

## CONTRACT FORMATION

### Authority

#### *The History of Apparent and Actual Authority Revealed*

In *Brunner v. United States*,<sup>1</sup> the Court of Federal Claims (COFC) provided a detailed explanation of authority and analyzed when a government representative's action will bind the government. In its opinion, the COFC thoroughly examined the history of agency authority and the basis for prior decisions.

Brunner, a “cooperating individual” for the Drug Enforcement Administration (DEA),<sup>2</sup> testified that he entered into an agreement with the DEA in which he was orally promised the following compensation package: “(1) a salary of \$2,000 per month, plus expenses; (2) an award of \$2,500 per defendant indicted by the government as a result of his cooperation; (3) an award of twenty-five percent of any assets seized as a result of his work; and (4) relocation expenses for his family.”<sup>3</sup> The record indicates that Brunner was paid in excess of \$13,000. Brunner, however, asserts that he should have been paid a much higher amount in accordance with the original agreement.<sup>4</sup> The DEA “contends that, as a matter of law, [Brunner] may not enforce his various agreements—if any existed—because no one who dealt with him was authorized to contract on behalf of the DEA, and anyone purporting to do so was without authority.”<sup>5</sup>

The COFC explained that the two parties' motions “concern[ed] the existence and validity of an alleged oral contract.”<sup>6</sup> To prove the existence and validity of an express contract, “[t]he party alleging a contract must show a mutual intent to contract including an offer, and acceptance and consideration.”<sup>7</sup> The elements necessary to prove the existence of an oral, or implied-in-fact, contract are the same.<sup>8</sup> “The difference between an express and an implied-in-fact contract is that the ‘lack of ambiguity in offer and acceptance’ . . . or meeting of the minds . . . is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”<sup>9</sup>

When the government is a party to the contract, one additional element must be proven: Brunner must prove that the government representative upon whom it was relying had “‘actual authority’ to bind the government in contract.”<sup>10</sup> So, unlike other contracts not involving the government as a party, “even if a government employee purports to have authority to bind the government, the government will not be bound unless the employee *actually* has that authority.”<sup>11</sup> Actual authority may be express or implied, “as opposed to the apparent authority that enables agents to bind other entities,” in contracts not involving the government.<sup>12</sup> The COFC stated further that even though this line of reasoning is well-based in case law, “the meaning of this rule, its reason for being, and its practical consequences are all far from clear.”<sup>13</sup>

The COFC then examined and recited the tenets of agency law that form the basis for authority in government contracts. The COFC provided the following explanation of the *actual* authority requirement in order to bind the government:

(1) Authority can be created either expressly or by implication; (2) public entities act publicly, using the same means to communicate the grant of authority to their agents that they use to communicate this to third parties; (3) apparent authority describes the situation when a principal has placed restrictions on an agent

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<sup>1</sup> *Brunner v. United States*, 70 Fed. Cl. 623 (2006).

<sup>2</sup> *Id.* at 625.

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

<sup>4</sup> *Id.* at 626.

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

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

<sup>7</sup> *Id.* (citing *Trauma Svc. Grp. v. U.S.*, 104 F.3d 1321, 1324 (Fed. Cir. 1997) (citing *City of El Centro v. U.S.*, 922 F.2d 816, 820 (Fed. Cir. 1990))).

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

<sup>9</sup> *Id.* at 626-27 (citing *City of El Centro v. U.S.*, 922 F.2d at 820; *Baltimore & Ohio R.R. Co. v. U.S.*, 261 U.S. 592, 597 (1923)).

<sup>10</sup> *Id.* at 627.

<sup>11</sup> *Id.* (citing *Tracy v. U.S.*, 55 Fed. Cl. 679, 682 (2003) (citing *Humlen v. U.S.*, 49 Fed. Cl. 497, 503 (2001)) (emphasis added)).

<sup>12</sup> *Id.* (citing e.g., *H. Landau & Co. v. U.S.*, 886 F.2d 322, 324 (Fed. Cir. 1989)).

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

that are not known to a third party; (4) restrictions on government agents are accomplished in the open, through laws and regulations; (5) everyone, including contractors, are supposed to know the laws and regulations of our government; and thus (6) the concept of “apparent authority” is often inapt when dealing with the government, insofar as the only cognizable restrictions on the agent’s authority are deemed known to third parties, shattering any appearance of authority.<sup>14</sup>

The court explains that since the government is a “public entity,” its representatives presumably act publicly, and individuals dealing with the government are presumed to understand the extent of authority of a government agent.<sup>15</sup> Before binding the government, an official must have more than apparent authority, unlike a private agent whose conduct is not regulated to the extent of a government employee.<sup>16</sup> While the COFC opinion does not change the rules regarding the requirement that a government representative have actual authority in order to bind the government, it certainly provides a detailed and colorful history of the concepts surrounding authority.

Major Jennifer C. Santiago

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<sup>14</sup> *Id.* at 629.

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

<sup>16</sup> *Id.*

## Competition

### *While the Transportation Security Administration Falls under the Department of Homeland Security, and the GAO Has Jurisdiction over DHS Procurements, the GAO Does Not Have Jurisdiction over TSA Procurements Because of the Administration Acquisition Management System*

In *Knowledge Connections, Inc.*,<sup>1</sup> the Government Accountability Office (GAO) confirmed that while the Transportation Security Administration (TSA) falls within the Department of Transportation (DOT), the GAO does not have jurisdiction over TSA procurements.<sup>2</sup> Knowledge Connections protested a TSA solicitation for reservation center support services.<sup>3</sup> The Aviation and Transportation Security Act (ATSA)<sup>4</sup> established the TSA as an agency under the Department of Transportation.<sup>5</sup> The Homeland Security Act of 2002<sup>6</sup> transferred the TSA to Department of Homeland Security (DHS), but did not effect the specific exemption of the Federal Aviation Administrations Acquisition Management System (AMS) from GAO bid protest jurisdiction.<sup>7</sup>

The GAO had previously determined that TSA solicitations and contracts for services did remain part of their jurisdiction because the ATSA limited the bid protest exemption to procurements for equipment, supplies and services.<sup>8</sup> In 2005, Congress specifically stated that “[f]or fiscal year 2006 and thereafter, the acquisition management system of the [TSA] shall apply to the acquisitions of services, equipment, supplies, and materials.”<sup>9</sup> Therefore, the GAO dismissed the protest.<sup>10</sup>

### *Is It Reasonable to Expect the Contracting Officer to Read Information Provided for a Pending Procurement?*

Europe Displays, Inc., successfully protested a Federal Transit Administration’s (FTA) sole source procurement to Connexion for the design, construction, maintenance, and dismantling of a pavilion at the Mobility and City Transport Exhibition held in Rome, Italy, on the grounds that the contracting officer’s negligence can erode the grounds for a sole source procurement.<sup>11</sup> The FTA first misinterpreted the exhibition requirements, and then attempted to justify the sole source selection under a misguided theory.<sup>12</sup>

The FTA published an announcement on FedBizOpps that it intended to negotiate with Connexion on a sole source basis for the design and construction of a U.S. pavilion at the biannual exhibition.<sup>13</sup> Believing that the exhibition required the use of a particular contractor, the FTA based its sole source selection on the “only one responsible source” exception to competition.<sup>14</sup> The notice went on to state that interested potential sources could submit a written response to the agency “no later than 15 days” after publication.<sup>15</sup>

Europe Displays, Inc. submitted a proposal on day fourteen, within the time limit placed on FedBizOpps. Relying on the government’s misinterpretation of the exhibition requirements, the contracting officer stated the agency would not “give the

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<sup>1</sup> Comp Gen. B-298172, Apr. 12, 2006, 2006 CPD ¶ 67.

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

<sup>3</sup> *Id.* at 1.

<sup>4</sup> 49 U.S.C. § 114 (2004 Supp.).

<sup>5</sup> *Knowledge Connections, Inc.*, 2006 CPD ¶ 67, at 1.

<sup>6</sup> Pub. L. No. 107-296, 116 Stat. 2135, 2173 (2002).

<sup>7</sup> *Knowledge Connections*, 2006 CPD ¶ 67, at 1.

<sup>8</sup> *Id.* (citing Resource Consultants, Inc., Comp. Gen. B-290163, B-290163.2; June 7, 2002, 2002 CPD ¶ 94, at 5).

<sup>9</sup> Pub. L. No. 109-90, 119 Stat. 2064 (2006).

<sup>10</sup> *Knowledge Connections*, 2006 CPD ¶ 67, at 1.

<sup>11</sup> Europe Displays, Inc., Comp. Gen. B-297099, Dec. 5, 2005, 2005 CPD ¶ 214.

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

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* See U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 6.302-1(2) [hereinafter FAR], and 41 U.S.C.S. § 253(c)(1) (LEXIS 2006).

<sup>15</sup> *Europe Displays*, 2005 CPD ¶ 214, at 2.

firm an opportunity to compete.”<sup>16</sup> Initially the agency was under the mistaken impression that the exhibition organizer required the participants to use Connexion to build and maintain the exhibitions.<sup>17</sup> The agency believed this in spite of the fact that the exhibitor’s handbook specifically addressed custom-designed stands and the thirty days required for custom project approvals.<sup>18</sup> By the time the agency realized its mistake, the exhibition was less than thirty days away and the organizers denied FTA’s request for a waiver of the thirty-day deadline.<sup>19</sup> The FTA then issued a justification and approval (J&A) for a sole source award to Connexion based upon the exception allowing award of a follow-on contract for the continued development of a major system or highly specialized equipment when it is likely that an award to a source other than the incumbent would result in unacceptable delays in fulfilling the requirement.<sup>20</sup>

Europe Displays, Inc. filed an agency level protest which the agency denied.<sup>21</sup> In the interim, the agency determined that it was in its best interest to continue performance with the contract as awarded.<sup>22</sup> Europe Displays, Inc. then filed a protest with the GAO alleging that the J&A did not support award to Connexion and that the agency had no reasonable basis to determine that the awardee was the only firm permitted to design and construct the exhibits.<sup>23</sup> Unfortunately for Europe Displays, Inc., by the time the protest was heard, the protested procurement had been fully performed.<sup>24</sup>

In response to the protest, the agency acknowledged that the authority cited in the J&A did not apply to this procurement, and that Europe Displays, Inc. was qualified and capable of performing the contract.<sup>25</sup> Instead, the agency claimed that the acquisition was conducted under the simplified acquisition procedures and, therefore, *FAR part 13* applied.<sup>26</sup> While the GAO agreed, it reminded the agency that even under the simplified acquisition procedures, it was still required to obtain competition “to the maximum extent practicable.”<sup>27</sup> While an agency may solicit from a sole source, the contracting officer has to determine that only one source is reasonably available.<sup>28</sup> In this case the agency did not clearly identify the basis of its belief that the exhibition organizer required participants to use Connexion.<sup>29</sup> In fact, the belief was not reasonable given that the information in the handbook specifically addressed custom designs there was no basis for a sole source award.<sup>30</sup> The GAO sustained the protest, but since the contract was fully performed, awarded Europe Displays, Inc. its costs and attorneys fees.<sup>31</sup>

#### *The Reverse Sole-Source Bid Protest*

In *Metro Home Medical Supply, Inc.*,<sup>32</sup> the contractor protested a request for proposals (RFP) for home oxygen supplies and services for patients of seven Veterans Affairs (VA) Hospitals claiming that the agency should have sole-sourced the requirement to Metro, a certified Historically Underutilized Business Zone (HUBZone).<sup>33</sup> The RFP provided for a cascading

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<sup>16</sup> *Id.*

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

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* See also FAR, *supra* note 14, at 6.302-1(a)(2)(ii)(B) and 41 U.S.C.S. § 253(d)(1)(B) (2000).

<sup>21</sup> *Europe Displays*, 2005 CPD ¶ 214, at 3.

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

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing Info. Ventures, Inc., Comp. Gen. B-293541, Apr. 9, 2004, 2004 CPD ¶ 81, at 3).

<sup>28</sup> *Id.* at 3-4 (citing FAR, *supra* note 14, at 13.106-1(b)(1)).

<sup>29</sup> *Id.* at 4.

<sup>30</sup> *Id.* at 5.

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

<sup>32</sup> Comp Gen. B-297262, Dec. 8, 2005, 2005 CPD ¶ 220.

<sup>33</sup> *Id.* at 1.

set-aside award process.<sup>34</sup> For the facility in Detroit and three other locations, if two or more responsible HUBZone small businesses responded and award would be at a fair market price, the VA would award to a HUBZone small business.<sup>35</sup> For the remaining three locations and any of the previously mentioned facilities not resulting in award to a HUBZone small business, if technically acceptable competitive offers were received from two or more responsible small businesses, the VA would award to a small business.<sup>36</sup> If award was not made to either HUBZone or small businesses under the conditions previously described, then award would be made on the basis of full and open competition, regardless of that contractor's size or socio-economic status.<sup>37</sup>

Metro protested to the GAO three days prior to bid closing, claiming that the Detroit location should be removed from the cascading set-aside process and awarded to Metro on a sole source basis.<sup>38</sup> Metro claimed that the VA failed to comply with the goals for HUBZone small businesses that it had set out for itself and, therefore, the agency should sole-source the procurement to remedy their noncompliance.<sup>39</sup>

The agency stated that it could not award the Detroit contract sole-source because the requirements of *FAR part 19.1306* were not satisfied. Neither the requirement for only one HUBZone business capable of satisfying the requirement nor the contract price limitation of \$3 million could be met.<sup>40</sup> The Small Business Administration also pointed out that the language at *FAR part 19.1306* is discretionary, not mandatory.<sup>41</sup> In the end, the GAO denied the protest.<sup>42</sup>

### *Requirement to Adequately Disclose the Desired Services?*

In *M.D. Thompson Consulting, LLC; PM Tech, Inc.*,<sup>43</sup> the GAO sustained a protest where an agency failed to adequately disclose the services required and then awarded a sole source bridge contract.<sup>44</sup> It makes it hard to compete for a procurement, or even to know whether to compete, when the synopsis does not accurately reflect what the agency seeks. In a protest of the Department of Energy's (DOE) nine-month extension of a sole-source "bridge contract," two firms alleged that they had been excluded for failing to provide a requirement that was not in the synopsis.<sup>45</sup> Two small businesses, M.D. Thompson Consulting, LLC, and PMTech, Inc., argued that the DOE failed to properly synopsise its requirement to allow for meaningful responses from prospective bidders, thereby making DOE's sole-source contract improper.<sup>46</sup>

<sup>34</sup> *Id.* at 1-2. Cascading award procurements an award preference order for socio-economic qualifying businesses allowing contracting officers to consider and award to small business offerors before non-preferenced firms during the evaluation.

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

<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* Metro did not, however, protest the use of the cascading set-aside award process.

<sup>40</sup> *Id.* FAR part 19.1306 states: A participating agency contracting officer may award contracts to HUBZone small business concerns on a sole source basis without considering small business set-asides . . . provided—

- (1) Only one HUBZone small business concern can satisfy the requirement:
- (2) Except as provided in paragraph (c) of this section, the anticipated price of the contract, including options will not exceed-
  - (i) \$5,000,000 for a requirement within the North American Industry Classification System (NAICS) code:
  - (ii) \$3,000,000 for a requirement within any other NAICS code
- (3) The requirement is not currently being performed by a non-HUBZone small business concern;
- (4) The acquisition is greater than the simplified acquisition threshold
- (5) The HUBZone small business concern has been determined to be a responsible contractor with respect to performance.

FAR, *supra* note 14, at pt. 19.1306.

<sup>41</sup> Comp Gen. B-297262, Dec. 8, 2005, 2005 CPD ¶ 220, at 5.

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

<sup>43</sup> Comp. Gen. B-297616, B-297616.2; Feb. 14, 2006, 2006 CPD ¶ 41, at 1.

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

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

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

The DOE published a pre-synopsis notice on FedBizOpps stating its intent to extend the contract with CSC Systems & Solutions LLC for “unspecified services” for up to nine months.<sup>47</sup> Both M.D. Thompson and PMTech submitted capability statements.<sup>48</sup> The agency rejected both in part because the firms did not propose personnel experienced in “isotope separation technology,” although such a requirement was not apparent from the synopsis.<sup>49</sup>

The GAO sustained the protest stating that the *FAR* requires publication of a synopsis of sole-source procurements unless a regulatory exception applies. In this case, no exception applied.<sup>50</sup> The GAO stated that the “synopsis must provide an ‘accurate description’ of the property or services to be purchased and must be sufficient to allow a prospective contract to make an informed business judgment as to whether to request a copy of the solicitation.”<sup>51</sup> In this case, the GAO determined that the agency failed to meaningfully describe the requirement.<sup>52</sup> The synopsis identified the contract being extended and that it involved “critical, highly specialized technical and administrative support,” but did not provide any details concerning specifics needed for successful performance.<sup>53</sup> Instead, the synopsis in this case discouraged responses.<sup>54</sup> Since the synopsis inadequately described the services, the GAO sustained the protest.<sup>55</sup>

*Lack of Advanced Planning Not an Authorized Exception to the Competition in Contracting Act (CICA)*

The GAO sustained a VA sole source procurement of ophthalmology equipment for several of its facilities, finding that the award was improper where the awardee was determined to be the only responsible source, but the capabilities of other interested firms were not considered.<sup>56</sup> Bausch & Lomb, Inc. protested the VA sole source procurement of ophthalmology equipment used in cataract procedures. The VA based the sole source procurement on unusual and compelling urgency exception of the CICA.<sup>57</sup>

The ophthalmology department at the Albany VA Medical Center identified a need to replace the machines used for cataract surgery after several patients developed eye infections from improperly cleaned machines.<sup>58</sup> Since the staff was familiar with one brand name machine from their private practice experiences and the current machines were outdated and needed replacing, the Chief of Ophthalmology recommended in a memorandum the Infiniti machine produced by a company named Alcon.<sup>59</sup> That same day the VA publicized its intent to sole source the contract to Alcon and invited response by 1630 that afternoon.<sup>60</sup> Later that day, the VA purchased the Alcon machines, despite knowing that the protester and a third firm expressed an interest in competing for the procurement.<sup>61</sup>

The agency’s J&A contended that urgent circumstances required the sole source purchase of the Alcon machine for the Albany and Syracuse VA hospitals.<sup>62</sup> According to the J&A, the Alcon machines were the only ones which would meet the needs of the government because its equipment was “state of the art” and other machines lacked the “advanced design features,” referring in particular to a “torsional phaco handpiece” and “aqualase technology.”<sup>63</sup>

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<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 4 (citing to 15 U.S.C.S. § 637(e) (LEXIS 2006), and *FAR*, *supra* note 14, at 5.101(a)(1) and 6.302-1(d)(2)).

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.*

<sup>56</sup> Bausch & Lomb, Inc., B-298444, 2006 U.S. Comp. Gen. LEXIS 147 (Sept. 21, 2006), at 1.

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

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

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

<sup>60</sup> *Id.*

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

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.*

The VA relied on anecdotal evidence from one hospital that had not replaced their cataract machine in twelve years that the machine had proven unreliable in the operating room.<sup>64</sup> The J&A went on to state that other vendors did not have updated technology.<sup>65</sup>

Bausch & Lomb alleged that the J&A did not justify a sole source award, but revealed a lack of advanced planning.<sup>66</sup> The company went on to state that the agency's determination that only Alcon's machines could meet the requirement was inaccurate because its cataract machines were the "most advanced system on the market."<sup>67</sup>

While the GAO recognized an important need for a replacement machine, at least at the hospital where patients were getting eye infections, the agency failed to reasonably demonstrate why a limited competition including those firms expressing an interest was unreasonable.<sup>68</sup> Bausch & Lomb responded to the agency's request, yet there was no evidence that the VA ever considered the response.<sup>69</sup> Therefore, the GAO found the sole source award unjustified when the agency failed to consider the equipment of other interested vendors.<sup>70</sup>

*When Ordering Off the Federal Supply Schedule (FSS) the Question Is Not "Is the vendor willing to provide the services sought?" But "Are the services/positions offered actually included on the FSS Contract, as interpreted?"*

In a protest where Tarheel Specialties challenged its exclusion from a procurement, the GAO found that the awardee was not qualified and should have been excluded also.<sup>71</sup> The protest revolved around services to support the DHS Immigration and Customs Enforcement (ICE). The RFP informed potential contractors that the agency intended to award a competitive task order to an offeror who had a current Federal Supply Schedule (FSS) with the General Services Administration (GSA) which included each of the applicable labor categories listed, and provided the best value to the government.<sup>72</sup> The ICE would make the best value determination based off of "three evaluation factors: demonstrated technical capability, past performance/experience, and price (including discount terms)."<sup>73</sup> The ICE issued the RFP to the incumbent (USIS) and to the protester (Tarheel), both who held FSS schedule contracts for law enforcement, security, and facility management systems.<sup>74</sup>

After entering discussions with both firms about their proposals, the agency determined that Tarheel's lower-priced proposal unacceptable because "none of the labor categories in the PWS (Performance Work Statement) were mapped to the positions listed in Tarheel's schedule contract."<sup>75</sup> Tarheel submitted a protest, claiming its proposal was wrongfully rejected.<sup>76</sup> Based upon its conversations with the GSA, Tarheel believed that the positions did not need to be in the present GSA contract, just added later as new categories on the FSS contract after award.<sup>77</sup> In a supplemental protest filed after receipt of the agency report, Tarheel alleged that it had not been treated equally because USIS's FSS contract also lacked the labor categories required by the RFP.<sup>78</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.*

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

<sup>71</sup> Tarheel Specialties, Inc., Comp. Gen. B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 151.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.*

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

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

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

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

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

In sustaining the protest, the GAO determined that while Tarheel's proposal did not adequately list or map all the labor categories to their FSS contract, neither did USIS.<sup>79</sup> Therefore, "USIS's proposal should have been regarded as unacceptable."<sup>80</sup> The contractor failed to explain why labor categories in the RFP were "within the scope of USIS's FSS contract."<sup>81</sup> The DHS maintained that the descriptions were "sufficiently similar" to those required in the RFP.<sup>82</sup> The GAO stated that "[w]hen a concern arises that a vendor is offering services outside the scope of its FSS contract, the relevant inquiry is not whether the vendor is willing to provide the services that the agency is seeking but whether the services or positions offered are actually included on the vendor's FSS contract, as reasonably interpreted."<sup>83</sup> The Administrative Specialist-Level II position listed on USIS's FSS contract did not match the attributes and responsibilities to the three positions in the RFP.<sup>84</sup> "The mere fact that some of the duties of the RFP required positions were administrative in nature is an insufficient basis" to map the positions to the Administrative Specialist position.<sup>85</sup>

*Notice in DefenseLINK Does Not Equal Notice on FedBizOpps*

In *Worldwide Language Resources, Inc; SOS International Ltd.*,<sup>86</sup> the GAO sustained a protest against the U.S. Air Force (USAF) challenging its sole source award of bilingual-bicultural advisors to Russian and Eastern European Partnership, Inc. (REEP) doing business as Operational Support Services, Inc. (OSS). The USAF attempted to justify its sole source procurement under the statutory exception to the Competition in Contracting Act (CICA) for "unusual and compelling urgency" or as "only one responsible source."<sup>87</sup>

First, the GAO denied an agency attempt to have protests deemed untimely. Then, the GAO found that DefenseLINK is not designated by statute or regulation as the public medium for announcing procurements, and therefore publishing solely on DefenseLINK was not acceptable.<sup>88</sup>

Then, the GAO addressed the sole source procurement. The USAF attempted to sole-source two contracts to OSS for \$10.7 million and \$34.5 million respectively to support the Civil Affairs Command mission with Multinational Forces-Iraq (MNF-I).<sup>89</sup> Each contract called for "50-75 bilingual-bicultural advisor-subject matter experts (BBA-SME)" who could speak English and Iraqi dialect "who are committed to a democratic Iraq."<sup>90</sup> The requirement evolved from a previous contract that the Iraqi Reconstruction and Development Council (IRDC) had with Science Applications International Corporation (SAIC).<sup>91</sup> When the Coalition Provisional authority dissolved in June 2004, so did the IRDC. However, during the next month the deputy secretary of defense determined that the success of the war effort relied on these BBA-SMEs to help the country establish its constitutional government and made a determination to contract for BBA-SMEs.<sup>92</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.* at 5.

<sup>83</sup> *Id.* See also Am. Sys. Consultation, Inc., Comp Gen B-294644, Dec. 13, 2004, 2004 CPD ¶ 247.

<sup>84</sup> *Tarheel Specialties, Inc.*, 2006 CPD ¶ 151, at 8.

<sup>85</sup> *Id.*

<sup>86</sup> Comp. Gen. B-296984, B-296984.2, B-296984.3, B-296984.4, B-296993, B-296993.2, B-296993.3, B-296993.4, Nov. 14, 2005, 2005 CPD ¶ 206.

<sup>87</sup> *Id.* See also FAR, *supra* note 14, pts. 6.302-2 and 6.302-1. The agency also unsuccessfully attempted to have the protests dismissed as untimely because the contract award was announced on www.DefenseLink.mil, the DoD's official website. *Worldwide Language Resources, Inc; SOS Int'l Ltd*, Comp. Gen. B-296984, B-296984.2, B-296984.3, B-296984.4, B-296993, B-296993.2, B-296993.3, B-296993.4, Nov. 14, 2005, 2005 CPD ¶ 206.

<sup>88</sup> *Id.* at 1-2. To compare constructive notice of postings on DefenseLINK to the constructive notice the GAO recognized for Commerce Business Daily or the FedBizOpps website is unfair since CBD and now FedBizOpps are expressly designated by statute and regulation as the official public medium for providing public notice, where DefenseLINK is not. The constructive notice doctrine imputes knowledge without regard to actual knowledge. The statute tells a prospective bidder where to look as the Government point of entry (GPE). DefenseLINK is not a GPE. *Id.* at 9.

<sup>89</sup> *Id.* at 2. The contracts were awarded to OSS on 3 December 2004 and on 29 July 2005, respectively. *Id.*

<sup>90</sup> *Id.* The services included advising government ministers, planning for and implantation of elections, drafting of constitutional documents, advising neighborhood, municipal and national councils and public services, training of security forces and details, translation and interpretation of conversations, documents an cultural matters in support of democratic objectives. *Id.*

<sup>91</sup> *Id.* at 3.

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

Originally, the USAF attempted to compete the contract through the Air Force's Center for Environmental Excellence's (AFCEE) global engineering, integration, and technical assistance (GEITA) contract.<sup>93</sup> Five months later, the Office of the Secretary of the Air Force cancelled the action when it determined that the required service did not fit within the AFCEE's charter.<sup>94</sup> The contract action then fell to the Commander for the 11th Contracting Squadron at Bolling Air Force Base, Washington, who perceived significant pressure coming from Office of the Secretary of Defense (OSD) to meet the BBA-SME requirement.<sup>95</sup>

The 11th Contracting Squadron decided to sole-source the contract to OSS "[b]ecause there was no way to competitively go out and get that effort done in a way that probably wouldn't result in a minimum four to six month slip of the schedule, maybe longer. . . ." <sup>96</sup> The J&A cited 10 U.S.C. § 2304(c)(2) and *FAR part 6.302-2* (unusual and compelling circumstances) as the authority because the "OSS is the only known contractor who is in the position to provide deployed BBAs to Iraq in time to support the Iraqi national elections in January 2005."<sup>97</sup> The J&A claimed that there was not sufficient time to compete the requirement in order to meet the 1 December 2004 deadline for the contract and that the agency could not locate an existing contract vehicle to support the requirement. <sup>98</sup> Finally, the J&A stated that the requirement was for twelve months with no follow-on contract expected but if a similar requirement arose they would conduct a market research.<sup>99</sup>

By late January or early February, OSS began performing and was producing positive feedback to the OSD.<sup>100</sup> In May 2005 the Deputy Secretary of Defense approved an expansion of the program to two hundred individuals and extended the contract through June 2006.<sup>101</sup> When the OSD went back to the contracting activity to expand the program, there was a problem. Awarding the contract in June 2005 was not possible because full and open competition would take a minimum of six to eight months to coordinate and select an awardee.<sup>102</sup> The only option, according to the contracting activity, was for the OSD to "conduct adequate market research to certify that only one source can provide the required service without significant duplication of cost and loss of schedule."<sup>103</sup> Despite this exchange, the original J&A, approved by the USAF, cited "urgent and compelling needs" as the justifying exception, and stating that without this contract the missions in Iraq could not be performed.<sup>104</sup> The J&A claimed that "OSS is the only contractor who is capable of meeting the government's requirement in the unusual and compelling timeframe" and the national security interests of the United States would be harmed without the contract.<sup>105</sup>

The GAO pointed out that the exception for urgent and compelling needs does not give agencies a blank check to sole source.<sup>106</sup> Instead, the GAO stated that the "exception only allows an agency to 'limit the number of sources.'"<sup>107</sup> The agency was still required to "request offers from as many potential sources as is practicable under the circumstances."<sup>108</sup> In sustaining the protests of each of the two sole-source awards, albeit on separate grounds, the GAO reminded the agency that it must make reasonable efforts to meet the mandatory requirement of advanced planning of procurements.<sup>109</sup>

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<sup>93</sup> *Id.* at 4. The GEITA contract was to provide advisory and assistance series in support of AFCEE's continued excellence in the world environmental stewardship market in programs involving environmental restoration, compliance, pollution prevention, conservation and planning, fuel facility engineering, base realignment and closure activities and military housing initiatives including privatization and outsourcing. *Id.*

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.* The squadron originally contemplated placing the requirement under an existing contract with its two language contractors, one of which was OSS. *Id.*

<sup>96</sup> *Id.* (quoting the GAO hearing transcript, at 27).

<sup>97</sup> *Id.* at 6.

