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CONTRACT LAW DEVELOPMENTS OF 1997—THE YEAR IN REVIEW

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CONTRACT LAW DEVELOPMENTS OF 1997

THE YEAR IN REVIEW

FOREWORD

For those of you who peruse this article, keep in mind that it is an important component of the School's annual Contract Law Symposium. And, as in past years, the article's review of significant developments reflects this year's Symposium theme: "Procurement Reform: How far can we go?" The frenetic pace of activity and change in the field of government procurements over the past few years has been astounding. If you pick up a copy of our Year-In-Review article published in 1993, the authors commented on the "wait and see" attitude of legislators and the "dearth of regulatory action" in acquisition law. Compare that now with the developments and changes we are experiencing everyday, some of which are highlighted in this year's review.

In fact, over the last year, practitioners have been hard pressed to keep on top of all the changes and new developments in government acquisitions—particularly with the Department of Defense. With the "fall of the wall," our agencies must capitalize on our victory in the Cold War and transform our operations to meet the even more dynamic challenges of the twenty-first century. Consequently, nothing is sacred, everything is subject to scrutiny, and, of course, debate—a lot of debate.

Against this backdrop, we present to you our review of this year's appropriations and authorization acts, regulatory changes, and case law—all with an eye towards passing on to you survival tips, lessons learned, and a "heads-up" on recent trends and developments. We at the Contract Law Department hope you will find our latest effort a worthy addition to your professional library.

CONTRACT FORMATION

Authority

No Contract, No Quantum Meruit Remedy for AT&T[1]

Two years ago, we reported on the Court of Federal Claims decision regarding a Navy contract with AT&T.[2] The fixed price contract was for the development of a system called the Reduced Diameter Array (RDA). The RDA would replace the existing sonar that tracks Soviet submarines. The contract contained two efforts, one for the development of a prototype and the second for production of three RDA systems. The Navy exercised both options, despite AT&T's requests to the contrary. AT&T claimed that it spent $60 million more on contract performance than the contract's fixed price.

After the Navy denied AT&T's claim for these additional costs, AT&T sued in the Court of Federal Claims. It successfully argued that the pertinent annual appropriations act forbade a fixed price contract for the development of a major system or subsystem in excess of $10 million without written secretarial level approval.[3] AT&T also argued that the lack of such approval rendered the contract void, entitling AT&T to recovery on a quantum meruit basis. On appeal, the Court of Appeals for the Federal Circuit affirmed the finding that the contract was void, but rejected quantum meruit as the appropriate basis for a remedy. In doing so, the court noted that quantum meruit is a remedy for contracts implied-in-law. Such a remedy exceeds the court's jurisdiction. The Court of Appeals for the Federal Circuit remanded the case and directed judgment for the Navy. Although the Navy scored a victory, it may yet pay a higher price for the RDA system. The court noted that AT&T might seek to replevy the goods or sue for the government's wrongful use of its equipment.

Telecommunications Company Disconnected

Between 1975 and 1992, Contel of California, Inc. spent more than $700,000 installing an outside cable plant to serve the telecommunications needs of the China Lake Naval Weapons Center.[4] Contel provided telecommunications services for the Navy pursuant to a communication service agreement (CSA). When the Navy began using a government communications network, Contel sought its "unrecovered investment" in addition to termination costs. Initially, Contel maintained that its entitlement arose from the CSA. Unfortunately for Contel, the CSA did not provide for the requested remedy. The CSA specifically required supplemental agreements prior to installation of such equipment.[5]

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1. American Tel. & Tel. v. United States, 124 F.3d 1471 (Fed. Cir. 1997).

2. *See* Major Timothy J. Pendolino et al., *1995 Contract Law Developments—The Year in Review,* ARMY LAW., Jan. 1996, at 21 [hereinafter *1995 Year in Review*]; *see also* American Tel. & Tel. Co. v. United States, 32 Fed. Cl. 672 (1995).

3. The Secretary of the Navy had to determine that the risk had been sufficiently reduced to allow for realistic pricing. *American Tel. & Tel.*, 32 Fed. Cl. at 2.

4. Contel of California, Inc. v. United States, 37 Fed. Cl. 68 (1996).

Lacking an express contract upon which to base its claim, Contel concocted a theory based on an implied-in-fact contract and sought recovery on a quantum meruit basis.[6] This approach failed for several reasons. First, Contel claimed that a Navy commander had ratified its actions. The court, however, determined that the Navy commander lacked implied actual authority because negotiation of CSAs was not integral to his duties.[7] Second, it was clear that the parties had not contemplated that the Navy would pay any termination costs related to this equipment. Third, the parties had made no agreement that the Navy would pay Contel's "unrecovered investment," and Contel acknowledged that the Navy made no such assurances.[8] In the final analysis, Contel tried unsuccessfully to construct a contract only after its business decision resulted in losses rather than profits. The Court of Federal Claims' recent opinion allowing termination for convenience settlements in cable television franchise agreements at closing military installations may have fueled Contel's decision to pursue such a weak case.[9]

Partnership Agreements Are Contracts if They Meet All Applicable Regulatory Mandates

Two years ago, we discussed two seemingly conflicting opinions by the Court of Federal Claims.[10] The cases left unsettled the question of whether medical partnership agreements (MPAs)[11] are contracts under the Tucker Act.[12] This year the Court of Appeals for the Federal Cirucit answered the question in the affirmative.

In *Trauma Service Group v. United States*,[13] the Court of Appeals for the Federal Circuit found that, contrary to the opinion of the Court of Federal Claims, a memorandum of agreement "*can* also be a contract . . . ."[14] Nevertheless, the Federal Circuit affirmed the dismissal of Trauma Service Group's (TSG's) complaint, which sought recovery of an employee's salary.[15] The court noted that TSG could not cite a clause in the memorandum of agreement which supported its demand for recovery. Also, it failed to identify anyone with the requisite authority to bind the government to a contract implied-in-fact. The medical treatment facility commander lacked such authority because the statute authorized only the Secretary of Defense to enter into such agreements. Although implementing regulations gave medical treatment facility commanders the authority to negotiate these partnership agreements, this authority was subject to the final approval of the Surgeon General of the Army and the Director of the Office of Civilian Health and Medical Program of the Uniformed Services.[16]

On the same day, the Federal Circuit reversed the Court of Federal Claims in another case involving CHAMPUS partnership agreements. In *Total Medical Management, Inc. v. United*

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5. Certain master CSAs required "that the parties execute supplemental CSAs before particular equipment (including outside cable plant) could be installed at the Weapons Center. The governing agreement and each supplemental CSA were to comprise a separate contract governing the ordered equipment." *Id.* at 73.

6. Quantum meruit means "as much as he deserved" and describes a measure of liability for an implied-in-law contract. It describes an equitable doctrine relied upon to prevent unjust enrichment. BLACK'S LAW DICTIONARY 1243 (6th ed. 1991).

7. In fact, master CSAs delegated authority in these matters to specific individuals, none of whom made any such agreement with Contel. *Contel*, 37 Fed. Cl. at 73.

8. The plaintiff cited *United States v. Amdahl*, 786 F.2d 387 (Fed. Cir. 1986), as the basis for its quantum meruit claim. The Court of Federal Claims rejected this theory of recovery, pointing out that recovery under *Amdahl* is limited to situations in which reliance is based on an express contract which is subsequently determined to be invalid. *Contel*, 37 Fed. Cl. at 68. Here there was no express contract providing the plaintiff with the remedy it sought.

9. Department of Defense Cable Television Franchise Agreements, 36 Fed. Cl. 171 (1996). This case also involved a Federal Communications Commission (FCC) regulated service—cable television. The Army obtained cable service for installation residents through franchise agreements which were created and executed outside of the federal acquisition regulation (FAR). When base closures left cable companies facing tremendous losses, Congress requested an advisory opinion from the Court of Federal Claims on the applicability of the FAR. Rejecting the DOD's assertion that the cable franchises functioned only as easements, the court held that the agreements were subject to the FAR. *Id.* at 181. *See also* Major Kathryn R. Sommerkamp et al., *Contract Law Developments of 1996—The Year in Review*, ARMY LAW., Jan. 1997, at 17, 28 [hereinafter *1996 Year in Review*] (espousing that this was a surprising result, considering the genesis of the franchise agreements, but one which admittedly created a termination settlement remedy for the cable companies).

10. *See 1995 Year in Review, supra* note 2, at 17.

11. Congress authorized the Secretary of Defense to enter into agreements with civilian health care providers. 10 U.S.C. § 1096 (1994). Under these agreements, civilian health care providers treat patients in military facilities. This arrangement allows the government to avoid facility charges which would otherwise be billed to the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).

12. 28 U.S.C.A § 1491 (West 1997).

13. 104 F.3d 1321 (Fed. Cir. 1997).

14. *Id*. at 1326 (emphasis added). The Court of Appeals for the Federal Circuit rejected the Court of Federal Claims opinion, which denied contractual status to memoranda of agreement, stating that such agreements "can" be contracts. The Court of Appeals for the Federal Circuit left unanswered the question of whether this agreement was a contract.

15. *Id.* TSG alleged that the government forced its x-ray technician to work full-time on non-CHAMPUS patient services by threatening to terminate of the memorandum of agreement.

States,[17] the Federal Circuit found that a memorandum of agreement that exceeded the regulatory authority for medical partnership agreements by agreeing to pay a rate higher than the CHAMPUS allowable charge[18] was void ab initio. The court dismissed the contractor's complaint for failure to state a claim.

Jilted by the Prime? Subcontractor Often Left Standing at the Altar

When a government contractor fails to pay its subcontractors or employees, the subcontractors must generally seek their remedy from the prime contractor. Subcontractors lack privity of contract with the government. They can, however, overcome this significant hurdle by showing the existence of an implied-in-fact contract with the government or by establishing that they are a third-party beneficiary of the prime contract.[19]

Two interesting but unsuccessful attempts to recover under an implied-in-fact contract theory were *National Micrographics Systems, Inc. v. United States*[20] and *Appeal of Francis J. Wolzein*.[21] In *National Micrographics Systems*, the prime contractor furnished equipment to the government under a time and materials contract for engineering and technical support services. The contract stated that the title to contractor-furnished property would vest in the government upon delivery.[22] The plaintiff, National Micrographics Systems, Inc., (NMS) delivered a computer system to the National Security Agency (NSA) pursuant to a subcontract with the prime. The NSA paid the prime, but its check was "intercepted" by the IRS for delinquent taxes. After unsuccessful attempts to recover from the prime contractor, NMS turned to the NSA, which now had possession of the computer system for which it had never been paid. NMS demanded that the government pay for or return its equipment. It cited as authority its delivery ticket that, by standard language, purported to reserve title in the vendor to ensure payment. The delivery ticket also allowed for repossession by the vendor.

The Court of Federal Claims dismissed NMS's claim.[23] Even if a person with authority for the government signed the delivery ticket, there would be no contract. There was no consideration for such an agreement, because the contract with the prime contractor already entitled the government to the property.

In *Appeal of Francis J. Wolzein*, Telemarc was the original awardee of the contract. During performance, Telemarc ceased paying its employees several weeks prior to being terminated for default. The government awarded the replacement contract to Francis Wolzein, a former employee of Telemarc. The replacement contract was later terminated for convenience. In Wolzein's termination settlement proposal, he tried to recover his unpaid wages under the original contract. The Corps of Engineers Board of Contract Appeals denied his appeal, finding that the government employee who allegedly encouraged Wolzein's continued work and who promised eventual payment of his wages lacked authority to contract. That individual was neither a contracting officer nor a contracting officer's representative. There was also no evidence of ratification by a person with authority. Finally, the board noted that the government received no benefit from Wolzein's uncompensated work.[24]

By contrast, in *D & H Distributing Co. v. United States*,[25] a subcontractor recovered from the government the cost of goods the subcontractor supplied in accordance with the terms of its

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16. *See* 32 C.F.R. § 199.1 (1996).

17. 104 F.3d 1314 (Fed. Cir. 1997).

18. *See* 32 C.F.R. § 199.14(g)(1).

19. *See generally* JOHN CIBINIC, JR. AND RALPH C. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS 1253 (3d ed. 1995).

20. 38 Fed. Cl. 46 (1997).

21. ENG BCA No. 6278, 97-1 BCA ¶ 28,674.

22. The contract contained FAR 52.245-5(c)(2), which states that "title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon the vendor's delivery of such property." *National Micrographics*, 38 Fed. Cl. at 48. *See also* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.245-5(C)(2) (Apr. 1, 1984) [hereinafter FAR].

23. The plaintiff's 5th Amendment takings claim was dismissed as well. *National Micrographics*, 38 Fed. Cl. at 51-54.

24. The board stated:

> The Board recognizes some decisions by Boards and Courts which seem to stretch finding the existence of an implied-in-fact contract when the government has received and accepted a benefit from the unauthorized acts of agents despite the fact that unjust enrichment is usually an issue under the implied-in-law contracts which are inapplicable to the government; but even here, Appellant has not shown a benefit received by Respondent from its work as an employee of Telemarc . . . . There was no unjust enrichment of the Government.

Wolzein, 97-1 BCA ¶ 28,674 at 143,242

25. 102 F.3d 542 (Fed. Cir. 1996).

contract with Computer Integrated Management Corporation (CIM). CIM was the awardee of a contract for computer disks. Before D&H would extend credit to CIM, however, it wrote to the NSA seeking a joint payment arrangement with CIM. The NSA agreed to this arrangement, but, rather than executing a joint payment agreement supplied by D&H, the NSA modified its prime contract with CIM. The NSA then proceeded to make payment directly to CIM, and CIM made only partial payment to D&H. The Federal Circuit found no implied-in-fact contract between the NSA and D&H but concluded that D&H was a third party beneficiary. Accordingly, D&H could proceed against the NSA. The Federal Circuit rejected the NSA's argument that allowing recovery by D&H would violate the statutory assignment of claims prohibition.[26]

Trusting Cynthia's Interpretation of Contractor's Tax Liability

The Army Corps of Engineers awarded a contract to Foley Company for the construction of a sewage project at Fort Knox, Kentucky.[27] During bid preparation, one of Foley's secretaries sought clarification regarding the contractor's liability for state taxes. After winning the award, Foley alleged that its secretary received erroneous information from an Army Corps of Engineers employee, whom Foley could identify only as "Cynthia." Foley alleged that this misinformation resulted in a mutual mistake that entitled it to reformation of the contract and reimbursement of over $290,000. The Court of Federal Claims, however, held that the contract placed the risk of mistake on the contractor. The invitation for bids (IFB) stated that the contract price should include applicable state taxes. The IFB also required written requests for clarification. The court emphasized the unfairness to other bidders that would result if the Corps allowed Foley to submit such questions through informal channels, while denying others access to the same information. Finally, the court reasoned that Foley could not rely on the interpretation of an employee without verifying her authority and identifying her by more than her first name.

Competition

Central Contractor Registration (CCR)

On 10 February 1997, the Director for Defense Procurement, Office of the Undersecretary of Defense, Ms. Eleanor R. Spector, issued a memorandum concerning the implementation of the CCR.[28] The purpose of the CCR is to allow contractors to provide basic business information, capabilities, and financial information on a one time basis to the government.[29] The Department of Defense (DOD) intends to use the CCR to comply with the Debt Collection Improvement Act of 1996 (DCIA).[30] The DCIA requires federal agencies to have the taxpayer identification number of every government contractor and to pay every contractor electronically.

Ms. Spector initially announced that contractors must register for the CCR for contract awards resulting from solicitations issued after 30 September 1997.[31] On 11 June 1997, Ms. Spector and Dr. John Hamre, former Under Secretary of Defense (Comptroller),[32] issued a joint letter which extends the deadline for contractor registration to 31 March 1998.[33] The CCR applies to all solicitations and awards, except for purchases made: by commercial purchase card, by contracting officers located outside the United States, for classified contracts, and by contracting officers in support of contingency or emergency operations. Ms. Spector intends for the CCR to provide worldwide visibility of sources to government buyers and finance officers, thereby streamlining contract awards and payments.

Restrictive Specifications

Cyber Specs Are Sufficient. In NuWestern USA Constructors, Inc.,[34] the Army Corps of Engineers issued a request for proposals (RFP) for the design and construction of a warehouse. It issued the solicitation exclusively in a CD-ROM format. The Commerce Business Daily (CBD) synopsis stated that the Corps would issue the solicitation in electronic format only. The Corps planned to issue any amendments on floppy disks, CDs, or the Internet. The synopsis also advised potential offer-

26. *See* 31 U.S.C.A. § 3727 (West 1997); 41 U.S.C.A. § 15 (West 1997).

27. Foley Company v. United States, 36 Fed. Cl. 788 (1996).

28. Memorandum, Director, Defense Procurement, CP/CDF, subject: Central Contractor Registration (Feb. 10, 1997) [hereinafter Spector Memorandum].

29. *Id.* at para. 1.

30. Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-81 (1996). *See* 31 U.S.C.A. § 3302 (1997).

31. Spector Memorandum, *supra* note 28, para. 3.

32. Dr. Hamre is now the Deputy Secretary of Defense.

33. Joint Memorandum, Under Secretary of Defense and Director, Defense Procurement, subject: Central Contractor Registration (June 11, 1997) (this letter can be accessed at <http://www.acq.osd.mil/ec/policy.htm).

34. B-275514, Feb. 27, 1997, 97-1 CPD ¶ 90.

ors to check the Corps' Internet address daily for changes. Finally, the solicitation required offerors to submit their proposals in hard copy format.

NuWestern protested. It argued that the use of the electronic format limits competition. According to NuWestern, only firms that possess the technology required to print the plans and specifications from the CD-ROM or that have the financial resources to pay a third party for the printing can compete. NuWestern further alleged that by failing to provide complete paper copies, the Corps shifted the responsibility for the completeness and accuracy of the solicitation from the government to potential offerors.

The General Accounting Office (GAO) found that the financial burden of paying to have hard copies printed was no greater than the reasonable fee the law permits an agency to charge for solicitation documents under more traditional procedures.[35] The GAO also noted that the agency's responsibility for providing complete and accurate solicitations was the same, regardless of the format.[36] The GAO highlighted recent legislative initiatives[37] that signaled Congress' intent that agencies use electronic acquisition methods. Finally, the GAO cited specific cases which support the principle that the use of electronic commerce does not conflict with full and open competition.[38]

Security for Ronald Reagan! (The Building).[39] The General Services Administration (GSA) determined that the Ronald Reagan Federal Office Building requires approximately 350,000 security guard hours per year. This easily qualifies as one of the largest security guard service requirements in the industry.[40] The GSA established a minimum "experience requirement" that required offerors to have completed two security guard contracts of at least 175,000 hours each within the last five years.[41] Integrity International Security Services, Inc. (Integrity) protested, arguing that the minimum experience requirement was unduly restrictive of competition.

A contracting agency may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs.[42] The GSA argued that agencies have discretion to use restrictive provisions where the solicitation requirement relates to safety concerns. The agency, however, must establish that the challenged restriction is necessary to insure the highest level of reliability and effectiveness.[43] In view of the size and unique character of the Ronald Reagan Building and the threat posed to government buildings in the aftermath of the bombing of the Murrah Federal Building in Oklahoma City, the GAO held that the GSA was reasonable in giving enhanced attention to the security requirements. The GAO found the precautions reasonable, despite the fact that the "GSA did not articulate the basis for the restriction as clearly as we would have preferred."[44]

Mossberg Gives the INS Both Barrels! In *Mossberg Corp.,*[45] the Immigration and Naturalization Service (INS) was seeking to procure approximately 5000 shotguns. Mossberg challenged the specification concerning the placement of the safety switch on the shotguns.[46] The RFP called for a "crossbolt" type safety. Mossberg designed its shotguns with a "top-of-the-receiver" type safety switch.

Mossberg claimed that the requirement for a "crossbolt" type safety switch was unduly restrictive because both types of safety effectively render the weapon inoperable when engaged.[47] The INS specified the crossbolt type safety pursuant

35. FAR, *supra* note 22, at 5.102(a)(6).

36. *NuWestern,* 97-1 CPD ¶ 90 at 4.

37. Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 426 (1994).

38. *See* Latins Am., Inc., B-247674, June 15, 1992, 92-1 CPD ¶ 519; Spectronics Corp., B-260924, July 27, 1995, 95-2 CPD ¶ 47; Arcy Mfg. Co., Inc., B-261538, Aug. 14, 1995, 95-2 CPD ¶ 283.

39. *In re* Integrity Int'l Sec. Serv., Inc., B-276012, May 1, 1997, 97-1 CPD ¶ 157.

40. This office building is the second largest federal office building in the country.

41. *Integrity Int'l,* 97-1 CPD ¶ 157 at 2.

42. 41 U.S.C. § 253a(a)(2)(B) (1994).

43. *Integrity Int'l,* 97-1 CPD ¶ 157 at 3, *citing* Harry Feuerberg & Steven Steinbaum, B-261333, Sept. 12, 1995, 95-2 CPD ¶ 109.

44. *Id.* at 3 (Integrity argued that because it had successfully performed one comparable 175,000-hour project it possessed the necessary large contract experience to compete.).

45. B-274059, Nov. 18, 1996, 96-2 CPD ¶ 189.

46. The safety is a mechanism installed in the receiver of the weapon that prevents the gun from firing when the safety is engaged.

47. *Mossberg,* 96-2 CPD ¶ 189 at 3.

to its weapons standardization policy.[48] The INS maintained that it needs all of its shotguns to have crossbolt safeties. The INS claimed that, if it introduced weapons into the arsenal with a different type of safety, it would increase the risk of accident or death because it increases the potential for agents to become confused as to which safety disengagement procedures to use.[49]

The GAO confirmed that an agency does not have to show any actual damage or injury under a prior contract before imposing a requirement that reduces risks to life or property. It noted, however, that the requirement must be reasonable in light of the perceived risk. Mossberg presented expert testimony that concluded there is little difficulty or cost associated with training individuals in the use of more than one type of shotgun. The GAO also noted that the INS intended to acquire as many as 5000 new shotguns during the procurement. This doubled their present arsenal. Accordingly, it was clear that the weapons purchased in the instant buy would be setting the new agency standard. As such, the GAO concluded that properly trained users would not become confused regarding the operation of the safety. The GAO sustained the protest.

Contract Types

Regulatory and Statutory Changes

Fixed-Price Award Fee Contracts. On 16 May 1997, the Federal Acquisition Regulatory Council issued a final rule amending the Federal Acquisition Regulation (FAR) to allow the use of performance incentives in fixed-price contracts.[50] The rule added a new contract type called a "fixed-price award fee" contract.[51] Under this contract type, the government pays the contractor a fixed price plus an award fee. Having a fixed-price award fee contract is not without precedent. The Defense Federal Acquisition Regulation Supplement (DFARS) already allows the use of performance incentives in fixed-price contracts.[52]

The new rule does not state whether a base fee is applicable in fixed-price award fee contracts.[53] The DFARS provision, however, specifically disallows a base fee when using an award fee incentive in contract types other than cost-plus-award-fee contracts.[54]

Cost-Plus-Fixed Fee Limitation Exception. On 8 January 1997, the Defense Acquisition Regulations (DAR) Council issued a DFARS final rule. It added an exception to the restriction on the use of cost-plus-fixed-fee contracts for military construction.[55] The final rule amends DFARS 216.306, which restricts the use of cost-plus-fixed fee contracts for military construction.[56] The new rule specifies that the prohibition does not apply to contracts for environmental restoration at an installation set for realignment or closure, as long as the agency funds the contract with Base Realignment and Closure (BRAC) funds.

Proposed DFARS Rule—Streamlining the Architect-Engineer Selection Process. On 29 July 1997, the DAR Council issued a proposed rule that would amend the DFARS[57] to streamline the process for selection of firms for architect-engineer contracts.[58] Specifically, the proposed rule would: (1) eliminate the requirements for formal constitutions and minimum sizes for pre-selection boards; (2) eliminate special approval requirements for selection of firms for contracts exceeding $500,000; and (3) change the criteria for inclusion of firms on a pre-selection list

48. *Id.* at 4. All the shotguns in the agency's arsenal had crossbolt safeties.

49. *Id.* at 4.

50. 62 Fed. Reg. 12,690 (1997).

51. FAR, *supra* note 22, at 16.404. The previous FAR 16.404 and FAR 16.405 have been redesignated as FAR 16.405 and 16.406 respectively. The fixed-price award fee contract type allows the government to recognize and to reward contractors who exceed minimum standards in terms of quality, timeliness, technical ingenuity, and effective management. *Id*.

52. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 216.470 (Apr. 1, 1991) [hereinafter DFARS].

53. FAR, *supra* note 22, at 16.305; DFARS, *supra* note 52, at 216.404-2(c). In cost-plus award fee contracts, the fee pool consists of base fee and minimum fee. The base fee is commonly called a minimum fee, because the contractor is always entitled to a base fee. In DOD contracts, the base fee is limited to three percent of the estimated cost in cost-plus award fee contracts. *Id*.

54. DFARS, *supra* note 52, at 216.470(2).

55. 62 Fed. Reg. 1058 (1997). Generally, DOD agencies may not use cost-plus fixed fee contracts for construction contracts over $25,000 without approval from the Secretary of Defense or his delegee. DFARS, *supra* note 52, at 216.306.

56. 1997 Military Construction Appropriations Act, Pub. L. No. 104-196, § 101, 110 Stat. 2385 (1996).

57. DFARS, *supra* note 52, at 236.602.

58. 62 Fed. Reg. 40,497 (1997).

from "the maximum practicable number of qualified firms" to "the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board."[59]

Exercising Options

Stop! Don't Add Those Clauses. In *Varo, Inc.*,[60] the Air Force awarded Varo a fixed-price contract for modular power supply units for the AIM-9 missile launcher. The contract required Varo to submit twelve first articles and to produce 1,661 production units. It also contained two option periods for an additional 1,673 units each. The contract allowed the Air Force to exercise the first option period anytime within ninety days of the approval of the first article. On 16 May 1989, the contracting officer exercised the first option within the ninety day window. The modification which exercised the first option added eight FAR and DFARS clauses[61] that were not included in the original contract. Two days later, Varo informed the contracting officer that the exercise of the option was untimely and invalid.[62]

The Air Force claimed that adding the eight clauses did not invalidate the option because statute or regulation required the inclusion of the clauses. The Air Force also contended that Varo failed to prove that it suffered increased performance costs as a result of the inclusion. Unfortunately for the Air Force, the board did not agree.

The board concluded that the exercise of the option constituted a constructive change to the original contract. The board found that the contractor was entitled to an equitable adjustment, because the Air Force added substantial duties by adding clauses that it did not originally include in the contract. The board held that "[t]he inclusion in the exercise of an option of a provision(s) departing from the original contract provisions, makes such option exercise invalid."[63]

ASBCA Decision Overturned. On 4 March 1997, the Court of Appeals for the Federal Circuit held that Lockheed Martin IR Imaging Systems, Inc. (Lockheed) was entitled to a price adjustment for the partial exercise of a 100 percent option.[64] The Federal Circuit's decision reversed the ASBCA in *Loral Infrared & Imaging Systems, Inc.*,[65] which held that the government was only required to purchase up to the 100 percent option quantity.

On 20 September 1991, the government awarded a fixed-price contract for 779 detector cooler assemblies. The contract included a line item for a 100 percent option. Section M-2, Evaluation of Options, however, advised the bidders that they may offer different option prices for varying option quantities. Lockheed submitted one price for the entire 100 percent option; it did not state different prices for varying quantities for the option. Lockheed relied on the representations of the contract line item that the option was for 100 percent of the base year quantity. After contract award, the Army issued an addendum to the contract which stated that the Army may purchase less than the 100 percent option quantity at the price the contractor had listed for 100 percent option quantity.[66] When the Army ordered less than the 100 percent option quantity, Lockheed protested.

The board agreed with the Army's position that Section M-2 notified Lockheed that this was not a 100 percent option contract. Lockheed argued that Section M-2 did not require the bidders to offer lesser quantities than the 100 percent option. It contended that Section M-2 permitted, but did not require, bidders to offer lesser quantities and different prices.[67] Two years later, the Federal Circuit reversed the board and held that the partial exercise of the option was a constructive change to the contract. The court found that the board erred in its interpretation of the contract and concluded that the contract was not ambiguous and that Lockheed's interpretation was reasonable.[68]

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59. *Id. See also* DFARS, *supra* note 52, at 236.602-2, 236.602-4.

60. ASBCA Nos. 47945, 47946, 96-1 BCA ¶ 28,161.

61. FAR, *supra* note 22, at 52.223-6 (Drug Free Workplace), 52.232-8 (Discounts for Prompt Payment), 52.232-25 (Prompt Payment), 52.232-28 (Electronic Funds Transfer Payment Method), 52.223-5 (Certification Regarding a Drug Free Workplace); DFARS, *supra* note 52, at 252.223-7500 (Drug Free Work Force), 252.225-7027 (Restriction on Contracting with Toshiba Corporation or Kongsberg Valpenfabrikk), 252.225-7026 (Notice on Restriction on Contracting with Toshiba Corp., or Kongsberg Vapenfabrikk-Offer[or]'s Representation).

62. Despite its claim, the contractor performed the required work under the first option.

63. *Varo,* 96-1 BCA ¶ 28,161 at 140,564.

64. Lockheed Martin IR Imaging Systems, Inc. v. Togo D. West, Jr., 108 F.3d 319 (Fed. Cir. 1997). With a 100% option, the government has the option to purchase double the total quantity of items or services specified in the base year contract.

65. ASBCA No. 45744, 95-2 BCA ¶ 27,803. The board denied the contractor's claim and held that the contractor was required to submit a price for the entire option quantity; however, the Board also held that the government was not required to purchase the entire option quantity. *Id*.

66. *Id.* at 77,421.

67. *Lockheed,* 108 F.3d at 322.

Indefinite Delivery Contracts

Board Defines Measure of Damages—Twice! In *AJT & Associates, Inc.*,[69] the Army awarded an indefinite quantity contract for architect-engineering services. The contract required the Army to order a minimum of $15,000 in services. The maximum quantity of services the Army could order was $750,000. At the end of the contract period, the Army had not ordered any work under the contract. AJT submitted a claim for $15,000 for the guaranteed minimum quantity of services. The contracting officer awarded the contractor $1500 as lost profits and denied the rest of the claim.

AJT appealed to the board. It argued that it was entitled to the entire amount of the guaranteed minimum quantity.[70] The board disagreed. It held that AJT was only entitled to its actual damages. The board found that AJT had not presented evidence of actual damage resulting from the Army's failure to order the guaranteed minimum quantity. Additionally, AJT failed to prove that its profit on the minimum order would have exceeded the $1500 the contracting officer awarded as lost profits.

In *AFTT, Inc.*,[71] the Army awarded an indefinite quantity contract for painting and maintenance services. The contract required the Army to order at least $10,000 worth of services.[72] Again, the Army failed to issue any task orders. AFTT submitted a claim for $48,473 for its overhead and profit, plus an additional $6653 for payment and performance bond premiums.

On 13 June 1997, the board held that AFTT is only entitled to recover the profits it would have earned on the required minimum amount of work, plus overhead costs actually incurred. The board reasoned that AFTT "is entitled only to be put in as good a position as it would have been had [the government] performed the contract by ordering the minimum work required."[73]

"Nominal" Quantities Do Not Apply to Individual Orders. The FAR requires that the minimum guaranteed quantity in an Indefinite Delivery Indefinite Quantity(IDIQ) contract be more than a nominal quantity.[74] In *C.W. Over and Sons, Inc.*,[75] the NSA solicited for an IDIQ contract for a variety of construction, renovation, and repair services. The solicitation stated that the NSA would order a minimum guaranteed quantity of $800,000 in services. The contractor, however, alleged that the NSA violated FAR 16.504(a)(2) by including a provision in the solicitation that the minimum value for any individual delivery order is $0.01.[76]

The GAO disagreed with the contractor. It noted that the $800,000 in minimum guaranteed services was more than adequate to meet the requirements of FAR 16.504(a)(2). The GAO held that FAR 16.504(a)(2) only requires that the guaranteed minimum quantity be more than a nominal quantity. The GAO concluded that individual delivery orders issued under an IDIQ contract do not require a minimum amount (more than a nominal amount) in order to be binding.[77]

Board Has To Tell Contractor That an IDIQ Contract is Not a Requirements Contract. In *PCA Microsystems, Inc.*,[78] the Veterans Administration (VA) awarded an IDIQ contract for video display terminals (VDTs). The contract provisions required the VA to purchase a guaranteed minimum quantity of 6210 terminals.[79] The contract also contained an option provision which allowed the VA to purchase an additional 33,000 terminals. The contract also provided for maintenance services for all terminals offered by PCA after the warranty period

68. *Id.* at 323.

69. ASBCA No. 50240, 97-1 BCA ¶ 28,823.

70. AJT based this argument on *Maxima Corp. v. U.S.*, 847 F.2d 1549 (Fed. Cir. 1988). Here, the government had already paid the contractor the entire sum of the unordered minimum guaranteed quantity. The court merely held that the contractor was entitled to retain this amount. The board noted that the holding in *Maxima* does not automatically entitle the contractor to the full dollar value of the minimum guaranteed quantity. *Id.*

71. PSBCA No. 3717, 97-2 BCA ¶ 29,057.

72. *Id.* at 144,623.

73. *Id.* at 144,624.

74. FAR, *supra* note 22, 16.504(a)(2) (providing that "[t]o ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order").

75. B-274365, Dec. 6, 1996, 96-2 CPD ¶ 223.

76. *Id.* at 3.

77. *Id.* (citing Sunbelt Properties, Inc., B-249307, Oct. 30, 1992, 92-2 CPD ¶ 309; International Creative and Training, Ltd., B-245379, Jan. 6, 1992, 92-1 CPD ¶ 26.)

78. VABCA No. 4549, 97-1 BCA ¶ 28,718.

expired. This contract provision required the VA to purchase the guaranteed minimum maintenance services for 6210 terminals.

The VA purchased 16,742 terminals from PCA, but it only purchased maintenance services for 6210 terminals. PCA claimed that the VA must issue task orders for maintenance services on all terminals the VA purchased. PCA claimed that the portion of the contract dealing with maintenance services was a requirements contract. Therefore, when the VA ordered the additional 10,532 terminals, it was obligated to purchase maintenance services for all additional quantities above the guaranteed minimum quantity.[80]

The board determined that the VA procured both the terminals and the maintenance services as an IDIQ contract. It stated that the contract terms referred to both the terminals and the maintenance services as an IDIQ contract. The board specifically noted that the contract did not contain any "Requirements" clause. The board denied PCA's claim and held that the VA did not have to purchase the maintenance services above the guaranteed minimum quantity stated in the contract.

Combination Fixed-Price/Indefinite Quantity Contract. Following the precedent it set in *ANC Group*[81] in 1994, the Armed Services Board of Contract Appeals (ASBCA) held that the Navy met its obligation to purchase the minimum guaranteed quantity under a combination fixed-price/indefinite quantity contract where the contract specified that the fixed-price portion of the contract is the minimum guaranteed quantity.[82]

The Navy awarded a combination fixed-price/indefinite quantity contract to Mac's Cleaning and Repair Services (Mac) for janitorial services at the naval air station in Kingsville, Texas. In this contract, the Navy specifically stated that the guaranteed minimum quantity is the fixed-price portion of the contract.[83] When the Navy did not order the maximum estimated quantity under the indefinite quantity portion of the contract, Mac defaulted. Mac stated that it could not pay its employees.[84] Mac argued that the Navy failed to state a guaranteed minimum quantity on the indefinite-quantity portion of the contract. Considering this, Mac claimed that it was entitled to the full amount of the fixed-price portion of the contract and the full price for the entire indefinite-quantity contract based on FAR 52.216-22. [85]

The board dismissed the appeal. The board held that the government is only required to state and to purchase the guaranteed minimum quantity in an indefinite quantity contract. In a combination fixed-price/indefinite quantity contract, the government may specify the fixed-priced portion of the contract as the guaranteed minimum quantity.[86]

GAO Upholds FASA Preference for Multiple Awards. On 11 June 1996, the Army issued a request for proposals (RFP) for computer-simulated training at the Command and General Staff College's (CGSC) Tactical Commander's Development Course.[87] It provided for both a firm-fixed-price contract and a requirements contract. The solicitation included a phase-in period, base year, and three one-year option periods for the requirements portion. The total cost of all estimated government requirements, including options, exceeded $10 million. The contracting officer contemplated making one award under the requirements contract.

The solicitation also required the contractor to provide various services for the computer simulation exercises conducted by the U.S. Army Training and Doctrine Command at different facilities throughout the United States.[88] It also required that contractor personnel make recommendations for upgrading the computer hardware.[89]

Nations, Inc. protested. It claimed that the solicitation involved "advisory and assistance services" that required multiple awards under an IDIQ type contract, because the contract

79. *Id.* at 3.

80. *Id.* at 23-24.

81. ASBCA No. 47065, 94-3 BCA ¶ 27,086.

82. Mac's Cleaning and Repair Serv., ASBCA No. 49652, 97-1 BCA ¶ 28,748.

83. *Id.* at 143,481.

84. *Id.* at 143,483.

85. The government is required to state a guaranteed minimum quantity in an indefinite quantity contract. FAR, *supra* note 22, at 52.216-22.

86. *Mac's Cleaning and Repair Serv.*, 97-1 BCA ¶ 28,748 at 143,483. The board stated that, in a combination fixed-price/indefinite quantity contract, the government is only obligated to pay the contractor based on each delivery/task order.

87. Nations, Inc., B-272455, Nov. 5, 1996, 96-2 CPD ¶ 170.

88. *Id.* at 1. These services generally called for technical advice and assistance during the preparation, simulation, and evaluation phases of the exercises.

89. *Id.* at 2.

price exceeded $10 million and the contract term exceeded three years.[90] Nations alleged that the Army failed to make a written determination that the services "are so unique or highly specialized that it is not practicable to award more than one contract."[91]

The key issue was whether the technical services required under the RFP were contracted advisory and assistance services that fell under the statutory and regulatory definitions. The GAO held that the professional technical services in support of the computer simulation training fell within the new statutory definitions of advisory and assistance services.[92] The GAO recommended that the Army either amend the solicitation to procure these services under a multiple award, indefinite delivery/ indefinite quantity type of contract or execute the necessary written determination that the services are so unique or of such a highly specialized nature that it is impractical to make multiple awards.[93]

Office of Federal Procurement Policy (OFPP) Issues Guidance on Multiple Award Task and Delivery Order Contracting. In July 1997, the OFPP issued its interim "Best Practices" guide for multiple award task and delivery order contracting. The OFPP issued this publication to provide additional guidance for contracting officers, above and beyond what the FAR currently provides. The guide is useful because of its practical tips on how to structure and to conduct multiple award contracts. It also tells the contracting officer how to issue task and delivery orders for multiple award contracts. Copies are available through the Executive Office of the President's Publications Office by calling (202) 395-7332, or by accessing the Acquisition Reform Network at www.arnet.gov.[94]

Contracts in Perpetuity. In 1972, the Air Force awarded its utilities contract to the City of Tacoma.[95] Under the contract, Tacoma would provide electrical services to McChord Air Force Base until the Air Force terminated the contract.[96] Tacoma sought to terminate the contract by claiming that the contract was ambiguous and that it did not provide for an ending date to the contract—an invalid perpetuity. Tacoma, however, failed to provide the Court of Federal Claims with any evidence of ambiguity. The court stated that "the fact that the parties agree that the contract is for an indefinite term indicates that the contract is not ambiguous."[97] Further, the court concluded that "[w]hile indefinite term contracts may be disfavored by the courts, they are not *per se* ambiguous."[98] As to the validity of a contract in perpetuity, the court adopted the holding in *Consumer's Ice Co. v. United States*[99] and ruled that indefinite term contracts are valid and enforceable.[100] In *Consumer's Ice*, the court held that it will neither invalidate nor declare the contract unenforceable merely because a contract is for an indefinite term.

Cost Reimbursement Contracts

On 31 July 1987, NASA awarded a cost-plus-fixed-fee contract to Grumman Space Station Integration Division (Grumman) for program management, integration, and support to NASA.[101] In 1992, the parties bilaterally modified the contract to establish a separate award fee pool aside from the basic award fee pool.[102] On 23 November 1993, NASA terminated the contract for convenience. After the termination, Grumman submitted a claim for unpaid award fees which remained in the separate award fee pool.

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90. *Id. See* FAR, *supra* note 22, at 16.503(d)(1). This provision provides that unless the contracting officer or the head of the agency (designated officer) makes a written determination pursuant to 16.503(d)(2), "no solicitation for a requirements contract for advisory and assistance services in excess of three years and $10,000,000 (including all options) may be issued . . . ." *Id*.

91. FAR, *supra* note 22, at 16.503(d)(1), 16.503(d)(2).

92. *Nations*, 96-2 CPD ¶170 at 5.

93. *Id*. at 6. Although FAR 16.503(d)(1) requires the government to make this determination prior to issuing the solicitation, a recent Court of Federal Claims case held that the government's failure to make a determination prior to award was "harmless error" that did not warrant voiding the solicitation. Cubic Applications, Inc. v. United States, 37 Fed. Cl. 345 (1997).

94. OFFICE OF FEDERAL PROCUREMENT POLICY, BEST PRACTICES FOR MULTIPLE AWARD TASK AND DELIVERY ORDER CONTRACTING (interim ed. 1997).

95. City of Tacoma v. United States, No. 95-697C, 1997 WL 602734, at *1 (Fed. Cl. Sept. 24, 1997).

96. *Id.* at *3.

97. *Id.* at *8.

98. *Id.*

99. 475 F.2d 1161 (1973).

100. *City of Tacoma*, 1997 WL 602734, at *9.

101. Grumman Space Station Integration Div., ASBCA No. 48719, 97-1 BCA ¶ 28,843.

On 3 March 1997, the board ruled that Grumman is not entitled to the unpaid award fee when the government terminates a cost-plus-award-fee contract for convenience. The board held that fees are not payable for work or events that are part of the terminated portion of the contract. Payment is allowed for the award fee only to the extent that work has been performed.[103]

Sealed Bidding

Responsiveness

Bid Signed by One Partner in Joint Venture is Responsive. Who has the authority to bind a joint venture? That was the question presented in *PCI/RCI v. United States.*[104] A joint venture, PCI/RCI, submitted to the GSA a bid for a courthouse modernization project. The bid, bid bond, and procurement integrity certificate were all signed by Mr. James Roers, who was identified in the signature blocks as either a partner or managing partner. PCI/RCI's bid was the low bid. The contracting officer subsequently requested information about how the joint venture intended to perform the contract, particularly how the joint venture partners would divide their responsibilities under the contract. In response, PCI/RCI submitted documents, including a North Dakota contractor's license, a fictitious partnership name certificate, a joint bonding agreement, and PCI's by-laws. The contracting officer became concerned, because the joint bonding agreement designated PCI as the "sponsoring joint venturer" and designated its president as the individual authorized to sign the contract. The contracting officer rejected the bid as nonresponsive because only one joint venture partner had signed it.[105] The Court of Federal Claims issued a permanent injunction requiring the GSA to treat the bid as a responsive bid and forbidding award to any other entity. In so doing, the court applied the common law of joint ventures, noting the absence of a procurement regulation addressing this issue.

Contract Cannot be Awarded to Successor in Interest. When the government awards a contract, it is entitled to expect that the same bidder/awardee will perform the contract. To allow otherwise would deprive the government of its ability to enforce the contract against the same bidding entity and would allow contractors to engage in speculative trading of government contract rights. Two anti-assignment statutes forbid this practice.[106] Exceptions to the prohibition "are allowed only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of a merger, corporate reorganization, or the sale of an entire portion of a business embraced by the bid or proposal."[107]

In *Premier Security,*[108] the protestor challenged the award to a successor in interest. The question presented to the GAO was whether the sale of the awardee's business was equivalent to an improper sale of the bid. Although the proposed awardee had sold its entire business, the protestor alleged that the business itself was of such negligible value that the transaction would not fall within the exceptions to the anti-assignment prohibition. The sale of the "business," it argued, was really a sale of the bid, because the bid was the only real asset changing hands. The GAO sustained the protest, finding that the proposed awardee's net worth prior to the sale was a mere $3362. The proposed awardee's unproven assertion that its intangible assets were worth over $100,000 lacked merit.

Pre-Bid Assertions Do Not Qualify an Otherwise Responsive Bid. The Navy found itself in a quandary due to the low bidder's pre-bid assertion that it could not meet the IFB's performance schedule.[109] In particular, the Ryan Company asserted that it would take more time to bring materials to the site than the time allowed by the IFB for completion of the entire project. In its letter, Ryan stated that it would proceed with its bid but would assume that the time allowed for construction was exclusive of the time necessary for delivery of materials to the site. Ryan's interpretation was erroneous. Nevertheless, Ryan's bid was regular on its face.

The Navy rejected Ryan's bid as nonresponsive, and Ryan protested. Complicating the situation was the lack of a Navy response to Ryan's letter challenging the completion date. Rather than opening the correspondence, the Navy had placed the letter in the bid box until bid opening. As such, there was no opportunity to clarify this issue prior to bid opening. In sus-

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102. *Id.* The government hoped that the restructuring would provide an additional incentive to the contractor to provide better service.

103. *Id.* at 143,882-83.

104. 36 Fed. Cl. 761 (1996).

105. The FAR requires the signature of each joint venture partner on the contract. FAR, *supra* note 22, at 4.102. It does not, however, create a similar requirement for bid signatures. The contracting officer reasoned that the same signatures must therefore appear on the bid, because the bid later "metamorphoses" into the contract. *PCI/RCI*, 36 Fed. Cl. at 769.

106. *See* 41 U.S.C.A. § 15 (West 1997); 31 U.S.C.A. § 3727 (West 1997).

107. Premier Security, B-275908.2, 1997 U.S. Comp. Gen. LEXIS 238, at *8 (July 14, 1997) (citing J.I. Case, Co., B-239178, Aug. 6. 1990, 90-2 CPD ¶ 108 at 3).

108. *Id.*

109. The Ryan Company, B-275304, Feb. 6, 1997, 97-1 CPD ¶ 62.

taining Ryan's protest, the GAO noted that, in determining responsiveness, the contracting officer may consider only documents contained in the bid and those incorporated by reference. The GAO suggested that the Navy might explore the issue raised by Ryan's letter as one related to responsibility.

Acknowledging Amendments— Harder Than You Think? Mere acknowledgment of a material amendment without an affirmative indication of the bidder's intent to be bound may render a bid nonresponsive. Recent cases illustrate the frustrating result of an unintentional ambiguity[110] caused by amendment of the solicitation.

In *Sundt Corp.*,[111] the bidder acknowledged and returned an amendment with its bid, which changed the minimum bid acceptance period from 90 days to 120 days. Unfortunately, the bidder stated a ninety-day bid acceptance period on the Standard Form 1442.[112] The agency properly rejected the bid.

Bidding on a superseded bid schedule was the downfall of 3W American Enterprises, Inc. (3W). It argued unsuccessfully that it used the original schedule to "'be safe' because it was confused by all the amendments, sublines, and options."[113] In calculating its total price, 3W used the unamended quantities. The contractor argued that the contracting officer should ignore its total bid price in favor of a new total to be calculated by multiplying its unit prices by the amended schedule quantities. The GAO denied the protest. Although 3W's argument seems a bit absurd, the Navy certainly could have done a better job. During the course of the procurement, it issued seven amendments, one of which substituted an entirely new twenty-five page bid schedule. Of the fourteen bids received, the five low bids had to be rejected, along with 3W's bid.[114]

In *J. Caldarera & Co., Inc.*[115] (Caldarera) the IFB included a "Variations in Estimated Quantities" clause. The agency amended the estimated quantities for certain items. Caldarera acknowledged the amendment, but included in its bid a page from the original IFB. That page showed the original estimated quantities. This rendered its bid nonresponsive and its protest unsuccessful.

Mistake in Bid

Mistake in Claim Does Not Affect Sufficiency of the Evidence of Original Mistake. It is common for disgruntled protestors to object to corrections of mistakes made by low bidders. The sufficiency of the evidence of mistake is a frequent point of contention. Still, PCL Constructors Canada, Inc. [116] made a unique and somewhat compelling argument against allowing its competitor, Axor Engineering Construction Group, Inc. (Axor), to correct its low bid. The protestor found an apparent mistake in Axor's mistake claim. Axor requested an upward correction of its bid in an amount smaller than the amount of the alleged mistake! PCL insisted that the discrepancy between the amount of correction requested by Axor and the amount of the alleged mistake generated doubt as to the bid actually intended

Axor's request for correction stemmed from a quotation which it received from a potential subcontractor at the last minute and quickly incorporated into its bid. The $9 million quotation was for miscellaneous metals work. The lowest quote Axor had previously obtained for that work was for $12.5 million. According to Axor, it had deducted $4 million from the $12.5 million quotation during its original calculations, because it considered the quotation too high. When the more reasonable quotation arrived at the last minute, Axor entered the figure onto its spreadsheet, but forgot to undo the $4 million adjustment. So why, asked PCL, did Axor seek only a $3.75 million upward correction?

The GAO dismissed the protest with only a brief discussion. PCL had no standing to challenge the apparent discrepancy in Axor's mistake claim. Resolution of mistake issues is the responsibility of the contracting parties. Perhaps Axor decided not to ask for the additional money because to do so would have strengthened the protestor's argument of the uncertainty of Axor's intended bid.

Some Kind of Transcription Error. In *Brazos Roofing, Inc*., [117] the protester argued that the Navy should not have allowed the correction of the bid submitted by States Roofing. Correction of the bid allowed States Roofing to displace Brazos as the low

110. Such situations are bad for the government as well as the bidder. It appears that the bidder sincerely intends to comply with the requirements of the amendment and that the ambiguity is a result of the complicated and sometimes confusing process of reconciling the original solicitation and its amendments. The government has little choice but to reject these bids and, in doing so, loses the benefit of getting the best price.

111. B-274203, Nov. 5, 1996, 96-2 CPD ¶ 171.

112. It seems quite likely that the bidder made the notation on the SF 1442 prior to the amendment and that the failure to correct it was the result of an oversight.

113. 3W Am. Enter., Inc., B-274410.2, Dec. 27, 1996, 96-2 CPD ¶ 242 at 3.

114. Although the facts are not entirely clear, it appears that the five low bidders were also rejected because they were non-responsive. It is difficult to imagine that the agency received the best possible price for these services.

115. B-276201, 1997 U.S. Comp. Gen. LEXIS 197 (May 21, 1997).

116. *In re* PCL Constructors Canada, Inc.—Reconsideration, B-274697, Dec. 24, 1996, 96-2 CPD ¶ 239, *recon. denied* B-274697.2, May 13, 1997, 97-1 CPD ¶ 176.

bidder. The IFB included a fifteen page bid schedule. Bidders were to insert unit prices for numerous contract line items, multiply their unit prices by the estimated quantities, and add the figures together for a base year total (which was inserted on page sixteen). Two additional pages of the bid schedule allowed bidders to bid on two option years by performing calculations based on a percentage of price increase or decrease for the option years. The percentage of increase or decrease was applied to the base year's total.

After bid opening, States Roofing alleged a mistake in its bid. It had inserted a different figure as its base year total for the calculation of the option year prices than the total used for its base year bid. The Navy considered this an obvious clerical error under FAR 14-407-2(a)[118] and allowed correction of the bid to conform the figure used in calculating the option years to that of the grand total for the base year. The GAO upheld the Navy's decision that "only the page 16 figure could reasonably be considered States Roofing's intended base year price, and, therefore, the figure States Roofing used to calculate its first year option price on page 17 logically can only be viewed as simply reflecting *some kind of transcription error.*"[119] The GAO based its conclusion on the fact that the base year total represented an error free calculation of over 150 unit prices.[120]

Stuck with Figures Too Good to Be True. R.P. Richards Construction Company submitted the apparent low bid on an Army Corps of Engineers construction contract.[121] In fact, its bid was low by over $1.5 million dollars. After bid opening, Richards sought an upwards correction in the amount of $646,336. Richards alleged two "clerical" errors in its bid calculation. First, it sought relief from its misreading of a subcontractor's quotation for structural steel work. The quotation arrived only thirty minutes before bid opening. In spite of the apparent low nature of this quotation (the other quote in its possession was nearly double this one) and a price quoted as "F.O.B. job site,"[122] Richards assumed that the last minute subcontractor's quote included delivery and erection of the steel. Richards subsequently learned that the quotation was for materials only.

Richards' second alleged mistake was its decision to calculate its bid using its own estimate of $2000 for certain specifications rather than the $91,760 submitted by a potential subcontractor. The GAO deemed both mistakes uncorrectable errors in judgment. The GAO refused to allow Richards the opportunity to recalculate its bid, thereby transforming it into something other than what it intended prior to bid opening.

Responsibility

Call It What You Will. The GSA sought to award a contract for roof replacement and related work.[123] The IFB required bidders to have a certain level of experience. Also, the IFB stated that bids must include a copy of the roofing manufacturer's warranty and a statement from the roofing manufacturer indicating that the bidder was an approved applicator. The IFB warned that failure to include these documents could result in rejection of a bid. The absence of these documents in the low bid prompted a protest which alleged that the bid was nonresponsive. The protester also complained that the low bidder got

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117. B-275319, Feb. 7, 1997, 97-1 CPD ¶ 66.

118. The FAR provides:

> Any clerical mistake, apparent on its face in the bid, may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent mistakes are:
>
> (1) Obvious misplacement of a decimal point;
> (2) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days);
> (3) Obvious reversal of the price f.o.b. destination and the price f.o.b. origin; and
> (4) Obvious mistake in designation of unit.

FAR, *supra* note 22, at 14.407-2(a).

119. *Brazos Roofing*, 97-1 CPD ¶ 66 (emphasis added).

120. In the author's opinion, the GAO incorrectly deemed this error a clerical mistake under FAR 14.407-2(a). It seems unreasonable to consider this error apparent on the face of the bid. The base year total that appeared in the bid was $1,169,780. The figure used as the base year total in calculating the option year prices was $1,274,430. This does not appear to be a classic transcription error, such as the mistaken reversal of digits. Furthermore, the GAO seems to assume that the accuracy of the calculations bolsters the base year total's reliability as the intended price. With the advent of computer spreadsheets, bidders can easily plug in different figures and achieve instant totals. Bidders may have numerous versions of the spreadsheet all with different totals, but all accurately calculated. Who can say that States Roofing had not intended the higher base year price and mistakenly entered onto the bidding schedules the figures from a rejected version of a computer spreadsheet? Under the circumstances, the GAO's reliance on the accuracy of the figures seems misplaced.

121. R.P. Richards Constr. Co., B-274859.2, Jan. 22, 1997, 97-1 CPD ¶ 39.

122. *Id.* at 3.

123. Beta Constr. Co., B-274511, Dec. 13, 1996, 96-2 CPD ¶ 230.

"two bites" at the proverbial apple. It could elect whether to be bound by its bid by deciding whether to produce the required documentation. The GAO denied the protest, finding that the missing materials related to matters of responsibility, regardless of the characterization in the IFB. The potential for a bidder to avoid award by its failure to cooperate during the responsibility determination is always present and does not call for rejection of the bid.

"Hey Loser, Now That I've Won, Tell Me How to Perform This Contract!" Could any losing contractor resist protesting when employees of the proposed awardee phoned the losing contractor to seek assistance in understanding the contract's performance requirements and to inquire about the possibility of subcontracting the work which they admittedly did not know how to perform? Sonic Dry Clean, Inc. could not.[124] The Army issued an IFB for diesel air filter cleaning services. James T. Moller was the low bidder and won the award following an affirmative responsibility determination. In its protest, Sonic alleged that Moller's employees admitted that they did not know how to perform the required air filter cleaning services. Finding no bad faith on the part of the Army, the GAO refused to review the agency's affirmative responsibility determination.

Late Bids

GAO S-T-R-E-T-C-H-I-N-G the Late Bid Rules. The GAO stretched the late bid rules and allowed consideration of bids that were misdelivered due to conflicting information given out by the government. In *AABLE Tank Services, Inc.*,[125] the Army issued an IFB for the removal and installation of underground storage tanks in Savana, Illinois. Standard operating procedure would have required the submission of bids to Letterkenny Army Depot, Pennsylvania, but the IFB gave a Savanna, Illinois, address. When bidders called for information, the contract specialist advised delivery of the bids to Letterkenny Army Depot in accordance with normal agency procedures. The GAO refused to require rejection of the bids delivered to Letterkenny. The integrity of the process would not be harmed, and the lateness was caused by the agency's "affirmative misdirection."[126]

Similarly, in *Palomar Grading & Paving, Inc.*,[127] the Navy expected bids to be sent to Yuma, Arizona, but the IFB included an address that mistakenly contained a Tempe, Arizona zip code. Weststar, Inc. gave its bid to the United Parcel Service (UPS) the day before bid opening. UPS promised delivery by 10:30 the following morning, well before the 2:00 p.m. bid opening time. Nevertheless, the bid arrived late, because UPS sent the package to Yuma by way of Tempe. The GAO upheld the Navy's decision to accept the bid, citing the "fundamental principle" that "a bidder who has done all it could and should to fulfill its responsibility should not suffer if the bid did not arrive as required because the government failed in its own responsibility, and if that is otherwise consistent with the integrity of the competitive system."[128] The UPS records clearly showed that the bid was out of the bidder's control and that the bid was misdirected due to the erroneous zip code.

Facsimile Follies. Recent protests regarding bids sent by facsimile reveal high tech nuances to the late bid rules. Must the agency consider a bid transmitted if it arrived at the agency's machine five seconds before bid opening but was recorded, initialed, sealed, and delivered to the bid opening room approximately three minutes after bid opening had been announced? According to the GAO, the bidder not only confused arrival at the agency with arrival at the bid opening room, but also failed to allow sufficient time for the agency to deliver the bid to its intended destination.[129] The protest was denied.

The GAO had more sympathy for Brazos Roofing, Inc., which tried its best to send its bid to the Army Corps of Engineers in response to an urgent procurement for the repair of hurricane damage at Seymore Johnson Air Force Base, North Carolina.[130] Brazos began attempting to transmit its bid hours before bid opening. When its facsimile machine would not transmit, Brazos tried to phone the Air Force point of contact, who was apparently away from the phone. The Air Force's machine was out of paper. Finally, Brazos reached an office secretary, who provided another number. Brazos began resending its transmission to both machines, and the agency received the bid at the alternate machine. The other machine, however, jammed after several pages of Brazos' bid had been transmitted. Although Brazos' bid arrived at the agency before bid opening, the agency discovered it sometime thereafter. The Corps of Engineers maintained that the IFB put Brazos on notice that it bore the risk of an inoperable machine. Through

124. Sonic Dry Clean, Inc., B-275929, Apr. 21, 1997, 97-1 CPD ¶ 145.

125. B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180.

126. *Id*. at 3.

127. B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16.

128. *Id*. at 3.

129. Roy McGinnis & Co., B-275988, Apr. 28, 1997, 97-1 CPD ¶ 156.

130. Brazos Roofing, Inc., B-275113, Jan. 23, 1997, 97-1 CPD ¶ 43.

a somewhat tortured reading of the clause, the GAO determined it inapplicable to Brazos because Brazos had not *chosen* to transmit its bid, but had been forced to do so by the urgency of the situation and the agency's very late amendment of the IFB.

Cancellation of the IFB

Neither Rain, Nor Snow, Nor Sleet, Nor Hurricane Will Stop Bid Opening at Fort Bragg. The FAR allows postponement of bid opening in the event of an emergency that interrupts normal operations.[131] But is there relief for a would-be bidder who seeks postponement of bid opening because a hurricane prevented delivery of its bid by normal commercial carrier? This was the question presented in *Educational Planning & Advice, Inc*.[132]

Bid opening was set for 1400[133] at Fort Bragg, North Carolina. A hurricane hit the area the day prior, closing the Fayetteville Airport and prompting the governor to declare a state of emergency. In fact, the governor ordered North Carolina businesses to shut down at noon on the day of bid opening. Fort Bragg officials nevertheless remained at work, refusing to scratch bid opening in spite of the bidder's request. The GAO found no abuse of discretion by the combat-ready Fort Bragg officials. The GAO also noted that adequate competition was achieved. All the way—Airborne!

We See Your Bids and You're Confused! The GAO repeatedly upheld cancellation of an IFB where bid prices convinced the agency that the bidders did not understand the specifications. In *Grot, Inc*., [134] the Army Corps of Engineers sought bids on fire alarms and smoke detectors for buildings at Arnold Air Force Base. Even the low bidder exceeded the government estimate, and it subsequently withdrew after alleging a mistake in its bid. The remaining bids all exceeded the "awardable range,"[135] leading the Army Corps of Engineers to conclude that its specifications required clarification. The GAO denied Grot's protest that the agency lacked a compelling reason to cancel the solicitation. Grot's post-bid opening assertion that the specifications were clear was undermined by its preaward letter to the agency, in which it characterized its understanding of the specifications as a "very wild guess."[136]

The GAO also upheld cancellation of the IFB in *Neals Janitorial Service.*[137] In reviewing bids for a fixed-price service contract, the contracting officer noticed that all of the bids had widely varying line item prices. Some bids were well above and others were well below the government estimate. This led the contracting officer to scrutinize the solicitation and to conclude that bidders had been unable to determine the actual workload. The GAO upheld cancellation.

Can the government cancel its IFB when it determines that its estimate is deficient? The GAO said "yes" in *News Printing, Inc.*[138] In reviewing the reasonableness of the contracting officer's decision, the GAO noted "the government's obligation to use due care in determining estimated quantity needs and . . . the possibility of government liability for the knowing use of an inaccurate estimate."[139]

Negotiated Acquisitions

The FAR Council Finally Finalizes Part 15[140]

FAR Part 15, Contracting by Negotiation, has been in the spotlight lately as a result of the FAR Council's rewrite effort.[141] The Government Printing Office published the final

131. "A bid opening may be postponed even after the time scheduled for bid opening . . . when emergency or unanticipated events interrupt normal governmental processes so that the conduct of bid opening as scheduled is impractical." FAR, *supra* note 22, at 14.402-3(a)(2).

132. B-274513, Nov. 5, 1996, 96-2 CPD ¶ 173.

133. 2 p.m. for the "militarily" challenged.

134. B-276979.2, 1997 U.S. Comp. Gen. LEXIS 283 (Aug. 14, 1997).

135. *Id.* at *2.

136. *Id.* at *7.

137. B-276625, 1997 U.S. Comp. Gen. LEXIS 243 (July 3, 1997).

138. News Printing, Inc., B-274773.2, Feb. 11, 1997, 97-1 CPD ¶ 68.

139. *Id*. at 2.

140. *See 1996 Year in Review, supra* note 9, at 35-37. According to the case summary in the final rules, the goals of this rewrite were "to infuse innovative techniques into the source selection process, [to] simplify the process, and [to] facilitate the acquisition of best value. The rewrite emphasizes the need for contracting officers to use effective and efficient acquisition methods and eliminates regulations that impose unnecessary burdens on industry and on Government contracting officers." Part 15 Rewrite, Contracting by Negotiation and Competitive Range Determination, Final Rule, 62 Fed. Reg. 51,224 (1997) (commonly known as the Final Rules).

