild) originally submitted F-45 drawings to the Civil Aeronautics Agency in 1935.¹⁴⁰²

1394. 41 U.S.C. § 423(a)(1) (2000). Moreover, the PIA's "savings provision" provides that the statute does not "limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation." *Id.* § 423(h)(7). In *Pikes Peak Family Housing v. United States*, 40 Fed. Cl. 673 (1998), a case not cited by the *LASER* court, the government also argued that the PIA prohibited the release of source selection information. The court highlighted the government's failure "to mention that the Act prohibits not *all* disclosure of procurement-related information, but rather, disclosure 'other than as provided by law.'" *Id.* at 680 (citing 41 U.S.C. § 423).

1395. The decisions involved in the letting of multi-million dollar contracts are the very "policy decisions" that should be afforded protection under Exemption 5. The focus of analysis should be "whether the agency has plausibly demonstrated the involvement of a policy judgment in the decisional process relevant to the requested documents." *Petroleum Info. Corp. v. Dep't of Interior*, 976 F.2d 1429, 1436 (D.C. Cir. 1992). For an analysis of the "emerging" policy focus of Exemption 5 cases, see FOIA GUIDE, *supra* note 1375, at 255-56.

1396. The government has yet to establish through litigation the PIA's status as a FOIA Exemption 3 statute. See discussion on *Pikes Peak*, *supra* note 1378. The *LASER* court's conclusion that the PIA is an Exemption 3 statute is merely dicta. Moreover, the DOJ did not file an appeal in the case. Consequently, the issue of the PIA's status will await litigation in a future case.

1397. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

1398. 5 U.S.C. § 552(b)(4) (2000). Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id.*

1399. 18 U.S.C. § 1905 (2000). As discussed above, the Trade Secrets Act was once considered to be a FOIA Exemption 3 withholding statute. The D.C. Circuit, the court of universal jurisdiction for FOIA litigation, closed the debate on the Trade Secrets Act's status in *CNA Finance Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987).

1400. Most courts view the Trade Secrets Act and FOIA Exemption 4 as "coextensive." See, e.g., *Gen. Elec. Co. v. NRC*, 750 F.2d 1394, 1402 (7th Cir. 1984).

1401. No. 98-0234, 2000 U.S. Dist. LEXIS 20342 (D. Wyo. Dec. 12, 2000) (appeal pending).

1402. *Id.* at *2. From 1935 to 1939, the Fairchild Aircraft Corporation produced only sixteen F-45s, of which only three survive. *Id.*

The plaintiff, a collector of rare airplanes, submitted a FOIA request to the FAA for a copy Fairchild's 1935 drawings. The FAA recognized that the design drawings still had some commercial value to Fairchild.¹⁴⁰³ Consequently, the FAA provided Fairchild with the required "submitter notice,"¹⁴⁰⁴ positioning itself for a potential "reverse" FOIA action.¹⁴⁰⁵ After considering Fairchild Corporation's response, the FAA informed the plaintiff that the agency would deny his request. Thereafter, the plaintiff filed suit under the FOIA challenging the FAA's decision.¹⁴⁰⁶

The court observed that, in determining whether the FOIA protects commercial information, the "first step is to determine whether any of the information is a trade secret; if so, it is categorically protected by Exemption 4."¹⁴⁰⁷ Next, the court reviewed affidavits submitted by the FAA that highlighted the commercial value of the requested information within the "antique airplane market"¹⁴⁰⁸ and found that the "F-45 certification materials do come within the scope of Exemption 4 as they are trade secrets customarily not available to the public."¹⁴⁰⁹ Accordingly, the court did not address the plaintiff's claim that the FAA failed to demonstrate that disclosure would commercially harm Fairchild.¹⁴¹⁰

The court, however, did address the plaintiff's "estoppel" argument that Fairchild had previously released other F-45 certification materials. Fairchild initially authorized the release of limited information in 1955. The FAA also admitted that it previously released F-45 drawings pursuant to requests from the plaintiff, but asserted that "those drawing lists are not protected trade secrets."¹⁴¹¹ The court quickly dispatched the issue by opining that only the materials released under the 1955 authorization "are in the public domain" and that "the corporation has reversed its earlier authorization to disclose materials."¹⁴¹²

While contracting officials may only rarely encounter similar fact patterns, the case offers a few lessons. First, the judiciary will likely recognize submitters' rights to withdraw release authorizations for information that has not yet been disclosed. Second, so long as there is privity between different entities, the courts may recognize a successor-organization's right to restrict the release of even antiquated information. And finally, trade secrets may have a very long life. Thus, in determining whether or not to release documents, agency officials must understand that the "age or antiquity of materials in the custody and possession of the agency is irrelevant and is not a pertinent factor."¹⁴¹³

1403. *Id.* at *3-4. The Fairchild Engine and Airplane Corporation acquired the Fairchild Aircraft Corporation in 1939. In turn, the Fairchild Engine and Airplane Corporation was subsumed by the Fairchild Corporation. Although the Fairchild Aircraft Corporation is no longer extant and was unable to assert its rights, the court found that the successor of the original submitter, the Fairchild Corporation, still had a proprietary interest in the protection of the trade secrets. The plaintiff's contention that the Fairchild's corporate evolution "should play a significant role" in the case was deemed by the court to be "a red herring." *Id.* at *14-15.

1404. Agencies frequently receive FOIA requests for previously submitted commercial information that may be considered "confidential" by the submitter. Executive Order 12,600 requires all executive branch departments and agencies to establish and publish "predisclosure notification procedures which will assist agencies in developing adequate administrative records." FOIA GUIDE, *supra* note 1375, at 652 (citing 3 C.F.R. § 235 (2001)). Under these procedures, agencies are generally required to notify submitters of the potential disclosure of "confidential" information. The agency must consider the submitter's response before the agency determines whether release is appropriate. This process is commonly referred to as "submitter notice." Exec. Order No. 12,600, 3 C.F.R. (1987 Comp.) at 235, *reprinted in* 5 U.S.C. § 552 note (2000). FOIA procedures for individual agencies are generally published in the Code of Federal Regulations.

1405. *Herrick v. Garvey*, 2000 U.S. Dist. LEXIS 20342, at *3-4. "Reverse" FOIA cases pit the submitter of information against the agency contemplating disclosure of that information. The FOIA does not provide submitters "any right to enjoin agency disclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979), therefore, submitters seeking to prevent the disclosure must bring suit under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (2000), where the administrative record is reviewed to determine whether the agency's actions were arbitrary or capricious. *Chrysler Corp.*, 441 U.S. at 318.

1406. *Herrick v. Garvey*, 2000 U.S. Dist. LEXIS 20342, at *3-4. The plaintiff alleged that the materials in issue did not fall under Exemption 4, that the FAA failed to establish that the Fairchild Corporation would suffer competitive harm, and that Fairchild Corporation had previously waived Exemption 4 protections. The court rejected the plaintiff's assertion that Fairchild Corporation lacked standing. *Id.* at *20.

1407. *Id.* at *7 (quoting *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 13 (D.D.C. 2000)).

1408. *Id.* at 12. The requested documents would have had commercial value to the requestor.

For example, if a person restored an F45, and wanted to fly the aircraft, each repair to the aircraft must be certified as an airworthy repair. This procedure is significantly easier if the certification materials are available. . . . Without the materials the mechanic would have to establish some other means of demonstrating, to the FAA, the airworthiness of each repair made to restore the aircraft An antique aircraft which can be flown is more valuable than the same airplane which cannot.

Id. at *12-13.

1409. *Id.* at *16.

1410. *See id.*

1411. *Id.* at *19.

1412. *Id.* at *20.

Government-Furnished Property (GFP)

Government Liable for Defective GFP Notwithstanding Inclusion of “As Is” Clause in Contract

In *Primex Technologies*,¹⁴¹⁴ the contractor was required to disassemble government-furnished ammunition for reuse and resource recovery. The explosive material in the ammunition contained unusually low levels of wax that increased the hardness of the material and caused the contractor to incur additional costs. The contractor submitted a claim for its additional costs, alleging that the government-furnished ammunition was defective. In its motion for summary judgment, the government contended that even if the ammunition was defective, the claim should be dismissed because the contract contained FAR section 52.245-19, Government Property Furnished “As Is.”¹⁴¹⁵ This clause states in pertinent part:

(a) The Government makes no warranty whatsoever with respect to Government property furnished ‘as is,’ except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.¹⁴¹⁶

Although the board found that the contract did incorporate this clause, it concluded that the clause did not shield the government from liability because the contract “contained no clause specifying that the ammunition to be delivered by the Government was to be delivered ‘as is.’”¹⁴¹⁷ Because the contract in *Primex* did not specifically state that the government-furnished ammunition was subject to the “as is” clause, the issue of liability had to be determined and the board denied the government’s summary judgment motion.¹⁴¹⁸

“Government-Furnished Computers” Includes Printers, but Not Internet Service

A contract to provide dining services required the government to provide “government-furnished computers” and required the contractor to supply the software to be used with the computers.¹⁴¹⁹ When the government refused to provide the computers, the contractor purchased a computer and a printer and submitted a claim for the cost of both, as well as for Internet service (all of which were used to perform the contract). The board found that the printer was included within the term “government-furnished computers,” and held that the contractor was entitled to an equitable adjustment for the cost of the computer and the printer. The board, however, did not find that the contractor was entitled to reimbursement for the cost of Internet service, reasoning that “[w]e consider internet service to be within the definition of software that was [the contractor’s] responsibility under the contract.”¹⁴²⁰

Waiver Defense Denies Equitable Adjustment to “De-Fenced” Contractor

In *E.L. Hamm & Associates*,¹⁴²¹ a housing maintenance contract required the Navy to furnish storage and shop facilities to the contractor. At the site visit before submitting its bid, representatives of E.L. Hamm & Associates (E.L. Hamm) noticed that the government-furnished facilities were surrounded on three sides by a chain-link fence and that posts were embedded in concrete. Although the fence appeared to be an integral part of the Navy’s facilities, it was installed and owned by the incumbent contractor. E.L. Hamm’s representatives assumed that the fence would be provided by the Navy and did not include costs for a fence in its bid. After the incumbent contractor learned that it was not selected for award, it removed the fence. After the Navy denied E.L. Hamm’s request that the Navy replace the fence, an E.L. Hamm employee informed the Navy that it would install the fence itself “at no cost to the government.”¹⁴²² E.L. Hamm management had second thoughts, however, and later submitted a claim for the cost of the fence, which the Navy denied.¹⁴²³

1413. *Id.* at *18. “Information does not become stale merely because it is old.” *Id.* (citing *Center for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000)).

1414. ASBCA No. 52000, 01-1 BCA ¶ 31,231.

1415. *Id.* at 154,146-47.

1416. FAR, *supra* note 11, § 52.245-19.

1417. *Primex Techs.*, 01-1 BCA ¶ 31,231 at 154,148.