<sup>98</sup> *Id.*

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

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

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

<sup>102</sup> *Id.* at 7.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

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

<sup>106</sup> *Id.* at 11.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (quoting FAR, *supra* note 14, at 6.302-2(c)(2)).

<sup>109</sup> *Id.* at 12.

Examining the initial sole source award, the GAO stated that “the agency’s efforts—as described and explained by the agency itself—were so fundamentally flawed as to indicate an unreasonable level of advance planning” directly resulting in the sole source award to OSS.<sup>110</sup> The GAO rejected the recommendation from the USAF to evaluate its actions based on the circumstances faced by the contracting activity when the OSD sent them the requirement.<sup>111</sup> The GAO recognized the abbreviated window, but pointed out that the time crunch was the result of the “unreasonable actions and acquisition planning by the Air Force and the Department of Defense.”<sup>112</sup>

In reference to the July 2005 sole-source contract, the GAO examined the conclusion that OSS was the only one responsible source.<sup>113</sup> The GAO dismissed the J&A’s rationale of “unusual and compelling urgency” because the facts only justified the “one responsible source” exception, and pointed out that there was no proof of the required market research.<sup>114</sup> Instead, the testimony showed that the contracting officer believed Mr. Rostow, from the OSD, performed the market research since the J&A placed the burden on the OSD to conduct the market research. Unfortunately, Mr. Rostow testified that he had not considered whether other contractors had the capability to perform and did not know whether the USAF had considered other contractors.<sup>115</sup> Therefore, the GAO determined that the USAF did not consider other firms and the conclusions supporting the J&A were faulty and unreasonable.<sup>116</sup> The GAO did not, however, recommend termination of the first contract as it was near completion. The GAO did recommend prompt action to compete the second contract or support the sole source through a properly documented J&A.<sup>117</sup>

*Solicitation Requirements for a Mass Notification System Requiring a Specific Frequency and Range Are Unduly Restrictive If the Agency Cannot Provide a Reasonable Basis for Their Inclusion*

In another case where brand name or equal requirements cause agencies angst, *MadahCom, Inc.*<sup>118</sup> successfully protested the DoD’s RFP for a mass notification system (MNS) on the ground that the solicitation was unduly restrictive.<sup>119</sup> The MNS transmits emergency and related information via radio signal among a group of buildings during emergency situations.<sup>120</sup> The GAO determined that the DoD failed to demonstrate that its requirement to be in compliance with the Association of Public Safety Communications Officials International Project 25 (APCO 25) standard for radio transmissions and ten kilometer range requirement for transmission/receiving stations was reasonably related to its need for the MNS.<sup>121</sup>

On several occasions, the DoD attempted to address a need for MNSs to bring facilities and bases in Europe in line with its Unified Facilities Criteria (UFC) 4-010-01, DoD Minimum Antiterrorism Standard for Buildings, which required a “timely means to notify occupants of threats and instruct them on what to do in response.”<sup>122</sup> While the USAREUR

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

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

<sup>112</sup> *Id.* at 13. Specifically pointing to the 2-3 months lost during the initial attempt to have the contract placed under the GEITA contract which was clearly outside the scope of an environmental contract. *Id.*

<sup>113</sup> *Id.* at 14.

<sup>114</sup> *Id.* at 14-15.

<sup>115</sup> *Id.* at 15.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 17.

<sup>118</sup> Comp. Gen. B-298277, Aug. 7, 2006, 2006 CPD ¶ 119.

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

<sup>120</sup> *Id.* The system can work in a single building or a group of buildings and allows an authorized individual to trigger emergency alert notifications. In this case an authorized person could send the emergency information throughout the base from his central location. *Id.*

<sup>121</sup> *Id.* at 4

<sup>122</sup> *Id.* The U.S. Army Europe (USAREUR) issued its original solicitation in December 2003 for the MNS requirement for seventeen bases. The Corps of Engineers (COE) assumed the procurement requirements in December 2004 and issued a solicitation based upon USAREUR’s requirements. The RFP called for anticipated award of an indefinite delivery, indefinite quantity contract that required, among other things, that the equipment be “Motorola, system ASTRO 25, repeater site trunking system or equal.” Two months later the COE planned to fulfill its requirements through a competition for task orders open only to those companies who had been awarded a multiple award task order contract for construction of family housing. The protester here, MadahCom, protested this action. Subsequently the COE abandoned this avenue when the multiple award task order contracts expired and the COE chose not to extend them. Instead, the COE returned to the earlier version of the RFP, reissuing an RFP for indefinite delivery, indefinite quantity (ID/IQ) contracts. MadahCom again protested the solicitation claiming several of the provisions were unduly restrictive. The agency and MadahCom counsels reached agreement on what corrective action would be taken and MadahCom withdrew its protest. When the agency reissued the solicitation most of the provisions originally protested had been resolved, however the provision for APCO 25 remained. *Id.* at 3-4.

attempted on several occasions to procure MNSs, there always seemed to be an unforeseen bump in the road.<sup>123</sup> This solicitation followed a cancelled solicitation in which MadahCom protested, then withdrew its protest when the agency revised its solicitation and agreed to address the concerns in the new solicitation.<sup>124</sup>

The solicitation at issue in this protest looked to procure a MNS system for Landstuhl, Vilseck, Grafenwoehr, and Kaiserslautern (Kleber Kaserne) in Germany.<sup>125</sup> The solicitation called for compliance with the APCO 25 standard for radio transmissions and a ten-kilometer-range for transmission and receiving stations,<sup>126</sup> the DoD failed to show that the solicitation requirements were reasonably related to its needs.<sup>127</sup> The APCO 25 standard is a set of standards for digital transmissions put out by a public safety organization that normally applies to land mobile radios (LMRs), but to be adapted and applied to wireless communications from the primary control center to the individual buildings.<sup>128</sup>

MadahCom claimed the APCO 25 standard was unduly restrictive because it was not required by DoD policy requirements and not necessary to meet the agencies general requirements for a MNS.<sup>129</sup> MadahCom also argued that the MNS transmitting and receiving station range requirements should have been stated in terms of coverage area for the individual installations as opposed to the ten-kilometer-range standard.<sup>130</sup> Therefore, the ten-kilometer-range standard was also unduly restrictive.<sup>131</sup>

While the agency first claimed the APCO 25 standard was a requirement, it conceded that it was not a requirement in a supplemental submission.<sup>132</sup> The agency also claimed the APCO 25 standard would make the system interoperable with related communications systems.<sup>133</sup> In regards to the ten kilometer range standard the agency argued that the requirement allowed future integration with other sites and it kept the system flexible for this future integration.<sup>134</sup>

The GAO sustained the protest, in part because the requirement that the MNS be APCO 25 compliant lacked a reasonable basis.<sup>135</sup> The GAO stated that since the RFP did not require the LMRs accompanying the system to be APCO 25 compliant and the agency did not know how the requested radios would be used by installations that would receive the MNS under the contract there was no reasonable basis to include the requirement.<sup>136</sup> In regards to the ten-kilometer-range-requirement, the agency was unable to articulate its rationale for that as well. Once again, the GAO found it was not reasonably related to the agency's legitimate need.<sup>137</sup>

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

<sup>124</sup> *Id.* at 3.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 5.

<sup>127</sup> *Id.* at 4. The APCO 25 standard is a set of standards put out by an association of public safety organization that is supposed to enable them to “procure and operate compatible LMRs.” *Id.*

<sup>128</sup> *Id.* at 4-5.

<sup>129</sup> *Id.* at 5.

<sup>130</sup> *Id.* at 10.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 5.

<sup>133</sup> *Id.* at 7.

<sup>134</sup> *Id.* at 10.

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

<sup>136</sup> *Id.* at 9-10.

<sup>137</sup> *Id.* at 11.

*Terms of a Solicitation Are Not Unduly Restrictive as Long As the Terms Are Reasonably Aimed at Satisfying the Agency's Legitimate Needs*

In two separate bid protests this year, the GAO denied protests based upon unduly restrictive requirements in solicitations for GSA-leased office space.<sup>138</sup> In both cases, the GAO found the solicitation terms reasonably addressed the agency's needs and therefore denied the protests.<sup>139</sup>

In *Bristol Group—Union Station Venture*,<sup>140</sup> the protester alleged the terms of solicitation for offers (SFO) were unduly restrictive because it required the building space for the VA to be “within 2500 walkable linear feet” of amenities such as inexpensive fast food, inexpensive cafeteria or table service restaurants and other retail stores, cleaners, and banks, etc..<sup>141</sup> Bristol asserted that the proximity requirements of the local amenities was unduly restrictive to competition.<sup>142</sup> The GAO disagreed, stating the requirement was reasonable based upon the VA's legitimate needs.<sup>143</sup> The VA employees had only thirty minutes for lunch and needed to have these amenities close by in order to allow them to walk to and from the locations within the time requirement.<sup>144</sup>

In *Paramount Group, Inc.*,<sup>145</sup> the GAO determined a requirement for open area office space<sup>146</sup> that forced potential bidders who had interior offices already built in potential office space to demolish the existing offices thereby creating the open area office space was not unduly restrictive.<sup>147</sup> The protester was the present landlord for the DHS ICE in a building where the interior was already divided into separate offices.<sup>148</sup> Paramount alleged the requirement to renovate its current space placed it at a competitive disadvantage.<sup>149</sup>

The GAO restated the default rule that a contracting agency has the discretion to determine its needs and best methods to accommodate them, but those needs have to be specified in terms designed to achieve full and open competition.<sup>150</sup> In this case, the agency cited two reasonable reasons for the “warm lit shell” requirement: giving flexibility to GSA clients and allowing the agency to more easily compare the offers.<sup>151</sup> Since the agency demonstrated a reasonable basis for requiring the open office space, the GAO denied the protest.<sup>152</sup>

Lieutenant Colonel Ralph J. Tremaglio, III

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<sup>138</sup> Bristol Group, Inc.-Union Station Venture, Comp. Gen B-298110, June 2, 2006, 2006 CPD ¶ 89; Paramount Group, Inc. Comp. Gen. B-298082, June 15, 2006, 2006 CPD ¶ 98.

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

<sup>140</sup> Comp. Gen. B-298110, June 2, 2006, 2006 CPD ¶ 89.

<sup>141</sup> The GAO denied a subsequent protest by Bristol where they challenged their elimination from the competitive range and having their proposal improperly rejected. Bristol Group, Inc.-Union Station Venture, Comp. Gen B-298086, B-298086.3, May 30, 2006, 2006 CPD ¶ 92.

<sup>142</sup> *Bristol Group*, 2006 CPD ¶ 89, at 2.

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

<sup>144</sup> *Id.*

<sup>145</sup> Comp. Gen. B-298082, June 15, 2006, 2006 CPD ¶ 98.

<sup>146</sup> Open area office space is referred to as “warm lit shell.” *Id.* at 2.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Id.* at 1.

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.* (citing Mark Dunning Indus., Inc., B-289378, Feb 27, 2002, 2002 CPD ¶ 46).

<sup>151</sup> *Id.* at 4.

<sup>152</sup> *Id.* at 5.

## Contract Types

### *Final Rule on Contract Period for Task and Delivery Orders*

The Department of Defense (DoD) issued a final rule which allows the ordering period of a task or delivery order contract to be up to five years, and up to ten years with options or modifications.<sup>1</sup> The ten year limit can be modified by written documentation of exceptional circumstances by the head of the agency.<sup>2</sup> The rule adds an annual reporting requirement to Congress of any extensions granted under the “exceptional circumstances” authority.<sup>3</sup>

### *Transformation of Contract Types*

As part of the *Defense Federal Acquisition Regulation Supplement (DFARS)* Transformation, the DoD issued a final rule amending the *DFARS* in the area of contract types.<sup>4</sup> The main changes included increasing the standard maximum ordering period under basic ordering agreements from three to five years; deleting unnecessary text on cost-plus-fixed-fee contracts for environmental restoration and design stability and use of incentive provisions; and relocating procedures for selecting contract types and using special economic price adjustment clauses, incentive contracts and basic ordering agreement to the procedures, guidance and information companion resource.<sup>5</sup>

### *The Death of Share-in-Savings Contracting*

The Civilian Agency Acquisition Council and the Defense Acquisition Council (FAR Councils) withdrew the proposed rule on share-in-savings contracting discussed in the *2004 Year in Review*<sup>6</sup> because Congress failed to reauthorize the new contract type.<sup>7</sup> The rule would have allowed a contractor in information technology contracts to get a percentage of any realized savings.

### *Reviewing Award and Incentive Fees*

The Government Accountability Office (GAO) unfavorably reviewed the use of award and incentive fees in the DoD in a December 2005 report.<sup>8</sup> These types of contracts accounted for 4.6 percent of all contracts, but twenty percent of obligated dollars.<sup>9</sup> The GAO examined ninety-three contracts out of a study population of five hundred ninety-seven award-fee and incentive-fee contracts active between 1999 and 2003.<sup>10</sup> The GAO was especially concerned about these contracts since most involved the acquisition of weapons systems, a GAO-declared high risk area since 1990.<sup>11</sup>

The GAO concluded that award fees “have generally not been effective at helping DoD achieve its desired acquisition outcomes.”<sup>12</sup> In addition, the estimated eight billion dollars in award fees were paid regardless of how well the contractor

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<sup>1</sup> Defense Federal Acquisition Regulation Supplement; Contract Period for Task and Delivery Order Contracts, 70 Fed. Reg. 73,151 (Dec. 9, 2005) (to be codified at 48 C.F.R. pts. 216 and 217).

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

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

<sup>4</sup> Defense Federal Acquisition Regulation Supplement; Types of Contracts, 71 Fed. Reg. 39,006 (July 11, 2006) (to be codified at 48 C.F.R. pts. 216).

<sup>5</sup> *Id.* at 39,006-07.

<sup>6</sup> Major Kevin Huyser et al., *Contract and Fiscal Law Developments of 2004—The Year in Review*, ARMY LAW., Jan. 2005, at 16.

<sup>7</sup> Federal Acquisition Regulation; FAR Case 2003—008, Share-in-Savings Contracting, 71 Fed. Reg. 4854 (30 Jan. 2006).

<sup>8</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-66, DoD HAS PAID BILLIONS IN AWARD AND INCENTIVE FEES REGARDLESS OF ACQUISITION OUTCOMES (Dec. 2005).

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

<sup>10</sup> *Id.* at 2. The subject contracts had at least one action coded as cost-plus-award-fee, cost-plus-incentive-fee, fixed-price-award-fee or fixed-price-incentive valued at \$10 million or more. *Id.* In addition, fifty-two contracts had only award-fee provisions; twenty-seven contracts had only incentive-fee provisions; and fourteen had both types. *Id.* at 9. Fifty-one percent of the obligated dollars in the sample was research and development contracts. *Id.* at 10.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 3.

met contract objectives.<sup>13</sup> The GAO perceived a general reluctance “to deny contractors significant amounts of fee, even in the short term.”<sup>14</sup> In the sample contracts, the median percentage of the award fee was ninety percent of the award fee pool.<sup>15</sup>

The GAO cited the Comanche, F/A-22, Joint Strike Fighter, and the Space-Based Infrared System High satellite system as problematic programs in which the contractors have received a substantial portion of the award fees.<sup>16</sup> In addition, the government often gave contractors a second chance to receive an unpaid award fee.<sup>17</sup> The GAO did point out two programs which used fee criteria effectively: the Missile Defense Agency’s Airborne Laser Program<sup>18</sup> and the Terminal High Altitude Area Defense Program.<sup>19</sup>

The GAO felt that award fees should be focused on acquisition outcomes, rather than the perceived DoD focus on contractor responsiveness to feedback, quality of proposals or timeliness of contract data requirements.<sup>20</sup> Incentive fee contracts fared better; still, half of the twenty-seven contracts reviewed failed to meet the target price, a key component of mission success.<sup>21</sup> The GAO was also concerned by a lack of data evaluating how well incentive and award fees work. Generally, contract effectiveness is backed by anecdotal evidence, rather than hard evidence.<sup>22</sup> The GAO did note that the DoD possessed adequate guidance and training and structured the review of award-fees properly.<sup>23</sup>

The GAO issued three recommendations with which the DoD concurred: the focus of these types of contracts should be outcome based, more guidance should be provided on the rollover of award fees, and central means to share lessons learned should be developed.<sup>24</sup>

The DoD partially concurred with four recommendations. The GAO felt that award fees should never be paid for satisfactory performance; the DoD maintained that some portion of the fee should be paid under these circumstances.<sup>25</sup> The DoD stated that it would conduct a study on the remaining disputed recommendations: a review of new contracts, a mechanism for capturing award and incentive fee data in a central system, and performance measures to evaluate how effective award and incentive fee contracts are in motivating contractor performance and achieving program success.<sup>26</sup>

### *The DoD Response*

Deputy Under Secretary of Defense James Finley issued a policy memorandum which addresses the GAO’s concerns on 29 March 2006.<sup>27</sup> The memorandum stated that award fees should be tied to identifiable interim outcomes, discrete events, or milestones; and that relevant provisions should clearly lay out how to evaluate performance.<sup>28</sup> Satisfactory performance should receive less award fees than excellent ratings; if the performance is less than satisfactory, the contractor should not

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<sup>13</sup> *Id.* at 14.

<sup>14</sup> *Id.* at 19.

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

<sup>16</sup> The prime contractors received eighty-five, ninety-one, one hundred, and seventy-four percent respectively. *Id.* at 26.

<sup>17</sup> *Id.* The report noted the Joint Strike Fighter routine rolled over the entire unearned fee for later periods. *Id.* at 22.

<sup>18</sup> The contract was changed to shift award fees toward successful system demonstration; the demonstration failed and contractor did not receive any of the seventy-three million dollars available for award fee. *Id.* at 27.

<sup>19</sup> The contract was tied to conducting successful flight tests. *Id.* at 28.

<sup>20</sup> *Id.* at 4.

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

<sup>22</sup> *Id.* Seventy-seven percent of employees who responded to a GAO survey indicated that fees have improved performance, pointing to increased responsiveness at the management level. *Id.* at 32.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 6.

<sup>27</sup> Memorandum, Deputy Under Secretary of Defense (Acquisition and Technology), to Secretaries of the Military Departments and Directors of the Defense Agencies, subject: Award Fee Contracts (29 Mar. 2006).

<sup>28</sup> *Id.* at 1-2.

receive an award fee.<sup>29</sup> The “rollover” of unearned award fee should be the exception, and not the rule. If a rollover provision is used, only a portion of an unearned fee should be moved to later provisions.<sup>30</sup> The memorandum also announced the formation of the “Award and Incentive Fees” Community of Practice through the Defense Acquisition University.

### *The USAF Response*

The Secretary of the Air Force issued a memorandum announcing a “cultural shift” in the incentives for award and incentive fee contracts.<sup>31</sup> Incentive contracts should use “objectively verifiable” criteria; award fees should reward “only realized superior performance leading to successful end-item delivery or performance.”<sup>32</sup>

### *The Next Generation of ID/IQ contracts*

The Director of Defense Procurement and Acquisition Policy issued guidance on indefinite delivery, indefinite quantity (ID/IQ) contracts.<sup>33</sup> The memorandum noted that some agencies had not been structuring ID/IQ contracts in accordance with the *Federal Acquisition Regulation (FAR)*. Specifically, agencies were issuing ID/IQ contracts without required *FAR* clauses, and were not buying supplies and services through the issuance of delivery or task orders.<sup>34</sup> In addition, agencies must record an obligation for the minimum order amount at the time of contract award and process the obligation through the Federal Procurement Data System—Next Generation.<sup>35</sup>

### *Reconsidering ID/IQs*

The GAO reconsidered a decision discussed in the negotiations section<sup>36</sup> and clarified an alleged apparent confusion regarding variable quantity contract types in *Department of Agriculture—Reconsideration*.<sup>37</sup> The Department of Agriculture (USDA) alleged that the GAO had misapplied rules governing ID/IQ contracts onto the requirements contract in question.<sup>38</sup>

In the earlier case, the GAO sustained a protest stating that the Forest Service must consider cost in analyzing competitive proposals.<sup>39</sup> In its request for reconsideration, the USDA argued that a cost estimate for a requirements contract was more difficult than an ID/IQ contract, which at least had a minimum guaranteed quantity around which to base the estimate.<sup>40</sup> In addition, forcing an agency to calculate an uncertain estimate exposes an agency to liability to a breach of contract suit if that estimate is wrong.<sup>41</sup>

The GAO, while noting that it correctly identified the type of contract in the original case,<sup>42</sup> denied the reconsideration request, stating that the USDA was the one that misapplied the original decision. The GAO recommended “employing a

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<sup>29</sup> *Id.* at 2.

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

<sup>31</sup> Memorandum, Secretary of the Air Force, to SEE Distribution, subject: Contract Incentives (4 Apr. 2006).

<sup>32</sup> *Id.*

<sup>33</sup> Memorandum, Director of Defense Procurement and Acquisition Policy, to Directors of the Defense Agencies, Assistant Secretary of the Army (Acquisition, Logistics and Technology), Deputy Assistant Secretary of the Navy (Acquisition Management), ASN (RDA), Deputy Assistant Secretary of the Air Force (Contracting), SAF/AQC, subject: Indefinite Delivery Contracts (21 Sept. 2006).

<sup>34</sup> *Id.* at 1.

<sup>35</sup> *Id.* at 2.

<sup>36</sup> See Negotiated Acquisitions section, *infra*.

<sup>37</sup> Comp. Gen. B-296534.12, Nov. 3, 2005.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> “We fully recognized, as noted four times in the decision, that a requirements contract was at issue.” *Id.* (emphasis added).

price evaluation method that allows comparison of the relative cost.”<sup>43</sup> While the agency was left to decide how to do that, an estimate is only one method available. Another method that the agency could use to compare relative costs would be notional or hypothetical work orders.<sup>44</sup> However, the GAO noted that the Forest Service had historical data under prior contracts and actually compared the offeror’s mileage costs in the original evaluation.<sup>45</sup>

### *No Windfall for Negligent Estimates*

In *S.P.L. Spare Parts Logistics, Inc. (S.P.L.)*,<sup>46</sup> the ASBCA ruled that the damages for a negligent government estimate in a requirements contract should be based on the fixed costs in the offeror’s proposal rather than the company’s actual costs performing the contract.<sup>47</sup> In an earlier entitlement case,<sup>48</sup> the ASBCA found that the U.S. Army Tank-Automotive and Armaments Command (TACOM) negligently prepared estimates for a contract for new roadwheels for various combat vehicles. The TACOM failed to adjust the estimate for the following causes: a new “repair first” policy; the reduction in the use of the M60 tank, and the last-minute procurement of rebuilt wheels made after a congressional inquiry caused a delay in the instant procurement.<sup>49</sup>

The dispute revolved on reimbursing S.P.L. for its inability to spread out its costs during the contract since it built fewer wheels than anticipated in the contract due to the government’s negligent estimate. The contractor argued that it should receive \$1,215,021.40, calculating the increased costs per wheel by comparing the negligent estimate with a non-negligent estimate and reimbursing S.P.L. for its increase in costs by multiplying that figure by the wheels actually purchased.<sup>50</sup> The government agreed with S.P.L.’s methodology, but argued that the contractor should receive an award of \$152,154.28 limiting the contractor to the fixed costs around which S.P.L. calculated its proposal; the government also calculated the proper, or non-negligent, estimate of roadwheels differently and lower than the contractor’s estimate.<sup>51</sup>

The ASBCA agreed with the government that basing entitlement on S.P.L. alleged actual costs<sup>52</sup> would result in a windfall. The ASBCA stated that the general rule would be “to place the non-breaching party in as good a position as it would have been had the breaching party fully performed.”<sup>53</sup> Since the dispute involved a fixed-price requirements contract, the award would be limited to the fixed costs in S.P.L.’s offer, and not its disputed higher actualized costs.<sup>54</sup>

The ASBCA followed the government’s general calculation of the proper estimate with some adjustments and awarded S.P.L. \$ 421,269.26. The ASBCA looked at the historical data and created a baseline which was partially reduced due to the actual decline in TACOM’s requirements due to various factors.<sup>55</sup> The ASBCA denied a claim for excess strips, discs, painting and vulcanization equipment because S.P.L. failed to prove that these costs were incurred based on the negligent

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<sup>43</sup> *Id.* at 5.

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

<sup>45</sup> *Id.* at 6.

<sup>46</sup> ASBCA Nos. 54435, 54360, 06-2 BCA ¶ 33,135.

<sup>47</sup> *Id.* at \*14.

<sup>48</sup> *S.P.L. Spare Parts Logistics*, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982.

<sup>49</sup> *S.P.L. Spare Parts Logistics*, 06-2 BCA ¶ 33,135 at \*7.

<sup>50</sup> *Id.* at \*9. The contractor alleged that it spent \$1,829,718.80 in its production of 10,537 wheels. The increase in fixed cost per wheel was calculated to be \$155.31, or spreading out the costs with 10,537 wheels (non-negligent estimate) vice 31,361 wheels (negligent estimate). The contractor calculated its entitlement by multiplying the increase in fixed costs by the actual number of produced wheels (10,537). *Id.*

<sup>51</sup> *Id.* at \*10. In its proposal, *S.P.L.* included a figure of \$743,569.31 in fixed costs in its proposal. The government also calculated a different actual estimate of 19,493 based on an average of new wheels purchased in a five year period, multiplied by three (the life of the contract), reduced by the wheels ordered before award and by ten percent due to the actual reduction in requirements of the M60 tank. *Id.*

<sup>52</sup> The government disputed this figure but the ASBCA did not need to address the allegation. *Id.* at \*11 n.4.

<sup>53</sup> *Id.* at \*11.

<sup>54</sup> *Id.* at \*14.

<sup>55</sup> The ASBCA computed a base-line of 24,918 wheels, reduced that figure by twenty percent due to the move away from the M60 tanks, subtracted five thousand wheels due to the decline in wheel demand, and reduced the number of wheels as a result of the Congressional inquiry delay. The ASBCA then divided the fixed costs in the offeror’s price by the resulting figure, 11,675, and computed the fixed costs per wheel as \$ 63.39 per wheel. The difference between the non-negligent cost per wheel and the actual negligent cost per wheel (\$63.39 - \$23.71 = \$39.98) was then multiplied by the total number of new wheels ordered by the TACOM (10,537) to come up with the award figure. *Id.* at \*15-16.

estimate.<sup>56</sup> In addition, the ASBCA denied a claim for excess inventory, since the cost of that risk should be borne solely by the contractor.<sup>57</sup>

### *Locked and Captured Costs*

In *Bannum, Inc.*,<sup>58</sup> the Department of Transportation Board of Contract Appeals (DOT BCA) held that in an ID/IQ contract in which the government failed to order the guaranteed minimum, the contractor's entitlement should be reduced by the costs it would have incurred for the guaranteed minimum amount of work.

The Bureau of Prisons (BOP) awarded an ID/IQ contract to provide community correctional center services for federal offenders in the Washington, D.C. area.<sup>59</sup> Following a Department of Justice legal memorandum which Bannum felt affected the potential number of inmates; Bannum submitted a monthly invoice billing for the guaranteed monthly minimum of twenty-six inmates instead of the actual number of inmates. The contracting officer denied the claim, stating that the guaranteed minimum kicked in only after the contract's yearly term ended.<sup>60</sup>

Following a summary judgment motion, the DOT BCA found that the contract was an ID/IQ contract and that the contract referred to a total minimum of inmates on a yearly basis.<sup>61</sup> Bannum argued that its entitlement should be one hundred percent of its unit price multiplied by the number of unordered minimum guaranteed inmate days for the year.<sup>62</sup> The DOT BCA followed *White v. Delta Construction International Inc.*,<sup>63</sup> holding that the contractor's recovery should be reduced by the amount of additional work the contractor would have been required to provide, but did not, due to the government's breach.<sup>64</sup> The DOT BCA rejected Bannum's argument that the government's failure resulted in the company being unable to capitalize its cost over the yearly contract, finding that *Delta* meant that the company must reduce its claim by any unrealized costs.<sup>65</sup>

The DOT BCA held open the question of how much the guaranteed minimum was. Although the Request for Proposals contained a guaranteed yearly minimum of 19,345 inmates, Bannum's final revised proposal contained a figure of 28,470 inmates. The board left open the question of whether the BOP incorporated Bannum's figures and changed the terms of the contract. and that summary judgment could not be rendered based on the record.<sup>66</sup>

### *The Magnification of a Fixed Price Contract*

In *Magni Environmental. Group, Inc.*,<sup>67</sup> the DOT BCA denied a contractor's attempt to unilaterally create a fixed-price level-of-effort contract. The Forest Service awarded a single task order with Magni through the Federal Supply Schedule for environmental advisory services in the Finger Lakes area of New York.<sup>68</sup> In its submission, Magni identified an expected level of effort and anticipated costs in addition to the fixed price, which it stated "is based to be reviewed in light of scoping."<sup>69</sup> However, in response to a Forest Service request for clarification, Magni "apologize[d] if our presentation led

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<sup>56</sup> *Id.* at \*17.

<sup>57</sup> *Id.* at \*19.

<sup>58</sup> DOT BCA No. 4452, 06-1 BCA ¶ 33,228.

<sup>59</sup> *Id.* at \*2.

<sup>60</sup> *Id.* at \*11.

<sup>61</sup> Bannum argued that, since the contract required monthly billing, the guaranteed minimum should be derived also on a monthly basis. The DOT BCA read the plain meaning of the contract to be a contract for services on a yearly basis. *Id.* at \*27.

<sup>62</sup> *Id.* at \*32.

<sup>63</sup> 285 F.3d 1040 (Fed. Cir. 2002).

<sup>64</sup> *Delta*, 285 F.3d at 1043.

