

## SPECIAL TOPICS

### Alternative Dispute Resolution

#### *Paying the Piper: Government Accountability Office (GAO) Recommends Agency Pay Protest Costs After Undue Delay in Taking Corrective Action*

In the following two protests,<sup>1</sup> the GAO considered protesters' requests for reimbursement of protest costs following the parties' participation in outcome prediction alternative dispute resolution (ADR) conferences.<sup>2</sup> In each case, the GAO attorney assigned to the case opined at the ADR conference that if the GAO issued a formal opinion, the protest would likely be sustained.<sup>3</sup> Subsequently, in each case, the government stated it would take corrective action in response to the protest and as a result, the GAO dismissed each protest as academic.<sup>4</sup> The protesters later filed separate actions requesting that the GAO recommend the agencies reimburse the protesters' costs.<sup>5</sup>

In *T Square Logistics Services*,<sup>6</sup> the GAO recommended that the Air Force reimburse the protester its protest costs. After the protester filed the protest, the parties participated in an outcome prediction ADR conference with a GAO attorney. Following the ADR conference, the Air Force agreed to take corrective action and then the GAO dismissed the protest as academic. Because the Air Force delayed taking corrective action, the GAO recommended that the Air Force pay protest costs.<sup>7</sup>

In *T Square Logistics*, the Air Force issued a request for proposals (RFP) for the base operating support services at Grissom Air Reserve Base.<sup>8</sup> The RFP stated that the agency would evaluate past performance based on recency, relevancy, and quality. The possible ratings for past performance were "high confidence," "significant confidence," "confidence," "unknown confidence," "little confidence," and "no confidence."<sup>9</sup> In response to the solicitation, the Air Force received ten proposals; of these, the Air Force considered nine of them to be technically acceptable. The agency conducted written discussions with the remaining nine offerors. Data Monitor was the lowest priced offeror of those offerors that received the highest past performance rating of "significant confidence." While the protester's price was lower than Data Monitor's price, the protester received an overall past performance rating of "little confidence." The agency then determined that Data Monitor's proposal was the best value for the government and the agency awarded it the contract.<sup>10</sup>

Following contract award, the protester filed three protests arguing that the Air Force should have included in its discussions with the protester the basis of the Air Force's determination that it had "little confidence" in the protester's past performance.<sup>11</sup> In response to the protests, the Air Force submitted a report to the GAO responding to the protests. In its report, the Air Force argued that it was not required to discuss with the protester its determination that it had "little confidence" in the protester's past performance because the Air Force believed such a deficiency was not the type of deficiency that the protester could have corrected.<sup>12</sup>

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<sup>1</sup> *T Square Logistics Servs. Corp.—Costs*, B-297790.4, 2006 U.S. Comp. Gen. LEXIS 79 (Apr 26, 2006); *Honeywell Tech. Solutions, Inc.—Costs*, Comp. Gen. B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226.

<sup>2</sup> Outcome prediction is a form of alternative dispute resolution (ADR) that the GAO offers in which the GAO attorney assigned to the protest holds a conference with both parties and then provides what he or she predicts will be the likely outcome of the protest if the GAO later issues a written opinion. *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at \*5 n.1. An outcome prediction is not an official GAO opinion and as such, it is not binding upon the GAO. *Id.*

<sup>3</sup> *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at \*5; *Honeywell*, 2005 CPD ¶ 226, at 2.

<sup>4</sup> *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at \*8; *Honeywell*, 2005 CPD ¶ 226, at 3.

<sup>5</sup> *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at \*9; *Honeywell*, 2005 CPD ¶ 226, at 4.

<sup>6</sup> *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79.

<sup>7</sup> *Id.* at \*8-10. The "protest costs" that GAO recommended the Air Force pay include the costs of filing and pursuing the protest. *Id.*

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

<sup>9</sup> *Id.* at \*3.

<sup>10</sup> *Id.* at \*3-4.

<sup>11</sup> *Id.* at \*4-5.

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

On 13 February 2006, the parties engaged in an outcome prediction ADR conference with the GAO attorney assigned to the protest.<sup>13</sup> After considering the arguments of the parties, the GAO attorney predicted that if the GAO issued a decision on these protests, the protester would prevail. On 3 March 2006, the Air Force agreed to take corrective action in the form of re-evaluating the offers for past performance purposes.<sup>14</sup> The Air Force further agreed that if it concluded that any offeror besides Data Monitor presented the best value to the government, then the Air Force would award the contract to that other offeror. Because the Air Force agreed to take corrective action which could result in contract award to the protester, the GAO dismissed the protest as academic.<sup>15</sup>

The protester subsequently requested that the GAO recommend that the Air Force reimburse it for protest costs because the Air Force unduly delayed taking corrective action.<sup>16</sup> Although the Air Force did not agree to pay protest costs, the Air Force did not reply to the protester's request.<sup>17</sup>

While the GAO did not specify the basis of its conclusion, the GAO found that the Air Force unduly delayed taking corrective action in this case and recommended that the Air Force pay the protester protest costs.<sup>18</sup> Pursuant to the GAO's bid protest regulations,<sup>19</sup> the GAO may recommend the agency pay protest costs where "based on the circumstance of the case," the GAO finds that "the agency unduly delayed taking corrective action in the face of a clearly meritorious protest thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief."<sup>20</sup> Generally, the GAO will find that corrective action is not prompt if it is taken, as here, after the agency files its agency report. In this case, because the GAO found the protest to be clearly meritorious and also because it found the Air Force unduly delayed taking corrective action, the GAO recommended the Air Force pay protest costs.<sup>21</sup>

In *Honeywell Technology Solutions*,<sup>22</sup> the GAO recommended that the Navy not reimburse the protester its protest costs arising from an issue that was not clearly meritorious and that was severable from the issue which prompted corrective action.<sup>23</sup> After the protester filed the protest, the parties participated in an outcome prediction ADR conference with a GAO attorney.<sup>24</sup> Following the ADR conference, the Navy agreed to take corrective action regarding an issue deemed clearly meritorious and then the GAO dismissed the protest as academic.<sup>25</sup> Subsequently, the protester requested that the GAO recommend the Navy reimburse it for protest costs related to two separate organizational conflict of interest (OCI) issues. The GAO recommended that the Navy reimburse the protester only for the protest costs which arose from the one OCI issue deemed meritorious during the ADR conference.<sup>26</sup>

In this case, after issuing a RFP for technical and engineering support services, the Navy awarded a contract to Assurance Technology Corporation (ATC).<sup>27</sup> Honeywell protested the award to ATC on multiple grounds, to include allegations that ATC had OCIs that should have prevented contract award.<sup>28</sup> Regarding the OCI allegations, Honeywell presented two separate arguments. First, Honeywell contended that ATC acquired "non-public proprietary cost and technical

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<sup>13</sup> *Id.* at \*5.

<sup>14</sup> *Id.* at \*8.

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

<sup>16</sup> *Id.* at \*9.

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

<sup>18</sup> *Id.* at \*10-11.

<sup>19</sup> 4 C.F.R. § 21.8(e) (2006).

<sup>20</sup> *T Square Logistics*, 2006 U.S. Comp. Gen. LEXIS 79, at \*9.

<sup>21</sup> *Id.* at \*11-12. The GAO found it noteworthy to mention that the Air Force did not dispute the argument that the protests were clearly meritorious or that the Air Force unduly delayed taking corrective action. *Id.*

<sup>22</sup> *Honeywell*, 2005 CPD ¶ 226.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 2. See also explanation of outcome prediction ADR conference *supra* note 2.

<sup>25</sup> *Honeywell*, 2005 CPD ¶ 226, at 3.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 1.

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

data”<sup>29</sup> about Honeywell resulting from Honeywell’s performance as previous technical and engineering support services contractor. Honeywell stated that ATC acquired this non-public information during ATC’s performance of a separate, but related, space systems development department (SSDD) contract. Consequently, Honeywell contended that this knowledge gave ATC an unfair advantage in the contract award at issue. Second, Honeywell contended that ATC’s performance of the SSDD contract would lead to ATC’s supervision of its own work under the technical and engineering support services contract leading to ATC’s “impaired objectivity.”<sup>30</sup>

After the GAO received the agency report, the parties participated in an outcome prediction ADR conference with the GAO attorney assigned to the case.<sup>31</sup> The GAO attorney advised the parties that if the GAO issued a written decision, the GAO would likely sustain the protest on the protester’s first OCI argument because that issue was clearly meritorious. The GAO attorney did not opine on the merits of the protester’s second OCI argument.<sup>32</sup>

Following the outcome prediction conference, the Navy took corrective action in the form of re-evaluating the proposals in light of the potential for OCIs. Because the Navy took corrective action, the GAO dismissed the protest as academic.<sup>33</sup>

Although the protester requested that the GAO recommend that the Navy reimburse it for its protest costs related to both OCI issues, the GAO recommended that the Navy only reimburse the protester for the one OCI issue found to be clearly meritorious.<sup>34</sup> While the GAO normally recommends that the agency reimburse a successful protester for all of its protest costs, the GAO may limit its recommendation under certain circumstances. For example, if the GAO finds that losing protest issues are “so severable as to essentially constitute a separate protest,” then the GAO will recommend that the agency pay only those protest costs which are allocable to the winning protest issues.<sup>35</sup> In this case, at the ADR conference, the GAO attorney found only the first OCI issue to be meritorious. Further, the GAO viewed these two OCI issues as separate. Thus, because the GAO found that the two OCI issues were so severable as to constitute, essentially, separate protests, the GAO recommended that the Navy reimburse the protester only for the first OCI issue.<sup>36</sup>

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

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

<sup>31</sup> *Id.* at 2-3.

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

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

<sup>34</sup> *Id.* at 3-4.

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

<sup>36</sup> *Id.* at 4-5.

## Competitive Sourcing<sup>1</sup>

### *Deputy Garrison Commander Is Not an “Interested Party”*

A recent amendment to the Competition in Contracting Act (CICA)<sup>2</sup> expanded the definition of “interested party” for the purpose of filing a General Accountability Office (GAO) protest of an Office of Management and Budget (OMB) Circular A-76 competition (A-76 competition). Nevertheless, the expanded definition does not include a representative of affected employees.<sup>3</sup> This article discusses an A-76 competition protest filed by Mr. Alan King, Deputy Garrison Commander of the Department of the U.S. Army’s Walter Reed Medical Center in Washington, D.C.<sup>4</sup> The GAO dismissed the protest reasoning that Mr. King was not an “interested party” under the CICA.<sup>5</sup>

Mr. King’s protest arose from the Army’s decision to award a contract for base operations support services to a contractor, (Johnson Controls World Services, Inc. (JCWS), following a cost comparison<sup>6</sup> conducted under the 1999 version of the OMB Circular A-76 (Old A-76).<sup>7</sup> Although the Army ultimately decided to award a contract to JCWS, the Army initially decided to continue performing the subject services with government employees.<sup>8</sup> After the initial decision favoring the in-house employees, JCWS filed two GAO protests arguing that the Army’s decision to implement the most-efficient organization (MEO)<sup>9</sup> was based on inaccurate cost data. JCWS contended, essentially, that if the Army had accurately figured the cost of implementing the MEO, then JCWS’s offer would have been more cost-effective. After a GAO hearing, the Army agreed to take corrective action by reanalyzing the MEO’s cost estimate. Because of this corrective action, the GAO dismissed the protests as academic.<sup>10</sup> Following the Army Audit Agency’s review of the MEO, the Army made changes to the MEO resulting in an increase in the cost of in-house performance and consequently, the Army revised its earlier decision and determined that it would be more cost-effective to award a contract to JCWS.<sup>11</sup> Mr. King’s protest followed ten days later.<sup>12</sup>

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<sup>1</sup> *Office of Management and Budget (OMB) Circular A-76* is a statement of federal policy concerning the performance of commercial activities in the federal government. U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES pmb. (2003) [hereinafter REVISED A-76]. Generally, this policy requires private sector performance of commercial activities unless performance by government employees is more cost-effective. *Id.* This policy also prescribes the procedures that federal agencies must follow in conducting so-called “competitions” of commercial activities; in such competitions, agencies must determine whether private sector performance or government performance would be more cost-effective [hereinafter A-76 competition]. *Id.* at attach. B. If the agency finds that private sector performance is more cost-effective, then at the conclusion of an A-76 competition, the agency awards a contract to a contractor. *Id.* Conversely, if the agency finds that government performance is more cost-effective, then the agency issues a “letter of obligation” to the “official responsible for performance of the MEO” (most-efficient organization). *Id.*

<sup>2</sup> National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1848 (2004). The National Defense Authorization Act for FY 2005 amended the definition of “interested party” for protests under the Competition in Contracting Act, Pub. L. No. 98-369, tit. VII, § 2701, 98 Stat. 1175 (1989) to include the “official responsible for submitting the Federal agency tender in a public-private competition” completed pursuant to OMB Circular A-76 regarding an activity performed by more than 65 full-time equivalent employees. *Id.* See also 31 U.S.C. § 3551 (LEXIS 2006). Thus, this amendment permits the agency tender official in a competition of this magnitude to file a protest at the GAO. *Id.*

<sup>3</sup> Alan D. King, Comp. Gen. B-295529.6, Feb. 21, 2006, 2006 CPD ¶ 44.

<sup>4</sup> *Id.* Last year’s *Year in Review* discussed two earlier GAO protests (filed by JCWS) concerning this same competition. See Major Andrew Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 107.

<sup>5</sup> King, 2006 CPD ¶ 44, at 7.

<sup>6</sup> A “cost comparison” is the “process of developing an estimate of the cost of Government performance of a commercial activity and comparing it . . . to the cost to the Government for contract performance of the activity.” U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES para. 6(1999) [hereinafter OLD A-76]. See generally U.S. OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-76, REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES app. 1 (1996) [hereinafter A-76, REV. SUPPL HANDBOOK]. *Revised A-76* replaced and superseded *old A-76* for streamlined and standard competitions commenced after its effective date. REVISED A-76, *supra* note 1, at pmb.

<sup>7</sup> King, 2006 CPD ¶ 44, at 4-5.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> Under the 1999 version of *OMB Circular A-76*, the most-efficient organization (MEO) is defined as the “government’s in-house organization to perform a commercial activity.” The MEO is based on the performance work statement and is, in effect, the government’s “offer” which is compared to private sector offers during the cost comparison process. A-76, REV. SUPPL HANDBOOK, *supra* note 6. Similarly, under the current version of the circular, the MEO is defined as the “staffing plan of the agency tender, developed to represent the agency’s most efficient and cost-effective organization.” REVISED A-76, attach. D, *supra* note 1, at attach. D.

<sup>10</sup> King, 2006 CPD ¶ 44, at 4.

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

<sup>12</sup> *Id.* at 4-5.

Substantively, Mr. King argued that the Army's authority to conduct a cost comparison under the Old A-76 had expired and thus, the Army should have proceeded under 2003 version<sup>13</sup> of the circular (Revised A-76).<sup>14</sup> Mr. King further argued that in conducting the cost comparison, the Army violated the Anti-Deficiency and other statutes.<sup>15</sup>

Procedurally, Mr. King argued that he was an "interested party" under Revised A-76 claiming that he was the "functional and legal equivalent" of an agency tender official.<sup>16</sup> Although the Army posited that the 1999 version of the circular applied to this cost comparison, Mr. King contended that the 2003 version of the circular applied in this case.<sup>17</sup> The GAO disagreed and concurred with the Army that the 1999 version applied in this case. Nevertheless, the GAO stated that Mr. King would not be an "interested party" under either version of the circular because Mr. King did not fall within the definition of "interested party" under the version of the CICA that was in effect at the time the cost comparison began.<sup>18</sup> Thus, the GAO reasoned that it was the CICA, not the version of the circular, which provided the protester with standing to file a GAO protest. The GAO concluded that Mr. King had no standing because he was "not an interested party to pursue this protest before our Office."<sup>19</sup>

. . . *And Neither Is the Union President*

Similarly, in *Lawrence C. Drake*,<sup>20</sup> the GAO dismissed an unrelated protest stating again that the protester was not an "interested party"<sup>21</sup> under the CICA. After reviewing a protest filed by the president of a chapter of the American Federation of Government Employees, Lawrence C. Drake, the GAO dismissed the protest stating that the president was not an "interested party."<sup>22</sup>

Mr. Drake protested the Department of Labor's classification of accounting services as a "commercial activity."<sup>23</sup> Mr. Drake filed this protest prior to the agency's issuance of a solicitation for the proposed competition under Revised A-76.<sup>24</sup> In the protest, Mr. Drake argued that he was an "interested party" due to his status as the president of the local chapter of affected union employees.<sup>25</sup> The GAO disagreed.<sup>26</sup>

The GAO examined the expanded definition of "interested party" under the CICA, as amended in 2004,<sup>27</sup> and concluded that Mr. Drake was not an "interested party."<sup>28</sup> The GAO further stated that while the term "interested party" under both the

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<sup>13</sup> REVISED A-76, *supra* note 1, at pmb1.

<sup>14</sup> *King*, 2006 CPD ¶ 44, at 2.

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

<sup>16</sup> An "agency tender official" (ATO) is an "inherently governmental agency official with decision-making authority who is responsible for the agency tender and represents the agency tender during source selection." REVISED A-76, *supra* note 1, at attach. D. The "agency tender" is the "agency management plan submitted in response to a solicitation for a standard competition. *Id.* The agency tender includes an MEO agency cost estimate, MEO quality control plan, MEO phase-in plan, and copies of any MEO subcontracts." *Id.* Prior to the 2004 amendment to the CICA permitting the agency tender official to file a GAO protest on behalf of the unsuccessful government employees, no one had standing to file such a protest on behalf of the government employees. *King*, 2006 CPD ¶ 44, at 5.

<sup>17</sup> *King*, 2006 CPD ¶ 44, at 5.

<sup>18</sup> *Id.* While the GAO did not respond to Mr. King's assertion that he was the "functional and legal equivalent" of an ATO, it is clear that Mr. King would not be considered an ATO under Revised A-76. REVISED A-76, *supra* note 1, at attach. D. Under the current circular, an ATO is a responsible party charged with representing the agency during source selection. *Id.* There is no evidence that Mr. King was named as an ATO in this case. *King*, 2006 CPD ¶ 44, at 2-4.

<sup>19</sup> *King*, 2006 CPD ¶ 44, at 7.

<sup>20</sup> Comp. Gen. B-298143, Apr. 7, 2006, 2006 CPD ¶ 63.

<sup>21</sup> *Id.* at 4.

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

<sup>23</sup> *Id.* A "commercial activity" is a "recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement." REVISED A-76, *supra* note 1, at attach. A, ¶ B.2.

<sup>24</sup> *Drake*, 2006 CPD ¶ 63, at 1.

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

<sup>26</sup> *Id.* at 4.

<sup>27</sup> National Defense Authorization Act for FY 2005, Pub. L. No. 108-375, § 326, 118 Stat. 1848 (2004).

<sup>28</sup> *Drake*, 2006 CPD ¶ 63, at 3.

CICA and its own bid protest regulations now includes the agency tender official in a competition involving more than sixty-five employees, the new definition does not include a union representative of the affected employees.<sup>29</sup> The GAO opined that the protester may have confused the term “interested party” under the CICA with the term “intervenor.”<sup>30</sup> While an interested party has standing to file a protest regarding an A-76 competition in its own right, an intervenor does not have standing to file a protest.<sup>31</sup> Nevertheless, one meeting the definition of intervenor may only intervene in a protest previously filed by an interested party. Thus, the GAO dismissed this protest stating that Mr. Drake was not an “interested party” under the CICA eligible to file such a protest.<sup>32</sup>

*GAO Disagrees that Evaluators Were Directly-Affected Employees*

In *CRAssociates, Inc.*,<sup>33</sup> the GAO considered a protest following the agency’s exclusion of the sole private offeror’s proposal from the competitive range. The protester, CRAssociates (CRA), argued that some of the agency’s evaluators had conflicts of interest preventing them from serving as evaluators and also that the agency should have permitted it to correct the deficiencies in its offer. The GAO denied the protest on both grounds.<sup>34</sup>

The contractor’s protest arose from an A-76 competition conducted by the Department of Health and Human Services (HHS) concerning medical services for individuals in the custody of the Department of Homeland Security.<sup>35</sup> The solicitation stated that it would use a cost-technical trade-off analysis in evaluating the private offers and the agency tender.<sup>36</sup> In response to the solicitation, the HHS received one private offer (from CRA) and the agency tender. After the evaluators found numerous deficiencies in CRA’s offer, the agency found CRA’s offer to be technically unacceptable and excluded it from the competitive range. After learning of its exclusion from the competitive range, CRA filed a protest with the GAO.<sup>37</sup>

The GAO considered each of CRA’s arguments separately. First, CRA argued that because five of the eleven source selection evaluators were employed at a particular organization within the agency, Revised A-76 precluded their participation as evaluators. In response, the HHS argued that these five evaluators held positions that were “inherently governmental” and thus, Revised A-76 did not prohibit their participation as evaluators.<sup>38</sup> The GAO agreed with the agency in that Revised A-76 does not prohibit agency employees holding “inherently governmental” positions from serving as evaluators.<sup>39</sup> In contrast, the GAO stated that Revised A-76 does prohibit “directly-affected” employees from serving as evaluators.<sup>40</sup> The

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

<sup>30</sup> *Id.* at 3 n.9. The GAO’s Bid Protest Regulations define an “intervenor” as “an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.” 4 C.F.R. § 21.0(b)(1) (2006). Additionally, these regulations state, “if an interested party files a protest in connection with a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition. . . may also be intervenors.” *Id.* § 21.0(b)(2). Thus, GAO’s regulations would permit a union president to intervene, but not to file an initial protest. *Id.*

<sup>31</sup> *Drake*, 2006 CPD ¶ 63, at 3.

<sup>32</sup> *Id.* at 4.

<sup>33</sup> *CRAssociates, Inc.*, Comp. Gen. B-297686, Mar. 7, 2006, 2006 CPD ¶ 62.

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

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

<sup>36</sup> See generally *supra* note 16 (defining “agency tender”).

<sup>37</sup> *CRAssociates*, 2006 CPD ¶ 62, at 3.

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

<sup>39</sup> *Id.* at 4-5. An “inherently governmental” activity is “an activity that is so intimately related to the public interest as to mandate performance by government personnel.” REVISED A-76, *supra* note 1, at attach. D. In contrast, a “commercial activity” is a “recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement.” *Id.* A commercial activity is the type of activity for which agencies conduct competitions pursuant to Revised A-76. *Id.* Employees holding inherently governmental positions are not involved in commercial activities and so, will never be the subject of a competition under Revised A-76. *CRAssociates*, 2006 CPD ¶ 62, at 5.

<sup>40</sup> “Directly affected” employees are “civilian employees whose work is being competed in a streamlined or standard competition.” REVISED A-76, *supra* note 1, at attach. D. Since only commercial activities are the subject of a competition under Revised A-76, inherently governmental positions will also never be “directly-affected” employees. *Id.* The GAO clarified that Revised A-76 precludes directly-affected employees (employees whose positions the competition is studying) from serving as evaluators on the source selection evaluation board. *CRAssociates*, 2006 CPD ¶ 62, at 4-5. In this case, however, the GAO concluded that the subject HHS evaluators were not directly-affected employees; these evaluators merely worked at the HHS. *Id.* So, the employees were not precluded on that basis from serving as evaluators. *Id.*

GAO determined that the subject evaluators were simply HHS employees—vice “directly-affected” employees. Because the subject evaluators were not directly-affected employees, the GAO found that Revised A-76 did not prohibit their participation as evaluators.<sup>41</sup> GAO concluded that it had no reason to question HHS’s contention that the evaluators in question held positions that were inherently governmental and therefore, denied the protest on this basis.<sup>42</sup>

Second, CRA argued that the solicitation required the HHS to allow it to correct deficiencies in its proposal. The HHS responded that the solicitation only required it to conduct discussions with (and allow revisions to proposals submitted by) offerors whose offers were in the competitive range.<sup>43</sup> Because CRA’s proposal was not in the competitive range, the HHS argued, HHS had no obligation to permit CRA to revise its proposal.<sup>44</sup> The GAO agreed. Therefore, after considering CRA’s protest on both of the aforementioned grounds, the GAO denied the protest.<sup>45</sup>

### *IRS Can’t “Convert” Mailroom to Contract Performance Without a Competition*

The District Court for the District of Columbia considered a case filed by the National Treasury Employees Union (National) contending that the Internal Revenue Service (IRS) improperly obligated fiscal year (FY) 2004 funds<sup>46</sup> to convert IRS mailroom services from government employees to contractors without first conducting an A-76 competition.<sup>47</sup> The Court granted National’s request for declaratory judgment in holding that IRS did, in fact, improperly obligate FY 2004 funds in order to convert performance of its mailroom services to contractors without first conducting a competition pursuant to Revised A-76.<sup>48</sup>

On 31 October 2003, the IRS awarded a contract to ServiceSource for the operation of the IRS mailroom. This contract permitted the IRS to issue task orders for the operation of its mailroom; the contract did not require, however, the IRS to issue any task orders. From January to December 2004, the IRS issued task orders to ServiceSource for performance of mailroom activities obligating funds appropriated to the IRS under the Consolidated Appropriations Act of 2004 (2004 Act). During this timeframe, the IRS gradually terminated the employment of government employees who had been performing the mailroom services by replacing them with ServiceSource employees. By December 2004, the IRS mailroom was operating solely by ServiceSource employees. The IRS did not conduct a competition under Revised A-76 prior to converting mailroom performance to the contractor.<sup>49</sup>

The 2004 Act provides:

None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of an executive agency, that on or after the date of enactment of this Act, is performed by more than 10 Federal employees unless—the conversion is based on the result of a public-private competition plan [under Revised A-76].<sup>50</sup>

National argued that the IRS improperly obligated FY 2004 funds appropriated under the 2004 Act by converting the operation of its mailroom from government employees to contractors without first conducting a competition pursuant to Revised A-76.<sup>51</sup> The IRS responded by arguing that it completed its conversion of the mailroom no later than 31 October

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<sup>41</sup> *CRAssociates*, 2006 CPD ¶ 62, at 4-5.