141. FAR Case 95-029.

rules, designated as FAC 97-02, in the *Federal Register* on 30 September 1997.[142] The final rules are effective for all solicitations issued on or after 10 October 1997. Agencies can delay implementing the final rules until 1 January 1998, at which time they become mandatory.

The Long-Suffering Past: A Quick History of the Rewrite. The initial proposed rules, issued in September 1996,[143] caused a considerable stir within both industry and certain government offices, including the GAO and the SBA.[144] The first proposed rules did not address the existing rules on make or buy, price negotiation, or profit.[145] The FAR Council designated this as "Phase 2" of the rewrite effort and deliberately withheld these sections for later release. The second rewrite, which addressed all of FAR Part 15, was issued in May 1997.[146] The final rules mirror the second round of proposed rules.

The Short, Tortured Present. Although the committee revised and reorganized much of FAR Part 15, two of the most controversial changes involve: (1) communications between the government and offerors and (2) establishment of the competitive range.

The first rewrite deleted the existing term "clarification"[147] and redefined the term "discussion" to include only "communication[s] after establishment of the competitive range between the contracting officer and an offeror in the competitive range."[148] The proposed rule[149] would have permitted selective pre-competitive range communications with only some of the offerors, regardless of whether the agency intended to award with or without discussions.

As a result of a considerable outcry that the proposed rules would result in unfair communications, the second round of proposed rules withdrew the ability to conduct these selective communications for award without discussions.[150] Except for "clarifications" (i.e., tendering an explanation or defense) regarding adverse past performance information, the final rules for award without discussion recreate the same minor clarifications limitation that exists under the current regulations.[151] With respect to awards made with discussions, selective communications are permitted *before establishment of the competitive range* in order to: (1) enhance government understanding of proposals; (2) address issues that must be explored to determine whether a proposal should be placed in the competitive range, including perceived deficiencies, weaknesses, errors, omissions, or mistakes; and (3) obtain information relating to relevant past performance.[152] These provisions on award with discussions remain essentially unchanged in the final rules. With the increasing attention given to reducing process in government procurements, the net effect of the final rules is ironic. A more streamlined approach (i.e., award on initial proposals) is discouraged because the regulations afford it less flexibility.

The impetus for reworking the competitive range provisions in FAR 15.609 was largely the result of the Clinger-Cohen Act of 1996.[153] This statute authorizes the contracting officer to limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with the solicitation's criteria. In the FAR Council's first attempt to implement this rather ambiguous standard, contracting officers would have had the ability to limit the competitive range both when the solicitation was issued[154] and after evaluation of offers

142. 62 Fed. Reg. at 51,224 (Final Rules).

143. 61 Fed. Reg. 48,380 (1996) (commonly known as the First Rewrite).

144. The interagency committee actually tasked with drafting the rewrite received 1541 comments from 100 respondents. 61 Fed. Reg. at 51,225 (Final Rules).

145. *See* FAR, *supra* note 22, subpts. 15.5, 15.7, 15.8, 15.9.

146. 62 Fed. Reg. 26,639 (1997) (commonly known as the Second Rewrite).

147. *See* FAR, *supra* note 22, at 15.601. The regulation defines a clarification as: "communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in the proposal." *Id*.

148. 61 Fed. Reg. at 48,380 (First Rewrite, proposed FAR 15.401).

149. *Id.* (proposed FAR 15.407(b)).

150. 62 Fed. Reg. at 26,639 (Second Rewrite, proposed FAR 15.406(a)); 62 Fed. Reg. at 51,224 (Final Rules, FAR 15.306(a)).

151. *See* FAR, *supra* note 22, at 15.607.

152. 62 Fed. Reg. at 26,639 (Second Rewrite, proposed FAR 15.406(b)); 62 Fed. Reg. at 51,224 (Final Rules, FAR 15.306(b)).

153. On 30 September 1996, President Clinton signed the Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996). This act, in section 808, redesignated Divisions D and E of the National Defense Authorization Act of 1996 (Pub. L. 104-106, 110 Stat. 186 (1996)) as the Clinger-Cohen Act.

154. "In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the competitive range is expected to exceed the number at which an efficient competition can be conducted." 61 Fed. Reg. at 48,380 (First Rewrite, proposed FAR 15.406(b)).

received.[155] In the latter case, the competitive range could be limited "to the greatest number that will permit an efficient competition among the most highly rated proposals."[156]

Best Value—It's Not Just a Buzz Word Anymore! The FAR Part 15 final rules also define "best value,"[157] a term often seen but never previously defined in the FAR. Best value is now defined as any acquisition that obtains the greatest overall benefit in response to the requirement. In a departure from its current usage,[158] "best value" now specifically includes lowest priced technically acceptable source selections.[159] The term "trade-off approach" is now given to what has traditionally been considered a best value procurement. However, lowest priced technically acceptable evaluations now must include past performance as a non-cost factor in determining acceptability. What impact this mandatory evaluation criteria will have on the use of this latter source selection approach (given the certificate of competency process for small businesses) remains to be seen. Where small businesses are likely to compete, a hybrid between a trade-off approach and a lowest priced technically acceptable source selection now seems the only meaningful alternative to a pure trade-off approach. Contracting officers who desire the "GO/NO GO" approach of a lowest priced technically acceptable source selection will segregate and evaluate nonresponsibility factors on a best value basis.

Just Don't Go There—Proposed Multi-Step Techniques Deleted From Final Rules. The second rewrite also included new procedures called multi-step source selection techniques. These procedures would have authorized the contracting officer to solicit and to consider initial responses from offerors that did not constitute complete proposals.[160] Contracting officers could have then set a competitive range on the basis of the initial responses. Successive steps, or phases, called for more increasingly detailed proposals, with the ability to conduct additional competitive range determinations at each step of the process. In the last step, the agency would receive full proposals from the remaining offerors.

The proposed rule implied that a multi-step source selection technique is appropriate only where the submission of full proposals at the beginning of a source selection would be unduly burdensome both for offerors to prepare and for the government to evaluate. It is not likely, however, that anyone would have readily embraced this new technique. Each successive down-select evaluation would have created new windows of protest. The execution of these successive mini-competitive range determinations would cumulatively expend significant government resources as well.

Proposal Evaluations— Past Performance

Past performance evaluations continue to frustrate both agencies and contractors as they grapple to understand the many issues involved in this critical and increasingly emphasized criterion. There were numerous challenges to the adequacy of agency evaluations and subsequent discussions with offerors. A number of protests centered on whether agencies must provide offerors the opportunity to discuss adverse past performance information.[161]

Aggressive Schedule for Mandatory Use of Past Performance Information Suspended. On 18 December 1996, Dr. Steve Kelman, the former Policy Administrator, Office of Federal Procurement Policy (OFPP), suspended the mandatory requirement to use past performance information in source selection contracts below $1 million while the OFPP reviewed both the threshold and the type of data to be collected. The requirement to collect past performance data was suspended as well.[162] The OFPP apparently believed that a one-size-fits-all approach was

155. The First Rewrite stated:

> After evaluating offers, the contracting officer may determine that the number of proposals . . . exceed the number at which an efficient competition can be conducted. Provided that the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the contracting officer may limit the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

Id.

156. *Id.* (First Rewrite, proposed FAR 15.406).

157. 62 Fed. Reg. at 51,224 (Final Rules, FAR 2.101).

158. Best value, as commonly understood today, is now defined as a "tradeoff process."

159. 62 Fed. Reg. at 51,224 (Final Rules, FAR 15.101-2).

160. 62 Fed. Reg. at 26,639 (Second Rewrite, proposed FAR 15.102). In the first round, these were known as "multiphase acquisition techniques."

161. *See* FAR, *supra* note 22, at 15.610(c)(6).

162. On 20 December 1996, the Director of Defense Procurement, Ms. Eleanor Spector granted authorization to deviate from the relevant regulatory provisions, FAR 15.605(b)(ii) and FAR 42.1502.

not consistent with the DOD's requirements for goods and services. The leading alternative under consideration is tailoring the collection and evaluation of performance based upon business areas rather than merely contract dollar amounts.[163]

The DOD's Past Performance Council is studying two recommended approaches to collect and to maintain past performance data. The first involves a standard data format and a centralized approach, with Defense Contract Management Command responsible for maintaining the database. Under the second proposed approach, each buying activity would establish its own tailored collection system based on overall DOD guidelines.

Ignorance of Past Performance Evaluations Doesn't Cut It. The VA needed a replacement phone system for one of its medical centers.[164] In evaluating the protester's past performance, the contracting officer identified two past performance references directly applicable to the RFP, but only used one reference for evaluation. The second reference was for the installation of a similar telephone system in another VA medical center. The contracting officer did not consider this previous contract because the reference evaluation form was not completed and returned. The protester argued that the VA could not reasonably ignore past performance on the second contract.

The GAO had no difficulty in finding that "some information is just too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain, and to consider, the information."[165] The contracting officer not only had first-hand knowledge of the protester's past performance on the ignored work, but described that work as "exemplary" in a letter to the SBA that was written barely four months before the award decision.

GAO Allows Agency to Ignore Past Performance Evaluations. In reviewing the protester's past performance in a solicitation for court reporter services, the National Mediation Board (NMB) only considered one of seven contracts referenced by the protester.[166] The sole contract considered was a prior contract with the NMB. The protester received a low past performance rating on that contract. The NMB based its award decision on the lowest overall price and past performance. The GAO concluded that this was permissible in the absence of any evidence that contacting the other six references would have made a difference in the award determination. The GAO found neither an implication in the solicitation that the NMB would review every reference nor a legal requirement that every reference be checked. Moreover, the GAO implies that this in-house past performance experience should significantly outweigh any other past performance information collected, referring to the staff attorney's critique as "the only meaningful discriminator available."[167]

Past Performance Evaluations Do Not Require You to Turn Over Every Stone. Solicitations often require offerors to submit numerous past performance references, but seldom advise offerors as to how deeply the agency will delve into that record. *IGIT, Inc*.[168] involved a Fort Leonard Wood, Missouri laundry and dry cleaning solicitation that endured three separate protests. In one of the earlier protests, IGIT alleged, among other matters,[169] that Fort Leonard Wood's evaluators and contracting personnel were biased against it. The Army settled that protest by agreeing to have personnel from Fort Knox, Kentucky perform the past performance evaluation. The Army invited offerors to submit new past performance packages, including any additional information offerors elected to submit.

After award, IGIT complained that the Army contacted its creditors and suppliers, in addition to its prior customers, and that the evaluators failed to contact fifty references who would have given favorable responses. IGIT also alleged that the Army deviated from the solicitation's evaluation criteria by looking into its financial history instead of just reviewing financial statements. Furthermore, IGIT felt that it was treated unfairly because the awardee did not receive as extensive a review.

The Army conceded that it had conducted a more detailed investigation of IGIT's past performance, but declared that a more extensive review was necessary because of IGIT's significant adverse financial information.[170] In denying the protest, the GAO found nothing unreasonable in the Army's evaluation or the slight deviation from the evaluation criteria. The GAO stated that there is no requirement to contact every reference, or

163. Although a formal definition is still forthcoming, these business areas apparently are akin to standard industry categories, as used in FAR Part 19, Small Business Programs.

164. International Bus. Sys., Inc., B-275554, Mar. 3, 1997, 97-1 CPD ¶ 114. *See also* Safeguard Maintenance Corp., B-260983.3, Oct. 13, 1996, 96-2 CPD ¶ 116 (contracting officer erroneously ignored personally known past performance information merely because it was not referenced by the offeror in its proposal).

165. *International Bus. Sys*., 97-1 CPD ¶ 114, at 5.

166. Neal R. Gross & Co., Inc., B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30.

167. *Id.* at 3.

168. B-275299.2, June 23, 1997, 97-2 CPD ¶ 7.

169. *Id.* IGIT also alleged that the Army failed to conduct meaningful discussions concerning past performance.

to contact the same number of references for each offeror. It was reasonable for evaluators to perform a more detailed review to resolve or to confirm their concerns, particularly where a significant portion of the investigation focused on the review of like contracts on the same installation.[171]

Yet Certain Stones Must Be Uncovered. Agencies must beware of automatically "visiting the sins" of one affiliated company on another affiliate in the past performance arena. In *ST Aerospace Engines Pte, Ltd.*,[172] the Coast Guard issued an RFP for the overhaul and repair of aircraft engine components, with past performance being the most important evaluation criteria. The Coast Guard queried past customers for data concerning quality deficiency problems and on-time delivery statistics. ST Aerospace lost the competition primarily because of its past performance on a contract for overhauled propellers. ST Aerospace alleged that any consideration of poor performance was improper because the work performed on the other contract was done by a distant affiliate of its parent holding company.

The GAO stated that, in determining the relevancy of attributing the past performance of affiliates, the agency must also consider "the nature and extent of the relationship between the two in particular, whether the work force, management, facilities or other resources of one may affect the contract performance of the other."[173] The GAO found that it is inappropriate to consider an affiliate's track record where that record has no bearing on the likelihood of the offeror's successful performance. Here, the GAO found that the Coast Guard neither inquired into the relationship between ST Aerospace and the other affiliate nor offered ST Aerospace the opportunity to respond to the affiliation issue during discussions. The GAO deemed this a failure to conduct meaningful discussions, making any downgrade in ST Aerospace's past performance score improper.

Competitive Range Determinations

Elimination From Competitive Range Based Upon Past Performance Does Not Trigger a COC Review. Where a solicitation calls for a best value determination rather than a pass/fail evaluation, elimination from the competitive range for an unacceptable past performance rating does not trigger the need for referral to the SBA. In *T. Head & Co., Inc*.,[174] the protester had been found guilty of thirty-nine counts of false claims by inflating time records and labor costs under a previous government contract. In addition, the State Department noted a history of cost overruns and a poor risk rating from Dun & Bradstreet. The procurement was for mail processing and handling services for the Department of State's Diplomatic Pouch and Mail Division. The contracting officer informed offerors that the State Department would award the contract on a best value basis, with price equal to the two technical factors.[175] The State Department concluded that, with the unacceptable past performance rating, the overall rating was too low for the firm to have a reasonable chance of award. Eight other competitors made the competitive range.

COC Still Required If Concerns Are Not Addressed By Past Performance Factors. In *Hughes Georgia, Inc.*,[176] the protester alleged that the Army improperly referred the issue of the awardee's responsibility to the SBA. In a procurement for night sights, the U.S. Army Missile Command (MICOM) included only two evaluation criteria: price and past performance risk. The MICOM evaluated two offerors, including Hughes Georgia, as low risk on past performance, because they had successfully executed contracts of comparable dollar value for the same or similar requirements. The awardee (the lowest-priced offeror) had never conducted similar contracts. The contracting officer, apparently concerned with the lowest-priced offeror's lack of relevant experience, ordered a pre-award survey. The result was a "no award recommendation" for lack of technical expertise and the necessary equipment to perform the contract. Given that the lowest-priced offeror was a small business, the contracting officer referred the matter for consideration under the certificate of competency procedures. In light of the SBA's finding that the awardee was responsible, the agency set aside its "no award recommendation" and awarded the contract to the lowest-priced offeror.

Noting that the RFP neither required previous night sight manufacturing experience nor provided for the evaluation of such experience, the GAO denied the protest. The RFP did not include technical evaluation factors. Therefore, the contracting officer correctly initiated Certificate of Competency proce-

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170. *Id.* at 5. IGIT had numerous problems meeting its payrolls and received an IRS tax levy for not paying employee payroll taxes. In addition, the protester had failed to pay its utility bills. It ultimately filed a Chapter 7 bankruptcy petition.

171. *Id.* Here, IGIT was the incumbent contractor.

172. B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161.

173. *Id.* at 3.

174. B-275783, Mar. 27, 1997, 97-1 CPD ¶ 169.

175. *Id.* The two technical factors were technical approach and corporate experience/past performance.

176. B-272526, Oct. 21, 1996, 96-2 CPD ¶ 151.

dures,[177] as technical competence had to be evaluated as a traditional responsibility matter. The GAO also noted that, to the extent that the protester was arguing that the evaluation scheme should have included additional evaluation criteria, its challenge was untimely.

Conducting Discussions

In evaluating past performance, agencies are now required to give offerors an opportunity to address negative ratings where the offeror has not previously had an opportunity to comment.[178] The GAO upheld the requirement in *American Combustion Industries, Inc.*[179] That case involved a Commerce Department contract for the construction of a large boiler room as an addition to an existing building.

The RFP required offerors to provide references on past construction projects. Under the evaluation scheme, eighty percent of the technical rating centered on the offerors' past performance. During discussions with American Combustion, the Commerce Department asked about one unfavorable report concerning past performance and personnel problems, but not a second similar report. The evaluators subsequently deducted points from American Combustion's past performance rating due to the undisclosed report. The Commerce Department argued unsuccessfully that the requirement to discuss adverse past performance information was inapplicable until it created a past performance reporting network. The GAO found that the FAR Council would have clearly stated that the requirement was to be held in abeyance if it so intended.[180]

A Real Rarity—Mutual Mistake Regarding Taxes Found in a Negotiated Procurement

Black River Limited Partnership[181] involved a dispute over a price increase for high temperature water (HTW) supplied to Fort Drum, New York, under a contract that took advantage of third party contracting and financing.[182] The Army considered such a financial arrangement preferable to contracting for the construction of a HTW facility. Funding was unavailable, and the Army had an urgent need for heating capability to accommodate the expansion of Fort Drum.

During negotiations, it became apparent that the availability of investment capital would be adversely affected by proposed changes to the tax law. The proposed changes were expected to eliminate certain tax benefits. Among these were the elimination of the investment tax credit and changes in the property depreciation schedules. In response to concerns raised by the eventual awardee, the Army included a clause which provided for an adjustment in the contract price in the event of post award changes to the state or federal tax codes.[183] This clause allowed the contractor to preserve its after tax rate of return on investment. The contract also included a clause indicating that the Army could award only after Secretary of Defense approval and notification of Congress. The same clause clarified the time of award as the time of the contractor's receipt of notice to proceed.

The Secretary of Defense eventually approved the contract, and the contracting officer issued a notice to proceed. Both parties apparently overlooked the fact that changes to the tax laws had occurred prior to award. The parties eventually negotiated a bilateral modification that increased the contract price by forty-eight percent, but the enormous price increase was unpopular with Army officials. The Army attempted to negotiate an additional modification, which would have allowed the Army to make a lump sum discounted payment in lieu of the payment of increased charges over the life of the contract. Black River refused. Finally, the government rescinded the modification. On appeal, the board determined that the contract should be reformed based on the mutual mistake of the contracting parties. This rare finding of mutual mistake would have been a significant victory for the contractor, but for the fact that the board also found that the government was entitled to a price adjustment due to contractor violations of the Truth in Negotiations Act.[184]

Simplified Acquisitions

No Harm No Foul!

177. FAR, *supra* note 22, subpt. 19.6 (Certificates of Competency).

178. *Id*. at 15.610(c)(6).

179. B-275057.2, Mar. 5, 1997, 97-1 CPD ¶ 105.

180. *Id.* The GAO also sustained an objection to the protester's personnel evaluation. *Id.* The agency suspected that the protester intended to proffer a substitute project manager after award. This suspicion had an adverse impact on the protester's evaluation. Yet, this issue was not raised during discussions, giving American Combustion Industries no opportunity to either correct this misperception or otherwise address the agency's concerns.

181. ASBCA Nos. 46790, 47020, 97-2 BCA ¶ 29,077.

182. *Id.* at 144,709. This had been approved by Congress.

183. *Id.* at 144,711. The increase was to be made to subsequent billing period rates.

184. Pub.L. No. 87-653, 100 Stat. 1783 (1986).

In *Forestry, Surveys & Data*,[185] the GAO concluded that the Forest Service considered undisclosed evaluation factors in reaching its award decision. Although this was improper, the GAO denied the protest because the protester was not harmed by the government's error.[186]

Using simplified acquisition procedures, the Forest Service issued an RFQ for timber stand examination services.[187] The RFQ stated that the Forest Service would award to the "responsible quoter whose quotation is most advantageous to the government, cost or price and other factors considered."[188] The RFQ did not specifically identify any *nonprice* evaluation factors, but it did require completion of an experience questionnaire.

Forestry, Surveys & Data (FSD) submitted the lowest quote, but the government did not issue any purchase orders to FSD because of FSD's lack of experience. While FSD did not allege that it was unaware that experience would be considered in the evaluation, it argued that some of the questions related to undisclosed evaluation subfactors.[189] The FAR requires agencies to list subfactors when they are significant and will be considered in the evaluation of offers.[190] However, in this case, the GAO concluded that FSD's experience was so inferior to the rest of the field that the method for evaluating past experience was irrelevant; FSD had no reasonable chance of winning. "Since the awardees' quotations reasonably were found more advantageous to the government than FS&D's based on the experience evaluation, the agency's improper consideration of undisclosed factors did not competitively prejudice FS&D, and therefore does not provide a basis for disturbing the awards."[191]

When Late Is Not Late? The Story of Safety Storage, Inc.[192]

The Army issued an RFQ to procure six steel prefabricated storage sheds for Fort McClellan, Alabama. The solicitation was styled a "brand name or equal" acquisition and had a requirement for a ten-year structural warranty on the steel sheds. Eight firms submitted quotations, including Safety Storage, Inc. and LAMCO Industries, the apparent low bidder. Five days after the closing date, the Army requested a copy of LAMCO's structural warranty. Ten days later, LAMCO was awarded the contract. Safety Storage filed its protest one week later.

Safety Storage contended that the Army improperly permitted LAMCO to submit evidence of its compliance with the RFQ's structural warranty requirements after the closing date. The GAO denied the protest, explaining that RFQs do not seek a binding offer from a potential competitor, merely information. The court added that agencies generally may seek and consider revisions to a quotation any time prior to the government's issuance of a purchase order. Moreover, when an RFQ does not contain a late quotations provision but merely requests quotations by a certain date, that date is not considered to be a firm closing deadline.[193]

Navy Does It by the Book

In *Michael Ritschard*,[194] the Navy's Regional Contracting Center in Singapore issued two purchase orders for computer services. In each instance, the contracting officer contacted only two out of five potential sources. The contracting officer then awarded to the lower of the two.[195] The Navy never contacted Michael Ritschard for either purchase order. Subsequently, Ritschard protested to the GAO and contended that he was wrongfully excluded from the competition.

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185. B-276802.3, Aug. 13, 1997, 97-2 CPD ¶ 46.

186. *Id* at 2.

187. This is a process by which sections of woodland are evaluated for maturity, health, and quality of growth. This evaluation is then used to determine proper land use.

188. *Forestry, Surveys & Data*, 97-2 CPD ¶ 46 at 1.

189. *Id.* The protester objected to the Forest Service evaluating the offers based on specific prior experience performing work in the Three Rivers Ranger District and on the proximity of a firm's location to the worksite.

190. FAR, *supra* note 22, at 15.605(d)(1).

191. *Forestry, Surveys & Data*, 97-2 CPD ¶ 46 at 2. Arguably, it is intellectually dishonest for the Comptroller General to find the Forest Service's evaluation procedures improper, and then using a "lack of prejudice" standard to avoid a harsh result. The implication is that agencies must explicitly identify formal evaluation factors in a simplified acquisition. This implies a degree of formality that is not required. FAR, *supra* note 22, at 5.605(d)(1).

192. B-275076, Jan. 21, 1997, 97-1 CPD ¶ 32.

193. *Id.* at 3, *citing* A&B Trash Serv., B-250322, Jan. 22, 1993, 93-1 CPD ¶ 53.

194. B-276820, 1997 WL 419223 (Comp. Gen. July 28, 1997).

195. *Id* at 1. One order was for $600.00; the other was for $309.00.

The GAO found that the Navy did it right. That is, the Navy can obtain services on micro-purchases without obtaining competitive quotations.[196] The GAO specifically noted that Ritschard had informed the Navy that he wanted to be placed on the source list a week before the purchase orders were issued. Moreover, the Navy would consider Ritschard as a possible source for future micro-purchases.[197]

Bid Protests

In the past year and a half, there have been a large number of changes in the area of protest litigation. With an effective date of 8 August 1996, the GAO revised its bid protest rules to comport with the statutory changes contained in the Clinger-Cohen Act. Additionally, with the enactment of the Administrative Dispute Resolution Act of 1996, Congress amended the Tucker Act to expand the jurisdiction of federal courts to cover both pre-award and post-award protests.[198] What follows is a brief survey of case law that reflects the impact of these changes.

GAO Bid Protests[199]

Protest Timing Triggered by GAO Web Page. The computer age continues to infiltrate almost everything we do these days.[200] Recently, a protester's ability to "surf the net" caused it to miss a protest filing deadline. The GAO protest rules require a party to seek reconsideration of a GAO decision within ten days from the date on which the requesting party knew or should have known of the basis for the request.[201] Case law demonstrates that, as with all time limits, the GAO strictly enforces this rule.

In *Speedy Food Service, Inc.—Reconsideration*,[202] the protester learned from the GAO homepage that its protest was denied.[203] The opinion discloses that, after reading the decision on the Internet, the protester immediately contacted the GAO to voice its concern that the information covered by the protest's protective order may have been inappropriately released. Some six days later, the protester received a copy of the decision by mail. The protester filed for reconsideration approximately one week later, more than ten days after its initial call to the GAO. Since the facts clearly demonstrated that the protester knew of the protest decision from the GAO home page, the reconsideration request was dismissed as untimely.[204]

Protest Following Permissive Debriefing Untimely. In an effort to keep everyone out of the courtroom as much as possible, recent statutory and regulatory revisions encourage agencies to conduct pre-award and post-award debriefings with unsuccessful offerors. The theory is that if the agency informs the disappointed vendor as to the reasons for not receiving award, fewer protests will be filed to "fish for information" on agency determinations. Consequently, the FAR requires agencies to debrief disappointed offerors upon receipt of a timely request.[205] As a recent GAO decision confirms, however, this rule applies only to procurements conducted on the basis of competitive proposals (i.e., negotiated procurements).[206]

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196. *Id., citing* 41 U.S.C. § 428(d) (1994) ("[A] purchase not greater than $2500 may be made without obtaining competitive quotations, if the contracting officer determines that the price for the purchase is reasonable.).

197. For simplified acquisition purchases exceeding the micro-purchase threshold, FAR 13.106-2(a)(4) requires that, "if practical," two sources not included in the previous solicitation should be requested to furnish quotations or offers. "[B]ids shall be solicited from prospective suppliers who have been added to the solicitations mailing list since the last solicitation." FAR, *supra* note 22, at 14.205-4(b) (Sealed Bidding).

198. Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (amending 28 U.S.C. § 1491).

199. **PRACTICE TIP:** If your Westlaw or Lexis budget is tight, you can obtain and search GAO protest decisions from the Government Printing Office web site. Government Printing Office Homepage, http://www.gpo.gov/gao/index.html> (visited 18 Nov. 1997). This free database contains Comptroller General decisions from October 1995 forward, and it includes GAO bid protest and appropriation decisions.

200. For many favorite Internet addresses within the procurement and fiscal law communities, see the appendix to this article.

201. 4 C.F.R. § 21.14(b) (1997); GAO Bid Protest Regulations, § 21.14(b) (1996).

202. B-274406.2, Jan. 3, 1997, 97-1 CPD ¶ 5.

203. *See* Comptroller General Homepage, http://www.gao.gov> (visited Nov. 18, 1997). The GAO home page includes bid protest decisions and appropriations decisions issued by the Comptroller General within the past 60 days.

204. *Speedy Food Serv.*, 97-1 CPD ¶ 5, at 2.

205. FAR, *supra* note 22, at 15.1005-06. In essence, the offeror must request a debrief within three days of learning of the agency action (e.g., exclusion from the competitive range or contract award). With respect to postaward debriefings, the agency, "to the maximum extent practicable," should conduct the debrief within five days of receiving the offeror's request. *Id.* at 15.1006(a). As to preaward debriefings, however, the FAR gives the agency the discretion to postpone the debrief to the time it conducts postaward debriefs. *Id.* at 15.1005(b).

206. *Id.* at 15.1002.

At issue in *Fumigadora Popular, S.A.*[207] was a *sealed bid* procurement. The contracting officer informed the protester by letter that its bid was rejected for its unreasonably low pricing. The protester then requested a debriefing, which was conducted approximately two weeks later. The protester filed its protest four days after the debrief, almost three weeks after receiving the agency's rejection letter.[208] In dismissing the protest as untimely, the GAO pointed out that the protester learned of the basis for protest when it received the contracting officer's letter of rejection. Although it may have questioned the reasons for the rejection of its bid, the protester was on notice of any grounds for protest when it received the contracting officer's letter of rejection. The GAO further noted that since this was a sealed bid procurement, the time rules with respect to competitive proposals and mandatory debriefings did not apply.[209]

Protesters Seeking Information Must Move Quickly. Over the past year, the GAO has underscored time and again the importance of protesters taking the "most expeditious approach"[210] available to obtain information that will serve as the basis for its protest. In *Automated Medical Products Corp.*,[211] the protester sought information for its protest by submitting a request under the Freedom of Information Act (FOIA)[212] rather than through a debrief. Four months following award, the agency responded to the FOIA request, and the protester promptly filed its protest with the GAO. In response to the government's motion to dismiss, the protester contended that "it had no reason to request a debriefing because there was nothing it could expect to learn from a debriefing since award was based on low price."[213] The GAO disagreed; a protester may not simply wait for the agency to provide information which provides a basis for the protest. The GAO observed that the protester could have requested the very information it obtained under its FOIA request during the debrief with the agency. Given the protester's failure to utilize the most expeditious approach for obtaining information, the GAO dismissed the protest as untimely.

The GAO also dismissed a protest as untimely when the protester requested a delay in debriefing for its own convenience. In *Pentec Environmental, Inc.*,[214] the protester requested a one-month delay from the agency's offered debriefing date so that the protester could obtain and review information from a FOIA request and so that an employee of the protester could "attend an unrelated business conference and take a vacation."[215] However commendable the protester's California-like approach to life may be,[216] the GAO was not understanding. Again, the GAO pointed out that the protester's failure to utilize the most expeditious approach to obtain information was inconsistent with the comptroller's "goal of resolving protests expeditiously and without unduly disrupting or delaying the agency's procurement process."[217]

In *Geo-Centers, Inc.*,[218] the GAO concluded that the protester diligently sought the information necessary to support its protest even though the protest was filed nearly three months after contract award. At issue was an Army services contract which was awarded on 30 October. According to the GAO, the protester timely requested a debrief, which was initially set for 12 November. Due to a scheduling conflict with Army technicians, however, the contracting officer rescheduled the debrief to 26 November. During the debrief, the protester specifically requested information about the point scores assigned to the proposals and independent government cost estimate. The Army declined to provide such information at the debrief. Consequently, the protester filed a FOIA request for the same information and (you guessed it) the Army released the information to the protester.

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207. B-276676, Apr. 21, 1997, 97-1 CPD ¶ 151.

208. *Id.* at 2.

209. *Id.* at 3.

210. *See, e.g.*, Pentec Envtl. Inc., B-276874.2, June 2, 1997, 97-1 CPD ¶ 199 at 3.

211. B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52.

212. 5 U.S.C. § 552 (1994).

213. *Automated Med. Prods.*, 97-1 CPD ¶ 52 at 3.

214. *Pentec Envtl.*, 97-1 CPD ¶ 199.

215. *Id.* at 3.

216. *See, e.g., Go West, Young Man, But There's No Big Rush*, TAMPA TRIB., Aug. 24, 1997, at 5 (stating that a study by a social psychologist proves that "California was easily overall the slowest region in the country"). *But see* Jennifer Bryd and Carrie Spector, *Mountain Retreat: Practicing Law Is Different in the Lake Tahoe Area, Where Everybody Knows Your Name*, CAL. LAW., Oct. 1995, at 49 (noting the growing immigration of attorneys from the "demanding pace" of California to Lake Tahoe, Nevada, where attorneys view law practice as a "side life," useful for paying the rent and buying a pair of new skis).

217. *Pentec Envtl.*,97-1 CPD ¶ 199 at 3.

218. B-276033, May 5, 1997, 97-1 CPD ¶ 182.

Upon review of the material, the protester learned for the first time that the Army had incorrectly calculated the cost estimate. The protester filed its protest on 24 January, three months after contract award, two months after the debrief, *but* only eight days after it received the FOIA material.

The GAO concluded that the protester "at each step in the process—at no point allowing more than ten days to pass before making its next request" had diligently sought from the Army information necessary to support its protest.[219] Since the protest was based on information that the protester had timely requested during the debrief but did not receive until months later, and since the protester filed its protest within ten days of receiving that information, the GAO found the protest to be timely.

It remains to be seen how far an agency can argue that the protester failed to "utilize the most expeditious approach to obtain information." Indeed, taking the GAO's repeated admonitions to heart, it would seem that the "ten-day clock" would be triggered by the date offered for debrief and *not* the date the debrief was conducted, if the delay in debriefing is attributable to a request by the protester. As an example, counsel may want to consider whether a protest filed thirteen days after the date offered for a debrief, but within ten days of the actual conduct of the debrief, is timely or not.

GAO Tells Protester "Hasta La Vista, Baby."[220] Whatever its practice may have been in the past with respect to supplemental protests, the GAO has let it be known that it will make every effort to issue a decision within 100 calendar days of the filing of the initial protest. In *California Environmental Engineering*,[221] the protester challenged its exclusion from the competitive range and the subsequent award of an automotive emissions testing contract issued by the Environmental Protection Agency (EPA). After receiving the report the EPA submitted in response to the original protest, the protester supplemented its protest with additional allegations regarding the EPA's evaluation of proposals. In order to keep the protest on track with the 100-day mandate, the GAO invoked an accelerated timetable that required the protester to comment on the supplemental agency report within five calendar days of receipt, that is, no later than 5:30 p.m. on the fifth day. The protester, however, filed its comments by facsimile at 6:10 p.m. on the fifth day. Since the protester's response was untimely, the supplemental protest was dismissed.

"Pay Me Now or Pay Me Later"—Pre-award Debriefings. Both federal statute and the FAR allow agencies to delay providing mandatory pre-award debriefs if such delay is "in the best interests of the government."[222] As a consequence, the agency may very well find itself in the position of providing two sets of debriefs following contract award. One set of debriefs will be provided to one group of offerors and will address pre-award actions taken by the agency, such as competitive range determinations. The other set of debriefs, which may well involve a whole different group of disappointed offerors, will center on the award determination. The GAO let it be known early on that it was not terribly enamored with challenges to postponements of otherwise properly requested pre-award debriefings.

In *Global Engineering & Construction*,[223] the protester promptly requested a pre-award debrief from the Army Corps of Engineers regarding its exclusion from the competitive range. The Corps denied the request, stating that postponement of the debrief was "in the best interests of the government."[224] Although agreeing with the protester that delaying debriefs runs counter "to the aim of much of the recent procurement reform effort to . . . promot[e] . . . the early exchange of information," the GAO stated that it would not interfere with the agency's determination that such a delay was in the government's best interest. Given this state of affairs, the GAO further pointed out that offerors who receive their debriefs after the agency has awarded the contract (which may be weeks or months after the initial request for a debrief) still retain the right to file a protest to challenge pre-award events, such as competitive range determinations. Additionally, such a protester may still stay performance of the contract if the protest is timely filed.

The protester in *Siebe Environmental Controls*[225] was frustrated by the government's decision to delay the pre-award

219. *Id.* at 5.

220. Apologies to Mr. Arnold Schwarzenegger, star of the movie *Terminator 2—Judgment Day.*

221. B-274807, B-274807.2, Jan. 3, 1997, 97-1 CPD ¶ 99.

222. *See* 10 U.S.C. § 2305(b) (1994); FAR, *supra* note 22, at 15.1005(b) (allowing the contracting officer to delay a debrief if "providing a preaward debrief is not in the best interest of the Government"). Apparently, the argument for such a delay is that the debrief may impede the overall timeliness of the procurement process through award.

223. B-275999.3, Feb. 19, 1997, 97-1 CPD ¶ 77.

224. The Corps added that the diversion of agency resources to conduct such a debrief "would not best serve our customers' needs or be a wise expenditure of U.S. tax dollars." *Id.* at 3, n. 1.

225. B-275999.2, Feb. 12, 1997, 97-1 CPD ¶ 70

debrief regarding Siebe's exclusion from the competitive range until after award. In an attempt to force a debrief, Siebe filed a protest which was really an attempt to secure information regarding the agency's exclusion determination.[226] Although acknowledging the "difficult position" of the protester, the GAO dismissed the protest because Siebe was unable to specifically explain how the agency's determination violated the law. Given the discretion afforded the agency for the scheduling of debriefs, the GAO concluded that the protester must try to obtain factual information through a FOIA request or a debrief— which in this case would occur after award.[227]

"Pay Me Now or Pay Me Later"—Navy Balks at Paying Costs Associated with a CICA Override. Those who defend their agencies against GAO protests are well aware of the automatic CICA stay and the thresholds for overriding the stay.[228] In fact, while planning the acquisition milestones, it behooves the agency and legal counsel to carefully craft the agency's response in the event of a protest. Is the acquisition of such a sensitive nature that override of the CICA stay is based upon either "urgent and compelling" circumstances or, in the case of post-award protests, "in the best interest of the government?"[229]

Department of the Navy—Modification of Remedy[230] highlights the impact an override decision can have on an acquisition. If a protest is sustained, the GAO will generally take into account the impact that the recommended remedy will have on the agency. In those instances, however, where the agency overrides a protest based upon the government's "best interests," the GAO shall make its recommendation "without regard to any cost or disruption from terminating, re-competing, or re-awarding the contract."[231]

At issue in *Department of the Navy* was the procurement of a multi-million dollar ship-handling simulator, which required the contractor to construct a test facility and to provide simulation services to the Navy. Following receipt of initial proposals, the Navy excluded DynaLantic Corporation from the competitive range. DynaLantic timely requested a debrief regarding its exclusion, but the Navy delayed debriefing the contractor until after contract award. Following the post-award debrief, DynaLantic filed its protest early enough to merit the automatic CICA stay. Relying on the "best interest" of the government,[232] however, the Navy elected to override the stay and directed the awardee to commence construction of the test facility. The GAO subsequently sustained the protest and recommended that the Navy reinstate DynaLantic's proposal, re-conduct the evaluation process (to include discussions and the submission of BAFOs), and make award anew.[233]

The Navy balked at the GAO's recommendation and pointed out that the contract did not give it title to the test facility, which was near completion. In light of this, the Navy stated that "it may not be able to afford" the costs associated with making contract award to a contractor other than the original awardee.[234] In response, the GAO pointed out that because the Navy relied upon the government's "best interest," the GAO was required by statute to craft a remedy without consideration of the attendant costs. Further, the GAO took exception to the Navy's statements, pointing out that "there is no basis in the record for concluding that this procurement involves unusually high termination or reprocurement costs."[235]

Air Force Objects to Admission of Awardee's In-House Counsel to Protective Order. It is the responsibility of government counsel to carefully review all applications for admission to a

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226. The GAO had earlier dismissed Siebe's protest, which was made "upon information and belief" allegations, but which failed to provide any valid factual basis for protest. *Id.* at 2.

227. *Id.* at 3.

228. *See* 31 U.S.C. § 3553 (1994); FAR, *supra* note 22, at 33.104.

229. *See* FAR, *supra* note 22, at 33.104.

230. B-274944.4, July 15, 1997, 97-2 CPD ¶ 16.

231. 4 C.F.R. § 21.8(c) (1997).

232. 31 U.S.C. § 3553(d); FAR, *supra* note 22, at 33.104(c).

233. *See* DynaLantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101.

234. *Dep't of the Navy*, 97-2 CPD ¶ 16.

235. *Id.* In fact, the GAO appeared to be a little exasperated with the Navy's failure to provide it little more than argument. The GAO stated:

> [T]he Navy has made no attempt to quantify the costs involved or to show that the necessary funds are not available. Nor is there any reason to believe that, if termination of . . . [the] contract is appropriate . . . the Navy and . . . [awardee] could not enter into good faith negotiations to resolve the issues relating to use of the facility.

Id. n. 3. *See also* DynaLantic Corp., B-274994.5, Aug. 25, 1997, 13 CGEN ¶ 110,059 (DynaLantic's protest of the Navy's implementation of the GAO's recommendations denied).

protective order.[236] The protest of *Robbins-Gioia, Inc.*[237] highlights the principle that this responsibility applies to applications from the protester as well as the awardee. In *Robbins-Gioia*, the Air Force challenged the application of awardee's in-house counsel, contending that "too much is at stake to admit in-house counsel who directly report to persons who engage in competitive decision-making."[238] The GAO balanced the Air Force's objections with the type and sensitivity of the material being protected, the in-house counsel's need for the information to represent her client adequately, and the risk of inadvertent disclosure of confidential information. Reviewing the specific circumstances before it, the GAO observed that the attorney was not involved in the competitive decision-making process of her firm; she did not prepare or approve proposals for government business. Furthermore, the corporate attorney stated that she would review protected material only at the law offices of the out-of-house counsel. Under these circumstances, the GAO concluded that admission of the in-house attorney was appropriate.

GAO Asserts Protest Jurisdiction Over a "Swap." In this day and age of acquisition reform and streamlining, agencies are constantly thinking outside of the proverbial procurement box. Consequently, the GAO will undoubtedly continue to confront innovative acquisition methods and the unique issues accompanying them for the foreseeable future. In *Assets Recovery System, Inc.*, [239] the GAO addressed a protest which concerned the exchange or sale of government-owned aircraft and parts for new aircraft and cash. The Army wanted to exchange its inventory of aged aircraft and components in return for newer aircraft.

Before addressing the merits of the ensuing post-award protest, the GAO first discussed whether it could properly hear the case. The GAO noted that, since the solicitation called for the actual exchange of property, "property is necessarily being acquired by the government."[240] Observing that it is authorized to review protests regarding any and all government acquisitions of property or services, the GAO concluded that it could properly consider the protest.[241]

Don't Fence Me In.[242] Not all agency transactions merit review by the GAO. For example, under its protest rules, the GAO will generally decline to review offers to sell or to lease government property.[243] Additionally, the GAO will examine concession contracts only when they result in a benefit to the government or otherwise support the agency's mission requirements.[244] In *Meyers Cos.*,[245] the Army sought to lease land at the Sunflower Army Ammunition Plant (SAAP) near DeSoto, Kansas. The Army would allow the successful high bidder the privilege of grazing their animals on the leased parcels of land. As a condition to lease the land, the offeror had to agree to fence each of the parcels so that the herds of animals would be segregated from each other. Challenging this requirement, the protester asserted that the procurement of the fence work provided the GAO the necessary jurisdictional basis. The GAO disagreed, finding that the fence work was for the benefit of the bidders, not the Army. Since the fences neither benefited the Army nor supported the Army's principal mission at SAAP, the GAO dismissed the protest.[246]

What Settlement Agreement? GAO Declines to Consider Protest of Settlement Agreement. Okay, the protester scored one on you. Following contract award, the protester correctly

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236. *See* 4 C.F.R. § 21.4(c).

237. B-274318, Dec. 4, 1996, 96-2 CPD ¶ 222.

238. *Id.* at 9.

239. B-275332, Feb. 10, 1997, 97-1 CPD ¶ 67.

240. *Id.* at 3.

241. The GAO also noted that, under its regulations, it could consider protests involving the sale of items or services only if the agency agreed to such a review. *Id.* at 3-4. *See also* Resource Recovery Int'l Group, Inc., B-265880, Dec. 19, 1995, 95-2 CPD ¶ 277; 4 C.F.R. § 21.13(a).

242. Kudos to Mr. Gene Autry and his faithful wonder horse, Champion, who made the song "Don't Fence Me In" famous. Mr. Autry celebrated his 90th birthday this past October. Gary Dretzka, *Riding High: Star-Studded Gala Helps Autry Celebrate His 90th*, CHI. TRIB., Oct. 2, 1997, at 2 (the song reflected the "economic war" between the cattle barons and the small business sheep herders, which served as grist for many a Hollywood cowboy-western movie). *But see* William Safire, *When Cattle Lie Down with Sheep, It's More Than Just Weed Control*, FRESNO BEE, Aug. 3, 1997, at B7 (ranchers graze sheep and goats to chew up noxious European weed that otherwise sicken cattle and horses).

243. *See, e.g.*, Fifeco, B-246925, Dec. 11, 1991, 91-2 CPD ¶ 534 (holding that the sale of property by the FHA is not a procurement of property or services); Columbia Communications Corp., B-236904, Sept. 18, 1989, 89-2 CPD ¶ 242 (GAO declined to review a sale of satellite communications services).

244. *See, e.g.*, Maritime Global Bank Group, B-272552, Aug. 13, 1996, 96-2 CPD ¶ 62 (holding that a Navy agreement with a bank to provide on-base banking services was not a "procurement").

245. B-275963, Apr. 23, 1997, 97-1 CPD ¶ 148.

246. *Id.* at 4-5.

points out a conflict of interest regarding your source selection process. It seems that a member of your evaluation board worked part-time for a subsidiary of the awardee. (ouch!) In response, your office resolves the dispute by agreeing to perform a new evaluation and source selection—with an entirely new evaluation board. The GAO then dismisses the associated protest as academic. Subsequently, and upon further reflection, you and the other "Boys from Brazil" at your office conclude that repaneling an entirely new board is "nice" but not necessary. Consequently, you decide to conduct the reevaluation with the same board members less the member with the ties to the awardee.[247] Surprisingly, the panel affirms its earlier source selection decision, and award is again made to the same offeror. Quicker than you can say "tain't fair," the same protester protests your office's failure to abide by the terms of the settlement agreement.

Such were the facts in American Marketing Associations, Inc.—Reconsideration.[248] In denying the protester's request for reconsideration, the GAO pointed out that, although the agency failed to abide by the terms of the settlement agreement, the protester could not identify any defect in the underlying source selection decision. Given the fact that the award decision was otherwise proper, the GAO declined to meddle in a "dust-up" surrounding the enforceability of a settlement agreement.

The Fifteen Percent Solution. In *JAFIT Enterprises., Inc.—Claim for Costs*,[249] the GAO determined that the protester was entitled to recover only $3537.82 out of a claim for $34,513.46. The protester had previously prevailed in challenging the Navy's non-competitive award of a contract to Goodwill Industries. In its claim, the protester sought the costs associated with it initial agency-level protest as well as the costs associated with pursuing the GAO protest. Citing well-established case law, the GAO quickly denied that portion of the claim as it related to the agency protest.[250] The GAO observed that the protester claimed more than "[seven] man-weeks of time expended in pursuing this relatively simple and straightforward protest."[251] The GAO further noted that the protester should have incurred most of its work effort while pursing its agency protest. As a result, the GAO concluded that the protester should have expended far less effort on its GAO protest than otherwise might generally be expected. Against this background, the GAO allowed the protester fifteen percent of the man-hours claimed and nominal reproduction costs.[252]

Despite Agency Corrective Action, GAO Denies Protester Costs Where Protest Is Not "Clearly Meritorious." At issue in *Spar Applied Systems—Declaration of Entitlement*[253] was a dispute over an allegedly ambiguous RFP. Interestingly, the issue was resolved during a GAO-sponsored ADR session held at the GAO's hearing room in lieu of a "formal hearing/conference."[254] The agency agreed to amend the RFP to the satisfaction of the protester. The GAO, however, denied the protester's subsequent request for compensation of costs associated with pursuing the protest. Specifically, the GAO pointed out that "as a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question."[255]

The Post-award CICA Stay: Does the Sovereign Acts Doctrine Apply to NAF Contracts? In *F2M, Inc.*,[256] the Army Corps of Engineers, on behalf of a non-appropriated fund instrumentality (NAFI), contracted for the design and construction of a guest house at Fort Lewis, Washington. Unfortunately, the award decision was almost immediately protested to the GAO, which caused the contracting officer to delay issuing the notice to proceed pending the outcome of the protest. Although the GAO denied the protest, commencement of the work was delayed by five months. F2M filed a claim for costs associated with this "unreasonable delay," which ultimately resulted in an appeal to the board.

247. That person, no doubt, was sent to your agency's Procurement Integrity Reeducation Camp.

248. B-274454.4, May 14, 1997, 97-1 CPD ¶ 183.

249. B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125.

250. *Id.* (citing Data Based Decisions, Inc.—Claim for Costs, B-232663.3, Dec. 11, 1989, 89-2 CPD ¶ 538; E&R, Inc.—Claim for Costs, B-255868.2, May 30, 1996, 96-1 CPD ¶ 264).

251. *Id.* at 3.

252. *Id.* at 3-4.

253. B-276030.2, Sept. 12, 1997, 13 CGEN ¶ 110,060.

254. The GAO initially convened the formal protest hearing, but, at the suggestion of the GAO hearing official, the parties agreed to attempt first to resolve their differences via alternative dispute resolution techniques. *Id.* at 121,883.

255. *Id.* (citing J.F. Taylor, Inc.—Entitlement to Costs, B-266039.3, July 5, 1996, 96-2 CPD ¶ 5 at 3; Baxter Healthcare Corp.—Entitlement to Costs, B-259811.3, Oct. 16, 1995, 95-2 CPD ¶ 174 at 4-5; GVC Cos.—Entitlement to Costs, B-254670.4, May 3, 1994, 94-1 CPD ¶ 292 at 4).

256. ASBCA No. 49719, 97-1 BCA ¶ 28,982.

In a series of cross-motions for summary judgment, the Army pointed out that since this was a NAF contract, the "Protest After Award" clause was not included in the contract. The Army further contended that it was not otherwise required to incorporate the clause into the contract. The board agreed, finding that neither the FAR, the applicable NAF regulation, nor the *Christian* Doctrine required inclusion of the clause.

The Army also argued that F2M's delay claim was without merit since the contracting officer's actions were made pursuant to the CICA stay requirements. On this issue, however, the board disagreed with the Army. The board observed that although the GAO may consider NAF contracts issued by a federal agency as falling within its bid protest jurisdiction, the GAO's interpretation of CICA is not binding on the board when the agency asserts the sovereign act defense. Thus, the board concluded that where the government acts as an agent of a NAFI, the CICA stay requirements do not allow the agency to assert the sovereign acts defense as protection from liability under the contract.

Bid Protests in the Federal Courts[257]

Effective 31 December 1996, the Administrative Dispute Resolution Act of 1996[258] provides federal courts with jurisdiction to hear both pre-award and post-award bid protests. Since then, many folks have closely watched developing case law to see how the courts map out their new jurisdictional authority.

What Does the Administrative Record Consist Of? Cubic Applications, Inc. v. United States[259] was the first bid protest handled by the Court of Federal Claims under its new authority. The case was an "appeal" of an earlier GAO protest.[260] At issue was an Army procurement for battle simulation exercise training services in Europe.[261] As both sides advanced towards a hearing on the merits, one of the first questions the court had to address was the content of the administrative record. The Army asserted that inclusion of the entire agency report developed during the GAO protest was appropriate and, indeed, required by statute.[262] The protester disagreed, arguing that the GAO report contained "*post hoc* rationalizations," such as the contracting officer's statement of facts, the agency legal memorandum, declarations or affidavits of witnesses, and the protester's rebuttal, and that such rationalizations deserved little evidentiary weight.[263]

After reviewing statutory guidance regarding the composition of the administrative record, the court adopted the standards laid out by the Court of Appeals for the D.C. Circuit in *Esch v. Yeutter.*[264] The court concluded that clearly all information the agency relied upon in awarding the contract must be part of the record. The more problematic question centered on post-decisional materials that "would not otherwise be considered in a review under the Administrative Procedures Act."[265] Although the court agreed with the Army that, by statute, it had "no choice" but to include the entire GAO agency report as part of the administrative record, the court did "have a choice about

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257. The Department of Commerce's Contract Law Division sponsors an outstanding home page which covers virtually all hot button topics and case law in government procurement law. Particularly attractive is the homepage's collection of significant federal court procurement decisions, which provide practitioners with the earliest access to Court of Federal Claim decisions. The internet address is: http:// www.ogc.doc.gov/OGC/CLD.HTML.

258. Pub. L. No. 104-320, 110 Stat. 3870, 3874-75 (1996) (amending 28 U.S.C. § 1491(b) (1994)).

259. 37 Fed. Cl. 339 (1997).

260. If dissatisfied with the GAO recommendation, a party may seek relief in the federal courts. 28 U.S.C. § 1491(b) (1994). Although not technically an "appeal" of the GAO recommendation, the process ultimately results in a judicial decision that is binding on the parties. *Id.*

261. *Cubic Applications*, 37 Fed. Cl. at 341.

262. *Id.* at 343. *See* 31 U.S.C. § 3556 (1994).

263. *Cubic Applications*, 37 Fed. Cl. at 342-44.

264. *Id.* at 342 (citing Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989)). The court concluded that review of an agency decision under the Administrative Procedures Act generally prevents consideration of material or information that was not before the agency at the time of its decision or protested action. Citing the *Esch* exceptions, however, the court held that it could consider "extra-record" evidence under the following circumstances:

> (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Id. (citing *Esch*, 876 F.2d at 991). The Court of Federal Claims has applied this laundry list of exceptions in subsequent protests. *See, e.g.*, ATA Defense Indus., Inc., v. United States, No. 97-382C, 1997 WL 359959 (Fed. Cl. June 27, 1997); Graphicdata, LLC v. United States, 37 Fed. Cl. 771, 779 (1997).

265. *Cubic Applications*, 37 Fed. Cl. at 342. *See also* 5 U.S.C. § 706(2) (1994).

the degree of relevance to assign" to the contents in the report.[266] As a result, with respect to witness statements and legal memoranda developed during the GAO protest, the court concluded that, although the documentation was a part of the administrative record, "none of . . .[it would] have evidentiary weight."[267]

The Administrative Record Is Not an "Immutable Boundary." Along similar lines, the court in *Graphicdata LLC v. United States*[268] concluded that the administrative record was not an "immutable boundary that defines the scope of the case," but that it could supplement the record when necessary.[269] The *Graphicdata* court specifically concluded that the protester could introduce evidence to better allow the court to decide whether the agency acted improperly. Under this philosophy, the agency could certainly provide the court with materials it had relied upon but which were not in the administrative record. Echoing the approach used in *Cubic Applications*, the presiding judge in *Graphicdata* concluded that the courts must adopt "a flexible approach both in putting together the evidence that will be considered and in discovery."[270]

Discovery Limited by Previous GAO Litigation. The *Cubic Applications* court also concluded that since its review of agency procurement decisions was prescribed by the Administrative Procedures Act, the scope of discovery is far more limited than in a *de novo* proceeding.[271] Consequently, the court commented that discovery would be permitted to the extent necessary to allow an adequate understanding of the agency's conduct, but that discovery "normally would not be likely to lead to relevant evidence given the truncated nature of the court's review."[272]

The protester wanted to depose five Army officials, all of whom were stationed in Germany. Noting that the protester had the opportunity to depose the same individuals during the prior GAO protest and chose not to do so, the court denied the discovery request as to four of the five officials. The court, however, allowed the protester to depose the contracting officer regarding a count in the complaint that was not an issue before the GAO.[273]

Absent a Showing of Bad Faith, Protestor's Ability to Depose Procurement Official Limited. In a protest which challenged exclusion from the competitive range, a protester sought to depose eleven procurement officials who were members of the source selection evaluation board, the teams that comprised the board, the source selection authority (SSA), and the contracting officer.[274] Based on the protester's request, the trial judge concluded that the protester wanted to delve into the mental processes of the procurement officials regarding the substance of their evaluations. The court found, however, that the administrative record contained contemporaneous explanations of the conclusions of these officials. Moreover, the trial judge held that, in light of this available information and absent a showing of bad faith on the part of these officials, depositions of these individuals were improper. The court allowed the protester to depose the SSA and the contracting officer, but it limited the scope of the depositions to little more than clarifying the administrative record and a declaration made by the contracting officer in response to one of the protester's allegations. In closing, the court emphasized that it was not establishing a set of generalized rules applicable to all protests, because to do so would open a Pandora's box of frivolous lawsuits.

Court of Federal Claims Follows GAO Interpretation of "Interested Party" Requirement. In *CC Distributors, Inc. v. United States*,[275] the Air Force challenged the interested party status of the protester. At issue was a base operations service contract at Tyndall AFB, Florida. The protester was the incumbent contractor that operated the base engineering supply store, one of the many activities covered by the solicitation. Despite two separate Commerce Business Daily (CBD) notices and the issuance of two RFPs, the protester elected not to submit an offer.

266. *Cubic Applications*, 37 Fed. Cl. at 343-44.

267. *Id.* at 344.

268. 37 Fed. Cl. 771 (1997).

269. *Id.* at 780.

270. *Id.*

271. *Cubic Applications*, 37 Fed. Cl. at 339.

272. *Id.* at 344 (citing CACI Field Servs., Inc. v. United States, 12 Cl. Ct. 680, 684 (1987)).

273. Citing 10 U.S.C. § 2304b, the protester alleged that the contract at issue essentially sought "advisory and assistance services," which required the Army to make multiple awards absent a written determination to the contrary. According to the protester, the Army's failure to make such a determination rendered the contract void ab initio. *Id*. at 349.

274. Aero Corp., S.A. v. United States, 38 Fed. Cl. 408 (1997).

275. No. 97-517C, 1997 WL 543131 (Fed. Cl. Sept. 2, 1997).

Following contract award, the protester was unable to work out a subcontract with the awardee to continue working at the supply store. As a result, almost two months after contract award, the protester challenged the entire procurement as improperly "bundling" too many base activities under one contract. Noting that it is "within the discretion of . . . [the] court to rely on principles analogous to those recognized by the GAO," the court dismissed the protest as untimely.[276] Specifically, the court found that the protester's failure to respond to the CBD notices and the RFP by submitting an offer barred it from protesting the bundling or "any other issue . . . at this late date."[277]

Temporary Restraining Order and Injunctive Relief Hearings. When a protester files its complaint, it may seek injunctive relief to stop further activity under the procurement. For the protester to prevail, the Court of Federal Claims requires the protester to establish the following:

> (1) protester will suffer a specific irreparable injury if defendant's performance is not enjoined; (2) the harm to protester in not granting the requested relief outweighs any potential harm to the defendant in granting such relief; (3) granting the requested relief serves the public interest; and (4) protester is likely to succeed on the merits of its claim.[278]

Over the past year, the Court of Federal Claims has addressed various protest scenarios using this traditional four-element test. This test may be of use to government counsel in future litigation.

Protestor Not Entitled to TRO Where Air Force Agreesto Delay Contract Award. In *Aero Corp., S.A. v. United States*,[279] the Air Force issued a solicitation either to privatize depot maintenance operations at Kelly Air Force Base, Texas or to transfer those functions to another government activity. The protester challenged the Air Force's decision to eliminate the protester's offer from the competitive range and requested the Court of Federal Claims to enjoin the Air Force from further evaluating any of the remaining proposals until the court rendered a decision on the merits of the protest. The Air Force replied that such a draconian order was unnecessary since it would refrain from making contract award pending the court's final decision on the protest. The Air Force would properly evaluate the protester's proposal if so ordered, but the delay otherwise associated with an injunction would have a negative impact on military readiness.[280] The protester disagreed and argued that such an arrangement would allow the remaining offerors the opportunity to submit two BAFOs, while the protester would only be allowed to submit one BAFO. The protester contended that it would be at a severe competitive disadvantage under such conditions and would suffer irreparable harm.

The Court of Federal Claims disagreed with the protester. The court found that the protester's argument of irreparable harm was speculative and that injunctive relief was not available "to prevent injuries neither extant nor presently threatened, but only merely 'feared.'"[281] Given the Air Force's obvious willingness to review the protester's offer, if necessary, and the impact on national security interests, the court denied the protester injunctive relief.[282]

No "Irreparable Harm" Where Protester Could Perform Most of Contract Work. At issue in *CINCOM Systems, Inc.*[283] was a contract for commercial off-the-shelf software that supported the management of repair parts and components at DOD maintenance depots. In response to the protester's request for injunctive relief, the agency pointed out that the protester could readily be substituted for the awardee should the protester prevail and that work on the contract was still in the very early stages. In denying the request for the TRO, the court also noted the expedited schedule for resolving the protest. Given that the protester would still be able to profit substantially from the contract if it prevailed, the court concluded that the protester would not suffer irreparable harm.[284]

Alternative Dispute Resolution (ADR)

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276. *Id.* at *11.

277. *Id.*

278. *Aero Corp.*, 38 Fed. Cl. at 240. *See also* We Care, Inc. v. Ultra-Mark, Int'l Corp., 930 F.2d 1567 (Fed. Cir. 1991); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983); Cincom Sys., Inc. v. United States, 37 Fed. Cl. 266 (1997); Magnavox Elec. Sys., Co. v. United States, 26 Cl. Ct. 1373, 1378 (1992).

279. *Aero Corp.*, 38 Fed. Cl. at 237.

280. *Id.* at 241. To describe the national security implications of any "needless delay," the Air Force submitted the declaration of Major General James S. Childress.

281. *Id., citing* Exxon Corp. v. FTC, 589 F.2d 582, 594 (D.C. Cir. 1978).

282. *Id.* at 242-43.

283. *Cincom Sys*., 37 Fed. Cl. at 266.

284. The court further questioned whether the plaintiff had established that it was "likely" to prevail on the merits of the protest. *Id*. at 268-69.

Boards Work Together to Promote ADR[285]

Ten of the boards of contract appeals[286] agreed to a sharing arrangement whereby they would serve as party neutrals for disputes from other agencies. The only board that did not enter the arrangement was the General Services Board of Contract Appeals. The procedures for the sharing arrangement are straightforward. If a party wants to use ADR, it would approach the board that would normally handle the dispute. If the party wants to use a neutral from another board, it should make that desire known. The chair of the board that would normally hear the dispute would then obtain a neutral from another board through the sharing arrangement. An obvious advantage to the sharing arrangement is that it expands the pool of neutrals from which parties draw upon to resolve their disputes.[287]

Navy Issues New Policy Guidance on ADR[288]

The Navy issued a comprehensive policy on the use of ADR.[289] The policy states that ADR mechanisms "shall be used as an alternative to litigation or formal administrative procedures to the maximum extent practicable."[290] The new policy recognizes that "[t]he goal is to resolve disputes and conflicts at the earliest stage feasible, by the fastest and least expensive method possible and at the lowest possible organizational level prior to litigation."

The new policy directs senior commanders to: (1) promulgate ADR guidance for their organizations; (2) coordinate local ADR instructions through consultations with the ADR Group; (3) train personnel on ADR techniques and procedures; and (4) report the use of ADR in their organization yearly. Finally, commanders of all activities must assess existing methods of dispute resolution and adopt the use of ADR techniques, where feasible.

Army Policy and Procedure Guide for ADR

The Office of the Chief Trial Attorney, U. S. Army Legal Services Agency, compiled a comprehensive guide, titled *ADR Policy and Procedure Guide*. The guide is a reference tool that provides suggestions on how to analyze a particular dispute for its ADR potential. Although the guide was developed primarily for use by members of the Army Contract Appeals Division (CAD), others outside of CAD are welcome, and encouraged, to use it whenever they are considering ADR as a tool for dispute resolution.

