Request for Public Comment

The attached is a proposal submitted to the Commercial Practices Working Group that is being posted on the Panel's web site for comment.

While the proposal has not been approved by the Commercial Practices Working Group or the Acquisition Advisory Panel as a recommendation, the working group seeks input for consideration.

Please note that the proposal excepts any rule or practice covered by existing statutory provisions. Therefore, the proposal, if adopted, would not affect procedural laws (such as the Armed Services Procurement Act of 1947 or the Federal Property and Administrative Services Act of 1949, both as extensively amended) or substantive laws (such as the Contract Disputes Act, Service Contract Act, labor or other socio-economic laws, etc.).

Please submit written public statements per the instructions at this web site.

Proposal for Public Comment

DATE: May 5, 2005

TO: Commercial Practices Working Group,
Acquisition Advisory Panel

FROM: Marshall Doke

RE: Commercial Practices Legislation

This memorandum recommends legislation to provide that, except as otherwise expressly required by statutes, the same rules of interpretation and performance of contracts and the liabilities of the parties shall apply to contractors and the Government. This recommendation merely will adopt the view consistently expressed by the Supreme Court of the United States.

1. Supreme Court Cases

As early as 1875, the Supreme Court stated that the Government is subject to the same rules as contractors. In *Cooke v. United States*, 91 U.S. 237 (1875), the issue involved the Government's liability on a treasury note. The Court said that, when the United States became parties to commercial papers, they incur all the responsibilities of private persons under the same circumstances. (91 U.S. at 242) The Court then said:

> If [a government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.

(91 U.S. at 243) Two years later, in a case involving the Government's obligations under a lease, the Court said:

> The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.

United States v. Bostwick, 94 U.S. 65, 66 (1877).

In a case involving government insurance, *Lynch v. United States*, 292 U.S. 571, 579 (1934), the Court said:

> When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

In another case, *Perry v. United States*, 294 U.S. 330, 352 (1935), the Court said:

> When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. *There is no difference*, said the Court in United States v. Bank of the Metropolis, 15 Pet. 377, 392, 10 L. Ed. 774, except that the United States cannot be sued without its consent . . . .

(Emphasis added.) *See also Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) (The United States does business on business terms). More recently, the Court said in *Franconia Associates v. United States*, 536 U.S. 129, at 141 (2002): "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals," quoting *Mobile Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000).

2. Government's More Favorable Treatment

The courts and boards of contract appeals, in a number of significant circumstances, have not followed the guidance in the Supreme Court cases discussed above. One reason may be the failure to recognize the distinction between the Government's actions in its sovereign and contractual capacities. In *Horowitz v. United States*, 267 U.S. 458, 459 (1925), the Court quoted from *Jones v. United States*, 1 Ct. Cl. 383, 384, saying that the two characters which the government possesses as a contractor and as a sovereign cannot be fused.

Some rules of contract interpretation, performance, and liability which favor the Government over contractors are inconsistent with the Supreme Court cases discussed above. Examples of such rules and their application are discussed below.

a. Presumption of Regularity. The presumption of regularity of action of government officials has its historical roots in the presumption against misconduct (particularly regarding sovereign functions). It is a rule of evidence to avoid third party proof. As stated in *Wigmore*, it most often is applied when the matter is more or less in the past and is incapable of easily produced evidence and usually involves a mere formality or detail of procedures. 9 *Wigmore, Evidence* § 2534 (Chedbourn rev. 1981). The presumption has been used in government contracts, however, to favor one of the parties (the Government) in connection with contractual matters in dispute. Examples of the presumption favoring the Government are in the following cases where it was presumed that:

(1) the reasonableness of reprocurement costs was tested, as required by regulations, *Solar Laboratories, Inc.*, ASBCA No. 19957, 76-2 BCA ¶ 12,115 at 58,197-98;

(2) the Government's deduction from payments, or withholding of payments, was because the contractor had not performed the work, *W.B.&A., Inc.*, ASBCA No. 32524, 89-2 BCA ¶ 21,736 at 109,329;