<sup>65</sup> *Bannum*, 06-1 BCA ¶ 33,228, at \*37. The board did leave open the opportunity for Bannum to produce evidence of damages cause by the government's failure to order the guaranteed minimum. *Id.*

<sup>66</sup> *Id.* at \*30.

<sup>67</sup> AGBCA Nos. 2005-101-1, 2004-102-1, 2005-103-1, 06-1 BCA ¶ 33,233.

<sup>68</sup> *Id.* at \*2.

<sup>69</sup> *Id.* at \*14.

you to believe that we were offering merely a level of effort of hours rather than deliverable results.”<sup>70</sup> After a unilateral modification which increased the contract price by \$ 45,000, Magni filed a claim for additional funds based on the additional increased effort to complete the contract.<sup>71</sup> This claim was based on both “growth in technical lead efforts and related issues” and the fact that Magni had “expended the proposed effort” in the fixed-price level of effort contract.<sup>72</sup>

The board looked at the terms of the contract and found that the parties had agreed to a fixed price contract based on the completion of designated tasks, despite Magni’s extraneous language in its submission regarding its expected levels of effort.<sup>73</sup> However, the board rejected the Forest Service’s argument that the fixed price precluded Magni’s claim for equitable adjustment. Since the changes clause allows disputes under the CDA, a fixed price contract does not preclude a contractor’s claim for contract adjustments based on increased or decreased work or costs.<sup>74</sup> The board did not allow summary judgment for the government based on the fixed price nature of the contract.<sup>75</sup>

Major Andrew S. Kantner

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

<sup>71</sup> *Id.* at \*21.

<sup>72</sup> *Id.* at \*27.

<sup>73</sup> *Id.* at \*35

<sup>74</sup> *Id.* at \*38.

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

## Sealed Bidding

### *Agencies Should Not Rely on Protestor to Determine Validity of Mistakes*

In *Odyssey International, Inc.*,<sup>1</sup> the Government Accountability Office (GAO) examined a protest from the low bidder in an invitation for bids (IFB) case from the Department of Labor (DOL) for construction of a three-story dormitory.<sup>2</sup> The low bidder, Odyssey, bid \$6,246,616, while the next lowest bid was from Allied Contractors and Eng'rs (Allied) for \$7,319,800.<sup>3</sup> There were six other bids, and the government estimate was \$7,352,357.<sup>4</sup>

About a month after bid opening, the agency asked the lowest three bidders to verify their bids, at which time Odyssey reported “a dramatic posting error” in its bid tabulation sheet.<sup>5</sup> Apparently, Odyssey had “mistakenly recorded a \$1,275,000 quote for structural steel from a subcontractor as \$275,000 in its electronic spreadsheet.”<sup>6</sup> To prove the mistake, Odyssey “furnished the subcontractor’s proposal of \$1,275,000, as well as printed copies of the original bid tabulation spreadsheet and the corrected spreadsheet.”<sup>7</sup> The DOL then requested additional evidence in order to “establish[] the existence of the error, and the manner in which it occurred, and the bid actually intended.”<sup>8</sup>

About a week later, Odyssey provided additional information, “including a compact disc (CD) containing the electronic version of the previously printed spreadsheets.”<sup>9</sup> In addition to the \$1,000,000 mistake, Odyssey also adjusted its bid to reflect the increase in profit based on the increased price.<sup>10</sup> The final bid submitted was \$7,317,216, only \$2,584 less than the next lowest bidder, Allied.<sup>11</sup> At that point, Allied submitted an agency protest concerning the “propriety of permitting Odyssey to correct its bid.”<sup>12</sup> At some point after receiving the protest, the DOL accepted Odyssey’s bid, “finding clear and convincing evidence of the mistake and the intended bid,” resulting in a denial of Allied’s protest.<sup>13</sup> Allied then filed a protest with the GAO based on a review of Odyssey’s submitted spreadsheet.<sup>14</sup> As a result of Allied’s position, the DOL “reversed its prior position and advised that it would now not accept Odyssey’s corrected bid because of ‘a number of other serious errors, related to [the] initial mistake in bid claimed by Odyssey.’”<sup>15</sup>

Ultimately, the GAO found that there was clear and convincing evidence of the mistake that Odyssey provided based on “hidden” information contained on the CD. Odyssey hid two rows of a spreadsheet for confidentiality purposes (profit markup) that was later viewed and interpreted by Allied, and later determined by DOL as being insufficient to establish clear and convincing evidence of the mistake.<sup>16</sup> I determined that the information contained in the spreadsheet did not allow DOL to “determine[e] Odyssey’s intended bid price.”<sup>17</sup>

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<sup>1</sup> Comp. Gen. B-296855.2, 2005 U.S. Comp. Gen. LEXIS 249 (Nov. 16, 2005).

<sup>2</sup> *Id.* at 1.

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

<sup>4</sup> *Id.* at 2.

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

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

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

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

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

<sup>10</sup> *Id.* This information was deleted from the GAO opinion as it is proprietary or confidential information.

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

<sup>12</sup> *Id.* at 3.

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

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

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

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 3.

The GAO held that the DOL “did not act reasonably in determining that Odyssey’s spreadsheets were not in good order and did not provide clear and convincing evidence of Odyssey’s intended bid.”<sup>18</sup> The GAO further recommended to “permit Odyssey to correct its mistake in bid, and award the contract to that firm, if otherwise appropriate.”<sup>19</sup>

*Failing to Acknowledge Amendment Is Not Always Non-Responsive*

In its successful protest, Fort Mojave/Hummel argued that DOL’s rejection of its bid based on the failure to acknowledge an amendment was improper.<sup>20</sup> The IFB required the successful bidder to “construct nine new buildings totaling approximately 190,997 gross square feet, including . . . [dormitories, an administrative medical/dental building, an education building, a cafeteria, and a warehouse].”<sup>21</sup> The amendment at issue “answered 28 bidder questions and clarified the period of performance.”<sup>22</sup> Fort Mojave/Hummel failed to acknowledge the amendment, and as a result, the agency rejected the bid as non-responsive.<sup>23</sup>

The GAO provides a detailed review of precedent on failing to acknowledge material amendments to IFBs, to include defining what “material” amendments include.<sup>24</sup> The basis for the agency rejecting the protestor’s bid was that there were two items set forth in the amendment that were in fact material: “one item pertains to the insulation of certain pipes and the other item pertains to the placement of certain pipes in five of the rooms in the vocational education building.”<sup>25</sup> The protestor argued that, contextually, neither of the two provisions should be interpreted as material. The GAO agreed, and held that the amendment items were “no more than [ ] minor modification[s] of what was already required by the IFB, not as the agency suggests, the imposition of a material, new and separate legal obligation.”<sup>26</sup>

The GAO further recommended that the protestor be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys’ fees.<sup>27</sup>

Major Jennifer C. Santiago

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<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> Comp. Gen. B-296961, Oct. 18, 2005.

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

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2-3.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.*

## Negotiated Acquisitions

### *Late Proposals*

#### *Lost*

In *Project Resources, Inc.*,<sup>1</sup> the Government Accountability Office (GAO) placed a high burden on an offeror attempting to gain relief from a proposal lost by the government. The case involved a request for proposals (RFP) for environmental remediation services for the U.S. Army Corps of Engineers.<sup>2</sup> Project Resources timely sent its proposal to the Corps of Engineers, but apparently the government lost its proposal.<sup>3</sup> After the Corps of Engineers failed to award Project Resources one of the five awarded contracts, Project Resources contacted the government who informed the company that its proposal could not be found.<sup>4</sup>

Project Resources filed a protest with the GAO along with a copy of the submitted proposal requesting that the GAO direct the agency to evaluate its proposal. The GAO refused, stating the general rule that the “negligent loss of proposal information does not entitle the offeror to relief.”<sup>5</sup> Although agencies have a “fundamental obligation” to safeguard information, the overarching goal of having an open playing field for all competitors trumps the “occasional loss” of a contractor’s proposal since it would be unfair to allow an offeror reconstruct an offer after the closing date of proposals.<sup>6</sup> Although the GAO conceded that this might be an “arguably harsh result,” Project Resources did not provide “pre-closing evidence” of the proposal which might allow the GAO to disturb the Corps of Engineer’s decision not to reopen the competition.<sup>7</sup>

The Corps of Engineers contracting officer testified that she knew of no other “comparable disappearance of a proposal” within the Sacramento District.<sup>8</sup> This testimony precluded Project Resources from using the limited exception of allowing relief in the case of a “systemic failure resulting in multiple or repetitive instances of lost information.”<sup>9</sup>

#### *Late Rejection of Late Proposal*

In *Argencord Machinery & Equipment, Inc. v. United States*,<sup>10</sup> the Court of Federal Claims (COFC) ruled that the Army could reject a late proposal even though it had not discovered the submission was untimely until midway through the procurement. The U.S. Army Aviation and Missile Command (AMCOM) at Redstone Arsenal, Alabama, issued a RFP for tie rod structural support assemblies for Black Hawk helicopters.<sup>11</sup> Argencord faxed the first thirteen pages of its offer on 18 August 2006, or six days after the due date for initial offers, and delivered the rest the next day.<sup>12</sup> The Army issued an amendment, sending it to three additional offerors and Argencord, approving a request from Tek Precision Company, the ultimate winning offeror, to proffer alternate materials for the requested parts.<sup>13</sup> In what the contracting officer characterized as a “boo-boo” and a “rookie mistake,”<sup>14</sup> the Army evaluated Argencord’s offer and determined that it was in the competitive

<sup>1</sup> B-297968, 2006 U.S. Comp. Gen. LEXIS 58 (Mar. 31, 2006).

<sup>2</sup> The RFP contemplated the award of five indefinite delivery, indefinite quantity (ID/IQ) contracts to section 8 (a) contractors. *Id.* at \*1.

<sup>3</sup> *Id.* at \*2. The RFP was due at the Sacramento District Corps of Engineers office in Sacramento, California, no later than 1400 on 12 October 2006. Project Resources shipped its proposal via Federal Express and the tracking slip shows the government received the proposal that day at 0938. *Id.*

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

<sup>5</sup> *Id.* at \*3.

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

<sup>7</sup> *Id.* at \*4.

<sup>8</sup> *Id.* at \*2.

<sup>9</sup> *Id.* at \*4.

<sup>10</sup> 68 Fed. Cl. 167 (2005).

<sup>11</sup> *Id.* The RFP was a small business set-aside for an ID/IQ contract.

<sup>12</sup> The fax cover sheet indicated that the company thought the solicitation was due on 29 August 2006. *Id.* at 170.

<sup>13</sup> *Id.* The COFC also rejected a challenge to this amendment stating that authorizing an alternate material was not so substantial as to require the Army to cancel the solicitation and reissue a new one. *Id.* at 174.

<sup>14</sup> *Id.* at 171.

range for discussion purposes before realizing that it was late.<sup>15</sup> At that point, the Army notified Argencord that its proposal was rejected because the Army received it after the due date for initial offerors.<sup>16</sup>

Argencord made two arguments to revive its admittedly late proposal. Its first argument was that it was the only responsive proposal received. This argument ignored the fact that the AMCOM, in a negotiated procurement, has no obligation to reject non-responsive offers, as in a sealed bid procurement. The COFC rejected Argencord's theory, citing the agency's right to amend a solicitation based on an offeror's deviation from stated requirements.<sup>17</sup>

The second argument was that the AMCOM's amendment and Argencord's timely response to the amendment essentially waived the lateness of its initial proposal.<sup>18</sup> The COFC cited a GAO opinion with approval, holding that *Hausted, Inc.*<sup>19</sup> stated the settled rule regarding late proposals: "An extended period of negotiation that includes the submission of revised proposals cannot legally cure an initial late submission."<sup>20</sup>

### *Competitive Range*

#### *A Global Mess*

In *Global, A 1st Flagship Company*,<sup>21</sup> the GAO sustained a protest on behalf of an offeror who was excluded from the competitive range based solely on a cost/price differential.<sup>22</sup> The Navy issued a RFP for a cost-reimbursement contract to operate and maintain inactive ships on the U.S. east coast.<sup>23</sup> The RFP indicated that technical factors were more important than cost/price.<sup>24</sup> The RFP indicated that the government would apply "plug-in" numbers for certain costs for materials; however those numbers were not specifically identified<sup>25</sup> and the government did not choose to provide that info in a solicitation amendment.<sup>26</sup>

After submission of initial proposals, the choice was between Global, the incumbent, and George G. Sharpe, Inc. Under the technical evaluation, Global was rated "highly acceptable," while Sharpe was rated "unacceptable, but capable of being made acceptable."<sup>27</sup> The Navy conducted a cost realism analysis on both proposals. The Navy, suspecting a clerical error, projected labor costs for option years that were missing from Sharpe's proposal. In analyzing Global's proposal, the Navy replaced proposed costs with actual cost figures from the previous year of the contract. The end result was that Global's contract was about \$5 million more than Sharpe's.<sup>28</sup>

The contracting officer established a competitive range of just Sharpe's proposal, reasoning that Global could never realistically lower its cost enough to be competitive for award.<sup>29</sup> The GAO agreed with Global's protest, stating that the Navy committed errors in its cost realism analysis which tainted its exclusion from the competitive range.

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<sup>15</sup> *Id.* at 170 n.6.

<sup>16</sup> *Id.* at 172.

<sup>17</sup> *Id.* at 173-74.

<sup>18</sup> *Id.* at 174.

<sup>19</sup> Comp. Gen. B-257087, 94-2 CPD ¶ 49.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> Comp. Gen. B-297235, B-297235.2, Dec. 27, 2005, 2006 CPD ¶ 14.

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.* The factors in descending order of importance were: technical and management approach, corporate experience, past performance, personnel resources, and small business participation. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 3.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 5.

The Navy conceded that Sharpe's evaluated cost/price should have been higher since some costs attributed to the indirect cost pool should have been categorized as other direct costs and included in the overall cost.<sup>30</sup> In addition, when the Navy projected the labor costs, it forgot to include the fee in the cost projections.<sup>31</sup> There were also problems with the cost realism evaluation of Global's proposal. When the Navy substituted the costs using the old contract, it failed to take into account that the direct labor projected for the new contract would be lower and that Global's figures accurately represented the changes for the new contract.<sup>32</sup> As a result, the adjusted difference between the two would have been \$1 million less.

The key for the GAO was the fact that the only difference was cost/price. Since the RFP indicated that technical factors were more important than cost/price, it did not seem to make sense that the only initially "highly acceptable" proposal would have been excluded from the competitive range. The bottom line was that the GAO did not find sufficient support for the argument that Global could not have lowered its cost/price enough "to make it competitive for award."<sup>33</sup>

### *Discussions*

#### *A Cogent Argument*

The GAO, in *Cogent Systems, Inc.*,<sup>34</sup> faulted the Army for not discussing a significant weakness with an offeror during discussions in a procurement for an Automated Fingerprint Identification System (AFIS) to be used by the government of Iraq. The Army issued a RFP under the FAR's commercial item authority contemplating the award of a fixed price contract for the Rapid Equipping Force.<sup>35</sup> The RFP stated that the basis for award would be a cost-technical tradeoff and that non-price factors were more important than price.<sup>36</sup>

In a litigious procurement, Cogent first submitted a protest after the Army awarded the contract without discussions to Motorola, partly because it evaluated Cogent's proposal as technically unacceptable.<sup>37</sup> The Army took corrective action and amended the RFP, conducting discussions with Cogent and Motorola. The Army again evaluated Cogent's proposal as unacceptable and sent Cogent a discussion letter to that effect. Cogent again submitted a protest to the GAO, which was dismissed as premature.<sup>38</sup> After both companies submitted revised proposals, the Army reopened discussions and provided Cogent a more detailed discussion letter highlighting areas of its design that were judged to be a significant risk<sup>39</sup>

Cogent filed an agency-level protest which the Army dismissed as premature. Cogent submitted another final revised proposal which the Army again evaluated as unacceptable. The Army again awarded the contract to Motorola, who provided the only technically acceptable proposal. Cogent filed the instant protest with the GAO complaining that the Army's evaluation was unreasonable.

In looking at Cogent's proposal, the GAO focused on the Army's evaluation of a proposed scanner that the Army evaluated as too slow for the requirement. Cogent's initial proposal involved a critique of the Army's minimum requirements for the scanner.<sup>40</sup> After the Army reopened the competition, Cogent substituted another scanner which met the Army's requirements but did not change the overall unsatisfactory rating. Subsequent discussion letters did not mention the scanner problem.<sup>41</sup>

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<sup>30</sup> The GAO noted that those costs were billed as such in Sharpe's similar contract for the west coast. *Id.* at 7.

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 10.

<sup>34</sup> Comp. Gen. B-295990.4, B-295990.5, Oct. 6, 2005, 2005 CPD ¶ 179.

<sup>35</sup> *Id.* at 1-2.

<sup>36</sup> *Id.* at 3. The RFP included the following factors: technical/management with experience, integrated technical/management, design, risk management, and key personnel as subfactors; past performance, price, and subcontracting plan. *Id.* at 2.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 5. These risks included a design change that was not explained, a radical change in proposed performance that raised questions concerning its stability, disconnects in calculations of response times, and an unexplained price decrease for upgrades. *Id.*

<sup>40</sup> The scanner had to be certified by the FBI and able to scan a fingerprint card at 1,000 pixels per inch in ninety seconds. *Id.* at 7.

<sup>41</sup> *Id.*

The proposal evaluation board (PEB), in its evaluation of Cogent's proposal, seemed to focus on the delay caused by Cogent's protests,<sup>42</sup> noting that the board found it odd that Cogent's initial protest stated that a scanner could not be found, but the revised proposal contained an allegedly compliant product.<sup>43</sup> Unfortunately for the Army, the hearing testimony indicated that the Army failed to realize that Cogent had substituted a scanner which met the Army's requirements. Since the Army had labeled this area as a significant weakness, yet the Army never raised the issue in discussions, the GAO opined that the Army had not conducted meaningful discussions with Cogent.<sup>44</sup>

### *Reopening Discussions*

#### *Ford Tough*

In *Al Long Ford*,<sup>45</sup> the GAO informed the Army that it must reopen discussions if the agency realizes, while reviewing an offeror's final proposal revision that a problem in the initial proposal was vital to the source selection decision but not raised with the offeror during discussions. The U.S. Army Tank-Automotive and Armaments Command (TACOM) issued a RFP for light utility trucks and accompanying spare parts and manuals to be delivered in Iraq.<sup>46</sup> The solicitation informed offerors that this was an urgent requirement and that timely delivery and performance was of the essence.<sup>47</sup> The RFP indicated that timeliness would be based on delivering the minimum guaranteed quantity within one hundred twenty days after receipt of the order. The agency would conduct a risk assessment on whether an offeror could meet the proposed delivery schedule.<sup>48</sup>

The TACOM conducted discussions and received final revised proposals (FRP) for seven offerors. Al Long Ford proposed a delivery period of one hundred and ten days and its total price was \$207,824,347. The Army evaluated the proposed schedule as a "very high risk."<sup>49</sup> The source selection evaluation board contacted Ford's regional marketing manager who informed the Army that Ford would need ninety days of production lead time for any truck deliveries. The Army then added thirty-seven days to Al Long Ford's one hundred and ten-day delivery schedule.<sup>50</sup>

American Equipment Company, the winning proposal, proposed one hundred and fifty days and its total price was \$191,443,169. The source selection authority, in its cost-technical tradeoff, determined that three earlier days of delivery did not warrant Al Long Ford's additional price.<sup>51</sup>

Al Long Ford filed a protest arguing that its delivery schedule should not have been recalculated since it intended to comply with its proffered schedule. In addition, the company should have been given a chance to validate its schedule before the Army conducted its recalculation.<sup>52</sup>

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<sup>42</sup> The PEB noted:

. . . in their first Protest (sic) they explained how they nor anyone else not meet (sic) this rated requirement . . . they have still not explained how they meet it not and there is still no AFIS in Iraq because they protested saying no such system existed. What are we to believe? When will we have permission to move on and meet our critical need?

*Id.* at 8.

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

<sup>44</sup> *Id.* at 9.

<sup>45</sup> Comp. Gen. B-297807, Apr. 12, 2006, 2006 CPD ¶ 67.

<sup>46</sup> *Id.* The RFP contemplated the award of a two-year fixed-price ID/IQ contract for a minimum quantity of five hundred and a maximum quantity of six thousand trucks. *Id.*

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* The solicitation also cautioned that a schedule which did not meet the estimated guideline of one hundred twenty days may be considered unacceptable for award. *Id.*

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 4. Al Long Ford incorporated fifty-three days of production lead-time in its proposal. *Id.* at 3.

<sup>51</sup> *Id.* at 4.

<sup>52</sup> *Id.* at 5.

The GAO agreed with Al Long Ford. Although the general rule is an agency is not required to reopen discussions for new problems in the final proposal revision, the GAO focused on the fact that Al Long Ford's initial proposal contained the same alleged problems which triggered the recalculation.<sup>53</sup> Therefore, the perceived flaws in the proposed schedule was not a new problem, but a new realization on the part of the government about an existing problem, which should have been discussed before the final proposal revisions were due. As the GAO states, the key fact was that the concerns "relate to the proposal as it was prior to discussions."<sup>54</sup> In order for those prior discussions to be meaningful, the agency was required to reopen discussions and inform the offeror of the agency's concerns.<sup>55</sup>

### *Improper Communications*

#### *The CIGNAfigance of Changes*

The GAO used two cases to reinforce the idea that agencies may not allow offerors to correct mistakes unless the mistakes are minor and "both the existence of the mistake and what was actually intended are clearly apparent from the face of the proposal."<sup>56</sup>

In *CIGNA Government Services, LLC*,<sup>57</sup> the Department of Health & Human Services (HHS) issued a RFP for Medicare claims processing services for suppliers and beneficiaries of durable medical equipment. After receiving initial proposals, the HHS discovered that offerors had difficulty proposing the required level of effort (LOE). The HHS subsequently created a template for offerors to compete, which it provided to offerors along with the discussion letters.<sup>58</sup>

The source selection authority chose Palmetto GBA, LLC over CIGNA in one of the jurisdictions for the RFP.<sup>59</sup> CIGNA subsequently filed a protest with the GAO over the conduct of the source selection process. During the review of the agency record, CIGNA discovered that there was different data in Palmetto's final revised proposal (FRP), particularly in its LOE template, than in the source selection decision memorandum.<sup>60</sup> The HHS informed the GAO that there had been an exchange of e-mails between Palmetto and the HHS concerning errors in the FRP. The chair of the business evaluation panel, in charge of evaluating cost and price, asked Palmetto to confirm the hours in the LOE template. Palmetto, in an e-mail, responded by stating that the hours were "grossly overstate(d)" and attached corrections.<sup>61</sup> Additional e-mails and corrections followed.<sup>62</sup>

The GAO focused on testimony by the chair of the business evaluation panel that it was impossible to figure out Palmetto's intent behind its LOE submission without the follow-up e-mails.<sup>63</sup> As a result, the post-FRP communications equaled improper discussions.

In *University of Dayton Research Institute*,<sup>64</sup> the Air Force issued a RFP for design, engineering, and technical support services for weapons systems. The RFP requested that offerors propose a total evaluated price (TEP),<sup>65</sup> which basically was

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<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.* at 8.

<sup>55</sup> The Army had already issued the delivery order and due to the urgent requirements, the GAO did not recommend to overturn the Army's award of the contract. The GAO did recommend that Al Long Ford receive reimbursement of its proposal preparation costs. *Id.* at 11.

<sup>56</sup> *CIGNA Gov't Svs., LLC*, B-297915.2, 2006 U.S. Comp. Gen. LEXIS 75 (May 4, 2006) at \*17; *University of Dayton Research Inst., Comp. Gen. B-296946.6*, June 15, 2006, 2006 CPD ¶ 102, at 8.

<sup>57</sup> *CIGNA Gov't Svs., LLC*, 2006 U.S. Comp. Gen. LEXIS 75 at \*17.

<sup>58</sup> *Id.* at \*7.

<sup>59</sup> The RFP split the HHS requirement into four different jurisdictions. The jurisdiction in question involved the following states and territories: Alabama, Arkansas, Colorado, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, Puerto Rico, South Carolina, Tennessee, Texas, Virgin Islands, Virginia, and West Virginia. *Id.* at \*4 n.3.

<sup>60</sup> *Id.* at \*12.

<sup>61</sup> *Id.* at \*13.

<sup>62</sup> *Id.* at \*15.

<sup>63</sup> *Id.* at \*18.

<sup>64</sup> *Dayton*, 2006 CPD ¶ 102.

<sup>65</sup> This acronym was used by the solicitation. *Id.* at 3.

a mechanical sum of individually required labor rates.<sup>66</sup> The Air Force would use the TEP “for evaluation/selection purposes only.”<sup>67</sup> In evaluating individual proposals, the Air Force discovered that offerors had trouble filling out the rate tables, using numbers for the TEP that deviated from “official” rate tables.<sup>68</sup> The Air Force then issued clarifications to some offerors, asking, for example, for one to correct evaluated rates, and another to reconcile its printed and electronic versions of the proposed subcontractor rates.<sup>69</sup> The Air Force then selected ten proposals for award “without discussions.”<sup>70</sup>

The Dayton Research Institute protested to the GAO on the basis that it did not have a chance to revise its proposal like the others.<sup>71</sup> The GAO, in its review of the record, found that in the so-called clarifications, several offerors were allowed to make dozens of changes to the rates initially proposed. The multiple changes decreased an offeror’s TEP by \$6 million and increased another’s by \$6 million.<sup>72</sup> The GAO determined, as a result, that the mistakes in the initial proposals were not minor. In addition, the Air Force could not determine, by looking at the initial proposals, what the offerors’ ultimate intent were regarding the TEP.<sup>73</sup> Because the Air Force used the TEP to ensure price reasonableness and to ultimately make the source selection decision, the alleged communications “clearly constituted discussions” which the Air Force should have held with all offerors.<sup>74</sup>

### *Past Performance*

#### *Where’s the Dirt?*

In *Clean Harbors Environmental Services, Inc.*,<sup>75</sup> the GAO criticized a past performance evaluation for failing to consider the relevancy of the work of the incumbent. In addition, the GAO stated that, to analyze the relevancy of past performance, an agency should do more than just average the numerical ratings of submitted past performance questionnaires.<sup>76</sup>

The National Institutes of Health (NIH) issued a RFP for comprehensive chemical and low-level radioactive waste management for its main campus.<sup>77</sup> The NIH would make a best value selection looking at the following factors, in descending order of importance: technical, cost/price, and past performance.<sup>78</sup> Offerors would submit five contracts completed within the past two years, as well as current contracts similar in nature. The NIH would consider the “currency and relevance of the information, source of the information, context of the data, and general trends in the offeror’s performance.”<sup>79</sup> The source selection decision was between Clean Harbors and Clean Venture. The source selection authority selected Clean Venture, since the proposals were deemed to be technically equal, both received “satisfactory” past performance ratings, and Clean Venture offered a cost savings.<sup>80</sup>

Clean Harbors challenged the past performance evaluation. The GAO looked at the past performance evaluation to see if it was fair, reasonable and in accordance with the evaluation scheme, and if it was “based on relevant information sufficient to make a reasonable determination.”<sup>81</sup> The GAO agreed with Clean Harbors, stating that the NIH failed to analyze the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> The Air Force used two different sets of pricing tables: one for evaluation and one used for the resulting contract. *Id.* at 11.

<sup>69</sup> *Id.* at 6.

<sup>70</sup> *Id.* at 7.

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

<sup>72</sup> *Id.* at 8.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 9.

<sup>75</sup> Comp. Gen. B-296176.2, Dec. 9, 2005, 2005 CPD ¶ 222.

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.* at 1.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 3.

relevance of the past performance questionnaires and solely “considered the scores derived from the questionnaire responses received for the two firms.”<sup>82</sup> The GAO criticized the NIH’s evaluation of the relevancy of the past performance information, stating that Clean Venture’s references appeared to be smaller and less complex than the solicitation, while Clean Harbor’s evaluation received no weight for the experience of being the incumbent.<sup>83</sup>

### *The Wright Weight of Experience*

In *United Paradyne Corp.*,<sup>84</sup> the GAO criticized the Air Force’s past performance methodology as improper because its mechanical application of numerical scores resulted in skewed final ratings. The Air Force issued a RFP for fuels management services at Wright-Patterson Air Force Base. The basis for award was a price/past performance tradeoff.<sup>85</sup> The RFP indicated that the ratings would be based on performance confidence, a mix of relevance and experience. The Air Force chose Four Winds Services, which had a lower price, but a lower past performance rating, than United Paradyne.<sup>86</sup>

United Paradyne, the incumbent, submitted a protest to the GAO, stating that the Air Force did not properly evaluate its performance at a highly similar contract in Puerto Rico, or did not give proper credit to the company for its excellent performance in other contracts.<sup>87</sup> The GAO looked at the Air Force’s undisclosed past performance methodology with critical eyes. The Air Force averaged its evaluation of relevance into an overall rating, and then integrated that overall rating with the past performance rating, based on the point scores from the reference’s questionnaires. The end result was incongruous; essentially a contractor with four excellent highly relevant contracts would be rated higher than a contractor with four excellent highly relevant contracts and four excellent non-relevant contracts (which would bring down his total average).<sup>88</sup> In addition, the methodology gave equal weight to United Paradyne’s excellent performance as an incumbent as its performance on non-relevant contracts.