Small Business

Adarand Introduction: Each Branch Struggles With the Implementation of the Landmark Case

On 12 June 1995, the United States Supreme Court handed down its historic case, *Adarand Constructors, Inc. v. Pena*.[291] In a five to-four decision, the Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a strict scrutiny standard.[292] Many legal commentators believe that *Adarand* was the most significant

285. *ADR: Boards of Contract Appeals Agree To Sharing Arrangement To Promote Use of ADR*, 67 FED. CONT. REP. 15 (BNA) (1997).

286. The participating boards include the Armed Services Board of Contract Appeals, the Department of Agriculture Board of Contract Appeals, the Department of Energy Board of Contract Appeals, the Corps of Engineers Board of Contract Appeals, the Department of Interior Board of Contract Appeals, the Department of Housing and Urban Development Board of Contract Appeals, the Department of Labor Board of Contract Appeals, the Post Service Board of Contract Appeals, the Department of Transportation Board of Contract Appeals, and the Department of Veterans Affairs Board of Contract Appeals. *Id.*

287. *Id.* Historically, there have been concerns about smaller boards of contract appeals handling ADR matters. The reason is that when a board member on a smaller board serves as a neutral and fails to resolve the dispute, the party then resorts to traditional dispute resolution techniques. The board member who participated in the ADR may not participate in the appeal. Depending on the workload or other constraints on the remaining judges on the board, this may make it very difficult for the board to process the appeal.

288. *ADR: Navy Issues New Policy Requiring Use of ADR to Maximum Extent Practicable*, 67 FED. CONT. REP. 3 (BNA) (1997).

289. *Id*. The guidance is contained in Secretary of the Navy Instruction 5800.

290. *Id.* The policy recognizes that the parties can use ADR to resolve either the entire dispute or a discrete segment of the dispute.

291. 115 S. Ct. 2097 (1995). The underlying facts of *Adarand* are undisputed. In 1989, the Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (Mountain Gravel). Mountain Gravel then solicited bids for the guardrail work under the contract. Adarand Constructors, Inc., a Colorado-based highway construction contractor, submitted the low bid for the work. Gonzales Construction Company (Gonzales) also submitted a bid for the project. The prime contract between Mountain Gravel and CFLHD granted Mountain Gravel additional compensation if it retained subcontractors for the project who were small businesses controlled by "socially and economically" disadvantaged individuals. Gonzales was certified as such a business; Adarand was not. Despite Adarand's low bid, Mountain Gravel awarded the subcontract to Gonzales. The chief estimator of Mountain Gravel submitted an affidavit to the court stating that it would have had to accept Adarand's bid had it not been for additional payment it received by hiring Gonzales instead.

292. *Id*. at 2113. To survive the strict scrutiny standard, the classification must be tested by two prongs. First, there must be a compelling government interest for the racial or ethnic classifications. That is, what are the government's reasons for using a racial or ethnic classification? Second, in addition to advancing a compelling government goal or interest, any governmental use of race must be narrowly tailored. *Id.*

decision to address a social issue since *Brown v. Board of Education*.[293] This past year, each of the branches of government struggled, to varying degrees, with the implementation of the Court's opinion.

Judicial Decisions Interpreting Adarand

Adarand on Remand. In June 1997, on remand from the Supreme Court, the United States District Court for the District of Colorado granted summary judgment in favor of Adarand Constructors, Inc.[294] In his seventy-one page decision on remand, Judge John L. Kane, Jr. provided an in-depth discussion of the application of the strict scrutiny test. Judge Kane eventually concluded that the subcontracting compensation clause program was not sufficiently narrowly tailored to pass the strict scrutiny test.[295]

Although the ultimate disposition of the case did not turn on the compelling interest prong, Judge Kane discussed in dicta the application of the compelling interest prong. Judge Kane concluded that the government satisfied the compelling interest prong.[296]The court, however, did not come to the same conclusion in regard to the government's attempt to satisfy the second prong, that of a narrowly tailored program. Finding the subcontractor compensation clause to be a "bonus," Judge Kane explained that:

> To the extent that [a subcontracting compensation clause] payment acts as a gratuity for a prime contractor who engages a [disadvantaged business], it cannot be said to be narrowly tailored to the government's interest of eliminating discriminatory barriers . . . . Where subcontracting to a DBE [disadvantaged business enterprise] does not cause an increase in costs, the prime contractor receives additional payment because of a choice based only on race.[297]

The court further disclosed that it found "it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such a program is both under inclusive and over inclusive."[298] As an example of its extensive analysis, the court further distinguished the disputed program (which lacked individualized inquiries) from the 8(a) program (which mandates inquiry into each participant's economic disadvantage). Consequently, the court found the challenged affirmative action programs unconstitutional.

Dynalantic Corp. v. Department of Defense[299]*—SBA's 8(a) Program Under Siege*. In *Dynalantic*, the plaintiff was a non-minority owned small business.[300] It sought an injunction against the Navy to prevent it from awarding a contract under the SBA's 8(a) program. Dynalantic contended that the 8(a) program violated the Fifth Amendment to the United States Constitution in so far as it was a race-based program that excluded Dynalantic from competing for a procurement.[301]

The court rejected Dynalantic's argument. The court held that it lacked standing to challenge the constitutionality of the 8(a) program.[302] The court noted that Dynalantic failed to meet the "injury-in-fact" requirement regarding the SBA's alleged discrimination in administering the 8(a) program.

Dynalantic then appealed to the Court of Appeals for the D.C. Circuit, where it received a divided, yet more favorable, welcome.[303] After enjoining the procurement pending appeal, the court reversed the district court in a two-to-one decision. The appellate court took a far broader approach to standing than the court below.

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293. 347 U.S. 483 (1954). *See* William T. Coleman, *Adarand and its Aftermath, How the Supreme Court Overestimated Precedent and Underestimated the Impact of Its Decision*, 31 PROCUREMENT LAW. 12 (1996).

294. Adarand Constructors, Inc. v. Pena, Civ. A. No. 90-K-1413, 1997 WL 295363 (D. Colo. June 2, 1997).

295. *Id.* at *16. Judge Kane noted that, in applying the strict scrutiny test, the initial inquiry is whether the interest propounded by the government as its reason for injecting the consideration of race is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the governmental actor is concerned. He further noted that the compelling interest inquiry is the linchpin of constitutionality under the strict scrutiny analysis. That is, the narrowly tailoring requirement merits review only when the governmental action under judicial review is shown to be supported by such a compelling interest. *Id.*

296. *Id*. Judge Kane explained that "nothing in [*Adarand*] or any other Supreme Court decision persuades me that in subjecting a statutory or regulatory scheme created by Congress to strict scrutiny, one is to ignore Congress' ability to legislate nationwide to address nationwide problems thus placing it on the same constitutional plane as a city council." *Id*. at *20. Nonetheless, Judge Kane reasoned that "Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications." *Id*. After extensive analysis, the court attributed significantly more weight to the government's record "than to that brushed aside in *Croson*." *Id*. at *45 (citation omitted). The court concluded that "Congress has a strong basis in evidence for enacting the challenged statutes, which thus serves a 'compelling governmental interest.'" *Id.* at *25.

297. *Id*. at *28.

298. *Id*. at *29.

299. 894 F. Supp. 995 (D.D.C. 1995).

300. *Id*. at 995-96.

By the time the case reached the appellate court, the Navy had canceled the procurement and removed it from the 8(a) program.[304] The government argued that since Dynalantic could compete for the procurement, the issue challenged below was moot. The court of appeals disagreed. The court granted Dynalantic's request to allow it to amend its pleadings to raise a general challenge to the 8(a) program.[305] The court raised the question, "whether future use of the 8(a) program will impact" on Dynalantic.

The court specifically noted that absent a government declaration that it would "decide never again to set aside a simulator contract under the 8(a) [program] . . . Dynalantic's injury looms close enough to support its standing to pursue the case."[306] The majority concluded that: "Dynalantic's injury—its ability to compete on equal footing with 8(a) participants—is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program."[307]

Rules, Rules, and More Rules

Background. For the past two years, the government has struggled to develop a regulatory scheme that both supports affirmative action and survives strict scrutiny. Against this backdrop, the Department of Justice outlined six key factors that encompass the narrow tailoring prong of strict scrutiny.[308]

The regulatory scheme subsequently developed is a three prong effort to bring federal acquisition rules on affirmative action in line with the strict scrutiny requirements of *Adarand*.[309] The first prong is proposed changes to the FAR to authorize SDB procurement mechanisms when SDB participation falls below certain benchmarks. The second prong involves the SBA's proposed rules that govern the certification requirements and eligibility criteria for the 8(a) program. The final prong will be the Commerce Department's establishment of the actual benchmarks.

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301. *Id.* The court provided a brief overview of the 8(a) program. It stated:

> Under the 8(a) program, the SBA may award government procurement contracts to "socially and economically disadvantaged small business concerns." 15 U.S.C. § 637(a). A small business concern seeking admission to the 8(a) program must be certified by the SBA as being at least 51 percent owned and controlled by one or more individuals that satisfy the criteria for social and economic disadvantage status. 15 U.S.C. § 637(4)(A). A business that is certified for entry into the 8(a) program may participate in the program for a maximum period of nine years. 15 U.S.C. § 636(j)(10); 13 C.F.R. § 124.110(a). However, a participant in the 8(a) program may be graduated from the program before the expiration of the nine years if the business substantially achieves its business plan. 13 C.F.R. § 124.208(a). Further, any individual will be deemed ineligible for continued participation in the program if that individual's personal net worth exceeds $750,000.

Id.

302. The doctrine of standing serves to "identify those disputes which are appropriately resolved through the judicial process." Whitmore v. Arkansas, 495 U.S. 149 (1989). In order to meet the jurisdictional requirements for standing, a plaintiff must establish: (1) an "injury-in-fact," which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct; and (3) that it is likely, as opposed to speculative, "that injury will be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

303. Dynalantic Corp. v. Department of Defense, No. 96-5260, 1997 U.S. App. LEXIS 13622 (D.C. Cir. June 10, 1997).

304. *Id*. at 7. An affidavit from the government explained that it had removed the procurement from the 8(a) program because of delays which were caused by the protracted litigation and which led to operational and safety concerns.

305. *Id*. at 9.

306. *Id*. at 20. The court specifically noted, among other things, that: the number of qualified 8(a) firms registered with the procuring center had more than doubled between 1993 and 1995; the procuring center sets aside every contract for which qualified 8(a) firms are available; and, because the sole source 8(a) procurements are not preceded by public notice, "Dynalantic learns about their award only after the fact." *Id.*

307. *Id*. at 22.

308. 61 Fed. Reg. 26,042 (1996). The factors are:

> (1) whether the government considered race neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the program and whether it is flexible; (3) whether race is relied upon as the sole [or as one] factor . . . in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities; (5) whether the duration of the program is limited and . . . subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries.

Id.

309. *Affirmative Action: SBA Set to Propose Rule on Affirmative Action Role, Changes to 8(a) Program*, 68 FED. CONT. REP. 1 (BNA) (1997).

Eligibility: An Expanded SDB Definition. Eligibility requirements, although addressed in the proposed FAR Subpart 19.3, will fall under the proposed rules published by the SBA.[310] Under the new regulatory scheme, businesses must demonstrate their eligibility for small disadvantaged business status by either producing a certification from an SBA approved organization or obtaining a determination from the SBA.

The criteria used to determine a business' disadvantaged status are: (1) social and economic disadvantage[311] and (2) ownership and control of the business. Certain specified minority groups would retain a presumption of social and economic disadvantage. Offerors lacking the presumption could request a determination by the SBA that they are socially and economically disadvantaged.[312] Contracting activities will be able to verify the SDB status of non-presumed firms through the SBA on-line central registry of firms holding such an SBA determination.

Another key change in the proposed rules is the use of the preponderance of the evidence standard for determining social and economic disadvantage for individuals who do not qualify for a presumption of disadvantage.[313] In distinguishing the preponderance standard from the clear and convincing standard (the previous standard), the Justice Department suggests that "[t]here is significant legal support for the use of the preponderance of the evidence [standard] when an agency is determining what is essentially a question of civil law" and notes that the Supreme Court has found that the preponderance of the evidence standard is appropriate in civil litigation involving discrimination.[314] Under the new scheme, any offeror, contracting officer, or the SBA could challenge an individual firm's SDB eligibility. Even a party who is ineligible to protest—due to a lack of either timeliness or standing—can, in effect, protest an SDB's eligibility, if the party persuades the contracting officer to adopt protest grounds.[315]

Procurement Mechanisms: Preferences, Etc. The proposed FAR rules employ three mechanisms to benefit SDBs. The three mechanisms would include (1) a price evaluation adjustment or preference up to ten percent; (2) a source selection evaluation factor or subfactor for planned SDB participation in the contract, primarily at the subcontract level; and (3) monetary incentives for subcontracting with SDBs.[316]

The proposed regulations reserve the right to employ more aggressive or, arguably, innovative tools. The proposed rule notes that the Commerce Department "is not limited to the SDB procurement mechanism identified," where it finds: (1) "substantial and persuasive evidence" that there is "persistent and significant" underutilization of SDBs in certain industries "attributable to past or present discrimination" and (2) that the three available mechanisms are incapable of alleviating the problem.[317]

The proposed regulations identify four types of acquisitions in which price adjustments shall not be used: (1) acquisitions at or below the simplified acquisition threshold; (2) contracts

310. Small Business Size Regulations, 8(a) Business Development/Small Disadvantaged Business Status Determinations, Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, Proposed Rule, 62 Fed. Reg. 43,583 (1997). *See generally*, Peter Behr, *SBA Program to Accept More White Women: Minority Firms Have Been Getting Most Aid*, WASH. POST, Aug. 13, 1997, at A1; *Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences in Contract Actions*, 67 FED. CONT. REP. 547 (BNA) (1997).

311. Such status may or may not be presumed.

312. 62 Fed. Reg. at 25,788. The proposed regulations do not alter the criteria for determining a contractor's status as a small business. *See, e.g*., FAR, *supra* note 22, at 19.301. Some commentors lamented that the proposed rules gave no consideration to women-owned firms "despite the fact that many women entrepreneurs had endured the effects of discrimination similar to those suffered by minorities." 62 Fed. Reg. at 25,652-53. The Justice Department explained that neither section 7102 of the FASA nor 10 U.S.C. § 2323 authorizes affirmative action for women, and, as a result, the proposed rules are limited to implementing affirmative action for designated minority groups. *Id.* Moreover, *Adarand* applied the strict scrutiny standard to race-based actions, while gender-based actions remain scrutinized by a lesser standard of review. The Justice Department asserts, however, that the lowering of the standard of proof for non-minority firms as SDBs would create opportunities for women-owned firms not owned by minorities. 62 Fed. Reg. at 25,652-53.

313. 62 Fed. Reg. at 43,587. The preface to the recently proposed SBA regulations explains:

> [R]edesignated Sec. 124.103(c) (present Sec. 124.105(c)) would be amended to require an individual who is not a member of a designated socially disadvantaged group to establish his or her social disadvantage by a preponderance of the evidence presented in the 8(a) BD application. This is a change from the current regulation which requires that an individual who is not a member of a designated group establish his or her social disadvantage on the basis of clear and convincing evidence.

Id.

314. *Id*. at 25,649, *citing* Price Waterhouse v. Hopkins, 490 U.S. 228, 252-55, 261 (1989) (preponderance standard), *referencing* Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983) (clear and convincing evidence standard should be limited to civil questions in which "particularly important individual interests or rights are at stake such as 'termination of parental rights, involuntary civil commitment, and deportation'").

315. *Id*. at 25,788.

316. The price evaluation adjustment language is applied to sealed bid procurements. The evaluation factor language is applied to negotiated procurements. The proposed clause, 52.219-23, instructs evaluators to add a factor (to be determined) to the price of all offers except SDBs (that have not waived the adjustment) or other successful offers (over the dollar threshold) of eligible products under the Trade Agreement Act. *Id*. *See* FAR, *supra* note 22, at 25.402.

awarded under the 8(a) program; (3) acquisitions that are set aside for small business; or (4) acquisitions for long distance telecommunication services. Similar exemptions apply to the use of the evaluation factor for SDB participation. The mechanisms are not to be used for contracts awarded under the 8(a) program or acquisitions that are set aside for small business. Moreover, the evaluation factor mechanism is not to be used in (a) lowest cost, technically acceptable, negotiated procurements or (b) contract actions that will be performed outside the United States.[318]

Individual agencies are responsible for ensuring that the use of particular mechanisms do not cause specific industries "to bear a disproportionate share of the contracts awarded by a contracting activity of the agency to achieve its goal for SDB concerns."[319] If an agency identifies such a disproportionate share, the agency can seek a determination from the Commerce Department which will permit the contracting activity to limit the use of the specific SDB mechanism.[320]

Benchmarking: The Centerpiece of the New Rules. The proponents of the rules intend to create a flexible system in which race-neutral alternatives should be used to the maximum extent possible. Race should become a factor "only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination."[321]

The keystone for the future of the program, therefore, are the benchmarks. "Application of the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination."[322] The proposed general policy statement on benchmarks directs that:

> The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanism, and their effective dates for new solicitations for the upcoming year.[323]

In anticipation of the new benchmarking system, SDBs remain concerned that the proposed affirmative action measures can be curtailed or eliminated based upon the success of SDBs in obtaining government work within certain industries.[324] In fact, the Justice Department has articulated what some SDB's fear: "When Commerce concludes that the use of race-conscious measures is not justified in a particular industry

317. 62 Fed. Reg. at 25,788.

318. *Id.* at 25,790.

319. *Id.* at 25,788.

320. *Id*.

321. 61 Fed. Reg. 26,049 (1996).

322. *Id.*

323. 62 Fed. Reg. at 25,787. The Department of Justice noted that the Commerce Department's "recommendation" will "rely primarily on Census data to determine the capacity and availability of minority owned firms." *Id*. at 25,650 (1997). The recommendation to the OFPP as to how to use the available procurement mechanism will depend upon the benchmarks derived by the Commerce Department. The Justice Department explains:

> [A] statistical calculation representing the effect that discrimination has had on suppressing minority business development and capacity would be made, and that calculation would be factored into benchmarks . . . . Regardless of the outcome of that statistical effort, the effects of discrimination will be considered when utilization exceeds the benchmark and it is necessary to determine whether race-conscious measures in a particular SIC code should be curtailed or eliminated. Before race-conscious action is decreased, consideration will be given to the effects discrimination has had on minority business development in that industrial area, and the need to consider race to address those effects.

Id. at 25,650-51 (1997).

324. *Id.* at 25,652. According to the Justice Department:

> Achievement of a benchmark in a particular SIC code does not automatically mean that race-conscious programs . . . will be eliminated in that SIC code. The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in [a] SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, [the OFPP] may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of action.

Id.

(or region), the use of the bidding credit and the evaluation credit will cease."[325] Finally, the Justice Department has stated that a compelling interest warranting race-conscious efforts in federal procurement remains.[326] The Justice Department explains that the Urban Institute concluded that "minority-owned businesses receive far fewer government contract dollars than would be expected based on their availability."[327] So long as race-conscious means are needed to afford minority firms a fair opportunity to compete for federal contracts,[328] the Department of Justice conclusion appears valid.

Movement to Increase Small Business Contracting Goal From Twenty Percent to Twenty-Three Percent

On 5 June 1997, H.R. 1824 was introduced to amend the Small Business Act to increase the annual government-wide goal from the current twenty percent to twenty-five percent for procurement contracts awarded to small businesses concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women.[329] The legislation would give small businesses the chance to garner an additional $7.6 billion in federal contracts.[330]

Aida Alvarez, head of the Small Business Administration, proposed that President Clinton issue an executive order to increase the current statutory goal to twenty-five percent over the next three years.[331] The proposed increase was not without opposition. Dr. Stephen Kelman, Chief of Procurement Policy, Office of Federal Procurement Policy, noted some serious concerns about raising the limit to twenty-five percent. In a memorandum leaked to the press, Kelman was quoted as saying,

> We believe there are very serious concerns about the practicality of the suggestion [to raise the goal to twenty-five percent], as well as political risks for the administration. First, the goal is highly unlikely to be met, creating a political embarrassment for the administration. At the same time, efforts undertaken to try to reach the goal could produce bad contracting strategies that would be costly to taxpayers.[332]

Labor Standards

Walsh-Healey Public Contractors[333] No Longer Required to Be Either a Manufacturer or a Dealer

On 22 August 1997, the DOD, the GSA, and NASA issued a final rule which eliminates the "manufacturer" and "regular dealer" requirements,[334] in conformity with new Department of Labor regulations. The interim rule, published on 20 December 1996,[335] was adopted as a final rule without change, thereby eliminating one of the more mundane administrative burdens that contracting officers bear.

"Helper" Provisions Prove to Be of No Help

For the foreseeable future, you should continue to apply helper classifications only where there is "a separate and distinct class of worker that prevails in an area, the duties of which can be differentiated from the duties of journey-level workers."[336] In *Associated Builders and Contractors v. Herman*,[337] the U.S. District Court for the District of Columbia upheld the Labor Department's decision to indefinitely suspend the

325. 61 Fed. Reg. at 26,047.

326. For a more extensive analysis of the compelling interest, see the Department of Justice's Appendix—*The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,042, 26,050 (1996).

327. 62 Fed. Reg. at 25,653.

328. *Id.*

329. H.R. 1824, 105th Cong. § 1 (1997).

330. *Small Business: Rep. Wynn Offers Bill to Increase Small Business Contracting Goal to 25 percent*, 67 FED. CONT. REP. 23 (BNA) (1997). Representative Albert Wynn (D-Md) noted that even though small businesses created 75 percent of all new jobs in 1996, they received only 20 percent of federal contract opportunities, while large businesses received 65 percent.

331. Stephen Barr, *Small Firms Want More U.S. Contracts*, WASH. POST, Aug. 6, 1997, at A17.

332. *Id.*

333. 41 U.S.C. §§ 35-45 (1994).

334. Federal Acquisition Circular 97-1, Item II—FASA and the Walsh-Healey Public Contracts Act (FAR Case 96-601); 62 Fed. Reg. 44,802 (1997).

335. 61 Fed. Reg. 67,409 (1996).

336. The suspended revised rules are at 29 C.F.R. § 5.2(n)(4). Helpers were defined as semi-skilled workers, as opposed to skilled journeymen mechanics, who work under the direction of, and assist, a journeyman.

revised Davis-Bacon Act "helper" rules. Those revised rules, which were originally published in 1982 but never implemented due to successive judicial and legislative challenges,[338] would have allowed contractors to use more lower-paid workers on federal construction projects. The court held that while the Labor Department may have an obligation to determine the changes needed in the required rules, the Labor Department did not have an obligation to return to the status quo before the suspension. On 30 December 1996, the Labor Department issued the final rule, indefinitely postponing the changes.[339]

New Executive Memorandum on Project Labor Agreements

In the face of considerable Congressional opposition to a proposed executive order that would encourage the use of project labor agreements, the administration agreed instead to issue an executive memorandum that will expire when President Clinton leaves office. Project labor agreements, negotiated at the beginning of large construction projects, are agreements between the owner or construction manager and the unions which represent all of the workers who will be employed. The agreements cover wages, working conditions, work rules, and dispute resolution procedures. The administration offered its compromise after the nomination of Alexis Hermann as Secretary of Labor was held up in the Senate. In addition, both the House and Senate introduced bills that would counteract the proposed order.[340] The 5 June 1997 memorandum allows, but does not require, federal agencies to use project labor agreements on federal projects valued at more than $5 million.

Changes Clause, Rather Than Price Adjustment Clause, Governs Service Contract Act Wage Revisions During a Contract's Base Year

In *Lockheed Support Systems v. United States,*[341] a case involving a Postal Service contract for automation support services, the Court of Federal Claims determined that contractors are entitled to recover indirect costs for base year modifications incorporating new Service Contract Act (SCA) wages. The court determined that base year modified wage determinations do not fall within the "Fair Labor Standards Act and Service Contract Act—Price Adjustments Clause," which limits compensation due to wage changes.[342]

The court disagreed with the Postal Service's interpretation of the price adjustments clause. The court held that the clause is only applicable to the exercise of option years and the determinations made necessary by multi-year contracting. The court then found that the new wage provisions were governed by the contract's changes clause[343] and, therefore, were not subject to any special recovery limits.

Bonds and Sureties

Change in Bonds Review Responsibility

As of 1 October 1997, the Army Contract Appeals Division (CAD) will no longer review bonds and sureties. The past practice was to forward certain bonds and sureties to CAD for review. AFARS Part 28 will be amended to delete the requirement for CAD review. The new requirement is for local legal review.

Remedy of Quantum Meruit Available Against Surety

Amwest, as surety, contracted with AKM Associates, Inc. to provide the required bonds for an IDIQ with the Air Force Academy for roofing repairs. The contract was for a one-year period with options. The guaranteed work was for a minimum of $200,000 to a maximum of $9 million. As with any IDIQ contract, as the contracting officer places delivery orders, the value of the contract rises. During the first year of the contract, the contracting officer placed several delivery orders, and the value of the contract exceeded $1,000,000. At the end of the year, the contracting officer exercised the option. Soon thereafter, the Academy experienced delivery problems with AKM. AKM also fell behind in its payments to its subcontractors. The Academy issued a cure notice and granted a time extension to aid AKM in completing the work. The Academy eventually terminated the contract for default, and the unpaid subcontractors filed suit against AKM and the surety.

337. No. Civ. A 96-1490, 1997 WL 525268 (D.D.C. July 23, 1997).

338. *Id.* at *1-4. The district court's decision meticulously outlines the long, tortured history of these proposed helper rules. *See* 1996 *Year in Review, supra* note 9, at 58.

339. 61 Fed. Reg. at 40,366.

340. *See* OPEN COMPETITION ACT OF 1997, S. 606 and H.R. 1378 (1997).

341. 36 Fed. Cl. 424 (1996).

342. FAR, *supra* note 22, at 52.222-44. Where applicable, this clause precludes the contractor from recovering general and administrative costs (G&A), overhead, and profit.

343. *Id.* at 52.243-2 (Changes-Cost-Reimbursement).

Amwest argued that its liability was limited to $100,000, the stated sum of the Miller Act payment bond. The subcontractors' argument was that the prime and the surety were liable for all unpaid material and labor supplied. The central question the district court decided was the quantum of the surety's liability.[344]

The court stated that the Miller Act[345] protects subcontractors through the use of a payment bond. The Miller Act provides an alternative to the civilian remedy of a mechanics' lien that cannot be used against a federal construction project. The Miller Act requires payment bonds for any construction contract greater than $100,000.[346] The government bases the penal amounts of these bonds on the contract price.[347] The government bases the amount of the IDIQ contract price on the guaranteed minimum, which was $200,000 in this case. The Miller Act required the payment bond to be fifty percent ($100,000). The court ruled that although the penal amount of the payment bond was $100,000, the prime and surety's liability was not confined to that amount. This was due to the nature and amount of work being indefinite upon entering an IDIQ contract. The amount of liability for the surety and the prime increases as the delivery orders on the contract increase. This contract increased to an amount in excess of $1,000,000; therefore, the liability of the surety increased to forty percent of the contract price.

CONTRACT PERFORMANCE

Contract Interpretation

Squeaky Contractor Gets No Grease (or Oil!)

In *American Construction Services, Inc.*,[348] the Navy awarded a fixed-price construction contract to American Construction Services (ACS) for the demolition and removal of all facilities at an old tank farm. The contract required ACS to remove the old steel storage tanks and piping. The contract also required ACS to remove, to store safely, and to dispose properly of all residual fuel from the lines.[349] The contract contained the following language concerning title to the materials being demolished and removed at the tank farm:

> [E]xcept where specified in other sections, all materials and equipment removed and not reused, shall become the property of the Contractor and shall be removed from government property. Title to materials resulting from demolition, and materials and equipment to be removed, is vesting in the Contractor upon approval by the Contracting Officer of the Contractor's demolition and removal procedures, and authorization by the Contracting Officer to begin demolition.[350]

ACS discovered that the storage tanks had not been pumped out! They contained almost 100,000 gallons of valuable fuel oil. ACS and the Navy discussed the oversight. The Navy informed the contractor that the government was in the process of pumping the fuel oil out of the tanks and reminded ACS that it was the contractor's responsibility to remove and to dispose of any residual product from the lines. Approximately six months later, ACS filed a claim with the contracting officer for $126,000, which constitutes the value of the fuel oil that the government pumped out of the tanks. ACS based its claim on the language in the clause quoted above. It interpreted the clause to say that, once the contracting officer issued the order to proceed, all materials removed from the facility that were not expressly reserved to the government became the property of the contractor. ACS also claimed that it took the value of the fuel oil into consideration when it computed its bid price.

The board found ACS's interpretation of the pertinent contract provisions unreasonable. It pointed out that ACS's pre-dispute, contemporaneous conduct was inconsistent with its claimed interpretation. ACS was surprised to find the oil still in the tanks. The pre-dispute correspondence showed that ACS's main concern was that the delay in emptying the tanks would not interfere with its cleaning efforts. The board granted the Navy's summary judgment motion.

How Many Contracting Officers Does It Take to Change a Light Bulb?

In *Johnson Controls World Services, Inc.*,[351] the Navy awarded a Base Operating Services Contract (BOSC) at a sub-

344. United States *ex rel*. B & M Roofing of Colorado, Inc. v. AKM Assoc. Inc., 961 F. Supp. 1441 (D. Colo. 1997).

345. 40 U.S.C. §§ 270a-270f (1994).

346. TLC Serv., Inc. B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.

347. If the contract price is not more than $1 million, the penal sum must be 50 percent of the contract price; if it is more than $1 million but not more than $5 million, the bond must equal 40 percent of the contract price; if it is more than $5 million, the bond must equal $2.5 million.

348. ASBCA No.49,180, 97-2 BCA ¶ 28,984.

349. *Id.* at 144,336.

350. *Id*.

marine base. It was a firm-fixed-price, lump-sum contract. The award price for the phase-in and base periods was $35,241,241.00. The contract also provided for special orders called "Silver Bullet" work. This was a procedure for ordering discretionary work that could not be projected in advance. The contract contained a discrete number of "bullets" that were priced at $250.00 per work order.

The Navy had a BOSC in place at the base since 1977. When the Navy issued the RFP for this contract in 1991, the RFP had no specific reference to the requirement for replacing light bulbs (described as "relamping"). The contracting officer had been considering where in the specifications to include the "relamping" requirement. During the course of drafting the solicitation, the Navy had inadvertently left the requirement out completely. While preparing its proposal, Johnson realized that the relamping requirement was absent. During the appeal, Johnson claimed it simply believed the Navy had a reason for the omission, and it never sought clarification of the issue.

It was only after award that Johnson questioned the contracting officer about how the Navy planned to order relamping. The contracting specialist was "shocked" to learn that the specifications did not address the requirement. After considering the problem, the Navy determined that the responsibility for changing light bulbs should reasonably be considered part of the "routine recurring maintenance." Johnson disagreed and claimed the work would have to be ordered on a discretionary basis through the "Silver Bullet" process. The contracting officer informed Johnson of the Navy's intent to enforce its interpretation. Johnson notified the contracting officer that it considered the Navy's decision as a change to the work and was performing under protest. A claim for $34,003.00, which covered five months of relamping, soon followed. On appeal, the board concluded that even if Johnson's interpretation was reasonable, the missing requirement created a "patent ambiguity" and obligated Johnson to seek clarification.

Contract Changes

Formal Changes

Safety-Kleen Goes "Green" . . . But Not the Army! In *Safety-Kleen Corp.*,[352] the Army issued a solicitation for parts cleaner recycling services. United States Army Forces Command (FORSCOM) installations require these services for degreasing, cleaning, and maintaining equipment. The solicitation primarily anticipated the offering of hazardous solvent-based cleaning systems. However, the specifications allowed for the submission of an "equivalent application" that could meet the required benchmark cleaning performance. One of the competitors, ChemFree, Inc., offered an equivalent application which used non-hazardous solvents for most of the cleaning requirements. ChemFree had subcontractors in place to perform those functions which still required traditional solvent-based technology. The Army certified ChemFree's submission as an equivalent application and awarded it the contract.

The contracting office received several complaints that ChemFree's product was an inadequate replacement process for many of the requirements. For example, ChemFree's product was not approved for use in aviation maintenance procedures. As a result, the contracting officer issued a change order, directing ChemFree to use the traditional solvent technology for aviation maintenance requirements. This change required ChemFree to replace eighty-four (out of the 1050 provided to FORSCOM facilities) of its bioremediation technology cleaners with solvent-based technology circulating parts cleaners.

Safety-Kleen protested, arguing that the change was out-of-scope. It reasoned that since ChemFree's original proposal did not offer to provide *any* solvent-based *circulating parts* cleaners, its low bid price was not based on having to provide that technology. Therefore, the change altered the essential nature of the contract and would have significantly affected the competition.

The GAO denied the protest, pointing out that "the actual change here involves substituting a small quantity of one type of equipment for another type of equipment, and slightly expanding the role of the in-place subcontractors."[353] The GAO concluded that the change was minimal when viewed in the context of the overall contract.

Three Strikes and You're Out, Master Security! In *Master Security, Inc.*,[354] the GSA awarded a contract to Knight Protective Services (KPS) for armed and unarmed security guard services at GSA facilities located in Baltimore City and Baltimore County, Maryland. The contract was awarded on 19 June 1995, just two months after the catastrophic bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Not surprisingly, soon after contract award, the demand for security services increased greatly.

The protest concerned three modifications issued by the GSA. The first modification occurred during the base contract year and added sixteen new Baltimore City/County sites to the nine original contract locations. The second modification

351. ASBCA No. 46,692, 97-1 BCA ¶ 28,629.

352. B-274176.2, Nov. 25, 1996, 96-2 CPD ¶ 200.

353. *Id.* at 4.

354. B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21.

occurred shortly before the beginning of the first option year. It required basic security services at five contract sites *outside* of the solicitation's identified Baltimore City/County geographical area. The third modification involved three delivery orders which required the performance of "substantially different" security guard services at the Health Care Financing Administration facility in Woodlawn, Maryland.[355]

Master Security Inc. (MSI) argued that, by almost tripling the number of work sites described in the original solicitation, the first modification was beyond the scope of the contract. The GAO denied the protest of the sixteen additional Baltimore City/County contract sites, explaining that the very language of the contract should have put potential offerors on notice that this type of change was a possibility. The contract was for a five-year period and clearly established Baltimore County and the City of Baltimore as the geographic scope of the requirement. The expressed time and space of the solicitation was sufficiently broad to accommodate the increased service requirement. Furthermore, the RFP informed potential offerors that the estimated sites and work hours enumerated in the RFP were for evaluation purposes and represented the government's best estimates of the total quantity of service required.[356] Finally, the statement of work reserved to the agency the unilateral right, within the general scope of the contract, to order services in excess of those stated estimates.[357] Based on the plain language of the solicitation, offerors should have reasonably anticipated the kind of modification represented by the first change order.[358]

The GAO also upheld the second modification as an in-scope change. The GAO recognized that the GSA had properly competed the additional requirements using the simplified acquisition procedures available in FAR Part 13. KPS was only one of three vendors the GSA had solicited for the contracts, and, "[a]lthough the orders were issued as modifications to Knight's existing contract, the record shows that the agency properly competed the requirements and properly selected Knight for award in accordance with the FAR small purchase procedures."[359]

The GAO declined to set aside the third modification. The GSA properly characterized the three protested delivery orders to KPS as critical "interim purchases"[360] designed to meet a short term need, pending the agency's proceeding with a full and open competition. Completing the "hat trick"[361] for the agency, the GAO concluded that the record supported the GSA's claim that they were only awaiting a DOL wage determination before proceeding with a fully competitive procurement for the Woodlawn site.[362] Therefore, the use of small purchase procedures as an interim means to meet the agency's critical requirement was proper.[363]

Constructive Changes

A Tale of Three Buses. In *Green's Multi-Services, Inc.*,[364] Green contracted to provide shuttle bus and van transportation services between various facilities of the Department of Energy (DOE) in the Washington, D.C. area. The specifications required that the vehicles hold at least thirty passengers each. Several days after award, Green conducted a live demonstration test. However, instead of providing three thirty-passenger buses,[365] Green used three forty-seven-passenger buses. Seventeen months into performance, Green filed a claim for the costs associated with providing forty-seven-passenger buses in place of thirty-passenger buses.

Green claimed that, between award and the live demonstration, the DOE amended the contract to increase the bus capacity requirement from thirty-passenger to forty-seven-passenger for scheduled service. The "verbal constructive change order"[366] was allegedly issued during the course of a telephone conference call initiated by the DOE. Green contended that its presi-

355. *Id.* at 6.

356. *Id.* This information appeared in both a disclaimer which introduced the statement of work and the published minutes of a pre-bid conference.

357. *Id.* at 3.

358. *Id.* at 2, *citing* Marine Logistics Corp., B-218150, May 30, 1985, 85-1 CPD ¶ 614.

359. *Id.* at 5.

360. *Id.* at 6.

361. "Hat trick" is an ice hockey term which denotes three goals by one player in a single game.

362. *Master Security, Inc.*, 97-1 CPD ¶ 21 at 6.

363. *Id.* at 6, *citing* Mas-Hamilton Group, Inc., B-249049, Oct. 20, 1992, 92-2 CPD ¶ 259.

364. EBCA No. C-9611207, 97-1 BCA ¶ 28,649.

365. *Id.* at 2. The contract required a minimum of three buses for the regular service.

366. *Id.*

dent was informed by the contracting officer that the DOE wanted forty-seven-passenger vans. Green further contended that when it protested the change, the DOE threatened to terminate the contract for default. Fearful of the consequences of a default termination, Green complied.

The board reiterated the requirements for proving a constructive change. It explained that appellant must show that: (1) a change occurred, (2) the change was not voluntarily done but was as a result of government direction, and (3) the contractor relied on the direction and incurred extra costs.[367] The board concluded that Green failed to sustain its burden of proof as to any of the required elements. In the first place, Green never proved it actually planned to use thirty-passenger buses to perform the contract. The contract required the buses to hold thirty passengers at a *minimum*. The record showed that Green's had no thirty-passenger buses in its fleet and that it never ordered any after being awarded the contract![368]

Green also failed to establish that the alleged change resulted from the DOE's direction. Green never objected to the alleged change. As for the third element of the constructive change analysis, an increase in cost or time of performance, if Green's always planned to use forty-seven-passenger buses, the use of such buses could not have resulted in extra cost. In dismissing the protest the board stated:

> Having found that the three elements required for a constructive change are not present, Appellant's contention that Respondent should have recognized that its bid was based on the use of 30-passenger buses and not 47-passenger buses is immaterial. While the government has a duty of fair-dealing towards a contractor, the premise underlying Appellant's argument—that the government is somehow a guarantor against any adverse consequences stemming from a contractor's business judgment—is erroneous.[369]

When Is a Change Not a Change? Graphicdata, LLC. v. United States[370] involved a contract for the printing of patents for the Patent and Trademark Office (PTO). Graphicdata, LLC had performed the contract for the Government Printing Office (GPO) for over a decade. In this instance, however, News Printing Company, Inc. was the low bidder, with a bid of $2,173,605.00. Since 1995, the PTO had been using 8mm magnetic tapes to provide the patents to the printing contractor. The GPO supplied the tapes as GFP to the performing contractor. These tapes were prepared from electronic files for the PTO under a different contract.

Soon after award, the GPO and News Printing discussed the possibility that the electronic files themselves might be useful to News Printing in performing the contract. The contracting officer modified the contract by adding the electronic file to the list of GFP. Before News Printing signed and/or accepted the modification, Graphicdata filed for a temporary restraining order and a motion for preliminary injunction, seeking to enjoin the GPO from acquiring printing services from any vendor other than Graphicdata. On that same day, News Printing filed a motion to intervene, and the motion was granted.

The Court of Federal Claims heard conflicting expert testimony concerning whether providing the electronic file would allow a significant advantage to the performing contractor. Graphicdata claimed that had the electronic file been provided as GFP in the original solicitation, Graphicdata would have "lowered its bid significantly."[371] The court denied Graphicdata's application for a TRO and found that Graphicdata had not established a substantial likelihood of success on the merits.[372] Subsequently, the agency and News Printing filed a joint motion for summary judgment. They argued that Graphicdata's cause of action was moot since News Printing had never signed the modification which included the electronic file as GFP, never accepted the modification, did not use the electronic file to print patents, and returned the electronic file to the GPO.[373]

Graphicdata asked the court to view the contract as if it had been modified and to determine whether the hypothetical modification prejudices Graphicdata. The court refused to extend its jurisdiction that far, holding that "the court cannot rewrite a

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367. *Id.* at 5, *citing* Dan G. Trawick, III, ASBCA No. 36260, 90-3 BCA ¶ 23,222.

368. *Id.* at 5. Two months before the alleged telephone conference occurred, Green advised the DOE that Airport Connection would be the vendor supplying them the buses for contract performance. The record showed that Airport Connection had only 47-passenger buses in its inventory; there were no 30-passenger buses available. *Id*.

369. *Id* at 3. Green claimed that when the agency saw the hourly rate it was bidding for the buses, it was on notice that it intended to use 30-passenger buses, since the rate for 47-passenger buses was routinely 26 percent higher. Even if that had been the case, the Government had already required Appellant to verify its bid twice before award.

370. 37 Fed. Cl. 771 (1997).

371. *Id*. at 775.

372. *Id.* at 778.

373. *Id* at 782.

solicitation to include a modification not agreed to by the parties to the original contract."[374] The court determined that since News Printing never made use of the electronic files, the attempted modification did not change how News Printing performed the contract. Therefore, regardless of how the provision of the electronic file might have made for a better original procurement, the "plaintiff had a full and fair opportunity to compete for the same contract that News Printing is currently performing."[375] In granting the joint motion for summary judgment,[376] the court said: "[t]he court endorses a bright-line test rule that a modification must be effective, i.e., signed by both the awardee and the contracting officer, before a cause of action lies for breach of the duty of fair dealing by materially modifying a contract after award."[377]

Value Engineering Change Proposals (VECPs)

A Claim Too Far[378]

Last year, it appeared that M. Bianchi of California had triumphed in its long running dispute with the Air Force concerning two disputed VECPs. The VECPs suggested improvements in the packing and shipping of women's pantsuit uniform coats.[379] Bianchi convinced the Federal Circuit[380] and, on remand, the board[381] that the Air Force "constructively accepted" Bianchi's VECPs. Bianchi was awarded royalties for all work performed during the contract's designated three-year VECP sharing period, beginning with the first delivery of items which incorporated the VECP.[382]

Dissatisfied with the above results, Bianchi filed another appeal and claimed to have newly-discovered, compelling evidence which would prove that Bianchi's original contract also qualified for an alternative royalty period authorized by Defense Acquisition Circular (DAC) 76-26.[383] The ASBCA denied the claim. The board pointed out that Bianchi's contract was awarded on 7 November 1979, and the DAC was not effective until 15 December 1980. The board applied the normal rule that new regulations are to be applied prospectively unless there is a clear mandate that the change should be retroactive. Stay tuned next year for the continuing saga of Bianchi and its expanding pants suits.

Dunn's Bridge Was Never Done![384]

NASA awarded Dunn Construction Co., Inc. a contract to construct a test stand for the Advanced Solid Rocket Motor (ASRM) at the Stennis Space Center. The contract required a ten ton hoist bridge crane for moving heavy support equipment around the test stand. The contract incorporated by reference

374. *Id.*

375. *Id* at 783.

376. *Id.* However, the court also warned:

> The court does not rule out the possibility that, in the future, a case may arise wherein justice requires creating an exception to the actual modification requirement. Given the fact that the proposal and subsequent rejection of the modification did not prejudice plaintiff, the court does not believe the convenient timing both of the proposed modification and NPC's rejection of it justifies fashioning an exception that blurs the lines between agency discretion and judicial review.

Id.

377. *Id.* at 784.

378. Appeal of M. Bianchi of California, ASBCA No. 37029, 97-1 BCA ¶ 28,767.

379. *See 1996 Year in Review, supra* note 9, at 109.

380. M. Bianchi of California v. Perry, 31 F.3d 1163 (Fed. Cir. 1994).

381. M. Bianchi of California, ASBCA Nos. 37029, 37071, 96-2 BCA ¶ 28,410.

382. *Id.* at 141,862.

383. The present rule at FAR 48.001defines "Sharing Period," as:

> the period beginning with acceptance of the first unit incorporating the VECP and ending at the later of: (a) 3 years after the first unit affected by the VECP is accepted or, (b) the last scheduled delivery date of an item affected by the VECP under the instant contract delivery schedule in effect at the time the VECP is accepted.

FAR, *supra* note 22, at 48.001. FAR 48.102(g) expands the coverage in the case of "low-rate-initial-production" contracts. In those cases, the future sharing shall be on scheduled deliveries equal in number to the quantity required over the highest 36 consecutive months of planned production, based on planning or production documentation at the time the VECP is accepted. *Id.* at 48.102(g).

384. Dunn Constr. Co., Inc., ASBCA No. 48145, 97-2 BCA ¶ 29,103.

the "Value Engineering-Construction" clause.[385] Dunn submitted a VECP for a revised bridge crane. The NASA Configuration Control Board and NASA's system safety engineer reviewed and approved the VECP. The contracting officer asked Dunn to submit a price proposal for the VECP, and Dunn responded with shop drawings and a point-by-point review of the proposed crane. Rather than proceed with the VECP, however, NASA unilaterally changed the contract by completely deleting the requirement for the bridge crane. When Dunn provided NASA with its price proposal, which reflected the cost reduction due to the reduced requirements, it adjusted the figure to capture its share of the VECP contract savings. It alleged that the price reduction was based on the estimated cost of the revised bridge crane as proposed in its VECP rather than on its original bridge crane estimate. Dunn's price proposal also included a credit for the purported instant contract savings associated with the VECP.

NASA unilaterally modified the contract by reducing the price by an amount which failed to account for the VECP benefits. This modification included a reduction of $231,082 for deleting the procurement and installation of the bridge crane. Dunn submitted a claim for $74,598.75 in instant contract savings associated with the VECP. The claim was denied by the contracting officer's final decision, and Dunn appealed. The board denied the appeal stating:

> [I]t is undisputed that the bridge crane was never delivered and installed on the project. The Value Engineering Clause in the contract provided that the contractor could share in any "instant contract savings realized from accepted VECPs." Thus, not only must the VECP be accepted, but the instant contract savings must also be realized . . . . [I]t does not matter whether the VECP was accepted, rejected, or not acted upon. The bridge crane was deleted from the contract before it was delivered and installed. Therefore, no instant contract savings were realized.

Pricing of Adjustments

In *Satellite Electric Co. v. Dalton*,[386] the Navy awarded Satellite a contract to set up a power supply system.[387] The Navy required Satellite to stop performance twice during the performance period of the contract. The stoppage was due to the Navy's inability to provide two items that the contract required.[388] The suspension periods were 82 days and 146 days respectively, and the Navy required Satellite to remain on "standby"[389] during the suspension periods. During those periods, Satellite bid on new contracts,[390] but it obtained only two contracts.

At trial, the board denied the contractor's claim for *Eichleay* damages. It held that Satellite proved the first two prongs of the *Eichleay* formula: (1) a government-imposed delay; and (2) the contractor was on standby during the delay.[391] The board, however, found that the government carried its burden of rebutting the prima facie case by showing that "the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay."[392]

On appeal, Satellite argued that the board applied the wrong standard. According to Satellite, the language in *Mech-Con Corp. v. West*[393] that the government was required to present evidence or argument "showing that the contractor was able to take on other work during the delay" required the government either to establish that the contractor actually took on replacement work or, at least, to *prove* rather than merely to *show* its ability to do so. Satellite further argued that the board erred in not requiring the government to establish that the additional work Satellite sought was intended to replace the work that was suspended.

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385. FAR, *supra* note 22, at 52.248-3.

386. 105 F.3d 1418 (Fed. Cir. 1997).

387. *Id*. at 1420.

388. *Id.* The two items were batteries and an induction coil.

389. *Id*. Standby status means that the firm must be available to resume work promptly upon the government's instruction. Note that both suspension periods occurred after Satellite had completed approximately 97 percent of the contract.

390. *Id.* Satellite bid on approximately 30 projects during the first period, and on 19 during the second suspension period.

391. Appeal of Satellite Elec. Co., ASBCA No. 46935, 95-2 BCA ¶ 27,883, at 139,084-85 (citing *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688).

392. *Id.* The Board decided that the evidence "does not show an inability to take on additional work for any reason attributable to the government." *Id.* Moreover, the Board stated "[t]here must be impairment of a contractor's ability to take on other work that is attributable to the government-caused delay to be reimbursed for the period of delay under the *Eichleay* formula." *Id*.

393. 61 F.3d 883 (Fed. Cir. 1995).

The court did not accept Satellite's arguments. It declined to impose the added burdens upon the Navy that Satellite proposed. In affirming the board's decision, the court held that:

> Requiring the government to prove the actual acquisition of additional work would be inconsistent with the assumption on which the *Eichleay* formula rests: that where the government delays performance and requires the contractor to stand by indefinitely, the contractor is unable to develop other work against which the unabsorbed home office overhead otherwise chargeable against the suspended contract may be charged. If the government shows that the contractor was able to handle other work—whether or not it actually did so, which may have depended on circumstances other than the delay—it refutes the underlying fact on which *Eichleay* damages are based.[394]

Inspection, Acceptance, and Warranties

Direct Shipment from Subcontractor to Government Does Not Create Implied-in-Fact Contract

In *National Micrographics Systems, Inc. v. United States*,[395] the Court of Federal Claims addressed a novel claim in the never ending saga by subcontractors to obtain legal remedies from the government rather than the prime contractor. In this instance, the subcontractor sued for breach of implied-in-fact contract and for unconstitutional taking after the government refused to pay for or return a computer system delivered directly to the agency pursuant to their subcontract with the prime contractor. After first finding the claim cognizable under the subject matter jurisdiction of the Tucker Act,[396] the court addressed the delivery ticket which accompanied the computer system. This standard form bore the subcontractor's logo, a "received by" signature line which was signed by a government employee, and language that purported to create a security interest in the property delivered.[397] The Court of Federal Claims held that no implied-in-fact contract was created with the sub-contractor through mere delivery, in spite of the language on the delivery ticket.

Construction Contractor Cannot Cement Its Rights to Specifications

In a contract for a foot bridge in the Six Rivers National Forest, California, the Forest Service waived the mix design requirements for the concrete footings.[398] Subsequently, the government discovered evidence that the pre-mixed concrete used became wet while stored at the site. The Forest Service neither tested the concrete strength of the footings, nor did they require the contractor to remove and replace them. They merely informed the contractor that, to be accepted, all subsequent concrete pourings must comply with the original contractual standard. The contractor argued that approval of the pre-mixed concrete was not just for the footings, but for all concrete to be used in the construction.[399] The board rejected the contractor's argument, noting that the Forest Service received no consideration for the initial approval of the nonconforming pre-mixed concrete. Moreover, the board ruled out detrimental reliance, noting that the contractor ordered the pre-mixed concrete two months in advance of the government's approval.[400]

Pavement Contractor Road Weary After Unsuccessful Action to Obtain Reimbursement for Warranty Work

At issue in *Valco Construction Co*.[401] was a pavement contract at Luke Air Force Base, Arizona. The board held that the government properly ordered a contractor to perform warranty work on pavement with substantial defects because the contrac-

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394. *Id.* at 1422-23. The court noted:

> To require the government to prove that the contractor actually obtained additional work would be inconsistent with two elements of the *Mech-Con* standard that this requirement is intended to implement, namely, that the "showing" of the government may be made by "rebuttal evidence or argument" and that the government need show only that the contractor was "able" to take on other work. Moreover, in this court's original formulation of the *Eichleay* requirements, under which the contractor was required to show all three elements, the third element was phrased in terms of the contractor's inability to take on additional work, not in terms of whether it had done so.

Id.

395. 38 Fed. Cl. 46 (1997).

396. 28 U.S.C. § 1491 (1994).

397. *National Micrographics*, 38 Fed. Cl. at 50.

398. Tri-West Contractors, Inc., AGBCA No. 95-200-1, 97-1 BCA ¶ 28,662.

399. *Id.* at 143,172.

400. *Id.* at 143,173. The appellant's president admitted that he was aware that if the mix design, or certifications in lieu thereof, were not approved, "his goose would be cooked." *Id.*

tor had warranted that its work conformed to contract requirements and would be free of any defect in material or workmanship for a period of one year.[402] Although the Air Force took early possession of completed sections of the work, the government had the right to do so without such possession being deemed acceptance of the completed work, let alone a waiver of its warranty rights.[403] Moreover, the board noted that whether the government provided a punch list of work items remaining to be performed or corrected "did not relieve Valco of its responsibility of complying with the terms of the contract."[404]

Termination for Default

Federal Circuit "REACTs" to Termination Decision

In *PLB Grain Storage Corporation v. Glickman*,[405] the Federal Circuit addressed a contracting officer's decision to terminate a contract for default. In the case, PLB Grain Storage Corporation (PLB) entered into a uniform grain storage agreement (UGSA) and an extended grain storage agreement (EGSA) with the Commodity Credit Corporation (CCC). The agreement required PLB to have a facility available to store at least 13.5 million bushels of CCC grain for $10,020.78 per day.[406]

In the early 1980s, a number of state and federal agencies inspected PLB's facilities. The inspections showed that the quality and quantity of grain stored at PLB facilities was deficient. On 13 August 1984, the CCC ceased all payments to PLB under the UGSA and EGSA and removed PLB from CCC's list of approved warehouses. On 14 December 1984, CCC terminated PLB for default.[407] PLB filed numerous claims and challenged the propriety of the termination at the Agriculture Board of Contract Appeals (AGBCA). The AGBCA upheld the government's termination for default, and PLB appealed the decision to Court of Appeals for the Federal Circuit.

PLB argued that the CCC's termination for default was improper because government officials, known as the "REACT committee," (not the contracting officer) allegedly made the decision to terminate the contract for default. PLB contended that such an arrangement undermines the contracting officer's exercise of independent, personal judgment on the termination decision. The court noted that there was "substantial evidence" to support the conclusion that the contracting officer did make the decision to terminate the contract for default. Even though the REACT committee instructed the contracting officer to terminate the contract for default, the contracting officer reviewed, agreed with, and made revisions to the termination order. Accordingly, the court held that the contracting officer exercised independent, personal judgment.[408]

Chemical Suit Maker Burned Badly in T4D

In *Amertex Enterprises, Ltd v. United States*,[409] Amertex Enterprises, Ltd. (Amertex) entered into a contract for the production of chemical suits. The contract specified the production of 2,415,885 chemical suits. In describing the procurement, the Court of Federal Claims said, "From its inception, this procurement was plagued by poor decisions, mistakes, and miscommunication that delayed and disrupted Amertex's performance of its obligations."[410]

On 7 December 1988, the parties met to discuss Amertex's financial condition. At the meeting, Amertex submitted a cer-

401. Valco Constr. Co., ASBCA Nos. 47909, 48313, 97-1 BCA ¶ 28,743.

402. *Id.* at 143,168. The work was warranted under FAR 52.246-21(b).

403. FAR, *supra* note 22, 52.236-11.

404. *Valco Constr. Co*., 97-1 BCA ¶ 28,743, at 143,469.

405. No. 95-1169, 1997 WL 242179 (Fed. Cir. May 12, 1997).

406. *Id.* The agreement ran from May 1980 until December 1986. The contract did not condition CCC's obligation to pay PLB upon actual storage of the grain. The contract did, however, obligate PLB to ensure the quantity and quality of any grain that was stored.

407. *Id.* The CCC provided PLB a cure notice. After PLB failed to cure the deficiencies outlined in the cure notice, CCC terminated the contract for default. Moreover, the contracting officer determined that PLB owed the government approximately $3.6 million in damages, which reflected the balance between the value of the storage and the money owed to PLB as a result of CCC's decision to withhold payments to PLB.

408. *Id*. In a vacuum, the decision in this case does not add much to the established law in the area. However, in light of the fact that the Court of Appeals for the Federal Circuit will likely hear McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1995), a multi-billion dollar case that turned on a similar issue, it is instructive to see how the court handled the issue.

409. No. 96-5070, 1997 WL 73789 (Fed. Cir. Feb. 24, 1997).

410. *Id*. During the performance period of the contract, the government issued 42 modifications and eight amendments to the contract, resulting in over 100 changes to the contract specifications.

tified claim in the amount of $33 million for alleged government-caused delay. Amertex also outlined its financial position. It stated that it had a current negative cash position of $2.8 million, and it had a cash requirement of $19.2 million beyond the funds in the contract to complete the work on the contract.

On 12 December 1988, the government issued Amertex a cure notice, stating that the company did not possess adequate financial resources to complete the contract. On 6 January 1989, the contracting officer terminated the contract for default. The basis for the termination was Amertex's failure to make progress so as to endanger performance. The Court of Federal Claims, citing *Hannon Electric Co. v. United States*,[411] noted that the government bears the burden of proving that Amertex's conduct or condition actually endangers performance. Absolute impossibility of performance is not required before the government may declare a contract in default. Instead, the essence of the test is the "reasonable likelihood" that the contractor could perform the entire contract within the time remaining. According to the Court of Federal Claims, the same principle applies to funding.

In applying the reasonable likelihood test to the facts in the case, the Court of Federal Claims found that the government met its burden and was justified in declaring Amertex in default. Amertex had a $19 million shortfall which grew worse with each passing month.

At the Federal Circuit, Amertex argued that the Court of Federal Claims' factual findings were in error.[412] Amertex failed to persuade the Federal Circuit. The Federal Circuit held that, based on the underlying facts, the Court of Federal Claims reached the correct conclusion.

Air Force in "Hot Water" in Piping Contract

The Air Force entered into a contract with L&H Construction Co. to replace 5000 feet of an underground water heating piping system at McGuire Air Force Base, New Jersey.[413] Under the contract, a government engineer was responsible for the development of the specifications in the contract. Unfortunately, he had no experience in heating system design.[414] Likewise, the contracting officer had no experience.[415]

After contract award, the construction project never got off the ground. There were various delays that led to the contract being terminated for default. The critical delays involved the heating pipe submittal.[416] In preparing its submittals for the contract, U.S. Polycon, L&H's vendor for all prefabricated pipes under the contract, discovered certain ambiguities in the government's specifications and drawings. The board specifically found, in a separate opinion by Administrative Judge Kienlen, that in telling PolyCon to go ahead with its pipe submittal, the government misled L&H and PolyCon into the understanding that the pipe submittal would be acceptable. The government waited more than seventy days to reject the submittal.[417] In resolving this issue in favor of L&H, the board noted that when a contractor relies upon and acts upon misleading and evasive government conduct, the government is ultimately responsible for any delay that results.

The terminating contracting officer (TCO) at Headquarters, Military Airlift Command, Scott Air Force Base, Illinois ultimately made the decision to terminate the contract. The TCO based his decision on a formal recommendation made by the engineers at McGuire AFB. The recommendation was erroneous and did not disclose the fact that ambiguities existed with the government's drawings and specifications and that the government instructed Polycon to proceed notwithstanding the ambiguities.

The board held that a decision to terminate a contract for default based on materially erroneous information as to the contractor's culpability for delay are not reasonable. According to the board, to hold otherwise would encourage deception. The board converted the termination for default into a termination for convenience.

Rare Summary Judgment Against German Contractor

In *Hubsch Industrieanlagen Spezialbau, Gmbh v. United States*,[418] Hubsch Industrieanlagen Spezialbau, Gmbh (Hubsch) entered into a contract with the Army to construct a two-story medical and dental clinic facility at Rhein Main Air Force Base

411. 31 Fed. Cl. 135, 143 (1994), *aff'd*, 52 F.3d 343 (Fed. Cir. 1995).

412. *Amertex*, 1997 WL 73789, at *3.

413. L&H Constr. Co., Inc., ASBCA No. 43833, 97-1 BCA ¶ 143,546.

414. *Id.* The engineer prepared drawings for the new system based upon an old design from the 1960s.

415. *Id.* This contract was among her first group of contracts as a contracting officer at McGuire Air Force Base.

416. *L&H Constr.*, 97-1 BCA ¶ 143,546, 143,557. Nothing of consequence could be done until the pipe submittal was approved.

417. *Id.* Judge Kienlen noted that L&H could have sought a new subcontractor if the government had told L&H on 3 April 1991 (as opposed to 13 June 1991) that its submittal was unsatisfactory. Judge Kienlen amplified this position by stating that the government's misleading and evasive responses to Polycon and L&H caused the intervening delay.

in Frankfurt, Germany, and to demolish the existing clinic building.[419] Hubsch fell behind schedule on the contract. The Army notified Hubsch seven times that its progress and performance were unsatisfactory. On 16 June 1993, the Army advised Hubsch that it was considering terminating the contract for default due to Hubsch's inability to complete the contract in light of its admitted financial condition. The Army finally terminated the contract for default on 9 July 1993. In the contracting officer's final decision, he noted that the contract completion date was 2 January 1993 and that approximately ninety-two percent of the contract was complete at the time of the termination. The contracting officer also found that Hubsch was only accomplishing 0.2 percent of the remaining work per month, and that there was no significant progress over the last five months. At the time of termination, Hubsch's financial condition prevented it from paying its subcontractors, and Hubsch would not be able to complete the contract for another twelve months. The Court of Federal Claims granted summary judgment in favor of the Army.[420]

The Federal Circuit affirmed the trial court's decision. In doing so, the Federal Circuit noted that it was beyond dispute that Hubsch neither had been nor was proceeding diligently toward the completion date. Moreover, the Federal Circuit specifically noted that Hubsch affirmatively asserted that it could not complete the project without additional time and funds. According to the court, such anticipatory repudiation alone provides sufficient basis for the termination of the contract.[421]

Judge Newman dissented on two grounds. First, he stated that there are too many material facts in dispute.[422] Second, he contended that the theory of anticipatory repudiation applied by the Court of Federal Claims was improper. According to Judge Newman, a contractor's assertion that in order to complete its contractual obligations it needs more money due to delays and inadequacies in the specifications is not by itself an anticipatory repudiation of the contract. As such, it does not warrant the termination of the contract for default. Citing the same authority as the majority,[423] Judge Newman highlighted that anticipatory repudiation requires that a contractor's communication be a distinct and unequivocal absolute refusal to perform the contract. A mere assertion that the party will be unable, or will refuse, to perform its contract does not suffice.[424]

Later Fraud Conviction Establishes Basis for Termination

On 6 June 1987, the Navy contracted with Ricmar Engineering, Inc. for 3399 arresting hookpoints for the F-14.[425] On 12 March 1992, the contracting officer terminated the contract for default, because Ricmar abandoned contract performance, failed to deliver 812 arresting hookpoints, failed to respond to the Navy's cure notice, and failed to make progress toward completing the contract. Ricmar appealed to the board.

The Navy filed a summary judgment motion, contending that since Ricmar and its president and sole owner were convicted of violating 18 U.S.C. § 286, Conspiracy to Defraud the Government with Respect to Claims, Ricmar had breached the contract.[426]

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418. No. 96-5119, 1997 WL 337557 (Fed. Cir. June 20, 1997).