(3) payments made by the Government were correctly computed, *Maintenance Engineers*, ASBCA No. 23131, 83-1 BCA ¶ 16,411 at 81,632;

(4) the government tests were conducted properly, *Astro Science Corp. v. United States*, 471 F.2d 624, 627 (Ct. Cl. 1973);

(5) the government test results were accurate, *Tempo, Inc.*, ASBCA Nos. 37589 et al., 95-2 BCA ¶ 27,618 at 137,661-62; *C.W. Roen Construction Co.*, DOT CAB Nos. 75-43 et al., 76-2 BCA ¶ 12,215 at 58,799; and

(6) the government's method of testing was proper, *Continental Chemical Corp.*, GSBCA No. 4483, 76-2 BCA ¶ 11,948 at 57,269.

The examples above reflect the unfairness of the presumption in the Government's favor, particularly because evidence to rebut the presumption is in the Government's possession.

b. Estoppel. The doctrine of equitable estoppel may be invoked to avoid injustice. The courts may use the doctrine to prevent a defendant from denying the existence of a contractual commitment or agreement. As stated in *Frazer v. United States*, 288 F.3d 1347, 1352-53 (Fed. Cir. 2002), the precise circumstances under which a claim of equitable estoppel is available against the Government are not completely settled. Some cases hold affirmative misconduct is a prerequisite for invoking equitable estoppel against the Government. *See, e.g., Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003). If the Government is to be treated as a private party would be under commercial contracts, estoppel should be equally applicable to the Government.

c. Presumption of Good Faith. There is a strong presumption that government officials act in good faith. *Torncello v. United States*, 681 F.2d 756, 770 (Ct. Cl. 1982). The presumption is so strong that, until recently, it took "well-nigh irrefragable proof" to overcome the presumption. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977). Recently, the Federal Circuit said it takes "clear and convincing" evidence (not just a preponderance of evidence) to overcome the presumption. The presumption may be appropriate for actions of officials in the Government's *sovereign* capacity, but it should not be used to give the Government an advantage in *contractual* disputes if the Government is to be treated as other private parties. Why should it be *presumed* that government employees act in good faith but contractor employees do not?

d. Interest as Damages. The courts have held that interest is not recoverable against the Government. *See J.D. Hedin Construction Co. v. United States*, 456 F.2d 1315, 1330 (Ct. Cl. 1972). In a recent case, the Federal Circuit held that interest is not recoverable against the Government for breach of contract even where interest was a component of price. *England v. Contel Advanced Systems, Inc.*, 384 F.3d 1372 (Fed. Cir.

2004). Judge Newman dissented in the *Contel* case, pointing out that the basic rule of sovereign immunity was not directed to "interest" but to the underlying liability and that the ancient bar to recovery of interest reflects the canonical law and common law prohibitions on usury, not the divine right of kings. She further said that sovereign immunity is not a tool of unfairness to those who do business with the Government. Therefore, if the Government should be treated as a private person when it enters into a contract, then the Government should be liable in damages as would other parties in commercial contracts.

3. Recommendation

Section 1423 of SARA directed the Panel to review laws, regulations, and policies with a view toward ensuring effective and appropriate use of commercial practices. As discussed above, the Supreme Court consistently has stated that, when it enters the commercial marketplace, the Government is subject to the same rules that apply to private parties. It is clear, however, that rules applicable to the Government in its *sovereign* capacity have been adopted by courts and boards for resolving disputes in which the Government is involved in its *contractual* capacity. This Panel, I believe, should recommend action to "level the playing field" for the Government and contractors.

A simple statutory provision could be a significant step toward leveling the field. My recommendation is that the procurement laws be amended to provide substantially as follows:

> Except as otherwise expressly provided by statute, the same rules of interpretation and performance of contracts and the liabilities of the parties shall be applied in the same manner to the Government and to contractors.

This provision will foster the Section 1423 goal of achieving "fair" administration of government contracts by requiring equal treatment for both parties to government contracts.

I request that this Working Group consider this recommendation and forward it to all other Panel members for discussion purposes.