1418. *Id.*

1419. LA Ltd., ASBCA No. 52179, 00-1 BCA ¶ 30,319.

1420. *Id.* at 154,701.

1421. ASBCA No. 48600, 01-1 BCA ¶ 31,247.

On appeal, the board determined that the contractor reasonably concluded that the fence was included as part of the government-furnished facilities that the government was required to provide. The board, however, denied the appeal, finding that a waiver by “estoppel” applied against the contractor, because it had stated that it would install the fence at “no cost to the government,” and the Navy relied on that statement to its detriment by forgoing alternative means of resolution.¹⁴²⁴

Poor Design Decision, Not Late GFP, Responsible for Contractor’s Additional Costs

When a contractor receives late or defective GFP, its recovery is generally based on the additional costs attributable to delays or performance inefficiencies. In *NavCom Defense Electronics, Inc.*,¹⁴²⁵ the contractor advanced a more innovative basis for recovery. Under its contract with the Navy, the contractor was to design and build one or more types of interface boards that would be compatible with twelve government-furnished testers. The Navy delivered the GFP late and the contractor alleged that, because it could not simply wait until all of the GFP was received, it started to build what it hoped would be a “universal” interface board. When the late GFP arrived and the contractor realized that its universal interface was not as universal as hoped, the contractor changed its approach and had to design several interface boards. The contractor appealed the contracting officer’s denial of its claim for additional costs to design and build additional types of interface boards.¹⁴²⁶

Although the board agreed with the contractor that the Navy failed to meet its obligation to provide GFP in a timely manner, it denied recovery because the contractor failed to prove that the late GFP caused it to incur additional costs. Instead, the board

determined that the contractor had sufficient information at the time its initial design decision was made to know that its universal interface strategy could not work. The board concluded, “[B]ecause NavCom was forced to redesign the [interface board] as a result of its own flawed design, and not as a result of the late delivery of GFP, we conclude that the Government is not liable for the costs incurred in redesigning the [interface board].”¹⁴²⁷

Information Technology (IT)

If You Don’t Get IT, You’ll Never Get It!

The importance of IT continued to grow during the past year. More Army installations are issuing the DOD “smart card to their soldiers.”¹⁴²⁸ Along with serving the same functions as the current military ID card, the smart card also will allow users to log onto DOD computer networks, digitally sign and encrypt e-mail messages, and allow keyless entry to certain buildings and controlled spaces.¹⁴²⁹ Soldiers also are benefiting from free online technology courses sponsored by the Army.¹⁴³⁰ Although the courses do not offer actual certifications, soldiers can nonetheless use the Internet to train on more than 1100 technical subjects.¹⁴³¹ In the near future, soldiers also will benefit from a new distance learning program that will enable them to obtain college degrees and professional certifications.¹⁴³² Awarding a \$453 million contract to PricewaterhouseCoopers to develop and deliver the technology, the Army plans to offer the program to 80,000 soldiers over the next five years.¹⁴³³ Soldiers who sign up for the program will receive a free laptop, printer, Internet service provider, and access to a help desk.¹⁴³⁴ The equipment becomes the property of the soldier upon completion of twelve credit hours within two years.¹⁴³⁵

1422. *Id.* at 154,214.

1423. *Id.* at 154,216.

1424. *Id.*

1425. ASBCA No. 50767, 01-2 BCA ¶ 31,546.

1426. *Id.* at 155,763.

1427. *Id.*

1428. Lisa Beth Snyder, *More Installations to Issue New ID Card*, SOLDIERS, July 2001, at 16. Those installations are Fort Monmouth, Fort Meade, Somerset National Guard (New Jersey), Tobyhanna Army Depot (Pennsylvania), Fort Hamilton, Fort Detrick, and Fort Myer. *Id.*

1429. *Id.* See also *2000 Year in Review*, *supra* note 2, at 86.

1430. *Army Offers Free Online Tech Courses*, SOLDIERS, Feb. 2001, at 14.

1431. *Id.* This program is a result of a contract between the Army and SmartForce, a commercial computer-based training company. About 70,000 soldiers have registered to use the SmartForce instruction. *Id.*

1432. See *Distance Education Contract Awarded*, SOLDIERS, Feb. 2001, at 13; *Soldiers Can Use Laptops to Get College Degrees*, FEDTECHNOLOGY.COM EMAIL NEWSLETTER (Jan. 16, 2001) (on file with author).

1433. *Distance Education Contract Awarded*, SOLDIERS, Feb. 2001, at 13. The Army will test the new initiative during the next year at Fort Benning, Fort Campbell, and Fort Hood. *Id.*

Last year, we wrote about the Navy and Marine Corps' new Intranet project, called the NMCI (Navy-Marine Corps Intranet).¹⁴³⁶ The NMCI is the Navy and Marine Corps' "5-year, \$4.1 billion-effort to outsource the technology, maintenance and help desk support for over 350,000 desktops and 200 networks."¹⁴³⁷ The Navy and Marine Corps opened the NMCI's Norfolk operations center and help desk on 9 July 2001.¹⁴³⁸ The Navy and Marine Corps hope that the NMCI will make them the government leader in electronic records management.¹⁴³⁹

Section 508 Disabilities Initiative Takes Effect

Perhaps the most important IT development this past year was the implementation of the Section 508 disabilities initiative (Section 508).¹⁴⁴⁰ Effective 25 June 2001, government contracts awarded for electronic and information technology (EIT) must contain technology that is accessible to disabled federal employees and disabled members of the public.¹⁴⁴¹ The new requirement applies to contracts *awarded*, not *solicited*, on or after 25 June. For indefinite-quantity contracts, the requirement applies to delivery orders or task orders issued on or after 25 June.¹⁴⁴²

The rule contains several exceptions. First, the rule does not apply to "national security systems," as the Clinger-Cohen Act defines that term.¹⁴⁴³ Second, there is the "back room" or "service personnel" exception. The rule does not apply "in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment."¹⁴⁴⁴ Third, micro-purchases¹⁴⁴⁵ are exempt until 1 January 2003. Fourth, Section 508 does not apply to EIT "acquired by a contractor incidental to a contract."¹⁴⁴⁶ Finally, agencies need not comply with Section 508 if doing so would "impose an undue burden on the agency."¹⁴⁴⁷

Although its requirements are significant and complex, agencies are not without help in implementing Section 508. Participants in all aspects of public procurements should access the GSA's "Frequently Asked Questions" Web site.¹⁴⁴⁸ All players in public procurement must understand these Section 508 requirements, how to implement them, and their exceptions.

The Future of IT—a Revolving Door?

On 31 July 2001, Congressman Tom Davis of Virginia introduced a bill that would establish an exchange program between

1434. *Id.*

1435. *Id.* Talk about incentive to study hard!

1436. *2000 Year in Review*, *supra* note 2, at 85-86.

1437. Joshua Dean, *Navy Intranet Backers Push for Continued Funding*, GovExec.com (May 31, 2001), at <http://www.govexec.com/index.cfm?mode=report&articleid=20281&printerfriendlyVers=1>.

1438. *Navy Intranet Project Takes Off with Opening of First Network Operations Center but Questions About Testing Remain*, 43 GOV'T CONTRACTOR 26, ¶ 277 (July 18, 2001). The Norfolk center is the first of six planned operations centers. *Id.*

1439. Joshua Dean, *Navy Says Intranet Will Solve Records Management Problem*, GovExec.com (July 17, 2001), at <http://www.govexec.com/dailyfed/0701/071701j1.htm>.

1440. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 508 (codified as amended by the Workforce Investment Act of 1998 at 29 U.S.C. § 794d (2000)) (usually referred to as "Section 508").

1441. Elec. & Info. Tech. Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001) (to be codified at 48 C.F.R. pts. 2, 7, 10-12, 39); see Major John Siemietkowski, *Procurement Disabilities Initiative Takes Effect*, ARMY LAW., Sept./Oct. 2001, at 27.

1442. Elec. & Info. Tech. Accessibility, 66 Fed. Reg. 20,894 (Apr. 25, 2001).

1443. *Id.* at 20,897; Elec. & Info. Tech. Accessibility Standards, 65 Fed. Reg. 80,500 n.1 (Dec. 21, 2000) (to be codified at 36 C.F.R. pt. 1194) (citing the Clinger-Cohen Act of 1996, 40 U.S.C. § 1452(a) (2000)).

1444. 66 Fed. Reg. 20,897.

1445. Micro-purchases are acquisitions of "supplies or services (except construction), the aggregate amount of which does not exceed \$2500, except that in the case of construction, the limit is \$2,000." FAR, *supra* note 11, § 2.101.

1446. 66 Fed. Reg. 20,897.

1447. *Id.* "Undue burden" means "a significant difficulty or expense." *Id.* The lack of significant guidance in defining this term will likely lead to much litigation.

1448. U.S. Gen'l Servs. Admin., *Section 508 Acquisition FAQ's*, Section 508, at <http://www.section508.gov/index.cfm?FuseAction=Content&ID=75> (last visited Jan. 22, 2002).

the government and industry to develop expertise in IT management.¹⁴⁴⁹ Generally speaking, transferred employees would “switch sides” for one year, and would retain all pay and benefits of their permanent employer.¹⁴⁵⁰ The bill has been referred to the appropriate House committees.¹⁴⁵¹

GAO Speaks Out!

The GAO addressed IT issues in six separate reports to Congress during the past year. In February 2001, the GAO issued a report to Congress assessing the government’s public key infrastructure strategy in terms of secure transactions and communications.¹⁴⁵² In March, the GAO criticized cost-overruns related to the DOD’s computer systems.¹⁴⁵³ The GAO also issued two other reports in March, one assessing the DOD’s ability to resist a computer attack, and the other challenging the DOD to improve its ability to safeguard computer-based information.¹⁴⁵⁴ The GAO addressed the dangers of IT interference with operational electronic systems for deployed units in May.¹⁴⁵⁵ To cap off a plethora of writing, the GAO analyzed the DLA’s IT management practices in June.¹⁴⁵⁶

Non-FAR Transactions

DOD OT Guidance

This past year, the DOD issued its first guidance on use of its authority to enter into “other transactions” (OTs) to acquire prototypes of weapon systems.¹⁴⁵⁷ Congress enacted 10 U.S.C. § 2371 in 1989 to allow the DOD to enter into a contract that did not have to comply with the FAR. The term OT is derived from the title of the statute: “Research projects: transactions other than contracts and grants,” which, as the title also implies, were initially limited to the scenario in which the government was acquiring basic, applied, and advanced research. Section 845 of the NDAA for FY 1994¹⁴⁵⁸ broadened this authority and temporarily permitted the DOD to use OTs to acquire prototypes of weapon systems. Section 803 of the NDAA for FY 2001¹⁴⁵⁹ extended this expanded authority through 30 September 2004, but also placed some restrictions on the DOD’s use of this authority.¹⁴⁶⁰ The “*Other Transactions*” (*OT*) *Guide For Prototype Projects*,¹⁴⁶¹ published by the DOD in December 2000, addresses these restrictions and provides fairly comprehensive guidance on a whole host of issues, including intellectual property, price reasonableness determinations, allowable costs, accounting systems, audits, and annual reporting requirements.¹⁴⁶²

1449. H.R. 2678, 107th Cong. (2001).

1450. *Id.* §§ 3702-3704.