419. *Id*. at *1. The contract consisted of three phases: building construction, site work, and demolition.

420. *Id*. The court concluded that the termination for default was proper. It noted that Hubsch argued that the government had waived the delivery schedule. However, the court noted that even if the Army had waived the delivery schedule that was specified in the contract, it re-established the delivery schedule in a subsequent cure notice. The court also ruled that the termination was proper because of Hubsch's failure to provide a schedule or evidence of financial ability to perform the contract, as required by a cure notice that it received from the contracting officer. *Id*. The court also held that the termination was proper because Hubsch had expressly notified the Army that it was unable to perform unless it received additional payments. *Id*. Finally, the court found that the contracting officer did not abuse his discretion by failing to consider all of the factors contained at FAR 49.402.3. *Id*.

421. *Id. See* United States v. DeKonty Corp., 922 F.2d 826, 828 (Fed. Cir. 1991). In that case, the court stated that when one party absolutely refuses to perform its contract, and distinctly and unqualifiedly communicates that refusal to the other party, the other party can treat the refusal as a breach.

422. *Id.* Judge Newman noted that the parties do not agree on how much of the contract was actually completed. Moreover, he contends that it was not established on summary judgment that Hubsch would perform the remaining portion of the contract at a 0.2 percent rate. According to Judge Newman, "[s]uch speculative hyperbole of the contracting officer is an improper basis for summary judgment." *Id*.

423. United States v. Dekonty Corp., 922 F.2d 826, 828 (Fed. Cir. 1991).

424. *Hubsch*, 1997 WL 337557 at *5. According to Judge Newman, Hubsch made efforts to resolve the problems in the contract. Moreover, it was relevant that the replacement contractor completed the work under the contract on terms and conditions that were refused to Hubsch.

425. Appeals of Ricmar Eng'g, ASBCA No. 44,260, 1997 WL 365025 (ASBCA June 23, 1997).

426. *Id.* 18 U.S.C. § 286 (1994) states:

> Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false or fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Ricmar argued that the Navy's motion must be defeated because there were errors in the contract specifications, superior knowledge on the part of the Navy, and a breach of the contract by the Navy prior to Ricmar's nonperformance and fraud. The board initially observed that it is well settled law that a default termination for reasons relating to performance deficiencies may be upheld on the basis of an adequate cause existing at the time of the termination, even if then unknown to the contracting officer.[427] Moreover, in *Cosmos Engineering, Inc.*,[428] the board specifically held that "[a] contractor which engages in fraud in its dealing with the government on a contract has committed a material breach justifying the termination of the entire contract for default."[429] Here, the undisputed facts show that Ricmar and its president were convicted for conspiring fraudently to submit a progress payment request. Accordingly, the board granted the Navy's motion for summary judgment.

Termination for Convenience

Krygoski[430]*—One Year Later.*

This past year, the government contracts community still felt the aftershocks following one of the most significant government contracts cases to come out of the Federal Circuit in years—*Krygoski Construction Co., Inc. v. United States.*[431] Furthermore, the U.S. Supreme Court denied Krygoski's petition for certiorari. Additionally, the terminations subcommittee of the American Bar Association (ABA) Section on Public Contracts drafted proposed changes to the FAR that would require the government, when exercising its right to terminate a contract for convenience, to act consistently with those contractual good faith duties to which private parties are held.[432] The proposal provides that the government may not: (1) terminate a contract simply to obtain a more advantageous price or (2) act inconsistently with the justified expectations of the parties at the time they entered into the contract. At the ABA meeting in San Francisco this past summer, the subcommittee concluded that the draft proposal needed more work.[433]

The proposal embraces the *Torncello*[434] "change in circumstances"[435] test, but with a twist. Under the proposal, there is a difference between the elimination of the actual requirements or needs of the government and a mere change in the needs of the government. The draft proposal provides that a termination for convenience is appropriate when there is an elimination of the need but not appropriate when there is a mere change.[436]

Although the FAR Council is unlikely to adopt the proposal in its present form, the practitioner should recognize that the private bar is making efforts to change the long-standing regulatory termination for convenience scheme.

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427. *Ricmar Eng'g*, 1997 WL 365025, at *5 (citing Joseph Morton Co. Inc. v. United States, 757 F.2d 1273 (Fed. Cir. 1985)).

428. ASBCA No. 23529, 84-2 BCA ¶ 17,268.

429. ASBCA No. 44,260, 1997 WL 365025, at *5.

430. Krygoski Constr. Co., Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997).

431. In *Krygoski*, the Air Force awarded the plaintiff a contract to demolish an abandoned Air Force missile site in Michigan. During a pre-demolition survey, the plaintiff identified additional areas not included in the original government estimate that required asbestos removal. Due to the substantial cost increase related to additional asbestos removal, the contracting officer decided to terminate the contract for convenience and to reprocure the requirement. The plaintiff sued in the Court of Federal Claims, alleging breach of contract. Relying on *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), the trial court found that the government improperly terminated Krygoski's contract. *Id.* The court also found that the government abused its discretion in terminating the contract under the standard found in *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (1976) (i.e., bad faith or an abuse of discretion). *Id.* The Court of Appeals for the Federal Circuit reversed and remanded, holding that the Court of Federal Claims incorrectly relied upon *dicta* in the plurality opinion in *Torncello*. *Id.* Specifically, the court concluded that the trial court improperly found the change of circumstances insufficient to justify termination for convenience. Although arguably the government's circumstances had changed to meet even the *Torncello* plurality standard, the court declined to reach that issue, because *Torncello* only applies when the government enters a contract with no intention of fulfilling its promises. *Id.*

432. *Termination for Convenience: ABA Section Drafting Proposed Changes in Wake of Krygoski*, 67 FED. CONT. REP. 20 (BNA) (1997).

433. *Terminations for Convenience: ABA Section Sends Proposed FAR Part 49 Language Back For More Work*, 68 FED. CONT. REP. 6 (BNA) (1997). Several members of the terminations subcommittee objected to the second test—the government may not act inconsistently with the justified expectations of the parties at the time of the contracting. Their concern was that the language "justified expectations" was confusing. Moreover, some members realized that it was highly unlikely that the FAR Council would adopt the recommendations, because they would limit the government's ability to exercise its right to terminate for convenience. *Id.*

434. Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982). *Torncello* stands for the proposition that when the government enters into a contract knowing full well that it will not honor the contract, it cannot avoid a breach claim by using the termination for convenience clause. In *Torncello*, the government entered into an exclusive requirements contract knowing that it could get the same services much cheaper from another contractor. When the contractor complained that the government was breaching the contract by satisfying its requirement from the cheaper source and ordering nothing from it, the government claimed its actions amounted to a constructive termination for convenience. The court held that the government could not avoid the consequences of breach by hiding behind the termination for convenience clause. *Id.*

435. *Id.* at 781. The *Torncello* court interpreted the termination for convenience clause to require some change in the circumstances of the bargain or in the expectations of the parties.

Federal Circuit Addresses Constructive Termination in Contract International, Inc.[437]

In *Contract International, Inc*., the Air Force entered into a contract with Contract International, Inc. (CI) for the production of dairy products at a United States government-owned plant in Japan on 20 September 1989. The contract called for a one-year base performance period with four option years. On 26 September 1990, the incumbent contractor, Servrite International, Ltd. (Servrite) filed a bid protest challenging the award of the contract to CI. On 29 November 1989, the Air Force notified the GAO that it was sustaining Servrite's protest.[438]

The contracting officer informed CI that he would issue an amended request for proposals on or about 20 January 1990 and would award the resulting contract on or about 1 July 1990. CI challenged the contracting officer's decision in a protest it filed with the Air Force. The Air Force and the GAO denied the protest, and the Air Force awarded the new contract to Servrite.[439] CI's contract ended on 30 September 1990, and the Air Force did not exercise its options. CI submitted a claim for an equitable adjustment, seeking to recover breach damages for improperly terminating the contract.[440] The contracting officer denied the claim, and CI appealed to the board. The board sustained the appeal to the limited extent of the cost of repairing the machinery and costs from the Air Force's failure to make orders within the estimated volume requirements.

Contract International appealed to the Federal Circuit, arguing that the Air Force actions amounted to a constructive termination for convenience. According to CI, the Air Force repudiated its commitment to perform for at least one year when: (1) it told CI that it would issue an amended RFP, (2) it sought BAFOs, and (3) a new contract would begin in July 1990. CI argued that it found itself in a position in which it anticipated prompt termination of the contract. As such, CI argued that a constructive termination for convenience occurred.

The Federal Circuit disagreed with CI's reasoning. First, the court restated the principle that "no decision has upheld retroactive application of a termination for convenience clause to a contract that had been fully performed."[441] In the instant case, CI completed contract performance. The court also noted that if it accepted CI's argument, it would mean that each time any uncertainty was injected in a contract, the government would be liable to the contractor under a theory of constructive termination for convenience.[442] In summary, the court held that uncertainty caused by anticipating that contract termination may occur sometime in the future does not constitute grounds sufficient to hold the government liable for a constructive termination for convenience.

Termination for Convenience Settlement Agreement Does Not Stop Off-Set by Army

In *Applied Companies v. United States*,[443] the Army awarded Applied Companies a contract for 1000 air conditioners. On 12 July 1991, the Army terminated the contract for default. Applied appealed the termination for default to the board. On 29 March 1994, the board sustained Applied's appeal and converted the termination for default into a termination for convenience.

In February 1995, the Army and Applied entered into a termination for convenience settlement agreement. As part of the agreement, the Army agreed to pay Applied $2.8 million. The Army only paid $911,604 of the settlement amount. The Army offset the remaining $1.9 million against erroneous overpayments previously made to Applied under another contract. Applied filed suit in the Court of Federal Claims and argued

436. *Termination for Convenience: ABA Section Drafting Proposed Changes in Wake of Krygoski*, 67 FED. CONT. REP. 20 (BNA) (1997). Arguably, where the government's needs have changed, the contractor has the expectation that the government will use the Changes clause of the contract, and not the Termination for Convenience clause.

437. Contract Int'l, Inc. v. Widnall, 106 F.3d 426 (Fed. Cir. 1997).

438. *Id.* The Air Force stated that in light of certain pre-award discussions between the Air Force and Servrite, it was unable to determine "whether award was made to the offeror whose proposal would have been most advantageous to the government." *Id*.

439. *Id.* On 7 June 1990, the Air Force notified CI that the amended request for proposals would be issued about 30 June 1990, with award being made on or about 1 October 1990.

440. *Id.* The contractor sought to recover the following damages: (1) cost for inventory which was lost due to the alleged early termination of the contract; (2) the costs arising as a result of the Air Force's failure to make orders within certain estimated volume requirements; (3) cost of repairing certain machinery; (4) non-recurring costs and depreciation; (5) costs relating to pay and fringe benefits for a plant manager; and (6) profit.

441. *Id.* at 3 (citing Maxima Corp. v. United States, 847 F.2d 1549, 1557 (Fed. Cir. 1988)).

442. *Id*. The court further noted that the uncertainty resulted from the evaluation of Servrite and CI's original offer and the ensuing protests. The Air Force simply attempted to ensure that it followed proper acquisition procedures while Servrite and CI exercised their bid protest rights. All of these factors created the possibility that the Air Force would terminate CI's contract for convenience.

443. 37 Fed. Cl. 749 (1997).

that the Army's offset was a breach of the parties' termination for convenience settlement agreement.

The court granted the Army's summary judgment motion. Citing *United States v. Munsey Trust Co.*,[444] the court initially noted that the government has the same right as every other creditor to apply a debtor's funds to extinguish its debts. The court added the caveat that the parties are free to provide in their settlement agreement that the amount of the settlement agreement shall not be subject to an offset of any other debt owed by one party to another.[445] The settlement agreement provided that the government agreed to pay Applied (or its assignee) the sum of $2.8 million. There was, however, no unequivocal provision that such amount was not subject to setoff. Accordingly, the court held that the Army could withhold the $1.9 million from the settlement proceeds owed to Applied.

Constructive Termination for Convenience Limits Contractor's Recovery

In *Best Foam Fabricators, Inc., v. United States*,[446] the Navy entered into a contract with Best Foam for foam fuel cells for its fleet of UH-1N/HH-1N helicopters. The Navy conducted the procurement pursuant to the Small Business Administration's (SBA's) 8(a) program. The Navy uses the foam fuel cells by inserting them into the fuel tanks of military aircraft to prevent or to minimize the effects of an explosion if the aircraft crashes or is subjected to gunfire. There was an urgent need for the foam fuel cells.[447] The contract required Best Foam to follow the stringent inspection standards under MIL-I-45208.[448]

Following contract formation, the Navy failed to provide Best Foam with contractually required National Stock Numbers and shipping destinations. Additionally, the Navy failed to act on Best Foam's request that the Navy accept accelerated deliveries and drop MIL-I-45208 as a contract requirement. The court found that the Navy repudiated its contractual obligations by not knowledging the existence of a contract unless Best Foam submitted additional cost data and by stating that no contract existed because of Best Foam's request to drop MIL-I-45208.

The court initially noted that when one party to a contract fails to perform and improperly repudiates its obligations under the contract, they generally owe the other party breach damages. The court, however, determined that this case was appropriate for application of the constructive termination for convenience doctrine. Under this doctrine, if a contract includes a termination for convenience clause (as did this contract) and the contracting officer could have invoked the clause, a court will constructively invoke the clause to retroactively justify the government's actions, thereby avoiding a breach and limiting liability.[449] The court found that since there was no evidence of bad faith or an abuse of discretion by the Navy, the contracting officer could have invoked the termination for convenience clause instead of improperly repudiating the contract.

Contract Disputes Act Litigation

Contract Disputes Act (CDA)[450] Claims and Appeals

Parties Cannot "Contract Away" Their CDA Rights. Burnside-Ott Aviation Training Center v. Dalton[451] involved a dispute over a cost plus award fee contract. Burnside contended that the Navy improperly calculated its award fee by allegedly using a conversion chart that was not part of the contract. As part of its response, the Navy identified a clause in the contract which essentially exempted the award fee determination from review under the CDA.[452] The Federal Circuit noted that although parties to a contract may waive certain rights, this general rule does not apply to "a provision in a government contract that violates or conflicts with a federal statute."[453] The

444. 322 U.S. 234 (1947).

445. *Applied Cos.*, 37 Fed. Cl. at 756.

446. No. 94-1036C, 1997 WL 409205 (Fed. Cl. July 18, 1997).

447. *Id.* at *2. The need was urgent because many of the helicopters in the fleet were flying either with older, lower quality foam inserts or without any inserts at all.

448. *Id.* This standard basically requires the contractor to have a detailed and thorough inspection system in place to ensure that all goods submitted to the government conform to the contract requirements. The clause makes the contractor responsible for performing all of the inspections and testing necessary to ensure compliance with the contract.

449. *Id.* In *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925), the Court outlined the theoretical underpinnings for the doctrine. The Court stated:

> A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, recession, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.

College Point Boat Corp., 267 U.S. at 15-16.

450. Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1994).

451. 107 F.3d 854 (Fed. Cir. 1997).

court further observed that if this were not the case, parties to any agency contract could contractually subvert legislative mandates that would otherwise apply. Since the CDA requires *de novo* review of disputes involving government contracts, the court concluded that the offending clause was void.[454]

Board Allows Contracting Officer Nine Months to Issue Final Decision. With respect to a CDA claim greater than $100,000, the contracting officer can either issue a final decision within sixty days of receiving the claim or notify the contractor of a reasonable time when the final decision will be issued. Not surprisingly, what exactly is "reasonable" is determined by the size and complexity of the claim.[455] At issue in *Defense Sys. Co.*[456] was a $72 million claim for alleged breach of contract by the government. Defense Systems Company, Inc. (DSC) submitted a comprehensive two volume "Claim for Breach," which contained more than 162 pages of narrative and 49 exhibits. All of this was improperly certified with a "Certificate of Current Cost or Pricing." Upon examination of the claim, the contracting officer notified DSC that it needed to correct the certificate,[457] and he then set the projected date for issuance of the final decision for the following July, or nine months afterward. DSC took exception to this response and appealed, filing a ninety-seven page complaint. The Army fired back with a motion to dismiss the appeal as premature and supported the motion with an affidavit from the contracting officer which detailed the reasons for the extended time frame.[458] Viewing the mass of information and dollar value of this claim, the board quickly concluded that the contracting officer's position was eminently reasonable.[459]

Army Leaves the Claims Window of Opportunity "Unlached"[460]

Picture this. Back in March 1987, a German contractor files a claim for almost deutschemarks (DM) 130,000 for renovation work being done at Camp Pieri, Wiesbaden, Germany. Two months later, the Army replies that it is evaluating the claim and directs the contractor to perform additional work under the contract. The contractor subsequently increases its claim amount to more than DM 170,000. Unfortunately, the Army does not respond promptly. Indeed, after waiting two years, in February 1991, the contractor's counsel again requests a final decision or, in the alternative, a meeting with Army contracting officials. The two parties subsequently met in June 1991, but the claim is not resolved.

Here's the good part—for the next five years no further action is taken on the claim. Finally, in May 1996, the contractor appeals the "deemed denial" to the board. Even though little happened to the claim over the ensuing five years, the European landscape changed dramatically for the Army. The military has not seen an installation in Europe that it does not view as ripe for shutdown or dramatic downsizing. Facilities are closing, and people are retiring, transferring, or otherwise departing Europe. On top of all of that, files are being stored, destroyed, misplaced, and re-filed. All of the above actually happened to the claim here and the Army dutifully detailed this morass of events in its summary judgment motion, citing laches as the basis for disposing of this action.[461] Noting that the government's "hands are not clean since it contributed to the . . . delay," the board concluded that the Army had failed to prove that it was prejudiced by the late appeal and denied the motion.[462]

Federal Circuit Affirms Prospective Application of

452. *Id.* at 856. The clause provided that a fee-determining officer would unilaterally make the award fee decision; this decision was not subject to the Disputes Clause contained in the contract.

453. *Id.* at 858.

454. *Id.* at 859.

455. 41 U.S.C. § 605(c) (1994); FAR, *supra* note 22, at 33.211.

456. ASBCA No. 50534, 97-2 BCA ¶ 28,981.

457. A contracting officer has no obligation to render a final decision in response to a claim with a defective certification if the contracting officer informs the contractor of the defect within 60 days of receiving the claim. FAR, *supra* note 22, at 33.211(e).

458. The contracting officer noted, in part, that because of the "serious allegations" and "large amount of money" claimed, requiring a final decision any earlier "would seriously jeopardize the government's ability to address each issue raised by DSC." *Defense Sys. Co.*, 97-2 BCA ¶ 28,981 at 144,326.

459. The board also informed DSC that if the Army failed to issue its final decision by the established date, the contractor could view the failure as a "deemed denial" and resubmit its appeal. *Id.* at 144,326-27.

460. Anlagen und Sanierungstechnik GmbH, ASBCA No. 49869, 97-2 BCA ¶ 29,168.

461. In an affidavit accompanying its motion, the Army noted that: the regional contracting office responsible for administering the contract had closed in 1991; it could not locate former employees with first-hand knowledge of the claim; and, in all likelihood, the contract files relevant to the claim were destroyed. *Id.* at 145,034.

462. *Id.* at 145,034-35.

Six-Year Statute of Limitations

The Federal Acquisition Streamlining Act of 1994[463] (FASA) established a six-year statue of limitations for CDA claims. The Office of Federal Procurement Policy (OFPP) implemented this new time frame and provided that the six-year period would not apply to contracts awarded before 1 October 1995.[464] In reviewing an appeal involving a government defective pricing claim, the Federal Circuit affirmed the OFPP's implementation of this FASA provision and its prospective application to CDA contracts.[465]

ASBCA Declines to Sanction Navy for Loss of Documents

The appeal of *Hughes Aircraft Co.*[466] centered on a government claim that Hughes had provided defective pricing information which caused the Navy to overpay the contractor almost $258,000. Hughes claimed that it had provided the Navy with documentation which detailed its costs and which should have alerted the agency to the full extent of the repair costs, to include the alleged overpayment. During document discovery, the Navy notified Hughes that some of the documents requested by Hughes had been lost or destroyed. The Navy further stated that it had conducted numerous searches but could not locate the documents or explain their loss.

Contending that the documents lost by the Navy would exonerate Hughes, the contractor requested that the board sanction the agency and dismiss the appeal. The board has the "inherent power to impose sanctions for discovery abuses," but it noted that it examines the "reasonableness of a party's failure to comply voluntarily in the appeal process."[467] In this instance, despite the fact that the lost documents were material to the dispute, the board could find no evidence of malfeasance on the part of the Navy. Consequently, the board ruled that it would, at most, "draw adverse inferences on a fact specific basis" as appropriate.[468]

Exercising Independent Judgment—Contracting Officers Must Separate the Wheat from the Chaff

To what extent can a contracting officer rely on the statements of others when rendering his final decision? Although the FAR encourages the contracting officer to seek guidance from others before issuing his final decision, he must ensure that, whatever the circumstances, he bases his actions on his independent, personal judgment.[469]

In *PLB Grain Storage Corp. v. Glickman*,[470] the contractor argued that the contracting officer failed to exercise adequate independent judgment in issuing a termination for default in a grain storage contract with the Department of Agriculture. A panel of government officials instructed the contracting officer to terminate the contract. The contracting officer reviewed the panel's draft termination order, discussed the directive with panel members and others within the agency, and made a number of revisions to the proposed termination document. Only after taking these investigative actions did the contracting officer issue his final decision to terminate the contract.

In an opinion designated as non-precedential, the Federal Circuit concluded that even though the contracting officer "was not the primary decision maker and had little or no role in actually preparing the decision," the steps taken by the contracting officer to investigate and to review the panel's directive reflected the independent judgment necessary to render a "legally effective" final decision.[471]

The board came to a similar conclusion in *Prism Construction Co.*[472] The appellant challenged the efficacy of a contracting officer's final decision six days into a projected fourteen day hearing—more than five years after the contracting officer made his determination. Prism contended that the contracting officer's failure to evaluate independently or to verify the facts underlying the dispute rendered the final decision fatally deficient.

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463. Pub. L. No. 103-355, § 2351, 108 Stat. 3243, 3322 (1994) (amending 41 U.S.C. § 605).

464. *See* FAR, *supra* note 22, at 33.206.

465. *See* Motorola, Inc. v. West, No. 97-1098, 1997 WL 576502 (Fed. Cir. Sept. 18, 1997).

466. ASBCA No. 46321, 97-1 BCA ¶ 28,972.

467. *Id.* at 144,272.

468. *Id.* at 144,273. In fact, the board also observed that Hughes did not have a "system in place to record what data had been provided to the government during negotiations." *Id.* at 144,286.

469. In rendering a final decision, the FAR requires contracting officers to seek assistance from "legal and other advisors." FAR, *supra* note 22, at 33.211(a)(2).

470. 113 F.3d 1257 (Fed. Cir. 1997).

471. *Id*.

472. ASBCA No. 44682, 97-1 BCA ¶ 28,909.

The board found that the contracting officer reviewed the documents surrounding the contractor's claims and the ROICC's[473] position on the claims. Although the contracting officer could not specifically recall what documents he had reviewed, he admitted that he did not attempt to verify independently any of the facts the ROICC and other officials provided him because these individuals had the necessary first-hand knowledge regarding the appellant's performance. The contracting officer also testified that he issued his final decision after reviewing the ROICC's documents and position on the claims, which the contracting officer found to be persuasive. The board concluded that there is "no requirement that a contracting officer independently investigate the facts of a claim," only that the contracting officer exercise his independent judgment in reviewing the facts prior to rendering his final decision. Under these circumstances, the contracting officer exercised the necessary independent judgment in deciding Prism's claims.[474]

Engineers Board Finds REA for Unincurred Costs Constitutes CDA Claim

At issue in *J.S. Alberici Construction Co.*[475] was a dispute involving a differing site conditions claim for more than $6 million. The contract with the Army Corps of Engineers required the contractor to perform considerable construction work on the Melvin Price Locks and Dam project on the Upper Mississippi River. The contractor encountered rock obstructions which it contended were differing site conditions and increased the cost of contract performance. At the time the contractor submitted its request for equitable adjustment (REA), however, it had not yet incurred all of its costs. Hence, the final amount was certain to change. The Corps of Engineers and the contractor subsequently resolved the $6 million claim, but the contractor later contended that it was entitled to almost $880,000 in interest associated with its claim. The Corps argued that since the contractor had not yet incurred all of its costs at the time the REA was submitted, there could be no "sum certain."[476] Without a "sum certain," the Corps contended, there could be no CDA claim.

The Engineers Board rejected the Corps' position, pointing out that a "'sum certain' need not remain fixed throughout the claims process, so long as the information provided to the government is accurate to the extent possible, and provides adequate notice of a monetary claim against the government to permit adjudication."[477] The board concluded that the legislative history behind the CDA supports the position that contractors should be encouraged to submit claims as early as possible. Given this backdrop, a contractor need not wait until it has incurred all claimed costs before filing its REA, thereby triggering the CDA interest clock.

Federal Circuit Encourages Attorney Bragging Rights, or Gaffny's Gaff Doesn't Pay Off After All[478]

A couple of years ago, the board issued a controversial decision regarding the applicability of the Equal Access to Justice Act (EAJA).[479] At issue was an appeal by Gaffny Corporation against the Navy.[480] The firm was represented by its vice president, Mr. Michael Gaffny, who generally signed all submissions to the board as "Vice President" or "Attorney Pro Se." Indeed, Mr. Gaffny submitted his firm's post-hearing brief, with the *nom de plume* of "Attorney Pro Se." After granting the appeal, the board approved Mr. Gaffny's EAJA application for compensation of attorney fees.

The facts of the case reveal that at some point in time following his initial appeal to the board, Mr. Gaffny had entered the practice of law. Apparently, however, Mr. Gaffny did not think much of his achievement because, but for two minor submissions which were signed "Michael Gaffny, Esq.," the record contained no evidence that the appellant was represented by a licensed attorney.[481] In a nonprecedential opinion, the Federal Circuit observed that "the addition of three letters following his

473. Responsible Officer-In-Charge of Construction.

474. Judge Watkins dissented from the five-judge opinion, arguing that the contracting officer "merely paraphrased the ROICC's memorandum." *Prism Constr. Co.*, 97-1 BCA ¶ 28,909, at 144,125. The dissent would remand the appeal back to the contracting officer for a proper final decision which reflected the contracting officer's independent judgment on the claims. *Id.*

475. ENGBCA No. 6179, 97-1 BCA ¶ 28,639, *recon. denied*, ENGBCA No. 6179-R, 97-1 BCA ¶ 28,919.

476. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. Essex Electro Eng'r, Inc. v. United States, 22 Cl. Ct. 757, *aff'd* 960 F.2d 1576, (Fed. Cir.), *cert. denied*, 113 S. Ct. 408 (1992) (submission of cost proposals for work under consideration did not seek a sum certain as a matter of right); *but see* Fairchild Indus., ASBCA No. 46197, 95-1 BCA ¶ 27,594 (claim for costs not yet incurred, but based upon estimates, deemed to be a sum certain). *See also* East West Research, Inc., ASBCA No. 35401, 88-3 BCA ¶ 29,931 (request for future savings under VECP was a "sum certain").

477. *J.S. Alberici Constr. Co.*, 97-1 BCA ¶ 28,639, at 143,008 (citing Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987)).

478. Dalton v. Gaffny Corp., 108 F.3d 1391 (Fed. Cir. 1997) *rev'g* Gaffny Corp., ASBCA No. 39740, 96-1 BCA ¶ 28,060. *See also 1996 Year In Review*, *supra* note 9, at 81.

479. 5 U.S.C. § 504 (1994).

480. *Gaffny Corp.*, ASBCA No. 39740, 96-1 BCA ¶ 28,060.

signature did not provide adequate notice of . . . [Mr. Gaffny's] change in status." Consequently, the two letters signed by Mr. Gaffny represented little more than a "single evidentiary tile taken from a large, factual mosaic" that could not support the board's findings.[482] The lesson here: maybe lawyers have inflated opinions of themselves for a reason.

Equal Access to Justice Act (EAJA) [483]

ASBCA Takes a Dim View of Agency Counsel's Attitude. Following a favorable settlement of its appeals, Industrial Steel requested compensation of fees under the EAJA.[484] Although conceding that the appellant was a "prevailing party," government counsel contended that the application for fees was untimely. Under the EAJA, the appellant must submit its request for compensation within thirty days of final disposition.[485] Apparently, the appellant had submitted its EAJA request to agency counsel, not to the board. Asked why the request was not forwarded to the board, agency counsel argued that "[t]here should be no expectation of assistance from opposing trial counsel in any adversarial adjudication or proceeding."[486] Noting that it had previously upheld as timely an EAJA request initially submitted to a contracting officer, the board extended this approach to cover otherwise timely submissions to agency counsel.[487]

EAJA Argument Flushed Away by Withdrawal of Settlement Offer. In *Bildon, Inc.*,[488] the appellant partially prevailed in a dispute over bathroom floor tile work, a new lavatory, and the propriety of liquidated damages assessed by the government. Bildon initially submitted a claim for increased costs associated with the bathroom work. In reply, the contracting officer issued a final decision which offered "to settle" the claim and also to delete $10,000 of liquidated damages the government was about to assess against the appellant. When the contractor appealed the final decision, the contracting officer withdrew his "settlement offer" and supplemented his final decision by assessing more than $12,000 in liquidated damages against Bildon. Although Bildon prevailed on part of its appeal, the amount it actually recovered was less than that offered in the contracting officer's original final decision. Given this result, the government argued that any compensation of fees under the EAJA was unreasonable. The board disagreed, noting that the contracting officer had rescinded his "offer" merely because the contractor appealed the initial final decision. Under such circumstances, the contracting officer did not make a "bona fide settlement offer," and the appellant's prosecution of the appeals was not only reasonable but appropriate.[489]

SPECIAL TOPICS

NAF Contracting

NAF Contracting Officer Warrants Subject to Lower Dollar Limitations

A 1995 change to Army Regulations raised the dollar limitations for NAF contracting officers from $25,000 to $100,000 for supplies, services, and construction.[490] Unfortunately, the change has expired. For the time being, NAF contracting officers are subject to the lower limitations. The Community and Family Support Center (CFSC) is actively seeking to have this inadvertent regulatory lapse corrected.

Good for the Goose, but Not for the Gander

The GAO takes jurisdiction over protests of NAF contracts when the contracts are handled by appropriated fund contracting officers.[491] Protest jurisdiction in the GAO does not, however, subject the contract to other statutory provisions. When reviewing protests of NAF contracts, the GAO seeks to determine whether the agency acted reasonably.

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481. *Dalton*, 108 F.3d at 1391.

482. *Id.*

483. 5 U.S.C. § 504.

484. Industrial Steel, Inc., ASBCA Nos. 49632, 49633, 97-1 BCA ¶ 28,979.

485. 5 U.S.C. § 504(a)(2).

486. The board also noted that, given his "no expectation of assistance" attitude, agency counsel never informed appellant of its error and never intended to forward the claim. *Industrial Steel*, 97-1 BCA ¶ 28,979, at 144,322.

487. *Id.* (citing Bristol Elecs. Corp., ASBCA No. 24792, 87-2 BCA ¶ 19,697) (otherwise timely submission of EAJA application to contracting officer valid).

488. ASBCA Nos. 46937, 47473, 97-2 BCA ¶ 29,101.

489. *Id.* at 144,835.

490. U.S. DEP'T OF ARMY, REG. 215-4, NONAPPROPRIATED FUND CONTRACTING (10 Sept. 1990) (IO1, 15 June 1995) [hereinafter AR 215-4].

491. Gina Morena Enter., B-224235, Feb. 5, 1987, 66 Comp. Gen. 231, 87-1 CPD ¶ 121.

In *F2M, Inc.*,[492] the board considered a request for an equitable adjustment due to a delay in issuance of the notice to proceed caused by a pending GAO protest. The board refused F2M's plea to read into the NAF contract the Protest After Award clause,[493] which would have entitled it to an equitable adjustment. The board noted that the clause is required by regulation when a NAF contract will be handled by an appropriated fund contracting officer.[494] The board found no statutory authority, however, for promulgation of the NAF contracting regulation. Nevertheless, the board refused to leave the contractor without a remedy for the delay caused by a GAO protest. Regardless of the GAO's assertion of jurisdiction pursuant to CICA, the board found the CICA stay provisions inapplicable for the government's assertion of the sovereign acts defense. The board articulated no cogent reason for failing to follow its own precedent, which deemed the CICA stay a sovereign act which barred contractor recovery in the absence of the Protest After Award Clause.[495]

The Buck Stops at the Board of Contract Appeals

In *Strand Hunt Construction, Inc. v. West*,[496] the Court of Appeals for the Federal Circuit declined to take jurisdiction over an appeal of a claim against a NAFI. The Federal Circuit's appellate jurisdiction over boards of contract appeals claims arises from the Contract Disputes Act (CDA). The board's consideration of claims against NAFIs, however, stems from regulation, not from the CDA. In dismissing the appeal, the court followed its own precedent from *McDonald's Corp. v. United States*.[497] The court rejected appellant's argument that its demand for an equitable adjustment was distinguishable from the issue in *McDonald's*, which involved the scope of the Tucker Act's waiver of sovereign immunity for suits against military exchanges. The court found *McDonald's* directly relevant for determining the scope of the CDA's application to contracts involving NAFIs. Furthermore, the court chided Strand Hunt for attempting to shift the burden of establishing subject matter jurisdiction to the government through a waiver of sovereign immunity.

Government-Furnished Property

Not All Government Property Furnished to a Contractor is "Government Furnished Property"

When the government furnishes property to a contractor for the contractor's convenience and the contract does not identify the property as "Government Furnished Property," the government will not be liable under the GFP clauses.[498] In *Hunter Manufacturing Co.*,[499] the contract stated that the government would provide an engine to the contractor as GFP only if the government ordered items under a specified CLIN. Although the government never ordered any items under the specified CLIN, the contractor requested the engine "for demonstration purposes," and the government furnished the engine for the contractor's convenience. The contractor alleged that the government furnished the engine so late that it impacted the performance schedule, and the contractor submitted a claim for delay costs. The board denied the subsequent appeal because the government had no obligation to provide the engine as GFP. Accordingly, the government was not obligated to furnish the engine within any particular time or in a suitable condition.

Unauthorized Retention of GFP Creates Rental Liability

On 21 January 1993, a contracting officer directed a contractor to ship GFP test equipment to another contractor's facility. The contractor refused, contending that it needed the property to meet scheduled commitments on other contracts. After much discussion, the contractor finally shipped the property on 18 May 1995. The contracting officer issued a decision which assessed $305,040 for the rental value of the GFP improperly retained. The contractor appealed, contending that the contracting officer's revocation of authority to use the GFP was improper because the contractor's use was not interfering with any of the contracting officer's contracts.

In *Astronautics Corp. of America*,[500] the board granted the government's motion for summary judgment, noting that the

492. ASBCA No. 49719, 97-1 BCA ¶ 28,982.

493. *See* G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Cl. Ct. 1963).

494. *See* AR 215-4, *supra* note 490, para. 4-40a(2).

495. *See, e.g.*, Tempo, Inc., ASBCA Nos. 37589, 37681, 38576, 95-2 BCA ¶ 27,618; Port Arthur Towing Co., Inc., ASBCA No. 37516, 90-2 BCA ¶ 22,857.

496. 111 F.3d 142 (Fed. Cir. 1997).

497. 926 F.2d 1126 (Fed. Cir. 1991); s*ee also* Maitland Bros. v. Widnall, No. 94-1107, 1994 U.S. App. LEXIS 33097 (Fed. Cir. Nov. 21, 1994) (nonprecedential opinion).

498. FAR, *supra* note 22, at 52.245-2, 52.245-5.

499. ASBCA No. 48693, 97-1 BCA ¶ 28,824.

500. ASBCA No. 48190, 97-1 BCA ¶ 28,978.

appellant cited no authority for the proposition that the contractor's use of the property must interfere with the government's use in order for the revocation to be effective. We are aware of no such authority.

When is GFP "Unsuitable"?

To recover under the GFP clauses, the contractor must establish that the government furnished the property as "GFP", the property was unsuitable for its intended purpose; and that unsuitability was the proximate cause of the contractor's injury.[501] In *E-Systems, Inc.*,[502] the government provided a variety of reference documents in the bidders' library, including a report stating that a particular power converter was "ideally suited" for systems similar to that which the awardee was to deliver. E-Systems used the specified converter but experienced integration and performance problems and submitted a claim for its increased costs. On appeal the board determined that the report, and not the recommended converter, was the GFP identified in the contract. It next determined that the intended use for the GFP report was as a reference document and that it was suitable for that purpose. In denying the claim, the board observed that contractors do "not have an unfettered right to rely on information furnished as GFP.

An Analysis of the Proposed FAR Part 45 Rewrite

On 2 June 1997, the rewrite of Part 45 of the FAR was issued as a proposed rule.[503] The proposed rule eliminates many of the administratively burdensome provisions of the current rule and greatly streamlines the processes by which the government and its contractors transfer, account for, and dispose of government-furnished property (GFP). The most notable changes follow:

Definitions. Paragraph 45.001 of the proposed rule would consolidate the definitions currently included under four paragraphs, 45.101, 45.301, 45.501, and 45.601 and would simplify the entire FAR Part by eliminating twenty-six of the current definitions.[504] The definitions remaining in the proposed rule do not make substantive changes to their current counterparts and are comparatively unambiguous and concise.

Gratefully, the nearly incomprehensible definitions of "facilities" and "facilities contracts" would be eliminated, as would the associated facilities contracts clauses.[505] The FAR Council reasoned that most facilities contracts are contracts for services and would more appropriately be addressed in Part 37, Service Contracting.[506] Subpart 45.4, Property Management Contracts, is the only remaining section of Part 45 dealing specifically with contractor use of government-owned facilities. One criticism of the proposed rule, however, is that it does not clearly distinguish between bailments (e.g., when the contractor receives government property for storage, transport, or repair) and the furnishing of government property to facilitate performance of the contract (e.g., machine tools, equipment, material, etc.).

Policy. The proposed rule, 45.201-1(a), would greatly simplify the criteria that contracting officers should use in determining whether to provide GFP. Unlike the current rule, in which the policies on providing GFP are scattered throughout Part 45,[507] the proposed rule enumerates the nine common-sense criteria that a contracting officer must consider before authorizing contractor use of GFP.[508] Examples include circumstances in which the government is the only source of the property, the government expects substantial cost savings by providing GFP, the property will be used as a model or standard, or the property must be provided to meet an unusual and compelling urgency.

Perhaps in response to thirty years of criticism concerning the willingness with which agencies furnish readily available commercial items to contractors as GFP, the proposed rule states that "[a]gencies *shall not* direct, require, or specify for contract performance the use of specific commercially available items or software."[509] Compliance with this requirement alone would greatly reduce the needless administrative burdens associated with performing property management functions for millions of items of government-furnished office equipment, tools, and raw materials.

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501. *See* Steven N. Tomanelli, *Rights and Obligations Concerning Government-Furnished Property,* PUB. CONT. L.J. 413 (Spring 1995).

502. ASBCA No. 46111, 97-1 BCA ¶ 28,975.

503. Federal Acquisition Regulation, Government Property, 62 Fed. Reg. 30,186 (1997).

504. *Id.* at 30,190.

505. *See* FAR, *supra* note 22, at 52.245-7 through 52.245-16.

506. 62 Fed. Reg. at 30,197.

507. *See* FAR, *supra* note 22, at 45.102, 45.302-1, 45.302-4, 45.303-1, 45.304, 45.306-1, 45.307-1, 45.308-1, 45.309, 45.310.

508. 62 Fed. Reg. at 30,192.

509. *Id.* at 30,191.

The proposed rule would also substantially restrict the availability of non-commercial GFP. For example, although an agency could furnish equipment to a contractor for repair or to support contingency contracting, it could not furnish equipment based only on the expectation of substantial cost savings.

Competitive Advantage. Under the proposed rule, agencies would still be required to eliminate, to the extent practicable, the competitive advantage created when less than all offerors have access to GFP.[510] As under the current rule, agencies would add a rental equivalent factor to the proposals of those offerors with access to GFP, but unlike the current rule, there is no alternative requirement to charge rent in those cases where using a rental equivalent factor is not practical.[511] The proposed rules concerning competitive advantage would be placed in Part 15, which is more appropriate since the application of adjustment factors is directly related to the conduct of source selections.[512] Although the Part 15 rewrite,[513] which predates the proposed Part 45 rewrite, does not include proposed rule 15.608 or an equivalent, one can assume that such a provision will eventually be incorporated.

Risk of Loss. The proposed rules generally maintain the current distinction between fixed-price contracts (under which the contractor is strictly liable for loss, damage, and destruction of GFP) and cost-reimbursement contracts (under which the government acts as self-insurer and the contractor is liable in very limited circumstances). However, the proposed rules would treat labor-hour contracts like fixed-price contracts for risk of loss purposes, rather than as cost-reimbursement contracts.[514] Thus, labor-hour contractors using GFP would be subjected to greater liability under the proposed rules.

Commercial Use of GFP.

The guidance addressing the circumstances in which a contracting officer could authorize commercial use of GFP would be greatly simplified under the proposed rule (45.202). The proposed rule consolidates and streamlines the guidance that is currently scattered haphazardly throughout Part 45.[515] Agencies may authorize commercial use of GFP in exchange for an equitable rental.[516] Agencies would presumably have to transfer this rental income to the U.S. Treasury as miscellaneous receipts, unless the rentals are taken as offsets to payments due under a particular contract in which the contractor is also using the GFP for government purposes.

Property Management. Property accountability problems have been the focus of many studies and investigations since the mid-1960's. Most recently, in a December 1996 letter to the National Security Industrial Association, Major General Robert F. Drewes, Commander of the Defense Contract Management Command, expressed his concern over the widespread property management problems in which poor record keeping and misclassification are common. The proposed rules emphasize the contractor's role in ensuring accountability by encouraging contracting officers to develop evaluation factors that consider the property management systems of offerors in negotiated source selections.[517] The proposed rule would also encourage agencies to rely on the property control systems that the contractor uses for its own property, rather than imposing a government-specified system.[518] Property control procedures would also be streamlined by requiring an accounting for property with an acquisition cost less than $1500 only upon contract completion or termination.[519] Since industry representatives estimate that eighty percent of GFP items have an acquisition cost of less than $1500, this procedure would eliminate a significant amount of non-value added expense and paperwork.

Comments to the proposed rule were due on or before 1 August 1997. Given the fact that the proposed rule was prepared by a multi-agency panel which considered approximately 500 comments, one could be cautiously optimistic that the final rule will contain few substantial changes from the proposed rule.

510. *Id.* at 30,193.

511. *Id.* at 30,188.

512. *Id.*

513. 62 Fed. Reg. 51,224 (1997).

514. 62 Fed. Reg. at 30,192.

515. *See* FAR, *supra* note 22, at 45.302-1(b)(3), 45.402(c), 45.406(c), 45.407.

516. 62 Fed. Reg. at 30,194.

517. *Id.* (proposed rule 45.301-1).

518. *Id.*

519. On 20 July 1997, the Director of Defense Procurement, Ms. Eleanor Spector, extended an existing class deviation that authorizes the same streamlined property control procedures contemplated by the proposed rule. The extension will last until 14 July 1998. *See* Memorandum from Director of Defense Procurement, to DOD Agencies, subject: Extension of Class Deviation (20 July 1997).

Payment and Collection

Prompt Payment Rules

On 17 March 1997, the FAR Council published a final rule concerning prompt payment requirements.[520] This final rule incorporated changes required by the Prompt Payment Act Amendments of 1988.[521] The Office of Management and Budget (OMB) implemented the statutory requirements by revising OMB Circular A-125.[522] The final rule amends the FAR to reflect the changes in the OMB circular. Although recently implemented by the final rule, the Prompt Payment Act Amendments required immediate procedure changes.

GAO Report Cites Failures of Government Payment Procedures

On 12 May 1997, the GAO issued a report[523] which criticized the DOD's payment and collection procedures. The report states that three factors contributed significantly to the problems and increased costs in the DOD's payment and collection process. The first factor listed by the report is the nonintegrated computer systems used by the DOD. These computer systems require manual entry of data that is often erroneous or incomplete. The second factor is the multitude of documents that contractors are required to submit. These documents must be matched before contractors are paid. The final factor listed in the report is that payments made to the contractor require allocation among numerous accounting categories.

The GAO recommended that the DOD increase its use of the International Merchant Purchase Authorization Card (IMPAC) for small purchases and eliminate the requirement to match payments to invoices if other controls are in place. The GAO also recommended that the DOD further examine the best practices of organizations that have reengineered their contract payment process.[524] These organizations have combined technical improvements with streamlined processes to improve service and to reduce cost.

Help Requested from DOD to Streamline Progress Payment Process

On 1 May 1997, Eleanor Spector, Director of DOD Procurement, invited industry and government personnel to provide suggestions on how to simplify and to streamline the process of requesting and paying progress payments.[525] Ms. Spector formed an interagency team to review and to rewrite the applicable FAR provisions.[526] The rewrite team will consider simplifying the progress payment process. Also under consideration are changes to the progress payment provisions which are necessary to include before performance-based payments and commercial financing payments to subcontractors can be included as part of a contractor's request for progress payments.

In a 10 June 1997 letter, the Council of Defense and Space Industry Associations (CODSIA) responded to Ms. Spector's challenge.[527] The CODSIA urged the government to eliminate the requirement for large businesses to pay their subcontractors before billing their progress payments request. The CODSIA stated that most large businesses pay their subcontractors within thirty days as is the accepted standard in the ordinary course of business. The CODSIA also criticized the DOD's lack of progress in implementing FASA's contract financing reforms, specifically in the area of commercial item financing and performance based payments. Finally, the CODSIA recommended the maximum progress payment be raised from seventy-five percent to at least eighty percent.

Defense Export Loan Guarantee Program

On 8 November 1996, the DOD issued guidance[528] which implemented the Defense Export Loan Guarantee (DELG)[529] program. Loan guarantees are available for the purchase or

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520. 62 Fed. Reg. 12,705 (1997).

521. Pub. L. No. 100-497, 100 Stat. 2455 (1988).

522. 59 Fed. Reg. 23,776 (1994).

523. *Contract Management: Fixing DOD's Payment Problems is Imperative*, GAO/NSIAD-97-37 (1997).

524. *Id*. The report recommended visiting Electronic Data Systems, Boeing Co., ITT Automotive, and the University of California at Berkeley.

525. 62 Fed. Reg. 23,740 (1997).

526. FAR, *supra* note 22, subpt. 32.5 (Progress Payments Based on Costs); *id.* at 52.232-16 (Progress Payments).

527. *Progress Payments: Defense Group Urges Dropping Paid Cost Rule in Progress Payment Reform Initiative*, 67 FED. CONT. REP. 24 (BNA) (1997).

528. 61 Fed. Reg. 57,853 (1996).

529. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996).

lease of United States defense articles, services, or design and construction services. Eligible recipients are NATO members, major non-NATO allies, emerging Eastern Europe democracies, and Asia-Pacific Economic Cooperation countries. The program's purpose is to meet national security objectives by encouraging standardization and interoperability of defense systems with allied nations, thereby lowering purchase costs of defense items, preserving critical defense skills, and maintaining the industrial base.

DCAA Audit Guidance Concerning Submission of Interim Vouchers

On 8 May 1997, the DCAA issued audit guidance[530] allowing all Defense Finance and Accounting paying offices to accept interim vouchers submitted by contractors that have adequate billing cycle internal controls. These are contract financing payments and do not require receiving reports prior to payment. Even though there is no actual receipt and acceptance of any product or service, the certification of the contractor's billing system provides the basis for provisional acceptance of the contractor's interim vouchers for payment.

Defective Pricing

Regulatory Changes

Final FAR Rule—Truth in Negotiations Act Regulations Revisited. On 2 January 1997, the FAR Council issued a final rule[531] amending the FAR to implement the various changes to the Truth in Negations Act (TINA)[532] under the Clinger-Cohen Act of 1996.[533] First, the new rule simplifies the process for obtaining a TINA exception for commercial items by eliminating the distinction between catalog or market-priced commercial items and all other items.[534] Second, it eliminates the subordination of the commercial item exception to the traditional exceptions of adequate price competition, catalog or market-priced commercial items, or prices set by law or regulation.[535] Essentially, this means that a contracting officer shall not require the submission of cost or pricing data for the procurement of commercial items. So long as the item sought constitutes a "commercial item," a lack of information relating to price competition or catalog or market pricing shall have no bearing on the applicability of this exception. Third, the new rule eliminates the criteria established by FASA for the commercial item exception and deletes the authority to obtain cost or pricing data for commercial item acquisitions when the criteria is not met.[536] Fourth, it eliminated the clause for the post-award audit of information submitted to support the pricing of commercial item contracts.[537]

Final DFARS Rule—Cost or Pricing Data. On 29 July 1997, the Director of Defense Procurement issued a final rule amending the DFARS to conform to the FAR pertaining to cost or pricing data requirements.[538] The primary change occurred in DFARS 215.804-1. The final rule sets out the standards for the exceptions to submission of cost or pricing data. Additionally, the amendment removed DFARS 215.801, the definition of cost realism analysis.

Interim DFARS Rule—Certification of Requests for Equitable Adjustment. On 11 July 1997, the Director of Defense Procurement issued an interim rule requiring contractors to certify their requests for equitable adjustment exceeding the simplified acquisition threshold.[539] The rule requires contractors to certify that its claims are made in good faith and are supported by accurate and complete data. Small businesses will likely suffer most from the impact of this rule, because the majority of the claims between $100,000 and $500,000[540] come from small businesses.[541]

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530. *DOD: DCAA Expands Program Allowing Direct Submission of Interim Vouchers by Eligible Contractors*, 67 FED. CONT. REP. 22 (BNA) (1997).

531. 62 Fed. Reg. 257 (1997).

532. 10 U.S.C.A. § 2306a (West 1997); 41 U.S.C.A. § 254(d) (West 1997).

533. Pub. L. No. 104-106, 110 Stat. 186 (1996).

534. FAR, *supra* note 22, at 15.804-1.

535. *Id.* at 15.804-1(b)(3).

536. *Id.* at 15.804-2.

537. *Id.* at 15.106.

538. 62 Fed. Reg. 40,471 (1997).

539. *Id.* at 37,146 (1997).

540. FAR, *supra* note 22, at 15.8042(a)(1). This is the threshold for obtaining cost or pricing data.

541. Approximately 88 percent. 62 Fed. Reg. at 37,146.

Price Reduction for Defective Pricing Data Clause

Christian Doctrine Applied. In *University of California, San Francisco*,[542] the Veterans Affairs Board of Contract Appeals declared that the standard "Price Reduction for Defective Cost or Pricing Data" clause is a mandatory contract clause that expresses a significant or "deeply ingrained strand of public procurement policy."[543] Here, the VA awarded a services contract to the UCSF for anesthesiologist services. The contract required UCSF to provide the VA with certified cost or pricing data under FAR 15.804-4, but the contract did not include the "Price Reduction for Defective Cost or Pricing Data" clause.[544] When the issue of defective cost or pricing data was identified by the VA Inspector General, the VA demanded repayment of $169,400. The UCSF refused and stated that the recovery is prohibited because the contract did not incorporate the "Price Reduction for Defective Cost or Pricing Data" clause.[545]

The board disagreed with the UCSF's arguments and applied the holding of *Christian & Associates v. United States*.[546] In *Christian*, the court ruled that if a termination for convenience clause (mandatory clause) is omitted from the contract, it will be read into the contract by operation of law.[547] Here, the board applied the same logic and found that the defective pricing clause is a mandatory clause required by the TINA.[548] Similarly, the board found that the TINA, enacted almost thirty-five years ago, required the government to include the defective pricing clause into the contract. The board applied the *Christian Doctrine* and incorporated the defective pricing clause into the contract. The board concluded by holding that the "Price Reduction for Defective Cost or Pricing Data" clause is a mandatory clause under the TINA "that expresses a significant or deeply ingrained strand of public procurement policy."[549]

Government Barred by Collateral Estoppel. In 1995, the board held that Lockheed Corp. (Lockheed) did not have to disclose labor planning information as cost or pricing data under the TINA.[550] This decision provided a "number of benchmarks for determining when management decisions rise to the level of cost or pricing data."[551]

Two years later, the Air Force again claimed that Lockheed provided defective cost or pricing data in its C-130 aircraft contract.[552] *Lockheed II* involved the question of whether Lockheed's internal plans for collective bargaining were cost or pricing data required to be disclosed under the TINA.[553] When the board concluded that the issue presented in *Lockheed II* was identical to the issues presented in *Lockheed I*, the board ruled that the doctrine of collateral estoppel applied in *Lockheed II*.[554] The issue presented in both cases dealt with the same alleged cost or pricing data—whether the labor planing information was cost or pricing data under TINA.[555] The board concluded by stating that the application of this doctrine in *Lockheed II* precluded the Air Force from relitigating the same issue.[556]

542. VABCA No. 4661, 97-1 BCA ¶ 28,642.

543. *Id.* at 143,069

544. FAR, *supra* note 22, at 52.215-22.

545. *University of California, San Francisco*, 97-1 BCA ¶ 28,642 at 143,057.

546. 312 F.2d 418 (Ct. Cl. 1963), *reh'g. denied*, 320 F.2d 345 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1964).

547. *Id*. at 427.

548. 41 U.S.C.A. § 254(d) (West 1997); FAR, *supra* note 22, at 15.808(a).

549. *University of California, San Francisco*, 97-1 BCA ¶ 28,642 at 143,057.

550. Lockheed Corp., ASBCA No. 36420, 95-2 BCA ¶ 27,722 (Lockheed I).

551. *See 1995 Year in Review*, *supra* note 2, at 64. In *Lockheed I*, the ASBCA identified "two principles for identifying management decisions that constitute pricing data. First, there must be a substantial relationship between the decision and the cost element at issue. Second, the decision must have been made at a level of management which had the authority to affect the relevant cost element." *Id*.

552. Lockheed Corp., ASBCA No. 37944, 97-1 BCA ¶ 28,757 (Lockheed II).

553. *Id*. This was essentially the same issue that the board decided in favor of the contractor in *Lockheed I*.

554. The court applied four criteria to determine whether collateral estoppel is applicable: (1) the issue to be decided is identical to one decided in the first case; (2) the issue was actually litigated in the first case; (3) resolution of the issue was essential to a final judgment in the first case; and (4) the parties had a full and fair opportunity to litigate the issue in the first case. *See* Arkla, Inc. v. United States, 37 F.3d 621 (Fed. Cir. 1994).

555. 97-1 BCA ¶ 28,757 at 143,518.

556. *Id.* at 143,520-21.

Cost and Cost Accounting

Cost Principles

Environmental Cost Principle Now a Hazardous Waste. By memorandum dated 8 May 1997, Eleanor Spector, Director of Defense Procurement, recommended closing the FAR case regarding the feasibility of an environmental cost principle.[557] The proposed cost principle governed the allowability of a contractor's cleanup and other related costs. According to Ms. Spector, the DOD will continue to evaluate the allowability of these costs in accordance with the existing FAR and DFARS cost principles.[558]

Local Government Lobbying Costs Are Now Unallowable. The FAR Council agreed to an interim rule to amend the FAR to make the cost of lobbying activities to influence local legislation allowable only under certain circumstances.[559] If the lobbying activities directly reduce contract costs or avoid material impairment of the contractor's authority to perform the contract, they may be allowable.[560]

The FASA[561] added the costs of lobbying the legislative body of a political subdivision of a state to the list of unallowable costs.[562] Accordingly, FAR 31.205-22(b) was revised to make the costs associated with any attempt to influence local legislation unallowable.[563] FAR 31.205-22(b) contains a list of activities exempted from the provisions at FAR 31.205-22(a). Included in the exempted activities are lobbying activities to influence state legislation in order to directly reduce contract costs or to avoid material impairment of the contractor's authority to perform the contract. The interim rule amends FAR 31.205-22(b)(2) to treat lobbying activities to influence local legislation in a manner consistent with the treatment of lobbying activities to influence state legislation.

DFARS Supplement Restructuring Costs. The Director of Defense Procurement issued an interim DFARS rule[564] on 6 December 1996 to implement provisions of the National Defense Authorization Act for Fiscal Year 1997[565] concerning the reimbursement of external restructuring costs associated with a business combination.[566] The Authorization Act restricted the DOD from using 1997 funds to reimburse these costs by a defense contractor unless certain conditions are met.[567]

Foreign Differential Pay. By interim rule[568] dated 31 December 1996, the Far Council amended FAR 31.205-6[569] by deleting the prohibition on the calculation of foreign differential pay[570] based directly on an employee's specific increase in income taxes resulting from assignment overseas. Currently, FAR 31.205-6 prohibits contractors from calculating any increased compensation for foreign overseas differential pay on the basis of any employee's specific increase in income taxes resulting from foreign assignment. This prohibition was

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557. *Allowable Costs: Environmental Cost Principle Cleared for Issuance as a Proposed Rule*, 58 FED. CONT. REP. 7 (BNA) (1992).

558. *Environmental Cleanup: DOD Closes FAR Case on Allowability of Contractor Cleanup Costs*, 67 FED. CONT. REP. 19 (BNA) (1997).

559. FAR, *supra* note 22, at 31.205-22(b)(2).

560. 61 Fed. Reg. 67,424 (1996).

561. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

562. 10 U.S.C. § 2324(e)(1) (1994); 41 U.S.C. § 256 (1994).

563. 60 Fed. Reg. 42,659 (1995).

564. DFARS, *supra* note 52, at 231.205-70 (1996).

565. Pub. L. No. 104-208, § 8115, 110 Stat. 3009 (1996).

566. Business combinations occur when the assets or operations of two previously separate companies are combined, whether by merger, acquisition, or sale and purchase of assets. DFARS, *supra* note 52, at 231.205-70(b)(1).

567. *Id*. These conditions include either (1) the audited savings for the DOD resulting from the restructuring will be at least twice the cost or (2) the savings for the DOD will exceed the costs allowed and the Secretary of Defense determines that the business combination will result in the preservation of a critical capability that might otherwise be lost to the DOD. *Id*.

568. 61 Fed. Reg. 69,294 (1996).

569. FAR, *supra* note 22, at 31.205-6 (Compensation for Personal Services).

570. When personal services are performed in a foreign country, compensation may also include a cost differential. The cost differential may properly consider all expenses associated with foreign employment, such as housing; cost of living adjustments; transportation; bonuses; additional federal, state, local, or foreign income taxes resulting from foreign assignment; and other related expenses. *Id*. at 31.205-6.

intended to prevent a conflict with the FAR policy that federal income taxes are unallowable costs.[571] Conversely, FAR 31.205-6(e)(1) explicitly states that contractors may properly consider increased federal income taxes in the allowable foreign differential pay provided employees assigned overseas.

This interim rule was published without public comment.[572] The interim rule was necessary because FAR 31.205-6 imposes unnecessary administrative and accounting requirements, and it prohibits contractors from calculating differential pay on the basis of an employee's specific increase in income taxes resulting from overseas assignment. Instead, the contractor must employ an alternate, less accurate approach, that may result in an employee being under or over compensated.[573]

Automatic Data Processing Equipment Leasing Cost. On 31 December 1996, the FAR Council published an interim rule.[574] It deletes the definition of automatic data processing equipment (ADPE) and the cost principle from the FAR.[575] The FAR Council stated in the interim rule that the cost principle concerning ADPE leasing costs was implemented when ADPE was an emerging technology and was a substantial cost element on government contracts.[576] The FAR Council went on to state that with these early computers, the hardware constituted a major expense which justified the detailed scrutiny under the cost principle. In today's technological environment, the continued application of FAR 31.205-2 is no longer appropriate and is an unnecessary accounting and administrative burden on contractors. FAR 31.205-36, Rental Costs, adequately protects the government's interests. The interim rule deletes FAR 31.205-2, the ADPE definition found at FAR 31.001, and all references to ADPE found in Part 31.

On 3 March 1997, the Director of Defense Procurement issued an interim DFARS rule,[577] amending the DFARS[578] to remove any references to the obsolete FAR cost principle pertaining to ADPE leasing costs.[579]

Allowability of Foreign Selling Costs. A final rule[580] amending the FAR[581] was published by the FAR Council on 17 March 1997. The final rule removes the ceiling on allowable foreign selling costs. The rule also revises FAR 31.205-1 by deleting any references to the ceiling limitation.

The proposed rule[582] was published on 20 June 1996. The proposed rule retained an allowability ceiling but increased the threshold from $2.5 million to $5 million. The final rule removes the ceiling on allowable foreign selling costs in lieu of the proposed rule's doubling of the present threshold.[583] Additionally, the elimination of the ceiling promotes the government's policy of stimulating the export of U.S. products.[584] FAR 31.205-38 now reads:

> [T]he costs of broadly targeted and direct selling efforts and market planning other than long-range, that are incurred in connection with a significant effort to promote export sales of products normally sold to the U.S. government, including the costs of exhibiting and demonstrating such products, are allowable on contracts with the U.S. government provided the costs are allocable, reasonable, and otherwise allowable.[585]

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571. *Id.* at 31.205-41(b)(1).

572. If urgent and compelling reasons exist, the Secretary of Defense, in concert with the Administrator of General Services and the NASA Administrator, may publish an interim rule prior to comment by the public. 41 U.S.C.A. § 418b (West 1997).

573. *Id*. The interim rule reads "differential allowances for additional Federal, State, or local income taxes resulting from domestic assignments are unallowable." *Id*.

574. 61 Fed. Reg. 69,287 (1996).

575. FAR, *supra* note 22, at 31.205-2.

576. *Id*.

577. 62 Fed. Reg. 9,375 (1997).

578. DFARS, *supra* note 52, at 239.7300, 239.7301, 239.7303, 239.7304, 239.7305, Table 39-1.

579. *Id*.

580. 62 Fed. Reg. at 12,703.

581. *See* FAR, *supra* note 22, at 31.205-38(c)(2), 31.205-1.

582. 61 Fed. Reg. 31,800 (1996).

583. The final rule achieves a greater reduction in the administrative burden on contractors than that which would result from retaining the ceiling at the doubled rate.

584. 62 Fed. Reg. at 12,703.

Interest Paid on Tax Underpayment is Allowable Cost. The Federal Circuit held that interest on a contractor's state tax assessment was not "interest on borrowings" within the meaning of the Defense Acquisition Regulation (DAR),[586] which disallows interest on borrowings.[587]

Lockheed timely filed its federal and state income taxes in 1973 and 1974 and paid its tax liability in full. In 1982, the IRS audited these returns and disallowed several deductions, resulting in greater liability. No additional taxes were due, because Lockheed had net operating losses that were carried over into those years. Unfortunately for Lockheed, the State of California did not allow those losses to be carried over and assessed additional state tax liability. Lockheed allocated the additional state tax and interest in accordance with its accounting practices. In 1982, two business segments were no longer in existence. In response, Lockheed included the amount that would have been allocated to those business segments in its residual expense pool. The contracting officer challenged the allowability of the interest on the additional state taxes, stating that it was an unallowable expense under DAR § 15-205.17. The contracting officer chose two contracts as test vehicles and issued a final decision disallowing the costs. Lockheed appealed to the board. The board upheld the contracting officer's decision, stating that the costs were unallowable because of DAR 15-205-17. The case was appealed to the Federal Circuit.