The GAO, ultimately, would have preferred a more thorough analysis of individual contracts rather than lumping all the contracts together in the Air Force’s mechanical fashion.<sup>89</sup> The GAO finally criticized the Air Force for asking for references concerning terminated contracts, ironically under the heading “Relevant Contracts” and not evaluating the offeror’s past performance under those contracts on the ground that they were “irrelevant.”<sup>90</sup>

### *Price Evaluation*

#### *The Pit and the Pendulum*

The GAO sustained a protest in *R&G Food Service, Inc., d/b/a Port-A-Pit Catering*,<sup>91</sup> holding that the agency’s price evaluation was faulty when it only looked at unit prices without comparing the overall cost estimates. The Forest Service’s National Interagency Fire Center issued a RFP for mobile food services for field locations during wildland fires. The RFP contemplated multiple awards of fixed-price requirements contracts for a base year and four option years.<sup>92</sup> Offerors were required to submit unit prices for meal services, mileage, and handwashing units for the requirements contract.<sup>93</sup> The source

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

<sup>83</sup> *Id.*

<sup>84</sup> B-297758, 2006 U.S. Comp. Gen. LEXIS 46 (Mar. 10, 2006).

<sup>85</sup> *Id.* at \*2-\*3. There were three evaluation factors: mission capability, past performance, and price. The RFP evaluated mission capability as acceptable/unacceptable. *Id.* at \*2.

<sup>86</sup> *Id.* at \*3.

<sup>87</sup> *Id.* at \*4.

<sup>88</sup> *Id.* at \*12.

<sup>89</sup> *Id.* at \*13.

<sup>90</sup> *Id.* at \*14.

<sup>91</sup> Comp. Gen. B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ 194.

<sup>92</sup> *Id.* at 1.

<sup>93</sup> *Id.* at 2. The offerors also submitted unit prices for additional refrigeration storage space, additional tents and seating, additional tents and seating, and supplemental food and beverage items for a blanket purchase agreements. *Id.*

selection official made contracts awards to twelve offerors for twenty-one field locations; Port-A-Pit received no awards because the Forest Service determined that its prices were not fair and reasonable.<sup>94</sup>

Port-a-Pit submitted a protest arguing that the determination was based on only one element of its offer, mileage price, and its overall price could have been reasonable based on lower unit prices in the other areas.<sup>95</sup> The GAO agreed, holding that the Forest Service's price evaluation did not reflect the actual cost of the offeror's proposals.<sup>96</sup>

The GAO felt that a price reasonableness analysis should also look at quantity estimates and agreed with Port-a-Pit that its overall cost may have been lower depending on the relative percentages of the elements of the contract.<sup>97</sup> Since Port-A-Pit had a higher mileage price but lower meal and sink prices than the awardee, the offer could have been competitive if the Forest Service had used historical data to create realistic estimates to better conduct the price reasonableness evaluation.<sup>98</sup> Limiting the evaluation to analyzing the unit prices in isolation resulted in an improper basis to consider the proposed costs to the government.<sup>99</sup>

### *Cost Realism*

#### *Serco-stantial Evidence*

The GAO, in *Serco, Inc.*,<sup>100</sup> informed agencies that cost realism should not be done in a vacuum when evaluating proposals. The U.S. Navy Space and Naval Warfare Systems Command (SPAWAR) issued a RFP for various support services for the maintenance, modernization, and new system installation for the command, control, communications, computer, intelligence, surveillance and reconnaissance (or C4ISR) requirements on the U.S. west coast.<sup>101</sup> The RFP called for the award for ID/IQ performance-based contract for all requirements. Non-price evaluation factors would be significantly more important than price; the key non-price evaluation factors assigned points were: understanding of work-sample tasks, and management plan.<sup>102</sup> Offerors were also required to respond to sample tasks which would be evaluated for cost/price.<sup>103</sup>

The Navy received two timely proposals: Serco and AMSEC. After reviewing the evaluation and realizing that there was some confusion regarding the sample tasks, the SPAWAR amended the RFP to disclose the Independent Government Estimate (IGE), conduct discussions, and request revised proposals.<sup>104</sup> The amended RFP warned offerors that unsubstantiated estimates would result in cost realism adjustments<sup>105</sup> and may affect the offeror's technical evaluation.<sup>106</sup>

AMSEC's revised proposal did not use the IGE in its staffing estimate and relied on its initial proposal along with a written explanation of how the staffing levels were calculated.<sup>107</sup> The SPAWAR found the explanation unsatisfying and

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<sup>94</sup> *Id.* at 3.

<sup>95</sup> *Id.* at 3-4.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 6-7.

<sup>98</sup> *Id.* at 7.

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

<sup>100</sup> Comp. Gen. B-298266, Aug. 9, 2006, 2006 CPD ¶ 120. Serco filed the protest on behalf of Resource Consultants, Inc.; the Navy conceded that Serco had standing as the parent firm. *Id.* at 1. For the sake of clarity, this note will refer to Serco as the offeror.

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

<sup>102</sup> The evaluation factors were: corporate experience, past performance, management plan, understanding of work-sample tasks, small business participation, cost/price, professional employee compensation plan, and small business subcontracting plan. *Id.* at 2.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 3.

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

<sup>106</sup> *Id.* at 4.

<sup>107</sup> *Id.* at 5.

normalized AMSEC's evaluated cost to reflect the IGE.<sup>108</sup> Despite this increase in overall price, the Navy awarded the contract to AMSEC because, as the source selection official stated, there was no "significant risk."<sup>109</sup>

Serco challenged the evaluation, stating that the cost realism adjustment should have affected the evaluation of AMSEC's understanding of work and management plan since the proposed staffing levels showed a fundamental misunderstanding of the requirements.<sup>110</sup> The GAO agreed, stating that the judgment that the offeror's staffing levels were unrealistically low should have been reconciled with the positive assessment of the technical approach.<sup>111</sup> This result is especially reinforced by the fact that the RFP amendment contained a requirement to review the effect cost realism adjustments on the ultimate technical evaluation.<sup>112</sup> Here the fact that the SPAWAR more than doubled AMSEC's sample task hours should have impacted the acceptability of the technical piece, or at least raised the risk assessment of AMSEC's proposal.<sup>113</sup>

### *Machines Challenge Mechanical Evaluation*

In *Metro Machine Corp.*,<sup>114</sup> the GAO rejected a challenge to the Navy's overall cost realism analysis while ultimately sustaining the protest based on the Navy's failure to account for a teaming agreement on the awardees probable cost of performance. The Naval Sea Systems Command (NAVSEA) issued a RFP for a cost-plus-award-fee contract for maintenance and modernization work on ships in Norfolk, Virginia.<sup>115</sup> The RFP proposed two notional work item packages (one for each type of ship) for which offerors were required to use the government's estimated labor hours and material costs. The offeror could deviate from these estimates with "clear and compelling evidence" that its proposed changes were proper and warranted.<sup>116</sup>

After discussions, the NAVSEA conducted a cost realism analysis of each offerors' final revised proposal by essentially using the government's estimates as the base and rejecting any attempted deviation.<sup>117</sup> After labor hours and material costs were normalized, the cost realism analysis essentially boiled down to the offeror's rate information<sup>118</sup> which was adjusted to create the Navy's best estimate for each proposal.<sup>119</sup>

Metro challenged this technique as a mechanical application of normalization which failed to take into account individual technical approaches.<sup>120</sup> The GAO disagreed, stating that the reasonableness of a cost realism evaluation does not need to "achieve scientific certainty."<sup>121</sup> All the government would need to show was that the evaluation was "reasonably adequate" and the agency's conclusions were "reasonable and realistic in view of other cost information reasonable available" to the government.<sup>122</sup> Given the government's declaration in the RFP that the Navy would use the government's estimates absent "clear and convincing" evidence to the contrary, the NAVSEA's approach was reasonable.<sup>123</sup> The GAO

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 6.

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

<sup>111</sup> *Id.* at 7.

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

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

<sup>114</sup> B-297879.2, 2006 U.S. Comp. Gen. LEXIS 87 (May 3, 2006).

<sup>115</sup> *Id.* at \*1-\*2. The RFP stated that award would be made to the best value based on technical factors and cost. *Id.* at \*3.

<sup>116</sup> *Id.* at \*7.

<sup>117</sup> *Id.* at \*14.

<sup>118</sup> The rate information consisted of the direct composite weighted labor rate, general and administrative, and subcontractor rates. *Id.* at \*14.

<sup>119</sup> *Id.* at \*14-\*15.

<sup>120</sup> *Id.* at \*17.

<sup>121</sup> *Id.* at \*20.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at \*25.

also rejected a challenge to the underlying evaluation scheme as untimely since the cost realism approach should have been challenged prior to the submission of proposals.<sup>124</sup>

The GAO agreed with Metro in the challenge to the cost realism evaluation of the individual awardee, Earl Industries, LLC. Metro argued that the NAVSEA failed to take into account potentially different subcontract direct labor rates that Earl would achieve as a result of its teaming agreement.<sup>125</sup> The Navy raised the question with Earl, but ultimately made no effort to capture the cost of the teaming agreement. The GAO noted that this was significant, not only because the NAVSEA noted that the teaming agreement was a strength of Earl's proposal, but also because the normalization scheme magnified the importance of individual offeror's labor rates.<sup>126</sup> Since the end result was that the NAVSEA "ignored an actual cost" of Earls' proposal, Metro's proposal was sustained on this ground.<sup>127</sup>

### *Nothing Ventured, Nothing Gained*

In *Information Ventures, Inc.*,<sup>128</sup> the GAO sustained a challenge to the government's normalization of costs and a contradictory evaluation which both praised and criticized proposed staffing levels. The Centers for Disease Control and Prevention (CDC) issued a RFP for a cost-plus-fixed-fee contract for information development and dissemination activities for priority cancer efforts for the Division of Cancer Prevention and Control (DCPC).<sup>129</sup> The RFP identified a project director position without identifying duties or responsibilities or suggested or minimum proposed hours.<sup>130</sup> An amendment did suggest a level of effort of about 25-30 hours per month.<sup>131</sup>

The CDC included the offeror and BRI Consulting Group in the competitive range.<sup>132</sup> During discussions, both offerors reduced the number of hours for the program director.<sup>133</sup> The agency conducted then a cost realism analysis of the final proposal revisions. The technical evaluation panel added hours to that position based on the government's estimate of the hours per year.<sup>134</sup> The CDC then awarded the contract to BRI based on its lower evaluated cost.<sup>135</sup>

After a protest, the CDC conducted a corrective action which included a reevaluation of the proposals and a cost analysis by the CDC Acquisition Oversight and Evaluation Branch (OEB). Although the OEB had some concerns regarding the proposed costs, it made no changes to the CDC's initial evaluations which were used in the new source selection determination which again awarded the contract to BRI.<sup>136</sup>

Information Ventures challenged the technical evaluation, stating that the CDC praised both offerors for having "more than adequate staff" in the technical evaluation<sup>137</sup> while both offerors' costs were increased because their "hours had been lowered to unrealistic expectations."<sup>138</sup> The GAO agreed, stating that the contradiction between the cost evaluation and technical evaluation resulted in flawed evaluations which warranted a new source selection decision.<sup>139</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at \*25-\*26.

<sup>126</sup> *Id.* at \*28.

<sup>127</sup> *Id.* at \*28-\*29.

<sup>128</sup> B-297276.2, B-297276.3, B-297276.4, 2006 U.S. Comp. Gen. LEXIS 47 (Mar. 1, 2006).

<sup>129</sup> *Id.* at \*1.

<sup>130</sup> *Id.* at \*13.

<sup>131</sup> *Id.* at \*15.

<sup>132</sup> *Id.* at \*3.

<sup>133</sup> *Id.* at \*13.

<sup>134</sup> *Id.* at \*19.

<sup>135</sup> *Id.* at \*4.

<sup>136</sup> *Id.* at \*5-\*6.

<sup>137</sup> *Id.* at \*8.

<sup>138</sup> *Id.* at \*9.

<sup>139</sup> *Id.* at \*11.

In addition, Information Ventures challenged the CDC's normalization of cost. The GAO again sided with the protestor, stating that the agency's mechanical normalization did not take into account different technical methods which offerors were free to propose based on the terms of the RFP.<sup>140</sup> A key fact was that the RFP suggested "25-30 hours per month" while the normalization assumed a minimum of sixty-six hours per month.<sup>141</sup>

### *Researching Copying Costs*

In a case discussed in last year's *Year in Review*,<sup>142</sup> the GAO denied a protest challenging an agency's upward adjustment to an offeror's proposed reproduction costs in *University Research Company, LLC*.<sup>143</sup> The Substance Abuse and Mental Health Services of the Department of Health and Human Services (HHS) issued a RFP to realign health information dissemination efforts under one contract.<sup>144</sup> The GAO sustained an initial proposal from University Research, based on the source selection authority's misstatement of an award recommendation.<sup>145</sup> Following a revised source selection decision, the GAO denied a second protest;<sup>146</sup> University Research then filed with the COFC which sustained the protest in one area normalized by the HHS: reproduction costs.<sup>147</sup>

The HHS reopened the competition on limited grounds, clarifying the requirement for reproduction work and seeking revised cost information in that area.<sup>148</sup> The HHS issued an amendment with significant upward revisions to the photocopying requirement.<sup>149</sup> University Research submitted a revised proposal which included a "two-tiered, fixed-price cap" pricing feature. The offer included a fixed price, for both color and black-and-white, for photocopying capped at one-twelfth of the total annual estimate. If the photocopying needs exceeded this figure, University Research raised its fixed price.<sup>150</sup> University Research based its cost estimate on the lower price, assuming that the HHS would balance its photocopying throughout the year.<sup>151</sup> IQ Solutions, the other competitor, offered separate costs for color and black-and-white photocopying with a detailed calculation concerning its estimates.<sup>152</sup>

In looking at the cost estimates, the HHS obtained historical data. Since the monthly limit would be exceeded in five months, the HHS recalculated University Research's costs. The source selection official did not change the technical scores, noting that photocopying represented less than ten percent of the total estimated costs.<sup>153</sup> Since both companies were essentially technically equal, the source selection official selected IQ, whose proposal cost \$7.3 million less.<sup>154</sup>

University Research again submitted a protest to the GAO, challenging the HHS's failure to alter the technical evaluation scores, the HHS's upward adjustment of the photocopying costs, and the agency's decision not to adjust IQ's proposed costs.<sup>155</sup> The GAO denied the protest, holding that the narrow photocopying revaluation would not affect the overall

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<sup>140</sup> *Id.* at \*19.

<sup>141</sup> *Id.* at \*29. The GAO also sustained a challenge to the final contract, which contained a ceiling rate for general and administrative costs which was not in BRI's final proposal revision. The GAO viewed this addition as a material change which should have triggered a new round of discussions. *Id.* at \*26.

<sup>142</sup> Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 38-39 [hereinafter *2005 Year in Review*].

<sup>143</sup> Comp. Gen. B-294358.8, B-294358.9, B-294358.10, Apr. 6, 2006, 2006 CPD ¶ 61.

<sup>144</sup> *Id.* at 2. The RFP was set aside for small businesses and HHS intended to award a cost-plus-award-fee contract for one year with four option years. The RFP identified four technical evaluation criteria including (1) understanding the project; (2) technical approach, (3) key personnel, and (4) management plan and facilities. *Id.*

<sup>145</sup> *University Research Co., LLC*, B-294358, B-29435.2, B-294358.3, B-294358.4, B-294358.5., Oct. 28, 2004, 2004 CPD ¶ 217.

<sup>146</sup> *University Research Co., LLC*, B-294358.6, B-294358.7, Apr. 20, 2005, 2005 CPD ¶ 83.

<sup>147</sup> *University Research Co., LLC v. United States*, 65 Fed. Cl. 500 (2005).

<sup>148</sup> *University Research*, 2006 CPD ¶ 61, at 5.

<sup>149</sup> *Id.* at 5-6.

<sup>150</sup> *Id.* at 6-7.

<sup>151</sup> *Id.* at 7.

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

<sup>153</sup> The reproduction costs were approximately \$4 to \$5 million out of a total contract between \$60 and \$65 million. *Id.* at 8.

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

<sup>155</sup> *Id.* at 10.

technical evaluation. Since reproduction was a small part of the total performance work statement, two-and-a-half lines out of a thirty-three page description, any changes in reproduction would be *de minimis* to the larger scheme.<sup>156</sup>

The GAO approved of the HHS's cost adjustment, stating that the agency should evaluate "contractor-imposed conditions on cost-control devices."<sup>157</sup> The two-tiered price approach "raised cost issues the agency needed to consider if it was not planning to make changes in how it managed its workload, which the agency was neither inclined, nor required, to do."<sup>158</sup>

The GAO denied the overall protest, essentially because, even if it had won each aspect of its allegations, IQ's proposal would still be \$1.2 million less than University Research's.<sup>159</sup> Since the proposals were essentially equal, it seemed doubtful that the HHS would select University Research's more expensive proposal.<sup>160</sup>

### *Seeking Closure*

In *EPW Closure Services, LLC; FFTF Restoration Co., LLC*,<sup>161</sup> the GAO sustained a challenge to a cost realism analysis that failed to show that the agency could justify the cost figures used in the source selection analysis. The Department of Energy (DOE) issued a RFP for the award of a cost-plus-incentive-fee contract to a small business for the deactivation and decommissioning of the Fast Flux Test Facility, a nuclear test reactor located in southeastern Washington State.<sup>162</sup> The RFP contemplated a best-value award considering both cost/fee and five technical/management evaluation criteria.<sup>163</sup> As part of the proposed cost, offerors were required to submit a fully supported target cost<sup>164</sup> including an allowance for contingencies.<sup>165</sup>

Three proposals made the competitive range: SEC Closure Alliance, EPW and FFTF Restoration. The DOE selected SEC Closure for the award since SEC Closure had a "slight advantage" over FFTF restoration "because of its schedule and its approaches to the other technical issues."<sup>166</sup> SEC Closure was the only offeror to offer a cost savings under the maximum allowed funding, although the other two proffered earlier completion schedules.<sup>167</sup> Both EPW and FFTF Restoration submitted protests to the GAO.<sup>168</sup>

FFTF Restoration challenged SEC Closure's contingency allowance. SEC Closure identified one hundred and five separate risks which were rated for probability, cost, or schedule impact and for which the company proposed a mitigation approach. SEC Closure also ran the risks through a simulation to arrive at a contingency allowance of \$14,274,050 with an eighty percent confidence level that the project cost would not exceed the offeror's proposed costs.<sup>169</sup>

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<sup>156</sup> *Id.* at 12.

<sup>157</sup> *Id.* at 14.

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

<sup>159</sup> *Id.* at 15.

<sup>160</sup> The GAO also dismissed additional allegations concerning adjusting IQ's costs as untimely even though the GAO noted that IQ would still be the lower-priced proposal. *Id.* at 15-16.

<sup>161</sup> B-294910, et al., Jan. 12, 2005, 2006 CPD ¶ 3.

<sup>162</sup> *Id.* at 2.

<sup>163</sup> The evaluation criteria were: (1) technical approach (weight of thirty percent), (2) key personnel, (fifteen percent with project manager weighed higher), (3) experience and past performance (each worth ten percent for a total of twenty percent), (4) environment, safety and health (fifteen percent), and (5) business management (twenty percent). *Id.* at 3.

<sup>164</sup> The offeror needed to show a target cost for each activity was shown in a work breakdown statement, the completion date, the target fee, the minimum fee, the maximum fee, the share line (ratio) for cost overruns or underruns, and a detailed basis of estimates. *Id.*

<sup>165</sup> The total contract target cost and target fee could not exceed \$43.5 million for fiscal year 2005 and \$46.1 million for each subsequent fiscal year. *Id.*

<sup>166</sup> *Id.* at 4.

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

<sup>168</sup> *Id.* at 6.

<sup>169</sup> *Id.* at 9.

The GAO noted that the evaluation of the contingency allowance was important since it was the main difference between the three proposal's evaluated costs which were wildly divergent.<sup>170</sup> The GAO's main concern with the agency's evaluation of these allowances was that the DOE appeared not to be able to verify any of the proposed costs and merely accepted the proposals' figures without question.<sup>171</sup> The GAO felt merely concluding that the offeror used a sound method to calculate the costs was not enough; the DOE's acknowledged limited review failed to adequately capture the difference between the offeror's approaches and was, therefore, unreasonable.<sup>172</sup>

The GAO also sustained RRTF's protest on the ground that, while the RFP made it clear that an accelerated schedule was desired, the DOE did not give offeror's an advantage for the "degree to which the offeror's proposed to accelerate completion ahead of the 2012 required site closure date. . . ."<sup>173</sup> The GAO also denied EPW's protest challenging the DOE's evaluation of a proposed technical approach as a weakness based on a risk that approval of the technical approach would not be granted by the lead regulatory agency.<sup>174</sup>

### Evaluations

In *Magnum Medical Personnel, A Joint Venture*,<sup>175</sup> the GAO sustained a protest in which the agency failed to evaluate the protestor on the same terms as the awardee. The Air Force issued a RFP for direct care clinical support services for Air Force Medical Treatment Facilities (MTF). The Air Force intended to award up to five ID/IQ contracts with a four-year base contract period and two three-year option periods.<sup>176</sup> The evaluation factor of mission capability had three subfactors, in descending order of importance: retain, recruit, and qualify.<sup>177</sup> The RFP required that the healthcare employees obtain security clearance in order to be qualified to work in the MTF; the Air Force also performed a risk assessment for each subfactor.<sup>178</sup>

The Air Force rated Magnum, whose offer had the lowest price, as having a marginal mission capability and a moderate risk under the qualify subfactor.<sup>179</sup> This rating ultimately doomed Magnum's chance for selection for award, since the source selection authority selected the five most highly rated offerors for award.<sup>180</sup>

Magnum challenged the evaluation, stating that an evaluator who questioned its internal security process raised similar questions with an awardee's proposal which had similar faults.<sup>181</sup> The GAO agreed, stating that Magnum provided the same information as the awardee while arguably providing more detail regarding an internal process for complying with the RFP's security requirements.<sup>182</sup> The GAO noted that the awardee only added the word, "security," in flowcharts and milestones, while Magnum used a narrative description to show how it would issue credentials to its workers.<sup>183</sup> The GAO concluded that it was not reasonable for the Air Force to give Magnum a lower rating than the awardee.<sup>184</sup>

<sup>170</sup> FFTF Restoration proposed \$22,114,000 with a fifty percent confidence rating; EPW proposed \$25,836,000. The agency cost estimate was 18.3 percent. *Id.* at 10.

<sup>171</sup> The agency's contingency analysis noted that "the (offeror's) techniques used to arrive (at the final calculation) . . . and the amount of information that was provided varied, making it difficult to assess whether any of the three offerors assessed the variability more accurately than the others. *Id.* The testimony of the source evaluation board was ". . . if you're looking at a hundred different categories, I mean, it requires a lot of analysis. . . . So we accepted the information that was provided by the offerors. . ." *Id.* at 11.

<sup>172</sup> *Id.* at 12.

<sup>173</sup> *Id.* at 8.

<sup>174</sup> *Id.* at 16. The technical approach dealt with sodium residue removal; EPW proposed to leave 350 gallons or less in the inside of the vessels and piping. *Id.* at 14.

<sup>175</sup> B-297687.2, 2006 U.S. Comp. Gen. LEXIS 105, June 20, 2006.

<sup>176</sup> *Id.* at \*3.

<sup>177</sup> Mission capability and past performance were equal in importance, and proposal risk was more important than price. *Id.*

<sup>178</sup> *Id.* at \*7.

<sup>179</sup> *Id.* at \*9-\*10.

<sup>180</sup> *Id.* at \*18.

<sup>181</sup> *Id.* at \*19-\*20.

<sup>182</sup> *Id.* at \*22-\*23.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at \*24-\*25.

*Just for Kic(k)s*

The GAO sustained a protest in *KIC Development, LLC*,<sup>185</sup> holding that the agency could not evaluate a proposal as technically acceptable for relying on a subcontractor to meet the RFP's experience requirement. The Department of Housing and Urban Development issued a RFP for lead evaluation services for single-family properties.<sup>186</sup> The RFP contemplated award to the lowest-price, technically acceptable proposal in four geographical areas: Atlanta, Denver, Philadelphia, and Santa Ana.<sup>187</sup> Under the experience and past performance factor, the RFP stated, "[t]he Offeror and/or its proposed key personnel and/or its proposed subcontractors must have performed the same or similar service as required by the solicitation over approximately the last three years."<sup>188</sup>

The technical evaluation panel judged KIC's proposal to be technically unacceptable since "KIC relies completely on a sub for the work;" based on this evaluation, KIC did not receive the award for the Atlanta region.<sup>189</sup> KIC challenged this evaluation because it met this requirement through a properly-committed subcontractor.<sup>190</sup>

The GAO agreed with the protestor, holding that the HUD strayed from the stated evaluation scheme. The GAO found that the term "and/or" could be met jointly or by only one of the named entities and the HUD could not penalize KIC for relying on a subcontractor.<sup>191</sup>

*Valid Passports*

The COFC found that the Government Printing Office (GPO) used undisclosed criteria in a binding manner and was therefore required to disclose that criteria to all competitors in *OTI America v. United States*.<sup>192</sup> The GPO issued a solicitation for a new electronic U.S. passport; the GPO set up the procurement in stages in which competitors would be eliminated from the competition.<sup>193</sup> OTI joined a final field of eight contractors after filing a GAO protest, withdrawn after corrective action by the GPO.<sup>194</sup>

During stage two, the GPO tested samples from all contractors. The GPO issued a "cure notice" to OTI concerning test failures of sample electronic passport book covers.<sup>195</sup> OTI submitted a second set that contained a different flaw in an adhesive material. OTI discovered that it had received the wrong ingredient from a supplier, but the GPO refused to accept the new sample. The GPO then informed OTI that it would be eliminated from stage two.<sup>196</sup>

OTI filed a protest with the GAO which was denied.<sup>197</sup> OTI then filed a complaint with the COFC, arguing that GPO used an internal document, labeled "E-Passport Selection Guidance," as undisclosed evaluation criteria in contravention of the *FAR*. The GPO argued that the Selection Guidance was merely "an internal set of guidelines" which did not need to be disclosed in the initial solicitation.<sup>198</sup>

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<sup>185</sup> Comp. Gen. B-297525.2, Jan. 26, 2006, 2006 CPD ¶ 27.

<sup>186</sup> *Id.* at 1.

<sup>187</sup> *Id.* at 2.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 4.

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

<sup>191</sup> *Id.* at 5.

<sup>192</sup> 68 Fed. Cl. 646 (2005).

<sup>193</sup> *Id.* The solicitation contained mandatory CLINs with guaranteed minimum amounts. The goal was either to award the contract to a single company or to multiple awardees using optional CLINs. *Id.* at 649.

<sup>194</sup> *Id.* at 650.

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

<sup>196</sup> *Id.* at 651.

<sup>197</sup> *OTI America*, Comp. Gen. B-295455.3, 2005 CPD ¶ 157.

<sup>198</sup> *OTI*, 68 Fed. Cl. at 652.

The COFC agreed with OTI, finding that the Selection Guidance, never published to any of the contractors,<sup>199</sup> was used as evaluation criteria to assess proposals. Although the protest involved test and evaluation in a second stage of a procurement, the COFC applied “principles pertinent to evaluation criteria in procurements” since the evaluative stages ultimately would result in the award of a contract for “full agency deployment.”<sup>200</sup>

The COFC agreed with a GAO case, *Telos Field Engineering*,<sup>201</sup> which struck down an undisclosed point system which had been used in a binding fashion against competitors. The COFC found that the GPO had used the Selection Guidance as binding evaluation criteria without prior notice to the competing contractors.<sup>202</sup> The COFC also criticized the Selection Guidance as being internally inconsistent, since the elimination rules were mandatory and discretionary in different areas of the Guidance.<sup>203</sup> In a redacted section, the COFC found that the GPO had also applied the Selection Guidance in an inconsistent manner.<sup>204</sup>

The COFC also found that the contracting officer failed to use independent judgment in eliminating OTI on the basis of the conclusions by the technical evaluation team.<sup>205</sup> The COFC focused on the contracting officer’s testimony that she had “no idea” concerning a question about whether a clerical error would result in elimination under one of the rules of the Selection Guidance.<sup>206</sup>

The COFC declined to issue an injunction of the competition; however, the COFC instructed the GPO to accept OTI’s product as a restored competitor of the competition to see if OTI should graduate to the second stage of the procurement.<sup>207</sup>

### *Getting Hung Up on the Numbers*

In *BAE Technical Services, Inc.*,<sup>208</sup> the GAO sustained a protest in which the agency applied two different standards in the evaluation process. The Air Force issued a RFP for a cost-plus-award fee contract for the operations and maintenance of the Eglin Test and Training Complex in Eglin Air Force Base, Florida.<sup>209</sup> The protest surrounded the evaluation of the program management subfactor of the mission capability factor of the “best value” award decision.<sup>210</sup> The Air Force intended to evaluate “innovation and efficiency initiatives . . . that would produce reasonable qualitative improvements, cost reductions, or cost avoidance.”<sup>211</sup>

Three offerors provided final proposal revisions, including BAE, the incumbent; and InDyne, the awardee.<sup>212</sup> The critical difference between BAE and InDyne was within the program management, agility, and organizational conflict of interest subfactors. The key aspect for both program management and agility was plans to reduce full-time equivalent (FTE) personnel over the life of the contract.<sup>213</sup>

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<sup>199</sup> *Id.* at 653.

<sup>200</sup> *Id.* at 655.

<sup>201</sup> Comp. Gen. B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240.

<sup>202</sup> *OTI*, 68 Fed. Cl. at 656.

<sup>203</sup> *Id.* Rule 2 stated that a product may be eliminated if it fails more than once in a single phase; Rule 4 stated that a second failure would result in a mandatory elimination unless the product was in “significant compliance,” and Rule 3 stated that a second failure which was a different problem would receive a cure notice and an opportunity to correct. *Id.*

<sup>204</sup> *Id.* at 657.

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

<sup>206</sup> *Id.* at 658.