1451. U.S. Library of Congress, *Bill Summary & Status for the 107th Congress*, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:h.r.02678> (last visited Oct. 12, 2001).

1452. GENERAL ACCOUNTING OFFICE, INFORMATION SECURITY: ADVANCES AND REMAINING CHALLENGES TO ADOPTION OF PUBLIC KEY INFRASTRUCTURE TECHNOLOGY, REPORT NO. GAO-01-277 (Feb. 26, 2001).

1453. GENERAL ACCOUNTING OFFICE, DOD INFORMATION TECHNOLOGY: SOFTWARE AND SYSTEMS PROCESS IMPROVEMENT PROGRAMS VARY IN USE OF BEST PRACTICES, REPORT NO. GAO-01-116 (Mar. 1, 2001).

1454. GENERAL ACCOUNTING OFFICE, INFORMATION SECURITY: CHALLENGES TO IMPROVING DOD’S INCIDENT RESPONSE CAPABILITIES, REPORT NO. GAO-01-341 (Mar. 29, 2001); GENERAL ACCOUNTING OFFICE, INFORMATION SECURITY: PROGRESS AND CHALLENGES TO AN EFFECTIVE DEFENSE-WIDE INFORMATION ASSURANCE PROGRAM, REPORT NO. GAO-01-307 (Mar. 30, 2001).

1455. GENERAL ACCOUNTING OFFICE, DEFENSE SPECTRUM MANAGEMENT: NEW PROCEDURES COULD HELP REDUCE INTERFERENCE PROBLEMS, REPORT NO. GAO-01-604 (May 17, 2001).

1456. GENERAL ACCOUNTING OFFICE, INFORMATION TECHNOLOGY: DLA SHOULD STRENGTHEN BUSINESS SYSTEMS MODERNIZATION ARCHITECTURE AND INVESTMENT ACTIVITIES, REPORT NO. GAO-01-631 (June 29, 2001).

1457. See Memorandum, Under Secretary of Defense (Acquisition, Technology and Logistics), to Secretaries of the Military Departments and Directors of Defense Agencies, subject: “Other Transaction” Authority (OTA) for Prototype Projects (21 Dec. 2000), available at <http://www.acq.osd.mil/dp/dsps/ot/atl21dec00memowithguide.doc>. Attached to this memorandum is a sixty-page guide covering usage of such OTs.

1458. Pub. L. No. 103-160, 107 Stat. 1721 (1993).

1459. Pub. L. No. 106-398, 114 Stat. 1654 (2000).

1460. *Id.* § 8. For example, at least one nontraditional defense contractor has to participate in the OT to a significant extent.

1461. UNDER SECRETARY OF DEFENSE, ACQUISITION, TECHNOLOGY, AND LOGISTICS, “OTHER TRANSACTIONS” (OT) GUIDE FOR PROTOTYPE PROJECTS (Dec. 21, 2000), available at <http://www.acq.osd.mil/dp/dsps/ot/atl21dec00memowithguide.doc>.

1462. *Id.*

Payment and Collection

Performance-Based Payment Preferred Method of Contract Financing

On 13 November 2000, Dr. J. S. Gansler directed that the DOD take “maximum advantage of the benefits of performance-based payments [PBP],” making PBP the “primary and most commonly used form of contract financing.”¹⁴⁶³ For FY 2002, agencies should use PBP in “at least 25% of contracts valued at \$2 million or more.”¹⁴⁶⁴ By FY 2005 PBP should be used in “most” contracts that provide financing.¹⁴⁶⁵

“Commercial-Friendly” Policies Include Increased Progress Payment Rates

Under Secretary of Defense (Acquisition, Technology, and Logistics) E.C. Aldridge, took steps to encourage more companies to do business with the DOD by increasing the customary uniform progress payment rate for large business concerns from seventy-five to eighty percent.¹⁴⁶⁶ The progress payment rate change only applies to contracts awarded on or after 1 October 2001.¹⁴⁶⁷

Speak Now or Forever Hold Your Peace!—Boards Find Government Silence Waives Claim

In *Ver-Val Enterprises, Inc.*,¹⁴⁶⁸ the ASBCA found that the government’s claim for over \$2 million in unliquidated progress payments had been discharged in bankruptcy proceedings. Even though the government had filed a claim against the contractor for the unliquidated progress payments and received a copy of the reorganization plan, the amount listed on the reorganization plan was \$0. The government took no action to notify the bankruptcy court otherwise. The board found that the “fatal difficulty” with the government’s argument that the parties intended to settle the unliquidated damages claim outside of the bankruptcy court was a lack of “evidence as to what the government intended.”¹⁴⁶⁹ The government missed several opportunities to voice an objection to the plan.¹⁴⁷⁰ Because the government was a party to the bankruptcy proceeding, and did not appeal the court’s order, the final bankruptcy judgment binds the government with respect to this claim.¹⁴⁷¹

The Veterans Affairs Board of Contract Appeals decided a similar issue in *Bradford F. Englander*.¹⁴⁷² In this case, the government sought to set off funds mistakenly paid to a contractor against payment due on a different contract. The board barred such a set-off, finding that the government had failed to assert the claim during the contractor’s bankruptcy case. The government failed to participate in the bankruptcy proceedings except to object to the reorganization plan, and failed to appeal the bankruptcy court’s order approving the plan.¹⁴⁷³ By not partic-

1463. Memorandum, J.S. Gansler, Under Secretary of Defense (Acquisition, Technology and Logistics), to Secretaries of Military Departments, Component Acquisition Executives, and Directors, Defense Agencies, subject: Use of Performance-Based Payments (13 Nov. 2000) [hereinafter Gansler PBP Memo]. When using a PBP, the agency and contractor agree on performance events that will trigger a pre-negotiated financing payment. Statutory authority for PBPs is found in 10 U.S.C. § 2307(b) (2000) and implemented in FAR, *supra* note 11, pt. 32.10.

1464. Gansler PBP Memo, *supra* note 1463.

1465. *Id.* On 20 July 2001, the Defense Contract Audit Agency (DCAA) released audit guidance on PBPs. This guidance stresses the importance of establishing and valuing the PBP triggering events. Pre-payment auditor assistance may be sought in negotiating and structuring the contract financing template. The DCAA cautions that PBP event values should not be disproportionate to the “value” of the progress the events represent. See Memorandum, Lawrence P. Uhlfelder, Assistant Director, Policy and Plans, Defense Contract Audit Agency, to Regional Directors, DCAA and Director Field Detachment, subject: Audit Guidance on Performance-Based Payments (PBPs) (July 20, 2001).

1466. Defense Federal Acquisition Regulation Supplement; Customary Progress Payment Rate for Large Business Concerns, 66 Fed. Reg. 44,588 (Aug. 24, 2001).

1467. *Id.* The new rule specifically prohibits modification of existing contracts to incorporate the eighty percent rate. *Id.*

1468. ASBCA No. 49892, 01-2 BCA ¶ 31,518.

1469. *Id.* at 155,600.

1470. *Id.* at 155,595-99. The government did not vote on the reorganization plan, and filed a formal objection that only discussed debts related to taxes and certain secured obligations, but did not object to or mention the disposition of debts owed to the DOD. Finally, the government did not demand a hearing to address the plan’s payment treatment of the debt claimed. *Id.*

1471. See *id.* at 155,600.

1472. VABCA No. 6475-6477, 6479, 2001 VA BCA LEXIS 4 (Apr. 24, 2001).

1473. *Id.* at *2-11. The government argued the claim was not covered by the bankruptcy order, because it was asserted as a defense to the contractor’s claim for increased costs and therefore covered by the Contract Disputes Act. The board disagreed, finding the set-off claims should have been pursued in the bankruptcy proceedings. *Id.* at *11-15.

ipating, the board said, the government had waived its rights and was bound by the bankruptcy court's order, as the reorganization plan constituted a final judgment and had to be given res judicata effect as to those claims.¹⁴⁷⁴

Time Is on My Side—Wait, No It's Not!—Government Claim Too Old, Says Appeals Court

The Court of Appeals for the Eleventh Circuit found that the statute of limitations of 28 U.S.C. § 2415¹⁴⁷⁵ barred a government claim for over \$900,000 in procurement costs. In *United States v. American States Insurance Co.*,¹⁴⁷⁶ the government terminated a contract for failure to perform in 1985 and asserted a claim against the contractor and the surety for the excess procurement costs in 1992. The contractor and surety refused to pay and challenged the government's demand. In 1995, the contracting officer issued a final decision demanding the amount originally claimed in 1992. Then, in 1999, the government sued the surety to recover under the terms of the bond.¹⁴⁷⁷

The district court granted the government's motion for summary judgment, holding that the surety was bound by the contracting officer's 1995 final decision. The surety appealed, arguing that the case was barred by the statute of limitations. The government argued that the statute of limitations did not begin until the issuance of the contracting officer's final decision, which in this case occurred in 1995. The Eleventh Circuit disagreed, finding that the latest date the cause of action had accrued was July 1992, when the government first demanded the excess costs. Because the government had waited until 1999 to file suit, the six-year statute of limitations had passed, precluding the government from pursuing the claim.¹⁴⁷⁸

My Word Is My Bond—or at Least My Financial Condition Is (Adequate Security)

In an interesting and ironic change of positions, the government argued that the FAR improperly implemented the FASA by allowing a contractor's financial condition to serve as "adequate security" for a commercial item financing payment.¹⁴⁷⁹ A contract for integrated drive generators, which the procuring contracting officer (PCO) determined were commercial items, included the installment payment clause at FAR section 52.232-30.¹⁴⁸⁰ The contract did not include a definition of "adequate security," which led to the issues at the heart of the dispute. The contractor understood that its financial condition was adequate security, a position the PCO apparently shared. The administrative contracting officer, however, disapproved the contractor's request for an installment payment unless it provided some form of security the government could liquidate if it became necessary.¹⁴⁸¹

At the board, the dispute centered around the definition of "security." The government argued that "security" meant "collateral," and without some form of collateral of at least equal value to the installment payment, the installment payment provision ran afoul of a statutory prohibition on advance payments. The board used a broader definition of "security" and found it reasonable to use the contractor's good financial condition as "security." Because the appellant's financial condition was adequate security, and there was no evidence of any "impairment or diminution of the security under the contract," the contractor was entitled to the installment payments claimed, as well as interest from the date of receipt of the certified claim.¹⁴⁸²

I Can't Hear You—No Jurisdiction to Hear PPA Claim Without CDA Claim

In *Sprint Communications Co. v. General Services Administration*,¹⁴⁸³ the GSBCA held it had no jurisdiction to hear a

1474. *Id.* at *14-15.