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

<sup>43</sup> *Id.* at 6.

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

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

<sup>46</sup> Consolidated Appropriations Act, 2004 Pub. L. No. 108-199, div. F, § 647(a), 118 Stat. 3 (2004).

<sup>47</sup> *Nat’l Treasury Employees Union v. Internal Revenue Serv.*, 2006 U.S. Dist. LEXIS 9719 (2006).

<sup>48</sup> *Id.* at \*19.

<sup>49</sup> *Id.* at \*13. See generally *supra* note 1 (explaining A-76 competition).

<sup>50</sup> Consolidated Appropriations Act, Pub. L. No. 108-199, § 647(a) (2004). The Court applies the term, “public-private competition” (used in the 2004 Act) interchangeably with the term, “competition” (used in the *Revised A-76*) where the agency formally compares the cost of performance of a commercial activity by government employees versus by a private contractor. *Nat’l Treasury*, 2006 U.S. Dist. LEXIS 9719, at \*17.

<sup>51</sup> *Nat’l Treasury*, 2006 U.S. Dist. LEXIS 9719, at \*12-13.

2003 when it awarded the contract to ServiceSource—months before the 2004 Act’s effective date of 23 January 2004.<sup>52</sup> Thus, FY 2004 funds were not used in the conversion.<sup>53</sup> The Court disagreed. The Court stated that the key was not the date of contract award, but rather the obligation of FY 2004 funds when the IRS issued task orders under the contract.<sup>54</sup> As such, the court held that the IRS “illegally used 2004 Act funds, without having first held a public-private competition” pursuant to Revised A-76.<sup>55</sup>

### *OMB’s Latest A-76 Report*

In April 2006, the OMB released its annual report concerning FY 2005 competitive sourcing in the federal government.<sup>56</sup> In this report, the OMB tracked competitive sourcing data pursuant to the President’s Management Agenda (PMA).<sup>57</sup> The OMB reported that during FY 2005, federal agencies conducted 181 competitions involving 9,979 employees resulting in over \$3 billion dollars in expected net savings.<sup>58</sup> The total number of competitions and number of affected employees were higher in FY 2004.<sup>59</sup>

The OMB identified some competitive sourcing trends for FY 2005.<sup>60</sup> Federal agencies determined that performance of commercial activities by in-house personnel was more cost-effective than private sector performance for sixty-one percent of the full-time equivalent (FTE) <sup>61</sup> employees competed.<sup>62</sup> The average number of FTEs per standard competition was 152, while the average number of FTEs per streamlined competition was ten.<sup>63</sup> During FY 2004 and FY 2005, eighty-two percent of the FTEs involved in competitions fell into one of five categories: (1) information technology, (2) maintenance and property management, (3) logistics, (4) human resources, personnel management, education and training, or (5) finance and accounting.<sup>64</sup> The average length of standard competitions was eleven months while the average length of streamlined competitions was two and one-half months.<sup>65</sup> In contrast to FY 2004,<sup>66</sup> the clear majority of the competitions in FY 2005

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<sup>52</sup> *Id.* at \*16. The IRS, apparently, asserts its argument that the FY 2004 Act was not in effect on 31 October 2003 because the FY 2004 Act became law on 23 January 2004. *Id.*

<sup>53</sup> *Id.* at \*16.

<sup>54</sup> *Id.* at \*17.

<sup>55</sup> *Id.* at \*19.

<sup>56</sup> U.S. OFFICE OF MANAGEMENT & BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2005 (April 2006), at <http://www.whitehouse.gov/omb> [hereinafter OMB 2005 REPORT]. This report compiles government-wide competitive sourcing data. *Id.*

<sup>57</sup> See U.S. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S MANAGEMENT AGENDA: FISCAL YEAR 2002, at 17 (2001), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf> (explaining that competitive sourcing is one of the key methods by which President Bush seeks to improve government performance).

<sup>58</sup> OMB 2005 REPORT, *supra* note 56, at 1, 14. The OMB explains that agencies predict that they will save in excess of \$3 billion over the next five to ten years resulting from A-76 competitions completed in FY 2005. *Id.* Agencies achieve these savings by “modernization of facilities, the consolidation of operations and other process reengineering, the adoption of new technologies, improved performance standards, [and] workforce realignments. . .” *Id.*

<sup>59</sup> In contrast, in 2004, government agencies completed 229 competitions, cost comparisons and conversions, involving 13,323 FTEs resulting in only \$1.4 billion in expected net savings. U.S. OFFICE OF MANAGEMENT AND BUDGET, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2004, at 10, 33 (May 2005), at <http://www.whitehouse.gov/omb> [hereinafter OMB 2004 REPORT].

<sup>60</sup> OMB 2005 REPORT, *supra* note 56, at 3.

<sup>61</sup> A “full-time equivalent” (FTE) is defined as the “staffing of federal civilian employee positions, expressed in terms of annual productive work hours . . . FTEs may reflect civilian positions that are not necessarily staffed at the time of public announcement . . . The staffing and threshold FTE requirements stated in this circular reflect the workload performed by these FTE positions, not the workload performed by actual government personnel.” REVISED A-76, *supra* note 1, at attach. D.

<sup>62</sup> OMB 2005 REPORT, *supra* note 56, at 12. As in prior years, the OMB compiled data regarding the performance decision as a percentage of FTEs competed rather than as a percentage of competitions completed. *Id.* Thus, the OMB states that competitions completed in FY 2005 resulted in performance by in-house employees for 61 percent of all of the FTEs competed; the OMB does not report the percentage of the time in-house employees won for all competitions completed. *Id.*

<sup>63</sup> REVISED A-76, *supra* note 1, at attach. B. An agency must utilize “standard competition” procedures if on the competition’s start date, a commercial activity is performed by more than sixty-five FTEs. *Id.* Conversely, an agency may utilize “streamlined competition” procedures if on the start date, a commercial activity is performed by sixty-five or less FTEs. *Id.*

<sup>64</sup> OMB 2005 REPORT, *supra* note 56, at 9. OMB did not report separate statistics for FY 2005 regarding the commercial activities most frequently competed; rather, OMB combined these statistics for FY 2004 and 2005. *Id.*

<sup>65</sup> *Id.* at 12.

<sup>66</sup> OMB 2004 REPORT, *supra* note 59, at 33. In FY 2004, seventy-nine percent of the competitions were standard competitions. *Id.*

(sixty-nine percent) was streamlined.<sup>67</sup> Regarding the level of participation by the private sector, the OMB reported that agencies received two or more private sector offers in sixty-three percent of the standard competitions conducted in FY 2005.<sup>68</sup> Agencies received no private sector offers in eleven percent of the standard competitions.<sup>69</sup> Finally, agencies pursued larger standard competitions in FY 2005 (average of 152 FTEs) than in FY 2004 (average of 113 FTEs).<sup>70</sup>

### *Reports on Competitive Sourcing in DoD*

The aforementioned OMB report,<sup>71</sup> a separate DoD report,<sup>72</sup> and a GAO report<sup>73</sup> provide data specifically on competitive sourcing results in the DoD. According to the OMB Report, in FY 2005, the DoD completed thirty-five competitions involving 2,500 FTEs.<sup>74</sup> Of these competitions, nine were standard competitions and twenty-six were streamlined; there were no direct conversions.<sup>75</sup> The average number of FTEs involved in the DoD standard competitions was two hundred and forty-four, while the average number of FTEs in DoD streamlined competitions was twelve.<sup>76</sup> The most frequently competed commercial activity in DoD was “maintenance and repair of buildings and structures.”<sup>77</sup> Resembling the trend in other federal agencies, the performance decisions following DoD competitions favored in-house employees seventy-one percent of the time.<sup>78</sup>

The DoD Report also tracked the cost of conducting FY 2005 competitions, the expected cost savings resulting from conducting the 2005 competitions, and the actual savings from competitions completed.<sup>79</sup> During FY 2005, the DoD incurred costs totaling approximately \$15.4 million attributable to conducting the competitions.<sup>80</sup> The DoD expects that it will realize savings of over \$177 million for the competitions conducted in FY 2005.<sup>81</sup> From FY 2003-FY 2005, the DoD reported it actually saved over \$308 million due to competitions completed during those three years.<sup>82</sup>

To a great extent, competitive sourcing trends in the DoD mirror the trends in other government agencies. For instance, in FY 2005, both the DoD and other federal agencies determined that in-house performance was less expensive than private sector performance the majority of the time.<sup>83</sup> Additionally, in both the DoD and other federal agencies, the vast majority of competitions in FY 2005 were streamlined competitions.<sup>84</sup>

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<sup>67</sup> OMB 2005 REPORT, *supra* note 56, at 28. In 2005, federal agencies completed 124 streamlined competitions and 57 standard competitions. *Id.*

<sup>68</sup> *Id.* at 11. This statistic covers seventy-five percent of the FTEs competed during FY 2005.

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

<sup>70</sup> *Id.* at 28. *See also* OMB 2004 REPORT, *supra* note 59, at 33.

<sup>71</sup> OMB 2005 REPORT, *supra* note 56.

<sup>72</sup> U.S. DEP'T OF DEFENSE, REPORT: FY 2005 COMPETITIVE SOURCING EFFORTS (29 Dec. 2005), at <http://sharea76.fedworx.org/inst/sharea76> [hereinafter DoD REPORT].

<sup>73</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT NO. GAO-06-72, HEALTH BENEFITS COST COMPARISON HAD MINIMAL IMPACT, BUT DOD NEEDS UNIFORM IMPLEMENTATION PROCESS (Dec. 2005) [hereinafter GAO A-76 REPORT] (Report to Congressional Committees).

<sup>74</sup> OMB 2005 REPORT, *supra* note 56. This total includes all competitions completed in FY 2005 regardless of when initiated.

<sup>75</sup> *Id.* While the OMB report states that DoD completed nine “standard competitions,” these nine competitions were actually “cost comparisons” conducted under the previous circular. DoD REPORT *supra* note 72, at 1-3.

<sup>76</sup> OMB 2005 REPORT, *supra* note 56, at 28.

<sup>77</sup> *Id.* at 32.

<sup>78</sup> *Id.* at 33.

<sup>79</sup> DoD REPORT, *supra* note 72, at 4-5.

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

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

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

<sup>83</sup> OMB 2005 REPORT, *supra* note 56, at 33.

<sup>84</sup> *Id.* at 11 and 28.

The reports from both the OMB and the GAO analyzed a recurring provision in the annual DoD appropriations acts<sup>85</sup> requiring that contractors competing in a competition involving more than ten FTEs under Revised A-76 provide a minimum amount of health care for its employees.<sup>86</sup> Specifically, this provision prohibits the DoD from giving any advantage to a private sector proposal where (1) the proposal either provides no health benefits at all or (2) the proposal requires the employer to contribute less for such benefits than the DoD contributes for its civilian employees.<sup>87</sup> The OMB took the position that this requirement creates a disincentive for private contractors to participate in a Revised A-76 competitions referring to these provisions as “statutory constraints on the use of competitive sourcing.”<sup>88</sup> The OMB stated that this restriction is especially harsh for small businesses and that it “eliminates incentives for contractors to provide cost-effective health benefits, such as through health saving and medical saving accounts.”<sup>89</sup>

Similarly, the GAO report analyzed the effect of the health benefits language on DoD A-76 competitions.<sup>90</sup> The GAO analyzed how the DoD was applying the above provision and also what impact, if any, the provision had on DoD’s competitive sourcing program.<sup>91</sup> The GAO determined that this language affected only twelve of the fifty-four competitions the GAO studied. Of these twelve competitions, the GAO found that the health benefits cost provision did not affect the outcome of the final sourcing decision, and thus, had little impact on DoD’s competitive sourcing program.<sup>92</sup> The GAO also concluded that the DoD did not have a consistent policy for implementing this health benefits provision in its A-76 competitions.<sup>93</sup>

Following the above GAO report, the Deputy Under Secretary of Defense (Installations and Environment) issued a policy memorandum implementing the above health benefits provision of the FY 2006 DoD Appropriations Act.<sup>94</sup> This policy requires the DoD to use a uniform process, outlined in the memorandum, to evaluate the health benefits portion of a private sector offer submitted in an A-76 competition. In particular, this policy requires the DoD to state in all A-76 solicitations that a private sector offeror must state in the offers whether it includes a health benefits plan. If the offer does include a health benefits plan, then the DoD will assess the “ratio of a private sector offeror’s health insurance contribution to its direct labor costs to determine if the ratio is equal to, or greater than, the standard health benefit cost factor used in the agency cost estimate” [in calculating the total cost of the agency tender].<sup>95</sup> Regarding the ratio of the private sector offer’s health insurance contribution to its direct labor costs, the memorandum states:

<sup>85</sup> National Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014(a)(3), 119 Stat. 2680; National Defense Appropriations Act for FY 2005, Pub. L. No. 108-287 § 8014(a)(3), 118 Stat. 951 (2004). This recurring provision, also present in the National Defense Appropriations Act for FY 2007, Pub. L. No. 109-289, § 8013(a)(3) (2006) limits DoD’s A-76 competitions involving more than ten FTEs by providing no funding for competitions resulting in contract performance where the contractor does not afford a certain minimal amount of health care benefits for its employees. This provision provides:

None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that . . . is performed by more than 10 Department of Defense civilian employees unless. . .

(3) the contractor does not receive an advantage for a proposal that would reduce costs for the Department of Defense by—

(A) not making an employer-sponsored health insurance plan available to the workers who are to be employed in the performance of that activity or function under the contract; or

(B) offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Department of Defense for health benefits or civilian employees under chapter 89 of title 5, United States Code.

*Id.* § 8014(a)(3).

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

<sup>87</sup> *Id.*

<sup>88</sup> OMB 2005 REPORT, *supra* note 56, at 20.

<sup>89</sup> *Id.*

<sup>90</sup> GAO A-76 REPORT, *supra* note 73, at 27. This report analyzed fifty-four DoD A-76 competitions that were either in progress or were completed in FY 2005. *Id.* The GAO’s study encompassed more competitions than only the thirty-five which DoD completed in FY 2005. *Id.*

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* at 19.

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

<sup>94</sup> Memorandum, Deputy Under Secretary of Defense (Installations and Environment), to DoD Components, subject: Competitive Sourcing Program Policy—Private Sector Health Insurance Costs in Public-Private Competitions, (1 May 2006), *available at* <http://sharea76.fedworx.org/inst/sharea76> [hereinafter Competitive Sourcing Memo].

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

If the ratio is less than the standard health benefit cost factor used in the agency cost estimate, the DoD . . . shall make an upward adjustment for all performance periods to the evaluated cost of the private sector offer's cost proposal, so that the ratio is equal to the standard health benefit cost factor.<sup>96</sup>

In summary, regarding the aforementioned health benefits language required by a recurring provision in the DoD appropriations acts, the GAO determined that the language did not affect the outcome of any sourcing decisions.<sup>97</sup> Additionally, while the GAO found that the DoD did not have a consistent policy for implementing this provision, the DoD issued a memorandum requiring the armed services to implement a consistent policy.<sup>98</sup>

*Extra! Extra! Read All About the Amendment to the A-76 Statute*

On 6 January 2006, section 341 of the National Defense Authorization Act for FY 2006 permanently amended 10 U.S.C. § 2461<sup>99</sup> making significant changes to DoD public-private competitions under Revised A-76.<sup>100</sup> The statute imposes a number of requirements upon a DoD agency conducting a competition under Revised A-76 if the commercial activity is being performed “by 10 or more Department of Defense civilian employees.”<sup>101</sup> Consequently, if a particular DoD competition meets the “10 or more” threshold, the agency must: (1) develop an agency tender and an MEO, (2) issue a solicitation, (3) utilize a cost conversion differential in determining whether to award a contract,<sup>102</sup> and (4) submit a report to Congress prior to commencing the competition.<sup>103</sup>

This amendment to the public-private competition statute is significant for two reasons. First, the amended statute permanently imposes additional restrictions on DoD A-76 competitions over a certain threshold.<sup>104</sup> Prior to the amendment, Congress had imposed some of the same restrictions on an annual basis in the yearly appropriations act.<sup>105</sup> Second, the statute apparently conflicts with another threshold in the National Defense Appropriations Act for FY 2007 (FY07 Appropriations Act) for some of the same requirements.<sup>106</sup> For example, while 10 U.S.C. § 2461 now states that the key threshold is “10 or more”<sup>107</sup> DoD employees, the FY07 Appropriations Act states that the key threshold is “more than 10”<sup>108</sup> (meaning 11 or more). So, while the statute requires the DoD to create an MEO and utilize the cost conversion differential when the function is being performed by “10 or more” employees, the FY07 Appropriations Act imposes this requirement only when the function is being performed by “more than 10” employees. Despite this apparent conflict in the law, because the amended statute—unlike the similar language in the appropriation act—is a permanent change to the law, the permanent statutory language should take precedence over any conflicting language in the annual appropriations act.

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

<sup>97</sup> GAO A-76 REPORT, *supra* note 73, at 27.

<sup>98</sup> Competitive Sourcing Memo, *supra* note 94.

<sup>99</sup> 10 U.S.C.S. § 2461 (LEXIS 2006).

<sup>100</sup> National Defense Authorization Act for FY 2006, Pub. L. No. 109-163, § 341, 119 Stat. 3195 (2006).

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

<sup>102</sup> National Defense Appropriations Act for FY 2006, § 341. The “cost conversion differential” contained in the amended statute states that after the completion of a competition under OMB Circular A-76, government employees will continue to perform the function “unless the difference in the cost of performance by a contractor compared to the cost of performance of the function by . . . civilian employees would exceed the lesser of 10 percent” of the agency tender’s personnel-related costs or \$10,000,000. *Id.* So, this cost conversion differential prevents the DoD from converting a commercial activity to private performance when savings would be insignificant. *Id.*

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

<sup>104</sup> 10 U.S.C.S. § 2461.

<sup>105</sup> National Defense Appropriations Act for FY 2006, Pub. L. No. 109-148, § 8014, 119 Stat. 2814 (2005). This section requires DoD to create an MEO and to use a cost conversion differential in determining whether to award a contract in A-76 competitions involving “more than 10” FTEs. *Id.* The prior year’s appropriations act contained identical language. National Defense Authorization Act for FY 2005, Pub. L. No. 108-287, § 8014, 118 Stat. 951 (2004).

<sup>106</sup> National Defense Appropriations Act for FY 2007, Pub. L. No. 109-289, § 8014, 120 Stat. 1257 (2006).

<sup>107</sup> 10 U.S.C.S. § 2461.

<sup>108</sup> National Defense Appropriations Act for FY 2007, § 8014.

## Privatization

### *GAO's Latest Housing Privatization Report*

In April 2006, the GAO issued a report<sup>1</sup> on the military's family housing privatization program.<sup>2</sup> The GAO's objective in undertaking this study was to assess "whether opportunities exist to improve DoD's oversight of awarded housing privatization projects and to what extent projects are meeting occupancy expectations."<sup>3</sup> The GAO made two major findings.<sup>4</sup> First, it found that the DoD could improve its oversight of awarded privatization projects. Second, it found that the low actual occupancy rates of some privatization projects could create future problems. Finally, the GAO made specific recommendations addressing these findings.<sup>5</sup>

The GAO explained three reasons for its finding that the DoD could improve oversight of awarded housing privatization projects.<sup>6</sup> First, the GAO stated that the Navy's privatization program failed to identify internal problems and further that the Navy reported inaccurate information to the Office of the Secretary of Defense (OSD) for five of the eight projects the GAO reviewed.<sup>7</sup> Second, the GAO stated that the OSD's privatization oversight report was inadequate in that the document was too long, untimely, and often inaccurate.<sup>8</sup> Third, the GAO stated that the armed services used varying methods to gather data regarding housing occupants' satisfaction with the privatization program. The GAO opined that these varying methods reduced the value of the data.<sup>9</sup>

The GAO next explained the reasons for finding that the low occupancy rates in privatized housing could create future problems for housing projects.<sup>10</sup> While the DoD originally anticipated occupancy rates ranging from ninety to ninety-five percent, the actual occupancy rates were much lower. For example, the occupancy rates were below ninety percent in six of nineteen Army projects, four of thirteen Navy and Marine Corps projects, and six of twelve Air Force projects. Additionally, the GAO found that the recent increase in DoD's housing allowances has encouraged many service members to forego living in privatized housing.<sup>11</sup> Consequently, lower occupancy rates results in a decreased cash flow to the developer which, in turn, results in decreased funds to operate the privatization projects. At worst, these reduced funds could result in the

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFF., REPORT NO. GAO 06-438, MILITARY HOUSING: MANAGEMENT ISSUES REQUIRE ATTENTION AS THE PRIVATIZATION PROGRAM MATURES (Apr. 28, 2006) [hereinafter GAO PRIVATIZATION REPORT].

<sup>2</sup> The DoD has permanent authority to privatize military family housing. 10 U.S.C.S. §§ 2871-85. When a military service decides to privatize military family housing at a particular installation, the service normally conveys the housing units to a developer and then it leases the underlying land to the same developer. Office of the Deputy Undersecretary of Defense, Installations and Environment, Military Housing Privatization, Military Housing Privatization Initiative (MHPI) (10 Sept. 2006), <http://www.acq.osd.mil/housing> (last visited 5 Nov 2006). The developer is then responsible for providing suitable housing to military families. *Id.* The privatization project developer's income stream is the service members' housing allowance. *Id.*

<sup>3</sup> GAO PRIVATIZATION REPORT, *supra* note 1, at 1.

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

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

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 12-14. In criticizing the Navy's oversight program, the GAO explained how the Navy failed to identify operational issues and where it failed to report accurate information to the Office of the Secretary of Defense (OSD). *Id.* For example, while a GAO team visited a Navy privatization project at the Naval Air Station in Kingsville, Texas, the GAO found that housing privatization project funds had not been disbursed as the project agreement required. *Id.* Regarding the Navy's reporting inaccurate information to OSD, the GAO stated that the Navy erroneously reported to OSD that the total cost of the San Diego II housing privatization project was \$304 million, while the correct amount was \$427 million. *Id.* The report listed other examples of inaccurate reporting. *Id.*

<sup>8</sup> *Id.* at 15-16. In criticizing the OSD's privatization oversight report, the GAO stated that the sheer number of DoD housing privatization projects has resulted in the report becoming too lengthy and unfocused. *Id.* The GAO recommended that OSD streamline its report format so that the report will not continue to expand as more privatization projects are awarded. *Id.* The GAO further stated that because of sluggish reporting by the armed services, by the time OSD compiles its report, the information it contains is out-of-date. *Id.* Because OSD relied upon some inaccurate information in compiling its report, OSD's report also contained inaccuracies. *Id.*

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

<sup>10</sup> *Id.* at 19. GAO based its conclusions about occupancy rates on a review of all of DoD's awarded privatization projects. *Id.* As of September of 2005, the services had awarded forty-four housing privatization projects. *Id.* In twenty of these forty-four projects, project managers had rented housing units to non-target tenants (i.e. single individuals, military civilians, and the general public). *Id.* In particular, at Patrick Air Force Base, military families occupied only 172 of the 592 available units in September of 2005; non-target tenants occupied 261 units, to include 126 civilians. *Id.* at 25.

<sup>11</sup> Until 2001, the DoD housing allowance only partially reimbursed service members for their off-base housing costs. *Id.* at 27. For example, in 2000, the average housing allowance reimbursed only eighty-one percent of a member's off-base housing costs; currently, the average housing allowance reimburses all of a member's off-base housing costs. *Id.*

developer's default on the project. Thus, lower occupancy rates could place privatization projects at risk by leading to a developer's financial instability.<sup>12</sup>

The GAO made five recommendations to DoD regarding its findings in this report.<sup>13</sup> First, the GAO recommended that the Navy improve oversight of its privatization program. Second, the GAO recommended that the DoD streamline its privatization program report and to make efforts to ensure its accuracy. Third, the GAO recommended that the DoD require the armed services to collect customer satisfaction data—concerning housing privatization—in a consistent manner. Fourth, the GAO recommended that the DoD determine how low occupancy rates in privatized housing will affect DoD's overall privatization program. Finally, the GAO recommended that the DoD revise its housing privatization manual in order to more accurately predict future privatized housing requirements.<sup>14</sup>

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<sup>12</sup> *Id.* at 19-20.

<sup>13</sup> *Id.* at 31-32.

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

## Construction Contracting

### *Specifications Trump Drawings Where Drawings Conflict with Specifications*

The Court of Appeals for the Federal Circuit (CAFC) reversed the Armed Services Board of Contract Appeals' (ASBCA's) grant of a summary judgment motion in favor of the government in a case where drawings and specifications conflicted.<sup>1</sup> The court held that where construction drawings only indicate one of two options that the contract specifications listed, the contractor is entitled to use either of the two options listed in the specifications.<sup>2</sup> The ASBCA earlier interpreted the contract in a way that the drawings merely narrowed the specifications, but did not conflict with them and, therefore, entered summary judgment for the government.<sup>3</sup> The CAFC disagreed and found that the specifications conflicted with the drawings.<sup>4</sup>

The contract giving rise to this disputed claim required the construction of a vehicle maintenance facility at Fort Hood, Texas. The specifications in the contract stated that either polystyrene rigid insulation or pre-cast concrete were approved materials for concrete framework.<sup>5</sup> The drawing detail indicated required dimensions for pre-cast concrete forms, but was silent on polystyrene forms.<sup>6</sup> The contractor elected to use the cheaper polystyrene forms but the government later directed the contractor to use pre-cast concrete in accordance with the drawing detail.<sup>7</sup> The contractor filed a claim for the increased cost to use the concrete forms.<sup>8</sup>

The contract contained the standard construction clauses, including *FAR part 52.236-21, Specifications and Drawings for Construction*, which basically states that in the case of a conflict between the specifications and drawings, the specifications control.<sup>9</sup> The government argued at both the ASBCA and in the appeal that the drawings merely narrowed the specifications and did not conflict with them.<sup>10</sup> The contractor argued at the Board and on its appeal that the "contract must be interpreted in its entirety, giving meaning to all its terms," and that in so doing *FAR 52.236-21* demands that the specifications prevail.<sup>11</sup> The ASBCA, relying on a short line of cases, ruled in favor of the government on the grounds that "a specification provision that allows latitude or options is not in conflict with contracting drawings that narrow the latitude or options."<sup>12</sup>

The court reversed the ASBCA.<sup>13</sup> The court correctly points out that the government's interpretation of the contract does not merely *narrow* the scope of the contractor's options, it *eliminates* an option and the court rejects the cases upon which the

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<sup>1</sup> *Medlin Constr. Group, Ltd v. Harvey*, 449 F.3d 1195 (Fed. Cir. 2006).