<sup>207</sup> *Id.* at 660.

<sup>208</sup> B-296699, 2005 U.S. Comp. Gen. LEXIS 250 (Oct. 5, 2005).

<sup>209</sup> *Id.* at \*1-\*2.

<sup>210</sup> *Id.* at \*2-\*3. There were four evaluation factors: Mission capability and past performance were of equal importance and each was more important than proposal risk; mission capability, past performance and proposal risk, when combined, were significantly more important than cost/price. *Id.* at \*3.

<sup>211</sup> *Id.* at \*3-\*4.

<sup>212</sup> *Id.* at \*4.

<sup>213</sup> *Id.*

BAE used a business process reengineering program to develop its FTE personnel reduction and efficiency plans;<sup>214</sup> the Air Force did not trust the modeling methodology of its program and doubted BAE's ability to achieve its planned reduction in FTEs.<sup>215</sup> The GAO did not find the Air Force's concerns about the program to be unreasonable. The main problem was that a similar type of scrutiny was not applied to InDyne's FTE reduction plans.<sup>216</sup>

As the GAO stated, while BAE at least tried to present a coherent analytical calculation, InDyne's calculations used general references to prior attempts, e.g. "we have always successfully employed continuous improvement on our contracts."<sup>217</sup> As the chairman for the source selection evaluation team testified, "we didn't get hung up on the numbers."<sup>218</sup> The scrutiny applied to BAE's methodology should have been extended to InDyne's generalities.<sup>219</sup>

### *A Weird Evaluation*

The GAO disapproved of an agency's evaluated weaknesses of a proposal, finding them unsupported or unreasonable in *Intercon Associates, Inc.*<sup>220</sup> The General Services Administration (GSA) issued a RFP for a fixed-price ID/IQ contract for a comprehensive electronic forms system.<sup>221</sup> The GSA received eleven proposals, including eight in the competitive range. The agency awarded the contract to Information Analysis; Intercon, the incumbent, submitted a protest to GAO, challenging the evaluation of its proposal.<sup>222</sup>

The GAO agreed with Intercon, finding that the GSA's brief evaluation record, which included initial evaluation scoring sheets, no consensus evaluation report, a brief summary of advantages and disadvantages of each offer's operational demonstration, and a brief source selection document, was "either factually incorrect, internally contradictory, or so cryptic that (the GAO was) unable to discern either the basis for the evaluators' concerns or how their concerns related to the solicitation's evaluation criteria."<sup>223</sup>

The GAO found that the GSA's determination that Intercon's proposal could not generate "true" electronic forms to be unsupported.<sup>224</sup> In addition, the GAO found that the GSA's conclusion that the file sizes of electronic forms were larger than Information Analysis's proposal was unsupported by comparing the offeror's file size with the Adobe Acrobat forms used by the awardee's.<sup>225</sup> The GAO also dismissed an assessment of the wizard function which shows a split screen with the electronic form and a text window as "weird," stating that it was not clear what the evaluator meant while noting that the source selection decision referred to Intercon's "nice wizard function."<sup>226</sup> Finally, the source selection decision criticized Intercon's proposal stating that it required a separate application that needed to be downloaded and was not available to most agencies.<sup>227</sup> The GAO noted that Adobe Acrobat, the awardee's preferred program, also needed to be downloaded and that thirty-seven different federal agencies had installed seventy-seven thousand copies of the software for Intercon's product, Accessible FormNet.<sup>228</sup>

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<sup>214</sup> *Id.* at \*7-\*8.

<sup>215</sup> *Id.* at \*19-\*20.

<sup>216</sup> *Id.* at \*22.

<sup>217</sup> *Id.* at \*23.

<sup>218</sup> *Id.* at \*16.

<sup>219</sup> In a redacted section, the GAO applied similar logic to the Air Force's evaluation of agility. *Id.* at 11-12. The GAO recommended that the Air Force reopen discussions and request revised proposals. *Id.* at 12.

<sup>220</sup> Comp. Gen. B-298282, B-298282.2, Aug. 10, 2006, 2006 CPD ¶ 121.

<sup>221</sup> *Id.* at 1.

<sup>222</sup> *Id.* at 2.

<sup>223</sup> *Id.* at 3.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 5. For example, the file size of the Standard Form 278 for Accessible FormNet, used by the protestor, was 407.6 kilobytes while the PDF version is 1799.3 kilobytes. *Id.*

<sup>226</sup> *Id.* at 5-6.

<sup>227</sup> *Id.* at 6.

<sup>228</sup> *Id.* The GAO also addressed a criticism of the use of digital certificates, stating, *inter alia*, that the RFP did not address a preference regarding this detail. *Id.* at 7. Also, in a heavily redacted section, the GAO found that the GSA's evaluation of Intercon's key personnel proposal was unsupported. *Id.* at 8.

*The Mystery of the Spherix Revisited*

In a case discussed in last year's *Year-in-Review*,<sup>229</sup> the GAO again sustained a protest of the U.S. Forest Service's solicitation for the National Recreation Reservation Service (NRRS) in *Spherix, Inc.*<sup>230</sup> The GAO issued a RFP for a multi-year fixed-unit-price requirements contract with six yearly options for the NRRS, which is a one-stop reservation system for the public use of recreational facilities and activities on federal lands.<sup>231</sup> The basis for award was a cost-technical tradeoff with the following evaluation factors in descending area of importance: technical approach, management approach, reservation system demonstration, past performance and price.<sup>232</sup>

After the sustained protest, the Forest Service amended the RFP and reopened the competition. The Forest Service narrowed the competitive range between Spherix, the incumbent contractor for the National Park Reservation Service run by the National Park Service, and ReserveAmerica, the NRRS incumbent contractor.<sup>233</sup>

Spherix challenged the Forest Service's award of the contract to ReserveAmerica, arguing that the agency's evaluation of its proposal was unreasonable. The GAO agreed, finding that the agency did not fairly consider the differences between the two proposals<sup>234</sup> and that the source selection authority had an incorrect understanding of the relative strengths of the two proposals.<sup>235</sup>

First, the GAO determined that the agency misunderstood Spherix's proposal concerning field control of inventory. The agency's report stated that the inventory management capability did not address tours and ticketing. Spherix's proposal, however, states that its capability applies to both recreation facilities and recreation activities.<sup>236</sup> Second, the agency's report mistakenly asserted that Spherix's proposal did not offer automatic uploading of data. In fact, even though ReserveAmerica received a more favorable assessment, the GAO felt that Spherix's proposal offered more offline capabilities than ReserveAmerica.<sup>237</sup>

In addition, ReserveAmerica received credit for proposing an alternative implementation plan.<sup>238</sup> In response to a question from Spherix, the Forest Service seemed to imply that the agency wanted a one-time deployment of the system. The GAO felt that this statement misled Spherix into not submitting an alternative plan.<sup>239</sup>

The GAO also noted that the source selection decision may have exaggerated a strength for ReserveAmerica in the "ease of use" discriminator involving customization of the system. At the hearing, a software consultant for ReserveAmerica testified that the requested customization was as easy as picking which shirt or tie to wear, and that the Forest Service's use of this aspect as a key discriminator was "silly."<sup>240</sup> The GAO noted that ReserveAmerica's incumbency may have given the company an unfair advantage in this area.<sup>241</sup>

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<sup>229</sup> 2005 Year in Review, *supra* note 142, at 28.

<sup>230</sup> Comp. Gen. B-294572.3, B-294572.4, Oct. 20, 2005, 2005 CPD ¶ 183.

<sup>231</sup> *Id.* at 2.

<sup>232</sup> *Id.* at 3. The technical factors were significantly more important than price, with price becoming more important if the differences in technical matter were narrow. *Id.*

<sup>233</sup> *Id.* at 4.

<sup>234</sup> *Id.* at 9.

<sup>235</sup> *Id.* at 8.

<sup>236</sup> *Id.* at 6.

<sup>237</sup> *Id.* at 7.

<sup>238</sup> *Id.* at 8.

<sup>239</sup> *Id.* at 9.

<sup>240</sup> *Id.* at 10.

<sup>241</sup> *Id.* The GAO also noted that there was some confusion about the solicitation's requirement for offline capability. The GAO sided with Spherix in its interpretation that offline capability should be greater than the interpretation of the Forest Service and ReserveAmerica. *Id.*

### *Turning Over a Green Leaf*

In a procurement covered in last year's *Year in Review*,<sup>242</sup> the GAO sustained a protest in *Greenleaf Construction Company*,<sup>243</sup> finding that an alleged "bait and switch" of proposed key personnel rendered the evaluation process unfair. The HUD issued a RFP for the award of fixed-unit-price ID/IQ contract for single-family home management and marketing services.<sup>244</sup> The protest involved the award of the contract for properties in the Ohio/Michigan area.<sup>245</sup> Following a COFC decision, the HUD awarded the contract to Chapman Law Firm. Greenleaf then filed a protest with the GAO, alleging that the evaluation was improper.

The GAO agreed, finding that Chapman had notice that two key personnel would be unavailable for work under the awarded contract at least two months prior to the HUD's final evaluation.<sup>246</sup> In addition, Chapman knew, at around the same time period, that the company would use a different software package and company than proposed in its initial offer.<sup>247</sup> In addition, the contracting officer failed to take into account Chapman's sale of one of its principal assets, which would have changed a positive DCAA audit, relied upon by the contracting officer, on Chapman's responsibility to perform the contract.<sup>248</sup>

### *Hitting the Golf Ball FAT*

In *Novex Enterprises*,<sup>249</sup> the GAO found that an agency unreasonably selected an awardee based on an evaluation that failed to fully consider the overall impact of different delivery schedules, a key factor of the solicitation. The Defense Logistics Agency (DLA) Defense Supply Center in Columbus, Ohio, issued a RFP for an urgent requirement for 15,887 steel side rings.<sup>250</sup> The RFP contained two required delivery schedules: if the part required a first article test (FAT), the FAT would be completed in forty-five days, the company would deliver 3000 rings in 165 days, and 3000 rings every thirty days thereafter until complete. If the DLA waived the testing requirement, the required schedule was 3000 rings in ninety days and 3000 rings every thirty days thereafter until complete.<sup>251</sup> The RFP stated that preference may be given for "offered deliveries that are shorter than the required delivery."<sup>252</sup>

Novex proposed a unit price of \$38.50 and two delivery schedules: if the DLA waived the FAT requirement, Novex could provide 3000 rings in 120 days, with 3000 rings every thirty days thereafter; if FAT was not waived, it would comply with the proposed government schedule.<sup>253</sup> Badger, the awardee, relied on a FAT waiver proposing to deliver 3000 initial units in 150 days, with 1800 rings every thirty days until complete; and a unit price of \$39.11.<sup>254</sup> Essentially, Badger would provide the required units in sixty more days than the proposed government schedule, while Novex's schedule, which mirrored the government estimate, was fifteen days behind Badger's since the DLA ultimately did not waive FAT for Novex.

The DLA selected Badger, the only offeror for whom FAT was waived. The source selection decision stated that, since the DLA had a limited supply, the extra time needed for the FAT approval for the other offerors and the urgency of the requirement gave Badger the advantage, since the DLA estimated that FAT would take at least seventy-five days.<sup>255</sup>

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<sup>242</sup> 2005 *Year in Review*, *supra* note 142, at 24.

<sup>243</sup> Comp. Gen. B-293105.18, B-293105.19, Jan. 17, 2006, 2006 CPD ¶ 19.

<sup>244</sup> The contract supervised the maintenance and sale of foreclosed properties under the Federal Housing Authority's role in administering the home mortgage insurance program. *Id.* at 2.

<sup>245</sup> The contract was a small business cascading set-aside. *Id.*

<sup>246</sup> *Id.* at 7.

<sup>247</sup> *Id.* at 10. The court also sustained an OCI allegation.

<sup>248</sup> *Id.* at 15.

<sup>249</sup> B-297660, B-297660.2, 2006 U.S. Comp. Gen. LEXIS 41 (Mar. 6, 2006).

<sup>250</sup> *Id.* at \*2.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at \*3.

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

<sup>254</sup> *Id.* at \*4.

<sup>255</sup> *Id.* at \*4-\*5.

Novex challenged the review, stating that Badger's offer did not meet the required delivery schedule and should not be eligible for award.<sup>256</sup> The GAO agreed, finding that the Badger's offer did not seem to be the best value. The GAO felt that Novex would complete the entire contract of 15,887 steel rings seventy-five days earlier than Badger. In addition, a gain of fifteen days for the initial delivery of the 3000 units did not seem to be worth the additional cost of Badger's proposal.<sup>257</sup> The GAO recommended that, given the urgency of the requirement, Badger should be allowed to furnish the initial quantity, but the DLA should redo the RFP for the remaining steel side rings.<sup>258</sup>

### *Improper Weights for YORK*

In *YORK Building Services*,<sup>259</sup> the GAO found that the Department of Agriculture (USDA) improperly converted a RFP into a lowest-price, technically acceptable procurement due to a thin source selection document and summary evaluation. The USDA issued a RFP for janitorial and recycling services for buildings in Washington, D.C.<sup>260</sup> The RFP emphasized technical superiority and listed three technical factors in descending order of importance: technical approach, management plan, and past performance.<sup>261</sup> Out of twenty-five proposals, the USDA found twenty-three technically acceptable and included only YORK and Obsil, the awardee, in the competitive range. After discussions, the source selection authority found both proposals technically equal and selected Obsil due to its lower price.<sup>262</sup>

YORK submitted a protest to the GAO, alleging that the USDA improperly gave technical approach and management plan equal weight.<sup>263</sup> The GAO agreed, finding that the evaluators gave both factors a maximum score of thirty-five points, which was contrary to the RFP. In addition, the evaluators seemed to strive for technical acceptability, and the final report, which was only one page and two lines in length, only confirmed technical acceptability.<sup>264</sup>

In addition, the GAO felt that the source selection authority relied upon the point scores in a mechanical fashion in awarding the contract to Obsil.<sup>265</sup> The source selection authority total evaluation of Obsil was that "Obsil, Inc. clarified all technical concerns and submitted final proposal revisions that are inclusive of work statement requirements." Her evaluation of York was that the company "too has responded satisfactorily to the panel concerns and demonstrates its capacity to perform required services and its proposal is substantially equal to Obsil."

Other than that, the GAO found that the record contained no discussion of the technical evaluation factors, and the source selection official and the technical evaluators looked at the final proposal revisions "merely to verify their acceptability, rather than to assess relative quality or to evaluate whether either proposal was superior to the other under the evaluation factors and weightings required by the RFP."<sup>266</sup> The GAO also dismissed the agency's supplemental argument which contained "new rationales, based on a hypothetically correct evaluation, for which there is no support in the contemporaneous record."<sup>267</sup>

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<sup>256</sup> *Id.* at \*6.

<sup>257</sup> *Id.* at \*8-\*9. The GAO noted that in an alternative dispute resolution submission, the DLA proposed different rationale but gave little weight to this submission since it was made "in the heat of litigation." *Id.*

<sup>258</sup> *Id.* at \*9-\*10.

<sup>259</sup> Comp. Gen. B-296948.2, B-296948.3, B-296948.4, Nov. 3, 2005, 2005 CPD ¶ 202.

<sup>260</sup> *Id.* at 1.

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

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

<sup>263</sup> *Id.* at 3.

<sup>264</sup> *Id.* at 5.

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

<sup>266</sup> *Id.* at 7.

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

## Simplified Acquisitions

### *Micro-Purchase Threshold Raised to \$3,000*

The Civilian Agency Acquisition Council and the Defense Acquisition Council (FAR Councils) increased the maximum purchase threshold for micro-purchases from \$2,500 to \$3,000.<sup>1</sup> Section 807 of the Ronald Reagan National Defense Authorization Act of 2005 mandated this action directing that certain acquisition thresholds be adjusted in response to future inflation every five years.<sup>2</sup>

The micro-purchase threshold for construction contracts remains \$2,000 because Congress did not alter the threshold for applicability of the Davis-Bacon Wage Act. The Davis-Bacon Act still applies to contracts over \$2,000, so that remains the limit of the micro-purchase threshold for construction contracts.

Because many service contracts are subject to the Service Contract Act which applies to certain service contracts exceeding \$2,500, there is now a new, separate micro-purchase threshold of \$2,500 for contracts subject to the Service Contract Act.<sup>3</sup> Prior to adjusting the micro-purchase threshold up from \$2,500 to \$3,000, there was no need for a separate “service contracts micro-purchase threshold” because the old micro-purchase threshold of \$2,500 was consistent with the Service Contract Act.

The result of these threshold changes is that we now have three separate micro-purchase thresholds: \$2,000 (construction); \$2,500 (contracts subject to the Service Contract Act); and \$3,000 for all other contracts, in addition to the adjustments for contingency operations.<sup>4</sup> Congress did not change any of the micro-purchase contingency thresholds.

### *Optional FSS Schedules Are Merely a “Preferred Source,” Not a Required Source*

In a case where the Defense Logistics Agency elected not to order from a contractor’s optional Federal Supply Schedule (FSS), the Government Accountability Office (GAO) denied a protest against that decision finding that “while the list of required sources found in *FAR part 8.002* places non-mandatory FSS contracts above commercial sources in priority, it does not *require* an agency to order from the FSS.”<sup>5</sup>

In this case, Murray-Benjamin protested an unrestricted Request for Proposals (FRP) for fiber optic cables. Murray-Benjamin’s FSS schedule included fiber-optic cables and Murray-Benjamin believed that “instead of competing the requirement, the agency should have purchased certain of the RFP’s line items under its FSS contract.”<sup>6</sup> While that would seem to be a reasonable interpretation of the *FAR part 8.002*, the GAO instead relied on the GSA’s slightly more flexible policy interpretation of regulatory language to reach its conclusion.<sup>7</sup> The General Services Administration’s interpretation of *FAR part 8.002* is that the optional FSS schedules<sup>8</sup> are a:

preferred source of supply for Government agencies. As such, Government agencies should first consider whether it can best fulfill its requirements through the use of an FSS schedule contractor. Where it can do so, agencies should generally use the FSS schedule in accordance with the procedures set forth in 48 C.F.R. § 8.401 *et seq.*

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<sup>1</sup> Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 188, at 57,365 (effective 28 Sept. 2006). *See also* U.S. GEN. SVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. pt. 2.101 (July 2006) [hereinafter FAR]. Note that following Hurricane Katrina the President temporarily increased the micro-purchase threshold to \$250,000 under certain Office of Management and Budget (OMB) set conditions. That temporary increase ended on 3 October 2005 by memorandum from the Office of Management and Budget. *See* Chris Gossier, *OMB Restores \$2,500 Limit on Micro-Purchases*, FederalTimes.com, <http://www.federaltimes.com/index.php?S=1151186>.

<sup>2</sup> Pub. L. No. 108-375, 118 Stat. 1811 (2004).

<sup>3</sup> 71 Fed. Reg. 188 at 57,365. *See also* FAR, *supra* note 1, at pt. 2.101.

<sup>4</sup> 71 Fed. Reg. 188 at 57,365. *See also* FAR, *supra* note 1, at pt. 2.101.

<sup>5</sup> Murray-Benjamin Elec. Co., LLP, B-298481; 2006 U.S. Comp. Gen. LEXIS 143 (Sept. 7, 2006) (emphasis added).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> While FAR part 8.002 still lists mandatory and optional schedules as separate priority sources, mandatory schedules have not been in use by GSA since the mid-1990s. Today, all schedules are “optional use,” but are still listed as a required source of supply. Telephone interview with Roger Waldron, Acting Senior Procurement Executive, General Services Administration, in Washington, D.C. (Oct. 19, 2006).

However, assuming the agency concludes that it is not in its best interest to utilize an FSS schedule contract, the agency is free to meet its needs through an open-market procurement.<sup>9</sup>

The GAO further stated that “although an agency’s placement of an FSS order indicates that the agency has concluded that the order represents the best value . . . , the regulation does not establish a presumption that all FSS contractors represent the best value, such that the agency would be required to purchase from a FSS. . . .”

Interestingly, the GAO’s approach is similar to the DoD’s previous policy. The *DFARS* previously stated that the DoD should “make maximum use of the [optional] schedules. Other procedures may be used if further competition is judged to be in the best interest of the Government in terms of quality, responsiveness, or cost.”<sup>10</sup> This provision was deleted from the *DFARS* in 2006, however, as being apparently superfluous after revisions were made at *DFARS 217.7802* adding language to ensure “best value” in intragovernmental acquisitions which became effective in 2005.<sup>11</sup> It is unclear from the GAO decision how, if it all, this now-deleted *DFARS* clause affected the procurement.

#### *Even in Simplified Acquisitions, Government Must Still Follow Stated Evaluation Criteria*

The GAO reminded everyone that simplified acquisitions are just *simplified*, not simple, in *Low and Associates, Inc.*<sup>12</sup> In this case, the GAO recommended that the National Science Foundation (NSF) review their needs and then either amend their prior solicitation and reopen negotiations, or terminate award and resolicit where the NSF awarded a contract based on a proposal that failed to follow the agency requirements stated in the solicitation.<sup>13</sup>

The NSF awarded a contract to Dynamic Research Corporation (DRC) to provide visual information support services. The contract included seven required duty positions. The solicitation stated that only one of the duty positions could be performed off-site, but specified that both of the two web-designer positions would be required to work on-site.<sup>14</sup> Ignoring the solicitation’s requirement, the DRC’s proposal stated that one of its web designer positions would work off-site (in New York City). Nonetheless, its proposal received high marks for “personnel plan.”<sup>15</sup> By the time GAO considered this protest, the awardee was performing with individual personnel it had not proposed and *neither* of the web designers had ever worked on-site as required in the solicitation.<sup>16</sup>

The GAO stated that in a “competitive procurement, a proposal that fails to conform to one or more of the solicitation’s material requirement is technically unacceptable and cannot form the basis for an award.”<sup>17</sup> The GAO further stated that “an agency may not make an award, then immediately modify or waive the material requirements included in the solicitation which formed the basis of the competition; rather the awards must be based on the requirements and criteria disclosed in the solicitation.”<sup>18</sup> In addition to directing the NSF to re-open the competition in one form or another based on their redefined needs, the GAO also recommended that the agency reimburse the protester for its cost of filing and pursuing the protest, to include reasonable attorney’s fees.<sup>19</sup>

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<sup>9</sup> *Id.* at 3 n.4. The quoted language comes from a GAO memorandum that was prepared during consideration of this protest and is referenced in the decision footnote. See Memorandum, Michael J. Noble, Assistant General Counsel, Personal Property Division, GSA, for Paul E. Jordan, subject: Protest of Murrery-Benjamin Electric Co., B-298481 (Aug. 23, 2006) (on file with author).

<sup>10</sup> U.S. DEP’T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. 208.404-2, Optional Use (July 2006) [hereinafter *DFARS*].

<sup>11</sup> Defense Federal Acquisition Regulation Supplement; Competition Requirements for Federal Supply Schedules and Multiple Award Contracts, 71 Fed. Reg. 14,106 (Mar. 21, 2006).

<sup>12</sup> B-297444.2, 2006 U.S. Comp. Gen. LEXIS 82 (Apr. 13, 2006).

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 3.

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

<sup>16</sup> *Id.* at 6.

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

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.* at 8.

### *FSS Awards Must Match FSS Schedules*

The GAO sustained a protest in *Tarheel Specialties, Inc.*<sup>20</sup> where the Department of Homeland Security (DHS) awarded a labor-hour services contract to an FSS contractor despite the fact that the specific services required in the task order were not within the scope of the vendor's FSS contract.

In this case, the DHS solicitation was for nine labor positions under a labor-hour contract for a base year and four option years.<sup>21</sup> Among the nine labor positions were requirements for a site supervisor, a material management specialist, and a ballistic engineering technician. Because the labor categories in Tarheel's proposal were not listed or mapped to the labor categories in Tarheel's FSS contract, the agency properly determined that Tarheel's proposal was unacceptable.<sup>22</sup> Tarheel protested because it believed that the proposal of the awardee, USIS, also failed to map the required labor positions to their FSS contract.<sup>23</sup>

The proposal from USIS mapped the labor positions of site supervisor, material management specialist, and ballistic engineering technician to its FSS contract position of Administrative Assistant-Level II<sup>24</sup> and compared the attributes listed for the Administrative Assistant-Level II from USIS's schedule against the duty descriptions of the three positions in the RFP.<sup>25</sup> The GAO concluded that "the attributes and responsibilities of the Administrative Specialist-Level II position in USIS's FSS contract did not match the attributes and responsibilities" of these three positions as stated in the RFP.<sup>26</sup> The GAO concluded that "the mere fact that some of the duties of the RFP-required positions were administrative in nature is an insufficient basis to determine that these positions match up against the FSS contract" positions.<sup>27</sup> As a result, because non-FSS products and services may only be purchased using competitive procedures, the GAO sustained the protest and recommended termination of the contract awarded to USIS.

The lesson to take from this decision is that broadly-worded labor descriptions on an FSS schedule do not a guarantee that such descriptions can be used to fill a wide variety of task orders. The government must carefully match its requirements to the FSS schedule to ensure a proper fit before award. If the FSS schedules do not match the government's requirements, then the contracting officer must follow the full and open competition procedures to procure the non-matching FSS line items.

### *Small Business Set-Aside Requirements Not Applicable to FSS Purchases*

The GAO took the opportunity in *Global Analytic Information Technology Services, Inc.*,<sup>28</sup> to reiterate what the FAR already states—the small business set-aside requirements in FAR part 19 do not apply to FSS purchases.

In this case, the Army originally set-aside an FSS solicitation for management and support services for small business concerns.<sup>29</sup> A task order was awarded to the low bidder but, upon receipt of a size protest, the SBA determined the awardee was not a small business.<sup>30</sup> The government then changed its procurement strategy and posted a request for quotations (RFQ) on the General Service's Administrations "e-Buy" electronic service as an FSS solicitation without set-aside restrictions.<sup>31</sup> The decision to do so resulted in this protest based on the belief that even the FSS RFQ should be set aside for small businesses because it was previously issued as a task order set-aside.

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<sup>20</sup> Comp. Gen. B-298197, B-298197.2, July 17, 2006, 2066 CPD ¶ 151.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> B-297200.3, 2006 U.S. Comp. Gen. LEXIS 50 (Mar. 21, 2006).

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.* at 2.

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

The GAO held that the protest was without merit because the Army conducted this procurement under the provisions of *FAR part 8.4* which specifically provides that *FAR part 19* (Small Business Programs) does not generally apply to orders placed against FSS contracts.<sup>32</sup> The GAO was not persuaded by the protestor's equity arguments based on the initial solicitation and dismissed the protest.

*Agency Not Required to Make Responsibility Determination for FSS Order*

The GAO denied a protest against an FSS task order award concluding that an ordering agency is not required to make a responsibility determination each time it places a task or delivery order.<sup>33</sup> Advanced Technology Systems (ATS) protested the Department of Housing and Urban Development's (HUD) issuance of an FSS task order to Pyramid Systems for operational support and corrective maintenance services. ATS argued that the HUD failed to make a proper responsibility determination on Pyramid Systems before awarding the task order.<sup>34</sup>

The company argued that the GSA's responsibility determination, made at the time of the award of the FSS contract, is "only as valid as the facts before GSA at that time, and that changes to the indicia of responsibility may exist at the time orders are actually places."<sup>35</sup> The GAO held that "because [GSA] is tasked with making determinations of responsibility pertaining to the award of FSS contracts, ordering agencies, while not precluded from doing so, are not required to make a responsibility determination prior to placing an FSS order."<sup>36</sup> In making its determination, the GAO relied on the *FAR's* concept of responsibility applying to "prospective contractors," and not "current contractors."<sup>37</sup>

In dismissing the protest, the GAO compared the award of a task order to the exercise of an option and restated the fact that "once an offeror is determined to be responsible and is awarded a contract, there is no requirement that an agency make additional responsibility determinations during contract performance."<sup>38</sup> The GAO concluded that this principle applies regardless of the "type of contracting vehicle the Government elects to use for an acquisition."<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Advanced Tech. Sys., Inc., B-296493.6, 2006 U.S. Comp. Gen. LEXIS 164 (Oct. 6, 2006).

<sup>34</sup> *Id.* at 4.

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

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* (citing 41 U.S.C. § 403 (LEXIS 2006); FAR §§ 9.100 and 9.103).

<sup>38</sup> *Id.* (citing E. Huttenbauer & Son, Inc., Comp. Gen. B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148).