1475. Every action for money damages founded upon any express or implied in law or fact contract shall be barred "unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later." 28 U.S.C. § 2415(a) (2000).

1476. *United States v. Am. States Ins. Co.*, 252 F.3d 1268 (11th Cir. 2001).

1477. *Id.* at 1272.

1478. *Id.*

1479. *Sundstrand Corp.*, ASBCA No. 51572, 01-1 BCA ¶ 31,167.

1480. *Id.* at 153,949. This clause provided that the contractor was entitled to contract financing installment payments when the supplies deliverable under the contract were delivered, providing there was no impairment or diminution of the government's security under the contract. FAR, *supra* note 11, § 52.232-30 (a). The clause further gave the contracting officer the right to suspend financing payments in the event the contractor failed to provide adequate security. *Id.* § 52.232-30 (f).

1481. *Sundstrand Corp.*, 01-1 BCA ¶ 31,167 at 153,949-50.

1482. *Id.* at 153,957. Impairment or diminution of the security would give cause to the contracting officer to deny the installment payment under the clause. *See* FAR, *supra* note 11, § 52.232-30(a).

Prompt Payment Act (PPA) interest claim because the claim was never submitted to the contracting officer for final decision under the CDA.¹⁴⁸⁴ This case arose from a previous decision in which the GSBCA found the GSA responsible to pay Universal Service Fund (USF) contributions as part of a Federal Communications Commission tariff imposed on the telecommunications contract in dispute.¹⁴⁸⁵ The first decision was limited to entitlement, and the board directed the parties to develop a record to use to decide the quantum of the claim. Sprint claimed CDA interest as well as PPA interest on the over \$4 million in USF funds due. The government argued, and the board agreed, that because no CDA claim had ever been submitted to the contracting officer for PPA interest on any of the unpaid USF line items, the board had no jurisdiction to hear the PPA interest claim.¹⁴⁸⁶ The board found that Sprint was entitled to only CDA interest for the USF line-item charges that were unpaid.¹⁴⁸⁷

When Is a Payment “Past Due” Under the PPA?

In *Active Fire Sprinkler Corp. v General Services Administration*,¹⁴⁸⁸ the GSBCA focused on the question of when interest begins to accrue under the PPA, reiterating the rule that the government will not pay interest on a payment that is not made because of a dispute over the amount of the payment or compliance with the contract.¹⁴⁸⁹ In this case, the DOL directed the contracting officer to withhold payment on a contract, pending the outcome of an investigation into alleged labor standard violations.¹⁴⁹⁰ The contractor claimed PPA interest on the withheld amounts, claiming that the withholdings were “unnecessary and unreasonable.”¹⁴⁹¹

The board found that the contractor was not entitled to PPA interest for two reasons. First, the PPA does not require an interest penalty on a payment that is not made because of a dispute over the amount of payment or compliance with the contract.¹⁴⁹² The board reasoned that as a result of the DOL investigation into possible labor standards violations, the contracting officer reasonably questioned whether the contractor was in compliance with the contract. The funds did not become “due” under the PPA until the DOL determined the scope and extent of the labor violations and notified the contracting officer to release the withheld funds.¹⁴⁹³

Second, the contract contained an “Interest on Overdue Payments” clause, which provided that “the contractor shall not be entitled to interest penalties on progress payments . . . on amounts temporarily withheld in accordance with the contract.”¹⁴⁹⁴ The board noted that the contract contained a withholding clause giving the contracting officer the ability to withhold amounts “necessary to pay laborers . . . the full amount of wages required by the contract” and that withholdings would continue “until such violations ceased.”¹⁴⁹⁵ Further, the board found that the contracting officer did not act unilaterally, that the DOL approved all her actions in conjunction with the labor standards investigation, and that she had released the withheld amounts when instructed by the DOL. The board declined to make any findings about the reasonableness of the DOL investigation that led to the withholdings, citing a lack of jurisdiction in such a matter.¹⁴⁹⁶

In *Johnson Controls World Services, Inc.*,¹⁴⁹⁷ the ASBCA found that payments providing reimbursement of costs on a provisional basis were not subject to the PPA. In this case, the

1483. GSBCA No. 15139, 01-2 BCA ¶ 31,464.

1484. *Id.* at 155,344.

1485. *See* Sprint Comm’n Co. v. GSA, GSBCA No. 15139, 00-1 BCA ¶ 30,909.

1486. *Sprint Comm’n Co.*, 01-2 BCA ¶ 31,464 at 155,345.

1487. *Id.* at 155,344-45.

1488. GSBCA No. 15318, 01-2 BCA ¶ 31,521.

1489. *Id.* at 155,619.

1490. *Id.* at 155,612. Specifically, the DOL was investigating violations of the Davis-Bacon Act, 40 U.S.C. § 276a (2000), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 (2000). *Active Fire Sprinkler Corp.*, 01-2 BCA ¶ 31,521 at 155,612.

1491. *Active Fire Sprinkler Corp.*, 01-2 BCA ¶ 31,521 at 155,618.

1492. *Id.* at 155,619. *See* 31 U.S.C. § 3907(c) (2000) (“This chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract.”).

1493. *Active Fire Sprinkler Corp.*, 01-2 BCA ¶ 31,521 at 155,619.

1494. *Id.*

1495. *Id.* at 155,613.

1496. *Id.*

cost-reimbursement contract provided for reimbursement of costs and payment of fee every two weeks, based on an invoice from the contractor supporting the claimed costs.¹⁴⁹⁸ The vouchers from JCWSI were subject to audit before final payment.¹⁴⁹⁹ JCWSI claimed PPA interest for late payment of ninety-four cost reimbursement vouchers. JCWSI contended the vouchers were requests for payment for partial performance of the services, and therefore subject to the PPA. The board, however, found that the vouchers submitted were not requests for specific services performed, but rather were requests for reimbursements of costs incurred as work progressed. Further, because the vouchers were subject to audit and adjustment for under/overpayment, the payments were not final payments, further evidencing their financing nature.¹⁵⁰⁰

Am I Repeating Myself?—GAO Issues More Reports Critical of Payment Systems, and Congress Again Considers Recovery Audit Legislation

The GAO issued several reports this year, echoing prior criticism of government payment and collection systems.¹⁵⁰¹ Although no new legislation aimed at correcting these identified deficiencies emerged from the 106th Congress, congressional attention has not died. In July 2001, Representative Burton introduced the 107th Congress' version of legislation designed to address government overpayments.¹⁵⁰² Mr. Burton's Erroneous Payments Recovery Act of 2001 would require

all agencies that enter into contracts totaling over \$500 million to develop a "cost-effective program for identifying errors made in paying contractors and for recovering any amounts erroneously paid to the contractors."¹⁵⁰³ Although the bill requires "recovery audits," it leaves the definition of such audits to the Director of the OMB.¹⁵⁰⁴

Performance-Based Service Contracting (PBSC)

OMB Chief Boosts PBSC Usage

During the past year, both the OMB and the FAR Council emphasized the use of PBSC as the preferred method for government procurement of services.¹⁵⁰⁵ Unlike the FAR, which only requires the use of PBSC to "the maximum extent practicable," the OMB has set a specific goal to use PBSC techniques when awarding contracts over \$25,000 for "not less than 20 percent of the total eligible service contracting dollars."¹⁵⁰⁶

Privatization

District Court Answers Privatization Questions

In last year's issue, the authors reported on a GAO decision addressing whether the Army must convey on-base utility distribution systems in accordance with state law.¹⁵⁰⁷ After the

1497. ASBCA 51640, 51766, 52127, 52262, 01-2 BCA ¶ 31,531.

1498. *Id.* at 155,664.

1499. *Id.* at 155,665.

1500. *Id.* at 155,668-70.

1501. See GENERAL ACCOUNTING OFFICE, CONTRACT MANAGEMENT: EXCESS PAYMENTS AND UNDERPAYMENTS CONTINUE TO BE A PROBLEM AT DOD, REPORT NO. GAO-01-309 (Feb. 2001) (concluding most excess payments are due to contract administration problems, particularly adjustments in progress payments); GENERAL ACCOUNTING OFFICE, DEBT COLLECTION: DEFENSE FINANCE AND ACCOUNTING SERVICE NEEDS TO IMPROVE COLLECTION EFFORTS, REPORT NO. GAO-01-686 (June 2001) (citing DFAS management commitment and targeted efforts as critical aspects to collecting and resolving delinquent debts, totaling almost \$750 million); GENERAL ACCOUNTING OFFICE, STRATEGIES TO MANAGE IMPROPER PAYMENTS, LEARNING FOR PUBLIC AND PRIVATE SECTOR ORGANIZATIONS, REPORT NO. GAO-02-69G (Oct. 2001) (identifying effective practices and providing case illustrations for use in developing strategies to manage improper payment in federal agency programs).

1502. H.R. 2547, 107th Cong. (2001).

1503. *Id.* § 2(a).

1504. *Id.* § 2(c). On 18 July 2001, the bill was referred to the House Committee on Government Reform. 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).

1505. Sean O'Keefe, Deputy Director of the Office of Management and Budget, set a specific goal of using PBSC in a 9 March 2001 memo to federal agencies. See Performance Goals Memo, *supra* note 1058. Federal Acquisition Circular (FAC) 97-25 amended FAR sections 2.101 and 37.102. FAR section 37.102 notes the policy that agencies must use performance-based contracting methods to acquire services "to the maximum extent practicable." Federal Acquisition Circular (FAC) 97-25, 66 Fed. Reg. 22,082 (May 2, 2001) (to be codified at 48 C.F.R. pt. 1). The AFARS goes one step further, requiring all service contracts be performance based. See AFARS, *supra* note 112, pt. 5137.

1506. Performance Goals Memo, *supra* note 1058. The memo does not define service contracts that might be exempt from the requirement, although the language "eligible service contracting dollars" suggests that some service contracts might be exempt. Members of the Procurement Executive Council subsequently asked OMB to raise the threshold to \$100,000 to exempt service contracts awarded using simplified acquisition methods. See Jason Peckenpaugh, *Procurement Chiefs Want New Guidance on Performance-Based Contracts*, GovExec.com (Apr. 26, 2001).

1507. See *2000 Year in Review*, *supra* note 2, at 61.

Procurement Fraud

Beware of “Take Care”

GAO denied their protest, Baltimore Gas & Electric (BG&E) and the Maryland Public Service Commission (PSC) turned to the U.S. District Court of Maryland, challenging the solicitation to privatize the utility distribution system at Fort Meade, Maryland.¹⁵⁰⁸ The plaintiffs contended that the solicitation improperly failed to include a provision specifying that the private entity providing electricity and natural gas distribution services to Fort Meade would be subject to PSC’s regulatory jurisdiction, as mandated by section 8093 of the DOD Appropriations Act of 1988.¹⁵⁰⁹ In effect, BG&E and PSC wanted the Army to create a sole-source acquisition for BG&E, because it is the only franchisee for gas and electric distribution services in the Fort Meade area.