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

<sup>3</sup> *Medlin Constr. Group*, ASBCA No. 54772, 05-1 BCA ¶ 32,939.

<sup>4</sup> *Medlin*, 449 F. 3d at 1196.

<sup>5</sup> *Id.* at 163,179.

<sup>6</sup> *Id.* at 163,180.

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

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

<sup>9</sup> This clause states in pertinent part that:

(a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. *Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.* In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided. (emphasis added).

<sup>10</sup> *Medlin Constr. Group*, ASBCA No. 54772, 05-1 BCA ¶ 32,939, at 163,181.

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

<sup>12</sup> *Id.* at 163,182. Interestingly, none of the cases cited by the ASBCA dealt with specification options being eliminated in the drawings as in this case, only that the latitude on how to do the work was limited.

<sup>13</sup> *Medlin Constr. Group, Ltd v. Harvey*, 449 F.3d 1195 (Fed. Cir. 2006).

government and the ASBCA relied.<sup>14</sup> Then, rather than simply relying on the Specifications and Drawings for Construction Clause, the court applied the basic contract interpretation principle that contracts should first be looked at to give meaning to each and every provision of the contract.<sup>15</sup> Under this analysis, the court held that only the contractor's interpretation of the specifications and drawings give meaning to both and remanded the case to the ASBCA with instructions to enter summary judgment for the contractor and to determine quantum.<sup>16</sup>

*Procedurally Deficient Type II Differing Site Condition Claim Sustained Where Government Can't Show Prejudice*

The ASBCA sustained a contractor's Type II Differing Site Condition claim despite the fact that the contractor did not comply with the written notice provision's in the Differing Site Conditions Clause.<sup>17</sup> The Board held that the procedural deficiency did not prejudice the government.<sup>18</sup>

In this case, the contractor damaged its equipment when it encountered unexpected obstacles and debris while digging electrical conduit lines.<sup>19</sup> Although the government was aware of the conditions based on meetings and site visits, the government argued that the contractor could not recover because it failed to provide the prompt written notice required by the contract clause.<sup>20</sup>

In sustaining the contractor's claim, the Board held that "[t]he written notice requirements are not construed hypertechnically to deny legitimate contractor claims when the government was otherwise aware of the operative facts."<sup>21</sup> The Board also stated that "[t]he written notice requirement is waived if the government has actual or constructive notice of the conditions encountered and is thus not prejudiced by lack of [written] notice from the contractor."<sup>22</sup> The Board found that the government failed to make any showing of prejudice "from the passage of time or an inability to minimize extra costs resulting from any delay in receiving prompt written notice"<sup>23</sup> and the case was remanded to the parties to negotiate the quantum.<sup>24</sup>

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<sup>14</sup> *Id.* at 1202.

<sup>15</sup> *Id.* at 1201.

<sup>16</sup> *Id.* at 1204.

<sup>17</sup> FAR 52.236-2, Differing Site conditions (Apr 1984), which states in pertinent part that:

(a) The contractor shall *promptly*, and before the conditions are disturbed, give a written notice to the Contracting Officer of . . . (2) unknown physical conditions at the site, of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as in inhering in work performed of the character provided for in the contract. . . .

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the *written* notice required; . . . .

U.S. GENERAL SERVS. ADMIN ET. AL., FEDERAL ACQUISITION REGULATION PT. 55.236.2 (July 2006) (emphasis added).

<sup>18</sup> Parker Excavating, Inc., ASBCA No. 54637, 06-1 BCA ¶ 33,217.

<sup>19</sup> *Id.* at 6-7.

<sup>20</sup> *Id.* at 21.

<sup>21</sup> *Id.* at 24.

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

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

<sup>24</sup> *Id.* at 25.

## Bonds, Sureties, and Insurance

### *Increased Threshold for Requirement to Provide Performance and Payment Bonds for Construction Contracts*

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) raised the minimum purchase threshold from \$25,000 to \$30,000 for requiring performance and payment bonds in construction contracts, or alternative payment protections in the case of contracts not greater than \$100,000.<sup>1</sup> The Council took this action in accordance with section 807 of the Ronald Reagan National Defense Authorization Act of 2005 directing that certain acquisition thresholds be periodically adjusted in response to future inflation.<sup>2</sup>

### *Bid Bond Broker's Questionable Conduct Not Imputed to Bidder*

The Court of Federal Claims (COFC) declined to impute an insurance broker's questionable conduct to a bidder whose bid a contracting officer determined to be nonresponsive because the amount of the contractor's bid bond exceeded the amount authorized by their surety.<sup>3</sup>

In this case arising out of a construction and repair contract at the Fresno Air National Guard Station, Aeroplate submitted a bid bond to cover the value of its apparent winning bid of \$7.3 million. When the government called the surety to validate the bid bond before award, the surety informed the official that the bid bond was only for bids not exceeding \$5.5 million. Upon further investigation, the contracting officer discovered that the surety's broker was aware of this limitation, but prepared a bid bond for \$7.3 to cover Aeroplate's bid.<sup>4</sup> Because the contracting officer knew of this information before award, the contracting officer found Aeroplate's bid nonresponsive even though the bid bond was facially valid.<sup>5</sup>

The COFC first restated the basic principle of suretyship law that the government generally cannot challenge a facially valid bid bond. The government must instead rely on other remedies after the bidder is awarded the contract if it later fails to submit the required performance and payment bonds.<sup>6</sup> The COFC went on to address the government's "unclean hands" argument and stated that although the broker knew they were submitting a bid bond that exceeded the surety's authorization, there was no evidence that the bidder knew that the bid bond exceeded the surety's authorization.<sup>7</sup> Therefore, the COFC declined to impute the broker's knowledge to the bidder to tarnish it with "unclean hands" and thus prevent it from recovering in a court of equity.<sup>8</sup> In reaching its conclusion, the court relied on the relatively common industry practice of brokers issuing bid bonds that exceed a surety authorization.<sup>9</sup>

### *Payment Bond Surety Can Bring Action under Tucker Act<sup>10</sup>*

In a case arising out of a U.S. Army Corps of Engineers contract in Massachusetts, the Court of Federal Claims rejected the government's challenge to the long-standing authority permitting a payment bond surety to bring suit under the Tucker

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<sup>1</sup> Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 71 Fed. Reg. 188, at 57,366 (effective 28 Sept. 2006). *See also* U.S. GEN. SRVS. ADMIN, ET. AL., FEDERAL ACQUISITION REG. pt. 28.102 (July 2006).

<sup>2</sup> Pub. L. No. 108-375, 118 Stat. 1974 (2004).

<sup>3</sup> *Aeroplate Corp. v. United States*, 71 Fed. Cl. 568 (2006).

<sup>4</sup> *Id.* at 569.

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

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

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

<sup>8</sup> *Id.* at 571.

<sup>9</sup> *Id.* at 570.

<sup>10</sup> The case discussed below is one representative case out of a series of at least five cases the Court of Federal Claims decided the past year in which they came to a consistent conclusion – that the Tucker Act gives even a *payment* bond surety the jurisdictional predicate to step in the shoes of the contractor to recover retained funds. Only one case is discussed for economy of space purposes. For additional cases on point, *see* *Commercial Cas. Ins. Co. of Ga. v. United States*, 71 Fed. Cl. 104 (2006); *Liberty Mutual Ins. Co. v. United States*, 70 Fed. Cl. 37 (2006); *Nova Cas. Co. v. United States*, 69 Fed. Cl. 284 (2006); and *Nat'l Am. Ins. Co. v. United States*, 72 Fed. Cl. 251 (2006).

Act to recover for payments made to subcontractors when the government releases retained funds to the contractor after notification by the surety of their performance.<sup>11</sup>

In this case, the contractor, M.A.T. Marine, Inc., successfully completed performance on a project but arguably defaulted on its obligation to pay certain laborers and materialmen. Traveler's Insurance, the payment and performance surety, paid the subcontractors and suppliers and notified the government of their action.<sup>12</sup> Following completion of the project, and *after* the surety had notified the government of their actions under their payment bond and requested that the government withhold payment to the contractor, the government nonetheless released retained funds to M.A.T. Marine, Inc. Traveler's then brought suit to recover their payments under the doctrine of equitable subrogation.<sup>13</sup>

The COFC held that the

Tucker Act's waiver of sovereign immunity encompasses the claim of a surety that has satisfied all of its obligations under a payment bond and is therefore subrogated to the equitable rights of the contractor, to recover from the United States an amount equal to the damages it suffered with respect to the payment bond."<sup>14</sup>

Before finding in favor of the surety in this case, the court summarized the surety's equitable rights to subrogation as follows:

a surety that satisfies its payment, but not its performance, bond and settles all unpaid claims of laborers and materialmen is subrogated to the equitable rights both of the subcontractors and of the prime contractor in any retained contract funds, with the limitation that a payment-bond surety has a priority inferior to the government's right to set off the remaining contract balance if the United States has an unsettled claim against the contractor.

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<sup>11</sup> The Traveler's Indemnification Co. v. United States, 72 Fed. Cl. 56 (2006).

<sup>12</sup> *Id.* at 58.

<sup>13</sup> *Id.* "The doctrine of equitable subrogation has been described by the Supreme Court as one 'not founded in contract [, but rather,] . . . a creature of equity . . . enforced solely for the purpose of accomplishing the ends of substantial justice . . . and independent of any contractual relations between the parties.'" *Id.* at 60 (quoting *Memphis & L.R.R. Co. v. Dow*, 120 U.S. 287, 301-302 (1887)).

<sup>14</sup> *Traveler's Indemnification*, 72 Fed. Cl. 56, at 66.

## Deployment and Contingency Contracting

### *New FAR Part 18*

The Civilian Agency Acquisition Council and the Defense Acquisition Council (FAR Councils) published an interim rule through FAR Case 2005-038, Emergency Acquisitions.<sup>1</sup> This interim rule revises *FAR part 18, Emergency Acquisitions*, “to provide a single reference to acquisition flexibilities that may be used to facilitate and expedite acquisitions of supplies and services during emergency situations.”<sup>2</sup> The interim rule does not provide any additional emergency acquisition flexibilities, policies, or procedures.<sup>3</sup> Rather, part 18 provides a single reference for the various flexibilities located throughout the *FAR*.<sup>4</sup> The interim rule became effective on 5 July 2006, and comments were due by 5 September 2006.<sup>5</sup>

*Part 18* is divided into two subparts: *subpart 18.1, Available Acquisition Flexibilities*, which “identifies the flexibilities that may be used anytime and do not require an emergency declaration;”<sup>6</sup> and *subpart 18.2, Emergency Acquisition Flexibilities*, which “identifies the flexibilities that may be used only after an emergency declaration or designation has been made by the appropriate official.”<sup>7</sup> The Emergency Acquisition Flexibilities subpart is further divided into three sections: Contingency Operation, Defense or Recovery from Certain Attacks, and Incidents of National Significance, Emergency Declaration, or Major Disaster Declaration.<sup>8</sup>

### *SIGIR Reports*

The Special Inspector General for Iraq Reconstruction (SIGIR) published a report titled, *Iraq Reconstruction: Lessons in Contracting and Procurement (Iraq Contracting Report)*, in July 2006.<sup>9</sup> The Iraq Contracting Report is the second in a series of three reports published by the SIGIR addressing the reconstruction efforts in Iraq under the SIGIR’s Lessons Learned Initiative (LLI).<sup>10</sup> The Iraq Contracting Report “provides a chronological review of the U.S. government’s contracting and procurement experience during the Iraq relief and reconstruction program.”<sup>11</sup> Following the review, the SIGIR then provides lessons learned from this process and recommendations for improving contingency contracting in the future.<sup>12</sup>

The Iraq Contracting Report explores the variety of planning approaches used by different agencies involved in the Iraq reconstruction effort, and reviews funding allocations provided by Congress through various stages of the reconstruction.<sup>13</sup> For the uninitiated, the Iraq Contracting Report gives a look into the complex process of planning for and executing a massive foreign rebuilding effort. For those with prior exposure to the Iraq reconstruction effort, the Report reminds how the process began and highlights the successes, failures, and lessons learned. “SIGIR divides this report into four chronological periods and one functional concept area.”<sup>14</sup> The Iraq Contracting Report begins in the summer of 2002 with what it terms the “Pre-ORHA Period,”<sup>15</sup> and follows through “The ORHA and Early-CPA Period,”<sup>16</sup> “The Later CPA Period,”<sup>17</sup> and “The

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<sup>1</sup> Federal Acquisition Regulation; Emergency Acquisitions, 71 Fed. Reg. 38,247 (July 5, 2006) (to be codified at 48 C.F.R. pt. 18).

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

<sup>3</sup> *Id.* at 38,248.

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

<sup>5</sup> *Id.* at 38,247.

<sup>6</sup> *Id.* at 38,248.

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

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

<sup>9</sup> SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, IRAQ RECONSTRUCTION: LESSONS IN CONTRACTING AND PROCUREMENT (July 2006).

<sup>10</sup> *Id.* at 9. The Special Inspector General for Iraq Reconstruction (SIGIR) Lessons Learned Initiative (LLI) began in September 2004, and includes reports addressing three areas: human capital management, contracting and procurement, and program and project management. *Id.*

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

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

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* The Pre-ORHA Period covers the period from the summer of 2002 to January 2003. *Id.* “ORHA” stands for Office of Reconstruction and Humanitarian Assistance. *Id.* at 14. This period was characterized by classified, uncoordinated agency action. *Id.*

Post-CPA Period.”<sup>18</sup> The functional area addresses the Commander’s Emergency Response Program (CERP) and the Commanders Humanitarian Relief and Reconstruction Program (CHRRP).<sup>19</sup>

Following the historical review, the SIGIR provides key lessons learned and recommendations.<sup>20</sup> Lessons learned were broken into two sections: strategy and planning, and policies and process.<sup>21</sup> Lessons in strategy and planning consisted of: including contracting staff in the planning process; ensuring all agencies operate under the same system of roles and responsibilities; emphasizing flexible programs for smaller-scale reconstruction such as the CERP; and generally avoiding sole-sourced and limited competition procurements.<sup>22</sup> Lessons learned in policies and process consisted of: establishing a single, simple, uniform set of contracting regulations; developing contracting systems for contingency operations; designating a single contracting entity to coordinate all contracting in theater; ensuring adequate requirements data; avoiding design-build contracts for small-scale projects; and using assessment and audit teams.<sup>23</sup>

The SIGIR then provides six recommendations to address the lessons learned.<sup>24</sup> First, DoD should lead “[a]n interagency working group . . . [to develop] a single set of simple and accessible contracting procedures for use in post-conflict reconstruction situations.”<sup>25</sup> The SIGIR refers to this as the “Contingency FAR (CFAR).”<sup>26</sup> Second, Congress should “legislatively institutionalize” programs such as CERP and CHRRP for use in future operations.<sup>27</sup> Third, contracting staff should be included at all planning stages for contingency operations.<sup>28</sup> Fourth, a “deployable reserve corps of contracting personnel” should be created to be called on in contingency operations.<sup>29</sup> Fifth, information systems for managing contracts in contingency operations should be developed.<sup>30</sup> Finally, the SIGIR recommends that a “diverse pool of contractors with expertise in specialized reconstruction areas” be pre-qualified, and contracts possibly pre-competed.<sup>31</sup>

The SIGIR also published a report titled Review of Task Force Shield Programs (TFS Report) in April 2006.<sup>32</sup> The TFS Report “addressed the U.S.-led effort, implemented by Task Force Shield, from September 2003 through April 2005, to build the capacity of the Iraqi government to protect its oil and electrical infrastructure.”<sup>33</sup> The SIGIR notes that “during the course of this review there was a lack of available program, financial, and contract records” and that “we did not receive access to selected information we requested from the Multi-National Force-Iraq subordinate commands . . .”<sup>34</sup>

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<sup>16</sup> *Id.* at 11. The ORHA and Early-CPA Period covers the time from January 2003 to August 2003. *Id.* The ORHA was created in January 2003 to manage reconstruction and humanitarian activities in Iraq, but was based in Washington, D.C. *Id.* at 18. The Coalition Provisional Authority (CPA) was created to replace the ORHA between April and June 2003. *Id.* at 23.

<sup>17</sup> *Id.* at 11. The Later CPA Period covers August 2003 to June 2004. *Id.* This period was characterized by a shift in contracting emphasis from humanitarian relief and restoration of essential services to large-scale infrastructure projects. *Id.* at 34.

<sup>18</sup> *Id.* at 11. The Post-CPA Period covers the period from June 2004 to the time of the Report. *Id.* “On June 28, 2004, the CPA Administrator transferred sovereignty to the Iraq Interim Government (IIG).” *Id.* at 68. Despite this transfer of authority, the U.S. government maintained a substantial contracting presence in Iraq. *Id.*

<sup>19</sup> *Id.* at 11. The Commander’s Emergency Relief Program (CERP) was created to assist lower level commanders to “contract, procure, and implement small projects in a short timeframe.” *Id.* at 81. The Commanders Humanitarian Relief and Reconstruction Program (CHRRP) was developed to “target reconstruction of water and sewerage services, primarily in Baghdad.” *Id.*

<sup>20</sup> *Id.* at 93.

<sup>21</sup> *Id.* at 94-95.

<sup>22</sup> *Id.* at 94.

<sup>23</sup> *Id.* at 95.

<sup>24</sup> *Id.* at 97.

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

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

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

<sup>28</sup> *Id.* at 98.

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

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

<sup>31</sup> *Id.* at 99.

<sup>32</sup> SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, REVIEW OF TASK FORCE SHIELD PROGRAMS (REPORT NO. SIGIR-06-009) (Apr. 28, 2006).

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

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

Aside from a lack of access to information, the SIGIR reported that “[m]ost of the information we gathered generally indicates that the lack of a clear management structure for the U.S. agencies responsible for the protection of Iraq’s security degraded the ability of Task Force Shield to effectively manage the [Oil Protective Force] OPF and [Electrical Power Security Service] EPSS.”<sup>35</sup> The SIGIR found that OPF was not successful and that EPSS “barely got started before it was cancelled.”<sup>36</sup> The SIGIR further found that money management was not documented and there were indications of potential fraud.<sup>37</sup> From these findings, the SIGIR recommends that the Iraq Reconstruction Management Office (IRMO) and the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A) cooperate to solve these issues.<sup>38</sup>

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

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

<sup>37</sup> *Id.* at i-ii.

<sup>38</sup> *Id.* at ii-iii.

## Information Technology (IT)

### *These Laptops Are Not Made for Walkin'*

The main development this past year in IT was the potential compromise of personal data from government laptop computers. In early May, the Department of Veterans Affairs (VA) reported the theft of a department laptop computer from an employee's home.<sup>1</sup> Law enforcement officials later recovered the stolen computer, which contained personal information on approximately 26.5 million people.<sup>2</sup> This theft prompted the Government Accountability Office (GAO) to warn that "[r]obust federal security programs are critically important to properly protect this information and the privacy of individuals."<sup>3</sup> Heeding this warning, the VA awarded a \$3.7 million contract to install encryption software on "department computers and portable media, such as mobile e-mail devices, flash drives and CDs."<sup>4</sup>

The VA was not alone in reporting such security breaches. The Commerce Department reported the loss or theft of 1,137 laptops since 2001, and also could not account for fifteen handheld devices and forty-six thumb drives since 2003.<sup>5</sup> An internal report at the Department of Homeland Security also noted problems with laptop security.<sup>6</sup> The Department of Education acknowledged losing personal information of 11,000 student aid borrowers.<sup>7</sup> Within the Department of Defense (DoD), "a Navy recruiter . . . lost 30,000 records when a bag holding his laptop fell off his motorcycle in August."<sup>8</sup>

These security breaches prompted the Chairman of the House Committee on Government Reform to require all agencies to report similar losses or breaches of security.<sup>9</sup> As of this writing, the departments of Defense, Treasury and Health and Human Services had not reported their losses.<sup>10</sup> With Congress considering a data breach bill,<sup>11</sup> all agencies should expect to see greater reporting requirements, as well as an increased procurement focus on data security.

### *Do NOT Go to the Head of the Class*

In March 2006, the House Committee on Government Affairs issued its annual "federal computer security scorecards,"<sup>12</sup> tracking agency compliance with the Federal Information Security Management Act (FISMA).<sup>13</sup> Using inflammatory language in an accompanying press release,<sup>14</sup> Committee Chair Tom Davis released computer security "grades" for twenty-

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<sup>1</sup> Daniel Pulliam, *House Passes IT Security Bill*, GovExec.com (Sept. 27, 2006), at <http://www.govexec.com/dailyfed/0906/092706pl.htm>.

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

<sup>3</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-897T, INFORMATION SECURITY: LEADERSHIP NEEDED TO ADDRESS WEAKNESSES AND PRIVACY ISSUES AT VETERANS AFFAIRS, at Highlights (June 20, 2006).

<sup>4</sup> Daniel Pulliam, *VA Installs Encryption Software on Thousands of Laptops*, GovExec.com (Sept. 26, 2006), at <http://www.govexec.com/dailyfed/0906/092606pl.htm>.

<sup>5</sup> Daniel Pulliam, *Commerce Reports Loss of More Than 1,100 Laptops*, GovExec.com (Sept. 22, 2006), at <http://www.govexec.com/dailyfed/0906/092206pl.htm>.

<sup>6</sup> Daniel Pulliam, *Review: Security Flaws Place DHS Inspectors' Laptops at Risk*, GovExec.com (Oct. 2, 2006), at <http://www.govexec.com/dailyfed/1006/100206pl.htm>.

<sup>7</sup> CBS News, *More Government Laptops Missing* (Sept. 22, 2006), available at <http://www.cbsnews.com/stories/200609/22/national/printable2032797.shtml> [hereinafter CBS News].

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

<sup>9</sup> Committee on Government Reform, *Davis Data Breach Bill Approved by House* (Sept. 27, 2006), available at <http://reform.house.gov/GovReform/News/DocumentSingle.aspx?DocumentID=50834>.

<sup>10</sup> CBS News, *supra* note 7.

<sup>11</sup> H.R. 5838, 109th Cong. (2006), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.05838> (last visited Oct. 13, 2006).

<sup>12</sup> Committee on Government Reform, *Leave No Computer System Behind: A Review of the 2006 Federal Computer Security Scorecard* (Mar. 16, 2006), available at <http://reform.house.gov/GovReform/Hearings/EventSingle.aspx?EventID=40364> [hereinafter *Leave No Computer System Behind*].

<sup>13</sup> Pub. L. No. 107-347, 116 Stat. 2899 (2002).

<sup>14</sup> *Leave No Computer System Behind*, *supra* note 1607. ("If FISMA was the No Child Left Behind Act, a lot of critical agencies would be on the list of 'low performers.'")

four agencies, which averaged a D+ across the government.<sup>15</sup> According to Davis, the DoD dropped from a D in Fiscal Year (FY) 2004 to an F in FY 2005.<sup>16</sup>

Also in March 2006, the Office of Management and Budget (OMB) released its annual assessment of FISMA compliance across the government.<sup>17</sup> Though not assigning grades, OMB's report analyzed agency FISMA compliance in more detail than Congressman Davis' report.<sup>18</sup> In its report, the OMB noted "progress in . . . several key security performance measures,"<sup>19</sup> but also found "areas requiring strategic and continued management attention over the coming year. . . ."<sup>20</sup> Crediting input to the report from agency Inspectors General and Chief Information Officers (CIOs),<sup>21</sup> the OMB relayed several statistics from DoD's CIO.<sup>22</sup> Perhaps most interestingly, the DoD's CIO reported that "76%" of its employees had received IT security awareness training, while "85%" of employees with "significant responsibilities" had received such training.<sup>23</sup>

Until these grades improve, and until these percentages increase, procurement officials should expect to see more of their agency dollars earmarked for IT security.

### *Invest Wisely*

Whether budgeting specifically for IT security or other IT needs, agencies must justify their requests for major IT investments. Agencies do this through a Capital Asset Plan and Business Case, usually called an "exhibit 300."<sup>24</sup> In January 2006, the GAO released a report criticizing the lack of "[u]nderlying support" found in exhibit 300s.<sup>25</sup> Specifically, the GAO noted deficiencies in supporting documentation, policy compliance, and cost-information processes.<sup>26</sup> The danger of this, according to the report, is that the "OMB and agency executives may be depending on unreliable information to make critical decisions on IT projects, thus putting at risk millions of dollars."<sup>27</sup> Though the report examined only five agencies,<sup>28</sup> it noted that the identified "weaknesses and their causes are . . . consistent with problems in project and investment management that are pervasive governmentwide, including at such agencies as the Department of Defense. . . ."<sup>29</sup>

Agencies should get their exhibit 300s in order because it looks as if there will be plenty of opportunity to spend billions of dollars on IT in the coming years. On 29 September 2006, the General Services Administration (GSA) posted a Request for Proposal in support of its "Alliant" government-wide acquisition contract (GWAC).<sup>30</sup> Valued at \$65 billion over ten

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

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

<sup>17</sup> U.S. OFF. OF MGMT. & BUDGET, FY 2005 REPORT TO CONGRESS ON IMPLEMENTATION OF THE FEDERAL INFORMATION SECURITY MANAGEMENT ACT OF 2002 (Mar. 1, 2006). The GAO's Director, Information Security Issues, also provided congressional testimony that commented on OMB's findings. See U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-527T, INFORMATION SECURITY: FEDERAL AGENCIES SHOW MIXED PROGRESS IN IMPLEMENTING STATUTORY REQUIREMENTS (Mar. 16, 2006).