<sup>39</sup> *Id.*

## Commercial Items

### *Commercial Items Test Program Thresholds Raised*

The Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (FAR Councils) raised the maximum purchase threshold for using simplified acquisition procedures for the purchase of commercial items under the Commercial Items Test Program (*FAR part 13.5*) from \$5 million to \$5.5 million.<sup>1</sup> This threshold doubles to \$11 million for acquisitions that, as determined by the head of the agency, are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack.<sup>2</sup> The FAR Councils executed this action in accordance with section 807 of the Ronald Reagan National Defense Authorization Act of 2005 which directed that certain acquisition thresholds be adjusted in response to future inflation every five years.<sup>3</sup>

### *DoD IG Reports Problems in Commercial Contracting for Defense Systems*

The Department of Defense (DoD) Office of the Inspector General (IG) issued a report criticizing the DoD's over-reliance on the very broad definition of "commercial item" to purchase defense systems.<sup>4</sup> The DoD IG audited eighty-six contract actions involving forty-two DoD contracts for which DoD purchased what it considered to be "commercial items" as the *FAR* defines that term.<sup>5</sup> The DoD IG concluded that DoD "contracting officials did not adequately justify the commercial nature of 35 of 42 (83%) commercial contracts for the defense system and subsystems awarded in FYs 2003 and 2004."<sup>6</sup> The DoD IG found that as a result of these insufficient justifications, "contracting officials inappropriately awarded contracts that did not achieve the benefits of buying truly commercial products and relinquished price and other oversight protections under the Truth in Negotiations Act that would have allowed better visibility to establish fair and reasonable prices."<sup>7</sup>

The DoD IG also found that contracting officials have "used loopholes within the broad [categorical definitions of commercial items] without justification to support the availability in the commercial marketplace for these defense systems and subsystems."<sup>8</sup> The report cited abuses of the *FAR* commercial items definitions with regard to several sub-definitional terms including: "of a type" items;<sup>9</sup> "offered and available for sale;"<sup>10</sup> and "modified commercial items."<sup>11</sup> As a result of these abuses, contracting officers were unable to obtain sufficient information regarding commercial availability of these items and failed to ensure the government was getting the benefit of competitive prices established by the commercial marketplace, or other benefits normally associated with acquiring commercial items.<sup>12</sup>

By awarding these non-commercial items contracts under *FAR part 12* procedures, the government could not obtain certified cost or pricing data and, therefore, "limited their ability to ensure that fair and reasonable prices were paid on these contract actions."<sup>13</sup> The DoD IG concluded that "the Government lost oversight and control over the development and quality of the defense systems and subsystems when it awarded commercial contracts . . . and the Government's rights were compromised because it had no access to contractor facilities to monitor" progress.<sup>14</sup>

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<sup>1</sup> Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 57,363 (effective 28 Sept. 2006).

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

<sup>3</sup> Pub. L. No. 108-375, 118 Stat. 1811 (2004).

<sup>4</sup> U.S. DEP'T OF DEF., OFF. OF THE INSPECTOR GEN., D-2006-115, COMMERCIAL CONTRACTING FOR THE ACQUISITION OF DEFENSE SYSTEMS (29 Sept. 2006) [hereinafter COMMERCIAL CONTRACTING REPORT].

<sup>5</sup> U.S. GEN. SVS. ADMIN, ET. AL., FED. ACQUISITION REG. pt. 2.101 (July 2006) [hereinafter FAR].

<sup>6</sup> COMMERCIAL CONTRACTING REPORT, *supra* note 4, at i.

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

<sup>8</sup> *Id.* at 7.

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

<sup>10</sup> *Id.* (Air Force contracting officials justified award of four contracts for the Joint Primary Aircraft Training System as commercial even though the commercial version only existed on paper and there was no evidence of a commercial marketplace.)

<sup>11</sup> *Id.* at 8 (The Army classified its purchase of High Mobility Multi-Wheeled Vehicle (HMMWV) as a commercial item based on modifications of the HUMMER H1 commercial sport utility vehicle despite the fact that the contractor's website states that the HMMWV is not available for sale to the public.)

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

<sup>13</sup> *Id.* at 12.

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

The DoD IG recommended that: (1) commercial item legislation be amended to allow for the exclusion of certified cost and pricing data only for commercial items that *are sold in substantial quantities to the general public*; and (2) “when commercial items determinations are made, these determinations should be in writing and included in the contract file.”<sup>15</sup>  
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<sup>15</sup> *Id.* at 12-13.

## Socioeconomic Policies

### *Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses*

In accordance with subsection 10 U.S.C. § 2323(e), the Department of Defense (DoD) continues to suspend the use of any price evaluation adjustment for small disadvantaged businesses in DoD procurements.<sup>1</sup> This statute requires the DoD to suspend the regulation<sup>2</sup> implementing the authority to enter into a contract for a price exceeding fair market cost if the Secretary determines at the beginning of the fiscal year that the DoD achieved the five percent goal established in 10 U.S.C. § 2323(a) for contracts awarded to small disadvantaged businesses during the previous year.<sup>3</sup> Based on data from 2005, “the determination was made that the DoD exceeded the five percent goal established and, accordingly, the use of the price evaluation adjustment prescribed in *FAR part 19.11* and *DFARS part 219.11* is suspended for the DoD.”<sup>4</sup>

In addition to the statutory suspension provisions applicable to the DoD, there is also no current authority for civilian agencies to apply the preference either.<sup>5</sup> Currently, only the Coast Guard and the NASA are both authorized and required to provide a price preference under *FAR part 19.11*. The Coast Guard and the NASA must continue to apply the preferences because neither of these agencies is covered by the suspension of the application of the price adjustment otherwise applicable to the DoD or other civilian agencies.<sup>6</sup>

Democratic Congressional leaders continue to question the accuracy of the data on which the DoD relied to conclude that the DoD has met its five percent statutory goal.<sup>7</sup> Should the method in which this data is collected and reported change in the near future, as some in the procurement community would like, the price preference suspension era that the DoD has enjoyed over the past decade may come to a close.

### *Defense Authorization Act Limits Use of Tiered Set-Asides; Renames SADB*

Last year’s *Year in Review* discussed the future of tiered, or cascading, set-asides as an issue which needed clarification.<sup>8</sup> Congress took action this year to clarify the limits of this controversial procurement method. Section 816 of the National Defense Authorization Act of 2007 (2007 NDAA) says that a contracting officer can use tiered set-asides only if he or she first conducts proper market research seeking qualified small business offerors.<sup>9</sup> Contracting officers must also document in

<sup>1</sup> Memorandum, Domenic C. Cipicchio, Acting Director, Defense Procurement and Acquisition Policy, to Directors of Defense Agencies, subject: Class Deviation and Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses (8 Feb. 2006); *see also* Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses, 71 Fed. Reg. 9320 (Feb. 23, 2006).

<sup>2</sup> *See* U.S. GEN. SVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 19.11 (July 2006) [hereinafter FAR] for details regarding the application of price evaluation adjustments to offers from small disadvantaged business concerns. Ultimately, the Department of Commerce is responsible for determining which industries are eligible for the price preference and the specific price adjustment factor preferences to be given to each industry.

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

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

<sup>5</sup> *See* Major Andrew S. Kantner, et. al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 56 [hereinafter *2005 Year in Review*]. *See also* 71 Fed. Reg. 20,304 (Apr. 19, 2006) (adopting as a final rule the interim rule canceling for civilian agencies—except for the NASA and Coast Guard—the small disadvantaged business price-evaluation adjustment authorized under the Federal Acquisition Streamlining Act of 1994).

<sup>6</sup> Memorandum, Chief Acquisition Officer, U.S. Small Business Administration, to Chief Acquisition Officers and Senior Procurement Executives, subject: Suspension of Price Evaluation Adjustment for Small Disadvantaged Business at Civilian Agencies (22 Dec. 2004).

<sup>7</sup> Chris Strohm, *House Democrats Blast Small Business Contracting Efforts*, GovExec.com, Oct. 20, 2005, <http://www.ogovexec.com/dailfed/1005/102005.cl.htm> (citing a report issued by Democrats on the House Business Committee which asserts that government-wide contracting with small businesses was actually only 21.5 percent in 2004, the lowest in five years; disadvantaged businesses received 3.78 percent of government contracts; women-owned businesses 3.11 percent; and HUBZone businesses 3 percent).

<sup>8</sup> *See 2005 Year in Review*, *supra* note 5, at 53. Under cascading set-aside procedures agencies solicit bids from all socio-economic classes, but only open bids in order of legal socio-economic status preference. If the agency finds two satisfactory proposals from one socio-economic class, the agency does not proceed to open offers from offerors in other socio-economic strata.

<sup>9</sup> John Warner National Defense Authorization Act for 2007, Pub. L. No. 109-364, § 816 (2006). The statutory section reads:

(a) Guidance Required—The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.

(b) Elements—The guidance prescribed under subsection (a) shall include a *prohibition* on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract *unless* the contracting officer—

writing why he or she was unable to make a determination of whether or not small business offerors in the proper socio-economic categories were available for limiting a contract action to certain socio-economic categories.<sup>10</sup> The DoD published an interim rule implementing the Authorization Act's language.<sup>11</sup> While the current restrictions only apply to the DoD, that may change in the near future. Robert Burton, Acting Administrator of the Office of Federal Procurement Policy at the Office of Management & Budget said that "we certainly, in this office, have our reservations, and some concerns about it . . . [The cascading set-aside procedures] could possibly be abused, so I think we do need to take a look at it."<sup>12</sup>

In addition to the changes discussed above, the 2007 NDAA also renamed all Offices of Small and Disadvantaged Business Utilization across the DoD as Offices of Small Business Programs.<sup>13</sup>

### *GAO Report: Alaska Native Corporations Need More Oversight*

The favored treatment afforded to Alaska Native Corporations (ANC)<sup>14</sup> under the Small Business Administration's (SBA) 8(a) Program remained a hot topic in 2006. The GAO issued a report critical of the SBA's oversight of ANC contracts and recommended that the SBA tailor its policies and practices to account for ANCs unique status and rapid growth over the last five years.<sup>15</sup> The GAO specifically recommended that the SBA investigate and determine whether more than one subsidiary of the same ANC is generating a majority of its revenue in the same primary industry and whether awards to 8(a) ANCs have resulted in other small businesses losing contract opportunities.<sup>16</sup> The GAO further recommended that the SBA ensure partnerships between 8(a) ANC firms and large firms are functioning in the way they were intended.<sup>17</sup>

The GAO reported that while dollars obligated to ANC firms through the 8(a) Program only represent a small percentage of total federal spending, dollars obligated to ANCs through the 8(a) program quadrupled to \$1.1 billion between 2000 and 2004. The GAO reported that several restrictions placed upon other 8(a) contractors do not apply to ANC 8(a) contractors which encourages agencies to turn to them for a quick and easy method of awarding contracts, regardless of dollar value, with the added bonus of counting the award towards their small business quotas.<sup>18</sup>

The SBA responded to the GAO report by stating that the report showed that the ANCs have successfully used the 8(a) Program the way Congress intended: to benefit the local economic conditions in Alaska.<sup>19</sup> The SBA also pointed out that

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(1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;

(2) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and

(3) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

*Id.* (emphasis added).

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

<sup>11</sup> Defense Federal Acquisition Regulation Supplement; Limitations on Tiered Evaluation of Offers, 71 Fed. Reg. 53,042 (proposed Sept. 8, 2006).

<sup>12</sup> Chris Gosier, *Contractor Wins Limits on Disfavored Procurement Practice*, FED. TIMES, Jan. 16, 2006, at 5.

<sup>13</sup> John Warner National Defense Authorization Act for 2007, Pub. L. No. 109-364, § 904, 120 Stat. 2083 (2006).

<sup>14</sup> Alaska Native Corporations were created in 1971 by the Alaska Native Claims Settlement Act, 43 U.S.C.S. § 1601 – 1629e (LEXIS 2006). ANCs became a vehicle for distributing land and monetary benefits to Alaskan Natives in lieu of a reservation system. In exchange for the release of aboriginal land claims potentially affecting hugely valuable oil deposits, the Act permitted about forty-four million acres of Alaska to be conveyed to ANCs, along with a payment of nearly one billion dollars. The Regional ANCs (total of twelve covering Alaska and one for Alaskans outside of the U.S.) are required to be formed as profit-making entities and they provide a variety of direct and indirect benefits to their shareholders who are entitled to membership based on where they live. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-399, CONTRACT MANAGEMENT—INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT 1 (Apr. 2006) [hereinafter GAO ANC REPORT].

<sup>15</sup> GAO ANC REPORT, *supra* note 14, at 40-41.

<sup>16</sup> *Id.* at inside cover.

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

<sup>18</sup> *Id.* at 6. Among the benefits that ANC contractors enjoy, that other 8(a) small and disadvantaged contractors do not, are limitless dollar threshold sole source awards and exclusion of affiliates from the determination of size status. *Id.* at 3. See also FAR, *supra* note 2, pt. 19.805.

<sup>19</sup> GAO ANC REPORT, *supra* note 14, at 53-55.

there were no reports of wrongdoing among 8(a) participants.<sup>20</sup> While this is correct, the real focus of the report and later Congressional hearings was how the ANC rules could be tightened to ensure that other 8(a) contractors are not being treated unfairly.<sup>21</sup>

*HUBZone Designation Is Mandatory If Statutory Criteria Are Met*

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of a district court in *Contract Management Industries, Inc., v. Rumsfeld*,<sup>22</sup> a case dealing with mandatory HUBZone set-asides. The Ninth Circuit granted the government's summary judgment motion to dismiss a small business contractor's suit to prevent award of a custodial services contract to a HUBZone small business concern.<sup>23</sup> The Court stated that, unlike the discretionary awards under the 8(a) program,<sup>24</sup> the HUBZone program is statutorily mandated.<sup>25</sup> Consequently, the Court held that the contracting officer did not have the discretion to elect not to set aside a contract when two or more responsible HUBZone small businesses were expected to compete and award would be made at a fair market price.<sup>26</sup>

Contract Management Industries, Inc. (CMI) was a small business incumbent contractor performing several custodial services contracts at Pearl Harbor Naval Base.<sup>27</sup> When the contracting officer decided to consolidate several installation custodial contracts into one contract and to set-aside the procurement for HUBZone small businesses concerns (HSBC), CMI was no longer eligible for award because it was not a HSBC.<sup>28</sup> CMI believed that the HUBZone statutory language should be read as permitting the contracting officer discretion in deciding to set-aside solicitations for HSMCs, much like the contracting officer has discretion in set-aside awards for 8(a) small businesses.<sup>29</sup> CMI further believed, though the record failed to support, that the contracting officer would have chosen to award to CMI if the statute did not require the contracting officer to set-aside the award for HSBCs.<sup>30</sup> CMI asserted that failing to read contracting officer's discretion into the HUBZone statute put the separate provisions of the Small Business Act (the HUBZone portions and the section 8(a) portions) in conflict with each other.<sup>31</sup>

Ultimately, the court read the statute to clearly require contracting officers to set-aside contract awards to HSBCs where, as here, the statutory requirements to do so are met.<sup>32</sup> The court found no merit in CMI's claim that such a ruling would create an internal conflict in the statute.<sup>33</sup>

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

<sup>21</sup> Jenny Mandel, *House Committees Probe Native Alaska Contracting Program*, GovExec.com. June 21, 2006, available at <http://www.govexec.com/daily/fed/0606/062106m1.htm>.

<sup>22</sup> *Contract Mgmt. Indus., Inc. v. Rumsfeld*, 734 F.3d. 1145 (9th Cir. 2006).

<sup>23</sup> *Id.*

<sup>24</sup> See 15 U.S.C.S. § 637(a)(1)(A) (LEXIS 2006).

<sup>25</sup> See *id.* 657a(b)(2).

<sup>26</sup> *Contract Mgmt.*, 734 F.3d. at 1148.

<sup>27</sup> *Id.* at 1146.

<sup>28</sup> *Id.* at 1147.

<sup>29</sup> *Id.* at 1148.

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

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1149.

The GAO recommended that the U.S. Immigration and Customs Enforcement, Department of Homeland Security (ICE) terminate a small business set-aside award where it failed to provide pre-award notification of a prospective awardee's identity prior to award.<sup>34</sup> After award, Spectrum Security Services, Inc., an unsuccessful offeror, protested the size status of the awardee, Ahuska Security Corporation.<sup>35</sup> The contracting officer forwarded the post-award protest to the Small Business Administration (SBA) which determined that Ahuska was other than a small business.<sup>36</sup> Due to administrative processing problems, the SBA did not respond to the protest in the required ten days so the ICE argued that contract award should not be terminated.<sup>37</sup> The ICE argued that since *FAR part 19.302(h)(1)* permits contracting officers to award a contract if the SBA has not ruled on a size protest within ten days in a *pre-award* protest situation, the same analysis should apply in this *post-award* size protest.<sup>38</sup> Since the SBA failed to take action until the fourteenth day in this post-award case, ICA argued that the award should not be terminated.<sup>39</sup>

Spectrum also protested on other grounds in time to stay performance of the contract by Ahuska.<sup>40</sup> The ICE decided to override that Competition in Contracting Act (CICA) stay, finding instead that performance of Ahuska's contract was in the best interest of the United States pursuant to 31 U.S.C. § 3553(d)(3)(A).<sup>41</sup> The ICE further argued that its written CICA-stay override served a dual purpose of also satisfying the requirement at *FAR part 19.302(h)(1)* permitting award in the face of a size status protest when a contracting officer makes a written determination that "award must be made to protect the public interest."<sup>42</sup>

The GAO accepted neither of the ICE's arguments. First, regarding the delayed SBA determination on the size status protest, the GAO was unwilling to speculate on whether the SBA would have responded within ten days had the ICE complied with the pre-award notice requirement.<sup>43</sup> Second, and somewhat more surprisingly, the GAO denied the ICE's arguments that its CICA override determination should also permit award in the face of the size status protest.<sup>44</sup> The GAO questioned the grounds on which the ICE justified its CICA override and, perhaps for that reason, refused to allow that determination to satisfy the requirement for a written determination for award in the face of a size status protest.<sup>45</sup> Although reaching the same conclusion on other grounds, it is unclear why the GAO did not simply rely on SBA regulations which state that "a timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest."<sup>46</sup>

*Different Rules Apply for Post-Award Size Status Determinations in Small Business Set-Asides and Service Disabled Veteran-Owned (SDVO) Small Business Set-Asides*

Unlike the *Spectrum* case discussed above where the GAO recommended contract termination for failing to notify losing offerors of the proposed awardee prior to a small business set-aside award, in *Veteran Enterprise Technology Services, LLC*,<sup>47</sup> the GAO denied a protest seeking termination of a Department of the Army award under a SDVO set-aside. In this case, the Army did not terminate the set-aside contract it awarded Wexford Group International (WGI) even though the Army

<sup>34</sup> Spectrum Security Servs., Inc., Comp. Gen. B-297320.2, Dec. 29, 2005, 2005 CPD ¶ 227. See FAR, *supra* note 2, at 15.503(a)(2) for agency requirements to notify unsuccessful small business offerors of the proposed awardee's identity prior to award of a contract set-aside for small businesses.

<sup>35</sup> *Spectrum Sec. Servs.*, 2005 CPD ¶ 227, at 2.

<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 5.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 9-10.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 10.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> 13 C.F.R. §121.1004(c) (2006).

<sup>47</sup> Comp. Gen. B-298201.2, July 13, 2006, 2006 CPD ¶ 108.

did not give pre-award notification to the other SDVO offerors and the SBA determined *after* contract award that the awardee was not a small business concern.<sup>48</sup>

The GAO decided that the Army contracting officer had properly waived pre-award notification of unsuccessful SDVO small business offerors after reasonably determining that the urgency of the procurement required award without delay pursuant to the *FAR* requirements.<sup>49</sup> Despite the fact that VETS timely protested after receiving notice of award, the GAO determined that the SBA regulations size status determinations in SDVO set-aside cases only apply prospectively.<sup>50</sup> Therefore, the Army was not required to terminate the award to WGI.<sup>51</sup>

The Army awarded the SDVO set-aside to WGI for support services to the Rapid Equipping Force (REF) which “develops strategies and methodologies to swiftly introduce material innovations into the U.S. Army by taking emerging technologies to operational environments for initial field evaluation.”<sup>52</sup> The award of this contract comprised a consolidation of several other contracts, several of which were expiring with no additional options.<sup>53</sup> Prior to award, the contracting officer determined that award should be made without delay and executed a written determination, pursuant to *FAR part 15.503(a)(2)(iii)*, that urgency necessitated award to WGI without providing the other offerors the pre-award notice required by *FAR part 15.503(a)(2)(i)(D)*.<sup>54</sup> After award, VETS protested to the GAO on the ground that WGI was not a small business.<sup>55</sup> A month later, the SBA determined that the awardee, WGI, was not a small business and VETS protested, seeking termination of award to WGI and requesting recommendation that award be made to VETS.

The GAO denied the protest finding that Army properly executed the urgency determination to waive the pre-award notification and, therefore, award was proper.<sup>56</sup> Following award of an SDVO set-aside contract, any determination by SBA that the awardee was other than a small business has only prospective effect in accordance with SBA regulations and does not require terminating the properly awarded SDVO contract.<sup>57</sup> The GAO explained that a different result would occur if the award was a simple small business set-aside, as opposed to a SDVO set-aside. In such a case, SBA regulations state that a post-award determination by the SBA that the awardee was other than a small business applies to the current contract.<sup>58</sup> Therefore, such a post-award determination would, generally, require termination of such a contract.<sup>59</sup>

#### *Agency May Require Recertification of Small Business Status Prior to Placing Task Order Under a MAS Contract*

The Court of Federal Claims (COFC) held that an Air Force contracting officer acted properly within his discretion in requiring a multiple-award schedule contractor to recertify its small business status before being eligible for award of a task order under a multiple award schedule contract.<sup>60</sup> The court determined labeled the task order a “new contract” for which the Air Force was entitled to demand renewed certification.<sup>61</sup> The court did not accept the plaintiff’s argument that if this task

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 2-4.

<sup>50</sup> *Id.* at 3.

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

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2. “The agency concluded that WGI would need three weeks prior to contract start date to assemble its work force and delaying award for pre-award notice was not feasible because it could delay contract performance.” *Id.*

<sup>55</sup> *Id.*

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

<sup>57</sup> *Id.* at 3. See also 13 C.F.R. § 125.27(g) describing the effect of an SBA determination on SDVO status as follows:

SBA’s determination is effective immediately and is final unless overrules by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the [agency] can not count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on future procurements. . . .

<sup>58</sup> *Id.* at 3 n.5.

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

<sup>60</sup> *LB&B Assocs., Inc. v. United States*, 68 Fed. Cl. 765 (2005).

<sup>61</sup> *Id.* at 772.

order was actually a “new contract,” then the government violated the CICA by failing to allow all small businesses to compete for award, rather than only soliciting those contactors that had previously been awarded multiple award schedule (MAS) contracts.<sup>62</sup> The GAO dismissed this argument by relying on the broad discretionary language at *FAR part 15.505(b)(ii)*. This provision states that “the contracting officer may exercise broad discretion in developing appropriate order placement procedures” when administering ID/IQ contracts.

The COFC accepted the plaintiff’s argument that generally a small business contractor retains that status for the life of a contract.<sup>63</sup> Nevertheless, the COFC deferred to the SBA Office of Hearings and Appeals (OHA) judge’s decision on this case that the Air Force could require LB&B to recertify its size status.<sup>64</sup> The OHA judge determined that the Request for Proposals (RFP) for the task order was a “new procurement” for the following reasons: the original MAS award was structured to anticipate future set-asides; it utilized different evaluation criteria in the task order RFP than it did in the ID/IQ RFP; and it required future task or delivery orders to give the ID/IQ contract any status or meaning.<sup>65</sup> The OHA judge further found that the task order was a new procurement because the definition of a “procurement” or “acquisition” in the *FAR* requires the use of appropriated funds, a description of agency requirements, and an establishment of agency needs.<sup>66</sup> The OHA felt that the original ID/IQ contract did none of these things so the task orders would have to be new procurements.<sup>67</sup> The OHA was also persuaded in their decision by the fact that the task order RFP required offerors to re-certify their status and 13 C.F.R. section 121.405(a) requires an offeror to self-certify it is a small business under the relevant standards specified in the solicitation.<sup>68</sup>

Ultimately, the COFC gave great deference to the SBA’s interpretation of its own regulations and precedents and found that the decision of the OHA was not clearly erroneous. The COFC, therefore, denied LB&B’s request for injunctive relief.<sup>69</sup>

In response to this case, the Air Force published a clarifying memo explaining that

this ruling should not be interpreted as precedence requiring recertification prior to awarding a delivery, task order, or the exercise of an option. The case stands only for the proposition that under appropriate circumstances, the Contracting Officer retains the discretion to request re-certification before the award of a delivery order, task order, or the exercise of an option.<sup>70</sup>

#### *Berry Amendment Changes*

Another year of wrangling between the House’s special metal industry protectionists and the Senate’s defense industry supporters resulted in a significant modification to the Berry Amendment<sup>71</sup> with regard to the purchase of specialty metals.<sup>72</sup> The debate primarily centered on whether or not the Berry Amendment’s limitation on the purchase of “specialty metals”

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<sup>62</sup> *Id.* at 773.

<sup>63</sup> *Id.* at 772.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 768.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* It is unclear from the facts whether or not this ID/IQ contract had guaranteed minimum purchases as would the most typical ID/IQ contract. If the original contract did provide for a guaranteed minimum, it is further unclear as to why that would not satisfy the OHA judge’s concern over the use of appropriated funds. The court does state that the underlying contract did not guarantee any specific future contract, but merely the opportunity to participate in future competitions against a smaller competitive pool (i.e. those that are awarded MAS contracts). The COFC accepted the OHA judge’s decision that the original MAS contract provided a mere framework for future contracts. *Id.* at 772.

<sup>68</sup> *Id.* at 769.

<sup>69</sup> *Id.* at 773.

<sup>70</sup> Memorandum, Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), Department of the Air Force, and Director Small Business Programs of the Department of the Air Force, to ALMAJCOMS/DRUs/FOAs, subject: Small Business Recertification (10 May 2006).

<sup>71</sup> 10 U.S.C.S. § 2533a (LEXIS 2006). The “Berry Amendment” is a sixty-five-year-old American industrial protectionist law that requires the DoD to buy certain listed items only from domestic sources. The statute is more draconian in its requirements than the Buy American Act because the Berry Amendment contains fewer exceptions. Among the listed items under the Berry Amendment are: food; clothing, and material components, thereof; tents, cotton and other natural fiber products, canvas, or wool; specialty metals (deleted, and re-inserted under specific criteria in FY 07 NDAA); and hand and measuring tools. *Id.*

<sup>72</sup> National Defense Authorization Act for FY 2007, Pub. L. No. 364, § 842, 120 Stat. 2083 (2006); see also GOVEXEC.com, *Negotiators Pressured to Resolve “Buy America” Dispute*, Sept. 12, 2006, [http://www.govexec.com/story\\_page.cfm?articleid=34992&printerfriendlyVers=1&](http://www.govexec.com/story_page.cfm?articleid=34992&printerfriendlyVers=1&).

included a prohibition on the inclusion of “specialty metal” component parts for larger systems, or just applied to the direct purchase of specialty metals themselves. Section 842 of the 2007 NDAA makes clear that the Berry Amendment provisions should apply even to component parts in most major end items.<sup>73</sup>

The National Defense Authorization Act of 2007 added section 2533b, to title 10.<sup>74</sup> The new law follows immediately the traditional Berry Amendment provisions at 10 U.S.C. § 2533a. The new provisions, titled “Requirement to buy strategic materials critical to national security from American sources; exceptions,” deletes “specialty metals” from the listed items in § 2533a and creates a new section to more fully address specialty metals. The new section provides that the use of appropriated funds may not be used to purchase the following end items, *or components thereof*, containing specialty metal not melted or produced in the United States: aircraft; missile and space systems; ships; tank and automotive items; weapon systems; ammunition; or specialty metals themselves that are purchased by DoD or a prime DoD contractor.<sup>75</sup>

The new law provides exceptions for some purchases including: procurements of commercially available electronic components whose specialty metal content is *de minimis* compared to the value of the overall item; procurements under the simplified acquisition threshold; procurements outside the United States in support of combat or contingency operations; procurements where purchase under other than competitive procedures has been approved for urgent and compelling urgency; and procurements where the Secretary of Defense or a military department determines that “compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed.”<sup>76</sup>

The FY07 NDAA also established a Strategic Materials Protection Board (SMP Board) under the Secretary of Defense.<sup>77</sup> The SMP Board’s main purposes is to determine the need to provide long term domestic supply of materials designated as critical to national security to ensure that national defense needs are met and to recommend additions to or deletions from the list of “specialty metals” under 10 U.S.C. § 2533b.<sup>78</sup>

#### *DOD Guidance on Berry Amendment Compliance*

Prior to the FY07 NDAA changes to the Berry Amendment, the DoD issued a memorandum authorizing both conditional acceptance and partially withholding payment in cases where a contractor submits items which the government believes does not comply with the Berry Amendment.<sup>79</sup> Recognizing that the delay caused by sorting out Berry compliance issues “may seriously impact our ability to meet military needs,” the memorandum authorized commands to conditionally accept the items under dispute until a long-term remedy can be implemented.<sup>80</sup> The memorandum provided specific conditional acceptance and withholding language that should be used and attached to the receiving report to protect the government’s interests.<sup>81</sup> Although the DoD has not rescinded this memorandum, it is unclear whether the FY07 NDAA provisions will effect its implementation.

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<sup>73</sup> National Defense Authorization Act for FY 2007, Pub. L. No. 364, § 842, 120 Stat. 2083.

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

<sup>75</sup> *Id.* (emphasis added). The Act defines specialty metals to include steel, nickel, iron-nickel, cobalt based alloys, titanium, and zirconium. *Id.* U.S. Dep’t of Defense, Defense Federal Acquisition Reg. Supp. 252.225-7014 (July 1, 2006) [hereinafter DFARS] also contains certain restrictions on the use of proper specialty metals on DoD contracts.

<sup>76</sup> National Defense Authorization Act for FY 2007, Pub. L. No. 364, § 842, 120 Stat. § 2083.

<sup>77</sup> *Id.* § 843.

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

<sup>79</sup> Memorandum, The Undersecretary of Defense (Acquisition, Technology, and Logistics), to Commander, United States Special Operations Command, Directors of the Defense Agencies and Assistant Service Secretaries, subject: Berry Amendment Compliance for Specialty Metals (1 June 2006).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* The new mandatory language reads as follows:

1. This item is conditionally accepted with parts that have, or may have been, manufactured with non-compliant specialty metals as described in [identify letter of other document form contractor disclosing actual or potential non-compliance] pending completion of the contractor’s investigation and Government concurrence. The contractor remains liable for any noncompliance with 10 U.S.C. 2533a as implemented in DFARS clause 252.225-7014, Preference for Domestic Specialty Metals, and Alternate I to the clause, where applicable. Further acceptance of this part does not constitute a waiver by the Government of any of its rights, contractual, statutory, or otherwise, relating to any matter involving the production or delivery of this part, and does not waive any claim by the United States for fraud, false claims, or other conduct on the part of any party which may be actionable under law.