The district court agreed with the Army’s position that, although section 8093 requires the Army to purchase electricity in accordance with state law and regulation, 10 U.S.C. § 2688 requires that conveyance of utility systems be subject to competition.¹⁵¹⁰ Therefore, the court found, the Army had appropriately issued a solicitation that allowed private entities other than those with state franchise rights to compete. Further, the court found that PSC had no regulatory jurisdiction over the successful bidder because the federal government had not ceded such jurisdiction over Fort Meade.¹⁵¹¹

Last year,¹⁵¹² we analyzed a Court of Appeals for the Fifth Circuit decision¹⁵¹³ wherein a divided panel ruled that the *qui tam* provisions of the False Claims Act (FCA)¹⁵¹⁴ violate the “take care” clause¹⁵¹⁵ of the Constitution. Not surprisingly,¹⁵¹⁶ the Fifth Circuit, sitting en banc, reversed its earlier decision and held that *qui tam* does not violate the take care clause.¹⁵¹⁷ In its decision, the court emphasized that the executive branch retains some control over *qui tam* litigation regardless of whether it joins the relator’s lawsuit:

[T]he Executive retains significant control over litigation pursued under the FCA by a *qui tam* relator. First, there is little doubt that the Executive retains such control when it intervenes in an action initiated by a relator. Second, even in cases where the government does not intervene, there are a number of control mechanisms present in the *qui tam* provisions of the FCA so that the Executive nonetheless retains a significant amount of control over the litigation. The record before us is devoid of any showing that the government’s ability to exercise its authority has been thwarted in cases where it was not an intervenor.¹⁵¹⁸

1508. *Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721 (D. Md. 2001).

1509. Pub. L. 100-202, § 8093, 101 Stat. 1329 (1987). Section 8093 provides in pertinent part:

None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

Id.

1510. *Baltimore Gas & Elec.*, 133 F. Supp. 2d at 740-41. Section 2688 requires that “if more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures.” 10 U.S.C. § 2688(b) (2000).

1511. *Baltimore Gas & Elec.*, 133 F. Supp. 2d at 741.

1512. *2000 Year in Review*, *supra* note 2, at 90.

1513. *United States ex rel. Riley v. St. Luke’s Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999).

1514. 31 U.S.C. § 3730(b) (2000).

1515. U.S. CONST. art. II, § 3 (requiring the executive branch to “take care that the laws be faithfully executed”).

1516. As a practical matter, if the full court had not reversed the first decision, the right to pursue a *qui tam* action would disappear in all cases where the government declined to join the relator’s lawsuit.

1517. *United States ex rel. Riley v. St. Luke’s Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc).

1518. *Id.* at 753.

This decision should put to rest the theory that *qui tam* somehow infringes upon the executive branch's ability to "take care" that the nation's laws are faithfully executed.

Make It Hurt So Good

Under the FCA, a court may assess civil penalties of \$5000 to \$10,000 per false claim and treble damages against a defendant.¹⁵¹⁹ Finding such treble damages inherently punitive in nature, the Court of Appeals for the Ninth Circuit held last March that such penalties are subject to the Eighth Amendment's "excessive fines" prohibition.¹⁵²⁰ In this case, *United States v. Mackby*,¹⁵²¹ the court noted that treble damages indicate an intent to punish.¹⁵²² The court further noted that trial courts may impose treble damages without regard to the government's actual damages.¹⁵²³ The court therefore held that trial courts must determine whether the penalties imposed are "grossly disproportionate to the gravity" of the FCA violation before imposing treble damages.¹⁵²⁴ One way to make this determination is to decide whether the penalties are necessary to achieve the desired deterrence.¹⁵²⁵

But Does It Have to Hurt at All?

A more basic issue in determining FCA liability is whether the government must suffer any damages at all for a *qui tam* relator to succeed in an FCA action. The Courts of Appeal for the Sixth and Third Circuit recently reached different conclu-

sions on this issue. In *Varljen v. Cleveland Gear Co.*,¹⁵²⁶ the Sixth Circuit ruled that an FCA plaintiff need not prove a "quantifiable effect or detriment that the submission of a false claim had on the government."¹⁵²⁷ In the court's view, the mere submission of a false claim is sufficient for FCA liability to attach.¹⁵²⁸ Taking a different view, the Third Circuit decided in *Hutchins v. Wilentz, Golman & Spitzer* that FCA liability requires a finding of financial loss to the government.¹⁵²⁹ The court held that the mere submission of false invoices,¹⁵³⁰ without payment by the government of those invoices, was insufficient for FCA liability.¹⁵³¹

Who Is a "Person" Subject to FCA Liability?

The FCA subjects "any person" to civil liability for defrauding the government.¹⁵³² In May 2000, the Supreme Court ruled that state entities are not "persons" subject to FCA *qui tam* liability.¹⁵³³ The Fifth Circuit extended this ruling to local government entities in *United States ex rel. Garibaldi v. Orleans Parish School Board*.¹⁵³⁴ Noting that imposing penalties on local governments usually results in higher taxes or reduced services for blameless citizens, the court held that FCA liability could not attach to a school board.¹⁵³⁵ State employees, however, may not be as fortunate as their employers. In *Bly-Magee v. California*,¹⁵³⁶ the Ninth Circuit ruled that state employees may be subject to FCA liability in their individual capacities.¹⁵³⁷ The court held, however, that such individual liability could

1519. 31 U.S.C. § 3729(a) (2000).

1520. U.S. CONST. amend. VIII.

1521. 243 F.3d 1159, *remanded on other grounds*, 2001 U.S. App. LEXIS 18478 (9th Cir. Aug. 16, 2001).

1522. *Id.* at 1167.

1523. *Id.* See also *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965) (no requirement for government to show that it suffered any damages). *But see* discussion on "Does It Have to Hurt at All?," *infra* notes 1526-31 and accompanying text.

1524. 243 F.3d at 1167.

1525. *Id.*

1526. 250 F.3d 426 (6th Cir. 2001).

1527. *Id.* at 431.

1528. *Id.* at 429-30.

1529. 253 F.3d 176, 179, 182 (3rd Cir. 2001).

1530. The false invoices were for inflated legal bills submitted for payment by a law firm to a bankruptcy trustee. Apparently, the firm's policy was to multiply actual Westlaw and LEXIS expenses by 1.5. *Id.* at 179-80.

1531. *Id.* at 182-84.

1532. 31 U.S.C. § 3729(a) (2000).

1533. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780-87 (2000); see also *2000 Year in Review*, *supra* note 2, at 89-90.

1534. 244 F.3d 486 (5th Cir. 2001).

only attach for wrongful conduct outside of the employees' official duties.¹⁵³⁸

Arbitrate, Don't Litigate!

No Parasites Allowed!

The FCA permits *qui tam* lawsuits only if the plaintiff is the "original source" who uncovers the fraud committed against the government.¹⁵³⁹ The law is designed to prevent parasitic plaintiffs from benefiting when others uncover fraud. The Ninth Circuit clarified this rule in *Seal I v. Seal A*.¹⁵⁴⁰ In *Seal*, the plaintiff filed a *qui tam* lawsuit against his former employer, a government contractor.¹⁵⁴¹ This prompted the government to launch an investigation into the former employer, which expanded to include another contractor as well. Based on the government's investigation into this second contractor, the plaintiff filed a separate *qui tam* lawsuit against the second contractor.¹⁵⁴² Because the plaintiff had access to the government's investigative work, the court ruled that the material was "publicly disclosed" even though the government disclosed the information to *only* the plaintiff as part of his original lawsuit.¹⁵⁴³ The court reasoned that "disclosure of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure."¹⁵⁴⁴ The court therefore dismissed the plaintiff's *qui tam* suit against the second contractor.¹⁵⁴⁵

Can arbitration in FCA litigation be mandatory without being binding? According to the Court of Appeals for the Fourth Circuit, the answer is "yes!" In *United States v. Bankers Insurance Co.*,¹⁵⁴⁶ the court held that the non-binding nature of an arbitration clause in a contract with an FCA defendant did not render such a clause optional for the government.¹⁵⁴⁷ Although the government's contract with the defendant stated that factual issues "may be submitted to arbitration for a determination that *shall be binding*,"¹⁵⁴⁸ the court nonetheless found that arbitration was *mandatory*, though *not binding*.¹⁵⁴⁹ The court further reasoned that the government could not seek to enforce the arbitration clause only when it is convenient to do so.¹⁵⁵⁰ Although the court's reasoning in *Bankers* is a bit circuitous, the government will always look good when it arbitrates claims under an arbitration clause even though the clause may not seem to require such arbitration.

One Bad Apple Don't Spoil the Whole Bunch

May a contractor who successfully defends against fraud allegations charge the government for the cost of its legal defense? According to *DynCorp*,¹⁵⁵¹ the answer is "yes." In *DynCorp*, the government had successfully prosecuted one

1535. *Id.* at 491-93; *accord*, *United States ex rel. Dunleavy v. County of Delaware*, No. 94-7000, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000) (county is not an entity subject to FCA liability). *But see* *Giles v. Sardie*, No. CV-96-2002, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. Aug. 1, 2000) (city of Los Angeles is a "person" subject to FCA liability).

1536. 236 F.3d 1014 (9th Cir. 2001).

1537. *Id.* at 1018.

1538. *Id.* It seems that the plaintiff bringing the suit, as well as the state entity defending the suit, would likely argue that any wrongful conduct by employees is *per se* outside the scope of their official duties.

1539. 31 U.S.C. § 3730(e)(4)(A) (2000).

1540. 255 F.3d 1154 (9th Cir. 2001).

1541. *Id.* at 1156.

1542. *Id.* at 1157.

1543. *Id.* at 1161-62.

1544. *Id.* at 1162.

1545. *Id.* at 1163.

1546. 245 F.3d 315 (4th Cir. 2001).

1547. *Id.* at 325.

1548. *Id.* at 318 (emphasis added).

1549. *Id.* at 320-21. The court reasoned that clauses stating that parties "may" arbitrate give the parties the choice of arbitrating the dispute or dropping the claim, not the choice of avoiding arbitration in order to litigate. Furthermore, the court found that "shall be binding" did not mean "binding" because of a statutory requirement that this particular agency head approve any arbitration award. *Id.* at 321-22.