<sup>18</sup> *Id.* at tbl. of contents.

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

<sup>20</sup> *Id.* at 4. According to OMB, the first such area needing more attention is "[o]versight of contractor systems." *Id.*

<sup>21</sup> *Id.* at 5.

<sup>22</sup> *Id.* at 27.

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

<sup>24</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-250, INFORMATION TECHNOLOGY: AGENCIES NEED TO IMPROVE THE ACCURACY AND RELIABILITY OF INVESTMENT INFORMATION at highlights (Jan. 2006).

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

<sup>26</sup> *Id.* at 2-3.

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

<sup>28</sup> *Id.* (Agriculture, Commerce, Energy, Transportation, Treasury.)

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

<sup>30</sup> U.S. GEN. SERV. ADMIN., *What's New on Alliant* (Sept. 29, 2006), available at [http://www.gsa.gov/Portal/gsa/ep/contentView.do?programID=8957&channelId=-14865&oid=14264&contented=14628&pageTypeId=8199&contentType=GSA\\_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=9FG4](http://www.gsa.gov/Portal/gsa/ep/contentView.do?programID=8957&channelId=-14865&oid=14264&contented=14628&pageTypeId=8199&contentType=GSA_BASIC&programPage=%2Fep%2Fprogram%2FgsaBasic.jsp&P=9FG4).

years,<sup>31</sup> the Alliant GWAC will “provide[ ] IT solutions through performance of a broad range of services . . . .”<sup>32</sup> The GSA will manage the GWAC both through a full and open competition and through a small business set-aside.<sup>33</sup>

Within the DoD, the Army announced “a \$5 billion . . . contract designed to standardize desktop and notebook purchases.”<sup>34</sup> The Army awarded the ten-year “Army Desktop and Mobile Computing-2 (ADMC-2)” contracts to “three large businesses and six small businesses.”<sup>35</sup> The Navy also announced a \$3.1 billion three-year extension of its contract with Electronic Data Systems to build the Navy Marine Corps Intranet.<sup>36</sup>

Given the burgeoning opportunities to buy IT,<sup>37</sup> and given congressional and GAO scrutiny of IT matters, procurement officials should invest wisely when buying goods and services in this exploding acquisition area.

Lieutenant Colonel John J. Siemietkowski

*Agencies Should Increase Scrutiny of Risky Information Technology Projects*

In June 2006, the GAO issued a report on high-risk<sup>38</sup> information technology (IT) projects in twenty-four government agencies.<sup>39</sup> The GAO’s objectives in this study were to (1) summarize high-risk projects, (2) determine how each agency identified its high-risk projects and how each agency managed them, and (3) determine the relationship between the high risk list and the OMB’s Management Watch List.<sup>40</sup> The GAO made three major findings and it also made recommendations to OMB for future action.<sup>41</sup>

The GAO made three primary findings in its report on high-risk IT projects.<sup>42</sup> First, agencies identified two hundred twenty-six IT projects as high-risk.<sup>43</sup> Normally, agencies identified these projects as high-risk because the projects met one

<sup>31</sup> Jenny Mandel, *GSA Solicits Input on IT Contracts Worth \$65 Billion*, GovExec.com (June 2, 2006), at <http://www.govexec.com/dailyfed/0606/060206m1.htm>.

<sup>32</sup> U.S. GEN. SERVS. ADMIN., *Alliant Overview* (Oct. 12, 2006), available at [www.gsa.gov/alliant](http://www.gsa.gov/alliant).

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

<sup>34</sup> Dawn S. Onley, *washingtonpost.com, Army Computer Initiative Awards Work to 9 Firms* (May 1, 2006), available at <http://pqasb.pqarchiver.com/washingtonpost/access/1029503671.html?dids=1029503671:1029503671&FMT=ABS&FMTS=ABS:FT&fmac=&date=May+1%2C+2006&author=Dawn+S.+Onley&desc=Army+Computer+Initiative+Awards+Work+to+9+Firms>.

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

<sup>36</sup> Daniel Pulliam, *Navy Intranet Contractor Receives Three-Year Extension*, GovExec.com (Mar. 28, 2006), at [http://www.ogovexec.com/story\\_page.cfm?articleid=33704&den=e\\_gvet](http://www.ogovexec.com/story_page.cfm?articleid=33704&den=e_gvet).

<sup>37</sup> Along with the examples above, we also expect agencies to increase IT spending on continuity of operations plans—those arrangements necessary for employees to work remotely during natural disasters, viral epidemics, and terrorist attacks. See U.S. GOV’T ACCOUNTABILITY OFF., REP. NO. GAO-06-713, CONTINUITY OF OPERATIONS: SELECTED AGENCIES COULD IMPROVE PLANNING FOR USE OF ALTERNATE FACILITIES AND TELEWORK DURING DISRUPTIONS (May 2006).

<sup>38</sup> In most instances, projects are considered “high-risk” because these projects are so essential that delay or failure in contract performance would have a significant impact on the agency’s essential functions. The OMB has specified that agencies should consider IT projects as high-risk if a project meets one of more of the following four reasons.

[T]he agency failed to demonstrate the ability to manage [complex projects]; the projects had exceptionally high development, operation or maintenance costs; the projects are addressing deficiencies in the agencies’ ability to perform mission critical business functions; or the projects’ delay or failure would impact the agencies’ essential business functions.

U.S. GOV’T ACCOUNTABILITY OFF., GAO 06-647, INFORMATION TECHNOLOGY: AGENCIES AND OMB SHOULD STRENGTHEN PROCESSES FOR IDENTIFYING AND OVERSEEING HIGH RISK PROJECTS 1-2 (June 15, 2006).

<sup>39</sup> These 226 IT projects were valued at approximately \$6.4 billion and represented about ten percent of the President’s total IT budget for FY 2007. *Id.* at 3.

<sup>40</sup> *Id.* at 2. In the President’s budget request for FY 2007, the OMB listed about thirty percent of the federal government’s major IT projects on the OMB’s “Management Watch List.” *Id.* at 9. This list, also known as OMB’s At-Risk List, is an OMB tool to monitor the performance of the federal government’s IT contracts. The OMB places a project on this list if the project does not demonstrate sufficient indications of successful performance. In the OMB’s evaluation, the OMB gives each project a score in ten different categories and then determines whether the project should be placed on the Management Watch List. *Id.* at 7.

<sup>41</sup> *Id.* at 3-4.

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

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

or more of OMB's four high-risk criteria.<sup>44</sup> In about seventy percent of the cases, an agency listed a project as high-risk because a delay or failure in the project's performance would have a significant impact on the agency's functions. Second, the GAO found that while it is significant that agencies identified high-risk IT projects, agencies did not always follow OMB's four-part criteria in determining a project to be high-risk.<sup>45</sup> As such, the GAO opined that it is likely that there are IT projects that should be identified as high-risk which have not been so identified. Third, the GAO stated that while the criteria the OMB uses for determining a high-risk IT project and for placement on OMB's Management Watch List differ, agencies should monitor both types of projects.<sup>46</sup>

The GAO summarized its findings, by agency, regarding high-risk IT projects in a series of tables in an appendix to the report.<sup>47</sup> Table seven summarizes DOD's high-risk IT projects.<sup>48</sup> The GAO lists these DOD IT projects as high-risk because in each case, the project (1) has very high development, operating, or maintenance costs, (2) is intended to address deficiencies in performance of an "essential mission program or function of the agency," and (3) would be so affected by delay or failure that this would constitute "unacceptable or inadequate performance or failure of an essential mission function of the agency."<sup>49</sup>

The GAO recommended three courses of action to OMB.<sup>50</sup> First, the GAO recommended that each agency consistently applies OMB's criteria for identifying high-risk IT projects. Second, the GAO recommended that each agency develops a standardized method for placing new high-risk projects on its list and also for removing high-risk projects from its list. Third, the GAO recommended that OMB establishes a consolidated list of all government high-risk IT projects and report that list to Congress.<sup>51</sup>

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

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

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

<sup>47</sup> *Id.* at 31-69.

<sup>48</sup> The DOD's six high-risk IT projects are: the Joint Tactical Radio System, the Defense Integrated Military Human Resources System, the Expeditionary Combat Support System, the Global Combat Support System—Army, the Logistics Modernization Program, the Navy Enterprise Resource Planning. *Id.* at 34-35. In the DOD's 2007 budget request, DOD requested over \$782 million to fund these six high-risk IT projects. *Id.*

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

<sup>50</sup> *Id.* at 4, 24.

<sup>51</sup> *Id.* at 24.

## Major Systems Acquisitions

*Government Accountability Office (GAO): DoD Is Failing to Acquire Technical Data Rights (a.k.a. You Can't Repair Your Car Without the Repair Manual)*

In July 2006, the GAO issued a report<sup>1</sup> on the DoD's failure to obtain sufficient technical data rights<sup>2</sup> for seven major weapons systems. The GAO's objective in undertaking this study was to assess how "Army and Air Force sustainment plans for fielded weapon systems had been affected by technical data rights" and to evaluate "requirements for obtaining technical data rights under current DoD acquisition policies."<sup>3</sup> The GAO made two major findings. First, it found that the Army and Air Force's failure to obtain technical data rights in procuring certain weapons systems had resulted in problems in sustaining these weapons systems.<sup>4</sup> Second, it found that DoD's acquisition policies do not require obtaining technical data rights when procuring major weapons systems.<sup>5</sup> The GAO also made specific recommendations addressing these shortcomings.<sup>6</sup>

The GAO first found that the Army and Air Force's failure to obtain technical data rights resulted in problems in sustaining particular weapons systems.<sup>7</sup> Specifically, the GAO reviewed seven major weapons systems to include the C-17 aircraft, the F-22 aircraft, the C-130J aircraft, the up-armored High-Mobility Multipurpose Wheeled Vehicle (HMMWV), the Stryker family of vehicles, the Airborne Warning and Control Systems (AWACS) aircraft, and the M-4 carbine.<sup>8</sup> In each of these weapons systems, the GAO found that because the government lacked technical data rights, it in competitively acquiring additional weapons systems, in acquiring needed spare parts, and in performing maintenance on these weapon systems.<sup>9</sup>

While the GAO also found that that DoD's acquisition policies do not require obtaining technical data rights when procuring major weapons systems, the GAO noted that both the Army and the Air Force are working independently toward drafting guidance.<sup>10</sup> In 2005, the Army created a working group to explore problems and solutions concerning technical data for weapons systems.<sup>11</sup> This group will likely produce proposed guidance on this topic.<sup>12</sup> The Air Force Materiel Command is currently developing proposed procedures to identify technical data rights issues early in the acquisition process.<sup>13</sup> In fact, in May 2006, the Secretary of the Air Force issued a memorandum mandating that technical data rights be considered in all acquisition "strategy plans, reviews, and associated planning documents for major weapon systems programs and subsequent source selections."<sup>14</sup>

After discussing its findings, the GAO made recommendations to the Secretary of Defense.<sup>15</sup> First, the GAO recommended that the Secretary of Defense require program managers to "assess long-term technical data needs and

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO 06-839, WEAPONS ACQUISITION: DOD SHOULD STRENGTHEN POLICIES FOR ASSESSING TECHNICAL DATA NEEDS TO SUPPORT WEAPON SYSTEMS (July 14, 2006).

<sup>2</sup> Technical data is defined as "recorded information used to define a design and to produce, support, maintain, or operate the item." *Id.* at 1. When DoD contracts to purchase weapons systems, it may also purchase the technical data rights associated with those systems. *Id.* As intellectual property, data rights have intrinsic value and thus, purchasing these rights costs money. *Id.* Because DoD may utilize some major weapons systems for many years, purchasing technical data rights may be worthwhile so that DoD may competitively solicit other vendors for follow-on contracts and also so that DoD may be able to maintain the weapons systems. *Id.*

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

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

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

<sup>6</sup> *Id.* at 2-4.

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

<sup>8</sup> *Id.* at 6-9.

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

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

<sup>11</sup> *Id.* at 15.

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

<sup>13</sup> *Id.* at 17-18.

<sup>14</sup> *Id.* at 18. In this memorandum, the Secretary of the Air Force stated that the best time to assess the need for technical data rights is prior to contract award. *Id.*

<sup>15</sup> *Id.* at 19.

establish corresponding acquisition strategies that provide for technical data rights needed to sustain weapon systems.”<sup>16</sup> Second, the GAO recommended that the Secretary of Defense require any new DoD policies implementing the GAO’s recommendations be included in mandatory acquisition guidance such as DoD Directive 5000.1 and DoD Instruction 5000.2.<sup>17</sup> In response to the GAO’s recommendations, the DoD submitted a statement concurring with the GAO’s report.<sup>18</sup>

*Verdict Is In on Major Systems—Cost of Research, Development and Production Is Up*

In its annual audit of DoD’s major acquisition programs, the GAO found that the cost of research, development and production has increased dramatically over the past five years.<sup>19</sup> In an effort to control costs, the DoD implemented a policy in May of 2003 implementing a “knowledge-based evolutionary framework.”<sup>20</sup> The framework requires DoD acquisition decision makers to possess a certain level of technical knowledge at certain key time periods in the life cycle of each weapon system: at the time development starts, at the time of DoD design review, and at the time of the production decision.<sup>21</sup> This policy further requires decision makers to possess the requisite technical knowledge at each critical juncture prior to moving on to the next phase of development.<sup>22</sup>

In this report, the GAO assessed fifty-two DoD weapons systems on three knowledge-based criteria: (1) the level of technology maturity at the start of development,<sup>23</sup> (2) the level of design and technology maturity at the point of the DoD’s design review,<sup>24</sup> and (3) the level of production, design and technology maturity at the point of the production decision.<sup>25</sup> The GAO opined that DoD’s lack of sufficient technical knowledge at these three critical junctures (at development start, at the point of DoD review, and at the point of the production decision) was the primary cause for cost overruns in the fifty-two systems studied.<sup>26</sup>

In reviewing the level of knowledge at the three critical junctures, the GAO reported that at the start of development, the DoD possessed sufficient knowledge in only ten percent of the programs studied.<sup>27</sup> By the time of design review, the GAO stated that the DoD possessed sufficient knowledge in only forty-three percent of the programs.<sup>28</sup> By the time of the production decision, the DoD possessed sufficient knowledge in only sixty-seven percent of the programs.<sup>29</sup>

For example, the GAO’s report assessed the Air Force’s F-22A Raptor,<sup>30</sup> the Army’s Future Combat Systems,<sup>31</sup> and the Navy’s Multi-mission Maritime Aircraft.<sup>32</sup> While the GAO analyzed fifty-two weapons systems, these three systems

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

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

<sup>18</sup> *Id.* at 43. In DoD’s response, the Deputy Undersecretary of Defense commented that “guidance on technical data rights will be incorporated into DoD Instruction 5000.2 when it is next updated.” *Id.*

<sup>19</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO 06-391, DEFENSE ACQUISITIONS: ASSESSMENTS OF SELECTED MAJOR WEAPON PROGRAMS (Mar. 31, 2006). From 2001 to 2006, DoD’s budget for major weapons has nearly doubled from approximately \$700 billion to almost \$1.4 trillion. *Id.* at 3.

<sup>20</sup> *Id.* at 10-11.

<sup>21</sup> *Id.* at 11.

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

<sup>23</sup> The GAO defines sufficient “technology maturity” at the start of development as the point when the “technologies needed to meet essential product requirements have been demonstrated to work in their intended environment.” *Id.* at 9.

<sup>24</sup> The GAO defines sufficient “design and technology maturity” at the point of DoD design review as when “at least 90 percent of engineering drawings . . . provides tangible evidence that the design is stable.” The GAO also refers to this as a “stable design.” *Id.*

<sup>25</sup> *Id.* The GAO defines sufficient “production, design and technology maturity” at the point of the production decision as when “all key manufacturing process are in statistical control—that is, they are repeatable, sustainable, and capable of consistently producing parts within the product’s quality tolerances and standards—at the start of production.” *Id.* For each weapons system it studied, the GAO inserted a bar graph showing what it considered to be the optimal level of knowledge at the three critical junctures—at the start of development, at DoD’s design review, and at the time of the production decision. *Id.* at 16-17.

<sup>26</sup> *Id.* at 10-11.

<sup>27</sup> *Id.* at 11.

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

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

<sup>30</sup> The F-22A Raptor is an air superiority fighter aircraft with air-to-ground attack capability. *Id.* at 59.

illustrate some of the problems with cost overruns the GAO noted throughout its report. In each of these three weapons systems, the GAO found that the DoD did not possess sufficient knowledge at all three critical junctures resulting in increased costs.<sup>33</sup>

The tone of the GAO's report expressed some frustration with the DoD's inability to control the costs of its weapons systems.<sup>34</sup> The GAO takes the position that the DoD could better control costs if the DoD ensured that its acquisition decision makers possessed the requisite technical knowledge at the three critical junctures discussed above.<sup>35</sup>

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<sup>31</sup> The FCS is a system of related systems "composed of advanced networked combat and sustainment systems, unmanned ground and air vehicles, and unattended sensors and munitions." *Id.* at 61.

<sup>32</sup> The Multi-mission Maritime Aircraft (MMA) is "part of the Broad Area Maritime Surveillance (BAMS) family of systems, along with the BAMS unmanned aerial vehicle and the aerial common sensor. *Id.* at 89. The family of systems is intended to sustain and improve the Navy's maritime warfighting capability." *Id.*

<sup>33</sup> *Id.* at 59, 61 and 89.

<sup>34</sup> *Id.* at 3. The GAO stated in the letter forwarding this report to Congress, "it is imperative that these investment deliver as promised not only because of their value to the warfighter but because every dollar spent on weapons systems means one dollar less of something else DoD or the Government can do."

<sup>35</sup> *Id.* at 10-11.

## Intellectual Property

### *One Step Outside the Country, One Step Back from Patent Infringement*

In *Zoltek Corp. v. United States*,<sup>1</sup> the federal circuit addressed two questions related to the remedy available for a government contractor's unauthorized use of a patentee's patent. The court found that (1) 28 U.S.C. § 1498 is inapplicable if some of the steps in the claims of a method patent are practiced in a foreign country; and (2) an unauthorized use of a patentee's patent by a government contractor does not amount to a separate taking action under the Fifth Amendment. Although the court agreed on the aforementioned points, it could not agree on a rationale as to why. Such lack of clarity makes this opinion incorrigible because it is impossible to wade through its murky waters.

Further confusing the landscape, the court also fails to address in its controlling opinion how 28 U.S.C. § 1498(c), the extraterritoriality limitation provision confining U.S. liability to certain domestic activity, fits into the landscape. Omitting a discussion on subsection 1498(c), the only part of the statute addressing territoriality, is confusing and unhelpful. At the heart of failing to write an informative and useful decision is the court's lack of appreciation as to the purpose and underlying principles behind why section 1498 was written. Unfortunately, the Federal Circuit has denied a petition to rehear *Zoltek* or to hear it en banc.<sup>2</sup> Thus, no solution to calm the churned-up waters appears to be on the horizon.

In *Zoltek*, the plaintiff owned a patent on a method to produce silicon fiber products that could be used in stealth aircraft.<sup>3</sup> The U.S. government, through its contractors, used patentee's invention in designing and building the F-22 fighter.<sup>4</sup> In producing patentee's silicon fiber products, the government contractors manufactured and processed some of the sheets entirely abroad, and some, the Tyranno fibers, were manufactured abroad and processed in the United States.<sup>5</sup> Subsequently, patentee sued the United States for unauthorized use of its patent under 28 U.S.C. § 1498.<sup>6</sup> The government moved for partial summary judgment stating that patentee's claims were barred under 28 U.S.C. § 1498(c), which prohibits any claim arising in a foreign country.<sup>7</sup> The Court of Federal Claims dismissed the motion, agreeing that the claim was barred under section 1498(c), and "directed plaintiff to amend its complaint to allege a taking under the Fifth Amendment."<sup>8</sup> The trial court certified its section 1498 analysis and its holding that the plaintiff's claims of patent infringement "sounded in the Fifth Amendment, under section 28 U.S.C. § 1292(d)(2)" for interlocutory appeal.<sup>9</sup> Although the trial court's analysis addressed 1498(c) as the reason for why no patent infringement liability attached, the federal circuit did not address that statute in its holding.

Section 1498 in pertinent part reads:

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without a license of the owner thereof or lawful right to manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his **reasonable and entire compensation** for such use and manufacture.

...

(c) The provisions of this section shall not apply to any claim arising in a foreign country.

The federal circuit produced four opinions in *Zoltek*, each having different rationales. In the controlling *per curiam* opinion, two judges (Dyk and Gajarsa) agreed that 28 U.S.C. § 1498 would only hold the United States liable for the use of a method patent if each and every step of the claimed method was practiced within the boundaries of the United States.<sup>10</sup> They

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<sup>1</sup> 442 F.3d 1345 (Fed. Cir 2006).

<sup>2</sup> *Zoltek Corp. v. United States*, 464 F.3d 1335 (2006).

<sup>3</sup> *Zoltek*, 442 F.3d at 1347.

<sup>4</sup> *Id.* at 1349.

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

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

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

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

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

<sup>10</sup> 442 F.3d at 1347.

also agreed that direct infringement under section 271(a) is a necessary predicate for government liability to attach under section 1498, but not agree as to why.<sup>11</sup> In addition, the two judges held that alleged patent infringement against the United States is not a taking of private property for public use under the Fifth Amendment.<sup>12</sup>

The second opinion, a concurring opinion by Judge Gajarsa, agrees that 271(a) is a necessary predicate for infringement because *NTP, Inc. v. Research In Motion (NTP)*<sup>13</sup> stated as much in its reasoning, however erroneously. Judge Gajarsa opines that the rationale for that proposition is weak and is better justified through another line of reasoning.<sup>14</sup> He notes that in *NTP*, the federal circuit mischaracterized the holding of *Decca v. United States*<sup>15</sup> in the footnote of another decision, *Motorola, Inc. v. United States*.<sup>16</sup> In that case, the court merely was articulating that the government, under 28 U.S.C. § 1498, cannot be sued for active inducement infringement under 35 U.S.C. § 271(b) or for contributory infringement under 35 U.S.C. § 271(c).<sup>17</sup> Thus, finding infringements of sections 271(b) and (c) is precluded in a § 1498 action. This does not mean, however, that a §1498 infringement must be a predicate for a 35 U.S.C. § 271(a) infringement as *NTP* interpreted the situation.<sup>18</sup> This mischaracterization is the catalyst for how the waters started to become cloudy.

Instead of relying on *NTP*'s weak reasoning to reject Zoltek's claims against the government under § 1498, Judge Gajarsa concluded that a "use" of a method claim of a patented invention occurs only when each and every step of that method is practiced.<sup>19</sup> Further, a use "arises in a foreign country" under 28 U.S.C. § 1498 (c) when any one of the claimed steps is practiced abroad.<sup>20</sup> Thus, Judge Gajarsa would have affirmed the trial court's findings with respect to its section 1498(c) analysis and barred plaintiff from its suit, regardless of the *NTP* precedent.<sup>21</sup>

Judge Dyk, in his concurring opinion, expressed why he believes *NTP* was correctly decided in concluding that the government "can only be liable for infringement under section 1498(a) if the same conduct would render a private party liable for the infringement under section 271(a)."<sup>22</sup> Judge Dyk saw the purpose of section 1498(a) as making the government and its contractors liable for "use" of a patented invention under the similar circumstances upon which a private party would be liable for a direct infringement under section 271(a) in the patent laws. He did not see a broader and separate purpose for why section 1498 was written.

Judge Plager dissented from the *per curiam* opinion and wrote his views separately. He did not agree that a claim under section 1498 is governed by the limitations of section 271(a). Judge Plager saw section 271(a) as solely addressing infringements among private litigants.<sup>23</sup> The only issue Judge Plager agreed with the panel on is that, for an infringement of a method claim to occur under 1498(a) or 271(a), each and every step of the method must be practiced.<sup>24</sup> He did not agree, however, that each step must be practiced within the United States, as is required under section 271(a).<sup>25</sup> "[D]ealing with infringement litigation between private parties [has] no direct application to infringement litigation against the United States under 28 U.S.C. § 1498."<sup>26</sup> Accordingly, Judge Plager would have held that plaintiff has stated a cause of action under § 1498

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<sup>11</sup> *Id.* at 1372 (J. Plager, dissenting).

<sup>12</sup> *Id.* at 1347.

<sup>13</sup> 418 F.3d 1282 (Fed. Cir. 2005).

<sup>14</sup> *Zoltek*, 442 F.3d at 1353.

<sup>15</sup> 640 F.2d 1156 (Ct. Cl. 1980).

<sup>16</sup> 729 F.2d 765, 768 n.3 (Fed. Cir. 1984).

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

<sup>18</sup> *See NTP*, 418 F.3d at 1282.

<sup>19</sup> *Zoltek*, 442 F.3d at 1358.

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

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

<sup>22</sup> *Id.* at 1368.

<sup>23</sup> *Id.* at 1372.