*Commercial IT Exempt from Buy American Act - FAR Final Rule*

*FAR part 25.103* and *subpart 25.11* were amended by a final rule which provides an exception to the Buy American Act for the acquisition of information technology that satisfies the definition of commercial items.<sup>82</sup> The *FAR* changes implements the authority originally granted by section 535(a) of Division F of the Consolidated Appropriations Act, 2004.<sup>83</sup>  
Major Michael S. Devine

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2. Payments due under this contract shall include a withhold in the amount of [insert amount] based upon the contracting officer's assent to the contractor's representation of the estimated cost of the nonconforming specialty metal parts, plus applicable burden and profit.

<sup>82</sup> Federal Acquisition Regulation; Item VII—Exception to the Buy American Act for Commercial Item Technology, 71 Fed. Reg. 57,357 (effective Sept. 28, 2006).

<sup>83</sup> Pub. L. No. 108-99, 118 Stat. 3 (2004).

## Labor Standards

### *Successor Contractor Entitled to Increased Costs of Providing Fringe Benefits under “Defined Benefit” Plan*

As noted in last year’s *Year in Review*<sup>1</sup> the Armed Services Board of Contract Appeals (ASBCA) held in 2005 that a successor contractor who provided health insurance as fringe benefits consistent with the predecessor’s collective bargaining agreement (CBA) was not entitled to a price adjustment in a subsequent year after the costs to provide that insurance had increased.<sup>2</sup> This year, in *Lear Siegler Services, Inc. v. Rumsfeld*,<sup>3</sup> the Court of Appeals for the Federal Circuit (CAFC) reversed the ASBCA decision and held that the contractor was entitled to a price adjustment for the increased costs of providing the benefits.<sup>4</sup>

In *Lear Siegler*, the wage determination applicable to the contract incorporated the wages and fringe benefits set forth in the previous contractor’s CBA, which provided the health insurance benefits under a “defined-benefit” plan.<sup>5</sup> Under what is known as the “successor contractor rule” of the Service Contract Act (SCA),<sup>6</sup> a contractor must pay its employees no less than the amount of wages and fringe benefits that the employees would have been entitled to under the previous contractor’s CBA that was effective under the previous contract.<sup>7</sup> The cost to the contractor to provide those defined health benefits increased during the course of contract performance, so the contractor submitted a request for a price adjustment for the option year.<sup>8</sup> The applicable Price Adjustment clause entitled the contractor to a price adjustment to the extent that the contractor was compelled by an applicable wage determination to pay increased wages or benefits.<sup>9</sup>

The ASBCA acknowledged that the contractor’s payment of increased wages or benefits would entitle him to a price adjustment under the Price Adjustment clause “to the extent that the increase is made to comply with the applicable wage determination.”<sup>10</sup> Here, however, the wages and benefits received by the employees did not increase, though the contractor’s costs of providing those benefits had increased. The board also observed that under the Service Contract Act and applicable DOL regulations, a contractor may satisfy its obligation to provide fringe benefits under a wage determination “by making equivalent or differential payments in cash.”<sup>11</sup> The board then reasoned that by choosing to continue providing the health

<sup>1</sup> See Major Andrew S. Kantner, et al., *Contract and Fiscal Law Developments of 2005—The Year in Review*, ARMY LAW., Jan. 2006, at 63 [hereinafter *2005 Year in Review*].

<sup>2</sup> *Lear Siegler Servs.*, ASBCA No. 54449, 05-1 BCA ¶ 32,937.

<sup>3</sup> 457 F.3d 1262 (Fed. Cir. 2006).

<sup>4</sup> *Id.* at 1269.

<sup>5</sup> *Id.* at 1265.

<sup>6</sup> McNamara-O’Hara Service Contract Act of 1965, 41 U.S.C.S. §§ 351-58 (LEXIS 2006).

<sup>7</sup> 41 U.S.C.S. § 353(c); 29 C.F.R. § 4.163(k) (2006).

<sup>8</sup> *Lear Siegler Servs.*, 457 F.3d at 1265.

<sup>9</sup> The Price Adjustment clause provided, in relevant part:

(a) This clause applies to both contracts subject to area prevailing wage determinations and contracts subject to collective bargaining agreements.

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(d) The contract price or contract unit price labor rates will be adjusted to reflect the Contractor’s actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period . . . .

(2) An increased or decreased wage determination otherwise applied to the contract by operation of law . . . .

U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.222-43 [hereinafter FAR].

<sup>10</sup> *Lear Siegler Servs.*, 05-1 BCA ¶ 32,937 at 163,172.

<sup>11</sup> Section 2 of the SCA provides that “[t]he obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under the rules and regulations established by the Secretary.” 41 U.S.C.S. § 351(a)(2). Department of Labor regulations, in turn, provide:

Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor’s collective bargaining agreement . . . . [A] contractor may satisfy its fringe benefits obligations under any wage determination “by furnishing any equivalent

insurance benefits, which had increased in cost, rather than providing “equivalent” benefits under the CBA, the contractor incurred increased costs that were not compelled by a wage determination and was therefore not entitled to a price adjustment.<sup>12</sup>

That reasoning makes sense if one presumes, as the board apparently did, that the contractor could have provided “equivalent” benefits at no increase in cost; that is, that the contractor could have satisfied its obligation by providing cash benefits “equivalent” to the base year’s cost of providing the health insurance, without regard to increases in insurance costs in subsequent years. But that is not how it works, the federal circuit explained this year, when the case was heard on appeal.

The court reversed the ASBCA, holding that the Price Adjustment clause entitled the contractor to a price adjustment for its increased costs of providing the required benefits, even though there was no change in the benefits received by its employees.<sup>13</sup> The court noted the distinction between a defined-benefit plan and a defined-contribution plan: “a defined-benefit plan obligates an employer to spend whatever is necessary to continue to provide its employees with an agreed-upon level of benefit.”<sup>14</sup> This conclusion, the court explained, is consistent with the Price Adjustment clause itself, which provides for an adjustment to “reflect the Contractor’s actual increase or decrease in applicable wages or benefits,”<sup>15</sup> as well as with “other provisions of the regulatory scheme, which provide for the ‘equivalency’ of fringe benefits to be measured not in terms of the value to the employee, but cost to the employer.”<sup>16</sup> The court also relied upon the analogous case of *United States v. Service Ventures, Inc.*,<sup>17</sup> in which the court had similarly held that a contractor’s increased costs in meeting its obligation to provide required benefits entitled it to a price adjustment even though the wage determination itself was “nominally unchanged.”<sup>18</sup> “In short,” the court concluded, “the Price Adjustment Clause is triggered by changes in an employer’s cost of compliance with the terms of a wage determination,”<sup>19</sup> and the fact that the benefits received by the employees remains unchanged “is simply irrelevant.”<sup>20</sup>

The court also disagreed with the ASBCA’s implicit notion that the contractor could have satisfied its obligation to provide the benefits by paying an “equivalent” cash value to its employees without increased cost to the contractor, noting that to pay the “equivalent” of the health benefits, the contractor would have to pay its employees “an amount equal to its own costs of providing the benefit.”<sup>21</sup> Therefore, in order to comply with the CBA, the contractor would have incurred the same increased costs regardless of whether it continued to provide the health benefits or an equivalent cash value.

#### *That Ain’t Workin’, But Money for Being On-Call Is Still “Wages” for Purposes of Price Adjustment Clause*

Early in Fiscal Year 2006, the ASBCA, in *ARCTEC Alaska*,<sup>22</sup> held that a contractor was entitled to a price adjustment for an increase in “response premium” pay that it was required to pay its employees under a wage determination. In that case, the Air Force had awarded ARCTEC a contract for the operation and maintenance of the Alaska radar system.<sup>23</sup> The wage determination incorporated into the contract required ARCTEC to pay its employees the wages and benefits contained in its

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combinations of fringe benefits or by making equivalent or differential payments in cash” in accordance with the rules and regulations set forth in § 4.177 of this subpart.

29 C.F.R. § 4.163(j).

<sup>12</sup> *Lear Siegler Servs.*, 05-1 BCA ¶ 32,937, at 163,173.

<sup>13</sup> *Lear Siegler Servs.*, 457 F.3d at 1269.

<sup>14</sup> *Id.* at 1265. The court continued: “A defined-benefit plan thereby ensures that employees will continue to receive the same level of benefits (here health coverage), even as costs rise. *Id.*”

<sup>15</sup> *Id.* at 1268 (quoting 48 C.F.R. § 52.222-43(d)) (emphasis supplied by the court).

<sup>16</sup> *Id.* (citing 48 C.F.R. § 4.177(a)(3)).

<sup>17</sup> 899 F.2d 1 (Fed Cir. 1990).

<sup>18</sup> *Lear Siegler Servs.*, 457 F.3d at 1269.

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

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

<sup>21</sup> *Id.* (citing 29 C.F.R. § 4.177(a)(3) (“[E]quivalent means equal in terms of monetary cost to the contractor.”)).

<sup>22</sup> ASBCA No. 54946, 05-2 BCA ¶ 33,109.

<sup>23</sup> *Id.* at 164,091.

CBA.<sup>24</sup> Among other things, the CBA required ARCTEC to pay a “response premium” to its employees for each day they are required to carry a radio or cell phone for on-call purposes, regardless of whether it was a work day, non-work day, or even a vacation day.<sup>25</sup> In a subsequent year, the contract was modified to incorporate a wage determination requiring ARCTEC to comply with its new CBA, which contained a higher daily “response premium.”<sup>26</sup> However, the contracting officer later denied ARCTEC’s proposed price increase for the “response premium” under the Price Adjustment clause, finding that the on-call time was not compensable as because it did not constitute hours worked.<sup>27</sup>

The ASBCA agreed that the off-duty on-call time was not hours “worked.”<sup>28</sup> However, the board held that the premium for the on-call time is nonetheless an element of the employee’s “wages” for purposes of the contract’s Price Adjustment clause.<sup>29</sup> The board determined that it is not necessary that the on-call time be hours “worked” in order for it to be compensable as wages.<sup>30</sup> The board also pointed to the fact that the Fair Labor Standard Act<sup>31</sup> overtime regulations include on-call time in determining the regular rate for overtime pay.<sup>32</sup> The board noted that the Service Contract Act “is remedial labor legislation which must be liberally construed,”<sup>33</sup> and that the “wages” referred to in the Price Adjustment clause “should be similarly so construed to affect the purposes of the Act.”<sup>34</sup> Accordingly, ARCTEC was entitled to a price adjustment for the increased “wages” occasioned by the higher daily response premium it was required to pay its employees for being on-call.<sup>35</sup>

Later this fiscal year, the board reconsidered its *ARCTEC Alaska* decision, reaffirming its earlier decision.<sup>36</sup> The Air Force again argued that compensation for the on-call time does not constitute “wages” for purposes of the Price Adjustment clause.<sup>37</sup> The board found that neither 29 C.F.R. section 4.178,<sup>38</sup> which deals with the computation of hours worked under the contract, nor 29 C.F.R. section 785.17,<sup>39</sup> which defines when an employee on-call is deemed to be “working,” address

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 164,092.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* The applicable clause provided for a price adjustment “to reflect the Contractor’s actual increase or decrease in applicable wages” compelled by a Department of Labor wage determination. FAR, *supra* note 9, at pt. 52.222-43(d).

<sup>30</sup> *ARCTEC Alaska*, 05-2 BCA ¶ 33,109, at 164,092.

<sup>31</sup> Fair Labor Standards Act of 1938, 29 U.S.C.S. §§ 201-19 (LEXIS 2006).

<sup>32</sup> *ARCTEC Alaska*, 05-2 BCA ¶ 33,109, at 164,092. In demonstrating this, the board quoted the following portion of 29 C.F.R. § 778.223 (2003):

... If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent “on call” are not considered as hours worked. *Although the payment received by such employees for such “on call” time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee’s job . . . . The payment must therefore be included in the employee’s regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.*

*Id.* (emphasis added by the board).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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

<sup>36</sup> *ARCTEC Alaska*, ASBCA No. 54946, 06-1 BCA ¶ 33,192.

<sup>37</sup> *Id.* at 164,558.

<sup>38</sup> Section 4.178 provides, in part: “The hours worked which are subject to the compensation provisions of the [Service Contract] Act are those in which the employee is engaged in performing work on contracts subject to the Act.” 29 C.F.R. § 4.178 (2006).

<sup>39</sup> Section 785.17 provides, in its entirety:

§ 785.17 On-call time.

An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on call”. An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Handler v. Thrasher*, 191 F.2d 120 (C.A. 10, 1951); *Walling v. Bank of Waynesboro, Georgia*, 61 F.Supp. 384 (S.D. Ga. 1945))

whether compensation for “non-working” on-call time constitute “wages” for purposes of the Service Contract Act. The board found that ARCTEC’s payment of the response premium was required by the CBA which was made part of the wage determination, and was thus required by the SCA.<sup>40</sup> Finally, the board further supported its earlier decision that the premium pay for the non-working on-call time constituted “wages” by noting that it was “a direct and immediate economic benefit of the employment relationship. As such, it was within the meaning of ‘wages’ for purposes of the collective bargaining provisions of the National Labor Relations Act.”<sup>41</sup>

Lieutenant Colonel Michael L. Norris

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29 C.F.R. § 785.17.

<sup>40</sup> *ARCTEC Alaska*, 06-1 BCA ¶ 33,192, at 164,559.

<sup>41</sup> *Id.* (citing *W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949)).

## Bid Protests

### *Interested Party*

The Court of Appeals for the Federal Circuit (CAFC) and the Court of Federal Claims (COFC) addressed protest standing issues in Fiscal Year 2006. The CAFC upheld the rule that post-award protesters must be actual bidders to be an interested party. The COFC overturned an agency attempt at depriving the COFC of jurisdiction *post hoc*.

### *Court of Appeals for the Federal Circuit*

The CAFC affirmed a COFC finding that a protester that did not submit a bid does not have standing to pursue a bid protest before the COFC.<sup>1</sup> Prior to 2003, Rex Service Corporation (Rex) had supplied “thumbwheel switches” to the Defense Supply Center, Columbus (DSCC) as the sole approved source.<sup>2</sup> In 2003, the DSCC issued a request for proposals (RFP) for thumbwheel switches; the DSCC canceled this solicitation following an agency protest filed by Rex.<sup>3</sup> In 2004, the DSCC again issued an RFP for thumbwheels.<sup>4</sup> Rex again protested to the agency, but did not submit a proposal.<sup>5</sup> Rex’s 2004 protest did not allege that any agency failure prevented Rex from submitting a proposal.<sup>6</sup> The DSCC denied Rex’s 2004 protest in January 2005, and awarded the contract to a different contractor in February 2005.<sup>7</sup> Rex filed its protest with the COFC on 21 March 2005.<sup>8</sup>

The CAFC began by explaining the standard that standing to bring a protest before the court is based on a showing that the protester is an interested party as defined by the Competition in Contracting Act (CICA).<sup>9</sup> To meet this standard, the protester must show that it is an actual or prospective bidder whose direct economic interests are affected by the award or failure to award the contract.<sup>10</sup> Rex clearly did not submit a proposal, and is therefore not an actual bidder.<sup>11</sup> Rex argued that it was a prospective bidder because it filed an agency protest prior to the close of bidding and it was prejudiced, but not prevented, from bidding.<sup>12</sup>

The CAFC dispensed with Rex’s argument, stating that “in order to be eligible to protest, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation.”<sup>13</sup> The CAFC continued relying on *MCI*,<sup>14</sup> stating “the opportunity to qualify as an actual or a prospective bidder ends when the proposal period ends.”<sup>15</sup> While Rex relied on its pre-closing date agency protest to preserve its standing, the CAFC rejected this reasoning.<sup>16</sup> Standing requires a protester to be an actual or prospective bidder.<sup>17</sup> Once the closing date has arrived, generally only actual

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<sup>1</sup> Rex Serv. Corp. v. United States, 448 F.3d 1305 (Fed. Cir. 2006).

<sup>2</sup> *Id.* at 1306.

<sup>3</sup> *Id.* at 1306-07.

<sup>4</sup> *Id.* at 1307.

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

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

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

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

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

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

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

<sup>12</sup> *Id.* at 1307-08.

<sup>13</sup> *Id.* at 1308 (citing *MCI Telecomm. Corp. v. United States*, 878 F.2d 362, 365 (Fed. Cir. 1989)).

<sup>14</sup> *MCI Telecomm. Corp.*, 878 F.2d 362.

<sup>15</sup> *Rex*, 448 F.3d at 1308 (citing *MCI Telecomm. Corp.*, 878 F.2d at 365).

<sup>16</sup> *Id.*

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

bidders are interested parties and have standing.<sup>18</sup> The CAFC expressly declined to address the situation in which the protester argues that the alleged agency violation prevented the protester from bidding.<sup>19</sup>

### *Court of Federal Claims*

Systems Plus, Inc. protested a Department of Labor (DOL) procurement for network-infrastructure and operations-support services.<sup>20</sup> Following dismissal by the Government Accountability Office (GAO) on timeliness grounds, Systems filed its protest with the COFC.<sup>21</sup> On the merits of the original protest claim, the COFC found for the government.<sup>22</sup> The interesting procedural aspect of the case involves agency action while the protest was pending.

After the protest was filed and proceedings had begun at the COFC, the contracting officer issued a Determination and Findings (D&F) that the protester “would be ineligible to compete in any corrective competition that might be ordered as a result of this case.”<sup>23</sup> Based on the contracting officer’s (KO’s) disqualification of the protester, the government moved to dismiss the protest because Systems was no longer an interested party.<sup>24</sup>

The KO disqualified Systems because an appearance of impropriety had developed from the discovery of a document containing sensitive awardee information at Systems’ office.<sup>25</sup> Systems’ employees stated that the document was delivered to its office more than two weeks after it was notified of award.<sup>26</sup> The KO speculated that because the document was created before proposals were due, Systems could have had access to the information and used the information in formulating its proposal.<sup>27</sup>

The COFC set aside the KO’s disqualification of Systems “on three separate and independent grounds—the disqualification was procedurally flawed, it lacked a rational basis, and it constituted an improper post hoc attempt to remove System Plus’s protest from this court’s jurisdiction and thus insulate DOL’s procurement decision from review.”<sup>28</sup> First, the disqualification was procedurally flawed because the KO did not afford Systems minimal due process, i.e., the opportunity to be heard on the issue.<sup>29</sup> Second, the disqualification lacked a rational basis because the KO based her decision on erroneous facts and speculation.<sup>30</sup> The COFC did not fully explain these errors, but provided one example that the KO accepted a statement by agency counsel that Systems’ building was locked to non-employees on Saturdays.<sup>31</sup> However, several Systems’ employees, including the president and CEO, and the property manager of the building, all stated that the building was open Saturday mornings.<sup>32</sup>

Third, the disqualification action improperly attempted to remove the protest from COFC jurisdiction.<sup>33</sup> “The Contracting Officer rendered her decision only because of the pendency of this action . . . [t]his litigation-motivated contrivance by a contracting officer does not deserve any deference from this court.”<sup>34</sup> The court explained, “[o]nce this

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<sup>18</sup> *Id.*

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

<sup>20</sup> *Sys. Plus, Inc. v. United States*, 69 Fed. Cl. 757 (2006).

<sup>21</sup> *Id.* at 762-63.

<sup>22</sup> *Id.* at 775.

<sup>23</sup> *Id.* at 759.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 763.

<sup>26</sup> *Id.* at 765.

<sup>27</sup> *Id.* at 765-66.

<sup>28</sup> *Id.* at 767.

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

<sup>30</sup> *Id.* at 768.

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

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

court has been accorded jurisdiction over an action, events may occur which moot the controversy. However, those events may not be manufactured by the defending agency solely for the purpose of divesting the court of its juridical power.”<sup>35</sup> While condemning the KO’s actions in this case, the reasoning appears to allow COFC jurisdiction to be defeated in the case of justifiable post hoc disqualification decisions.

### *Subject Matter Jurisdiction*

The COFC and the GAO both addressed protest subject matter jurisdiction in the past fiscal year. The COFC appears to be moving toward a conclusion regarding indefinite-delivery, indefinite-quantity (ID/IQ) task orders. The GAO addressed affirmative responsibility determinations.

### *Court of Federal Claims*

The COFC decided two cases this past year addressing protests filed over ID/IQ task orders. Although the Federal Acquisition Streamlining Act (FASA)<sup>36</sup> removed bid protest jurisdiction over task orders,<sup>37</sup> interpretation of the jurisdictional limits continues to evolve.

In August 2005, Group Seven Associates (Group Seven) protested to the COFC a task order issued to CACI, Inc. (CACI) to perform contract administration support services under an existing General Service Administration (GSA) Federal Supply Schedule (FSS) contract.<sup>38</sup> Group Seven argued that the agency should not have considered CACI’s alternate proposals submitted in response to the RFP because the solicitation did not specifically request or allow for alternate proposals.<sup>39</sup> The government argued that the COFC lacked jurisdiction over protests filed regarding task orders.<sup>40</sup>

Group Seven relied on an earlier COFC case, *Labat-Anderson, Inc. v. United States*,<sup>41</sup> in which the court maintained jurisdiction over a protest involving a blanket purchase agreement (BPA), stating the BPA “is not a task order itself, but rather a vehicle against which task orders will be placed.”<sup>42</sup> The *Labat* court further stated that the FASA jurisdiction bar did not apply to the placement of BPAs against GSA FSS contracts.<sup>43</sup> The *Labat* court decided that, because GSA FSS contracts are governed by *FAR part 8 (Required Sources of Supplies and Services)* and not *FAR subpart 16.5 (Indefinite-Delivery Contracts)*, the FASA jurisdiction bar does not apply to GSA FSS task orders.<sup>44</sup>

The Group Seven court did not agree with the *Labat* reasoning regarding the applicability of the FASA jurisdiction bar to GSA FSS contracts.<sup>45</sup> The court stated, “[w]hile we can follow the analysis of *Labat*, we find it less than compelling. . . . In short, jurisdiction is doubtful.”<sup>46</sup> Doubtful as it was, the court determined that, with the *Labat* decision in place and the intervenor’s reluctance to rely on the FASA bar in argument, the court would decide the case on the merits.<sup>47</sup> As the court ultimately found for the government, the court’s jurisdiction decision was of less import.<sup>48</sup>

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<sup>35</sup> *Id.* at 768-69.

<sup>36</sup> Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified in scattered sections of 10 U.S.C. and 41 U.S.C.).

<sup>37</sup> The FASA ID/IQ provisions are codified identically at 10 U.S.C. §§ 2304a-2304d and 41 U.S.C. §§ 253h-253k.

<sup>38</sup> *Group Seven Assocs., LLC v. United States*, 68 Fed. Cl. 28, 29 (2005).

<sup>39</sup> *Id.* at 30.

<sup>40</sup> *Id.* at 31.

<sup>41</sup> 50 Fed. Cl. 99 (2001).

<sup>42</sup> *Group Seven Assocs.*, 68 Fed. Cl. at 31 (citing *Labat-Anderson*, 50 Fed. Cl. at 105).

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

<sup>44</sup> *Group Seven Assocs.*, 68 Fed. Cl. at 32.

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

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 33.

More recently, the COFC addressed the applicability of the FASA jurisdiction bar in *A&D Fire Protection, Inc. v. United States*.<sup>49</sup> The court noted the intent behind the FASA to gain more efficiency in federal procurements.<sup>50</sup> “In particular, when a procurement envisioned a multiple award ID/IQ contract, creating, through competition, a pool of contractors for certain work projects, the issuance of individual task order to these contractors would not be subject to protests.”<sup>51</sup>

The court next recognized that the COFC had only addressed the FASA bar twice, in *Labat* and *Group Seven*.<sup>52</sup> The court explained that *Labat* “opined that [the FASA bar] would bar bid protests in this court for task orders on multiple award ID/IQ contracts, but not BPA awards under the FSS.”<sup>53</sup> The court then explained that *Group Seven* “concluded that this court’s ‘jurisdiction[ ] is doubtful’ over a task order protest, even if the task order is an FSS task order.”<sup>54</sup>

The *A&D* court determined, in its case dealing with a multiple award ID/IQ not involving the FSS that the FASA bar applied.<sup>55</sup> “This court cannot frustrate the intent of Congress, which was to exempt from protest the issuance of individual task orders to contractors who had already received awards, subject to protest, of their master ID/IQ contracts.”<sup>56</sup> Whether the FASA bar applies to task orders issues against the GSA FSS is beyond the scope of the case, and remains an open question.

The court then addressed whether any subsequent legislation had affected the FASA jurisdiction bar.<sup>57</sup> The court noted that although the Administrative Disputes Resolution Act of 1996 (ADRA)<sup>58</sup> expanded the COFC protest jurisdiction, nothing in the Act or legislative history indicated a congressional intent to reverse the FASA jurisdiction bar.<sup>59</sup> The FASA is an earlier, more specific statute; the ADRA is a later, more general statute.<sup>60</sup> In this case, “[r]epeal by implication is strongly disfavored . . .”<sup>61</sup> The court concluded by explaining, “the court understands that ADRA expanded this court’s bid protest jurisdiction but left intact the bar against a specific type of bid protest, the protest of the issuance of a task order on a multiple award ID/IQ contract not alleging any of the exceptions enumerated in Section 253j(d).”<sup>62</sup>

#### *Government Accountability Office (GAO)—Affirmative Responsibility Determination*

Charter Environmental, Inc. protested the proposed award of a Forest Service contract for mine restoration services to ECI Northeast, LLC.<sup>63</sup> The main complaint was that the Forest Service should have rejected ECI Northeast’s bid for failure to meet definitive responsibility criteria.<sup>64</sup> The GAO sustained the protest.<sup>65</sup>

The invitation for bids (IFB) contained affirmative responsibility criteria, including a past experience requirement of the successful completion of at least three similar projects.<sup>66</sup> The Forest Service determined that ECI Northeast met the

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<sup>49</sup> 72 Fed. Cl. 126 (2006).

<sup>50</sup> *Id.* at 133.

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

<sup>52</sup> *Id.* at 133-34.

<sup>53</sup> *Id.* at 133.

<sup>54</sup> *Id.* at 133-34 (citing *Group Seven Assocs., LLC v. United States*, 68 Fed. Cl. 28, 32 (2005)).

<sup>55</sup> *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl. 126, 134 (2006).

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

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

<sup>58</sup> Pub. L. No. 104-320, 110 Stat. 3870 (1996).

<sup>59</sup> *A&D Fire Protection*, 72 Fed. Cl. at 134.

<sup>60</sup> *Id.*

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

<sup>62</sup> *Id.*

<sup>63</sup> Charter Envntl., Inc., Comp. Gen. B-297219, Dec. 5, 2005, 2005 CPD ¶ 213.

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* The GAO sustained in part and denied in part. *Id.* The GAO sustained the protest on the issue addressed in this article, but denied a separate argument that ECI Northeast’s bid was nonresponsive. *Id.* at 7.

affirmative responsibility criteria and selected ECI Northeast for award of the contract.<sup>67</sup> As the GAO observed, “[a]lthough the relative quality of the evidence is a matter within the contracting officer’s judgment, the contracting officer may only find compliance with the definitive criterion based on adequate, objective evidence.”<sup>68</sup>

In this case, the agency contacted ECI Northeast requesting confirmation and evidence that ECI Northeast met the responsibility criteria.<sup>69</sup> ECI Northeast replied with information regarding projects completed by Environmental Contractors of Illinois (ECI), ECI Northeast’s parent company.<sup>70</sup> The agency accepted ECI’s experience as valid for ECI Northeast.<sup>71</sup> “As a general rule, the experience of a technically qualified subcontractor or third party – such as an affiliate or consultant – may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor.”<sup>72</sup> The key determination ordinarily turns on the existence and evidence of a commitment by the third party to the prime contractor.<sup>73</sup>

The administrative record did not show any evidence of a commitment by ECI to ECI Northeast’s performance of the contract.<sup>74</sup> ECI and ECI Northeast are separate business entities, and nothing supported the agency determination that ECI Northeast met the affirmative responsibility criteria.<sup>75</sup> The GAO recommended that the agency reconsider the responsibility determination.<sup>76</sup> The GAO also recommended that the agency reimburse the protester the costs of filing and pursuing the protest.<sup>77</sup>

### *Timeliness*

#### *Court of Federal Claims*

The COFC, in *Transatlantic Lines LLC v. United States*,<sup>78</sup> rejected the government’s motion to dismiss a protest regarding the terms of a solicitation filed after the due date for receipt of proposals.<sup>79</sup> This post-award bid protest involved a Military Surface Deployment and Distribution Command request for proposals to transport cargo between Florida and Guantanamo Bay.<sup>80</sup> The GAO dismissed the protest as untimely,<sup>81</sup> the COFC declined to follow the GAO protest timelines and considered the protest on the merits.<sup>82</sup>

This case appears to continue a trend that the COFC is moving further away from the GAO timelines in bid protest actions. In 1994, the COFC addressed a protest complaining of solicitation defects filed after proposal due date, stating, “[w]hile this Court declines to accept [the GAO protest regulation] as controlling in all cases, the defendant persuasively demonstrates the utility of the GAO rule in the bid protest arena.”<sup>83</sup>

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<sup>66</sup> *Id.* at 2.

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* at 5.

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

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

<sup>72</sup> *Id.* at 4-5.

<sup>73</sup> *Id.* at 5.

<sup>74</sup> *Id.* at 6.

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

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 9.