1550. *Id.* at 320.

employee of the corporation for a violation of the Major Fraud Act,¹⁵⁵² but could not obtain a conviction against the corporation itself.¹⁵⁵³ When the contractor subsequently claimed its legal defense costs as allocable to the contract, the government denied the claim, reasoning that the government obtained no benefit from the successful defense of the corporation against the fraud allegations.¹⁵⁵⁴ The board disagreed, finding that legal defense costs are properly allocable to a contract in the absence of a conviction.¹⁵⁵⁵ The corporation's legal defense costs (but not the employee's defense costs) were properly allocable to the contract because the government obtained a fraud conviction against one employee and not against the entire corporation.¹⁵⁵⁶

Randolph-Sheppard

Food Fight!: Fourth Circuit Decides NISH v. Cohen

Last year, we reported on the Eastern District of Virginia's decision that the Randolph-Sheppard Act preference for blind vendors applies to the procurement of dining facility services.¹⁵⁵⁷ NISH and Goodwill Industries, Inc. (NISH, collectively), appealed to the Court of Appeals for the Fourth Circuit, arguing that because the Randolph-Sheppard Act (RSA) was not a statutory procurement procedure it failed to meet the CICA's exemption for procurement procedures otherwise expressly authorized by statute. The Fourth Circuit, however, affirmed the district court's decision, finding that the CICA broadly defines "procurement" as "including all stages of the process of acquiring property or services, beginning with the

process for determining a need for property or services and ending with contract completion and closeout,"¹⁵⁵⁸ and that the provisions of the RSA "clearly fit this sweeping definition of procurement."¹⁵⁵⁹ Like the district court, the circuit court deferred to the Department of Education's interpretation that the Act "clearly covers all types of food service operations on military bases, including military troop mess halls,"¹⁵⁶⁰ and the DOD General Counsel's opinion that "the assertion that the Act does not apply to military dining facilities cannot withstand analysis."¹⁵⁶¹ The court further cited Comptroller General opinions that military dining facilities are cafeterias subject to the Act's priorities.¹⁵⁶²

Food Fight 2: Randolph-Sheppard Versus HUBZones

Automated Communication Systems, Inc. (ACSI), tried another approach at the CAFC to challenge the Air Force's application of the RSA mandatory award preference for blind vendors to dining facility contracts at Lackland Air Force Base, Medina Annex, Kelly Annex, and Camp Bullis, Texas.¹⁵⁶³ ACSI first challenged the continued validity of the RSA preference for the blind implemented by DOD Directive 1125.3. The court dismissed this challenge, finding that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities.¹⁵⁶⁴ ACSI also argued that the Air Force had failed to apply properly preferences provided by other procurement-oriented statutes such as those favoring businesses in HUBZones.¹⁵⁶⁵ The court agreed with the govern-

1551. ASBCA No. 53098, 01-2 BCA ¶ 31,476. For further discussion of this case, see *supra* notes 1182-93 and accompanying text.

1552. 18 U.S.C. § 1031 (2000).

1553. *DynCorp*, 01-2 BCA ¶ 31,476 at 155,399.

1554. *Id.* at 155,403.

1555. *Id.* at 155,404.

1556. *Id.* at 155,406.

1557. *See 2000 Year in Review, supra* note 2, at 92.

1558. *NISH v. Cohen*, 247 F.3d 197, 204 (4th Cir. 2001) (citing 10 U.S.C. § 2302(3)(A) (2000)).

1559. *Id.*

1560. *Id.* at 205 (citing 1997 memorandum of Frederick K. Schroeder, Commissioner of Rehabilitative Services Administration).

1561. *Id.* (citing 1998 memorandum of Judith A. Miller, General Counsel of the DOD).

1562. *Id.* (citing Matter of Dep't of the Air Force—Reconsideration, Comp. Gen. B-250465.6, B-250465.7, B-250783.2, June 4, 1993, 93-1 CPD ¶ 431; Comptroller General of the United States, Opinion Letter to Senator Jennings Randolph, Comp. Gen. B-176886 (June 29, 1976)). The Randolph-Sheppard Act (RSA) gives contracting priority to blind persons operating vending facilities on federal property, and defines "vending facility" as "automatic vending machines, cafeterias, snack bars, cart services, shelters, and counters." *See* 20 U.S.C. § 107e(7) (2000). At the lower court, NISH had contended that the Javits-Wagner-O'Day (JWOD) Act, which provides a more general priority for all disabled persons, governed the solicitation. *See 2000 Year in Review, supra* note 2, at 92. The Fourth Circuit found that both the RSA and JWOD Act applied to the solicitation, but that the RSA more specifically addressed the issue. The court stated it was following the "basic tenant of statutory construction that when two statutes ostensibly apply, the more specific of the two control[s]." *NISH*, 247 F.3d at 205.

1563. *Automated Comm'n Sys., Inc. v. United States*, 49 Fed. Cl. 570 (2001).

Mistaken Tax Calculations

ment’s argument that the RSA and HUBZone preferences were not in conflict; rather, the RSA preference carries greater weight in the military vending procurement process.¹⁵⁶⁶ Further, the court cited the Fourth Circuit rationale in *NISH v. Cohen*,¹⁵⁶⁷ that even if there were a conflict between the RSA and HUBZone statutes, the more-specific RSA preference would take precedence over the less-specific HUBZone statute.¹⁵⁶⁸

*But State Licensing Agencies Don’t Win
All the Arguments . . .*

Maryland’s State Department of Education, Division of Rehabilitative Services challenged food service solicitations for Andrews Air Force Base and Fort Meade, claiming that the solicitations violated DOD regulations implementing the RSA and inappropriately contemplated a HUBZone preference in addition to the RSA preference. The GAO, however, dismissed the protest, finding that the Secretary of Education has exclusive authority for resolving disputes between State Licensing Agencies (SLAs) and contracting agencies.¹⁵⁶⁹ Although the SLA argued that the protest alleged a violation of DOD regulations, the GAO found that, in fact, the issue was one of compliance with the RSA and that the Secretary of Education must resolve such an issue “under the statutory and regulatory scheme established for Randolph-Sheppard procurements.”¹⁵⁷⁰ The GAO noted that this protest differed from other RSA protests it had decided because the other protests had been filed by businesses competing with the SLA, not the SLA itself.¹⁵⁷¹

In *B&M Cillessen Construction Co.*,¹⁵⁷² the GAO upheld the agency’s decision to allow the low bidder to adjust its bid upward by recalculating applicable taxes, while at the same time it avoided comment on the correctness of the recalculation. The IFB contained the standard tax clause for fixed-price contracts.¹⁵⁷³ In this case, the applicable taxes included a 5.75% New Mexico Gross Receipts Tax (NMGRT) and a three percent Navajo Business Activities Tax (BAT).¹⁵⁷⁴

After bid opening, HB Construction of Albuquerque, Inc. (HB), notified the contracting officer that it mistakenly calculated the amount for the NMGRT at three percent, instead of adding the three percent BAT to the cost of the contract and then calculating the 5.75% NMGRT. HB was permitted to recalculate its bid and revised its bid from \$4,579,000 to \$4,842,293.¹⁵⁷⁵

The GAO concluded that the agency action to allow HB to adjust its bid upward was reasonable based on clear and convincing evidence of the claimed mistake and the intended bid price.¹⁵⁷⁶ The GAO also rejected B&M Cillessen Construction Co.’s argument that HB underestimated various costs that it accurately calculated, would displace HB as the low bidder.¹⁵⁷⁷

1564. *Id.* at 575 (“The ADRA vests exclusive jurisdiction in the Court of Federal Claims over actions challenging the government’s compliance with its procurement regulations, *not* over actions regarding the validity of those regulations.”).

1565. *Id.* at 576.

1566. *Id.* at 577.

1567. *See supra* note 1562 and accompanying text.

1568. *Automated Comm’n Sys., Inc.*, 49 Fed. Cl. at 578. *See also* *NISH v. Cohen*, 247 F. 3d 204, 205 (2000).

1569. Maryland State Dep’t of Educ., B-288501, B-288502, 2001 U.S. Comp. Gen. LEXIS 123 (Aug. 14, 2001).

1570. *Id.* (citing 34 C.F.R. § 395.37(a) (2000)).

1571. *Id.* at *9 n.1.

1572. B-287449.2, 2001 U.S. Comp. Gen. LEXIS 84 (June 5, 2001).

1573. *See FAR, supra* note 11, § 52.229-3(b) (providing that “the contract price includes all applicable Federal, State, and local taxes and duties”).

1574. *B&M Cillessen*, 2001 U.S. Comp. Gen. LEXIS 84, at *2. The GAO noted that the BAT applies to the entire contract amount, including the amount of the NMGRT. *Id.*

1575. *Id.* at *4-5. The GAO noted that HB remained the low bidder regardless of the order in which the percentages for the NMGRT and the BAT were calculated. *Id.* at *5 and n.4.

1576. *Id.* at *8-9.

1577. *Id.* at *9. The GAO noted that “submission of a below-cost bid is not illegal” and that an agency is allowed to exercise its subjective judgment regarding a bidder’s responsibility. *Id.* at 10.

Avoid Special Tax Notices on Green Paper

In *Hunt Construction Group, Inc. v. United States*,¹⁵⁷⁸ the COFC relied on basic rules of contract interpretation to reject a contractor's claim for sales and use tax reimbursement. The dispute involved a Department of Veterans Affairs (DVA) solicitation for construction of an ambulatory care clinic in Phoenix, Arizona.¹⁵⁷⁹ Most of the solicitation was printed on white paper and contained the standard fixed-price tax clause.¹⁵⁸⁰ The solicitation also included a "Special Notice," printed on green paper, with instructions that the contractor seek applicable sales and use tax exemptions.¹⁵⁸¹ Plaintiff Hunt Construction Group, Inc. (Hunt), the low bidder and eventual awardee, submitted its bid on the assumption that it would not have to pay state and local sales and use taxes on permanent materials.¹⁵⁸²

Several months after beginning work, Hunt asked the DVA to sign an agreement so Hunt could obtain the tax exemption. The DVA refused, citing FAR 29.303(a), which generally prohibits prime and subcontractors from being "designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes."¹⁵⁸³ The DVA subsequently denied Hunt's claim for reimbursement of the state sales taxes that it was required to pay because of the inability to claim exemptions.¹⁵⁸⁴

The COFC rejected Hunt's contention that the Special Notice created an ambiguity that should be construed against

the government as its drafter. It concluded that the "plain meaning of the provisions, taken together, is clear."¹⁵⁸⁵ Specifically, the COFC found that the only reasonable interpretation of FAR section 52.229-3 and the Special Notice was that the responsibility for determining tax exemptions fell on the contractor, and that the Special Notice merely put offerors on notice that exemptions might be available. The Special Notice did not relieve bidders of the duty to include all applicable taxes in their bids.¹⁵⁸⁶ Nevertheless, the court shared Hunt's "frustration" with the Special Notice, stating that "[i]f a continuum exists by which plain meaning can evolve into ambiguity, this case can be positioned right before the line of demarcation."¹⁵⁸⁷ The court added that it is reasonable for a contractor to expect the same subject matter to be addressed under one section.¹⁵⁸⁸

For That Matter, Avoid Special Tax Notices on White Paper

In *Costello Indus., Inc.*,¹⁵⁸⁹ the ASBCA denied a contractor's request for reimbursement of Mississippi state taxes. In addition to the standard FAR tax clauses,¹⁵⁹⁰ this solicitation included a notice to bidders advising them of a 3.5% Mississippi state tax, along with an admonition to direct "[q]uestions on these taxes" to the Mississippi State Tax Commission.¹⁵⁹¹ Costello Industries, Inc. (Costello), incorrectly concluded that the Mississippi tax did not apply to this contract, and did not include the tax in its bid. Mississippi levied the tax on the total value of Costello's work under the contract. Costello contested

1578. 48 Fed. Cl. 456 (2001).