<sup>24</sup> ***Id.* at 13779.**

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

<sup>26</sup> *Id.* (citing *Motorola, Inc. v. United States*, 729 F.2d 765, 768 (Fed. Cir. 1984)).

with regard to the Tyranno mats manufactured in Japan, but processed in the United States.<sup>27</sup> He would have found no cause of action for all activity occurring entirely outside U.S. boundaries.<sup>28</sup>

In addition, Judge Plager analyzed in great detail why the unauthorized use of a patent by the government or its contractors exercises the taking power of the government requiring just compensation under the Fifth Amendment.<sup>29</sup> His professorial opinion exhibited an incredible command of takings law and is extremely convincing. For example:

In my view, the existence of a proper takings claim is an issue wholly independent of whether under § 1498 there is a valid claim that triggers a remedy under that statute. The latter is a question of statutory right granted by Congress under its legislative authority pursuant to the Constitution; the former is a matter of constitutional principle the vindication of which Congress has properly provided for by remedy in the Court of Federal Claims pursuant to the provisions of the Tucker Act. The mixing and merging of these two separate legal concepts in the manner the majority has done is incorrect as a matter of law, and leads them to an erroneous conclusion.<sup>30</sup>

In reading through these four opinions, very little is agreed upon and the sole areas of agreement have no common rationale. What is missing in all of these opinions is the purpose behind why section 1498 was written and the underlying policy reasons behind the statute. Judge Plager noted that section 1498 and section 271 relate to different players, the government and private litigants, but did not delve into this issue more deeply.

In 1928, the Supreme Court of the United States, with Chief Justice Taft writing for the Court, addressed the purpose of granting patentees a remedy against the United States where the government, through its own use or through that of its contractors, used a patent without a license.<sup>31</sup> The Court referred to the Naval Appropriations Act of 1918, the precursor to 1498(a), in holding that the “purpose of the [act] was to stimulate contractors and furnish what was needed for the war, without fear of becoming liable themselves for infringements to inventors or owners or assignees of patents.”<sup>32</sup> The Court further held that Congress, in passing the 1918 Act, “intended to secure to the owner of the patent the exact equivalent of what it was taking away from him. . . .”<sup>33</sup> Although the Court was clear in the purpose of the 1918 Act, the Federal Circuit failed to adequately address the purposes behind 28 U.S.C. § 1428 in *Zoltek*.

Instead, the federal circuit compared the scope of 35 U.S.C. § 271(a) of the Patent Act with that of 28 U.S.C. § 1498(a) instead of looking at the broad policy reasons behind section 1498 on its own merits. In other words, the court failed to acknowledge that the purpose of 28 U.S.C. 1498 is to protect the procurement process from any disruption through eliminating the threat of patent infringement lawsuits against U.S. government contractors.<sup>34</sup> Evidence that the purpose of 1498 is distinct from that of the Patent Act lies in the different remedies available. The Patent Act in Title 35 of the United States Code, allows for adequate compensation for patent infringement in various forms, including but not limited to, lost profits,<sup>35</sup> reasonable royalty,<sup>36</sup> treble damages,<sup>37</sup> injunctions,<sup>38</sup> and attorney fees.<sup>39</sup> In contrast, the remedy under 28 U.S.C. § 1498 is limited to “reasonable and entire compensation,” which disfavors awarding lost profits,<sup>40</sup> and punitive damages,<sup>41</sup> and

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<sup>27</sup> *Id.* at 1385

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

<sup>29</sup> *Id.* at 1374-78.

<sup>30</sup> *Id.* at 1378.

<sup>31</sup> *Richmond Screw Anchor Co., Inc. v. United States*, 275 U.S. 331, 343-45 (1928).

<sup>32</sup> *Richmond*, 275 U.S. at 345. David R. Lipson, *We're Not Under Title 35 Anymore: Patent Litigation Against the United States Under 28 U.S.C. 1498(A)*, 33 PUB. CONT. L.J. 243, 247 (Fall 2003).

<sup>33</sup> *Richmond*, 275 U.S. at 345.

<sup>34</sup> *See id.* at 343-45; *see also* *Coakwell v. United States*, 372 F.2d 508, 511 (Ct. Cl. 1967) (citing *Richmond*, 275 U.S. at 343).

<sup>35</sup> 35 U.S.C.S. § 284 (LEXIS 2006).

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

<sup>37</sup> *Id.* § 284.

<sup>38</sup> *Id.* § 283.

<sup>39</sup> *Id.* § 285.

<sup>40</sup> *Brunswick Corp. v. United States*, 36 Fed. Cl. 204, 208 (1996) (rejecting the trial court's award of lost profits because such a remedy assumes a right of exclusivity that does not exist in 1498 actions, which allow the United States to take a compulsory license) (quoting DONALD S. CHISUM, PATENTS § 20.03[6], at 20-27 (1992)). *Lessona Corp. v. United States*, 36 Fed. Cl. 204, 208 (1979) (en banc) (rejecting the trial court's award of lost profits and double

injunctions are generally unavailable.<sup>42</sup> Thus, the remedies alone make recovery under 28 U.S.C. § 1498 different from that under 35 U.S.C. § 271.

Instead of being a case that clarifies a patentee's remedy for the government's unauthorized use of a patent, *Zoltek* creates more questions than answers.

Lieutenant Colonel Katherine E. White

## *Government Contractor and Grant Researcher Affirmative Defenses Against Patent Infringement*

### *I. Introduction*

Acquisition personnel are being tasked to keep pace with as well as innovate in the procurement and management of intellectual property assets for the benefit of the U.S. government. Along these lines, the U.S. government has increased federal spending for the development of research laboratories and research programs within private and public university settings. Practical and technical procurement and grant issues arise when the U.S. government undertakes research relationships with universities and private laboratories. These issues range from whether procurement regulations apply to agreements entered into between the federal government and contractors or grant recipients, to whether universities are performing research "on behalf of the government" in order to qualify for immunity from claims of infringement of intellectual property. The Federal District Court for the Middle District of North Carolina recently considered the latter issue in *Madey v. Duke University*.<sup>43</sup> This case represents protracted litigation which begun in 1995 involving claimed patent rights of a university researcher and alleged patent infringement based on unauthorized use of patented inventions by Duke University.

The issues raised and addressed in the district court's decision in *Madey v. Duke University* are significant to the U.S. government, specifically the Department of Defense's research and technology innovation missions. Specifically, universities represent fertile ground for conducting cutting-edge basic and applied research. In fact, the research being done by university faculty and graduate students is often a major component in the federal government's race to remain ahead of foreign governments in the development of dual-use technologies. Accordingly, *Madey v. Duke University* is an important case for government attorneys, acquisition/grant professionals, and technical managers to consider so that the U.S. government can better ensure that universities and their talented personnel remain willing and able to perform research under government contracts or federal grants, absent the specter of potential claims of intellectual property infringement.

### *II. Background*

In 1988, Duke University hired Dr. John M.J. Madey, a prominent scientist in the field of laser technology, as a professor in the physics department. Duke expected Dr. Madey to assist in establishing a Free Electron Laser Laboratory (FEL Lab) as well as assist the university to obtain federal research grants.<sup>44</sup> Dr. Madey in fact assisted Duke in obtaining federal research grants from the Office of Naval Research (ONR).<sup>45</sup> Dr. Madey's FEL Lab contained substantial equipment that required Duke to construct an extension onto its physics building in order to house the equipment. Several pieces of equipment contained in Dr. Madey's lab were covered by patents owned by Madey, i.e., U.S. Patent No. 4,641,103 covering a microwave electron gun, and U.S. Patent No. 5,130,994 covering a free-electron laser oscillator for simultaneous narrow spectral resolution and fast time resolution spectroscopy.<sup>46</sup>

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damages as beyond the reasonable and entire compensation damages permitted under 1498). See Lipson, *supra* note 32, at 253-54 (discussing the disfavored status of lost profits in § 1498 actions because they are based in an eminent domain theory that allows the United States to take a license and is at odds with an exclusive right).

<sup>41</sup> *Lessona*, 36 Fed. Cl. at 208.

<sup>42</sup> *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 842 F.2d 1275, 1282 (Fed. Cir. 1988) (stating: "In our view, the statute, 28 U.S.C. § 1498(a), which the injunction is said to contravene, assures it that right without interference from [alleged infringer].")

<sup>43</sup> 413 F. Supp. 2d 601 (M.D.N.C. 2006).

<sup>44</sup> *Id.* at 603.

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

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

Dr. Madey was employed at Duke for nearly a decade before resigning in 1998 following a dispute with Duke concerning his ability to manage the FEL Lab effectively. Specifically, Dr. Madey contended that as a result of this dispute, Duke conspired to take control of the FEL Lab and his patented technology, removed him from his position as Director of the Lab, and petitioned the Office of Naval Research to remove him from his position as Principal Investigator on the ONR grant.<sup>47</sup> Despite Dr. Madey's resignation, Duke continued to use the lab's equipment, including the equipment covered by Dr. Madey's patents. Based on this unauthorized use of his patents, Dr. Madey sued Duke for patent infringement. In response, Duke contended that all uses of the FEL equipment were pursuant to the ONR grant or other government research grants or authorization.<sup>48</sup>

### III. Issues

*Madey v. Duke University* raises significant issues regarding affirmative defenses available to federal contractors and researchers performing under government contracts or federal research grants when private parties sue those contractors or researchers for infringement. Specifically, the case addresses the findings required to demonstrate what government statements or activities will qualify as government authorization and consent and the scope of such authorization and consent for contractors or researchers seeking immunity from patent infringement. In addition, the *Madey* case discusses the question regarding standing to raise the government license defense created by the Bayh-Dole Act in response to a claim of patent infringement between private parties.

### IV. Section 1498 Immunity from Suit for Patent Infringement

Federal law immunizes government contractors and researchers from claims of patent infringement in certain circumstances. Section 1498 provides in part:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture. . . .

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.<sup>49</sup>

The Court of Appeals for the Federal Circuit described section 1498 as having two features: to relieve a third party from patent infringement liability and to waive sovereign immunity and consent to liability by the United States.<sup>50</sup> The courts cite the purpose of section 1498 as being a stimulant to contractors to furnish the government's needs for goods, services, or research without fear of becoming liable themselves for infringements to inventors or owners or assignees of patents.<sup>51</sup> Accordingly, a contractor or researcher who demonstrates that it used a patented invention with the authorization and consent of the U.S. government as well as for the benefit of the government, cannot be held liable for patent infringement in a lawsuit between private parties.

#### A. Authorization and Consent to Infringe a Patent

As an initial matter, the section 1498 affirmative defense requires a party to establish authorization and consent. A use is with the authorization and consent of the government if the government either expressly or implicitly consents to the infringement.

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

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

<sup>49</sup> 28 U.S.C. § 1498(a) (LEXIS 2006).

<sup>50</sup> *Madey*, 413 F. Supp. 2d at 606.

<sup>51</sup> *See id.*

## 1. Express Authorization and Consent

In some circumstances, the government clearly and expressly authorizes and consents to infringement of a patented invention in the performance of a government contract or research grant. Such express consent is often contained in the language of the government contract or grant itself, or in other formal, written authorization from the government.<sup>52</sup> Even though a formal writing is evidence of authorization and consent, it need not take a specific form.<sup>53</sup> Moreover, the authorization and consent can be broad or limited, depending on the intent of the parties.

### a. Broad Authorization and Consent

If the parties intend an authorization and consent that is broad it could extend to any patented invention and any infringing use. For example, the *Federal Acquisition Regulation (FAR)* and contract clauses for federal research and development contracts provide an example of broad authorization and consent language. Specifically, *FAR part 52.227-1* provides:

The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.<sup>54</sup>

By choosing to negotiate a broad authorization and consent clause, the government ensures that its contractors or researchers have the freedom to use patented inventions to accomplish any work that is required to be performed under the government program or contract.

### b. Limited Authorization and Consent

The government may choose to negotiate a more limited authorization and consent for patent infringement. A limited authorization and consent may restrict the contractor or researcher to using only certain patented inventions or to only those uses that are necessary for completing contract or research work. For example, *FAR part 52.227-1* also provides for a more narrow or limited authorization and consent. The clause states in pertinent part:

- (a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent
  - (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or
  - (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with
    - (i) specifications or written provisions forming a part of this contract or
    - (ii) specific written instructions given by the Contracting Officer directing the manner of performance.<sup>55</sup>

By limiting the scope of the authorization and consent, the government controls the extent of patent infringement by its contractors or researchers and also controls the extent of its liability to inventors, owners, or assignees of patents.<sup>56</sup> Accordingly, limited authorization and consent operates as a limited, as opposed to a full, waiver of sovereign immunity.<sup>57</sup>

## 2. Implied Authorization and Consent to Infringe a Patent

In other circumstances, the government might not expressly consent, either using broad or narrow language, to contractor/researcher use of patented inventions; instead, the government may be found to have provided implied consent.<sup>58</sup>

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<sup>52</sup> See *id.* at 607-08.

<sup>53</sup> See *id.*

<sup>54</sup> 48 C.F.R. 52.227-1 (1984) (Authorization and Consent, Alternate I).

<sup>55</sup> 48 C.F.R. 52.227-1 (July 1995) (Authorization and Consent; see also 48 C.F.R. 27.201-2(a)).

<sup>56</sup> *Madey*, 413 F. Supp. 2d at 608.

<sup>57</sup> *Id.* at 609.

Implied authorization and consent may be found in situations where “(1) the government expressly contracted for work to meet certain specifications; (2) the specifications cannot be met without infringing on a patent; and (3) the government had some knowledge of the infringement; or where the government requires the private contractor to use or manufacture the allegedly infringing device.”<sup>59</sup>

Because implied consent also operates as a waiver of sovereign immunity pursuant to section 1498, such authorization and consent must be narrowly construed.<sup>60</sup> The contractor or researcher carries the burden of proof that the government authorized and consented to its patent infringement because section 1498 is an affirmative defense that will immunize otherwise infringing conduct.<sup>61</sup> In addition, the contractor or researcher must demonstrate that its infringing conduct falls within the scope of the government’s authorization and consent.<sup>62</sup>

#### *For the Benefit of the Government*

The second prong of the section 1498 affirmative defense requires the contractor or researcher to show that its use of a patented invention was for the government. A use is for the government if it is in furtherance and fulfillment of a statement of government policy that serves the government’s interests.<sup>63</sup>

#### *Assertion of § 1498 Affirmative Defense in Private Party Litigation*

Generally, when a patent holder asserts patent infringement against the government’s agent, either contractor or researcher, section 1498 provides an affirmative defense that applies only when an invention is used without a license. Thus, section 1498 provides an affirmative defense to contractors or researchers, acting without a license, who use a patented invention with the government’s authorization and consent for the benefit of the government without regard to the rights that the government may ultimately hold in the invention.<sup>64</sup> As a practical matter, section 1498 grants the government a compulsory, compensable license in the patent, which only requires the government to pay just compensation for a contractor’s or researcher’s use of the patented invention. Moreover, the section 1498 affirmative defense was meant to protect contractors or researchers who are required to use the patented inventions of others from patent infringement suits where the government is not a party to such litigation.

Duke University found itself party to such litigation. Importantly, Dr. Madey did not sue the government for patent infringement; rather, Dr. Madey only sued Duke University for its continued use of his patented inventions in the operation of the FEL Lab. In response to Dr. Madey’s claims of patent infringement, Duke University asserted the section 1498 affirmative defense. Specifically, Duke University contended that it remained a researcher for the Office of Naval Research and performed under ONR federal research grants that provided either express or implied authorization, and consent for the use of patented inventions for the benefit of the government. Furthermore, Duke University contended that all of its uses fell within the scope of the government’s authorization and consent because it was undertaking federally sponsored research.

The district court concluded, while a research grant in and of itself does not necessarily provide authorization and consent, a grant recipient may still avail itself of the section 1498 affirmative defense if the grantee demonstrates the necessary predicates. Accordingly, the district court stated that the statements or aspects of the particular governmental grant purportedly providing the government’s authorization and consent had to be analyzed. As such, the district court analyzed federal grant funding agreements, log books, and operating notebooks to determine whether the uses of the FEL Lab equipment were within the scope of the relevant federally funded programs.<sup>65</sup>

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

<sup>59</sup> *Id.* at 620.

<sup>60</sup> *Id.* at 609.

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

<sup>62</sup> *Id.* at 610.

<sup>63</sup> *Id.* at 607.

<sup>64</sup> *Id.* at 614.

<sup>65</sup> *Id.* at 616.

With respect to two funding agreements with the Department of Defense and the Department of Energy, respectively, the District Court concluded that Duke University's uses of Dr. Madey's 103 and 994 patents fell within the scope of the federal grant programs and were protected by the section 1498 affirmative defense. The district court found that "the Office of Naval Research specifically amended the terms of the grant to include a clause from the Department of Defense providing that the 'work under this agreement is of vital interest to the U.S. government' and that 'the U.S. Government authorizes and consents to all past and future use and manufacture of the invention described in and covered by [the 103 patent] in the performance of work under this agreement or any subagreement at any tier.'"<sup>66</sup> The district court cited another provision of the funding agreement that stated: "In accordance with 28 U.S.C. § 1498, the use or manufacture of [the 103 patent] by the recipient under this agreement or by any person, firm or corporation under any subagreement is construed as use or manufacture for the United States."<sup>67</sup> The district court cited similar language of authorization and consent in Department of Energy grant funding agreements with respect to [the 994 patent].

Based on these findings, the district court concluded that the specific grant provisions clearly provided express government authorization and consent for uses of the patents in the performance of the specific projects covered by the relevant funding agreements. The district court further concluded that there was no question that uses within the scope of the grants were for the government and with the authorization and consent of the government. For example, the district court noted that "research for the Army that was 'militarily relevant' to the 'warfighter' would be squarely within the original contemplation of Section 1498 as a use for the Government."<sup>68</sup> The district court explained that because of its holding regarding authorization and consent for uses that benefit the government, all Duke University would have to do in subsequent proceedings is present testimony and evidence that its research undertakings were within the scope of the DoD and DOE grants in order to assert successfully the § 1498 affirmative defense.<sup>69</sup>

#### V. Government License Defense

The Government License Defense created by the Bayh-Dole Act<sup>70</sup> was meant to benefit and regulate the relationship between the government and its contractors or funding recipients.<sup>71</sup> The Government License Defense cannot be invoked by a private party as a defense to a patent owner's claim of infringement because the defense only belongs to the Government. In order to take advantage of the Government License Defense, the government would actually have to be a party to the patent infringement litigation involving otherwise only private parties.

In *Madey*, Duke University contended that the government held a license to practice or have practiced on its behalf the 103 and 994 patents because the inventions described in these patents were originally developed as part of government sponsored research.<sup>72</sup> Accordingly, Duke argued that the license extended at least to all uses that would be considered "for the United States."<sup>73</sup> Duke University's attempt to raise the Government License Defense was unsuccessful because Dr. Madey sued only Duke University for patent infringement, not the government. Accordingly, Duke University's motion for summary judgment as to the Government License Defense was denied because Duke could not, as a matter of law, raise that affirmative defense on behalf of federal agencies that were not party to Dr. Madey's patent infringement suit. Thus, the Government License Defense is best raised by the government as an affirmative defense, not by a private party in a patent infringement action against only itself.<sup>74</sup>

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<sup>66</sup> *Id.* at 617.

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

<sup>68</sup> *Id.* at 618.

<sup>69</sup> *See id.*

<sup>70</sup> **35 U.S.C.S. § 200 - \_\_\_\_\_ (LEXIS 2006)**. The Act allows nonprofit organizations and small and large businesses to retain title to any subject inventions that result from federally funded projects. Congress passed the Act "to promote commercialization and public availability of inventions made in the United States by United States industry and labor," and "to encourage maximum participation of small business firms in federally supported research and development efforts." *Id.* § 200. The Act also sought "to ensure that the Government obtains rights in federally supported inventions to meet the needs of the Government" and to ensure that inventions could be used "without unduly encumbering future research and discovery." *Id.*

<sup>71</sup> *Madey*, 413 F. Supp. 2d at 613.

<sup>72</sup> *See id.* at 605.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 613.

### A. Statutory Government License

The Bayh-Dole Act creates a government license by statute. The statute retains for the federal funding agency a paid-up license. The Act states, in pertinent part:

With respect to any invention in which the contractor elects rights, the Federal agency shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world.<sup>75</sup>

As the statutory language indicates, the nonexclusive license that the government retains is not transferable. Accordingly, the statutory license right belongs only to the government and can be invoked only by the government. Thus, the government, if party to a patent infringement suit, is the only party able to raise the statutory Government License Defense. In order to establish that it is entitled to the Government License Defense, the government must proffer a funding agreement between itself and the patent holder; as well, the government must establish that the patented invention was conceived or first reduced to practice under that funding agreement.<sup>76</sup>

In *Madey*, the district court concluded that Duke University could not avail itself of the statutory Government License Defense. The district court held that the statutory “Government License created by the Bayh-Dole Act [was] designed to regulate the relationship between the Government and its funding recipients, but it would not be available to a private third party as the basis or a private right of action or, [as in this case,] a private defense.”<sup>77</sup>

### B. Contractual/Regulatory Government License

The Bayh-Dole Act creates a government license by reference to incorporated contract language. The Act requires that all federal funding agreements must include language that reserves for the government the license specified in 35 U.S.C. § 202(c)(4). As with the statutory Government License, the contractual Government License is not transferable and, therefore, remains a right only for the government. Moreover, the contractual Government License cannot be invoked as an affirmative defense to patent infringement by a private third party.

## VI. Practical Implications of the Affirmative Defenses to Patent Infringement

*Madey v. Duke University* raised several implications for the drafting of government contracts and grant funding agreements. First, the government as well as its contractors and grant recipients must pay keen attention to the purpose and goals of the contract or research grant. The parties to the contract or grant must identify their intentions before executing contracts or funding agreements. In particular, the government and its contractors or grant recipients must ensure that agreements are unambiguous as to the scope and extent of authorization and consent for certain activity or conduct occurring under or pursuant to contracts or funding agreements.

Second, with respect to grant funding agreements in particular, the parties to such a grant cannot merely rely on the grant itself to establish the necessary predicates for invoking a section 1498 affirmative defense. For example, the government’s mere approval of a research proposal, standing alone, is insufficient to show implied authorization and consent.<sup>78</sup> Instead, the government and its grant recipients should consider the more prudent course of including express language of authorization and consent and express statements regarding how grant activity will benefit the government in relevant funding agreements. By relying on express authorization and consent as opposed to implied authorization and consent, the government and its grant recipients can be confident of meeting the burden of proof for showing the applicability of section 1498 in a patent infringement suit between private parties.

Third, the government and its contractors or grant recipients should negotiate the proper type of authorization and consent based upon the contract work or federally supported research to be undertaken. The type of work or research to be performed will dictate whether the parties should contemplate broad or limited authorization and consent language in

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<sup>75</sup> 35 U.S.C.S. § 202 (c)(4) (LEXIS 2006).

<sup>76</sup> *Madey*, 413 F. Supp. 2d at 612.

<sup>77</sup> *Id.* at 613.

<sup>78</sup> *Id.* at 620.

contracts or grant funding agreements. If broad authorization and consent language is intended and if such language is consistent with the work or research to be performed, it would be prudent to rely on express as opposed to implied authorization and consent.

Finally, a contractor or a grant recipient being sued for patent infringement where the government is not a party cannot rely on the Government License Defense. The Government License Defense is a right belonging only to the government and not to a private third party. Accordingly, a contractor or grant recipient must find its defense to patent infringement arising from private litigation in the application of section 1498.

Major Danielle M. Conway

## Payment and Collection

### *Central Contractor Registration—Tax Identification Number Validation*

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) issued a proposed rule requiring tax identification number (TIN) validation with the Internal Revenue Service for Central Contractor Registration (CCR) registrants.<sup>1</sup> Although TIN validation had been planned since CCR was implemented,<sup>2</sup> technological constraints prevented its requirement until now.<sup>3</sup> This proposed rule would amend the definition of “registered in CCR” in *FAR part 2.101* to include the requirement for TIN validation.<sup>4</sup> Comments regarding this proposal were due by 19 December 2005.<sup>5</sup>

### *Fast Payment Procedures*

The FAR Councils issued a final rule revising fast payment procedures effective 19 May 2006.<sup>6</sup> The new rule allows the payment office flexibility for situations in which a contractor fails to follow the fast payment procedures.<sup>7</sup> Under the Fast Payment Procedure clause, contractors are required to prominently mark invoices with “FAST PAY.”<sup>8</sup> Prior to this rule change, the Fast Payment Procedure clause required payment offices to reject invoices that were not marked prominently with “FAST PAY.”<sup>9</sup> This revision allows the payment office the flexibility to pay the invoice using either fast payment or normal payment procedures, and eliminates the inefficiency of rejecting otherwise proper invoices.<sup>10</sup>

### *Electronic Payment Requests*

The Department of Defense (DoD) has issued a proposed rule through DFARS Case 2005-D009 to clarify procedures for granting an exception to the requirement that payment requests be submitted electronically.<sup>11</sup> Section 1008 of the 2001 National Defense Authorization Act (2001 NDAA) required the use of electronic invoicing in the DoD by October 2002.<sup>12</sup> While the DoD did not meet this deadline for technological reasons,<sup>13</sup> the *DFARS* was amended to comply with the 2001 NDAA through an interim rule in February 2003.<sup>14</sup> This interim rule allowed an exception to electronic invoicing if either the contractor or the DoD was unable to comply.<sup>15</sup> An earlier proposed rule requiring Secretary of Defense approval was rejected as unduly burdensome, and the interim rule required instead that the contracting officer, payment office, and contractor mutually agree on an alternate method.<sup>16</sup> Following comments on the interim rule, the final rule in December 2003 added the contract administration office to the list of entities to agree to an alternate invoicing system.<sup>17</sup>

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<sup>1</sup> Federal Acquisition Regulation; Central Contractor Registration—Taxpayer Identification Number (TIN) Validation, 70 Fed. Reg. 60,782 (Oct. 19, 2005).

<sup>2</sup> *Id.* The Department of Defense (DOD) required Central Contractor Registration beginning in 1988 and the civilian agencies required its use beginning in 2003. *Id.*

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

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

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

<sup>6</sup> Federal Acquisition Regulation; Fast Payment Procedures, 71 Fed. Reg. 20,308 (Apr. 19, 2006) (to be codified at 48 C.F.R. pt. 52).