In reversing the board, the Federal Circuit ruled that interest on a defense contractor's state tax assessment was not interest on borrowings within the definition of DAR § 15-205-17. The contractor filed its tax returns in good faith, did not intend to underpay its taxes, and did not attempt to obtain capital or to finance its operations.

Cost Principle Rules Not Waived by Lack of Incorporation into the Contract. The board ruled[588] that a contractor may not recover interest on borrowings, even though the contract did not incorporate FAR 31.205-20.[589]

Superstaff was awarded a fixed price, indefinite quantity contract for shelf stocking and custodial work at the Walter Reed Commissary. It filed a claim with the contracting officer, asserting a demand for interest on borrowed money. The claim was denied, and the contractor appealed. The Army filed a motion for summary judgment which alleged that the cost principles were incorporated into the contract through the Pricing of Contract Modifications Clause.[590] The board, citing its decision in *Tomahawk Construction Co.*,[591] stated that the clause does make standard cost principles applicable to equitable price adjustment. Considering the plain language of the contract provisions and case law, the board concluded that interest on borrowed money is not allowable under Superstaff's contract.

Cost Accounting Standards

Allocation of Contractor Restructuring Costs. On 6 June 1997, the Cost Accounting Standards (CAS) Board interpreted a final rule designed to address period cost assignment and allocability criteria for restructuring costs incurred under certain defense contracts.[592] The National Defense Authorization Act for Fiscal Year 1995[593] restricted the DOD from reimbursing a contractor or subcontractor which decides to incur restructuring costs associated with a business combination, unless certain net savings provisions are met. Questions arose as to the methods to be used in measuring, assigning, and allocating such restructuring costs. The interpretation was designed to address those questions.

The CAS Board's interpretation clarifies whether restructuring costs are to be treated as an expense of the current period or as a deferred charge that is subsequently amortized over future periods.[594] Restructuring costs are comprised of direct and indirect costs associated with contractor restructuring activities taken after a business combination if effected or after a decision is made to execute a significant restructuring event not related to a business combination. The costs of improvements of capital assets that result from restructuring activities shall be capi-

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585. *Id.*

586. U.S. DEP'T OF DEFENSE, DEFENSE ACQUISITION REG. § 15-205.17. The regulation disallows interest on borrowings, bond discounts, costs of financing and refinancing operations, professional fees paid in connection with preparing prospectuses, and costs of preparing and issuing stock rights; interest paid to raise capital also is unallowable. *Id.*

587. Lockheed Corp. v. Widnall, 113 F.3d 1225 (Fed. Cir. 1997).

588. Superstaff, Inc., ASBCA No. 48062, 97-1 BCA ¶ 28,845.

589. Interest on borrowings is unallowable except for interest assessed by state or local taxing authorities under the conditions set forth in FAR 31.205-41. FAR, *supra* note 22, at 31.205-20. *See id.* at 31.205-41.

590. DFARS, *supra* note 52, at 252.243-7001.

591. ASBCA No. 45071, 94-1 BCA ¶ 26,312.

592. 62 Fed. Reg. 31,308 (1997).

593. Pub. L. No. 103-337, 108 Stat. 2663 (1994).

talized and depreciated. When a procuring agency imposes a net savings requirement for the payment of restructuring costs, the contractor shall submit data specifying the estimated restructuring costs by period, the estimated restructuring savings by period, and the cost accounting practices by which such costs shall be allocated to cost objectives.

Contractor restructuring costs may be accumulated as deferred costs and subsequently amortized over a period during which the benefits of restructuring are expected to accrue. However, a contractor proposal to expense restructuring costs for a specific event in a current period is also acceptable when the contracting officer agrees that such treatment will result in a more equitable assignment of costs. If a contractor incurs restructuring costs but does not have an established or disclosed cost accounting practice covering such costs, the deferral of such restructuring costs may be treated in the initial adoption of a cost accounting practice.

Applicability of Cost Accounting Standards Coverage. On 6 June 1997, the CAS Board issued a final rule revising the applicability criteria for application of CAS to negotiated federal contracts.[595] The phrase "contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public" has been replaced with the phrase "contracts or subcontracts for the acquisition of commercial items."[596] As amended, firm fixed-price contracts and subcontracts as well as fixed-price contracts with economic price adjustment for the acquisition of commercial items will be exempt from CAS requirements. The board's exemption for fixed-price with economic price adjustment does not include those contracts where adjustment is based on actual costs incurred.[597]

Fraud

Qui Tam Developments

High Profile Decision Handed Down by Supreme Court. On 16 June 1997, the U.S. Supreme Court ruled for Hughes Aircraft Company, holding that the 1986 amendments to the False Claims Act do not apply retroactively to pre-1986 conduct.[598] The case generated a great deal of interest in the procurement community,[599] because it was the first time the Supreme Court decided to hear a *qui tam* case since the 1986 amendments to the False Claims Act.[600]

In late 1981, Northrop Corporation awarded Hughes Aircraft Company a subcontract to design and to develop a radar system for the B-2 bomber.[601] Both the prime and subcontracts were cost contracts.[602] Shortly after Northrop awarded Hughes the B-2 work, McDonnell-Douglas subcontracted with Hughes for the upgraded radar system for the F-15.[603] Hughes used internal commonality agreements to allocate costs between the projects because the B-2 and F-15 work overlapped in significant respects.

The Air Force audited Hughes after Northrop raised concerns about Hughes' practice of shifting costs from the fixed-price F-15 contract to the B-2 contract under its commonality agreements.[604] In mid-1986, the Air Force concluded that Hughes improperly shifted certain developmental costs between the two programs. Moreover, based upon subsequent audits, the Air Force resolved that Hughes failed to adequately disclose its cost shifting practices in a cost accounting standards

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594. It also defines restructuring costs as costs that are incurred after an entity decides to make a significant nonrecurring change in its business operations or structure in order to reduce overall cost levels in future periods through: work force reductions; the elimination of selected operations, functions, or activities; or the combination of ongoing operations including plant relocation. 62 Fed. Reg. at 31,308.

595. *Id.* at 31,294.

596. *Id.*

597. FAR, *supra* note 22, at 16.203-1(b).

598. Hughes Aircraft Co. v. United States *ex rel.* Schumer, No. 95-1340, 1997 WL 321246 (U.S. June 16, 1997).

599. *Qui Tam Litigation: Unanimous Supreme Court Rules for Hughes, Says 1986 FCA Amendments Do Not Apply Retroactively*, 67 FED. CONT. REP. 24 (BNA) (1997). The amici brief on behalf of Hughes included such organizations and groups as the U.S. Chamber of Commerce, the National Security Industrial Association, the Electronic Industrial Association, and the Shipbuilders Council of America. Individual defense contractors supporting Hughes included Northrop Grumman Corp., Lockheed Martin Corp., and FMC Corp. A number of groups supported Schumer with amici briefs, including the federal government, Taxpayers Against Fraud, and the Project on Government Oversight.

600. 31 U.S.C.A. § 3729 (West 1997).

601. *Hughes Aircraft*, 1997 WL 321246, at *2. Northrop had a prime contract with the Air Force for the B-2 bomber.

602. *Id.* The contracts provided that both Northrop and Hughes were to receive their reasonable, allocable, and allowable costs plus a reasonable profit.

603. *Id.* The subcontract between Hughes and McDonnell-Douglas was a fixed-price contract.

604. *Id.*

report in 1984. Accordingly, the Air Force directed Northrop to withhold $15.4 million from Hughes.[605]

On 20 January 1989, William J. Schumer commenced the action[606] under the *qui tam* provisions of the False Claims Act.[607] He alleged that Hughes knowingly mischarged Northrop, resulting in a $50 million net overcharge.[608] The Department of Justice neither intervened[609] in the action nor moved to have it dismissed.[610]

After the case worked its way through the lower courts, the Supreme Court granted certiorari. The Court initially decided to limit its review to three issues: (1) whether monetary damage to the government was a prerequisite for a *qui tam* action; (2) whether the disclosure on the alleged fraudulent conduct constituted "public disclosure" within the meaning of the jurisdictional provisions of the False Claims Act; and (3) whether the 1986 amendments to the False Claims Act, which relaxed the restrictions on *qui tam* lawsuits, apply retroactively to actions challenging pre-1986 contracts.[611]

In finding for Hughes, Justice Clarence Thomas, writing for a unanimous Court, held that the 1986 amendments to the False Claims Act do not apply retroactively to pre-1986 conduct.[612] In reaching a conclusion, Thomas stated:

> In sum, whether we consider the relevant conduct to be Hughes' disclosure to the government or its submission of the allegedly false claim, disclosure of information about the claim to the government constituted a full defense to a *qui tam* action prior to 1986. If applied in this case, the legal effect of the 1986 amendments would be to deprive Hughes of that defense. Given the absence of a clear statutory expression of congressional intent to apply the 1986 amendments to conduct completed before its enactment, we apply our presumption against retroactivity and hold that, under the relevant 1982 version of the FCA, the District Court was obliged to dismiss the action because it was "based on evidence or information the government had when the action was brought.[613]

The decision by the Court was somewhat disappointing because it provided the procurement community limited guidance on what *qui tam* suits can be filed under the False Claims Act. That is, the Court did not address the issue of whether there must be an injury to the "public fisc" to sustain a *qui tam* action, or exactly what "public disclosure" requires. The procurement community must wait for another day before the Supreme Court takes on those issues.

Settlement Agreement in State Action Bars Later Qui Tam Suit[614] Christopher Hall worked as an engineer for Teledyne Wah Chang, Albany from 1978 to 1991. Hall worked on tubeshells for nuclear fuel rods.[615] In order to prevent corrosion and leaking, Teledyne subjected the tubeshells to the "Beta Quench" process. The process involved heating the tubeshells to extremely high temperatures. A chemical reaction took place at the high temperature, resulting in improved corrosion resistance.[616]

Hall alleged that Teledyne's Beta Quench process was faulty because it did not heat the tubeshells to the necessary temperature for the chemical reaction. Hall initially informed Tele-

605. *Id.* The Air Force ultimately changed its mind on the internal commonality agreements. It concluded that the agreements actually benefited the Air Force by charging costs to the fixed-price contract that otherwise would have been absorbed solely by the cost-plus B-2 program. Therefore, the Air Force withdrew its finding of noncompliance and directed Northrop to pay Hughes the $15.4 million it withheld. *Id.*

606. *Id.* at *3. Schumer was, at one time, the contracts manager for Hughes' B-2 division.

607. 31 U.S.C.A. § 3730(b) (West 1997). Under the *qui tam* provisions, a private individual, known as a "relator," is authorized to bring a claim on behalf of the United States against anyone who knowingly presents a false or fraudulent claim to the United States in violation of 31 U.S.C. § 3729.

608. *Hughes Aircraft*, 1997 WL 321246, at *3.

609. *Id.* The Department of Justice is entitled to intervene, pursuant to 31 U.S.C. § 3730(2).

610. *Id.* The Department of Justice is also entitled to seek dismissal, pursuant to 31 U.S.C. § 3730(c)(2)(A).

611. *Id.* at *4.

612. *Id.* at *1.

613. *Id.* at *7.

614. United States *ex. rel* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230 (9th Cir. 1997).

615. *Id.* The tube shells were made of zircaloy and were the primary containment sheath for nuclear fuel rods in nuclear reactors.

616. *Id.* Teledyne sold the tube shells to other private firms in the nuclear industry as well as to the government. Teledyne certified that the tube shells had been heated to the necessary temperature for the enhanced chemical reaction.

dyne's management of his concerns.[617] He later filed a complaint with the Nuclear Regulatory Commission.[618] Shortly after Hall voiced his concerns to Teledyne, the company disciplined him for "alleged" performance deficiencies. Teledyne eventually fired him.

Hall filed suit against Teledyne in state court.[619] He alleged that Teledyne fired him for his whistleblowing.[620] Hall and Teledyne settled the lawsuit for a sizable sum of money and entered into a broadly worded settlement agreement with a general mutual release.[621] In October 1994, Hall filed the instant *qui tam* action against Teledyne based on the same allegations that he made in the state action. The district court granted summary judgment for Teledyne on the ground that the release executed in the state action encompassed the *qui tam* action.[622]

In holding for Teledyne, the court distinguished a previous Ninth Circuit opinion, *United States ex rel. Green v. Northrop Corp*.[623] In *Green*, shortly after the plaintiff told his employer that he found evidence of fraud on a government contract, the employer fired him.[624] Green filed a wrongful discharge action in state court and subsequently entered into a settlement agreement and general release of all claims.[625] At the time of the settlement agreement, the United States was unaware of Green's fraud allegations and the release.[626]

The Ninth Circuit distinguished the instant case from *Green* in that the government had full knowledge of Hall's charges and had investigated them before Hall and Teledyne had settled.[627] Accordingly, the settlement does not affect the public interest in having information of fraudulent conduct, that the government could not otherwise obtain, brought forward.[628]

Federal Circuits Split on Government's Unlimited Right to Veto Qui Tam Settlements. In *Searcy v. Philips Electronics North America Corp*.,[629] the Fifth Circuit addressed the issue of whether the False Claims Act gives the government the authority to veto a settlement agreement between the relator and the defendant after it declined to intervene in both the trial and appellate courts.[630] The Ninth Circuit addressed the issue in *Killingsworth v. Northrop Corp*.[631] In that case, the government sought to intervene for purposes of appeal after the district court refused to block a settlement. The government argued that the relator was short-changing the government in settling its *qui tam* and wrongful termination suit at the same time in order to reduce the amount that would typically go to the government. The court in *Killingsworth* held that "the government's consent to dismissal is only required during the initial sixty-day (or extended) period in which the government may decide whether to [proceed with the action]."[632]

The Fifth Circuit disagreed with the Ninth Circuit's reasoning in *Killingsworth*.[633] The Fifth Circuit contended that the

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617. *Id*. Teledyne's management investigated Hall's allegations and concluded that his concerns lacked merit.

618. *Id*. The NRC also could not substantiate Hall's allegations.

619. *Id.*

620. *Id.* Although Hall did not allege a *qui tam* claim in the state action, he clearly asserted that Teledyne had defrauded its customers by falsely certifying that the Beta Quench process effectively increased the corrosion resistance of the tube shells.

621. *Id.* The release stated, in part, that "it includes, but is not limited to, all claims which were, or could have been, brought as claims or counterclaims in the above-referenced action. This Mutual Release of Claims also includes, but is not limited to, any other claims brought in any other type of action or proceeding." *Id*.

622. *Id*. In reaching its conclusion, the district court balanced the benefits of enforcing the settlement agreement against the potential harm to the public interest.

623. 59 F.3d 953 (9th Cir. 1995).

624. *Id*. at 956.

625. *Hall*, 104 F.3d at 233.

626. *Id*.

627. *Id.* at 230.

628. *Id*. at 233.

629. 117 F.3d 154 (5th Cir. 1997).

630. *Id*. at 155.

631. 25 F.3d 715 (9th Cir. 1994).

632. *Id.* at 723. In support of its position, the Ninth Circuit explained that the government was aware of the settlement and chose not to exercise its right to intervene for good cause in the trial proceeding.

633. *Searcy*, 117 F.3d at 159.

statutory language of 31 U.S.C. § 3730(b)(1) is clear when it provides that the court may not grant a voluntary dismissal in a *qui tam* suit unless the Attorney General consents to the dismissal. Accordingly, the Fifth Circuit held that the False Claims Act gave the government the power to veto settlement agreements even after it declined to intervene.[634]

Major Fraud Act: Federal Circuits Split on Application of $1 Million Jurisdictional Threshold

In *United States v. Brooks*,[635] the Fourth Circuit held that the $1 million jurisdictional threshold of the Major Fraud Act[636] is met when the value of a prime contract is $1 million or more, regardless of the value of the tainted subcontract.[637] The Fourth Circuit's holding in *Brooks* is contrary to the Second Circuit's decision in *United States v. Nadi.*[638] In *Nadi*, the court specifically held that, for jurisdictional purposes under the Major Fraud Act, the value of the fraudulent contract must meet the $1 million requirement.[639] The conflict between the circuits creates a certain amount of ambiguity for the practitioner who must decide whether to pursue a particular contractor under the Major Fraud Act.

In *Brooks*, the Fourth Circuit supported its decision by noting that its reading of the Major Fraud Act recognizes that the measure of fraud "of this species" is not only the financial losses on a particular subcontract but also the potential consequences to persons and property.[640] The court specifically noted that "[i]n military contracts, in particular, fraud in the provision of small and inexpensive parts can have major effects, destroying or making inoperable multi-million dollar systems or equipment, injuring service people, and compromising military readiness."[641] Therefore, by having the statute cover even minor contractors whose actions could threaten major military operations, Congress empowered prosecutors to effectively fight procurement fraud.[642]

By contrast, in *Nadi*, the Second Circuit concluded that the focus should be on the specific contract that was tainted with fraud. The court stated:

> Nonetheless, we find that a reasonable reading of the statute, in light of the legislative history, requires that we adopt the rule, argued for by the Defendants, whereby the value of the contract is determined by looking to the specific contract on which the fraud is based. So, for example, in a case where the value of a subcontract is less than $1,000,000 but the prime contract is for $1,000,000 or more, the subcontractor would escape liability under section 1031. We adopt this rule

634. *Id*. at 160. The Fifth Circuit concluded the case with the following language:

> For more than 130 years, Congress has instructed courts to let the government stand on the sidelines and veto a voluntary settlement. It would take a serious conflict within the structure of the False Claims Act or a profound gap in the reasonableness of the provision for us to be able to justify ignoring this language.

Id.

635. 111 F.3d 365 (4th Cir. 1997).

636. 18 U.S.C.A. § 1031(a) (West 1997). The statute provides:

> Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent (1) to defraud the United States, or (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more, shall, subject to the applicability of subsection (c), be fined not more than $1,000,000, or imprisoned not more than 10 years or both.

Id.

637. *Brooks*, 111 F.3d at 368. The facts of the case are rather straightforward. Edwin, John, and Stephen Brooks operated B&D Electric Supply, Inc. The company sold electrical supplies to both military and civilian customers. B&D's fraud involved two subcontracts it held with firms that had entered into prime contracts with the U.S. Navy. The first subcontract was with Jonathan Corporation to supply 14 shipboard motor controls for a total price of $51,544. The second subcontract was with Ingalls Shipbuilding, Inc. for six rotary switches for a total price of $1470. The value of Ingalls Shipbuilding, Inc.'s prime contract with the Navy was $5 million. B&D was convicted in the United States District Court for the Eastern District of Virginia for violating the Major Fraud Act.

638. 996 F.2d 548 (2d Cir. 1993).

639. *Id*. at 551.

640. *Brooks*, 111 F.3d at 369.

641. *Id.*

642. *Id.*

with reference to the language of the statute.[643]

For the practitioner, it is virtually impossible to reconcile the contrary positions taken by the Fourth and Second Circuits. In neither circuit was there a fact-dependent application of the Major Fraud Act. It boils down to a matter of statutory interpretation. The more expansive reading of the Major Fraud Act by the Fourth Circuit is more advantageous to the government.

Debarment Does Not Trigger Double Jeopardy

In *United States v. Hatfield*,[644] the Fourth Circuit faced the issue of whether a debarred government contractor may subsequently face criminal prosecution for the same fraudulent conduct that led to its debarment.[645] In September 1990, Fred Hatfield, doing business as HVAC Construction Company, lied to the Army by stating that neither he nor his firm had ever been terminated for default. Hatfield also presented an inflated subcontractor invoice to the government. Finally, he falsely certified that his firm completed certain work in order to obtain payment from the government. As a result of this conduct, the Army debarred Hatfield and his company from all government contracting for twenty-six months.[646]

Hatfield argued that his debarment constituted punishment, thereby precluding a subsequent prosecution under the Double Jeopardy Clause of the Fifth Amendment.[647] More specifically, Hatfield contended that the court must make a "particularized assessment" as required by *United States v. Halper*[648] to determine whether a debarment is punishment. He believed that such an assessment would show that his losses sustained from the debarment were disproportionate to the harm caused to the government.[649]

The Fourth Circuit disagreed. It concluded that debarment is civil and remedial action and not punishment.[650] As such, it does not trigger the Double Jeopardy Clause. The court distinguished *Halper*, finding that it did not apply to the instant facts.[651] Specifically, the court noted that the balancing test in *Halper*—weighing the government's harm against the penalty's size—was appropriate only where the penalty was for a fixed monetary amount.[652] As such, the court stated "when confronted with the in rem forfeiture sanction where the 'nonpunitive purposes served' were 'virtually impossible to quantify,' the *Halper* test is inapplicable."[653]

The court had little difficulty concluding that a debarment was a civil proceeding. It noted that: (1) the Army's own procedural rules state that it is not punishment, but only to protect the Army in its dealings with contractors; (2) the procedures are informal; (3) the standard of proof is a preponderance of evidence; and (4) the remedial purpose is tied to specific conduct that relates to the protection of the Army from fraud, neglect, and nonperformance, with the focus being on the "present responsibility" of the contractor.[654]

Finally, the court did not believe that debarment for twenty-six months was "unreasonable or excessive" enough to transform a civil remedy into a criminal sanction.[655] In support of its conclusion, the court cited *United States v. Glymph*.[656] In

643. *Nadi*, 996 F.2d at 551.

644. 108 F.3d 67 (4th Cir. 1997).

645. *Id*. at 68.

646. *Id.*

647. *Id.* The Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

648. 490 U.S. 435 (1989). In *Halper*, the contractor received a civil penalty of $130,000, which was 220 times greater than the government's $585 in damages. The Supreme Court held that while the civil penalty did not rise to the level of punishment solely because Congress provided for a remedy in excess of the government's actual damages, its precedent did not "foreclose the possibility that in a particular case a civil penalty . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id*. at 442.

649. *Hatfield*, 108 F.3d at 68-69. Hatfield claimed that the debarment cost him and his company $1.1 million in attorneys' fees, lost profits, and out-of-pocket expenses.

650. *Id.* The court applied a two-part test to determine whether a debarment is civil or criminal: (1) whether the procedure was designed to be remedial and (2) whether the remedy provided, even if designated as civil, "is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty." *Id.*

651. *Id*. at 70.

652. *Id.*

653. *Id*.

654. *Id*. at 69.

Glymph, the contractor was debarred for four years for knowingly supplying the government with nonconforming parts. The contractor argued that such a sanction was "overwhelmingly disproportionate."[657] The court in *Glymph* rejected the contractor's argument, noting that the government paid more than $40,000 for the non-conforming parts.[658] In *Hatfield*, the government's loss was between $40,000 and $60,000, not including losses by subcontractors. Accordingly, the Fourth Circuit concluded that the twenty-six month debarment was not "unreasonable or excessive" and did not transform an otherwise remedial sanction into a criminal penalty.[659]

Taxation

On the Road Again

Federal government travelers are still confused about whether they can be required to pay sales and other local taxes when traveling on official business. Such confusion stems, in part, from the Ninth Circuit's decision in *California Credit Union League v. City of Anaheim*.[660] The court in that case held that federal credit union employees could not be subject to a transitory occupancy tax because they were, for all practical purposes, the government. Unfortunately for federal travelers, the United States Supreme Court granted certiorari and remanded the case for further review.[661] The Supreme Court remanded the case because it had previously ruled that there was no federal jurisdiction in such a case and because the United States was not a party to the case.

As a result of this recent reversal, the rule regarding the taxation of federal travelers in the Ninth Circuit is once again the same as the rest of the country. The rule was summarized in a 1976 Comptroller General opinion.[662] Basically, government travelers are subject to local taxes when they are paying for hotel rooms themselves, even if they are being reimbursed. The theory is that the government traveler is contracting with the innkeeper. As such, the legal incidence of the tax falls on the traveler. Although the government must reimburse the traveler, the tax is an indirect tax on the federal government. The opinion further states that while the federal government could establish a system whereby it directly contracts for all hotel rooms for employee travel, the cost of such a system would exceed any tax savings.

Each state determines whether or not it taxes federal travelers. Some states have decided to do so, while others have not. Accordingly, federal travelers should always ask about the possibility of being exempt from local taxes, but they must understand that they have no federal right to be exempt. If there is an exemption, it is by the grace of state legislation.

Where There's a Will, There Just Might Be a Way

The Federal District Court of Nevada recently held that the taxation of a federal contractors' "beneficial use" of federal property does not violate the Supremacy Clause.[663] The court also held that the taxing authority could use the value of the property to establish the value of the beneficial use.

For more than a decade, Nye County, Nevada sought to tax property located within its borders that is owned by the United States, but is used and maintained by federal contractors. Nye County's first attempt was against a defense contractor, Arcata Associates, Inc.[664] Arcata paid $127,414.03 in personal property taxes for 1983-84 and 1988-89 under protest. The United States reimbursed Arcata and then sued Nye County to recover the taxes. In *United States v. Nye County, Nevada*, the Ninth Circuit noted that historically when jurisdictions sought to impose a tax on the federal property itself, the tax failed.[665] In contrast, when jurisdictions sought to impose a tax on "an isolated possessory interest or on a beneficial use of United States property," the tax was allowed.[666] The court noted that the Nevada statute under which Nye County sought to tax the prop-

655. *Id.* The court specifically noted that Hatfield's conduct (lying on numerous occasions and falsely inflating a subcontractor's invoices) raised serious questions about his honesty and dependability.

656. 96 F.3d 722 (4th Cir. 1996).

657. *Id*. at 725-26. Glymph argued that the debarment should not exceed three years because FAR 9.406-4 provides that debarments generally should not exceed three years.

658. *Id*.

659. *Hatfield*, 108 F.3d at 69.

660. 95 F.3d 30 (9th Cir. 1994).

661. California Credit Union League v. City of Anaheim, 117 S. Ct. 2429 (1997).

662. *In re* Hotel-Motel Tax—Anchorage, Alaska, B-172621, 55 Comp. Gen. 1278, (July 16, 1976).

663. United States v. Nye County, 957 F. Supp. 1172 (D. Nev. 1997).

664. United States v. Nye County, 938 F.2d 1040 (9th Cir. 1991), *cert. denied*, 530 U.S. 919 (1992).

erty in issue taxed the property as if it were owned by Arcata.[667] Nye County lost the suit.

Following Nye County's loss in federal court, Nevada amended its statutes.[668] It was under this amended statute that Nye County sought to tax tangible personal property owned by the federal government but used and maintained by several defense contractors. Since the revised statute sought to tax only the contractors' beneficial use of the property and not the property itself, the court held that Nye County could impose such a tax. The court further held that Nye County could use the value of the property as a basis for determining the value of the contractors' beneficial use of the property.

Superfund Taxes Are Income Taxes

In *Rockwell International Corp. v. Widnall*,[669] the Federal Circuit held that federal environmental or "Superfund" taxes are federal income taxes.[670] As such, they are not an allowable, reimbursable cost under the FAR.

Rockwell entered into a contract with the Air Force that contained a standard cost reimbursement clause.[671] Pursuant to this clause and FAR Part 31, federal income and excess profits taxes are not allowable. Rockwell argued that the environmental income tax or "Superfund" tax was an allowable cost.

The "Superfund" tax was passed in 1986 and was codified at 26 U.S.C. § 59A.[672] This section of the Internal Revenue Code imposes a tax on all corporate taxpayers whose modified alternative minimum taxable income exceeds $2 million.[673] After reviewing the legislative history of this tax, the court concluded that the "Superfund" tax is an income tax. As such, Rockwell is not entitled to reimbursement because the "Superfund" tax is not an allowable cost.[674]

Freedom of Information Act (FOIA)[675]

A proposed change[676] to the FAR requires the disclosure of unit prices in post-award notices and debriefings. This requirement relieves agencies of the cumbersome process of giving

665. *See* United States v. Colorado, 627 F.2d 217 (10th Cir. 1980), *summarily aff'd. sub nom.* Jefferson County v. United States, 450 U.S. 901 (1981), United States v. Hawkins County, 859 F.2d 20 (6th Cir. 1988).

666. *See* United States v. New Mexico, 455 U.S. 720 (1982); United States v. County of Fresno, 429 U.S. 452 (1977); United States v. City of Detroit, 355 U.S. 466 (1958).

667. Prior to a 1993 revision, a Nevada statute provided:

> Personal Property exempt from taxation which is leased, loaned, or otherwise made available to and used by a natural person, association, or corporation in connection with a business conducted for profit is subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of the property . . . .

NEV. REV. STAT. ANN. § 361.159 (Michie 1992).

668. The pertinent part of the statute now reads:

> Except as otherwise provided in subsection 3, when personal property, or a portion of personal property, which for any reason is exempt from taxation is leased, loaned, or otherwise made available to and used by a natural person, association or corporation in connection with a business conducted for profit, the leasehold interest, possessory interest, beneficial interest, or beneficial use of any such lessee or user of the property is subject to taxation to the extent the:
>
> (a) Portion of the property leased or used; and
>
> (b) Percentage of time during the fiscal year that the property is leased to the lessee or used by the user, can be segregated and identified.

NEV. REV. STAT. Ann. § 361.159 (Michie 1997).

669. 109 F.3d 1579 (Fed. Cir. 1997).

670. *See* I.R.C. § 59A (1997) (imposing an additional tax on all corporations to help defray the government's cost of cleaning up environmentally damaged areas).

671. *See* FAR, *supra* note 22, at 52.216-7; 48 C.F.R. § 52.216-7 (1987).

672. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

673. The alternative minimum income tax is imposed on all individuals and corporations who otherwise might not have to pay taxes because they have taken advantage of a variety of allowances, deductions, and credits. *See generally* I.R.C. §§ 55-59.

674. Rockwell International Corp. v. Widnall, 109 F.3d. 1579, 1583 (Fed. Cir. 1997).

675. 5 U.S.C.A. § 552 (1997), *as amended by* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996).

notice to the successful offeror before determining whether to disclose unit prices in response to a FOIA request.[677]

The proposed change will not violate the Trade Secrets Act (TSA).[678] The TSA is a broadly worded criminal statute prohibiting disclosure of "practically any commercial or financial data collected by any federal employee from any source"[679] unless otherwise "authorized by law." Because the FAR itself will now expressly provide such authorization, the TSA will not be violated.[680] Since disclosure of unit prices will now be mandatory in the post-award process, successful offerors cannot reasonably argue (and thus need not be afforded submitter notice) that their unit prices should later be withheld under FOIA since those cannot be considered "confidential." This FAR change does not apply to unit prices of unsuccessful offerors. Those continue to be withheld, as well as all other items in an unsuccessful proposal, as required by 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b (m)(2).

Environmental Law

DFARS Final Rule: Environmental Restoration and Construction Contracts

On 8 January 1997, the Director of Defense Procurement issued a DFARS final rule which added an exception to the restriction on the use of cost-plus-fixed-fee contracts for military construction.[681] The exception applies to contracts for environmental restoration at installations that are being closed or realigned, where payments are made from a Base Realignment and Closure (BRAC) Account.

Prior to the final rule, DFARS 216.306[682] restricted the use of cost-plus-fixed fee contracts for military construction.[683] The amendment lifts the prohibition for environmental restoration contracts at installations set for BRAC closure. The service secretaries are authorized to approve such contracts that are for environmental work not classified as construction.[684] The Secretary of Defense or designee must approve contracts that are not for environmental work only or that are for environmental work classified as construction.

Comprehensive Guideline for Procurement of Products Containing Recovered Materials

On 7 November 1996, the Environmental Protection Agency (EPA) published a proposed rule which designated thirteen new items that are or can be made with recovered materials.[685] These items include shower and restroom dividers, latex paint, parking stops, channelizers, delineators, flexible delineators, snow fencing, garden and soaker hoses, lawn and garden edging, printer ribbons, ink jet cartridges, plastic envelopes, and pallets. The proposed rule clarifies the EPA's previous designation of floor tiles, structural fiberboard, and laminated paperboard as items that can be made with recovered materials.[686]

Within one year after publication of the guideline items, each procuring agency must develop an affirmative procurement program that will assure that these items will be purchased to the maximum extent practicable.[687] The use of the guideline items must not jeopardize the intended end use of the item.[688] The statutory requirement to purchase these items only

676. 62 Fed. Reg. 51,224 (1997).

677. The previous policy of the DOD was that unit prices should be disclosed except in unusual circumstances. Before an agency could make an independent determination in response to a FOIA request for confidential commercial information, the agency had to solicit the views of the submitter of that information as to whether disclosure would cause substantial competitive harm.

678. 18 U.S.C. § 1905 (1994).

679. CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987).

680. A disclosure pursuant to an express provision in a properly promulgated and statutorily based agency regulation would be "authorized by law." *See* Chrysler v. Brown, 441 U.S. 281, 295-316 (1979).

681. 62 Fed. Reg. 1058-1101 (1997).

682. Implementing § 101 of the 1997 Military Construction Appropriations Act, Pub. L. No. 104-196, 110. Stat. 2385 (1996).

683. Cost-plus-fixed-fee contracts are prohibited from use in construction contracts when the project: is funded by a military construction appropriation act; is estimated to exceed $25,000; and will be performed within the United States, except Alaska. DFARS, *supra* note 52, at 216.306.

684. As defined in 10 U.S.C.A. § 2801 (West 1997).

685. 61 Fed. Reg. 57,748 (1996).

686. *Id.*

687. 42 U.S.C.A. § 6962(e) (West 1997).

688. *Id.* § 6962(d)(2).

applies to procurements over $10,000 or where the purchased quantity, or of functionally equivalent items, procured in the fiscal year exceeds $10,000.[689] Under the Resource Conservation and Recovery Act (RCRA),[690] there are exceptions to these requirements. These exceptions are: if the procuring contracting officer determines that the items meeting the statutory requirements are not reasonably available within a reasonable period of time, fail to meet the performance standards set forth in the specifications, or fail to meet the reasonable performance standards of the procuring agencies. The contracting officer also considers price, availability, and competition.

GAO Criticizes DOD Environmental Cleanup Cost Sharing Policies

GAO Criticizes DOD Environmental Cleanup Cost Sharing Policies at GOCO Plants. On 17 April 1997, the GAO released a report criticizing the DOD's policies and practices concerning sharing environmental cleanup costs at GOCO plants.[691] The report stated that the military's criteria for cost-sharing with contractors still varies widely. This is due to the DOD's failure to give the military services adequate guidance for making decisions as to when and whether to seek recovery of environmental cleanup costs at GOCO sites. Absent this guidance, the services have taken different approaches to cost sharing policies. The Air Force, Navy, and Army Corps of Engineers have guidance in place while the Army and DLA do not.

The GAO recommends that the Secretary of Defense issue necessary guidance to put standard cost sharing policies in place for the DOD. It also recommends that DOD increase its cost data analysis.[692]

GAO Criticizes Army Cleanup Efforts at Rocky Mountain Arsenal. In a report dated 23 January 1997,[693] the GAO criticized the Army's internal accounting practices at Rocky Mountain Arsenal, Colorado.[694] The report centers on a settlement agreement between the Army and Shell Oil Company. The agreement provided for shared environmental studies and cleanup activities. The GAO found that the Army paid Shell approximately $3.1 million in claimed costs that lacked necessary documentation.

Acceptable Proof of Environmental Compliance

The GAO found that a contractor provides acceptable proof of environmental compliance where its proposal addresses anticipated hazardous wastes and establishes that waste disposal would be handled by a reputable subcontractor.[695]

On 19 July 1996, the Army issued a solicitation for the production and delivery of blasting caps and fuses. The solicitation provided for award to the low-priced, technically acceptable offeror. The protester, Ensign-Bickford, submitted its proposal on 19 August 1996. STS also submitted a proposal which the Army initially found was unacceptable because it failed to provide proof of environmental compliance. During discussions, STS informed the Army that it used a subcontractor to dispose of all explosives and hazardous waste and that it did not have a formal waste management procedure document. STS provided information on its subcontractor, Laidlaw Environmental Services, and Laidlaw's capabilities and compliance with environmental regulations. The Army then awarded the contract to STS.

Ensign-Bickford argued that the Army should have rejected STS's proposal because it did not provide proof of environmental compliance as required by the RFP. The protester also argued that reliance upon a subcontractor is insufficient to demonstrate such compliance. Ensign-Bickford contended that waste management is a cradle-to-grave process, where a generator's responsibility for waste begins at the plant and not after delivery of the waste to a subcontractor to a disposal facility.

The Army advised the GAO that it did not anticipate the involvement of any hazardous products in addition to those being produced by other contracts STS was performing. The Army stated that STS's proposal and response to discussions properly identified the type of waste anticipated, the anticipated amount of waste, and a fully competent and licensed subcontractor to handle that waste. The Army also pointed out that since the protester processes its waste on-site, it needed the required licenses and permits. Therefore, the Army reasonably found the STS proposal acceptable even though it did not submit evidence of the required licenses, permits, or waste management plan.

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689. *Id.*

690. *Id.* § 6901.

691. *Environmental Cleanup at DOD: Better Cost-Sharing Guidance Needed at Government Owned, Contractor Operated Sites*, GAO/NSIAD-97-32 (1997).

692. *Id.*

693. *Environmental Cleanup: Inadequate Army Oversight of Rocky Mountain Arsenal Shared Costs*, GAO/NSIAD/AIMD-97-33 (1997).

694. The Arsenal was once a chemical weapons manufacturing facility.

695. Ensign-Bickford Co., B-274904.4, Feb. 12, 1997, 97-1 CPD ¶ 69.

Public Participation in Defense Environmental Restoration Activities

On 27 December 1996, the Office of the Deputy Under Secretary of Defense for Environmental Security issued a proposed rule[696] concerning the provision of technical assistance to local community members of restoration advisory boards (RABs) and technical review committees (TRCs).[697] In 1994, Congress authorized the DOD to develop programs to facilitate public participation in environmental restoration by providing technical assistance to local communities.[698] In 1996, Congress revised this authority. The proposed rule is in response to this revision.[699]

Under the rule, the DOD may obtain technical assistance from the private sector to help TRCs and RABs to understand better the scientific engineering issues underlying an installation's environmental restoration activities. TRCs and RABs may request this assistance only under certain circumstances. First, they must demonstrate that the federal, state, and local agencies responsible for overseeing environmental restoration at the installation do not have the technical expertise necessary for achieving the environmental restoration objective. Second, the technical assistance must be likely to contribute to the efficiency, effectiveness, or timeliness of the environmental restoration activities and must be likely to contribute to community acceptance of environmental restoration activities at the installation.[700] Environmental restoration and base closure accounts will fund the program.[701]

Ethics in Government Contracting

New FAR Part 3 Implements New Procurement Integrity Act[702]

A new FAR Part 3 implemented the provisions of the Procurement Integrity Act, as amended in 1996 by the Clinger-Cohen Act.[703] One of the most popular amendments may be the elimination of procurement integrity certifications. The new statute and its implementing regulation have also eliminated mandatory training and certification of training. Contracting officers, however, must still receive mandatory annual ethics training.[704]

One Year Employment Ban

The new rules create a one-year ban on accepting compensation[705] from an awardee. The ban applies to individuals who served in enumerated procurement-related jobs[706] and anyone who personally made enumerated procurement related decisions.[707] The ban applies only if the procurement is in excess of $10 million.[708] If the ban results from the employee's contract formation related duty position (e.g. procuring contracting officer, source selection authority, member of a source selection board), the ban runs from contract award, unless the employee left the position prior to award, in which case the one-year period begins on the date of source selection.[709] If the ban results from a contract administration related duty position (e.g., program manager, deputy program manager, administrative contracting officer), the ban begins on the last date of service in that position.[710] A former employee may work for a division or affiliate so long as it does not produce the same or similar product or services.[711]

696. 61 Fed. Reg. 68,184 (1996).

697. RABs and TRCs are established to review and to comment on DOD actions at military installations which are undertaking environmental restoration activities.

698. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

699. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-112, 110 Stat. 186 (1995) (codified at 10 U.S.C. § 2705(e) (1996)).

700. 10 U.S.C.A. § 2705 (West 1997).

701. 61 Fed. Reg. 68,184 (1996).

702. The proposed rule was discussed in *The Fiscal Year 1996 Department of Defense Authorization Act: Real Acquisition Reform in Hiding?*, ARMY LAW , Apr. 1996 at 10.

703. The new provisions have been codified at 41 U.S.C.A § 423 (1997).

704. *See* 5 C.F.R. § 2638.704 (1997).

705. "'Compensation' means wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Indirect compensation is compensation paid to another entity specifically for services rendered by the individual." FAR, *supra* note 22, at 3.104-3.

706. This includes those who "[s]erved, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of source selection evaluation board, or chief of a financial or technical evaluation team . . . ." *Id*. at 3.104-4

707. Decisions which trigger the ban include the decision to award a contract, subcontract, modification, or task order or delivery order; the decision to establish overhead or other rates valued in excess of $10 million; the decision to approve issuance of a payment or payments in excess of $10 million; or the decision to pay or to settle a claim in excess of $10 million. FAR, *supra* note 22, at 3.104-4.

The Gap

The new post-government employment restrictions apply to former officials only for services provided or decisions made on or after 1 January 1997.[712] Officials who left government service before 1 January 1997 are subject to the restrictions of the Procurement Integrity Act as it existed prior to its amendment.[713] There are likely to be a number of former government employees who remained in government service until 1 January 1997 but performed few or no procurement-related duties during 1997. These former employees will have no post-government employment restrictions arising from the Procurement Integrity Act.[714]

Protection of Information

Like its predecessor, the new Procurement Integrity Act contains restrictions on disclosing[715] or obtaining[716] procurement sensitive information. The new statute and implementing regulation introduce new terms. Replacing the old term "proprietary information" is the term "contractor bid or proposal information."[717] Source selection information[718] continues to be protected.

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708. *Id*. at 3.104-3. In excess of $10,000,000" is defined as:

> (1) The value or estimated value of contract including options;
> (2) The total estimated value of all orders under an indefinite-delivery, indefinite-quantity, or requirements contract;
> (3) Any multiple award schedule contract unless the contracting officer documents a lower estimate;
> (4) The value of a delivery order, task order, or order under a Basic Ordering Agreement;
> (5) The amount paid or to be paid in a settlement of a claim; or
> (6) The estimated monetary value of negotiated overhead or other rates when applied to the Government portion of the applicable allocation base.

Id.

709. *Id*. at 3.104-8(b)

710. *Id.* at 3.104-8(c).

711. *Id.* at 3.104-8(d)(2).

712. *Id.* at 3.104-2(c).

713. *Id.* at 3.104-2(d).

714. Officials and former agency officials may request an advisory opinion from an ethics counselor as to whether he would be precluded from accepting compensation from a particular contractor. *Id*. at 3.104-7(a).

715. *Id*. at 3.104-4(a)(2). The following persons are forbidden from knowingly disclosing contractor bid or proposal information or source selection information before the award of a contract:

> [A]ny person who—
> (i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a federal agency procurement; and
> (ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

Id.

716. "Person[s]" (other than as provided by law) are forbidden from obtaining contractor bid or proposal information or source selection information. *Id*. at 3.104-4(b).

717. Contractor bid or proposal information includes cost or pricing data; indirect costs or labor rates; proprietary information marked in accordance with applicable law or regulation; information marked by the contractor as such in accordance with applicable law or regulation. *Id*. at 3.104-3. If the contracting officer disagrees with a contractor's protective marking, he must give the contractor notice and an opportunity to respond prior to release of marked information. *Id*. at 3.104-5(d). *See also* CNA Finance Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 917 (1988); Chrysler Corp. v. Brown, 441 U.S. 281 (1979). These so-called reverse Freedom of Information Act (FOIA) cases also create a requirement for notice and an opportunity to respond before releasing such information in response to a FOIA request.

718. Contractor bid or proposal information is defined as any of the following: bid prices before bid opening; proposed costs or prices in negotiated procurement; source selection plans; technical evaluation plans; technical evaluations of proposals; cost or price evaluations of proposals; competitive range determinations; rankings of bids, proposals, or competitors; reports and evaluations of source selection panels, boards, or advisory councils; and any other information marked as source selection information where release would jeopardize the integrity of the competition. FAR, *supra* note 22, at 3.104-3.

Reporting Employment Contacts

The new rules require officials who are "participating personally and substantially"[719] in an acquisition over the simplified acquisition threshold to report employment contacts with bidders or offerors.[720] The regulatory definition of "personal and substantial participation" that triggers the reporting requirement requires involvement in certain pre-award activities, including drafting statements of work, evaluating proposals, and reviewing and approving award.[721] It is very similar to the definition of "procurement official" contained in the previous version of FAR Part 3. Reporting may be required even if contact is through an agent or intermediary.[722] In addition to reporting the contact, the agency official must either reject the employment or disqualify himself from the procurement. An employee who disqualifies himself must submit a disqualification notice to the HCA or designee, with copies to the contracting officer, source selection authority, and immediate supervisor.[723]

Practitioners may recall previous Procurement Integrity Act provisions which required the employee to request recusal and allowed the agency to deny the request. Now the employee not only has a right, but a duty, to disqualify himself from the procurement. What of the official whose job-hunting and concurrent disqualification substantially interferes with his official duties? If an official refuses to cease employment discussions, the agency may take administrative actions[724] such as annual leave, leave without pay, or other "appropriate" administrative action.[725]

New Contract Clauses Threaten Loss of Fee or Profit

A new contract clause advises contractors of the potential for cancellation or rescission of the contract and recovery of any penalty prescribed by law and the amount expended under the contract.[726] Another clause advises the contractor that the government may reduce contract payments by the amount of profit or fee for violations.[727]

Protesters Must Fire a Warning Shot

The new rules seek to ensure that competitors with knowledge of Procurement Integrity Act violations inform an agency promptly. In many instances, early notice will allow agencies to take corrective measures. The statute states, "[n]o person may file a protest, and the GAO may not consider a protest, alleging a [Procurement Integrity Act] violation unless the protester first reported the alleged violation to the agency within fourteen days of discovery of the possible violation."[728]

This new provision has several significant weaknesses. The notice is required only for violations of the Procurement Integrity Act.[729] Many protests are based on alleged violations of other statutes or on general allegations of an appearance of impropriety. Another issue regards the date of discovery of a possible violation. Contractors may argue that violations are not discovered until solid evidence has been obtained. Practitioners should also keep in mind that the statute specifically forbids the GAO from considering these issues absent timely notice to the agency. It does not, however, specifically address protests made to the agency, Court of Federal Claims, or district courts. Time will tell how other forums will deal with this issue.

719. *Id*. at 3-104-4(c).

720. The reporting requirement applies to an official who "is participating." The regulation provides no guidance as to when such participation ceases. In order to give reasonable meaning to this prohibition, participation should normally be presumed to continue until award. It might end sooner, however, if, for example, the employee had a significant change of duties or took an entirely different government job. Conspicuously absent from the statute or the new FAR provisions is a definition of the term "bidder or offeror." Absent a definition, it is difficult to determine if contact with a prospective bidder or offeror would also trigger the reporting requirement. Again, it seems more reasonable to read the term broadly to include prospective bidders (as did the term "competing contractor" in the prior statute). The reporting requirement applies regardless of which party initiated the employment contact. *Id*.

721. *Id*. at 3.104-3.

722. *Id*. at 3.104-6(a)

723. *Id*. at 3.104-6(b).

724. *See* 5 C.F.R. § 2635.604(d) (1996); FAR, *supra* note 22, at 3.104-11(c).

725. Other "appropriate" action is not defined in the regulations. *But see* Smith v. Department of Interior, 6 M.S.P.R. 84 (1981) (upholding the removal of an employee for violation of conflict of interest regulations).

726. FAR, *supra* note 22, at 52.203-8.

727. *Id*. at 52.203-10.

728. *Id*. at 33.102(f).

729. 41 U.S.C.A. § 423 (West 1997).

New Exemptions and Waivers Concerning 18 U.S.C. § 208

The conflict of interest statute forbids a government employee's participation in an official capacity in any matter in which that person, a family member, a business associate, certain organizations, or a contractor or person with whom the government employee is negotiating for employment has a financial interest.[730] On 18 December 1996, the Office of Government Ethics issued executive branch-wide blanket waivers, exempting those financial interests "too remote or inconsequential to warrant disqualification."[731] These waivers supersede those currently contained in the Joint Ethics Regulation (JER).[732]

Under the new blanket waivers, an employee may continue to participate in official matters if the financial interest stems from ownership in a "diversified mutual fund."[733] Ownership of "sector funds," however, may create a conflict of interest.[734] There are different rules for sector funds.[735] The new regulation also creates an exemption for de minimis interests in securities (held by the employee, his spouse, or minor children) which are publicly traded or long-term federal government or municipal securities of an aggregate value of $5000 or less.[736] An employee whose interests grow to exceed $5000 must disqualify himself or must divest the portion of his holdings that exceed the deminimis value.[737]

No Conflict of Interest Created by Vested Marital Property Rights

The FAR prohibits contracting with a business concern "owned or substantially controlled by one or more government employees."[738] Does this prohibition preclude an award to a corporation owned, in part, by the spouse of a government employee? Not according to the GAO, which upheld the National Cancer Institute's (NCI) award of a contract for technical support services to a business owned by the wife of an NIH employee.[739] The NCI is part of the NIH.

The protester, Cygnus Corporation, alleged a conflict of interest. Cygnus pointed out that the awardee's line of credit was secured by an indemnity deed of trust on the employee's house. Without this guarantee, Cygnus argued, the awardee would not be a responsible offeror. Not only did the NIH employee risk losing the roof over his head, but, under state property law, he stood to reap substantial financial gains from his wife's success. The protester estimated his potential gain to be in excess of $100,000.

The GAO upheld the NIH's decision to allow the wife's business to compete. In making this determination, the GAO emphasized several factors. The NIH employee did not work for and was not known to employees of the NCI. His wife had been in business for many years, and there was no evidence of control of the corporation by the NIH employee. The GAO concluded that the assistance provided by putting up a security interest in his house as a guarantee did not create an impermissible conflict of interest.

Information Technology

Proposed FAR Rule—Modular Contracting

In compliance with Section 5202 of the Information Technology Management Reform Act,[740] the FAR Council issued a proposed amendment to FAR Part 39.[741] The proposed rule cre-

730. 18 U.S.C.A. § 208 (West 1997); 5 C.F.R. § 2635.402 (1996).

731. *See* 61 Fed. Reg. 66,830 (1996) (amending 5 C.F.R. § 2640, effective 17 Jan. 1997).

732. U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, app. D (Aug. 30, 1993).

733. 5 C.F.R. § 2640.201(a) (1996). A "diversified" mutual fund "does not have a stated policy of concentrating in any industry, business, single country other than the United States, or bonds of a single state within the United States . . . ." *Id.*

734. A "sector fund" is "a mutual fund that concentrates its investments in an industry, business, single country other than the United States, or bonds of a single state within the United States. *Id*. § 2640.102(g).

735. *Id*. § 2640.201(b).

736. *Id*. § 2640.202(a). The aggregate amount includes the interests of a spouse and/or minor children.

737. *Id*. The regulations suggests that a conflict may be avoided by a standing order with one's broker to sell any excess over $5000.

738. FAR, *supra* note 22, at 3.601(a).

739. Cygnus Corp., B-275957, Apr. 23, 1997, 97-1 CPD ¶ 202.

740. Pub. L. No. 104-106 § 5113, 110 Stat. 681-83 (1996).

741. 62 Fed. Reg. 14,756 (1997).

ates modular contracting[742] techniques in acquisitions of information technology. Modular contracting techniques allow agencies to procure major information technology acquisitions by dividing them into smaller, more manageable increments. Modular contracting allows agencies to balance the government's need for fast access to rapidly changing technology and incentivized contractor performance with stability in program management, contract performance, and risk management. The proposed rule directs agencies to use modular contracting to the maximum extent practicable for major information technology systems.

I Want Something "FAST"er!

To accommodate those agencies that require information technology resources faster than the blanket purchase agreements or federal supply schedule agreements can provide, the GSA has a new and faster "Federal Acquisition Services for Technology" (FAST) buying service.[743] FAST is a rapid procurement, cost-reimbursable GSA buying service managed by GSA for use by other agencies. This program provides agencies with a quick, low-cost buying service for commercial off-the-shelf integrated information systems and network solutions that support an agency's mission.[744]

Construction Contracting

Design-Build Rules in Final Form

On 2 January 1997, the FAR Council issued a final rule[745] amending the FAR[746] to implement the construction design-build rules.[747] The proposed rule was published on 7 August 1997.[748] The FAR Council received seventy-seven comments. After reviewing the comments, the FAR Council revised the proposed rule to include examples of phase two evaluation factors.[749]

FAR 36.104 was also amended to state that unless the traditional acquisition approach of design-bid-build [750] or design-build methods are used,[751] the contracting officer shall use the two phase selection procedures.[752] The two phase design-build selection procedures[753] shall be used when the contracting officer determines it is appropriate.[754] The contracting officer may issue one solicitation covering both phases or sequentially issue two solicitations. Proposals are evaluated in phase one to determine which offerors will submit proposals for phase two. One contract is awarded using competitive negotiations.[755] Phase one of the solicitation shall include the scope of the work, the phase one evaluation factors,[756] the phase two evaluation factors,[757] and a statement of the maximum number of offerors that will be selected to submit phase two proposals.[758]

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742. *Id.* Under modular contracting, agencies divide the purchase of an IT system into smaller "stand-alone" modules. Several modules or purchases are required to complete a system. In other words, the goal of modular contracting is to purchase smaller units that will function independently, yet allow for the creation of integrated systems through the execution of additional modules.

743. *See Information Technology: GSA Launches FAST Buying Service to Expedite Purchase of COTS Software, Equipment, Services*, 67 FED. CONT. REP.8 (BNA) (1997).

744. *Id.*

745. 62 Fed. Reg. at 271.

746. FAR, *supra* note 22, at 36.104, 36.301(b)(2), 36.303-1, 36.303-(a).

747. Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 4105, 110 Stat. 186 (1996).

748. 61 Fed. Reg. 41,212 (1996).

749. Examples include design concepts, management approach, key personnel, and proposed technical solutions. FAR, *supra* note 22, at 36.303-2.

750. This is defined as the traditional delivery method where design and construction are sequential and contracted for separately with two contracts and two contractors. *Id*. at 36.102. The Brooks Architect-Engineers Act established the design-bid-build rules. 41 U.S.C.A. § 541 (West 1997).

751. Design-build is defined as combining design and construction work in a single contract with a single contractor. FAR, *supra* note 22, at 36.102.

752. This is a selection method in which the agency selects a limited number of offerors (normally five or fewer) during phase one to submit detailed proposals for phase two. *Id*. at 36.102.

753. *Id*. at 36.303. Phase one shall include the scope of work, the phase one evaluation factors (including technical approach, specialized experience and technical competence, capability to perform, past performance, and other appropriate factors that are not cost- or price-related factors), phase two evaluation factors, and a statement of the maximum number of offerors that will be determined to be in the competitive range. *Id.* In phase two, the contracting officer shall determine the competitive ranges and then negotiate in accordance with the procedures found in FAR Part 15. *Id*.

754. *Id.* at 36.301. The phase two procedures apply where: 1) three or more offers are anticipated; 2) design work must be performed by offerors before developing price or cost proposals and; 3) the offerors will incur a substantial amount of expense in preparing offers. *Id.*

755. *Id.* at 36.303.

Differing Site Conditions

Third Parties After Contract Award Do Not Create a Differing Site Condition. On 10 March 1987, Olympus Corporation was awarded a fixed-price construction contract to pave the plant yards at the Stratford Army Engine Plant in Stratford, Connecticut. The contract included the standard differing site conditions clause. The government issued a notice to proceed on 18 April 1987. In May 1987, while clearing a trench in the plant yard, another government contractor operating the plant accidentally cut open an underground oil pipe. Oil escaped, contaminated the soil, and prevented Olympus from proceeding with its required paving. Shortly thereafter, Textron employees went on strike. These employees picketed the plant entrances and prevented Olympus employees from accessing the plant for two months. The contracting officer received timely notice of the contamination and the plant strike. Olympus requested an equitable adjustment and a sixty-nine day time extension. The contracting officer granted the time extension but only paid the contamination costs.

Olympus filed suit in the Court of Federal Claims, arguing the strike costs should be paid under the differing site conditions clause. The Court of Federal Claims granted the government's motion for summary judgment based on the fact that the differing site conditions clause did not provide the contractor with relief. Olympus appealed the decision to the Federal Circuit.[759]

In sustaining the summary judgment, the Federal Circuit held that the differing site conditions clause applies only to conditions existing at the time of contract award. Soil contamination and labor strikes occurring after the contract award are not differing site conditions. Olympus was not entitled to an equitable adjustment based on delay in completing its paving project caused by adverse physical conditions arising after contract performance began, because such delay was not caused by a differing site condition. The Federal Circuit further stated that interference by the government with the contractor's access to the work site may breach the government's duty to cooperate. The court concluded that the government is not responsible for third party actions that delay the contractor's performance.

Contractor Entitled to Interest on Differing Site Condition Claim Even if Costs Not Yet Incurred. The Army Corps of Engineers Board of Contract Appeals ruled that a contractor may recover interest on its differing site condition costs from the time its claim was received by the contracting officer, although the contractor had not yet incurred these costs.[760] The government argued that Congress did not intend for contractors to receive millions of dollars in interest before costs are incurred.[761] The board determined that the contractor is not unbridled in its interest submission. Had Congress felt it necessary to limit interest costs to costs already incurred, Congress could have done so. It did not. The board specifically found that Congress rejected that approach in favor of the more readily ascertainable date of claim submission.

The government further argued that it has no way to protect itself from incurring interest on unperformed work. The board disagreed and found that the government does specifically have control over the incurrence of cost through its approval of the changed work process. The contractor has to prove its costs for claims over $100,000 due to the certification process, and the government controls what work it approves in a change of work modification. Accordingly, the government is protected against unbridled interest costs.[762]

Capacity to Perform Other Contracts Defeats Unabsorbed Overhead Costs Claim

The Air Force awarded AEC Corporation a contract for asbestos abatement and renovation on a building at Patrick Air Force Base, Florida. After beginning performance, AEC found materials it suspected contained asbestos but which were not identified as such in the specifications or drawings. AEC provided samples to a testing laboratory and ordered testing with-

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756. *Id*. at 36.303-1. The phase one evaluation factors include technical approach (not detailed design or technical information), technical qualifications (such as specialized experience, technical competence, capability to perform and past performance of the offeror's team, including the architect-engineer and construction members), and other appropriate factors (excluding cost- or price-related factors, which are not permitted at this point).

757. Phase two of the solicitation shall be prepared in accordance with FAR Part 15 and shall include phase two evaluation factors. *Id*. at 36.303-2.

758. *Id*. at 36.303-1. The maximum number specified shall not exceed five unless the contracting officer determines, for that particular solicitation, that a greater number is in the government's interest and is consistent with the purposes and objectives of two phase design-build contracting.

759. Olympus Corp. v. United States, 98 F.3d 1314 (Fed. Cir. 1996).

760. J.S. Alberici Constr. Co., ENGBCA No. 6179-R, 97-1 BCA ¶ 28,919. The government requested that the board reconsider an earlier decision which granted summary judgment. Making the same arguments as in the earlier decision, the government asserted that the board erred in its interpretation of undisputed facts. Although the primary purpose of reconsideration is to allow a party the opportunity to present significant newly discovered evidence or evidence not readily available at the time of the original decision, the board decided to hear the case because of the government's strong interest in the outcome of the case.

761. Brookfield Constr. Co., Inc. v. United States, 661 F.2d 159 (Ct. Cl. 1981).

762. *Alberici*, 97-1 BCA ¶ 28,919.

out notifying the Air Force. Although the results were positive for asbestos, the contract did not require such testing. Upon notice to the Air Force, the Air Force issued a written suspension of work notice. The length of the suspension was unknown at the time. Ultimately, the suspension period lasted 305 days, which the board found to be unreasonable.[763] After sending additional samples to a testing lab, AEC submitted the positive asbestos results to the Air Force. The Air Force issued another indefinite suspension of work notice which lasted thirty-two days. The board also found this suspension to be unreasonable. AEC then sought recovery of the unabsorbed overhead costs and recovery of increased overhead costs during the extended contract performance period.

The board found that the two Air Force ordered suspensions of work were the sole responsibility of the Air Force. AEC established a prima facie case of entitlement. These work suspensions were unreasonable in that they were of uncertain and unreasonable duration. However, the board denied AEC's claim for unabsorbed overhead costs because, although the Air Force unreasonably suspended the contract work, the contractor had the capacity to perform on other contracts. The contractor had submitted bids on five other government contracts during the suspension period.

No Substantial Completion when Punch List Not Finished

The GSA awarded a contract to Environmental Data Consultants, Inc. (EDC) for the replacement of underground fuel oil storage tanks at a federal office building in Brooklyn, New York. The GSBCA[764] considered three claims arising from this contract. First, the GSA demanded a $171,217 credit from EDC for work not performed due to contract deductive changes. Second, EDC sought $918,341.41 for extra costs and materials not covered under the base contract. Third, the contract was terminated for default.

The contract required EDC to excavate soil from the job site and to construct a cofferdam.[765] Once accomplished, EDC was to install three new oil storage tanks within the excavated area. EDC's excavation subcontractor, Soil Solutions, Inc., engaged Maybey Bridge, Inc. to supply materials to construct the cofferdam. Maybey Bridge could not build a cofferdam to the GSA's specifications. As a result, EDC requested and was granted the right to build a smaller cofferdam than specified. The government then established how much less to pay EDC for the reduced work.[766] The board found that the government was entitled to the credit for the deleted work.

The contract required the work to be completed no later than 365 days after receipt of the notice to proceed. On that date, the GSA determined the project was substantially complete because the building was able to get oil through installed pipes from a single new storage tank. Although the GSA found the contract to be substantially complete, it gave EDC a punch list of items that needed to be completed.[767] EDC proceeded to complete the punch list items and sent a letter stating that it had completed all the work. The contracting officer was unconvinced[768] and issued a termination for default.

EDC claimed the termination for default was improper because the GSA found that the contract was substantially complete. The GSBCA determined that even if the contracting officer made this determination, the project was not in fact substantially complete. According to the board, when a construction contract is substantially complete is determined by whether the facility is "occupied" and used by the government for its intended purposes.[769] The parties contracted for three oil tanks. One oil tank could not be used because it consistently had a high level of water in it.[770] The project was not substantially complete because the power plant had only two-thirds of the oil storage capacity required by the contract. The board went further, stating that even if it had agreed that the project was substantially complete, there would still remain good cause for the default termination. A project can be suitable for its intended purpose, but not complete in the sense of providing the govern-

763. AEC Corp., ASBCA No. 45713, 97-1 BCA ¶ 28,973.

764. Environmental Data Consultants, Inc., GSBCA No. 13244, 96-2 BCA ¶ 28,614.

765. A cofferdam is a structure to keep the walls of the excavation from collapsing.

766. When the government deletes clearly required work from the contract, it is entitled to impose a deductive change, decreasing the contract price to reflect the reduced cost to perform the work. Plaza Maya Ltd, GSBCA No. 9086, 91-1 BCA ¶ 23,425. The government has the burden of proving the extent of the downward adjustment by establishing the reasonable cost the contractor would have incurred in performing the deleted work.