1579. *Id.* at 457.

1580. See FAR, *supra* note 11, § 52.229-3(b), (h) (providing, in relevant part, that "the contract price includes all applicable Federal, State, and local taxes and duties," and that "the Government shall, without liability, furnish evidence appropriate to establish exemption from any Federal, State, or local tax when the Contractor requests such evidence and a reasonable basis exists to sustain the exemption").

1581. *Hunt Constr.*, 48 Fed. Cl. at 459. On the page immediately following the table of contents, a piece of green paper contained the title "SPECIAL NOTICE" and text that read: "I. Sales and Use Taxes: (a) Sales and use tax exemptions should be sought where applicable." *Id.*

1582. *Id.* at 458. Arizona law provided for exemption to sales and use tax on the purchase of permanent building materials, but only when a "qualifying" hospital designates the general contractor as agent. *Id.* at 458 n.3.

1583. *Id.* at 458-59.

1584. *Id.* at 459.

1585. *Id.* at 460.

1586. *Id.* The court made this finding notwithstanding the fact that another offeror submitted a qualified offer that proffered an agency agreement for the DVA to sign. After the contracting officer rejected that offer, the offer was revised to give the DVA the option, which it took, of adding a specified amount of sales tax to the original price, in lieu of signing the agency agreement. The COFC noted, however, that neither Hunt nor any other offeror asked any questions about the Special Notice at the pre-bid conference. *Id.* at 461 n.5.

1587. *Id.* at 463.

1588. *Id.*

1589. ASBCA No. 49125, 00-2 BCA ¶ 31,098.

1590. See FAR, *supra* note 11, § 52.229-3.

1591. *Costello Indus.*, 00-2 BCA ¶ 31,098 at 153,577.

the tax, but ultimately paid the assessment and unsuccessfully sought reimbursement from the Navy.¹⁵⁹²

Costello argued that it reasonably interpreted the language of the tax notice as inapplicable to the contract and that the government should not receive “a windfall for having the work done without absorbing the tax.”¹⁵⁹³ The board disagreed, finding that the tax notice was a fair summary of the law and not misleading. The board concluded that Costello’s reading of the tax notice was a “judgmental mistake” which was “not compensable.”¹⁵⁹⁴ Although the government prevailed in this case, *Costello* nevertheless illustrates the potential pitfalls of including special tax provisions in a solicitation, even when they are intended to help offerors.

And Sometimes, Special Tax Notices Aren’t Worth the Paper Written on

In *Encorp*¹⁵⁹⁵ the ASBCA denied a contractor’s claim for reimbursement of certain foreign taxes the contractor paid during performance of a construction contract in Pakistan. This solicitation by the USAID included a tax clause for foreign fixed-price contracts.¹⁵⁹⁶ Several statements modified the tax clause. One statement indicated that the USAID was not allowed to finance any identifiable host-country taxes or duties. Another statement cited to an agreement between the United

States and Pakistan, which exempted U.S. technical and developmental projects from Pakistani taxes.¹⁵⁹⁷ These statements were further mentioned in amendments to the solicitation.¹⁵⁹⁸

Encorp’s subcontractor, Murshid, was unsuccessful in obtaining an exemption for duties and taxes imposed on steel reinforcing bars and billets, and eventually paid the duties and taxes to avoid project delays. Murshid sought reimbursement through Encorp. The USAID denied Encorp’s request for reimbursement, citing the Foreign Taxes clause.¹⁵⁹⁹

The contractor argued that the government breached its contractual obligation to enforce international agreements between the United States and Pakistan that established exemption from these taxes.¹⁶⁰⁰ The board concluded that Encorp, not the USAID, was negligent in its pursuit of the exemptions.¹⁶⁰¹ The board also discarded the notion that the government was at fault by characterizing the failure to grant the tax exemptions as actions of local Pakistani authorities, and not an “official” position of the Pakistani government.¹⁶⁰² While the board’s rejection of the claim hinged in part on its finding that Encorp was negligent in pursuing the exemptions,¹⁶⁰³ the case raises some issues with its distinction between an “official” government position and actions of local authorities.¹⁶⁰⁴

1592. *Id.* at 153,584.

1593. *Id.* at 153,585.

1594. *Id.*

1595. ASBCA No. 51293, 01-1 BCA ¶ 31,165.

1596. See FAR section 52.229-6, which states, in pertinent part, that the contract price includes “all applicable taxes and duties, except taxes and duties that the Government of the United States and the government of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.” FAR, *supra* note 11, § 52.229-6(c). It further states that the contractor “shall take all reasonable action to obtain the exemption from or refund of any taxes . . . which the governments of the United States and the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.” *Id.* § 52.229-6(i).

1597. *Encorp*, 01-1 BCA ¶ 31,165 at 153,933. The Bilateral Agreement for Technical Cooperation Between the United States of America and Pakistan (1951) exempts from Pakistani taxes “[a]ny funds, materials and equipment introduced into Pakistan by the Government of the United States of America pursuant to such program and project agreements.” *Id.*

1598. *Id.*

1599. *Id.*

1600. *Id.* at 153,937.

1601. *Id.* at 153,937-38.

1602. *Id.* at 153,938.

1603. The board notes that “[the] sole legal action instituted by appellant [Encorp] was submission of the [subcontractor’s] claim to the contracting officer, without exhausting its remedies in Pakistan.” *Id.*

1604. What if the contractor was found to have taken all reasonable steps to obtain the exemption or refund, but to no avail? What recourse is left to the contractor if this is not considered a breach of the international agreement (the sole basis for the exemption)?

Apportionment of Tax Refund Under Cost-Reimbursement Contract

In *Hercules, Inc. v. United States*,¹⁶⁰⁵ the COFC determined the proper methodology for computing the government's proportionate share of a \$10.5 million, 1995 tax refund received by Hercules. The refund was based on Hercules's 1987 Virginia state income tax liability, which was previously reimbursed by the government under Hercules' contract.¹⁶⁰⁶ The principal issue was whether to base the government's share of the refund on the mix of government and commercial work at Hercules in the year the tax was paid (1987) or the year the refund was received (1995).¹⁶⁰⁷ The government argued that its share of the refund must be calculated in the same proportion as was used to calculate the amount of taxes it reimbursed Hercules.¹⁶⁰⁸ Hercules argued that cost accounting standards CAS required that the refund be allocated over the 1995 contract mix.¹⁶⁰⁹ The COFC disagreed with Hercules, stressing that a tax refund is not itself an indirect cost subject to CAS, but a "credit for a previously recognized and allocated indirect tax cost."¹⁶¹⁰ Thus, the credits clause,¹⁶¹¹ incorporated into the contract, prevailed over the CAS.

Intellectual Property

ASBCA Sinks Navy's Ship

Only rarely does a court or board decision involve sorting through intellectual property (IP) issues arising in a government contract. This past year, in *Ship Analytics, Inc.*,¹⁶¹² the ASBCA heard such an appeal and found the Navy had breached its contract by allowing a third party to have access to source code to upgrade ship-handling simulators that Ship Analytics, Inc. (SAI), had developed at private expense and furnished to

the Navy under the contract. In 1986, the Naval Training Systems Center issued a request for proposals (RFP) for a "computer-based simulator system for teaching ship-handling skills to naval students."¹⁶¹³ The trainer had two frigate class and two destroyer class simulated bridges that could operate independently or in a combined exercise. The trainer simulated ship control cues, internal and external communication, and radar/sonar displays, but it specifically did not provide any "out-the-window or real world visual setting" for the students.¹⁶¹⁴

SAI responded to the RFP and proposed using Pilotship 2000 software, which it had developed at private expense, for the trainer. Its proposal indicated that it was conditioned "upon execution of a software license agreement granting the Government restricted rights to the software."¹⁶¹⁵ The government asked SAI for clarification concerning whether it would be disclosing its source code, because the code was a contract deliverable. During this dialogue, the government indicated that it needed the code to maintain and support the software over the life of the trainer, and SAI noted that it did not want the source code to get turned over to a competitor or to anyone for other than maintenance and support. SAI later submitted a revised proposal that stated its restricted rights software license "will fully support the Government's requirements for operation and maintenance of the [trainer]."¹⁶¹⁶

In 1995, the government awarded an 8(a) contract to Enzian Technology, Inc. (ETI), under which the government would give SAI's source code to ETI and ETI would upgrade the trainer to provide an "out-the-window simulation experience."¹⁶¹⁷ Before award of this latter contract, SAI notified the government that it had heard about the contemplated procurement and indicated that it viewed the action as a breach of its contract and license agreement.¹⁶¹⁸ Before the board, the government contended it had unlimited rights in the source code.

1605. 49 Fed. Cl. 80 (2001). For further discussion of this decision, see *supra* notes 1214-19 and accompanying text.

1606. See FAR, *supra* note 11, § 31.205-41 (reimbursement for taxes under cost-reimbursement contracts).

1607. *Hercules*, 49 Fed. Cl. at 85-86. The 1987 share was much more favorable to the government than the 1995 share. See *id.*

1608. *Id.* at 89.

1609. *Id.* at 91-92.

1610. *Id.*

1611. See FAR, *supra* note 11, § 31.201-41.

1612. ASBCA No. 50914, 01-1 BCA ¶ 31,253, *motion for reconsideration denied*, 01-1 BCA ¶ 31,394.

1613. *Id.* at 154,346.

1614. *Id.*

1615. *Id.* at 154,347.

1616. *Id.* at 154,347-48.

1617. *Id.* at 154,349.

The board rejected this contention, however, noting that SAI's interpretation of the government's rights in the code had been clearly conveyed to the government, and the government did nothing to object to or change this interpretation.¹⁶¹⁹

Guiding the IP Challenged

Shortly before leaving office last year, Dr. Gansler, then Under Secretary of Defense (Acquisition, Technology, and Logistics), ordered the creation of a DOD Intellectual Property (IP) Guide.¹⁶²⁰ A later DOD memorandum called for release of this guide "by March, 2001."¹⁶²¹ The first version of the guide was published on 15 October 2001.¹⁶²² Both memoranda stated the guide was supposed to make the complex field of IP more understandable for the acquisition workforce.¹⁶²³ It appears, however, that the guide is mainly concerned with showing the acquisition workforce that there is sufficient flexibility in the IP laws and regulations to accommodate non-traditional defense contractors.¹⁶²⁴ As the *Ship Analytics* case demonstrates, however, the DOD acquisition workforce needs a better understanding of all aspects of IP law, not just those aspects that will enable it to attract new contractors to do business with the government.