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

<sup>8</sup> U.S. GENERAL SERVS. ADMIN. ET AL., FED. ACQUISITION REG. pt. 52.213-1(c)(1)(ii) [hereinafter FAR].

<sup>9</sup> 71 Fed. Reg. at 20,308.

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

<sup>11</sup> Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 71 Fed. Reg. 14,149 (Mar. 21, 2006)

<sup>12</sup> Pub. L. No. 106-398, 114 Stat. 1654 (2000).

<sup>13</sup> Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 8450 (Feb. 21, 2003).

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

<sup>15</sup> *Id.* at 8455.

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

<sup>17</sup> Defense Federal Acquisition Regulation Supplement; Electronic Submission and Processing of Payment Requests, 68 Fed. Reg. 69,628 (Dec. 15, 2003).

The inclusion of several different offices in the current *DFARS* language caused problems determining who decides whether an exception to the requirement for electronic invoicing applies.<sup>18</sup> The proposed rule clarifies that the administrative contracting officer (ACO) is the approval authority for determining that electronic invoicing is too burdensome for a contractor.<sup>19</sup> For the exception to apply, the ACO must make this determination in writing.<sup>20</sup> Further, rather than leaving the alternate invoicing system open for post-hoc mutual agreement, the proposed rule requires that the alternate system be included in section G of the contract.<sup>21</sup> Comments regarding this proposed rule were due by 22 May 2006.<sup>22</sup>

### *Contract Financing*

The DoD issued a final rule through DFARS Case 2003-D043 amending *DFARS* text pertaining to contract financing as part of the *DFARS* Transformation.<sup>23</sup> As part of the process of changing the purpose and content of the *DFARS*, obsolete text has been deleted and instructional text has been moved to the *DFARS* companion resource, *Procedures, Guidance, and Information (PGI)*. These changes include moving instructional text regarding distribution of financing payments to multiple appropriations accounts to the *PGI*;<sup>24</sup> amending the dollar value from \$500 to \$2,500 in section 232.404(a)(9);<sup>25</sup> and adding text at section 232.906(a)(i) requiring “contracting officers to insert the standard due date for interim payments on cost-reimbursement contracts for services.”<sup>26</sup> No comments were submitted regarding the changes, and the final rule became effective 20 December 2005.<sup>27</sup>

### *Payment and Billing Instructions*

The DoD continued its *DFARS* transformation initiative by issuing a final rule intended to “streamline payment procedures and ensure line item accountability in contractor payment requests.”<sup>28</sup> Consistent with the transformation initiative in general, the final rule moves *DFARS* text not containing significant legal or policy-driven requirements to the *DFARS PGI*.<sup>29</sup> In this case, the transformation moves former *DFARS* text addressing topics such as distribution of contracts and modifications, contract line item numbering, and inclusion of payment instructions in contracts to the *PGI*.<sup>30</sup>

Additionally, the final rule amends *DFARS 204.7103-1* by requiring that contracts containing a combination of fixed-price line items, Time-and-Materials/Labor-Hour line items, and/or cost-reimbursement line items, identify the contract type for each line item.<sup>31</sup> This amendment also requires that all subline items and exhibit line items under one contract line item be the same contract type as the contract line item.<sup>32</sup>

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<sup>18</sup> 71 Fed. Reg. at 14,150.

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

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

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

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

<sup>23</sup> Defense Federal Acquisition Regulation Supplement; Contract Financing, 70 Fed. Reg. 75,412 (Dec. 20, 2005) (to be codified at 48 C.F.R. pt. 232).

*DFARS* Transformation is a major DoD initiative to dramatically change the purpose and content of the *DFARS*. The objective is to improve the efficiency and effectiveness of the acquisition process, while allowing the acquisition workforce the flexibility to innovate. The transformed *DFARS* will contain only requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors. *Id.*

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

<sup>25</sup> *Id.* This section pertains to advance payments for non-commercial items involving high school and college publications for military recruiting. *Id.*

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

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

<sup>28</sup> Defense Federal Acquisition Regulation Supplement; Payment and Billing Instructions, 70 Fed. Reg. 58,980 (Oct. 11, 2005) (to be codified at 48 C.F.R. pts. 204, 215, 252, and app. F to ch. 2).

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

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

<sup>31</sup> *Id.* at 58,983.

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

The final rule also amends *DFARS 204.7106* to clarify that contract modifications decreasing the amount obligated require prior coordination between the PCO and ACO and shall not be issued unless sufficient unliquidated obligation exists or the purpose is to recover monies owed to the government.<sup>33</sup>

The final rule adds the clause at *DFARS 252.204-7006, Billing Instructions*.<sup>34</sup> Contracting officers must incorporate this clause into solicitations and contracts if any standard payment instructions from *PGI 204.7108(d)(1)-(6)* or other payment instructions in accordance with *PGI 204.7108(d)(12)* are used.<sup>35</sup> The clause requires the contractor to identify the contract line item on the payment request that reasonably reflects the work performed, and to separately identify an amount for each contract line item.<sup>36</sup>

The final rule amends Appendix F to require submission of payment requests in electronic form unless an exception in *DFARS 232.7002* applies.<sup>37</sup>

### *DOD IG Payment Reports*

The Office of Management and Budget (OMB) requires agencies to determine the amount of improper payments made each year. The DoD Office of Inspector General (IG) published three financial management reports in FY2005 addressing payments within DoD. These reports included a report on compliance with the Prompt Payment Act (PPA) in April 2006, a report on improper payments for fuel in June 2006,<sup>38</sup> and a report on proper interim payments in September 2006.

The DoD IG issued its Report on DoD Compliance with the Prompt Payment Act on Payments to Contractors on 19 April 2006.<sup>39</sup> The PPA requires agencies to make payment to contractors not later than thirty days after receipt of invoice, and not earlier than seven days before payment due date.<sup>40</sup> Late payment results in the accrual of interest in favor of the contractor;<sup>41</sup> early payments result in lost interest for the government.<sup>42</sup> According to the Defense Finance and Accounting Service (DFAS) Columbus database provided to the DoD IG, contractors were paid within the seven-day window allowed under the PPA eighty-five percent of the time.<sup>43</sup> Of the remaining fifteen percent of payments, early payments cost the government \$919 thousand dollars in lost interest, and late payments cost the government \$850 thousand dollars in interest payments to contractors.<sup>44</sup>

While the DoD IG found that the “DFAS Columbus paid most of the contractor invoices it received in FY 2004 in accordance with the requirements of the [PPA],”<sup>45</sup> errors committed in a projected 61,000 invoice payments (roughly ten percent of total processed) cost the government an additional \$1.8 million dollars.<sup>46</sup> These errors included calculating improper invoice dates, processing improper invoices, and incorrectly calculating payment windows based on invoice dates.<sup>47</sup>

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

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

<sup>35</sup> *Id.* at 58,980.

<sup>36</sup> *Id.* at 58,983.

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

<sup>38</sup> U.S. DEP’T OF DEFENSE, OFF. OF THE INSPECTOR GEN., REP. NO. D-2006-094, FINANCIAL MANAGEMENT: IMPROPER PAYMENTS FOR DEFENSE FUEL (29 June 2006). This article does not address this report because the report focuses more on management and coordination issues than payment issues.

<sup>39</sup> U.S. DEP’T OF DEFENSE, OFF. OF THE INSPECTOR GEN., REP. NO. D-2006-076, FINANCIAL MANAGEMENT: REPORT ON DOD COMPLIANCE WITH THE PROMPT PAYMENT ACT ON PAYMENTS TO CONTRACTORS (19 Apr. 2006). The DoD IG has issued one other report addressing this same topic in the last five years, DoD IG Report No. D-2004-058. *Id.* at 19.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.* at 1.

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Id.* at 3.

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

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

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

<sup>47</sup> *Id.* at 4. The IG discovered the errors through a statistical sampling of the payments shown in the database to be early, on time, or late. *Id.*

The IG identified several management and training deficiencies and issued recommendations to the DFAS Columbus Director.<sup>48</sup> The DFAS Columbus Director submitted comments indicating that most of the recommendations will be implemented to address the noted deficiencies.<sup>49</sup>

The DoD IG issued its Report on Providing Interim Payments to Contractors in Accordance with the Prompt Payment Act on 1 September 2006.<sup>50</sup> This report focuses on the payment of interim payments on cost-reimbursement service contracts for which the National Defense Authorization Act of 2001<sup>51</sup> (2001 NDAA) requires compliance with the PPA.<sup>52</sup> The DoD paid approximately \$32.1 billion dollars in such payments in FY 2005.<sup>53</sup> The report concluded that the DoD paid about 291,000 interim payments on cost-reimbursement contracts early, resulting in \$9.4 million dollars in lost interest for the government.<sup>54</sup> The DoD and DFAS Columbus disagreed with much of the report.<sup>55</sup>

The report noted that the 2001 NDAA made the PPA applicable to interim payments under cost-reimbursement service contracts, and that the OMB was tasked with publishing implementing regulations.<sup>56</sup> Relevant to this report, the PPA permits agencies to make payments up to seven days prior to the payment due date, “or earlier as determined by the agency to be necessary on a case-by-case basis.”<sup>57</sup> The *OMB regulation* states that “[t]he payment due date for interim payments under cost-reimbursement service contracts shall be 30 days after the date of receipt of a proper invoice.”<sup>58</sup>

The report determined that DFAS Columbus paid ninety percent of all interim payments on cost-reimbursement service contracts prior to seven days before the payment due date.<sup>59</sup> The report found that several regulations and policies, including the *FAR*,<sup>60</sup> *DFARS*,<sup>61</sup> and the *DoD Financial Management Regulation*,<sup>62</sup> conflicted with the *PPA* and *OMB regulation* and led to the early payments.<sup>63</sup> The DoD disagreed with the report that the *PPA* requires (1) a payment due date of thirty days after receipt of a proper invoice, and (2) payment no earlier than seven days prior to the payment due date.<sup>64</sup> The DoD argues that the regulations in place comply with the intent of the *PPA* of setting a baseline for assessing interest payments due to contractors.<sup>65</sup> The report was returned to DoD for additional consideration following the IG rebuttal to initial DoD comments.<sup>66</sup>

Major Mark A. Ries

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<sup>48</sup> *Id.* at 14.

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

<sup>50</sup> U.S. DEP’T OF DEFENSE, OFF. OF THE INSPECTOR GEN, REP. NO. D-2006-108, FINANCIAL MANAGEMENT: PROVIDING INTERIM PAYMENTS TO CONTRACTORS IN ACCORDANCE WITH THE PROMPT PAYMENT ACT (1 Sept. 2006) [hereinafter INTERIM PAYMENTS REPORT].

<sup>51</sup> Floyd D. Spence National Defense Authorization Act for FY 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000).

<sup>52</sup> INTERIM PAYMENTS REPORT, *supra* note 50, at 1.

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

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.* at 8-9. The DoD disagreement was expressed by the Deputy Chief Financial Officer for the Under Secretary of Defense (Comptroller)/Chief Financial Office. *Id.* The DFAS Columbus disagreement was expressed by the Center Site Deputy Director for Defense Finance and Accounting Service Columbus. *Id.*

<sup>56</sup> *Id.* at 3.

<sup>57</sup> 31 U.S.C. § 3903(a)(8) (LEXIS 2006).

<sup>58</sup> 5 C.F.R. 1315.4 (g)(2).

<sup>59</sup> INTERIM PAYMENTS REPORT, *supra* note 50, at 3-4.

<sup>60</sup> FAR, *supra* note 8, at pt. 32.908(c)(2) (July 2006) (allowing agency policies and procedures to amend the thirty-day payment due date).

<sup>61</sup> U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 232.906 (July 2006) (stating that generally the contracting officer should insert a payment due date of fourteen days from invoice receipt).

<sup>62</sup> U.S. DEP’T OF DEFENSE, DOD 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION para. 070205 (July 2002).

<sup>63</sup> INTERIM PAYMENTS REPORT, *supra* note 50, at 5-7.

<sup>64</sup> *Id.* at 8.

<sup>65</sup> *Id.* at 9.

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

## Performance-Based Acquisitions

### *Defining Performance-Based*

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) issued a final rule amending the *FAR* concerning performance-based acquisitions (PBAs).<sup>1</sup> The rule changed the terms “performance-based contracting” and “performance-based service contracting” to “performance based acquisitions.”<sup>2</sup> The FAR Councils refined the definition of PBAs as focused on results rather than “required performance objectives and/or desired outcomes.”<sup>3</sup> The rule added definitions for both performance work statements and a statement of objectives.<sup>4</sup> The FAR Councils eliminated a preference for fixed-price contracts for follow-on acquisitions in order to provide more flexibility to agencies to craft more complex contracts.<sup>5</sup> In general, the rule streamlined the *FAR subpart* to only address those issues which are unique to PBAs.<sup>6</sup>

### *Office of Federal Procurement Policy (OFPP) Goal*

The OFPP of the Office of Management and Budget (OMB) issued a memorandum requesting that government agencies prepare a PBA plan by 1 October 2006.<sup>7</sup> The OFPP set a goal of PBA methods for forty percent of eligible service acquisitions over \$25,000. The memorandum indicated that PBA reports will be reviewed every fiscal year through the Federal Procurement Data System.<sup>8</sup>

### *Defense Procurement and Acquisition Policy (DPAP) Guidance*

The Director of the DPAP issued a memorandum updating DoD requirements based on the OFPP guidance.<sup>9</sup> The memorandum retained the DoD goal of fifty percent of eligible service actions over \$25,000, given the success rate of fifty-five percent in FY 2005.<sup>10</sup> Contracts would be coded as performance-based as long as more than fifty percent of the requirement was performance-based.<sup>11</sup> The memorandum noted that PBAs should have appropriate metrics, a quality assurance surveillance plan, and properly trained contracting officer representatives assigned before contract award.<sup>12</sup>

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<sup>1</sup> Federal Acquisition Regulation; Change to Performance-based Acquisition, 71 Fed. Reg. 211 (Jan. 30, 2006).

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

<sup>3</sup> *Id.* at 214.

<sup>4</sup> *Id.* at 217.

<sup>5</sup> *Id.* at 211.

<sup>6</sup> *Id.* at 212.

<sup>7</sup> Memorandum, Associate Administrator, Office of Management and Budget, to Chief Acquisition Officers and Senior Procurement Executives, subject: Use of Performance-Based Acquisitions (21 July 2006).

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

<sup>9</sup> Memorandum, Director, Defense Procurement and Acquisition Policy, to SEE DISTRIBUTION, subject: Performance Based Acquisition (6 Sept. 2006).

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

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

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

## Procurement Fraud

*“...the United States has been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.”<sup>1</sup>*

Sadly, the rhetoric has not changed since the Civil War as procurement fraud is daily news today as it was during the 1860s. Bottom line: as in the day of Lincoln, when there is a war, there are those who seek to be war profiteers. The purpose of this update is to examine how the combined forces of the government’s civil, criminal, and administrative fraud fighters, along with private citizen whistleblowers, held defense contractors accountable this past year and how the mission to fight fraud continues to evolve. An important practical tip for the government contracts practitioner to keep his eye on all False Claims Act (FCA)<sup>2</sup> developments, not just cases involving the Department of Defense (DoD), as the courts rarely draw a distinction between the two.

### *On the Civil Side of the House*

#### *Let’s Start with the Numbers<sup>3</sup>*

The Department of Justice (DOJ) reports that fiscal year (FY) 2005 was a record-setting year for False Claims Act recoveries.<sup>4</sup> The DOJ announced that the United States attained over \$3.1 billion in settlements and judgments in cases involving allegations of fraud against the government in FY 2005. The total recoveries since 1986, when Congress strengthened the civil False Claims Act and enhanced its whistle blower provisions,<sup>5</sup> are estimated to be over \$18 billion. Defense procurement fraud accounted for \$609 million in settlement and judgment awards in FY 2005, as recoveries broke down to seventy-two percent health care, twenty percent defense, and eight percent non-health care/non-defense federal agencies.

### *The Bigger They Are . . .*

In the “show me the money” category, the Boeing company set the new standard. In June 2006, Boeing finally put the long-standing saga of Darleen A. Druyun behind it as the company paid the United States a \$615 million settlement to resolve criminal and civil allegations that the company improperly used competitors’ information to procure contracts for launch services worth billions of dollars from the Air Force and the National Aeronautics and Space Administration.<sup>6</sup>

As referenced in last year’s *Year In Review*,<sup>7</sup> the focal point of the government’s investigation was Boeing’s hiring of the former Principal Deputy Assistant Secretary of the Air Force for Acquisition and Management, Darleen A. Druyun, by its then-Chief Financial Officer, Michael Sears. The investigation focused on Boeing’s relationship with Darleen A. Druyun (“the self-proclaimed Godmother of the C-17”<sup>8</sup>) as Druyun was the Air Force’s top career procurement officer when she retired from the Air Force in 2002. In 2000, Druyun used her position to have Boeing hire her daughter and future son-in-

<sup>1</sup> *United States v. McNinch*, 356 U.S. 595, 599 (1958) (citing H.R. Rep. No. 2, Part 2, 37th Cong., 2d Sess. (1862)).

<sup>2</sup> 32 U.S.C.S. § 3729 (LEXIS 2006). The *qui tam* provisions of the False Claims Act authorize “private persons” to bring actions for a violation of the FCA in the government’s place. The FCA provides civil penalties against any person who: (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

<sup>3</sup> American Public Media, Marketplace, <http://marketplace.publicradio.org> (last visited 16 Nov. 2006).

<sup>4</sup> Department of Justice, Press Release, *Justice Department Recovers Record \$3.1 Billion in Fraud and False Claims in Fiscal Year 2006*, [http://www.usdoj.gov/opa/pr/2006/November/06\\_civ\\_783.html](http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html) (last visited 14 Dec. 2006).

<sup>5</sup> Whistleblower or *qui tam* suits are filed under the FCA pursuant to 31 U.S.C. 3730 whereby private individuals known as “relators” are permitted to act as private attorney generals and file action alleging fraud against the United States. Under the FCA, the government may or may not join the relator’s suit, but regardless whether or not the government joins the suit, relators are entitled to share in the any recoveries. RALPH C. NASH ET AL., *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* (2d ed. 1998); see also TAF Education Fund, *The False Claims Act Legal Center*, <http://www.taf.org/faq.htm> (last visited 16 Nov. 2006).

<sup>6</sup> Department of Justice, Press Release, *Boeing to Pay United States Record \$615 Million to Resolve Fraud Allegations*, [http://149.101.1.32/opa/pr/2006/June/06\\_civ\\_412.html](http://149.101.1.32/opa/pr/2006/June/06_civ_412.html) (last visited 16 Nov. 2006) [hereinafter *DOJ Press Release*].

<sup>7</sup> Major Andrew S. Kantner, et. al., *Contract and Fiscal Law Developments of 2005—Year in Review*, *ARMY LAW.*, Jan. 2006, at 137 [hereinafter *YIR 05*].

<sup>8</sup> Project on Government Oversight, Press Release, *The Pentagon’s Self-Proclaimed “Godmother of the C-17” Takes a Top Position with the Aircraft’s Manufacturer*, <http://www.pogo.org/p/contracts/ca-030103-c17.html> (last visited 16 Nov. 2006).

law. Then in 2002, Sears recruited Druyun for an executive position with Boeing following her retirement. During this period (2000 - 2002), Druyun was responsible for dozens of Boeing contracts, as well as for the controversial \$23 billion procurement to lease a fleet of KC-767 aerial refueling tankers that has since been canceled. As reported in last year *YIR*, Sears and Druyun both pled guilty to violations of the conflict of interest statutes.<sup>9</sup> In documents filed with the criminal court, Druyun admitted that Boeing's favors in hiring her children and in offering her a position influenced her contracting decisions.<sup>10</sup>

The investigation also focused on Boeing's use of competitors' information in connection with the Evolved Expendable Launch Vehicle (EELV) Program and certain NASA launch services contracts EELV program. The Air Force's strategy called for two sources to reduce the risk of failure and cost through competition. Those sources ended up being Boeing and Lockheed, with Boeing's low pricing leading the Air Force to favor Boeing in awarding it nineteen of the original twenty-eight launch services contracts awarded in October 1998. The investigation uncovered that, prior to the award, Boeing obtained confidential competition-sensitive or other proprietary documents from Lockheed Martin which contained information related to Lockheed's EELV program. Some of this information was used to unfairly assist Boeing in the EELV competition.

The \$615 million global settlement included a defense procurement fraud record \$565 million civil settlement and a \$50 million monetary penalty according to a separate criminal agreement.<sup>11</sup>

### *Can I Keep the Change?*

It's always good to get a rebate, but what happens when companies do not share the existence of the rebate with the federal government? Stemming from a *qui tam* suit first filed in 2001, consulting firms BearingPoint, Inc., Booz Allen Hamilton, Inc., Ernst & Young, LLP, and KPMG, LLP settled allegations that they submitted false claims to various governmental agencies, including of the Army, in connection with travel costs in January 2006.<sup>12</sup> And when I speak of "change," I am talking about change with a significant number of zeros attached as BearingPoint agreed to pay \$15 million, Booz Allen agreed to pay \$3,365,664, Ernst & Young agreed to pay \$4,471,980 and KPMG agreed to pay \$2,770,000.<sup>13</sup>

Each of the companies had received rebates on travel expenses charged to government contracts. The rebates were paid by credit card companies, airlines, hotels, rental car agencies and other travel service providers. The investigation uncovered that these companies failed to fully disclose the existence of these travel rebates and did not reduce cost reimbursement claims by the amounts of the rebates on numerous government contracts.

### *Can I File?*

As part of the growing body of jurisprudence focusing on what happens when government employees want to be relators, the U.S. District Court of Colorado, in *United States ex rel. Maxwell v. Kerr-McGee Chem. Worldwide, LLC*<sup>14</sup> reviewed a government auditor's status as a person under the False Claims Act. The would-be relator, Mr. Maxwell, was a senior auditor with the Program of Minerals Management. The defendant sought dismissal on conflict of interest and public disclosure grounds based on Maxwell's work auditing the substance of the allegations as part of his official duties. The Court noted that "any conflict of interest comes only between the government and [relator]" and "does not affect his status as a person under the FCA nor deprive the Court of jurisdiction."<sup>15</sup> The court further noted that there was a public disclosure, but as the relator had "direct and independent knowledge of the information on which the allegations are based and have voluntarily provided the information to the government prior to filing an action"<sup>16</sup> and he was the original source of that

<sup>9</sup> *YIR 05*, *supra* note 7, at 137-39.

<sup>10</sup> Supplemental Statement of Facts, the Defendant's Post Plea Admissions, *U.S. v. Druyun*, U.S. District Court of the E.D. of Va, Crim. No. 04-150-A, at <http://www.pogo.org/m/cp/cp-druten-postpleaadmission-2004-odf> (last visited 20 Oct 2006).

<sup>11</sup> *DOJ Press Release*, *supra* note 6.

<sup>12</sup> Ellen McCarthy, *BearingPoint Settles Probe Into Overbilling*, WASH. POST, Jan. 4, 2006, at D3.

<sup>13</sup> Department of Justice, Press Release, *Four Multinational Consulting Firms Pay Millions to Settle Case Alleging they Overbilled U.S. for Travel*, <http://www.usdoj.gov/usao/cac/pr2006/001.html> (last visited 16 Nov. 2006) [hereinafter *DOJ Overbilling Press Release*].

<sup>14</sup> 2006 U.S. Dist. LEXIS 73014 (D. Colo. Oct. 6, 2006).

<sup>15</sup> *Id.* at \*3 (citing *Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003)).

<sup>16</sup> *Id.* at \*5 (citing *United States ex rel. Fine v. MK Ferguson Co.* 99 F.3d 1538, 1543 (10th Cir. 1996)).

information, the plaintiff survived a summary judgment motion against him.<sup>17</sup> Further, the court took into account that Mr. Maxwell went beyond his government official duties and was acting as a private citizen, and not as the government, when he filed his suit.<sup>18</sup>

### *Little Big Horn Revisited?*

Last year's *YIR* wondered if relator's survival from a motion for summary judgment in *United States ex rel. DRC, Inc. et al. v. Custer Battles, LLC*<sup>19</sup> was "Custer (Battle)'s Last Stand."<sup>20</sup> That question was answered in part on 16 August 2006 by Judge T.S. Ellis.<sup>21</sup> As the reader might recall, the Coalition Provisional Authority (CPA)<sup>22</sup> awarded a start-up Virginian corporation, Custer Battles LLC, a time-and-materials contract to provide support services while the CPA launched the Iraqi Currency Exchange Program, among other contracts. The relators, former Custer Battles employees and subcontractors, alleged that Custer Battles used shell subsidiaries to submit fraudulent invoices to justify getting an advance payment. After an investigation, the Department of Justice declined to intervene in this matter, and relators' counsel proceeded to discovery and an eventual trial in federal court.

After a twelve-day jury trial in Alexandria, Virginia, both the relator and the defendant moved for a judgment as a matter of law.<sup>23</sup> Judge Ellis deferred ruling on the motion and sent the jury off to deliberate. The jury returned a verdict on all counts that Custer Battles had knowingly presented both false claims and false reports to justify obtaining the \$3 million advance payment received on this contract.<sup>24</sup>

Prior to entry of the judgment, Judge Ellis ordered additional hearings on the pending Rule 50 motions and ultimately ruled that relator had failed to introduce evidence that any claims were presented to the United States. The court relied heavily on the *Totten* decision that both sections 3729(a)(1) and (2) of the False Claims Act require a presentment to the U.S. government. Judge Ellis stated that "just as § 3729(a)(1) requires proof that false claims have been presented, or caused to be presented, to a United States government officer or employee working in his or her official capacity, § 3729(a)(2) also requires proof that any false records or statements were presented or caused to be presented, to a United States government employee or officer working in their official capacity."