767. This included incomplete work regarding piping containment chambers and underground piping. The contract required EDC to install a piping containment chamber on top of each of the three oil storage tanks. The contract also required EDC to removed underground piping in its entirety insofar as such piping was connected to three old tanks that were to be removed from the site. *Environmental Data Consultants*, 96-2 BCA ¶ 28,6149, at 142,860.

768. EDC claimed that it had cut a hole in the pavement outside the power plant, removed the underground piping through the hole, and patched the pavement. It did not appear to the contracting officer that the asphalt patch was big enough to allow a person to work within it and bring up the old piping. In addition, the on-site inspector had not observed any pipe removal. *Id.* at 142,861.

769. Thermodyn Contractors, Inc. v. GSA, GSBCA No. 12510, 94-3 BCA ¶ 27,071.

770. If the tank were used as is, the water would destroy the system. *Environmental Data Consultants*, 96-2 BCA ¶ 28,6149, at 142,860.

ment with the benefits of its bargain.[771] When completion of the facility is unduly prolonged, or even when only the correction of punch list items is unduly prolonged, so as to indicate a lack of due diligence, or when effective progress of correction action ceases, a termination for default is legally justified.[772] This is true even if the government is using the facility. The correction of punch list items is a contractual obligation. The GSBCA found that despite opportunities over several months, EDC did not complete at least two significant punch list items, making the termination for default proper.

Federal Supply Schedules

A Bad Case of Mixing Apples and Oranges?— "Bundling" of Schedule and Non-Schedule Procurements Violates CICA

In a case that may well reverberate throughout the procurement community, the Court of Federal Claims ruled that "bundling" nonschedule products with schedule products under a multiple award schedule purchase order is illegal.[773] The GSA and the GAO had previously condoned an authorized buyer's acquisition of bundled items when they were "incidental" to the multiple award schedule purchase.[774] In *ATA Defense Industries, Inc.*, the Court of Federal Claims held that this bundling practice was "fundamentally inconsistent with Congress' unambiguous statutory mandate in the CICA."[775] It is significant that the Army, in issuing its purchase order contract for the upgrade of two target ranges at Fort Stewart, Georgia, had included non-schedule items amounting to thirty-five percent of the total contract value.

Contracting officers have increasingly turned to the federal supply schedule to meet their needs.[776] In addition, agencies are turning more frequently to blanket purchase agreements, where the government enters into an agreement with an individual contractor or a team of contractors for particular types of goods or services. These contracts have frequently included schedule as well as nonschedule items. This Court of Federal Claims decision may slow the recent explosion in these multiple award schedule trends.

New Regulatory Guidance on Ordering over Maximum Order

The FAR Council released the final rules for placing schedule orders above the maximum order threshold.[777] The rules[778] permit contracting officers to place orders in excess of the threshold after: (1) reviewing reasonably available information about multiple award schedule contracts using the "GSA Advantage!" on-line shopping service; (2) reviewing catalogs/pricelists of additional schedule contractors; (3) generally seeking price reductions from schedule contractors appearing to provide the best results; and (4) placing an order with the contractor that provides the best value and offers the lowest overall cost alternative.

In essence, contracting officers may exceed the threshold whenever it will yield the best value. In selecting an item, contracting officers can consider special features that are not provided by comparable vendors, trade-in and warranty considerations, maintenance availability, probable life compared to comparable items, past performance, and environmental/energy efficiency considerations.[779]

The new rules give contracting officers guidance in seeking price reductions. The rules provide that competition need not be a factor in placing an order against multiple award schedules. The GSA is presently eliminating maximum order limitations from its schedule contracts as quickly as it can. Should the issue arise, it will be interesting to see how the GAO handles these rules in light of *Komatsu Dresser Company.*[780] This

771. R.M. Crum Constr. Co., VABCA No. 2143, 85-2 BCA ¶ 15,149.

772. Two State Constr. Co., DOTBCA No. 78-31, 81-1 BCA ¶ 15,149.

773. ATA Defense Indus., Inc. v. U.S., 38 Fed. Cl. 489 (1997).

774. *See, e.g.*, Vion Corp., B-275063.2, B-275069.2, Feb. 4, 1997, 97-1 CPD ¶ 53. The GAO held:

> [A]n agency may procure FSS and non-FSS items that are incidental to the FSS items under a single FSS procurement, so long as they meet the needs of the ordering agency and offer the lowest aggregate price, and if the cost of the non-FSS items is small compared to the total cost of the procurement.

Id.

775. *ATA Defense Indus.*, 38 Fed. Cl. at 489.

776. Given the dramatic reduction in the number of acquisition positions within federal agencies, streamlining procurements are particularly welcome.

777. 62 Fed. Reg. 44,802 (1997).

778. Amending FAR 8.404.

779. FAR, *supra* note 22, at 8.404(b)(2) (as amended).

1992 decision addressed a "Re-quote Arrangements" clause that provided for limited competitions only among schedule contractors for requirements exceeding the largest maximum order limitation available from any particular vendor. The Comptroller General found the clause inconsistent with the Competition in Contracting Act's requirement for full and open competition. Regardless of the elimination of maximum order limitations, however, a broad challenge to BPAs under CICA appears inevitable, given the Court of Federal Claims analysis in *ATA Defense Industries*.

Foreign Acquisition Issues

In *Goddard Industries, Inc.*,[781] the GAO held that the Army properly purchased a foreign military sale[782] requirement under a sole source acquisition. The Army purchased M151 vehicle spare parts on behalf of the Republic of the Philippines. Goddard Industries, Inc., the protester, claimed that the Army violated the Competition in Contracting Act of 1984[783] when the agency bought (reimbursed by the foreign country) the spare parts using a sole-source specified by the Philippines.[784]

FAR 6.302-4(b)(1) provides an exception[785] to the requirement of "full and open" competition if a foreign government issues a written direction to the agency to purchase the requirement using a sole-source.[786] Goddard claimed that this contract does not fall under this exception because the foreign country is not really reimbursing the United States. When the United States provides funds to a foreign country for an FMS purchase, the funds are drawn from the United States Treasury and are transferred to the foreign country's FMS account. After receiving the funds, the foreign country reimburses the United States. Therefore, Goddard claimed, the FMS purchase was improper because the military assistance program funds (MAP)[787] do not actually belong to the Phillippines.[788] Goddard asserts that the Army should have used competitive procedures rather than a sole-source procurement.[789]

The GAO in *Goddard* stated that the MAP funds issue was litigated in *International Logistics Group, Ltd.*[790] In *International*, the GAO determined that the federal statute allows the transfer of funds from the United States to a foreign country's FMS trust account for the obligations arising from purchases made under the Arms Export Control Act.[791] The GAO concluded that after the transfer of funds into the FMS account, the Army may use sole source procurement.[792]

Commercial Activities/Service Contracting

A Right of First Refusal for Contractor Employees

An interim rule, published on 22 August 1997, creates a right of first refusal for employment with a successor contractor for certain contractor employees.[793] The rule applies only to "building service contracts"[794] and only to nonmanagerial and nonsupervisory employees. Examples of contracts to which the rule is applicable are contracts for custodial services; groundskeeping; inspection, maintenance, and repair of fixed equipment; laundry services; and food service.[795]

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780. B-246121, Feb. 19, 1992, 92-1 CPD ¶ 202.

781. B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104.

782. In an FMS acquisition, the DOD acts as an agent for a foreign country and procures the requested services or supplies on a sole source basis. The foreign country later reimburses the United States. *See* Arms Export Control Act, 22 U.S.C. §§ 2751-99aa (1994).

783. 10 U.S.C. § 2304 (1994) (requiring federal agencies to use full and open competition to the maximum extent practicable).

784. *Goddard*, 97-1 CPD ¶ 104 at 1.

785. 22 U.S.C. § 2311(a)(3) (1994).

786. 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(C)(4) (1994); FAR, *supra* note 22, at 6.302-4.

787. 22 U.S.C. § 2311(a)(3).

788. *Goddard*, 97-1 CPD ¶ 104 at 1.

789. *Id*. at 2.

790. B-214676, Sept. 18, 1984, 84-2 CPD ¶ 314.

791. B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104 at 2.

792. *Id*.

793. 62 Fed. Reg. 44,823 (1997).

794. A building service contract is "a contract for recurring services related to the maintenance of a public building." FAR, *supra* note 22, at 22.1202.

In such contracts, the right of first refusal applies only to employees performing the covered services. The rule does not apply to contractors whose employees perform their services both in public buildings and in other buildings.[796] Examples of such contracts include pest control and trash removal.

The rule applies to public buildings, but defines the term narrowly via a long list of exclusions. Significant exclusions are military installations other than the Pentagon, Postal Service buildings, VA hospitals, leased buildings, government housing, and U.S. owned buildings in foreign countries.

The predecessor contractor must provide the contracting officer with a list of its covered employees. The contracting officer must notify eligible employees of their potential employment rights[797] and must furnish the list to the successor contractor.[798] The successor contractor may not offer employment to anyone else until it has complied with the right of first refusal requirements.[799] During the first three months of performance, a contractor which reduced the workforce numbers from that of the predecessor contractor must offer covered employees a right of first refusal to fill certain vacancies.[800]

Disputes related to the right of first refusal are not subject to the general disputes clause. Complaints, however, may be lodged with the contracting officer.[801] The contracting officer must forward unresolved disputes and supporting documents to the Department of Labor (DOL) for resolution.[802] The DOL is authorized to enforce the requirement. Additionally, the DOL may order the contracting officer to withhold payments and subsequently to transfer them to the DOL for disbursement.[803]

A successor contractor may reduce staffing levels,[804] offer employment in dissimilar positions with reduced pay and benefits,[805] or decline to offer employment to those who "failed to perform suitably on the job."[806]

Performance-Based Service Contracting

On 22 August 1997, the FAR Council published final rules on performance-based service contracting.[807] The new rules encourage the use of performance-based contracting methods, encourage the use of performance incentives,[808] and require the development and use of quality assurance surveillance plans.[809]

According to the FAR, contracting officers should use performance incentives, both positive and negative, to the maximum extent practicable. Additionally, those performance standards which relate to performance incentives "shall be capable of being measured objectively."[810] The OFPP has placed several model performance-based statements of work on the Internet.[811] Each contains provisions for the use of positive and negative performance incentives. Contracting officers and legal advisors who look to these model statements of work for

795. Day care services, non-recurring maintenance contracts, and concession contracts for other than food or laundry services are not covered. The rule applies to contracts which include recurring building services and other additional services or requirements, such as construction or supplies. *Id*. at 22.1203-1(b)(1).

796. *Id*. at 22.1203-2(b).

797. *Id*. at 22.1205(a).

798. *Id*. at 22.1204(a).

799. *Id*. at 52.222-50(b).

800. *Id*. at 22.1208(b).

801. *Id*. at 52.222-50(j), 22.1206.

802. *Id*. at 22.1206(b).

803. *Id*. at 22.1207(b).

804. *Id*. at 52.222-50(b).

805. *Id*. at 55.2222-50(c).

806. *Id*. at 55.222-50.

807. FAC 97-01, 62 Fed. Reg 44,813, (1997). *See also 1996 Year in Review, supra* note 9, at 11 (discussing the proposed rule).

808. FAR, *supra* note 22, at 37.602-4.

809. *Id*. at 37.602-2, 46.401.

810. *Id*. at 37-602-4.

811. These are available on the internet at http://www.arnet.gov/.

guidance are advised that the negative performance incentives in these model statements of work have already been criticized as unenforceable penalties.[812] Contracting officers must also heed the mandate to use only objective performance criteria in the application of incentives.

Support Agreements Permitted Without a Cost Comparison

Beginning 1 October 1997, agencies must conduct a commercial activities program cost comparison before "[n]ew, expanded, or transferred work requirements"[813] can be performed by an Interservice Support Agreement.[814] An expansion is the modernization, replacement, upgrading, or enlargement of an in-house commercial activity or capability.[815] By definition, expansions require cost comparisons only when they involve an operating cost increase of thirty percent or more, a capital investment increase of thirty percent or more, or an increase of sixty-five or more full-time equivalent federal employees. A "new requirement" is defined as a "newly established need for a commercial product or service."[816] This definition does not limit the size or scope of a new requirement as the trigger for a cost comparison. It would seem reasonable to read "new requirement" as equivalent to out-of-scope change.[817]

Trimming the Fat from the Already Lean

A recent GAO report questions the accuracy of the DOD's estimated cost savings from proposed outsourcing initiatives.[818] The report notes that the savings are based on a database, which tracked savings during only the first three years following commercial activities studies. These statistics fail to take into account subsequent changes due to inadequately drafted statements of work, cost increases from changes in federal wage rates, costs of conducting commercial activities cost comparison studies, and mission creep. Additionally, the report suggests that downsizing may have already achieved efficiencies.

The GAO also notes that downsizing within the DOD has already resulted in civilian personnel cuts which may force outsourcing, regardless of cost effectiveness. In addition, many installations lack qualified personnel to perform the cost comparison studies required by OMB Circular A-76 and the Revised Supplemental Handbook. The use of contractor consultants may be invaluable, but it is at odds with Congress' concern about what it considers an unjustified increase in the use of advisory and assistance services.

Cost Comparison for "Privatized"[819] Function?

The National Air Traffic Controllers Association has survived a motion to dismiss its challenge to the Department of Transportation's "privatization" of numerous air traffic control towers.[820] This may be a case to watch. The government never raised the argument that the cost comparison requirements under OMB Circular A-76 were inapplicable to privatization decisions. If the plaintiffs prevail, this could have a significant impact on other privatization projects, such as those currently underway in the Army to privatize base housing.

Happy Birthday!

The OPM took a unique and innovative approach to securing contractor performance of background investigations for security clearances.[821] It awarded a sole source contract to a company formed by approximately ninety percent of its own former employees.[822] The use of other than full and open competition was justified by the Director, OPM, as in the public interest.

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812. *See* John Cibinc, *Performance-Based Service Contracting: Negative Incentives—Liquidated Damages or Penalties?*, 11 NASH & CIBINC REP. ¶ 40, Aug. 1997.

813. FEDERAL OFFICE OF MANAGEMENT AND BUDGET [OMB], CIR. A-76 PERFORMANCE OF COMMERCIAL ACTIVITIES; REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES, ch. 2, para. A.5.a (1996).

814. An Interservice Support Agreement is defined as "the provision of a commercial activity, in accordance with an interservice support agreement, on a reimbursable basis. This includes franchise funds, revolving funds, and working capital funds." *Id.* app. 1.

815. *Id.*

816. *Id.*

817. This is an area which may come under close scrutiny. One industry group has a hotline "to gather information about contract opportunities for which federal agencies are competing against the private sector to provide commercially available services." *See Public-Private Competition*, 68 FED. CONT. REP. 9 (BNA) (1997).

818. GEN. ACCOUNTING OFFICE, REPORT ON BASE OPERATIONS, CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING, Report No. GAO/NSIAD-97-86 (1997).

819. The term privatization is currently used to describe the government's complete divestiture of a function. The term outsourcing is commonly used to refer to the performance of a governmental function by a government contractor.

820. National Air Traffic Controllers Ass'n. v. Pena, 944 F. Supp. 1337 (N.D. Ohio 1996).

821. Varicon Int'l v. Office of Personnel Management, 934 F. Supp. 440 (D.D.C. 1996).

The District Court for the District of Columbia denied injunctive relief to contractors seeking to force competition. These were contractors who were providing the same services to other federal agencies and who wanted a chance to compete for this business.[823] The court determined that the sole source award was not reviewable under the APA. The determination to forgo competition in the public interest is a matter committed to agency discretion.

The OPM justified its decision as the only feasible way to privatize this function. The determination and findings also cited the need for uninterrupted service, the uncertainty of achieving similar quality service from another contractor, and the benefit of placing employees whose jobs would be lost. The court found this explanation neither irrational nor arbitrary. The court also rejected the plaintiffs' argument that USIS was created in violation of the government Corporation Act.[824]

Perhaps this OPM innovation will become the model for other outsourcing efforts. It is interesting to note that the plaintiffs claimed that injunctive relief would prevent the government from paying higher prices as a result of the lack of competition. The OPM claimed that the privatization of this function will save the government $20-25 million.[825]

Technical Data Rights and Patents

The Court of Federal Claims has finally denied Inslaw Inc.'s long-standing quest for recovery against the Justice Department.[826] This decision hopefully closes out nearly fifteen years of litigation regarding the plaintiff's allegations that the Department of Justice conspired to steal and to distribute copies of its proprietary software named PROMIS, the popular name for "Prosecutor's Management Information System."[827] Among the wilder allegations was Inslaw's contention that former Attorney General Edwin Meese and other Department of Justice employees had conspired with marketplace competitors to steal PROMIS and financially undermine Inslaw. The Justice Department procured PROMIS in 1982 under a $9.6 million cost-plus-basis contract with the Executive Office for United States Attorneys.

Reviewing the case under the dual criteria for congressional reference cases (i.e., the existence of a legal claim or one in equity), the Court of Federal Claims found that the plaintiffs failed to prove that Inslaw's claimed enhancements were proprietary, that the DOJ acted unjustifiably in respect to them, that the government had less than unlimited rights in enhanced PROMIS as delivered and installed, that the DOJ in any way frustrated or impeded proof of Inslaw's proprietary rights to the claimed enhancements, or that the DOJ administered the 1982 contract in bad faith.[828] In other words, Inslaw's allegations were finally laid to rest—hopefully.

Commercial Item Acquisition

In *Access Logic, Inc.*,[829] NASA issued a solicitation for a 360-degree rear projection screen display system. The system is used to simulate the outside view from an air traffic control tower.[830] NASA issued the solicitation in the combined synopsis/solicitation commercial item format.[831] It advertised that award would be made to the lowest-priced technically accept-

822. The company, incorporated as US Investigations Service, is an employee stock ownership plan (ESOP). It is the first ESOP ever created from a former federal agency. Apparently, the Office of Personnel Management assisted in the formation of the company by contracting with a consulting company, ESOP Advisors, Inc., for a feasibility study and with American Capital Strategies for a business plan. *See* Ronald P. Sanders and James Thompson, *Live Long and Prosper*, 1997 NAT'L J. GOV'T EXECUTIVE, Apr. 1997.

823. Executive branch agencies which desire to perform this function in-house must seek a grant of authority from the Office of Personnel Management (OPM). The plaintiffs argued that injunctive relief was necessary to prevent the OPM from revoking these delegations in order to give more business to the newly formed company run by its former employees. This was part of the plaintiffs' attempt to show that they would suffer irreparable harm if the court failed to intervene. *See Varicon*, 934 F. Supp. at 447.

824. 31 U.S.C.A. § 9102 (West 1997).

825. Dierdre Shesgreen, *OPM Privatization*, LEGAL TIMES, Aug. 5, 1996, at 14.

826. Inslaw v. United States, No. 95-338X, 1997 WL 433804 (Fed. Cl. July 31, 1997).

827. The long tale of Inslaw innuendo began with allegations in bankruptcy court. Inslaw contended that the Department of Justice (DOJ) used an enhanced version of its software program without permission. The bankruptcy court agreed with Inslaw and awarded the corporation approximately $6.8 million. *Id.* at *2. The DOJ appealed to the district court, which reduced the damages and upheld the bankruptcy court's decision. *Id.* The Court of Appeals for the D.C. Circuit reversed, however, and found that the bankruptcy court's automatic stay did not bar the DOJ from exercising control over software that had been installed before the bankruptcy petition was filed. *Id.* After the Supreme court denied certiorari, Inslaw sought relief through the congressional reference process under 28 U.S.C. § 1492. The matter was ultimately referred to the Court of Federal Claims.

828. *Id.*

829. B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36.

830. *Id.* at 1.

able proposal. NASA used a "brand name or equal" specification and included a projection display system requirements document, which constituted the agency's salient characteristics. One of these characteristics was that the physical separation between the screens, referred to as mullions, be as small as possible so as to make it difficult to see the screen edge lines.[832]

The only reference in Access Logic's (ALI's) proposal concerning the mullions was a statement that "[t]he screens will be installed as close together as possible, with minimal vertical mullions."[833] NASA rejected ALI's proposal because it determined that a "fusing" alternative proposed by ALI was not satisfactorily explained. ALI protested, arguing that its submission complied with all the terms and conditions of the solicitation.

The GAO determined that NASA's analysis was reasonable. The GAO found that the flexibility afforded acquisitions of commercial items does not extend to awarding contracts based on hidden agendas. An agency may be flexible with regard to its evaluation criteria in a solicitation. However, it is obligated to award based only on that criteria expressly identified in the solicitation just as strictly as in non-commercial procurements.

FISCAL

Purpose

Money for Training—A Matter of Degree

Through the Army's Funded Legal Education Program (FLEP), attorneys enjoy free tuition and books for law school. The GAO has also allowed an agency to pay the cost of a bar review course.[834] Nevertheless, the fee for taking the bar examination is a personal expense.[835] Such GAO decisions left the DOD On Site Inspection Agency (OSIA) wondering—if it could pay for college classes as part of an academic degree training program, could it pay the lower cost of College Level Examination Program (CLEP) tests?[836] The GAO said "yes." The definition of training found in the Government Employee's Training Act[837] includes the "process . . . of placing or enrolling the employee in a planned, prepared, and coordinated program." The GAO viewed CLEP testing as an "integral part" of that process. In its opinion, however, the GAO continued to draw the distinction between these college placement type tests and licensing examinations.

Eating the Profits

The Defense Reutilization and Marketing Service (DRMS) had a very good year in fiscal year 1994. Its deposits exceeded expenditures by $17 million.[838] This followed a year in which expenditures had exceeded deposits by almost $92 million. The impressive turn around was due to the adoption of new commercial-type practices implemented after the DRMS became a DOD "Re-invention Laboratory."[839] This called for a celebration, so the DRMS granted awards to every employee and authorized a "[c]elebration day," on which the government paid for lunch for each employee. Each DRMS location spent up to $20.00 per person for the awards ceremonies. The DRMS reasoned that the free lunches were an appropriate incidental expense related to awards ceremonies. The GAO agreed! Refreshments at awards ceremonies represent an exception to the general rule that food is a personal expense.[840] The GAO recognized that, although it had not previously approved refreshments of this magnitude, the DRMS had been neither arbitrary nor capricious.[841]

Out in the Boondocks—Where the Government Buys the Refrigerators

In *Central Intelligence Agency—Availability of Appropriations to Purchase Refrigerators for Placement in the Work-*

831. FAR, *supra* note 22, pt. 12.603.

832. *Access Logic* 97-1 CPD ¶ 36, at 2.

833. *Id.* Mullions are the blank spaces between screens.

834. *See* Decision of the Comptroller General, B-187525, 1976 WL 9595 (Comp. Gen. Oct. 15, 1976).

835. *Id.*

836. Payment of Fees for College Level Examination Program, B-272280, 1997 U.S. Comp. Gen. LEXIS 188 (May 29, 1997).

837. 5 U.S.C.A. §§ 4101 (1997).

838. Defense Reutilization and Mktg. Serv. Awards Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997).

839. *Id.* at *2.

840. *See* Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, 1989 WL 241549 (Comp. Gen. Dec. 22, 1989) (holding that the cost of coffee and donuts is an unauthorized entertainment expense).

841. *Id.* The GAO compared this to the National Aeronautics and Space Administration's expenditure of $60,000 for a banquet at which President Nixon awarded the Medal of Freedom to the Apollo 11 astronauts. *See* Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (July 21, 1986).

place,[842] the GAO allowed the purchase of refrigerators, not as a matter of "personal convenience of individual employees,"[843] but as a tool to enhance the agency's performance of its mission. The CIA justified this expense based on the following. The cafeteria was open only for breakfast and lunch and could not accommodate all employees. The closest restaurants were ten to fifteen minutes away. Employees who ordered food from a delivery service had to pick it up at a visitor's location, because deliveries were forbidden on the CIA compound. In its discussion of the issue, the GAO made it clear that such expenses were appropriate only where the agency determined a necessity based upon lack of alternative eating facilities.

Department of Justice Thumbs Its Nose at GAO

In November 1995, Attorney General Janet Reno signed an order advising the Department of Justice Accountable Officers to seek legal opinions concerning the legality of questionable obligations or claims from the general counsel's office, rather than from the GAO.[844] The order also stated that GAO opinions would not "absolve such officers from liability for the loss or improper payment of funds."[845] This order followed "long-standing" legal opinions that laws granting the Comptroller General the authority to relieve executive branch accountable officers from liability were unconstitutional.[846]

This year, the Department of Justice went a step further and advised the GSA that it could properly use a lump sum or general appropriation for the purchase of business cards for its employees' official use.[847] In its opinion, the Department of Justice examined GAO precedent and found it "difficult to reconcile" the GAO's purpose test with its numerous opinions forbidding the use of appropriated funds for the purchase of business cards. For the Army, however, the printing of business cards remains prohibited by regulation.[848]

Obligations

In *McDonnell Douglas Corp. v. United States*,[849] the Court of Federal Claims limited McDonnell Douglas' recovery of incurred costs to the amount obligated at the time of the termination for default.[850] The Navy's total amount of obligation[851] at the time of termination was $3.5 billion. McDonnell Douglas claimed total incurred costs of $4 billion. The Court of Federal Claims ruled in favor of the Navy and limited McDonnell Douglas' recovery to $3.5 million.[852]

In *McDonnell Douglas*, the Navy awarded a fixed-price incentive contract for the development of A-12 attack aircraft. The A-12 contract was incrementally funded.[853] The primary issue involved the interpretation of the incremental funding clause in the contract. The incremental funding clause states, in part, that "[t]he government's total obligation for payment (including termination settlement expenses) under this contract shall not exceed the total amount obligated at the time of termination." However, McDonnell Douglas claimed $4 billion in incurred costs. In its appeal, McDonnell Douglas claimed that

842. B-276601, June 26, 1997, 97-1 CPD ¶ 230.

843. *Id.* at 1.

844. U.S. DEP'T OF JUSTICE, ORDER DOJ 2110.39A, Nov. 15, 1995.

845. *Id*. Disbursing officials, certifying officials, and agency heads may request from the GAO an advance decision concerning the propriety of making a particular payment of appropriated funds. 31 U.S.C.A. § 1301(a) (West 1997). Most agencies consider GAO decisions to be binding precedent, although aggrieved individuals retain the right to judicial review. *See generally* 1 UNITED STATES GENERAL ACCOUNTING OFFICE, OFFICE OF GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 1, para. E.2.a. (2d ed. 1991).

846. Memorandum from Stephen R. Colgate, Assistant Attorney General for Administration, to John Koskenen, CFO Council Chair, subject: Policy of Interest to the CFO Council (Jan. 24, 1996) (copy on file with authors).

847. Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, to Emily C. Hewitt, General Counsel, General Services Administration, subject: Use of Appropriations to Purchase Employee Business Cards (Aug. 11, 1997) (copy on file with authors).

848. U.S. DEP'T OF ARMY, REG. 25-30, ARMY INTEGRATED PUBLISHING AND PRINTING PROGRAM, para. 1-11 (28 Feb. 1989).

849. 37 Fed. Cl. 295 (1997). This case concerns the Navy's terminination of the A-12 aircraft program.

850. *See* McDonnell Douglas Corp. v. United States, 35 Fed. Cl. 358 (1996). This case involved the Navy's attempt to replace the A-6 aircraft. In 1988, the Navy awarded a contract to McDonnell Douglas to develop the A-12 attack aircraft. McDonnell Douglas ran behind schedule and experienced cost overruns during its initial performance. Eventually, the Navy terminated the contract for default. Later, the termination for default was converted into a termination for convenience because the court found that the Navy abused its discretion in terminating the contract for default. *Id*.

851. DEFENSE FINANCE AND ACCOUNTING SERVICE, REG. 37-1, para. 9-1 [hereinafter DFAS REG. 37-1]. An obligation is any act that legally binds the government to make payment.

852. *McDonnell Douglas*, 37 Fed. Cl. at 297.

853. *Id*. at 299. Incremental funding is a one-year appropriation to a multi-year contract.

its fixed-price contract with the Navy was actually a series of cost-reimbursement contracts. McDonnell Douglas argued that, under the principles of cost reimbursement contracts, the Navy must provide reimbursement for all of its incurred costs which are allocable and allowable.[854]

The Court of Federal Claims disagreed. The court observed that cost reimbursement contracts generally limit the government's liability and do not require the government to pay incurred costs in excess of the total amount allotted to the contract.[855] Furthermore, the court noted that the contractor is not obligated to continue performance beyond the total amount obligated to the contract.[856]

The court did not find McDonnell Douglas' arguments persuasive and held that the A-12 contract was a fixed-price contract. The court concluded that the incremental funding clause limits recovery of incurred costs to those obligated at the time of termination.[857]

Intragovernmental Acquisitions

DOD Issues New Project Order Regulations

The DOD issued new regulations for project orders in its latest version of Volume 11A of its financial management regulation, DOD 7000.14-R.[858] Project orders are statutorily authorized transactions between military departments and DOD government-owned government-operated (GOGO) establishments for work related to military projects.[859] The new regulation rescinds the guidance previously found in DOD Instruction 7220.1, "Regulations Governing the Use of Project Orders."

In order to issue a project order, the DOD GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Under previous guidance, only incidental subcontracting was permitted. Regardless of how narrowly or expansively this requirement was interpreted by contracting officers in the past, the new regulation clearly and dramatically expands the amount of subcontracting permitted. The DOD 7000.14-R merely requires that the GOGO "incur costs of not less than fifty-one percent of the total costs attributable to rendering the work or services ordered."[860]

The new regulation also provides clearer guidance regarding the requirement that work begin in a "reasonable time" after the time of acceptance. Absent unusual circumstances, the regulation states that work should begin within ninety days.[861] This new DOD guidance should not cause any discomfort in Army circles, as our own regulations already define a reasonable amount of time as ninety days.[862]

GAO Refuses to Review Challenge to Agency Decision to Issue Project Orders

In *SRM Manufacturing Co.*,[863] the GAO upheld its long-standing refusal to review agency decisions to execute work in-house, rather than contract out to the private sector, where no solicitation was issued for cost comparison purposes. The Defense Logistics Agency (DLA) issued a request for proposals for F-15 aircraft metal tube assemblies, citing a McDonnell Douglas Corporation part number as the approved item of supply. SRM submitted the only offer, and it was for an alternate ultimately approved as technically acceptable. The DLA, however, was not able to find SRM's offered price reasonable and canceled the solicitation. The DLA subsequently issued a request for quotations for the same items. In response, both McDonnell Douglas and SRM submitted quotes. McDonnell Douglas' quotation, however, did not meet the required delivery schedule and SRM's quotation still could not be determined fair and reasonable. Ultimately, the agency issued a project order to the Air Force.

SRM contended that the DLA should not have issued the project order without first performing a comparison between

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854. FAR, *supra* note 22, subpt. 16.3.

855. *McDonnell Douglas*, 37 Fed. Cl. at 300. *See also* FAR, *supra* note 22, at 52.232-22.

856. *McDonnell Douglas*, 37 Fed. Cl. at 302.

857. *Id*. at 295.

858. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vol. 11A (Reimbursable Operations Policy and Procedures) (11 Mar. 97) [hereinafter DOD REG. 7000.14-R].

859. 41 U.S.C.A. § 23 (West 1997).

860. DOD REG. 7000.14-R, *supra* note 858, ch. 2 (project orders).

861. *Id*.

862. DFAS REG. 37-1, *supra* note 851, para. 12-8b(16).

863. B-277416, Aug. 4, 1997, 97-2 CPD ¶ 40.

in-house and contractor performance. The GAO reaffirmed its general rule that they will not normally review agency decisions to perform work in-house, as they regard such decisions as matters of executive branch policy.[864] The GAO stated that they will only review such decisions where a competitive solicitation was issued for cost comparison purposes. The previous RFP issued by the DLA had no such purpose, and the GAO declined to expand its jurisdiction on that basis.

Liability of Accountable Officers

Who's Liable When the Boss Screws Up?

At issue in *Environmental Protection Agency*[865] was the decision by an EPA regional administrator to pay for the travel and lodging expenses of 171 non-federal officials attending an EPA data management conference.[866] Rather than acquiring the travel and related support services via contract, as he should have done, the administrator elected to fund the attendees' costs through a cooperative agreement awarded to the University of Kansas (KU).[867] Upon review, the EPA's inspector general concluded that appropriated funds were improperly expended and that either the certifying officer responsible for the payment or KU, which provided the conference support services, was liable.

Although agreeing that the EPA should not have used appropriated funds, the GAO concluded that neither the certifying official nor KU should be held liable. The GAO found that the certifying official had acted in good faith and had no reason to know that the administrator had elected to fund the travel costs using an improper funding instrument. The GAO further noted that the EPA received some value by the attendance of these "non-federal officials."[868] In light of all of this, the GAO was "not willing to charge the certifying official with the responsibility of ensuring that agency officials are always correct in exercising their discretion in choosing funding instruments."[869]

GAO Grants Cashier Relief Due to Leadership's Pervasive "Sense of Laxity"

Where's Dilbert© when you need him?[870] In *Sidney Kaplan*,[871] the State Department's Committee of Inquiry into Fiscal Irregularities audited the cash account of the Class B Cashier at the American Embassy in the Dominican Republic. The audit revealed an "unexplained loss" of $15,835, which gives rise to a rebuttable presumption of negligence on the part of the accountable office responsible for the funds,[872] in this case the cashier. Interestingly, the investigative committee found a "pervasive laxity in the supervision and management of the cashier's office."[873] The opinion reveals that the leadership at the embassy allowed unauthorized access to the cashier's office, failed to repair the safe's lock, did not ensure that alternate cashiers were adequately trained, and generally failed to ensure the cashier's operations were adequately staffed. The GAO found "most significant," however, the failure of "top-level officers of the embassy" to take corrective actions following repeated admonishments from a regional review center

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864. *See* Boulder Scientific Co., B-225644, Mar. 20, 1987, 87-1 CPD ¶ 323.

865. B-262110, Mar. 19, 1997, 97-1 CPD ¶ 131.

866. The "non-federal officials" were "certain state and Native American officials" who the EPA management identified as key to the success of the conference. *Id.* at 3.

867. Awards made under cooperative agreements lose their identity as federal funds. *Id.* at fn. 1. *See* 31 U.S.C.A. § 6305(l) (West 1997).

868. *Environmental Protection Agency*, 97-1 CPD ¶ 131 at 3. *See* 31 U.S.C.A. § 3528(b)(1)(B).

869. Instead, the Comptroller stated that a "certifying official's inquiry should be directed at assuring that correct administrative procedures are followed and the agency's payment is within statutory limits." *Id.* at 4. Similarly, the Comptroller concluded that KU was not "in a position to question the . . . Administrator's use of a cooperative agreement." *Id.* at 5.

870. *See* SCOTT ADAMS, THE DILBERT PRINCIPLE (1st ed. 1996). For example, Dilbert© provides cogent insight on "Pretending to Work" by suggesting that one should "Study Things."

> Get a job that lets you "analyze" or "evaluate" something as opposed to actually "doing" something. When you evaluate something you get to criticize the work of others. If you "do" something, other people get to criticize *you*.
>
> Often there are no clear performance standards for the job of analyzing something. You can take your time, savoring the mistakes of those people who were foolish enough to "do" something.

Id. at 118.

871. B-271896, 1997 WL 90626 (Comp. Gen. July 15, 1997).

872. *See* Mr. Anthony Dudley, B-235147, 1991 WL 202593 (Comp. Gen. Aug. 14, 1991).

873. *Sidney Kaplan*, 1997 WL 90626, at *2.

tasked to review embassy operations.[874] As a consequence, the GAO found this "general lack of concern and the sense of laxity" and not any negligence by the cashier to be the "proximate cause" for the unexplained loss of funds.[875]

Nonappropriated Funds and Official Representation Funds

Liberated Money

Last year, Congress authorized a demonstration project in which agencies would give appropriated funds directly to NAFIs. The appropriated funds would take on the attributes of NAFs.[876] This transformation of appropriated funds to NAFs is beneficial to MWR activities because NAF procurements are subject to a less rigorous regulatory scheme than procurements under the FAR.[877]

On 22 July 1997, the Assistant Secretary of Defense for Force Management and Policy signed a directive-type memorandum establishing the DOD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DOD MWR USA) Practice. This "practice" is "designed to facilitate the effective use of funds for the MWR program."[878] Like the demonstration project, it allows the direct transfer of appropriated funds to NAFIs.[879] Military departments may implement the practice on 1 October 1997.[880]

The "practice" applies to the use of Operation and Maintenance Funds; Operation and Maintenance, Reserve Funds; and Research Development Test and Evaluation Funds (RDT&E) for those installations funded with RDT&E. NAFIs may use these transferred appropriated funds only for goods or services for which appropriated fund support is authorized by DOD Instruction.[881] Each service must establish a memorandum of agreement describing the appropriated fund support that will be provided to the MWR program.[882]

NAFIs must keep an accounting of the funds. The transfer of funds from appropriated funds to NAFI does not extend the life of appropriated funds. If the NAFI will not obligate the funds for a bona fide current fiscal year need, the NAFI must return the funds for obligation elsewhere.[883]

The memorandum also allows the conversion of a vacant appropriated fund position to a NAF or contract position. The appropriated funds provided by the DOD MWR USA practice may be used to pay for the salary. Once converted to NAF, a position cannot be converted back to an appropriated fund position.

This new "practice" may seem reminiscent of reimbursements, which were a common practice in the 1980s and early 1990s. Agencies also used reimbursements to repay the salaries of NAF employees who performed appropriated fund missions due to inadequate staffing of general schedule employees.[884] Some commands also used reimbursement as an expeditious method of spending money at the end of the fiscal year. Agencies used NAFs and NAF procurement methods to procure items needed in support of appropriated fund missions. The NAFI was then reimbursed for the purchase. This avoided the delay caused by following more cumbersome appropriated fund procurement procedures.[885] Congress ended this practice in 1992.[886] Since that time, except in the case of the demonstration program, appropriated fund support of NAFIs could only be provided in kind. The new practice should not result in sim-

874. *Id.* In light of all of the above, the State Department's reviewing center also recommended that the embassy's budget and fiscal officer be reprimanded and "that the previous Ambassador be reprimanded for assessing administrative penalties against . . . [the cashier] without adjudication and for his lack of oversight." *Id.* fn. 2.

875. *Id.* at *3.

876. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 321, 110 Stat. 186, 251 (1996).

877. Nonappropriated funds contracts are not governed by the FAR. *See* U.S. DEP'T OF ARMY, REG. 215-4, MORALE, WELFARE, AND RECREATION NONAPPROPRIATED FUND CONTRACTING (10 Sept. 90) [hereinafter AR 215-4].

878. Memorandum, Assistant Secretary of Defense, subject: DOD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DOD MWR USA) Practice (23 July 1997) [hereinafter DOD Memo].

879. The memorandum appears to conflict with Defense Finance and Accounting Service Regulation 37-1, which states: "Appropriated Fund reimbursement to Nonappropriated Funds (NAF) is no longer authorized. Effective FY 91, the *only authorized method to move appropriated funds to NAF is to establish a contract through the appropriated fund procurement office where the NAF performs services for the appropriated fund.*" DFAS REG. 37-1, *supra* note 851, para. 26-12f (emphasis added).

880. DOD Memo, *supra* note 877. The memorandum does not apply to installations which are involved in the demonstration program.

881. U.S. DEP'T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MILITARY MORALE, WELFARE, AND RECREATION, (MWR) (3 Nov. 1995).

882. DOD Memo, *supra*, note 877.

883. *Id.* This provision would seem to indicate that funds may be provided to the NAFI before the NAFI has procured the particular item or service.

884. *Funding Flexibility Returns, but Don't Call It Reimbursement; Call It USA*, FEEDBACK (U.S. Army Community and Family Support Center), Aug. 1997, at 1 [hereinafter *Funding Flexibility Returns*].

ilar abuses, however, because payment must correspond to those items of authorized appropriated fund support of NAFIs.[887]

Party On!

The Department of Energy (DOE) receives an annual appropriation for "Departmental Administration," a portion of which is earmarked for official reception and representation expenses. Unlike the Army's Operation and Maintenance appropriation, from which the Army's Official Representation Funds are drawn,[888] the DOE's appropriation is a no year appropriation. The issue in *Availability of Department of Energy Reception and Representation Funds*[889] was whether the DOE's representation funds were available for only one year or whether they also remained available until expended. The GAO found the latter. The GAO pointed out, however, that the DOE could carry over only the lesser of the unused representation funds or the unobligated balance of "Departmental Administration" funds.

Construction Funding

By memorandum dated 2 July 1997, the DOD provided a new standardized definition of repair.[890] The new definition is more expansive and enhances the services' ability to provide better facilities for DOD employees.[891] The new definition is as follows:

1. Repair means to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.

2. When repairing a facility, the components of the facility may be repaired by replacement, and the replacement can be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental) may be included as repair.

3. Additions, new facilities, and functional conversions must be done as construction. Construction projects may be done concurrent with repair projects as long as the projects are complete and usable.[892]

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885. *See* Luke Britt and Vince Crawley, *Dollar Shuffle Leaves MWR Fund Without Cash*, STARS AND STRIPES, July 14, 1992, at 1.

886. *Funding Flexibility Returns, supra* note 884.

887. Contractors may challenge this practice as a violation of the Competition in Contracting Act. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984). Although, the GAO will not consider a protest of a NAF procurement conducted by a NAF contracting officer, it will consider a protest involving a NAFI when the protester alleges that the agency is using the NAFI to avoid competition requirements. *See* Premier Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8. Although the Assistant Secretary of Defense for Force Management and Policy directed the new practice, it has no statutory basis.

888. In Fiscal Year 1997, for example, the Army's annual Operation & Maintenance appropriation contained the following language:

> For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; *and not to exceed $11,437,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes*; $17,519,340,000 and, in addition, $50,000,000 shall be derived by transfer from the National Defense Stockpile Transaction Fund: *Provided*, That during the current fiscal year and hereafter, funds appropriated under this paragraph may be made available to the Department of the Interior to support the Memorial Day and fourth of July ceremonies and activities in the National Capital Region: *Provided further*, That of the funds appropriated in this paragraph, not less than $300,000,000 shall be made available only for conventional ammunition care and maintenance.

Department of Defense Appropriations Act, Title II, Operation and Maintenance, Pub. L. No. 104-208, 110 Stat. 3009-73 (1996) (emphasis added). The Army's official representation funds are drawn from the amount designated for "emergency and extraordinary expenses." Because funds for DOD activities come from an annual appropriation, these activities could not carry over official representation funds.

889. B-274576, 1997 U.S. Comp. Gen. LEXIS 13 (Jan. 13, 1997).

890. Memorandum, Office of the Secretary of Defense, Comptroller, subject: Definition for Repair and Maintenance (2 July 1997) [hereinafter Repair and Maintenance Memo].

891. Prior to the drafting of the new definition, each military service had its own definition of repair. The rules were not only haphazardly followed, but in many cases, the definitions were manipulated to meet a specific need. There was no consistency in how a project should be repaired. There was also a question as to whether repair allowed replacement up to the state of the art, with greater capacity, or up to the standards of a required code or regulation. Further, there was no consistency in whether a code or regulation included environmental, safety, or health codes.

In implementing the new definition, the Army provided the following guidance:

> 1. A facility must exist and be in a failed or failing condition in order to be considered for a repair project.
> 2. When repairing a facility you may now bring the facility (or component of the facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet a current standard when repairing a facility. Pursuant to the new definition, moving load-bearing walls, additions, new facilities, and functional conversions must be done as construction.
>
> 3. Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.[893]

CONCLUSION

As this article goes to press, the pace of change in acquisition law continues to accelerate. Secretary of Defense Cohen has just announced his Defense Reform Initiative. The "four pillars" of this initiative are reengineering, consolidating, competing, and eliminating excess infrastructure.[894] Some have referred to this initiative as "long overdue,"[895] and its proponents anticipate realizing savings of up to $6 billion annually.[896] In addition to significant cuts in personnel, the Initiative establishes other noteworthy goals. For example, by 1 July 1998, all DOD-wide regulations and instructions will be placed on CD-ROM or the Internet, or both. By 1 January 2000, all aspects of the contracting process will be conducted electronically. Additionally, the DOD initiatives to privatize activities such as housing and utilities will continue to march forward.[897] With all of these changes, there are challenges, and with these challenges, there are opportunities. It will be interesting to see what the world of government contract law looks like on the eve of the new millenium.

Finally, as a current best-selling book puts it: "Don't sweat the small stuff . . . and it's all small stuff."[898] This is just another way of underscoring the importance of keeping things in perspective. Many of us are actively involved in or have close friends and loved ones participating in contingencies and deployments throughout the world. For those Soldiers, Sailors, Marines, and Airmen, our thoughts and prayers are always with you—as are our wishes for a safe return home. That being said, we extend to all of you our best wishes for a productive new year and join you in looking forward to the "opportunities" that are sure to arise between now and when we next meet.

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892. Repair and Maintenance Memo, *supra* note 890.

893. Memorandum, U.S. Dep't of the Army, Asst. Chief of Staff for Installation Mgmt., subject: New Definition of "Repair" (4 Aug. 1997).

894. *U.S. DOD: DoD News Briefing*, M2 COMMUNICATIONS, LTD., Nov. 11, 1997, 1997 WL 15143289.

895. Quoting Rep. Floyd Spence (R-SC), Chairman, House National Security Committee. *OSD Seeks to Trim Its Bulk through Competition and Cuts*, NAVY NEWS & UNDERSEA TECH., Nov. 17, 1997, 1997 WL 12981708.

896. *Id.*

897. Jack Weible, *30,000 Job Cuts and Base Closures Planned*, AIR FORCE TIMES, Nov. 24, 1997, at 9.

898. RICHARD CARLSON, DON'T SWEAT THE SMALL STUFF . . . AND IT'S ALL SMALL STUFF (1997).

Appendix A

DEPARTMENT OF DEFENSE LEGISLATION
FISCAL YEAR 1998

National Defense Authorization Act for Fiscal Year 1998

Introduction

On 18 November 1997, President Clinton signed the National Defense Authorization Act for Fiscal Year 1998 (1998 DOD Authorization Act).[1] What follows is an overview of the key provisions, with an emphasis on its impact on fiscal, procurement, and operational activities within the Department of Defense (DOD).

Congress Troubled by Army's Funding of NTC Rotations

The 1998 DOD Authorization Act provides funding for the operation of prepositioned equipment for training rotations at the Army's National Training Center (NTC), Fort Irwin, California.[2] The conference report also reflects Congress' concern over the Army's recent proposal to have visiting units foot the bill for operational expenses out of their home station budget. In the opinion of the conferees, such a process will reduce the overall effectiveness of unit training and, hence, the overall readiness of our forces.[3]

Measuring OPTEMPO and PERSTEMPO

Concerned about the DOD's ever-increasing operations tempo (OPTEMPO) and personnel tempo (PERSTEMPO), Congress is scrutinizing their impact on military readiness.[4] Consequently, Congress directed the Chairman of the Joint Chiefs of Staff (CJCS) to develop a common means of measuring deployment activity within the DOD.[5] Additionally, Congress separately directed the Secretary of Defense to report on the number of military personnel deployed overseas as of 30 June 1996 and 30 June 1997.[6]

Congress Focuses on the Accuracy of Readiness Reports

Continuing to reflect its concern over unit readiness in this time of shrinking budgets, Congress has directed the DOD to expand its quarterly readiness reports to provide a more comprehensive picture of unit readiness.[7] What is the motivation behind this? In its conference report, the House National Security Committee (HNSC) noted "a growing disconnect between the readiness picture presented by 'official' readiness reports and reality out in the field."[8] As a result, the 1998 DOD Authorization Act directs the Secretary

1. Pub. L. No. 105-85, 111 Stat. 1629 (1997).

2. *Id.* § 307.

3. H.R. CONF. REP. NO. 105-340, at 705 (1997). The House Appropriations Committee (HAC) viewed this "pay-as-you-go" training policy as "a significant policy change that has the effect of reducing funding to maintain the readiness of the Army's combat units." *Id.* Consequently, beginning with Fiscal Year (FY) 1999, the HAC directed the Army to "fully fund" rotations to the NTC. H.R. REP. NO. 105-206, at 38 (1997). Moreover, the HAC was troubled over the Army's decision to reduce the number of annual rotations at Fort Irwin from 12 to 10 (each rotation lasts four weeks). The HAC announced that it would "be closely monitoring this change for any adverse effects on the readiness of Army units." *Id.* at 43. Finally, note that the 1998 DOD Appropriations Act provides an additional $30 million to cover the "NTC rotation shortfall." H.R. CONF. REP. NO. 105-265, at 66 (1997).

4. In one of his last appearances before Congress, former Chairman of the Joint Chiefs of Staff, General John Shalikashvili, stated that today's readiness problems "bear no comparison with the 'hollow force' of the 1970s, but 'cracks' are beginning to show." Jack Weible, *Readiness "Cracks" Reflect Several Shortages*, ARMY TIMES, Sept. 8, 1997, at 6. Additionally, General Shalikashvili observed that only 40,000 personnel out of 1.4 million are temporarily deployed overseas. *Id.*

5. Pub. L. No. 105-85, § 326, 111 Stat. 1629.

6. *Id.* § 332.

7. *Id.* § 322 (amending 10 U.S.C. § 482). *See* George C. Wilson, *E-Mail Lament: "Readiness In Tailspin,"* ARMY TIMES, Aug. 18, 1997, at 3 (survey of e-mail traffic on an "unofficial military Internet network" reflects perception of reduced readiness).

of Defense to submit a plan on implementing the expanded readiness reports not later than 15 January 1998. Furthermore, Congress withheld ten percent of the DOD's Operation and Maintenance (O&M) funds from obligation, pending receipt of the plan.[9]

Still focusing on the overall utility of readiness reports, Congress directed the CJCS to assess military preparedness of both active duty and reserve component commands under "a tiered readiness system." Under such an analysis, units are categorized based on their role and their time of deployment in response to a contingency or conflict.[10] Despite this directive, however, Congress prohibited any military department from implementing a "tiered readiness system" (i.e., one that would place units in certain categories based upon the likelihood and time by which it would respond to a military conflict) absent Congressional consent.[11]

Relief From Administrative Actions That Are Adverse to Military Training or Readiness?

The 1998 DOD Authorization Act requires the Secretary of Defense to notify Congress and the President of any federal administrative action which would have a significant adverse impact on the readiness or military training of critical components within the armed forces.[12] Unless the Secretary of Defense or the President determines otherwise, this notice delays implementation of the proposed action for thirty days. During this time, the Secretary of Defense and the head of the proponent agency are to work things out. If agreement cannot be reached on how the proposed action will apply to the DOD, the President shall take "final action" on the matter. The President must then notify the Congress of his ultimate determination.[13]

Secretary of Defense Must Report on the Movement of O&M Funds

Congress is concerned about the movement of funds between O&M accounts. As a result, if the reallocation of O&M funds between operations subactivities exceeds $15 million in any given month, the Secretary of Defense must notify Congress of the reasons for, and the impact of, this action.[14] Similarly, Congress extended through Fiscal Year (FY) 2000 the requirement that the Secretary of Defense submit a semiannual report to Congress on transfers from high-priority readiness appropriations.[15]

Joint Exercise Funding

Congress directed the Secretary of Defense to report on past and planned joint training exercises sponsored by the CJCS Exercise Program and the Partnership for Peace Program.[16] The report must describe the duration, objectives, participants, costs, and training value of the exercises, as well as the extent to which the exercise enhances the military readiness of all participating forces. Congress further limited the expenditure of FY 1998 CJCS Exercise Program funding to not more than ninety percent of this year's allocation, pending submission of the report.[17]

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8. H.R. REP. NO. 105-132, at 328 (1997).

9. Pub. L. No. 105-85, § 322, 111 Stat. 1629 (1997).

10. This report will also assess readiness requirements under a "tiered readiness and response system" that categorizes units in accordance with their potential role in military conflicts. There will be three tiers: (1) forward-deployed and crisis response forces to be deployed within 10 days (Tier I); combat-ready follow-on forces to be deployed within 60 days (Tier II); and combat-ready conflict resolution forces to be deployed within 180 days (Tier III). *Id.* § 329.

11. *Id.* § 328.

12. *Id.* § 325 (adding 10 U.S.C. § 2014). Examples of a "critical component" include "a Marine battalion preparing for deployment as part of a Marine Expeditionary Unit, or Special Operations Forces dedicated to a specific mission." H.R. CONF. REP. NO. 105-340, at 707 (1997).

13. Pub. L. No. 105-85, § 325, 111 Stat. 1629.

14. *Id.* § 321. Initially, the House National Security Committee (HNSC) would have required the Secretary of Defense to notify Congress *prior* to reallocating O&M funds above a certain threshold. *See* H.R. REP. NO. 105-132, at 329 (1997).

15. Pub. L. No. 105-85, § 323, 111 Stat. 1629 (amending 10 U.S.C. § 483).

16. *Id.* § 331. The HNSC cited a recent GAO report which "noted [that] a large number of joint exercises conducted in 1995 had little training value, with nearly 75 percent conducted for reasons other than training, such as a show of military presence in a region or to foster relationships with other nations." H.R. REP. NO. 105-132, at 331 (1997). The HNSC expressed its concern that the number of CJCS Exercise Program and Partnership for Peace program exercises "is exceeding the ability of the services to meet these requirements in what is already a high paced operational environment." *Id. See Military Capabilities: Stronger Joint Staff Role Needed to Enhance Joint Military Training*, GAO/NSIAD-95-109 (1995).

Secretary of Defense Must Report on Environmental Fines and Penalties Assessed Against the DOD

Congress directed the Secretary of Defense to submit an annual report detailing all fines and penalties imposed on the DOD for violations of federal, state, or local environmental laws.[18] The reporting requirement begins with FY 1998.[19] Additionally, the Secretary of Defense must report to Congress the fines and penalties assessed against the DOD for fiscal years 1994 to 1997.[20]

Sense of Congress: Stay Away from OCONUS Environmental Preservation Missions

In a "Sense of Congress" provision,[21] Congress voiced its position that members of the armed forces should not be deployed to assist another country in its environmental preservation activities, unless the Secretary of Defense determines that such action is justified for reasons of national security. Activities undertaken for humanitarian purposes, disaster relief activities, peacekeeping activities, or operational training activities are expressly excepted. Environmental compliance and restoration activities associated with overseas military installations and deployments are also permitted.[22]

DOD Recovery and Cost-Sharing Practices at Environmental Cleanup Sites

Congress has directed the Secretary of Defense to establish regulations which would require all DOD agencies to aggressively pursue recovery of costs from third parties responsible for the mess found at DOD environmental restoration sites.[23] The regulations will require the DOD agencies to obtain all data (including cost data) relevant to identifying contractors and other third parties who contributed to the contamination of DOD sites.[24] In the accompanying conference report, Congress concluded that the lack of uniform guidance for the recovery of such costs "[has] contributed to a lack of focus and minimal cost-recovery or cost-sharing at third party sites, particularly at government-owned/contractor-operated facilities."[25]

Use Recycled Copier Paper

Congress codified the President's Executive Order mandating increased use of recycled-content paper products.[26] Specifically, the new provision requires that, commencing January 1998, the "post-consumer recycled content" of copier paper must be at least twenty percent. This recycled content requirement increases to thirty percent in January 1999 and to fifty percent by January 2004.[27] These goals are waived if the cost differential between recyclable content paper and virgin copier paper is "significant."[28]

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17. Pub. L. No. 105-85, § 331, 111 Stat. 1629 (1997). In fact, the HAC noted that as a result of the Quadrennial Defense Review, "DOD announced its plans to decrease the number of man-days required for joint exercises in fiscal year 1998 to 15 percent below the level of fiscal year 1996." Given its concern over the DOD's OPTEMPO/PERSTEMPO, the HAC recommended the funding for JCS Exercises be reduced by $50 million. H.R. REP. NO. 105-206, at 56-57 (1997). The 1998 DOD Appropriations Act cuts funding for JCS Exercises by $50 million. H.R. CONF. REP. NO. 105-265, at 78 (1997).

18. Pub. L. No. 105-85, § 344, 111 Stat. 1629 (amending 10 U.S.*C.* § 2706(b)(2)).

19. *Id.*

20. *Id.*

21. A "Sense of Congress" provision generally highlights areas of congressional concern that are frequently addressed in subsequent authorization and appropriations acts.

22. Pub. L. No. 105-85, *Id* 347, 111 Stat. 1629.

23. *Id.* § 348.

24. *Id.*

25. H.R. CONF. REP. NO. 105-340, at 711-12 (1997).

26. *See* Exec. Order No. 12,873, 58 Fed. Reg. 54,911 (1993).

27. Pub. L. No. 105-85, § 350, 111 Stat. 1629.

Depot-Level Activities

After much debate, Congress and the President finally agreed on the manner in which depot-level activities would be considered for contracting out and privatization.[29] No matter what the level of outsourcing, however, the 1998 DOD Authorization Act requires the Secretary of Defense to identify "core logistics capabilities" crucial to the "strategic and contingency plans of the U.S. Armed Forces" and to ensure that public depot activities maintain the capability to perform this "core work."[30] Nonetheless, the 1998 DOD Authorization Act increases the share of depot maintenance work eligible for conversion to performance by contractors from forty percent to fifty percent.[31] The Act also requires that any contracted-out depot work be the subject of "fair and open" competition.[32] To ensure the fairness of this competitive process, the Comptroller General will review all solicitations and competitions conducted under this authority.[33]

A-76: Congress Revisits Contract Outsourcing

Heightened Reporting Requirements

Congress has expanded the report and notification requirements associated with contracting out. Specifically, the 1998 DOD Authorization Act now requires DOD agencies to include a timetable for proposed outsourcing. Congress further extended these notice and reporting requirements to encompass government activities performed by more than twenty DOD civilian employees.[34]

Standardized Formats

The 1998 Authorization Act also allows the Secretary of Defense to develop standard performance work statements and a "standard request for proposal" to be used in A-76 conversion actions. Congress directed the Secretary of Defense to give priority to activities that have been successfully converted to contractor performance on a repeated basis.[35]

Tracking the Costs of Outsourcing

Congress amended the requirement to collect and to retain cost data associated with contracting out.[36] The Secretary of Defense must collect cost data on outsourcing for the term of the contract, or up to five years.[37] Similarly, for commercial activities that are not outsourced, the Secretary of Defense will assemble cost data that compare the costs of government performance with the estimated costs of contractor performance.[38] All of this information shall be retained for at least ten years.[39]

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28. *Id.* The original House provision would have excepted DOD agencies from the proposed goals if the cost differential exceeded seven percent. H.R. CONF. REP. NO. 105-340, at 713 (1997).

29. Pub. L. No. 105-85, §§ 355-59, 111 Stat.1629. The Act establishes a statutory definition of "depot-level maintenance and repair" that tracks with that currently used in DOD regulations. *Id.* § 355 (adding 10 U.S.C. § 2460).

30. Specifically exempted, however, are commercial systems purchased by the DOD, where such purchases do not comprise a majority of the sales of that item. *Id.* § 356 (amending 10 U.S.C. § 2464).

31. *Id.* § 357 (amending 10 U.S.C. § 2466).

32. *Id.* § 359 (adding 10 U.S.C. § 2469a). Congress specifically noted its concern regarding the possibility of "preferential treatment" being given to any one particular offeror and the extent to which workloads were bundled into one contract vehicle. H.R. CONF. REP. NO. 105-340, at 717 (1997).

33. Pub. L. No. 105-85, § 359, 111 Stat. 1629.

34. The previous threshold exempted activities performed by 45 or fewer DOD civilian employees from various notice and reporting requirements. *Id.* § 384 (amending 10 U.S.C. § 2461).

35. *Id.* § 389.

36. *Id.* § 385 (amending 10 U.S.C. § 2463).

37. *Id.*

38. This data collection requirement applies only to those activities that were performed by at least 50 contractor employees before the work was converted to performance by government employees. *Id.*

Funding the Army National Guard's New Mission Statement?

The 1998 DOD Authorization Act expressly authorizes the Secretary of the Army to "provide financial assistance" to a state in support of activities carried out by that state's Army National Guard.[40] Specifically, the Secretary may fund Guard units to perform the following activities: training, maintenance and repair of military equipment, and construction.[41] Any funds disbursed under this authority will be made through the Chief of the National Guard Bureau.[42]

Authority to Retain Funds Collected Under Warranty Claims

Congress has established a pilot program for the Air Force[43] which allows the agency to retain any funds collected for maintenance work performed on aircraft engines in public depots while still under warranty. The funds will be available for the same purposes and same period of availability as the appropriation to which they are credited.[44]

"Operation Mongoose" Receives Permanent Authority

The 1998 DOD Authorization Act establishes a permanent program to coordinate the identification, investigation, and prevention of fraudulent financial actions within the DOD.[45] Congress is specifically interested in accelerating the review of transportation and vendor payments. In addition, Congress expects the DOD to use this new authority to make more effective use of, and obtain information from, other government agencies in combating fraud within the military departments.[46]

The Cost of Political Correctness: Loss of Funds Causes Universities to Reconsider Ban on Military Recruiting

The 1995 DOD Authorization Act directed the DOD to suspend contract and grant funding to any college or university that prohibited military recruiting on its campus.[47] Hitting them where it hurts—in the pocketbook—university after university has re-looked the costs of political correctness versus fiscal stability.[48] As a consequence, many universities have reversed themselves. A noteworthy exception to this trend, however, was the State of Connecticut. At the time of the conference report, Connecticut state universities and colleges still banned military recruiting on their campuses.[49] According to one newspaper, Connecticut stood to lose $70 million in federal grants.[50] Noting that the governor of Connecticut had "pledged" to obtain legislation to prohibit universities from banning

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39. *Id.*

40. *Id.* § 386 (adding 32 U.S.C. § 113).

41. The Secretary of the Army will coordinate and obtain the consent of the Chief, National Guard Bureau when making these assignments. *Id.*; *see* 10 U.S.C. §§ 3013(b)(6),(10), (11) (1994).

42. These funds are available only to pay for activities performed by the Guard during the same fiscal year as that for which the funds were appropriated; in other words, the *bona fide* need rule applies. Pub. L. No. 105-85, § 386, 111 Stat. 1629.

43. No pun intended.

44. Pub. L. No. 105-85, § 391, 111 Stat. 1629.

45. *Id.* § 392.

46. H.R. CONF. REP. NO. 105-340, at 724-25 (1997).

47. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994). *See* Major Nathanael Causey et al., *1994 Contract Law Developments—The Year in Review,* ARMY LAW., Feb. 1995, at 18.

48. *See, e.g.,* Katherine Rizzo, *Military Recruiters Back On Campus—Congress Cuts All Federal Student Aid to Schools Maintaining a Ban*, PATRIOT LEDGER, Oct. 25, 1997, at 8 (stating that from a high of 138 campuses, only a handful of university-level institutions still prohibit military recruiters).