<sup>78</sup> 68 Fed. Cl. 48 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 50.

<sup>81</sup> *Id.* at 50-51.

<sup>82</sup> *Id.* at 52. The court ultimately enjoined the government from continuing with the awardee because the contracting officer failed to ensure the awardee could meet the government’s stated needs and failed to enforce small business regulations. *Id.* at 57-58.

<sup>83</sup> *Aerolease Long Beach & Satsuma Inv., Inc. v. United States*, 31 Fed Cl. 342, 358 (1994).

In a 1999 case, the COFC stated that it “generally has endorsed the GAO’s jurisprudence which dismisses a bid protest in which the protester failed to seek to clarify ambiguities or inconsistencies in the solicitation prior to the award of the contract.”<sup>84</sup> However, in the same case, the COFC recognized that “it appears that this court has followed GAO’s timeliness rule when the plaintiff’s protest is founded upon alleged defects in the solicitation, but it has eschewed GAO’s rule when the plaintiff has asserted a procurement violation.”<sup>85</sup>

The COFC effectively distanced itself from the GAO timeliness regulations in a 2003 case.<sup>86</sup> The court stated, “this court, with all due respect, fails to see how a GAO rule that self-limits that agency’s advisory role constitutes a limit, either legally or prudentially, on this court’s exercise of jurisdiction.”<sup>87</sup> Rather, the court determined that protest actions should be addressed under the same rules as other cases: protester delay in bringing the complaint to the court will be considered as part of the “multi-factored analysis of whether injunctive relief is warranted.”<sup>88</sup>

The government again attempted to persuade the COFC to follow the GAO timeliness rule regarding complaints about the solicitation in the instant case.<sup>89</sup> The cargo transport solicitation was set aside for small business concerns.<sup>90</sup> The contracting officer failed to check the appropriate box on the solicitation to indicate that the Limitations on Subcontracting clause applied.<sup>91</sup> The protester failed to protest this issue prior to the date proposals were due.<sup>92</sup> The COFC dispensed with the timeliness argument swiftly, noting that the rule is not binding on the court, and “[i]n fact, it is not binding on GAO.”<sup>93</sup> It thus appears that the COFC will not regard as untimely a protest challenging a solicitation filed after the proposal due date.

### *GAO Cases*

#### *DefenseLINK does not equal FedBizOpps*

The GAO sustained a protest filed more than six months after award.<sup>94</sup> Worldwide Language Resources, Inc. and SOS International, Ltd. (SOSI) protested the sole-source award of two Air Force contracts for bilingual-bicultural advisor/subject matter experts (BBA-SME) in Iraq.<sup>95</sup> One of these contracts was awarded in December 2004, and the other in July 2005, expanding the scope and length of the contract.<sup>96</sup> The Air Force announced the award of the first sole-sourced contract on 6 December 2004 on the official Department of Defense website, DefenseLINK.<sup>97</sup> The Air Force publicized the July award on FedBizOpps.<sup>98</sup>

The Air Force argued that the protest should be dismissed as untimely because it was not filed until more than six months after publication on DefenseLINK, which placed the protesters on constructive notice of the sole-source award.<sup>99</sup>

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<sup>84</sup> Cubic Def. Sys., Inc. v. United States, 45 Fed. Cl. 239, 252 (1999).

<sup>85</sup> *Id.*

<sup>86</sup> Software Testing Solutions, Inc. v. United States, 58 Fed. Cl. 533 (2003).

<sup>87</sup> *Id.* at 535.

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

<sup>89</sup> Transatlantic Lines, LLC v. United States, 68 Fed. Cl. 48 (2005).

<sup>90</sup> *Id.* at 50.

<sup>91</sup> *Id.* at 52. The Limitations on Subcontracting clause requires that at least half of the personnel cost in performing the contract be for employees of the awardee, not subcontractors. U.S. GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.219-14(b)(1) (July 2006).

<sup>92</sup> *Transatlantic Lines*, 68 Fed. Cl. at 52.

<sup>93</sup> *Id.* The court noted that the timeliness rules are not truly binding on the GAO, either, because the GAO has authority to consider an untimely protest for good cause shown or where a protest raises an issue important to the procurement system. *Id.*

<sup>94</sup> Worldwide Language Res., Inc., Comp. Gen. B-296993.4, Nov. 14, 2005, 2005 CPD ¶ 206.

<sup>95</sup> *Id.* at 2-3.

<sup>96</sup> *Id.* at 3-4.

<sup>97</sup> *Id.* at 17.

<sup>98</sup> *Id.* at 18.

<sup>99</sup> *Id.* at 17.

The protesters claimed to first learn of the contracts from the July award posting to FedBizOpps.<sup>100</sup> Thus, the protesters filed their protests regarding the sole-source award more than six months after the initial action.<sup>101</sup>

The GAO rejected the government argument that announcement on DefenseLINK provided constructive notice to the protesters.<sup>102</sup> The GAO recognized that constructive notice is “evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted.”<sup>103</sup> Because of this harsh result, constructive notice is sparingly invoked, limited to “information published in the CBD and now on FedBizOpps.”<sup>104</sup> These resources “have been expressly designated by statute and regulation as the official public medium for providing notice of contracting actions by federal agencies.”<sup>105</sup>

#### *GAO Dismisses as Untimely, Then Reverses Itself on Reconsideration*

The GAO reversed, after a request for reconsideration, its decision to dismiss a protest as untimely.<sup>106</sup> The U.S. Army Corps of Engineers, Europe District (USACE) issued requests for proposals (RFP) on 7 and 8 September 2005 to procure custom emergency mass notification systems.<sup>107</sup> The USACE issued the RFPs to firms already holding existing task-order contracts.<sup>108</sup> MadahCom, Inc. (MadahCom), the protester, did not hold one of the existing task-order contracts.<sup>109</sup> MadahCom discovered on 8 September 2005 that the contract would be given to one of the existing task-order holders.<sup>110</sup>

MadahCom filed a GAO protest on 20 September 2005.<sup>111</sup> MadahCom claimed that the subject procurement exceeded the scope of the task-order contracts.<sup>112</sup> The GAO dismissed MadahCom’s protest as untimely based on the requirement that protests based on other than solicitation issues be filed within ten days of when the protester knew or should have known of the basis for the protest.<sup>113</sup> In this case, MadahCom knew of the basis for the protest by 8 September but did not file its GAO protest until 20 September, outside the ten-day limit.<sup>114</sup>

MadahCom requested that the GAO reconsider its decision, arguing that the GAO applied the incorrect timeliness rule to the protest.<sup>115</sup> MadahCom argued that the basis for its protest was that the RFP was overly restrictive in limiting the competition to existing task-order contract holders.<sup>116</sup> As this is a solicitation issue, the correct timeliness rule requires the protester to file its protest prior to the proposal due date.<sup>117</sup> Proposals were due on 21 September and MadahCom filed its protest on 20 September, within the time limit.<sup>118</sup> The GAO agreed with MadahCom and reopened the protest.<sup>119</sup>

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<sup>100</sup> *Id.* at 18.

<sup>101</sup> *Id.* at 17.

<sup>102</sup> *Id.* at 21.

<sup>103</sup> *Id.* at 19.

<sup>104</sup> *Id.* at 20.

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

<sup>106</sup> MadahCom, Inc., Comp. Gen. B-297261.2, Nov. 21, 2005, 2005 CPD ¶ 209.

<sup>107</sup> *Id.* at 1-2.

<sup>108</sup> *Id.* at 2.

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

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

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

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

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

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 3-4.

<sup>116</sup> *Id.* at 4.

<sup>117</sup> *Id.*

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

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

### *Pre-Award Debriefing*

Remington Arms Company protested the award of a contract for sniper rifles by the Army to Knight's Armament Company.<sup>120</sup> The Army issued the RFP on 6 December 2004 and had a proposal due date of 11 March 2005.<sup>121</sup> The Army determined that Remington's proposal was unacceptable, and excluded Remington from the competitive range.<sup>122</sup> Remington received a pre-award debriefing on 14 September 2005.<sup>123</sup> Remington alerted the Army that the test which disqualified Remington's proposal was conducted incorrectly.<sup>124</sup> The Army agreed and reinstated Remington into the competitive range.<sup>125</sup>

After the Army awarded the contract to Knight's, Remington protested to the GAO on 6 October 2005.<sup>126</sup> One of the protest grounds was based on information Remington learned in the pre-award debriefing.<sup>127</sup> The Army argued that this protest ground should be dismissed as untimely because it was filed more than ten days from when Remington knew of the basis for the protest.<sup>128</sup> More specifically, in a case involving a required debriefing, a timely protest must be filed within ten days from when the debriefing is held.<sup>129</sup> Remington filed its protest outside either of these required timelines.<sup>130</sup>

The GAO declined to follow these timelines.<sup>131</sup> Subsequent to the debriefing in which Remington learned of the basis for its protest, the Army reinstated Remington into the competitive range.<sup>132</sup> Once that action occurred:

there was no agency action prior to the award determination that was prejudicial to, and protestable by, Remington. In fact, had Remington filed a protest here [on this ground] after being reinstated in the competitive range and before award, the protest would have been speculative and premature because it would have merely anticipated prejudicial agency action.<sup>133</sup>

Therefore, Remington's protest was timely filed.<sup>134</sup>

### *Druyun Revisited*

The GAO rejected a protest filed more than five years after the subject contract was awarded.<sup>135</sup> In 2001, the Air Force awarded a contract to Boeing Satellite Systems.<sup>136</sup> Ball Aerospace & Technologies Corp. (Ball) protested the award in July 2006, arguing that Darleen Druyun's bias resulted in an improper award to Boeing.<sup>137</sup> Ball protested the award to the GAO

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<sup>120</sup> Remington Arms Co., Comp. Gen. B-297374, Jan. 12, 2006, 2006 CPD ¶ 32.

<sup>121</sup> *Id.* at 3, 5.

<sup>122</sup> *Id.* at 5.

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

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 6.

<sup>126</sup> *Id.* at 6-7.

<sup>127</sup> *Id.* at 14.

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

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 16.

<sup>132</sup> *Id.* at 15.

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

<sup>134</sup> *Id.* at 16.

<sup>135</sup> Ball Aerospace & Tech. Corp., Comp. Gen. B-298522, Aug. 11, 2006, 2006 CPD ¶ 113.

<sup>136</sup> *Id.* at 2.

<sup>137</sup> *Id.*

in 2001, but withdrew its protest.<sup>138</sup> The evaluation record, provided to Ball's attorneys, showed that the "evaluation ratings had been changed in a way that appeared to favor Boeing after an initial briefing to Ms. Druyun in her role as the SSA."<sup>139</sup>

Ms. Druyun pled guilty to conspiring with Boeing's chief financial officer in federal district court in 2004.<sup>140</sup> In a statement filed with the court, Ms. Druyun admitted favoring Boeing in several negotiations.<sup>141</sup> Four such negotiations were named, but the subject procurement was not.<sup>142</sup> This statement was publicly available after it was filed with the court.<sup>143</sup> In July 2006, the Department of Defense Inspector General (IG) issued a report concluding that Ms. Druyun had improperly favored Boeing in the subject contract.<sup>144</sup> The IG posted this report on its website, and Ball filed this protest within ten days of that posting.<sup>145</sup>

The Air Force argued that Ball knew of the basis for its protest in 2001 when it received the evaluation report.<sup>146</sup> Alternatively, the Air Force argued that Ball knew, at the latest, when the Druyun statement was filed and publicly available in connection with the criminal case.<sup>147</sup> Ball countered that neither of those earlier occurrences provided real evidence that Ms. Druyun improperly affected the subject procurement; thus, it was not until the IG report was posted that Ball learned of the basis for its protest.<sup>148</sup> The GAO determined that,

although Ms. Druyun's supplemental statement of fact [in 2004] did not specifically identify this procurement as one that she steered to Boeing, Ball knew or should have known the basis of its protest that the award to Boeing was the result of Ms. Druyun's bias after Ball learned of the content of Ms. Druyun's statement.<sup>149</sup>

The GAO came to this conclusion based on a totality of the circumstances-type analysis. The GAO examined all the information available to Ball, and determined that, all of it together, put Ball on notice in 2004.<sup>150</sup> Thus, the protest was untimely.<sup>151</sup>

### *CICA OVERRIDES—Best Interests Really?*

#### *Time Sensitivity Counts*

The government began the fiscal year by convincing the COFC to uphold the override of a CICA stay.<sup>152</sup> The Defense Information System Agency (DISA) issued a RFP for spectrum management engineering services.<sup>153</sup> Alion Science and

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<sup>138</sup> *Id.* at 3.

<sup>139</sup> *Id.* at 4.

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

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

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

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

<sup>144</sup> *Id.* at 4-5.

<sup>145</sup> *Id.* at 5.

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

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 6.

<sup>149</sup> *Id.* at 7.

<sup>150</sup> *Id.* at 10.

<sup>151</sup> *Id.* at 2. The GAO also declined to consider the protest under the significant issue exception to its timeliness rules. *Id.* at 11-12. "While we recognize that the corruption that Ms. Druyun's actions represent has been of widespread interest well beyond the procurement community, the fact is that we have twice addressed the impact of her bias in favor of Boeing." *Id.* at 11.

<sup>152</sup> *Alion Sci. & Tech. Corp. v. United States*, 69 Fed. Cl. 14 (2005).

<sup>153</sup> *Id.* at 16.

Technology Corp. protested to the GAO the contract awarded to Advanced Engineering and Sciences (AES).<sup>154</sup> The protest triggered the statutory stay under the CICA, preventing contract performance by AES.<sup>155</sup> The DISA overrode the stay.<sup>156</sup>

The COFC determined that agency overrides based on a best interests determination are reviewable by the court.<sup>157</sup> The DISA justified its override of the stay based on both the best interests provision and the urgent and compelling provision of the CICA.<sup>158</sup> The government argued to the COFC that an agency override decision based on the best interests provision is not reviewable by the COFC, except in very limited circumstances.<sup>159</sup> This argument is based on language from a 1988 case in the District Court for the District of Columbia.<sup>160</sup> The COFC noted that, although this argument has not been adopted by the COFC, the government continues to press the issue because the CAFC has not directly answered the question.<sup>161</sup>

The COFC found that the DISA had justified that the override because the record supported the determination that both the best interests and the urgent and compelling provisions were satisfied.<sup>162</sup> The DoD requires ever-increasing dedicated spectrum to support its network-centric warfare.<sup>163</sup> The record established that various international governmental and commercial conferences and working groups were meeting to negotiate spectrum allocation.<sup>164</sup> These meetings, well beyond the control of the DoD or federal government, made the need for the subject contract time sensitive.<sup>165</sup> Finally, the DISA justified that continued contract performance was the only solution; the contract was for new work, so no incumbent contract could be temporarily extended to perform the time sensitive mission, and AES was the only offeror with adequate staffing to fulfill the contract.<sup>166</sup> For these reasons, the COFC upheld the override.<sup>167</sup>

### *Override Decision Arbitrary and Capricious*

CIGNA Government Services, LLC protested to the GAO the award of a Medicare claims administration services contract awarded by the Department of Health and Human Services Centers for Medicare and Medicaid Services (CMS).<sup>168</sup> The CMS overrode the CICA stay based on the best interests provision of the CICA.<sup>169</sup> The COFC reinstated the stay because the CMS override decision contradicted evidence in the record and failed to consider relevant factors.<sup>170</sup>

The CMS justified the override in this case by claiming that the CICA stay would delay the implementation of the new Medicare claims system.<sup>171</sup> The COFC did not find this argument compelling because the CMS reported to Congress that “it had ‘flexibility’ in its procurement schedule which could accommodate ‘any unforeseen changes in the marketplace or legislative environment’ and still enable CMS to meet the Congressionally-mandated implementation date of 2011 for the

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

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

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 22.

<sup>158</sup> *Id.* at 16.

<sup>159</sup> *Id.* at 22.

<sup>160</sup> *Id.* The district court case is *Topgallant Group, Inc. v. United States*, 704 F. Supp. 265 (D.D.C. 1988). *Id.* “In *Topgallant*, the district court concluded that a ‘best interests’ determination was of the type ‘committed to agency discretion by law’ and ‘traditionally exempt from judicial review.’” *Id.* (citing *Topgallant*, 704 F. Supp. at 266).

<sup>161</sup> *Alion Sci.*, 69 Fed. Cl. at 22.

<sup>162</sup> *Id.* at 32.

<sup>163</sup> *Id.* at 15-16.

<sup>164</sup> *Id.* at 16.

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

<sup>166</sup> *Id.* at 27.

<sup>167</sup> *Id.* at 32.

<sup>168</sup> *CIGNA Gov’t Servs., LLC v. United States*, 70 Fed. Cl. 100 (2006).

<sup>169</sup> *Id.* at 101.

<sup>170</sup> *Id.* at 102.

<sup>171</sup> *Id.* at 101.

new contracts.”<sup>172</sup> The COFC rejected the CMS attempt to assert flexibility when reporting to Congress and claim a “need to maintain its ‘tight schedule’” when overriding the CICA stay.<sup>173</sup>

The COFC also rejected the CMS override because the CMS failed to consider relevant factors in making its override determination.<sup>174</sup> First, the CMS failed to consider the risks involved if the GAO were to sustain the protest.<sup>175</sup> No mention was made in the override decision addressing the possible costs involved if the GAO recommended that the CMS re-compete the contract.<sup>176</sup> The CMS also failed to evaluate the harm to CMS if the stay remained in place; rather, the CMS simply asserted that the harm outweighed the CICA stay mandate.<sup>177</sup> Finally, the CMS failed to consider the effect the override would have on competition.<sup>178</sup> For these reasons, the COFC reinstated the stay.<sup>179</sup>

#### *\$100,000/Month Savings Still Not Sufficient Override Justification*

In *Automation Technologies, Inc. (ATI)*,<sup>180</sup> the COFC reinstated the CICA stay that the Department of Homeland Security (DHS) had overridden.<sup>181</sup> The DHS awarded a contract to ATI for computer maintenance services in January, 2006.<sup>182</sup> Another offeror, Digital Technologies, Inc. (DTI) protested to the GAO, and contract performance was stayed under the CICA.<sup>183</sup> The DHS took corrective action, and after receiving revised price proposals, awarded the contract to DTI.<sup>184</sup> Another timely protest to the GAO, this time by ATI, again triggered the CICA stay.<sup>185</sup> The DHS overrode the stay, but with this decision the COFC vacated the override.<sup>186</sup>

The DHS executed a determination and findings (D&F) explaining its decision to override the stay.<sup>187</sup> The CICA allows the head of a procuring activity to override a post-award stay imposed under the statute if contract performance is in the best interests of the government or urgent and compelling circumstances preclude waiting for the protest decision.<sup>188</sup> In this case, the DHS overrode the stay because it determined that contract performance was in the best interests of the government.<sup>189</sup> The DHS D&F focused on the merits of the protested issues, and concluded that the estimated savings of approximately \$100,000 per month expected by proceeding under the new contract justified the override.<sup>190</sup> The COFC reviews CICA overrides to ensure agency decisions are not arbitrary, capricious, or contrary to law.<sup>191</sup>

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

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

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 102.

<sup>179</sup> *Id.*

<sup>180</sup> 2006 U.S. Claims LEXIS 278 (Fed. Cl. Sept. 11, 2006).

<sup>181</sup> *Id.* at 1-2.

<sup>182</sup> *Id.* at 2.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 3.

<sup>185</sup> *Id.* at 4.

<sup>186</sup> *Id.* at 5.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 7-8 (citing 31 U.S.C. § 3553(d)(3)(c) (LEXIS 2006)).

<sup>189</sup> *Automation Tech., Inc. v. United States*, 2006 U.S. Claims LEXIS 278, at 6 (Fed. Cl. Sept. 11, 2006).

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

<sup>191</sup> *Id.* at 12-13.

The COFC rejected the DHS's best interests justification.<sup>192</sup> First, the DHS failed to consider the impact of an adverse GAO decision on the protest merits.<sup>193</sup> While the DHS attempted to address the merits in the D&F finding that the protester would lose, the DHS failed to consider how the procurement would be affected if the GAO sustained the protest following the CICA override.<sup>194</sup> Second, the amount of savings the DHS expected was roughly the same amount as had been determined insufficient to justify an override in a separate 2003 case.<sup>195</sup> The COFC declined to foreclose the possibility that savings alone could ever justify an override.<sup>196</sup> However, in this case, the COFC determined that to allow this minimal amount of savings to justify an override would strip away the strength of the stay provisions.<sup>197</sup>

## Costs

### *Standard for Attorney and Consultant Fees Clarified*

Following a GAO recommendation for corrective action and the payment of costs,<sup>198</sup> the Department of the Army (DA) and ITT Federal Services International Corporation (ITT) sought an opinion from the GAO regarding the calculation of costs to be reimbursed to ITT.<sup>199</sup> Specifically, the GAO was asked to address the proper standard for determining the amount of a cost of living increase in the allowable hourly rate for attorney services and the maximum allowable amount for payment of consultant fees.<sup>200</sup>

The CICA allows the GAO to recommend that an agency reimburse a protester the reasonable costs of pursuing the protest, but limits the amount a protester may be paid for attorney fees to \$150 per hour.<sup>201</sup> An agency may only pay a protester more than \$150 per hour for attorney fees if the GAO recommends doing so justified by an increase in the cost of living or other special factors.<sup>202</sup> The CICA also limits the amount that can be paid to a protester for consultant and expert witness services to the highest rate of compensation for expert witnesses paid by the federal government.<sup>203</sup>

In this case, ITT requested payment for attorney fees at \$238 per hour, justifying the higher amount on an increase in the cost of living.<sup>204</sup> ITT based the amount of increase on the Department of Labor (DOL) Consumer Price Index (CPI) specifically measuring costs of securing legal services.<sup>205</sup> The Army countered, and the GAO agreed, that the proper index to use in an upward adjustment in allowable attorney fees is the DOL CPI for All Urban Consumers, U.S. City Average for All Items (CPI-U).<sup>206</sup> This index more closely implements the CICA language of allowing an upward adjustment to account for an increase in the cost of living.<sup>207</sup>

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<sup>192</sup> *Id.* at 23-24.

<sup>193</sup> *Id.* at 16.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 14-15 (citing *PGBA, LLC v. United States*, 57 Fed. Cl. 655, 664 (2003)). See also *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25 (2006) (setting aside a “best interests” agency override of the CICA stay that was a bare “allegation that the new contract is better than the old one”).

<sup>196</sup> *Automation Tech., Inc. v. United States*, 2006 U.S. Claims LEXIS 278 at 18 (Fed. Cl. Sep. 11, 2006).

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

<sup>198</sup> *ITT Fed. Servs. Int'l Corp., Comp. Gen. B-296783, 296783.3* (Oct. 11, 2005). This decision is subject to a protective order and no redacted version has been released.

<sup>199</sup> *ITT Fed. Servs. Int'l Corp., Comp. Gen. B-296783.4, Apr. 26, 2006, 2006 CPD ¶ 72.*

<sup>200</sup> *Id.* at 2.

<sup>201</sup> *Id.* This limit applies to protesters that are not small businesses. *Id.* For a recent case addressing the payment of attorney fees to a successful small business protester see *Blue Rock Structures, Comp. Gen. B-293134.2, Oct. 26, 2005, 2005 CPD ¶ 190.* For small businesses, attorney fees must be reasonable. *Id.* The \$150 per hour limit in the FAR is a benchmark for determining reasonableness, but the agency must challenge amounts claimed above \$150 per hour on reasonableness grounds. *Id.* In this case, the GAO approved a rate of \$350 per hour for a partner in a Washington D.C. firm because the agency provided no evidence that this rate was not reasonable. *Id.*

<sup>202</sup> *ITT Fed. Servs. Int'l Corp., 2006 CPD ¶ 72, at 2.*

<sup>203</sup> *Id.* at 6.

<sup>204</sup> *Id.* at 2.

<sup>205</sup> *Id.* at 3.

<sup>206</sup> *Id.* at 3-4.

<sup>207</sup> *Id.* at 5.

For consultant fees, ITT claimed reimbursement at a rate of \$360 per hour, for a total amount of about \$82,000.<sup>208</sup>

ITT assert[ed] that the proper measure of the ‘highest rate of compensation for expert witnesses paid by the Federal Government’ is the rate that has been paid by any federal agency for any expert witness or consultant in any forum at any time. In support of its claimed amount, ITT has tendered evidence showing that the federal government has paid more than \$360 per hour for expert witnesses in other litigation in various forums.<sup>209</sup>

The Army responded that the *FAR* limits consultant and expert witness fees to the highest federal pay rate, general schedule (GS) grade 15, step 10.<sup>210</sup>

The GAO agreed with the DA.<sup>211</sup> The *FAR* limits compensation for consultant and expert witness fees, referencing statutory and regulatory provisions that in turn list federal pay rates.<sup>212</sup> Further, nothing in the CICA “explains the ‘highest rate of compensation’ language.”<sup>213</sup> The GAO also determined that this approach is consistent with court interpretation of fees allowed under the Equal Access to Justice Act (EAJA) which contains a provision identical to that in the CICA.<sup>214</sup> Therefore, consultant fees reimbursing protesters are capped at the GS 15, step 10 pay rate.<sup>215</sup>

#### *Court Case Good Reason to Delay Paying Costs Claim*

The GAO recommended that the Department of the Air Force reimburse BAE Technical Services, Inc. the costs of pursuing its protest, but refused to recommend that the Air Force reimburse the costs of pursuing the instant claim.<sup>216</sup> BAE submitted its claim to the contracting officer 2 December 2005.<sup>217</sup> By the time BAE filed its request for a GAO opinion on the amount of costs on 8 May 2005, the Air Force still hadn’t issued a written response to the claim.<sup>218</sup> In addition to the substance of its protest costs claim, BAE requested that the GAO recommend that the DAF pay the costs BAE incurred in pursuing the costs claim to the GAO.<sup>219</sup>

The GAO denied the BAE request.<sup>220</sup> The GAO determined that the Air Force had delayed adjudicating the costs claim because a competitor in the same procurement had protested to the COFC.<sup>221</sup> The GAO decided that the Air Force decision to await the outcome of the COFC protest, which essentially challenged the result of the earlier BAE GAO protest, was reasonable and prudent.<sup>222</sup> Further, the GAO determined that although the Air Force had not issued a written response to BAE’s claim, the Air Force had orally informed BAE that the Air Force disputed much of the claimed amount.<sup>223</sup> Despite finding that the Air Force should pay most of the costs claimed, the GAO did not recommend that the Air Force pay the additional expenses BAE incurred in pursuing the GAO opinion on the amount of costs due.<sup>224</sup>

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<sup>208</sup> *Id.* at 6.

<sup>209</sup> *Id.* at 6-7.

<sup>210</sup> *Id.* at 7.

<sup>211</sup> *Id.* at 8.

<sup>212</sup> *Id.* at 7.

<sup>213</sup> *Id.* at 8.

<sup>214</sup> *Id.* at 9-10.

<sup>215</sup> *Id.* at 11.

<sup>216</sup> BAE Technical Servs., Inc., Comp. Gen. B-296669.3, Aug. 11, 2006, 2006 CPD ¶ 122.

<sup>217</sup> *Id.* at 4.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 16.

<sup>220</sup> *Id.* at 19.

<sup>221</sup> *Id.* at 18.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 18-19.

<sup>224</sup> *Id.* at 19.

The GAO published updated versions of two guides: *Bid Protests at GAO: A Descriptive Guide (Bid Protest Guide)* and *Guide to GAO Protective Orders*. The new *Bid Protest Guide* is in its eighth edition, providing a comprehensive user's guide to protests at the GAO.<sup>225</sup> This new edition was necessary due to changes last year to the official GAO bid protest regulations.<sup>226</sup> The *Guide to GAO Protective Orders* was also updated in response to changes in the bid protest regulations.<sup>227</sup> These changes were brought about by the growing use of electronic information transmission and GAO experience in issuing protective orders.<sup>228</sup>

*Bid Protest Statistics for Fiscal Years 2002-2006*<sup>229</sup>

	FY 2006	FY 2005	FY 2004	FY 2003	FY 2002
Cases Filed	1,327 (down 2% <sup>230</sup> )	1,356 (down 9%)	1,485 (up 10%)	1,352 (up 12%)	1,204 (up 5%)
Cases Closed	1,274	1,341	1,405	1,244	1,133
Merit (Sustain + Deny) Decisions	249	306	365	290	256
Number of Sustains	72	71	75	50	41
Sustain Rate	29%	23%	21%	17%	16%
Effectiveness Rate (reported) <sup>231</sup>	39%	37%	34%	33%	33%
ADR <sup>232</sup> (cases used)	91	103	123	120	145
ADR Success Rate <sup>233</sup>	96%	91%	91%	92%	84%
Hearings	11% (51 cases)	8% (41 cases)	9% (56 cases)	13% (74 cases)	5% (23 cases)

Major Mark A. Ries

<sup>225</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-797SP, BID PROTESTS AT GAO (2006).

<sup>226</sup> *Id.* The GAO bid protest regulations are found at 4 C.F.R. § 21 (2006).

<sup>227</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-716SP, GUIDE TO GAO PROTECTIVE ORDERS (May 2006).

<sup>228</sup> *Id.* at 2.

<sup>229</sup> E-mail from Mr. Louis A. Chiarella, Government Accountability Office, Bid Protest Section, to Major Mark A. Ries, Associate Professor, The Judge Advocate General's School, U.S. Army (20 Nov. 2006) (on file with author).

<sup>230</sup> From the prior fiscal year.

<sup>231</sup> Based on a protester's obtaining some form of relief from the agency, as reported to the GAO.

<sup>232</sup> Alternative Dispute Resolution.

<sup>233</sup> Percentage resolved without a formal GAO decision.