A "claim" exists only if there is "a request or demand for payment that if paid would result in economic loss to the [U.S.] government fisc." A "claim" does not exist "where the government acts solely as a custodian, bailee, or administrator, merely holding or managing property for the benefit of a third party." The court then notes that the contractor's \$3 million request was submitted to the CPA. The court held that even though most CPA workers were employees of the U.S. government, the CPA was not an agency or instrumentality of the United States and the U.S. government employees working in the CPA were not working in their official capacity as employees or officers of the U.S. government. Judge Ellis focused on the fact that relators were given "fair warning that the denial of defendant's motion for summary judgment in *DRC I* did not relieve them of their burden of proving the element of presentment."<sup>25</sup>

As this matter is currently on appeal, and there are other FCA cases<sup>26</sup> dealing with CPA contracts, this issue is far from dead. The trial advocacy lesson learned from Judge Ellis strongly worded opinion is that the moving party has to establish

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<sup>17</sup> Under § 3730(e)(4)(A), "[n]o court shall jurisdiction over [a qui tam] action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media, unless the action is brought by . . . an original source of the information." 31 U.S.C.S. § 3730(e)(4)(A) (LEXIS 2006).

<sup>18</sup> *DOJ Overbilling Press Release*, *supra* note 13, at 7.

<sup>19</sup> 376 F. Supp. 2d 617 (E.D. VA 2005).

<sup>20</sup> *YIR 05*, *supra* note 7, at 133.

<sup>21</sup> 415 F. Supp. 2d 628 (E.D. Va. Aug. 16, 2006).

<sup>22</sup> The CPA documents can still be found at <http://www.cpa-iraq.org/>. There have been a number of books documenting the trials and tribulations of the CPA, *see e.g.* T. CHRISTIAN MILLER, *BLOOD MONEY* (2006), and BOB WOODWARD, *STATE OF DENIAL* (2006).

<sup>23</sup> FED. R. CIV. P. 50(A).

<sup>24</sup> The jury had been instructed that the \$3 million was the maximum amount of damages they could award. This award would have been trebled under the False Claims Act. 31 U.S.C.S. § 3729(a) (LEXIS 2006).

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

<sup>26</sup> There is also a Custer Battles security contract for Baghdad International Airport (BIAP) which was severed from this case by Judge Ellis. Order Severing ICE Claims from BIAP (E.D. Va. Aug. 16, 2006) (on file with author).

the evidence chain of presentment through federal government witnesses to create the necessary nexus on false claims cases. From a jurisprudential point of view, Judge Ellis relied heavily on *Totten*. However, the rationale behind *Totten* is currently being evaluated in various circuits and two district courts have rejected *Totten* already.<sup>27</sup>

### *Wave of the Future?*

In this era of globalization, where three of the top ten defense contractors are foreign corporations,<sup>28</sup> it is increasingly important that the government finds a way to keep these foreign corporations in check. In the first False Claims Act settlement involving a foreign corporation committing fraud on a foreign base, Shinwha Electronics Inc. paid the United States \$1,200,000 to resolve allegations brought to light in a *qui tam* case filed in Hawaii.<sup>29</sup> The investigation focused on Shinwha's billing the U.S. Army Contracting Command, Korea, for inspection, test and maintenance work that was not done on a fire system inspection contract.

### *Shhhh. . .*

In a reminder that *qui tam* cases are filed under seal, Judge George O'Toole took a proactive approach.<sup>30</sup> In a non-DoD *qui tam* case, *United States ex rel. Driscoll v. Serono, Inc.*, a principal of one of the relators discussed the case, while it was under seal, with a Wall Street Journal reporter resulting in a 5 August 2005 news article. The seal was lifted two months later as part of settlement negotiations, and, on 16 March 2006, Judge O'Toole ordered that the admitted source pay the United States the cost of its investigation into the leak.

### *Let's Be More Exact*

A trio of declined cases this year reminds those who allege fraud to plead with particularity or face the wrong end of a motion to dismiss.<sup>31</sup>

In a case in the Southern District Court of Ohio, *United States ex rel. Zeller v. Cleveland Construction, Inc.*,<sup>32</sup> the relators alleged that the prime contractor and one of its subcontractors conspired to submit false claims during the construction of a Navy medical facility in Portsmouth, Virginia. As the defendant contractor moved to dismiss under Federal Rule of Civilian Procedure 9(b)<sup>33</sup> and 12(b)(6),<sup>34</sup> Judge Susan Dlott required the relator to provide a more definitive statement identifying which prime and subcontractor employees were involved in the alleged conspiracy. The court reasoned that the relator must allege the "who" involved in the alleged fraud before it could move forward.

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<sup>27</sup> See *United States ex rel. Wong v. Consul-Tech Eng'g, Inc.*, No. 02-023081 (S.D. Fla. Mar. 16, 2005); *United States ex rel. Maxfield v. Wasatch*, No. 2:99 CV 00040 (D. Utah, May 27, 2005).

<sup>28</sup> DefenseNews.com, Defense News Top 100, <http://www.defensenews.com/content/features/2005chart1.html> (last visited 16 Nov. 2006).

<sup>29</sup> Department of Justice, Press Release, <http://www.usdoj.gov/usao/hi/pressreleases/0601shinwha.html>, and Davis, Levin, Livingston, and Grande, [www.DavisLevin.com, Press Release, Settlement of False Claims Act Case Against Korean Fire Inspection Company](http://davislevin.com/ShinwhaPressRelease.pdf), <http://davislevin.com/ShinwhaPressRelease.pdf> (last visited 16 Nov. 2006).

<sup>30</sup> 2006 WL 355392 (S.D. Ohio Feb 15, 2006)

<sup>31</sup> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. malice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

<sup>32</sup> *United States ex rel. Driscoll*, 2006 WL 355392.

<sup>33</sup> FED. R. CIV. P. 9(b).

<sup>34</sup> FED. R. CIV. P. 12(b)(6) states:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted . . . [i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In *United States ex rel Smith v. Boeing and Ducommun Inc.*,<sup>35</sup> the District Court in Kansas granted Boeing's motion to dismiss for failure to plead fraud with particularity because the Relator's complaint was comprised of "blanket allegations." Judge Brown noted that even though "the complaint is already extensive and contains significant details about Ducommun's alleged manufacturing deficiencies and Boeing's alleged response to Relator's investigation, it addresses only in conclusory terms the submission of false or fraudulent claims to the U.S. Government."<sup>36</sup> Relator had alleged that that Boeing and its subcontractor, Ducommun, Inc., violated the False Claims Act by submitting false claims for payment because Ducommun lacked manufacturing and quality control processes resulting in the delivery of "bogus" or "unapproved" aircraft parts over thirty-two different aircraft. Judge Brown noted that the relators were correct to point out that Rule 9(b) does not require a description of all of the evidence supporting a fraud claim, but that the rule is designed to afford a defendant fair notice of claims by setting forth the time, place, and contents of the alleged fraud. The relators' allegations that the defendants violated terms of the contract, military specifications and Federal Aviation Administration requirements, without identifying any of those terms. The court allowed the relator leave to amend the complaint, but without showing the nexus with particularity will have to defend their complaint once again.

The relators in *United States ex rel Brooks v. Lockheed Martin Corp.*<sup>37</sup> were not lucky enough to get another chance. In a FCA suit stemming from a 1984 Department of Energy contract with Martin Marietta to operate a uranium enrichment plant in Piketon, Ohio, the relator, to quote the judge, "cribbed" the general allegations from another case at a similar plant, *United States ex rel. NRDC v. Lockheed Martin*,<sup>38</sup> still under discovery, but did not have any specific claims to bring to the court. As this was the defendant's second 9(b) motion, the Court concluded that although the relator had the opportunity to amend his complaint and did not then he must not know any details of fraud conduct at Piketon, Ohio and dismissed the case with prejudice.

### *Criminal—The Good, the Bad, and the Ugly*

#### *The Good: New Task Force*

On 10 October 2006, Deputy Attorney General (DAG) Paul J. McNulty announced a new National Procurement Fraud Task Force established by the Justice Department's Criminal Division in partnership with the Civil Division and the U.S. Attorneys' offices to promote the early detection, prevention and prosecution of procurement fraud.<sup>39</sup> The DAG pronounced the task force, working with various agencies, inspector generals (OIG), and investigative organizations will focus on:

- (1) Identification and prosecution of viable procurement fraud cases through coordination with U.S. Attorneys' Offices and OIG field offices;
- (2) Ensuring adequate resources are available to successfully investigate and prosecute procurement fraud cases; Standardization of "best practices" (e.g., recruitment of sources, consensual calls, and witness interviews);
- (3) Better coordination between agency auditors and investigators to ensure that red flags and badges of fraud are promptly reported to criminal investigators for follow-up investigation;
- (4) Better identification and resolution of investigative and coordination issues as they arise in joint cases (e.g., audit support and expanded efforts to share information);
- (5) Specialized training for OIG agents and auditors on the development and prosecution of procurement fraud cases;
- (6) Examination of existing laws and policies to determine if they need to be strengthened or changed;
- (7) Development of strategies encouraging agencies to refer more cases for civil and criminal prosecution;
- and
- (8) Better coordination of targeted civil, regulatory and criminal enforcement actions.

<sup>35</sup> 2006 WL 542851 (D. Kan. Feb 27, 2006).

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

<sup>37</sup> 423 F.Supp. 2d 522 (D. Md. Mar. 27, 2006).

<sup>38</sup> No. 99-CV-00170-M.

<sup>39</sup> Department of Justice, Press Release, *Deputy Attorney General Paul J. McNulty Announces Formation of National Procurement Fraud Task Force*, [http://www.usdoj.gov/opa/pr/2006/October/06\\_odag\\_688.html](http://www.usdoj.gov/opa/pr/2006/October/06_odag_688.html) (last visited 16 Nov. 2006).

As the DOJ turns to a new task force to fight procurement fraud, an old task force's methods has been called into question. In *United States v. Stein*,<sup>40</sup> Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, examined the methods of how the DOJ prosecutes business organization targets under the "Thompson Memo." On 20 January 2003, then-United States Deputy Attorney General Larry D. Thompson issued what has been commonly referred to as the "Thompson Memo." The "Thompson memo" set forth nine factors to guide federal prosecutors in their determination whether to charge a business organization stemming from the DOJ's Corporate Fraud Task Force, but applicable to all charging decisions involving business organizations. One of those factors is "whether the corporation appears to be protecting its culpable employees and agents . . . through [among other things] the advancing of attorneys' fees."<sup>41</sup>

It was DOJ's handling of this factor in a tax-shelter case,<sup>42</sup> against former professionals of KPMG that Judge Kaplan ruled unconstitutional under the Sixth and Fourteenth Amendments.<sup>43</sup> As Judge Kaplan noted, prior to the investigation KPMG had been the longstanding practice to advance and pay legal fees for partners, principals and employees, without a preset cap or condition of cooperation with the government, in any civil, criminal or regulatory proceedings arising within the scope of their duties at KPMG. In looking for the spirit of corporate cooperation with DOJ investigation into KPMG tax shelters KPMG first capped advanced attorney fees at \$400,000 and then provided it only on the condition that its employees did not invoke their Fifth Amendment privilege against self-incrimination. According to the Court, DOJ took advantage of this corporate level of cooperation and repeatedly notified KPMG when its personnel did not cooperate leading KPMG to advise the attorney for the individual in question that the payment of legal fees would be terminated "[a]bsent an indication from the government within the next ten business days that your client no longer refuses to participate in an interview with the government." When the government indicted a number of KPMG employees, the company, following this new spirit of cooperation, cut off payments of those employees' legal fees and expenses. Skipping the possibility that both DOJ and KPMG were trying to establish a groundwork to settle this matter, Judge Kaplan found that the government "conducted itself in a manner that evidenced a desire to minimize the involvement of defense attorneys."

As for the remedy, Judge Kaplan found that the sovereign immunity doctrine prevented him from directing the government to pay the KPMG employees' legal fees, but that the affected defendants could seek payment from KPMG.

In a sign that this matter is a long way from resolved, Deputy Attorney General Paul McNulty defended the use of the Thompson Memo before the Senate Judiciary Committee on 12 September 2006

The Thompson Memo is a set of principles, the basic structure of which is used every day in the criminal justice system. We ask cooperating drug dealers, bank robbers and gun-toting felons to waive their Fifth Amendment privilege against self-incrimination all the time – and the vast majority of them do not have access to the high-priced legal talent corporations do. If a corporation has committed a crime, it is no more deserving of special treatment than any of these defendants. The American public rightly demands that we judge all defendants by the severity of their crime, not the size of their pocketbook.<sup>44</sup>

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<sup>40</sup> 435 F.Supp.2d 330 (S.D.N.Y. 2006).

<sup>41</sup> Memorandum, Deputy Attorney General, Department of Justice, to Heads of Department Components and United States Attorneys, subject: Principles of Federal Prosecution of Business Organizations (20 Jan. 2003), at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>42</sup>

This . . . has been described as the largest tax fraud case in United States history. The government thus far has produced in discovery . . . at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns. The briefs on pretrial motions passed the 100-page mark some time ago. The government expects its case in chief to last three months, while the defendants expect theirs to be lengthy as well. To prepare for and try a case of such length requires substantial resources.

*Id.*

<sup>43</sup> U.S. CONST. amend. VI and XIV.

<sup>44</sup> Deputy Attorney General Paul McNulty, Testimony before U.S. Senate Judiciary Committee, (Sept. 12, 2006), [http://www.usdoj.gov/dag/testimony/2006/091206dagmcnulty\\_testimony\\_thompson\\_memo.htm](http://www.usdoj.gov/dag/testimony/2006/091206dagmcnulty_testimony_thompson_memo.htm) (last visited 31 Oct 2006).

Continuing the push to provide law and order to the “Wild Middle East,” there were a number of high profile pleas and convictions this past year. The U.S. Attorney Office for the Central District of Illinois and the U.S. Department of Justice’s Criminal Division has been leading the criminal charge as evidenced by these three cases involving the work of Halliburton’s subsidiary, Kellogg, Brown & Root Services Inc. (KBR), on the Logistics Civil Augmentation Program (LOGCAP III). The LOGCAP III supports the logistical needs of U.S. military forces in Iraq.<sup>45</sup>

On 18 November 2005, Glenn A. Powell, a former employee of KBR was sentenced to fifteen months in prison for taking a \$121,800 kickback to award a subcontract from the LOGCAP III prime contract to an Iraqi subcontractor.

On 23 March 2006, Stephen L. Seamans, a former ‘Procurement Materials and Property Manager’ of KBR pled guilty to wire fraud and conspiracy to launder money related to the awarding of a subcontract under the LOGCAP III contract. According to the plea agreement and statements made in court, Seamans accepted kickbacks in excess of \$124,000 to improperly award a dining facility services contract at Camp Arifjan in Kuwait. He awaits sentencing.<sup>46</sup>

On 23 June 2006, Mohammad Shabir Khan, Tamimi Global Company’s former Director of Operations for Kuwait and Iraq pled guilty to paying KBR employees kickbacks to secure two military dining facility contracts.<sup>47</sup>

### *Administrative*

#### *APA Review*

As a reminder that suspension and debarment officials (SDO) are reviewable there was a rare challenge of that authority this year: *WEDJ et al. v. Department of Defense*.<sup>48</sup>

WEDJ Inc., a small air conditioner manufacturer in York, Pennsylvania, had numerous government contracts with the Communications and Electronics Command (CECOM) and the Defense Logistics Agency to provide environmental control units—military air conditioners—on various weapon systems. WEDJ used the Administrative Procedure Act (APA)<sup>49</sup> to attack the Army’s SDO decision to debar WEDJ and its principles under *Federal Acquisition Regulation (FAR) part 9-406*. The Army’s SDO debarred WEDJ and its principles for improperly using surplus parts and falsifying first article test results on air conditioners for Patriot Missile Shelters, Firefinder Radar Control Shelters and Navy Hovercraft.

WEDJ contention was that the SDO had acted arbitrary and capriciously by relying on the factual record before him. Judge James McClure reviewed the administrative record and noted that each of WEDJ’s “spurious” allegations had been heard by the SDO in the hearing and in the written materials and had been properly considered. Key to this decision is that Army had kept a complete administrative record and that the SDO had what he needed before him to make a decision that survived APA scrutiny.

There is nothing new here, but the case is a classic textbook manner in which coordination between the buying command (CECOM), the investigators (Defense Criminal Investigative Service and the Army’s Criminal Investigative Command-Major Procurement Fraud Unit), the DOJ, and the agency headquarters element (Army Procurement Fraud Branch) resulted in a solid administrative record supporting a fact-based debarment.

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<sup>45</sup> Department of Justice, Press Release, Former KBR Employee Sentenced to 15 Months in Prison for Accepting Kickbacks (18 Nov. 2006), <http://www.usdoj.gov/usao/ilc/press/> (last visited 16 Nov. 2006).

<sup>46</sup> Department of Justice, Press Release, *Former KBR Employee Pleads Guilty to Accepting Kickbacks Related to Award of Military Subcontract* (23 Mar. 2006), <http://www.usdoj.gov/usao/ilc/press/> (last visited 16 Nov. 2006).

<sup>47</sup> Department of Justice, Press Release, *Former Tamimi Global Executive Admits Paying Kickbacks for Military Subcontracts in Kuwait*, (23 June 2006), <http://www.usdoj.gov/usao/ilc/press/> (last visited 16 Nov. 2006).

<sup>48</sup> 2006 WL 2077021 (M.D. Pa.)

<sup>49</sup> 5 U.S.C.S. § 551 et seq. (LEXIS 2006).

Information is key and each of the DoD administrative fraud agencies has established webpages and regular updates to spell out their policies and publicize their actions.<sup>50</sup> To wrap up this note, the FY 2005 administrative numbers are as follows:<sup>51</sup> the Army SDO suspended fifty-six, proposed sixty-two for debarment and debarred fifty-two; the Air Force SDO suspended five, proposed seventy-nine for debarment and debarred fifty-one; the Defense Logistics Agency SDO suspended eleven, proposed 101 for debarment and debarred sixty-six; and last but not least, the Navy SDO suspended fourteen, proposed sixty for debarment and debarred fifty-three.

Major Art J. Coulter

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<sup>50</sup> Army at [https://jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ArmyFraud.nsf/\(JAGCNetDocID\)/HOME?OpenDocument](https://jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ArmyFraud.nsf/(JAGCNetDocID)/HOME?OpenDocument); Navy at <http://ogc.navy.mil/ogcwww/aio.asp>; and Air Force at <http://www.safgc.hq.af.mil/safgcr.htm>.

<sup>51</sup> Administrative numbers gathered through e-mail correspondence with agency point of contacts (on file with author).

## Taxation

### *Surface Water Management Fee Is All Wet*

If you have a situation where you are unsure whether a charge being assessed against the federal government by a state or local municipality is a fee (and thus payable) or a tax (and thus not payable), turn to *Forest Service-Surface Water Management Fees*<sup>1</sup> for a thorough discussion of the distinctions between the two. That opinion addressed the propriety of the Forest Service using appropriated funds to pay surface water management (SWM) fees assessed by King County, Washington, against federal lands located within its jurisdiction. Applying the three-part test of a classic tax,<sup>2</sup> the GAO found that the King County SWM fee was a tax and not a “reasonable service charge” allowable under the Clean Water Act’s sovereign immunity waiver.<sup>3</sup> Conceding that King County’s SWM fee also had some characteristics of a classic “regulatory fee,” the GAO said that was not enough to convert it from a “tax” into a “fee.” Furthermore, the GAO noted that even if it had found the SWM fee to be service charges rather than taxes, it would still have concluded that the fee was not payable by the Forest Service because of its discriminatory nature—King County gave a discount to the Washington State Department of Transportation, but no similar discount to federal agencies.

### *Government Not Stuck, After All, with Individual Shareholder’s Tax Bill*

Last year we reported on a Court of Federal Claims decision<sup>4</sup> that allowed a Subchapter S corporation’s<sup>5</sup> sole shareholder to be reimbursed for state income taxes she paid, on the basis that, as a Subchapter S corporation, its income tax liability is “passed through” to its sole shareholder and that state income taxes paid by the shareholder are allowed under the Taxes cost principle applicable to the corporation’s cost-reimbursement contracts.<sup>6</sup> On appeal, however, the Court of Appeals for the Federal Circuit (CAFC) reversed,<sup>7</sup> finding 48 C.F.R. section 31.205-41<sup>8</sup> inapplicable because the corporation never paid any state income taxes; only the shareholder paid state income taxes on dividends paid to her by the corporation. Because the shareholder was not the contracting entity, her state income tax payments could not be an allowable cost for the corporation.

### *Title Means Title, Not Lien*

Northrop Grumman successfully challenged an ad valorem personal property tax assessment by the County of Los Angeles,<sup>9</sup> by asserting that specified portions of the property belonged to the federal government and were not taxable by the county. Northrop relied on title provisions of the Progress Payment clause<sup>10</sup> of its fixed-price defense contracts, which states that title to property allocable or chargeable to the contracts vests in the federal government. The Court of Appeals affirmed,<sup>11</sup> rejecting the County’s interpretation of the clause as giving the federal government only a lien or security interest in the property. Because the county cannot tax property owned by the United States, it had to refund the taxes paid by Northrop Grumman on property allocated to the performance of its military contracts, including overhead property allocated as an indirect cost.

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<sup>1</sup> B-306666, 2006 U.S. Comp. Gen. LEXIS 93 (June 5, 2006).

<sup>2</sup> An assessment that (1) is imposed by a legislature upon many, or all, citizens, (2) raises money, and (3) is spent for the benefit of the entire community. See Comp. Gen. B-30666, at 12.

<sup>3</sup> 33 U.S.C.S. § 1323(a) (LEXIS 2006).

<sup>4</sup> *Info. Sys. & Networks Corp. v. United States*, 48 Fed. Cl. 265 (2000).

<sup>5</sup> Subchapter S corporations are so called because they are organized under Subchapter S of the Internal Revenue Code, 26 U.S.C. §§ 1361-79 (LEXIS 2006). They are typically small businesses, closely held by no more than 75 shareholders, and often by a sole shareholder.

<sup>6</sup> Part 31.205-41 provides that certain federal, state, and local taxes are allowable if they are required to be paid or accrued in accordance with generally accepted accounting principles. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 31.205-41 (July 2006) [hereinafter FAR].

<sup>7</sup> *Information Sys. & Networks Corp. v. United States*, 437 F.3d 1173 (Fed. Cir. 2006); *rehearing denied*, 2006 U.S. App. LEXIS 10778 (Apr. 14, 2006).

<sup>8</sup> FAR, *supra* note 6, at pt. 31.205-41,

<sup>9</sup> Superior Court of Los Angeles County, No. BC279303.

<sup>10</sup> FAR, *supra* note 6, at pt. 52.232-16.

<sup>11</sup> 134 Cal. App. 4th 424; 2005 Cal. App. LEXIS 1837 (Nov. 28, 2005), *petition for review denied*, 2006 Cal. LEXIS 2779 (Feb. 22, 2006).

*Don't Give Tax Advice to Contractors!*

*GarCom, Inc.*, a recent Armed Services Board of Contract Appeals decision,<sup>12</sup> illustrates once more the dangers of providing tax advice to prospective contractors, as well as the misunderstanding surrounding the proper use of the Standard Form (SF) 1094, a U.S. tax exemption form.<sup>13</sup> *GarCom* attempted to recover the cost of the Arizona's Transaction Privilege Tax (TPT),<sup>14</sup> which it failed to include in its price, but for which, after being audited by the State of Arizona, it was in fact found liable. At the board proceedings, the applicability of the TPT was not in dispute. However, *GarCom* argued that the government misled it into excluding the TPT costs from its proposal. For one thing, *GarCom* alleged that prior to award, they were verbally advised by the government's contract administrator not to include state and local taxes in their price. For another, *GarCom* requested and received an SF 1094 signed by the government contracting officer. The board neither accepted the contractor's version of its conversations with the government representative, nor found the SF 1094 misleading. While we find the board's interpretation of the application of the SF 1094 a bit misguided (in implying that the SF 1094 covers a contractor's purchases for the federal government), the board did seem to understand that the form evidences the federal government's tax immunity, not the contractor's. None of this ultimately factored into the board's decision anyway. In denying *GarCom*'s appeal, the board relied on the terms of *GarCom*'s written contract, which included the standard clause for commercial items,<sup>15</sup> making the contract price inclusive of all applicable taxes.

*Recent Tax Legislation Imposes New Withholding Tax on Government Contractors—But Not for a While and Maybe Never*

The "Tax Increase Prevention and Reconciliation Act of 2005"<sup>16</sup> included a provision which generally imposes a three percent withholding tax on payments for property and services made to contractors by federal, state, and local government agencies.<sup>17</sup> However, this new law is not scheduled to take effect until 2011 and a bill<sup>18</sup> has already been introduced to repeal this particular provision, so we will have to wait and see what the results are.

Ms. Margaret K. Patterson

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<sup>12</sup> ASBCA No. 55034, 06-1 BCA ¶ 33,146; 2005 ASBCA LEXIS 105 (Dec. 14, 2005).

<sup>13</sup> FAR, *supra* note 6, at pt. 53.301-1094 (providing a copy of the form).

<sup>14</sup> Arizona imposes a transaction privilege tax (TPT) on the privilege of doing business in Arizona, on persons doing business in the State, pursuant to § 42-5008 of the Arizona Revised Statutes. The tax is based on the amount or volume of business transacted.

<sup>15</sup> FAR 52.212-4, Contract Terms and Conditions – Commercial Items, states in para (k) that "The contract price includes all applicable Federal, State, and local taxes and duties." FAR, *supra* note 6, at pt. 52.212-4.

<sup>16</sup> Pub. L. No. 109-222, 120 Stat. 345 (2006).

<sup>17</sup> Note that although federal, state, and local governments will be required to withhold the tax, private companies will not.

<sup>18</sup> S. 2821. To repeal the imposition of withholding on certain payments made to vendors by government entities. The bill was referred to the Committee on Finance, where it remains as of this writing.