49. H.R. CONF. REP. NO. 105-340, at 736 (1997).

military recruiters, Congress agreed to preserve any funds otherwise intended for Connecticut universities until March 1998.[51] In early November 1997, the governor of Connecticut signed a bill allowing military recruiting on Connecticut state campuses.[52]

Congress Establishes a "Requirement of Exemplary Conduct"

The 1998 DOD Authorization Act establishes a uniform policy requiring "exemplary conduct" by Army and Air Force leaders. Under this provision, "all commanding officers and others in authority" are required:

> (a) to show in themselves a good example of virtue, honor, patriotism, and subordination;
>
> (b) to be vigilant in inspecting the conduct of all persons who are placed under their command;
>
> (c) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army[/Air Force], all persons who are guilty of them; and
>
> (d) to take all necessary and proper measures, under the laws, regulations, and customs of the Army[/Air Force], to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge. [53]

Cost Accounting Standards Board Under Scrutiny

In the conference report comments, Congress highlighted its concerns as to whether government contracting cost accounting standards "are an impediment to acquisition streamlining."[54] With this in mind, the conferees directed the GAO to review and to analyze the mission of the Cost Accounting Standards Board. According to the conferees, such a study would aid Congress in "balanc[ing] . . . the needs of taxpayers and the need for greater acquisition streamlining."[55]

Hallelujah! DOD Finally Receives Authority to Enter into Severable Service Contracts That Cross Fiscal Years

In October 1994, Congress passed the Federal Acquisition Streamlining Act[56] (FASA), which allowed most non-DOD agencies with a statutory exception to the bona fide need rule for severable service contracts.[57] Under 41 U.S.C. § 253l, most non-DOD agencies (except the Coast Guard[58] and NASA) have the authority to award and to fund *any* service contract for a period not to exceed one year (exclusive of options) at any time during the fiscal year. Meanwhile, DOD agencies were permitted to enter into contracts crossing fiscal years only for specified services, most dealing with the maintenance of tools, equipment, and facilities.[59] The 1998

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50. *Panel Discussion: A Question of Rights*, HARTFORD COURANT, Nov. 4, 1997, at A10 [hereinafter *Panel Discussion*].

51. H.R. CONF. REP. NO. 105-340, at 736 (1997).

52. *Panel Discussion*, *supra* note 50.

53. Pub. L. No. 105-85, § 507, 111 Stat. 1629 (1997) (adding 10 U.S.C. §§ 3583, 8583). Interestingly, Congress did not identify any other service or agency for this special treatment.

54. H.R. Conf. Rep. No. 105-340, at 771 (1997).

55. *Id.* The HNSC noted that this report, which was first requested by the chairmen of the committees on National Security and Government Reform and Oversight in June 1996, was overdue. The HNSC requested that the GAO submit its report and recommendations not later than 31 December 1997. H.R. REP. NO. 105-132, at 387 (1997).

56. Pub. L. No. 103-355, § 1073, 108 Stat. 3243 (1994) (adding 41 U.S.C. § 253l).

57. *Id.* Services contracts are presumed to be the bona fide need of the fiscal year in which performed. *See In re* Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (June 8,1992); EPA Level of Effort Contracts, 65 Comp. Gen. 154 (Dec. 24, 1985).

58. Congress subsequently extended this authority to the Coast Guard in FY 1996. *See* Pub. L. No. 104-324, § 214(b), 110 Stat. 3915 (1996).

59. 10 U.S.C. § 2410a (1994); U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 237.106 (Apr. 1, 1991).

DOD Authorization Act now places DOD agencies on par with most non-DOD agencies and extends this discretionary fiscal authority to all severable service contracts.[60] Under the revised 10 U.S.C. § 2410a, DOD activities may enter into a severable service contract "that begins in one fiscal year and ends in the next fiscal year if . . . the contract period does not exceed one year."[61] Additionally, the conference report directs the Secretary of Defense to report to Congress the extent to which this authority is used over the next two fiscal years. Congress further directed the GAO to report *any* abuses of this authority and recommendations for further changes.[62]

Undefinitized Contract Actions and Humanitarian and Peacekeeping Operations

Agency heads can now waive otherwise applicable restrictions on undefinitized contracting to support humanitarian and peacekeeping operations.[63] Unless waived, however, a DOD contracting officer must still abide by the fiscal and contractual limits associated with undefinitized contract actions.[64]

Restructuring Costs

The 1998 DOD Authorization Act permanently recognizes the allowability of restructuring costs for business combinations.[65] Such costs are calculated under a two-to-one savings-to-cost formula employed in the National Defense Authorization Act for Fiscal Year 1997.[66] Contractor restructuring costs are allowable when: (1) the projected savings associated with the business combination will be at least twice that of the costs allowed, or (2) the projected savings will exceed the allowed costs and the business combination will result in the preservation of a national defense "critical capability."[67] The 1998 DOD Authorization Act further requires the Secretary of Defense and the GAO to report on the overall costs and impact of the restructuring of the nation's defense industry.[68]

Multiyear Procurement Contracts Must Now Be Authorized

DOD activities are now prohibited from entering into multiyear procurement contracts greater than $500 million unless otherwise specifically authorized by law.[69] This restriction does not apply to multiyear contracts entered into prior to the 1998 DOD Authorization Act. The Act also mandates additional notice requirements as to the dollar amount of the procurement, the amount of any economic order quantity, and the amount of the unfunded contingent liability.[70]

Allowability of Executive Salaries Based On an Industry-Wide Benchmark

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60. Pub. L. No. 105-85, § 801, 111 Stat. 1629 (1997).

61. *Id.*

62. H. CONF. REP. 105-340, at 771-72 (1997). Curiously, the conferees specifically identified "efforts to circumvent year-end spending limitations." *Id.* If anything, this new authority will encourage contracting officers to better balance their workload and shift the commencement of contracts and options away from the September-October time frame. *See* Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247 ("to minimize the surge in workload," the Air Force staggered its contract periods so that fewer service contracts expired at the end of the fiscal year).

63. Pub. L. No. 105-85, § 807, 111 Stat. 1629 (amending 10 U.S.C. § 2326).

64. *See* 10 U.S.C. § 2326 (placing time restrictions and funding limitations on undefinitized contract actions).

65. Pub. L. No. 105-85, § 804, 111 Stat. 1629 (amending 10 U.S.C. § 2325). The term "business combinations" includes mergers and acquisitions. *Id.*

66. The two-to-one cost-to-savings ratio was employed in the Omnibus Consolidated Appropriations Act, 1997, and was applicable only to FY 1997 funds used to pay contractors. *See* Pub. L. No. 104-208, § 8115, 110 Stat. 3009 (1996).

67. Pub. L. No. 105-85, § 804, 111 Stat. 1629.

68. *Id.*

69. *Id.* § 806 (amending 10 U.S.C. § 2306b).

70. *Id.* This new subsection does not apply to NASA or the Coast Guard.

For the past few years, Congress and defense industry executives have jousted back and forth about the extent to which senior executive compensation should be allowed.[71] As with restructuring costs, Congress seems to have taken a final position on this issue by allowing reimbursement of executive level salaries as measured under an industry-wide benchmark.[72] Based on a review of commercially available surveys of executive compensation, the Office of Federal Procurement Policy (OFPP) will determine a benchmark compensation amount. In essence, this "benchmark" will be the median amount of compensation provided senior executives of all corporations with annual sales greater than $50 million.[73] So pull out your latest issue of Forbes and try to figure out this year's benchmark.

Use of Expired Funds Collected During the Contract Litigation Waltz

Congress has extended the availability of funds collected on a Contract Disputes Act claim filed against a contractor by a DOD activity.[74] You know the drill about how agencies must treat these funds—once collected, they retain their fiscal identification and must either be "deposited" back into their original fund account, or, if appropriate, treated as miscellaneous receipts. In many instances, the account at issue may already be expired, if not yet closed.[75] Now, regardless of their status, these collections remain available to pay off any subsequent settlement or judgment rendered in favor of the contractor regarding the government claim.[76] Of course, no new authority would be complete without a new statutory reporting requirement. The 1998 DOD Authorization Act also requires the DOD Comptroller to report the amount of funds made available under this new authority, the total amounts collected, and the amounts ultimately disbursed.[77]

List of Firms Not Eligible for Defense Contracts

The 1998 DOD Authorization Act directs the Secretary of Defense to develop and to maintain a list of all firms and their subsidiaries that are prohibited from performing DOD contracts because of substantial ownership by governments that support international terrorism.[78] Any firm cited on the list may petition the Secretary of Defense for removal if it can demonstrate that its inclusion was erroneous or that its ownership has changed significantly. This prohibition extends to subcontracts greater than $25,000.[79]

Contractor Guarantees No Longer Required On Major Weapon Systems Buys

The DOD is no longer required to obtain written guarantees which cite government-specific terms from major weapon systems contractors.[80] This action apparently responds to repeated DOD requests that the warranty requirement be repealed. Moreover, in support of this action, the conferees noted a recent GAO report concluding that the DOD spends an additional $270 million annually for warranties that are not cost effective.[81] Contracting officers now have the discretion to determine the appropriate use of such

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71. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-210, § 809, 110 Stat. 2422 (1996) (setting the ceiling for executive compensation at $250,000).

72. Pub. L. No. 105-85, § 808, 111 Stat. 1629 (amending 10 U.S.C. § 2324 and the Office of Federal Procurement Policy Act, 41 U.S.C. § 401).

73. "Senior executive" is defined as the chief executive officer and the four most highly compensated employees in management positions of the contractor. *Id.*

74. *Id.* § 831.

75. *See generally* 2 U.S. General Accounting Office, Principles of Federal Procurement Law 6-115 through 6-122 (1992). *See also* Army Corps of Engineers—Disposition of Funds Collected in Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 (Sept. 8, 1986).

76. Note that, absent this exception, judgments rendered in the contractor's favor are paid out of the Judgment Fund. 31 U.S.C. § 1304 (1994). Agencies must then reimburse the Judgment Fund with funds current at the time of judgment against the agency. 41 U.S.C. § 612(c) (1994); Bureau of Land Management—Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308, 312 (Apr. 24, 1984).

77. Pub. L. No. 105-85, § 831, 111 Stat. 1629 (1997).

78. *Id.* § 843.

79. This restriction applies unless the head of the agency determines that "compelling reasons" exist for allowing a subcontracting relationship with the listed firm. *Id.*

80. *Id.* § 847 (repealing 10 U.S.C. § 2403).

81. H.R. Rep. No. 105-206, at 248 (1997).

contract performance guarantees. The conferees further directed the Secretary of Defense to issue regulations ensuring that program managers "actively and thoroughly examine the value and utility of contractor guarantees . . . and pursue such guarantees where appropriate and cost effective."[82]

Congress Mandates Greater Use of Government Purchase Cards

The 1998 DOD Authorization Act requires that by 1 October 1998, at least sixty percent of all DOD micropurchases be made by use of the government commercial purchase card.[83] By FY 2001, at least ninety percent of all DOD micropurchases must be made using the streamlined procedures allowed by the purchase card. The provision allows the Secretary of Defense to exclude categories of purchases that are determined to be inappropriate for this streamlined treatment.[84]

The Future of FACNET in Doubt

Congress repealed the requirement that agencies use the Federal Acquisition Computer Network (FACNET) for electronic commerce.[85] Following on the heels of a GAO report critical of FACNET, the repeal is made in recognition of the fact that many agencies are realizing greater success through the use of non-FACNET systems.[86] Agency heads may now consider all electronic commerce technologies, after giving "due consideration" to the use or partial use of existing electronic architecture. Congress also requires the agency head to ensure that the system "is implemented with uniformity throughout the agency, to the extent practicable."[87]

CINC Initiative Funds Can Be Used for Force Protection

The 1998 DOD Authorization Act authorizes the use of CINC Initiative Funds "to provide for any force protection requirements that emerge in . . . [the CINCs] respective areas of operation."[88] As with past years, the 1998 DOD Appropriations Act provides no more than $25 million for the CINC Initiative Fund Account.[89]

The Bad News: Defense Acquisition Workforce Cut Yet Again; The Good News: It Could Have Been Worse

The 1998 DOD Authorization Act directs the Secretary of Defense to trim the defense acquisition workforce by 25,000 individuals.[90] The Secretary of Defense may waive up to 15,000 positions from this mandated cut in personnel if he determines that any additional cuts "would be inconsistent with the cost-effective management of the defense acquisition system . . . and would adversely affect military readiness."[91] Additionally, Congress directed the Secretary of Defense and the Task Force on Defense Reform to

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82. Pub. L. No. 105-85, § 847, 111 Stat. 1629.

83. *Id.* § 848.

84. *Id.*

85. *Id.* § 850 (amending 41 U.S.C. § 426; repealing 41 U.S.C. § 426a). The Federal Acquisition Streamlining Act (FASA) mandated the use of FACNET as the uniform means for all government agencies to advance into the world of electronic commerce. Pub. L. No. 103-355, § 9001(a), 108 Stat. 3399 (1994). In fact, until repealed by this provision, the agency's implementation of FACNET into its electronic commerce activities was tied to the simplified acquisition threshold. 41 U.S.C. § 427 (1994).

86. *See Acquisition Reform—Obstacles to Implementing the Federal Acquisition Computer Network*, Jan. 3, 1997, GAO/NSIAD-97-26, at 7 (GAO concludes that the "[d]ifficulties of doing business through FACNET have overshadowed the benefits of using it").

87. Pub. L. No. 105-85, § 850, 111 Stat. 1629.

88. *Id.* § 902 (adding 10 U.S.C. § 166a(b)(9)). H.R. CONF. REP. NO. 105-340, at 783 (1997).

89. Pub. L. No. 105-56, 111 Stat. 1203, 1206 (1997). The 1998 DOD Appropriations Act also provides the Secretary of Defense no more than $28.85 million for emergency and extraordinary expenses. Pub. L. No. 105-85, 111 Stat. 1629.

90. Pub. L. No. 105-85, § 912, 111 Stat. 1629. The House bill contained a provision that would have slashed 124,000 positions from the defense acquisition workforce by FY 2002. Under the House version, 40,000 of those positions would have been cut in FY 1998. H.R. CONF. REP. NO. 105-340, at 786 (1997).

91. Pub. L. No. 105-85, § 912, 111 Stat. 1629.

review the DOD acquisition organizational structure and mission statement, with an eye on making additional changes to better reflect DOD acquisition and budgetary needs.[92]

Congress Provides Greater Fiscal Flexibility to Close Outstanding Contracts

The 1998 DOD Authorization Act allows the Secretary of Defense to establish an account for making final payments on contracts where the underlying funding has been canceled.[93] The amount of the final payment, however, must not be greater than the micro-purchase threshold. Once the account has been established, the Secretary of Defense may from time to time transfer procurement or RDT&E funds into the account for closing these dated contracts. Moreover, the Secretary of Defense may not transfer more than $1 million into the account without additional Congressional approval.[94] This new account targets contracts entered into and "for which an unobligated balance of an appropriation . . . initially applied to the contract was canceled before December 5, 1990."[95]

Congress Continues to Tinker with Revolving Funds

Hoping to strengthen the viability of revolving funds, Congress made a few operational adjustments to the DOD's working capital funds.[96] First, Congress expanded the ability of working capital funds to obtain "capital assets" by providing the funds contract authority.[97] Hence, the working capital funds may contract for the procurement of capital assets in advance of the availability of working capital funds. To qualify as a "capital asset," the cost of developing or procuring the item must be at least $100,000 and fall into one of the following categories: (1) unspecified minor military construction project; (2) automatic data processing equipment or software; (3) any other equipment; or (4) any other capital improvement.[98] Congress also struck out against the practice of advance billings. The 1998 DOD Authorization Act now requires the Secretary of Defense to notify Congress when a working capital fund engages in advanced billing and the reasons behind the action.[99] Additionally, Congress placed a cap on the level of advanced billing by the Navy's working-capital funds and the Defense Business Operations Fund.[100] Finally, the conferees noted that with "proper budgeting and the use of full costing policies," the working capital funds would assure sound financial management of the funds and avoid having to resort to advanced billing.[101]

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92. Indeed, Congress also directed the Secretary of Defense to report on the number of DOD acquisition positions cut since 1989 and to establish a uniform definition of the term "defense acquisition workforce." *Id.* § 912.

93. *Id.* § 1007. Appropriations are canceled or "closed" five years after the end of their period of availability, as defined by the applicable appropriations act. Once closed, any remaining balances are no longer available for obligation or expenditure for any purpose. 31 U.S.C. § 1552(a) (1994). Arguably, the funds are returned to the Department of the Treasury, which, in turn, balances the budget.

94. *See* H.R. CONF. REP. 105-340, at 792 (1997).

95. Pub. L. No. 105-85, § 1007, 111 Stat. 1629. *See* 31 U.S.C. § 1553(b) (1994). After an account is closed, agencies may also, within certain limits, charge obligations and adjustments to obligations formerly chargeable to the closed account and not otherwise chargeable to another current agency appropriation to any current agency account available for the same general purpose. Such charges are limited to the lesser of: (1) the unobligated expired balance of the original appropriation, or (2) one percent of the current appropriation available for the same purpose. 31 U.S.C. § 1553(b)(2). *See, e.g.*, Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1CPD ¶ 287 (ordering activity used current funds to pay ten-year old obligation).

96. In late 1996, the DOD reorganized the Defense Business Operations Fund (DBOF) structure so as to create four working capital funds: Army, Navy, Air Force, and Defense-wide. The GAO reports that, for fiscal year 1998, these funds "are expected to generate about $69 billion in revenue and employ about 220,000 civilians and 24,000 military personnel." *Defense Working Capital Funds: DOD Faces Continued Challenges in Eliminating Advance Billing*, GAO/T-AIMD/NSIAD-97-221 (1997).

97. Pub. L. No. 105-85, § 1011, 111 Stat. 1629 (amending 10 U.S.C. § 2008(k)). *See* Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, § 8108, 111 Stat. 1203, 1244 (1997).

98. Pub. L. No. 105-85, § 1011, 111 Stat. 1629.

99. Advanced billing is defined as "a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided . . . on behalf of the customer . . . before the customer receives the goods or before the services have been performed." *Id.*

100. This action, no doubt, responds in part to a GAO report indicating that DOD working capital funds have yet to operate on a break-even basis. Since 1993, the working capital funds have had to advance bill their customers to avoid cash shortages. According to the GAO, the four DOD working capital funds will disburse approximately $2.3 billion more than they will collect in fiscal year 1997. *Defense Working Capital Funds: DOD Faces Continued Challenges in Eliminating Advance Billing*, GAO/T-AIMD/NSIAD-97-221 (1997).

101. H.R. CONF. REP. 105-340, at 791-92 (1997). In addition, the 1998 Department of Defense Appropriations Act appropriated $972 million to put the Defense Working Capital Funds back on track. Pub. L. No. 105-56, 111 Stat. 1203, 1217 (1997).

Bosnia: Congress Flexes Its Power of the Purse

Congress used the 1998 DOD Authorization Act to communicate its serious reservations regarding the continued presence of American troops in Bosnia.[102] In a "Sense of Congress" provision, Congress stated that "United States ground combat forces should not participate in a follow-on force in the Republic of Bosnia and Herzegovina after June 1998."[103] As a result, Congress expressly conditioned the funding of American forces in Bosnia and Herzegovina on a certification by the President justifying their continued presence.[104] Absent such a Presidential certification, Congress prohibited the DOD from using any funds "for the deployment of any United States ground combat forces" in this region after 30 June 1998.[105]

Reports and Guidance from Congress

Advisory and Assistance Services

In its conference report, the House National Security Committee (HNSC) expressed its concern over the the DOD's increasing use of advisory and assistance services (AAS).[106] According to the HNSC, the FY 1998 budget request represents a 248 percent increase in AAS funding requests since 1992. Moreover, upon examination of each service's O&M account, the HNSC found the FY 1998 requirement for AAS constituted a significant increase over that of FY 1997. In this era of significant downsizing, the HNSC concluded that the DOD could not justify such funding. As a result, the HNSC directed that, beginning with the FY 1999 budget request, the Secretary of Defense justify the extent and level of each department's requirement for AAS and report on the DOD's overall expenditures for AAS over the previous two fiscal years.[107]

Contracting Out Firefighter and Security Activities at Military Installations

The GAO, the Defense Science Board, and the DOD have each informed the HNSC that the prohibition on contracting for fire-fighting or security guard services is inefficient and costly.[108] Since most of us have been the subject of considerable downsizing and contracting out studies, it would seem logical to conclude that competing these services would result in lower costs and a leaner, more efficient operation, right? The HSNC, however, was concerned that a repeal of this section could "negatively impact national security."[109] Consequently, the HNSC directed the Secretary of Defense to identify what fire fighting and security guard functions are considered inherently governmental and why. Interestingly, though, the HNSC also instructed the Secretary of Defense to include a plan implementing the outsourcing of fire fighting and security guard functions should the current prohibition be repealed.[110]

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102. Pub. L. No. 105-85, §§ 1201-06, 111 Stat. 1629.

103. As an exception, however, Congress allowed continued U.S. support to a Western European Union-led or NATO-led follow-on force. Such support may include "command and control, intelligence, logistics, and, if necessary, a ready reserve force in the region." *Id.* § 1202.

104. The certification must state, in part, that the continued presence of U.S. forces in the Bosnia-Herzegovina region is required "to meet the national security interests of the United States" and that U.S. ground forces will not be used as civil police in this region. *Id.* § 1203.

105. *Id. See* Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, § 8132, 111 Stat. 1203, 1250 (1997).

106. AAS include contracted experts and consultants, studies and evaluations, management support, and technical services. H.R. REP. NO. 105-132, at 293 (1997).

107. *Id.*

108. *Id.* at 294. With a few exceptions, the DOD is prohibited from contracting for firefighting or security guard services at military installations. This proscription does not apply: (1) to overseas installations; (2) to government-owned but privately operated installations; (3) to contracts for such services that were in effect prior to 24 September 198;3 and (4) when the contract is for services with local governments at an installation closing within 180 days. 10 U.S.C. § 2465 (1994). There are currently 44 military installations which fall under one of the above exclusions. *See Base Operations: Contracting for Firefighters and Security Guards*, GAO/NSIAD-97-200BR (1997).

109. The committee provided no further insight on this comment. H.R. REP. NO. 105-132, at 293 (1997).

110. The HNSC further directed the Secretary of Defense to provide this plan to both the HNSC and the Senate Armed Services Committee. The HNSC requested this report by 31 December 1997. *Id.*

Oversight of Outsourced Functions

The HNSC acknowledged the DOD's plans to outsource more than 100,000 civilian positions between FYs 1998 and 2003 as an effort to maximize efficiencies and the overall level of services.[111] The committee, however, expressed several concerns about these plans. First, the HNSC noted that, in some instances, the DOD is considering outsourcing functions and services currently provided by military personnel. The committee questioned the DOD's estimated savings under such plans, observing that the military personnel performing these services will still be retained. The HNSC was also troubled by the possibility that the DOD would outsource training services and functions. Finally, the committee wondered whether the DOD would have adequate personnel and resources to administer the increased contract workload associated with expanded outsourcing. Consequently, the HNSC directed the Secretary of Defense to review and then to report back on the costs, savings, and scope of the DOD's outsourcing plans. Additionally, the committee asked the Secretary of Defense to determine the level of staff support necessary to manage these planned contract actions. Last, the HNSC requested the Secretary of Defense to identify any studies the DOD planned "to review the return of outsourced services and functions to the private sector."[112]

Performance Based Contracting and Environmental Clean Up

The HNSC acknowledged the potential cost savings associated with performance-based contracting for environmental cleanup at DOD installations.[113] In contrast to traditional cost-type contracting, performance-based contracts evaluate contractor performance for the purpose of determining the award fees.[114] Contractor performance is measured against the achievement of a prescribed, outcome-oriented result. How those results are attained is the contractor's responsibility. This contracting approach is very appealing, because it encourages contractor innovations and smart business practices. With this in mind, the HNSC directed the Secretary of Defense to report on the viability of using a performance-based approach for all environmental clean-up activities within DOD.[115]

Logistics Civil Augmentation Programs (LOGCAP)

The HNSC is concerned that each military service is establishing its own unique, and perhaps duplicative, LOGCAP program.[116] The GAO reported that both the Air Force and the Navy, which previously relied on the Army's LOGCAP,[117] have developed their own contingency support program arrangement.[118] The Committee questioned the need for more than one LOGCAP program among the services and noted the potential for duplication of effort and unnecessary expense. As a result, the HNSC directed the Secretary of Defense to submit a report on whether the DOD's needs are best served by one or multiple LOGCAP contracts.[119]

Department of Defense Appropriations Act, 1998—For 13th Straight Year, DOD Funding Fails to Keep Pace with Inflation

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111. *Id.* at 298-99.

112. *Id.*

113. *Id.* at 302-03.

114. The committee cited the demolition of contaminated buildings and the installation of a pump and treat system as examples of how this contracting method can be successfully used. *Id.*

115. The HNSC will use the results of this report to determine the true potential of performance-based contracts and whether employment of this contract type can accelerate cleanup of contaminated sites at a lower cost to the government. *Id.* at 302.

116. LOGCAP uses a civilian contractor to provide logistics and engineering services to deployed forces. LOGCAP provided much of the service support to U.S. troops deployed in Bosnia. It was also used extensively in Somalia, Rwanda, Haiti, Saudi Arabia, Kuwait, and Italy. *Id.* at 320.

117. Since 1992, the Army Corps of Engineers has been responsible for the management and contract administration of LOGCAP. On 1 October 1996, LOGCAP management transferred to the Army Materiel Command; however, the Corps of Engineers will remain responsible for LOGCAP management in Bosnia for the duration of the mission. The costs and efficacy of LOGCAP has been the subject of considerable discussion by Congress and the DOD alike. *See, e.g., CONTINGENCY OPERATIONS: Opportunities to Improve Use of Contractor Support Services*, GAO/NSIAD-97-63 (1997).

118. In August 1995, the Navy awarded the Navy Emergency Construction Capabilities Program. In 1997, the Air Force awarded a contract for a program called the Air Force Contract Augmentation Program. H.R. REP. NO. 105-132, at 320 (1997).

119. The committee directed the Secretary of Defense to provide a report to the congressional defense committees by 1 March 1998. *Id.*

Introduction

On 8 October 1997, President Clinton signed the Department of Defense Appropriations Act for Fiscal Year 1998 (1998 DOD Appropriations Act).[120] The President's FY 1998 budget request for the 1998 DOD Appropriations Act totaled $243.9 billion. Congress added $4.4 billion to the administration's budget request to bring the total amount appropriated to the DOD for FY 1998 to $248.3 billion, which is $3.87 billion more than that appropriated for the DOD in all of FY 1997.[121] Still, in real dollars, DOD funding will once again fail to keep pace with inflation. Adjusted for inflation, total funding is 0.6 percent, or $1.5 billion less than FY 1997 levels. This is the thirteenth straight year of real, inflation-adjusted reductions in defense spending.[122]

Forces to be Supported[123]

Department of the Army

The 1998 DOD Appropriations Act is structured to support ten active Army divisions and three armored cavalry regiments, eight Army reserve divisions and three separate brigades, and fifteen enhanced National Guard brigades. This structure provides the minimum force necessary to meet enduring defense needs and to execute the National Military Strategy. Under this force structure, active duty Army end strength is 495,000.[124]

Department of the Navy

The FY 1998 budget supports battle forces totaling 346 ships, a decrease from the FY 1997 battle force structure.[125] The FY 1998 force structure includes 18 strategic ships, 11 aircraft carriers, 262 other battle force ships, 324 support ships, 1746 Navy/Marine Corps tactical/ASW aircraft, 673 Undergraduate Training aircraft, 443 Fleet Air Support aircraft, 480 Fleet Air Training aircraft, 443 Reserve aircraft, 177 RDT&E aircraft, and 470 aircraft in the pipeline. The end strength for Navy personnel is 390,082 and for the Marines is 174,000.[126]

Department of the Air Force

The fiscal year 1998 budget supports a total active force structure of fifty-one fighter and attack squadrons, ten Air National Guard air defense interceptor squadrons, and nine bomber squadrons (including B-2s, B-52s, and B-1s). The Minuteman and Peacekeeper ICBM forces will consist of 700 active launchers. The active duty end strength is 371,577.[127]

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120. Pub. L. No. 105-56, 111 Stat. 1203 (1997). On 14 October 1997, President Clinton used his line item veto authority to cancel an additional $144 million from the Act. Cancellation Pursuant to Line Item Veto Act, Department of Defense Appropriations Act, 1998, 62 Fed. Reg. 53,704 (1997).

121. Congress provided the DOD with $1.846 billion in emergency supplemental appropriations in FY 1997. Pub. L. No. 105-18. *See* H.R. REP. 105-206, at 1, n. 1 (1997).

122. H.R. REP. NO. 105-206, at 2 (1997).

123. The House Appropriations Committee notes that the U.S. military services have "been drawn down to the lowest force levels since the end of World War II." *Id.* at 4.

124. *Id.* at 21.

125. The Navy battle force structure has shrunk over the past few years. In FY 1996, the total number of ships supported was 365. This dropped to 357 ships in FY 1997. *Id.* at 21-22.

126. *Id*.

127. *Id*. at 22-23.

Overseas Contingency Operations Transfer Fund

Congress appropriated $1.884 billion for expenses directly related to overseas contingency operations. The Secretary of Defense may transfer these funds only to O&M accounts provided for by the 1998 DOD Appropriations Act and working capital fund operations. Once transferred, the funds shall be merged with, and shall be available for, the same purposes and for the same time period as the appropriation in which the funds were transferred.[128] Additionally, the House Appropriations Committee (HAC) directed that the DOD budget for all future contingency operations be in the Overseas Contingency Operations Transfer Fund."[129]

Environmental Restoration Accounts

Congress appropriated the following funds for each agency's Environmental Restoration Account: Army, $375.3 million; Navy, $275.5 million; Air Force, $376.9 million; and defense-wide activities, $26.9 million. These funds are available once the service secretary or Secretary of Defense determines that they are required for environmental restoration, reduction and recycling of hazardous waste, and removal of unsafe buildings and debris at sites formerly used by the DOD. The funds may be transferred to other appropriations available for environmental restoration and are available for the same time period and the same purpose as those funds.[130] If the environmental restoration funds prove unnecessary, they may be transferred back to the environmental restoration account.[131]

National Guard Distance Learning Project

The Chief of the National Guard Bureau may permit the use of his National Guard Distance Learning Project equipment to any person or entity on a space available, reimbursable basis. Any funds collected under this authority may be credited for use by the Project to defray the costs associated with such use. These funds remain available without fiscal year limitation.[132]

Long-Range Air Power Panel

The 1998 DOD Appropriations Act established an independent panel to evaluate the adequacy of current planning for United States long-range air power and to assess the requirement for continued low-rate production of B-2 stealth bombers. By 1 March 1998, the panel must submit to Congress and the President a report regarding the appropriate B-2 bomber force. The report must specifically state the panel's recommendation on whether additional funds for the B-2 should be used for continued low-rate production of the B-2 or for upgrades to improve deployability, survivability, and maintainability.[133]

Congress Criticizes DOD's Acquisition and Appropriations Practices

The HAC expressed concern about an apparent breakdown of existing multiyear contracting procedures for major weapons systems. The committee was also troubled by what it perceived to be a fundamental breach of appropriations discipline whereby the DOD uses RTD&E funds to initiate production contracts for weapons programs.[134] According to the HAC, these actions are occurring without the knowledge of the Secretary of Defense or Congress.

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128. Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, 111 Stat. 1203, 1208 (1997).

129. H.R. REP. NO. 105-206, at 40 (1997).

130. These are generally O&M fund accounts.

131. Pub. L. No. 105-56, 111 Stat. 1203, 1208-09.

132. The Chief, National Guard Bureau establishes the amount of reimbursement on a case-by-case basis. *Id.* at § 8095.

133. *Id*. at § 8131.

134. The HAC identified several programs, to include the F-22 program and various missile programs. H.R. REP. NO. 105-206, at 15 (1997).

Additional Restrictions Placed on Multiyear Contracting Authority

The HAC specifically criticized the DOD for its application of multiyear contracting in budget requests. When used appropriately, multiyear contracts offer substantial benefits in terms of both cost savings and program stability. Once started, a particular program's funding is committed for several years and is unlikely to be reduced because of the termination liability costs associated with failure to adequately fund the program. According to the HAC, however, the military services have sought multiyear contracting authority from Congress even though the particular program otherwise lacked sufficient funding to actually execute the contract. The HAC viewed this tactic as a clear effort on the part of the military services to secure increased budget allocations from the Office of the Secretary of Defense. Hence, the 1998 DOD Appropriations Act now provides that Congress will consider no request for multiyear contracting unless it has been formally submitted as part of the President's budget or requested for in writing by the Secretary of Defense.[135]

DOD Taken to Task for Mixing and Matching Funds

The HAC also criticized the DOD for what it perceived to be the growing abuse of RDT&E appropriations. The committee acknowledged the desire of many within the DOD's acquisition community (particularly program managers) to merge development and procurement funding into a single appropriation. According to the HAC, however, such a practice would severely impede oversight by both senior DOD managers and Congress. The committee further noted that the DOD has allowed its program managers to blur distinctions between these appropriations. According to the HNSC, the DOD has repeatedly used RDT&E funding to initiate production and production funding to initiate development.[136] Against this backdrop, the HAC served notice that "it takes its oversight responsibilities seriously and will not tolerate lax observance of the long-standing policies on the proper use of appropriations."[137] Consequently, the 1998 DOD Appropriations Act prohibits the DOD from using RDT&E funds to procure end-items for any DOD system unless the items will be used as part of the test and evaluation process leading up to a final production determination.[138]

Purchases of Foreign-Made Goods

The HAC has identified an apparent increase in the procurement of foreign-made goods by the DOD when simplified acquisition procedures are used. Since the DOD does not have a system for tracking such information, the HAC directed the DOD Inspector General (DODIG) to randomly audit simplified acquisitions at various CONUS-based military installations to determine the extent of this phenomenon. The DODIG must report its findings to the Committees on Appropriations no later than 30 April 1998.[139]

Air Force Institute of Technology (AFIT)

In an effort to cut costs, the Air Force plans to eliminate its in-residence programs at the Air Force Institute of Technology (AFIT) in FY 1998. Although acknowledging the budgetary reasons for such action, the HAC questioned the absence of a recent "comprehensive" cost-benefit study to support this change in policy. Consequently, the committee directed the National Academy of Sciences to complete a cost-benefit analysis on this matter and report back by April 1998.[140] Additionally, commencing with academic year

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135. Pub. L. No. 105-56, § 8008, 111 Stat. 1203, 1221.

136. The HAC is particularly disturbed over a trend in missile programs to initiate production to provide an interim warfighting capability using research and development funding, contrary to committee direction and DOD policy on the use of such funding. H.R. REP. NO. 105-206, at 15 (1997).

137. *Id.*

138. The 1998 DOD Appropriations Act exempts programs funded within the National Foreign Intelligence Program, or in those cases where the Secretary of Defense has waived this restriction in the interests of national security and has informed Congress of this determination. Pub. L. No. 105-56, § 8114, 111 Stat. 1203, 1245 (1997).

139. H.R. REP. NO. 105-206, at 41 (1997).

140. *Id.* at 53.

1998-1999, the 1998 DOD Appropriations Act prohibits the Air Force from sending graduate students who would otherwise have attended AFIT to civilian institutions.[141]

Military Construction Authorization Act for Fiscal Year 1998

Introduction

On 18 November 1998, President Clinton signed the Military Construction Authorization Act for Fiscal Year 1998 (1998 Construction Act).[142] The 1998 Construction Act authorizes $9.124 billion in budgetary authority for specified military construction projects, unspecified minor military construction projects, the military family housing program, and for activities associated with base realignment and closure.[143]

Congress Provides DOD Greater Authority to Use O&M Funds for Unspecified Minor Military Construction

Congress has expanded on the authority of deploying commands to use O&M funds for minor military construction projects. Specifically, the Secretary of Defense can use "mobility enhancement funds" for minor construction work (i.e., construction projects that do not exceed $1.5 million) that "enhance[s] the deployment and mobility of military forces and supplies."[144] Keep in mind, however, that any construction work costing over $500,000 must be still approved in advance by the appropriate agency Secretary.[145]

Additional Reporting Requirement for Big Dollar Repair Projects

For facility repair projects with an estimated cost that exceeds $10 million, the relevant agency Secretary is now required to first submit to Congress a report justifying the use of O&M funds for such work.[146] Additionally, the 1998 Construction Act defines a "repair project" as "a project to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose."[147]

Threshold for Minor Land Acquisitions Increased

The 1998 Construction Act now allows the Secretary of a military department, in the interest of national defense, to acquire any interest in land that does not exceed $500,000. This represents an increase from the previous cap of $200,000.[148]

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141. This provision applies: (1) if the civilian degree program is otherwise offered by the AFIT (or was offered by the AFIT during the 1996-1997 academic year); (2) the officer is qualified for enrollment at AFIT in that degree program; and, (3) the number of students commencing the AFIT program during the first semester of the 1998-1999 academic year is less than the number of students commencing that degree program for the first semester of the 1996-1997 academic year. Pub. L. No. 105-56, § 8099, 111 Stat. 1203, 1242 (1997).

142. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

143. The administration's construction budget request was $8.374 billion. The House report on military construction asserts that the budget request, in constant dollars, is 25 percent less than that sought in FY 1996 and 28 percent less than what Congress authorized for the same year. The report also points to a study by the Defense Science Board Task Force on Quality of Life that found 62 percent of barracks and dormitories and 64 percent of military family housing to be unsuitable. H.R. REP. NO. 105-132, at 431 (1997). Among the problems common in these substandard housing units are asbestos, corroded pipes, inadequate ventilation, faulty heating and cooling systems, and peeling lead-based paint. H.R. REP. NO. 105-150, at 3 (1997).

144. Pub. L. No. 105-56, § 2801, 111 Stat. 1203 (amending 10 U.S.C. § 2805).

145. *Id.*

146. *Id.* § 2802 (amending 10 U.S.C. § 2811).

147. *Id.* In its report, the HAC set forth the following guidelines for funding repair work from the O&M account:

> Components of the facility may be repaired by replacement, and such replacement can be up to current standards or codes. Interior rearrangements and restorations may be included as repair, but additions, new facilities, and functional conversions must be performed as military construction projects . . . . Such projects may be done concurrent with repair projects, as long as the final conjunctively funded project is a complete and usable facility.

H.R. REP. NO. 105-150, at 9 (1997).

The Military Construction Appropriations Act, 1998

Introduction

The Military Construction Appropriations Act, 1998[149] (1998 MCA Act) provides $9.183 billion in funding for the planning, design, construction, alteration, and improvement of active and reserve military facilities worldwide. It finances the construction, alteration, improvement, operation, and maintenance of military family housing. This includes payments against past housing mortgage indebtedness. Community impact assistance may also be provided, in addition to assistance to members of the military who face loss on the sale of private residences due to installation realignments and closures. It is also the source for the United States share of the NATO Security Investment Program and the funding to implement base realignments and closures authorized by law.[150]

Cost-Plus-Fixed-Fee Contracting

As in past years, the 1998 MCA Act prohibits the use of "cost-plus" contracting procedures for construction contracts exceeding $25,000. To take into account the uncertainty associated with environmental remediation efforts, however, this prohibition does not apply to contracts for environmental restoration at closing bases.[151] This year, the HAC specifically denied a DOD request to extend the use of "cost-plus" contracting authority to "all contracts . . . which are funded from the Base Realignment and Closure accounts." The HAC, though, invited the DOD to submit a "detailed justification citing instances in which base closure and realignments have been impeded" by this restriction.[152]

Contingency Construction Contracting

The 1998 MCA Act appropriates $4 million to the DOD for its "Contingency Construction Account," less than half the amount sought in the DOD's budget request.[153] The Secretary of Defense may use these funds for unforeseen facility requirements.

Notice Requirement Associated with Housing Contracts

It seems that everyone within the DOD is actively studying the viability of outsourcing installation housing responsibilities.[154] With this in mind, the 1998 MCA Act requires the service secretaries to notify Congress of payment guarantees placed in any solicitation for housing contracts.[155] The notice must state whether any guarantee, including the making of mortgage or rental payments, has been made to a private contractor. Additionally, the notice must include whether these guarantees take effect upon the closure or realignment of the installation, the reduction in force of units stationed at the installation, or the extended deployment overseas of units stationed at the installation. The nature of the guarantee and the extent and likelihood of government liability must also be addressed by the notice.[156]

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148. Pub. L. No. 105-56, § 2811 (amending 10 U.S.C. § 2672).

149. Pub. L. No. 105-45, 111 Stat. 1142 (1997). This represents $800 million over the administration's budget request and $610 million under FY 1997 appropriations. The Senate Appropriations Committee (SAC) feels that the DOD's budget request does not provide sufficient resources to continue the DOD's efforts to modernize, to renovate, and to improve its existing facilities. S. REP. NO. 105-52, at 8 (1997).

150. S. Rep. No. 105-52, at 3 (1997).

151. Pub. L. No. 105-45, § 101, 111 Stat. 1142, 1146 (1997).

152. H.R. REP. NO. 105-150, at 44-45 (1997).

153. The budget request sought $9.8 million for Defense-wide contingency construction. H.R. CONF. REP. NO. 105-247, at 30 (1997). As justification for the cut, the HAC merely stated that the funding provided was "adequate to meet the needs of the Department." H.R. REP. NO. 105-52, at 21 (1997).

154. The SAC took notice of the DOD's efforts to develop new privatization initiatives to meet the shortfall in adequate family housing. The committee, however, wondered about the DOD's attempt to accelerate this program without allowing the time necessary to assimilate lessons learned from earlier projects. S. REP. NO. 105-52, at 27 (1997).

155. Pub. L. No. 105-45, § 128, 111 Stat. 1142, 1151.

Congress Rejects Request to Fund Current Year Programs with Prior Year Savings

The DOD budget request sought specific authority to use more than $40 million in "prior year savings" to fund FY 1998 construction projects.[157] The conferees objected "strongly to this method of financing," stating that proper budget procedures require the DOD to request rescission of the funds by account and by fiscal year.[158] Additionally, Congress noted that the proposed use of prior year funds "could jeopardize the successful completion of projects appropriated in prior years."[159]

Turmoil Over Funding of Army National Guard Construction Work Limits Funding for Overseas Classified Locations

In FY 1997, the SAC directed the Army to program at least $75 million into its FY 1998 budget request for Army National Guard construction work. The Army failed to do so, requesting only $45 million. Against this backdrop, the Army and the Army National Guard subsequently agreed to an annual budget request level of $50 million for the Guard. In light of this, the SAC directed that no Army funding for overseas classified locations could be expended until at least $50 million is requested for the construction of Army National Guard projects in both the FY 1999 budget request and future year defense plans.[160]

No Relief in Sight from Historic Preservation Requirements

Congress is concerned that the costs of maintaining historic quarters are overburdening military housing accounts. Last year, Congress directed each military service to report on plans to remove all but the most significant historic homes. The services subsequently determined that they were unable to remove facilities from the National Register.[161] Apparently, however, Congressional concern goes only so far, because Congress now directs the DOD to consult with the appropriate federal agencies "to identify and [to] pursue strategies for the services to maintain and use historic housing consistent with their mission and budgetary resources.[162]

The Line Item Veto—"It Ain't Over 'til It's Over"[163]

On 30 September 1997, President Clinton signed the 1998 Military Construction Appropriation Act.[164] On 6 October 1997, however, the President exercised his line item veto authority, striking $287 million worth of work from the 1998 MCA Act.[165]

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156. *Id.* Congress is apparently concerned about proposed privatization initiatives, which contain provisions that shift financial risk and liability from the private sector to the government. Specifically, the SAC is studying guarantee provisions that cover mortgage payments or otherwise insulate private interests against future BRAC actions, force reductions, or extended deployments (e.g., rent and occupancy level guarantees). S. REP. NO. 105-52, at 27-28 (1997).

157. H.R. CONF. REP. NO. 105-247, at 8 (1997).

158. *See* H.R. REP. NO. 105-150, at 9 (1997).

159. H.R. CONF. REP. NO. 105-247, at 8 (1997).

160. S. REP. NO. 105-52, at 22 (1997). In the conference report accompanying the 1998 MCA Act, the conferees stated that the "language and allocations set forth in House Report 105-150 and Senate Report 105-52 should be complied with unless specifically addressed to the contrary in the conference report and statement of the managers." H.R. CONF. REP. NO. 105-247, at 7 (1997).

161. S. REP. NO. 105-52, at 10-11 (1997).

162. H.R. CONF. REP. NO. 105-247, at 7 (1997).

163. Yogi Berra, commenting on the tight 1973 National League pennant race. *Pearls of Wisdom*, U.S. NEWS & WORLD REP., Aug. 29/Sept. 5, 1994.

164. Military Construction Appropriation Act, 1998, Pub. L. No. 105-45, 111 Stat. 1142 (1997).

165. President Clinton prefaced his line item veto message with the following: "In accordance with the Line Item Veto Act, I hereby cancel the dollar amounts of discretionary budget authority . . . . I have determined that the cancellation of these amounts will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest." Cancellation Pursuant to Line Item Veto Act; Military Construction Appropriations Act, 1998, 62 Fed. Reg. 52,452, Oct. 7, 1997.

President Clinton is the first President to have the power to veto certain items from the Appropriation or Authorization Acts without vetoing the entire act.[166] Since the veto, however, White House officials have conceded that some of the projects were mistakenly eliminated. As a result, the White House has pledged to work with Congress to restore funding for those vetoed projects.[167] Additionally, Congress may pass a bill to restore funding for the vetoed projects, but that bill is subject to Presidential veto as well. Congress then has thirty days to override the vetoes by a two-thirds vote in each chamber.[168]

Bob Hope – A Great American

For the first time ever, Congress conferred the status of honorary veteran of the Armed Forces of the United States on one of this nation's citizens, Bob Hope.[169] Congress formally recognized the "lifetime of accomplishments and service of Leslie Townes (Bob) Hope on behalf of members of the Armed Forces of the United States."[170] Citing his more than fifty years of support to American service members, Congress noted that "[d]uring World War II, the Korean conflict, the Vietnam War, the Persian Gulf War, and the Cold War, Bob Hope traveled to visit and entertain millions of members of the Armed forces in numerous countries, on ships at sea, and in combat zones ashore."[171] Perhaps the conferees said it best by closing its commentary on this provision with: "Thanks for the memories, Bob."[172]

166. *See* Gerald Solomon and Porter Goss, *This Veto Is Working*, WASH. TIMES, Nov. 19, 1997, at A19 (authors, who are Republican congressmen, caution against any "rush to judgment" regarding criticism of the President's line item veto authority).

167. Rick Maze, *Some Vetoed Projects May Get Funding*, AIR FORCE TIMES, Oct. 20, 1997, at 6.

168. *Id*. *See Votes In Congress*, DAILY PROGRESS, Nov. 16, 1997, at A11 (voting 352 to 57, the House joins the Senate in passing legislation disapproving the President's use of the line item veto of certain military construction projects).

169. Pub. L. No. 105-85, § 1087, 111 Stat. 1629 (1997); Pub. L. No. 105-67, 111 Stat. 1452 (1997).

170. Pub. L. No. 105-85, § 1087, 111 Stat. 1629 (1997); Pub. L. No. 105-67, 111 Stat. 1452 (1997).

171. Pub. L. No. 105-85, § 1087, 111 Stat. 1629 (1997); Pub. L. No. 105-67, 111 Stat. 1452 (1997).

172. H.R. CONF. REP. NO. 105-340, at 810 (1997).

APPENDIX B

CONTRACT & FISCAL LAW WEBSITES

A

ABA LawLink Legal Research Jumpstation	http://www.abanet.org/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Section (Agency Level Bid Protests)	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network	http://www.arnet.gov
ACQWeb - Office of Undersecretary of Defense for Acquisition & Technology	http://www.acq.osd.mil
Agency for International Development	http://www.info.usaid.gov
Air Force Acquisition Reform	http://www.safaq.hq.af
Air Force FAR Supplement	http://www.hq.af.mil/SAFAQ/contracting/far/affars/html
Air Force Home Page	http://www.af.mil/
Air Force Materiel Command Web Page	http://www.afmc.wpafb.af.mil
Air Force Publications	http://farsite.hill.af.mil/vfaffarl.htm
Air Force Site, FAR, DFARS, Fed. Reg.	http://farsite.hill.af.mil
Army Acquisition Website	http://acqnet.sarda.army.mil/
Army Home Page	http://www.dtic.mil/armylink
Army Financial Management Home Page	http://www.asafm.army.mil/homepg.htm
Army Materiel Command Web Page	http://amc.citi.net/index.shtml

C

CAGE Code Assignment Also Search/Contractor Registration (CCR)	http://www.disc.dla.mil
Code of Federal Regulations	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
Coast Guard Home Page	http://www.dot.gov/dotinfo/uscg
Commerce Business Daily (CBD)	http://cbdnet.access.gpo.gov/index.html
Comptroller General Decisions	http://www.gao.gov/decisions/decison.htm
Congress on the Net-Legislative Info	http://thomas.loc.gov/
Contract Pricing Guides (address)	http://www.gsa.gov/staff/v/guides/instructions.htm
Contract Pricing Reference Guides	http://www.gsa.gov/staff/v/guides/volumes.htm

Cost Accounting Standards	http://www.fedmarket.com/cas/casindex.html

D

DCAA Web Page	http://www.dtic.mil/dcaa *Before you can access this site, must register at http://www.govcon.com
DCAA - Electronic Audit Reports	http://www.abm.rda.hq.navy.mil/branch11.html
Debarred List	http://www.arnet.gov/epls/
Defense Acquisition Deskbook	http://www.deskbook.osd.mil
Defense Acquisition University	http://www.acq.osd.mil/dau/
Defense Tech. Info. Ctr. Home Page (use jumper Defenselink and other sites)	http://www.dtic.mil
Department of Justice (jumpers to other Federal Agencies and Criminal Justice)	http://www.usdoj.gov
Department of Veterans Affairs Web Page	http://www.va.gov
DFARS Web Page (Searchable)	http://www.dtic.mil/dfars
DFAS	http://www.dfas.mil/
DIOR Home Page - Procurement Coding Manual/ FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Claiment Program Number (procurement Coding Manual)	http://web1.whs.osd.mil/diorhome.htm
DOD Contracting Regulations	http://www.dtic.mil/contracts
DOD Home Page	http://www.dtic.mil/defenselink
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD SOCO Web Page	http://www.dtic.mil/defenselink/dodgc/ defense_ethics
DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc.html

F

FAC (Federal Register Pages only)	http://www.gsa.gov:80/far/FAC/FACs.html
FAR (GSA)	http://www.arnet.gov/far/
Federal Acquisition Jumpstation	http://procure.msfc.nasa.gov/fedproc/home.html
Federal Acquisition Virtual Library (FAR/ DFARS, CBD, Debarred list, SIC)	http://159.142.1.210/References/References.html
Federal Register	http://law.house.gov/7.htm
FFRDC - Federally Funded R&D Centers	http://web1.whs.osd.mil/diorhome.htm

Financial Management Regulations	http://www.dtic.mil/comptroller/fmr/
Financial Operations (Jumpsites)	http://www.asafm.army.mil

G

GAO Documents Online Order	http://gao.gov/cgi-bin/ordtab.pl
GAO Home Page	http://www.gao.gov
GAO Comptroller General Decisions (Allows Westlaw/Lexis like searches)	http:/www.access.gpo.gov/su_docs/aces/aces170.shtml?desc017.html
GovBot Database of Government Web sites	http://www.business.gov
GovCon - Contract Glossary	http://www.govcon.com/information/gcterms.html
Gov't. Information Locator Services Index U.S. Army Publications	http://www-usappc.hoffman.army.mil/gils/gils.html
GSA Legal Web Page	http://www.legal.gsa.gov

J

Joint Publications	http://www.dtic.mil/doctrine
Joint Travel Regulations (JTR)	http://www.dtic.mil/perdiem/jtr.html

L

Laws, Regulations, Executive Orders, & Policy	http://159.142.1.210/References/References.html#policy, etc
Library (jumpers to various contract law sites - FAR/FAC/DFARS/AFARS)	http://acqnet.sarda.army.mil/library/default.htm
Library of Congress Web Page	http://lcweb.loc.gov

M

Marine Corps Home Page	http://www.usmc.mil

N

NAF Financial (MWR)	http://www.asafm.army.mil/fo/naf/naf.htm

O

OGC Contract Law Division	http://www.ogc.doc.gov/OGC/CLD.HTML
OGE Ethics Advisory Opinions	http://fedbbs.access.gpo.gov/libs/oge_opin.html
OGE Web Page (Ethics training materials and opinions	http://www.access.gpo.gov/usoge

Office of Acquisition Policy	http://www.gsa.gov/staff/ap.htm
Office of Deputy ASA (Financial Ops) Information on ADA violations/NAF Links/Army Pubs/and Various other sites	http://www.asafm.army.mil/financial.htm
Office of Management and Budget (OMB)	http://www.access.gpo.gov/su_docs/budget/index/html
Office of Management and Budge Circulars	http://www.whitehouse.gov/WH/EOP/omb/html
OFPP (Guidelines for Oral Presentations)	http://www.doe.gov/html/procure/oral.html
OFPP (Best Practices Guides)	http://www.arnet.gov/BestP/BestP.html

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd97.htm
Producer Price Index	http://www.bis.gov/ppihome.htm
Purchase Card Program	http://purchasecard.dfas.mil

S

SBA Government Contracting Home Page	http://www.sbaonline.sba.gov/GC/
Service Contract Act Directory of Occupations	http://www.dol.gov//dol/esa/public/regs/compliance/whd/wage/main.htm
SIC	http://spider.osha.gov/oshstats/sicser.html

T

Taxes/Insurance	http://www.payroll-taxes.com

U

U.S. Congress on the Net-Legislative Info	http://thomas.loc.gov/
U.S. Code	http://law.house.gov/usc.htm

TJAGSA Practice Note

Faculty, The Judge Advocate General's School, U.S. Army

Changes for United States Army Reserve Component Officer Involuntary Separation Boards

The Reserve Officer Personnel Management Act[1] (ROPMA) makes a notable change to the composition of United States Reserve Component officer elimination board panels.[2] As of 1 October 1996, any officer who serves on a United States Army Reserve Component officer elimination board must be a colonel and also must be senior in grade and rank to any respondent whose status is being considered by the board.[3]

The new "colonels and above" requirement may significantly impede Army Reserve readiness when a command's senior leadership is sitting on officer elimination boards, rather than utilizing precious training time for command and staff duties. As an alternative, reserve commands, working with the Army Reserve Personnel Command (ARPERSCOM), should identify local area Individual Ready Reserve and Individual Mobilization Augmentee colonels who may be willing to serve as officer elimination board members.[4]

The Army National Guard, which often conducts concurrent boards for withdrawal of federal recognition and officer elimination, may now have difficulty in using the same board for both actions. Army National Guard officers who have lost their federal recognition become members of the Individual Ready Reserve (U.S. Army Reserve) upon losing their Army National Guard status.[5] Once a National Guard officer becomes a member of the Individual Ready Reserve, the ROPMA's requirements as to Reserve officer elimination actions are triggered.[6]

On 3 July 1997, the Commander, U.S. Army Reserve Command (USARC), published additional guidance for U.S. Army Reserve Regional Support Commands (RSCs) and Direct Reporting Commands (DRCs) in response to the ROPMA elimination board composition change.[7] The guidance delegates to the RSCs and DRCs the authority to initiate officer separation actions, to appoint and to convene boards of inquiry (BOIs), and to take action on the boards' findings and recommendations.[8] The guidance also directs U.S. Army Reserve commanders, acting as appointing authorities, to sign each Report of Proceedings by Investigating Officer/Board of Officers personally and to forward each officer separation board packet through the USARC Deputy Chief of Staff Personnel section to the ARPERSCOM commander for final separation action on behalf of the Secretary of the Army.[9] The USARC delegation memo superseded a USARC directive on Reserve

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1. Pub. L. No. 103-337, 108 Stat. 2957 (1994) (codified in various sections of Titles 10 and 32, United States Code). The ROPMA refers to involuntary officer separation boards as "boards of inquiry" (BOIs). United States Army National Guard and Army Reserve officer elimination boards are governed by *Army Regulation 135-175*, rather than by the active component officer separation regulation, *Army Regulation 600-8-24*. *Compare* U.S. DEP'T OF ARMY, REG. 135-175, SEPARATION OF OFFICERS (22 Feb. 1971) [hereinafter AR 135-175], *with* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (21 July 1995) [hereinafter AR 600-8-24]. *Army Regulation 600-8-24* applies to Regular Army officers and to reserve component officers who are on active duty status for a period of 30 or more consecutive days. Headquarters, Department of the Army Deputy Chief of Staff for Personnel, is currently revising *Army Regulation 135-175*.

2. Federal withdrawal of recognition boards for Army National Guard officers are not technically officer separation boards under Title 10 of the U.S. Code; thus, they are arguably not affected by the ROPMA's separation board provisions. *See* 10 U.S.C.A. § 323(b) (West 1997); U.S. DEP'T OF ARMY, NAT'L GUARD BUREAU REG. 635-101, EFFICIENCY AND PHYSICAL FITNESS BOARDS (15 Aug. 1977) [hereinafter NGR 635-101]. The ROPMA does, however, have a provision which deals with federal withdrawal of recognition boards. 10 U.S.C.A. § 14907.

3. Pub. L. No. 103-337, 108 Stat. 2957, *codified at* 10 U.S.C. § 14906(a). There is a similar requirement for active component Army officer elimination boards. *See* AR 600-8-24, *supra* note 1, para. 4-7a. Congress considered legislation to change reserve component officer board membership to an officer holding a grade above major/lieutenant commander (O-4) rank and higher, which would have alleviated this problem, but it was deleted from the final version of the National Defense Authorization Act for Fiscal Year 1998. *See* H.R. 1119, 105th Cong., § 516, H.R. REP. NO. 105-32 (16 June 1997); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629 (1997).

4. Reserve commands may reach ARPERSCOM Officer Personnel Management Directorate by writing to U.S. Army Reserve Personnel Command (ARPERSCOM), ATTN: ARPC-OP, 9700 Page Avenue, St. Louis, MO 63132-5200, or by calling (314) 592-0664. Individual Ready Reserve and Individual Mobilization Augmentee officers can get up to two retirement points per eight-hour period for sitting as an elimination board member for either Army Reserve or Army National Guard officer boards. U.S. DEP'T OF ARMY, REG. 140-185, TRAINING AND RETIREMENT POINT CREDITS AND UNIT LEVEL STRENGTH ACCOUNTING RECORDS, para. 2-4b(3) (15 Sept. 1979) [hereinafter AR 140-185].

5. *See* 10 U.S.C.A. § 12213(b); NGR 635-101, *supra* note 2, paras. 6b, 17c; AR 135-175, *supra* note 1, paras. 1-13g, 1-13h, 2-2b.

6. It is the opinion of members of the National Guard Bureau Chief Counsel's Office that once Guard officers have properly had their federal recognition withdrawn by board action they are automatically subject to discharge without another board to separate them from the Individual Ready Reserve. *See* AR 135-175, *supra* note 1, paras. 2-8b, 2-8c, 4-1b.

7. Memorandum, Commander, U.S. Army Reserve Command (USARC), AFRC-PRO, to Commanders, USARC MSCs [Major Subordinate Commands], subject: Delegation of Authority to Initiate and Convene Officer Involuntary Separation Boards (3 July 1997) [hereinafter USARC Delegation Memo].

Component Officer Involuntary Separation Boards, which was dated 20 November 1996.[10]

As of 3 July 1997, all officer boards of inquiry (BOIs) which are initiated by RSCs or DRCs must meet certain composition-requirements. First, all BOIs will have one Regular Army voting member (colonel or above), if available, or a "Reserve officer who is serving on active duty" (colonel or above; e.g., an Active Guard Reserve colonel) if no Regular Army officer is readily available.[11] Second, at least one of the voting board members should be of the same branch as the respondent, "if possible."[12] Third, at least one voting member of the board should be of the same sex as the respondent, "if reasonably available."[13] Fourth, upon timely request by the respondent, at least one voting member of the board should be a minority, "if reasonably available."[14] Currently, there is no regulatory or statutory requirement to have a reserve officer board member who is the same race as a minority respondent.[15] The USARC delegation memorandum does not specify who is a minority.[16]

What do these changes mean for U.S. Army Reserve recorders and personnel officers who are responsible for obtaining active and reserve component colonels to sit on Reserve officer BOIs? Command officials must now be cognizant of minority status, as well as the sex and branch of respondent officers; all of these factors must now be considered when assembling BOI panels. Additionally, BOI members should be screened to ensure that there are no rater/rated officer conflicts or supervi-

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8. *Id.* The memorandum provided:

> Pursuant to *AR 135-175*, paragraph 1-3a(3), you are hereby delegated the authority to process separation actions for officers assigned to troop program units within your command. This delegation includes the authority to initiate separation actions, [to] appoint and [to] convene boards of inquiry (BOI), and [to] take action on the boards' findings and recommendations. You are not authorized to take final action approving the retention or separation of officers referred to a BOI. Commander, ARPERSCOM, retains final retention and separation approval authority (*AR 135-175*, para. 2-20.1). Delegated functions include separation actions for:
>
> a. Chapter 2-11, Substandard performance of duty;
> b. Chapter 2-12, Moral or professional dereliction;
> c. Chapter 2-13, Failure to meet medical fitness standards at the time of appointment;
> d. Chapter 2-14, In the interest of national security; [and]
> e. Chapter 4, Removal from active status (when BOI required).
>
> This delegation of separation authority is effective as of the date of this memorandum.

Id. paras. 2, 3.

9. *Id.*

10. Memorandum, Commander, U.S. Army Reserve Command, AFRC-PRO, to USAR Commanders, subject: Change to Board Composition Concerning Officer Involuntary Separation Boards (20 Nov. 1996). The memorandum added the following requirements to BOIs appointed by the USARC:

> Further, one of the voting members will be active component if reasonably available. If an active component officer is not available, a reserve officer on active duty (AGR) may be substituted by submitting a statement in writing to the convening authority stating that an active component officer is not available. One of the three voting members should also be of the same branch as the officer being boarded, if possible. When a minority officer is being considered for separation, at least one of the voting members must be of the same sex and or race, if reasonably available.
>
> While the law came into effect on 1 Oct 96, the board composition requirements outlined above are only for boards *initiated* on or after that date. For purposes of board composition, initiation means at the time respondent is referred to a board of officers.

Id. paras. 3, 4. Neither this memo nor the USARC delegation memo subjects non-USARC reserve component units to the additional USARC officer board requirements.

11. 10 U.S.C.A. §§ 14906(a) (West 1997); AR 135-175, *supra* note 1, para. 2-25a(1). The ROPMA requirement for a colonel or above active component voting member to sit on USAR officer BOIs will create additional challenges for reserve commands. The most likely active component candidates for such duty will probably be each RSC's senior Army advisor, where that Regular Army officer is at least a colonel, or one of the RSC senior (colonel) full-time AGR staff officers, where no Regular Army colonel is readily available.