Proposed Rule on Government Trademarks

The FAR Council has published a proposed rule that would amend FAR part 27 to include a new subpart and a new clause in FAR part 52 dealing with contractor rights in government-

unique trademarks and servicemarks.¹⁶²⁵ Under the proposed rule, contractors would be required to submit written notification before attempting to register or assert rights in any mark that identifies and distinguishes its goods or services from the goods or services of other firms if those goods or services were first developed, manufactured, or rendered in performance of a government contract.¹⁶²⁶ Interestingly, under the proposed rule, use of the new clause would be prescribed whenever a rights in data or a patent rights clause also is included in the contract.¹⁶²⁷ This further demonstrates that there is a great deal of confusion within the government workforce concerning IP because trademarks/servicemarks often arise under circumstances where there would be no patentable invention and no technical data that would need protection.

Contract Pricing

*The Beginning of the End: Motorola, Inc.,¹⁶²⁸
What Did Congress Really Mean by "Contracts Entered
into on or After"?*

In a case of first impression, the ASBCA had the opportunity to determine when contracts were governed by the 1985 and 1986 amendments to the Truth in Negotiations Act (TINA).¹⁶²⁹ Effective 8 November 1985, section 934 of Public Law Number 99-145 prescribed interest on any overpayment made to a contractor due to defective pricing under TINA-covered contracts with the DOD. The provision applied to contracts entered into on or after 8 November 1985.¹⁶³⁰ Congress repealed section 934 a year later, replacing it with a prescription for TINA inter-

1618. *Id.*

1619. *Id.* at 154,352-53. The board also took the time to expressly point out that the contract administrator had very little "understanding of the contract and [software license agreement] provisions." *Id.* at 154,350.

1620. Memorandum, The Under Secretary of Defense (Acquisition, Technology and Logistics), to Secretaries of the Military Departments and Directors of the Defense Agencies, subject: Training on Intellectual Property (5 Sept. 2000) [hereinafter Training on Intellectual Property Memo].

1621. See Memorandum, The Acting Under Secretary of Defense (Acquisition, Technology and Logistics), to Service Acquisition Executives, subject: Reform of Intellectual Property Rights of Contractors (4 Jan. 2001) [hereinafter Reform of Intellectual Property Rights Memo], available at <http://www.acq.osd.mil/ar/doc/intellprop010501.pdf>.

1622. See UNDER SECRETAR OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS, INTELLECTUAL PROPERTY: NAVIGATING THROUGH COMMERCIAL WATERS (Oct. 15, 2001) [hereinafter IP NAVIGATING GUIDE], available at <http://www.acq.osd.mil/ar/doc/intelprop.pdf>.

1623. See Training on Intellectual Property Memo, *supra* note 1620; Reform of Intellectual Property Rights Memo, *supra* note 1621.

1624. See IP NAVIGATING GUIDE, *supra* note 1622.

1625. Federal Acquisition Regulation; Trademarks for Government Products, 66 Fed. Reg. 42,102 (Aug. 9, 2001) (to be codified at 48 C.F.R. pts. 27 and 52).

1626. *Id.* at 42,102-03.

1627. See *id.*

1628. ASBCA No. 51789, 01-1 BCA ¶ 31,233.

1629. 10 U.S.C. § 2306a (2000); 41 U.S.C. § 254b (2000).

1630. *Motorola, Inc.*, 01-1 BCA ¶ 31,233 at 154,150.

est on contracts with DOD and stated that the interest provision would apply “to contracts or modifications on contracts entered into after November 7, 1985.”¹⁶³¹

The contract in question was awarded by the CECOM¹⁶³² on 10 August 1984, with an effective date of 1 May 1984.¹⁶³³ The defective pricing occurred in a modification issued 30 September 1986, using cost or pricing data that was certified as of 24 September 1986.¹⁶³⁴ The primary issue was whether the interest to be recovered should use the TINA standard, interest due for the date of overpayment, or the Defense Acquisition Regulation (DAR) Interest clause,¹⁶³⁵ that provides for interest from the date of the first written demand for payment by the government.¹⁶³⁶

The board looked to the rules of statutory construction to resolve the differing interpretations by the parties.¹⁶³⁷ The board determined that both the 1985 and 1986 amendments to TINA included the phrase “under a contract with the Department of Defense” and that the contract in question was entered into before the TINA amendments; thus, interest was recoverable under the prior, more lenient, DAR interest provisions.¹⁶³⁸

DFARS Catches Up, TINA Threshold Increased to \$550,000

On 1 October 2001, the DOD issued a final rule¹⁶³⁹ amending the DFARS to reflect the increase in the cost or pricing data threshold specified in the FAR.¹⁶⁴⁰ The new rule now tracks FAR 15.403-4, raising the threshold at which a contracting officer must obtain cost and pricing data before award of a negotiated contract or the modification of certain existing contracts from \$500,000 to \$550,000.¹⁶⁴¹

The Curse of the \$900 Toilet Seat: Cost Reasonableness in Commercial Item Buys Still Lacking

The DOD continues to experience difficulties determining price reasonableness when cost or pricing data is not obtained, at least in the opinion of the DOD IG.¹⁶⁴² The IG reviewed 145 contract actions awarded in FY 1998 and FY 1999 valued at \$652 million on contracts totaling \$3.1 billion. Of the 145 contract actions reviewed, the IG determined that in thirty-two percent (forty-six actions), contracting officers failed to obtain required data. In addition, the price analysis documentation did not support price reasonableness in eighty-six percent (124) of the actions reviewed.¹⁶⁴³ The IG believes that the DOD has an ongoing problem with price reasonableness and an unwarranted propensity to waive cost and pricing data.¹⁶⁴⁴

1631. Pub. L. No. 99-500, 100 Stat. 1783 (1986).

1632. U.S. Army Communications and Electronic Command, located at Fort Monmouth, New Jersey.

1633. *Motorola, Inc.*, 01-1 BCA ¶ 31,233 at 154,149.

1634. *Id.* at 154,149-50.

1635. *Id.* at 154,149. The DAR was the predecessor to the current DFARS. The difference between DAR interest and the interest due under the TINA provision is significant.

1636. *Id.*

1637. *Id.* at 154,153 (citations omitted).

1638. *Id.* The board declined to follow a district court opinion that had previously addressed the issue raised in this appeal. *See United States v. United Techs. Corp., Sikorski Aircraft Division*, 51 F. Supp. 2d 167, 194-95 (D. Conn. 1999).

We are not persuaded to follow *Sikorski*, because it did not analyze whether, but apparently assumed that, the phrase, ‘entered into after November 7, 1985’ in § 952(d)(2), qualified ‘modifications on contracts’; did not address or analyze the legal effect of the absence of a contract clause implementing TINA interest; did not analyze the potential application of the rule in *Yankee Atomic Electric Co.*, [112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998)], and is not a precedent binding on the ASBCA.

Motorola, Inc., 01-1 BCA ¶ 31,233 at 154,154.

1639. Defense Federal Acquisition Regulation Supplement; Cost or Pricing Data Threshold, 66 Fed. Reg. 49,862 (Oct. 1, 2001) (to be codified at 48 C.F.R. pts. 215, 253).

1640. *2000 Year in Review, supra* note 2, at 67.

1641. DFARS, *supra* note 361, §§ 215.404, 253.215-70.

1642. U.S. DEP’T OF DEFENSE INSPECTOR GENERAL AUDIT REPORT, CONTRACTING OFFICER DETERMINATIONS OF PRICE REASONABLENESS WHEN COST OR PRICING DATA WERE NOT OBTAINED, REPORT NO. D-2001-129 (May 30, 2001) [hereinafter PRICE REASONABLENESS].

1643. *Id.* at i.

Several causes contribute to the inadequate price reasonableness determinations. First, contracting officers use questionable competition as a basis for accepting contractor prices.¹⁶⁴⁵ Second, contracting officers relied on unverified prices from contractors.¹⁶⁴⁶ Third, the lack of procurement planning leads to an excessive number of urgent requirements.¹⁶⁴⁷ Finally, staffing problems,¹⁶⁴⁸ lack of senior leadership oversight,¹⁶⁴⁹ and a lack of emphasis on obtaining cost or pricing data contributed to the problem.¹⁶⁵⁰

The DOD procurement community disputed the IG's interpretation of the data sampled. Ms. Lee, the Director of Defense Procurement, denied that the DOD had "systemic problems" determining price reasonableness.¹⁶⁵¹ She stated that the IG failed to consider acquisition reforms that were implemented since the IG's review, and the discretion exercised by contracting officers in determining price reasonableness.¹⁶⁵² Further, according to Ms. Lee, the IG's methodology did not result in statistically valid sampling, producing results that could not be extrapolated across DOD contracting actions.¹⁶⁵³

The Army's view was less argumentative, asserting that less overpricing occurred than the IG reported,¹⁶⁵⁴ but that the overpricing that did occur was a result of an overburdened workforce that has been reduced by more than fifty percent over the past ten years.¹⁶⁵⁵ The Navy also cited manpower problems as contributing to the difficulty in obtaining the required data.¹⁶⁵⁶ The Air Force argued that the sample was not sufficient to make

generalized comments about the status of pricing problems DOD-wide.¹⁶⁵⁷

FISCAL LAW

Release of GAO's "Red Book" Volume IV

One of the most important fiscal law developments of the past year was the long-awaited release of Volume IV of GAO's "Red Book."¹⁶⁵⁸ With this release, this "bible" for fiscal law acolytes is nearly complete.

Purpose

Comptroller General Refines Definition of Training

Before this past year's decision in *Payment of Fees for Actuarial Accreditation Examination Review*,¹⁶⁵⁹ there had been several Comptroller General decisions that limited the ability of an agency to use appropriated funds to pay for review courses for accreditation exams. These prior decisions viewed the review courses as personal expenses since the expenses were necessary to qualify the individual for the particular government employment. Thus, in these prior decisions the dividing line between whether training expenses were payable hinged on whether those expenses qualified the individual for a certain position.¹⁶⁶⁰

1644. *Id.* at 1. The IG has issued eleven reports regarding price reasonableness determinations and commercial item classification since FY 1998. *Id.* The most recent prior report is: U.S. DEP'T OF DEFENSE INSPECTOR GENERAL AUDIT REPORT, WAIVERS OF REQUIREMENTS FOR CONTRACTOR TO PROVIDE COST OR PRICING DATA, REPORT No. D-2001-061 (Feb. 28, 2001).

1645. PRICE REASONABLENESS, *supra* note 1642, at 13.

1646. *Id.* at 9-14.

1647. *Id.* at 14.

1648. *Id.* at 15, 18.

1649. *Id.* at 18.

1650. *Id.* at 15.

1651. *Id.* at 112.

1652. *Id.*

1653. *Id.* at 113.

1654. *Id.* at 129.

1655. *Id.* at 130.

1656. *Id.* at 159.

1657. *Id.* at 168.

1658. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, SECOND EDITION, VOLUME IV, PUBLICATION No. GAO-01-179SP (Mar. 2001). The preface to volume IV indicates that it will be followed by a volume V.

1659. Comp. Gen. B-286026, June 12, 2001, available at <http://www.gao.gov/decisions/appro/286026.pdf>.