## Contractors Accompanying the Force

### *National Defense Authorization Act for Fiscal Year 2007*

Contractor employees in Iraq and Afghanistan may now be subject to the Uniform Code of Military Justice (UCMJ). Until now, the UCMJ asserted jurisdiction over “persons serving with or accompanying an armed force in the field” only in “time of war.”<sup>1</sup> Courts have interpreted the phrase “time of war” as being limited to a congressionally declared war for more than thirty years.<sup>2</sup> However, the John Warner National Defense Authorization Act for Fiscal Year 2007 (2007 NDAA)<sup>3</sup> amended the UCMJ to provide jurisdiction over these persons “in time of declared war **or a contingency operation.**”<sup>4</sup>

The 2007 NDAA couched the change to the UCMJ as a “clarification” of the application of the UCMJ.<sup>5</sup> However, subjecting contractor personnel to the UCMJ during all contingency operations appears to constitute a significant change rather than a clarification.<sup>6</sup> No legislative history explains this change. Further, as there is no published guidance, it is unclear how this change will be implemented and precisely what the ramifications will be.

### *Contractor Personnel Authorized to Accompany the United States Armed Forces*

Last year’s *Year in Review*<sup>7</sup> discussed a final Department of Defense (DoD) rule governing contractor employees accompanying the forces on contingency, humanitarian, peacekeeping or combat operations.<sup>8</sup> Four months following the effective date of the *DFARS* final rule, the DoD published *Department of Defense Instruction (DODI) 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces*,<sup>9</sup> to serve “as a comprehensive source of DoD policy and Procedures concerning DoD contractor personnel authorized to accompany the U.S. Armed Forces.”<sup>10</sup>

In general, the *DODI* applies to all contractors and subcontractors at all levels, and their employees, authorized to accompany U.S. Armed Forces.<sup>11</sup> Specifically, the *DODI* also applies to third country national (TCN) and host nation (HN) contractor personnel.<sup>12</sup> These personnel are now called “contingency contractor personnel” (CCP).<sup>13</sup> This broad category of contractor personnel includes employees of systems support, external support, and theater support contracts.<sup>14</sup> All CCP must possess a proper Geneva Convention Identification (ID) card.<sup>15</sup>

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<sup>1</sup> UCMJ art. 2(a)(10) (2006).

<sup>2</sup> See *United States v. Averette*, 41 C.M.R. 363 (C.M.A. 1970) (holding “that the words ‘time of war’ mean . . . a war formally declared by Congress”). See also *United States v. Castillo*, 34 M.J. 1160 (N.M.C.M.R. 1992) (noting the difference in interpretation of “time of war” for punitive articles versus Article 2(a)(10)). See generally Mark J. Yost & Douglas S. Anderson, *Current Development: The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 AM. J. INT’L L. 446 (2001) (discussing the history of and recent changes to subjecting civilians to military justice).

<sup>3</sup> John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2007).

<sup>4</sup> *Id.* § 552 (emphasis added).

<sup>5</sup> *Id.* The title of the Section is “Clarification of application of Uniform Code of Military Justice during a time of war.” *Id.* The full text of the Section states, “Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ‘war’ and inserting ‘declared war or a contingency operation’.” *Id.*

<sup>6</sup> See *supra*, note 2, discussing application of the UCMJ to civilians. See also *Castillo*, 34 M.J. at 1163 (citation omitted) (noting that there have only been five declared wars in the history of the United States, and none since the enactment of the UCMJ).

<sup>7</sup> Major Andrew S. Kantner et al, *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006 at 149 [hereinafter *2005 Year in Review*].

<sup>8</sup> Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790 (May 5, 2005) (codified at 48 C.F.R. pts. 207, 212, 225, and 252).

<sup>9</sup> U.S. DEP’T OF DEFENSE, INSTR. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE U.S. ARMED FORCES (3 Oct. 2005) [hereinafter DoD INSTR. 3020.41].

<sup>10</sup> *Id.* para. 1.

<sup>11</sup> *Id.* para. 2.2.

<sup>12</sup> *Id.* para. E2.1.3.

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

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

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

A subset of CCP, subject to specific deployment and accountability requirements, are “contractors deploying with the force (CDF).”<sup>16</sup> These personnel “usually work for the U.S. military forces under a deployable contract[,] . . . have a long-term relationship with a specific unit . . . [and] live with and provide services directly to U.S. military forces and receive Government-furnished support similar to DoD civilians.”<sup>17</sup> The TCN and HN personnel contracted in theater are not CDF.<sup>18</sup> Certain sections of the *DODI* apply to all CCP, and others apply only to CDF.<sup>19</sup>

The *DODI* provides general DoD policy regarding contractor personnel authorized to accompany U.S. Armed Forces.<sup>20</sup> First, predeployment planning must include contractor issues, and operations plans and orders must implement the *DODI* requirements.<sup>21</sup> Also, DoD policy is to limit the logistics support provided to contractor personnel to those situations in which the commander or contracting officer determines that such support is necessary to ensure continued contractor support.<sup>22</sup> The *DODI* also establishes general policy regarding contractor security, arming, accountability, and deployment processing.<sup>23</sup>

Section six provides more specific DoD guidance covering a wide range of CCP issues, and is the “authoritative and comprehensive roadmap of policy and procedures applicable” to CCP.<sup>24</sup> The next few paragraphs will highlight some of the provisions of this roadmap. First, the *DODI* requires that every service provided by CCP in contingency operations be reviewed “on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.”<sup>25</sup> The *DODI* also explains that CCP may be subject to various HN, TCN, and even U.S. laws, depending on application of international agreements.<sup>26</sup>

The *DODI* directs the establishment or designation of a joint web-based contractor database as the central repository for CDF personnel and contract capability for all external and systems support contracts.<sup>27</sup> This goal of this database is to provide by-name accountability of all CDF.<sup>28</sup> Military departments are required to designate the database for required use in all external and systems support contracts, and populate the database with summary contract information when contracts are awarded.<sup>29</sup> Contractors awarded such contracts are responsible for inputting and maintaining CDF data and by-name accountability.<sup>30</sup>

The *DODI* explains that DoD policy is that logistical support of contractor personnel should be borne by the contractor.<sup>31</sup> The *DODI* states that the DoD should provide logistical support to contractor personnel “only when the commander or the contracting officer determines provision of such support is needed to ensure continuation of essential contractor services and adequate support cannot be obtained by the contractor from other sources.”<sup>32</sup> Where the DoD is to provide support, the contracting officer is required to issue a Letter of Authorization detailing the specific privileges to which the named contractor employee is entitled.<sup>33</sup>

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<sup>16</sup> *Id.* at E2.1.4.

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

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

<sup>19</sup> See, e.g., *id.* para. 6.2.7.4 (requiring a Letter of Authorization for CDF); and *Id.* at para. 6.2.7.10 (stating that generally CCP are not entitled to legal assistance).

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

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

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

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

<sup>24</sup> *Id.* para. 6.

<sup>25</sup> *Id.* para. 6.1.1.

<sup>26</sup> *Id.* para. 6.1.2.

<sup>27</sup> *Id.* para. 6.2.6.

<sup>28</sup> *Id.* para. 6.2.6.1.

<sup>29</sup> *Id.* para. 6.2.6.2.

<sup>30</sup> *Id.* para. 6.2.6.4.

<sup>31</sup> *Id.* para. 4.3.

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

<sup>33</sup> *Id.* para. 6.2.7.4.

The *DODI* establishes DoD policy regarding the arming of contractor employees.<sup>34</sup> The combatant commander may authorize, on a case-by-case basis, CCP to be armed for individual self-defense.<sup>35</sup> Self-defense arming must be voluntary, permitted by the contract and the contractor, and the government must ensure personnel are trained.<sup>36</sup> Further, the combatant commander, following review on a case-by-case basis by the supporting staff judge advocate, can approve the arming of contractor personnel to provide private security services.<sup>37</sup> Use of such private security service contractors must comply with applicable United States, HN, and international law, and must not be for uniquely military functions.<sup>38</sup>

Arguably one of the most significant aspects of the *DODI* is *section 6.3.3, Contractor Direction and Discipline*.<sup>39</sup> This section begins by stating the general rules that contractors are responsible for the direction and discipline of employees and the contracting officer (KO) is the liaison between the commander and the contractor because commanders have no contract authority.<sup>40</sup> The *DODI* then states, “However, the ranking military commander may, in emergency situations (e.g., enemy or terrorist actions or natural disaster), direct contingency contractor personnel to take lawful action as long as those actions do not require them to assume inherently governmental responsibilities . . . .”<sup>41</sup> This language is almost identical to language rejected by the *DFARS*.<sup>42</sup>

The proposed *DFARS* clause, published for comment in 2004, included a provision allowing the ranking military commander in the immediate area authority to direct contractor personnel to take lawful action in emergency situations.<sup>43</sup> The final rule effective in June 2005 rejected that portion of the proposed rule.<sup>44</sup> In response to comments, including “The contractor should not be put in position of determining . . . whether a commander giving an order has authority,”<sup>45</sup> and explaining the rejection of the proposed commander authority, the DAR Council stated the “proposed language is not consistent with existing procurement law and policy.”<sup>46</sup> The final *DFARS* rule contains no reference to the ranking military commander.<sup>47</sup>

The *DODI* was issued four months after the effective date of the *DFARS* changes rejecting the on-scene commander’s emergency authority.<sup>48</sup> The *DODI* includes a provision similar to that which was rejected, without any reference to the earlier rejection.<sup>49</sup> The two authorities conflict without any indication as to precedence. Subsequently, the *DFARS* was amended again through an interim change in June 2006.<sup>50</sup>

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<sup>34</sup> *Id.* paras. 4.4.1 and 4.4.2.

<sup>35</sup> *Id.* para. 6.3.4.1.

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

<sup>37</sup> *Id.* para. 6.3.5.1.

<sup>38</sup> *Id.* para. 6.3.5.

<sup>39</sup> *Id.* para. 6.3.3.

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

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

<sup>42</sup> Compare Defense Federal Acquisition Regulation Supplement; Contractors Accompanying a Deployed Force, 69 Fed. Reg. 13,500 (Mar. 23, 2004) with Defense Federal Acquisition Regulation Supplement; Contractor Personnel Supporting a Force Deployed Outside the United States, 70 Fed. Reg. 23,790 (May 5, 2005).

<sup>43</sup> 69 Fed. Reg. at 13,502. The language appeared in proposed paragraph (q) of the clause:

[I]f the Contracting Officer or the Contracting Officer’s representative is not available and emergency action is required because of enemy or terrorist activity or natural disaster that causes an immediate possibility of death or serious injury to contractor personnel or military personnel, the ranking military commander in the immediate area of operations may direct the Contractor or contractor employee to undertake any action as long as those actions do not require the contractor employee to engage in armed conflict with an enemy force. *Id.*

<sup>44</sup> 70 Fed. Reg. at 23,800.

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

<sup>46</sup> *Id.* The DoD also concurred with objections to the proposed commander contract authority based on concerns that allowing such authority could lead to the appearance of personal services contracts, and could violate the CICA and the ADA. *Id.*

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

<sup>48</sup> DoD INSTR. 3020.41, *supra* note 9.

<sup>49</sup> *Id.* para. 6.3.3.

<sup>50</sup> Defense Federal Acquisition Regulation Supplement; Contractor Personnel Authorized to Accompany U.S. Armed Forces, 71 Fed. Reg. 34,826 (June 16, 2006) (to be codified at 48 C.F.R. pts. 212, 225, and 252).

The interim rule was published “to implement the policy in DoD Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces, dated October 3, 2005.”<sup>51</sup> This rule amended the *DFARS* to address issues such as authority for contractor personnel use of deadly force, responsibility of the combatant commander relative to contractor personnel security, and logistical issues.<sup>52</sup> While the interim amendment purports to align the *DFARS* with the *DODI*,<sup>53</sup> nothing is mentioned or amended regarding the commander’s emergency authority present in the *DODI*, but specifically rejected by the *DFARS*.

The interim rule became effective on 16 June 2006.<sup>54</sup> Comments were due by 18 September 2006.<sup>55</sup>

*GAO Protest: Brian X. Scott—Security Contracts OK*

Contracts for cargo transportation and security services and for base security services are permissible guard and security services, and not impermissible quasi-military armed forces.<sup>56</sup> A contractor challenged two solicitations issued by the Joint Contracting Command—Iraq/Afghanistan alleging that the contracts would violate the Anti-Pinkerton Act<sup>57</sup> and DoD policies<sup>58</sup> regarding contractor personnel.<sup>59</sup> The Government Accountability Office (GAO) held that the solicitations did not implicate the Anti-Pinkerton Act, and DoD policy provides explicit authorization for use of contracted security services.<sup>60</sup>

The Anti-Pinkerton Act was passed in 1892 in response to violent confrontations between labor and factory owners in which the factory owners would employ the Pinkerton Agency to provide armed men as strikebreakers.<sup>61</sup> The Act prohibits the government from employing such tactics.<sup>62</sup> The GAO determined that the key prohibition of the Act was the employment of “quasi military forces as strikebreakers,” and that the Act does not prohibit government contracting for security guards.<sup>63</sup>

Although it is unclear how the analysis pertains to the Anti-Pinkerton Act, the GAO also appears to have addressed whether security services in Iraq constitute inherently governmental functions.<sup>64</sup> The protester claimed that the security requirements would constitute impermissible “offensive or defensive combat.”<sup>65</sup> In rejecting this portion of the protest, the GAO stated, “[t]he provisions of the SOWs [statements of work] describe guard or protective services that are often performed in the private sector, such as bank guards or armed escorts for valuable cargo, as opposed to combat operations reserved solely for performance by the armed forces.”<sup>66</sup> The GAO went on to note that the contractor would be required to summon military assistance in the event of any armed altercation.<sup>67</sup>

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

<sup>52</sup> *Id.* at 34,826-34,827.

<sup>53</sup> *Id.* at 34,826.

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

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

<sup>56</sup> Brian X. Scott, Comp. Gen. B-298370, Aug. 18, 2006, 2006 CPD ¶ 125.

<sup>57</sup> 5 U.S.C.S. § 3108 (LEXIS 2006).

<sup>58</sup> DoD INSTR. 3020.41, *supra* note 9.

<sup>59</sup> *Brian X. Scott*, 2006 CPD ¶ 125, at 3.

<sup>60</sup> *Id.* at 6, 9.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* The full text states, “An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.” *Id.*

<sup>63</sup> *Id.* at 6.

<sup>64</sup> See Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998). The FAIR Act defines inherently governmental function as “so intimately related to the public interest as to require performance by Federal Government employees.” *Id.* § 5(2).

<sup>65</sup> *Brian X. Scott*, 2006 CPD ¶ 125, at 5.

<sup>66</sup> *Id.* at 6.

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

The protester also asserted that *DODI 3020.41* only allows contingency contractor personnel to be armed for individual self-defense, and specifically precludes mutual defense.<sup>68</sup> The GAO addressed this protest ground by first noting that ordinarily an internal agency regulation would fall outside the GAO protest jurisdiction.<sup>69</sup> However, in this case, the *DODI* was followed by an amendment to the *DFARS* to mirror the *DODI*; therefore, the GAO considered an alleged violation of the *DODI* as though it would constitute violation of a procurement regulation.<sup>70</sup>

The GAO dispatched this protest ground because “the *DODI* provides explicit instruction for authorizing the ‘Use of Contingency Contractor Personnel for Security Services.’”<sup>71</sup> The *DODI* includes instructions for arming contingency contractor personnel “that clearly [anticipate] performance of security or guard services similar to those sought under the solicitations.”<sup>72</sup> The GAO also noted that the protester again alleged under this ground that the solicitations would result in the performance of “‘uniquely governmental’ work.”<sup>73</sup> The GAO determined that the solicitations did not require the performance on combat operations, and thus did not violate the prohibition against inherently governmental contract services.<sup>74</sup>

### *GAO Report—Actions Still Needed to Improve the Use of PSPs*

In June 2006, the Government Accountability Office (GAO) provided testimony to Congress addressing the use of private security providers (PSP) in Iraq.<sup>75</sup> The GAO was asked to follow-up on a report issued in July 2005 addressing the same issues.<sup>76</sup> The GAO found three significant problem areas: (1) coordination between the U.S. military and PSPs;<sup>77</sup> (2) the DoD and PSPs are not adequately completing security screening of PSP personnel;<sup>78</sup> and (3) no U.S. or international standards governing PSPs exist.<sup>79</sup>

Military-PSP coordination still needs improvement despite the creation of the Reconstruction Operations Center (ROC).<sup>80</sup> Lack of communication between the military and the PSPs results in PSPs entering military battle space without the awareness of the local military unit, putting personnel within both entities at increased risk.<sup>81</sup> Further, the DoD has not developed any predeployment training for military units regarding PSP operating procedures or the role of the ROC, despite agreement with the 2005 GAO recommendation to do so.<sup>82</sup>

As the GAO stated, “[b]ecause of the numerous difficulties in screening employees, particularly those who do not live in the United States, it may not be possible to know the true identities and backgrounds of the thousands of private security provider employees working in Iraq.”<sup>83</sup> The inability to completely screen the PSP employees presents a significant risk to U.S. military forces and civilians in Iraq because the PSP employees have access to weapons and U.S. bases and personnel.<sup>84</sup>

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<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.* at 7 n.6.

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

<sup>71</sup> *Id.* at 7.

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

<sup>73</sup> *Id.* at 7 n.7.

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

<sup>75</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-06-865T, REBUILDING IRAQ: ACTIONS STILL NEEDED TO IMPROVE THE USE OF PRIVATE SECURITY PROVIDERS (June 13, 2006) (Testimony Before the Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform (statement of Mr. William Solis, Director, Defense Capabilities and Management)).

<sup>76</sup> *Id.* at 1.

<sup>77</sup> *Id.* at 8.

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.* at 14.

<sup>80</sup> *Id.* at 8. The Reconstruction Operations Center (ROC) provides services such as disseminating unclassified intelligence information, recording incident information, and facilitating military assistance and communication. *Id.* at 2 n.2.

<sup>81</sup> *Id.* at 9.

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

<sup>83</sup> *Id.* at 10.

<sup>84</sup> *Id.*

No standards exist to ensure that background screening investigations of U.S. personnel are complete.<sup>85</sup> Security investigations of personnel from other countries encounter additional challenges due to privacy laws, incomplete record keeping, and a general lack of obtainable, verifiable information.<sup>86</sup>

In addition to standard background screenings, the DoD uses biometric screening for security purposes.<sup>87</sup> “In March 2005, shortly after a dining facility bombing at a U.S. installation in Iraq killed fourteen U.S. soldiers and wounded at least fifty, the Deputy Secretary of Defense issued a policy requiring the biometric screening of most non-U.S. personnel (including private security provider employees) seeking access to U.S. installations in Iraq.”<sup>88</sup> As with the background screenings, the lack of international information available hinders the effectiveness of this technology.<sup>89</sup> The biometric screening has successfully identified several individuals with criminal records in the U.S. seeking access to a military base in Iraq.<sup>90</sup>

No standards exist governing private security provider training and experience requirements.<sup>91</sup> This lack of standards has led to reconstruction contractors replacing security contractors during contract performance.<sup>92</sup> Private security provider associations and companies support the creation of governing standards.<sup>93</sup> Following the 2005 GAO Report, representatives from the Department of State, the DoD, and the U.S. Agency for International Development met to discuss PSP standards.<sup>94</sup> The Agencies determined that the best course of action was to provide reconstruction contractors with access to information about PSPs.<sup>95</sup>

The GAO concluded its report by stating that two recommendations from the 2005 Report remain valid and unimplemented.<sup>96</sup> First, the DoD should develop a training package for deploying military units regarding PSP operating procedures and the role of the ROC.<sup>97</sup> Second, additional efforts should be undertaken to assist contractors with obtaining suitable PSP support.<sup>98</sup> Additionally, the GAO recommends considering a contractual requirement that PSPs coordinate with the military.<sup>99</sup>

#### *DODD 2311.01E DoD Law of War Program*

The DoD published *DoD Directive (DODD) 2311.01E, DoD, Law of War Program*,<sup>100</sup> on 9 May 2006, to “ensur[e] DoD compliance with the law of war obligations of the United States.”<sup>101</sup> This new DODD includes contractors in DoD law of war policy and purports to place requirements on contractors.<sup>102</sup> “It is DoD Policy that . . . [t]he law of war obligations of the United States are observed and enforced by the DoD Components **and DoD contractors assigned to or accompanying deployed Armed Forces.**”<sup>103</sup>

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

<sup>86</sup> *Id.* at 11.

<sup>87</sup> *Id.* at 12.

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

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 14.

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

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

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

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

<sup>96</sup> *Id.* at 14-15.

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

<sup>98</sup> *Id.* at 15.

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

<sup>100</sup> U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DO D LAW OF WAR PROGRAM (9 May 2006).

<sup>101</sup> *Id.* para. 1.1.

<sup>102</sup> *Id.* para. 4.2.

<sup>103</sup> *Id.* (emphasis added).

The Directive tasks the heads of DoD Components to ensure that contract statements of work comply with the *DoD Law of War Program Directive* and *DODI 3020.41*.<sup>104</sup> Significantly, statements of work must require that contractors implement effective programs to prevent employee law of war violations.<sup>105</sup> The program developed must include law of war training.<sup>106</sup> Interestingly, nothing limits this requirement to those contracts which implicate law of war concerns.

The DODD also directs that contracts require contractor employees to relate “reportable incidents” to the local commander or combatant commander.<sup>107</sup> “Reportable Incidents” are “possible, suspected, or alleged, violation of the law of war, for which there is credible information.”<sup>108</sup>

### *Training for Contractor Personnel Interacting with Detainees*

Last year’s *Year in Review*<sup>109</sup> discussed an interim rule for DoD contractors who interact with individuals detained by DoD in the course of their duties.<sup>110</sup> This rule implements section 1092 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.<sup>111</sup> The interim rule required DoD contractors to train employees dealing with detainees regarding applicable laws, and each employee was required to acknowledge receipt of the training.<sup>112</sup> The interim rule has now been adopted, with changes, as final, effective 8 September 2006.<sup>113</sup>

The DoD adopted the rule as final, with changes, after receiving comments provided by one industry association.<sup>114</sup> The final rule clarifies the training responsibility sections by stating that the government will provide the required training.<sup>115</sup> There is also no longer a requirement that each contractor employee acknowledge receipt of the required training.<sup>116</sup> This requirement has been replaced by a requirement that the contractor employee provide a copy of the training receipt document to the contractor.<sup>117</sup> Finally, the rule no longer requires the combatant commander to “provide” the training; the combatant commander must “arrange” the training.<sup>118</sup> This clarifies that the combatant commander is not required personally conduct the training.<sup>119</sup>

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<sup>104</sup> *Id.* para. 5.7.4.

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

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

<sup>107</sup> *Id.* para. 6.3.

<sup>108</sup> *Id.* para. 3.2.

<sup>109</sup> *2005 Year in Review*, *supra* note 7, at 150.

<sup>110</sup> Defense Federal Acquisition Regulation Supplement; Training for Contractor Personnel Interacting With Detainees, 70 Fed. Reg. 52,032 (September 1, 2005) (codified at 48 C.F.R. pts. 237 and 252).

<sup>111</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

<sup>112</sup> 70 Fed. Reg. at 52,032.

<sup>113</sup> Defense Federal Acquisition Regulation Supplement; Training for Contractor Personnel Interacting With Detainees, 71 Fed. Reg. 53,047 (Sept. 8, 2006) (to be codified at 48 C.F.R. pts. 237 and 252).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 53,048. The final rule provides the Combatant Commander flexibility to determine whether the training will be provided by government personnel or contractors. *Id.*

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

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

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

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

*Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission*

The Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council (FAR Councils) issued a proposed rule that would create a new *FAR subpart 25.3* addressing issues with contractor personnel outside the United States.<sup>120</sup> The new subpart would include a clause specifically regarding contractor personnel “providing support to the mission of the U.S. government in the theater of operations or at a diplomatic or consular mission outside the United States, but are not covered by the DoD Clause for contractor personnel authorized to accompany the U.S. Armed Forces.”<sup>121</sup> The proposed rule is similar to *DFARS section 225.7402* and its associated clause, *Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States*, which was implemented in May 2005.<sup>122</sup> Comments were due by 18 September 2006.<sup>123</sup>

*Combating Trafficking in Persons*

The FAR Councils issued an interim rule<sup>124</sup> to implement the Trafficking Victims Protection Reauthorization Act of 2003, as amended by the Trafficking Victims Protection Reauthorization Act of 2005.<sup>125</sup> This Act “requires that the contract contain a clause allowing the agency to terminate the contract if the contractor or subcontractor engages in severe forms of trafficking in persons or has procured a commercial sex act, or used forced labor in the performance of the contract.”<sup>126</sup> The Council has added *FAR subpart 22.17* with an associated clause, which applies to non-commercial service contracts.<sup>127</sup> The interim rule also requires the contractor to establish prevention programs and obtain employee agreement to abide by the law.<sup>128</sup> Comments on the interim rule were due by 19 June 2006.<sup>129</sup>

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<sup>120</sup> Federal Acquisition Regulation; Contractor Personnel in a Theater of Operations or at a Diplomatic or Consular Mission, 71 Fed. Reg. 40,681 (July 18, 2006) (to be codified at 48 C.F.R. pts. 2, 7, 12, 25, and 52).

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

<sup>122</sup> U.S. Dep’t of Defense, Defense Federal Acquisition Reg. Supp. 225.7402 (June 16, 2006).

<sup>123</sup> 71 Fed. Reg. at 40,681.

<sup>124</sup> Federal Acquisition Regulation; Combating Trafficking in Persons, 71 Fed. Reg. 20,301 (Apr. 19, 2006) (to be codified at 48 C.F.R. pts. 12, 22, and 52).

<sup>125</sup> 22 U.S.C.S. § 7104 (g) (LEXIS 2006).

<sup>126</sup> 71 Fed. Reg. at 20,301.

<sup>127</sup> *Id.*

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

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