12. *See* AR 135-175, *supra* note 1, para. 2-25a(4). Reserve officers do not have to affirmatively request same branch board representation. *Id. But see* AR 600-8-24, *supra* note 1, para. 4-7d (providing that a respondent for an active component officer elimination board may request to have a member on the board who is of the same branch as the respondent if the respondent is a "special branch" officer (e.g., Army Medical Department, Chaplains Corps, or Judge Advocate General's Corps) and such a board member is reasonably available; a board member who is of the same branch as the respondent is not an entitlement). If an active component officer is being boarded for substandard performance of duty, the respondent may request that a member of the board be of the same branch as the respondent, regardless of whether the respondent is in a "special branch." *Id*. para. 4-7e.

13. AR 135-175, *supra* note 1, para. 2-25a(5). A respondent in the reserve component does not have to request same sex representation, but a respondent in the active component must request same sex representation within a specified time period. AR 600-8-24, *supra* note 1, para. 4-7d (providing that the request is waived if it is not timely).

sor/subordinate conflicts. If no officers who meet the minority status, sex, and branch of the respondent are appointed, Army Reserve personnel officers and command judge advocates should document why such officers were not made available for the board.[17] The documentation should be included in the separation packet prior to approval by the appointing authority.

Army Reserve commands should plan ahead to locate available colonels, both active and reserve component, to sit as voting BOI members. Commands should plan additional processing time for their officer elimination actions to account for the new colonels and above requirement for panel members. As soon as a reserve officer elimination case is received from a unit, efforts should be made to start identifying potential colonel officer board members. The creation of standing board panels, with several alternates that include female and minority officers, would assist commands in board scheduling and conflict resolution.[18]

To ensure proper board composition and to avoid unnecessary delays, the RSC/DRC staff judge advocate sections should review the proposed board composition before sending an officer BOI packet to the appointing authority for the appointment of board members. Command judge advocates should review each packet to ensure that: there is sufficient evidence for a prima facie case; the procedural paperwork is in order; and the directives for officer board membership have been met.[19] A legal review which is conducted prior to appointment of the board should be part of the appointing authority separation packet in each officer case. Command judge advocate prescreening of board members is not time-consuming and eliminates potential board challenges.

Respondents' counsel need to act quickly to preserve their clients' right to minority representation on officer elimination boards. The USARC delegation memorandum provides for a fifteen-day window to request minority board membership, starting from the date the respondent receives notice of the separation proceeding.[20] A respondent's failure to request minor-

14. AR 135-175, *supra* note 1, para. 2-25a. The USARC delegation memo states:

> When the respondent is a minority member, the board will, upon the respondent's written request, include a minority officer as a voting member, if reasonably available. This is not an entitlement. If a minority member is not reasonably available, the separation action may continue without a minority voting member on the BOI. Requests for a minority member will be made within 15 days of receipt of the memorandum notifying the officer of the initiation of the separation action. If the memorandum is undeliverable, or the respondent refuses delivery, the 15-day requirement begins from United States Postal Service confirmation of attempted delivery/delivery refusal. Failure to exercise the right to request a minority BOI member within these guidelines constitutes a waiver of that option.

USARC Delegation Memo, *supra* note 7, para. 4(c).

15. *But see* U.S. DEP'T OF ARMY, REG. 135-178, SEPARATION OF ENLISTED PERSONNEL, para. 2-12a(3) (1 Sept. 1994) [hereinafter AR 135-178] (providing that female and minority members should be provided an opportunity to serve on reserve enlisted separation boards). The mere appointment or failure to appoint a minority or female to an enlisted elimination board "does not provide a basis for challenging the proceedings." *Id.* para. 2-12a(3). In contrast, the USARC delegation memorandum has no such disclaimer regarding officer board minority member requests. For active component officer elimination boards, a minority, female, or special branch officer will be appointed to the board as a voting member only upon written request and only if reasonably available. AR 600-8-24, *supra* note 1. Under the regulation, a request for a minority, female, or special branch board member is not an enforceable entitlement, and such a request is waived if the respondent does not submit the request within seven days from notification of separation proceedings. *Id.* Similarly, the USARC delegation memorandum provides that a reserve officer minority member request "is not an entitlement" and that the request is waived if it is not made within fifteen days of separation notice. USARC Delegation Memo, *supra* note 7.

16. "Minority groups" are defined as "any group distinguished from the general population in terms of race, color, religion, gender, or national origin." AR 140-185, *supra* note 4, glossary (1 Sept. 1994). This very broad definition of "minority" includes not only race, color, or national origin, but also gender and religion. *See* U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL, PERSONNEL SEPARATIONS, glossary (17 Sept. 1990) [hereinafter AR 635-200]. Under *Army Regulations 135-175* and *600-8-24*, gender is treated separately from minority status. There is no definition of "minority" or "minority group" in the active component officer separation regulation, *Army Regulation 600-8-24*. The active component enlisted separation regulation makes a useful suggestion regarding minority membership on separation boards; it suggests that the requested minority board member "should normally be of the same minority group as the respondent." *Id.* para. 2-7b(5).

17. If minority, female, or branch-specific members are not reasonably available, the government should document that it attempted to obtain such members. *Cf.* AR 635-200, *supra* note 16, para. 2-7b(5) (providing that when a minority board member is not available "the reason will be stated in the record of proceedings"). While the racial makeup of a reserve officer administrative elimination board panel is not specifically listed as grounds to challenge the panel for cause under *Army Regulation 135-175*, paragraphs 2-25c(4) and 2-25d, respondent's counsel should object to a failure of the command to make any effort to seek out minority, female, or same branch board members. In support of the objection, counsel should argue that the lack of effort is a substantial error that has a material adverse effect on the respondent's right to a fair hearing. See U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS, para. 2-3c(3) (11 May 1988) [hereinafter AR 15-6].

18. Prior to the convening of the board, the command staff judge advocate may excuse board members and substitute board alternates who are already appointed. AR 15-6, *supra* note 17, para. 5-2a. The reasons for excusal include indication of a conflict, disqualification, or inability to serve. *Id.* The appointing authority should provide an express written delegation of authority to the command staff judge advocate to prevent challenges to such excusal actions. In cases where a respondent timely requests same sex, same branch, or minority members, the appointing authority should be prepared to specifically appoint such members, if reasonably available and not already members of standing BOI panels.

19. At a minimum, the board membership requirements of *Army Regulation 135-175*, paragraph 2-25, should be met prior to presenting the board packet to the appointing authority.

ity board membership within the fifteen-day window results in waiver of the government's obligation to appoint a minority board member. If the respondent makes a timely request for minority representation on the board and no minority members were appointed, the government should be prepared to explain why. In the absence of a reasonable explanation by the government, respondent's counsel should object to the board being seated and should renew the objection upon the opening of the board hearing.[21]

While not required by regulation, respondent's counsel should also draft a post-board memorandum to the command staff judge advocate and raise again the issue of improper BOI composition, as well as any other procedural or substantive errors. Respondent's counsel should provide the legal reviewer reasons to overturn the board results. Prior to the command's legal review after the board, respondent's counsel should also review the summarized transcript of the board proceeding to ensure accuracy, especially as to whether important objections were recorded. Counsel's input on potential errors of law and fact can assist the command staff judge advocate in providing an adequate legal review and in properly advising the appointing and separating authorities.[22]

The ROPMA has inspired several important changes to Army Reserve Component procedures in conducting officer separation boards. The ROPMA requires higher-ranking board members, which has an adverse impact on unit training and readiness. Army National Guard joint federal withdrawal of recognition and officer separation boards may be affected. Additionally, the USARC delegation memorandum, which establishes other criteria for board membership, raises new questions and challenges for commands and counsel.[23] Lieutenant Colonel Conrad.

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20. USARC Delegation Memorandum, *supra* note 7.

21. Failure to object during the board proceedings waives any board composition error. AR 15-6, *supra* note 17, para. 2-3c(4). Respondent's counsel should ensure that the board transcript reflects the objection and should create a record that can eventually be used to raise the issue of race/gender bias in the board selection. *See generally* U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTIONS OF MILITARY RECORDS (18 May 1977). Respondent's counsel should be prepared to challenge whether the government made any effort to contact minority, female, or same branch officers who could have been seated on the BOI panel. In making these arguments, there are several pieces of evidence which can be helpful: statistical evidence that the command has a particular percentage of minority, female, or same branch officers in the grade of colonel or above; lists of those officers; and sworn affidavits indicating that they were never contacted by the command. *Cf*. United States v. Moore, 28 M.J. 366 (C.M.A. 1989); AR 135-175, *supra* note 1, para. 2-27b(6). While there is no Sixth Amendment right to a jury in a military BOI proceeding, such proceedings must meet minimal standards of fairness and procedural due process. *See* Holley v. United States, 124 F.3d 1462 (Fed. Cir. 1997); Perez v. United States, 850 F. Supp. 1354 (N.D. Ill. 1994); AR 135-178, *supra* note 15, paras. 1-8, 11-15; AR 135-175, *supra* note 1, paras. 2-3 through 2-5. Where military regulations or directives provide certain respondent rights for involuntary separation proceedings, the government must comply with its own directives or regulations. *See* Casey v. United States, 8 Ct. Cl. 234, 241 (1985); Faircloth v. United States, 186 Ct. Cl. 133 (1968); Keef v. United States, 185 Ct. Cl. 454 (1968); Birt v. United States, 180 Ct. Cl. 910 (1967). Respondents' counsel, by analogy, may argue that the failure of a command to make any reasonable attempt to place minority or female officers on a minority or female respondent's BOI panel is a violation of fundamental fairness and minimal due process, which constitutes a substantial error and voids the board's results.

22. *See* AR 135-178, *supra* note 15, paras. 2-21c, 2-22; AR 15-6, *supra* note 17, paras. 3-18 and 5-10.

23. The opinions expressed in this note are solely the author's and are not those of The Judge Advocate General's Corps, U.S. Army; the U.S. Army Reserve Command; the National Guard Bureau; or the U.S. Army Deputy Chief of Staff, Personnel Policy.

Litigation Division Notes

Litigation Update

On 21 November 1997, the United States Court of Appeals for the Second Circuit vacated and remanded a judgment of the District Court for the Southern District of New York that had barred the enforcement of the Military Honor and Decency Act of 1996[1] (MHDA). The case, *General Media Communications, Inc. v. Cohen*,[2] was the first to challenge the MHDA's constitutionality, and the appellate court's decision affirmed the long-standing practice of judicial deference to Congress and the military when regulating official military conduct.

The district court, in granting injunctive relief for General Media,[3] found that the MHDA violated General Media's First Amendment right to free speech[4] and Fifth Amendment right to equal protection.[5] The district court further concluded that the MHDA was unconstitutionally vague.[6] In reaching its decision, the court determined that it did not need to determine whether military exchanges were public or nonpublic forums, a central issue in First Amendment jurisprudence.[7] The court determined that "[e]ven in a nonpublic forum, statutory restrictions on nonobscene speech must be based on a legitimate government interest . . . . The First Amendment prevents the government from banning material solely because it is offensive."[8] Applying the strict scrutiny standard, the district court also determined that the MHDA violated the equal protection clause because "the Act's classifications do not further a permissible, let alone compelling, state interest and because the means the government has chosen to further that interest are not narrowly tailored."[9] The district court found no evidence to support the alleged goal of maintaining "the appearance of honor, propriety, and professionalism and promoting core values" in the military.[10] As the court stated, "[g]iven the tremendous popularity of Penthouse and Playboy among military personnel, nothing indicates that the Act will reduce the presence of sexually explicit material on military property."[11] Finally, the district court determined that the MHDA is unconstitutionally vague and impermissibly chills speech because it contains a subjective element that "created the real danger of ad hoc, arbitrary interpretation and application of the law" when it comes to determining what is "patently offensive."[12]

The Second Circuit disagreed with the district court and determined that: military exchanges are not public forums that deserved special protection under the First Amendment;[13] the MHDA does not discriminate on viewpoint, but rather is content-oriented,[14] and the restrictions the MHDA placed on the sale of magazines were reasonable in light of the purpose of the

1. 10 U.S.C.A. § 2489a (West 1997). The Military Honor and Decency Act (MHDA) became effective on 22 December 1996. The district court summarized the MHDA's prohibitions as "banning only the sale or rental of sexually explicit material on military property . . . [the MHDA] does not restrict the possession of such material on military property, nor does it prohibit military personnel from sharing such material with their colleagues." General Media Communications, Inc. v. Perry, 952 F. Supp. 1072, 1075 (S.D.N.Y. 1997). The district court further determined that "military personnel may buy sexually explicit material off military property or order it through the mail." *Id.*

2. No. 97-6029, 1997 U.S. App. LEXIS 33869 (2nd Cir. Nov. 21, 1997).

3. General Media Communications, Inc. publishes various periodicals, including *Penthouse* magazine. The MHDA would ban the sale of *Penthouse* at military exchanges. "The other plaintiffs are various trade associations whose members are engaged in the wholesale and retail distribution, sale, and manufacture of periodicals, books, sound recordings, and home videos throughout the nation." *See General Media*, 952 F. Supp. at 1075. Court papers filed with the district court alleged that *Penthouse* is the third most popular magazine sold by the Army and Air Force Exchange Service, with sales of 19,000 copies per month. *Id*. In an amicus brief, Playboy Enterprises, Inc. alleged that it sold 25,000 copies per month in military exchanges. *Id*.

4. *Id.* at 1081.

5. *Id.* at 1081-82.

6. *Id.* at 1084.

7. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985); Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

8. *General Media*, 952 F. Supp. at 1080.

9. *Id.* at 1082.

10. *Id.*

11. *Id.*

12. *Id.* at 1083.

forum.[15] In deferring to congressional authority to regulate the military, the appellate court found that military exchanges were not "public street corners" and "are not available for everyone to 'speak' from their shelves."[16] They are "nonpublic forums" where speech may be restricted, so long as the restrictions are reasonable and are not based on any particular viewpoints.[17] The MHDA is a "reasonable way for Congress to uphold the military's image and core values of honor, professionalism, and discipline," by preventing the appearance that the military endorses sexually explicit material.[18]

As to the Fifth Amendment issue, the Second Circuit disagreed with the district court's conclusion that the MHDA's disparate treatment of material violated the Constitutional guarantee of equal protection.[19] The appellate court determined that "the Act's distinction between written and visual forms of expression, and its ban on lascivious expression contained in audio, video, and periodical materials, but not in books, are rationally related to a legitimate governmental interest.[20]

Finally, the Second Circuit determined that the MHDA was not unconstitutionally vague and found that the district court was "insufficiently sensitive to the particular context presented—namely, the specialized and strictly-regulated community of the armed forces."[21] The court noted that the military requires substantial judicial deference and that the MHDA complied with the requirements of the Due Process Clause of the Fifth Amendment, even if it fell "short of absolute linguistic precision."[22]

In dissent, Judge Parker asserted that the MHDA involved viewpoint discrimination which should be subjected to strict scrutiny.[23] He found the government's justifications lacking under either strict or intermediate scrutiny.[24] Major Mickle.

Litigation Concerning Health Care for Military Retirees

Three recent federal district court cases challenge the way the military provides health care to its retirees. The suits are apparently motivated by policy and regulatory decisions which have reduced the number of retirees who are treated at military medical facilities and by implementation of the TRICARE program, for which retirees must pay an annual premium in order to enjoy health care benefits comparable to active duty family members. The Department of Defense has assigned the Army to litigate these cases, which have generated numerous inquiries from retirees. This note summarizes these cases and provides an overview of the statutory and regulatory authority for retiree eligibility for medical care.

The first case to challenge the military's health care program for retirees is *Schism v. United States*.[25] In this case, the plaintiffs filed a class action suit in the United States District Court for the Northern District of Florida, broadly alleging that the government breached their enlistment contracts, violated Fifth Amendment due process and equal protection, and engaged in impermissible age discrimination by "revoking or limiting access to military hospitals, in-patient and out-patient care, and medicine."[26] On 11 June 1997, the court granted the Army's motion to dismiss for lack of jurisdiction with respect to the plaintiffs' age discrimination claims, but denied the motion with respect to the Fifth Amendment due process and Little Tucker Act claims as to plaintiffs whose retirement rights vested prior to 1956.[27] The United States filed a motion for summary judgment in September 1997 and argued that the plaintiffs had no legal entitlement to free medical care prior to

13. General Media, Inc. v. Cohen, No. 97-6029, 1997 U.S. App. LEXIS 33869, at *21 (2nd Cir. Nov. 21, 1997).

14. *Id.* at *21-*27.

15. *Id.* at *27-*35.

16. *Id.*

17. *Id.* at *4.

18. *Id.* at *5.

19. *Id.* at *35-*38.

20. *Id.* at *37.

21. *Id.* at *39.

22. *Id.* at *41.

23. *Id.* at *59-*60.

24. *Id.* at *64.

25. 972 F. Supp. 1398 (N.D. Fla. 1997).

26. *Id.*

1956, when the current governing statute passed.[28] A decision is pending in that case.

The second case, *Coalition of Retired Military Veterans v. United States*,[29] alleges a violation of the Fifth Amendment due process clause. The plaintiffs are members of a nonprofit military retirees' group which filed a complaint in the District of South Carolina in December 1996 and alleged deprivation of free lifetime medical care. The plaintiffs claimed that lifetime medical care was promised to them when they decided to pursue military careers. The government moved to dismiss and argued that the plaintiffs' benefits are governed by a statute[30] which does not provide a protected property interest in free medical care. The motion was argued in July 1997, and a decision is pending.[31]

The third case is *McGinley v. United States*,[32] in which the plaintiffs seek to certify a class action and have limited their recovery to $10,000 per class member. They also seek injunctive relief to stop Medicare B deductions from their retirement pay. Both of the named plaintiffs entered the service prior to 1956 and served continuously until retirement. The Litigation Division filed a dispositive motion in November 1997.

The government's primary argument in all of these cases is that there has never been a statutory or regulatory entitlement for military retirees to have unlimited health care on demand. The availability of health care for retirees is best explained in the *Military Compensation Background Papers*.[33] The papers explain that there was no legislative or administrative authority for medical care to be provided to military retirees and their dependents prior to World War I.[34] At that time, administrative directives established that "supernumeraries" might be admitted to military hospitals under certain circumstances; the term "supernumeraries" was construed to include retired personnel.[35] During World War II, the military placed severe restrictions on the provision of care to retirees in military medical facilities. These restrictions affected all consumers of military medical care other than active-duty members.

With the adoption of the Dependents' Medical Care Act,[36] military retirees and their dependents were given a contingent right to care in military medical and dental facilities based upon the "availability of space and facilities and the capabilities of the medical and dental staff."[37] Since 1956, the statute that governs the provision of health care to retired members of the armed forces at military hospitals has been 10 U.S.C. § 1074(b). This statute provided that: "a member or former member of a uniformed service who is entitled to retired or retainer pay . . . *may*, upon request, be given medical . . . care in any facility of any uniformed service, *subject to the availability of space and facilities and the capabilities of the medical . . . staff.*"[38]

Military retirees are not entitled to the extensive, no-cost medical care which the plaintiffs in these actions seek. Although some of the services' recruiting literature and unofficial publications have made imprudent references to such benefits over the years, there has never been a basis in law or regulation for any claim that military retirees are entitled to free medical care for life. Major Mickle.

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27. *Id.*

28. *See* Dependents' Medical Care Act, Pub. L. No. 84-569, §§ 301(b), 301(c), 70 Stat. 250, 253 (1956).

29. Civ No. 2:96-3822-23 (D.S.C. Dec. 1996).

30. 10 U.S.C.A. § 1074 (West 1997).

31. Just prior to this note going to the press for printing, a decision was issued in C*oalition of Retired Military Veterans*. The United States District Court for South Carolina dismissed the claim by the plaintiffs in that case. *See Coalition of Retired Military Veterans v. United States*, Civ. No. 2:96-3822-23 (D.S.C. Dec. 10, 1997). The court decided "with genuine regret" that it could not review the claim because it challenged a decision as to the allocation of resources which were in the DOD's discretion. *Id.* The court also decided that health care, an entitlement created by statute, is not a constitutionally protected property interest, and any promises to proivde lifetime care would be "invalid." *Id.* The plaintiffs have filed a motion to amend or to alter the decision.

32. No. 97-1140 (M.D. Fla. Sept. 19, 1997).

33. *See* U.S. Dep't of Defense, The Military Compensation Background Papers: Compensation Elements and Related Manpower Cost Items, Their Purposes, and Legislative Backgrounds (5th ed. 1996) [hereinafter Background Papers] (containing the legislative and regulatory history of the various elements of military compensation and related manpower cost items).

34. *Id.*

35. *Id.*

36. Pub. L. No. 84-569, §§301(b), 301(c), 70 Stat. 250, 253 (1956).

37. Background Papers, *supra* note 33, at 609. *See* 10 U.S.C. § 1074(b) (1994) (pertaining to retirees); *id*. § 1076(b) (pertaining to dependents or survivors of retired members).

38. 10 U.S.C. § 1074(b) (emphasis added). Military retirees also may be treated at a hospital operated by the Department of Veterans Affairs. *Id*.

Claims Report

United States Army Claims Service

Personnel Claims Note

Personnel Claims Files Releasable Under the Privacy Act

The U.S. Army Claims Service (USARCS) recently determined that individuals who file a claim under the Military Personnel and Civilian Employees' Claims Act (PCA)[1] are entitled under the Privacy Act[2] to obtain access to documents contained in their personnel claim file.[3] The USARCS disseminated this information to inform field claims offices of the potential for disclosure of personnel claims documents and to provide guidance on the preparation of personnel claims files. This note provides the legal basis for the disclosure requirement and sets forth rules for developing a personnel claim file without exposing the Army to avoidable litigation or adversely affecting its image.

Legal Basis for Disclosure

The Army Privacy Program permits an individual to request and to obtain access to a record which is maintained in a system of records and which pertains to that individual, unless it is exempt from disclosure.[4] The request may be oral or written and must be presented by an individual or his agent or legal guardian.[5] The individual is not required to provide a reason for the request[6] or to identify correctly the statute which requires release of the requested documents.[7] The individual, however, may only obtain documents which qualify as a "record maintained within a system of records."[8]

Before a requested document can be released, the custodian of the document must first determine whether the document is a record maintained within a system of records. A "record" is "any item, collection, or grouping of information about an individual that is kept by the Government . . . [and] contains an individual's name, identifying number, . . . or other individual identifier . . . ."[9] A "system of records" is "a group of records under the control of [the Department of the Army] from which information is retrieved by the individual's name or by some identifying number, symbol, or other identifying particular assigned to the individual. System notices for all systems of records must be published in the Federal Register . . . ."[10] Once the custodian of the requested document determines that the document qualifies as a record maintained in a system of records, the custodian must provide the individual with access to the record unless it is exempt from disclosure under both the Privacy Act and the Freedom of Information Act.[11] Only the Secretary of the Army or an "access and amendment refusal authority" may deny a request for a record which pertains to the individual who made the request.[12]

A personnel claim file constitutes a record under the Privacy Act. It is created by field claims offices and is maintained by the government during the adjudication and settlement process and into retirement. Claims offices use the claimant's name and

1. 31 U.S.C.A. § 3721 (West 1997).

2. 5 U.S.C.A. § 552a (West 1997).

3. The Office of the Judge Advocate General of the Army recently approved this determination. Determination on Release of Personnel Claims Documents, Op. Admin. L. Div., OTJAG, Army, DAJA-AL/1338 (29 July 1997). The Office of the Judge Advocate General of the Air Force also has determined that personnel claims "memoranda, adjudication notes, or recommendations" must be released under the Privacy Act to claimants upon request. Disclosure of Information from Household Goods Claims Files, Op. JAG, Air Force, No. 7 (10 Feb. 1988).

4. U.S. DEP'T OF ARMY, REG. 340-21, ARMY PRIVACY PROGRAM, para. 2-1 (5 July 1985) [hereinafter AR 340-21].

5. *Id*.

6. *Id*.

7. *Id.* para. 2-4.

8. *Id*. para. 2-1.

9. *Id*. glossary.

10. *Id*.

11. 5 U.S.C.A. § 552 (West 1997); AR 340-21, *supra* note 4, para. 2-3.

12. AR 340-21, *supra* note 4, para. 2-9.

an assigned claim number to identify a personnel claim file. The file contains numerous documents with information about the claimant, including: Department of Defense (DD) Form 1842, Claim for Loss of or Damage to Personal Property Incident to Service; DD Form 1844, List of Property and Claims Analysis Chart; a chronology sheet for actions taken by the field claims office in adjudicating the claim; and a seven-paragraph memorandum of opinion which transmits the claim to the final settlement authority.[13]

Personnel claims files are maintained within a system of records. Each file may be located by entering the claimant's name into a computerized personnel claims corporate database. The database contains the claimant's name and social security number, the amount of the claim, the amount paid to the claimant, a chronological list of transactions, the claims processing time, and pertinent insurance information. The personnel claims corporate database is maintained and controlled by the USARCS, a component of the Department of the Army. The database is part of the USARCS Management Information System, which is published in the Federal Register as an Army system of records subject to the Privacy Act.[14]

There are no exemptions under the Privacy Act which permit the Army to deny a claimant access to documents contained within his personnel claim file.[15] A record within a system of records is exempt from disclosure only if it qualifies under either a general or specific exemption, as determined by the Secretary of the Army, or if it was "compiled in reasonable anticipation of a civil action or proceeding."[16] General exemptions apply only to records which are compiled by "Army activities actually engaged in the enforcement of criminal laws as their primary function."[17] Specific exemptions apply to a gamut of particular records and permit the Army to deny a claimant access to them.[18] Personnel claims files do not fall within either of these categories. Personnel claims files also are not "compiled in reasonable anticipation of a civil action or proceeding." Although this language is not clearly defined in the Privacy Act's legislative history, the plain language of the exemption and related case law indicate that courts would likely find that documents contained in a personnel claims file are not exempt from disclosure.

Civil Action

Subsection (k) of the PCA states: "Settlement of a claim under this section is final and conclusive."[19] Several courts have held that this provision precludes judicial review of personnel claims.[20] There appears to be only one unreported case in which a federal court reviewed a service's final settlement of a personnel claim.[21] In that case, the court did not review the USARCS's denial of a personnel claim, but rather remanded the claim to the USARCS for consideration under the Military

13. *See* U.S. DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 11-19 (1 Aug. 1995). A personnel claim file may also contain several other documents with individual information. If the claim arose from loss or damage to a government-sponsored personal property shipment, the claim file will also include a Government Bill of Lading; DD Form 1840, Joint Statement of Loss or Damage at Delivery; and DD Form 1840R, Notice of Loss or Damage. It may also include DD Form 1841, Government Inspection Report. If the field claims office assessed liability against the carrier for the lost or damaged property, the file also will include DD Form 1843, Demand on Carrier/Contractor. In addition, the file will include documents presented by the claimant to substantiate the loss and the value of the loss (such as the Household Goods Descriptive Inventory and necessary purchase receipts, estimates of repair, etc.) and any applicable insurance information.

Some courts adopt a narrow construction of the term "record," which would exclude several of the documents listed above which do not provide information concerning a "quality or characteristic" of the claimant. *See, e.g.*, Wolde-Giorgis v. United States, No. 94-254 (D. Ariz. Dec. 9, 1994) (holding that a Postal Service claim form and information concerning estimated value of an item sent through the mail is "not a 'record' within the meaning of the [Privacy Act]" because it "disclosed no information about the plaintiff" and did not reflect any "'quality or characteristic' concerning the plaintiff"). Even though access to claims files might cause claims personnel to hesitate in recording issues concerning a claimant's credibility or potential fraud, the USARCS did not implement a policy which grants access only to those documents which describe a quality or characteristic of the claimant. There is no discernible policy reason why access to non-descriptive documents should be denied, and the USARCS announced that claimants should be granted access to all documents contained within their personnel claim file.

14. U.S. DEP'T OF ARMY, PAM. 25-51, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM-SYSTEM NOTICES AND EXEMPTION RULES, para. 5-6 (21 Sept. 1988).

15. Because personnel claims files are not exempt from disclosure under the Privacy Act, it is unnecessary to determine if they are exempt from disclosure under the Freedom of Information Act. Unless requested records are exempt under both statutes, they must be disclosed to the individual upon request. U.S. DEPARTMENT OF JUSTICE OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE & PRAVIACY ACT OVERVIEW 635 (1997).

16. AR 340-21, *supra* note 4, para. 2-1. *See* 5 U.S.C.A. § 552a(d)(5) (West 1997).

17. *Id*. para. 5-2.

18. *Id*. para. 5-3. The Secretary of the Army has exempted certain types of records from provisions of the Privacy Act, including properly classified information; investigatory data for law enforcement (other that that claimed under the general exemption); records related to Secret Service activities; purely statistical data required by statute; data compiled relative to suitability for federal service or contracts; and testing materials used to determine federal service (including military service) eligibility and promotion potential.

19. 31 U.S.C.A. § 3721(k) (West 1997).

20. *See, e.g.*, Meade v. F.A.A., 855 F. Supp. 619 (E.D.N.Y. 1994); Macomber v. United States, 335 F. Supp. 197 (D.R.I. 1971); Shull v. United States, 228 Ct. Cl. 750 (1981). *See also* Preferred Ins. Co. v. United States, 222 F.2d 942, 947 (9th Cir.), *cert. denied*, 350 U.S. 837 (1955) (concluding that the finality provision of the PCA's predecessor statute barred judicial review of "administrative action on claims").

Claims Act (MCA).[22] In reviewing the MCA's finality provision (which is the same as the PCA's finality provision),[23] most courts have held that final MCA determinations are not subject to judicial review.[24] There is only one reported case to the contrary.[25] These cases indicate that judicial review of personnel claims is very unlikely.

Proceeding

According to guidance from the Office of Management and Budget (OMB), "[t]he term civil proceeding was intended to cover those quasi-judicial and preliminary judicial steps which are the counterpart in the civil sphere of criminal proceedings as opposed to criminal litigation."[26] In *Martin v. Office of Special Counsel, MSPB*,[27] the Court of Appeals for the District of Columbia held that "civil proceedings" include quasi-judicial administrative hearings of the sort conducted by the Merit System Protection Board (MSPB).[28] The court stated that MSPB hearings resemble the formal civil actions that Congress intended to protect[29] and noted that such hearings are adversarial, include discovery proceedings, and are subject to the rules of evidence.[30] It further noted that, similar to federal district court decisions, MSPB decisions are subject to review by appellate courts.[31] The court also warned against interpreting the term "civil proceeding" too expansively:

> [E]xempting documents prepared in anticipation of quasi-judicial proceedings will not gut the Privacy Act. Quasi-judicial hearings are relatively rare, and the vast majority of agency records will not be associated with them . . . . We need not fear overmuch an ever-widening set of hearings embraced by the term and protected by exemption (d)(5).[32]

Though the *Martin* holding is limited to records compiled in reasonable anticipation of an MSPB hearing, it is helpful in determining whether an agency's administrative settlement procedures can be classified as "civil proceedings." The personnel claims settlement process has none of the characteristics of formal civil proceedings. The process neither resembles formal civil actions nor involves any type of administrative hearing. After a claimant submits his claim and supporting documentation, the claims office renders a settlement determination which does not involve negotiation, discovery, or rules of evidence. Though the decision may be appealed to the USARCS or one of its command claims services, it is not subject to judicial review.

In 1992, the Office of the Judge Advocate General of the Army issued an opinion which stated that a memorandum of opinion and several related documents prepared pursuant to the settlement of a claim under the MCA were exempt from disclosure under the Privacy Act.[33] The opinion was based on the fact

21. Brown v. Secretary of the Army, No. 79-1129 (D.C. Cir. Mar. 14, 1980).

22. 10 U.S.C.A. § 2733 (West 1997).

23. The finality provisions of the MCA and the PCA contained identical language until the 1982 revision to the PCA "omitted as unnecessary" the words "[n]otwithstanding any other provision of law." 31 U.S.C. § 3721, Historical and Revision Notes: 1982 Act (1983).

24. *See* Collins v. United States, 67 F.3d 284, 288 (Fed. Cir. 1995); Schneider v. United States, 27 F.3d 1327, 1332 (8th Cir. 1994), *cert denied* 513 U.S. 1077 (1995); Hata v. United States, 23 F.3d 230, 233 (9th Cir. 1994); Rodriguez v. United States, 968 F.2d 1430, 1434 (1st Cir. 1992); Poindexter v. United States, 777 F.2d 231, 233 (5th Cir. 1985); Labash v. Department of the Army, 668 F.2d 1153, 1156 (10th Cir. 1982), *cert. denied* 456 U.S. 1008 (1982). Except for the court in *Collins*, these courts will review cognizable constitutional claims. None, however, have held that a military service violated a claimant's constitutional rights in the settlement of a claim. The Court of Appeals for the D.C. Circuit also has held that the MCA precludes judicial review, but the court recognizes several exceptions to this rule. Broadnax v. U.S. Army, 710 F.2d 865, 867 (D.C. Cir. 1983) (judicial review not implicated under circumstances of this case but appropriate "where there has been a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination"). Numerous district courts in other circuits have held that the MCA precludes judicial review. *See, e.g.*, Duncan v. West, 965 F. Supp. 796 (E.D. Va. 1997); Niebalda v. United States, 37 Fed. Cl. 43, 50 (1996); Hass v. U.S. Air Force, 848 F. Supp. 926, 933 (D. Kan. 1994); MacCaskill v. United States, 834 F. Supp. 14, 17 (D.D.C. 1993), *aff'd*, 24 F.3d 1464 (D.C. Cir. 1994); Vogelaar v. United States, 665 F. Supp. 1295, 1298 (E.D. Mich. 1987); Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101, 107-08 (E.D. La. 1978), *aff'd*, 620 F.2d 568 (5th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

25. Welch v. U.S., 446 F. Supp. 75 (D. Conn. 1978).

26. Office of Management and Budget, Privacy Act Guidelines, 40 FED. REG. 28,948, 28,960 (1975).

27. 819 F.2d 1181 (D.C. Cir. 1987).

28. *Id*.

29. *Id*. at 1188.

30. *Id*.

31. *Id*.

32. *Id*.

that "MCA claims have substantive impact similar to FTCA[34] claims (which are judicially reviewable)" and the absence of case law including or excluding administrative claims procedures from the phrase "civil action or proceeding."[35] The "substantive impact" rationale was explained in an earlier memorandum from the USARCS.

> Under the MCA, the potential for sizable awards and thus a substantive impact or result for both the claimant and the government is just as great as under the FTCA. The Army claims procedures for investigating, substantiating, and determining the validity of tort claims under the MCA mirror those of the FTCA. The same questions of substantive law and burdens obtain. Under both statutes, the liability of the United States is essentially unlimited, except by the damages suffered and provisions of applicable local law. Negotiations can be as complex and protracted under the MCA as the FTCA. The same sort of intricate high-value structured settlements can be reached under the MCA as the FTCA.[36]

Claims under the PCA do not have a substantive impact similar to FTCA claims. The PCA limits settlements to $40,000 (or $100,000 in the case of emergency evacuations or extraordinary circumstances), and these settlements do not involve negotiations or structured settlements. Although PCA settlement procedures constitute "administrative settlement procedures" which neither statute nor case law have expressly excluded from the phrase "civil action or proceeding," personnel claims do not have a substantive impact similar to FTCA claims or claims arising under other statutes which permit judicial review of final agency decisions. The PCA settlement procedures also do not meet the characteristics of a formal civil proceeding as set forth in *Martin*.

Reasonable Anticipation

The other facet of the "civil action or proceeding" exemption to the Privacy Act is that the document must have been prepared in *reasonable anticipation of* the civil action or proceeding. The OMB states:

> [I]n a suit in which government action or inaction is challenged, the provision generally would not be available until the initiation of litigation or until information began to be compiled in reasonable anticipation of litigation. Where the government is prosecuting or seeking enforcement of its laws or regulations, this provision may be applicable at the outset if information is being compiled in reasonable anticipation of a civil action or proceeding.[37]

Because personnel claims files do not fall within the plain language of the litigation exemption, the interpretive case law, or the OPM guidelines, they must be released to claimants upon request.

General Rules for Developing Personnel Claims Files

Because claimants can obtain access to their personnel claims files, it is critical that claims personnel prepare documents in a manner which will not give rise to avoidable litigation and which will not adversely affect the image of the U.S. Army. Even if claimants could be denied access to their personnel claims files, the professional standards of the U.S. Army and the interests of justice require accurate and careful preparation of all claims documents. It is essential that claims personnel limit their entries to: (1) verifiable facts; (2) logically supported inferences from those facts; and (3) professionally stated opinions. Claims judge advocates, claims attorneys, and staff judge advocates must emphasize these standards (which also can be applied outside the claims arena) and review personnel claims files to ensure that these standards are met. This will provide the final settlement authority with an adequate basis to render a final decision and will enhance the likelihood of an equitable settlement. Captain Metrey.

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33. Op. Admin. L. Div., OTJAG, Army, DAJA-AL/2292, para. 5b(6) (22 Sept. 1992) [hereinafter Op. 2292].

34. Federal Torts Claims Act, 28 U.S.C. §§ 2671-80 (1994).

35. Op. 2292, *supra* note 33, para. 5b(6).

36. Memorandum, Acting Commander, United States Army Claims Service, JACS-TC, to Assistant Judge Advocate General (Military Law and Operations), subject: FOIA/Privacy Act Request of [MCA Claimant], para. 3a (20 Aug. 1992).

37. Office of Management and Budget, Privacy Act Guidelines, 40 FED. REG. 28,948, 28,960 (1975).

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division

Office of The Judge Advocate General, U.S. Army

The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is the current schedule of The Judge Advocate General's Reserve Component (on-site) Continuing Legal Education Program. *Army Regulation 27-1, Judge Advocate Legal Services,* paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization units or other troop program units to attend on-site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend on-site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any on-site training session.

1997-1998 Academic Year On-Site CLE Training

On-site instruction provides updates in various topics of concern to military practitioners as well as an excellent opportunity to obtain CLE credit. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and the United States Army Reserve Command. Legal automation instruction provided by personnel from the Legal Automation Army-Wide System Office and enlisted training provided by qualified instructors from Fort Jackson will also be available during the on-sites. Most on-site locations supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Additional information concerning attending instructors, GRA representatives, general officers, and updates to the schedule will be provided as soon as it becomes available.

If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan J. Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380 or (800) 552-3978, ext. 380. You may also contact Major Rivera on the Internet at riveraju@otjag.army.mil. Major Rivera.

USAR Vacancies

A listing of JAGC USAR position vacancies for judge advocates, legal administrators, and legal specialists can be found on the Internet at http://www.army.mil/usar/vacancies.htm. Units are encouraged to advertise their vacancies locally, through the LAAWS BBS, and on the Internet. Dr. Foley.

GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

COL Tom Tromey,.....tromeyto@otjag.army.mil
Director

COL Keith Hamack,.....hamackke@otjag.army.mil
USAR Advisor

Dr. Mark Foley,.....foleymar@otjag.army.mil
Personnel Actions

MAJ Juan Rivera,.....riveraju@otjag.army.mil
Unit Liaison & Training

Mrs. Debra Parker,.....parkerde@otjag.army.mil
Automation Assistant

Ms. Sandra Foster, ...fostersa@otjag.army.mil
IMA Assistant

Mrs. Margaret Grogan,.....groganma@otjag.army.mil
Secretary

THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE 1997-1998 ACADEMIC YEAR

DATE	CITY, HOST UNIT, AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP*		ACTION OFFICER
10-11 Jan 98	Long Beach, CA 78th MSO Hyatt Regency Long Beach 200 South Pine Avenue Long Beach, CA 90802 (562) 491-1234	AC GO RC GO Criminal Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue MAJ Martin Sitler CDR Mark Newcomb MAJ Juan Rivera	LTC Andrew Bettwy 5241 Spring Mountain Road Las Vegas, NV 89102 (702) 876-7107
31 Jan-1 Feb	Seattle, WA 6th MSO University of Washington School of Law Condon Hall 1100 NE Campus Parkway Seattle, WA 22903 (206) 543-4550	AC GO RC GO Criminal Law Contract Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara MAJ Charles Pede MAJ David Wallace COL Thomas Tromey	LTC David F. Morado 909 lst Avenue, #200 Seattle, WA 98199 (206) 220-5190, ext. 3531 email: david_morado@hud.gov
7-8 Feb	Columbus, OH 9th MSO/OH ARNG Clarion Hotel 7007 North High Street Columbus, OH 43085 (614) 436-5318	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	MG John Altenburg BG John F. DePue MAJ Stephanie Stephens MAJ Geoffrey Corn MAJ Juan Rivera	LTC Tim Donnelly 1832 Milan Road Sandusky, OH 44870 (419) 625-8373 e-mail: tdonne2947@aol. com
21-22 Feb	Salt Lake City, UT 87th MSO University Park Hotel 480 Wakara Way Salt Lake City, UT 84108 (801) 581-1000 or outside UT (800) 637-4390	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ Stephen Parke LTC James Lovejoy COL Keith Hamack	MAJ John K. Johnson 382 J Street Salt Lake City, UT 84103 (801) 468-2617
28 Feb- 1 Mar	Charleston, SC 12th LSO Charleston Hilton 4770 Goer Drive North Charleston, SC 29406 (800) 415-8007	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Richard M. O'Meara LTC Mark Henderson MAJ John Einwechter COL Thomas Tromey	COL Robert P. Johnston Office of the SJA, 12th LSO Bldg. 13000 Fort Jackson, SC 29207-6070 (803) 751-1223

14-15 Mar	Washington, DC 10th MSO National Defense University Fort Lesley J. McNair Washington, DC 20319	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG Michael Marchand BG John F. DePue LTC Karl Ellcessor MAJ Scott Morris COL Thomas Tromey	CPT Patrick J. LaMoure 6233 Sutton Court Elkridge, MD 21227 (202) 273-8613 e-mail: lampat@mail.va.gov
14-15 Mar	San Francisco, CA 75th LSO	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG Walter Huffman BG Thoms W. Eres MAJ Christopher Garcia MAJ Norman Allen Dr. Mark Foley	LTC Allan D. Hardcastle Judge, Sonoma County Courts Hall of Justice Rm 209-J 600 Administration Drive Santa Rosa, CA 95403 (707) 527-2571 fax (707) 517-2825 email: avbwh4727@aol. com
21-22 Mar	Chicago, IL 91st LSO Rolling Meadows Holiday Inn 3405 Algonquin Road Rolling Meadows, IL 60008 (708) 259-5000	AC GO RC GO Contract Law Int'l - Ops Law GRA Rep	BG John Cooke BG John F. DePue MAJ Thomas Hong MAJ Geoffrey Corn Dr. Mark Foley	MAJ Ronald C. Riley 20825 Brookside Blvd. Olympia Fields, IL 60464 (312) 603-6064
28-29 Mar	Indianapolis, IN IN ARNG Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241	AC GO RC GO Contract Law Criminal Law GRA Rep	BG Michael Marchand BG Thomas W. Eres MAJ David Freeman MAJ Edye Moran COL Thomas Tromey	LTC George Thompson Indiana National Guard 2002 South Holt Road Indianapolis, IN 46241 (317) 247-3449
4-5 Apr	Gatlinburg, TN 213th MSO Days Inn-Glenstone Lodge 504 Airport Road Gatlinburg, TN 37738 (423) 436-9361	AC GO RC GO Ad & Civ Law Contract Law GRA Rep	MG John Altenburg BG Thomas W. Eres MAJ Fred Ford MAJ Warner Meadows Dr. Mark Foley	MAJ Barbara Koll Office of the Cdr 213th LSO 1650 Corey Blvd. Decatur, GA 30032-4864 (404) 286-6330/6364
25-26 Apr	Newport, RI 94th RSC Naval Justice School at Naval Education & Trng Ctr 360 Eliott Street Newport, RI 02841	AC GO RC GO Ad & Civ Law Criminal Law GRA Rep	MG John Altenburg BG Richard M. O'Meara MAJ Maurice Lescault LTC Stephen Henley Dr. Mark Foley	MAJ Lisa Windsor Office of the SJA 94th RSC 50 Sherman Avenue Devens, MA 01433 (508) 796-2140/2143 or SSG Jent, e-mail: jentd@usarc-emh2.army.mil

2-3 May	Gulf Shores, AL 81st RSC/AL ARNG Gulf State Park Resort Hotel 21250 East Beach Blvd. Gulf Shores, AL 36547 (334) 948-4853 or (800) 544-4853	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Thomas W. Eres LTC John German MAJ Michael Newton COL Keith Hamack	CPT Scott E. Roderick Office of the SJA 81st RSC ATTN: AFRC-CAL-JA 255 West Oxmoor Road Birmingham, AL 35209 (205) 940-9304
15-17May	Kansas City, MO 89th RSC Westin Crown Center 1 Pershing Road Kansas City, MO 64108 (816) 474-4400	AC GO RC GO Ad & Civ Law Int'l - Ops Law GRA Rep	BG Joseph Barnes BG Richard M. O'Meara LTC Paul Conrad LTC Richard Barfield COL Keith Hamack	LTC James Rupper 89th RSC ATTN: AFRC-CKS-SJA 2600 N. Woodlawn Wichita, KS 67220 (316) 681-1759, ext 228 or CPT Frank Casio (800) 892-7266, ext. 397

*Topics and attendees listed are subject to change without notice.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army, (TJAGSA) is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys Course** 5F-F10

Course Number—133d Contract Attorney's Course **5F-F10**

Class Number—**133d** Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states which require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

1998

January 1998

5-16 January	JAOAC (Phase 2) (5F-F55).
6-9 January	USAREUR Tax CLE (5F-F28E).
12-15 January	PACOM Tax CLE (5F-F28P).
12-16 January	USAREUR Contract Law CLE (5F-F15E).
20-22 January	Hawaii Tax CLE (5F-F28H).
20-30 January	145th Basic Course (Phase 1, Fort Lee) (5-27-C20).
21-23 January	4th RC General Officers Legal Orientation Course (5F-F3).
26-30 January	146th Senior Officer Legal Orientation Course (5F-F1).
31 January-10 April	145th Basic Course (Phase 2, TJAGSA) (5-27-C20).

February 1998

9-13 February	68th Law of War Workshop (5F-F42).
9-13 February	Maxwell AFB Fiscal Law Course (5F-12A).
23-27 February	42nd Legal Assistance Course (5F-F23).

March 1998

2-13 March	29th Operational Law Seminar (5F-F47).
2-13 March	140th Contract Attorneys Course (5F-F10).
16-20 March	22d Admin Law for Military Installations Course (5F-F24).
23-27 March	2d Contract Litigation Course (5F-F102).
23 March-3 April	9th Criminal Law Advocacy Course (5F-F34).
30 March-3 April	147th Senior Officer Legal Orientation Course (5F-F1).

April 1998

20-23 April	1998 Reserve Component Judge Advocate Workshop

(5F-F56).

27 April-1 May — 9th Law for Legal NCOs Course (512-71D/20/30).

27 April-1 May — 50th Fiscal Law Course (5F-F12).

May 1998

4-22 May — 41st Military Judges Course (5F-F33).

11-15 May — 51st Fiscal Law Course (5F-F12).

June 1998

1-5 June — 1st National Security Crime and Intelligence Law Workshop (5F-F401).

1-5 June — 148th Senior Officer Legal Orientation Course (5F-F1).

1-12 June — 3d RC Warrant Officer Basic Course (Phase 1) (7A-550A0-RC).

1 June-10 July — 5th JA Warrant Officer Basic Course (7A-550A0).

8-12 June — 2nd Chief Legal NCO Course (512-71D-CLNCO).

8-12 June — 28th Staff Judge Advocate Course (5F-F52).

15-19 June — 9th Senior Legal NCO Course (512-71D/40/50).

15-26 June — 3d RC Warrant Officer Basic Course (Phase 2) (7A-55A0-RC).

29 June-1 July — Professional Recruiting Training Seminar.

July 1998

6-10 July — 9th Legal Administrators Course (7A-550A1).

6-17 July — 146th Basic Course (Phase 1, Fort Lee) (5-27-C20).

7-9 July — 29th Methods of Instruction Course (5F-F70).

13-17 July — 69th Law of War Workshop (5F-F42).

18 July-25 September — 146th Basic Course (Phase 2, TJAGSA) (5-27-C20).

22-24 July — Career Services Directors Conference.

August 1998

3-14 August — 10th Criminal Law Advocacy Course (5F-F34).

3-14 August — 141st Contract Attorneys Course (5F-F10).

10-14 August — 16th Federal Litigation Course (5F-F29).

17-21 August — 149th Senior Officer Legal Orientation Course (5F-F1).

17 August 1998-28 May 1999 — 47th Graduate Course (5-27-C22).

24-28 August — 4th Military Justice Managers Course (5F-F31).

24 August-4 September — 30th Operational Law Seminar (5F-F47).

September 1998

9-11 September — 3d Procurement Fraud Course (5F-F101).

9-11 September — USAREUR Legal Assistance CLE (5F-F23E).

14-18 September — USAREUR Administrative Law CLE (5F-F24E).

3. Civilian-Sponsored CLE Courses

1998

January

15 Jan — Effective Time Management
ICLE — Atlanta, GA

23 Jan — Environmental Justice
ICLE — Atlanta, GA

February

19-20 Feb ICLE	Advocacy & Evidence Courtroom Evidence Atlanta, GA

March

12-13 Mar ICLE	Trial Evidence Atlanta, GA
26 Mar ICLE	Cutting Edge in Courtroom Persuasion Atlanta, GA
27 Mar ICLE	Jury Selection and Persuasion Atlanta, GA

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000

(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533
(800) 922-6516

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905.

Current Materials of Interest

1. Web Sites of Interest to Judge Advocates

a. IRS Tax Forms (http://www.irs.ustreas.gov/forms_pubs/forms.html).

The tax season will soon be upon us. You may download and use all the IRS Tax Forms at this site in various formats, the most popular being Portable Document Format (PDF). If you do not have the Adobe Acrobat Reader required to read PDF, you may click on the link in the IRS homepage or go directly to the Adobe site at <http://www.adobe.com/>.

b. Defense Finance & Accounting Service Forms (http://www.dfas.mil/library/forms/index.htm).

This site contains helpful DFAS and DOD forms you can download and save as document templates in Microsoft Word. You can also link to other DFAS and military pages from here.

c. Metacrawler (http://www.metacrawler.com/).

Have you ever been bewildered by the plethora of search engines available to search the Web? Which one to choose and when? Metacrawler is a search engine which retrieves results from six search engines at once! It uses Alta Vista, Excite, Infoseek, Lycos, Webcrawler, and Yahoo to provide you the results you are looking for. A very powerful and useful tool for any researcher.

d. Virtual Legal Search Engines (http://www.dreamscape.com/frankvad/search.legal.html).

This site is a compilation of legal sites and search engines. It is a good starting point for legal research.

e. Air Force Ethics Site (http://www.afmc.wpafb.af.mil/organizations/HQ-AFMC/JA/lojaf/).

This is a very comprehensive ethics site. In addition to the searchable database of OGE opinions added last month, this site contains DOD SOCO advisories, ethics materials organized by subject, and many on-line resources such as the JER and useful links to other ethics sites.

2. TJAGSA Materials Available through the Defense Technical Information Center

Each year The Judge Advocate General's School, U.S. Army (TJAGSA), publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-9087, (DSN) 427-9087, toll-free 1-800-225-DTIC, menu selection 6, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography Service, a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $6, $11, $41, and $121. The majority of documents cost either $6 or $11. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last eleven years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the Web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-9087, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506-93 (471 pgs).

Legal Assistance

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A333321 Real Property Guide—Legal Assistance, JA-261-93 (180 pgs).

AD A326002 Wills Guide, JA-262-97 (150 pgs).

AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A323770 Uniformed Services Worldwide Legal Assistance Directory, JA-267-97 (60 pgs).

*AD A332897 Tax Information Series, JA 269-97 (116 pgs).

*AD A329216 Legal Assistance Office Administration Guide, JA 271-97 (206 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A313675 Uniformed Services Former Spouses' Protection Act, JA 274-96 (144 pgs).

AD A326316 Model Income Tax Assistance Guide, JA 275-97 (106 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

Administrative and Civil Law

*AD A328397 Defensive Federal Litigation, JA-200-97 (658 pgs).

AD A327379 Military Personnel Law, JA 215-97 (174 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (90 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A311070 Government Information Practices, JA-235-96 (326 pgs).

*AD A325989 Federal Tort Claims Act, JA 241-97 (136 pgs).

*AD A332865 AR 15-6 Investigations, JA-281-97 (40 pgs).

Labor Law

AD A323692 The Law of Federal Employment, JA-210-97 (290 pgs).

AD A318895 The Law of Federal Labor-Management Relations, JA-211-96 (374 pgs).

Developments, Doctrine, and Literature

AD A332958 Military Citation, Sixth Edition, JAGS-DD-97 (31 pgs).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A302312 Senior Officer Legal Orientation, JA-320-95 (297 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966	Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

a. The following provides information on how to obtain Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized [to have] publications accounts with the USAPDC.

(1) *Active Army*.

(a) *Units organized under a Personnel and Administrative Center (PAC)*. A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988)*.

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divisions*. These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above*. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements*. To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33*.

If your unit does not have a copy of DA Pam 25-33, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.

(1) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(2) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(3) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(4) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of DA Pamphlets by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

4. The Legal Automation Army-Wide System Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772 or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. Instructions for Downloading Files from the LAAWS OIS.

(1) Terminal Users

(a) Log onto the OIS using Procomm Plus, En-

able, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(1) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(2) Choose "S" to select a library. Hit Enter.

(3) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(4) Choose "F" to find the file you are looking for. Press Enter.

(5) Choose "F" to sort by file name. Press Enter.

(6) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(7) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(8) Once your file is highlighted, press Control and D together to download the highlighted file.

(9) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(10) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(11) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

5. TJAGSA Publications Available Through the LAAWS BBS

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (note that the date UPLOADED is the month and year the file was made

available on the BBS; publication date is available within each publication):

FILE NAME	UPLOADED	DESCRIPTION
8CLAC.EXE	September 1997	8th Criminal Law Advocacy Course Deskbook, September 1997.
97CLE-1.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-2.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-3.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-4.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
97CLE-5.PPT	July 1997	Powerpoint (vers. 4.0) slide templates, July 1997.
ADCNSCS.EXE	March 1997	Criminal Law, National Security Crimes, February 1997.
96-TAX.EXE	March 1997	1996 AF All States Income Tax Guide.
ALAW.ZIP	June 1990	*The Army Lawyer*/*Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BULLETIN.ZIP	May 1997	Current list of educational television programs maintained in the video information library at TJAGSA and actual class instructions presented at the school (in Word 6.0, May 1997).
CLAC.EXE	March 1997	Criminal Law Advocacy Course Deskbook, April 1997.
CACVOL1.EXE	July 1997	Contract Attorneys Course, July 1997.
CACVOL2.EXE	July 1997	Contract Attorneys Course, July 1997.
CRIMBC.EXE	March 1997	Criminal Law Deskbook, 142d JAOBC, March 1997.
EVIDENCE.EXE	March 1997	Criminal Law, 45th Grad Crs Advanced Evidence, March 1997.
FLC_96.ZIP	November 1996	1996 Fiscal Law Course Deskbook, November 1996.
FSO201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
21ALMI.EXE	January 1998	Administrative Law for Military Installations Deskbook, March 1997.
51FLR.EXE	January 1998	51st Federal Labor Relations Deskbook, November 1997.
97JAOACA.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACB.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
97JAOACC.EXE	September 1997	1997 Judge Advocate Officer Advanced Course, August 1997.
137_CAC.ZIP	November 1996	Contract Attorneys 1996 Course Deskbook, August 1996.
JA200.EXE	January 1998	Defensive Federal Litigation, August 1997.

JA210.EXE	January 1998	Law of Federal Employment, May 1997.
JA211.EXE	February 1997	Law of Federal Labor-Management Relations, November 1996.
JA215.EXE	January 1998	Military Personnel Law Deskbook, June 1997.
JA221.EXE	September 1996	Law of Military Installations (LOMI), September 1996.
JA230.EXE	January 1998	Morale, Welfare, Recreation Operations, August 1996.
JA231.ZIP	January 1996	Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text.
JA234.ZIP	January 1996	Environmental Law Deskbook, September 1995.
JA235.EXE	January 1997	Government Information Practices, August 1996.
JA241.EXE	January 1998	Federal Tort Claims Act, May 1997.
JA250.EXE	January 1998	Readings in Hospital Law, January 1997.
JA260.EXE	April 1997	Soldiers' and Sailors' Civil Relief Act Guide, January 1996.
JA261.EXE	January 1998	Real Property Guide, December 1997.
JA262.EXE	January 1998	Legal Assistance Wills Guide, June 1997.
JA263.ZIP	October 1996	Family Law Guide, May 1996.
JA265A.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part I, June 1994.
JA265B.ZIP	January 1996	Legal Assistance Consumer Law Guide—Part II, June 1994.
JA267.EXE	April 1997	Uniformed Services Worldwide Legal Assistance Office Directory, April 1997.
JA269.EXE	January 1998	Tax Information Series, December 1997.
JA269W6.DOC	December 1997	Tax Information Series, December 1997.
JA271.EXE	January 1998	Legal Assistance Office Administration Guide, August 1997.
JA272.ZIP	January 1996	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	August 1996	Uniformed Services Former Spouses' Protection Act Outline and References, June 1996.
JA275.EXE	January 1998	Model Income Tax Assistance Guide, June 1997.
JA276.ZIP	January 1996	Preventive Law Series, June 1994.
JA281.EXE	January 1998	AR 15-6 Investigations, December 1997.
JA280HH.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 4, Legal Assistance, Chapter HH, October 1997.
JA280P1.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 1, LOMI, October 1997.

JA280P2.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 2, Claims, October 1997.
JA280P3.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 3, Personnel, October 1997.
JA280P4.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 4, Legal Assistance (minus Chapter HH), October 1997.
JA280P5.EXE	January 1998	Administrative & Civil Law Basic Course Handbook, Part 5, Reference, October 1997.
JA285V1.EXE	January 1998	Senior Officers Legal Orientation Deskbook, December 1997.
JA285V2.EXE	January 1998	Senior Officers Legal Orientation Deskbook, December 1997.
JA280P1.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 1, (LOMI), February 1997.
JA280P2.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 2, Claims), February 1997.
JA280P3.EXE	December 1997	Administrative and Civil Law Basic Handbook (Part 3, Personnel Law), February 1997.
JA280P4.EXE	December 1997	Administrative and Civil Law Basic Handbook (Parts 4 & 5, Legal Assistance/ Reference), February 1997.
JA285V1.EXE	June 1997	Senior Officer Legal Orientation, Vol. 1, June 1997.
JA285V2.EXE	June 1997	Senior Officer Legal Orientation, Vol. 2, June 1997.
JA301.ZIP	January 1996	Unauthorized Absence Programmed Text, August 1995.
JA310.ZIP	January 1996	Trial Counsel and Defense Counsel Handbook, May 1996.
JA320.ZIP	January 1996	Senior Officer's Legal Orientation Text, November 1995.
JA330.ZIP	January 1996	Nonjudicial Punishment Programmed Text, August 1995.
JA337.ZIP	January 1996	Crimes and Defenses Deskbook, July 1994.
JA422.ZIP	May 1996	OpLaw Handbook, June 1996.
JA501-1.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 1, March 1996.
JA501-2.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 2, March 1996.
JA501-3.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 3, March 1996.
JA501-4.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 4, March 1996.
JA501-5.ZIP	March 1996	TJAGSA Contract Law Deskbook, volume 5, March 1996.
JA501-6.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 6, March 1996.
JA501-7.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 7, March 1996.

JA501-8.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 8, March 1996.
JA501-9.ZIP	March 1996	TJAGSA Contract Law Deskbook, Volume 9, March 1996.
JA506.ZIP	January 1996	Fiscal Law Course Deskbook, May 1996.
JA508-1.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	January 1996	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
JA509-1.ZIP	January 1996	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	January 1996	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	January 1996	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	January 1996	Federal Court and Board Litigation Course, Part 4, 1994.
1PFC-1.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-2.ZIP	January 1996	Procurement Fraud Course, March 1995.
1PFC-3.ZIP	January 1996	Procurement Fraud Course, March 1995.
JA509-1.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	January 1996	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JA510-1.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-2.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JA510-3.ZIP	January 1996	Sixth Installation Contracting Course, May 1995.
JAGBKPT1.ASC	January 1996	JAG Book, Part 1, November 1994.
JAGBKPT2.ASC	January 1996	JAG Book, Part 2, November 1994.
JAGBKPT3.ASC	January 1996	JAG Book, Part 3, November 1994.
JAGBKPT4.ASC	January 1996	JAG Book, Part 4, November 1994.
K-BASIC.EXE	June 1997	Contract Law Basic Course Deskbook, June 1997.
NEW DEV.EXE	March 1997	Criminal Law New Developments Course Deskbook, November 1996.
OPLAW97.EXE	May 1997	Operational Law Handbook 1997.
OPLAW1.ZIP	September 1996	Operational Law Handbook, Part 1, September 1996.
OPLAW2.ZIP	September 1996	Operational Law Handbook, Part 2, September 1996.
OPLAW3.ZIP	September 1996	Operational Law Handbook, Part 3, September 1996.
TJAG-145.DOC	January 1998	TJAGSA Correspondence Course Enrollment Application, October 1997.
YIR93-1.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.

YIR93-3.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1996	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1996	Contract Law Division 1993 Year in Review Text, 1994 Symposium.
YIR94-1.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium.
YIR94-2.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium.
YIR94-3.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium.
YIR94-4.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium.
YIR94-5.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium.
YIR94-6.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium.
YIR94-7.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium.
YIR94-8.ZIP	January 1996	Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium.
YIR95ASC.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.
YIR95WP5.ZIP	January 1996	Contract Law Division 1995 Year in Review, 1995 Symposium.

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International and Operational Law; or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 1/4 inch or 3 1/2 inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SSG James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

6. *The Army Lawyer* on the LAAWS BBS

The Army Lawyer is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 4. The following instructions are based on the Microsoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on the "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE
PKZIP110.EXE
PKZIP.EXE
PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK"_files and "ZIP" extension files must reside in the same directory after downloading*. For example, if you intend to use a WordPerfect word processing software application, you can select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs
or C:\msoffice\winword

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP JANUARY.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, Microsoft Word, Enable).

c. Voila! There is the file for *The Army Lawyer*.

d. In paragraph 4 above, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396, or e-mail strongch@otjag.army.mil.

7. Articles

The following information may be useful to judge advocates:

Gill, Sarah, *The Military's DNA Registry: An Analysis of current Law and a Proposal for Safeguards*, 31 NAVAL 175 (1997).

8. TJAGSA Information Management Items

The Judge Advocate General's School, United States Army, continues to improve capabilities for faculty and staff. We have installed new projectors in the primary classrooms and pentiums in the computer learning center. We have also completed the transition to Win95 and Lotus Notes. We are now preparing to upgrade to Microsoft Office 97 throughout the school.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil or by calling the Information Management Office.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or use our toll free number, 800-552-3978, and the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Information Management Office at extension 378. Lieutenant Colonel Godwin.

9. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library Service (ALLS) has become the point of contact for redistribution of materials purchased by ALLS which are contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

Law librarians having resources purchased by ALLS which are available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.